The Child Protection Convention

What does it mean for your client?

The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (convention) is a treaty which requires member states to recognise and enforce parenting orders made in other member states.

Australia ratified the treaty in 2003 and implemented it through the Family Law (Child Protection Convention) Regulations 2003 (Cth) (regulations). It is important to note that it is the regulations themselves which are binding in Australia, and not the text of the convention.

For many years, the convention was seldom utilised due to the small number of signatories, with most parents instead needing to either register their overseas parenting order pursuant to the Family Law Regulations 1984 (Cth) or to obtain a mirror order by way of an application for consent orders. This was problematic as the former covered only a very limited number of jurisdictions and the latter required the parties to satisfy section 69E of the Family Law Act 1975 (Cth) (the Act) and to incur the cost of preparing the relevant documentation.

This regime was thus ineffective in servicing the needs of Australia’s internationally mobile population. One of the most often encountered problems for practitioners was the lack of any reciprocal agreement with the United Kingdom, which is the leading place of birth for the overseas born population in Australia.1

However, on 1 November 2012, the convention entered into force in the United Kingdom, and the convention and the regulations quickly assumed a new importance.

How does it work?

The convention (or, in Australia, the regulations) provides a mechanism by which a parenting order or an order relating to the property of a child can be quickly and inexpensively registered in another convention country.

Broadly, should a client with orders made in a convention country intend to travel to Australia and want those orders to be binding in Australia, they can provide the order to the central authority in their home jurisdiction, which will then transmit it to the Australian Central Authority (ACA). The ACA (the international family law section of the Attorney-General’s Department) will then arrange for the order to be issued by the Family Court of Australia as a foreign-registered measure.
Once issued, the foreign-registered measure has force and effect as if it were a parenting order made pursuant to Part VII of the Act.2

This enables parenting orders made overseas to be enforced in Australia by the Australian authorities, if necessary, which is particularly important for matters in which there is concern about a parent’s intention to comply with orders once they leave the child’s home jurisdiction.

The reverse applies if a client wishes to have an Australian order registered in another convention country.

It is to be noted that although the convention and regulations refer to “personal protection measures” and measures “for protecting the person of a child”, the types of orders dealt with by the convention and the regulations are not limited to orders for the physical protection of a child, such as domestic violence orders. They also extend to orders relating to matters such as parental responsibility, arrangements as to the way in which the child spends time or communicates with other persons, guardianship, foster care and dealings with a child’s property.3 Child maintenance is, however, not included.

Practical issues

Apart from the usual issues of delay involved in the transmission of documents between bureaucracies that do not share a common language, the most important advice to provide a client who is registering an overseas parenting order is that the fact that final orders have been made and then registered overseas does not necessarily prevent new and different orders being made in that new jurisdiction.

The convention is designed to avoid jurisdictional disputes by granting jurisdiction to the country in which a child is habitually resident.4

That means that, if a child is simply passing through a convention country where a parenting order is registered, then the courts of that jurisdiction must enforce that order and cannot vary or discharge it, even if they would otherwise have jurisdiction.5 However, once a child becomes habitually resident in a convention country, that country’s courts acquire the jurisdiction to make parenting orders with respect to that child, including by varying or discharging the registered overseas parenting order.

In Australia, that means that once a child is both present and habitually resident in Australia, subject to the principle in Rice v Asplund (1979) FLC 90-725, the court acquires the jurisdiction to make new parenting orders under the Act, which the court may then elect to exercise in accordance with the conflict of laws principles applicable to family law matters.

There are exceptions to this general principle, such as when a child is present and habitually resident in Australia as the result of a wrongful retention under the Convention on the Civil Aspects of International Child Abduction.6 The specific circumstances in which an Australian court acquires parenting jurisdiction over a child are set out at section 111CD of the Act.

What is ‘Habitual Residence’?
The concept of habitual residence is one that would be familiar to practitioners from its use in the Convention on the Civil Aspects of International Child Abduction, and the same principles apply to habitual residence in the child protection convention.

The High Court has provided guidance as to when a child will be found to be habitually resident in a country in the case of LK v Director-General, Department of Community Services (2009) 237 CLR 582. In that case, the court approved at 598 the following statement of Waite J in Re B (Minors) (Abduction) [No.2] [1993] 1 FLR 993 at 995:

"Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.

“All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled."

The High Court further approved at 599 the following comment made by the plurality in P v Secretary for Justice [2007] NZLR 40:

“Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, SK v KP held that settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive. It should not in itself override what McGrath J called, at [22], the underlying reality of the connection between the child and the particular state.”

The most important take-home message is that, unlike the English common law concept of domicile, habitual residence is a question of fact and not law. Whether your client or their child is habitually resident in a country will depend on the objective factual ties they have to that country. Although subjective intention is a consideration, it is not the decisive element.

Accordingly, depending on the facts of the case, a person may have multiple countries of habitual residence, or indeed no country of habitual residence.

However, this does not mean that a foreign registered measure becomes meaningless once there has been a change in a child’s country of habitual residence.

Even once a court obtains jurisdiction to discharge or vary the foreign measure under the Act and elects to exercise that jurisdiction, section 111CW of the Act requires an Australian court hearing proceedings under Part VII to admit into evidence and consider the findings of a competent authority of a convention country as to the suitability of a parent as a person for the child to spend time or communicate with.
Conclusion

The convention is a useful tool for facilitating the registration of parenting orders to improve the enforceability of orders across international borders. However, it is not a panacea and your client will continue, with some exceptions, to be subject to the laws of the child's country of habitual residence.

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Notes


2 Family Law Act 1975 (Cth) s111CT; Bunyon & Lewis (No.3) [2013] FamCA 888, [75].


5 Bunyon & Lewis (No.3) [2013] FamCA 888, [80].


7 Ibid.

8 LK v Director-General, Department of Community Services (2009) 237 CLR 582, 593-4.

Authors

Scott Wedgwood
Phone: +61 7 3231 6311
Email: scott.wedgwood@bnlaw.com.au
Elizabeth Mathews
Phone: +61 3 9909 6318
Email: elizabeth.mathews@bnlaw.com.au