

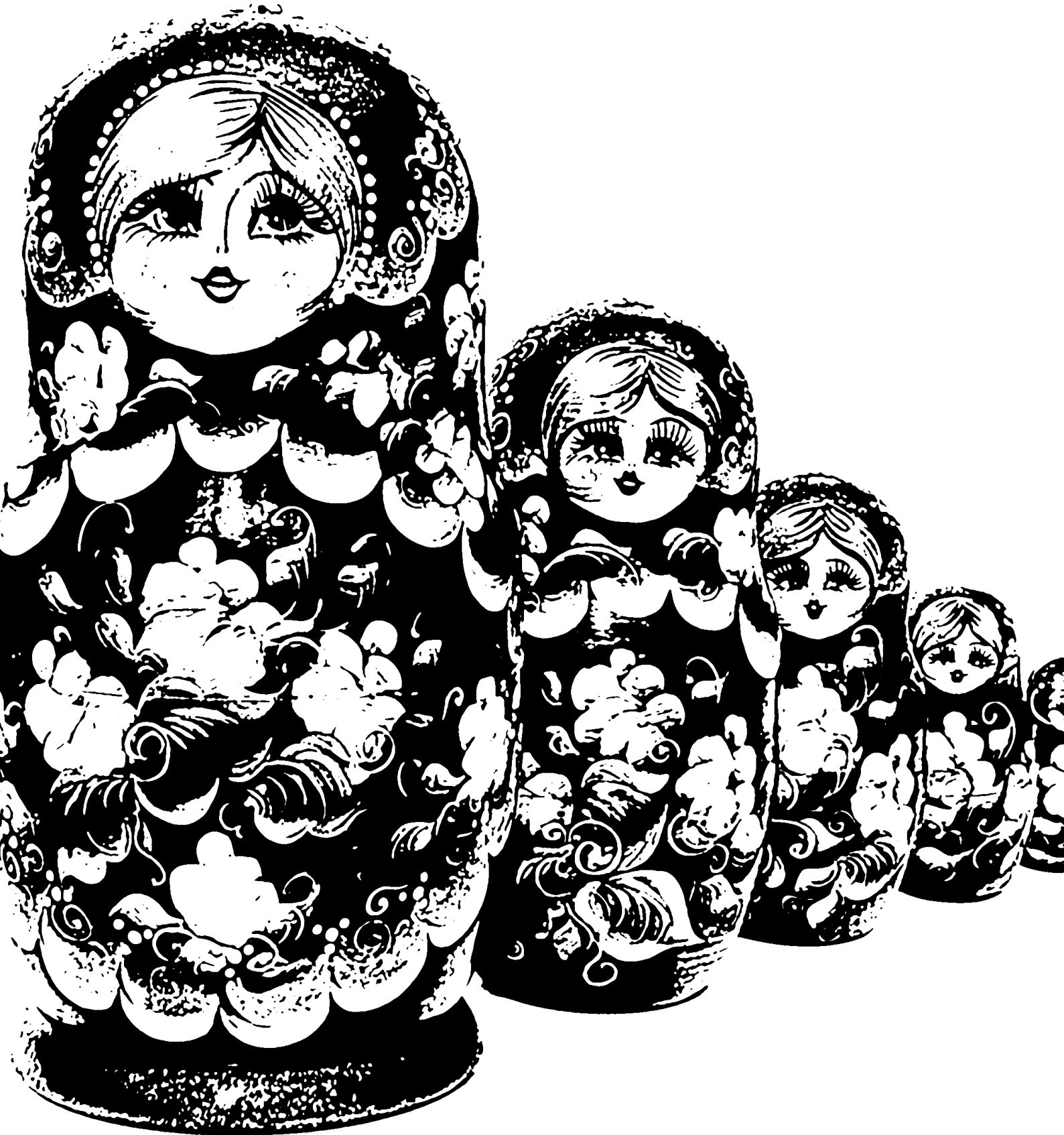


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Family Law News

Newsletter of the International Bar Association Legal Practice Division

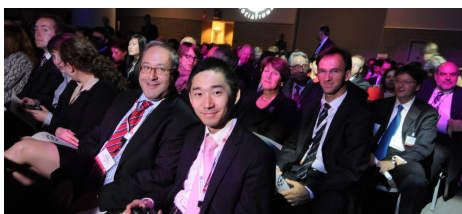
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INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012



Steeped in history, yet buzzing with youthful energy, Dublin's medieval, Georgian and modern architecture provide a backdrop to a bustling port where the cosmopolitan and charming meet in delightful diversity. Serving as Ireland's historical and cultural centre, as well as the nexus of Irish education, administration, economy and industry, Dublin is perfectly suited to host the IBA's 2012 Annual Conference.



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In this issue

From the Chair	4
From the Editor	5
Committee officers	6
IBA Annual Conference, Dublin 30 September – 5 October 2012: our Committee's sessions	7

Articles

How judicial reforms can give better outcomes for family court litigants	8
Family arbitration arrives in England	11
Children in distress – remedies in Indian law	14
Shared residence orders might not be an exception in Spain for much longer	18
The EU Maintenance Regulation: maintenance/needs claims when sole domicile jurisdiction	20
Child support changes in New Zealand – unanswered questions	24
Relocation in practice – the English perspective	27
Citizenship issues and the adopted child	31
Surrogacy: imported from India – need for a regulatory law	33
Declarations and The Hague Convention	35
Judicial activism in the International Movement of Children – a prime building site for development	36
Reflections on primary caregivers and the child's voice in Hague Convention cases	40
Declarations made by English courts on validity of foreign marriages	43
Inherited and pre-acquired assets – ring-fencing the family silver	45
International parental child-abduction between UK and India – a consular perspective	47
International parental child abduction: case study	49
BOOK REVIEW: <i>Indians, NRIS and the Law</i>	50

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This newsletter is intended to provide general information regarding recent developments in family law. The views expressed are not necessarily those of the International Bar Association.

From the Chair

Jaqueline Julyan

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An enormous amount of work goes into the production of this newsletter. Thanks are due to the editor, Ranjit Malhotra, for his tireless efforts and also to the authors of the articles, whose industry and insight has enabled the Family Law Committee to produce a newsletter of such high quality.

The international mobility of the world's population, from highly-paid executives to poorly-paid domestic workers, has meant that international issues increasingly arise in a family law context, from children to money. An international networking-base becomes ever more important. The IBA offers a unique opportunity for international networking, not only in a Family Law context, but with lawyers from around the world, practising in every conceivable area of law.

Attendance at the IBA Annual Conference is the best way to access the educational and networking opportunities. While attendance at the first annual conference can be quite daunting (5,000 lawyers all at one time), there will always be a long-standing member of the IBA and habitué of the annual conferences to assist. The IBA Family Law Committee is presenting a number of sessions at the IBA Annual Conference in Dublin, 30 September – 5 October 2012, and you can find further details on page 7 of this newsletter and on the IBA website, www.int-bar.org/Conferences/Dublin2012. As in past years, these sessions are presented jointly with other IBA committees so that the issues are considered from different legal perspectives, both in terms of jurisdiction and area of law.

Those members who attended the IBA Annual Conference in Dubai last year will recall the intense debate at the session on Surrogacy and Body Parts, presented with the Medicine and the Law Committee (now the IBA Healthcare and Life-Sciences Law Committee), as well as the highly charged Islamic Personal Law session which was conducted with the Arab Regional Forum. The session on Production of Documents

revealed startling differences in approach in different countries while the session conducted jointly with the Individual Tax and Private Client Committee demonstrated the overlap in problems presenting to family lawyers and private client lawyers. The mock trial, on relocation to a non-Hague-Convention country, entertained while it educated.

The topics for Dublin 2012 are equally wide-ranging and I anticipate that debate will be as vigorous as it was in Dubai. I look forward to welcoming you to the Family Law sessions in Dublin.

The Annual Family Law Committee breakfast will be held during the IBA Annual Conference, and will take place on the morning of Wednesday 3 October 2012. This is an opportunity for you to meet the Officers of the Family Law Committee and fellow Committee members. There will be no speeches: simply an opportunity to meet and greet.

The Family Law Committee has embarked upon a programme of increased interaction with other international organisations. To this end we have been liaising with the International Academy of Matrimonial Lawyers and the International Academy of Trust Lawyers.

The Family Law Committee supports the Individual Tax and Private Client Committee's Specialist Conference on International Wealth Transfer Practice, held in London in the first quarter of each year. We participated in the 2012 conference presenting a session on Messy Deaths and Messy Divorces (part 2, a sequel to the 2011 session). We will again be presenting a session at the 2013 conference and hope to see you there.

I am grateful to the staff of the IBA for their ready assistance. My thanks to the Officers of the Family Law Committee, for their commitment and support, and in particular to Gillian Rivers, Senior Vice-Chair, who will succeed me in 2013. The Family Law Committee is a vibrant and growing committee within the IBA and I am confident that it will go from strength to strength.

Ranjit Malhotra

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From the Editor

It is my proud privilege to pen down the newsletter editor's message now for the second time. Professionally and academically it is very enriching and stimulating to interact with fellow colleagues, respected judges and academics in the arena of family law from major jurisdictions in the process of compiling this newsletter.

But much more than that, the legal fraternity of the IBA has the opportunity to benefit immensely from specialist contributions which offer valuable insights and sharp analysis of family law issues, with strong international focus.

This year we have had contributions from across the world – from New Zealand to Canada. On the judicial side, there are two very eminent contributions, one from the Right Honourable Lord Justice Thorpe, Head of International Family Justice for England & Wales, and the other from Judge Peter Boshier, Principal Family Court Judge of New Zealand. From the other side of the fence, there are very high quality contributions on EU-related issues: Canada, UK, Spain, India and Malaysia.

As Jacky Julyan has kindly acknowledged in her Chair's message, the production of this newsletter would not have been possible but for the distinguished

contributions, and of course we are very grateful to all who submitted articles for the issue. She has also very eloquently summed up the recent work of the IBA Family Law Committee and the forthcoming IBA Family Law Committee events.

Lastly, we all look forward to the appointment of Gillian Rivers, as the Chair of the Family Law Committee.

Happy reading.

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INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012

FAMILY LAW COMMITTEE SESSIONS

MONDAY 0930 – 1230

Breaking up is hard to do: the private entrepreneur in his mid-life crisis

Joint session with the Closely Held and Growing Business Enterprises Committee and the Family Law Committee.

The private entrepreneur in the midst of his mid-life crisis may put his privately or family owned business at risk. Questions of divorce, re-marriage, succession planning to the next generation and even death may arise in that context, all of which will impact on the private or family owned business. This joint session of the Closely Held and Growing Business Enterprises Committee with the Family Law Committee will assemble legal as well as business specialists from all over the globe to provide their insight into the topic. They will review the challenges and implications to this not uncommon situation, both from a corporate as well as from a family law perspective.

TUESDAY 0930 – 1230

Family disputes involving trusts: from the errant beneficiary to the grantor giving it away in the wrong direction

Joint session with the Family Law Committee and the Individual Tax and Private Client Committee.

Trust litigation is a thriving business. This session will consider the reasons why there are an increasing number of disputes involving trusts and other asset holding vehicles. This session will also discuss the considerations a settlor might take into account to seek to ensure that his intentions in setting up a structure hold good for the future, whether the structure be for asset protection, succession planning or for some other purpose.

WEDNESDAY 0800 – 0930

Open committee business meeting and breakfast

Presented by the Family Law Committee.

An open meeting of the Family Law Committee will be held to discuss matters of interest and future activities.

THURSDAY 0930 – 1230

Kidding around? Children's rights and legal representation

Joint session with the Family Law Committee, the Judges' Forum and the Litigation Committee.

This session will discuss the legal representation of a child as an aspect of children's rights, how it can be achieved, and the challenges faced when representing a child in litigation.

THURSDAY 1430 – 1730

Who gets the ice cream? Ethical, medical, succession and family law considerations of frozen genetic material on the death or divorce of the donor

Joint session with the Family Law Committee, the Human Rights Law Committee and the Individual Tax and Private Client Committee and the Medicine and the Law Committee.

This session will investigate the ethical issues, legal rights and obligations that arise in respect of donated and frozen sperm or ova on the death of the donor and on relationship breakdown between the donor and the donee.

The session will examine this topic from a cross-border and cross-disciplinary viewpoint, including the medical law, family law and succession law that may apply in a variety of jurisdictions.

We would like it to be an interactive session and contributions from the floor will be encouraged.

Peter BoshierPrincipal Family Court
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How judicial reforms can give better outcomes for family court litigants

If there is one thing that users of the family court dislike, it is delay in having their cases resolved. Expense comes a close second.

Delays in family court jurisdictions around the world vary. In some countries, it may be many years before a case is heard – in others, it is many months. Any undue delay is usually injurious to children.

In New Zealand and in many other jurisdictions, parliament is supreme and laws are made through the legislative process. But what is legitimate by way of judge activity in order to ensure that the best processes are put in place to enable cases to move as speedily and as efficiently as possible? This is an issue that we have grappled with in New Zealand and, in this article, I describe the journey that we have undertaken in setting up our Early Intervention Process.

New Zealand is a small country both geographically and population-wise. In geographic size we resemble the UK but we have a population of just over four million people. There is a specialist family court and section 5 of the Family Courts Act 1980 specifies that a person shall not be appointed to be a family court judge unless he or she is 'by reason of his training, experience, and personality, a suitable person to deal with matters of family law.' Some family court judges undertake a percentage of other work – mostly criminal – but it rarely exceeds 25 per cent. Other judges undertake solely family court work.

Ours is a busy court. There are 52 family court judges and we sit in 59 locations around New Zealand. Last year, the court received a total of 64,576 substantive applications. By far the greatest area of work is private law disputes involving the care of children. Of all of our work, 39 per cent relates to private law disputes for the custody and access of children and so, in terms of applications, we received 25,150 applications in this category last year.

In 2004, Parliament passed the Care of Children Act and one of the principles explicitly stated in this Act is that decisions affecting the child should be made and implemented within a

time frame that is appropriate to the child's sense of time. The statute reinforces this in various respects by placing time limits on when orders have been made and for how long they should last. But what the statute does not do is to define a process by which cases can most speedily be brought to a conclusion.

Our judiciary, therefore, decided to experiment, by which I mean put in place processes and test them to see whether they delivered good natural justice outcomes but in a fashion which forced the pace. Our first venture was called the Parenting Hearings Programme, where we endeavoured to set up a short two-hour inquisitorial hearing, where we encouraged parties to speak to judges directly (although having their lawyers present) and we discouraged cross-examination, other than some questions by the judge. We tried to limit the scope of issues and evidence other than those which were demonstrably germane to the welfare of the child.

An evaluation of the Parenting Hearings Programme suggested to us that it was not working as well as we had expected and we went back to the drawing board to explore other options. We were convinced that early intervention and resolution in care disputes involving children was important to avoid intractability and broadening of the issues.

In April 2010, having looked at a number of models, we commenced our Early Intervention Process, on a national basis. This is how it works:

- Cases are filed in the registry as they routinely are in most family law jurisdictions in the common law world.
- If urgent relief is sought, such as a request for a protection or restraining order in relation to violence or abduction, the application is dealt with by a judge on the same day and a decision is made. Such a case then automatically enters the urgent track.
- For urgent track cases, after a judge has made initial orders in chambers, a conference must occur within 14 days. For this urgent conference, counsel file memoranda advising the judge whether there is a contest and, if so, what the issues are. If, for instance, there is a dispute as to

whether violence has actually occurred, a hearing occurs on that subject within six weeks of the conference.

- If urgent relief is not applied for, the pleadings are assessed by registry staff through a triage model and a decision is taken as to whether it should proceed on the urgent track or the standard track. Registry staff will consider features such as very high conflict suggestive of the need for urgency or, on the other hand, where there are no demonstrable urgent welfare issues evident.
- The majority of cases fall into the category where there is no pressing urgency and no overriding need for an instantaneous decision. They enter the standard track and are firstly referred to counselling. Counsellors are expected to see the parties for up to six hours of conciliation sessions although the counsellor may request an extension from the registrar, if necessary. Within eight weeks the counsellor will file a report in court as to whether any resolution has been reached. If there is resolution, the agreement can be formalised into consent orders. If not, the parties will continue in the standard track to the next step.
- We have then decided on a process which has been controversial where we appoint lawyers to assist the court as is permitted by legislation but instead of using them in the conventional *amicus curiae* way, we ensure that they are professionally trained to undertake mediation and we refer the case to them for mediation. They are expected to convene the mediation and report back to the court on the outcome of the mediation within six weeks of the referral. The mediation is expected to take no longer than five hours including administration time.
- If such mediation, which is wholly paid for by the state, does not provide total agreement, the case proceeds to a judicial conference before a judge and a robust analysis of the issues and evidence is undertaken with a view to the judge endeavouring to conclude it. However, at this judicial conference stage, the judge may only make consent orders.
- Finally, if the issues are sufficiently entrenched or difficult that a judge simply cannot resolve the case at this conference, it proceeds to a hearing. Usually these must be accommodated within two to four weeks of the conference but if they are complex cases requiring many days, they will take longer to be heard.
- A feature of both tracks is that lawyers for children are appointed at appropriate steps along the way. In the urgent track, lawyers are appointed once a judge has made initial orders and, in the standard track, the appointment is made once a defence has been filed.

The following flow chart sets out how all of this works and the time-limits that apply;

Has there been acceptance of this entirely judicially-led reform and has it worked?

On 2 August 2012, the Minister of Justice announced that the government will legislate to reform Family Court processes. The government has said it will remove alternative dispute resolution from the family court and set up a separate family dispute resolution service. But, save for that aspect, the proposed reforms very much reflect judge-led reforms.

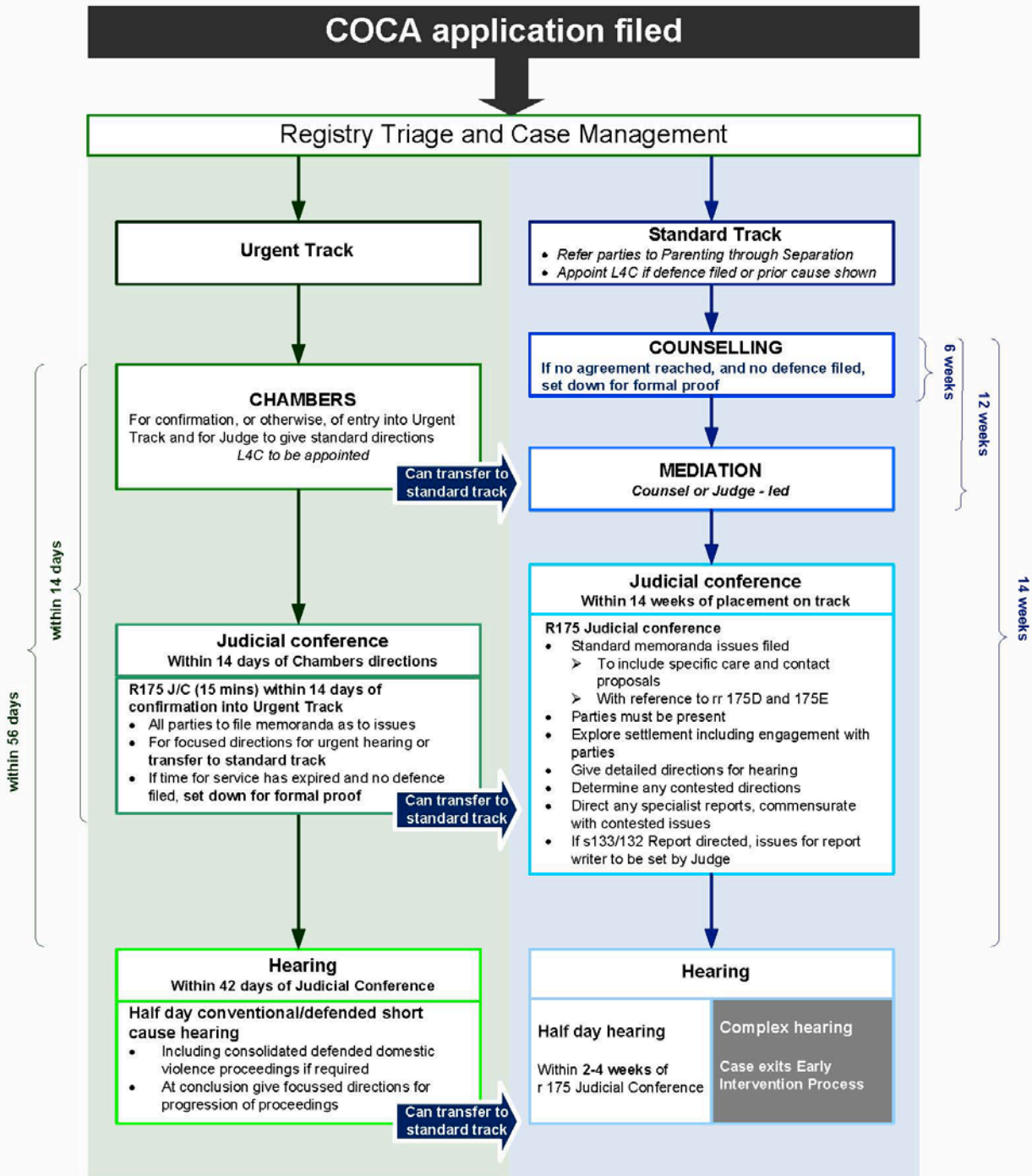
The announcements of 2 August came following a year of review of the family court, including an evaluation as to the cost and success of mediation in the standard track of our Early Intervention Process. The results of that evaluation indicated that there is inconsistency across large clusters as to how mediation is used. The average cost of mediation is \$893 and, perhaps most interestingly, successful mediations account for 56 per cent of all mediation appointments. With respect to this last point, a successful mediation means a short-cause/long-cause hearing was not required.

As a result of diverting judicial resource away from the initial steps, we have pulled back on delays for hearing cases across the board and our latest figures indicate that, in some of our main centres, a case requiring a day or more to be heard can expect to receive a hearing in 14–20 weeks. This contrasts markedly with the position as it was prior to our commencement of the Early Intervention Process when, for the most part, we could not offer hearings of this nature in under 30 weeks.

From the family court bar's perspective, there has been a wonderful acceptance of the initiative and this was always crucial to its success. What we have done is, largely, not rules-based but rather the creation of judge-initiative. The cooperation of the profession has, therefore, been important.

From data supplied by our Ministry of Justice, it seems clear we are resolving our applications more quickly. By examining the median disposal time for cases from 2009 compared with 2011, the data suggests we are reducing disposal times across the board. In each phase (receiving and processing, counselling, post-counselling, formal proof, mediation and hearing), the disposal times have reduced. The most significant gains have been in the mediation phase where the disposal time has reduced by 120 days. In all other phases, there has been a reduction of approximately 30 days. There continues to be some case-drift within registries but we have

Early Intervention Process



significantly reduced the delays for court-users and children.

The government’s recently-announced proposal is that when cases come into the family court they will go into one of three tracks: urgent, simple and standard. The urgent track replicates our own urgent track; the simple track is designed to have a more robust process for deciding reasonably straightforward disputes; and the standard track largely part replicates our present

simple track but removes the option of mediation and requires that this is undertaken before the case reaches court in the new family dispute resolution service.

I think, for children, it is incumbent on us to be ever vigilant about delay and to adopt measures which help to reduce it. What better foundation can we lay for our children of the future than to ensure that they receive justice speedily, efficiently and economically.

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Family arbitration arrives in England

The IFLA Scheme

A growing feeling that arbitration might have a place in English family law (as it does in some other common law jurisdictions) led to the formation of the Institute of Family Law Arbitrators (IFLA), a not-for-profit company established by the Chartered Institute of Arbitrators (CIArb), Resolution and the Family Law Bar Association. The IFLA has drawn up rules for a family law arbitration scheme (the 'Scheme').

Since September 2011 over 50 family lawyers (barristers, solicitors and two retired High Court judges) have been trained to become family arbitrators operating within the Scheme and have become members of the CIArb. More training courses are planned. Since February 2012 arbitration has been available as another route for resolution of many family disputes.

What is covered by the Scheme?

Article 2 sets out the scope of the Scheme. It covers any financial and property disputes arising from the breakdown of family relationships including divorce, parental obligations, civil partnerships, informal relationships and claims under the Inheritance (Provision for Family and Dependants) Act.

The Scheme does not apply to disputes directly concerning the liberty of individuals, the status of individuals or of their relationship, the care or parenting of children, bankruptcy or insolvency.

How does the Scheme work?

The first step is for the parties to complete and sign a form ARB 1 in which they agree to arbitrate and to adopt the rules of the Scheme. They summarise the issues to be arbitrated. They can either nominate an IFLA arbitrator or invite IFLA to nominate the arbitrator. All arbitrations under the Scheme have to pass through IFLA which charges an administration fee. They agree in the form ARB 1 that the arbitrator's decision will be final and binding and that, if necessary, they will apply for a court order to give effect to it.

After the form is submitted:

- the appointment is offered to the arbitrator;
- the arbitrator seeks the parties' agreement to their terms;
- the arbitrator accepts the appointment and the arbitration formally begins;
- the arbitrator contacts the parties with a view to furthering the conduct of the arbitration, by agreement or otherwise; and
- often (though not necessarily), there will then be a preliminary meeting to deal with the further conduct of the arbitration.

What happens after this will depend on what is agreed – or decided in default of agreement. In many cases there will be a final hearing, but arbitration can be entirely a paper exercise. The arbitral process concludes with a final award in writing.

It is a central feature of all arbitration that it is consensual, in that:

- the parties agree to the arbitration process;
- to a very large extent they can agree the way in which the arbitration will proceed; and
- they agree to be bound by the arbitrator's decisions.

Powers of the arbitrator

In the absence of agreement, an arbitrator can:

- rule over what matters are included in the arbitration agreement;
- determine all case management issues including the nature of the evidence, the extent of disclosure, the need for written submissions and the nature of the final hearing, if any;
- make interim awards or orders including interim maintenance;
- give directions, for example for the inspection or preservation of property in dispute;
- appoint an expert or assessor as an alternative to giving directions for expert evidence;
- recommend mediation or other forms of Alternative Dispute Resolution (ADR). (This could take place in parallel to the arbitration, as it can with court proceedings.)

The appointment of an arbitrator can only be brought to an end by agreement or by a court order, the grounds for which are limited.

However, the parties can agree to discontinue the arbitration at any time.

Flexibility

There are a few limits to what can be agreed under the Act and/or the Scheme: Article 3 provides that only English law can be applied. However, the flexibility of arbitration procedure is a very attractive feature. For example:

- Article 10 provides for a flexible general procedure which may include any out of: written statements of case, disclosure, witness statements and/or expert evidence;
- disclosure can either be limited or extensive, as may be appropriate;
- if the parties agree, or the arbitrator directs, the arbitration can proceed in part, or in whole, as a paper exercise.

It is for the parties to define the scope of the arbitration. In some cases they will want the entire dispute arbitrated. In others, there may be a large measure of agreement but one or a few intractable areas of disagreement. Discrete issue arbitrations could well be suitable for a paper only procedure, which would produce an outcome very quickly in areas such as:

- the term of a maintenance order;
- whether the sale of a particular property should be immediate or deferred; and
- chattels.

The arbitration can take place at anytime and anywhere:

- the arbitration can start and/or finish before any proceedings are issued;
- the process can be used for the summary resolution of an issue which is holding up negotiations (or mediation or a collaborative process);
- arbitration could take place at a late stage to avoid a long delay before the trial;
- hearings could take place at any times which are agreed, including evenings and weekends; and
- hearings could take place at an agreed location anywhere in the world.

Other advantages

Choice of arbitrator

Parties to a dispute never have the right to choose which judge will try their case in court. They do have the right to choose as their arbitrator a selected specialist with appropriate experience, who they can be sure will have read the papers. Litigants do not like the fact that they usually do not learn who their judge is until the day before a court hearing. Judges often do not have enough time to pre-read adequately.

Speed

It can be established in advance whether an arbitrator will be willing and able to deal with matters in an expedited way and it will be possible to find one who is. Subject to the arbitrator's availability, the timetable is entirely in the hands of the parties. This is in marked contrast to court procedures.

Confidentiality

The arbitration process is confidential by its nature. The parties can impose any terms of security that they wish and to which the arbitrator is willing to agree, for example, that the papers are never to leave a secure office and that the arbitrator is to do any preparatory work there.

Costs

In many cases there will be a saving of overall costs. On the one hand, the parties have to pay the arbitrator's fees and the cost of any venue which is hired; on the other hand, the ability to limit both disclosure and the ambit of the dispute and the potentially huge saving of time will, in many cases, lead to a net cost saving.

Article 14 of the Scheme provides that subject to; prior agreement; and the arbitrator's overriding discretion, the normal rule will be no order for costs. However, the parties can agree any costs rules that they like and the arbitrator has discretion to depart from the no order starting point on the basis of the conduct of a party in relation to the arbitration.

Third parties

The arbitrator has no power over any person who is not a party to the arbitration. However, there will be many cases where arbitration will be a convenient, cheap and expeditious route to resolve issues involving third parties provided that they agree to take part. For example, an issue over whether a family member or business associate has an interest in an asset can be submitted to arbitration and resolved as a preliminary issue. The third party will not have to be joined to the financial proceedings (if any). When the preliminary issue has been resolved the parties could either continue in the arbitral process or go down the court route. Also, trustees may object less to becoming parties to an arbitration than to court proceedings for the resolution of issues such as whether a trust is an ante-nuptial or post-nuptial settlement.

The status of the award

The Arbitration Act provides that:

- an arbitral award is enforceable by leave of the court in the same manner as a judgement; and
- when leave is given judgment may be entered in the terms of the award.

One of the advantages of commercial arbitration is that, under the New York Convention, arbitral awards are readily enforceable internationally. This may also be true of family awards depending upon the country involved. If it is not, a court order corresponding to the award could be obtained and enforced under the usual reciprocal arrangements.

An award under the Scheme is final and binding, subject to review or appeal. If an award provides for continuing payments it can be subject to a further award or court order: plainly there has to be scope for variation of ongoing maintenance awards.

Article 13(4) of the Scheme provides that, 'if and in so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award... and will take all reasonably necessary steps to see that such an order is made.'

It is possible that at some point there may be a case which will test the precise juridical status of an award made (eg, under the Matrimonial Causes Act). It may be arguable as a matter of strict legal theory that since the jurisdiction of the court cannot be ousted, the court will not be bound to make an order which mirrors the award.

However, it is established law that any issues either of fact or of law, which have

been decided by arbitration, cannot be challenged in other proceedings, except (in the case of a point of law) by appeal. A judge of the Family Division will regard an agreement to arbitrate as at least equivalent to an agreement to compromise litigation, since the parties have agreed, in the form ARB 1, to accept and be bound by the award and to use the court in support of the award. In addition, the parties will have had a full opportunity to argue their case and will probably have been – and certainly had the opportunity to be – legally represented. The arbitrator would have been satisfied with the disclosure.

It seems extremely unlikely that a judge would exercise judicial discretion in a way which departed from an award. Several judges of the Family Division have already privately expressed their support for the Scheme. There is little if any reason for concern about the finality of an award.

Where next?

Very few arbitrations have so far taken place under the IFLA Scheme. These are early days and many solicitors are still learning the advantages of arbitration. Before long they may have little choice. The present government makes no secret of its desire to cut the cost of the family court system and has shown interest in the Scheme. It seems very possible that judicial resources will be focused in such a way that financial disputes are largely squeezed out of the court system so that arbitration will become the only route to an effective determination by a qualified tribunal.

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Children in distress – remedies in Indian law

Today's children constitute tomorrow's future and it is sad, but true, that we are not protecting our children. Our future is in jeopardy. The abuse of children in care homes has recently shocked the conscience of the Indian nation. Physical, mental and sexual harassment was rampant in these private institutions. Offences of molestation, rape, wrongful confinement, criminal intimidation and trafficking have been registered against these care homes, where the care givers turned into predators. A plethora of laws exist to protect child rights. The Indian Protection of Children from Sexual Offences Bill 2011 is also on its way to becoming a deterrent law. However, enacting laws is not the solution. Sensitisation of child rights, appointing ombudsmen to protect children and, above all, providing special care to their privileges is the clarion call of the day. Lethargy, indifference, tardiness and insensitivity to protection of children must end. Callous treatment of children should be penalised by social ostracism of child offenders, as law alone is not the remedy.

A wholesome law – the Commission for Protection of Child Rights Act

India participated in the United Nations (UN) General Assembly Summit in 1990, which adopted a Declaration on Survival, Protection and Development of Children and acceded to the Convention on the Rights of the Child (CRC) on 11 December 1992. CRC is an international treaty that makes it incumbent upon the signatory states to take all necessary steps to protect children's rights enumerated in the Convention. In order to ensure protection of the rights of children, one of the recent initiatives that the government has taken for children is the adoption of the National Charter for Children 2003. The UN General Assembly Special Session on Children, held in May 2002, adopted an outcome document titled, 'A World Fit for Children', containing the goals, objectives, strategies and activities to be undertaken by the member countries for the current decade. Hence, in the wisdom

of the Indian Parliament, it was thought expedient to enact a law relating to children to give effect to the policies adopted by the government in this regard, standards prescribed in the CRC and all other relevant international instruments. Hence, after the UN Convention on the Rights of the Child was signed by India, the Commission for Protection of Child Rights Act, 2005 (CPCRA) was enacted by Parliament to provide teeth and implement the UN Convention. CPCRA is an act to provide for the constitution of a national commission, and state commissions, for the protection of child rights and children's courts for providing speedy trial of offences against children or of violation of child rights and for matters connected therewith or incidental thereto.

Suggested measures under CPCRA

In the light of the above provisions of the CPCRA, it is incumbent on the governments of all the states and the Union Territories (UTs) in India to take all necessary steps to protect children's rights enumerated in the CRC. Sections 13 and 24 of the CPCRA provide ample powers both to the national commission and the state commissions for, inter alia, taking necessary steps and recommending appropriate remedial measures with regard to issues pertaining to all children in distress. These can be enforced in all the states and the UT's throughout India by setting up and/or constituting state commissions for the protection of child rights under section 17 of the CPCRA in the respective territories of the individual governments. Hence, as a starting point, the states and the UT's in India should forthwith set up the said state Commissions so that the entire machinery can be galvanised under its regime.

It is suggested that any averment or contention by either of the state or UT governments not to set up state commissions for the protection of child rights in their territories should not be entertained and accepted, due to the sensitivity and magnitude of the problems relating to

children in difficulty. Hence, all the states and the UT's in India need to set up the said state commissions as a priority.

To complete the setting up of a fully operational system under the CPCRA, children's courts can be constituted in the said respective territories in India under section 25 of the CPCRA and special public prosecutors can be appointed in these territories under section 26 of the CPCRA. Thus, independent of the other statutory enactments dealing with criminal laws or other penal provisions in general, CPCRA can be very effectively utilised for individually setting up a statutory system for enforcement of child rights specifically and particularly in the larger interest of children only. This will create a special, exclusive and individual forum for on-camera proceedings for redress of violations of children's rights and will provide effective, speedy and timely relief in the case of any individual incident of missing/distressed children.

The issues pertaining to missing children and/or children in distress can be exclusively looked into by the respective state commissions in their individual territories within India in view of the powers vested in them under sections 13 and 24 of the CPCRA. Clearly, if the state commission concerned, *suo moto* or upon inquiry into complaints regarding missing children or children in distress, comes to a conclusion that there is a violation of child rights, there is non-implementation of laws relating to children, or there is non-compliance of decisions/guidelines/instructions pertaining to welfare of children, such Commission, under section 15 of the CPCRA, can approach the Supreme Court/High Court concerned for issuance of directions, orders or writs as may be deemed necessary by the Court, besides recommending concerned governments for grant of interim relief. Thus, any individual case of missing children/children in distress can be immediately remedied by the concerned state commission in India by enforcing the above provisions of the CPCRA.

The composition of the state commission with its six members, out of which at least two should be women specialising in child health, care, welfare or child development, juvenile justice, child psychology, laws relating to children and/or having knowledge of children in distress, will give adequate opportunity to the state commission to receive complaints or act *suo moto* whenever there is any issue of kidnapping or removal of

children and deprivation/violation of child rights. The state commission is empowered to examine all factors affecting children and relating to trafficking; torture; exploitation; pornography; prostitution; and to recommend appropriate remedial measures. The state commission has mandatory powers to forward cases to any magistrate and hear them as complaints. Independently, the commission can recommend initiation of proceedings for prosecution or such other action as deemed fit. Hence, all cases of trafficking of children, particularly for exploitation, begging, prostitution and pornography, can be monitored and future recurrence can be checked. It can, therefore, attempt to eliminate all organised child mafias.

For effective preventive measures for the future, every state and UT in India must forthwith set up the statutory District Child Welfare Committees, besides State and District Inspection Committees, as required under sections 29 and 35 of the Juvenile Justice (Care and Protection of Children) Act 2000. Under Rule 91 of The Juvenile Justice (Care and Protection of Children) Rules 2007, every state and UT in India must constitute a Selection Committee, to be headed by a retired judge of the High Court as its chairperson, to make selections of District Child Welfare Committees, as well as making selections of State and District Inspection Committees. Also, as prescribed under section 62 of the Juvenile Justice (Care and Protection of Children) Act 2000, every state and UT in India must elect a State Advisory Board by appointing independent professionals, in terms of section 62 of the above Act, on the matters relating to the establishment and maintenance of homes; mobilisation of resources; provision of facilities for education; training; and rehabilitation of children in need of care and protection. Nominating these committees with *ex officio* government officials as full-time members, who have no inclination, time, energy or interest in child-related matters, is fatal.

Conclusion of suggested measures under CPCRA

A conjoint reading of the provisions, remedies and suggestions made above under the CPCRA indicates that an altogether separate and independent machinery can be set into motion under the auspices of the CPCRA to specifically look into all issues related to child rights while the process of criminal law moves in the mainstream.

The menace of child abuse can be curbed with a heavy hand only if the issues relating to children are segregated and dealt with under separate parameters, under the watchful eye of child specialists (ie, qualified members of the state commissions for the protection of child rights) alongside child welfare or inspection committees and boards. Only if qualified, trained and experienced persons sensitive to child rights are empowered to handle the problems of children, can the process and machinery of criminal law work in tandem.

Once child offenders are apprehended, speedy trials of offences against children or of violation of child rights can be ensured in children's courts, which can be set up under the CPCRA. This can prevent recurrence of organised, children-related offences.

A vigilant state commission for protection of child rights – both as a watchdog and as an investigator – can serve a very significant role resolving the problems of children in difficulty. Hence, only if the issue of children in trouble is taken out from the general stream of treatment and handed over to child specialists to start with and if monitored/overseen from the outside, can the necessary attention, time and energy be devoted to this highly sensitive issue of problems of children.

Conclusion

Children go missing, are abused or are maltreated, and suffer in silence. It may be suggested that not only the police or the investigating authorities should be solely responsible for identifying the children in distress, whose cases have been reported to police stations. Rather, the public bodies, non-governmental organisations (NGOs) and State Legal Services Authorities within their territories in India should be made part of the support services as this would speed up the investigation process, making it possible for the children in distress to be helped. If all the authorities, at all levels, (eg, village, district, state and centre) in their respective jurisdictions (including public bodies) worked together to identify the children in distress, it would not be very difficult to solve their problems. Therefore, keeping in mind the above guidelines and suggestions,

it is stated that it is possible to efficiently investigate and locate children in difficulty and prevent future instances of child abuse and kidnap.

Considering that India is a large nation, geographically spread over an area of 3.28 million square-kilometres, with vast territories, housing a multi-cultural society and a population of over 1.1 billion people, spread over 28 states and seven UTs, resolving critical issues of children in distress is not an easy task. However, keeping in view that this vulnerable section of society is at very high risk, every effort, step and endeavour should be made to adapt means and methods to protect the future of the nation constituted of its precious children. Therefore, it should be the endeavour of every official body of the system in India to contribute and do whatever is the best that is possible for the plight of children in distress, who must be helped. Resolving their problems should be the top-most priority in all walks of life. We have to work tirelessly to save our children and if we do not, no one else will do it.

After perusing the comparative study of the above enactments, it can be stated that it is best that a state commission be formed under the commission for CPCRA, to look into the matters of protection of violation of child rights not visualised in other Acts. The state commissions formed under the Act in India for protection of violation of child rights have a vast scope to deal with the problems in hand. The Act talks about the protection of 'child rights', in terms of the definition given in the UN Convention on the Rights of the Child and the functions/powers of the state commission are very broad, giving ample authority to it in all areas of child rights. Commissions formed under this Act, in every state and at national level, will not only help solve the children's problems but will also look at other areas and give directions to state-level bodies for effective implementation. Hence, as per the provisions of the four Indian enactments and the comparative study above, it is best that the commissions under the CPCRA are formed to deal with all problems of child rights and they can further utilise the powers of state boards, authorities, committees for seeking effective implementation of all the four Acts.

Comparative look of all the four Indian enactments on child rights

Name of Indian enactment	Juvenile Justice (Care and Protection of Children) Act 2000	Commission for Protection of Child Rights Act 2005	The Right of Children to Free and Compulsory Education 2009	Child Labour (Prohibition and Regulation) Act 1986
Main objective	To provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles.	Provide for national and state commissions, courts for providing speedy trial of offences against children or of violation of child rights and for incidental/connected matters.	To provide for free and compulsory education to all children of age six to 14 years.	Prohibiting the engagement of children in certain employments and to regulate the conditions of work for children in certain other employments.
Definition of 'child' under the enactment	Child in need of care and protection is defined with nine different points	Child rights defined as per UN Convention on the Rights of the Child.	Child means a male or female child of the age six to 14 years	Child means a person who has not completed his 14th year of age.
Important and relevant sections under the enactment	Definition of Child, section 2(d); Juvenile Justice Board, sections 4–6; Important Provisions for Protection of Juveniles, sections 15 and 16; Child Welfare Committee, sections 29–31; Benefits for Children, sections 40–45.	Definition of Child rights section 2(b); National Commission formed under the Act, section 3, with functions under sections 13 and 14; State Commission, section 24; Children's Court, sections 25 and 26.	Definition of Child, section 2(c), (d) and (e); Rights of Child to Free Education, sections 3, 4 and 5; Protection of Rights of Child – Commission formed under CPCRA, section 31–34.	Definition of Child, section 2(ii); Prohibition of Employment of Child, section 3; Child Labour Technical Advisory Committee, section 5; Benefits for Children under the Act, sections 7, 8 and 13.
Authority constituted under the enactment	Juvenile Justice Board and Child Welfare Committee	National and state commissions for Protection of Child Rights and Children's Court for speedy trial of offences against children.	Under section 31, national and state commissions for Protection of Child Rights as constituted under sections 3 and 17 of the CPCRA/Advisory Councils, sections 33 and 34.	Child Labour Technical Advisory Committee
Role of the authority constituted under the enactment	Juvenile Justice Board – deals with all the proceedings relating to the juvenile under law. Child Welfare Committee – looks after the children in need of care and protection.	National and state commissions – have the duty of protection of all kinds of rights of children, as defined in section 13. Children's Court – speedy trial of offences of violation of child rights.	National and state commissions – in addition to the functions under the CPCRA, also look after the rights of education of children and inquire into the complaints of violation of the same.	Child Labour Technical Advisory Committee – to look into the complaints of violations under the Act, (ie, where children are engaged in employments in violation of the provisions under the Act.
Benefits available to the children	Provides for the rehabilitation and social reintegration of children or juveniles who are guilty under the law.	All kinds of rights of children on the whole are protected under the Act due to diverse functions and powers under section 13 of the Act.	Protection of right of education of children aged six to 14 years.	Protection of children from being employed in places with high risk to the life of the children and providing better work environment for children.
Drawbacks of the enactment	The Act specifically deals with the protection of juveniles who have committed crimes and the ways the courts should deal with them. No effective machinery is provided for protection of rights of children who are being exploited.	None apparently, though, if qualified, people as stipulated under sections 3 and 17 are not appointed to the national/state commissions, no meaningful purpose will be served in creating these specialist bodies with statutory powers created under the UN Convention of the Rights of the Child.	The major focus of the Act is on the right to provide free and compulsory education to children.	The Act only focuses on the prohibition of employment of children in certain work places which are harmful for children.

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Shared residence orders might not be an exception in Spain for much longer

Spain is undergoing a lot of changes in many areas, not least those which lead to it hitting the headlines of the major financial papers worldwide. Hopefully, these changes are not limited to the economy; the signs are that the new government wants to do something about shared parenting.

The newly appointed Minister of Justice, Alberto Ruiz-Gallardardón, has announced a proposal to amend the current Civil Code, so that shared residence orders are no longer exceptional in cases of separation or divorce of parents.

Article 92¹ of the Spanish Civil Code, as it currently stands, states as follows:

- Separation, annulment and divorce shall not exonerate parents from their obligations to their children.
- When the judge is to adopt any measure relating to custody, care and education of underage children, he shall ensure compliance with their right to be heard.
- The judgement shall order the deprivation of parental authority when grounds for this should be revealed in the proceedings.
- The parents may agree in the settlement agreement, or the judge may decide, for the benefit of the children, that parental authority be exercised in whole or in part by one of the spouses.
- Shared care and custody of the children shall be decreed where the parents should request it in the settlement agreement proposal, or where both of them should agree on this during the proceedings. The judge, in decreeing joint custody and after duly motivating his resolution, shall adopt the necessary precautions for the effective compliance of the agreed custody regime, trying not to separate siblings.
- In any event, after decreeing the care and custody regime, the judge must ask the opinion of the public prosecutor and hear minors who have sufficient judgement, where this is deemed necessary *ex officio* or at the request of the public prosecutor, the parties or members of the Court Technical Team, or

the minor himself and evaluate the parties' allegations at the hearing and the evidence presented therein, and the relationship between the parents themselves and with their children, to determine the suitability of the custody regime.

- No joint custody shall be granted when either parent should be subject to criminal proceedings as a result of an attempt against the life, physical integrity, freedom, moral integrity or sexual liberty and integrity of the other spouse or the children who live with both of them. Neither shall it apply where the judge should observe, from the parties' allegations and the evidence presented, that there is well-founded circumstantial evidence of domestic violence.
- Exceptionally, even in the absence of the circumstances provided in section 5 of this article, the judge, at the request of one of the parties, with the favourable report of the public prosecutor, may decree the shared care and custody, based on the argument that only thus is the minor's higher interest suitably protected.
- The judge, before adopting any of the decisions mentioned in the preceding paragraphs, *ex officio* or *ex parte*, may ask for the opinion of duly qualified specialists relating to the suitability of the form of exercise of parental authority and the minor's custody regime.

Currently shared residence can be only granted if:

- there is an agreement between the parties; or
- it is requested by one of the parties and the public prosecutor supports it as it is in the minor's best interest.

What has been most vigorously criticised since July 2005, when the Civil Code was last amended, is the legal restriction imposed on the judge, which prohibits him from ordering shared residence if such a regime is not supported by the public prosecutor, as currently stated in Article 92.8 of the Civil Code. Some courts have questioned whether this article is constitutional, as it restricts judicial exercise.

On 20 May 2010, the autonomous region of Aragón² took a major step by passing a law that

makes shared residence orders the preferred option whenever separating or divorcing couples cannot agree on how they will care for their children. In July of the same year, the Parliament of Catalunya³ passed a law requiring judges to grant residence according to the shared nature of parental responsibilities where an agreement between parents cannot be reached. As a result, depending on where in Spain you divorce or separate, you have a better or worse chance of obtaining a sole or a shared residence order.

The proposal to amend the Spanish Civil Code is reflecting a social need. The idea that shared care of children is in their best interest is becoming predominant in western societies.

The importance of the current governmental proposal is that it would become a national law resulting in an amendment to the Civil Code, permitting the Courts to grant shared residence in numerous circumstances, rather than as an exception.

The Minister has explained to the Spanish Congress that the intention is to end the aspect of exceptionality that shared residence orders currently have in the jurisdiction and to empower the position of the judge, who will ultimately decide.

One proposed change would be that the report filed by the public prosecutor would no be longer decisive. The judge would still be able to grant a shared residence order (even if not requested by any of the parties nor supported by the public prosecutor) when it is in the child's best interest.

If the proposal is approved, national law in respect of shared residence would be similar to the current legislation of regions such as Catalunya or Aragón, where the regime of shared residence is the preferred one. However, it is important to note that the government has clarified that it is not intending for either sole residence or shared residence to be preferred; they simply wish

to avoid a system of rigid regimes of care, which is the reality of the current regulation and to allow judges to decide what is best for the child.

Now the debate between professionals and interested associations is whether shared residence orders should be preferred nationally, as they currently are in some regions, providing equality to both parents.

The Minister of Justice has requested that the Commission of Codification, the government body which is consulted in the preparation of pre-legislation, prepare an amendment to Article 92 of the Civil Code in which residence is regulated. Such reports would need to be prepared within the next six months to be presented to the Spanish Congress, where it would be intended to be consensually voted into law.

There have also been discussions about changing the terms of *Patria Potestad* for Parental Responsibility and Custody in respect of residence. These changes were made in England and Wales in by The Children Act 1989.

The proposals are welcomed, not only by Spanish domestic practitioners but also by those professionals with international practices, as it will bring similitude to orders from different European member states, which will facilitate the recognition and enforcement of such orders in other member states.

So, as Miguel de Cervantes Saavedra wrote in *Don Quixote*, 'For neither good nor evil can last for ever; and so it follows that as evil has lasted a long time, good must now be close at hand.'

Notes

- 1 As amended by Law 5/2005, 8 July 2005.
- 2 Law 2/2010, 26 May 2010, Equality in family relationships following the breakdown of the parents relationship.
- 3 Law 25/2010, Act of the Second Book of the Catalan Civil Code regarding people and the family.

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The EU Maintenance Regulation: maintenance/needs claims when sole domicile jurisdiction*

The EU Maintenance Regulation¹ (MR) is one of the most complex and bewildering pieces of legislation in English family law, having been directly imposed into English law from the EU with effect from 18 June 2011. Its highly laudable intention is to make maintenance orders automatically recognised and enforceable across Europe. This is not just the preserve of the super wealthy. For example, for a mother in Hamburg with several young children and arrears of maintenance of €6,000, which she wants to pursue against the father who has moved to Bordeaux, the EU is quite rightly seeking to make it easier to pursue such claims across EU borders without having to invoke complex national processes in each country.

The problems with the EU MR are numerous. It is easier in Denmark and the UK – in contrast to all other EU countries where there is an added stratum of complexity based on the 2007 Hague Protocol² for countries using applicable law. Even continental European specialist family lawyers working daily with applicable law are reporting real difficulties in its interpretation and implementation.

It gives priority of jurisdiction to marital agreements in which the couple have chosen an EU jurisdiction to deal with maintenance (Article 4). Yet this is very much the civil law, continental European expectation of marital agreements. There is no necessity of independent legal advice and disclosure or other elements to make sure the parties fully understand the implications. The connection may be very minimal with the country chosen in a marital agreement at the time of the marriage (perhaps a decade previously), yet it takes prior jurisdiction at the time of the subsequent divorce.

The EU MR relates to maintenance. However, there is no definition within the legislation. Specifically, practice varies dramatically around Europe.

‘Maintenance’ is interpreted in this context as ‘needs’.³ In English law, ‘needs’ is one of the criteria for a fair financial outcome, alongside sharing, compensation and marital agreements. Fundamentally, English case law, in a series of cases from the Court of Appeal and High Court, has said that the court will transfer non-marital acquired assets, such as premarital, inherited or gifted assets, from one spouse to the other if it is required for the purposes of needs. These needs will often be accommodation with children but could include capitalised maintenance. As far as the matrimonial assets acquired during the marriage are concerned, these will have an automatic starting point of equal division. Nevertheless, the English court will divide unequally if required for provision of needs. Needs trumps equal sharing of the marital acquest assets.

It cannot be underestimated how important ‘needs’ is within English family law financial outcomes. It is dramatically greater than most other jurisdictions, certainly within Europe, where needs provision can be very modest. Whereas other countries in north-west Europe may make modest redistributions of wealth for maintenance needs, England will have no difficulty in making dramatic redistributions. Hence, this EU MR has a fundamental impact in England because so many financial outcomes on divorce are determined by reference to maintenance needs.

Jurisdiction in the EU Maintenance Regulation

One distinctive element within the EU MR concerning jurisdiction is now being interpreted by some lawyer practitioners as possibly having a much wider implication than just in cross-border EU cases. For many months, since June 2011, as lawyers have got to grips with the new law, this aspect has been discussed and debated between those lawyers undertaking a significant amount of international work. It needs now to be more widely discussed with views from practitioners,

academics, policy makers and others involved in family law issues.

Has the EU MR created an unintended consequence affecting all non-EU divorce finance work, including impact on domestic jurisdiction in non-EU countries? Or instead was it intended? What may it mean in practice? How can it be overcome if it is a problem in practice?

The EU Maintenance Regulation asserts that EU member states only have jurisdiction in matters relating to maintenance obligations when either party is habitually resident in that country (Article 3(a) and (b)) or in the EU country which 'according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on nationality of one of the parties'.⁴ Article 3(d) is in similar terms in the context of maintenance ancillary to parental responsibility proceedings (ie, regarding children).

In English law, the primary proceedings relating to the status of a person are divorce. Financial claims on divorce are made ancillary to divorce proceedings. Indeed, until April 2011,⁵ financial claims on divorce were known as 'ancillary relief', being ancillary to the divorce suit. So, there is no doubt that Article 3(c) is referring explicitly within England to financial claims on divorce. These claims are primarily for sharing or needs. In England, unlike many civil law jurisdictions, all claims are dealt with together, at the same time, according to the same law, before the same forum and by the same lawyers. There is no separation between maintenance and property sharing, between advocates and notaries, nor any concepts of marital property regimes.

Therefore, Article 3 states jurisdiction in member states does not lie for financial claims ancillary to divorce if that divorce jurisdiction is based solely on the nationality of one of the parties. It is, therefore, necessary to look at the divorce jurisdiction across the EU, found in another, EU-wide family law legislation.

EU divorce jurisdiction

This is found in the Brussels Regulation,⁶ sometimes known as 'Brussels II (BII)'. Article 3.1 of BII sets out the common jurisdiction across the EU for divorce, legal separation or marriage annulment. There are six based on varieties of habitual residence with a seventh of joint nationality or joint domicile. The habitual residence jurisdictional bases overlap

considerably, with continuing confusions, even though the legislation has been in force since March 2001.

If no EU Member State has jurisdiction for divorce based on these seven jurisdictional bases, then BII⁷ allows a further jurisdictional basis, known as the residual jurisdiction. For the UK and Republic of Ireland, this is sole domicile. As stated, it is only available if no EU Member State has BII Article 3.1 jurisdiction. Therefore, it is not available if either party is habitually resident in any EU Member State. These are issues which, on a daily basis, concern specialist family law practitioners across Europe dealing with international families.

The uncertain position about jurisdiction with the EU MR arises only when this so-called 'residual jurisdiction basis' of sole domicile is relied on.

Implications

If it is now the case, as is being argued by some lawyers, that an English divorce petition based only on sole domicile means the family court has no power or ability to make maintenance/needs orders, then what are the implications? What are the possible solutions?

It should be said immediately that this issue has relatively limited application. The vast majority of divorce petitions in England and Wales are on the jurisdiction of joint habitual residence. Indeed, this is the default position in the printed form attached to the court rules, Family Procedure Rules 2010. In some other cases, the jurisdiction is the English habitual residence of one of the parties even if the other spouse is abroad. If habitual residence of any form is available, it has to be used instead of sole domicile.

Nevertheless, sole domicile is still vitally relied on in a number of cases, including where there are connections with countries outside of the EU. Anecdotally, the number of contested domicile cases in the family courts has risen significantly over the past few years.

In the demographics and pattern of international families across the world at the present time, there are many instances of reliance on this jurisdictional basis. It is, for example, the spouse from England, living abroad with her husband, outside the EU, then returning home on the breakdown of the marriage and, as the plane crosses the White Cliffs of Dover, her domicile of origin reverts and the spouse hotfoots from Heathrow to her local divorce court to issue

on the basis of her sole domicile. She has not yet acquired habitual residence nor does she have the period of simple residence needed for the other bases of jurisdiction. It is in these circumstances where jurisdiction of the divorce is based on sole domicile that there is a belief among some lawyers that the EU MR does not allow maintenance claims (ie, on a needs basis). Accordingly, in this example, the wife would not then be able to claim any needs-based settlement provision.

Certainly the family courts would have power to deal with sharing, which might be greater than needs.

Objections

One response is that this EU Maintenance Regulation law is only intended for the EU market. It concerns, or should jurisprudentially concern, only cases involving more than one EU jurisdiction. It regulates the jurisdiction basis, including priority of jurisdiction within the EU. It does not or should not affect non-EU cases in any way to restrict the powers of the English court to make a fair order on a case with which it is competently seized. It is wrong that this jurisdiction provision should prevail in a case of an international family with connections with countries outside the EU.

There is absolutely no reciprocity outside the EU. So, by way of example, in Anglo–Australian cases, if England has jurisdiction on the basis of sole domicile and Australia has jurisdiction on the basis of nationality, there is nothing to prevent Australia dealing with maintenance needs issues, whereas the EU is depriving the English courts from doing so. It is a different matter if there is a level playing field, as there is across the EU where the MR prevails. There is no level playing field between England and non-EU countries, which are simply free to ignore these maintenance restrictions. This cannot be justified on any basis. It is distinctly unfair.

In any event, whilst habitual residence as a basis of jurisdiction finds favour in child-cases in a number of countries around the world, there are many countries which rely on nationality, domicile, citizenship, various forms of substantial connection and similar. They do not rely on habitual residence. The consequence of the EU legislation on this particular interpretation is that there could be international families with connections with several jurisdictions but those jurisdictions do not have habitual residence

as their basis of jurisdiction for maintenance claims. So, an applicant for maintenance with a sole domicile divorce petition in England could find herself prevented from bringing those maintenance claims in England on this interpretation of Article 3(c) and yet there would be no other jurisdiction in the world where those claims could be made.

Another difficulty is that the concept of habitual residence is very uncertain for international families needing to use cross-border EU family law legislation. Whereas domicile has a status in tax and other areas of personal laws with some degree of precision and certainty and whereas nationality is capable of objective proof, habitual residence has been the subject of differences in case law between national and international courts. It has different meanings in matters of divorce and maintenance than it does in matters concerning children. It has different meanings within the EU and without the EU. It also has a high degree of artificiality for families who simply travel in connection with their work, moved by employers, governments and others from one country to another throughout their working life, putting down relatively shallow roots until the next move. Yet the EU, in dealing with these very typical international families, has put its confidence in a concept and jurisdictional basis which is almost non-existent and meaningless for these families. The EU should be doing better for international families

A solution and remedy?

One solution may be found in Article 7, MR, which states that where no court of a member state has jurisdiction under Articles 3, 4, 5 and 6 (the jurisdictional bases of the MR), the courts of a member state may, on an exceptional basis, hear the case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which a dispute is closely connected. There must be a sufficient connection with the member state. This is technically ‘forum necessitates’. It would seem that this would enable the English court to deal with maintenance in a sole domicile jurisdiction case. The sufficient connection would invariably be proven by the jurisdiction of English domicile. What needs to be shown is that proceedings cannot reasonably be brought, conducted or be impossible in a third, non-EU Member State.

Conclusion

The EU has a declared and stated objective of creating simplicity, certainty and predictability in family law matters in cross-border cases.⁸ In a succession of family law legislation it has created the exact opposite. Cynics might quite rightly suspect the EU family law policy-makers of being conspiratorially in cohorts with family lawyers because they are making the law, the process and the procedure so complicated. In fact, very many family lawyers condemn the EU in its legislation in family matters as being against opportunities to settle, to mediate, to reconcile and to resolve quickly and cheaply.

Only time will tell if England will deal with maintenance claims if there is only a sole domicile divorce petition. For English lawyers, this means only a reliable decided case from one of the higher courts will tell us the answer. In the meantime, it is highly unsatisfactory for international families. Wherever possible it is wise to plead habitual residence even though this might be suspect, with sole domicile as a secondary alternative. When no other non-EU competent jurisdiction can deal with maintenance, there is power within the EU legislation for England to deal with maintenance and this power should be exercised and tested. The English family courts are likely to take on this power frequently if required to produce fairness and justice in a case before it.

In the meantime, the housewife in Hamburg seeking to pursue €6,000 arrears of maintenance against the husband and father of her children, in Bordeaux or elsewhere in Europe, may well find herself paying lawyers significantly in excess of those arrears in order for her lawyers to find a way through the complexities of EU family law legislation.

Notes

- * An earlier version of this article was previously published in *Family Law and Practice*, the online journal of the Centre for Family Law and Practice, London Metropolitan University. It has also previously appeared as an opinion piece with the online *Newsletter Family Law Newswatch* (published by Jordans) and from the author's book, *The International Family Law Practice* (Jordans, 2012) and is published with acknowledgement.
- 1 EU Council Regulation 4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Decisions and Co-operation in Matters relating to Maintenance Obligations.
- 2 Hague Protocol of 23 November 2007 on the law applicable to Maintenance Obligations.
- 3 See, for example, *Van de Boogaard v Laumen* (1997), 2 FLR 399 and *Moore* (2007) 2 FLR 339.
- 4 Article 3(c).
- 5 Changes in Family Procedure Rules 2010 (FPR 2010).
- 6 Council Regulation 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and Matters of Parental Responsibility.
- 7 Article 7.
- 8 See also Article 81, Treaty of Lisbon.

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Child support changes in New Zealand – unanswered questions

Child support framework

The New Zealand Parliament passed the Child Support Act in 1991 and it came into force the following year. It represents a comprehensive scheme that covers all ongoing financial support of children, except for international child maintenance.¹ It replaced rules that provided for the court to make orders for the maintenance of children. It also replaced what was known as the ‘liable parent contribution scheme’, which operated where a parent was receiving a social security benefit (typically what is known as the domestic purposes benefit) and enabled the state to collect money directly off the other parent.

The child support scheme is a system that, on the surface, is administratively simple. It leaves little room for discretion. It uses a statutory formula that is based on the liable parent’s taxable income. Partly for this reason, it is run by the tax department, known as the Inland Revenue Department. The formula takes account of the liable parent’s own living costs, number of dependants and the number of children in the care of the other parent. The amount to be paid is also affected where the custody of children is split or shared. Shared custody occurs when the liable parent has care of the child for at least 40 per cent of the nights, although there is power, not often successfully invoked, for a shared custody situation to arise where the care is provided in some way other than over-night stays.

The scope for injustice under this inflexible system is manifest. For this reason, there are rules that enable the formula to be modified. These are known as ‘departures’. In the leading case, the Court of Appeal described the section containing the grounds for a departure² as one of ‘formidable complexity’.³ Both the ‘custodian’ and the ‘liable parent’, that is the payee and the payer, can seek a departure. The payee, for instance, may want to have the amount of child support increased on the basis that taxable income does not represent the payer’s real financial position.

Self-employed people are able to minimise their official income in ways that also minimise their child support obligations. A payer, on the other hand, may have significant extra expenses and the payee may be earning a good salary that is not taken into account under the formula. A reduction in the level of payment will be sought. In both of these situations, the applicants for a departure must show that there are ‘special circumstances’, which has been interpreted narrowly,⁴ that a departure would be ‘just and equitable’ (which involves an examination of a wide range of circumstances affecting the various parties) and that it would be ‘otherwise proper’ to grant a departure, a phrase not defined in the legislation.

Bad law-making in the past

The New Zealand legislation was originally based in large part on the Australian equivalent. However, one major difference was that the New Zealand Act was retrospective in its effect. This meant that existing arrangements, whether by court order or agreement between the parties, became assailable. The result was that child support assessments led to a great deal of disgruntlement – in some cases where liable parents were paying substantially more and in others where the custodian was losing significantly. The courts were inundated with departure applications. Many of these applications related to transitional situations and so they eventually worked their way through the hearing processes. Yet it was an object lesson in how not to carry out law reform and, especially, how objectionable retrospect can be.

Rather too late, a new Part 6A was added in 1994, which provided that departure applications would be heard initially by review officers within the Inland Revenue Department. Only if a party was unhappy with the outcome of this administrative review process would an appeal be taken to the family court.

In fact, the lesson in bad law-making continued with these 1994 reforms. The new procedure allowed the applicant for a departure to appeal to the family court against an adverse ruling but did not give the respondent the same right. The respondent had to try some other convoluted method to challenge the administrative review decision, a situation glaringly contrary to principles of natural justice. Twelve years later, sections 103B-103E were finally added to the statute, giving both parties the same rights of appeal.

More reform

We come to the present day. Following consultation by means of a discussion document,⁵ the government decided that the child support system, in particular the formula, needed an overhaul. Legislation has been introduced to parliament and the Child Support Amendment Bill (the 'Bill') is currently before a parliamentary select committee. In part, the changes are based on similar moves in Australia.

The most notable aspect of the Child Support Amendment Bill is a radical reshaping of the formula, discussed shortly. The Bill also alters some of the rules that apply to payers who have fallen into arrears. Such people can very easily attract penalties in the same way as penalties can be imposed on people who get behind in paying their taxes. This approach illustrates well how child support is more of a taxation measure than a family law one and, from a family lawyer's point of view, this may be a cause for concern. The burden of penalties imposed on a recalcitrant liable parent has its place, but they can be heavy and can mount up very quickly. What effect does this have more generally on the parent/child relationship? In reality, many defaulters escape their situation by leaving the country, which helps neither the family nor the taxpayer. In some small ways, the Bill reduces the imposition of penalties and eases the circumstances when penalties can be written off.

Two other changes are of interest. First, child support payments will, in future, usually cease when a child turns 18 instead of 19, as applies under the present law. This will bring the Act into line with the age under the United Nations Convention on the Rights of the Child. However, there is an exception for children who are 18 and are still at school. The logic of this is that these children are still dependants and someone has to pay for

their upbringing. Yet, if this is so, why stop here? Why should not any dependent child, of whatever age, who is still at school, attract child support? And what of a dependent 18-year-old who is not at school but is in some other kind of training? Tertiary education students can receive various allowances and obtain student loans, but what of others? It appears that the change in the age is in line with principle but that the exception is purely for pragmatic purposes.

Secondly, a new ground is to be added to the list that governs departures from the formula. This ground arises where a party earns extra money to pay for set-up costs following the parents' separation, for example costs associated with accommodation. The Bill uses the ugly phrase 'a re-establishment costs situation' to describe the position. Unlike all the other grounds for departure, this new ground is not linked to 'special circumstances', so proof of the extra income and the 'actual and reasonable costs' should be enough to satisfy the ground. However, it applies for only three years after the parties have separated. This is fine for some costs, for example buying furniture, but makes rather less sense where the costs relate to mortgage payments that are longer term. Furthermore the failure to define 'actual and reasonable costs' may invite litigation unless those administering the process adopt a generous interpretation.

The new formula

The new formula is much more complicated than the current one. While the broad changes can be described and evaluated, the detailed mathematical formula contained in the Bill is very hard to understand. Given that lawyers working in the field have had trouble with it, how will the general public cope? This may not matter too greatly as a computerised programme will simplify the actual calculation but as a matter of principle, the law dealing with children should surely be reasonably accessible and it is not easy to determine how fair the new formula will really be in practice.

These are the main features of the new formula:

The income of both parties will be taken into account. The old model was based on the notion that the father earned an income and the mother was at home looking after the children. This ignored two realities: that women are increasingly in the paid work force; and that fathers are increasingly involved in caring for their children. It is

unfair for a liable parent's obligations to be worked out without any allowance for these two factors.

The increase in shared parenting that has occurred in a number of jurisdictions, including New Zealand, is behind another change. As noted above, 'shared custody' is at present determined by a parent's having the child for 40 per cent of the nights. This figure is somewhat arbitrary. In future, the key percentage will be 28 per cent of the nights, which equates to two nights per week. It will be easier to argue for a calculation based on something other than nights and the language of 'custody' is replaced with 'the proportions of care'⁶. A new provision empowers the child support personnel to rely on court parenting orders and agreements to establish these proportions. A party may raise objections to this on the basis that the order or agreement does not mirror what is happening in practice.

The new formula recognises that a teenager costs more to feed and clothe than a younger child. Thus, a liable parent pays more for a child aged 13 or over. One of the complexities of the formula is working out the amount to be paid where there are several children of different ages. In theory, the new formula will be based on the costs of bringing up children rather than the liable parent's income and the number of children.

Some question marks

The new Bill will certainly make a difference to child support payments – just how different is a little bit of a mystery. The Bill does not make the welfare of the child a consideration, let alone a primary one as bidden by the United Nations Convention. It is not clear how the changes will affect children or, for that matter, mothers, fathers, grandparents and others who bring up children. For those children whose primary carer is on a social security benefit, it will make no difference as all payments go back to the Crown. For those whose primary carer is in paid employment, one would expect the amount of child support to drop because of the inclusion of the carer's income in the formula. This may also occur because of the more generous account taken of shared parenting. On the other hand, the parent in this situation who pays less will have more to spend on the child when the child stays. This may be a case of swings and roundabouts but we shall not really know until real cases are processed.

Some argue that there is little or no accountability in the system in terms of how the money is actually used – the recipient is not obliged to spend it on the child. With one exception, the new law will not alter this. The exception is that Inland Revenue will be able to allow certain 'prescribed' payments (eg, school fees or expensive dental work) to be made instead of ordinary payments, so long as the recipient is not a social security beneficiary and so long as the parties agree. It will not apply where there is shared care and can relate to no more than 30 per cent of the liability. While the payments go directly to assist the child, they will be relevant only in limited situations.

Apart from those just mentioned, agreements made between two parents over the financial support of their children are of no real value. They are automatically displaced by an application by either party for a child support assessment under the Act. Despite an earlier submission by the Law Society, the Bill maintains the existing unsatisfactory position. Family law encourages parties to reach their own solutions but in New Zealand the child support scheme prevents this from happening.

Finally, is the new formula retrospective?⁷ Does it apply to parties whose assessment of child support has been based on the existing formula and, in some instances, varied by departures? The Bill is silent on this but the implication is that existing parties will be re-assessed under the new formula as far as future payments are concerned. In a sense, this is fair and is not strictly retrospective. However, the argument with respect to departures, which as explained above are obtained only after an application and, sometimes, a family court order, is far less clear-cut. Arguably, an existing departure should stand until an application to vary or discharge it has been made. Any other rule could lead to the kind of flood of litigation that occurred when the scheme was first introduced.

The proposals outlined here may be altered as a result of the forthcoming parliamentary procedures but probably more at the level of detail than the overall structure. There will remain some unanswered questions.

Notes

- 1 See part 8, Family Proceedings Act 1980, which, inter alia, has provisions for the registration and enforcement in New Zealand of overseas maintenance orders.
- 2 Section 105, Child Support Act 1991.

- 3 *Lyon v Wilcox* [1994] 3 NZLR 422 at 426.
- 4 For example, the image of ‘a narrow gate’ has been used: *Re M* [1993] NZFLR74 at 81.
- 5 Policy Advice Division of Inland Revenue, *Supporting Children A Government discussion document on updating the child support scheme* (Wellington, September 2010). The author assisted in preparing New Zealand Law Society submissions on this discussion document and also subsequent submissions on the Amendment Bill.
- 6 This reflects the Care of Children Act 2004, which dropped ‘custody’ in favour of ‘day-to-day care’ and ‘access’ in favour of ‘contact’.
- 7 I acknowledge that I first thought about this issue when a student in my Family Law class raised it.

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Relocation in practice – the English perspective

In international relocation cases, the tension is often between dislocation of contact and the reasonable desire of the primary carer to relocate.

The stakes are high. Lord Justice Thorpe has commented that, of all private law court applications with regard to children, application for relocation (if permitted) often has the most serious ramifications for the child and the parents.

Practitioners give careful focus to the possibility of compromise in each case but many cases are incapable of settlement. One party will then be bitterly disappointed at the outcome. Both parties have passionately held views. Mediation is now recognised in England as having an important role to play in this area. Newly published research by Dr Trevor Buck,¹ published by Reunite, (the leading English child abduction charity) on the long-term effects of parental child abduction, suggests that where parties reach an agreed solution, the long-term outlook for the child maintaining a meaningful relationship with the non-resident parent is significantly better than where the outcome has been imposed by the court. The legacy of contested litigation is often long and bitter.

Meanwhile, the importance of maintaining positive relationships with two parents is more widely acknowledged than ten years ago. For children of many age groups, seeing a parent again after, say, six months can feel strange. The relationship is so dislocated that it is barely meaningful. Even though quality time rather than quantity time is still recognised as needed, the impact of the interruption of contact routines is great.

The effect of travel on the child can be a great strain. For many children even a four-hour

journey, each way, to Ireland or France is an exhausting experience. The child can become neutral, or even hostile, to international contact because of the strain. The child contemplates a long dreary journey, a barely recalled environment and unfamiliar relationships.

Indirect webcam contact is difficult for many young children; even if the relocated parent co-operates and even if the child does sit still in front of the camera, the interaction is a poor substitute for physical presence.

The intending relocater can pay lip-service to a desire to support future contact. It is often hard to show that the commitment is thin. The relocated parent, sometimes deliberately, undermines the relationship with the left-behind parent.

Detailed plans and proposals for contact in the event of relocation will be expected by both parties. How the child is to travel, escorted by whom, at what cost, is crucial. A child will often be expected to manage three return trips a year to the US but only one to Australia, for example.

Courts often attach conditions which are ineffective. Not all countries will grant mirror orders or, if they do, they are not applied as one might hope. Many left-behind parents find that it is too easy for the parent who has relocated to ignore or circumvent undertakings which have been given. Particularly in non-EU cases, the English court will often have no power to enforce the undertakings and the court of the country of relocation may take a different view of the promise.

The relative importance of thwarting the parent seeking relocation and the impact of a radical change in the child’s existing contact arrangements is difficult to assess.

In her statement, the applicant mother asserts that she would be ‘devastated’ if leave were refused. The mother sits in court, ashen faced, as the judge will notice. Lack of any medical evidence that, if refused leave, she would suffer such distress it would impact on her parenting abilities, is no bar to a decision in her favour, with this point central to the judgment. Dr Mark Berelowitz, in the Resolution debate of September 2005,² pointed out that there is no evidence that relocation is a cure for depression. Neither was there evidence of the impact on a child of ‘sub threshold depression’ (ie, distress and disappointment). In reality, relocation creates new stresses and strains for all, whilst placing a child in a new situation with the loss of much of what is familiar. England, compared to certain jurisdictions such as New Zealand, is considered relatively pro-relocation.

The practical aspects of the effect of relocation are subject to careful scrutiny by the court. In this article, I consider some of the practical matters which arise.

Part 1: the law

Principles enunciated in *Payne v Payne* [2001] 1 FLR 1052, held sway for many years. In that case, Thorpe LJ stated, ‘Pose the question,

- (a) Is the mother’s application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child’s life? Then ask is the mother’s application realistic, by which I mean founded on practical proposals both well researched and well investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father’s opposition: is it motivated by genuine concern for the future of the child’s welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child’s relationships with maternal family and homeland?
- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child’s welfare of the paramount consideration, directed by the statutory checklist in so far as appropriate.’

At paragraph 41 (page 440), Thorpe LJ continued:

‘In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.’

At paragraph 26(b) in the Judgement, Thorpe LJ continued:

‘refusing the primary carer’s reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.’

Subsequent decisions of current importance include;

In the case of *Re Y* [2004] 2 FLR 330 where Judge Hedley cited *Payne* and continued at paragraph 14:

‘The court contemplates two separate states of affairs. The one the more common is where the child is plainly living with one parent and it is that parent that wishes to leave the jurisdiction for whatever reason. The other and much less common state of affairs is when there is a real issue about where the child should live or there is in place arrangement which demonstrates the child’s home is equally with both parents. In those circumstances many of the *Payne* factors while relevant may carry less weight.’

Payne demoted

The Decision of the Court of Appeal in *MK v CK* [2011] EWCA Civ 793 has eroded *Payne* principles. In effect, the likely distress to the mother from refusal of permission to relocate over other aspects of the welfare checklist, is no longer elevated. What was established in *Payne v Payne* 2001 as principle is now mere guidance. A Canadian mother of children aged four and two wished to return home to Canada after the breakdown of her marriage. The father had care of the children five days in a 14-day cycle (35.7 per cent of the time). The Children and Family Court Advisory and Support Service (CAFCASS) officer reported that the mother felt isolated and lonely in England but recommended, on balance, that

the application should be refused: in his view the damage to the children arising from the inevitable reduction in their relationship with their father if the application was allowed, outweighed the damage arising from the distress to the mother if the application was refused.

The trial judge heard evidence from the parents, the CAFCASS reporter and from the mother's GP about the level of the mother's distress. The application to relocate was allowed. In her judgment, she failed to explain why she was departing from the CAFCASS recommendation and scarcely dealt with the father's case at all.

Reviewing the authorities, Thorpe LJ distinguished *Payne* on the basis that, 'the guidance in *Payne* is posited on the premise that the applicant is the primary carer. It says so in terms.' At paragraph 57, Thorpe LJ said, 'Where each [parent] is providing a more or less equal proportion [of care] and one seeks to relocate externally then I am satisfied that the approach which I suggested in *Payne v Payne* should not be utilised. The judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in section 1(3) of the Children Act 1989.'

Lord Justice Moore-Bick followed Lord Justice Wilson in *Re H* in stressing the distinction between the ratio of *Payne* (which is simply the paramount nature of welfare) and the guidance in *Payne* (paragraph 81-6). Wilson LJ had warned against endorsing a parody of the decision in *Payne* and Moore-Bick LJ echoed this. At paragraph 4, Moore-Bick LJ approved the judgement of Judge Eleanor King in *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam), in which she emphasised that the effect on the mother of refusal is only one component in a wider exercise. At paragraph 6 she said, 'Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted.'

Lord Justice Black agreed with this at 140-2 and went on to say at paragraph 143 that, 'The effect of the guidance must not be overstated.' At paragraph 96, Black LJ said that her approach diverged from that of Thorpe LJ in relation to the distinction between primary carer cases and shared care cases. At paragraph 145, she expresses a hope that cases will not be bogged down with arguments about the amount of time spent with each parent and whether a case should be treated as a *Payne* case or a shared care case. At paragraph 58, Thorpe LJ also stressed the importance of applying the

welfare checklist. He gave particular praise to the decision of Judge Theis in *C v D* [2011] EWHC 335 (Fam), where a welfare checklist approach was followed rigorously; the children were spending one-third of their time with the father. The outcome was that the mother's application was refused even though the judge accepted that the effect would be devastating for her. The same outcome (with the same corollary) had been reached by Hedley in *Re Y*. In *Re Y*, Hedley J pointed out that both parents were suffering from severe stress symptoms.

Summary – the welfare checklist

The proper approach in every relocation case is to apply the welfare checklist. Each case is fact-specific. An application to relocate is not conceptually different to any other application under section 8 of The Children Act. The distress which a mother is likely to feel if her reasonable application to relocate is refused is likely to be one important factor in the overall balance. However, there are cases where relocation will be refused even if the effect on the mother is devastating. The greater the part the father is playing in the children's lives, the greater will be the damage caused by allowing the relocation. There are not separate categories of case but a spectrum which takes into account the quality, as well as the quantity, of time spent with the father.

Future disputes

AP v TD [2010] EWHC 2040 (Judge Parker) – unexpected help has come to hand from the EU Regulation 2021/2003 ('Brussels II Revised'). Parents may, pursuant to Article 12, elect England as the jurisdiction where disputes for future contact may be determined when agreeing to relocation. Provided that it is in the child's interest, the court will try the case at the later date, even if the child is residing abroad. The case was set down to consider contact and whether it was in the child's best interest for the English court to retain jurisdiction in relation to residence under Article 12.3.

Accordingly, a party who dreads future litigation overseas should seek the concession by the relocator in the hope that, if there is future litigation, the court will decide that it is in the child's best interests that it take place in England.

Part 2: seeking or resisting in practice

Relocation cases are most often;

- a returning home case;
- the applicant wishes to take up life elsewhere with a new partner; or
- the applicant wishes to try life in a country with which they have no prior connection, in the belief that there will be a better life or employment opportunities for them and their children.

Whether and how the respondent parent will be able to keep the parental relationship alive is often central to whether the proposed relocation is in the interest of the child.

The welfare checklist

Since the court must apply the Children Act, section 1 welfare checklist, opening and closing submissions by reference to the statutory checklist are likely to assist the court.

Instructions and the statement in support or opposing

- These should address in nearly all cases, inter alia:
- What is the motivation of the parent seeking to relocate?
- What are the reasons for the desired relocation?
- What relationships does the child leave behind in England?
- What are the wishes and feelings of the child?
- Does the child have a sophisticated appraisal of the impact on them of the planned dislocation in their life?
- What is the effect on the child of disruption with their significant relationships and life here?
- What supportive relationships will the relocating parent and child have?
- Are immigration issues relevant?
- Is it possible for the respondent to move to the new state?
- Is it possible to improve the applicant's life in England instead of a draconian relocation?
- What is the effect on the stepfather and new family of refusal to relocate?
- Is the applicant suffering from depression? If so, is it the stress because of uncertainty as much as because of the life in England?
- What are the employment prospects of the applicant or spouse?
- Are financial issues realistically addressed?
- Is there stability in the housing plans?
- Is insurance covered adequately?

- Is the schooling suitable?
- Are there special cultural factors, such as religion or a language?
- Is there support and back-up in the event of problems, such as illness or unemployment?
- Is there a commitment to contact by the applicant?
- How exactly will the contact be funded?
- What contact journeys can the child cope with?
- What contact to the new homeland can the left-behind parent achieve?
- Are mirror orders likely to be effective? (Expert evidence on this point is often inconclusive.)
- Is it realistic for a parent to take proceedings overseas in the event of disagreement?
- Can safeguards be put in place, such as a bond, to ensure contact?

The CAFCASS report

The CAFCASS officer is a trained social worker, who will interview the parties and observe each with the child, usually in each home. The judge, if he departs from the recommendation of the CAFCASS officer, must give clear and compelling reasons for doing so. If the CAFCASS officer makes a recommendation, one party will be disappointed. Cross-examination of the CAFCASS officer may be crucial.

Instructions will be taken from the client on the contents of the report. The methodology of the CAFCASS officer must be scrutinised. The CAFCASS officer may or may not have read the papers. Some prefer not to read the papers but to come at the matter afresh. The CAFCASS officer may express a view which is not underpinned by fact. A risk assessment of the child's resilience is, ultimately, just that.

The CAFCASS officer may have been influenced by hear-say, or may not have been informed of certain pertinent facts, or been misinformed of others. The question often worth asking is whether the CAFCASS officer's opinion would be different if the facts were different to those assumed.

The judge who tries the case over three days or so may often have a far more detailed knowledge of the background facts and be in a better position to form an opinion on crucial issues relating to relationships and insight, as well as practicalities, than the CAFCASS officer.

Conclusion

The range of considerations for the court is wide. It is often hard to predict outcome and yet many cases cannot be compromised. There is no substitute for detailed practical analysis of the proposals.

Notes

- 1 T Buck, *An Evaluation of the Long-term Effectiveness of Mediation in Cases of International Parental Child Abduction* (Reunite, 2012).
- 2 Held in London, 29 September 2005.

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Citizenship issues and the adopted child

In Malaysia, there exist two parallel systems governing adoptions of Muslim and non-Muslim children under Syariah and civil laws. The Registration of Adoptions Act 1952 and Syariah laws govern the adoption of Muslim children in Malaysia.

This article will focus on the Adoption Act 1952 (the 'Act'), which applies to non-Muslims only and on a recent decision of the Malaysian High Court that has raised certain interesting questions relating to the Act. Firstly, on the subject of nationality, the Act is silent on whether Malaysian citizenship is automatically acquired by adopted children whose original immigration status is unknown, or are foreigners.

Although Malaysia has acceded to the Convention of the Rights of the Child (CRC), it has done so with an express reservation to Article 7, which relates to the right of a child to acquire a nationality.

Article 7 states:

'The child shall be registered immediately after birth and shall have the right from birth to a name, **the right to acquire a nationality** and, as far as possible, the right to know and be cared for by his or her parents.'

The recent decision of the High Court of Kuala Lumpur in *Foo Toon Aik v the Registrar-General of Births and Deaths, Malaysia (2012)* (unreported) has highlighted the deficiencies in the Act and exposed the practical reality of Malaysia's reservation to Article 7 of the CRC, that foreign/stateless children, who are adopted by Malaysian nationals, do not automatically acquire Malaysian citizenship of their adoptive parent.

In practice, the National Registration Department of Malaysia (NRD) administratively registers the adoption orders pronounced by our local courts where the 'citizenship status' of stateless/foreign children on the newly issued birth certificates would be stated as 'permanent resident'.

However, we were informed by the NRD that this practice changed in 2011 due to directions issued from Home Ministry. Aptly illustrated in the *Foo Toon Aik* case, the NRD had registered the adoption order of a Thai child, who was adopted by his biological father (and a Malaysian) as a non-citizen (*bukan warganegara*) on his replacement birth certificate. This led to the filing of a judicial review application to challenge the NRD's failure in reflecting the child's citizenship as Malaysian.

An illegitimate child

In September 2004, Mr Foo, a Malaysian citizen began a relationship with a Thai woman and they underwent a tea ceremony in Malaysia. However, as the 'marriage' was neither registered under the governing laws of Thailand (Civil & Commercial Code of 1935, 1976 and 1990), nor in Malaysia under the Law Reform (Marriage & Divorce) Act 1976, the 'marriage' was invalid.

As a result of the said relationship, a male child (the 'Child') was born in Malaysia on 10 March 2006. Due to his illegitimate status, he took on the citizenship of his Thai mother and was listed as *bukan warganegara* on his original birth certificate. Sadly, the relationship broke down and the Child's

mother returned to Thailand, voluntarily relinquishing her parental rights to Mr Foo.

Adoption

To acquire guardianship rights over the Child, Mr Foo applied for an adoption order, which was granted on 20 November 2009 (the 'Adoption Order'). The Adoption Order was submitted to the NRD for the issuance of a new birth certificate pursuant to section 25 of the Adoption Act 1952. However, the replacement birth certificate, dated 14 August 2010, retained his original citizenship status as *bukan warganegara*.

Mr Foo commenced judicial review proceedings and sought to quash the NRD's decision, seeking a declaration that the Child is a Malaysian citizen by operation of law and for the issuance of a fresh birth certificate with the Child's nationality reflected as Malaysian. The following provisions were relied upon:

- The Adoption Order;
- sections 9 and 25A of the Adoption Act 1952;
 - 'Section 9. (1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter **as though the adopted child was a child born to the adopter in lawful wedlock.**'
 - 'Section 25A. (1) In respect of the Certificate of Birth referred to in paragraph 25(2) (b), every adoption order shall contain a direction;
 - (a) to the Registrar General that the word "adopted", "adopter" or "adoptive" or any word to like effect shall not appear in the Certificate...'
- Article 14(1)(b) of the Federal Constitution 1957; and section 1(a), Part II Second Schedule of the Federal Constitution 1957;
 - 'PART II Citizenship By Operation Of Law Of Persons Born On Or After Malaysia Day [Article 14 (1) (b)]
Subject to the provisions of Part III of this Constitution, the following **persons born** on or **after Malaysia Day are citizens by operation of law**, that is to say: every person born within the Federation of **whose parents one at least is at time of the birth either a citizen** or permanently resident in the Federation.'

- The unreported case of *Lee Chin Pon & Anor v Registrar-General of Births and Deaths Malaysia* (2010) of a stateless child who was born in Malaysia and adopted by a married couple (both Malaysian). The High Court Judge in that case allowed the adoptive parents' application for judicial review, which challenged the NRD's decision in registering their child as a 'permanent resident' in his birth certificate. The court granted, inter alia, the declaration for their child's Malaysian citizenship, which was an automatic operation of law as he was born in Malaysia, to Malaysians, who were lawfully married.

Based on the above authorities, it was argued before the High Court Judge that the Child is deemed to have been born to Mr Foo in lawful wedlock (section 9 of the Act) and under section 1(a), part II Second Schedule of the Federal Constitution and the *Lee Chin Pon* case, the said Child is automatically conferred Malaysian citizenship by operation of law.

It was submitted that the existing birth certificate was highly prejudicial and contrary to the intent of the Act, making it apparent that the Child was a non-citizen affecting his psychological well-being and affinity to his family and country of birth. Other considerations were highlighted, including the fact that the Child is deprived of a right to a Malaysian passport, to be educated in local schools as enjoyed by Malaysians and treated differently from any future children of Mr Foo.

The NRD opposed the application.

On 21 February 2012, the Judge refused the declarations sought and distinguished the case of *Lee Chin Pon* as, at the time of the Child's birth, Mr Foo did not have a valid marriage. Hence, section 1(a) of the Federal Constitution did not apply to illegitimate children who may only acquire the citizenship of their birth mother.

This unfortunate outcome shows the need for specific legislation to be enacted to expressly provide for the conferment of Malaysian citizenship upon adopted children by Malaysians, irrespective of their marital status. The lacuna created in the Act has prejudiced the rights of adoptive children and the Malaysian government ought to revisit its reservation to Article 7 of the CRC.

Today, Mr Foo is forced to pursue the conventional route for his son's Malaysian citizenship by filing an application under Article 15A of the Federal Constitution subject to the absolute discretion by the Minister of Home Affairs – an ironic situation as he is both the biological father of the child and a Malaysian citizen.

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Surrogacy: imported from India – need for a regulatory law

Glamour promotes surrogacy. British pop star Elton John and his Canadian film-maker partner, David Furnish, became parents of a baby boy born to a surrogate mother in California while our very own Indian film star Aamir Khan and Kiran Rao obtained a child through surrogacy aided by in-vitro fertilisation (IVF). Today, the reproductive tourism industry promoting surrogacy in India is estimated at Rs 25,000 crores, promoted by over 200,000 IVF clinics with websites offering wombs, sperms and eggs. Surrogacy packages, which reportedly cost US\$100,000 in Europe or the US, are easily available in India in the range of US\$10,000. Surprisingly, surrogate hiring of wombs exists in India even though The Transplantation of Human Organs Act, 1994, bans the sale of human organs, loaning of organs and any commercialisation of the trade of human organs. Moreover, surrogates are nowhere more freely available than in India to single parents, gay or unmarried partners, despite the fact that same-sex relationships are not permissible in India. The primordial urge to have a biological child of one's own flesh, blood and DNA, aided with technology and purchasing power of money coupled with the Indian entrepreneurial spirit, has generated this flourishing Indian reproductive tourism industry.

An anomalous law

In a developed country like the UK, no contract or surrogacy agreement is legally binding. In most states in the US, compensated surrogacy arrangements are either illegal or unenforceable. In some states in Australia, arranging commercial surrogacy is a criminal offence and any surrogacy agreement giving custody to others is void. In Canada and New Zealand, commercial surrogacy has been illegal since 2004, although altruistic surrogacy is allowed. In France, Germany and Italy, surrogacy, commercial or not, is unlawful. In contrast, in Israel, virtually all surrogacy permitted

– for married couples only – is commercial and surrogates are paid an amount as per a written agreement to be approved by a special committee. What then prompts India to enact a proposed law to make surrogacy agreements legally enforceable is to protect the genetic parents, surrogate mother and the child.

Economic necessity fuels the surrogate trade. Ironically, medical data indicates that in India, there is a need every year of about 175,000 kidneys, 50,000 hearts and 50,000 livers for transplantation and each year about 140,000 people die waiting for a kidney. Life-saving organs are not available but wombs on hire are. Even though commercial surrogacy is an anti-thesis of transplantation laws, it is a medically accepted practice reflected in the 2005 Indian Council of Medical Research (ICMR) Guidelines and the Assisted Reproductive Technology Regulation Bill, (ART), 2010, prepared by the Health Ministry. Clearly, surrogacy flourishes legally because it is medically not illegal. No doubt, the Supreme Court in the case of *Baby Manji Yamada (2008)* observed that 'commercial surrogacy' reaching 'industry proportions' is sometimes referred to by the emotionally charged and potentially offensive terms wombs for rent, outsourced pregnancies or baby farms. India, therefore, is set to be the only country to legalise commercial surrogacy through the proposed law which is already a glaring reality.

In December 2011 the High Court in London granted parental orders to a British couple under the British Human Fertilisation and Embryology Act, 2008, for their two children born to Indian surrogate mothers after both children were given British passports and allowed to leave India. Sir Nicholas Wall, speaking for the Court, held that 'it is plainly in the interests of these two children that they should be brought up by Mr and Mrs A as their parents'. The couple had paid £27,405 for a surrogacy package in India because of lack of surrogate mothers in UK as there was a three-year waiting list in the UK. Earlier, even the Indian Supreme Court in September 2008, in *Baby Manji Yamada's* case, had directed the Central Government

to expeditiously dispose of the request of the grandmother permitting her to transport her surrogate granddaughter born in India through surrogacy. Resultantly, the surrogate baby whose parents had divorced was issued an 'identity certificate' enabling her journey to Japan.

Courts to the rescue

After a frustrating two-year legal battle in India on behalf of their surrogate sons (Nikolas and Leonard) a German couple, Jan Balaz and Susan Anna Lohald, were allowed to return to Germany after the Supreme Court of India intervened and, in a court hearing on 26 May 2010, the Indian government agreed to provide them with exit permits. The twins were born in the State of Gujarat in January 2008 and registered as children born of a foreign couple through an Indian surrogate mother. Upon being declined birth certificates, Jan Balaz moved the Gujarat High Court, which ruled that since the surrogate mother is an Indian national, the children would also be treated as Indian nationals and would be entitled to Indian passports. However, the government of India challenged this decision, stating that the toddlers, being surrogate children, could not be granted Indian citizenship, which rendered them stateless as they had neither German nor Indian citizenship. The German authorities had also refused visas to the twins on the ground that German law did not recognise surrogacy as a means to parenthood. Ultimately, Jan Balaz and Susan Lohald went through an inter-country adoption process in India, upon which the Indian Government granted exit permits to the German surrogate twins to enable their journey back home to Germany. Clearly, Courts worldwide, acting equitably, lean to interpret existing laws favourably, aiding parenthood for surrogate children.

Surrogacy is also popularly resorted to by gay couples in India. Israeli gay couple, Yonatan and Omer Gher, became parents to a child born to them with the help of a Mumbai-based surrogate mother in 2008. Subsequently, in 2010, Dan Goldberg and Arnon Angel from Israel, another gay couple to whom twin baby boys were born in Mumbai from an Indian surrogate mother, were stranded in India after the refusal of the Jerusalem Family Court to allow a paternity test to initiate the process for Israeli citizenship for the twins. The issue was

debated in the Knesset (Israeli Parliament) where Prime Minister Benjamin Netanyahu had to intervene so that the infants could be brought to Israel following legal procedures. Ultimately, on appeal, the Jerusalem District Court accepted the claim that it was in the best interest to hold a DNA paternity test to establish that Dan Goldberg was the father of the boys, Itai and Liron. The DNA samples of Goldberg and the twins were brought to the Sheeba Medical Centre in Israel, which established Goldberg as the father of the infants. After being stranded in Mumbai for over three months, Goldberg and his twin baby boys returned to Israel in May 2010 after the children were granted Israeli passports. Thereafter, in 2011, a gay Spanish couple, Mauro and Juan, became parents of female twins born to them through a surrogate mother in India. More such occurrences will follow in times to come.

A flawed law in the making

The only face-saving which can be pondered and deliberated is how to regulate surrogacy, prevent exploitation as well as resolve issues of citizenship, nationality and parentage. In this context, the ART Bill 2010 suffers from serious lacunas and shortcomings. Some questions left unanswered in the ART Bill are enumerated below:

- Remedies available to biological parents to obtain exclusive legal custody of surrogate children and waiver of rights of surrogate mother besides restricting rights of sperm or ovum donor?
- Mode of statutorily establishing genetic constitution of surrogate baby?
- Legal process of recording parentage of surrogate child?
- Process of determination of citizenship and nationality rights?
- Guardianship/adoption proceedings in respect of children born out of surrogacy agreements as Hindu laws do not allow non-Hindu parents to adopt in India?
- Custodial rights of single/gay/unmarried/divorced parents?
- Legal validity of surrogacy agreements, vis-à-vis existing Indian laws?
- Rights to prevent exploitation of surrogate mothers?

The ART Bill 2010 is flawed. It has neither designated, nor authorised or created any court or judicial forum to resolve issues which will require adjudication in problems arising out of surrogacy. The National and

State Advisory Boards created by the ART Bill will not serve the purpose to determine issues of parentage, nationality, issuance of passports, granting of visas and problems of disputed parentage. It is extremely necessary to create a statutory procedure for mandatorily adjudicating these issues before the surrogate child leaves India. Even rampant exploitation of surrogate mothers has to be curbed, checked and punished upon detection. The ART Bill 2010 does not address these issues.

It seems that the question of whether India should be the surrogate motherhood capital of the world or not is no longer relevant. Social and economic necessities besides medical professional sponsorships have ensured that surrogacy is here to stay. Therefore, an active legislative intervention to facilitate the correct uses of this new technology of ART may be a more plausible approach in grappling with commercial surrogacy. The proposed law has to also take care that the use of ART and IVF does not

graduate to unethical practices of making designer babies by choosing traits or embryo selection now made possible by stem cell research and cloning. Medical personnel must be guided by a strict law to prevent any malpractices. Above all, trading of any form in human merchandise by other unethical agents in the so called 'business of babies' must be curbed with a heavy hand. A regulatory law, supported by both a legislative mechanism and effective rules to look at all the problems associated with surrogacy, must be put in place. In India, embassies and high commissions of foreign missions of different countries are also looking for a law which will help them make their own policies for adapting to surrogacy as well as resolving issues of surrogate children born to their countrymen to enable them to achieve dreams of parenthood. Thus, a proactive, well-drafted surrogacy law requires to be urgently put in place forthwith without any delay. This, it seems, is now the call of the born surrogate child.

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Declarations and The Hague Convention

When children are abducted into or unlawfully retained in foreign jurisdictions, then a person is likely to commence The Hague Convention process of a return, directly in the foreign jurisdiction or through the Central Authority of the home country of habitual residence, through legal representation or in person.

There is nothing unusual in such a familiar process for practitioners. However, the consideration of The Hague Convention in the foreign jurisdiction for the return of a child and such international treaty brought into law through the jurisdiction's own domestic statute, does not always mean, alas, that the matter will be resolved or resolved in accordance with the legal standards of other states.

This reality, where the words competence and comity, are bandied about regarding all other Hague Convention jurisdictions, is concerning. Such words are perhaps properly used out of politeness, diplomacy,

or with the motivation of a last-minute, earnest hope towards comity or competence: that would be reasonable.

Other occasions may result in judges – not used to, familiar with or as expert as with other jurisdictions – in dealing with Hague cases, through no fault on their own. Certain courts deal with such applications for returns, administratively and on paper alone, without the presence of representation at all, something anathema perhaps for legal system where Hague cases are considered by the highest judges only, with immense legal argument and jurisprudence as well. Indeed, in some jurisdictions, in certain cases, whilst the voice of the child will be heard as expected by the UN Convention on the Rights of the Child, through a court reporter, such children may even be, at times, separately represented as well, an utter indulgence for other jurisdictions, countries and their own legal systems.

These differences are inevitable throughout the world. Different legal systems and their

approaches to The Hague Convention inevitably exist, as different legal systems have their own methods. There is little wrong with that, as long as justice is both done and seen to be fairly – done surely, at least.

What can also assist are declarations being sought, either with or without notice in the jurisdictions of habitual residence, firstly that The Hague Convention on the Civil Aspects of Child Abduction permits with state request for such Declaratory relief from one central authority to another albeit domestic statute may lessen or widen such right to an application and permit an individual's request as well.

There are many instances whereby such a declaration, if granted, can well-assist a foreign jurisdiction and a judge used or unused to such Hague Convention application abroad. Whilst it is always emphasised that such declaration does not bind the foreign court or whether defences

to an application to a return will yet be made out or not on a full and final hearing, it is of course a matter for such foreign court, nevertheless, such declaration can point a way or shed a light and can be gratefully received by a foreign court that is not incompetent or without wished for comity but helps a judge who will admit reasonably to not being as experienced as other such expert judges around the world.

Whilst detractors may suggest that that is not the purpose of seeking such declarations with publicly funded seekers straining their local publicly funded providers, nevertheless, dealing with realities – as we all surely must – can not only point a way forward, it can also resolve certain issues helpfully in any event prior to the final hearing in the foreign court where the local judge might believe such preliminary issues were better declared and, therefore, perhaps resolved, in the country of habitual residence firstly.

Judicial activism in the International Movement of Children – a prime building site for development

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What can be done to ameliorate international family justice directed to the international movement of children? In this paper, I consider only civil justice and not criminal proceedings, which may have resulted from a wrongful abduction.

In considering the international movement of children, I do not speak only of wrongful movements and wrongful retentions, since I also want to consider how we might deal better with the lawful movement of children internationally.

It is worth emphasising that wrongful and lawful removals are but two sides of the same coin. Prior to the advent of The Hague Convention of 1980 on the Civil Aspects of Child Abduction (the '1980 Convention'), the wrongful removal of a child was usually labelled 'kidnap'. Since the advent of the

1980 Convention, we have benefited from its categorisations and concepts, now so widely utilised and applied. A removal or retention is wrongful if in breach of rights of custody being exercised in the state of the child's habitual residence immediately before the removal or retention.

The main instances of movements not categorised as wrongful are; where the removal is agreed by the holders of parental responsibility for the child; or have been managed by the child's sole custodian; or have been sanctioned by a judicial order.

History

The 1980 Convention has a monumental stature. It, with its sibling the 1996 Hague Child Protection Convention, provides a unique international mechanism for

preventing and remedying wrongful international movements. The 1980 Convention is now embedded as the principal instrument of international family law. The processes for its modification or modernisation are very complex and dependent on international consensus. Accordingly, the reality is that we must work with the tool as it is. Our focus must be upon ways of making the tool work better.

Equally well developed are the administrative services upon which the effective operation of the international law depends. The functions and responsibilities of the Central Authorities mandated by the 1980 Convention are well known, both what can be expected and what cannot. Their main function is international communication and collaboration. Accordingly, the majority have by now achieved a level of experience and expertise which allows little room for further improvement.

What then of the justice systems? Here, a clear international standard is harder to discern. There are wide variations in the efficiency and promptitude of the justice systems. Equally there are wide margins in the quality of the judgments delivered. However, these divergences are inevitable when the international law is dependent upon domestic courts for its application.

Furthermore, it must be said that the last decade has been one of steady improvement. Many states have introduced effective reforms to ensure, firstly, concentration of jurisdiction at an elevated level in the court hierarchy, secondly, specialisation of judges and, thirdly, prioritisation of international cases. Thus, whilst there are opportunities for further procedural improvement, they will be incremental and relatively modest in impact.

The judges

The core of this paper is to seek to demonstrate that it is the judges who have the greatest potential to improve systems and outcomes in proceedings arising out of the wrongful or the lawful international movement of children. Let us first identify these judges. Clearly, I am not speaking of generalists. Only judges who are specialists in the field have the confidence and commitment to recognise and to grasp the opportunity to work more effectively.

However, the greatest opportunity is given to those judges who have been appointed by their state to act within The Hague International Judicial Network (the Network).

The Network was inaugurated in 1998, at the first global judicial gathering at De Ruwenburg and has grown steadily to achieve its present compliment of about 68 judges representing 56 jurisdictions.

The development of the International Judicial Network can be traced through the record of the Special Commissions. At the fourth Special Commission in 2001 we read:

- Recommendation 5.5: contracting states are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communication between judges or between a judge and another authority.

Note the breadth of the language necessary to gain consensus at such a large assembly. The reference to ‘other persons or authorities’ was a necessary concession to member states, who were opposed to extending the function of the judge.

At the 5th Special Commission in 2006, we passed a resolution to create an expert working party to draft a comprehensive guide to good practice to be observed by judges collaborating across international borders. The Expert Group met first in July 2008 in The Hague. The text that resulted was debated at the congress devoted to direct judicial communication, jointly convened by The Hague Conference and the European Union in Brussels in January 2009 where 140 judges from 54 states agreed 17 resolutions the first of which:

‘emphasised the value of direct judicial communications in International child protection uses, as well as the development of international, regional, and national judicial networks to support communications.’

A later recommendation concluded ‘states that have not yet designated Network judges are strongly encouraged to do so’.

This congress marks the international extension of the scope of judicial collaboration beyond the 1980 Convention to all areas of international child law.

The developed text that emerged from the Brussels Conference was further refined at a meeting of the expert group in July 2010 in The Hague.

Our final draft was presented to the meeting of the 6th Special Commission. There it was approved and endorsed for publication and circulation.

You may think that my assessment of the importance of judicial activism is far from

objective. I proposed the Judges Network at the De Ruwenburg Conference in 1998; I have co-chaired the meetings of the expert group; I have worked persistently in order to recruit new members to the Judges Network; and I have launched the Association of International Family Judges; so I will include a quotation from a paper given at the Anglophone/Francophone Judicial Conference in Antwerp in April 2010 by Philippe Lortie, First Secretary at the Hague Conference. He wrote:

‘One cannot emphasise enough how useful direct judicial communications in specific cases can be to resolve some of the practical issues surrounding the return of an abducted or illegally retained child. Furthermore, they may result in immediate decisions or settlements between the parents before the court in the requested State. In particular, courts could suggest and produce settlements between the parents to facilitate the return process, to remove practical obstacles to return, to help to ensure that the prompt return may be effected in safe and secure conditions for the child (and sometimes for an accompanying custodial parent), and to pave the way for any proceedings on the custody issues which are to take place in the country to which the child is returned. Direct international judicial communications may reduce the number of decisions refusing return. For example, some courts may refuse an application for return based on Article 13(b) of the 1980 Hague Convention because the mother who looks after the child is not allowed to enter the country to which the child is to be returned. In such cases, the concerned judges, through direct communications, can ensure that arrangements are in place for the immediate return of the child, accompanied by the abducting parent. In some cases, the parent seeking the return of the child may offer some “undertakings” in relation to the return. How to ensure the enforceability of such undertakings in the State to which the child is to be returned is an important matter, and may be clarified in the course of judicial communications.’

There are other indications that the potential of the international judiciary is being recognised and harnessed. The launch of the International Network was matched by the launch of the Judges Newsletter, which has

been published twice yearly ever since. The Newsletter not only disseminates information and expertise but it undoubtedly fosters the sense of a specialist judicial community with a global distribution.

A physical gathering of the congregation of International Family judges is not easily achieved. Some opportunities are presented by major international family law conferences but our principal opportunity comes with the quinquennial Special Commissions. The importance of the judicial contribution to the Special Commission has been recognised by The Hague Conference who have issued, for the first time, an invitation specifically to the Network Judges to attend the 6th Special Commission. The niceties of international diplomacy required the invitation to emphasise that the membership of a national delegation is entirely a matter for the member state but beneath the skin of diplomacy ran the strong message that the Network Judges should attend.

Another aid to judicial specialisation and collective action is the formation in January 2009 of the Association of International Family Judges. The Association depends almost entirely on the internet for its operation and can, accordingly, be run on a very modest subscription. It permits the dissemination of information, it provides the opportunity for a member to seek advice or information from a member in another jurisdiction and, generally, it fosters a sense of unity amongst the highly specialist judicial group exercising this particularly important jurisdiction. The Association of International Family Judges has grown rapidly to a current membership of 150 and its standing is affirmed by the fact that The Hague Conference invited the Association of International Family Judges to the 6th Special Commission with the same observer status as is given to a few international non-governmental organisations.

The challenges on the bench

So what lies behind these developments? Surely, it is the general recognition that the Convention itself is but black letter law. To render it effective, to achieve its objectives, it depends upon the contribution of committed professional expertise. Without an effective central authority, communication and administration, before and after the issue of judicial proceedings, collapse.

Yet more important is the availability of trial judges committed to achieving the objectives of the 1980 Convention and expert in the application of its autonomous law. Crucially and fundamentally, the capacity of the 1980 Convention to achieve its objectives depends upon trial judges applying the Convention as its autonomous law requires and reaching a proportionate judgment on the facts of the case. The judge is only called upon to exercise discretion if one of the exceptions to a mandatory return order has been established.

Equally important are judges at the appellate level, who have made that autonomous law, or who will evolve that autonomous law to meet new situations and evolving social circumstances.

The potential of the judge is thus to improve the quality of justice delivered in the domestic courts of the world by activism and innovation. Wherever proceedings arise out of the international movement of a child two jurisdictions are likely to be actually or potentially seized. Activism embraces communication, which should lead to collaboration. Communication may be achieved through the agency of the Network Judge or it may be directly achieved.

The creation of The Hague International Network recognises the need for direct communication following the wrongful removal or retention of a child. It is not possible or desirable to seek to categorise what either judge may put upon the agenda for discussion. By way only of example, the judge in state A may want to be sure that safe harbour orders are possible in state B, he may want to know whether the threat of criminal proceedings can be neutralised, he may want to know how quickly an issue can be listed. The judge in state B may want information as to the law or as to the progress of the proceedings in state A, for instance when will The Hague application be heard, or what protective measures are necessary to safeguard the child on return.

However, there can be no sensible reason to restrict communication between Network Judges to 1980 Convention proceedings. In our jurisdiction and, no doubt, in yours, applications to take a child of dual nationality for a holiday in the other jurisdiction are common place. The application may present the spectre of a wrongful retention at the holiday's end, particularly if the other state is not a signatory to the 1980 Convention. In that situation, the judge in the state of the child's habitual residence may well require a mirror order in the other state as a minimum

safeguard. In that case direct communication between the two courts is advisable.

Another instance of the need for judicial collaboration arising out of a lawful movement is the relocation case. A relocation application very often arouses profound levels of anxiety and distress within the family. These tensions communicate themselves to the judges and only increase the difficulty of the core decision, whether to permit or to refuse the move. Of course, I am not suggesting that the responsibility for this core decision should be shared. The opportunity for collaboration only arises when the judge has decided, or provisionally decided, to permit the removal. The worst fate for the left-behind parent after the completion of the move is to experience the atrophy of the arrangements for future contact upon which the grant of permission was conditional. Thus, in many relocation cases there will be opportunities for cross-border collaboration. The judge trying the case may require information on a crucial factual issue, from a reliable independent source, which the judge in the other state might identify. Equally, after the decision, in principle, the orders for future contact, upon which the permission is conditional, may need to be replicated in the other state.

I am in no doubt that we need to develop a culture of judicial activism in international family cases. We need to dispel inhibition which finds expression in thoughts such as; 'I have never done this before'; 'I don't speak the language'; 'It would be the middle of the night for him'; 'I am overworked and underpaid and just haven't the energy'; 'I don't know what sort of reception I would get'.

Of course, I am not advocating unbridled communication. Above all, the integrity of the judicial proceedings must be maintained and the rules of natural justice must be observed. The responsibility of the individual judge to decide the issue without interference or contamination is paramount. The resolution to draft a Good Practice Guide arose out of a general recognition of the need for caution and precaution. The draft Guide, approved at the 6th Special Commission, is intended to guide judges who are in doubt as to how they should proceed.

The challenges beyond

The contribution that the judges can make for the good is certainly not restricted to collaboration in the management of specific cases. Indeed, arguably of far greater

potential value is the sharing of expertise and experience at specialist conferences. Nowhere is that potential greater than at the Special Commissions.

States, party to the 1980 Convention, are frequently represented by policy officials from the Ministry of Justice, central-authority representatives and academics. None of these will have practical experience of the operation of the Convention within the judicial proceedings. It is the judges who know the strengths and weaknesses of the Convention in its practical application. It is by experience in the courtroom that the judge learns that in many instances it will not be wise to activate an Article 15 request, without careful investigation of the ability and will of the requested state to respond. Likewise, it is the judges who encounter practical challenges, like reducing the risk of harm to acceptable levels and ensuring that enforcement does not itself become an instrument of harm.

There can be no doubting the momentum behind the growth of The Hague International Judicial Network. Whilst in the early years and, until recently, the minority of states party to the 1980 Convention were in and the majority were out, at last we have the majority in and the abstainers in the minority. It is no longer fanciful to predict that we will complete the Network and consolidate its functions.

I end with Resolutions 64 and 66, adopted at the 6th Special Commission:

- 'The Special Commission welcomes the extraordinary growth of the International Hague Network of Judges; Member States who have not yet designated Hague Network Judges are strongly encouraged to do so.'
- 'The Special Commission emphasises the importance of direct judicial communication in international child protection and international child abduction cases.'

Reflections on primary caregivers and the child's voice in Hague Convention cases

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This is an attempt to add the child's perspective to the important policy debate on the topic of primary care-giver and the child's voice in international parental child abduction cases, specifically as this relates to the bond between the child and his or her two parents and in regard to the 'child's voice' in custodial conflicts.

I interweave my personal background here with the larger issues at hand: my family experienced two separate incidences of international parental child abduction. Current policy debates related to the child's preferences in custodial conflicts will have major consequences on the way that custodial conflicts are handled by the international community and this is PACT's (Parents and Abducted Children Together) contribution to the discussion.

Child attachment theories are key reference points used by many scholars who are in favour of full recognition of the voice of the child in custodial conflicts, as highlighted in essays by Dr Judith Wallerstein and Dr Carol Bruch. These theories are highly relevant and provide general guidelines in the difficult process of determining what may be best for children involved in custodial conflicts. It goes without saying that children's best interests must be at the forefront at all times in custodial determinations. However, the concept of 'best interests of the child' is a contested one. It is surely safe to state that to date there has been little headway in defining this in an empirical way.

While broad guidelines do exist, zealous adherence to one set of theories has the potential to cause more harm than good. Favouring the primary parent in international

child abduction is an important tool in determining custody and, as this is in the spirit of The Hague Convention, this is not to be dismissed. However, it is not a perfect tool and it cannot and will not apply to all cases – especially when it is matched with the additional proposal of heeding the child's voice in all custodial conflicts. This is an additional recommendation of Wallerstein, Bruch and Goodman.

I will bring in my own family's case as a concrete example of the problems that can arise in regard to favouring primary parents and the voice of the child. My half-brothers and I were abducted from our primary care-giver. Within a short time, our father assumed the role of physical and emotional primary care-giver. We were desperate to remain with him, and Supreme Court judgements in several countries granted final custody to our father.

Our case highlights the difficulty of determining which parent is, in fact, the primary caretaker. If this is defined in terms of which parent the child feels most connected to, this can turn into a major win for would-be abductors. My brothers and I switched alliances in a short period of time. Our abducting parent quickly assumed the role of primary care-giver but, regardless of which parent abducts the child/children, the lost bond with the other parent, custodial or non-custodial, can be a severe and lasting loss in a child's life. Many adult survivors of abduction/high conflict custodial battles (with whom PACT is in contact) live with the pain of this loss. Barring strong and compelling reasons to allow for the severance of ties with one parent to the advantage of the other, this loss cannot and should not be taken lightly.

It is my concern that dismissing the basic concepts of parental alienation in heeding the voice of the child, can and most certainly will, in some cases, set up the stage for grave harm to children. I am not a disciple of the term's founder, Richard Gardner. To the contrary, I am critical of some of his proposed remedies.¹ However, I am firmly convinced that there are grains of wisdom in his work. In mapping out the fact that children can be encouraged to display hostility to a parent they have been physically and/or mentally distanced from, he brings to the table an important issue. I and my brothers experienced parental alienation personally, as did many of the people I am in contact with through PACT and my own support network, The Kids Link.

Inconsistent interpretations of the custodial status of non-custodial parents have wreaked havoc on the clear system that was to be put in place by The Hague Convention. Cases in which children are caught in protracted custody wars, unnecessarily forced into foster care or placed in the hands of their non-primary care-giver simply to punish an abducting parent, are horror stories children must be protected from. Guidelines that are hazy or unclear will lead to protracted litigation and unfettered discretion. This may exact large emotional tolls on all involved, adults and children alike. Clearer guidelines will be lifesaving tools for all involved. Hague Convention cases where abuse or violence is present must be dealt with in a non-compromising manner, one which does not place victims in an inferior power position in relation to abusers. This is critically important.

And yet, I am cognisant of the importance of The Hague Convention as a tool in reducing the incidence of 'non-necessary' (ie, abductions to escape harm) abductions and the danger of weakening the Convention should the result of these proposed policies turns out to be great numbers of (unnecessarily) rejected applications for return. Difficult policy issues exist in the arena of parental abduction. No-one has broken the code in arriving at a one-size-fits all solution in dealing with custodial conflicts. These cases are deeply challenging and must be dealt with on a case-by-case basis, by wise and discriminating experts. There is a push-pull conundrum here. Vague policies can cause harm, but so can rigid ones.

On a policy level, with a rising focus on voice of the children and custodial status as key factors, I envision a future where the following scenarios become commonplace:

- more parents will insist on securing full or joint custody in order to claim primary-caregiver status in custodial disputes;
- the potential exists for an increase in abductions by non-primary care-givers to non-Hague-Convention countries in order to ensure face-to-face access; and
- the new battleground may become the fine lines that distinguish each child's care-giver status; determining which parent is the primary care-giver and the degree of bonding to father v mother, might become a new frontline in some cases.

These may be necessary evils, but forewarned is forearmed.

I was parentally abducted as a child in a case that has been publicised in recent years.

I have worked on the sidelines with others who were abducted as children since 1997. I was abducted from my primary care-giver, my mother, at the age of four. From my point of view, my father quickly became my new primary care-giver. By the age of six, when my mother reappeared in my life and I was asked with whom I wished to live, I was desperate to stay with my father. The passage of time and my father's negative talk virtually assured this. It was painful and traumatising to be reunited with my mother. I was abducted from my primary parent, alienated from her and, consequently, given a voice in court.

The yoke of responsibility was heavy for a six-year-old and only as an adult have the ramifications taken full effect. I was given the burden of deciding between my parents, a heavy burden for a child and one I regret as an adult. A focus on children's rights should not mean that children now have the responsibility to bear a burden that is too large for their small shoulders to bear. The age and maturity level of a child must be taken into consideration. I bring up my story as an attempt to bring to light the complexities of these cases and the dangers of too much oversimplification of solutions in the name of the child.

At age six, I wanted to stay with my father. As an adult, I wish I had been returned to my mother, despite my protests as a child. My 'voice' misled me and this is a difficult position in which to put children. One of my friends was abducted as a young child by her primary care-giver, her mother. At age 14, she took the stand in a Swedish court. Her mother urged her to tell the court that her father had abused her – something he had not done. She did so and

now lives with a legacy of guilt and pain. Parental alienation was not brought up in that courtroom but it may have helped her father gain access to her and her siblings. Instead, their father was shut out of their lives. Today, my friend and her siblings spend much young adult energy attempting to right this wrong and dealing with the sad legacy of this situation.

These stories highlight the importance of an open mind in dealing with cases of custodial conflict. It is my hope that a combination of perspectives and viewpoints will guide the proper handling of abduction cases, at least to an extent that remains in the spirit of the Convention's drafters.

Strict and unwavering adherence to one viewpoint may prove damaging in the long-run. It is my view that some flexibility within a framework of guidelines will prove most helpful to children involved in the tragedy of custodial conflict. Parental abduction by primary care-givers must be taken seriously. I do not want to see the development of a culture in which custodial parents abduct with impunity. It is my belief that non-custodial parents are important to child development and that this bond must be nurtured whenever possible.

A partial solution may lie in the area of improved multi-national access to children by non-custodial parents residing in different lands. Safe, fair and secure policies will be an asset to children everywhere. Legal support for the maintenance of the parent-child bond across borders is crucial.

Note

- 1 See the author's published thesis on the subject for the Faculty of Social Sciences at Oslo University College, 2003.

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Declarations made by English courts on validity of foreign marriages

The aim of this article is to bring to the attention of practitioners the importance of seeking, through proper routes and in proper forums, declarations on the validity of foreign marriages or reliefs in English courts.

A question which arises frequently between spouses of international marriages is, from what forum should they obtain matrimonial relief, including declarations as to the validity of their marriages? A marriage conducted in accordance with section 7 of Hindu Marriage Act 1955 will be recognised by the English courts, in accordance with international law. This much is well known.

Rule 66 of Dicey and Morris, codifies the English common law, with regard to the formalities required, before the English courts will regard a foreign marriage as being formally valid. Rule 66 states, 'A marriage is formally valid when (and only when) any one of the following conditions as to the form of celebration is complied with: if the marriage is celebrated in accordance with the form required or recognised as sufficient by the law of the country where the marriage was celebrated.' (This is known as the *lex loci celebrationis* rule).

Section 14 of the Matrimonial Causes Act 1973, in effect, confirms this position and provides that in respect of foreign marriages, the rules of English private international law apply.

By the rules of private international law, the form of marriage is governed by the local law of the place of celebration (and Rule 67 of Dicey & Morris, *The Conflict of Laws* (13th edn) Vol 2 651) or by reference to the jurisdiction with which the marriage is adjudged to have its most substantial connection. For example, if the parties are both domiciled in England and Wales at the time of the marriage and following their marriage return to live in England, their capacity to marry or the validity of their marriage is governed by the law of England.

Once the foreign law had determined whether the religious marriage (or foreign marriage) was or was not a valid marriage, it is for English law as the law of the forum to decide the implications and what remedies are available to the petitioning spouse.¹ This article focuses on that issue.

The problem which arises in a number of cases is where the parties are (or one of them is) domiciled in India where the marriage takes place but the other party is domiciled in England at the relevant time. In such a case, if the validity of the marriage is in issue or is relevant in determining property or custody disputes, then relief may be sought by seeking a declaration from the family court under the Family Law Act 1986 (FLA).

It must be stressed that Rule 66 of Dicey concerns the recognition of foreign marriages and focuses on the formality of the marriage but it is not the source of power conferred on the English Court to grant a declaration that the parties are married; that source of power is found in Section 55 FLA.

The court's power to make a declaration as to the lawfulness of the marriage with regard to Rule 66 of Dicey and Morris (*lex loci celebrationis*) may be made under section 55 FLA and, possibly, not under the inherent jurisdiction of the court.

The scope of the declaration a county court or a high court may make under FLA, Part III, is limited to a declaration that the marriage was, at its inception, a valid marriage; a declaration that the marriage subsisted on a date specified in the application; a declaration that the marriage did not subsist on a date so specified; a declaration that the validity of a divorce, annulment or legal separation obtained in any country outside England and Wales, in respect of the marriage, is entitled to recognition in England and Wales; and a declaration that the validity of a divorce, annulment or legal separation so obtained, in respect of the marriage, is not entitled to recognition in England and Wales.

The Family Procedure Rules 2010 IS 2010/2955, came into force on the 6 April 2011 and will apply to these types of proceedings.

The question which is yet to be determined is whether a party to a foreign marriage may seek a declaration as to the validity of the marriage in a disputed probate action, without resorting to the specific procedures set out in the FLA. This is an important issue which is yet to be decided by the higher courts in England. A declaration which may be made under the FLA will depend on the parties' residence connection with England; whether or not they can circumvent these residence conditions by opting to seek a declaration in another court (for example in a probate court) is yet undetermined.

The writer is of the opinion that Part III FLA confers specific jurisdiction on the court to make a declaration on marital status and, accordingly, excludes the inherent jurisdiction of a court to make a declaration falling under this section if the residence conditions are not satisfied by the parties seeking relief.

As parliament has provided a specific statutory route for addressing the problem as to whether a party is lawfully married to another, it will be unwise for a court to devise or adopt another route to determine this very same issue falling within the scope of section 55 FLA. Accordingly, the court will only have jurisdiction if the conditions set out in section 55(2) FLA are met. Section 55(2) is a jurisdictional provision; the parties cannot consent to confer jurisdiction on the court where none exists. The burden is on the party to prove that the jurisdictional conditions in section 55(2) are met, that is, the residence connection with England. The court cannot avoid investigating whether the conditions set out in section 55(2) are met.

The court does not have the power to make a declaration that the marriage is invalid at the date of inception.² However, the making of such a declaration is not outlawed by section 58(5) if, and for so long as, it is made to declare that there never was a marriage, as distinct from being a declaration (which is not permitted) that a given marriage was void at its inception.³

The jurisdiction of the court to make a declaration under section 55 will only exist if, and only if, either of the parties to the marriage to which the application relates is;

- domiciled in England and Wales on the date of the application; or
- has been habitually resident in England and Wales throughout the period of one year ending with that date; or

- died before that date and either;
 - was at death domiciled in England and Wales; or
 - had been habitually resident in England and Wales throughout the period of one year, ending with the date of death.

Where an application is made to the court by any person other than a party to the marriage to which the application relates, the court shall refuse to hear the application if it considers that the applicant does not have a sufficient interest in the determination of that application. Again, it remains untested as to whether a person who does not have sufficient interest in the determination of an issue falling within section 55 FLA may seek a similar declaration in a non-family court.

Once such an application under Part III FLA is made, the Attorney-General is served with the papers and it will be a matter for him to decide whether to take part in the proceedings. This is of some importance, as the grant of a declaration, by way of example, will confer British citizenship on the children or pension rights of a spouse of a British citizen.

A declaration made by the court under Part III FLA, shall be binding on Her Majesty and all other persons. This position is no different to the declarations made by the Indian courts in probate proceedings. A probate, when granted, not only binds all the parties before the court but also binds all other persons in all proceedings arising out of the will, or claims under or connected therewith.⁴

For these reason, parties of foreign marriages seeking relief in English courts, must be aware of the jurisdictional limitations placed on English courts by the Family Law Act 1986. The domicile of the parties at the relevant time must be established before embarking on proceedings in the English courts. A party, married in India, involving a British national, may well be advised, depending on their residence connection with England, to institute proceedings in the place they have the closest connection to.

Notes

- 1 *Burns v Burns* (2007) EWHC 2492 (Fam); (2008) 1 FLR 813; (2008) Fam. Law 119.
- 2 *Westminster CC v C* (2009) 2 WLR 185 (15).
- 3 *Hudson v Leigh* (2009) EWHC 1306 (Fam) (2009) Fam Law 810, (2009) 3 FCR 401, (2009) 2 FLR 1129, (2009) EWHC 1306 (Fam).
- 4 *Basanti Devi v Raviprakash Ramprasad Jaisul* (2007) INSC 1054.

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Inherited and pre-acquired assets – ring-fencing the family silver

There has been something of an explosion in cases relating to pre-acquired and inherited assets. Given that the courts of England and Wales (the ‘Courts’) have a wide discretion when considering a financial remedy in divorce proceedings, these relatively recent developments have shed an interesting light on how the courts exercise their discretion.

When considering how to determine financial remedy applications, the courts will generally start off with a well rehearsed routine, as follows;

- The first step that the courts will usually take is to calculate the entirety of the assets available. This includes the valuation of assets that have become classified by the courts as matrimonial property (eg, the marital home and property accumulated during the marriage other than by inheritance or gift) and non-matrimonial property (eg, inherited wealth, business and other assets acquired before the marriage);
- Having valued the available assets, the court will then look to decide how important any inherited or pre-acquired assets are to a particular case, having considered the nature, value, timing and circumstances in which the property in question was acquired and, indeed, the way in which it was relied upon during the marriage. The general rule is that the more an asset has been intermingled, the more likely it is that the asset in question will be shared between the parties – in essence, it assumes the characteristics of ‘matrimonial property’; and
- Finally, in those cases where one party’s financial needs cannot be met without utilising that particular asset (and that is most likely the majority of the cases in England and Wales, albeit that these cases very rarely make it into the legal press), then the fact that an asset was pre-acquired or inherited will carry little, if any, weight – needs trumps the origins of an asset.

Sowing the seed

Looking back to the seminal case in 2001 of *White v White*,¹ the House of Lords, as it then was, confirmed that judges hearing financial

issues on divorce should take inherited assets into account. It was for the trial judge to then determine the level of importance that the asset in question should have, in light of the overall circumstances of the case. So, the seed was sown for inherited assets and, by proxy, non-marital assets, to be taken into account.

The Court of Appeal’s various approaches

As explained, a number of cases concerning inherited assets and pre-acquired assets have been considered by the Court of Appeal, which highlight a number of different ways to determine cases involving these issues.

In *Robson v Robson*² the vast majority of the £22.5m of assets were inherited, including the matrimonial home that was valued at £16m and described as the ‘undiscovered jewel of Oxfordshire’. The Court of Appeal awarded the wife £7.3m of the available assets, with the award predominantly based upon the wife’s needs. This amounted to 32 per cent of the overall assets.

In *Jones v Jones*³ the Court of Appeal commented on the appropriate way to deal with inherited and, in this case, pre-acquired assets. The value of the ‘matrimonial pot’ was approximately £25m. This was made up almost entirely from the value of the husband’s business that was sold post-separation for £25m. The business was valued at £2m at the date of the marriage. The High Court attributed a value of approximately £15m to the husband’s business, with it determining that its latent potential justified attributing such a large pre-marital value. It then awarded the wife £5.4m, having determined that this equated to 50 per cent of the marital assets. The Court of Appeal said that the correct approach was to divide the assets into marital and non-marital assets. It stated that the latent value took the business to a value of £4m, which is now known as the ‘springboard effect’, and then added in passive growth, giving an overall non-marital value of £9m. The remaining £16m was divided equally between the parties, increasing the wife’s award to £8m. This was

then cross-checked against what was deemed to be fair in all the circumstances and the fact that the Wife received 32.5 per cent of the overall assets was deemed fair.

In *K v L*⁴ the Courts were required to grapple with some extreme circumstances. The wife inherited shares from her family, 13 years before her marriage, when they were worth approximately £300,000. The shares were worth £700,000 at the date of the marriage. Through a combination of luck and passive growth, the wife's shares grew exponentially in value, so that at the date of the hearing they were worth approximately £58m. This was a long marriage and neither party worked, instead living modestly off the dividends from her shares. Indeed, despite the parties' wealth, they essentially lived a relatively modest lifestyle. The High Court made an initial award of £5m. Given what we have seen in the above cases, it was of little surprise to see that the husband appealed the award, particularly given that this was less than ten per cent of the overall assets. The Court of Appeal determined that an award of £5m would comfortably meet the husband's needs, when looked at in the context of their lifestyle. So, in this case, an award of eight per cent was deemed to be fair, when looked at in all the circumstances of the case.

Recent case law

In addition to the above Court of Appeal cases, there have been a number of High Court judgments regarding the issue of ring-fencing non marital assets. Two of these cases have been determined by the same judge, Mostyn J, and they offer an interesting comparison.

In the case of *FZ v SZ and Another*⁵, the total assets available were valued at £18.1m, with the court valuing the husband's premarital assets at £2.1m. The court decided not to apply inflation to this figure over the ten-year period of their marriage, as the intermingling of the assets led the court to determine that any investment return would be considered matrimonial property as opposed to non-matrimonial property. Mostyn J determined that the premarital assets could be excluded in their entirety, with the remaining £16m being split equally between the parties. The Court then carried out a cross-check against the overall assets, with the wife receiving 44 per cent of the total assets.

In *N v F*⁶ Mostyn J again valued the marital and non-marital assets. The non-marital assets

included shares, two properties, a profit share plan and funds in a brokerage account. In this case, the overall assets were valued at £9.7m, with the husband's pre-marital assets again being valued at £2.1m. Mostyn J excluded £1m of the husband's premarital assets and then divided the remainder of the assets equally between the parties. It was made clear that this invasion into the husband's pre-marital assets was only ordered because the wife's needs justified such an action; if the wife's needs could have been met without the need to utilise any of the non-marital assets, then this is what the Court would have ordered.

Finally, there has been a recent High Court case determined by Mrs Justice Macur DBE. In the case of *WF v HF*⁷ the husband came to the marriage with pre-marital wealth, being a successful business that he established. The High Court determined the value of the marital and non-marital assets and then made an award based upon the wife's needs. The wife was awarded 45 per cent of the total matrimonial assets, or 36 per cent of the total assets available, including the non-marital assets. Again, it appears the Court carried out a cross-checking exercise as to what percentage would be deemed fair in all the circumstances.

It seems clear that the courts can utilise inherited assets and pre-acquired assets when making a financial award but this must always be considered in light of the overall circumstances of the case. If this is likely to be an issue in the future, the parties should consider entering into a pre- or post-nuptial agreement. Alternatively, a party could seek to keep separate 'family' assets from pre-acquired or inherited assets, so as to minimise the mingling of the funds. Finally, the nature of the inheritance is likely to be important, so an heirloom passed through the generations might be treated differently than an inherited share portfolio.

Ultimately, the needs of both parties come first. The courts seem to be prepared to exclude non-marital assets, but not to the detriment of one party's needs.

Notes

- 1 *White v White* (2001) 1 AC 596.
- 2 *Robson v Robson* (2011) 1 FLR 751.
- 3 *Jones v Jones* (2011) 1 FLR 1723.
- 4 *K v L* (2010) 2 FLR 1467.
- 5 *FZ v SZ and Another* (2011) 1 FLR 64.
- 6 *N v F* (2011) 2 FLR 533.
- 7 *WF v HF* (2012) EWHC 438.

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International parental child-abduction between UK and India – a consular perspective

In this article, I'll be looking at; the extent of the current issues between the UK and India; what mechanisms are in place to assist left-behind parents; and what the UK government is doing to encourage India to sign the 1980 Hague Convention on the Civil Aspects of Child Abduction ('The Hague Convention').

Background

As a consequence of the increase in international mobility of families, there has been a steady rise in incidences of cross-border parental child abduction. Where a marriage or relationship between two people of different nationalities or cultural origins breaks down, the temptation of one parent to return to their country of origin taking a child with them is sometimes too strong to resist.

Child abduction covers the removal (or wrongful retention) of a child abroad by one parent (or relative at their behest) without the permission of the other parent or person with parental responsibility.

If the removal is from the UK to India, there are currently no international systems in place to ensure swift resolution of the case, as India has, thus far, not signed up to The Hague Convention. The Hague Convention is an agreement between countries (87 countries¹ as at February 2012) which aims to return the abducted child to the country where he/she normally lives so that issues of residence (custody) or contact (access) can be decided by the courts of that country.

The extent of the issue

Research conducted by the Foreign and Commonwealth Office suggests that every other day a British child is abducted by a parent to a country which has not signed The Hague Convention. In the financial year to 5 April 2012, India ranked second in terms of the number of cases the British High Commission offered consular assistance.

In India, these cases are handled by the consular teams based in the British High Commission in Delhi, the Deputy High Commissions in Mumbai, Kolkata and Chennai and the Consular Assistance office in Goa. In the last five years, these five posts have been involved in 38 cases. There are currently 13 active cases between India and the UK – in practice, the number of cases is likely to be even higher as many cases are simply not reported.

At a meeting of representatives from Australia, Canada, the EU, New Zealand and the US in April of this year, it was established that only the US had a greater number of child abduction cases in India than the UK.

Given the estimated 30 million non-resident Indians living worldwide, this is an issue which affects both the UK and India.

How are the British government tackling the issue?

In London, we have a dedicated Child Abduction Section (CAS), launched in 2003, which leads on cases involving countries which are not signatories to the Hague Convention. The unit has four full-time staff and runs a public advice line. This unit is not to be confused with the International Child Abduction and Contact Unit (ICACU) within the Ministry of Justice, which handles cases between Hague-contracting states.

The CAS assists British nationals affected by actual or potential international child abduction. They work closely with 'Reunite', the leading UK charity on International Child Abduction, which is taking the lead on awareness-raising, policy and preventative work.

In India, we have a network of 17 fully-trained consular officers across the five posts mentioned above.

There are many things we can do to help the left-behind parent, including;

- provide a list of local lawyers who speak English, some of whom are specialists in family law and are recommended by Reunite;

- if we know where the child and the abducting parent are **and** the abducting parent agrees, we can arrange to visit them, check on their welfare and report back to the left-behind parent; and
- where appropriate, we can contact the courts, express our interest in a case and ask about progress.

We cannot;

- ‘rescue’ a child or get involved in any illegal attempt to bring a child back to the UK;
- locate the child if the parent does not know where they are – but we help parents establish contact with the organisations and authorities responsible for locating the child;
- offer legal advice; or
- interfere with the legal process in India;

These are some recent examples of cases we have been involved in;

- we assisted a father, whose son was removed to India, without his knowledge or consent, by the mother. The mother subsequently committed suicide in India and proceedings had to be initiated to recover the child from the in-laws;
- we assisted an aunt, who had a residence order from a UK court relating to her niece. The child was subsequently abducted in contravention of the court order and brought to India; and
- we helped a mother, whose daughter was abducted to India by her father, in breach of UK court orders. Three years later the legal case in India is ongoing.

Not just a consular issue

Encouraging India to sign up to The Hague Convention is a joint consular and political objective of the British High Commission. Our High Commissioner, Sir James Bevan,

regularly raises the issue in his meetings with various ministries, seeking news of India’s progress towards signing the Hague Convention. He raised it with the Minister for Women and Children and the Ministry for External Affairs in July this year. The Minister indicated that a bill would hopefully be sent to the parliamentary standing committee by the end 2012. This is the next stage in getting The Hague Convention included in domestic Indian law. Each time we have high-level visitors from London, they too raise the matter with their Indian counterparts, as Charles Hay, the Director of Consular Services, did when he visited India in July this year.

Senior UK family law judges and the Central Authority of England and Wales have all offered to help India prepare for putting the Convention into operation and the Foreign and Commonwealth Office has previously funded a visit to the UK by senior Indian judges.

Conclusion

My experience to date leads me to conclude that, while the Indian government is willing to sign-up to The Hague Convention, there are still challenges to reaching this goal.

The British government will continue to raise the issue at all possible levels and will continue to collaborate with other governments which are also working to assist India in signing and implementing The Hague Convention.

Note

- 1 Source: *The World Organisation for Cross-Border Co-operation in Civil and Commercial matters*.

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International parental child abduction: case study

Max Blitt and Zarish Baig were retained by Legal Aid Alberta to represent a ten-year-old Muslim boy from East Jerusalem, Nadim S ('Nadim'). Nadim's parents, both Muslims were married in Israel in April 2001. Nadim is their only child, born on 10 February 2002 in Jerusalem. Nadim's father moved, by himself, to Canada in September 2006, hoping to have Nadim and his wife follow him once he had settled in Canada. He later became a Canadian citizen. The facts were disputed by the mother's counsel as to whether Nadim's father had in fact intended for Nadim and his mother to follow him to Canada, or whether he had simply abandoned them and then later asked them to come to Canada. Nadim's parents obtained a divorce from the Israeli Shariah courts in April 2008. Nadim started visiting his father in Canada every summer, starting in the summer of 2008. After each visit, he would return to Israel at the end of the summer break and before the start of the new school semester. The Hague case arose when Nadim's father did not send Nadim back to Israel after the end of his summer break in 2011. Nadim's father sought interim custody of Nadim and alleged that it was Nadim's wish that he did not go back to Israel.

The case was significant as it involved a Muslim Arab child living in a predominantly Jewish state. In addition, the father's counsel brought forward a number of issues for the Court to consider, namely;

- whether East Jerusalem was in fact apart of Israel, and thus a Hague signatory (given the dispute over the sovereignty of East Jerusalem) and whether Israel had jurisdiction over a resident of East Jerusalem; and
- whether Nadim's rights, under the Canadian Charter of Rights, were breached as he is a Canadian citizen allegedly entitled to live in Canada.

In addition, the father submitted that the parents, as Muslims, were answerable to the Shariah Law Court in Jerusalem and disputed that Nadim's mother had 'rights of custody' under The Hague Convention on the Civil Aspects of International Child Abduction

('The Hague Convention') where Shariah Law provides that the father retains full custody of the child until at least 12 years of age.

Our role as counsel for Nadim was rather limited. We had to ensure Nadim's wishes were brought to the attention of the court and to determine whether he was in fact of an age and degree of maturity for his wishes to be considered by the court. There is no question that there is an increasing trend to consider the wishes of children in custody and Hague Convention disputes – more so in the UK than in North America. As Nadim's counsel, we had to ensure that his wishes were separate and independent from those of his parents.

We consulted with Hanita Degan, a well-respected child psychologist in Calgary, Alberta, who has prepared numerous 'voice of the child' reports for the court. Degan provided a list of questions to ask Nadim in order to determine the independence of his views and his maturity. We had two meetings with Nadim, both interviews lasting about an hour each. After the interviews we had no doubt about Nadim's maturity and the independence of his views. He was a very confident young boy, who was very affirmative in his wishes and well-informed about his decision.

As Nadim's counsel, we argued that Article 13 of The Hague Convention and Article 12 of the United Nations Convention on the Rights of the Child applied. We used case authority from Canada, as well as International Hague cases to support our submission to the court that it should consider Nadim's views before deciding whether to return him to Israel under The Hague Convention. While views of children are more likely to be taken into account when children are closer to the age of 15, courts have recently been very clear in stating that each child's maturity is to be considered independently and that no minimum age can be adopted as to when a child's views are to be considered. We submitted that Nadim was, in fact, of an age and degree of maturity for his views to be considered. We used excerpts from our

interview with him that clearly reflected his maturity in our oral and written submissions to the court.

After a full day hearing on 8 June 2012, the court reserved its decision. On 3 July 2012 the Honourable Judge Richard O’Gorman of the Provincial Court of Alberta gave his

decision in favour of Nadim and refused to order his return to Israel from where he was considered to have been ‘unlawfully removed’. The Court held that Article 13 of The Hague Convention applied. The Court was clear that its decision was about one child, in very unusual circumstances.

BOOK REVIEW

Indians, NRIS and the Law

Anil and Ranjit Malhotra

(Universal Law Publishing, New Delhi: 2011)
978-9-3503-5124-6

£50 hardback

The Malhotra brothers are well known to many English practitioners, of whom many dealing with clients from the Indian sub continent already have a copy of the hugely successful book *Acting for non-resident Indian clients* (published by Jordans).

Their third publication *Indians, NRIs and the Law*, has now been published by Universal Law Publishing (New Delhi). This easy-to-read publication is invaluable for all advising non-resident Indians living and working in another jurisdiction, those currently residing in India including considering a move abroad and those individuals and families contemplating returning to India having lived abroad.

The book deals with a plethora of legal problems and provides helpful solutions on marriage, divorce, ADR in family law, the removal of children across national borders, child custody, inter country adoption, surrogacy, wills, Indian corporate immigration, international family migration, visas, rights to a family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and property issues. It contains easily accessible and well-researched legal and practical information for non resident Indians and those advising them.

I can do no more justice to this publication but to quote the accolades from the former Attorney General for England, Soli J Sorabjee, from Lord Justice Thorpe Head of International Family Justice for England & Wales and from Peter Boshier the Chief Family Court Judge, New Zealand who state:

‘I have no doubt that this book will be extremely useful to academicians, Judges, policy makers, lawyers in India, overseas lawyers and also to foreign readers. The book will provide invaluable guidance to foreign offices, Consulate Directorates besides Consular sections of the Embassies and High Commissions worldwide by producing answers to the unresolved problems on new emerging areas of the vast Indian diaspora scattered around the world.’ (Soli J Sorabjee)

‘In this work the authors clearly articulate the need for family reform, particularly to provide remedies for adults and children who, directly or indirectly, are entangled in breakdown of relationship that are not bounded by one village, one city or one nation. I commend this publication and trust that it will contribute to the enlargement of the law of India to cover areas that globalisation has changed.’ (Thorpe LJ)

‘I congratulate Anil and Ranjit Malhotra for this comprehensive and insightful publication on aspects of family law and issues that it gives rise to in India, as well as the international arena. Family Law is increasingly an international discipline and this text will educate and inform not only within India but beyond.’ (Peter Boshier).

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