International Academy of Family Lawyers

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28th November 2016

Dear Mr. Freedman,

The International Academy of Family Lawyers, pursuant to Article 24 of its bylaws and by the recommendation of its Amicus Committee chaired by Edwin Freedman, adopt the positions stated in the amicus brief attached hereto.

With best wishes,

Nancy Zalusky Berg
President, IAFL

IN THE COURS DE CASSATION OF FRANCE

No. T15-26664

Appellant: Emma Bowie
vs.
Respondent: Jean-Rene Louis Antoine Gaslain

Amicus Curiae Brief: Submitted by The International Academy of Family Lawyers
Filed in Support of Appellant, Emma Bowie

Introduction: The International Academy of Family Lawyers (IAFL) is a not-for-profit association of specialist family lawyers practicing in over 50 countries. Fellows of the IAFL are elected on the basis of their experience in family law and standing in their own jurisdictions. The IAFL has over 700 fellows worldwide. It has observer status at the Hague Conference on Private International Law and its fellows have participated in the Special Commissions of the 1980 Abduction Convention.

The IAFL has submitted amicus curiae briefs in other jurisdictions. The first was submitted in the United States Supreme Court in the case of Lozano vs. Montoya, 134 S. Ct. 1224 (2014). A brief was also submitted in the Supreme Court of the United Kingdom in a case entitled In The Matter of AR (Children) (Scotland), UKSC 2015/0048.

The IAFL's application to submit a brief in this case is made on the basis that the collective knowledge and experience of its Fellows would enable us to present to the Court practical information concerning the aspects of parental visitation as they are applied in other jurisdictions.

The question put before the Fellows was: How do the courts in your jurisdiction treat applications for visitation made by a parent living abroad to have visitation with their minor child where the custodial parent objects to visitation in the foreign state?

Set out below are the responses from various jurisdictions. The names which appear below each country heading are those of the contributing Fellow of that country.

FRANCE

Observations Amicus Curiae IAFL

I. Le maintien des relations personnelles de l'enfant avec ses deux parents dans le milieu dans lequel ils vivent est un élément de l'intérêt supérieur de l'enfant et du droit au respect de la vie familiale protégé par l'article 8 :

A. Rappel des textes

1) Convention internationale de NY (26 janvier 1990) relative aux droits de l'enfant :

Le texte de la Convention est à juste titre visé dans le mémoire ampliatif pour Mme BOWIE. Il convient de rappeler que les articles 3 et 9 sont eux aussi parfaitement utiles à la discussion sur la nécessité du maintien d'un contact avec les deux parents dans l'intérêt de l'enfant :

Art. 3. - 1. Dans toutes les décisions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, **l'intérêt supérieur de l'enfant doit être une considération primordiale**.

Art. 9. - 1. Les États parties veillent à ce que l'enfant **ne soit pas séparé de ses parents contre leur gré,** à moins que les autorités compétentes ne décident, sous réserve de révision judiciaire et conformément aux lois et procédures applicables, que **cette séparation est nécessaire dans l'intérêt supérieur de l'enfant**.
Une décision en ce sens peut être nécessaire dans certains cas particuliers, par exemple lorsque les parents maltraitent ou négligent l'enfant, ou lorsqu'ils vivent séparément et qu'une décision doit être prise au sujet du lieu de résidence de l'enfant.

(...)
3. Les **Etats parties respectent le droit de l'enfant séparé de ses deux parents ou de l'un d'eux d'entretenir régulièrement des relations personnelles et des contacts directs avec ses deux parents**, sauf si cela est contraire à l'intérêt supérieur de l'enfant.
(...)
Art. 10. - 1. Conformément à l'obligation incombant aux États parties en vertu du paragraphe 1 de l'article 9, toute demande faite par un enfant ou ses parents en vue d'entrer dans un Etat partie ou de le quitter aux fins de réunification familiale est considérée par les Etats parties dans un esprit positif, avec humanité et diligence. Les Etats parties veillent en outre à ce que la présentation d'une telle demande n'entraîne pas de conséquences fâcheuses pour les auteurs de la demande et les membres de leur famille.
2. **Un enfant dont les parents résident dans des Etats différents a le droit d'entretenir, sauf circonstances exceptionnelles, des relations personnelles et**

des contacts directs réguliers avec ses deux parents. A cette fin, et conformément à l'obligation incombant aux Etats parties en vertu du paragraphe 2 de l'article 9, les États parties respectent le droit qu'ont l'enfant et ses parents de quitter tout pays, y compris le leur, et de revenir dans leur propre pays. **Le droit de quitter tout pays ne peut faire l'objet que des restrictions prescrites par la loi qui sont nécessaires pour protéger la sécurité nationale, l'ordre public, la santé ou la moralité publiques, ou les droits et libertés d'autrui, et qui sont compatibles avec les autres droits reconnus dans la présente Convention.**

Art. 11. - 1. Les États parties prennent des mesures pour lutter contre les déplacements et les non-retours illicites d'enfants à l'étranger.

2. A cette fin, les États parties favorisent la conclusion d'accords bilatéraux ou multilatéraux ou l'adhésion aux accords existants.

Il doit être noté que les juridictions françaises donnent un effet immédiat à la Convention de NY relative aux droits des enfants selon un mouvement jurisprudentiel amorcé par la cour de Cassation en 2005. (*Cass Civ 1re, 13 mars 2007, 06-17869*)

2) Règlement (CE) n°2201/2003 du Conseil du 27 novembre 2003 dit « Bruxelles II bis »

Selon le guide pratique pour l'application du Règlement émis par la Commission européenne :

« L'un des principaux **objectifs du règlement est de garantir qu'un enfant puisse, tout au long de son enfance, maintenir des relations avec tous les titulaires de la responsabilité parentale** même lorsque ceux-ci sont séparés et vivent dans différents Etats membres. » Article 3.6.1

3) Charte des droits fondamentaux de l'UE

Article 24.3

« Tout enfant a le **droit d'entretenir régulièrement des relations personnelles et des contacts directs avec ses deux parents**, sauf si cela est contraire à son intérêt. »

4) Code civil français

Article 373-2-6 :

« Le juge du tribunal de grande instance délégué aux affaires familiales règle les questions qui lui sont soumises dans le cadre du présent chapitre en veillant spécialement à la sauvegarde des intérêts des enfants mineurs.

Le juge peut prendre les mesures permettant de **garantir la continuité et l'effectivité du maintien des liens de l'enfant avec chacun de ses parents**.

Il peut notamment ordonner l'interdiction de sortie de l'enfant du territoire français sans l'autorisation des deux parents. Cette interdiction de sortie du territoire sans l'autorisation des deux parents est inscrite au fichier des personnes recherchées par le procureur de la République. »

B. Rappel de la Jurisprudence de la CEDH sur l'importance des contacts avec chacun des parents

NB : certains arrêts cités ne traitent pas directement d'enlèvement mais ils renforcent notre raisonnement par un effet d'analogie.

1) Rappel : Dans les décisions qui concernent l'enfant son intérêt supérieur doit être la considération déterminante.

   - *CEDH X c/ Lettonie 13 décembre 2011 n°27853/09:* Les juridictions lettones (Etat requis) ont ordonné le retour de l'enfant vers l'Australie. La CEDH condamne la Lettonie sur le fondement de l'article 8: c'est **toujours l'intérêt de l'enfant qui doit constituer la considération déterminante quand bien même la décision litigieuse repose sur une base légale et poursuit un objectif légitime** y compris dans les procédures prévues par la Convention de La Haye. Les tribunaux saisis sont donc tenus d'examiner minutieusement la situation de la famille dans son ensemble et ce même s'ils ne sont pas censés se prononcer sur le droit de garde de l'enfant.

   - Idem *SEERSONE KAMPANELLA c/ Italie* avec la particularité que le retour était ordonné sur le fondement du Règlement Bruxelles II bis.

2) La CEDH est constante sur le point de dire que **le fait d'être ensemble** pour un parent et son enfant est un **élément fondamental de la vie familiale** et que les mesures internes qui y mettent obstacle constituent une ingérence dans le droit au respect de la vie familiale protégé par l'article 8.

   - *CEDH Olsson c/ Suède, 24 mars 1988 :* porte atteinte au droit de l'article 8 la **réduction ou la suppression des droits de visite d'un parent** à son enfant placé. La CEDH reconnaît la nécessité du placement des enfants mais considère qu'il y a eu violation de l'article 8 par le fait que le **placement dans des lieux différents et éloignés de leurs parents a nui à la possibilité de contacts entre eux et est allé à l'encontre du but ultime d'unir à nouveau la famille**.

   - En cas de **séparation parentale**, la Cour européenne énonce clairement que l'article 8 **inclut le droit pour le parent divorcé non investi du droit de garde de rendre visite à son enfant ou d'avoir des contacts avec lui** *(CEDH, Fourchon c/ France, 28 septembre 2005).*

   - *CEDH 1er déc. 2005, Tuquabo-Tekele et a. c/ Pays-Bas (n° 60665/00)* : Le couple parental vit aux Pays-Bas depuis un certain nombre d'années et a obtenu la nationalité néerlandaise. Ils ont deux enfants qui ne connaissent guère le pays d'origine de leurs parents. En conséquence, la Cour considère que le meilleur moyen, pour les requérants, de **développer une vie familiale** est de faire venir M., fils de Monsieur né d'un premier lit, aux Pays-Bas.

   - *CEDH 20 mai 2008, Gülmez c/ Turquie (n° 16330/02 § 50) :* **Aucune punition disciplinaire ne devrait inclure une interdiction totale de contacts familiaux.**

3) Le maintien de contacts avec les autres membres de la famille (vivant à l'étranger, dans l'Etat où réside le parent privé de la résidence principale) est également une composante de l'intérêt supérieur de l'enfant :

   - *CEDH Akin c / Turquie 6 avril 2010 n°4694/03 :* Atteinte à la vie familiale d'un enfant qui, compte tenu d'un placement séparé chez chacun des parents, **n'a jamais eu la possibilité de passer du temps avec sa sœur.** La Cour note également la violation du père qui n'a pas pu profiter la compagnie de ses deux enfants en même temps.

4) Si l'intérêt du parent n'est pas déterminant dès lors que c'est l'intérêt supérieur de l'enfant qui doit primer, toujours est-il que c'est une considération « dans la balance » :
   - *CEDH 6 juillet 2010 NEULINGER et SHURUK c/ Suisse :* La décision qu'un enfant de sept ans, qui avait été illégalement amené en Suisse par sa mère en 2005, doive retourner en Israël n'est pas compatible avec l'intérêt supérieur de l'enfant. Au paragraphe 134 la CEDH relève **« l'intérêt des parents, à bénéficier d'un contact régulier avec l'enfant reste un facteur dans la balance des intérêts en jeu ».**

C. Rappel de la jurisprudence interne

1) Argument selon lequel il est dans l'intérêt de l'enfant, pour son développement personnel (etc…), de pouvoir **voyager librement** et avoir **accès à une double culture** :

   - *CA Nancy 26 juin 2015 n°15/01471 :* Il est important que **l'enfant connaisse la patrie natale de son père qui constitue ses origines**. Il convient par conséquent d'infirmer le jugement et de débouter la mère de sa demande d'interdiction de sortie de l'enfant du territoire sans l'autorisation des deux parents.

   - *CA Versailles 27 mars 2014 n° 13/01975* : CA a estimé qu'il n'y avait **pas lieu à interdire la sortie du territoire de l'enfant sans l'accord de ses deux parents,** dans une espèce dans laquelle la mère était de nationalité française, n'avait aucune autre nationalité, était propriétaire d'un appartement à Paris et n'avait aucune attache dans un autre pays, autre qu'un frère marié vivant en Australie ; elle avait pris l'initiative de saisir le juge lorsque son employeur lui avait proposé une mutation en Australie et avait renoncé au projet au vu de la décision intervenue la déboutant de sa demande de transfert de la résidence de l'enfant à l'étranger. La mère faisait part de ses difficultés pour emmener l'enfant en voyage à l'étranger au regard du refus du père d'autoriser ces séjours. Selon la cour d'appel, aucun élément en l'espèce ne justifiait le maintien de l'interdiction de sortie de territoire et il était au contraire de l'**intérêt de l'enfant de voyager librement en vacances à l'étranger avec chacun de ses parents**.

2) Plusieurs cours d'appel ont rappelé le droit de l'enfant à entretenir des liens avec chacune des branches de sa famille, y compris avec celle dont les membres résident à l'étranger.

   - *CA AIX EN PROVENCE 3 mars 2016 n°14/22886 :* Le jugement est confirmé en ce qu'il a débouté la mère de sa demande d'interdiction de sortie des enfants du territoire français sans l'autorisation des deux parents. Les fillettes sont âgées de 3 et 6 ans. Le père réside en Israël et ses capacités éducatives ne sont pas remises en cause. S'il ressort de plusieurs attestations qu'il n'était pas très présent dans le quotidien de ses filles au moment de la vie commune, la volonté qu'il manifeste aujourd'hui de les voir en dépit de l'éloignement des domiciles parentaux démontre son attachement à leur égard. **Il est par ailleurs légitime que le père souhaite recevoir ses enfants dans son environnement habituel, afin notamment que ses filles ne soient pas privées de tout contact avec leur famille paternelle**, et plus particulièrement avec leur grand-père qui est dans l'incapacité de se déplacer en France.

- *CA Amiens 17 novembre 2010 RG n°10/01744 :* « Il ne serait pas dans l'intérêt supérieur de l'enfant que celui-ci soit **privé de son droit à connaître ses racines algériennes et à bénéficier de la richesse d'une double culture**. »
- *CA Limoges 7 juillet 2008 n° 07/01221 :* la Cour confrontée à une telle situation, procède à une analyse particulièrement minutieuse de l'intérêt de l'enfant dans laquelle la **volonté de celui-ci** joue un rôle essentiel. Dans cette décision la cour fait observer que, « quel que soit le lieu fixé pour être la résidence habituelle des enfants, ceux-ci ne peuvent se construire sans **conserver des liens étroits avec le parent chez qui ils ne vivront pas;** qu'il s'ensuit que chaque parent doit respecter l'autre et conforter les enfants dans ce même respect, et ce quels que soient le mode de vie et la culture de chacun; que l'observance de ce principe ne peut d'ailleurs, en l'espèce, que conduire les enfants à un **enrichissement** d'autant qu'il ressort de l'ensemble des éléments du dossier que les parents sont tous deux aimants, dotés l'un et l'autre de capacités éducatives certaines et en mesure en outre de leur apporter, de par leur personnalité et leurs intérêts propres, une ouverture certaine sur le monde extérieur ».

  La Cour constate ensuite « qu'il ressort de l'audition des enfants, dont il convient de rappeler qu'ils ont vécu en Turquie jusqu'en 2004, date à laquelle l'un était âgé de dix ans et l'autre de sept ans, qu'ils se sentent encore déracinés en France et regrettent leur vie à Istanbul; **que leur père leur manque, comme leur manquent les relations, selon eux très chaleureuses, qu'ils entretenaient avec leur famille turque**... ».
- *CA Amiens 28 février 2006 RG n° 02/02889 :* La Cour souligne que « l'intérêt des enfants réside dans le **maintien des liens tant avec leurs parents qu'avec leurs familles maternelles et paternelles respectives et la connaissance du pays d'origine de leurs parents** »

3) On trouve également dans la jurisprudence des juges du fond une méfiance vis-à-vis du risque que le mécanisme de l'interdiction de sortie de territoire soit détourné pour servir avant tout à limiter les contacts de l'enfant avec son parent résidant à l'étranger :

   - *CA CAEN 6 juin 2013 (n°12/02331) :* « Il sera tout aussi utilement rappelé que l'usage par l'un des parents du droit d'autoriser la sortie des enfants du territoire français ne s'entend qu'au regard des exigences de leur intérêt et des nécessités de la sauvegarde de la continuité et de l'effectivité de leurs liens avec chacun de leurs parents, et serait dénaturé, au point de pouvoir en remettre en cause l'institution, en cas d'**usage abusif aux fins de limiter la liberté d'aller et venir de l'autre parent** ».

Il ressort de l'ensemble de ces éléments du droit positif que l'interdiction de sortie du territoire, de par ses conséquences, constitue une atteinte aux droits de l'article 8.

L'Interdiction de sortie de territoire est un **facteur de dissymétrie entre les parents** : le juge en ordonnant l'IST, conformément à la faculté qui lui est donnée par 373-2-6, ne garantit pas le maintien du lien avec l'enfant vis-à-vis du parent qui vit à l'étranger.

Il faut donc que la mesure passe le test de l'atteinte aux droits de l'article 8.

II. Une atteinte à ce droit doit être prévu par la loi, poursuivre un but légitime et nécessaire dans une société démocratique :

L'atteinte à la vie familiale peut toutefois échapper à la qualification de « violation » de l'article 8 de la Convention si elle satisfait aux conditions cumulatives de l'alinéa 2:

- en étant prévue par la loi,
- en poursuivant un but légitime,
- et en étant nécessaire dans une société démocratique.

Si les deux premières conditions sont généralement réunies, la **troisième donne lieu à un contrôle de proportionnalité de la Cour européenne**.

A. Le but légitime affiché de l'interdiction de sortie de territoire repose sur le maintien des relations avec chacun des parents : quid alors du maintien des relations avec le parent géographiquement éloigné ?

En effet le but légitime de la mesure d'interdiction de sortie de territoire est d'assurer le **maintien des relations avec chacun des parents** en prévenant tout risque d'enlèvement.
Cet objectif découle d'une **obligation positive** à la charge des Etats parties à la CEDH.
En effet, il appartient à chacun des Etats signataires de la CEDH de **se doter d'un arsenal juridique adéquat et suffisant** pour assurer le respect des obligations positives qui lui incombent en vertu de l'article 8 de la Convention, consistant en particulier à permettre le maintien des liens de l'enfant avec chacun de ses parents. (CEDH *Zavrel c/ République tchèque, 18 janvier 2007, et CEDH Lafargue c/ Roumanie, 22 juillet 2006*)

Si cet objectif de maintien des relations semble assuré du point de vue du parent avec qui les enfants résident, on peut se demander ce qu'il en est des mesures mises en place vis-à-vis du parent résidant à l'étranger.
Comment est garantie la qualité et la continuité des relations de l'enfants vis-à-vis de ce parent géographiquement éloigné ?
C'est précisément là qu'apparait la dysmétrie que crée entre les parents le mécanisme de l'interdiction de sortie du territoire lorsqu'il n'est pas utilisé à bon escient.
On peut donc se demander s'il ne serait pas nécessaire de rappeler aux Etats que les textes les contraignent également à assurer l'effectivité du lien vis-à-vis des parents éloignés.

B. La question de la proportionnalité de la mesure : l'interdiction de sortie du territoire n'est pas toujours strictement nécessaire

Il convient ici de rappeler que le contrôle de la proportionnalité de la mesure consiste notamment à s'assurer qu'aucune autre mesure, moins attentatoire à la vie familiale, ne peut intervenir pour aboutir au résultat escompté.

Or le renforcement des mécanismes de lutte contre le déplacement illicite d'enfants est un facteur de dissuasion à l'enlèvement.

Cette affirmation ressort d'ailleurs directement du guide pratique pour l'application du Règlement Bruxelles II Bis émis par la Commission européenne puisqu'il y est affirmé, dans un article 4.1.2 précisément intitulé « Dissuasion de l'enlèvement parental d'enfants » que : « La Convention de La Haye de 1980 et le Règlement ont pour objectif commun de dissuader les enlèvements parentaux d'enfants entre Etats membres ».
Il est donc contestable que l'interdiction de sortie du territoire soit la mesure la « moins attentatoire à la vie familiale » pour lutter contre cette pratique puisque que d'autres instruments de prévention existent déjà.

- Une jurisprudence récente illustre d'ailleurs la faculté du juge de rejeter une demande d'interdiction de sortie de territoire en raison de l'existence d'un mécanisme garantissant le retour :

  - *CA VERSAILLES 12 mai 2016 n°15/06315 :* À défaut d'établir un risque concret et avéré d'enlèvement des enfants, **la mère n'est pas fondée en sa demande de maintien de l'interdiction de sortie du territoire national sans l'autorisation des deux parents**. La mère est de nationalité française et le père de nationalité française et hongroise, leurs trois enfants ayant la double nationalité française et hongroise. Les enfants, bilingues, bénéficient d'une double culture. Il est de leur intérêt de pouvoir entretenir ce précieux héritage. S'il est toujours possible d'imaginer que le père pourrait s'installer dans son pays d'origine et y emmener les enfants, il convient de constater qu'à l'occasion des voyages effectués à l'étranger avec l'autorisation de la mère, il a toujours ramené les enfants en France alors qu'il aurait pu les emmener en Hongrie. **Ce pays est lié par la signature de la Convention de La Haye relative aux enlèvements internationaux d'enfants ce qui constitue un frein à toute intention frauduleuse.** Ainsi, le seul fait que les enfants soient rattachés par des liens administratifs à la Hongrie est insuffisant pour caractériser un risque de départ vers ce pays.

- On peut par ailleurs rappeler la manière dont Bruxelles II Bis renforce le mécanisme du retour (par rapport à la Convention de La Haye) :

  - Célérité accrue (article 11-3 précise que la procédure en vue du retour doit être mise en place en « utilisant les procédures les plus rapides prévues par le droit national ») ;

  - Dès lors que selon l'Article 11(4) du of Règlement, le juge de l'Etat destinataire ne peut pas refuser le retour de l'enfant sur le fondement de l'Article 13(1) b) s'il est établi que des mesures adéquates ont été prises pour assurer la protection de l'enfant après son retour ;

  - Et surtout Bruxelles II bis met en place un mécanisme par lequel les tribunaux de l'Etat requérant conservent leur compétence sur l'enfant. Tout jugement rendu par ces tribunaux sera **automatiquement exécutoire dans l'Etat requis (notamment par le biais des certificats de l'article 42)**.

- A contrario d'ailleurs, il arrive que les juges tiennent compte du risque que la situation échappe aux mécanismes de lutte contre l'enlèvement prévus par les traités pour décider du maintien de l'interdiction de sortie du territoire :

- *CA Versailles 6 décembre 2012 :* il n'y a pas lieu de lever l'interdiction de sortie du territoire national ; (…) la mère mentionne, sans en apporter la preuve, mais sans être démentie par le père, **que ce dernier a engagé à son insu des démarches pour l'acquisition de la nationalité marocaine par ses fils, ce qui rendrait impossible tout retour forcé sur le territoire national (…) ».**

Conclusion

Il ressort des textes applicables et de la jurisprudence que le maintien des relations personnelles de l'enfant avec ses deux parents dans le milieu dans lequel ils vivent est une composante de l'intérêt supérieur de l'enfant et du droit au respect de la vie privée et familiale protégé par l'article 8 de la CEDH.

Les mesures que les Etats doivent prendre pour garantir la pérennité des relations parent /enfant devraient donc également préserver le lien avec le parent non gardien qui vit à l'étranger.

L'intérêt du maintien des contacts avec le parent non gardien dans le pays dans lequel il vit est multiple:

- Assurer la qualité de la relation parent/enfant (le parent vivant à l'étranger reçoit ses enfants chez lui et les enfants ont accès à son quotidien) ;
- L'enfant bénéficie d'une double culture ;
- L'enfant maintien des liens avec la branche familiale qui réside à l'étranger.

L'atteinte aux droits à la vie privée et familiale et à l'intérêt supérieur de l'enfant, que constitue, dans certains cas, l'inscription d'une interdiction de sortie de territoire, doit être parfaitement nécessaire pour qu'il n'y ait pas violation des principes fondamentaux protégés par la Cour Européenne des Droits de l'Homme.

Cette nécessité est d'autant plus contestable dans les cas où le risque allégué d'enlèvement se situe dans un Etat signataire non seulement de la Convention de La Haye de 1980 mais aussi du Règlement Bruxelles II Bis qui renforce considérablement les mécanismes de retour de l'enfant par rapport à cette Convention.

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United States:

I. Interests of the Minor Children

In USA family law judges take evidence during contested child custody trials. They then issue judgments which allocate parental rights and responsibilities, including legal and physical custody, the latter now often called "parenting time".

In today's world children are more often born of two parents who are from different backgrounds, nations, and religions.[1] Each country has, over centuries, developed its own national traditions and policies regarding the fundamental human rights of children.

Children born of parents from different nations should have - as children born of parents from one nation - the right: a) to spend time with each parent and that parent's family; and b) to consistent access to their parent's country-of-origin.

The factual summary contains an alleged violation of a prior custody order which raised concern there might be another alleged violation if the children are permitted to travel to the mother's residence in England.[2] Judicial limitations on travel by parents from different countries changes the natural and legal rights held by parents who both live in France. Such limitations deny those children their right to experience both families-of-origin and their respective

[1] Here we only encompass biological parents, excluding discussion of issues – such as parentage by adoption, IVF, *de facto*, and so on and so forth - which are beyond the scope of the present case.

[2] This brief does not address the common reality that parents do not have enough money to pay for travel and other expenses necessary for international parenting of children. The main brief characterizes this aspect of the case, as follows: "However, as Mrs. Fishwick pointed out in her brief, as she does not have any friends or family who could host her in France, she would be forced to rent a house to accommodate her three children as well as her three other children living with her in the United Kingdom, which her financial situation does not allow (p. 5 and 6 of the Mrs. Fishwick's brief). Thus, in practice, Mrs. Fishwick is deprived from the opportunity of exercising her visitation right [in France] and will not be able see her children again."

associated cultures of origin. Courts do not condone violations of court-ordered parenting time and place of parenting.[3]

The question presented to this Court has been discussed and litigated in the USA for more than a century. The issue is often compared to constitutional challenges to limitations on travel by a parent with a child. But that question is analyzed in the context of the rights of children to a parenting relationship with each parent when the court order effectively terminates that relationship. USA family court judges are required to: (1) do what is in the best present and future interest of the child; and (b) not treat the issue as a conflict between a parent and a child.[4]

The current international and intra-national system of determining parenting plans is triangulated by government, parent/child, and family court systems. Here, the Trial Court, without explanation, entered the harshest judgment. It prevents these children for being in their Mother's care in the UK, together with their step-siblings. Essentially the Judgment prevents these children from have their due relationship with their step-siblings.

Whether grounded in EU obligations and directives, international treaties, or French law, there are no findings that it is not in the best interests of these children to travel to the mother's UK home for a limited period of time. That Order would be consistent with the implied choice of these parents to share culture and language and experiences. France should join in building a consensus on the appropriate way to handle these complex issues. Mirror image orders have proven effective.

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[3] *El Chaar v. Chehab*, 941 N.E.2d 75, 78 Mass.App.Ct. 501 (2010) (Mother violated Lebanese law by removing child to another country without first obtaining – as Lebanese law requires – the father's permission. By moving, mother deprived father of his visitation rights. The Lebanese judge properly suspended mother's custody for so long as she remained outside Lebanon and, until she return ordered her to deliver the child to the father.

[4] *Finlay v. Finlay,* 148 N.E. 624, 626 (N.Y. 1925), an opinion written by Judge Benjamin Cardozo, then a member of the New York Court of Appeals [NY's highest court], and a then-future member of the US Supreme Court).

[5]**The Rights of Children to Travel**

Article 21 of the Treaty on the Functioning of the European Union would support arguments made by parents against some state laws in the USA who claim that the federal constitution restricts state decision-making concerning limitations on the rights of travel in a child custody relocation case. [6]The Supreme Court of the United States (SCUS) has held that the right to travel is a part of the "liberty" of which the "citizen cannot be deprived without the due process of law under the Fifth Amendment."[7]

The USA cases generally hold that ordering children into father's primary physical custody if the mother moves to another state or country does not adversely impact her freedom to travel. [8] Of critical importance to this appeal now before the French Supreme Court, is that a best interests' analysis in the USA is not severed from the right to travel nor any lawful restrictions on that right. Even when a custody order may have the "collateral effect" on a parent's freedom to travel, the court has to balance a custodial parent's right to move to another state with the non-

[5] *See* Linda D. Elrod, *National and International Momentum builds for more Child Focus in Relocation Disputes*, 44 FAM. L. Q. 341, 347 (2010) International Conference on Relocation, Child Abduction and Forced Marriage in London Conference in 2010, an International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, in Windsor, England, and the Washington International Judicial Conference signify serious national and international movements to encourage the development of standards to make the treatment of relocation more uniform, even if not predictable.

[6] The United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V; see also U.S. Const. amend. XIV.

[7] *Kent v. Dulles*, 357 U.S. 116, 125 (1958). And, in the context of travel related to welfare benefits or other rights, courts have protected this constitutional liberty. *See e.g. Brown v. Dep't of Inland Fisheries & Wildlife*, 577 A.2d 1184, 1185 (Me. 1990) (holding that the Fifth Amendment protection extends to travel for purposes of "migration undertaken with intent to settle and abide.")

[8] *Light v. D'Amato*, 2014 ME 134, 105 A.3d 447 (2014). This recent case captures much of the USA law. The best interests' analysis is the same irrespective of whether it is an original case of divorce, non-married parents, or a modification motion or petition. While burdens of proof may shift, the framework for analysis is the same. *Cf. Arredondo v. Betancourt*, 383 S.W.3d 730, 744 (Tex. App. 2012) (vacating an order that required the mother to seek approval from her ex-husband for any travel outside of the United States, whether or not their child was with her).

custodial parent's right to have continuing and meaningful parent/child contact with the child.[9] Although the fundamental rights for *a relocating parent, a non-relocating parent, and a child* are being considered, the Court must focus on the child's best interest. .[10] Some US states have reject the best interests test in this area of the law.[11]

II. Children and an Independent Right to Travel

The evolution of family law in the European Union these past decades has dealt with the role of family law, family law courts – and the legal and evidentiary standards unique to each, scope of jurisdiction, the primacy or balancing of the presumptive rights of parents to autonomy and self-determination as free citizen-adults, and the rights of children when parents abdicate decision making to courts. These issues have result in shifting and adaptive tensions in profoundly complex and meaningful ways.[12]

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[9] *Malenko v. Handrahan*, 2009 ME 96, ¶ 24, 979 A.2d 1269; see also *Arnott v. Arnott*, 2012 WY 167, 293 P.3d 440, 454 (Wyo. 2012) (acknowledging that the custodial parent's right to travel is not the only interest to be protected in relocation cases because the child and other parent have "an equally important fundamental right of familial association").

[10] *Id.* at ¶22. *See* 19-A Maine R.S. §1653(1)(C) (declaring that, "except when a court determines that the best interest of a child would not be served, it is the public policy of this State [Maine] to assure minor children of frequent and continuing contact with both parents"). *In re Custody of D.M.G.,* 951 P.2d 1377, 1385 (Mont. 1998) (holding that "general, non-case-specific proof presented at trial on the best interests issue" was inadequate to demonstrate that the particular child's best interest was served by the judgment that restricted a parent's travel).*In re Marriage of Cole*, 729 P.2d 1276, 1281 (Mont. 1986) (requiring "the parent requesting the travel restriction to provide sufficient proof that a restriction is, in fact, in the best interests of the child").

[11] *See* Karhryn E. Wilhelm, *Freedom of Movement at a Standstill-Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U.L. REV. 2461, 2491 (2010) ("For example, Minnesota eschews a balancing test of the parents' constitutional rights (such as the right to travel and the right to rear one's child) by making the best interests of the child paramount. In contrast, Colorado and New Mexico apply equal weight to all of the rights implicated when balancing the competing interests.") (Footnotes omitted).

[12] *See* Todd Heine, *Home State, Cross-Border Custody, and Habitual Residence Jurisdiction: Time for a Temporal Standard in International Family Law*, 17 ANN. SURV. INT'L & COMP. L. 9, 30 (2011) (Tracing the evolution of family law in the EU and concluding that "Today's European Union family law is rooted in private international law conventions, when the European Union initially waded into this legal area five decades ago with the Brussels I Convention on jurisdiction and recognition of judgments in civil and commercial matters.") (Footnote omitted).

The question is - when parents do not agree - whether children of divorce, subject in varying degrees to the *parens patriae* authority of family courts in all countries have their independent rights recognized by code, treaty, or natural rights to travel to the other parent.[13] One source for examining such a policy outcome in the face of all the family dissolution which implicates the stability and success of millions of children world-wide, is the United Nations Convention on the Rights of the Child [UNCRC].[14] The earliest pronouncement on children's rights in the international domain was the 1959 United Nations Declaration on the Rights of the Child, which directed that "the best interests of the child shall be the paramount consideration."[15] After a thirty-year gap, The United Nations Convention on the Rights of the Child (CRC) was adopted in 1989. The relevant language states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[16] In addition, Article 12 indicates that children have the right to have their views given "due weight" in all matters affecting them—including and in particular "any judicial and administrative proceedings."[17]

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[13] The phrase "parens patriae" has often been misused or its roots diluted but, as one author has noted, "was an expression of the king's prerogative.' As explained by Chitty: The king is in legal contemplation the guardian of his people, and in that amiable capacity is entitled (or rather it is his Majesty's duty, in return for the allegiance paid him) to take care of his subjects as are legally unable, on account of mental incapacity, whether it proceed from first nonage [children]: second, idiocy: or third, lunacy: to take proper care of themselves and their property." George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 DEPAUL L. REV. 895, 896 (1975).

[14] Parts of this discussion are drawn from Timothy P. Fadgen & Dana E. Prescott, *Do the Best Interests of the Child End at the Nation's Shores: Immigration, State Courts, and Children in the United States*, 28 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWES 359 (2015).

[15] Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 2, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959).

[16] UNCRC, art. 3.

[17] UNCRC, art. 12.

For some scholars, the UNCRC "is an agreement between states that formulates the obligations undertaken by those states towards their citizens. The UNCRC should, therefore, not only be considered as a children's rights instrument but also and primarily as a social and political platform: it constitutes a general policy framework outlining obligations for the state and for social services with respect to children and parents alike."[18] Yet other scholars have observed that this language is often cited as merely a "guiding principle" in CRC interpretation.[19] Barbara Bennett Woodhouse argues that the "twentieth century shift to a theory of parental powers centered on the child's interests is consistent with an international human rights revolution taking place around the globe. The principle that court orders must serve the best interests of the child is a key element of the 1989 [CRC]."[20]

Even with differences among scholars, there are three unifying themes that undergird this Convention - which are implicated in this appeal - often referred to as the "3Ps": provision, protection, and participation. While it is demonstrable that the best interests of the child standard itself is an inherent part of the CDC, defining the concept is not as simple: "The indeterminate nature of the concept of 'the best interests of the child' is highly problematic. The notion is not clearly defined in international law, and the Committee on the Rights of the Child . . . has been less than successful" in defining the term.[21] A comprehensive review of the CRC literature identifies three central themes.[22] First, is a growing emphasis on the ascendancy of a child's

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[18] Rudi Roose & Maria Bouverne-de Bie, *Do Children have Rights or do their Rights have to be Realised?: The United Nations Convention on the Rights of the Child as a Frame of Reference for Pedagogical Action*, 41 J. PHILOS. ED. 431, 438 (2007).

[19] Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 171 (1998).

[20] Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L Q. 815, 831 (1999).

[21] SONJA GROVER, CHILDREN DEFENDING THEIR HUMAN RIGHTS UNDER THE CRC COMMUNICATIONS PROCEDURE: ON STRENGTHENING THE CONVENTION ON THE RIGHTS OF THE CHILD COMPLAINTS MECHANISM 110 (2015).

autonomy and participation rights. Second, is a theme emphasizing the competition between children's and parental rights. Third is the global children's rights industry. The counter-narrative is that the CRC may only be applied to an incompetent child.

In the USA, this Convention has been recognized by the SCOTUS and various state courts.[23]

These cases are usually decided for parents who, as in this case on appeal, are not now and are not likely in the future able to trust each other. [24] That means the custodial parent is unlikely to ever give his or her permission for the children to travel to see the non-custodial parent.

The Court's *parens patriae* authority is deeply rooted in the principles which undergird the UNCRC and generations of law related to children. A more important point is that any Court which has directly or indirectly given the *parens patriae* power to a parent has improperly delegated its judicial powers to a non-judicial individual. If this Court finds such a delegation was made to the father, that fact, of itself, requires reversal.

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[22] Didier Reynaert, Maria Bouverne-de-Bie, & Stijn Vandevelde, *A Review of Children's Rights Literature Since the Adoption of the United Nations Convention on the Rights of the Child*, 16 CHILDHOOD 518 (2009).

[23] *See Roper v. Simmons*, 543 U.S. 551, 576 (2005) ("As respondent and a number of amici emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470 (entered into force Sept. 2, 1990)"); *In re Pedro M.*, 864 N.Y.S.2d 869, 21 Misc.3d 645, 648 n.8 (N.Y. Fam. Ct. 2008) (Under art. 12 of the UNCRC, "Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matter affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child" and "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.").

[24] Mrs. Bowie brief: "However, as the Court pointed out, the relationships between Mrs. Fishwick and Mr. Gaslain are still tense and given the state of persistent mistrust so that in practice, Mrs. Fishwick will never get the children's father's consent to bring them with her over to England." (p. 12).

If *parens patriae* authority is misused when - based on economic, personal, or emotional reasons, - access to children is permitted only to a parent who is in France. The rights of children are not an abstract academic debate but a factually objective account of a real life-in-being with factually objective consequences. So, if used to support spite or lack of reason, *parens patriae* authority was abused.

Under these circumstances and consistent with the rights of travel and parental authority, any *de facto* or *de jure* termination of contact between one parent and a child in that parents' nation-of-origin should require affirmative proof by the objecting parent that the requesting parent will not return the children, that the other parent is unfit, or that the children are at risk of serious demonstrable harm. Ordering mirror image orders be put in place in the second forum, safeguarding passports, and other tactics can be well-employed to assure a timely return.

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The Legal Capacity and Guardianship Law, 5728-1962, (hereinafter;The Law) states that both parents are equal guardians of their children This applies whether or not the parties are married. Case law interprets this to meant that both parents have an equal right to determine significant issues regarding the health, welfare and education of their children. This is so even if one parent is awarded primary physical custody.

Chapter 14 of The Law provides that both parents have equal rights of guardianship of their children. Chapter 15 of The Law provides that guardianship of the parents includes the right to determine the child's place of residence and the authority to act on his/her behalf. Chapter 17 states that in exercising their guardianship, the parents shall act in the best interests of the minor.

Chapter 19 empowers the courts to determine issues within the scope of parental guardianship where the parents are unable to agree. The fundamental principle upon which the courts act is the best interests of the child. Courts will usually appoint experts to assist in evaluating the parental relationship with the minor and each parties' parenting skills. The Law is the basis for the case law concerning parental rights in matters that parents are unable to reach an agreement.

Case law:

The Supreme Court of Israel has held that it is in the best interest of a minor to maintain contact with both parents and their extended families and to benefit from the love and attention of both sides (1). Courts in Israel recognize the importance of physical contact between children and non-resident parents. In cases where one parent lives abroad, the courts will make the relocation contingent upon fulfilling certain provisions to insure regular visitation. A parent who wishes to relocate with a minor child outside of Israel will be required to guarantee that the left behind have regular visitation with the child. This will include undertakings by the relocating parent to insure that the child will be brought to Israel for visitation with left behind parent.

The type of undertakings will usually include obtaining a mirror order in the country to which the child is relocating as well as posting a monetary guarantee or some other type of financial security.

Another example of the court's determination to encourage contact is contained in an order made July 31, 2016 in the case of A. v L.(2). The case concerned a father who lives in Denmark and his minor child, who lives with his mother in Israel. The court conditioned visitation in Denmark with the father on obtaining two types of guarantees. One was a bank guarantee, the other was obtaining a mirror order in Denmark.

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1. Goldstein vs. Goldstein, PD vol. 26(2)634) (1973)
2. Axelsen vs. Levitsky, Family File 62826-05-16, Tel Aviv Family Court, July 25, 2016

After consulting with a Danish lawyer, the father learned that Denmark does not issue mirror orders. The only option was for the parties to sign an agreement stating that the child would be returned to Israel at the conclusion of the visit. Such an agreement could then be filed in Denmark for immediate enforcement in the event that the father failed to comply with the visitation agreement.

The mother refused to sign the agreement and claimed that the father did not meet the terms of the original order. The Israeli court held that since it was not possible to obtain a mirror order, the alternative proposal of the father would be accepted. Since the mother had the opportunity to sign the agreement but willfully failed to do so, the court would not prevent the visitation in Denmark and therefore ordered that the child be permitted to travel even without the mirror order.

Another example of the court exercising its power to insure the visitation rights of the foreign resident parent occurred in the case of Monason. The mother, an Israeli citizen and resident, had married the father, who was an American, in the United States. The mother relocated back to Israel when the child was eight. Four years later, after not having seen his son, the father applied to the court in Israel to request visitation with his son in the U.S. The mother objected strenuously, citing the father's lifestyle in a remote community with no electricity, his use of marijuana and the lack of contact between him and the minor. The court ruled that it no matter what the mother thought of the father's lifestyle, as long as it did not present a danger to the child's welfare, both he and the child had a right to spend time together outside of Israel. The court recognized the importance of a parent spending time with their child in their own environment. Visitation in Israel would be an entirely different experience for the father. He did not speak the language, was not familiar with the country and would have to stay in a hotel. He would be dependent on is son to translate and to guide him around.

On the other hand, the father had the right to share his own environment with his son. In order to know his father, the son needed to see where he lived and understand his environment. The father could act as a parent in his own environment, rather than depend on his child to guide him around. In addition, the father had family in the United States and the minor was entitled to know that family as well. The court ordered that visitation would take place in the United States, subject to the father making certain guarantees.

In the case of Geoffrey Plesa vs Linda Plesa, the parents reached an agreement whereby their daughter, who resided with the mother in Israel, would visit her father in California for several weeks. Shortly before the visit, the mother asked the court to prevent its occurrence due to the alleged psychological damage to the minor that the visit would cause. The court held that it is the right of the child to have a connection with her father.

The fact that the father lives in the United States is not a reason to interfere with that right. The court ordered the mother to comply with the agreement and turn over the minor's passport to the father (3).

Other than the welfare of the child, the courts will also require assurances that the custodial parent will be able to reasonably assure the return of the minor at the conclusion of the visit. In addition to mirror orders and monetary security, particular attention is made to whether the country in which the visit will occur is a signatory to the 1980 Hague Convention, The Civil Aspects of International Child Abduction, which Israel adopted. Where visitation abroad is considered, the courts will usually limit it to countries that are signatories to the Convention.

Conclusion:

Most cases involving visitation abroad result in an agreement between the parties, as the courts make it clear that visits abroad with the non-custodial parent are the child's best interests. It provides the minor with an opportunity to know the other parent in the parent's own environment, as well as meeting the family members of that parent. The non-custodial parent is not able to develop the same quality of relationship with the minor when visitations only take place in the minor's country of residence. The non-custodial parent often does not speak the local language, does not know his way around, is unfamiliar with places of interest to the minor and is unable to act naturally as a parent while being a tourist in a foreign country.

Case law holds that the minor has a right to spend time with both parents and it is in their best interests to know them both as well as their respective families. Even where the parents have fundamentally different life styles, the minor cannot be prevented from visiting with the non-custodial parent abroad simply because the custodial parent objects. As long as the visit will not present a danger to the welfare of the child, it will be ordered.

The courts will require some form of guarantee to insure the return of the minor at the end of the visit. The court will usually require that the country of visitation be a signatory to The Hague Convention on Child Abduction, that a guarantee in the form of a bank check or a power of attorney to transfer property rights is deposited with the court and that a mirror order is obtained in the foreign state.

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3. Plesa vs. Plesa, Family File 21754/97, Tel Aviv Family Court, July 1, 2004

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AUSTRALIA

Australia is a nation with a multi-cultural and mobile society built, particularly in the post-World War II period, on migration. As a result, this is an issue which arises not infrequently where one party returns to their country of origin or relocates to Australia

with their children following marriage or relationship breakdown, and is dealt with by legislation and almost 40 years of accumulated jurisprudence.

Australian parenting law

Issues between parents in relation to their children following marital or relationship breakdown are determined under the provisions of the ***Family Law Act 1975*** (Cth). This is national legislation which applies to all Australian children and their parents regardless of marital status or gender.

Jurisdiction under the Family Law Act is exercised by the Family Law Courts (the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia) subject to overall appeal oversight by the Full Court of the Family Court of Australia and, ultimately, the High Court of Australia.

The relevant principles governing decisions under the Family Law Act regarding children are found in Part VII - Children.

The objects of that Part include ensuring that the best interests of the children are met, relevantly for present purposes, by ensuring that they have the benefit of both of their parents having a meaningful involvement in their lives to the maximum extent consistent with their best interests,[25] and that they are protected from physical or psychological harm.[26]

The principles underlying those objects are that (except where it is or would be contrary to a child's best interests):

a) Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together;[27]

b) Children have the right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant in their care, welfare and development (such as grandparents and other relatives).[28]

c) Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).[29]

[25] Section 60B(1)(a), Family Law Act
[26] Section 60B(1)(b), Family Law Act
[27] Section 60B(2)(a), Family Law Act
[28] Section 60B(2)(b), Family Law Act

An additional object of Part VII is to "give effect to the Convention on the Rights of the Child done at New York on 20 November 1989".[30]

Parenting orders

Where there is dispute or conflict between parents, the Family Law Courts may make parenting orders.

Parenting orders may deal with one or more of the following matters:[31]

a) Where and with whom the child is to live;

b) The time a child is to spend with another person;

c) The allocation of parental responsibility for a child;

d) The communication the child is to have with another person;

e) Any aspect of the care, welfare and development of the child;

f) Any other aspect of parental responsibility for the child.

"Parental responsibility" means all of the duties, powers, responsibility and authority which, by law, parents have in relation to children[32] and is not displaced other than by an express court order.[33]

The overriding requirement for the Family Law Courts in deciding whether to make a particular parenting order in relation to a child is to regard the best interests of the child as the paramount consideration.[34]

The Family Law Act requires a court, when making parenting orders, to apply a presumption of equal shared parental responsibility as being in the best interests of the child.[35]

The presumption is rebuttable by evidence which satisfies the court that it would not be in the best interests of the child for the parents to have equal shared parental responsibility.[36]

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[29] Section 60B(2)(c), Family Law Act
[30] Section 60B(4), Family Law Act
[31] Section 64B(1), Family Law Act
[32] Section 61B, Family Law Act
[33] Section 61D, Family Law Act
[34] Section 60CA, Family Law Act
[35] Section 61DA (1), Family Law Act
[36] Section 61DA (4), Family Law Act

Parenting orders may deal with a range of issues including, relevantly for the present purposes:

a) the person with whom a child is to live;

b) the time the child is to spend with another person or persons;

c) the allocation of parental responsibility for the child;

d) the communication a child is to have with another person or persons;

e) any aspect of the care, welfare and development of the child or any other aspect of parental responsibility for the child.[37]

Although the terminology used in the Family Law Act may differ from that used in other jurisdictions ("with whom the child is to live" equates to custody; "spend time with" equates to access or visitation) the underlying principles are the same.

The Family Law Act also requires the court to consider the child spending equal, or substantial and significant, time with each parent.[38]

Equal shared parental responsibility and equal time must be considered if it is in the child's best interests and is reasonably practicable.[39]

If equal shared parental responsibility is to be ordered but equal time is not practicable, then the court must consider orders for the child to spend substantial and significant time with each parent if it is in the child's best interests and reasonably practicable for this to occur.[40]

Substantial and significant time is intended to enable a parent to be involved in as many aspects as possible in the child's life including holiday and day to day activities.[41]

Reasonable practicability includes, relevantly for present purposes, where the parents live in relation to each other.[42]

Overseas visitation

In circumstances where the parents live in different jurisdictions equal shared parental responsibility is generally impracticable and the Family Law Courts focus on arrangements

[37] Section 64B (2), Family Law Act
[38] Section 65DAA, Family Law Act
[39] Section 65DAA (1)(a) and (b), Family Law Act
[40] Section 65DAA (2), Family Law Act
[41] Section 65DAA (3), Family Law Act
[42] Section 65DAA (5), Family Law Act

which will enable the children to spend substantial or significant time with each parent, and share in the parent's day to day life, consistently with the children's best interests. That may involve the non-custodial parent visiting Australia to spend time with the children; or the children travelling to the non-custodial parent's home country to spend time with that parent there.

Where a dispute arises regarding international travel the court may be asked to make a parenting order determining that issue. That determination will be based primarily on the best interests of the child and the requirement to protect the child from harm.[43]

The Family Law Act prevents parents from taking or sending children from Australia to a place outside Australia when parenting orders have been made[44] or an application for parenting orders in relation to the children is pending[45]. The prescribed penalty for breach is imprisonment for 3 years.

These provisions do not however restrict children travelling outside Australia for visitation or other purposes:-

a) With the consent of both parties; or

b) In accordance with a court order made under the law of the State or Territory of Australia after the institution of parenting proceedings under Part VII of the Family Law Act.[46].

Whether or not a non-custodial parent will be granted time (visitation rights) with children out of Australia will be heavily dependent on a range of factors including: -

a) The ages of the children;

b) The country in which it is proposed that such contact take place (and in particular whether or not it is a Hague Convention country);

c) The history of the relationship between the parents, and between the children and each parent;

d) The practicality of contact taking place in another jurisdiction;

[43] Section 60B Family Law Act
[44] Section 65Y, Family Law Act
[45] Section 65Z, Family Law Act
[46] Section 65Y(2) and 67Z(2), Family Law Act

e) The desirability of the children visiting the other parent in their home jurisdiction (including the opportunity for contact with their extended family and culture);

f) Whether the proposed arrangements for the safe travel and return of the children are satisfactory and/or can reasonably be guaranteed;

g) Any safety or health risks in the proposed destination. Australian Government travel warnings may be influential in some cases.

Where there are concerns about the possibility of a parent failing to return the children at the conclusion of visitation/contact, the Australian courts may impose conditions on the children being able to travel out of Australia for that purpose. These conditions may include:-

a) The provision of a cash or other security for their return sufficient to cover the cost of any proceedings in the other jurisdiction required to bring about their return, including legal, travel and accommodation costs for the custodial parent;

b) A requirement that appropriate orders be put in place in the other jurisdiction (whether by way registering the Australian orders there, having orders made which mirror the Australian orders or having independent orders made confirming the Australian custody, travel and return orders and containing an appropriate mechanism for them to be enforced in that jurisdiction);

c) A requirement that the passports of the children and the non-custodial parent to be deposited and held by an independent lawyer in the other jurisdiction, and only released to facilitate the return of the children at the conclusion of the visitation/contact period;

d) Provision of confirmed return fares, itinerary and arrangements for the children;

e) Restriction on travel to or through a non-Hague Convention country with the children;

f) Arrangements for regular communication by telephone, Skype etc with the custodial parent through the visitation period.

The specific orders made, and any conditions attached to them, will obviously be entirely dependent on the individual circumstances of the particular family and children, and the jurisdictions involved. In most cases there is minimal concern where the non-custodial parent is living in a Hague Convention country and there are very few issues between Australia-New Zealand, Australia-United Kingdom, Australia-Canada, Australia-USA, Australia-Ireland and with most European jurisdictions.

Case law

Because each case is fact specific, and decisions made involve the exercise of judicial discretion, there are relatively few precedents or authorities which are particularly helpful in illuminating the practical application of the principles under the Family Law Act insofar as they are applied by the Australian Family Law Courts to international visitation/contact arrangements. However by way of example:

- The Full Court of the Family Court of Australia in ***Kuebler and Kuebler***[47] (1978) reviewed the issues that should be considered in an application which involves the custodial parent taking a child out of the jurisdiction and held that, without being exhaustive, these would include:-

  "(a) The length of the proposed stay out of the jurisdiction;
  (b) The bona fides of the application;
  (c) The effect on the child of any deprivation of access;
  (d) Any threats to the welfare of the child by the circumstances of the proposed environment;
  (e) The degree of satisfaction in which the court based its assessment of the parties that a promise to return to the jurisdiction that would be honored."

  In that instance the mother was permitted to remove the children from Australia subject to payment of an amount to be held by the father's legal practitioners as surety for her return.

- In ***Line and Line***[48] (1997) the mother wanted to take the children to the United States on holiday. She was born in the United States, all of her immediate family were there, she had received a large cash settlement from the Australian divorce, the post-separation relationship had been one of high conflict and the wife had few

[47] *Kuebler and Kuebler* (1978) FLC 90-434 per Asche SJ, Gun and Yuill JJ
[48] *Line and Line* (1997) FLC 92-729 per Murray, Lindenmayer and Kay JJ

significant ties to Australia and little incentive to return. The Full Court of the Family Court held that the fact the United States was a Hague Convention signatory, although a relevant consideration, was not a complete answer and that security for her return was required.

The Court drew attention to the matters highlighted in ***Kueble***r (supra) and went on to consider various other factors which may be relevant to determining the risk of a departing parent choosing, despite assurances, not to return including:

a) Continuing ties between the departing parent and Australia (such as the ownership of real estate);

b) The existence of business interests or the residence of close family or friends in Australia;

c) The existence and strength of possible motives not to return (including the level of conflict between the parents, particularly over child-related issues);

d) The existence and strength of possible motives to remain in the other country (such as ownership of assets or residence of close family and friends there);

e) The weight to be given to whether the destination country is a signatory to the Hague Child Abduction Convention (bearing in mind that, even if the designated destination is a Convention country, once the departing parent has left Australia there may be little to prevent him or her deviating from that designated destination to another destination in a non-Convention country.)

The Full Court also considered the purposes of requiring provision of security by the departing parent including the provision of a sum which will:

a) realistically entice the person removing the children to return with them; and

b) adequately provision the party left in Australia to take action and proceedings in Australia and overseas to secure the recovery of the children if the departing parent fails to return them.

In this instance the Full Court, on appeal, increased the security ordered by the Trial Judge to an amount which it considered appropriate to meet those objectives.

- In ***Carlson & Fluvium***[49] (2004) orders were made in Australia for the child (who was in the custody of the father) to visit the mother in Canada provided that the Australian orders were first registered in Ontario under the Children's Law Reform Act 1999 or any other Canadian legislation providing for the registration of foreign orders so as to be enforceable under Canadian law.

- In ***Whipp & Richards***[50] (2012) the mother was an Australian citizen and the father was a United States citizen and permanently resident in that country. The mother left New York and travelled to Israel (where Hague Convention proceedings were commenced) and then on to Australia (where further Hague Convention proceedings took place but were ultimately dismissed).

  The father sought to take the child on a visit to the United States. The Trial Judge held that although the mother was fearful of the risk of retention, the evidence did not give rise to an unacceptable risk that the father would not return the child, but that appropriate security for the return of the child should be provided.

  In this case the Trial Judge permitted expert evidence about the range of costs involved in recovering children who had been taken to or retained in the United States, and set a bond within the parameters of that range. He also ordered that the father be restrained from taking the child out of the United States during the holiday period, and provide the mother with copies of the return air tickets and itinerary and the addresses and contact details of where the child would be throughout the time away.

- In ***Stevens & Stevens***[51] (2015) the mother (who was Peruvian by birth but had lived in Australia for 11 years and taken Australian citizenship) wanted to take the children, aged 8 and 6, to Peru to visit their grandparents and extended family and to experience their Peruvian heritage and the culture into which their mother was born. The father objected on numerous grounds including the danger of non-return given the hostility in the post-separation relationship between the parents;

[49] *Carlson & Fluvium* [2004] FamCA32
[50] *Whipp & Richards* [2012] Fam CA93 per Kent J
[51] *Stevens & Stevens* [2015] FamCA 1106 per Hogan J

an unacceptable risk to the children on the basis of Australian Government travel warnings for Peru; and suggestions that although Peru was a Hague Convention signatory it may not act promptly (or at all) to enforce a return if the children were retained there.

The Court made orders permitting the children to be removed from Australia for the purposes of holiday travel. As the mother's financial capacity was limited, no security for the return of the children was required.

Other cases over the last 40 years have adopted different variations of these principles in the light of the differing issues and evidence which the court was required to consider.

Summary

In broad terms, Australian law recognises and gives priority to the right of children to enjoy a meaningful relationship with both parents to the fullest extent possible in the particular circumstances of the family, and to experience life with each parent in their own environment, provided that this is consistent with the children's best interests and does not expose them to harm.

Custody does not confer rights on the custodial parent to determine whether or not the children should be permitted to enjoy visitation with the non-custodial parent in another jurisdiction. That is a matter for determination by the court in the event of dispute.

In most instances the court will permit overseas visitation where it considers that this is in the best interests of the children and that the risk of non-return is acceptable in all the circumstances.

That permission will more readily be granted where the destination country is a Hague Convention member - and is very much less likely to be granted where it is not a Hague state.

The Court, in granting permission, may or may not attach conditions. The most common condition is to require the parent taking the child out of Australia to provide security for the return and/or to make funds available to enable the custodial parent to recover the child from the destination country if the child is retained there.

Other conditions may include the making of Australian orders and their registration (or the making of mirror orders) in the destination country and requiring undertakings by the departing parent to the court for the return of the child.

Insofar as the Australian decisions show a tendency in these cases, it is towards permitting the children (and particularly older children) to visit and spend time with the overseas parent in their home state, (particularly where this gives them the opportunity to have exposure to the life, family and culture which the non-custodial parent has in that country). While the custodial parent may oppose the travel by the child for visitation purposes that objection is in most cases not successful, and can usually be addressed by the imposition by the court of appropriate conditions.

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ENGLAND and WALES

In accordance with section 3(1) of the Children Act 1989 ("the 1989 Act"), '*parental responsibility*' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. Pursuant to section 2(1) of the 1989 Act, where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility for the child. By virtue of section 4(1) of the 1989 Act where a child's father and mother were not married to each other at the time of his birth, the father shall acquire parental responsibility for the child if:-

(a) he is registered as the child's father;

(b) he and the child's mother make a '*parental responsibility agreement*' providing for him to have parental responsibility for the child; or

(c) the court, on his application, orders that he shall have parental responsibility for the child.

The legal position as to whether a parent may remove a child from the jurisdiction of England and Wales is that where a child arrangements order (an order regulating with whom the child concerned is to live and when the child is to live with any person), no person may remove him from the United Kingdom without either the written consent of every person who has parental responsibility for the child or the leave of the court (section 13(1)(b) of the 1989 Act). This does not prevent the removal of a child, for a period of less than one month by a person named in the child arrangements order as a person with whom the child is to live (section 13(2) of the 1989 Act). In making a child arrangements order, the court may grant the leave required by subsection (1)(b), either generally or for specified purposes (section 13(3) of the 1989 Act).

2. When considering the issue of whether a child may be permitted to spend time with the parent with whom he does not live/spend the majority of his time, outside the jurisdiction, the court may order that the parent shall be prohibited from leaving the jurisdiction without the consent of both parents. Alternatively it may grant the parent permission/leave to remove the child from this jurisdiction for the purpose of spending time with the parent in another jurisdiction irrespective of whether the parent with whom the child lives consents to this. The court will be concerned to ensure that appropriate safeguards will be put in place to secure the child's return to this jurisdiction, particularly in a situation where the parent with whom the child lives can show a risk of child abduction. Subject to appropriate safeguards, the court may allow the parent to take the child to the other jurisdiction.

3. The court may be reassured by the fact that any orders made by the English court, including those providing for arrangements for a child to spend time with a parent in another jurisdiction will be automatically enforceable in the destination country if that country is within the EU, excluding Denmark, under the Brussels IIa Regulation (subject to any application there to vary the order) so long as the requisite formalities have been complied with. The formalities essentially require there to be a copy of the court's judgment, together with '*certificates*' which contain the information demanded by Annexes II and III of the Regulations. A similar situation exists if the destination country is a signatory to the 1996 Hague Convention. As with the EU case, with these countries, orders from the English courts may be recognised and enforced without the need for mirror orders depending on the detail of national laws implementing the Convention in the relevant country.

4. The position is more complex if the destination country is not within the EU or a signatory to the 1996 Hague Convention. In R (A Child) (Prohibitive Steps Order) [2013] EWCA Civ 1115, [2014] 1FLR643, [2014] 1FCR113, [2013] Fam Law 1532, the appellant father successfully appealed against a decision of a district judge to discharge a prohibited steps order and grant permission to the respondent mother to take their child to Kenya. In allowing the appeal, the Court of Appeal held that the overriding consideration for the court in deciding whether to allow a parent to take a child to a non-Hague Convention country was whether the making of that order would be in the best interests of the child. Where there was some risk of abduction and an obvious detriment to the child if the risk were to materialise, the court had to be positively satisfied that the advantages to the child of her visiting that country outweighed the risks to her welfare which the visit would entail. That routinely involved the court in investigating the safeguards that could be put in place to minimise the risk of retention and to secure the child's return if that transpired. Those safeguards should be capable of having a real and tangible effect in the jurisdiction in which they were to operate. If in doubt the court should err on the side of caution and refuse to make the order.

5. In R (Children) (Temporary Leave to Remove from Jurisdiction) [2014] EWHC 643 (Fam), [2014] 2FLR1402, [2014] Fam Law 817, the court applied re R (A Child) in refusing to grant permission to a mother to take her children on holiday to India (a non-Hague Convention country) as there was a risk that she would not return them. Although there were benefits to the child in allowing the mother to take them on holiday to India, the consequences of wrongful retention was so great and the safeguarding measures so uncertain that it would not be in the child's best welfare interests for permission to be granted.

6. Even when the destination country is a signatory to the 1996 Hague Convention, the court is likely to consider the issue of whether appropriate safeguards can be provided, carefully. In Re C-W (A Child) [2015] EWCA Civ 1272, [2015] All ER (D) 114 (Dec), the Court of Appeal, Civil Division, allowed a mother’s appeal against the refusal of her application for contact with her child in Florida. The Court of Appeal held that the mother would be permitted to take the child to Florida for staying contact subject to appropriate safeguards.

7. In summary, the child C-W was born in the US and was aged 10. She has a British father and a Caribbean mother. Following the parents' separation, the father and C-W relocated to the UK. The mother brought Hague Convention 1980 Proceedings which were dismissed and resulted in a residence order being made to the father. The child was having daily Skype contact with her mother and staying contact in this country.

8. The central issue to the appeal was the welfare analysis contacted by the judge. The mother contended that the judge weighted the father's fear in relation to staying contact above other welfare considerations and the adequacy of proposed safeguards. The mother had proposed the following safeguards:

- that an American attorney be instructed to collect C-W's passport upon her arrival in the US;
- that the attorney would hold her passport for the duration of the stay;
- the passport would be returned to the flight attendant at the end of the stay; and
- confirmation of these events would be provided to the father.

The mother also proposed that a '*mirror order*' be obtained in Florida, if C-W travelled there. This would make it clear that C-W was entitled only to travel from the US to the UK and no other country and provide for the Floridian courts to enter an order requiring C-W's return without a hearing upon the father's affidavit if the deadline for her return were not met.

9. The father firmly believed that the mother would seek to abduct C-W and did not believe that the Hague Convention 1980 Proceedings would be an effective remedy, principally due to the costs. Despite the judge at first instance finding that, in light of the safeguards, the risk of C-W not being returned was low, she found that it was still too significant a risk to run. The Court of Appeal disagreed, and found that the adequacy of the safeguards proposed was sufficient and should have been accorded greater weight in the balance.

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SUMMARY

All of the jurisdictions included in this brief recognize the best interest of the child as a fundamental guiding principle in all matters relating to custody and visitation. The courts in each jurisdiction recognized both the right of the parent who does not have physical custody, to maintain close contact with their minor children. Further, these jurisdictions recognize the separate right of the child to maintain contact with the non-custodial parent and their wider family.

The fact that a parent lives abroad is not a reason to interfere with the fundamental rights of both the parent and the minor to maintain contact. The objections of the custodial parent cannot prevail where there is no clear evidence that such a visit would be contrary to the minor's best interests. In fact, the courts have found that it is in the child's best interests to maintain contact with the parent residing abroad.

This approach is consistent with international instruments that relate to children's rights, such as the UN Convention on the Rights of the Child and the Treaty on the Functioning of the European Union. The courts in all jurisdictions will, to varying degrees, make provisions to insure the return of the minor. The courts may require that a mirror order be issued in the country in which the visitation will occur and there may be a need to deposit some form of monetary guarantee with the court. In addition, courts will often limit visitation to countries that are parties to the 1980 Hague Convention on Child Abduction.

It is clear that visitation in the home of the parent residing abroad is qualitatively different that visitation in the state where the child resides. A parent is far less able to fulfill his or her role in a country where they often do not speak the language, have no friends or family, are not familiar with the environment and are dependent on their child to assist them during their stay. A child is entitled to get to know the noncustodial parent in his or her own home and environment where the parent is able to accommodate the child, rather than in a hotel room in a foreign country. In addition, the costs of travel and accommodations abroad may make it difficult if not impossible for some parents to visit with their child in the minor's home state on a regular basis.

It is our opinion that the right to contact with a child in the home state of the visiting parent is fundamental and in the child's best interests. It would be a violation of that interest, as well as that of the visiting parent, to leave the decision to permit such visitation entirely in the hands of the custodial parent. We believe that the court should exercise its duty to protect the best interests of the child in such matters and determine the conditions for visitation abroad even where the custodial parent objects.