

EQUAL SHARED PARENTAL RESPONSIBILITY AND SHARED CARE POST-RETURN TO AUSTRALIA UNDER THE HAGUE CHILD ABDUCTION CONVENTION

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I INTRODUCTION

This article explores the outcomes experienced by abducting primary carer mothers and their children post-return to Australia under the *Hague Convention on Civil Aspects of International Child Abduction*.¹ The circumstances faced by families that experience international parental child abduction are examined by considering how part VII of the Australian *Family Law Act 1975* (Cth) is applied to resolve parenting disputes post-return. At present, the statutory criteria found in part VII encourage an equal shared parental responsibility and shared care parenting approach.² This emphasis aligns children's best interests with collaborative parenting³ and their parents living within close geographical proximity of each other to facilitate the practicalities of the approach.⁴ Arguably, these statutory criteria guide the exercise of judicial discretion to determine a child's best interests towards a parenting arrangement that is incompatible with the lifestyle and functional characteristics of these families.

Shared care has been shown to be suitable only when the parents: have self selected the arrangement; live within close geographical proximity of each other; enjoy financial stability; have flexible working arrangements; and are capable of maintaining a child-focused collaborative relationship without family violence or

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

2 The equal shared parental responsibility and shared care approach was introduced into Part VII of the *Family Law Act 1975* (Cth) by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

3 The equal shared parental responsibility and shared care statutory criteria are established on a foundational belief that collaborative parenting is inherently advantageous to children. See Helen Rhoades, 'The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform' (2008) 36 *Federal Law Review* 279, 281.

4 See *Rosa v Rosa* [2009] FamCAFC 81 (15 May 2009).

high levels of conflict.⁵ Families that experience international parental child abduction do not possess these functional characteristics. Instead they are likely to have distinctive characteristics that make the resolution of their parenting dispute particularly complex and challenging. For this reason it is axiomatic that for these families a balanced equality of parental responsibility cannot be achieved post-return to Australia under the *Convention*. The application of the equal shared parental responsibility and shared care statutory criteria may further exacerbate the precarious position that children and their abducting primary carer mothers may find themselves in post-return. Despite the discord between these families' functional characteristics and the dynamics necessary to make equal shared parental responsibility and shared care work, this form of parenting arrangement has increased for these families since the approach's introduction in Australia in 2006.

This article examines the Australian experience using the findings of the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia*.⁶ In the cases reported, the *Convention* return proceedings took place in a *Convention* country other than Australia. These proceedings resulted in the child being returned to Australia. In a significant portion of these cases the substantive parenting dispute went on to be determined under part VII of the *Family Law Act 1975* (Cth). Part VII proceedings resolve the substantive parenting dispute, and determine the time that each parent will spend with the child, their parental responsibilities, and the state in which the child will reside.

The *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* specifically examines outcomes produced by the *Convention's* operation on abducting primary carer mothers and their children post-return to Australia as the child's habitual residence. Undoubtedly, the instability experienced by primary carer mothers and their children post-return to Australia is also correct for other contracting states. However, the added presence of an emphasis on equal shared parental responsibility and shared care post-return makes Australia a particularly useful jurisdiction to examine. The study was also confined to cases where the abduction was by the child's primary carer mother,

5 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.

6 This study was conducted as part of the author's PhD research. See Danielle Bozin-Odhiambo, *A Critical Analysis of the Hague Convention on Civil Aspects of International Parental Child Abduction* (PhD Thesis, Griffith University, 2013). For a general overview of this study, see Danielle Bozin-Odhiambo, 'A Study of Outcomes Post-Return to Australia under the *Hague Child Abduction Convention* for Abducting Primary-Carer Mothers and their Children' (2013) 3 *Family Law Review* 201. This study would not have been possible without the generous support of those family law practitioners who participated. Ethical clearance was obtained for this study from the Griffith University Human Research Ethics Committee. The study complied with Queensland, national and international guidelines, regulations and legislation concerning the ethical conduct of research involving humans. Given the nature of this study and its subject matter, the project did not qualify for an Expedited Ethical Review. Consequently, it was subject to, and satisfied the requirements of, a Full Ethics Review.

because the impact of the relatively recent 'feminisation' of international parental child abduction is yet to be fully explored empirically. Since the *Convention's* inception there has been a trend away from abducting non-custodial fathers to abducting primary carer mothers.⁷ The cases studied are characterised by a pre-abduction parenting arrangement where one parent, the mother, provided most of the parenting. Therefore, examining abducting primary carer mother cases facilitates an interesting analysis of the impact of the part VII statutory criteria that are based on a foundational belief that 'the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time'.⁸ This focus is not intended to diminish the undeniable experiences of left-behind fathers, who find themselves divested of the joy that a meaningful relationship with their child brings.

If a primary caregiving mother abducts her child from Australia to another *Convention* country which she considers to more closely constitute her home, there are two broad possible scenarios. If the child is returned to and remains in Australia, then the mother must choose to live in a country where she may have few established meaningful connections, if she wishes to remain with her child. The dilemma is that her freedom to live in an environment where she has meaningful social, cultural, linguistic and economic connections is constrained. This is so that the child can enjoy meaningful physical contact with both of their parents, and the father can reside in Australia; his country of choice. Alternatively, if the child is not returned to Australia and remains in the mother's country of choice, then in all likelihood the aggrieved father will only have limited contact with and influence on his child's life. The dilemma is that the child will be deprived of the meaningful presence of both of their parents on a regular basis. In addition, the father will be left to try to move on with his life without the joy of day-to-day interactions with his child. A third post-separation scenario can exist for families which is in contrast to the above two scenarios. Both parents are happy to reside in a country that is not their home (the 'content transnational person') but the child is separated from their extended family. The dilemma is that the child does not have the benefit of the nurturing influence of their extended family. This includes the rich cultural identity that these family members can provide. Also, both parents may have a limited support network close at hand. Inevitably there will be negative consequences that will flow from

7 See, eg, 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. 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 – 2007 Update, Hague Conference on Private International Law, September 2008) ('2007 Update'). We will see that the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* reported within this article also reflects comparable findings.

8 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) 30 ('*Every Picture Tells a Story Report*').

each of the above three scenarios, principally because the family in question is cross-cultural and possibly ‘transnational’⁹ in nature.

A brief discussion of the *Convention*’s purpose is provided below, followed by an overview of the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia*. Next, the Australian equal shared parental responsibility and shared care statutory criteria are explained. Whether or not equal shared parental responsibility and shared care accommodates the lifestyle and functional characteristics of families that experience international parental child abduction is then considered in two parts. First, an examination of how the statutory criteria are applied to formulate parenting arrangements for non-Hague families that possess similar characteristics to those that experience international parental child abduction is provided. Studies have shown that shared care arrangements are a source of significant psychological stress for children of families characterised by family violence, high levels of inter-parental conflict, and where one parent wishes to relocate.¹⁰ Second, the implications of this for families that attempt to resolve their parenting dispute post-return to Australia will be explored using the findings of the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia*.

II THE HAGUE CHILD ABDUCTION CONVENTION

The *Convention* is a multilateral treaty that establishes procedures to secure the prompt return of children to their habitual residence. Children must be deemed to have been wrongfully removed from, or retained outside of, their habitual residence,¹¹ in breach of rights of custody.¹² In its preamble, the

9 A ‘transnational’ family is a family unit that plays out its social interactions across geographical borders and is characteristically mobile: Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 37.

10 These studies will be discussed in detail later in this article. See, eg, Smyth and Weston, above n 5; Belinda Fehlberg, Christine Millward and Monica Campo, ‘Shared Post-Separation Parenting in 2009: An Empirical Snapshot’ (2009) 23 *Australian Journal of Family Law* 247.

11 For a discussion of the meaning of the term ‘habitual residence’ see 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 & 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. See generally Paul R Beaumont and Peter E McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999); Danielle Bozin-Odhiambo, ‘Re-examining Habitual Residence as the Sole Connecting Factor in Hague Convention Child Abduction Cases’ (2012) 3 *Family Law Review* 4.

Convention describes signatory states including Australia, as desiring to protect children internationally from the harmful effects of parental child abduction: this is the child protection rationale. The *Convention's* Explanatory Report articulates 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.'¹³ The *Convention's* return mechanism is premised on a belief that the prompt return of children restores the status quo. This is said to facilitate issues relating to parental responsibility being resolved in the most appropriate jurisdiction; the child's habitual residence immediately preceding their abduction.

The *Convention* has two principal objectives articulated in article 1.¹⁴ The *Convention* seeks to secure the prompt return of children wrongfully removed to, or retained in, any contracting state. Also, it endeavours to ensure that rights of custody under the law of each contracting state are effectively respected by the other contracting states. These objectives focus implicitly on re-establishing the status quo regarding a child's habitual residence. The *Convention's* principal function as a forum decider is evident in article 19. This article provides that a decision under the *Convention* concerning the return of a child shall not be taken to be a determination on the merits of any custody issue.¹⁵ Article 16 further reflects this approach. It provides that the judicial and administrative authorities in a contracting state that a child has been abducted to shall not determine the merits of the parenting dispute until it has been determined that the child is not to be returned.¹⁶ Re-establishing the status quo in the child's habitual residence immediately preceding their abduction prevents the abductor from 'forum shopping' to obtain a more favourable custody decision in another jurisdiction.¹⁷ Forum shopping is

the tactical activity of a litigant to choose (amongst several available venues) a specific forum in a specific jurisdiction in order to achieve the application of the most favourable procedural and substantive law to a case. As the choice of a specific forum may give the party some control over both, procedural and substantive law, this could offer the opportunity to the plaintiff to influence the applicable law by choosing one specific forum amongst several competent and available venues.¹⁸

12 *Convention*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983) arts 3, 4.

13 Elisa Pérez-Vera, 'Explanatory Report on the 1980 Hague Child Abduction Convention' (Explanatory Report, Hague Conference on Private International Law, 1982) 429.

14 See also *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 1A.

15 *Ibid* reg 18(1)(c).

16 *Ibid* reg 19.

17 Pérez-Vera, above n 13, 429.

18 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.

The prompt nature of *Convention* return proceedings helps ensure that the objective of maintaining comity between contracting states is promoted.¹⁹ An assessment of the merits of the parenting dispute is preserved for consideration post-return, once *Convention* return proceedings are complete. By focusing on maintaining comity and re-establishing the status quo regarding a child's habitual residence, the *Convention* provides for minimal consideration of the welfare of each individual child. Consequently, prompt return is considered to be in the best interests of children generally, rather than the best interests of the individual child.²⁰ The *Convention's* text does not openly refer to the best interests of the child concept. Instead its preamble provides that it is a central theme permeating the *Convention's* protocols and practices by implication. Comity and reciprocity are central considerations during *Convention* return proceedings.²¹ This is because it is assumed that if the child's best interests are to be considered, it is most appropriate that this takes place post-return in the child's habitual residence. However, it is important to note that the *Convention* does not provide a mechanism by which the resolution of the parenting dispute is assured post-return. Consequently, the parenting dispute can remain dormant. If the parenting dispute is litigated or mediated post-return to Australia the statutory criteria found in part VII of the *Family Law Act 1975* (Cth) are applied.

III THE STUDY OF HAGUE CHILD ABDUCTION CONVENTION OUTCOMES POST-RETURN TO AUSTRALIA

The *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* examined how children's best interests are assessed post-return to Australia under the *Convention*.²² More specifically, the study examined the incidence of equal shared parental responsibility and shared care post-return to Australia. The evaluation was confined to cases where the child was abducted out of Australia by their primary carer mother, and *Convention* return proceedings then took place in a *Convention* country other than Australia. These proceedings resulted in the child being returned to Australia, and the parenting dispute often

19 In *MW v Director-General, Department of Community Services* (2008) 244 ALR 205, the High Court of Australia said that although these applications are typically dealt with via affidavit evidence without the benefit of cross-examination: at 216 [38], the prompt return policy does not prevent issues of disputed fact from being examined through the expeditious giving of oral evidence which is subject to cross-examination: at 217–19 [46]–[56].

20 During the drafting of the *Convention* it was agreed that its principal aim should be to give effect to the best interests of children generally rather than the best interests of individual children. See Michael Freeman, 'The Best Interests of the Child? Is "the Best Interests of the Child" in the Best Interests of Children?' (1997) 3 *International Journal of Law, Policy, and the Family* 360.

21 Cf Joel R Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1.

22 For a general overview of this study, see Bozin-Odhiambo, 'A Study of Outcomes Post-Return to Australia', above n 6.

went on to be determined in accordance with part VII of the *Family Law Act 1975* (Cth).

The study focused on the outcomes in cases where the abduction was perpetrated by the child's primary carer mother.²³ Empirical research reveals that there has been a trend away from abducting non-custodial father to abducting primary carer mothers. The impact of the 'feminisation' of international parental child abduction is yet to be fully explored empirically, yet this trend has been identified. Professor Nigel Lowe studied *Convention* return applications made by left-behind parents in 45 *Convention* countries in 2003.²⁴ His research reveals that at that time 68 per cent of abducting parents were mothers, and 29 per cent were fathers.²⁵ Eighty-five per cent of abducting mothers were the primary caregiver or joint primary caregiver. Only 30 per cent of the abducting fathers were primary caregivers or joint primary caregivers. The *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* reflects comparable findings. In this study the family law practitioner participants²⁶ were asked, 'In the *Convention* case/s you have acted in, approximately what percentage of abducting parents were primary carer mothers?'²⁷ 77.3 per cent of the participants indicated between 76–100 per cent, 18.2 per cent said between 51–75 per cent, and 4.5 per cent said between 1–25 per cent.²⁸

The study had two categories of participants. First, Australian-based family law practitioners (both barristers and solicitors) who had acted in post-return part VII parenting cases, where there was a prior abduction by the child's primary carer mother that was handled under the *Convention*. Second, Australian-based family law practitioners (both barristers and solicitors) who had acted in *Convention* return proceedings. These practitioner participants were identified through their membership to a state or territory professional law association or society.²⁹ Most legal practitioners in Australia hold membership to one or more of these bodies.³⁰ The survey was conducted online, and the family law practitioners receiving the invitation email were asked to self-identify as having the requisite case experience.

23 This emphasis does not detract from the existence of international parental child abduction perpetrated by abducting secondary carer mothers, and abducting primary carer and secondary carer fathers.

24 Lowe, 'A Statistical Analysis of Applications', above n 7, 22.

25 Ibid.

26 A total of 42 Australian-based family law practitioners (both barristers and solicitors) participated in the study.

27 Question 30 of the survey.

28 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 137.

29 The professional law associations and societies whose member lists were accessed were: Bar Association of Queensland, New South Wales Bar Association, Victorian Bar, Northern Territory Bar Association, South Australian Bar Association, Tasmanian Bar, Western Australian Bar Association, ACT Bar Association, Family Law Practitioners' Association of Queensland Ltd, Queensland Law Society, Law Society of New South Wales, Law Institute of Victoria, Law Society of the Northern Territory, Law Society of Tasmania, Law Society of Western Australia.

30 The contact details of members of these associations and societies, along with their areas of practice, are available for public access online.

Why not recruit abducting and left-behind parents as participants? This was the original strategy considered during the study's preliminary design. The recruitment strategy involved the Australian Commonwealth Central Authority forwarding a recruitment package to both abducting and left-behind parents on the researcher's behalf. This package would have included an invitation for the recipient to contact the researcher directly if they wished to participate. This procedure was necessary because the personal contact details of parents are contained in return application files in the Commonwealth Central Authority's possession. These details could not be accessed by the researcher without prior consent due to privacy legislation. Ultimately, this recruitment strategy was not pursued because the timing of when these recruitment packages could be sent out meant that parents would be recruited during the early stage of a return order application being lodged by the left-behind parent. This would have resulted in a significant wait time for an outcome that could be examined. Obviously, to study the circumstances of abducting primary carer mothers and their children post-return to Australia, it would have been necessary to survey parents only once there had been a lapse of time post-return under the *Convention*, to examine what happened to the parenting dispute. During this period there was a risk of high participant attrition given the emotional stress that parents endure during the *Convention* process and aftermath. An option to overcome privacy issues and the requirement for a third party to facilitate inviting parents to participate would have been to advertise asking parents to self-identify as having a post-return outcome. However, it would have been impossible to determine whether or not the sample population achieved was representative. In addition, the approach would have been expensive due to the diverse geographic locations of parents, and in all likelihood face-to-face interviews would have been required due to these families' profiles. Also, it would have been difficult to prevent participant attrition for the reason stated above. For these reasons family law practitioners who had represented these parents were recruited as the study's participants. Of course, not interviewing parents directly meant that there were limitations to the qualitative data that could be collected.

Twenty-eight of the study's participants said that they had acted in part VII cases post-return to Australia under the *Convention*. These participants reported on 115 cases. Just over half of these participants were female (57.1 per cent), and there was an equal number of solicitors and barristers.³¹ The participants had significant experience, with 78.6 per cent having practised in family law for 10 years or more, 14.3 per cent for between six and nine years, and the rest for between three and five years.³² For most of the participants (89.3 per cent) family law work comprised 76 per cent of their practice. For 3.6 per cent it constituted 51 per cent to 75 per cent, and for the rest it made up 26 per cent to 50 per cent of

31 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 110.

32 Ibid.

their practice.³³ Most of the participants' firms were located in capital cities (82.14 per cent), with the other 17.6 per cent working in a regional centre.³⁴ Just under half of the participants (43 per cent) were accredited family law specialists.³⁵ Many of the solicitor participants were employed in small-sized firms, with 53.3 per cent practicing in firms with 2–5 lawyers, 20 per cent with 6–14, and the remaining 26.7 per cent with more than 15 lawyers in their firm.³⁶

Twenty-two participants said that they had acted in one or more *Convention* return proceedings cases where the child was abducted from Australia (outgoing) or to Australia (incoming).³⁷ These participants reported on 73 cases. Ten (45.5 per cent) of these participants were male.³⁸ The vast majority of the 22 participants were highly experienced with 77.3 per cent having worked in family law for 10 or more years, 13.6 per cent had practised in family law for 6–9 years, and 9.1 per cent for 3–5 years.³⁹ For 72.7 per cent of the participants, 76 per cent or more of their workload was in family law. 4.5 per cent had a family law workload of between 51–75 per cent, 9.1 per cent said 26–50 per cent, and the remaining 13.3 per cent had a family law workload of between 1–25 per cent.⁴⁰ A significant portion of these participants were accredited family law specialists (31.8 per cent).⁴¹ There were slightly more barrister participants than solicitor participants (59.1 per cent).⁴² Out of the solicitor participants, 22.2 per cent worked in firms with 15 or more legal practitioners, 11.1 per cent worked in a firm with 6–14 practitioners.⁴³ The majority (66.7 per cent) worked in a small sized firm with 2–5 practitioners.⁴⁴ Seventeen participants (77.3 per cent) practised in a capital city, with the others in a regional centre.⁴⁵

33 Ibid.

34 Ibid 111.

35 Ibid 110.

36 Ibid 111.

37 An outgoing case involves a parent abducting their child from Australia to another *Convention* country. In these cases, the *Convention* process will be initiated by the left-behind parent and central authority in Australia. The return proceedings will take place in the *Convention* country to which the child was taken. An incoming case involves a parent abducting their child from another *Convention* country to Australia. In these cases, the *Convention* process will be initiated by the left-behind parent and central authority in the *Convention* country from which the child was taken. The return proceedings will take place in an Australian court.

38 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 112.

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid.

45 Ibid.

IV EQUAL SHARED PARENTAL RESPONSIBILITY AND SHARED CARE

A The Statutory Criteria

The Australian equal shared parental responsibility and shared care statutory criteria comprise several provisions that collectively formulate the approach.⁴⁶ These criteria were introduced into part VII of the *Family Law Act 1975* (Cth) in 2006.⁴⁷ Section 60CA provides that the underlying consideration in all parenting cases is the best interests of the child.⁴⁸ Section 60B contains a list of objects that facilitate the achievement of the best interests of the child. Australian courts are to formulate a parenting arrangement that is in the best interests of the child by applying the two-tiered checklist of considerations found in section 60CC.⁴⁹

The first tier of primary considerations directs that when determining what is in the best interests of the child, consideration must be given to: concern for the benefit to the child of having a meaningful relationship with both of their parents;⁵⁰ 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.⁵¹ The second tier of additional considerations includes considerations that are particularly relevant for families attempting to resolve their parenting dispute post-return to Australia under the *Convention*. Section 60CC(3)(d) provides that the court must consider the likely effect of any changes in the child's circumstances. This includes the likely effect on the child of any separation from

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- 46 See Cate Banks et 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 3; 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; Zoe Rathus, 'How Judicial Officers are Applying New Part VII of the *Family Law Act*: A Guide to Application and Interpretation' (2008) 20 *Australian Family Lawyer* 5.
- 47 The equal shared parental responsibility and shared care approach was introduced into Part VII of the *Family Law Act 1975* (Cth) by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
- 48 See generally Richard Chisholm, '"The Paramount Consideration": Children's Interests in Family Law' (2002) 16 *Australian Journal of Family Law* 87.
- 49 See generally Patrick Parkinson, 'Decision-Making about the Best Interests of the Child: The Impact of the Two Tiers' (2006) 20 *Australian Journal of Family Law* 179; Rathus, above n 46; *Taylor v Barker* (2007) 214 FLR 433; *G & C* [2006] FamCA 994; *Peter v Elspeth* [2007] FamCA 95.
- 50 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 *Australian Journal of Family Law* 175.
- 51 *Family Law Act 1975* (Cth) 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 Kaspiw, 'Family Violence in Children's Cases under the *Family Law Act 1975* (Cth): Past Practice and Future Challenges' (2008) 14 *Journal of Family Studies* 279.

either of his or her parents, or any other child, or other person (including any grandparent or other relative of the child). Section 60CC(3)(e) provides that the court must consider the practical difficulty and expense of a child spending time with and communicating with a parent. Also, the court must consider 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.

When the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* data was collected,⁵² additional considerations existed within the *Family Law Act 1975* (Cth) called the 'friendly parent' provisions. Section 60CC(3)(c) provided that the court must consider a parent's willingness and ability to encourage and facilitate a close and continuing relationship between the child and the other parent. Also, section 60CC(4)(b) specified that the extent to which each parent has fulfilled, or failed to fulfil, their responsibility in facilitating the other parent participating in decision making regarding the child, and spending time and communicating with the child, are relevant. Despite these considerations being repealed in 2012,⁵³ they can still impact on the judicial decision-making process. This is due to the current catch-all final additional consideration found in section 60CC(3)(m). This section states that the court may take into consideration any other facts or circumstances that it thinks are relevant.

The formulation of a parenting arrangement using the two tiers of considerations found in section 60CC is also shaped by a presumption of equal shared parental responsibility. Section 61DA requires that when making a parenting order in relation to a child, the court must apply a presumption of equal shared parental responsibility.⁵⁴ This presumption relates to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each parent. Section 61B provides that parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.⁵⁵ Section 65DAC stipulates that an order for equal shared parental responsibility is taken to require each parent to consult with the other.⁵⁶ Parents must also make a genuine effort to come to a joint decision⁵⁷ about any major long-term decisions relating to the child's welfare. The section also says that the exercise of equal shared parental responsibility requires that any short-term decisions about the child's welfare are made by the parent who has care of the child at that time, without the need to consult the other parent.⁵⁸ The presumption of equal shared parental responsibility requires parents to adopt a collaborative parenting

52 The data was collected in late 2009.

53 These second tier considerations were repealed on 7 June 2012 by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

54 See *Goode v Goode* (2006) 206 FLR 212.

55 This definition applies to ss 61C–61D of the *Family Law Act 1975* (Cth).

56 *Family Law Act 1975* (Cth) s 65DAC(3)(a).

57 *Family Law Act 1975* (Cth) s 65DAC(3)(b).

58 *Family Law Act 1975* (Cth) s 65DAC(2), 65DAE(1).

approach. The presumption can be rebutted in circumstances where there are reasonable grounds to believe that a child's parent has engaged in family violence or child abuse.⁵⁹ Also, the presumption does not apply 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.⁶⁰

If the presumption of equal shared parental responsibility is sustained, section 65DAA provides that the court is to consider a parenting arrangement that requires the child to spend equal time, or substantial and significant time, with each parent ('shared care').⁶¹ A substantial and significant time arrangement requires that the time that a child spends with both of their parents includes both weekdays and weekends.⁶² Each parent must also be involved in the child's daily routine and occasions and events that are of particular significance to the child.⁶³ In determining whether or not to order equal or substantial and significant time, the court should consider the best interests of the child and whether such an arrangement is reasonably practicable.⁶⁴ The court must have regard to how far apart the parents live;⁶⁵ each parent's current and future capacity to implement a shared care arrangement;⁶⁶ each parent's current and future capacity to communicate with each other and resolve difficulties that might arise in implementing a shared care arrangement;⁶⁷ and any other matters the court considers relevant.⁶⁸

B Equal Shared Parental Responsibility and Shared Care Situated as the Conventional Arrangement

The Australian Commonwealth Parliament's implementation of the equal shared parental responsibility and shared care approach was largely the result of the House of Representatives Standing Committee on Family and Community Affairs's recommendations outlined in the *Every Picture Tells a Story Report*. In June of 2003, then Prime Minister John Howard referred an inquiry into family law matters to the House of Representatives Standing Committee on Family and Community Affairs.⁶⁹ The inquiry's terms of reference included

what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether

⁵⁹ *Family Law Act 1975* (Cth) s 61DA(2)(a)–(b).

⁶⁰ *Family Law Act 1975* (Cth) s 61DA(3)–(4).

⁶¹ *Family Law Act 1975* (Cth) s 65DAA(1)–(2).

⁶² *Family Law Act 1975* (Cth) s 65DAA(3)(a)(i)–(ii).

⁶³ *Family Law Act 1975* (Cth) s 65DAA(3).

⁶⁴ *Family Law Act 1975* (Cth) s 60DAA(5).

⁶⁵ *Family Law Act 1975* (Cth) s 60DAA(5)(a).

⁶⁶ *Family Law Act 1975* (Cth) s 60DAA(5)(b).

⁶⁷ *Family Law Act 1975* (Cth) s 60DAA(5)(c).

⁶⁸ *Family Law Act 1975* (Cth) s 60DAA(5)(e).

⁶⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2003, 1728 (John Howard, Prime Minister).

there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted.⁷⁰

The Committee was directed to consider the Australian Commonwealth Government's response to the *Out of the Maze: Pathways to the Future for Families Experiencing Separation Report* prepared by the Family Law Pathways Advisory Group.⁷¹

The equal shared parental responsibility and shared care statutory criteria are established on a foundational belief that collaborative parenting is inherently advantageous to children.⁷² Within 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. They [that is parents] should start with an expectation of equal care.'⁷³ To facilitate this outcome, the House of Representatives Standing Committee on Family and Community Affairs sought to alter the then common 80/20 time arrangement.⁷⁴ It did this by recommending the introduction of language 'which is neutral and reflects assumptions that children will be given maximum opportunity of spending significant amounts of time with each parent.'⁷⁵

Prior to the 2006 amendments, equal time or substantial and significant time care arrangements ('shared care') appear to have been quite rare.⁷⁶ The commonly held belief was that the standard care arrangement comprised contact for one parent (usually the father) in the form of alternate weekends and half of the school holiday period, and primary care for the other parent; often described as an 80/20 time arrangement.⁷⁷ The Australian Bureau of Statistics reported that in 1997, prior to the implementation of equal shared parental responsibility and shared care, less than three per cent of children with separated parents had shared

70 *Every Picture Tells a Story Report*, above n 8, xvii.

71 Family Law Pathways Advisory Group, 'Out of the Maze: Pathways to the Future for Families Experiencing Separation' (Report, Commonwealth Departments of the Attorney-General and Family and Community Services, July 2001). For details of previous inquiries into the law regarding parenting disputes, see Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, Parliament of Australia, *The Family Law Act 1975: Aspects of its Operation and Interpretation* (1992); House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *To Have and to Hold: Strategies to Strengthen Marriage and Relationships* (1998).

72 See Rhoades, above n 3, 281.

73 *Every Picture Tells a Story Report*, above n 8, 30.

74 This parenting arrangement entails the child spending 80 per cent of their time with their primary carer parent and 20 per cent of their time with the other parent.

75 *Every Picture Tells a Story Report*, above n 8, 25.

76 See, eg, Bruce Smyth, Lixia Qu and Ruth Weston, 'The Demography of Parent-Child Contact' in Bruce Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements* (Australian Institute of Family Studies, 2004) 111.

77 Anna Ferro, "'Standard' Contact' in Bruce Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements* (Australian Institute of Family Studies, 2004) 85.

care arrangements.⁷⁸ Consistent with this, in 2003, the Australian Child Support Agency reported that less than four per cent of parents registered with them had a shared care arrangement.⁷⁹ These figures may be explained by the fact that the equal shared parental responsibility and shared care approach had been long recognised as problematic for families that do not possess a distinctive set of functional characteristics.

C When Does Shared Care Work?

Several Australian studies including the *Caring for Children After Separation* project conducted by the Australian Institute of Family Studies ('AIFS'),⁸⁰ have found that shared care is suitable when the parents: have self-selected the arrangement; live within close geographical proximity of each other; enjoy financial stability; have flexible working arrangements; and are capable of maintaining a child-focused collaborative working relationship without family violence or high levels of inter-parental conflict. In 2009, Fehlberg, Millward and Campo⁸¹ studied the experiences of 60 separated parents living with shared care parenting arrangements. Their data suggests that children living in shared care cope well when their families possess similar dynamics to those described in the AIFS project.⁸² Those families that reported a positive experience with shared care, after Australia's introduction of the approach in 2006, bore a close resemblance to the small number of families that voluntarily adopted the approach pre-2006. In particular their family dynamics included a cooperative and child-focused parental relationship. Mothers reported a high degree of confidence in the father's parenting skills. They negotiated their shared care arrangement with minimal involvement of the family law system.⁸³ Not surprisingly, the study reported that parents described their family's experience with shared care negatively when there was a conflicted or controlling inter-parental relationship. Also, shared care was viewed negatively when mothers perceived the existence of a lack of paternal competence, and it was necessary for the parents to have recourse to the family law system, particularly courts and lawyers, to formulate a parenting arrangement.⁸⁴ Fehlberg, Millward and Campo explain:

78 See Bruce Smyth and Llene Wolcott, 'Why Study Parent-Child Contact?' in Bruce Smyth (ed), *Parent-Child Contact and Post-Separation Parenting Arrangements* (Australian Institute of Family Studies, 2004) 1.

79 Ibid. 'Shared care' was defined as between 40 per cent and 60 per cent of care time split between the parents.

80 For a discussion of this project and its findings, see Smyth and Weston, above n 5; Cashmore et al, above n 5.

81 Fehlberg, Millward and Campo, 'Shared Post-Separation Parenting in 2009', above n 10. See also Belinda Fehlberg, Christine Millward and Monica Campo, 'Shared Post-Separation Parenting: Pathways and Outcomes for Parents' [2011] (86) *Family Matters* 33.

82 Fehlberg, Millward and Campo, 'Shared Post-Separation Parenting in 2009', above n 10, 269.

83 Ibid.

84 Ibid.

shared parenting data suggests that the 2006 shared parenting changes are encouraging more parents to utilise shared care arrangements but that the group for whom shared care is workable remains much the same as was reported in research conducted prior to 2006. For others attempting shared care, particularly those who report on-going parental conflict, our data suggest negative experiences and consequences for children and mothers.⁸⁵

Research establishes that the shared care approach is not inherently advantageous for the majority of children. It continues to be a suitable parenting arrangement for separated families that possess a distinctive set of functional characteristics. Yet, the Australian statutory criteria arguably situate the approach as a conventional arrangement appropriately suited to resolve a considerable proportion of parenting disputes. As Rhoades aptly suggests:

At the heart of this [statutory criteria] framework is a narrowing of the discretion that has been historically associated with the 'paramountcy principle'. Whilst the child's best interests remain the 'paramount' consideration when determining appropriate care arrangements, those interests are now explicitly aligned with collaborative parenting, with limited exceptions such as for children affected by violence or abuse.⁸⁶

In view of this, how do the statutory criteria accommodate the circumstances of families that possess similar characteristics to those that experience international parental child abduction by the child's primary carer, ie, high levels of inter-parental conflict, family violence and child abuse, and where one parent has a desire to relocate with their child? Participants in the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* who had acted in *Convention* return proceedings were asked what they believed motivated the primary carer mother in their cases to abduct their child overseas.⁸⁷ Parents' motivations for the act of abduction provide some insight into the functional characteristics of these families. The findings were as follows: 63.6 per cent wanted to regain a family and/or social support network (a lack of feeling supported); 45.5 per cent of the abducting mothers were motivated by a need to escape domestic violence; 72.7 per cent of abducting mothers had a desire to return to their homeland (in Hague cases, the abducting parent clearly chose a unilateral action over following legal process and applying for a relocation order); and 36.4 per cent were seeking to improve their financial situation.⁸⁸

D Shared Care and Inter-Parental Conflict

Families that experience international parental child abduction are undoubtedly beset by inter-parental conflict. The Australian Commonwealth

85 Ibid 24.

86 Rhoades, above n 3, 282.

87 Question 29 of the survey. It should be noted that this data was provided by family law practitioners who acted for a parent, not the parent themselves. Therefore a level of speculation on the practitioner's behalf was required to answer this question. Twenty participants answered this question regarding a combined total of 73 cases.

88 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 136.

Parliament's House of Representatives Standing Committee on Family and Community Affairs recommended a legislative presumption against equal shared parental responsibility in cases characterised by entrenched conflict.⁸⁹ They acknowledged that there are families for whom inter-parental conflict is so ingrained that collaborative parenting, and the practicalities of a shared care arrangement, will not be achievable or in the child's best interests.⁹⁰ In response to this recommendation the Australian Commonwealth Government stated:

[I]t could be argued that any case that reaches a final court hearing involves entrenched conflict. Making entrenched conflict a ground for applying a presumption against joint parental responsibility could mean the courts would rarely be able to apply the proposed new presumption in favour of joint parental responsibility.⁹¹

Accordingly, an entrenched inter-parental conflict exception to the equal shared parental responsibility presumption was not included. Rhoades explains that the government's reason for omitting such an exception reveals their concern that to do so would effectively destabilise 'the normative aim of the reforms'.⁹²

Not surprisingly, since the introduction of equal shared parental responsibility and shared care in Australia, there has been an increase in the number of shared care arrangements being reached by final order and private agreement. Prior to 2006, separating parents who required judicial or alternative dispute resolution intervention to resolve their parenting dispute were typically seen as unsuitable candidates for shared care. This was due to the presence of high levels of inter-parental conflict necessitating intervention to formulate a parenting arrangement. Where such a dynamic is present, the introduction of a shared care arrangement has been recognised as exposing children to psychological harm, inhibiting the fulfilment of their emotional and developmental needs.

Empirical research reveals that for a significant number of children shared care arrangements are a source of psychological stress. This is largely due to the presence of high levels of family conflict, and the parents' corresponding inability to parent collaboratively.⁹³ A 2006 study by McIntosh and Long of 77 parents who participated in the Less Adversarial Trial ('LAT') and Child Responsive Program ('CRP') initiatives in the Family Court of Australia,⁹⁴

89 *Every Picture Tells a Story Report*, above n 8, 41.

90 *Ibid* 20.

91 Australian Government, *A New Family Law System: Government Response to Every Picture Tells a Story* (2005) 5–6.

92 Rhoades, above n 3, 288.

93 Rae Kaspiew et al, 'The AIF Evaluation of the 2006 Family Law Reforms: A Summary' [2011] (86) *Family Matters* 8.

94 Jennifer McIntosh and Caroline Long, 'The Child Responsive Program Operating with the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes' (Report to the Family Court of Australia, Family Transitions, 2007). This research comprised a study of a program piloted in the Family Court Registries of both Melbourne and Dandenong. Data was collected from 77 parents who were parties in 54 parenting cases in these registries. The participant parents responded to a follow-up survey four months after the settlement of their parenting dispute.

revealed that 28 per cent of the families entered into the process with a shared care arrangement. Forty-six per cent of them left with one.⁹⁵ Shared care was defined as the children spending five or more nights with each parent per fortnight. Most relevant for our purposes here is the study's findings concerning the emotional adjustment of these families' 111 children⁹⁶ four months after the shared care arrangements began. At this time, parents were asked to rate their children's functioning in the categories of anxiety, tearfulness, fearfulness, psychosomatic symptoms and separation anxiety. The researchers used the Emotional Symptoms Subscale of the Strengths and Difficulties Questionnaire.⁹⁷ Twenty-eight per cent of the children's scores indicated a high degree of emotional distress that the investigators categorised as a concerning level of functioning requiring professional intervention, such as counselling or specialist child psychiatric treatment.⁹⁸ McIntosh and Long concluded that five variables were cumulatively responsible for the children's poor emotional outcomes. They were: the parents remained in high conflict; the child was unhappy with their living and care arrangements; the child lived in substantially shared care (35 per cent or greater); the parent's relationship with the child had not improved post-court; and one parent had concerns about their child's safety when in the care of the other parent.⁹⁹

More recently, McIntosh et al¹⁰⁰ examined the potential risks of a broader application of shared care arrangements post-2006 to child development. Specifically, the purpose of their study was to identify the types of care arrangements that would either support or detract from the developmental needs of children within specific risk categories. One of these risk categories was school-aged children whose family environment was characterised by high inter-parental conflict. Their longitudinal study of this specific group of children comprised face-to-face interviews. These interviews were with both parents and children from 169 families who attended either child-focused or child-inclusive post-separation family dispute resolution. The interviews took place four times over a four-year period, beginning at the commencement of divorce mediation. Twenty-seven per cent of the sample of families experienced a continuous shared care arrangement during the period studied. Eighteen per cent began with shared

95 Ibid 9. See also Jennifer McIntosh and Caroline Long, 'Children Beyond Dispute: A Prospective Study of Outcomes from Child Focused and Child Inclusive Post-Separation Family Dispute Resolution' [2007] (3) *Family Relationships Quarterly* 3; Jennifer McIntosh and Richard Chisholm, 'Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale from Current Research' (2007) 20 *Australian Family Lawyer* 1.

96 The children in this study were three years of age and above.

97 McIntosh and Long, 'The Child Responsive Program Operating with the Less Adversarial Trial', above n 95, 16–17.

98 Ibid. McIntosh and Long explained that in the general normative population in Australia, about 14 per cent of children would normally fall into this category: at 17.

99 Ibid 17.

100 Jennifer McIntosh et al, 'Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes: Studies of Two Risk Groups' [2011] (86) *Family Matters* 40.

care and moved to a primary care arrangement. Fourteen per cent began with primary care and moved to a shared care arrangement. Forty one per cent experienced a continuous primary care arrangement.¹⁰¹ The researchers found that families that maintained a shared care arrangement for the duration of the studied period possessed distinctive functional characteristics conducive to this parenting arrangement.

Not unlike the AIFS *Caring for Children After Separation Project*¹⁰² and the Fehlberg, Millward and Campo study,¹⁰³ the successful maintenance of a shared care arrangement appeared to be supported by a number of distinctive functional characteristics. They were: low levels of inter-parental conflict and acrimony; high levels of parental alliance; close geographical proximity between the two households; and cooperative parenting informed by a belief held by each parent in the other's competence.¹⁰⁴ Those families that began with shared care but reverted back to a primary care arrangement were characterised by high levels of inter-parental conflict and a lack of collaborative parenting.¹⁰⁵ The study found that at the four-year mark, children living with a shared care arrangement had the lowest satisfaction of all of the four care arrangement groups.¹⁰⁶ Additionally, at this time children living with a shared care arrangement reported the highest levels of inter-parental conflict.¹⁰⁷ Children in this group were the most likely to report 'ongoing feelings of being caught in the middle of their parents' conflict.'¹⁰⁸

Weston et al¹⁰⁹ also examined the circumstances under which the wellbeing of children is positively and negatively influenced by shared care arrangements. Their investigation focused on data derived from a survey of 10002 parents who took part in stage one of a longitudinal study of separated families conducted by the AIFS to evaluate the 2006 amendments to the *Family Law Act 1975* (Cth).¹¹⁰ Across all age groups (0–17 years) 16 per cent of the sample of children

101 Ibid 40–1. Therefore 32 per cent of families changed their care arrangement during the four-year study period.

102 See Smyth and Weston, above n 5, 8.

103 Fehlberg, Millward and Campo, 'Shared Post-Separation Parenting in 2009', above n 10, 269.

104 McIntosh et al, above n 100, 42.

105 Ibid.

106 Ibid.

107 Ibid.

108 Ibid. Note that the study found that the type of care arrangement experienced by the children over time did not in itself predict their total mental health scores.

109 Ruth Weston et al, 'Care-Time Arrangements after the 2006 Reforms: Implications for Children and their Parents' (2010) 86 *Family Matters* 19.

110 Ibid 20. The study of participants occurred within 26 months after separation. The average duration of separation at the time of data collection was 15 months. The children of the parents surveyed were in the following age categories: 41 per cent were younger than three years old, 18 per cent were between three and four, 29 per cent were between 5 and 11, 7 per cent were between 12 and 14, and 5 per cent were between 15 and 18. The researchers used the Child Support Agency's child support liability cut-offs to define shared care. Children living with each parent between 35–65 per cent of nights were deemed to be in shared care arrangements: at 20–1.

experienced shared care, with 7–8 per cent of them living in an equal time care arrangement.¹¹¹ Children under the age of three were the least likely to experience shared care (only eight per cent).¹¹² Whilst 20 per cent of children aged 3–4 years old, 26 per cent aged 5–11, 20 per cent aged 12–14, and 11 per cent aged 15–17 lived in shared care arrangements.¹¹³ The researchers found that the wellbeing of children in shared care was compromised when their parents' relationship displayed high levels of conflict and/or fearfulness, due to family violence or parental concern for their and their children's physical safety.¹¹⁴ Parents were asked to evaluate the workability of their care arrangements for their children, themselves and the other parent. Fathers reported the highest level of self-satisfaction with shared care arrangements, possibly due to a belief in the fairness of the arrangement.¹¹⁵ Interestingly, overall, parents experiencing shared care arrangements were more likely than those living with primary care arrangements to perceive the arrangement as working well for their children.¹¹⁶ However, Weston et al¹¹⁷ suggest that this is indicative of the fact that those families with such arrangements possessed distinctive characteristics that facilitated the arrangement's success. Weston et al also remarked that '[i]mportantly, the generally positive findings about shared care time related more to the characteristics of families that chose these arrangements than to the nature of the arrangement.'¹¹⁸

The omission of an entrenched inter-parental conflict exception supports the argument that the equal shared parental responsibility and shared care approach guides the exercise of discretion to determine a child's best interests towards an outcome that is incompatible with the lives of families that do not possess the functional characteristics necessary to make shared care work. Research tells us that shared care arrangements expose children to psychological harm when their families possess a dynamic of high inter-parental conflict and lack a distinctive set of functional characteristics. The presence of high levels of inter-parental conflict may in part explain why abducting primary carer mothers have a desire to return to their homeland; to regain a sense of connectedness through a family and/or social support network.

111 Ibid 21. Equal time care was defined as living with each parent between 48–52 per cent of nights.

112 Ibid 22.

113 Ibid.

114 Ibid 29.

115 Ibid 23. See Figure Two.

116 Ibid. See Figure Four.

117 Ibid 29.

118 Ibid.

E Shared Care and Family Violence and Child Abuse

Families that experience international parental child abduction are affected by a high incidence of family violence.¹¹⁹ The Australian Commonwealth Parliament's House of Representatives Standing Committee on Family and Community Affairs did acknowledge that equal shared parental responsibility and shared care is not a 'one size fits all' approach.¹²⁰ It recommended a presumption against equal shared parental responsibility if the presence of family violence and/or child abuse could be substantiated.¹²¹ This recommendation was not adopted by the Australian Commonwealth Government. Instead, section 61DA(2) of the 2006 amendments provides that the presumption of equal shared parental responsibility does not apply when there is evidence of family violence and/or child abuse.¹²² Academics criticised this approach as actually 'shift[ing] the gaze away from evidence of past violence towards post-separation events [for example an act of abduction by the child's primary carer mother] and a new ideal future'.¹²³ This was principally because optimism associated with the exception's inclusion was eroded by the inclusion of the now repealed friendly parent provisions.¹²⁴ Despite the repeal of the friendly parent provisions, they can still impact on the judicial decision-making process due to the current catch-all final additional consideration found in section 60CC(3)(m) of the *Family Law Act 1975* (Cth). Recognising the inadequacy of the exception, the Australian Commonwealth Government inserted section 60CC(2A) into the *Family Law Act*

119 Lowe, 'A Statistical Analysis of Applications', above n 7, 22. See also Lowe, '2007 Update', above n 7. We will see that the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* reported within this article also reflects comparable findings.

120 *Every Picture Tells a Story Report*, above n 8, 31.

121 The Committee also recommended a presumption against shared parental responsibility where there is substance abuse by a parent or entrenched conflict. This suggestion was explicitly omitted from the amendments: *Every Picture Tells a Story Report*, above n 8, 41.

122 See also *Family Law Act 1975* (Cth) ss 60CC(2)(b), 60CC(3)(j)(k). See Richard Chisholm, 'Family Courts Violence Review' (Report, Australian Commonwealth Attorney-General's Department, 27 November 2009). In this report, Chisholm reviews the legislation, practices and procedures that apply in cases characterised by family violence. He also specifically discusses the inadequacy of the 'friendly parent' provisions.

123 Rathus, above n 51, 87. See also Dale Bagshaw et al, 'The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006' [2011] (86) *Family Matters* 49; Dale Bagshaw, 'Shared Parental Responsibility, Family Violence and the "Best Interests" of Children in Family Law' (Paper presented at the Family Relationships Services National Conference, Cairns, 5–7 November 2008); Helen Rhoades, Charlotte Frew and Shurlee Swain, 'Recognition of Violence in the Australian Family Law System: A Long Journey' (2010) 24 *Australian Journal of Family Law* 296.

124 Section 60CC(3)(c) of the *Family Law Act 1975* (Cth) provided that the court must consider a parent's willingness and ability to encourage and facilitate a close and continuing relationship between the child and the other parent. Also, s 60CC(4)(b) specified that the extent to which each parent has fulfilled, or failed to fulfil, their responsibility in facilitating the other parent participating in decision making regarding the child, and spending time with and communicating with the child, are relevant.

1975 (Cth) in 2012.¹²⁵ This section provides that when applying the primary considerations found in section 60CC(2), the court is to give greater weight to the domestic violence and child abuse considerations.

F Shared Care and Relocating a Child Overseas

When a family experiences international parental child abduction, the abducting parent has chosen to act on their desire to relocate by way of unilateral action, rather than following legal process by applying for a relocation order. The Australian Commonwealth Parliament's House of Representatives Standing Committee on Family and Community Affairs explicitly predicted a narrowing of the exercise of discretion to determine a child's best interests when a parent applies for an order to relocate with their child.¹²⁶ They anticipated the effect of the equal shared parental responsibility and shared care approach on relocation applications when stating 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'.¹²⁷ The statutory criteria found in part VII of the *Family Law Act 1975* (Cth) determine relocation applications. There are no additional provisions that exclusively apply to relocation disputes.¹²⁸

Equal shared parental responsibility and shared care aligns children's best interests with their parents living within close geographical proximity of each other to facilitate the practicalities of the approach.¹²⁹ A presumption of equal shared parental responsibility should not prevent relocation per se,¹³⁰ because it principally concerns equal shared decision making about long term rather than day-to-day issues. However, despite this, applications to relocate appear less likely to succeed since the introduction of equal shared parental responsibility and shared care.¹³¹ Parkinson's analysis of 58 relocation decisions handed down by the Family Court of Australia after the adoption of the approach reveals that it

125 This section was inserted by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

126 *Every Picture Tells a Story Report*, above n 8, 33.

127 *Ibid.*

128 See Family Law Council, *Relocation: A Report to the Attorney-General Prepared by the Family Law Council* (Commonwealth of Australia, 2006).

129 See *Rosa v Rosa* [2009] FamCAFC 81 (15 May 2009).

130 See the High Court of Australia case *MRR v GR* (2010) 240 CLR 461. See also Richard Chisholm and Patrick Parkinson, 'Reasonable Practicability as a Requirement: The High Court's Decision in *MRR v GR*' (2010) 24 *Australian Journal of Family Law* 255.

131 See Tim Carmody, 'Child Relocation: An 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 *Australian Journal of Family Law* 222; Juliet Behrens, Bruce Smyth and Rae Kaspiew, 'Outcomes in Relocation Decisions: Some New Data' (2010) 24 *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 *Australian Journal of Family Law* 89.

is more difficult for a primary carer to relocate and more difficult to justify an international relocation than one within Australia.¹³² This is because the equal shared parental responsibility and shared care statutory criteria require courts to consider relocation applications with a primary emphasis on the benefit to the child of having a meaningful relationship with both parents.¹³³ An application to relocate will generally be denied if it disturbs a meaningful relationship between parent and child.¹³⁴

Relocation cases are particularly challenging because where the relocation is of a considerable geographical distance, one of the parents must make a significant sacrifice. At the heart of the decision about whether or not to grant a relocation order, is a tension between the primary carer parent's right to freedom of movement,¹³⁵ and the statutory criteria's emphasis on the child maintaining a meaningful relationship with the other parent.¹³⁶ Post-2006, the resolution of this tension occurs within a context of equal shared parental responsibility and shared care arrangements.¹³⁷

Parkinson explains that post-2006 divergent judicial approaches to interpreting and applying the statutory criteria in relocation cases have emerged.¹³⁸ Differing views concern how to determine the weight to be attached to the applicant parent's right to freedom of movement, when that freedom impinges on the development of a meaningful relationship between the child and the other parent.¹³⁹ Furthermore, what constitutes a meaningful relationship appears indeterminate.¹⁴⁰ However, generally speaking, an applicant parent's right to freedom of movement must give way to the extent to which it is perceived as impacting upon a meaningful relationship between the child and the other parent.¹⁴¹

A small number of studies have examined the effect of the equal shared parental responsibility and shared care amendments on the outcome of

132 Patrick Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36 *Federal Law Review* 145, 153, 164.

133 Ibid 146. However, '[m]ajor differences have emerged between trial judges on how to interpret and apply the new law to relocation cases. In particular, there are very different views about how to evaluate the importance of freedom of movement when that freedom would disrupt a meaningful relationship between the child and the other parent'. See also Patrick Parkinson, Judy Cashmore and Judi Single, 'The Need for Reality Testing in Relocation Cases' (2010) 44 *Family Law Quarterly* 1.

134 See Parkinson, above n 132, 146.

135 See *AMS v AIF* (1999) 199 CLR 160 (Kirby J).

136 See Parkinson, above n 132.

137 See ibid 146.

138 Ibid 148. See also Patricia Easteal and Kate Harkins, 'Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act' (2008) 22 *Australian Journal of Family Law* 259.

139 See Parkinson, above n 132, 148–9.

140 Easteal and Harkins, above n 139, 259.

141 Parkinson, above n 132, 145. 'The central problem is determining how much importance should be given to a parent's freedom of movement given this [the equal shared parenting and care amendments'] greater emphasis on the involvement of both parents'.

relocation applications made in Australian courts.¹⁴² Parkinson's analysis of post-2006 relocation cases determined that 53 per cent of relocation applications¹⁴³ were unsuccessful.¹⁴⁴ Of the nine international relocation applications examined, five of them were unsuccessful.¹⁴⁵ Parkinson found that the benefit to the child of having a meaningful relationship with both parents is the central consideration.¹⁴⁶ Most successful relocation applications in Parkinson's sample involved concerns about the fitness and parenting capacity of the non-applicant parent.¹⁴⁷ These cases were also characterised by a history of family violence and/or child abuse, or paternal disengagement.¹⁴⁸ Understandably, under such circumstances, the existence of a meaningful relationship between the child and respondent parent is compromised. Conversely, many of the unsuccessful relocation applications involved an apprehension about the primary carer applicant's willingness to facilitate a meaningful relationship between the child and other parent, including them spending time together.¹⁴⁹

Easteal and Harkins¹⁵⁰ examined the last 20 relocation cases prior to the introduction of equal shared parental responsibility and shared care,¹⁵¹ and the first 20 afterwards, heard by the Family Court of Australia.¹⁵² As they had hypothesised, the amendments made relocation more difficult. Three-quarters of the pre-amendment relocation applications were successful, compared to only half post-amendment.¹⁵³ The researchers found that in their post-amendment sample, applicant parents who clearly demonstrated an ability and willingness to facilitate contact between the child and left-behind parent, fared better. This was an imperative consideration in 13 of the 15 successful relocation applications in their sample.¹⁵⁴

The present exceptions to the equal shared parental responsibility and shared care approach are insufficient to adequately accommodate the needs of families that do not possess the distinctive functional characteristics necessary to make shared care work. Despite being in the minority, families able to successfully

142 See, eg, Kaspiew, Behrens and Smyth, 'Relocation Disputes in Separated Families Prior to the 2006 Reforms: An Empirical Study' [2011] (86) *Family Matters* 72; Behrens, Smyth and Kaspiew, 'Outcomes in Relocation Decisions', above n 131; Behrens, Smyth and Kaspiew, 'Australian Family Law Court Decisions on Relocation', above n 131.

143 The applicants in this analysis were the child's biological parents.

144 Parkinson, above n 131, 37.

145 Ibid.

146 Parkinson, above n 131, 39.

147 Ibid 37.

148 Ibid.

149 Ibid.

150 Easteal and Harkins, above n 138, 259.

151 Between July 2003 and June 2006.

152 Between July 2006 and June 2007. They also examined the 10 consecutive cases immediately after the first Full Family Court of Australia decision after the equal shared parental responsibility and shared care amendments' introduction. See also *Taylor v Barker* (2007) 214 FLR 433.

153 Easteal and Harkins, above n 138, 263.

154 Ibid 269.

conform to this ideal paradigm of how families should configure their care arrangements are situated as conventional. However, families experiencing entrenched inter-parental conflict, family violence, and a desire to relocate overseas, find their needs overlooked. This is because their characteristics are incompatible with shared care. The next Part of this article will consider the implications of the equal shared parental responsibility and shared care approach for families post-return to Australia under the *Convention*.

V EQUAL SHARED PARENTAL RESPONSIBILITY AND SHARED CARE POST-RETURN TO AUSTRALIA UNDER THE HAGUE CHILD ABDUCTION CONVENTION

Short of abduction or other unilateral solutions that are unlawful and intolerable, the only peaceful means by which [child relocation] dilemmas can be resolved in a civilized society is by trusting a trained decision-maker with the painful task of reaching a conclusion according to statutory criteria and judicial guidance.¹⁵⁵

How is the part VII statutory criteria applied to formulate parenting arrangements that will accommodate the unique circumstances of families that experience international parental child abduction post-return to Australia under the *Convention*?

A An Empirical Snapshot

1 Parenting Orders and Agreements Post-Return

There are three possible states of affair post-return to Australia under the *Convention*. The parenting dispute may be litigated in court, mediated to agreement, or remain dormant.¹⁵⁶ If the parents litigate or mediate the dispute, what kind of parenting arrangements are being formulated?

The *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* had 28 family law practitioner participants who had acted in post-return part VII cases, where there was a history of abduction by the child's primary carer mother that had been handled under the *Convention*.¹⁵⁷ Participants were asked to include both cases where a *Convention* return order was granted, and where the left-behind parent initiated a return order application but the parties then negotiated return to Australia without a formal return order being made.

¹⁵⁵ *U v U* (2002) 211 CLR 238, 270 (Kirby J).

¹⁵⁶ It is difficult to identify the third group of abducting primary carer mothers for whom the parenting dispute is neither litigated nor mediated to agreement post-return. This is because these mothers may not have even sought advice from a legal practitioner upon return to Australia under the *Convention*.

¹⁵⁷ Question 9 and question 10 of the survey. Note that there were 29 participants before the removal of participant number 11's incorrect 'yes' answer to question 9. The participant numbers were 2, 4, 5, 6, 7, 8, 9, 10, 13, 17, 18, 21, 22, 23, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42.

Cumulatively these participants had acted in a total of 115 post-return cases.¹⁵⁸ Participants were asked to categorise their cases into final orders and private agreements.

Participants were asked to specify how many of their cases resulted in a final order.¹⁵⁹ All 28 participants responded with a total of 103 cases.¹⁶⁰ The sample of 115 post-return part VII cases included 103 cases that resulted in a final order.¹⁶¹ Participants were also asked how many of their post-return part VII cases resulted in a private agreement,¹⁶² concerning who the children would live with and where.¹⁶³ Four of the participants said that together six of their cases had this outcome.¹⁶⁴ With 103 of 115 cases resulting in a final order, and six cases resulting in a private parenting agreement, the remaining six cases remained dormant with no agreement reached or order made post-return to Australia.¹⁶⁵

This data reveals the complexity of these cases. These parenting disputes generally require a final order outcome due to the presence of entrenched inter-parental conflict. The potential for these cases to be resolved with a private agreement appears minimal. It is reasonable to hypothesise that many more post-return cases potentially fall into the dormant category than have been reported by the study's participants. Participants may not have instantly recalled cases in which they only gave a party one-off legal advice, without being retained to seek a final order or mediated private agreement. There may also be a category of cases where the abducting primary carer mother does not have any contact with a legal practitioner, or the family law system, post-return to Australia.

It was originally thought that a possible limitation of the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* was that the

158 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 118. All 28 participants identified in question 9 moved onto question 10 which asked them to indicate how many of these particular cases they had acted in.

159 Question 12 of the survey. When the term 'final order' is used, this encompasses judicially determined final court orders, as well as consent orders. If a consent order was lodged with the court there was no hearing. Instead, a registrar in chambers would determine whether or not the terms agreed to by the parties were in the best interests of the child, before granting what was considered a final order.

160 Participant numbers 42, 35 and 8 had zero post-return Part VII cases which resulted in a final order.

161 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 119.

162 Between 1996 and 2006, it was possible for parties to register their private parenting agreements (parenting plans) with the court. This process did not involve a judicial officer. Registration was only conditional on a third-party lawyer signing the agreement to say that they had provided legal advice. Alternatively, parents have always been able to reach an informal private parenting agreement without the assistance of a lawyer or any form of judicial process or registration. When the term private agreement is used, this encompasses both of these options.

163 Question 17 of the survey; 27 participants answered this question. Note that participant number 32 said that they had acted in five parenting dispute cases where there was a prior abduction handled under the *Convention* at question 12, with all five resulting in a final order outcome. However, rather than entering zero into question 17, they did not respond. This accounts for the drop to 27 participants in question 17.

164 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 123–4. Participant number 7 (2 cases), participant number 8 (1 case), participant number 35 (1 case), participant number 36 (1 case) and participant number 42 (1 case).

165 *Ibid.*

large number of final order outcomes could be due to the number of barristers participating. However, when considering the outcomes of the sample of post-return cases achieved by solicitors and barristers, the difference is fairly negligible. Nineteen solicitors and 23 barristers had acted in part VII cases considered by this study.¹⁶⁶ Sixteen (84.2 per cent) of the solicitors achieved final orders in their cases, compared to 21 (91.3 per cent) of the barrister participants.¹⁶⁷

If parties litigate or mediate their parenting dispute post-return to Australia, what type of parenting orders or agreements are made? First, the *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* participants were asked about the outcomes of the 103 post-return part VII cases they had acted in that resulted in a final order.¹⁶⁸ In only 25.5 per cent of cases, the child continued to live with their abducting primary carer mother and the father's contact remained the same as before the abduction.¹⁶⁹ In 31.3 per cent of cases, the child continued to live with their abducting primary carer mother and the father's contact increased. In three per cent of cases, the child continued to live with the abducting primary carer mother and the father's contact decreased.¹⁷⁰ In 13.1 per cent of cases, a 50 per cent shared time order was made. In 15.2 per cent of cases, the child changed to living with the left-behind father, and the once abducting primary carer mother now had contact.¹⁷¹ In one per cent of cases, the child changed to living with the left-behind father, and the once abducting primary carer mother did not have any contact.¹⁷² In 5.1 per cent of cases, the abducting primary carer mother was permitted to relocate back overseas with the child by consent.¹⁷³ In 8.1 per cent of cases, the abducting primary carer mother was permitted to relocate back overseas with the child by court order.¹⁷⁴

Next, the four participants who had acted in a total of six post-return cases that resulted in a private parenting agreement were asked to identify what these agreements were.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ In the remaining three cases (50 per cent), the abducting primary

¹⁶⁶ Ibid. Question 9 of the survey.

¹⁶⁷ Ibid. Question 12 of the survey.

¹⁶⁸ Question 12 and question 13 of the survey.

¹⁶⁹ Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 120.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Participant numbers 10, 18, 27 and 28. Question 17 and question 18 of the survey.

¹⁷⁶ Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 125.

¹⁷⁷ Ibid.

carer mother was able to relocate back overseas with the child.¹⁷⁸ Despite this being a very small sample, it appears that abducting primary carer mothers fare better in post-return private agreements compared to final orders.

In the case sample reported by the participants, 28.3 per cent of post-return part VII final 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 the final order cases the abducting primary carer mother's contact with the child was decreased in some way,¹⁷⁹ it is anticipated that these two figures will only increase with time, as the full effect of the equal shared parental responsibility and shared care approach is revealed. Moreover, in only 13.2 per cent of the final order cases studied, the primary carer mother was permitted to relocate back overseas with her child.¹⁸⁰ Relocation by a parent is less of an option since the introduction of equal shared parental responsibility and shared care. The figure of a 13.2 per cent success rate for relocation order applications, in the context of a prior abduction that was handled under the *Convention*, is lower than the statistics reported by Parkinson and his contemporaries in their studies of relocation applications post-2006.¹⁸¹ However, Parkinson's sample did not include cases where there had been a prior international parental child abduction.

2 The Impact of Shared Parental Responsibility and Shared Care Post-Return

The *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* reveals that the introduction of equal shared parental responsibility and shared care has affected an abducting primary carer mother's likelihood of successfully applying for a relocation order post-return. Collaborative parenting and shared care arrangements require parents to live within close geographical proximity of each other. Where the family has been transnational in character, this type of parenting arrangement can result in family members' freedom of movement being restricted. This can occur despite the family being characteristically mobile prior to the act of abduction.

Twenty-five of the study's participants had acted in 54 part VII cases where the abducting primary carer mother made a relocation application post-return to Australia under the *Convention*.¹⁸² These participants were asked, 'If in any of your cases the Court refused the abducting primary carer mother's relocation

178 Ibid.

179 Ibid 225.

180 Ibid 226.

181 Parkinson, above n 131, 37.

182 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 231. Question 15 of the survey. In total 25 participants answered this question. They said that a relocation application was made by the abducting primary carer mother in 54 out of the 101 final order outcome cases.

application, why in your opinion did it?’¹⁸³ Some 56.3 per cent said that the court refused the relocation application because of a belief that ‘relocation overseas would adversely affect the child/ren’s ability to maintain a meaningful relationship with the left-behind parent’.¹⁸⁴ Whilst 68.8 per cent said that the court determined that ‘the prior abduction indicated unwillingness on the abducting mother’s part to encourage a meaningful relationship between the child/ren and the left-behind parent’.¹⁸⁵ It is arguable that the equal shared parental responsibility and shared care statutory criteria support a censuring of mothers by restricting their freedom of movement. This is principally because the act of abduction offends the desired equal shared parental responsibility and shared care ideal.

The prior act of abduction adversely impacts on a mother’s prospects of retaining her caregiver status in post-return part VII litigation or mediation. The *Study of Hague Child Abduction Convention Outcomes Post-Return to Australia* participants were asked how the act of abduction affected the court’s final parenting order in the cases they had acted in.¹⁸⁶ Participants perceived the existence of a general judicial attitude of ‘condemnation’.¹⁸⁷ The act of abduction was regarded as demonstrating: ‘a poor attitude of the removing parent’;¹⁸⁸ a ‘lack of insight as to the important relationship between the child and father’;¹⁸⁹ a lack of ‘intention of the taking parent to promote and facilitate [the child’s] relationship with the other parent’;¹⁹⁰ and ‘an important factor affecting the child welfare issue’.¹⁹¹ The effect of these perceptions on final orders and private agreements can be a shift from a transnational lifestyle to immobility. An approach that censures a primary carer mother for having abducted her child needs to be positioned within a detailed consideration of her and her child’s circumstances in Australia prior to the abduction: how mobile the family unit has been; the mother’s motivations for the act; and how these circumstances relate to the child’s welfare and best interests. It is possible that these perceptions are exacerbated by the current statutory criteria’s emphasis on equal shared parental responsibility and shared care.

183 Question 16 of the survey. Participant numbers 4, 6, 9, 10, 17, 22, 23, 27, 28, 36, 37, 39, 40, 41 with participant number 2 and 18 providing ‘not applicable’ responses. More than one of the answer options provided could be chosen.

184 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 231–2.

185 Ibid.

186 Question 14 of the survey.

187 Bozin-Odhiambo, *A Critical Analysis of the Hague Convention*, above n 6, 232–3. Participant number 41.

188 Ibid Participant number 6.

189 Ibid Participant number 9.

190 Ibid Participant number 34.

191 Ibid Participant number 17.

VI CONCLUSION

If the abducting parent is the child's non-custodial father, and the child's habitual residence possesses the quality of their 'home' environment,¹⁹² then the application of equal shared parental responsibility and shared care post-return to Australia may not be excessively detrimental. Post-Return, the child and their mother, who was principally responsible for their nurturing and stability prior to the abduction, continue to live in a geographical environment in which they maintain meaningful social, cultural, economic, and linguistic connections. Some sense of normality and stability may prevail, despite the introduction of an equal shared parental responsibility and shared care arrangement. Unfortunately, thirty years after the *Convention* was conceived, these circumstances no longer depict the most common scenario for families.¹⁹³ Today, an abducting primary carer mother and her child may experience significant instability post-return to Australia under the *Convention*.

The application of a shared care parenting arrangement post-return to Australia can create artificial interactions and living arrangements for a family unit which up until that point may have been characteristically transnational. It may not only alter the pre-existing primary care arrangement, but also restrict the once primary carer mother's freedom of movement. This is because the act of abduction is seen as offending the desired equal shared parental responsibility and shared care ideal. The abducting primary carer mother may be censured for her act of abduction during post-return part VII proceedings. This relegates the mother and child to living in one geographical space, Australia.

192 See Bozin-Odhiambo, above n 11.

193 See Carol S Bruch, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 529; 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; Merle H Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 593; Miranda Kaye, 'Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy & the Family* 191; Regan Fordice Grilli, 'Domestic Violence: Is It Being Sanctioned by the Hague Convention?' (1997) 4 *Southwestern Journal of Law and Trade in the Americas* 71; 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.