Parenting in the Aftermath of Abduction: Comparative Insights into the Formulation of Parenting Arrangements Post-Return to Australia under the Hague Child Abduction Convention

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Abstract

This article reports the findings of a two phased empirical study that examines the formulation of parenting arrangements after the return of a child to Australia under the *Hague Convention on Civil Aspects of International Child Abduction*. The findings provide a picture of how the equal shared parental responsibility and shared care statutory criteria found in pt VII of the *Family Law Act 1975* (Cth) have been applied by Australian courts, and parties mediating agreements, since their introduction in 2006. The most significant finding from the study is that the kind of parenting orders and agreements being made in each phase of the study varied quite significantly. The emerging trends seem to indicate that over time Australian courts and family dispute resolution practitioners have developed a nuanced understanding of when shared care parenting arrangements are an appropriate fit for families with a history of international parental child abduction.

Keywords

Family Law; Hague Convention on Civil Aspects of International Child Abduction; International Child Abduction; Parenting Arrangements; Shared Care

I INTRODUCTION

This article reports the findings of a two phased empirical study that examines how parenting arrangements are formulated after the return of a child to Australia under the *Hague Convention on Civil Aspects of International Child Abduction*.[1] The *Convention* regulates the complex phenomenon of international parental child abduction: the abduction of a

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[1] Opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) ('*Hague Convention*'). The *Hague Convention* is implemented in Australian domestic law by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

child by one of their parents[2] due to a family law dispute about with whom the child should live, and in which country the child should reside. This problem is not to be confused with kidnapping of a more sinister nature involving a child predator. When a child is abducted out of Australia to another country party to the *Hague Convention*,[3] return proceedings may take place. If these proceedings result in the child's return to Australia, the parenting dispute may go on to be resolved in accordance with the statutory criteria found in pt VII of the *Family Law Act 1975* (Cth) ('*Family Law Act*'). These statutory criteria have broad application and are applied to formally resolve substantive parenting disputes in Australia, regardless of whether there has been a prior act of international parental child abduction. They guide the exercise of judicial discretion if court proceedings occur, and assist with the formulation of agreements through mediation. They determine the time that each parent will spend with their child, their parental responsibilities, and the jurisdiction in which the child will reside. The pt VII statutory criteria were amended in 2006 to provide legislative scope for facilitation of equal shared parental responsibility and shared care parenting arrangements.[4]

The study reported examines the application of the pt VII statutory criteria in these inherently complex parenting cases that require resolution post-return to Australia after an act of international parental child abduction.[5] The cases studied involved children abducted out of Australia to another state party to the *Hague Convention* by their primary carer mother, and subsequently returned to Australia as their habitual residence.[6] Australian-based family lawyers with experience in these specialised cases were asked

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[2] An abduction for the purposes of the *Hague Convention* is deemed to have occurred where a child is wrongfully removed from, or retained outside of, their habitual residence, in breach of rights of custody. In this context the abduction is most often by one of the child's parents, but a family member, for example, could also be the abductor. Ibid arts 3, 5.

[3] At present there are 99 contracting parties to the *Hague Convention*.

[4] The equal shared parental responsibility and shared care approach was introduced into Part VII of the *Family Law Act* by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). Parental responsibility concerns decision making about a child, and as specified in s 61B of the *Family Law Act*, means all of the duties, powers, responsibilities and authority which, by law, parents have in relation to children. Shared care is not defined in the *Family Law Act*. Shared care is a term often used to describe equal or approximately equal time sharing arrangements between parents. The legislative pathway for determining the time that parents spend with their children provides for consideration of an arrangement involving 'equal time' or 'substantial and significant time' if an order for 'equal shared parental responsibility' is made. See s 65DAA of the *Family Law Act*; see discussion of the legislative pathway at section II(B) of this article.

[5] Ethical clearance for phase one of the study was obtained from the Griffith University Human Research Ethics Committee. Clearance for phase two was obtained from the Queensland University of Technology Human Research Ethics Committee. The study complied with state, national and international guidelines, regulations and legislation concerning the ethical conduct of research involving humans.

[6] In some cases *Hague Convention* return proceedings resulted in a formal return order. In others an application for the child's return was made pursuant to the *Hague Convention* but the child's return was negotiated without a formal return order being made.

about the resolution of their past cases in an online survey. Both qualitative and quantitative data was gathered about the application of the pt VII statutory criteria to resolve the parenting dispute. Some cases were resolved by court order and others by private agreement. Participants were also asked about the characteristics of the families in their cases to obtain some qualitative data about the profile of families with a history of international parental child abduction.

Phase one of the study examined the outcomes – specifically, the actual parenting arrangements ordered or agreed to – in cases that were resolved prior to 2010.[7] Phase two examined the outcomes in cases that were resolved between 2010 and 2016. These two case samples legitimately display overall trends concerning how the pt VII statutory criteria have been applied over time. Because these cases are not always resolved through a court order, accessing reported and unreported judgments would not give an accurate overall picture of how these cases are determined post-return to Australia. It was necessary to ask family lawyers about the resolution of cases they had acted in to ensure that outcomes involving a private agreement were also captured.

Both phases of the study had two categories of participant. The first category was Australian-based family lawyers who had acted in post-return pt VII parenting cases where there was a prior abduction by the child's primary carer mother that was handled under the *Hague Convention.* The second category was Australian-based family lawyers who had acted in *Convention* return proceedings. Participants were asked to report on cases where abduction was undertaken by the child's primary carer mother, although they may have acted for either parent.

Specifically, the findings provide a picture of how the equal shared parental responsibility and shared care statutory criteria have been applied over time by Australian courts, and parties mediating agreements, to resolve parenting disputes with a history of parental child abduction handled under the *Hague Convention*. There are of course parenting disputes in this context that are not resolved post-return to Australia, through either mediation and/or court processes. In these cases the pre-abduction status quo may be resumed post-return. This study does not examine this category of case because participants in the study were lawyers. This inevitably meant that in the cases examined there was engagement with legal process post-return to Australia. Examining cases where there was no legal intervention post-return would require the recruitment of parents as participants.

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[7] See Danielle Bozin, 'Equal Shared Parental Responsibility and Shared Care Post-Return to Australian under the Hague Child Abduction Convention' (2014) 37(2) *University of New South Wales Law Journal* 603.

For some time social science literature has documented that for shared care parenting arrangements to work most effectively it is desirable that parents possess specific functional attributes.[8] Shared care has been shown to work particularly well when the parents have freely opted into the arrangement, maintain homes within close proximity, have accommodating work arrangements that enable them to manage the practical logistics of shared care, and exhibit low levels of inter-parental conflict so that they can adopt a child-focused collaborative co-parenting approach.[9] Because families that experience international parental child abduction do not typically possess these attributes[10] there is value in examining what kind of parenting arrangements are being ordered, or otherwise agreed to, for families upon return to Australia after an act of international parental child abduction. It is important to note that although these characteristics are desirable, sometimes highly conflicted parents can share care.[11] The relationship

[8] See, eg, Bruce Smyth and Ruth Weston, 'The Attitudes of Separated Mothers and Fathers to 50/50 Shared Care' [2004] (67) *Family Matters* 8; Judy Cashmore et al, 'Shared Care Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department' (Report, Social Policy Research Centre, University of New South Wales, May 2010) 143–5; Belinda Fehlberg, Christine Millward and Monica Campo, 'Shared Post-Separation Parenting in 2009: An Empirical Snapshot' (2009) 23 *Australian Journal of Family Law* 1; see also Belinda Fehlberg, Christine Millward and Monica Campo, 'Shared Post-Separation Parenting: Pathways and Outcomes for Parents' (2010) 86 *Family Matters* 33; Helen Rhoades, 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform' (2008) 36 *Federal Law Review* 279; Patrick Parkinson, 'Violence, Abuse and the Limits of Shared Parental Responsibility; (2013) 92 *Family Matters* 7; Zoe Rathus, 'Social Science or "Lego-Science"? Presumptions, Politics, Parenting and the New Family Law' (2010) 10(2) *Queensland University of Technology Law and Justice Journal* 1; Bruce Smyth et al, 'Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children' in Leslie Drozd, Michael Saini and Nancy Olesen (eds), *Parenting Plan Evaluations: Applied Research for the Family Court* (Oxford University Press, 2nd ed, 2016) 118; Nicole Mahrer et al, 'How Do Parenting Time and Inter-parental Conflict Affect the Relations of Quality of Parenting and Child Wellbeing Following Divorce?' in Leslie Drozd, Michael Saini and Nancy Olesen (eds), *Parenting Plan Evaluation: Applied Research for the Family Court* (Oxford University Press, 2nd ed, 2016) 63; see generally Lawry Moloney et al, 'Understanding Parenting Disputes After Separation' (Research Report no 36, Australian Institute of Family Studies, August 2016).

[9] Ibid.

[10] See, eg, Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Hart Publishing, 2013) 54-59; Bozin, above n 7; Miranda Kaye, 'Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four' (1999) 13(2) *International Journal of Law, Policy and the Family* 191; Merle H Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000-2001) 69 *Fordham Law Review* 593; Roxanne Hoegger, 'What if She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy' (2003) 18 *Berkeley Women's Law Journal* 181; Regan F Grilli, 'Domestic Violence: Is it Being Sanctioned by the Hague Convention?' (1997) 4(1) *Southwestern Journal of Law and Trade in the Americas* 71; see generally Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999).

[11] See, eg, Irwin Sandler, Lorey Wheeler and Sanford Braver, 'Relations of Parenting Quality, Interparental Conflict, and Overnights with Mental Health Problems of Children in Divorcing Families with High Legal Conflict' (2013) 27(6) *Journal of Family Psychology* 915; Kit Elam et al, 'Non-Residential Father-Child Involvement, Interparental Conflict and

between inter-parental conflict and outcomes for children is complex and this article does not purport to suggest otherwise. For example, for high-conflict families 'parallel parenting'[12] can afford an opportunity for co-parenting which may lead to the re-establishment of trust, facilitating cooperative parenting and a positive shared care arrangement in the future.

When considering cases where there has been a history of international parental child abduction we might expect that shared care outcomes would be uncommon for families once a child has been returned to Australia under the *Hague Convention*. This research helps to test the validity of this hypothesis. The central research question for each phase of the study was: what kind of parenting arrangements are being formulated for families upon return to Australia after an act of international parental child abduction handled under the *Hague Convention*? The most significant finding from the study was that the types of parenting orders and agreements being made in each phase of the study varied quite significantly. Some of the findings appear relatively consistent with Australian research into the incidence of shared care parenting arrangements in the general population of separated couples. That research indicates that after an initial surge in court ordered shared care, around the time equal shared parental responsibility and shared care statutory criteria were introduced in 2006,[13] the occurrence of such orders and agreements has plateaued.[14] The trends reported by this study of parenting cases post-return to Australia under the *Convention* may also indicate that over time, Australian courts and family dispute resolution practitioners have developed a nuanced understanding of when shared care arrangements may be an appropriate fit for a family that has experienced international parental child abduction given their specific functional attributes.

Mental Health of Children Following Divorce: A Person-Focused Approach' (2016) 45(3) *Journal of Youth and Adolescence* 581.

[12] Parallel parenting involves co-parenting whilst the parents are disengaged from each other. The parents thus have limited direct contact whilst co-parenting. This parenting arrangement can work where parents have displayed an inability to communicate effectively due to a high conflict dynamic.

[13] Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Report, Australian Institution of Family Studies, December 2006) 132. This research showed that judicially determined cases involving shared-time arrangements (where parenting time was specified in court orders) increased from four per cent before the 2006 reforms to 34 per cent after the 2006 reforms. However, it is important to note that this surge in shared care arrangements is not necessarily directly associated with the 2006 amendments, and there may be a multitude of reasons for this increase.

[14] See Bruce Smyth, Richard Chisholm, Bryan Rodgers and Vu Son, 'Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia? [2014] 1 *Law and Contemporary Problems* 109. In particular this study found that since the 2006 amendments shared-time parenting arrangements have plateaued at fifteen per cent of children of recently separated parents in the general population. See generally Patrick Parkinson, 'The Payoffs and Pitfalls of Laws that Encourage Shared Parenting: Lessons from the Australian Experience' (2014) 37(1) *Dalhousie Law Journal* 301.

This article begins with a description of the operation of *Hague Convention* return proceedings and pt VII of the *Family Law Act,* and how these two legal mechanisms can operate in succession. This discussion is followed by an explanation of the study's methodology. The findings of each phase of the study and a qualitative analysis of the emerging trends are then presented. This analysis includes an evaluation of possible reasons for the disparity in types of parenting arrangements reported by each phase's participants.

II THE OPERATION OF *HAGUE CONVENTION* RETURN PROCEEDINGS AND PART VII OF THE *FAMILY LAW ACT* POST-RETURN

The return of a child to their habitual residence under the *Hague Convention* after an act of international parental child abduction, and the resolution of the substantive parenting dispute post return, involves two legal mechanisms that can operate in succession. Although these legal mechanisms may be utilised at different points in time, in cases where legal intervention occurs post-return to Australia their collective operation is what ultimately resolves the parenting disputes of families that submit to their application. This of course does not apply in cases where the pre-abduction parenting status quo was resumed post-return without further engagement with legal processes.[15]

A *The Hague Child Abduction Convention*

As a multilateral treaty, the *Hague Convention* provides a process by which children who have been abducted by a parent from one *Convention* country to another are promptly returned to the *Convention* country deemed to be their habitual residence.[16] A wrongful international parental child abduction (also known as a 'unilateral removal') is regarded as having

[15] The outcomes in these cases are not captured by this study as lawyers (the participants in this study) are unable to report on them. Future research into this category of case would be valuable.

[16] For a discussion of habitual residence see generally David F Cavers, '"Habitual Residence": A Useful Concept?' (1972) 21 *American University Law Review* 475; Eric Clive, 'The Concept of Habitual Residence' (1997) *Juridical Review* 137; Peter Stone, 'The Concept of Habitual Residence in Private International Law' (2000) 29 *Anglo-American Law Review* 342; Pippa Rogerson, 'Habitual Residence: The New Domicile?' (2000) 49 *International and Comparative Law Quarterly* 86; Rhona Schuz, 'Habitual Residence of Children under the Hague Child Abduction Convention: Theory and Practice' (2001) 13 *Child and Family Law Quarterly* 1; Rhona Schuz, 'Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context' (2001) 11 *Journal of Transnational Law and Policy* 101; Tai Vivatvaraphol, 'Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases under the Hague Convention' (2009) 77 *Fordham Law Review* 3325; Danielle Bozin-Odhiambo, 'Reexamining Habitual Residence as the Sole Connecting Factor in Hague Convention Child Abduction Cases' (2012) 3 *Family Law Review* 4. See generally Beaumont and McEleavy, above n 10.

occurred when a child has been removed from, or retained outside of, their habitual residence, in breach of rights of custody.[17] Rights of custody are defined in the *Hague Convention* as rights relating to care of the child and, in particular, the right to determine the child's place of residence.[18] The *Convention*'s preamble articulates that *Convention* countries, including Australia, have a desire to protect children internationally from the harmful effects of parental child abduction.[19] This child protection objective is evident within the *Convention*'s Explanatory Report, which clarifies that 'the problem with which the *Convention* deals … derives all its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial.'[20] This problem is sometimes known as 'forum shopping'.[21]

The *Hague Convention*'s return mechanism is supported by a central premise: that promptly returning a child to the country that is their habitual residence restores the status quo regarding where the child was physically residing prior to the abduction, and which *Convention* country's laws should be applied to resolve the substantive parenting dispute.[22] This means that once the status quo has been restored the parenting dispute is resolved in the jurisdiction (i.e. the child's habitual residence) considered most suitable to decide what is in the child's best interests. The *Convention* does not seek to adjudicate the substantive parenting dispute on the basis that it is most appropriate that it is resolved within 'the moral framework of a particular culture'.[23] Prompt return to the child's habitual residence is specifically perceived as facilitating this.

The *Convention*'s drafters considered there to be an innate link between the construction of a child's identity and the environment within their habitual residence.[24] It is important to note, however, that this may no longer hold true. As families lead increasingly transient lifestyles, a child's habitual residence at any particular moment in time may not represent the culture with which the family and child most closely identify. The underlying purpose, as articulated in the *Convention*'s Explanatory Report, is that the determination of habitual residence during *Convention* return proceedings is a pronouncement of which moral and cultural framework of best interests should apply to the individual child.

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[17] *Hague Convention*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) arts 3, 4.
[18] Ibid art 3.
[19] Ibid preamble.
[20] Elisa Pérez-Vera, 'Explanatory Report on the 1980 Hague Child Abduction Convention' (Explanatory Report, Hague Conference on Private International Law, 1982) 426, 429.
[21] Guido Rennert, 'Is Elimination of Forum Shopping by Means of International Uniform Law an "Impossible Mission"?' (2005) 2 *Macquarie Journal of Business Law* 119, 119.
[22] Pérez-Vera, above n 20, 426.
[23] Ibid 431.
[24] Ibid.

The *Hague Convention*'s principal objectives supporting the restoration of the status quo are expressed in art 1.[25] First, the *Convention*'s return mechanism strives to facilitate the prompt return of children wrongfully removed to, or retained in, any *Convention* country. Second, it seeks to ensure that rights of custody under the law of each *Convention* country are respected by the other *Convention* countries. Essentially, the *Convention* operates as a forum decider.[26] A decision under the *Convention* regarding the return of a child is not a determination on the merits of the substantive parenting dispute and parental rights and responsibilities.[27] The judicial and administrative authorities in a *Convention* country to which a child has been abducted must not determine the parenting dispute's merits until it has been decided that the child is not to be returned.[28]

Restoration of the status quo through prompt return to the child's habitual residence is said to facilitate the development of comity between *Convention* countries.[29] An assessment of the child's best interests during substantive parenting dispute proceedings is reserved for consideration post-return, once *Convention* return proceedings are complete. There is some capacity for consideration of the individual child's best interests and welfare during the return process if the abducting parent elects to raise one of the defences to a child's return.[30] However, comity is a fundamental consideration during *Convention* return proceedings[31] because of the assumption that the individual child's best interests and welfare should be considered in the child's habitual residence post-return due to the quality of this jurisdiction.[32]

When a child is returned to the *Convention* country deemed to be their habitual residence, their family unit must submit to the domestic laws of that jurisdiction if they wish to resolve the parenting dispute through legal processes. In the Australian context this involves the application of pt VII of the *Family Law Act*.

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[25] See also *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 1A.
[26] *Hague Convention*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 19.
[27] *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 18(1)(c).
[28] Ibid reg 19.
[29] Pérez-Vera, above n 20, 429; Joel R Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1; Schuz, 'Habitual Residence of the Child under the Hague Child Abduction Convention', above n 16.
[30] For example the grave risk of harm defence. See *Hague Convention*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) art 13(b); see also *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(b).
[31] Rhona Schuz, 'The Doctrine of Comity in the Age of Globalisation: Between International Child Abduction and Cross-Border Insolvency' (2014) 40(1) *Brooklyn Journal of International Law* 31; Paul, above n 29.
[32] Pérez-Vera, above n 20, 431.

B *Equal Shared Parental Responsibility and Shared Care under pt VII of the Family Law Act*

The statutory criteria found in pt VII of the *Family Law Act* are applied to formally resolve parenting disputes in Australia. They guide both the exercise of judicial discretion if court proceedings occur and the formulation of agreements through mediation, and they determine parental responsibilities and the time that each parent will spend with their child. If there is a dispute concerning the child's geographical location they assist with decision-making about where the child will live. In 2006 significant amendments were introduced into pt VII, providing a legislative pathway that can facilitate equal shared parental responsibility and shared care parenting arrangements.[33] Rhoades has suggested that a belief that collaborative parenting is intrinsically advantageous to children underpins the equal shared parental responsibility and shared care statutory criteria found in this part of the legislation.[34] Prior to the introduction of the 2006 amendments, the House of Representatives Standing Committee on Family and Community Affairs, in *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation*, suggested that children should be given maximum opportunity to spend significant amounts of time with each of their parents when appropriate.[35]

The most fundamental guiding consideration when making a parenting order or agreement is the best interests of the child.[36] The best interests of children are supported by a list of objects and underlying principles contained within s 60B.[37] What is in the best interests of a particular child is determined by making findings of fact on both primary and additional considerations found in ss 60CC(2) and 60CC(3) respectively.[38] The primary considerations that must be examined when determining what is in the best interests of a child are the benefit to the child of having a

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[33] The equal shared parental responsibility and shared care approach was introduced into pt VII of the *Family Law Act* by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). See ss 60B, 60CA, 60CC, 61B, 61C, 61D, 61DA, 65DAA, 65DAC; see also Cate Bankscet al, 'Review of Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill (2005)' (2005) 19 *Australian Journal of Family Law* 79; Rhoades, above n 4; Helen Rhoades 'Children's Needs and 'Gender Wars': The Paradox of Parenting Law Reform' (2010) 24 *Australian Journal of Family Law* 160; Helen Rhoades, 'The Rise and Rise of Shared Parenting Laws – A Critical Reflection' (2002) 19 *Canadian Journal of Family Law* 75; Rathus, above n 8.

[34] Rhoades, above n 8, 280.

[35] House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003) 25.

[36] *Family Law Act* s 60CA; see generally Richard Chisholm, '"The Paramount Consideration": Children's Interests in Family Law' (2002) 16 *Australian Journal of Family Law* 87.

[37] *Family Law Act*.

[38] Ibid.

meaningful relationship with both of their parents[39] and the need to protect the child from physical or psychological harm, or from being subjected to, or exposed to, abuse, neglect or family violence.[40] The need to protect the child from physical or psychological harm is to be given greater weight in decision-making than the first primary consideration.[41] Several additional factors must also be considered.[42] Most relevant for families resolving their substantive parenting dispute after an act of international parental child abduction is the requirement for consideration of the likely effect of changes in the child's circumstances, including the effect on the child of any separation from either of their parents, or any other child, or other person (including any grandparent or other relative of the child), with whom they have been living.[43] The requirement to consider the practical difficulty and expense of a child spending time with and communicating with a parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis, is particularly relevant in this context.[44]

A presumption of equal shared parental responsibility also influences the formulation of parenting arrangements under pt VII. When making a parenting order in relation to a child the court must in certain circumstances apply a presumption that it is in the best interests of a child for their parents to have equal shared parental responsibility:[45] all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.[46] This presumption relates solely to the allocation of parental responsibility for a child as defined in s 61B; it in no way concerns the amount of time that a child should spend with each parent.[47] The effect of a parenting order that provides for equal shared parental responsibility is that each parent is required to consult with the other about major long term issues such as decision making around medical care and schooling.[48] However, any short-term decisions concerning a child's welfare, such as a

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[39] Ibid s 60CC(2)(a); see generally Donna Cooper, 'Continuing the Critical Analysis of "Meaningful Relationships" in the Context of the "Twin Pillars"' (2011) 25 *Australian Journal of Family Law* 33; Richard Chisholm, 'The Meaning of "Meaningful": Exploring a Key Term in the *Family Law Act* Amendments of 2006' (2008) 22 A*ustralian Journal of Family Law* 175.

[40] *Family Law Act* s 60CC(2)(b); see generally Richard Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law' (2011) 25 *Australian Journal of Family Law* 1; Zoe Rathus, 'Shifting the Gaze: Will Past Violence Be Silenced by a Further Shift of the Gaze to the Future under the New Family Law System?' (2007) 21 *Australian Journal of Family Law* 87; Rae R Kaspiew, 'Family Violence in Children's Cases under the *Family Law Act*: Past Practice and Future Challenges' (2008) 14 *Journal of Family Studies* 279.

[41] *Family Law Act* s 60CC(2A).

[42] Ibid s 60CC(3).

[43] Ibid s 60CC(3)(d).

[44] Ibid s 60CC(3)(e).

[45] Ibid s 61DA(1).

[46] Ibid s 61B. This definition applies to ss 61C−61D of the *Family Law Act*.

[47] Ibid s 61DA(1).

[48] Ibid s 65DAC. See s 4 for the definition of 'major long term issue'.

child's bedtime or what they eat or wear, are to be made by the parent who has care of the child at the time the decision is required, without the need to consult the other parent.[49]

The presumption of equal shared parental responsibility is rebutted if there are reasonable grounds to believe that a child's parent (or a person who lives with a parent of the child) has engaged in child abuse or family violence.[50] Further, the presumption is rebutted if the court is satisfied that equal shared parental responsibility would not be in the child's best interests, or if it would not be appropriate in the circumstances when making an interim order.[51] In cases where the presumption of equal shared parental responsibility is maintained, the court is obliged to consider whether the child spending equal time with each of their parents would be in the child's best interests, and whether the child spending equal time with each parent is reasonably practicable.[52] If it is then the court must consider making an order for equal time.[53]

If the presumption of equal shared parental responsibility is maintained and the court does not make an order for the child to spend equal time with each parent, the court must at least consider whether the child spending substantial and significant time with each parent would be in the child's best interests. If it is, the court should consider making an order for the child to spend substantial and significant time with each parent.[54] A substantial and significant time arrangement involves each parent spending time with their child on both weekdays and weekends;[55] each parent must be involved in their child's daily routine, and in occasions and events that are of significance to the child.[56] When determining if an equal or substantial and significant time order is appropriate, the court considers both the best interests of the child and whether such an arrangement is reasonably practicable.[57] The court must consider how far apart the parents live;[58] each parent's current and future capacity to implement a shared care arrangement;[59] each parent's current and future capacity to communicate with each other and resolve difficulties that might arise in implementing a

[49] Ibid s 65DAC(2), s 65DAE(1).
[50] Ibid ss 61DA(2)(a)–(b).
[51] Ibid ss 61DA(3)–(4).
[52] Ibid ss 65DA(1)(a)-(b)
[53] Ibid s 65DA(1)(c)
[54] Ibid s 65DAA(2).
[55] Ibid ss 65DAA(3)(a)(i)–(ii).
[56] Ibid s 65DAA(3).
[57] Ibid s 65DAA(5).
[58] Ibid s 65DAA(5)(a).
[59] Ibid s 65DAA(5)(b).

shared care arrangement;[60] and any other matters the court considers relevant.[61]

Part VII provides a legislative pathway that can facilitate equal shared parental responsibility and shared care parenting arrangements. For an equal time or substantial and significant care arrangement to be in the best interests of a child, it is desirable that there exist a high degree of collaborative parenting, and a minimal amount of inter-parental conflict.[62] We might expect that shared care outcomes are uncommon for families with a history of international parental child abduction given that they do not typically possess these attributes.

III A Study of Parenting Arrangements Post-Return To Australia Under the Hague Child Abduction Convention: Phase One and Two

A *Methodology, Sample and Limitations*

The purpose of this study was to obtain an understanding of the kind of parenting arrangements that are ordered for, or otherwise agreed to by, families post-return to Australia after an act of international parental child abduction handled under the *Convention*. Data concerning the general characteristics of families involved in these cases and the circumstances experienced by abducting primary carer mothers post-return was also sought.

The cases reported by the family lawyer participants in each phase of the study were different because participants in phase one reported on cases that they had acted in pre-2010. This data was collected in late 2009.[63] Participants in phase two reported on cases in which they had acted from 2010 onwards. This data was collected in late 2016. This was done to obtain a broad picture of the kind of parenting arrangements occurring post-return to Australia over time. In light of the introduction of equal shared parental responsibility and shared care statutory criteria in 2006, considering case outcomes at different junctures provides insight into general trends emerging concerning the application of the pt VII statutory criteria to families that have experienced international parental child abduction. The survey data from each phase of the study was compared and analysed descriptively for patterns and trends. The data obtained reveals significantly different case outcomes in each phase of the study.

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[60] Ibid s 65DAA(5)(c).
[61] Ibid s 65DAA(5)(e).
[62] See above n 8.
[63] Bozin, above n 7.

1 *Participants*

The first category of participants was Australian-based family lawyers who had acted in post-return pt VII parenting cases where there was a prior abduction by the child's primary carer mother, handled under the *Convention.* The second category was Australian-based family lawyers who had acted in *Convention* return proceedings.

2 *Recruitment and Selection*

Both phases of the study adopted an identical recruitment strategy. Potential participants were identified by initiating email contact with a significant proportion of all Australian-based barristers and solicitors with family law experience. The email addresses of potential participants were obtained through their membership of a relevant state or territory Professional Law Association or Society.[64] Most lawyers in Australia hold membership of one or more of these bodies. The contact details of members of these Associations and Societies, along with their areas of practice, are available for public access online. Lawyers who were accredited family law specialists were also identified through these lists. Lawyers who received the invitation email (which included a link to the information sheet and online survey) were asked to self-identify as having the requisite previous case experience. Self-identification was necessary as this information is not readily available through reported and unreported cases alone.

Some of the lawyers who had the requisite case experience were also identifiable through reported court judgments. This was possible when the case proceeded to a judicially imposed final court order outcome. The judgments for these cases were obtained, and the lawyers who represented parents in them were identified. Some lawyers who had acted in *Convention* return proceedings were also identified in this way. Their names were obtained from reported *Convention* return proceeding court judgments. Lawyers who had acted in relevant cases that resulted in a private agreement were impossible to identify without employing the self-identification approach.

[64] The Professional Law Associations and Societies whose lists of members were accessed were the Bar Association of Queensland, the New South Wales Bar Association, the Victorian Bar, the Northern Territory Bar Association, the South Australian Bar Association, the Tasmanian Bar, the Western Australian Bar Association, the ACT Bar Association, the Family Law Practitioners' Association of Queensland Limited, the Queensland Law Society, the Law Society of New South Wales, the Law Institute of Victoria, the Law Society of the Northern Territory, the Law Society of Tasmania, and the Law Society of Western Australia. In some instances members' email addresses were not posted within the online membership lists, or a general law firm administrative email address was provided. Where possible these lawyers' personal email addresses were sourced from their firm's website. Otherwise the lawyer was not included in the invitation email list.

3 *The Survey Tool*

The study employed mixed methods in the sense that the online survey included questions designed to obtain both qualitative and quantitative data about the application of the pt VII statutory criteria to resolve the parenting dispute post-return, and the resulting court orders and private agreements. An online survey using software called KeySurvey was favoured over a face-to-face interview approach for three reasons. First, potential participants were located in all Australian states and territories. Second, family lawyers are time poor. Scheduling an appropriate time to meet with them face-to-face would have been difficult. The need for participants to reschedule at the last minute was a real risk given the nature of their work. This would have been challenging to accommodate if travelling interstate to conduct the interviews and working within a limited budget. Third, the easier it was for family lawyers to participate the higher the probable response rate.

Participants were asked to reflect on their past client files and answer a series of closed-ended and open-ended questions which did not require their clients to be identified. Participants were asked not to include any information that could identify their clients directly or by inference. Participation was also anonymous. The initial invitation email included a link to both the information sheet and the online survey that was accessed anonymously. The survey took participants 10 to 20 minutes to complete depending on their experiences.

4 *The Sample of Participants and the Sample of Cases*

The sample of participants and the cases reported by them in each phase of the study were different. Data collection for each phase took place seven years apart. Each phase concerned cases that were decided during different periods of time. Because participation in the study was anonymous it is impossible to determine how many participants contributed to both phases.

For each phase of the study approximately 800 family lawyers were emailed the invitation to participate and link to complete the online survey. In phase one 28 participants said that they had acted in pt VII parenting cases post-return to Australia under the *Convention*. There were 18 participants with this experience in phase two. Despite the disparity in the number of participants, the number of cases that they reported on was similar in each sample. In phase one the participants provided outcomes for 115 post-return pt VII parenting cases, whilst in phase two the figure was 102.

In phase one of the study 22 participants said that they had acted in one or more *Convention* return proceedings where the child was abducted from Australia (outgoing) or to Australia (incoming). This can be compared to 17 participants with this case experience in phase two. In phase one the

participants reported on 73 return cases, whilst in phase two the case number was slightly higher at 90. Given the specialised nature of *Convention* return proceedings and the complexity of parenting cases post-return to Australia, it is reasonable to assume that the number of lawyers with the requisite experience is small.

5 *Participant Characteristics*

The participants in both phases of the study possessed similar characteristics. In both phases just over half of the participants were female (57.1 per cent in phase one and 55.6 per cent in phase two). The participants in both phases had significant experience in this area of the law, which is to be expected given the complex nature of parenting cases arising after an act of international parental child abduction. In phase one 78.6 per cent, and in phase two 77.8 per cent, of participants had practised family law for 10 years or more. For most of the participants (89.3 per cent in phase one and 77.8 per cent in phase two), family law work comprised 76 per cent or more of their practice. Again, this is not surprising. In both phases of the study most of the participants' firms were located in capital cities (82.1 per cent in phase one and 83.3 per cent in phase two). Just under half of the participants in phase one (43 per cent) were accredited family law specialists. In phase two 55.6 per cent held this qualification. This may go some way to explaining why there were fewer participants with this qualification in phase two but a similar case sample size to phase one.

6 *Limitations*

The evaluation in each phase of the study was confined to cases where the child was abducted out of Australia by their primary carer mother. *Hague Convention* return proceedings then took place in a *Convention* country other than Australia. These proceedings resulted in the child being returned to Australia,[65] and the substantive parenting dispute went on to be determined through either a court order or a private agreement where there was some form of engagement with legal process.

Each phase focused predominately on the legal outcomes in cases referred to. The study's ability to obtain qualitative data about the factual outcomes experienced by abducting primary carer mothers and their children post-return was considerably restricted, as the study did not include parents as participants. A separate study would be necessary to obtain rich qualitative data about the experiences of abducting primary carer mothers and their children post-return. With this limitation in mind, however, some data was obtained from the family lawyer participants about the factual outcomes experienced.

[65] Children in relevant proceedings were returned to Australia either by order or negotiated agreement.

It is impossible to definitively establish whether this study obtained representative samples of family lawyer participants with the requisite experience across all case outcomes sought to be examined. This is because the entire population of Australian family lawyers with the requisite case experience is not readily identifiable. Self-identification was necessary. As a result, the participant samples and the case samples they reported on may not be truly representative. However, the study's findings are strengthened by the fact that for each phase the initial invitation to self-identify and participate was sent to a significant proportion of all Australian-based barristers and solicitors with family law experience.

B *Comparative Analysis: Phase One and Phase Two*

Because families with a history of international parental child abduction are likely to possess distinctive characteristics that make collaborative parenting difficult (for example, they may have high levels of ongoing inter-parental conflict which has resulted in the act of abduction), formulating a post-abduction parenting arrangement that is in the best interests of the child concerned can be a difficult task. The role of Australian courts and family dispute resolution practitioners in resolving these parenting disputes post-return is undoubtedly challenging. Examining the data from phase one and phase two of the study provides insight into general trends, emerging over time, in application of the statutory criteria to craft parenting arrangements that accommodate the circumstances and characteristics of families that have experienced international parental child abduction.

The participants in each phase of the study who had acted in post-return pt VII parenting cases where there was a history of abduction by the child's primary carer mother handled under the *Convention* were asked to divide their cases into two categories for reporting purposes. How these categories were defined differed between the two phases of the study as a result of changes to the law between the two relevant periods. In phase one the first category was 'final court orders (not including registered parenting agreements)', and the second category was 'registered and unregistered parenting agreements'. In phase two the first category was 'interim and/or final court orders (not including cases where the court's only involvement was approving a consent order)', and the second category was an 'agreement (encompassing informal agreements, parenting plans, and where the parties simply applied to the court for approval of a consent order)'.

Registered parenting plans (a form of private agreement made between parties) were no longer used at the time of any of the cases reported by

participants in phase two of the study.[66] A registered parenting agreement (parenting plan) did not require the court to determine the dispute in any way. Registration of this kind of agreement with the court was only conditional upon a third party lawyer signing the agreement to say that they had provided legal advice. Another important point to note is that a final court order technically encompasses both judicially determined final court orders and agreements known as consent orders. Consent orders were available at the time of the cases reported by the participants in both phases of the study. A consent order in this context contains the parenting agreement reached between the parties. When a consent order application is made to the court there is no hearing. However, a Registrar in chambers will determine whether or not the terms agreed to by the parties are in the best interests of the child, before granting what is technically considered a final order. In phase one the decision was made to include consent orders in the first category of cases; that is, final court orders (not including registered parenting agreements). However, consent orders were incorporated into the second category in phase two of the study; that is agreements (encompassing informal agreements, parenting plans, and where the parties simply applied to the court for approval of a consent order).

The decision was made to more distinctly separate cases that required judicial intervention in the form of a judicially imposed parenting arrangement, i.e. a final and/or interim order, and cases where the parties were able to ultimately negotiate an agreement, even if it was with assistance and in the form of a consent order that was reviewed by a Registrar in chambers. This classification hopefully gives a clearer picture of the balance of cases that could be resolved through agreement, even with some legal intervention, and those cases that truly required a high level of judicial intervention. This does mean that the phase one and phase two case samples are not precisely comparable, but the data nevertheless legitimately displays overall trends concerning how the equal shared parental responsibility and shared care statutory criteria have been applied over time since their introduction in 2006.

Examining the case samples from the two phases provides a qualitative picture of how the equal shared parental responsibility and shared care statutory criteria were applied to resolve parenting disputes where there was a history of international parental child abduction both four years and 10 years after their introduction. The value of the findings will be seen in the following analysis section of this article, which reports that the types of parenting arrangements reported in phase one and phase two varied quite significantly. It will be seen that this applied equally to post-return parenting arrangements reached through court order and private agreement.

[66] The ability to register parenting plans ended in 2003. However, unregistered parenting plans are still used informally by parties.

The study does not purport to provide a quantitative picture of the number of court order outcomes versus private agreement outcomes.

1 *Part VII Parenting Cases Post-Return to Australia*

Participants in phase one of the study had acted in a total of 115 pt VII parenting cases, whilst participants in the phase two had acted in 102. Note that in each phase participants were asked to include parenting cases that were resolved post-return to Australia either where the previous *Convention* return order was granted, or where a formal return order was not made despite one being initiated because the parties negotiated the child's return to Australia. Participants in phase one reported a total of 103 final court orders (not including registered parenting agreements). This means that the sample of 115 post-return pt VII parenting cases in phase one included 103 cases that resulted in a final court order. Participants in phase two of the study reported 59 interim and/or final court orders (not including cases where the court's only involvement was approving a consent order). This means that the sample of 102 post-return pt VII parenting cases in phase two included 59 cases that resulted in a final and/or interim order.[67]

In phase one only four of the participants said that cumulatively six of their cases resulted in a registered or unregistered parenting agreement about time spent with each parent. With 103 of the 115 phase one cases resulting in a final court order, and six cases resulting in a private agreement, the remaining six cases remained dormant[68] with no agreement reached or order made post-return to Australia. In phase two of the study all 18 participants had also acted in cases that resulted in an agreement concerning time spent with each parent (encompassing informal agreements, parenting plans, and cases where the parties simply applied to the court for approval of a consent order). Together they reported that a total of 43 of their cases had this outcome. This means that in the phase two case sample 59 cases resulted in a court order (excluding consent orders) and 43 cases were resolved through a private agreement (including consent orders).

If parties litigate or mediate their parenting dispute post-return to Australia, what type of court orders and private agreements are made through the application of the pt VII statutory criteria? The types of parenting arrangements reported in phase one and phase two of the study varied quite significantly. This applied equally to post-return parenting arrangements reached through private agreement and by court order (be it a judicially imposed order or consent order).

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[67] This difference is understandable given that consent orders were included in category two in phase two of the study.

[68] This means that the participant simply gave once-off legal advice to a party in those cases.

In phase one of the study participants reported the following final court orders (not including registered parenting agreements).[69] Of 103 post-return pt VII parenting cases within this category, in 25.5 per cent of cases, the children continued to live with their abducting primary carer mother and the father's contact remained the same as before the abduction. In 31.3 per cent of cases, the children continued to live with their abducting primary carer mother and the father's contact increased. In three per cent of cases, the children continued to live with the abducting primary carer mother and the father's contact decreased. In 13.1 per cent of cases, a 50 per cent shared time order was made. In 15.2 per cent of cases, the children changed to living with the left-behind father, and the once-abducting primary carer mother was permitted contact with the children. In one per cent of cases, the children changed to living with the left-behind father, and the once-abducting primary carer mother did not have any contact with the children. In 5.1 per cent of cases, the abducting primary carer mother was permitted to relocate back overseas with the children by consent. In 8.1 per cent of cases, the abducting primary carer mother was permitted to relocate back overseas with the children by court order.

This means that in phase one of the study, 28.3 per cent of the post-return pt VII final court order cases resulted in 50 per cent time order (shared care) or a change in the primary carer status, whilst in 60.6 per cent of cases the abducting primary carer mother's time with the children was decreased in some way. At the time of first reporting the phase one findings[70] it was predicted that these figures could increase over time, once the judiciary had grown accustomed to applying the equal shared parental responsibility and shared care statutory criteria.[71] After all, in the *Every Picture Tells a Story Report*, the House of Representatives Standing Committee on Family and Community Affairs 'concluded that the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. [Parents] should start with an expectation of equal care.'[72] However, as will be seen, the opposite appears to have occurred. Furthermore, in the phase one case sample, in only 13.2 per cent of the reported cases the primary carer mother was permitted to relocate back overseas with her children.[73] Relocation at that time appeared to be much less of an option for a primary carer mother once she had committed an act of international parental child abduction.

In phase two of the study participants reported the following final and/or interim court orders (not including cases where the court's only involvement was approving a consent order). Of 59 post-return pt VII

[69] Bozin, above n 7.
[70] Ibid.
[71] Ibid 629.
[72] House of Representatives Standing Committee on Family and Community Affairs, above n 35, 30.
[73] Bozin, above n 7.

parenting cases, in 13.5 per cent of cases the children continued to live with their abducting primary carer mother and the father's contact remained the same as before the abduction. In 13.5 per cent of cases, the child continued to live with their abducting primary carer mother and the father's contact increased. In no cases did the children continue to live with the abducting primary carer mother and the father's contact decrease, and no 50 per cent shared time orders were made. In 6.8 per cent of cases the children changed to living with the left-behind father and the once-abducting primary carer mother was permitted contact with the children. In 1.7 per cent of cases, the children changed to living with the left-behind father and the once-abducting primary carer mother did not have any contact with the children. In no cases was the abducting primary carer mother permitted to relocate back overseas with the children by consent. In 3.4 per cent of cases the order was classified as 'other'. In a significant 61.1 per cent of cases, the abducting primary carer mother was permitted to relocate back overseas with the children by court order.[74] This means that in phase two of the study no post-return pt VII final and/or interim order cases resulted in 50 per cent time order (shared care). A change in the primary carer status only occurred in 8.5 per cent of cases. In only 22.0 per cent of cases the abducting primary carer mother's time with the children was decreased in some way. However, in a significant 61.1 per cent of the cases in the sample the primary carer mother was permitted to relocate back overseas with her children. Whilst relocation after an act of international parental child abduction appeared less of an option in the cases reported in phase one of the study, the cases reported in phase two seem to indicate that Australian courts are now much more prepared to make an order providing for it in this context.

The phase one and phase two findings concerning court orders appear relatively consistent with Australian research into the incidence of shared care in the general population of separated couples. These Australian studies considered the broader population of parenting cases and were not confined to cases with a history of international parental child abduction. The first of these studies, conducted by Kaspiew et al,[75] showed that judicially determined cases involving shared care arrangements (where parenting time was specified in court orders) increased from four per cent before the 2006 reforms to 34 per cent after the 2006 reforms.[76] The second

[74] Out of these cases, in 49.2 per cent the left-behind parent's time became less frequent for longer periods and/or provided for time other than face-to-face, and in 11.9 per cent the left-behind parent's time with the child ceased.

[75] Kaspiew et al, above n 13.

[76] However, it is important to note that this surge in shared care arrangements isn't necessarily directly associated with the 2006 amendments, and there may be a multitude of reasons for this increase. For this study the pre-reform figures were from cases sampled from the Melbourne and Perth registries (of the Family Court of Australia, the then Federal Magistrates Court, and the Family Court of Western Australia). The post-reform figures are from cases sampled from the Melbourne, Perth, Brisbane and Sydney registries (of the

of these studies, by Smyth et al,[77] found that since the 2006 amendments, shared care parenting arrangements have plateaued at 15 percent of children of recently separated parents in the general population.[78] When considering shared care orders in the general population of separated couples, after an initial surge in court ordered shared care around the time of the introduction of the equal shared parental responsibility and shared care statutory criteria, the occurrence of such orders and agreements appears to have plateaued.

It is possible that another reason for the variation in the occurrence of shared care since the 2006 amendments, in cases with a history of international parental child abduction, is that Australian courts and family dispute resolution practitioners have developed a nuanced understanding of what the social science literature says about when shared care parenting arrangements are a good fit for a family, and in particular the implications of this literature for families in high conflict situations due to a prior act of international parental child abduction. For a shared care or substantial and significant care arrangement to work well, it is desirable that there is a high degree of collaborative parenting, and a minimal amount of inter-parental conflict.[79]

In phase one of the study participants reported the following registered and unregistered parenting agreements.[80] Of six post-return pt VII parenting cases with a private agreement outcome, in one case (16.6 per cent) the child continued to live with the abducting primary carer mother and the father's contact remained the same as before the abduction. In another two cases (33.3 per cent), the child continued to live with the abducting primary carer mother and the father's contact increased. In the remaining three cases (50 per cent), the abducting primary carer mother was able to relocate back overseas with the child. In phase one of the study, despite the sample of private agreements being very small, it appears that abducting primary carer mothers fared better in post-return private agreements compared to final orders.

In phase two of the study participants reported the following private agreement outcomes (encompassing informal agreements, parenting plans, and where the parties simply applied to the court for approval of a consent

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Family Court of Australia, the then Federal Magistrates Court, and the Family Court of Western Australia).

[77] Smyth et al, above n 14.

[78] Ibid 116. This study analysed Australian data from three different sources for parenting time trends pre- and post-reform. These sources were administrative data from the Australian Child Support Agency, survey data from three cohorts of recently separated parents registered with the Child Support Agency, and administrative data from the Family Court of Australia. At present these three sources contain the most recent nationally representative time-series data on shared-time parenting in Australia.

[79] See above n 8.

[80] Bozin, above n 7.

order). Of 43 post-return Part VII parenting cases with a private agreement outcome, in 23.3 per cent of cases the child continued to live with the abducting primary carer mother and the father's contact remained the same as before the abduction. In 14 per cent of cases the child continued to live with the abducting primary carer mother and the father's contact increased. Mirroring the court order outcomes, there were no private agreements that provided for a shared care parenting arrangement. In the remaining 41.8 per cent of cases the abducting primary carer mother was able to relocate back overseas with the child by consent. In 16.3 per cent of cases the child continued to predominantly live with the once-abducting mother and the other parent's time decreased. In 2.3 per cent of cases the mother relocated without the child, and in 2.3 per cent of cases the participant labelled the outcome as 'other'.

Interestingly, in phase two of the study the abducting primary carer mother was in fact permitted to relocate back overseas with the child more frequently by final court order (61.1 per cent) than by private agreement (41.8 per cent). In the case sample in phase one, the abducting primary carer mother's prospects of being able to relocate after she had committed an act of international parental child abduction was minimal (13.2 per cent), and significantly lower than in phase two (61.1 per cent).[81] In 2003 the House of Representatives Standing Committee on Family and Community Affairs anticipated a narrowing of the exercise of discretion to determine a child's best interests when a parent makes a relocation application due to the statutory criteria.[82] For example, the Committee suggested that 'truly shared parental responsibility will inevitably mean that relocation of one parent, whether the primary carer or the other parent, should be less of an option'.[83]

The case outcomes reported in phase one of the study appear to indicate that applications to relocate were less likely to succeed within the four-year period after the introduction of the equal shared parental responsibility and shared care statutory criteria.[84] However, the case outcomes reported in

[81] Ibid.
[82] House of Representatives Standing Committee on Family and Community Affairs, above n 35, 33.
[83] Ibid.
[84] See Bozin, above n 7, 628-9. Regarding relocation see generally the Hon Justice Tim Carmody, 'International Judicial Perspectives on Relocation: Child Relocation and Intractable International Family Law Problem' (2007) 45 *Family Court Review* 214; Patrick Parkinson, 'The Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *Australian Journal of Family Law* 35; Juliet Behrens, Bruce Smyth and Rae Kaspiew, 'Australian Family Law Court Decisions on Relocation: Dynamics in Parents' Relationships Across Time' (2009) 23(3) *Australian Journal of Family Law* 222; Juliet Behrens, Bruce Smyth and Rae Kaspiew, 'Outcomes in Relocation Decisions: Some New Data' (2010) 24(1) *Australian Journal of Family Law* 97; Juliet Behrens and Bruce Smyth, 'Australian Family Law Court Decisions about Relocation: Parents' Experiences and Some Implications for Policy' (2010) 38 *Federal Law Review* 1; Vicki Kordouli, 'Relocation: Balancing the Judicial Tightrope' (2006) 20(1) *Australian Journal of Family Law* 89; Patrick Parkinson,

phase two of the study appear to suggest that more recently, a primary carer mother who has committed an act of abduction is not automatically censured for that action. It is possible that greater weight is now being placed upon her right to freedom of movement. Higher rates of permitted relocation after an act of international parental child abduction may also be an indication of a growing understanding that these families' functional attributes can mean shared care is not a good fit. The next part of this article reports some qualitative data concerning the characteristics of families involved in international parental child abduction cases handled under the *Convention*.

2 *Return Proceedings under the Hague Child Abduction Convention*

Participants in phase one of the study had acted in a total of 73 *Convention* return proceeding where the child was abducted from Australia (outgoing) or to Australia (incoming),[85] whilst participants in phase two had acted in 90. The responses to questions asked of this category of participants provide some insight into the personal circumstances experienced by abducting primary carer mothers and these families more broadly post-return.

Participants were asked what they believed to be the main reasons why primary carer mothers abduct their children overseas. They could agree with more than one of the answer options provided in the survey. 'A desire to return to their homeland' was a significant motivation given for the primary carer mother's abduction in 72.7 percent of cases reported in phase one, compared to 58.8 per cent of cases in phase two. 'A desire to regain a family and/or social support network' was a reason for the abduction according to participants in 63.3 per cent of cases in phase one, and 41.2 per cent of cases in phase two. 'A desire to escape domestic violence' was given as a reason for the primary carer mother's abduction in 45.5 per cent of cases in phase one, and 47.1 per cent of cases in phase two. 'A desire to improve their economic situation' was also common, and was provided as a motivation in 36.4 per cent of cases in phase one and 47.1 per cent of cases in phase two. 'A desire to deprive the left-behind parent of contact with the child' was offered as a reason in 27.3 per cent of cases in phase one, compared to 29.4 per cent of cases in phase two. Finally the most common reason given for the 'other' category of motivations for the act of

'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36 *Federal Law Review* 145; Patricia Easteal and Kate Harkins, 'Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act (Pre and Post-2006)' (2008) 22 *Australian Journal of Family Law* 259; Partick Parkinson, Judith Cashmore and Judi Single, 'Mothers Wishing to Relocate with Children: Actual and Perceived Reasons' (2011) 27(1) *Canadian Journal of Family Law* 11.

[85] Bozin, above n 7.

abduction was to follow a new relationship and be with a new partner (18.2 per cent of cases in phase one, and 23.5 per cent of cases in phase two).

To examine the gendered nature of international parental child abduction[86] participants were asked what percentage of abductions were by the child's primary carer mother in the *Convention* return cases in which they had acted. In phase one of the study 17 (77.3 per cent) participants said between 76 per cent and 100 per cent of their cases involved abductions by the primary carer mother. This indicates that there has been a feminisation of international parental child abduction since the *Convention*'s inception.[87] Four (18.2 per cent) participants said that 51 per cent to 75 per cent of their cases concerned abductions by the child's primary carer mother, and one participant (4.5 per cent) placed this figure between one per cent and 25 per cent. In phase two of the study 10 (58.8 per cent) participants said 76 per cent to 100 per cent of their cases involved abductions by the child's primary carer mother, whilst two (11.8 per cent) participants said 51 per cent to 75 per cent of their cases had this characteristic, three (17.6 per cent) participants said 25 per cent to 50 per cent, and two (11.8 per cent) participants said between one per cent and 25 per cent. It is important to note that this sample size is relatively small, and the case outcomes reported in this article concerning resolution of the substantive parenting dispute post-return to Australia all involved a prior abduction by the child's primary carer mother.

Participants in each phase of the study were asked about the immigration status of the abducting primary carer mother post-return to Australia in

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[86] See also Nigel Lowe, 'A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part 1 – Overall Report' (Preliminary Document 3, Hague Conference on Private International Law, October 2006) 22; Nigel Lowe, 'A Statistical Analysis of Applications Made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part 1 – Overall Report' (Preliminary Document 3 – 2007 Update, Hague Conference on Private International Law, September 2008) ('2007 Update'); Bozin, above n 7, 609.

[87] Schuz, above n 10; Taryn Lindhorst and Jeffrey Edleson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Northeastern University Press, 1st ed, 2012); Jeffrey Edleson and Taryn Lindhorst, 'Research for the Real World: Mothers and Children Seeking Safety in the US: A Study of International Child Abduction Cases Involving Domestic Violence' (Speech delivered at the NIJ Research for the Real World Seminar, National Institute of Justice, 12 October 2010 <http://nij.gov/nij/multimedia/presenter/presenter-edleson/data/resources/presenter-edleson-transcript.htm>; Linda Silberman, 'The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues' (2000) 33 *New York University Journal of International Law and Politics* 221; Regan F Grilli, 'Domestic Violence: Is it Being Sanctioned by the Hague Convention?' (1997) 4(1) *Southwestern Journal of Law and Trade in the Americas* 71; Miranda Kaye, 'Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four' (1999) 13(2) *International Journal of Law, Policy and the Family* 191; Merle H Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000-2001) 69 *Fordham Law Review* 593.

their cases. In phase one participants provided a visa status for 29 cases. In 11 cases (37.9 per cent) the abducting primary carer mother was an Australian citizen. In 14 cases (48.3 per cent) they were an Australian permanent resident. In four (13.8 per cent) they were on an Australian visa classed as temporary.[88] Consequently, 13.8 per cent of the primary carer mothers in the cases reported did not enjoy the certainty of a permanent visa and its accompanying substantive rights post-return to Australia. In phase two participants provided visa status for 63 cases. In 38 cases (60 per cent) the abducting primary carer mother was an Australian citizen. In 13 cases (21 per cent) the abducting primary carer mother was an Australian permanent resident. In 12 cases (19 per cent) the abducting primary carer mother was on a temporary Australian visa. Therefore, 19 per cent of the primary carer mothers in the phase two case sample did not enjoy the certainty of a permanent visa and its accompanying substantive rights post-return to Australia.

Participants were asked if they knew the reasons why the abducting primary carer mothers in the cases in which they had acted chose not to formally seek to relocate back overseas post-return to Australia. When comparing the phase one and phase two parenting case outcomes post-return to Australia, we see that relocation appears now to be more of an option than it was previously. In phase one 10 participants, and in phase two five participants, provided a response to this question. The most common reason provided in these cases was 'a belief that they would be unsuccessful because of their previous abduction'. This was a reason given for 60 per cent of these cases in phase one compared to 80 per cent of these cases in phase two of the study. 'Emotional fatigue' (50 per cent of these cases in phase one and 20 per cent of these cases in phase two) and 'the financial cost' (50 per cent of these cases in phase one and 40 per cent of these cases in phase two) were also reasons. 'A fear that the court would deny their relocation application and increase the other party's contact with the child' was provided as a reason in 40 percent of these cases in phase two, but no cases in phase one. The judicially determined post-return court order outcomes reported earlier indicate that this fear may be unfounded if the factual circumstances of the case are such as to warrant relocation.

IV CONCLUSION

Examining the application of the statutory criteria contained in pt VII of the *Family Law Act* in parenting cases post-return to Australia under the *Convention* is a valuable exercise given that families that experience

[88] Despite having identified 37 cases, participants only answered this question in relation to 29 cases. This discrepancy is understandable given the family lawyer may not have been aware of, or recalled, the immigration status of the primary carer post-return, especially given that their involvement may have simply involved drafting affidavits for overseas *Convention* return proceedings for the left-behind parent.

international parental child abduction are likely to possess distinctive characteristics that make shared care arrangements less desirable. What type of court orders and private agreements are made through the application of statutory criteria for families that have exhibited a history of high levels of inter-parental conflict and a lack of child-focused collaborative co-parenting, given that the criteria facilitate equal shared parental responsibility and shared care parenting?

The reported two-phased study examining how parenting arrangements are formulated after the return of a child to Australia under the *Convention* has revealed that the kind of parenting orders and agreements being made over time has varied quite significantly. When comparing the case outcomes prior to 2010 (phase one) with the case outcomes reported between 2010 and 2016 (phase two), shared care arrangements occurred for families in the case sample in phase one, but not those in phase two. Ten years since the introduction of the equal shared parental responsibility and shared care statutory criteria, case outcomes seem to be aligned with what we know from the social science literature: that for a shared care parenting arrangement to work most effectively it is desirable that the parents have freely opted into the arrangement, maintain homes within close proximity and exhibit low levels of inter-parental conflict so that they can adopt a child-focused collaborative co-parenting approach.[89]

Despite the House of Representatives Standing Committee on Family and Community Affairs in the *Every Picture Tells a Story Report* suggesting in 2003 that 'the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time…[and that parents] should start with an expectation of equal care',[90] families who have a history of international parental child abduction have been appropriately situated outside the majority. As lawyers, the judiciary and family dispute resolution services have grappled with how best to apply the equal shared parental responsibility and shared care statutory criteria, it has become apparent that even relocation after an act of international parental child abduction is becoming more frequent. Rather than censuring a primary carer mother for her prior act of abduction there may be greater weight attached to an applicant primary carer mother's right to freedom of movement, and a greater understanding of the motivations for an act of abduction and the gendered nature of international parental child abduction. The emerging trends seem to indicate that over time Australian courts and family dispute resolution practitioners have developed a nuanced understanding of when shared care parenting arrangements are a desirable fit for families with a history of international parental child abduction.

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[89] See above n 8.

[90] House of Representatives Standing Committee on Family and Community Affairs, above n 35, 30.