FAMILY COURT OF AUSTRALIA

STATE CENTRAL AUTHORITY & PEDDAR ***[2008] FamCA 519***

FAMILY LAW – CHILD ABDUCTION – HAGUE CONVENTION – Facilitating rights of access of requesting parent in Sweden to children to Australia pursuant to reg 24 of the Family Law (Child Abduction Convention) Regulations 1986 – relevant principles.

Family Law (Child Abduction Convention) Regulations 1986
Family Law Act 1975 (Cth)
Family law Reform Act 1995
Family Law Amendment (Shared Parental Responsibility) Act 2006

De L v Director General, NSW Department of Community Services (1996) FLC 92-706
Director General, Department of Families, Youth and Community Care v Reissner (1999) FLC 92-862
State Central Authority and D [2006] Fam CA 1083

APPLICANT:	State Central Authority
RESPONDENT:	Mr Peddar
INDEPENDENT CHILDREN'S LAWYER:	Donald Lampe
FILE NUMBER:	MLC 8853 of 2007
DATE DELIVERED:	30 June 2008
PLACE DELIVERED:	Melbourne
PLACE HEARD:	Melbourne
JUDGMENT OF:	Bennett J
HEARING DATE:	22, 23, 24 & 25 October 2007 & 27 November 2007
DATE OF LAST SUBMISSIONS:	21 January 2008

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Ms R Stoikovska

SOLICITOR FOR THE APPLICANT:	Australian Government Solicitor
THE RESPONDENT:	In Person
COUNSEL FOR THE INDEPENDENT CHILDREN'S LAWYER:	Mr A Skerlj
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER:	Lampe Family Lawyers

ORDERS

(1) That all previous parenting orders in respect of the children F born … April, 1997 and E born … April, 1999 ("the children") be discharged.

(2) That the parents, Mr Peddar ("the father") and … ("the mother") have equal shared parental responsibility for the children.

(3) That the children live with the father.

(4) That the children spend time with the mother, in Sweden, as follows:
   (a) for up to four weeks in September/October 2008 to include the children's third term school vacation:
   (b) for five weeks during the Australian Christmas school holiday period in each year; and
   (c) for four weeks during June and July in 2009 and each year thereafter to include the children's second term school vacation;
   (d) as may be otherwise agreed between the parties and confirmed in writing.

(5) That in the event that the mother travels to Australia, she provide the father with reasonable notice of her intention to do so with a view to the parties making arrangements for the mother to spend time with the boys as may be agreed or, in the absence of agreement, as ordered by the Court.

(6) That the mother book and pay for the children's unaccompanied return airline tickets for the first occasion of time spent between herself and the boys in Sweden and each alternate period of time spent thereafter.

(7) That the father book and pay for the children's unaccompanied return airline tickets for the second occasion of time spent between the mother and the boys in Sweden and on each alternate period of time spent thereafter.

(8) That not less than 30 days prior to the commencement of the first period of time to be spent by the boys in Sweden, the mother notify the father in writing of whether the boys will reside at the residence of their maternal grandparents, … and …, during their time in Sweden.

(9) That each parent and/or his or her respective agent, cause the children to be transported to the relevant airport in a timely manner to enable the children to board the scheduled flights.

(10) That no less than one month prior to the time to be spent referred to in paragraph (4) hereof, the parent responsible for the payment of the children's flights provide to the other parent a detailed itinerary of the flights and a copy of the children's airline tickets (E-ticket).

(11) That the father be at liberty to accompany the children on the flights to and from Sweden and if he does, the father be responsible for the cost of his own travel. If the father does propose to travel with the children, he immediately provide the mother with notice of his intention to do so.

(12) That the mother be at liberty to accompany the children on the flights to and from Sweden and if she does, the mother be responsible for the cost of her own travel.

(13) That the mother provide to the father a telephone number for the father to have telephone communication during the children's time in Sweden pursuant to this order.

(14) That notwithstanding any other notice provision in this Order, the mother provide to the father written details of the address or addresses where the children will be residing while in Sweden or spending time with her.

(15) That no less than fourteen days prior to each period of time, the mother provide to the Swedish Central Authority and the father written details of her passport number and driving licence number.

(16) That no less than fourteen days prior to each period of time, the mother write to the children assuring them that she has no intention to retain them in Sweden permanently and that the children will be returned to Australia and the date of their return journey.

(17) That the mother, at her expense, be entitled to communicate by telephone with the children up to twice a week with additional telephone communication permitted on special occasions, including Easter, the children's birthdays, Mothers' Day and the mother's birthday.

(18) That the father, at his expense, have telephone communication with the children twice a week when they are in Sweden spending time with the other with additional telephone communication at Christmas when the children are with the mother pursuant to this Order.

(19) That each parent do all things necessary to facilitate Webcam access between the mother and the children between 4:00 to 5:00 pm. on Sunday of each week (Australian Eastern Standard/Daylight saving time).

(20) That each parent shall refrain from discussing with the children issues which could reflect negatively on the other parent including allegations of sexual abuse, kidnap and/or wrongful retention.

(21) That the father forthwith authorise the principal of M School and each school attended by the children thereafter from time to time to provide to the mother, at her expense (if any) :

(a) copies of each school report in respect of a child;
(b) order forms for photos of the children; and
(c) publications routinely provided to parents.

(22) That notwithstanding the provisions in the preceding paragraph of this Order, the father send the mother at least one school photograph of each child each year.

(23) That not less than fourteen days prior to any change of residential address of the children, the father shall provide the mother with written details of the children's new address, including any new landline and mobile telephone numbers.

(24) That pursuant to section 65L(1) of the *Family Law Act* 1975 ("the Act"), compliance with these orders be supervised, as far as practicable, for a period not exceeding two years by a family consultant nominated by the Manager, Child Dispute Services of this Registry of the Court and that such supervision be reportable in the event :

(a) another application is filed pursuant to the Act; and
(b) the judicial officer before whom it is listed requests such a report.

IT IS REQUESTED:

(25) That the independent children's lawyer meet with the children as soon as practicable and advise them of the nature and effect of the orders made this day.

IT IS FURTHER ORDERED:

(26) That a sealed copy of these orders be provided to the principal at M School and the principal of each other school attended by a child from time to time.

(27) That I reserve liberty to each party and the mother to apply in relation to implementation of this Order and direct that any such application may be returnable before me as soon as practicable.

(28) That the independent children's lawyer be discharged one month from this date or, in the event a Notice of Appeal is filed, on determination of the appeal.

(29) If either parent initiates further proceedings in this Court in relation to the children, each party is at liberty to seek to have that application listed for mention before myself for directions if I am reasonably available and to do so by contacting my Associate, with their details.

(30) That all extant applications be otherwise dismissed.

IT IS DIRECTED:

(31) That these proceedings be removed from the List of matters awaiting finalisation.

(32) That pursuant to s.62B and s.65DA(2), of the *Family Law Act* 1975, the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders, and details of who can assist parties adjust to and comply with an order, are set out in the document entitled "Family Law Courts Fact Sheet" a copy of which is annexed to these orders.

IT IS CERTIFIED:

(33) That pursuant to Rule 19.50 of the *Family Law Rules* 2004 this matter reasonably required the attendance of counsel.

IT IS NOTED that publication of this judgment under the pseudonym *State Central Authority and Peddar* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

FAMILY COURT OF AUSTRALIA AT MELBOURNE

FILE NUMBER: MLC 8853 of 2007

State Central Authority
Applicant

And

Mr Peddar
Respondent

And

Independent Children's Lawyer

REASONS FOR JUDGMENT

Introduction

1. The applicant State Central Authority, acting on the request of the mother (the 'requesting parent'), seeks orders to facilitate the mother's rights of access to the children F born in April 1997 and E born in April 1999.
2. The respondent to the proceedings is the father of the children.
3. The parents separated in 2003. The children lived in Sweden until they relocated to Australia with their father on 7 February, 2004, pursuant to orders made by the Vastmanlands District Court. The requesting parent, the mother, still resides in Sweden.
4. It is alleged that the father is in breach of orders made in Sweden in that he has refused to take the children to Sweden to spend time with their mother. In June 2007, the mother came to Australia to enforce the orders and to spend time with the children and, at her own expense, to take the children to Sweden for the period for which access had been ordered. At the time of this trial, the children had not seen their mother since July 2005, when the father had last facilitated access.
5. As part of the court's preparation of this matter for trial, Mr Donald Lampe, solicitor, was appointed as the independent children's lawyer pursuant to s 68L of the *FamilyLaw Act*, 1975. The role of the independent children's lawyer is to form an independent view, based on available evidence, of what

is in the best interests of the children and then act in these proceedings in what he believes to be the boys' best interests.[1] Mr Lampe is not a legal representative retained by the children and he is not bound by instructions from the boys or either of them.[2] The independent children's lawyer is required to deal impartially with the parties, to ensure that any views expressed by the children are fully put before the court, to analyse documentary, expert evidence and reports and to distil from that evidence significant matters for the purpose of properly drawing them to the court's attention. The independent children's lawyer is also under a specific duty to take steps to minimise for the child the trauma associated with proceedings[3] and to facilitate an agreed resolution of matters in issue in the proceedings to the extent that it is in the best interests of the child to do so.[4]

6. The relevant rights of access arise under two decisions of Swedish courts, where the children were deemed to have been habitually resident at the time. In February 2004 the Vastmanlands District Court ordered, *inter alia*, that:-

> "[The children] shall every year have the right to access visits with their mother [Ms V] for 5 weeks during the Australian summer holidays which occur between 1 December and 1 February and four weeks during the Swedish summer holiday occurring during the Australian winter holidays which fall sometime at the end of June until the end of July".

7. In December, 2004 the Svea Court of Appeal, sitting on appeal from the decision of the Vastmanlands District Court ordered, *inter alia*, that:-

> "access should … take place in Sweden to the extent that has been decided in the District Court".

8. It is agreed that it is in the children's best interests to spend time with their mother. The issue is whether that access should take place in Australia or Sweden. Both parents say that they are impecunious and they are unable to fund travel variously to Sweden or Australia.

9. Australia and Sweden are both contracting states to the Convention on Civil Aspect of International Child Abduction which was concluded at The Hague on 25 October 1980 (" the 1980 Convention"). The Convention is given effect in Australia pursuant to *Family Law (Child Abduction Convention) Regulations 1986* ("the Regulations). The Regulations make provision for all cases under the 1980 Convention. Wrongful removal and retention cases are dealt with in Parts 2 and 3 of the Regulations and requests to central authorities and court applications for access are dealt with in Part 4 of the Regulations. Of the two, access applications are much less common before

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i) [1] s 68LA(2) *Family Law Act 1975* (Cth).
ii) [2] s 68LA(4) *Family Law Act 1975* (Cth).
iii) [3] s 68LA(5)(d) *Family Law Act 1975* (Cth).
iv) [4] s 68LA(5)(e) *Family Law Act 1975* (Cth).

our court than are cases involving wrong removal or retention of children. The present application was filed under Part 4 the Regulations on 8 August 2007.

10. Regulation 24 of the Regulations provides as follows:-

> (1) The Commonwealth Central Authority must take action to establish, organise or secure the effective exercise of rights of access to a child in Australia if:
>
> (a) it receives a request from a Central Authority on behalf of a person who claims:
>
> (i) to have rights of access to the child under a law in force in a convention country; and
>
> (ii) that those rights have been breached; and
>
> (b) it is satisfied that the request is in accordance with the Convention.
>
> […]
>
> (4) For subregulation (1), the action taken may include any of the following:
>
> (a) transferring the request to a State Central Authority;
>
> (b) applying to a court under regulation 25 for an order that is necessary or appropriate to establish, organise or secure the effective exercise of the rights of access to which the request relates;
>
> (c) seeking an amicable resolution in relation to the rights of access to the child.

11. Regulation 25 provides that the applicant State Central Authority may apply to the court for, inter alia, orders specifying with whom a child is to spend time or communicate as well as any other order that it appropriate to give effect to the Convention.

12. In the present case it is conceded that the children are children to whom the Regulation 24 applies. It follows that it is within my discretion to make any of the following orders:-

a) an order for the boys to spend time or communicate with their mother (Regulation 25A(1)(a));

b) any order which I consider is appropriate to give effect to the Convention (Regulation 25A(1)(b));

c) such order imposing conditions on the boys spending time or communicating with their mother as I am satisfied is appropriate to give effect to the Convention (Regulation 25A(1)(c)).

13. Article 1 of the Convention describes one of the objects of the Convention as being to ensure that rights of access under the law of one Contracting State are effectively respected in the other Contracting States. The Convention also provides:-

> CHAPTER IV--RIGHTS OF ACCESS
>
> *Article 21*
>
> An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.
>
> The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.
>
> The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

14. Article 7 of the Convention provides that Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to achieve the other objects of the Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures:-

- to exchange, where desirable, information relating to the social background of children[5];
- to provide information of a general character as to the law of their State in connection with the application of the Convention[6];

[5] Article 7(d)
[6] Article 7(e)

- to initiate or facilitate the institution of judicial or administrative proceedings, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access[7];
- where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers[8];
- to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application[9].

15. A significant issue in this case is the basis upon which my discretion to make the above orders is to be exercised. Do I apply the same law to the children as I would to most every other child in Australia or is it, as the State Central Authority contended, a matter where different considerations apply because it is a case brought pursuant to the access provisions of the *Family Law (Child Abduction Convention) Regulations 1986*? As part of the court's preparation of the matter for trial, I specified that each party should be in a position to address me on the applicable law. At the trial the applicant was represented by Ms Stoikovska of counsel. Mr Skerlj, of counsel, appeared for the independent children's lawyer. For the first 3 days of trial, being 22 to 25 October, 2007 inclusive, the respondent father was represented by Forte Family Lawyers. Mr G Atkinson, of counsel, appeared on his behalf. On 26 October, 2007 the matter was adjourned at the request of all parties to permit negotiations to take place with a view to resolving the matter. No resolution eventuated. When the matter was relisted on 28 November, 2007 the respondent father appeared on his own behalf.

16. On 1 November, 2007 the respondent father's solicitors had filed a notice of ceasing to act for the father. However, they did not appear on 28 November 2007 and seek to be excused from further attendance. I do not regard that lack of courtesy as something for which the respondent father is responsible. However, the effect of the respondent ceasing to be represented mid way through proceedings is that submissions which were to made on his behalf in relation to the applicable law and the basis upon which I should exercise my discretion under reg25, were virtually non existent.

Terminology

17. Before going further, I should deal briefly with terminology used by this court in parenting (child related) matters as opposed to the language of the Convention which has been adopted by all party states. I have described the requesting parent's entitlement to see the boys as "access" or "spending time

[7] Article 7(f)
[8] Article 7(g)
[9] Article 7(i)

with". In the present case, both descriptions are correct. There have been certain amendments to our domestic law since Australia implemented the 1980 Convention. Until 1995, the meaning in the Convention of the term "access" was the same as the meaning of that term in our domestic legislation. On 11 June 1996, the *Family Law Reform Act* 1995 came into effect and what was previously referred to in our domestic law as "access" became "contact". More recently, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* effected further amendments to our domestic law. Now, all non-financial orders in relation to children are called "parenting orders". Section 64B(2) of the Act provides that a parenting order may deal with various matters including :-

> (a) the person or persons with whom a child is to live;
>
> (b) the time a child is to spend with another person or persons;
>
> […]
>
> (e) the communication a child is to have with another person or other persons.

References to "residence" and "contact" were removed. The term "resides" was replaced by "lives with". References to a child having "contact" with a person were replaced by the phrases "a child is to spend time with a person" and "the child is to communicate with a person". Now, access rights under the Regulations equate to an order under the *Family Law Act 1975* that a child either spend time with a person or communicate with a person or both. I will use the terms interchangeably. However, when it comes to orders which I might make for the establishment, organisation or to secure the effective exercise of the requesting parent's 'rights of access', my orders will be expressed in terms of time to be spent and communication between the mother and the children, because that is the language of the operative law in Australia.

18. Just before I leave terminology, it will also become apparent from authorities from which I will quote below that the concept of the "best interest of the child" was, prior to 1995, referred to as the "welfare of the child". In the context of the 1980 Convention, the term, the "best interests of children" is used interchangeably with "children's welfare".

Legal principles

19. The Regulations are silent on particular matters to be taken into account under reg 25 and reg 25A in the exercise of my discretion to grant the relief sought I required each party to make preliminary submissions about the applicable principles for the exercise of the discretion under the Regulations. The first issue is whether the application falls for determination under usual welfare principles in Part VII of the *Family Law Act* 1975 or whether different tests and

considerations apply because this is an application brought by the applicant in accordance with the Regulations.

20. The applicant State Central Authority made written submissions about the matters to be considered in the exercise of the discretion. These submissions were filed on 18 October 2007 and 24 December 2007[10].

21. The State Central Authority contends that the present proceedings do not fall within the court's usual jurisdiction in parenting matters and that the best interests of the children are not the paramount consideration. The applicant contends that any implementation of the mother's access rights must be determined, first and foremost, with regard to the purpose and intention of the 1980 Convention. Further, the applicant State Central Authority submits that whilst the interests of the children are a *relevant or not extraneous matter*, they are not a matter that should be regarded as paramount.

22. The State Central Authority seeks to draw an analogy between the discretion which arises in the present case with that which arises in a case of wrongful removal or retention where an exception to mandatory return has been made out. In this respect, counsel for the applicant State Central Authority referred to and relied upon the majority decision of the High Court in *De L v Director General, NSW Department of Community Services* (1996) FLC 92-706 ('*De L')*. In *De L*, the High Court considered, *inter alia*, the basis upon which a discretion not to return a child to a convention country ought to be exercised if a court were to be satisfied that the child objected to being returned within the meaning of reg16(3)(c) of the Regulations. The majority, there comprising Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ (with whom Kirby J did not disagree on this point) made the following comments (footnotes omitted)[11]:-

> Remaining Considerations
>
> As earlier indicated, the so-called "paramountcy principle" is not applicable in proceedings under the Regulations. However, it is to be noted that, if a child objects to being returned to the country of his or her habitual residence and has attained the age and degree of maturity spoken of in reg 16(3)(c), it remains for the judge hearing the application to exercise an independent discretion to determine whether or not an order should be made for the child's return. The Regulations are silent as to the matters to be taken into account in the exercise of that discretion and the "discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the [Regulations]" enable it to be said that a particular consideration is extraneous. That subject-matter is such that the welfare of the child is properly to be taken into consideration in exercising that discretion.

[10] Submissions on behalf of the State Central Authority, paragraphs 32 to 34 inclusive
[11] 83,456

23. Clearly, the non-applicability of the paramountcy or best interest of the child principle to wrongful retention or removal cases under the Regulations is correct. That was the decision of the Full Court of the Family Court in the wrongful removal case of *McCall and McCall; State Central Authority: Attorney-General (Intervenor)* (1995) FLC 92-551. There, the Full Court set out the nature of the jurisdiction exercised in respect of applications made to it pursuant to the *Family Law (Child Abduction Convention) Regulations* 1986. McCall's case involved a child wrongfully removed or retained from the United Kingdom. Specifically, the taking mother, Mrs McCall, put into issue the validity of reg 16(3) in light of the child welfare/best interests provisions in the Act, in particular, the then s64(1)(a) of the Act. Prior to determining the proceedings at first instance, the trial judge stated a case for the opinion of the Full Court which procedure[12] enabled his Honour to refer questions of law to the Full Court without the need for an appeal. In this process, the Full Court decided, inter alia, that reg 16 (3)(a), (b), (c) and (d) were valid regulations. There was also the following question put and response forthcoming from the Full Court:-

> 6. What is the nature of the jurisdiction exercised by the Family Court of Australia in respect of applications made to it pursuant to the *Family Law (Child Abduction Convention) Regulations* 1986 (Cth)?.
>
> Answer The jurisdiction is jurisdiction derived from, and for the purposes of giving effect to, the Regulations. It does not involve the exercise of the Court's jurisdiction in relation to the custody or guardianship of, access to, or welfare of, a child.

24. I note the question and answer above is not confined to the provisions directly under consideration in McCall's case (wrongful removal or retention) but could be read to embrace the full scope of the Regulations, that is, the access provisions in Part 4 of the Regulations in addition to the Parts 2 and 3 which dealt with wrongful removals and retentions. However, I do not consider that to be a correct application. The Full Court's discussion of the jurisdiction of the Family Court under the regulations could, in my view, only have applied to the removal and retention cases, such as the facts were in *McCall's* case. If I am wrong and the Full Court's response (quoted above) was intended to encompass access cases (which I very much doubt), the statement is obiter dicta. No access matter under the Regulations arose or was under consideration in *McCalls* case. Accordingly, I respectfully distinguish the reasoning of the Full Court in McCall's case as applicable to wrongful removal and retention cases and not to access cases under the Regulations..

[12] pursuant to Section 94A

25. Regulations 25 and 25A provide as follows:-

Application for access to a child in Australia

reg25 (1) The responsible Central Authority may apply to the court, in accordance with Form 4, for any of the following orders:

(a) an order specifying with whom a child is to spend time or communicate;

(b) an order for the issue of a warrant mentioned in regulation 31;

(c) any other order that the responsible Central Authority considers appropriate to give effect to the Convention.

[…]

Orders

reg25A(1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under subregulation 25 (1):

(a) make an order of a kind mentioned in that regulation; and

(b) make any other order that the court considers to be appropriate to give effect to the Convention; and

(c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.

[…] (2) In determining an application made under subregulation 25 (1) seeking an order of the kind mentioned in paragraph 25 (1) (a), the court must have regard to the matters set out in section 111CW of the Act if the convention country under the laws of which the person mentioned in paragraph 24 (1) (a) claims to have access rights to the child is also a Convention country within the meaning of subsection 111CA (1) of the Act.[13]

(3) The court may make an order under subregulation (1) regardless of:

(a) whether an order or determination (however described) has been made under a law in force in another convention country about rights of access to the child concerned; or

[13] Note that reg 25A(2) has no application to the present case because Sweden is not a Convention country within the meaning of subsection 111CA(1) of the Act as it is not a country for which the Convention in respect of Parental Responsibility and Measures for the Protection of Children has entered into force.

(b) if the child was removed to Australia -- when that happened; or

(c) whether the child has been wrongfully removed to, or retained in, Australia.

(4) If the responsible Central Authority applies to the court for an order under sub regulation (1), and the order is made, the Commonwealth Central Authority or the State Central Authority is not required to make or pay for the arrangements that are necessary to give effect to the order.

26. Neither reg 25 nor reg 25A prescribe the matters be taken into account in access cases. In my view, that is because:-

a) reg 25 prescribes what orders the responsible Central Authority may apply for; and

b) reg 25A specifies that the court can make the orders specified in reg 25(1) or any other order that would be appropriate to give effect to the Convention or apply a condition which the court considers appropriate to give effect to the Convention.

The court's powers to make orders specifying with whom a child is to spend time or communicate does not derive from reg 25. When reg 25A(1)(a) is read together with reg 25(1)(a), those sections describe the orders the court may make, but reg 25A(a) does not set out the basis upon which the discretion to make those orders is to be exercised.

27. It is significant, in my view, that reg 25(1) and reg 25A(1) describe in separate sub-paragraphs the various orders which may be made on an application brought by the Central Authority. Clearly the court has jurisdiction pursuant to reg 25(1)(b) and (c) to give effect to the operation of the 1980 Convention pursuant to the Regulations. In my view, if it was intended that an order pursuant to which a child is to spend time with a person was to have as its focus the operation or purpose of the 1980 Convention, the Regulations would have been differently worded and would have specified the paramountcy or significance to be accorded to the effect and objects of the Convention

28. There is good reason why reg 25 provides that the responsible Central Authority may make certain applications. Absent any consideration of the Regulations, standing to make an application for a child to spend time or communicate with a person is provided for in Section 65C of the Act which provides as follows:-

A parenting order in relation to a child may be applied for by:

(a) either or both of the child's parents; or

(b) the child; or

(ba) a grandparent of the child; or

(c) any other person concerned with the care, welfare or development of the child.

29. Regulation 25(1)(a) empowers the Central Authority to make an application without having to prove that it is a "person concerned". In that respect it is directed to, and fulfils, the purpose of the Convention which, in relation to access matters, is for steps to be taken for the benefit of a requesting parent who is outside Australia and who may not necessarily be able or intending to enter Australia. In particular, it empowers the Central Authority to institute and prosecute proceedings under Part VII at the request of the parent who is in another country without the requesting parent necessarily having to come to Australia to start or to continue proceedings. This representative mechanism is otherwise lacking in our legislation.

30. I am mindful of the distinction between access cases and cases of wrongful removal or retention. Under the 1980 Convention children in respect of whom the wrongful removal or retention provisions of the Regulations are appropriately engaged are, subject to a few exceptions, to be returned to their country of origin so that proceedings about them can be determined in the country in which they were habitually resident immediately prior to the retention or removal. In other words, wrongful removal or retention cases, the Convention and recognises the country in which the child was last habitually resident as being the most appropriate forum for determination of disputes about the child. As the Full Court in *McCall's case* quoted with apparent approval:-

> In the New Zealand case of Adams and Wigfield [1994] NZFLR 132, […] Hammond J went on to say, at 139:
>
> > 'This of course suggests (in my view rightly) that the philosophy behind the 1991 Amendment is that section 12 applications are not concerned with the disposition of custody cases on the merits; they are really a modern set of conflicts of laws provisions coupled with the statutory mechanisms to give effect to those rules.'

31. I respectfully agree. The provisions in the Regulations which provide for mandatory return and exceptions thereto are provisions which relate to forum. They are not provisions which relate to the long term welfare of children. Therefore the welfare of the children or best interests of the children are not paramount considerations to which a court must have regard in such cases.

32. By contrast, with few exceptions, access cases under the Regulations, arise for consideration in this court after the child has assumed Australia as his/her place

of habitual residence. The children concerned are already habitually resident in Australia and are subject to Australian law. In my view, a child in respect of whom the access provisions of the 1980 Convention are appropriately engaged pursuant to the Regulations, should have his or her parenting arrangements determined according to the law which applies to all children in Australia. That is because such children, like F and E, are now habitually resident in Australia.

33. Relevantly, for the present case is the following description of the purpose of the Regulations as a whole which specifies, *inter alia* that the Regulations are intended to be construed:-

> recognising, in accordance with the Convention, that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence[14].

34. It appears that the contention is shared by the Swedish authorities. In the present case, the State Central Authority relied on a legal opinion by one Ms Ekberg-Carlsson[15] which commences 'As requested by the Central Authority of Australia, I hereby make the following statement concerning Swedish law'. She provides an analysis of the status of a bond, were this court to decide to order the mother to pay a bond before having access to the children. Ms Ekberg-Carlsson also makes reference to the potential for 'mirror orders' to be made in Sweden and opines:

> Swedish courts do not have jurisdiction/forum in questions concerning the children [F and E], since they do not have their habitual residence in Sweden.
>
> According to both international law and Swedish law all questions concerning the children such as custody, access etc, have to be dealt with in the country where the children live.
>
> If we would send the Australian orders to a Swedish court and request that mirror orders would be obtained in Sweden, the court would reject the application on the ground that the court does not have jurisdiction/forum.
>
> The Australian orders are however binding between the parties.

35. In the present proceedings, I have admitted into evidence and will consider the findings (if any) of the competent Swedish authorities. This is pursuant to s 111CW which provides as follows:

> Court proceedings dealing with whom a child spends time with
>
> (1) A court hearing proceedings under Part VII (Children) or regulations made for the purposes of section 111B dealing with:

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[14] reg 1A(2)(a)

[15] Affidavit of 19 October, 2007 a statement of Ms Suzzanne Ekberg-Carlsson, attorney at law, Stockholm

(a) whom a child is to spend time with ; or

(b) whom a child is to communicate with;

must admit into evidence and consider the findings (if any) of a competent authority of a Convention country on the suitability of a parent as a person for the child to spend time with http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/consol_act/fla1975114/s111cw.html?query=spend%20time%20with - disp4#disp4 or communicate with.

36. In Australian family law, in the determination of parenting matters including orders that the child should spend time or communicate with someone, a child's best interests are a paramount consideration. In my view, to regard E and F's best interests as anything other than the paramount consideration would be to make them subject to laws which are different from the law applicable to all other children who are habitually resident in Australia.

37. Just as decisions in cases of wrongful removal and retention are based on the acceptance that the child's country of habitual residence is best forum for a determination of the future care arrangements for children wrongfully removed or retained across international borders, the law pursuant to which E and F may be required spend time and communicate with their mother, must be the law of the country in which they habitually reside, Australia. On my reading, the Regulations do not provide for anything else.

38. Returning, however, to the contentions of the applicant State Central Authority as to the scope of the discretion to be exercised, it was submitted that the decision of Lindenmayer J in *Director General, Department of Families, Youth and Community Care v Reissner*[16] is a persuasive guide to the parameters of the exercise of the discretion available to the court in access cases.

39. In *Reissner's case* Lindenmayer J considered an access application brought at the request of a paternal grandmother in Arizona in the United States of America seeking to spend time with her grandson in the United States after the father had removed the child to Australia without her knowledge and in the face of an order in Arizona that the child spend regular time with her. In discussing the relevance of the welfare of the child on the exercise of his discretion to order that access take place, it is clear that his Honour viewed the welfare of the child as subordinate to the purposes and intention of the Convention. His Honour's discussion included:-

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[16] (1999) FLC 92-862

51. The proceedings are brought pursuant to Regulation 25 of the Family Law (Child Abduction Convention) Regulations, which I shall refer to hereafter simply as "the Regulations", to the relevant terms of which I shall refer in due course. Before doing so it is convenient to state some general principles which I adopt, with respect, from pages 5 to 7 of the excellent written outline presented by Mr Green of counsel, who represented the Central Authority in these proceedings.

> […]
>
> (3) The purpose of the Regulations is to enable the performance of the obligations of Australia under the Convention on the Civil Aspects of International Child Abduction - see s. 111B of the Family Law Act 1975, and reg. 22 of the Regulations.
>
> (4) An object of the Hague Convention is to ensure the rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States - see reg.22 of the Regulations, s. 111B of the Family Law Act, Article 1(b) of the Convention, which is itself contained in schedule 2 to the Regulations.
>
> (5) The principle of the best interests of the child as the paramount consideration does not apply in considering applications under the Regulations, at least, when the proceedings are for the return of a child wrongfully removed or retained in breach of rights of custody - see *McCall* previously referred to.

52. The father, through the written outline of his solicitors which was filed on his behalf and relied on by him for the purpose of these proceedings, really asserts otherwise in respect of access rights and, in broad terms, the submission for the father was that when it comes to the question of access rights, the best interests of the child remain the paramount consideration.

53. I do not accept that submission. Whilst it is true *McCall's* case related to an application for return of a child retained in breach of custody rights, the answers which the Full Court provided to the questions which were asked in the special case there, and their reasoning, in my view make it clear that the comments which they made and their answers apply to all applications which are brought under the regulations. And that, of course, includes applications in respect of access.

54. Accordingly, I conclude that the principle of the paramountcy of the best interests of the child, which is enshrined in the Family Law Act, is not a principle which applies to these current proceedings. Of course, it does not follow that the best interests or the welfare of the child is not relevant to the determination of the proceedings; indeed, I believe that it is, but it is

simply not the case that the child's bests interests are to be regarded by the Court as paramount.

40. And later Lindenmayer J said:-

> 86. In summary, it seems to me that whilst I have a discretion to exercise under reg. 24(5), I should pay proper regard to the purpose and intention of the Convention, and in fact that is perhaps the most significant matter to be taken into account in the exercise of that discretion. I should also, of course, have regard to practicalities. I should have regard to the welfare of the child, without making it the paramount consideration. And I should have regard to the relative recency and the circumstances of the making of the orders in the Superior Court of Arizona which defined the rights of access of the maternal grandmother, the breach of which has led to these proceedings.

41. With respect, I cannot agree that the purpose of the 1980 Convention is the most significant matter to take into account in access cases such as the present proceedings. To do so would be to have the purpose of the Convention displace the best interest of the children as the paramount consideration which, in my view, is impermissible.

42. Whilst not directly relevant to the present case but I should mention here that the decision of Lindenmayer J in *DG and Reissner* was made under the provisions of reg25 as it was then in force and which provided that a central authority could apply for an order "that is necessary or appropriate to organise or secure the effective exercise of rights of access to a child in Australia". Under the previous regulations, the role of the central authority was to facilitate the implementation of existing access rights. It did not extend to initiating proceedings to establish access rights. It is clear from his Honour's reasons that he was of the view that reg 25 (as it then stood) pertained only to rights of access which were pre-existing and did not extend to a situation where the central authority could apply to establish a right of access. In the present case the access rights are pre-existing. However, His Honour's discussion on the issue of implementation rather than establishment of rights of access leads into a further discussion about the extent of the then reg 25 and how it should be construed. It is a discourse upon which the applicant State Central Authority in this case relies. Lindenmayer J said:-

> 61. In the case of *Police Commissioner of South Australia v Castell* (1997) FLC 92 752, the Full Court, of which I was a member, held at page 84, 140 as follows:
>
> > "In our view, the rights of access referred to in the Regulation are rights already established in another Convention country either by operation of law, or as a consequence of a judicial or administrative decision, or by reason of an appropriate agreement having legal effect (cf, for example,

ss 63E and 63F(3) of the Family Law Act). Such an interpretation is, in our view, consistent with the provisions of Article 4 of the Convention that the Convention shall apply to any child who is habitually resident in a Contracting State immediately before any breach of custody or access rights."

62. Later on in the same judgment we said this:

"We thus consider it appropriate in construing reg 25 to regard it as confined to cases which give effect to the relevant purpose of the Convention, namely to ensure that foreign access rights are respected."

[….]

70. The ultimate and really significant question in this case is the power of this Court, in dealing with the proceedings, and the form of the order which it should make.

71. It is clear from the wording of reg. 25(4) that the Court has a discretion to exercise in the matter. It is not a matter of simply "mirror imaging" or taking appropriate steps to enforce the orders made in the American Court. However, as I have already indicated, a significant aspect of the Court's discretionary exercise is the requirement of Regulation 25(4) that the order be one which the Court considers appropriate to give effect to the Convention.

72. As I have already said, the aims of the Convention are, amongst other things, to ensure that access rights created in one Contracting State are respected in another Contracting State to the extent that that is possible. In the United Kingdom there has been an approach adopted by the Courts to the matter of enforcement of access rights which, in my view, is not in accord with the Regulations as they apply in Australia, nor is it a course which should be followed in this country. In that case, *Re G, a Minor, (Hague Convention Access)* (1993) 1 FLR 669, the Court of Appeal considered the operation of the access provisions of the Convention in the United Kingdom.

73. In the United Kingdom, of course, the provisions of the Convention have been effectively adopted into the law of the United Kingdom directly, rather than, as in Australia, through the enactment of Regulations. In that case, the father and mother of the child had lived in Ontario in Canada. Following certain allegations of violence, the mother left Canada for the United Kingdom, but was ordered to return to Canada following a successful application for return under the Convention on behalf of the father.

74. Upon her return to Canada, an Ontario Court made a consent order allowing the mother the option of living in either Ontario or England, and made detailed access arrangements for the child to have contact with her father in Ontario. The mother then returned to the United Kingdom with the child, as she was entitled to do. When the father sought to exercise his rights of access, the mother refused. The father then applied under the Convention for access orders.

75. At first instance, the Court ordered that access take place in the United Kingdom, and found that in considering the access provisions in the Convention, the Court must have regard to the welfare of the child. The father then appealed to the Court of Appeal, asking that the access take place in Canada. The first issue was whether the Convention applied to the case at all. All members of the Court of Appeal agreed that the Convention did apply, but found that Article 21 of the Convention only applied at an administrative level, requiring the Central Authority of the country receiving the application to make appropriate arrangements for the requesting applicant to be legally represented and arrange Legal Aid for the father to make an application under the United Kingdom Domestic Law, namely, the Children Act 1989. Once arrangements had been made by the Central Authority for the father to be represented and Legal Aid provided, Butler-Sloss LJ stated that this effectively exhausted the direct applicability of the Convention. The Court then held that the application by the father should properly be brought under the Children Act, and, as such, was governed by the principle that the welfare of the child was paramount.

76. As I have said, that approach differs from the approach which is appropriate in Australia, given that the Convention has been adopted here in a different way, and the words of the provisions of the Convention itself, in my view, also support the different approach which I regard as being more appropriate here.

77. However, some of the statements made by Butler-Sloss LJ in that case are of some relevance and assistance in this case in considering how the Court should exercise the discretion which it clearly has under reg. 25(4). In that case, amongst other things, her Honour said this at p.676:

> "The existence of an order of the court where the child was then habitually residing is, however, of crucial importance and is a factor to be given the greatest possible weight consistent with the overriding consideration that the welfare is paramount."

78. Her Honour then said that she agreed with a statement by Eastham J in *Re C* (1991) (an unreported case) which was in these terms:

> "In considering whether or not it is in the best interests of the child for the order to be implemented, the court must pay regard to the decision

> of the foreign court. It must pay regard to how recently the court has seen fit to make the order, and it must bear in mind that, having regard to the doctrine of comity of nations, unless it is clear the enforcement of the order is contrary to the welfare of the child, which is the paramount consideration, that the court should respect the order of the court in the requesting jurisdiction."

79. As I say, it seems to me that those statements of principle by that Court are relevant to the exercise of the discretion in this case, even though in this jurisdiction the Court does not approach the proceedings in the same way by regarding itself as bound by the best interests principle in these proceedings.

43. In *Re G*[17] Lord Justice Butler-Sloss had observed that, in the early 1990's, there had been a number of access applications brought in the United Kingdom under the 1980 Convention which had been resolved consensually. The decision of Eastman J in *Re C (Minors)(Enforcing Foreign Access Order)* [1993] 1 FCR 770 was the only judicial determination to which she referred. After the quote which is extracted above, Butler-Sloss LJ continued:-

> I agree, therefore, that Article 21 applies to this appeal. It is not entirely easy with the paucity of information about the actual working of Article 21 to be clear how it is to be effective. The approach of the Convention to rights of access is undoubtedly more flexible than the approach to wrongful removal or retention (compare Article 21 and Article 12).
>
> Dr John Eekelaar in his Explanatory Documentation prepared for the Commonwealth Jurisdictions in February 1981 commented on Article 21 in para 2.6. He explained that Article 21 allowed a party resident outside the Contracting State to present to that State's Central Authority an application for making arrangements for organizing or securing the effective exercise of rights of access. Central Authorities are not placed under mandatory duties with respect to such applications other than generally to promote co-operation on these questions, and he went on to say that in practice this can be achieved by passing the matter on to a local lawyer. The lawyer may either negotiate agreement between the parties or institute whatever proceedings may be necessary in the local court on behalf of the party living abroad. An article by AE Anton in the *International and Comparative Law Quarterly* Vol 30 (1981) gives some support to the view of Dr Eekelaar. Mr Anton said that it was obviously uncertain what impact these provisions were likely to have but that Article 21 could be seen as promoting a useful degree of co-operation between the Contracting States in the resolution of international problems of custody and access which may not be connected with child abduction.

[17] [1993] 2 FCR 485 at 491 to 492

> This approach of Dr Eekelaar, with which I entirely agree, draws the distinction between the duties of the Central Authority and the jurisdiction of the court. Article 21 applies at the administrative level to bring the application to the attention of the Central Authority of the Contracting State. On receiving an application the Central Authority, the Lord Chancellor's Department, complies with its obligation under Article 21 by making appropriate arrangements for the applicant and, in this case, by providing for legal aid and instructing English lawyers to act on behalf of the applicant. This in effect exhausts the direct applicability of the Convention. There is no provision in the Child Abduction and Custody Act 1985, which made the Convention part of English law, for enforcing any failure by the Lord Chancellor's Department to carry out its obligations under the Convention. The only remedy of a dissatisfied parent would be to apply for judicial review.
>
> In a case where the child is habitually resident in the Contracting State, being England, before the breach, the Convention does not directly affect the jurisdiction of the English court. The appellant father's lawyers applied to the High Court but were in error in requiring an order to enforce compliance with the Convention. There are no teeth to be found in Article 21 and its provisions have no part to play in the decision to be made by the Judge. The lawyers should have applied on his behalf for a section 8 order under the Children Act 1989 which is the appropriate way to secure the effective exercise of rights of access.

44. As will become apparent, I respectfully agree with the analysis of Lord Justice Butler-Sloss.

45. The last authority relied upon by the applicant State Central Authority was the decision in *State Central Authority and D*[18] delivered by the Honourable Justice Watt in Melbourne on 8 March 2006.

46. *State Central Authority and D* involved an application brought under the Regulations about the access rights of a South African parent whose three children resided with their mother in Australia. The access rights arose under an order made in South Africa in August 2004 which entitled the mother to relocate the children to Australia and provided that they visit their father in South Africa twice a year. The children had not seen the father since leaving South Africa. The mother sought that the effect of the South African orders be varied so that access between the father and the children take place, at least initially, in Australia. In support of this application she relied on the fact that she and the children were concerned that the father would not return the children after the access period. There was corroboration for this belief in an assessment of the family by Mr P, psychologist. His Honour accepted that, if the husband did fail to return the children, there was a real impediment to the mother entering South Africa to retrieve them. On the other hand, his Honour

[18] [2006] Fam CA 1083

accepted that the father had certain medical conditions and a fear of flying which precluded him from seeking to exercise his rights more promptly than he did and from travelling to Australia in any event. The relevant parts of Watt J's analysis is as follows:-

> 10. The mother urged upon me that I had a discretion to make orders that were different from the orders made in South Africa, for example orders that would require the father to come to Australia for his contact, whereas the Central Authority urged upon me that the only discretion remaining was to make orders for the purpose of giving effect to the orders already made in South Africa.
>
> 11. It appears to me that in cases where the State Central Authority is applying for an order that gives effect to a right of access, for example rights that are established in a general sense by legislation, but have not been formulated into an order specifying the form and frequency that access is to take by a court in the relevant Convention country, the orders made in Australia will have to be guided by the local legislative guidelines for giving effect to the best interests principle, and the Convention does not contain or impose an alternative to the application of that principle in the determination of such a case.
>
> 12. Here, however, there are orders already in place and in my view, there is limited scope for reshaping or restructuring those orders in an application the purpose of which is to give effect to them. That said, the best interests principle must, in my view, guide the framing of orders to give effect to the rights of access established under those orders.
>
> […]
>
> 14. There is therefore in my view some scope for further or additional orders to be made in proceedings such as this if they are found on good grounds and clear evidence to be appropriate in order to give effect to the rights of access that have been conferred on a parent by an order made in a Convention country.

47. In *State Central Authority and D* Watt J imposed a precondition to access taking place in South Africa in July 2006 which was that the father write to each of the children assuring them of his intention to return them to their mother in Australia at the conclusion of each period of access and to do so within 28 days. It appears that Watt J was comfortable with the application of the best interests' principle where there are no orders yet in place. However, where orders are in place, such as in the present case, then Watt J appears to have found that the application of the best interests' principle can extends only to the formulation of conditions or other orders which will have the effect of implementing the original orders. Therefore, if I were to apply His Honour's

reasoning in *State Central Authority and D* to the present case, I would be confined to making orders which supported and facilitated the children spending time with the mother in Sweden and it would not be open to me, under the Regulations, to make orders which facilitate the requesting parent's access rights being exercised under other conditions such as in Australia.

48. The submissions for the applicant State Central Authority concluded with the following[19]:-

> - This is not an application relating to the child's care, welfare and development – in such a case Part VII of the FLA would apply. Does it apply here?
>
> It is submitted, the Court is left with a general discretion. It may look to the local law as a guide to determining "the interests of children". It is not bound to take into account, and slavishly follow (sic) the provision of Section 60CC of the FLA; but it may do so. As Regulation 6(2) states:-
>
> > "These regulations are not to be taken as preventing a court from making an order at any time under Part VII of the Act or under any law in force in Australia for the return of a child."

49. I cannot see how reg 6(2) is apposite in the present case. That provision is directed to children who are wrongfully removed to or retained in Australia.

50. With respect, I decline to follow the earlier Australian first instance decisions relied upon by the applicant State Central Authority, being *Director General, Department of Families, Youth and Community Care v Reissner*[20] and *State Central Authority and D*[21], insofar as those decisions stand for the proposition that the best interests of the subject children is not the paramount consideration in the exercise of my discretion to make orders in the present proceedings.

51. I consider that the United Kingdom approach is the correct approach to take in the determination of the present proceedings. I agree with the comments of Butler-Sloss LJ quoted above that:

> "The existence of an order of the court where the child was then habitually residing is, however, of crucial importance and is a factor to be given the greatest possible weight consistent with the overriding consideration that the welfare is paramount."

52. I adopt as accurate the summary by Lindenmayer J of the approach taken in the United Kingdom (extracted at paragraph 42 above). That is, once the central authority fulfils its administrative function of bringing a matter before the Court, the matter falls to be determined according to the legal principles applicable to all other children under the jurisdiction of the Family Law Act.

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[19] Submissions on behalf of the State Central Authroity dated 19 December 2007 and filed on 24 December 2007, page 18
[20] 1999 FamCA 1238, (1999) FLC 92-862
[21] [2006] Fam CA 1083

That is not to say that the existence and recency of an access order from overseas is not relevant or that one can ignore the international nature of the case and the purpose of the 1980 Convention. However, there is more than sufficient capacity in the matters which must be considered according to our domestic law to examine closely and give significant weight to those aspects of the case.

53. Before examining the facts and applying the law in the present case, I should complete by summarising my reasoning for departing from the earlier first instance decisions which appear to have elevated the purposes of the 1980 Convention over the best interest principle in a determination of access cases under the Regulations.

54. I take into account the nature of these proceedings. As I have said above, access applications under the 1980 Convention are different from proceedings in which it is alleged that a child has been wrongfully removed to or retained in Australia. The best interest principle is not applicable to wrongful retention or removal proceedings under the Regulations (in the absence of an exception being made out) because, essentially, those proceedings are proceedings in relation to forum. Forum proceedings do not finally determine the substantive rights and responsibilities of either parent, nor to they define the rights of the children.

55. On the other hand, in access cases like the present case, orders for the effective exercise of access rights are orders which are likely to affect and define the substantive rights of the children and the rights and responsibilities of the parents or persons concerned. Accordingly, determination of an application for a child to spend time with a person cannot be determined in the streamlined and expeditious manner in which the court can, and should, dispose of a case where the subject child is not appropriately brought into or retained in the jurisdiction in the first place.

56. The next consideration for me is that Australia has a detailed, if not somewhat complex, legislative framework for the determination of disputes in parenting (access) matters. The legislation confers jurisdiction on this court to make parenting orders in relation to children who, at the time the application is filed, are in Australia or who are citizens or residents of Australia or whose parent is in or similarly connected with Australia or where a party to the proceedings is in or similarly connected with Australia[22]. I am satisfied that F and E are children in respect of whom the Act confers jurisdiction to make parenting orders. Australia is incontrovertibly the place in which they are habitually resident.

57. The orders which the court is empowered to make under reg 25A include orders specifying with whom a child is to spend time or communicate with, reflects

[22] Section 69E FLA

the terminology of parenting orders found in Part VII of the *Family Law Act* 1975. If the legislature had intended to have access matters under the regulations be determined by the court having regard to considerations other than those which apply to all other children in Australia who are the subject of parenting proceedings, it could have specified it. So, absent clear provision in our legislation or the Regulations that the law to be applied in these cases is something other than the usual law to be applied to parenting disputes in Australia, Australian law ought to apply.

58. Of course, there are exceptions to the applicability of the best interests' principle to children who are in Australia. One exception relates to children in respect of whom orders have been made under state based welfare law for the protection of children. Another is children to whom The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children which was concluded at the Hague on 19 October 1996 applies. That Convention entered into force for Australia on 1 August 2003, it is commonly called the Hague Child Protection Convention.

59. The Hague Child Protection Convention was incorporated into Australian law by legislative provisions in our Act as well as the *Family Law (Child Protection Convention) Regulations 2003*. Section 111CB of the Act provides that the provisions in relation to international protection of children[23] have effect "despite the rest of the Act" save for in relation to children affected by orders made under our child welfare/protection laws and the Regulations made in respect of the 1980 Convention. Relevantly, there are other sections that preclude an Australian court from exercising its jurisdiction under Part VII of the Act (which is the source of the best interest principle) in situations where it could normally do so and save for certain exceptional circumstances such as urgency.

60. At the moment, the Hague Child Protection Convention is only in force as between Australia and 12 other countries[24]. Sweden is not one of those countries. However, if the Hague Child Protection Convention was in force between Australia and Sweden, the orders of the Swedish courts of which the requesting parent has the benefit in the present case, may well fall within the relevant definition of a "foreign personal protection measure" and be enforceable in Australia as if they were orders which had been made in Australia as parenting orders under Part VII of the *Family Law Act*. That is not the situation in the present case.

61. A further instance of the best interest principle not being immediately applicable is found in the scheme for registration of overseas child orders under

[23] Part XII (Enforcement of Decrees) Division 4
[24] Czech Republic, Slovakia, Morocco, Monaco, Estonia and Ecuador

Sections 70G, 70H, 70J and 70K of the Act. Those provisions and regulations made pursuant to them provide for overseas orders about children which are registered to have the same effect as orders which are made under our domestic legislation. The effect of the legislation is that a registered overseas child order prevails and a court should decline to exercise any domestic jurisdiction unless there are substantial grounds for believing that a child's welfare is likely to be adversely affected by not making another order or, there has been such a change in the child's circumstances since the overseas order was made that the order ought to be made. The prescribed overseas jurisdictions which are the countries (or parts of countries) to whom these registration provisions apply are set out in Schedule 1A to the *Family Law Regulations 1984*[25]. Sweden is not a prescribed overseas jurisdiction for these purposes.

62. The above instances demonstrate that where the legislature intends to postpone the immediate application of the best interests principle or to make it wholly inapplicable, the legislation specifies that is so.

63. Moving to another relevant consideration, insofar as reg 25A provides that the court can make "any other order that the court considers appropriate to give effect to the Convention", regard must be had to the stated objects and expectations of the Convention. These include:-

    i) The objective "to ensure that rights of […] access under the law of one Contracting State are effectively respected in the Other Contracting States"[26];
    ii) The direction to Central Authorities "to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining […] and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access"[27];.

64. The securing of rights of access is made subject to a number of qualifications of which the greatest qualification is that the access rights are to be "respected" in contradistinction to being implemented or enforced. Reference to arrangements for organising and securing the effective exercise of rights of access "in a proper case" also leads me to infer that not every application is necessarily a "proper case".

65. Furthermore, the qualified expressions and reference to facilitation used when referring to the support of rights of access under the Convention is markedly different to the mandatory provisions for the support of rights of custody in the face or a wrongful removal or retention.

66. The applicant State Central Authority relied upon comments of the High Court in *De L* as applicable to the present case or, indeed, to access cases under the

[25] Regulation 14 of the FLR 1984
[26] Article 1 subparagraph (a)
[27] Article 7 subparagraph (f)

1980 Convention generally. In *De* L, the majority of the High Court were satisfied that an exception to mandatory return had been made out and were considering the exercise of the discretion which arose to refuse the summary return of the children to America. The matters to be taken into account in the exercise of that particular discretion are not defined in the Regulations or in the Convention. However as with *McCall's case*, *De L* was in relation to a wrongful removal case and it was not an access case. Necessarily, the issue under consideration was one of forum and jurisdiction between contracting states. It was not the substantive issue of the parent with whom a child should live or spend time. Their Honours' comments in relation to the breadth of a discretion in relation to issues of jurisdiction between contracting states should not, in my view, be read as applicable to the discretion to be exercised in the final determination of substantive rights of access under the Regulations, namely what (if any) orders should be made for F and E to spend time and communicate with the requesting parent.

67. So, for the above reasons, I consider that the present proceedings are proceedings brought under Part VII of the Family Law Act. The proceedings are able to be initiated by the applicant State Central Authority because of the provisions of the Regulations which implement the 1980 Convention. I will determine the present case aided with such of the procedural advantages in the Regulations as have relevance to this case. These include requiring an assessment and report by a family consultant[28] and the evidentiary provisions in Regulation 29 and as discussed above, the provisions of s111CW.

Relevant History

68. The requesting parent ("the mother") was born in Sweden in March 1964. She is 43 years of age. She is a student and there is no evidence before me that she is otherwise than of very modest financial means.

69. The respondent ("the father") was 40 years old at the time of the hearing having been born in Australia in April 1967. At the time of the hearing, he was a sales representative earning $20,000 per annum and working approximately 20 hours per week. The respondent has repartnered with Ms S. She earns $36,000 per annum and has week about care of her children, a son who is 13 years of age and a daughter, who is 10 years of age.

70. The parents married in September 1993. F was born in April, 1997 and E was born in April 1999. Both of the children were born in Sweden and lived there until February 2004. The parents separated whilst holidaying from Sweden, in Australia, on 28 November, 2002. The circumstances surrounding the separation are contested but both parties depose to considerable conflict and anguish. The family returned to Sweden on 31 December, 2002.

[28] Regulation 26

71. The mother was the children's primary carer prior to separation. The father's employment in Sweden required a deal of travel and the mother reports periods of time when she was sole carer. This evidence is contested by the father. He contends that the quality of the mother's care of the children was of a poor standard; that the children were often hungry and the home was unkempt when he arrived back from his travels. I need make no findings in relation to this period save for the fact that the children habitually lived in Sweden at the time and had a day to day relationship with both of their parents prior to the separation and relocation to Australia.

72. On 7 January 2003 the husband filed for a divorce in the Swedish courts. That divorce application was granted in September 2003. Contemporaneously, the mother made a report to the Swedish police alleging that the father's brother in law had sexually molested the children while the children had been staying in Adelaide.

73. Much of what occurred at this time is recorded in detail in the Swedish District Court judgment of 6 February, 2004 to which it is proper for me to have regard[29]. I will not repeat it chapter and verse. Suffice to say for these purposes, there were allegations and counter allegations. The parents' conflict was bitter. The children were spared very little of it. The children's interests were subordinated to a struggle over the interpretation of events. The children were assessed by multiple welfare agencies, police and specialist investigators.

74. The sexual abuse allegations alleged by the mother were never substantiated. About one matter many of these experts were *ad idem*. They agree that such was the parents' conflict at that time there were dim prospects of any joint custody arrangement.

75. In February 2003, the respondent father applied to the courts in Sweden to have the children live with him. In March 2003 a District Court in Sweden made orders for shared custody and for the parents to enter mediation. Also in March 2003 the mother made a report to the Swedish police alleging that the father had sexually abused the children.

76. Commencing 12 April, 2003 and for a period of two and a half months thereafter, the children were placed in a foster home. They remained there for the balance of the investigation. Within the first weeks of entering foster care, F had his sixth birthday and E turned four years of age.

77. The assessment of the children by social services dated 10 April, 2003 and cited in the judgment of the Vastmanlands District Court of 6 February, 2004, provides a context for the children's turmoil during their time in Sweden following separation:

[29] reg 29(4)

> . . . Both parents are in strong crisis and don't appear to be able to keep back their own needs but act out their worry and anxiety. Structure, continuity and predictability are missing in both parent's relationship with the children. They appear not to be able to protect the children so the children have to live in an environment which can be seen as insecure, confused and aggressive. The mother shows behaviour and actions which seem confused and it is impossible to imagine a context which must be much more difficult of the child. The father lacks understanding of his own actions and how they influence the children. It is difficult to imagine what happened in Australia. There is a risk that the children's situation won't be properly investigated when the mother is not considered believable as she has changed her statements during the investigation. The assessment is that whether or not the children have been exposed to sexual abuse, they are in a situation where they appear to exist without secure adults who can care for their needs. The interaction and the parents' ability to parent must be investigated during a lengthy period of time where adult psychiatric competence is available.

78. On 24 June, 2003 the District Court of Vastmanland ordered that until further order the respondent father have sole custody of the children.

79. On 6 February 2004 a highly contested hearing was held in the Vastmanlands District Court. It is relevant to briefly repeat the parties' competing proposals at this hearing. They provide a context to the current dispute and the orders put in place by that court the implementation of which this court is now requested to facilitate.

80. The father indicated that he intended to move to Australia and permanently settle here with the children. If the children were to live with him, he proposed that the mother would have access for 5 weeks during the Australian summer holidays and 4 weeks during the Swedish summer holidays. He therefore opposed the mother's proposed custody and access arrangements. In the event that the children were to permanently live with the mother in Sweden, he proposed that he have access to the children 5 weeks during the Swedish summer holidays and 4 weeks during the Swedish Christmas holidays.

81. The mother opposed the father's proposal for sole custody and that the children should live with him. She proposed joint custody. She proposed a number of arrangements that would allow the children the opportunity to spend time with her if she were unsuccessful in the case. She submitted that even if the father did move to Australia and the children were to live with her, that he have access to the children in Sweden on the same formula he proposed for her; were they to live with him, save for that that access to occur in Sweden.

82. At the conclusion of that hearing on 6 February, 2004 the father was granted sole custody of the children. He was permitted to relocate with the boys to reside permanently in Australia, subject to the children having access visits

with their mother. It appears that the orders did not specify where the access visits were to take place or, if the children were to travel back to Sweden for access, how their travel expenses were to be met. These visits were to occur for five weeks during the Australian summer holidays which occur between 1 December and 1 February and four weeks during the Swedish summer holiday, occurring during the Australian winter holiday which falls some time before the end of June until the end of July.

83. The father's case before the Swedish District Court was that he would easily be able to comply with a court order allowing the children to return for access in Sweden. He also proposed that the mother and her family could come to Australia to meet the children. He gave evidence to that court that his salary when he returned to Australia would be around 500,000 Swedish kronor, or $89,285 Australian dollars a year. He indicated that the living standard is cheaper than in Sweden, presumably allowing his funds to stretch further. In any event as a British Airways member, he gave evidence of having accrued 160,000 points, to facilitate free flights.

84. On 7 February, 2004 the father and children left Sweden for Australia. The mother deposes that he left with the children without providing her an opportunity to say goodbye. Upon arriving in Australia the father and boys settled first in South Australia. In April 2006 they moved to Victoria where they still reside. They now live in a rental property in a suburb of Melbourne. It is common ground in these proceedings that Australia is now the uncontested place of habitual residence of the children. The boys had access with the mother in Sweden in June/July 2004. The father travelled with the boys and met the cost of airfares.

85. On 26 September, 2004 child protection services and the police in South Australia visited the father. They investigated allegations made by the mother that the children had been sexually abused by the father's brother in law.

86. On 16 December, 2004, the mother appealed the original decision of Vastmanlands District Court to the SVEA Court of Appeal. The father cross appealed, seeking that the mother's right of access be exercised in Australia. The Appeal Court upheld the original decision and affirmed the mother's right of access to the children and held that 'it is important that the access can take place under as natural circumstances as possible. Access should therefore take place in Sweden to the extent that has been decided in the District Court". It appears that there was still no order apportioning responsibility for travel costs.

87. On 25 December, 2004 the mother had access to the boys for 5 weeks in Sweden facilitated by the father and the children returning to Sweden at his expense.

88. In June 2005 the children visited their mother in Sweden pursuant to the Swedish orders. This visit was for a period of 4 weeks from 25 June, 2005 to

23 July, 2005. Again this was facilitated by the father returning to Sweden with the children at his expense. Unbeknown to the mother, this was to be the last access visit by the boys in Sweden.

89. The father deposes that he facilitated three access visits between the mother and the children in Sweden in 2004 and 2005 by paying return airline tickets for the children and himself, pursuant to the orders of 6 February, 2004 of the Vastmanlands District Court.

90. On 5 August, 2005 the mother filed an application for leave to appeal the first instance and intermediate appeal decisions to the Supreme Court of Sweden. That application for leave to appeal was dismissed. Since that time, the father has not taken the boys back to Sweden to see their mother and has been in breach of those orders, which entitled the requesting parent to have access for five weeks during the Australian summer school holidays in 2005, 2006 and 2007 and for four weeks during July in 2006 and 2007.

91. In October or November 2005 the father applied to the district court in Nycoping alleging that the mother had not paid maintenance for the boys in Australia. He submitted that he was unemployed and not able to pay the travel costs; and sought that the mother be ordered to do so. It is not clear to what extent that application was prosecuted although the father agreed that he abandoned it after being advised that the mother could not pay for travel expenses associated with the boys' visits to Sweden.

92. The father deposes that after the last visit Sweden he was retrenched from his full time position. He deposes that he remained unemployed for a period in excess of 12 months. Since then, he says he was impecunious. The reason he gives for breaching the Swedish orders is because he did not have the financial capacity to purchase airline tickets.

93. On 6 May, 2006 the mother requested an enforcement of her right of access pursuant to the 1980 Convention and, through the official route, the application made its way to the applicant State Central Authority in Victoria who instructed solicitors, the Victoria Government Solicitor, to act on its behalf. On 10 August 2006 the applicant's solicitors wrote to the respondent father advising him of the request made by the mother.

94. On 13 and 30 April, 2007 the mother spoke to the children by phone. The father alleges (but the mother denies) that the mother spoke to F by phone on 21 April 2007. The father purports to provide a written transcript of tapes of a conversation which he attributes to that date. The mother disputes that the purported transcript relates to a single conversation but, rather, is a compilation of 18 calls. The mother, through the applicant State Central Authority, disputes that a call took place between her and either of the children on 21 April 2007. I will refer to this aspect of the case in more detail later in these reasons.

95. On 22 June 2007 the mother advised the children by telephone that she was coming to Australia. The father alleges that he was not told directly of her trip. He said that the mother had on various occasions communicated an intention to come to Australia and had not done so. There is no evidence before the court to confirm or refute that claim.

96. On 25 June, 2007 the mother arrived in Australia with the express intention of taking the boys back to Sweden with her on 8 July, 2007 pursuant to her access rights. However, the father refused to make the children available to see the mother for almost two weeks. On 19 July, 2007 the mother saw the children for 2 hours at the Office of the International Social Service. This time was supervised by personnel from that service.

97. On that same day 19 July, 2007 the mother received an email from the Child Support Agency. A telephone call from that agency also advised that she was $896 in arrears of child support. Apparently a prohibition order was issued by the Child Support Registrar, the effect of which was to prevent the mother from leaving Australia pending payment of the liability. The status of the liability is not in evidence before me but eventually the prohibition order must have been lifted because the mother did leave Australia on 5 September, 2007.

98. The respondent father commenced to live with his partner Ms S on 1 August, 2007 in a rental property in a Melbourne suburb.

99. On 3 August, 2007 the mother had a further period of supervised access with the children under the supervision of the International Social Service which is a body which provides professional social work services to people in Australia and overseas who have social or socio-legal problems resulting from migration and international movement. There were two supervised visits both of two hours duration.

100. By the time that the requesting parent had been in Australia for five weeks she had only been able to spend four hours with the boys.

101. On 8 August, 2007 the State Central Authority filed the present application in this Court, which is the subject of these proceedings. On my calculation, this was one year after the applicant had initially contacted the father to advise him of the mother's application for facilitation of access rights. The applicant sought orders in the terms of the extant orders made in Sweden and specifying that the children be sent to a town in Sweden for the purpose of access which I take to mean that the father be responsible for the cost of travel to that town. The applicant State Central Authority also sought:-

> That in lieu of the mother's rights of access that she should have had in June/July 2007, the children be sent to [a town in], Sweden, in September 2007 for the four weeks visit.

102. Subsequently the applicant State Central Authority seeks other orders which I will detail when I discuss its proposals.

103. The matter came before me on 14 August, 2007. I adjourned the matter to 15 August requiring the parties and the children attend upon a family consultant; appointing an independent children's lawyer and making various other orders.

104. On 15 August, 2007 I listed the matter for hearing before me commencing 22 October, 2007. The family consultant gave oral evidence on that day and recommended that the mother see the children for unsupervised time for the balance of the period she remained in Australia. Orders were made *inter alia*, for the mother to spend time with the children while she was in Australia for three consecutive weekends commencing 17 August, 2007 from after school Friday to 5pm Sunday; each Tuesday and Wednesday from after school until 7.00pm; and by telephone each day when the children are with the father between 7pm and 7.30pm and at any other reasonable time.

105. On 15 August, 2007 the father filed an answer and cross application seeking:-

1. That the application of the State Central Authority filed 8 August 2007 be dismissed;

2. That the wife spend time with the children on four occasions each week whilst the wife is in Australia for periods of up to two hours, such time to be supervised by International Social Services.

3. That the wife have liberal telephone communication with the children.

4. Such further or other orders as agreed.

106. Following 17 August, 2007 the mother had unsupervised access to the boys on 3 weekends from after school on Friday to 5pm on Sunday. The first such weekend was to be on 17 August 2007. There was some delay in starting the weekend because the mother had not delivered her passport to the Family Court of Australia which was a precondition to the access taking place. I have been provided no explanation as to why that did not occur. Additionally the mother had access to the children each Tuesday and Wednesday from after school until 7:30pm and telephone communication each day that the boys were not otherwise with her from 7pm to 7:30pm.

107. The mother was accommodated at the a Melbourne Backpackers Hostel, where the children stayed on occasion. There were disputes between the parents as to some of the arrangements surrounding the time she spent with the children. For example, there were some problems with phone contact or phone numbers and allegations about inadequate sleeping arrangements. I do not propose to rehearse all of the difficulties here. Suffice to say the hostility which characterized the parent's relationship continued and the children were not quarantined from it.

108. On 5 September 2007 the mother left Australia asserting that she could not afford to remain. By the time the mother returned to Sweden, she had been in Australia for some two and a half months. This period far exceeded her original intention to enter Australia in June 2007 and to return to Sweden with the children with her in early July 2007.

109. On 16 October, 2007 the father filed an amended cross application in which he sought various other orders which contemplated the boys travelling to Sweden to spend time with the mother on an unsupervised basis and a raft of orders directed to securing the return of the children to Australia following their access with the mother and preventing any change in the habitual residence of the boys from Australia. The orders sought also included:-

> 1. That the Orders sought by the State Central Authority be subject to and conditional upon the following mirror orders or orders made by consent being made in the relevant Court in the jurisdiction of Sweden.
>
> […]
>
> 9. That the wife pays all costs associated with the children's travel to and from Australia to Sweden and return or that she pay for the father's airline ticket and other relevant accommodation costs to and from Sweden to Australia.
>
> 10. That [a] bond payable [by the mother to the Swedish Central Authority] of US$50,000 be used if the wife fails to comply with access order [and return the children to Australia]. These funds are to be used by the father to cover the costs of litigation in the petitioner's place of residence or in any other country the children are retained in or abducted to. This bond shall also cover costs such as air travel, hotels, meals, local transportation if required to travel to Sweden or any other country to collect the children and to return to Australia.

110. Subsequently the father sought other orders which I will discuss when I discuss his proposals. It is sufficient for the purpose of detailing the relevant history that by October 2007, the father sought orders which envisaged the children having access with their mother in Sweden for block periods of 4 or 5 weeks twice a year on an unsupervised basis subject to an extensive set of restraints and security measures. For the mother's part, it was contended by the State Central Authority that the financial order sought by the father as security for compliance by the mother with the orders are beyond the capacity of the mother to meet so that, if made, they would effectively preclude access taking place in Sweden.

Standard of proof and findings of fact

111. The appropriate standard of proof in family law proceedings such as this is the balance of probabilities. In the unreported decision of Justice Carmody in *D and D* [2005] FamCA 356 delivered in Brisbane on 11 May 2005, his Honour analysed comprehensively the 'standard of proof' applicable in family law proceedings including the following

> [145] Lord Nicholls discussed the relevant standard of proof to be applied in non-criminal proceedings in his judgment in Re: H & Ors[30] in the context of a wardship application. His Lordship relevantly stated:
>
> > "Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise various serious issues, but so do other forms of civil proceedings.
> >
> > The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event is more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury … Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
> >
> > Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established".
>
> [146] What this means in a practical sense is the more serious the allegation, the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. [31]
>
> [147] Thus, civil proof is not a simple matter of belief and persuasion but of "reasonable satisfaction" following a real search for the truth and

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[30] (1996) 1 All ER 1, 16.
[31] *Re Dellow's Will Trusts, Lloyd's Bank Ltd v Institute of Cancer Research* (1964) 1 All ER 771 at 773 per Ungoed-Thomas J.

evaluating the evidence adduced with regard to the matters mentioned in s 140(2) and other relevant variable factors, including those referred to by Dixon J in *Briginshaw*[32] and in the light of the parties' respective power or capacity to produce or contradict it. [33]

[148] The balance of probability standard takes account of the instinctive judicial feeling that even in civil proceedings a court should be surer before finding serious allegations proved than when deciding less serious or trivial matters. However, the law looks for probability not certainty. There are degrees of probability but, when the law talks about "the balance of probabilities", it envisages a degree of probability to the point that a court can be satisfied that the alleged fact in issue is more likely than not."

112. I agree with that summation of the appropriate standard of proof and have apply in the determination of the present proceedings..

Evidence

113. Where in these reasons I have made, or make, statements of fact, they are findings of fact.

114. The father relied on two affidavits of 15 August, 2007; two affidavits of 15 October 2007. He filed a financial statement on 15 August 2007. He also filed an affidavit forming final submissions pursuant orders made on 28 November, 2007 that final submissions be filed by 9 January 2008. The father was cross-examined.

115. The State Central Authority relied upon an application to secure effective exercise of rights of access to the children filed 8 August, 2007; two affidavits of a solicitor of the Victorian Government Solicitor's Office filed on 12 and 19 October, 2007; an affidavit of 23 August 2007 of the maternal grandparents of the children; two affidavits of the mother of 14 and 24 August 2007.

116. Not all of the material filed by the applicant State Central Authority is contained in stand alone affidavits. Some evidence is not under oath but I have regard to it and to the reasons published in the proceedings in Sweden and by virtue of the evidentiary provisions in Regulation 29

117. The mother was not cross-examined. She left Australia before the conclusion of the trial. I am advised that the mother could not afford to remain in Australia until the second hearing in October. I accept her reasons as provided to me by the State Central Authority that her financial situation was such that she could not remain.

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[32] See generally, A Ligertwood, *Australian Evidence* (2004, 4th ed) 82-83.

[33] *Blatch v Archer* (1774) 1 Cawp 63, 65; 98 ER 969, 970. See also *Vetter v Lake Macquarie City Council* (2001-2002) CLR 439, 454[36]; *Burke v LFOT Pty Ltd* (2002) 187 ALR 612, 647[134].

118. The State Central Authority did not seek to have the mother heard by phone or to have her give any further evidence in chief. The father did not seek to test the mother's evidence by cross examination. The independent children's lawyer did not seek to cross examine the mother either. The mother did not have an opportunity to hear the father's account nor provide any alternative account if there were one. The father's fear that the mother would retain the children in Sweden was raised and an affidavit of the mother was filed which answers that allegation. The mother strongly denies the allegation. The mother's answer to his allegation was not tested. I infer that the mother's credibility was not in issue.

119. The children and both parents were seen by Mr K, a family consultant on 14 August, 2007. Early on in the proceedings, it was clarified for the benefit of the parties and the requesting parent that the family consultant is no relation to counsel for the father notwithstanding […].

120. Mr K gave evidence and was cross examined. Mr K's qualifications were not in issue. He is an experienced family consultant employed by the court with a background in child protection. I found Mr K to be a good witness upon whose evidence I place weight.

121. It is to the credit of the parents, particularly given the history of this matter, that they could overcome their hostility to be seen together with the children. The family consultant described both F and E as delightful boys. Both of the boys reported positive experiences at school and of living in Australia.

122. Mr K gave an oral report to the court on 15 August, 2007 and was cross examined. At that time, the focus was on what orders might be appropriate to effect the mother's time to be spent with the children while she was visiting Australia and before I could determine the matter finally. He recommended unsupervised contact. He suggested that it was important for the children to have an enjoyable time with their mother, particularly in view of the uncertainty as to when they are likely to see her again. He accepted that the children should spend time with their mother rather than going to school. He specified that changeovers ought to occur in a public place or with a neutral independent third person. He recommended that the children be protected from the parents' conflict because in his professional observation, the effect of long-term emotional conflict on children's emotional development is so detrimental.

123. On 9 October, 2007 I ordered that Mr K see the children again and report back to the court. I expressly required Mr K to expand his report to cover "the parental capacity of the parents and other matters relevant to the primary and additional considerations to be taken into account in a determination of this matter and for that purpose to further interview and assess the respondent father provided that the father not be further interviewed or assessed unless the mother is also accessible to be assessed by telephone". The order in relation to

the mother's participation by telephone was necessary because the mother had left Australia by 5 September, 2007.

124. On 15 October, 2007 Mr K saw the children and their father pursuant to orders made by the court on 9 October, 2007. This was six or so weeks after the boys had spent time with the mother in Melbourne and she had returned to Sweden on 5 September, 2007. At the time of the last interviews F was aged approximately 11 years old and E was aged about 9.

125. The family consultant provided a second oral report to the court on 16 October, 2007. He was cross examined on 23 and 25 October, 2007.

126. In his oral report to the court on 16th and 23rd October, 2007, Mr K explained that, the father had offered to provide the contact details of the mother in Sweden in the event that he needed to contact her. In cross examination, Mr K stated that while he had not formally interviewed the father, but he had met with him 'to give the father an opportunity to say where the boys were at.' When pressed, he agreed that he had discussed 'where the boys were at' in the context of the time they had spent with their mother, to ascertain how they might have reacted to that time. That discussion is difficult to reconcile with my order that the respondent not be interviewed unless the requesting parent could also be interviewed, or be present by phone.

127. Mr K had no recollection of the boys reporting any difficulties about the time they spent with the mother in Melbourne. Nor did he recall the father reporting any difficulties. The fact the father did not report any difficulties satisfies me that the mother was not disadvantaged by this discussion which was conducted outside the parameters set by my order.

128. Insofar as Mr K assessed the father, he reported no concerns. He indicated that in his view, the relationship between the father and the boys was perfectly appropriate and acceptable. He did not by his account focus on the father's relationship with the children, notwithstanding the order that he assess parental capacity. Nor was he able to report on the children's relationship with the father's partner or her children, save to say that he was under the impression that the boys felt safe with her. When pressed to make an assessment about the father's priority to be a home maker and parent to the boys, thus only working part time, Mr K admitted that he knew very little about the father. He could only say that the father was reluctant to facilitate and encourage the mother's access with the children in terms of his fear that she would retain the children in Sweden. He did not have the sense that the father was refusing the children's right to spend time with the mother on other terms.

129. Mr K reported that the contact with the mother in Australia had gone well for the children. The children had initially spent time with the mother supervised by International Social Services. This was the first contact they had had with her for about two years. It was to be expected that there would be some

apprehension for each of them, because they had not seen the mother for two years and also because of the manner in which the access was structured, that is, of very brief duration and under the supervision of a stranger. They spent unsupervised time with their mother on a limited basis between 19 July and 3 September, 2007. Mr K reported that F had described his life in Australia as enjoyable but he misses his mother a little bit as well as his maternal grandparents. He was happy to see his mother. Like E, he moderated this view with an expressed concern that he feels a little less safe with his mum because she 'might keep him for longer tha(n) she is allowed to'. This concern was conveyed in the context of his being held contrary to a week about arrangement in Sweden that he recalled, before he had relocated to Australia.

130. Mr K reported that E's views and fears were not dissimilar. While he wasn't sure why he was at court, he thought it might be because his mother was trying to take him back to Sweden. He was unable, with any clarity, to provide the report writer with an explanation about why this would be a concern for him. The report writer used the term "quite stonkered' when describing E's responses to his questions about why he was there and whether he was going to Sweden or not and the likely consequences that might arise from that.

131. In the second interview on 15 October, 2007 E was able to talk about his enjoyment of the time he had spent with his mother, that he had enjoyed activities such as going to the Aquatic Centre, and Luna Park. As he had mentioned in the first interview, E referred to his fears of not being returned to Australia from Sweden if he were to spend time with his mother there. In the second interview, although noticeably more relaxed, E referred to being worried that his mother might 'kidnap' him. He couldn't explain where he got that term. When pressed by the report writer about why he would be worried if he were to be living in Sweden, he thought that 'it would include no access to movies or aquatic centres'. Curiously when asked about what he would miss if he didn't live in Australia, E replied that he would miss the Aquatic centre and movies, those activities he had enjoyed with his mother in Australia.

132. In their interview with Mr K, the children reiterated a concern that they will be retained or over held. The terms they use are variously "over held', 'kidnapped' and 'not returned'. Only one of the boys used the term 'kidnapped'. Mr K said that it was difficult for him to comment upon whether the children were coached to provide these responses. Both children were reported to have enjoyed their contact with the mother. E said that he would also like to see her in Sweden one day and that he enjoyed the telephone contact he has with his mother.

133. Mr K agreed that any new or continuing allegations that the children have been sexually abused while in the father's care could be psychologically damaging to the children. However, Mr K said that there was no evidence of the mother discussing these matters or searching for proof of abuse while she was seeing

them in Melbourne. One of the boys mentioned to him that she used to talk about such things but now she generally just talks about school and staying in Sweden.

134. Ultimately, Mr K assessed that in his view there would be a benefit to the children in having a meaningful relationship with their mother. He did add that he would support their visits to Sweden if the court can be confident that the mother has the capacity to quarantine them from the pressure of any ongoing steps, she might be taking to keep them in Sweden, if she is taking such steps, and to any further exposure to allegations of sexual abuse.

135. He further agreed with the proposition of counsel for the State Central Authority that by the second interview, the children's concern about going to Sweden for access purposes was only at the "lower end of concern rather than the higher", in his opinion. I took him to mean by that, that the children may have a residual concern about retention if they were to return to Sweden. This concern, particularly felt by F, could in his view, be alleviated by the knowledge that he is definitely going to be coming back to Australia and that he is not going to be separated from his dad.

136. The children independently reported to him that the mother had told them, whilst she was in Australia, that she was lying to the government and the court. F reported this to Mr K first, who pressed him for more information. He said that the mother had said that she had actually intended keeping the children in Sweden. He claimed that she makes similar statements on the telephone when she speaks with him on a weekly basis. Mr K probed E's understanding of lies and truth telling to assess whether E understood what it meant when he said something similar. Mr K indicated that it was difficult in the absence of having spoken to the mother, to have any independent opinion of the claims.

137. The court has a similar difficulty without hearing from the mother. If the mother did make these statements, the court would be left in some doubt as to whether the children would be returned if they were to go to Sweden. Mr K put to the children that their mother had returned them when they were seeing her in Australia. They agreed with that proposition.

138. The children told the family report writer that they felt safe in their grandparents' company and in their grandparents' home in Sweden.

139. Mr K's account is that the children had a positive experience with their mother despite the limitations imposed by the mother's hotel accommodation. I rely on Mr K's evidence when he says at para 15:

> …I suppose in summary, your honour, I mean, the boys have been consistent in saying they want to see their mum, they want to spend time with their mum. They have not raised any issues other than the possibility that they may not be returned to Australia if they were to go and see her in Sweden.

"[. . .]

18. . . . I am not in a position to bear the costs of the children's tickets. I am a student and receive a student benefit from the Swedish Government. I have another three years to go to complete my study. Upon completion, I hope to find a full time job.

19. The money that I receive from the Swedish Government is only enough to support my daily living expenses. At times, particular during semester breaks, I was able to find a part time job. It is impossible for me to work and study full time.

20. In 2005, I worked full time and received a gross income of 44500 SEK (Aus $7946). In 2006, I worked part time during my study and earned a gross income of 32800 SEK (Aus $5857). Annexed hereto and marked with the letters 'ALV 3' are true copies of my statements received from the Swedish Government.

21. I have borrowed money from my parents to come to Australia for this visit.

[. . .]

24. I have been granted financial assistance from the Swedish Government in obtaining a lawyer because I have no money to obtain a lawyer. The Swedish government will only grant a financial assistance if it is believed that a person has no financial capacity to find a lawyer."[34]

140. The father's final submission is that the mother should pay child support in order for him to use the funds to accompany the children to Sweden. He also proposed that if the mother came to Australia to see the children during one of the specified periods of access, that she could use the nominated amount for accommodation.

141. I accept the mother's evidence that she has a meagre income. The father concedes that she does not have the financial capacity to pay child support and has failed to disclose assets. As I have made clear early in these reasons, there is no child support application before me. If the husband seeks child support payments as a precondition to access taking place in Sweden, that would be a disingenuous stance given his concession that the mother does not have the resources to pay child support.

Proposals

[34] Affidavit of the mother sworn 24 August 2007

142. It was agreed that closing addresses would take the form of written submissions. Usually[35], the sequence of final submissions would be the independent children's lawyer followed by the respondent father and then the applicant State Central Authority. However, in view of the father having ceased to be legally represented during the proceedings, the parties agreed that his submissions could be filed on 9 January, 2008. The effect was that the father's submissions were filed after those of the applicant State Central Authority and the independent children's lawyer. The applicant filed its submissions on 24 December, 2007 (contrary to orders they be filed on 19 December 2007). A preliminary view expressed by the independent children's lawyer on 6 December, 2007 was followed by final submissions on 16 January by the independent children's lawyer.

143. The applicant State Central Authority proposed that the requesting parent's rights of access continue under the Swedish orders. That is, that the mother have the children spend time with her, in Sweden for five weeks during the long summer school vacation between 1 December and 1 February each year and for four weeks during the Swedish summer holidays and the Australian winter holidays sometime at the end of June until the end of July.

144. As far as the boys' school holidays are concerned, the gazetted dates for 2008/9 are from 28 June to 11 July 2008 and from 6 December 2008 to 29 January 2009. The dates of the Swedish Summer holidays are not in evidence before me.

145. A shared regime for payment for travel is proposed with the mother booking and paying for the children's unaccompanied return airline tickets for the access at the commencement of the Swedish summer school holiday (June-July) and thereafter. The father would then book and pay for the children's unaccompanied return airline tickets for the access at the commencement of the Australian summer school holiday (December-January) and thereafter. Each party could be responsible for their own fares if they elected to accompany the children.

146. The applicant State Central Authority proposes that on the first access visit to Sweden, from June until July 2008, the children reside at the residence of the children's maternal grandparents. The involvement of the maternal grandparents was not a matter of which either other party had notice. It was a particular of the implementation of access rights not semaphored in the running of the applicant's case. That is not to say that it there was no evidence which is supportive of the proposal but it was that it was a proposal which was just put in the applicant's closing submissions. It is fortunate, therefore, that the applicant's written submission were the first required to be filed.

[35] rule16.07 Family law Rules 2004

147. The applicant State Central Authority proposed *inter alia* that both parents would be required to give notice of travel and accommodation arrangements and the mother would write the children assuring them she has no intention to retain them permanently. She would also provide an undertaking to this Court that the children will be returned. A range of communication arrangements are also recommended including telephone calls and webcam access.

148. The father's view and the independent children's lawyer's preliminary view as expressed in a submission filed 6 December, 2007 propose that the children continue to live with the father and that he continue to have sole responsibility for their care, welfare and development. Also, in common with the independent children's lawyer, the father proposes that the court make orders declaring that the children's habitual place of residence' be in Australia and that nothing in these orders, including provision for the mother to exercise rights of access to the children in Sweden, should vary or change that habitual place of residence.

149. The father proposes *inter alia* that the children have access with the Mother pursuant to her rights of access in Australia for four weeks for the Australian Christmas school holiday period in each year save for the first year, when the father proposes a different regime. The father also proposes that she have access in Sweden during the Swedish summer for up to five weeks in June/July of each year after and always to include the whole of the children's second term holidays.

150. For the first year, he proposes that the mother spend time with the children in Australia and encompass either the children's Australian Christmas school holiday in 2008/09 or the second term school holidays for June 2008/2009 (at the mother's election). If the mother elects not to exercise her rights of access on either of those occasions, then her first access visit with the children be on the Australian second term school holidays in 2009 or Christmas school holidays in 2009/10.

151. With regard to the payment of airfares and travel expenses, the father and the independent children's lawyer propose that the mother book and be responsible for the payment of the children's tickets not less than two months immediately preceding each proposed visit and provide copies thereof together with air travel itinerary to the father. The father proposes that the mother pay child support. He alleges that the current amount payable by the mother is $3,263 per annum. The father proposed that, were these funds to be paid, that they would be used by him to comply with his proposed order that he travel with the children to Sweden for their visits with their mother at his own expense. In the alternative, he proposes that the child support payments be used for the purpose of hotel accommodation in Australia for the children and the mother, if the mother exercises her right of access in Australia.

152. Child support obligations arise under the *Child Support (Assessment) Act 1987*. The father annexed to his affidavit of 16 October 2007, a letter from the Child Support Agency dated 5 October, 2006. It is not clear to me what the respondent father seeks. If he seeks a variation of the liability then he should have first have made an application for change of assessment to the Child Support Agency. If he seeks enforcement of an existing liability, then he should do so by enforcement summons. Enforcement is a significant matter which, in this case, I would not permit him to bring informally. Most likely, the respondent seeks that compliance by the requesting parent with her obligations to pay child support be a pre-condition to his obligation to take the children to Sweden to spend time with the mother. If that is correct, it is a parenting order the jurisdiction for which is the same as I have discussed apropos the bond sought by the respondent father.

153. The father proposes that the court attach a number of conditions to his proposed orders which in essence are directed to satisfying any concerns that the mother would either not exercise her right of access, retain or remove the children. These include matters relating to written notice of her intention to travel; details of the children's proposed accommodation; who and where the children's passports would be retained; continuous disclosure of addresses and movements and confinement to Swedish territory when the children visit Sweden and, in the alternative, confinement to Australia when the children visit their mother in Australia.

154. Significantly, the father proposes that the mother pay a bond of $40,000 for the purpose of facilitating recovery of the children to Australia by the father in the event that they are not returned. The final submission of the independent children's lawyer also proposes that the degree of risk of returning the children warrants the requirement of a security or bond, submitting that a surety amount of AUD$15,000 would suffice along with the other conditions of access set out above.

155. The applicant State Central Authority opposed the requesting parent being required to provide some monetary security for the return of the children after a period of access. The applicant relied on Regulation 21 of the *Family Law (Child Abduction Convention) Regulations* 1986 which prohibits a central authority or a court from requiring any security or bond for the payment of costs or expenses of or incidental to proceedings within the scope of the Convention. Regulation 21 is reflective of Article 22 of the Convention which provides:-

> No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses, in the judicial or administrative proceedings falling within the scope of this Convention.

156. Regulation 21 is directed to the costs and security for costs attributable to the institution and prosecution of and incidental to the proceedings, such as professional costs, filing fees, the expenses associated with obtaining of expert evidence and general preparation for trial. Regulation 21 is not directed to the substantive orders which may be made in the proceedings. The prohibition against security and bonds is not, in my view, directed to payment of monies or the giving of security which the court may be satisfied is required to give effect to an order. Regulation 21 does not, in my view, limit or diminish the capacity of the court to put in place a mechanism or safeguard directed to one party's obligation to return the children to the jurisdiction by a certain time including an order for the deposit of money by way of a bond or security. In the present case, the court's power to order security derives from our domestic law and may be invoked whenever, after consideration is given to appropriate matters, the court is satisfied that the best interests of the children require it be invoked.

157. I note the submission of the independent children's lawyer that, by virtue of reg 25A(1)(c), the court is empowered to impose a monetary bond to the exercise of the right of access and to ensure compliance with the Convention. reg 25A(1)(c) provides that if a court is satisfied that it is desirable to do so, the court may include in an order a condition that would be appropriate to give effect to the Convention. It remains my view that the power to impose a condition on the exercise of a parenting order, such as payment of security for the return of the children to Australia after periods of access, is a parenting order in itself. The jurisdiction to make parenting orders in those terms is found in Section 65D which provides that "in proceedings for a parenting order, the court may […] make such parenting order as it thinks proper." If I am wrong, however, then reg 25A(1)(c) merely provides another source of power to achieve the same end.

158. The applicant State Central Authority also opposes the imposition of any bond or security to be held in Sweden on the grounds that the Central Authority in Sweden is not permitted to hold any such bond. The applicant relies on the opinion of Ms Ekberg-Carlsson, Swedish Attorney at law annexed to the applicant State Central Authority affidavit of 19 October, 2007. She indicates that a bond would not be possible under the Swedish system and that neither the State Central Authority, herself in her legal practice or a Swedish court could hold such a bond:

> This answer is also given by Mr […] at the Swedish Central Authority.
>
> The Central Authority is further unable to hold a bond, since an action like that could be recognized as interference by the government of the legal system. According to the Swedish legal system the judging system is clearly separated from the government. The foreign ministry is ruled by a member of the government. He and his staff are absolutely forbidden to interfere in the legal authorities' business.

To receive and hold a bond would certainly be considered as a forbidden interference by the Central Authority.

159. The security sought by the respondent father, however, need not be in the form of monies to be held in Sweden. The principle purpose of the security would be to provide a fund which is accessible by the respondent father, in Australia, on order of a court, in the event that the children are not returned in accordance with the requesting parent's obligations pursuant to this court's orders to do so. It would be a fund from which the father could apply for funds to cover the reasonable expenses of retrieving the children from Sweden including airfares, accommodation and legal costs. In fact, the security would be of reduced amenity if it were to be held in Sweden and only accessed by an order of a court of competent jurisdiction. There is no prohibition on lawyers in Australia or indeed a proper officer of this court holding a security or bond.

160. I am satisfied that I have the power to make an order for payment of security or a bond. However, whether or not such an order is justified in the circumstances of this case is something I will come to later in my consideration of the practical difficulties and expense associated with contact in the context of s60CC(3)(e) of the Act.

161. The independent children's lawyer proposes that the children have access with the mother pursuant to her right of access in Sweden for five weeks of the Australian Christmas school holiday period in each year, save for the access period provided for in the first year. The independent children's lawyer proposes that the second period of time the mother spends with the children be in Australia for up to four weeks in June/July of each year and always to include the whole of the children's second term school holidays.

162. The independent children's lawyer's proposal for the first year mirrors those of the father in general terms and provision is made by the independent children's lawyer for a range of measures to protect the children from fear of retention and assurances of notice to the father. A bond or surety fund of $15,000 is proposed to facilitate recovery and return of the children in the event of the mother not returning the children.

163. The parents and the independent children's lawyer are in agreement about one important factor. They agree to a restraint in future from discussing with the children issues which could reflect negatively on the other parent including allegations of sexual abuse, kidnap and/or wrongful retention.

The applicable law: Part VII - Children

164. Pursuant to s 60CA, in deciding to make any parenting order in relation to the children, I must regard their best interests as the paramount consideration. That does not mean that their best interests are the sole consideration.

165. Section 60B casts light on what is meant by "best interests". It provides that the objects of Part VII as to 'ensure that the best interests of the children are met' by:-

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

166. The objects may be regarded as the core values of the legislation. Sub-section 60B(1)(a) of the Act has particular relevance in these proceedings. It emphasises that the involvement of both parents in the child's life should be meaningful as to its quality and to the maximum regularity and frequency permitted by each child's best interests.

167. The principles which underlie the objects are more specific but are not exhaustive. They are that, except when it is or would be contrary to the child's best interests, that:-

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

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Determining the child's best interests

168. In determining the best interests of a particular child, I am required to consider two primary considerations and several additional considerations, listed in s 60CC of the Act.

169. The primary considerations echo the first two objects set out in s 60B of the Act. The primary considerations are set out in s 60CC(2) and are described as follows:-

    (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

    (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

170. Both considerations are relevant to the present case.

The benefit of a meaningful relationship as a primary consideration

171. Section 60CC(2)(a) of the Act requires an evaluation of the nature and quality of the relationship between the parent and the children by reference to additional considerations. It is a prospective enquiry. I must evaluate the extent to which a meaningful or significant relationship between the children and the mother is going to be beneficial and of advantage to the children into the future.

172. The respondent father does not contend that the requesting parent ought not have meaningful relationship with the children. They are in dispute about how that can be achieved, whether it should be achieved pursuant to the orders made by the Swedish courts, that the access takes place in Sweden, or whether access should take place in Australia. The father submits that the children are not old enough to travel alone to Sweden as this could cause them anxiety.

173. I am satisfied that a meaningful relationship between the requesting parent and the boys is beneficial and I will be informed as to how that is most appropriately structured by taking into the account the remaining primary considerations and the additional considerations.

Protection from harm – as a primary consideration

174. Aside from the benefit to the child of having a meaningful relationship with both parents, the court must, as a primary consideration, have regard to the need to protect the child from physical and psychological harm from being subject to, or exposed to, abuse, neglect of family violence (S 60CC(2)b).

175. The second of the primary considerations mirrors s 60B(b) of the Act and recognises the necessity of protecting children from physical or psychological harm, including being exposed or subjected to abuse, neglect or family violence. This factor also requires a prospective evaluation. As such, I must assess the future risk of exposure by the children to physical or psychological harm and to formulate orders which protect the children from any such harm or aspects of it.

176. The term, 'abuse' is narrowly defined in s 4 of the Act as 'an assault, including a sexual assault, of the child'[36] or as the involvement of the child in a sexual activity by a person, where the child is used either directly or indirectly as a sexual object and where there is an unequal balance of power between the child and that person.[37]. 'Family violence', however, is given a broader definition as actual or threatened conduct toward another person, their family or their property, which causes reasonable fear or apprehension for their safety and wellbeing.[38] A notation to the definition in the legislation adds that the standard for such reasonable fear or apprehension is that of the reasonable person in those same circumstances. 'Neglect' is not defined in the Act.

177. A number of allegations of sexual abuse of the children were made by the mother. These allegations pre dated separation and continued until the children relocated to Australia. The welfare agencies in Sweden reported before the Swedish District Court that the allegations could not be substantiated.

178. In his affidavit of 16 October, 2007 the father refers to the history of the allegations made by the mother regarding sexual abuse of the children. Annexed to that affidavit is a welfare report from Sweden; a letter from the mother to the Ministry of Foreign Affairs dated 5 December, 2005 alleging the father is 'sick' and 'consumes psychopharmacological drugs'; and a letter to the principal of the children's Primary school in Adelaide, South Australia, dated 17 November, 2004 alleging sexual abuse.

179. Mr K gave evidence of the damaging nature of these allegations on the basis that they are unfounded. It was his opinion that the children had been through an incredible amount since February 2003. The impact of the conflict between the parents on the children has been significant. It would be, in his view, in the children's best interests in the short and long term, for this conflict to cease and for the children to get into an environment where it is 'consistent with predictability'.

180. Mr K's expressed a view that it is in the children's interests that the past history is not resurrected in any shape or form by either parent. That includes, in his view, the sexual abuse allegations, the separation issues, the issues in terms of

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[36] s 4(a) *Family Law Act 1975* (Cth).
[37] s 4(b) *Family Law Act 1975* (Cth).
[38] s 4 *Family Law Act 1975* (Cth).

the current proceedings in the court. He was of the opinion that it would be important that the children are given an opportunity to live in a safe environment where they can be children rather than taking responsibility for what is happening in the parents' world. I accept that evidence. I am satisfied that Sweden and Australia each have authorities appropriately charged with the protection of children.

181. There was no evidence before me at the trial that the mother had spoken of allegations of sexual abuse since the letter to the Swedish Ministry of Foreign Affairs, 13 December, 2005. Mr K gave evidence that one of the boys indicates that she *used* (my emphasis) to talk about these things in the past, but now she generally just talks about school and staying in Sweden.

182. It is not the father's case that the mother's right of access be refused because she will continue to make allegations of sexual abuse. Neither is it the father's case that the abuse allegations are continuing. The independent children's lawyer submits that the mother may have ceased making allegations of sexual abuse against the father, but is more concerned about past allegations as being relevant to her likelihood of retention of the children in Sweden.

183. In the present case the sexual abuse allegations are an element of past conflict and do not feature in the current conflict nor require analysis in these proceedings.

Treatment of the additional considerations

184. The additional considerations listed in s 60CC(3) of the Act are numerous but not exhaustive. I have had regard to the relevant additional considerations in the context of evaluating the primary considerations, namely, securing for the children the benefit that may flow from having a meaningful relationship with both parents and ensuring that the boys are protected from physical or emotional harm.

185. Finally s 60CC(3)(m) of the Act requires me to take into account '*any other fact or circumstance that the court thinks is relevant'*. This ensures that the infinite variety of individual children's circumstances, such as the international character of these proceedings, can be addressed.[39]

The children's views[40]

186. In determining what is in the child's best interests the Court must consider, amongst other factors, any views expressed by the children and any other factors that the Court thinks are relevant to the weight to be accorded to the

[39] *B and B: Family Law Reform Act* (1997) FLC 92-755.
[40] s 60CC(3)(a) *Family Law Act 1975* (Cth).

children's views. The views of children are important and proper and realistic weight should be attached to any wishes expressed by children[41].

187. There is a distinction between the concept of children's wishes and children's views. 'Views' will capture a child's perceptions, inclinations and feelings but not necessarily involve an aspiration or conclusion. 'Wishes' are the result of perceptions, inclinations and feelings coalescing into a specific desire or ambition in the child's mind. The requirement in our legislation to focus on the child's views, as opposed to wishes, means that I may have regard to the children's perceptions and inclinations without requiring the family consultant or independent children's lawyer to make enquiries or elicit the child's ultimate preference or wish. I agree with the reference in the Revised Explanatory Memorandum[42] that consideration of the children's views will:-

> allow for a decision to be made in consultation with the child without the child having to make a decision or express a 'wish' as to which parent he or she is to live or spend time with.[43]

Consideration of a child's views does not exclude consideration of a child's wishes.

188. Once a child's views are ascertained, the next step in interpretation and assessment of these views requires a balancing of the views against the applicable primary and additional considerations which are relevant to the child's welfare. This process was is described by the Full Court in *R v R* , in relation to children's wishes, as follows:-

> 42. […] the court will attach varying degrees of weight to a child's stated wishes depending upon, amongst other factors, the strength and duration of their wishes, their basis, and the maturity of the child, including the degree of appreciation by the child of the factors involved in the issue before the court and their longer term implications. Ultimately the overall welfare of the child is the determinant. That is so because the legislation says so and also because long before specific legislation the practice of the Court in its parens patriae jurisdiction established that view.
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> 54. […] There are many factors that may go to the weight that should be given to the wishes of children and these will vary from case to case and it is undesirable and indeed impossible to catalogue or confine them in the manner suggested. Ultimately it is a process of intuitive synthesis on the part of the trial judge weighing up all the evidence relevant to the wishes of

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[41] *R & R: Children's Wishes* (2000) FLC 93-000 where Nicholson CJ, Finn and Guest JJ, cited that statement with approval from the joint judgment of Fogarty and Kay JJ in *H & W* (1995) FLC 92-598 at 81,944 in relation to children's wishes.
[42] Revised Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Cth).
[43] Ibid paragraph 56.

> the children and applying it in a commonsense way as one of the factors in the overall assessment of the children's best interests.

189. I consider that in the discussion by the Full Court in *R v R*, reference to 'wishes' may be read interchangeably for 'views'.

190. The court may inform itself of views expressed by children by having regard to anything contained in a report given to the Court by a family consultant[44] or other expert or appropriately qualified person retained by the parties or through the independent children's lawyer.[45]

191. I am satisfied to the requisite standard that the children's views are that they would like to spend time with the mother but they do not wish to be detained or over held in Sweden. Both children also expressed a desire to spend time with their maternal grandparents.

192. I take into account the children's views about seeing the mother and the maternal grandparents and accord weight to those views.

193. I am more guarded in my assessment about the children's expressed concerns of being kidnapped or detained in Sweden. The children would not be drawn on the basis for their apprehension when they spoke to the family consultant. In my view it is more likely than not that the children's fears of being wrongfully retained are derived from the father. There are many ways in which the father may have inculcated them with his views in that regard and some of those ways are inadvertent or unintentional.

194. The children told Mr K about the father whispering to them during their telephone conversations with the mother. Mr K reported that both children said their conversation was taped on one occasion and that the father puts calls from the mother on loud speaker. Quoting his notes, Mr K reported:-

> When they're on the telephone, Dad puts on the loud speaker. He doesn't talk to us about it but sometimes he tells us what to say. He whispers to get information. I'd rather it stop. I'd rather it didn't happen.

195. I am satisfied that the circumstances of the mother's first two periods of time with the children would also have served to make them guarded and concerned about the mother. It is agreed that the mother told the boys on 22 June 2007 that she was coming to Australia to collect them and take them back to Sweden. Even allowing for the fact that the boys might not have known much prior to the first two hour visit supervised by International Social Services, the

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[44] ss 60CD(2)(a), 62G(2) and 62G(3A) *Family Law Act 1975* (Cth), the last provision of which generally requires the person giving the report to ascertain the child's views and include them in the report.

[45] ss 60CD(2)(b), 62G(2) and 68LA(5)(b) *Family Law Act 1975* (Cth), the last provision of which requires an independent children's lawyer to ensure that the child's views are put before the court.

arrangements must have seemed highly artificial to them and, I am satisfied, served to reinforce in their minds the legitimacy of the father's personal concerns about the possibility of the mother over holding them.

196. In my view, the views with each child expressed to Mr K about kidnapping and over holding must be looked at in the context of the children's heightened sensitivities to the father's own concerns. This does not cause me to disregard those views. However, in my assessment of the children's best interests overall, those particular views do not weigh heavily.

197. I do take into account what the children have said about being happy to stay with the maternal grandparents whilst they are in Sweden. The children said that they would like to see and stay with the maternal grandparents and one said that he trusted his maternal grandparents. I note that in the final submissions of the applicant State Central Authority, it is proposed that the children stay with the maternal grandparents. As indicated, the father had notice of the applicant's proposal because those submissions preceded his own. In his final submissions, the father raised no objection to the specific involvement of the maternal grandparents.

The nature of the children's relationships[46]

198. I consider the nature of the children's relationship with each of the parents and other persons inclusive of grandparents and other relatives.

199. The father is the primary carer of the children. The fact that the children speak fondly of the mother and enjoyed seeing her is indicative of a meaningful and positive relationship between them. This is particularly so given my findings in relation to the father's concerns, about the mother not being able to be trusted to return them after access, being passed on to the children. The closeness of the relationship between the boys and their mother may have been diminished by the significant interruption to their time together since 2005, but has certainly not been destroyed. The strength of the children's relationship, as observed by the family consultant, is no doubt based on her role as their primary or significant carer prior to separation.

200. I am satisfied that the boys have a positive and loving relationship with their maternal grandparents and base that on the evidence of the family consultant.

201. I know very little much about the boys relationship with the father's partner, Ms S or her children, a son (13 years old) and a daughter (10 years old).

[46] s 60CC(3)(b) *Family Law Act 1975* (Cth).

The willingness and ability of each parent to facilitate and encourage the children's relationship with others[47]

202. I am required to consider the ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the children and the other parent. It is also necessary for me to assess the extent to which each of the parents has, to date fulfilled or failed to fulfil their obligations or frustrated the other parent's participation in this regard.[48]

203. I cannot assess the father's capacity to encourage and facilitate the boys' relationship with the mother favourably. The applicant's contention is that he stopped taking the children back to Sweden upon finalisation of the proceedings in that jurisdiction and then placed himself in a position from which he could allege that he was unable to afford to do so. The father says that he felt that he could not work and, without work, he could not afford the cost of airfares. Taking into account the relevant evidence, I am satisfied that the mother's version is closer to the truth than the father's version. I note that the father did not disclose to the court at first instance the true nature of his intentions regarding his employment once he arrived in Australia or the unfavourable change in his financial situation to the appellant court. The result was that the father was permitted to relocate the children to Australia on the false premise that the boys would be returned to Sweden for more than 2 months each year to spend time with the mother when, in fact, no such arrangement was sustainable in the medium to long term.

204. The father's refusal to permit the children to see the mother when she landed in Australia in July 2007 was not reasonable after the point, which I would measure in days rather than weeks, that it would have taken him to institute urgent proceedings to safeguard the children remaining in Australia until he and the mother reached an accommodation. The boys were kept from the mother for more than a month and her from them. It was a harsh response on his part. When the matter was finally brought before the court, it was on the initiative and application of the State Central Authority and still the father maintained that the mother's time with the children should be of two hours duration and be supervised by International Social Services in each instance.

The likely effect of any changes in the children's circumstances[49]

205. In determining what is in the best interests of the children. I consider the likely effect of any change in their circumstances particularly in relation to separation from their parents, other children, wider family including grandparents and other persons with whom the children have a relationship.

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[47] s 60CC(3)(c) *Family Law Act 1975* (Cth)
[48] s 60CC(4) *Family Law Act 1975* (Cth)
[49] s 60CC(3)(d) *Family Law Act 1975* (Cth)

206. I am not satisfied that the boys spending time with the mother for the specific access periods applicable under the Swedish orders is too long for them to be separated from the father. Indeed, it is preferable in my view for there to be uninterrupted block periods of access in Sweden during which the boys can adjust to life with the mother again.

207. If orders had not already been made in Sweden for access of 5 weeks duration over the Australian long summer school vacation, it is precisely what I would have ordered as being appropriate. Four weeks to include the June/July school term holidays is the maximum which I would have ordered because that school vacation is usually not more than two weeks in duration. However, interruption to the boys school routine is not a matter which would concern me until F enters secondary school. For the meantime, it is more important that the boys spend time with the mother in Sweden than attend school in Melbourne.

208. I am satisfied that the access regime provides the boys with an adequate proportion of vacation time in the father's household.

Practical difficulties and expense associated with contact[50]

209. I consider the practical difficulty and expense of the children spending time with and communicating with the mother.

210. The father says that the boys are too young to travel to Sweden alone and, certainly as to the first occasion, I accept that as correct. He says that he will travel with the boys in due course but cannot afford to do so at the moment and that, in any event, the next period of access should be effected by the wife coming to Australia again.

211. The father's case is that without an extensive suite of orders directed to securing the children's return, including a bond of US$50,000, the children should not go to Sweden to visit their mother because there is a significant risk that they will not be returned or over held. This concern was echoed by the children in their meetings with Mr K. The concern emanates from what the father says is a series of phone calls culminating in a phone call allegedly made by the mother to F on 21 April, 2007.

212. The father deposes to a phone call in early April 2007, where that the mother discussed with the children that they would be returning to live with her in Sweden. The father says he recorded a telephone call on 21 April, 2007 because 'in recent times the telephone communication has included persistent references by the Wife of an intention to retain the children in Sweden permanently'.

213. The father purports to annex a transcript of the telephone conversation of 21 April 2007. That transcript is not admissible as an accurate record of a taped

[50] s 60CC(3)(e) *Family Law Act 1975* (Cth)

conversation. However, I accept that the "transcript" is the husband's version of what was said in a conversation which he deposes that he overheard.

214. In the alleged telephone call on 21 April 2007, F asked his mother a number of questions. The answers given by the mother confirmed, in the father's view, that the mother would refuse to return the children if they were to visit her in Sweden. The mother denies that phone call. She deposes to the father being present and prompting the boys during the course of a number of phone calls. She alleges that the alleged transcript of conversation annexed to the father's affidavit filed 15 August, 2007 was a transcript of an edited compilation of 18 phone calls to the children manufactured to assist the father's prospects in the present case.

215. The mother deposes repeatedly in her affidavits of 14 August and 22 October, 2007 to an intention to take the children back to Sweden pursuant to her right of access. She does not resile from this being her intention. Her evidence is of telephoning the father on 24 June, 2007 and notifying him of her intention to leave Sweden for Australia to collect the children. She makes it clear that she does not intend to retain the children in Sweden. Her proposed visit with the children occurred within the time frame set out in the Swedish orders, being at the end of June until the end of July during the Australian winter holidays.

216. In her affidavit of 19 October, 2007 the mother denies that she told the children they should live with her in Sweden with her, and that she would 'never risk the access and not follow the orders'. She prefers that the father facilitate access between the children and her in Sweden.

217. The husband's evidence of the alleged telephone call on 21 April, 2007 may be summarised. The conversation was with F. F asks the mother a number of questions directly on the issue of relocation to Sweden.

> [The mother]: Hi [F] do you know its your birthday on ….
>
> [F]: Yes, cool
>
> [The mother]: Your mother has sent a present but you maybe will not get it until Friday.
>
> [F]: Yes
>
> [The mother]: You're welcome
>
> [The mother]: You know the present, that is when you come home to your mother.
>
> [F]: how long are we going to stay there fore.
>
> [The mother]: You are going to stay here for (Pause), we will see later. If you think it is really fun, you can stay here as long as you want.
>
> [F]: Okey.
>
> [The mother]: we can play everyday. What have you done today.

[F]: Which school are we going to?

[The mother]: Mmmm which school are you going to.

[F]: Yeah.

[The mother]: You can go to different schools, we can go to the toy shop, we can go to schools and we can out and ride our bikes. When you come to long lake it will be summer and you can jump from the bridge and dive straight into the bottom of the lake.

[F]: But are we going to live in Sweden.

[The mother]: yeah off course you are going to live with you mum that will be fun wont it.

[F]: All the time

[The mother]: Do you know [F] we'll see, we'll see. [F] what have you done today. We want that you will come and live with your mother always's.

[F]: Okey.

[The mother]: your grandparents love you so much so that you come and live with us all the time.

[F]: Okey

[The mother]: why not.

[F]: But I live here

[The mother]: Is it that your father says that and is standing next to you.

[F]: No.

[The mother]: Why not

[F]: But I live here

[The mother]: Is that your father says that and is standing next to you.

[F]: No

[The mother]: I can hear that he is standing there

218. The husband's evidence is that the conversation between F and the mother proceeded with various questions by F regarding the future and a range of equivocal statements by the mother. F appears unmoved by her attempts to change the subject.

219. In the mother's affidavit of 21 June, 2007 she deposes that the telephone call that the father deposed to having occurred on 21 April, 2007 did not occur on that date and that there was no telephone conversation of the content alleged by the father. She deposes that it is a compilation of other conversations that occurred with F between 2005 and 2006. She deposes to the conversations concerning the planned visitation between her and the children: "I explain where we are going to live during their stay in Sweden (that they are going to

live with me) and what we are going to do together. She deposes that the children often ask her what will happen in the future and when they will see her next and if they are ever going to live in Sweden. Her evidence is that she answers their inquiries with a response that

> "..that would be my dream. I have never said to them that they are going to move to Sweden. I am well aware that is not my decision to take. I have however told my children I would love for them to come and live with me and that would be my dream."

220. However, she denies that this phone call took place on the day and in the manner the father alleges. She provides an alternative account. In the mother's affidavit of 22 October, 2006 the mother alleges that the father listens to her phone calls with the children and that he tells them what to say. She refers to telephone calls on each of the children's birthdays in April. She submits that if she had called them on 21 April, reference would have been made to her mother's birthday which is at that time. I accept that evidence as having an internal consistency about it. The maternal grandmother is mentioned in the alleged conversation in such a way that I am satisfied that if her birthday was in close proximity to the conversation, the mother would have sought to engage F on that topic.

221. In a sworn affidavit of 2 August, 2007 the maternal grandparents attach their telephone account. The account is in Swedish. There are two highlighted calls indicating that they are calls to Australia to the same telephone number +614…6 at the following dates and times:

- 14-04 2007 at 11.26 (.16 minutes)
- 14-4. 2007 at 12.39 (14.23 minutes)
- 30-4 2007 at11.35 14 (28 minutes)
- 09-06 2007 at 12.32 (.11 minutes)
- 22-06 2007 at 10.10 (14.28 minutes)
- 23-06 2007 at 9.36 (9.36 minutes)

222. No telephone call is recorded as having taken place from the telephone number identified in the telephone records on 21 April as alleged. It is possible that the telephone calls were made from another telephone and would therefore not have been recorded on the phone accounts tendered. The father was not cross examined on this point.

223. The father contends that this phone call, transcribed and annexed to his affidavit of 21 August, 2007, contains 'persistent references by the Wife of an intention to retain the children in Sweden'. That date is contradicted in the father's affidavit of 15 August, 2007 where the date of the recording is said to be 22 April, 2007. He was not asked about that discrepancy.

224. When asked about the transcript of the tape, Mr K agreed that the mother is an intelligent woman. He agreed that she would think it unwise and reckless to tell the boys that contrary to existing orders that they are going to live with her in Sweden. She knows that the father listens to her telephone calls and deposes to hearing his whispering. As this is her only means of contact with the children she has clearly accepted this context within those limitations. These are observations based on observations rather than expertise. However, Mr K's observations accord with my own view.

225. There are some troubling aspects of the children's account to Mr K of the father's behaviour during the phone calls. They undermine the credibility of the father's argument that the mother would retain the children. The mother answers the allegations and fully explains her own intentions. The children's account to the family consultant of the father prompting their questions to the mother is compelling and I give weight to it.

226. The father's case that the mother would retain the children in Sweden relies heavily on the contents of the call. The mother denies that it is either accurate or occurred in the way produced in the transcript. When provided the tape pursuant to orders made on 15 October, 2007 directing that the applicant State Central Authority advise the father and independent children's lawyer regarding the accuracy of the tape, the mother confirmed her denial of the conversation and disputes the accuracy of the call. In an annexure to the applicant State central Authority's affidavit filed 12 October, 2007 the mother alleges that the tape is a compilation of conversations which date back to 2005 and 2006. She provides an alternative translation and an alternative sequence of dates for the conversation. The father did not respond to that allegation. The mother was not cross-examined in relation to it.

227. The High Court considered the status of a transcript of a telephone call in *Butera v DPP (Vic) (1987) 164 CLR 180; 30 A Crim R 417*. There, Mason CJ, Brennan and Deane JJ said (at 185; 419):

> *What is a transcript of a tape recording? It is a document setting out words which can be heard on playing over a tape. It is not a copy of the tape, but a written record of what has been heard.*
>
> *Prima facie, the issue of whether the recorded conversation took place should be proved by playing the tape in court if it be available, not by tendering evidence, whether written or oral, of what a witness heard when the tape was played over out of court.*

228. In the present case, none of the parties sought to play the tape and I did not hear it. Whether or not a conversation occurred as alleged by the father; whether the mother did indicate in the telephone conversation on 21 April, 2007 that the boys could stay longer than any specific period of access is an important question given the husband's allegation and some degree of apprehension by the children. The mother's counter allegation, that the father has manufactured

evidence in this proceeding is also a very serious allegation. The fact that the mother has an awareness that the father listens to or monitors telephone calls between herself and the boys makes it unlikely that she would utter the words attributed to her by the husband in circumstances where they could be used against her. Likewise the lack of any mention by the mother of the maternal grandmother's birthday leads me to have some doubt as to the alleged date of the conversation. However, analysing what evidence I have and not having heard the tape, I cannot be and am not reasonably satisfied that there was a conversation in the terms described by the father.

229. The purpose of requiring security or a bond for the return of the children is to make it attractive to the person receiving the children to return the children in accordance with their obligation to do so. The other aspect is to properly provide the means for the left behind parent to take whatever reasonable action is necessary to secure the return of the children in the event that the taking parent does not honour his/her obligations.

230. Everyone agrees that the mother is not well off financially. Neither the father not the independent children's lawyer can point to any capacity which she has to access the monies sought by either of them. In evidence the father did not justify the amount claimed of US$40,000 but that gap in his evidence goes to quantum rather than whether any bond is appropriate at all. Having given the matter careful consideration, I am not satisfied that this is a case where it is practicable or necessary to have the mother post any bond or security. I accept that the imposition of security may be a panacea for the father's concerns which, it seems, are shared by the independent children's lawyer. However, that is not a sufficient basis on which to impose a special obligation on the mother to put up security when I am satisfied that to do so would be unrealistic and may, together with any responsibility I impose upon her to pay for costs of travel, mean that no access can take place.

231. I have regard to the fact that Sweden is a party to the 1980 Convention and the provisions of the Convention for securing the prompt return of children who are wrongfully retained. That is some comfort. However, I also recognise that the requesting parent may wish to retrieve the children by other more direct means and thereby reasonably incur costs and expenses to do so including but not limited to travel costs to collect the children and for the children themselves in the event that the taking parent has relinquished the return airfares.

232. Early in the case I too considered that security was probably called for and made the parties aware of that preliminary view. However, on further and more measured examination of the evidence I am not satisfied that the alleged telephone call of 21 April, 2007 did take place and I find that there is insufficient other evidence upon which I can be satisfied that security is required or proper or in the best interests of the boys.

233. I will decline to order a bond or other security as sought by the father and/or the independent children's lawyer.

234. Aside from seeking a bond, the father's case is that he does not have the financial resources to fly the children to Sweden to visit the mother, pursuant to the Swedish orders. He says that the mother has paid no child support to him since separation. She was served with an invoice for outstanding child support when she arrived in Australia. As far as I am aware, that invoice was not honoured when the mother left Australia on 5 September, 2007. The fact that the mother cannot be pursued for child support or the Swedish equivalent, because she does not have the means to pay was uncontentious. The father agreed that it was not his case that the mother had hidden assets or resources available that could be used for the children's airfares.

235. The father gave evidence about his employment prospects and his history of employment after separation and his return to Australia. The father's evidence before the Swedish Court as to his income and favourable financial circumstances was in my assessment, designed to achieve the outcome of relocation. The decision of the Swedish Court was predicated on the father's evidence of his ability to fund a return of the boys to Sweden to visit their mother twice a year.

236. The father gave evidence that, contrary to the evidence which he gave in Sweden, he did not take up the job earning $89,000 with SE Company as a sales representative. Instead, when he returned to Australia he decided to look after the children. He preferred not to take a job involving a degree of travel around Australia. When pressed, he said that he had accepted the position with SE Company in October or November 2003, while he was still living in Sweden. When the matter of the mother's appeal came before the courts in Sweden in 2004, the respondent father did not advise the mother or the court of the unfavourable or voluntary change in his financial circumstances. His advice of the change in his financial circumstances to the mother was given by his Swedish solicitors on 3 October, 2005, some eight months after the appeal judgment was delivered by the Svea Court of Appeal in December 2004. A copy of a letter to this effect is annexed to his affidavit of 16 October, 2007. He had not taken up the employment about which he'd given evidence and had not advised that Court that he now had insufficient income with which to support the children's regular trips back to Sweden.

237. It was also made clear, from the cross examination of the father, that the employer was his sister and brother in law and the business was a family business. Whereas the father variously referred to his potential employer as company called SE Company and then SO Company. The owner of SO Company was a person he named as Mr A. Later, the father identified the registered proprietor of SO Company as Mr A and the father's brother in law. The father's brother in law is married to the father's sister.

238. The father told this court that when he had told the Swedish Court of the job in Australia with the earnings of $89,000 he knew that the job involved considerable travel. He agreed he had accepted that position with a full understanding of the requirements of the position. When he arrived back in Australia on 7 or 8 February 2004, the father did not start work at SO Company until July 2004, when he took a position earning, approximately $46,000 to $50,000. As indicated, the appellate court in Sweden was not alerted to this change in circumstances when the father cross-appealed the mother's appeal in December 2004.

239. The father gave evidence that, in some capacity, he undertook various initiatives in SE Company to expand the company's interests, building on his contacts in Scandanavian countries and Europe. These initiatives as he describes them, were unsuccessful. He gave an account of two work related trips involving travel to Thailand and Paris, France. These trips were funded by SE Company. The father accrued the frequent flyer points, the balance of which was reported at trial to be around 230,000 points. When it was requested that he could use those loyalty points toward the boys' cost of travel to Sweden, he said that these points were owed, according to the father, to his brother in law in lieu of part payment for the debt he owed to him for legal fees in these proceedings.

240. The father's account is that he was retrenched by SE Company on 1 April, 2005. According to his evidence, he did not seek employment for a year after that. He explained that he had been coping with emotional difficulties himself; with the boys as a single parent; with relocation and with the allegations made by the mother against him. I accept that this was a difficult time for him. Adjusting to his new circumstances in Australia would have been challenging after a long period of living overseas. However, his evidence is that for that whole period during 2004-2005, he did not seek employment and lived on single parent and family tax benefit. His financial reserves were depleted. The proceeds of the property settlement he had achieved with the mother in Sweden were exhausted. His choice not to work must have affected his living standard.

241. In April, 2006 he said he moved to Melbourne, Victoria to improve his employment prospects. This proposition is hard to reconcile with his evidence that he did not seek employment in Adelaide over the previous year. Upon his move to Victoria, his evidence is that he applied for no other jobs and took up an opportunity working part-time for SE Company, the company that had previously retrenched him. The father still works part time for that company as a sales representative earning $20,800 per year. He does not have a contract of employment because his employment is based on a verbal agreement. He produced and "Employee Pay History, [SE} Pty Ltd" in which his salary is recorded as $400 per week, and $36 and $72 variously paid into superannuation, being 9% of that salary.

242. Both F and E are now at school obviating the need for child care. When pressed as to whether he would take a full time position at SE Company or with another employer in future, the father would not answer the question directly.

243. In answer to any inquiries regarding his employment, he referred repeatedly to the need to take care of his sons as a matter of absolute priority. He had not applied for a full time job as the only employment for which he is experienced and qualified is sales. Such jobs, according to his evidence, require a full time commitment, interstate travel and many hours away from the home. He deposed that he thought the children need a full-time father given the trauma associated with various events and that he thought it to be in their interests that he be available to them and that he wants to spend time with them. He did not provide any independent evidence of that trauma. Mr K, the family reporter did not identify any problems in the boys other than those arising from two children's normal responses to parents' separation in hostile circumstances.

244. Underlying the father's evidence throughout proceedings is his unsubstantiated view that full time employment is incompatible with good or effective parenting, a view that cannot be supported by ordinary community standards and seems not to take into account by any measure that he has now repartnered. Many parents effectively juggle these responsibilities, even when both their children are not at school, which E and F are. I do not find the father's claim that his circumstances preclude him from working more extensively to be plausible.

245. The father tendered a financial statement on August 15, 2007 to this court. The most significant of his assets is the total gross value of his Superannuation which he valued at $150,000 in a Swedish Superannuation Fund. The father accrued these Superannuation funds in Sweden from his employment and government payments over the course of his 12 years living there. He tendered a website extract of the Superannuation fund in support of his account that these Superannuation entitlements are subject to rules which prohibit them vesting until the age of 61 years, and then only able to be accessed on a regime delivered in a manner similar to a pension.

246. The father's evidence was that he used the proceeds of his property settlement with the requesting parent to find the airfares to Sweden after his relocation to Australia. He gave evidence of a debt of $37,000 and a debt of $17,394 in his affidavit of 16 October, 2007. A debt of $20,000 was also canvassed. He said it comprised $10,500 from the children's own savings held in trust accounts and about $9500 from his brother-in-law in Adelaide. This latter figure was later revised upward to $12,000 and $18,000. These borrowings he said followed a telephone call from his lawyers seeking a deposit of $20,000 into the trust account for legal fees.

247. By the father's hand, the children have had all of their savings of $10,500 used in part-payment of the father's legal fees in these proceedings.

248. The father cited the cost of each single trip for the children to visit the mother pursuant to her right of access to be in the vicinity of $10,000. He was pressed about why he had used the funds from the children's trust accounts to fund legal fees when he could have used these same funds to pay for them to access to their mother in December 2005. He said he had asked the children if he could borrow the funds, but had not asked anyone else. Any suggestion that the children could consent to these borrowings is risible. They were then aged eight and six years.

249. I am satisfied the respondent's decision not to seek employment outside the family business has probably adversely impacted on his ability to comply with the Swedish court orders. The father has made some choices that led to those circumstances, such as not pursuing full time employment, or testing the value of his skills in the marketplace. I do not find his explanation of why he did not take up employment at that time to be sufficient. That said, I have no evidence of the father's employability or opportunities so my ultimate finding is that he has not tried particularly hard to better his financial situation.

250. The father proposes that the mother pay all ongoing child support as assessed by the Child Support Agency. The amount he says the mother owes is $3,263 annually. It is the father's claim that there are arrears of child support debt owed by the mother to the child support agency in Australia of approximately $1,000 as of 1 January, 2008. There was no evidence to support this contention. He provided a copy of a letter from the Child Support Agency, annexed to his affidavit of 16 October, 2007 which assesses the mother to be in arrears of $8,695.27. That letter also identifies a monthly liability of the mother of $26.67 and advises that the case has been referred to the Swedish authorities requesting that they pursue the matter.

251. There was no application before me which particularized any claim for child support, nor any application seeking orders in this matter. The mother's affidavit evidence about her very modest financial circumstances was not challenged.

252. I am satisfied that the father has structured his financial affairs for the collateral benefit of saying that he cannot afford to financially support the access regime to which he agreed when he left Sweden. It follows that I do not accept that he does not have the ability to meet some such expenses. If it became a priority for him, as it is for the mother, I am reasonably satisfied that he would find the necessary funds. That said, I am not satisfied that the father has the wherewithal to pay for all transport costs associated with access as he also carries the full financial cost of the children without assistance from the mother by way of child support. I am informed by the concession of the applicant State

Central Authority that the cost travel should be shared on a trip about basis that the mother must have access to some funds.

253. I am satisfied that a reasonable apportionment of the travel costs is that each parent pays one half. That can be achieved on a trip about basis or by the mother booking and paying for the journey to Sweden and the father booking and paying for the homeward journey. There was no evidence as to the practicability of splitting the cost of payment for each trip. Accordingly, I will order that the parents be responsible for the costs on a trip about basis.

254. I do regard it as necessarily in the boys' best interests to be accompanied on the first trip to Sweden. The father says that he will fly with the boys. If he does so, it should be at his own expense. If the mother chooses to accompany the boys that fare should be borne by her. My impression is that the father will accompany the boys at his own expense. If I am wrong and the father will not travel by air at his own expense, the mother should have the option to accompany the children herself even if this is the more expensive option for her. After the first trip, the boys may travel as unaccompanied minors. They are still young children but, by that stage, will have made the trip on a number of occasions and will have the benefit of being cared for by airline staff.

Capacity of the parents to meet the children's needs[51]

255. In determining what is in the best interests of the children, I need to consider the capacity of the parent or of any other person to provide for the needs of the children, including emotional and intellectual needs.

256. I am satisfied on the evidence that the father's capacity to provide for the emotional and intellectual needs is less than optimal *vis a vis* the need of the boys to spend time with the mother. I wonder to what extent the father has moved on from the point at which the Swedish authorities described him as having a lack of understanding of how his actions can impact on the children[52].

257. There is no evidence before me that leads me to doubt that the mother has the requisite capacity to care for the boys for a period of 4 to 5 weeks twice a year in her country of origin. That said, I am of the view that the boys' time in Sweden would be enhanced if they are able to stay with the maternal grandparents on at least the first two occasions but I will not make orders requiring that be the case. The opportunity for the boys to stay with the maternal grandparents is not, to my mind, a prerequisite to the boys going to Sweden. It would enhance the benefits for the boys but, if it does not eventuate or cannot happen, I am not persuaded that the mother lacks the requisite capacity. That said, the boys should know in advance where they are going to stay so I will require the mother to provide notice to the father.

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[51] s 60CC(3)(f) *Family Law Act 1975* (Cth)
[52] see paragraph 77 of these reasons

The children's maturity, sex, background and other characteristics[53]

258. I consider the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the children and her parents.

259. F was 10 and a half years old at the commencement of this hearing and a student in Grade 5 in M Primary School. E, who was 8 and half years of age at the commencement of the hearing was a student in Grade 3 at M Primary school.

260. The family consultant described both F and E as delightful boys. He observed that both parents were appropriate with the boys and "sensitive to the boys needs". Both boys were assessed as meeting their developmental milestones, quietly spoken and offering positive eye contact. Both of the boys also reported positive experiences at school and of living in Australia.

261. Sweden is the boys' country of origin. I am satisfied that the boys will derive considerable benefit from experiencing Swedish life first hand. I have given consideration to the benefits which would be derived for the boys if access was to take place in Australia including but not limited to the mother being able to share in the life that they have made here. However, from the perspective of the boys I am comfortably satisfied that they will derive most benefit from seeing the mother in Sweden.

The attitude to the children and to the responsibilities of parenthood demonstrated by each of the children's parents[54]

262. I must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil his/her responsibilities as a parent. This factor includes the extent to which each parent has taken or failed to take the opportunity to spend time[55] with and communicate with[56] the child and to participate about major long term issues concerning child[57]. It includes the extent to which the parent has fulfilled or failed to fulfil his/her obligations to support the child financially[58] or otherwise maintain the child. It also includes the extent to which each parent has facilitated, failed to facilitate or frustrated the other parent's participation in the long term welfare[59] and the other parent communicating with the children[60] or spending time with the children.[61].

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[53] s 60CC(3)(g) *Family Law Act 1975*(Cth)
[54] s 60CC(3)(i) *Family Law Act 1975* (Cth)
[55] s 60CC(4)(a)(ii) *Family Law Act 1975* (Cth).
[56] s 60CC(4)(a)(iii) *Family Law Act 1975* (Cth).
[57] s 60CC(4)(a)(i) *Family Law Act 1975* (Cth).
[58] s 60CC(4)(c) *Family Law Act 1975* (Cth).
[59] s 60CC(4)(b)(i) *Family Law Act 1975* (Cth).
[60] s 60CC(4)(b)(ii) *Family Law Act 1975* (Cth).
[61] s 60CC(4)(b)(ii) *Family Law Act 1975* (Cth).

263. I am required, and do, have particular regard to events which have happened, and circumstances which have existed, since the parties separated.[62]

264. Since separation the relationship between the parents has been characterized by bitterness and hostility. The records from Sweden show that that hostility is manifest in various proceedings before the Swedish courts. The parents have shown little capacity to take account of the children's needs in their warring. Proceedings before this court are a continuation of that conflict. There are no signs of the parents moving toward a more cooperative approach to parenting.

265. After having reviewed the evidence, I am left with the distinct impression that each parent focuses considerably on their own needs as opposed to the needs of the children and I make a finding to that effect.

Any family violence involving the children or any member of the children's family and family violence orders[63]

266. As noted above, the definition of family violence provided in s 4 of the Act is broad and may include threatened or actual violence toward a person, members of their family or their property. I do not consider this to be a consideration relevant to this case.

Whether it would be preferable to make an order that will be least likely to lead to the institution of further proceedings in relation to the children[64]

267. Parenting proceedings are never final in the sense that children and their parents' circumstances change and arrangements may need to alter as a consequence of those changes.

268. Ideally courts should make parenting orders that minimise the prospects of future litigation. Litigation is costly in emotional and financial terms and may have the effect of standing in the way of parties parenting children effectively. Parents and children are readily distracted by litigation.

269. Parents are at liberty to modify court orders by subsequently entering into parenting plans, which have the effect of varying existing orders.

270. In the present case, I fear that the parties will require future intervention by the court probably as frequently as when access takes place. Therefore, in the hope that a streamlined procedure for any future applications may minimise disruption for the children, I will grant liberty to the parties to have the matter re listed before me, if I am reasonably available. I will also request that Child Dispute Services of this Court supervise the parenting arrangements for 2

[62] s 60CC(4A) *Family Law Act 1975* (Cth).
[63] ss 60CC(3)(j) and (k) *Family Law Act* (Cth)
[64] s 60CC(3)(l) *Family Law Act* (Cth)

years. Hopefully that will give the parties some access to facilitated discussions about the boys.

Any other fact or circumstance the Court thinks relevant[65]

271. Having dealt with the primary and additional considerations, I am comfortable with my conclusion that it is in the best interests of the children to see their mother in Sweden twice a year. However, whilst the best interests of the boys is the paramount consideration, it is not the only consideration.

272. In this case, the purpose of the 1980 Convention must be considered. It is directed toward the legal cooperation and the enhancement of the international movement of children. The Convention acknowledges an international community and the need for reciprocity in our approaches to custody, access and wrongful removal. These purposes complement rather than displace the best interests of the subject children. Given my findings, I am in the happy position that the significant weight that I am prepared to accord to the principles of the 1980 Convention are not at all inconsistent with the result at which I have arrived based on the best interests of the children.

Parental responsibility

273. The father seeks an order which I take as being the equivalent of having sole parental responsibility. His position is supported by the independent children's lawyer.

274. Parental responsibility in relation to children means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.[66] In making parenting orders in relation to children, I am (subject to a few exceptions) required to adopt as a starting point that it is in the best interests of the children that the parents have equal shared parental responsibility.[67] Equal shared parental responsibility relates to decision making about 'major long term issues', which is defined in s 4 of the Act as follows:-

> …… issues about the care, welfare and development of the child of a long-term nature and includes (but is not limited to) issues of that nature about:
>
> a) the child's education (both current and future); and
>
> b) the child's religious and cultural upbringing; and
>
> c) the child's health; and

[65] s 60CC(3)(m) *Family Law Act* (Cth)
[66] s 61B *Family Law Act 1975* (Cth).
[67] s 61DA(1) *Family Law Act 1975* (Cth).

d) the child's name; and

e) changes to the child's living arrangements that make it significantly more difficult for the children to spend time with a parent.

This presumption does not provide a starting point about the amount of time or communication that a child is to have with parents.

275. Where two or more persons share parental responsibility, equally or in relation to any major long-term issue under a parenting order, they are required to make the decision jointly.[68] The concept of joint responsibility carries with it the requirements to 'consult the other parent in relation to the decision to be made about that issue'[69] and to 'make a genuine effort to come to a joint decision about that issue'.[70] These provisions mean that consultation and some discussion between the parties is required regarding major long-term decisions, for which parental responsibility shared.

276. The presumption that it is in the best interests of the children that the parents have equal shared parental responsibility does not apply or is rebutted, inter alia, in the following circumstances:-

a) If the court reasonably believes that a parent of a child, or a person who lives with a parent of a child, has engaged in family violence[71] or abuse of the child or another child who is a member of the parent's family;[72]

b) Where evidence is adduced, upon which the court is satisfied that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.[73]

277. I am not satisfied that this case falls within either category of exception. In fact my view is quite the opposite as I am satisfied that it is in the best interests of the children for the mother to be consulted about the boys' education, religious and cultural upbringing and any changes to living arrangements which would make it more difficult for the boys to have access to their mother.

278. I have considered that the parents do not have a relationship in which they can talk freely about the children. It will be difficult for them to communicate and I do have regard to the fact that the mother lives in another country so it is not going to be appropriate or reasonable for the father to continually refer issues to her to see if they can reach agreement. In this case, the parties obligation to

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[68] s 65DAC(2) *Family Law Act 1975* (Cth).
[69] s 65DAC(3)(a) *Family Law Act 1975* (Cth).
[70] s 65DAC(3)(b) *Family Law Act 1975* (Cth).
[71] s 61DA(2)(b) *Family Law Act 1975* (Cth).
[72] s 61DA(2)(a) *Family Law Act 1975* (Cth).
[73] s 61DA(4) *Family Law Act 1975* (Cth).

consult is likely to be met by the father notifying the mother, in comprehensive terms, of what he identifies the issue to be and what he proposes to do about it and the mother being given an adequate time to consider what alternatives she wishes to put forward or whether proceedings in this court may be necessary.

279. I will not accede to the father's application for sole responsibility for the long term care welfare and development of the children. I will order that the parents have equal shared parental responsibility.

Consideration of equal time or substantial and significant time with both parents

280. Sub-section 65DAA(1) of the Act provides that, in making a parenting order for a child's parents to have equal shared parental responsibility for the child, I must consider the following:

a) whether the child spending equal time with each of the parents would be in the best interests of the child;[74] and

b) whether the child spending equal time with each of the parents is reasonably practicable;[75] and

c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.[76]

281. The fact that the mother resides in Sweden makes substantial or significant time impracticable in common sense terms and in the terms of what is 'reasonably practicable' by taking into account the factors listed in s 65DAA(5).

282. Before leaving this topic, however, I will mention ss 65DAA(3) of the Act which states that the child will be taken to spend substantial and significant time with a parent only if that time includes weekdays, weekends, holidays and non-holidays[77] and involvement of the parent in aspects of the child's daily routine[78] and occasions of significance to both parent and child.[79] The legislation notes that these factors are not intended to limit the matters to which the Court may consider in determining whether the time spent with a child is substantial and significant.[80] Just because substantial or significant time is not feasible in this case on a regular and frequent basis, I can still (and do) have regard to the nature of the relationship contemplated by the legislature as being beneficial to children to whom exceptions do not apply. To the extent that I am

[74] s 65DAA(1)(a) *Family Law Act 1975* (Cth).
[75] s 65DAA(1)(b) *Family Law Act 1975* (Cth).
[76] s 65DAA(1)(c) *Family Law Act 1975* (Cth).
[77] s 65DAA(3)(a) *Family Law Act 1975* (Cth).
[78] s 65DAA(3)(b)(i) *Family Law Act 1975* (Cth).
[79] ss 65DAA(3)(b)(ii) and 65DAA(3)(c) *Family Law Act 1975* (Cth).
[80] s 65DAA(4) *Family Law Act 1975* (Cth).

able to do so, I will order that the boys spend time with and communicate with the mother so that there is a normalcy to their life together.

283. The father and the independent children's lawyer both seek an order declaring that the children's habitual place of residence to be in Australia and that nothing in these orders, including provision for the mother to exercise rights of access to the children in Sweden, should vary or change that habitual place of residence. With respect, they appear to misunderstand the concept of habitual residence. Habitual residence is not something that it is open to one parent to change unilaterally absent consent (by which time it is not unilateral) or acquiescence. I will not accede to the father's application in this regard.

Conclusion

284. I found difficulty in this case based on the disjointed hearing times, attributable in large part to the interim issues and then the application of all parties for an extended adjournment to see if the matter could be amicably resolved. However, upon taking time to go through the evidence and isolate the real issues, I have every confidence that the appropriate result involves the children seeing their mother as frequently as twice a year in Sweden for extended periods which incorporate as much of the boys' school holidays here as possible. In order for that outcome to be implemented, I will make those orders for sharing costs of travel providing notice of arrangements and certain information sought by the father which I regard as soundly based and not too onerous for the mother . There should also be orders which regularise the living arrangements for the boys expressed as them residing with the father in Australia.

285. I will provide that the children can go back to Sweden for access in the forthcoming September school holidays because the July 2008 school holidays are now underway and I am satisfied that the Christmas/summer holidays, are too far into the future for F and E to wait to spend time with the mother.

286. For the above reasons, I make the orders set out at the commencement of this judgment.

I certify that the preceding two hundred and eighty six (286) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Bennett

Associate:

Date: 30 June 2008