DEVELOPING FAMILY RELATIONSHIPS

Judge Peter Boshier*

I. Introduction

Delivery of family law is very different when one compares Australia and New Zealand. It is not just that Australia is so much larger[1] and more populated;[2] but rather the presence of a state and federal system in Australia which is pivotal in setting a context for why our legal systems are so different.

In Australia (with the exception of Western Australia) federal jurisdiction is in many respects shared between the Family Court of Australia and the Federal Magistrates Court. But there is one important substantive exception that I would like to discuss; international child abduction, where the Family Court of Australia exercises exclusive jurisdiction.[3] Running alongside the federal system is the state system, bestowing a breadth of jurisdiction on State Magistrates and District Court Judges including the important area of care and protection of children who may need intervention because of abuse or neglect.

New Zealand, with its smaller population and size, has no separate state system. Family law, once enacted, applies throughout the breadth of the country and in a very uniform way. When the New Zealand Family Court was initially set up,[4] it was decided, upon the recommendation of a Royal Commission,[5] that it should form part of the first tier District Court, principally so that access to justice could be enhanced. In the early days, the Family Court concentrated on custody and access disputes, maintenance and some property, while sharing jurisdiction of these latter subjects with the High Court (who also retained exclusive *parens patriae* and wardship jurisdiction). Over time, the jurisdiction of the New Zealand Family Court has been increased and, in almost all respects, it is now the originating court of jurisdiction for all family law related matters.

The workload of the New Zealand Family Court is enormous and in terms of how the workload breaks down, between August 2009 and July 2010 it looked as follows in the table below:[6]

* Principal Family Court Judge, Christchurch, New Zealand.

1 Australia has a total land area of 7,741,220 square miles compared to New Zealand which has a total land area of 267,710 square miles. Central Intelligence Agency "Country Comparison: Area " CIA - The World Factbook <www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.htm>.

2 Australia has a population estimate (as at July 2010) of 221,262,641 compared to New Zealand which has a population estimate (as at July 2010) of 4,213,418. Central Intelligence Agency "Country Comparison: Population" CIA - The World Factbook <www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.htm>.

3 Please note this is by agreement. The Family Magistrates Court does have jurisdiction pursuant to the definition of "court" in the Child Abduction Convention Regulations.

4 In 1981 pursuant to the Family Courts Act 1980.

5 D Beattie, I Kawharu, R King, J Murray and J Wallace *Royal Commission on the Courts* (1978).

6 Statistics provided by the New Zealand Ministry of Justice.

Alcohol & Drugs	103	0.1%
Adoption	440	0.5%
Child Support	373	0.4%
Children Young Persons & Their Families Act	12,256	13.4%
Dissolution/Marriage	9,718	10.6%
Domestic Violence	8,571	9.4%
Estates (Family Protection & Testamentary Promises)	530	0.6%
Family Proceedings	1,225	1.3%
Guardianship	31,473	34.4%
Hague Convention	182	0.2%
Mental Health	5,949	6.5%
Miscellaneous	230	0.3%
Protection of Personal and Property Rights Act	2,781	3.0%
Property	2,929	3.2%
Requests for Counselling	14,764	16.1%

The establishment of the New Zealand Family Court as a part of the District Court has had both its advantages and disadvantages. I imagine that all court systems could look introspectively and make similar observations. But unlike the Family Court of Australia, the Family Court of New Zealand is not a superior court and does not have inherent jurisdiction. Furthermore, within New Zealand, appeals from the specialist Family Court proceed to the High Court, and are often presided over by a single Judge who does not have specialist family law knowledge. At times a Full Court sits, comprising two High Court Judges. This latter situation is in marked contrast to Australia where appeals from single judges of the Family Court go to the Full Court which consists of three specialist judges drawn from the Family Court of Australia.[7]

In many respects the difference in delivery of family law may not matter, but at times when our interests are closely aligned (as they are in relation to the international treaties under which we both operate) the differences are noticeable. Take for example the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. In New Zealand all originating cases under this Convention are heard by a Family Court and if there is an appeal it will be heard by one general Judge of the High Court. There is then the ability to proceed, on leave, to the Court of Appeal and the Supreme Court. All of this can make for a very tortuous process. By contrast, applications under the same convention in Australia are heard by the Family Court with a right of appeal to the specialised Full Court and, on a grant of special leave, an appeal may be possible to the High Court of Australia.

7 Appeals from the Family Magistrates Court also go the Family Court and can be heard by a single judge exercising the Court's appellate jurisdiction, or the Full Court sitting as a bench of three.

Despite these differences, family law is a jurisdiction where both the law and the judges have assumed a very close and collegial working relationship. Such is the travel of citizens from each country to the other, that it has been pragmatic for us to establish a close working relationship. But it goes deeper than that. We share fundamentally similar approaches to how we resolve disputes involving the care of children. Inevitably, our jurisprudence differs in certain areas because of quite specific legislative drivers. But I believe we both know that and can talk about those differences very comfortably.

In this paper, I want to look at those areas where our respective countries support each other, principally the child support and child protection areas. I want to then look at areas where our respective countries could do more to support each other, including international child abduction, and suggest that there is every reason why we can and should work even more cooperatively. Finally, I would like to consider the exciting prospect of New Zealand acceding to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children as well as upcoming legislation on trans-Tasman court proceedings and regulatory enforcement.

II. Areas where our respective countries currently support each other

A. Child Support

Long ago, New Zealand abandoned providing for the maintenance of children by court orders at first instance. Our current legislation, the Child Support Act 1991, is based largely on the Australian model for child support legislation and consequently the New Zealand Family Court retains the ability to order spousal maintenance and child support. However, the ability to collect this support has historically been a source of concern and unease given the prevalence of New Zealanders (including liable parents) who emigrate from New Zealand to Australia and who then do not comply with New Zealand based orders.

It is estimated that in the year ending June 2010 15,800 people emigrated from Australia to New Zealand while the numbers emigrating from New Zealand to Australia amounted to 31,700.[8] Interestingly the majority of migrants in both directions were New Zealand citizens.[9]

Despite the historical difficulties in interstate enforcement of child support our courts have stressed that one cannot avoid paying the proper obligations merely because of a choice to be domiciled in a country different to that of your child.[10] To help alleviate some of the difficulties faced in cross-border legal enforcement, such as choice of law questions, New Zealand and

8 G Bascand "Hot Off the Press International Travel and Migration: June 2010" (2010) Statistics New Zealand <www.stats.govt.nz/browse_for_stats/population/migration/inttravelandmigration_hotpjune2010.aspx>.

9 Ibid.

10 See *Harding v Bryson* (1995) 13 FRNZ 302 at 307.

Australia entered into a reciprocal agreement, which came into force on 1 July 2000.[11] The agreement allows one State to use the facilities of the other State to collect child support from parents living in the other country.[12] The money is then passed on to the custodial parent. In New Zealand the agreement was put into force by the Child Support (Reciprocal Agreement with Australia) Order 2000. In Australia the agreement appears as the First Schedule to the Child Support (Registration and Collection) (Overseas-Related Maintenance Obligations) Regulations 2000. The amount of child support to be paid is then calculated in the country where the child and custodial parent are living.

The agreement has proven to be an effective mechanism for the enforcement of child support. Regrettably I do not have the latest figures in this area. However as at 30 June 2006 a total of over $34.425 million had been collected under the Agreement. $18.425 million of this was collected from paying parents by Australian authorities on behalf of custodians living in New Zealand, with $16 million going the other way.[13]

Overall, this has been an area where reciprocal trans-Tasman support has been successful.

B. Care and Protection of Children

Another area where our reciprocal support has been felt is in the sphere of care and protection of children. Recently, I undertook a case[14] where neither the mother of a baby born here in New Zealand nor her wider family could look after her child. However a very well meaning lady from New South Wales who had been introduced to the family through a contact, offered to do so. It was a case that caused me great anxiety. Was I to give this child the ability to have a life with someone who had already begun to bond with her or should I look for foster care in New Zealand, through the Department of Child, Youth & Family Services.

When I asked for a social worker's report, I asked that Australian Social Services investigate and report to me on the prospective caregiver's circumstances. The report was illuminating. The extent of dysfunction, and need for care and protection notifications that had occurred on the part of the prospective caregiver's own family, completely changed my mind. Up until receipt of the report I had been prepared to entertain the move as tenable.

I cite this example as highlighting a number of issues for our bilateral relationship in relation to children who may need care and protection. It is not unusual when hearing a care and protection case to learn that a prospective caregiver wishes to take a child to Australia. But I want to acknowledge that in permitting that to occur, there must of necessity be an impact on Australian Social Services, for generally speaking it would be unthinkable to simply remit a child in need of care or protection to a new caregiving situation, without appropriate social services backup.

11 Agreement between the Government of New Zealand and the Government of Australia on Child and Spousal Maintenance.

12 Article 12.

13 Figures provided by Inland Revenue Child Support, current to 30 June 2006.

14 FC TAU FAM-2008-070-1803 30 July 2009.

For this reason, our countries have entered into a formal protocol concerning child protection orders.[15] In New Zealand the Protocol was inserted into the Children, Young Persons, and Their Families Act 1989 as Part 3A.

A protection order is defined as an order that places responsibilities of custody, guardianship, supervision, or support on a government or statutory department, or any organisation granted authority under the child protection laws of that State.[16] The Protocol was established to promote the transfer of proceedings and to ensure that a protection order follows a child as he or she moves between States.[17]

Orders may be transferred by either the Chief Executive of the Department of Child Youth and Family Services, or by an order of the Court.

Decisions regarding the interstate transfer of child protection orders and proceedings and the interstate placement of children are made in accordance with each State's case planning principles, so in New Zealand ss5 and 13 of the Children, Young Persons, and Their Families Act 1989 are relevant, as well as the following principles:[18]

- The interests of the child are paramount;
- Delay is contrary to the interests of a child and should, where possible, be minimised. The Protocol is designed to move the process along promptly ie, the transfer of an order occurs within six months (often more quickly) of a child being placed interstate;
- Planning an interstate placement, whether the child is subject to a protection order or not, should include the thorough involvement of the receiving State prior to the interstate placement; and
- A child protection order should generally be enforceable and effective pursuant to the child protection legislation of the State where the child resides.

So much for procedures that have been in place for some time and where reciprocal support for each other's practices operates efficiently. I would now like to address those areas where our support for each other's practices could be developed.

III. Areas Where Our Respective Countries Could Develop Support for Each Other

A. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

By far, the largest number of applications received by the New Zealand Central Authority under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Child Abduction

15 The Protocol for the Transfer of Child Protection Orders and Proceedings and Interstate Assistance.

16 Children, Young Persons, and Their Families Act 1989, s 207C.

17 A "State" is defined in cl 2 of the Protocol as a State or Territory of Australia, or New Zealand.

18 Clause 5 of the Protocol.

Convention") from one country come from Australia and equally, most of the applications that our Central Authority causes to be made, occur in Australia.

In 2007,[19] 47 applications were made in circumstances where children had been removed, in breach of the Child Abduction Convention, to other countries. Of these, 33 involved removals to Australia. In the same period, 36 applications were made in relation to children that had been removed in breach of the Child Abduction Convention, to New Zealand. Of these, 29 came from Australia.[20] Overall, the New Zealand Ministry of Justice classified 182 applications as Child Abduction Convention cases in 2007 and 222 in 2008.

The circumstances of international child abduction are strikingly similar between our two countries. It will not be unusual at all to read the following scenario in either the Family Court of New Zealand or Australia. A young adult visits the other country and while on a working holiday meets someone and a relationship is formed, perhaps leading to marriage, but not necessarily. Sooner or later a child is born. The relationship sours and there might even be some violence. Feeling anxious and without family support, one of the parents, and usually the mother, returns to the country of origin and may do so surreptitiously, to lessen the stress of relocation. Suddenly, the other parent learns, often when contact is seeking to be exercised, that the child and mother have gone. An application for return is made to the relevant Central Authority.

How different this is to what was imagined when the Child Abduction Convention was being drafted. Although when the Child Abduction Convention was being negotiated in the 1970s, there were no comprehensive abduction statistics available,[21] it was understood that "the paradigm case was that of the father who became so frustrated with being denied access to his child or children after the Court had granted sole custody to the mother, that he stole the child, went abroad, and then underground."[22] A number of studies conducted worldwide concur that abductions are now more likely to be brought about by mothers than by non-custodial fathers.[23] Of these, an analysis of 59 New Zealand judgments from 1998 to 2004 dealing with applications to New Zealand for orders for return showed that the mother was the abducting parent in nearly 71 per cent of cases, the father in just over 22 per cent of cases and close relatives in nearly 7 per cent of cases.[24] An analysis of the same judgments also showed that the child was taken by their caregiver in nearly 60 per cent of cases, and by the non-resident

19 Please note the following figures do not include the number of applications to secure rights of access or contact.

20 These figures were supplied by the New Zealand Central Authority.

21 N Lowe, M Everall QC and M Nicholls, *International Movement of Children, Law Practice and Procedure* (Jordon Publishing, 2004) at 218.

22 P Beaumont and P McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 2004) at 9.

23 Ibid, at 8-10.

24 E Parsons and P Tapp, "Case note: The Hague Convention in the 21st century – an issue of process: VP v A" 2005 5 NZFLJ 23 at 24.

parent in 24 per cent of cases.[25] It is clear therefore that the face of the child abductor has changed. In the late 1970s and early 1980s the abductor was more commonly the non-resident parent, who abducted a child out of anger, revenge, or as a selfish act designed to hurt the other parent.[26] Nowadays it is more common for the abducting parent to be female,[27] to be the primary caregiver, and, with increasing frequency, to be a parent returning to the country of that parent's birth.[28]

In an ideal world, every parent wishing to live elsewhere, but particularly in another country, would ask the permission of the other parent to relocate and, if that is not obtained, seek the permission of a court to do so. But both in Australia and New Zealand relocation cases are some of the most difficult cases to decide, and take considerable time and expense to resolve. It is not surprising that given a very stressful situation, one of the parents might simply act unilaterally. That is life.

When children are wrongly taken between our countries, Art 7 of the Child Abduction Convention requires the Central Authority to facilitate appropriate measures to secure the voluntary return of the child or for an amicable resolution of the issues. Thus it is necessary for our respective central authorities to have a close and cooperative working relationship. Notwithstanding this relationship, the reality is that not all situations can be resolved amicably and thus applications for return need to be filed. This then starts a legal process which can either be swift and robust, or very lengthy and tortuous.

The Child Abduction Convention has been incorporated into New Zealand law and forms part of our Care of Children Act 2004. Section 107 of that Act requires an application to the Court for return of a child abducted to New Zealand to be dealt with speedily – envisaging determination of the application within six weeks of the date on which the application is made. However, given the breadth of work that our Court undertakes, and the number of locations that the Court sits in, nearly sixty, meeting a six week deadline is for the most part, illusory.

In New Zealand, the practice is for the Central Authority to retain specialist members of the Family Bar to undertake applications for return orders filed in our Family Courts. At the first judicial conference, which should usually occur within fourteen days of the application being filed, one of the issues traversed is whether mediation is a responsible approach to resolving a case.

As long as the mediation process, if attempted, does not compromise the court process, it seems to me to be important to consider the context and see whether mediation might satisfactorily resolve the issues, and in particular

25 Ibid.

26 M O'Dwyer, "Current issues in Hague Convention cases: a New Zealand perspective" 2002 4 BFLJ 5 at 5.

27 N Lowe and K Horsova, "The Operation of the 1980 Hague Convention – A Global View" (2007) 41 Fam L Q at 67.

28 O'Dwyer, above n 27, at 5 and New Zealand Central Authority statistics for the year ending 31 December 2000. See also M Freeman, "Primary Carers and the Hague Child Abduction Convention" 2001 IFL at 140.

what it is that the left behind parent is looking for in terms of relief. If it is only ongoing enforceable contact, an overall satisfactory conclusion might be able to be reached.

The Permanent Bureau of the Hague Conference has been supportive of an exploration of the use of mediation not only by central authorities, but by courts. For example, one of the outcomes of the International Judicial Conference on Cross-Border Family Relocation held in March 2010 and co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children stated that "mediation and similar facilitates to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings."[29] Given that New Zealand and Australia are sovereign states and must therefore perform the Child Abduction Convention obligations to each other faithfully, any approach to mediation must be considered carefully. Not only is there the issue of our bilateral relationship but we are both contracting states to this widely supported Convention[30] and its overall integrity must be preserved.

But it is abundantly plain in at least some cases that if a return is ordered, that may be countered by the other State agreeing to relocation. Exploring this likelihood and what it is that each parent is seeking and is willing to do, may be just as important as the court process itself. How then should mediation be approached?

If an application for a return order is filed in the New Zealand Family Court and the left-behind parent is in Australia, mediation may occur here through counsel appointed to assist the court, and privileged mediation may occur alongside the court process without in any way impinging on its integrity. I have been working on guidelines which might see mediation attempted in certain cases that involve Australia and New Zealand on a basis which is principled and clear. Subject to further consultation with my bench I am going to suggest an approach to mediation along the following lines:[31]

1. Filing of application
   i. An application for return will be filed in the usual way: on receipt of an application by the Central Authority, counsel will be appointed to represent the left behind parent and applications will be filed in the local court.

29 "Washington Declaration on International Family Relocation" (The International Judicial Conference on Cross-Border Family Relocation, 23-25 March 2010) available at <www.hcch.net/index_en.php?act=events.details&year=2010&varevent=188&zoek=relocation>.

30 The Convention has 82 contracting states. Statistic correct as at 6 April 2010. For further information please see <www.hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24>.

31 Since this paper was written the Practice Note *Hague Convention Cases: Mediation Process – Removal, Retention and Access* has been finalised and published. It is available as appendix 12 of the Family Court Caseflow Management Practice Note at <http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/family-court-caseflow-management/family-court-caseflow-management-practice-note-24-march-2011>.

2. Consideration of mediation
   i. The requesting State may indicate at the outset if the applicant would like to attempt an amicable resolution by mediation. That indication could be included as part of the application or be contained in the body of the letter of request to the Central Authority.
   ii. If an indication that mediation may be appropriate is contained within the initial request, the Central Authority should draw this to the attention of counsel appointed to represent the left-behind parent.
   iii. If no indication is contained in the initial application, counsel instructed to represent the left- behind parent should consider if mediation is appropriate in a particular case. The Central Authority can assist in ascertaining if a view is held by the Central Authority of the requesting State or the left- behind parent regarding mediation.
   iv. A letter will be sent to the taking-parent outlining the mediation process and inviting his or her participation.
   v. The initial directions sought would reflect if mediation is considered appropriate or has been agreed to by the parties. A request that counsel to assist be appointed could be included at the time of filing the documents in court or as soon as mediation has been agreed to.

3. Timing of mediation
   i. Mediation should not delay the court proceedings and will run parallel to but separate from the court process.
   ii. If mediation is considered appropriate in a particular case mediation will be scheduled to occur as soon as practicable after receipt of the application. Mediation should occur within 7-14 days.
   iii. Mediation can occur any time after the direction has been made appointing counsel to assist and preferably before the judicial conference.
   iv. However mediation can be revisited at the first call if mediation was not considered previously and there are indications that it is appropriate. If mediation were agreed to at the judicial conference it shall be scheduled within 2-7 days of the judicial conference.

4. Mediation process
   i. The parties will be provided with information about the mediation process and what to expect.
   ii. Mediation will be by way of telephone, skype or other webcam/internet facility. If audio-visual link (AVL) is available and the parties agree to fund the use of this facility or it is cost neutral then AVL may be an option.
   iii. Parties will be in separate locations to the mediator to ensure that neither party is disadvantaged. If a party elects to travel to New Zealand to participate in mediation at his or her own cost then mediation may be conducted at the same location.
   iv. If counsel attend the mediation their participation is as observers, to participate if requested or invited to by the mediator and to provide clarification and advice if sought. It is important that counsel are aware of what has occurred at mediation and can facilitate/draft an agreement.

v. All parties are to be given the opportunity/encouraged to access independent legal advice. If counsel are not present at mediation counsel may be available by telephone, e-mail or to meet with the party before any agreement is signed.
vi. If agreement is reached the mediation may need to be adjourned to ensure any orders sought are enforceable in both States.
vii. At the conclusion of the mediation if agreement has been reached the mediator may provide a report setting out the substance of the agreement and whether any orders are sought from the court. Counsel for the parties to draft a memorandum for filing in the court seeking orders on the terms as agreed.

5. Judicial Conference
   i. The application will be served and set down for a judicial conference in the usual way. It is anticipated that the judicial conference will be held within 14-21 days of the application being filed.
   ii. If mediation has not been held or completed by the judicial conference timetabling directions will be made at the judicial conference to avoid delay in determining the application for return of the child/ren.
   iii. If agreement is reached at mediation, at the judicial conference a judge may:
      a. Make orders as sought by consent
      b. Allow the applicant to withdraw the application.

6. Non admissibility of evidence
   i. Any statement or admission disclosed or made to a mediator or during the course of mediation is not admissible in any court, or before any person acting judicially.

7. Lawyer for the child
   i. The appointment of a lawyer for child is to be considered in accordance with the practice note for their appointment in Hague Convention cases.
   ii. If the child/ren is of an age or has a level of maturity where it is appropriate to take their views into account and/or defences have been indicated that are tenable, the court may consider the appointment of a lawyer for child to report by memorandum prior to the mediation conference. If a lawyer for child is appointed his or her attention must be drawn to the fact that any considerations in Hague cases are not welfare based. Counsel's role is to ensure that the mediator is aware of what the child says and what is important to him or her.
   iii. It is not anticipated that a child shall attend or be present at mediation.
   iv. If the lawyer for child is required to attend, his or her attendance would be to provide information on the child's views and only if the child wishes his or her views to be expressed.

8. Hague mediators
   i. A list of qualified mediators knowledgeable in Hague Convention cases will be compiled and mediators appointed to assist the Court drawn from this list.

I now propose convening a judicial working group to advise me on all aspects of jurisdiction and any cost implications and once I have that report, I will discuss with the Chief Justice of the Family Court of Australia our respective desired approaches.

I acknowledge the need for caution. There is an obligation imposed by the Child Abduction Convention of return where the removal is wrongful and there is no defence. That should not be compromised by the mediation process. But it depends so much upon what each party is actually looking for at the end of the day. If that can be explored and agreed, and as a result return is not required, is this not just as legitimate an outcome as return and possible consequent relocation?

One of the premises that strongly motivates me to promote mediation is the fact that a subsequent long and unsatisfactory appeal process might be avoided. I say unsatisfactory because with the rights of appeal available in New Zealand, it can take some time before all rights are exercised.

I acknowledge that New Zealand and Australia must approach the question of mediation a little separately. For instance, it can only occur as directed by a Family Court judge and if each party is willing to participate. If an application for a return order is filed in Australia by our Central Authority, the funding and style of mediation might be markedly different because of the different structure.

B. Judicial Communications

If there is one area of law where direct judicial communications between States has been promoted to the point where it is now commonplace, it is undoubtedly family law. I shall explain.

In the decision of *Hoole v Hoole*,[32] the Honourable Madam Justice Martinson was faced with a situation in which contradictory orders had been made by the British Columbia Supreme Court, and a Court in Oregon, United States of America. Each order was injunctive and an untenable situation existed. A judge in the Oregon Court sought a joint hearing with the British Columbian Court in order to consider matters of jurisdiction.

The judgment sets out the essence of the process and conclusion in this way:[33]

> The Joint Hearing
> [15] During the joint hearing the parties advised the courts, through their lawyers, that they agreed that the Supreme Court of British Columbia is the appropriate court to decide the question of who should have custody of the child. Ms. Hoole's counsel said that Ms. Hoole wanted to apply to this Court to set aside the without notice, interim custody order. The discussion then focussed on when the hearing would take place in British Columbia and what would happen in the meantime.
> [16] I was able to assure Judge Hochman that this Court could hear the application at any time. Ms. Hoole wanted to retain a lawyer in British Columbia so we took that into account when agreeing upon a time frame in which the application would be heard.
> [17] There were discussions about facilitating the child's return to British Columbia. Ms. Hoole's counsel was concerned about efforts to enforce the British Columbia order in Oregon. Mr. Hoole agreed not to take enforcement steps with respect to his British Columbia Order until after the hearing to determine whether it should be set aside took place.

32 *Hoole v Hoole* 2008 BCSC 1248.
33 *Hoole v Hoole* 2008 BCSC 1248 at [15].

> [18] Judge Hochman, at the conclusion of the hearing, was satisfied that she had the information she needed to make appropriate orders, based on her jurisdiction, in Oregon. An application in this Court to set aside the interim custody order was not, in the end, required, as the parents reached an agreement on the interim custody of their son.

What is very helpful, in terms of Justice Martinson's judgment,[34] is the overview of inter-country communications which her Honour refers to in holding that to have a joint communication in this way was lawful and appropriate. For my part, I would not be inclined so much to call this a "joint hearing" as a judicial communication to establish jurisdiction.

In her judgment, Justice Martinson commented that judicial communications should not be carried out to determine the merits of a case, but rather to enable the judiciary to make informed decisions on jurisdiction, including the location of the place of habitual residence, and information about custody laws of that jurisdiction. In discussing judicial communication, her Honour noted that:

> Communication would make case management more efficient, especially when the return of the child is ordered, by undertakings made by the parents and mirror orders made in each jurisdiction.
> Judicial communication may even contribute to the parent voluntarily returning the child. By engaging in judicial communication, courts are fulfilling the mandate under the Hague Convention in co-operating towards the safe and prompt return of the children, by not tolerating child abduction.
> Direct judicial communication does not mean one court will decide for another, therefore the independence of the court is not compromised. Rather, the court is able to make a more informed decision after communication with the other court and applying the law of that jurisdiction. The reasons that favour direct judicial communication in international child abduction cases apply to disputes between provinces.
> Other Canadian judges have supported this concept, on the reasoning that it would lead to a more uniform application of the Hague Convention internationally.
> Judicial communications speed up return applications, as information can cross jurisdictions more easily. One of the greatest complexities in dealing with inter-jurisdictional custody disputes was dealing with the lack of jurisdictional communications, as this would often result in two states claiming jurisdiction.
> There is international judicial support for direct judicial communication, and the matter has been endorsed by legislation in the US.

Subsequent to this judgment, and in January 2009, the Hague Conference on Private International Law and the European Union hosted a conference on judicial communications.

This conference reached the following recommendations and conclusions:[35]

- The conference emphasises the value of direct judicial communications in international child protection cases, as well as the development of international, regional and national judicial networks to support such communications.

34 *Hoole v Hoole* 2008 BCSC 1248.

35 "Joint EC-HCCH Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks Recommendations and Conclusions" (Joint EC-HCCH Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks, 15-16 January 2009) available at <www.hcch.net/index_en.php?act=events.details&year=2009&varevent=158&zoek=judicial%20communication>.

- States that have not designated Network judges are strongly encouraged to do so.
- Judges designated to a network with responsibility for international child protection matters should be sitting judges with appropriate authority and experience in that area.
- As a general rule, designations should be formal. Where a designation has been made on an informal basis, every effort should be made without delay to obtain a formal designation from the relevant authority.
- The process for the designation of Network judges should respect the independence of the judiciary.
- The different networks should operate in a complementary and coordinated manner in order to achieve synergies, and should, as far as possible, observe the same safeguards in relation to direct judicial communications.
- The valuable work of regional judicial networks such as the European Judicial Network in Civil and Commercial Matters and IberRed should be recognised and promoted.
- Member States of the European Union which have a specialist family judge as a member of the European Judicial Network in Civil and Commercial Matters but have made no designation to the International Hague Network of Judges are invited to consider the designation of the same judge or judges to the Hague Network.
- IberRed Member States which have not designated a specialist family judge as a contact point but have designated a judge to the Hague Network are invited to consider the designation of the same judge or judges as contact points within IberRed.
- The development of national networks in support of the international and regional networks should be advanced.
- Efforts should be made within States to promote the appropriate use of direct judicial communications in the international protection of children and to increase awareness of the existence and role of Network judges.
- The conference recognises the important role that Central Authorities can play in giving support to judicial networks and in facilitating direct judicial communication.
- Adequate resources, including administrative and legal resources, should be made available to support the work of Network judges.
- States experiencing a high volume of international child protection cases should consider setting up an office to support the work of the Network judge or judges.
- Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the necessary steps should be taken to ensure that such legal basis exists.

- The conference recognises the importance of the project initiated by the Hague Conference on Private International Law to develop the Draft General Principles on Direct Judicial Communications and endorses their general direction. Discussion in the conference has made a major contribution to the future development of the guidelines. The conference looks forward to their continued development and refinement in consultation with judges from all regions of the world and different legal traditions.
- The conference recognises that there is a broad range of international instruments in relation to which direct judicial communications can play a valuable role.

There are a number of times when New Zealand and Australian judges have communicated. Seldom has it been in as formal a fashion as is set out in the Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October - 9 November 2006). These recommendations included the following:

> 5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.
> 5.6 Contracting States should actively encourage international judicial cooperation. This takes the form of attendance of judges at judicial conferences by exchanging ideas/communications with foreign judges or by explaining the possibilities of direct communication on specific cases.
> In contracting States in which direct judicial communications are practised the following are commonly accepted safeguards:
>
> > Communications to be limited to logistical issues and the exchange of information;
> > Parties are to be notified in advance of the nature of proposed communication;
> > Record to be kept of communications;
> > Confirmation of any agreement reached in writing;
> > Parties or their representatives to be present in certain cases, for example via conference call facilities.

While, as I indicated above, such communications have seldom been undertaken in as formal a fashion as the recommendations might suggest, it is worth considering a couple of instances where such judicial communication has occurred.

A first case illustrates the importance of judicial communication in upholding the primary objective of the Child Abduction Convention – to ensure the prompt return of children who are wrongly abducted. In *The Secretary for Justice v Te N*[36] a New Zealand judge was presented with an unusual take on an all too familiar situation. An application for a return order had been filed along with information that an authority in Australia had given undertakings to negate a defence of grave risk – primarily brought

36 FC, WAI, FAM 2005-081-049, 6 October 2005, Judge von Dadelszen.

about by the mother's drug use. In addition to conducting extensive research into the case law and commentary on "undertakings", Judge von Dadelszen contacted a senior member of the Australian judiciary to discuss the situation. In-depth discussion reassured him that it was entirely appropriate for the Australian agency to give the undertaking, making it possible for the Judge to exercise his discretion and issue the return order. Consequently barriers which otherwise might have caused a judge to exercise his discretion not to return a child were removed through judicial communication.

More recently the assistance of the New Zealand judiciary has been called upon to assist Australian judges confronted with applications for orders to return children to New Zealand. In *Department of Child Safety & Byrnes*[37] Justice Kay had expressed a preference to delay the return itself until the New Zealand Family Court had determined a strongly anticipated application by the mother to relocate to Australia where she was residing with her other children. Justice Kay therefore contacted us to discuss possible timeframes for the hearing of the relocation application in order to ascertain whether such a preference could be entertained. Our judiciary were able to confirm that timeframes would become clearer after a judicial conference. Relying on the information that had been given through the judicial communication, Justice Kay made the order but delayed the child's return to New Zealand until after the judicial conference. It all made for an orderly process.

From the above it is evident that judicial communications are immensely valuable, but it is of additional value to have designated liaison judges who can build up special working relationships. In mid-2007 Justice Bennett of the Family Court of Australia was hearing a request for a return order and had adjourned the matter, part heard, to permit the State Central Authority to produce a number of documents, including a complete copy of the file in the New Zealand Family Court. After the date on which the file was due to have been received had passed, Bennett J sought the assistance of Kay J, the Australian liaison judge. By relying on long established judicial liaison arrangements between Australia and New Zealand I am pleased to say we were able to secure most of the documents very quickly, giving the Judge a more complete understanding of the history to the case and resulting in a more just outcome.

Most recently I received a request from Justice Le Poer Trench in Australia who was faced with a very frequent situation wherein New Zealand residents who travel to Australia for a holiday decide to stay! In this instance a left-behind New Zealand mother sought return of her 14 year old son who had been taken on holiday by his father to Australia. During their time there the father decided to stay and found a good job. Furthermore the boy, who had been in his father's care since he was three, had settled into his new environment and objected to being returned to New Zealand. I was contacted as to whether it would be possible to have the father file an application in New Zealand to relocate to Australia and for that application to be heard urgently. As the case in Australia was current, Justice Le Poer Trench offered

37 [2007] FamCA BRF261/06.

to provide copies of their family report and arrange video-conferencing facilities. After careful consideration on both sides of the Tasman, the mediation took place. This resulted in the Judge making consent orders to dismiss the Hague application and orders under the Family Law Act for the boy to remain in Australia but spend time with his mother in New Zealand during the holidays – an outcome that all can surely see as being in the child's best interests.

Not only do I consider that direct communications between judges might be exploratory so that a decision under contemplation can be crafted carefully, a discussion on the form of return orders if there is consequence for the other country, appears to be sensible. For example communication with the Australian Hague Network Judge concerning a decision[38] that our Central Authority had referred to me where the Return Order required as follows:

> … The father shall, within the proceedings mentioned in subparagraph (a) above, secure an ex parte order against himself, or alternatively proffer to the New Zealand Court an enforceable written undertaking binding himself, for the protection of the respondent in terms consistent with the following:
>
> > The father must not assault, molest, harass, or otherwise interfere with the mother.
> >
> > The father must not approach within 100 metres of the mother or her place of residence.

It seems to me that if either of our countries is contemplating mirror orders or conditions of return which could impact on each other's courts and social services, a direct judicial communication could be as important as an issue of jurisdiction. An order such as that described above is problematic in terms of New Zealand domestic law and I see the sense in a prior discussion before either of us contemplates an order along these lines.

C. The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Another area I look forward to developing a reciprocal working relationship in is the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

This Convention was passed into law in Australia by means of the Family Law Amendment (Child Protection Convention) Act 2002. While New Zealand has not yet acceded to this Convention steps are being taken to do so. Very recently the Convention underwent the parliamentary treaty examination process by the Foreign Affairs, Defence and Trade Select Committee. While there is a way to go before this Convention finds its way into New Zealand's domestic legislation, looking at what the Convention changes and how it might fundamentally affect our relationship with Australia so far as family law is concerned is helpful.

38 *Director-General, NSW Department of Human Services & Morton* (P)SYC6976/2009 12 February 2010.

In essence, the Treaty will enable us to:

- automatically recognise orders for the purposes of enforcement;
- request or assume transfer of jurisdiction when it is in the best interests of the child to do so;
- obtain prior confirmation that a New Zealand order will be recognised and enforced (if necessary) in another jurisdiction before it is made (especially helpful in relocation cases);
- enable the Court to put enforceable conditions on an order for the child's return under the Child Abduction Convention;
- enable our respective countries to take interim measures for the necessary protection of children; and
- allow the setting up of a clearer basis for close cooperation in family law cases.

Of particular interest are Arts 8 and 9 of the 1996 Convention which give the authorities of a Contracting State the ability to transfer jurisdiction. A State that has jurisdiction can ask another State to accept jurisdiction or a State without jurisdiction can ask the State that has jurisdiction to transfer it to them if it is in the best interests of the child to do so. This must be done by consent. These provisions encourage States to work together in a co-operative way that better accommodates the immediate welfare needs of children.

D. Trans-Tasman Court Proceedings and Regulatory Enforcement

Finally I would like to talk a little about the harmonisation of trans-Tasman court proceedings and regulatory enforcement. On 24 July 2008 an agreement[39] was signed between the Australian and New Zealand governments that aims to streamline the processes for resolving civil proceedings with a trans-Tasman element in order to reduce costs, improve efficiency, and minimise impediments to enforcing certain judgments and regulatory sanctions.

In order to give effect to this agreement in Australia, the Trans-Tasman Proceedings Act 2010 (Cth) received Royal Assent on 13 April 2010.

New Zealand is in turn working on legislation that will implement the agreement; and, to this end, the Trans-Tasman Proceedings Bill was introduced in Parliament on 24 November 2009, has passed its third reading and is now awaiting Royal Assent.

The New Zealand Bill will support measures to encourage trade and develop a single economic market between New Zealand and Australia and improve the regulatory environment by reducing barriers to cross-border enforcement of civil penalties and criminal fines.

The Bill will help to resolve legal disputes with a trans-Tasman element more efficiently and effectively and at a lower cost by:

- allowing civil proceedings from an Australian court to be served in New Zealand without additional requirements and vice versa;

39 The Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement.

- extending the range of civil court judgments that can be enforced across the Tasman, with judgments being refused enforcement only if they conflict with public policy;
- allowing interim relief to be obtained from a court in one country in support of civil proceedings in the other;
- adopting a common 'give way' rule to apply when a dispute could be heard by a court in either New Zealand or Australia;
- encouraging greater use of technology for trans-Tasman court appearances;
- allowing civil penalty orders and certain criminal fines issued in one country to be enforced in the other country; and
- allowing the proposed regime to be extended to tribunals on a case-by-case basis.

I look forward to the implementation of the regime between our two countries.

IV. Conclusion

For the Chief Justice of the Family Court of Australia and me to share this session, and to talk on how family law impacts between us, is a very welcome opportunity.

Of course, the concept of trans-Tasman legal relationships is wide ranging but, in the specific field of family law, we have much in common and we have long co-operated on a basis of close friendship. We have respected each other's sovereignty but have acknowledged that we are sufficiently geographically close as to be virtually over the fence from each other.

To retain its integrity, law must of course change and adapt. Ways of communicating electronically have enabled us to share information and to make enquiries in a way which is consistent with speed and appropriate informality.

If family law is to maintain its relevance, it needs to acknowledge that movement between Australia and New Zealand is easy and inexpensive, and that there will be consequential family relationship issues that we will both have to deal with. I believe we are at the beginning of some exciting new developments and I also believe that right now we are laying a principled basis for enhancing judicial co-operation and resolution of family disputes for the future.

I applaud the staging of this Conference for the opportunity it has given to look at those areas where we already have legislation and agreements in place and equally, where we are focusing our attention at the moment on making the law more relevant and more efficient for the future.