

MITIGATING OVERSEAS TRAVEL RISKS FOR CHILDREN IN SEPARATED FAMILIES

BY ALISON JAMES

LEGISLATION

1. All parenting proceedings are governed by Division 5 of Part VII of the Family Law Act 1975 (Cth) (the Act).
2. There are no specific provisions in the Act relevant to permitting or restricting international travel except offences, exceptions and penalties under Subdivision E of Div 6 of Part VII of the Act. However, the Court has power under Section 65D(1) of the Act to make an order to travel overseas with children for a holiday because it is a parenting Order.
3. Restraints with injunctions in relation to travel outside the Commonwealth of Australia may be orders made under Section 67ZC of Division 8, Subdivision E of Part VII of the Act or may be under Section 68B(a) under Division 9 of Part VII of the Act.
4. As is the case in respect to all parenting Orders, in deciding what orders are appropriate in respect to overseas travel by children, the Court is required to have regard to the best interests of the child as the paramount consideration as provided for in s 60CA of the Act.
5. Section 60CC sets out the factors that the Court is required to consider in determining what is in a child's best interests.
6. In considering the specified matters, Section 60CC(2) of the Act requires the Court to consider what arrangements would promote the safety (including safety from being subjected to, or exposed to, family violence, abuse, neglect or other harm) of the child or each person who has the care of the child.
7. Section 60CG of the Act requires the Court to ensure that any order made does not expose anyone to an unacceptable risk of family violence and is consistent with any family violence order in place.

8. Also of relevance are Sections 43 and 67ZC of the Act. Section 43 sets out the principles to be applied in the exercise of the Court's jurisdiction and includes, in subsection (1)(c), an obligation to have regard to "the need to protect the rights of children and to promote their welfare." Section 67ZC relevantly provides:

(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

Note: Division 4 of Part XIII AA (International protection of children) may affect the jurisdiction of a court to make an order relating to the welfare of a child.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

9. Those legislative provisions are to be interpreted and applied in a manner that is consistent with the objects of Part VII of the Act, which includes in s 60B(a): "to ensure that the best interests of children are met, including by ensuring their safety" and "to give effect to the *Convention on the Rights of the Child done at New York on 20 November 1989.*"

10. The *Convention on the Rights of the Child 1989* relevantly include:

Article 10:

1. Applications by a child or their parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

APPLICATIONS TO THE COURT

11. Competing Applications as to the type of orders, if any, that should be made about future overseas travel for a child or children of the relationship may be brought before the Court.

12. If a party wants to travel overseas with a child or children and seek orders for passports to be issued for the children it is often met with an application for an injunction to restrain international travel.

APPLICABLE LAW

13. The relevant matters when considering an order for international travel were set out in *Kuebler & Kuebler* [1978] FamCA 26 as follows:

a) The length of the proposed stay out of the jurisdiction;

- b) The bona fides of the application;
 - c) The effect on the child of any deprivation of spending time with the other parent;
 - d) Any threats to the welfare of the child by the circumstances of the proposed environment; and
 - e) The degree of satisfaction in which the Court based its assessment of the parties that a promise of a return to the jurisdiction would be honoured.
14. Relevant to the making of such an order will be assessing risk of non-return of a child from overseas travel. To the question of risk, the Court in the decision of *Line & Line* [1996] FamCA 145 held that the following are relevant factors:
- 14.1. The existence or otherwise of continuing ties between the departing parent and Australia (such as the ownership of real estate, the existence of business interests, or the residence of close family or friends here); and
 - 14.2. The existence and strength of possible motives not to return (including the level of conflict between the parents, particularly over child related issues); and
 - 14.3. The existence and strength of possible motives to remain in the other nominated country (such as the ownership of real estate, the existence of business interests, or the residence of close family and/or personal friends there);
 - 14.4. Whether the country of travel is a signatory to *The Hague Convention on the Civil Aspects of International Child Abduction*; and
 - 14.5. The financial circumstances of both parties.
15. It was found in *Gin v Hing and Lorde & Chu* at [10], a country that is not a signatory to *The Hague Convention on the Civil Aspects of International Child Abduction* is not determinative, but otherwise a part of the considerations a court will take into account when assessing risk.
16. The fact that *The Hague Convention on the Civil Aspects of International Child Abduction* does not apply may be relevant to the amount of a security deposit to be paid by the parenting wishing to travel with the child or children.
17. In the event that the risk that the child will not return to Australia is unacceptable, the Court can restrain the parties by injunction from removing the child from Australia (*Cales & Cales* [2010] FamCAFC 237 at [80]).

RELEVANT EVIDENCE – GOVERNMENT TRAVEL ADVICE

18. In addition to the evidence of the parties, judicial notice of Government advices on risk levels and the information in smarttraveller advisory information or similar should be considered.
19. The assessed risk levels by Government in its advisory information are not determinative. Many countries may be assessed as the same ‘risk level’ but all for different reasons (*Feeney & Feeney* [64]). It may or may not be helpful to the court to rely upon an assessed level where the comparisons of risk to the child might be quite different between countries even assessed at the same level of risk by the Government.
20. When the Government travel advisory is read in its entirety, it may become apparent that the advice cannot be read as being confined by reference to the “Latest Updates”. The update may only refer to forthcoming events and the risks. Again, the weight to be given to any travel advisory will depend upon the circumstances as a whole.

RELEVANT EVIDENCE – FAMILY REPORTS

21. The overseas travel may have been a topic raised in a Child Impact Report or Family Assessment Report. If there has been an interview with the parents by a report writer and the parties are not called to give oral evidence it will put any evidence they record in their report in a position of advantage over the judge and significant weight may be placed by the judge on that report.

RELEVANT EVIDENCE – THE HAGUE CONVENTION

22. If a country is not a signatory to *The Hague Convention on the Civil Aspects of International Child Abduction* it may not have the legal mechanisms or institutions in place for the return of children taken to it from Australia and not returned. This should be taken into account but will not be determinative.

THE TEST

23. The test to be applied by the Court is whether the parent seeking the injunction can satisfy the court on the balance of probabilities that the other parent is likely to retain children in another Country. The components which lead to such conclusion that an unacceptable risk exists need not each be established on the balance of probabilities (*Feeney & Feeney* at [122])

BALANCING THE RISKS

24. Factual situations and outcomes in other cases will not be determinative.
25. Potential and future travel risks may arise. However, as stated by Justice Altobelli in *Chinasa & Ekwueme* at [18], all the Court can do is assess the known risk at the time of the hearing.
26. The court is not required to systematically consider and discuss each and every one of the factors identified in the authorities as if they are provisions contained in a statute (*Thomason & Malhotra* at [49 -50])

BENEFITS TO THE CHILD FROM OVERSEAS TRAVEL

27. It is in the interests of children to travel with their parents even after separation. The benefit to the children is to broaden their life experience and facilitate a greater understanding of other countries, especially of countries of cultural heritage.
28. It is also relevant that a child has the right to travel to have relations with members of their respective extended families under the *UN Convention on the Rights of the Child*.
29. It is likely that it would be found that a child would benefit from travel overseas generally, provided that type of travel is to locations that can suitably secure health, safety and general welfare of the child. Travel is likely to be recognised to positively impact of a child's sense of identity and provide opportunities to experience places and cultures other than that offered and lived within Australia including in sharing in the day to day lives of relatives who reside overseas. Any benefits including valuable firsthand experience of another culture should be given in evidence.
30. If there is a fixed purpose for travel it should be stated along with the finite time period of travel and the consequences of any delay being addressed, if possible.

UNACCEPTABLE RISKS

31. Conditions of travel may be offered or imposed by the Court, like adequate notice with the provision for detail of the travel and the posting of a bond.
32. Ideally, travel would be confined to school holiday periods given that schooling both in terms of its academic and social aspects would be of importance to any child, except in the case of emergency.

33. Determining the issue of risk involves applying a risk matrix from the accumulation of factors whereby it is necessary to assess the potential seriousness of harm in the context of the probability of its occurrence i.e. the magnitude of the risk, the nature of the harm to the child and the probability of the harm occurring (*Nikolakis & Nikolakis* at [95]-[96]).
34. If an unacceptable risk is able to be determined, the question becomes whether that risk can be mitigated.

ADDITIONAL CONSIDERATION TO ASCERTAIN RISK

35. There are many obvious instructions required about the international travel plans. Some other questions to assist in determining what is the magnitude of that risk to the child are as follows:
 - What has been the past conduct of the parent wishing to travel with the child as being an indicator of future conduct? In the past has a parent engaged in unauthorised travel or withholding previously?
 - Can the court be satisfied that a promise by a parent to return to Australia would be honoured.
 - What is the potential impact on the schooling and learning trajectories of the children or any health concerns?
 - What is the effect on the children of any deprivation of spending time with the other parent for the specified time period, if there is one?
 - Are there travel warnings issued by the Commonwealth Government?
 - Would the child be at unacceptable risk of physical or psychological harm as a result of potential instabilities in the other countries geopolitical environment?
 - What is the potential impact on the children if they were to travel overseas and circumstances overseas changed?
 - What is the risk of harm if the political situation deteriorated further? Is that country currently involved in armed conflict with another State?
 - Are there other options for the children to maintain contact with their family overseas, including video and phone communication? Could the relatives travel to Australia or meet up in another location?

- What are the legal remedies available in the other country to seek the return of the child?
 - Is the destination country a signatory to *The Hague Convention on the Civil Aspects of International Child Abduction* ?
 - Do the provisions of *The Hague Convention on the Civil Aspects of International Child Abduction* apply? Does it matter?
 - Is the reality that legal remedies available require the remaining parent to travel overseas themselves complex and costly for them either way?
 - What are the financial resources available to the parent remaining in Australia to be able to recover the child in the event of detention of the child overseas.
 - What secures the return of the parent to Australia with the child? Do they have demonstrated ties to Australia?
 - What are the financial resources available to the parent wishing to travel with the child? Do their financial circumstances increase the potential for the parent to leave the Commonwealth permanently?
 - Can a bond be lodged prior to commencing travel?
 - Does the parent wishing to travel with the child have real estate in Australia? If not, will this increase the potential for the parent to leave the Commonwealth permanently?
 - Does the child have a passport and where is it held currently? How has it previously been used.
36. Finally, a relationship between the parties of mistrust and enmity might be both mutual and justified, but may not justify precluding parents from taking children overseas (*Tahir & Shaikh* [90]). However, it might also provide a powerful motivation not to return to Australia and a reason to restrain a parent from taking a child overseas (*Chinasa & Ekwueme* [30]). Generally, though, regrettable communications about overseas travel plans or the inability of parents to agree about current parenting arrangements does not itself establish a risk of removal (*Feeney & Feeney* [79]).

BONA FIDES OF AN APPLICATION TO TRAVEL OVERSEAS

37. This is usually tested by the parent being cross examined. The purpose, reasons for travel and proposed duration will be very influential on the outcome of the application. The attitude of the traveling parent to the impact on the children and any risks abroad will be taken into consideration by the judge.

CONVENTION COUNTRIES

38. If a State is not a party to *The Hague Convention on the Civil Aspects of International Child Abduction*, this does not automatically preclude parents from traveling with children to those countries. It will be taken into account by the Court that the other parent is likely to experience significant legal challenges and related delay in proceedings for the return of the children to Australia if the proposed country is not a signatory.
39. Should a child be detained by a parent, overseas the benefits of that Convention in assisting the parent who has not then taken the child overseas, will not be available. This will entail extra expense and worry for that parent in having their time or living arrangements with the child under Orders restored. This will be considered by the judge.

SECURITY BOND

40. The court will look at the ties in Australia and reasons for the travelling parent to return to Australia. The court is essentially looking for motivation for the travelling parent to remain overseas with the children. Often a traveling parent will offer a payment of a security bond. If it is not proposed that may be a relevant consideration too depending on the financial circumstances of both parties (*Prashant & Ashtekar* [62 – 64]).
41. The Full Court in *Line & Line* (1996) 21 Fam LR 156 held that a bond should be large enough sum sufficient to entice the parent removing the child from Australia to return and adequate provision for the remaining parent to pay for legal fees in Australia bearing in mind if the country is a signatory to the Hague Convention and obtain the return of the child, if required.
42. The travelling parent's financial circumstances should be taken into account when determining the quantum of the bond. The posting of any bond may be considered a substantial and onerous burden for a party to supply (*Tahir & Shaikh* [30]). Whether it be \$5,000 or \$20,000 or more, ultimately, the amount should be incentive to return but

not so much that it becomes an obstacle in the way of international travel where there is not a significant risk of the child being retained overseas (*Thomason & Malhotra* [101]).

SECTION 65DAAA - RICE & ASPLUND PRINCIPLE

43. Finally, it is unknown yet if Final Orders Section 65DAAA of the Act, now codifying the principles adumbrated in the well-known case of *Rice and Asplund* (1979 FLC 90-725) will preclude a parent from bringing an application to travel with the child in the future should the travel circumstances change in the future.
44. A notation to an injunctive Order may facilitate a future application should the overseas travel be dismissed in the first instance and circumstances change in the future, including in an overseas country.

Alison M James
3 October 2024
Foley's List
0416 589 049

INTERNATIONAL HOLIDAY AUTHORITIES

AUTHORITY ON JURISDICTION OF COURT

Cales & Cales [2010] FamCAFC 237

Tahir & Shaikh [2023] FedCFamC2F 135

AUTHORITY ON INTERNATIONAL TRAVEL CONSIDERATIONS

Thomason & Malhotra [2010] FamCAFC 85

Kuebler & Keubler [1978] FamCA 26

AUTHORITY ON *The Hague Convention on the Civil Aspects of International Child Abduction*

Lorde & Chu [2015] FamCAFC 3

Gin & Hing [2010] FamCA 617

AUTHORITY ON BONDS

Thomason & Malhotra [2010] FamCAFC 85

Line & Line [1996] FamCA 145

AUTHORITY ON RISK ASSESSMENT

M & M (1988) 166 CLR 69

Nikolakis & Nikolakis [2010] FamCAFC 52 at [95]-[96]

Recent “NO TO INTERNATIONAL TRAVEL” CASES

Chinasa & Ekwueme [2023] FedCFamC1F 79

Feeney & Feeney [2022] FedCFamC1F 420 Injunction with Notation

Prashant & Ashtekar [2022] FedCFamC2F 1620 on interim basis

Recent “YES TO INTERNATIONAL TRAVEL” CASES

Petran & Petran [2024] FedCFamC2F 996

Tahir & Shaikh [2023] FedCFamC2F 135

PRECEDENT ORDERS

INJUNCTIONS RESTRAINING OVERSEAS TRAVEL

That each party, FATHER born 19XX and MOTHER born 19XX, and their servants and/or agents be and are hereby restrained by injunction, irrespective of authenticated consent as contemplated in Part VII of the *Family Law Act 1975* (Cth), from removing, attempting to remove or causing or permitting the removal of X, born 20XX (“the child”), from the Commonwealth of Australia (until the child is 18 years of age or such earlier time as the parties agree in writing).

NOTATION

The parties acknowledge that, consistent with Section 65DAAA and the principles adumbrated in *Rice and Asplund* (1979) FLC 90-725, there may, in the future, be changed circumstances of sufficient significance such that either party is justified in bringing further proceedings to seek a variation of these orders.

WATCH LIST ORDERS

That the child X born in 2015 (“X”) be removed from the Family Law Watchlist.

OR

IT IS REQUESTED that the Australian Federal Police give effect to this order by placing the name of the child on the Family Law Watchlist, in force at all points of arrival and departure in the Commonwealth of Australia, and maintain the child's name on the Watchlist until the child is 18 years of age or such earlier time as the parties agree in writing // further order // the Court orders its removal.

The Marshal and all officers of the Australian Federal Police and the police forces of the States and Territories are requested and authorised to give effect to these orders.

PERMISSION TO TRAVEL ORDERS

The Applicant mother is permitted to travel to Country B with the parties' children X born in 20XX, Y born in 20XX and Z born in 20XX (collectively referred to as the children) for a period of up to 28 days and on the following conditions:

- a. The mother provides a flight itinerary including copies of return airfare tickets to the father at least 14 days prior to her intended date of departure;
- b. The mother provides an address, contact phone number and details of accommodation throughout the period of travel to the father at least 14 days prior to her intended date of departure;
- c. The mother provides details of travel insurance for the entire period of travel to the father; and
- d. The mother provides confirmation that she will not travel to any area within Country B designated as advice "level 3" or higher on the SmartTraveller website maintained by the Australian government.

OR

That during any period of time that X is to live with or spend time with a party pursuant to the orders made 5 October 2022 that falls during any school holiday period that the parent with whom X is to then live with or spend time with during that school holiday period be at liberty to travel with X outside of Australia upon the following conditions:

- (a) that at least 45 days prior to the date of proposed departure notice in writing be provided to the non-travelling parent of:
 - (i) the proposed date of departure from Australia and of return to Australia;
 - (ii) the address of each place at which X will stay during the period of travel; and
 - (iii) an emergency contact number at which the travelling parent can be contacted;
- (b) that at least 40 days prior to the date of proposed departure the parties do all things and execute all documents necessary to open a bank account at such bank as nominated by the travelling party in the joint names of the parties of

which they are to be joint signatories in respect of any transaction upon the account;

- (c) that at least 30 days prior to the date of proposed departure travelling party do pay to the bank account referred to in Order 3(b) the sum of \$15,000 by way of bond (“the bond monies”) securing the return of X to Australia following the period of proposed travel and provide written confirmation to the non-travelling parent of the bond monies having been deposited;
- (d) that at least 30 days prior to the date of proposed departure further notice of the departure and return dates be provided in writing to the non-travelling parent in the form of a copy of the return flight tickets for X;
- (e) that during such period of travel the travelling parent facilitate at his/her expense communication between the non-travelling parent and X by electronic means at least twice per week at such times as may be agreed between the parties or in default of agreement on Tuesday and Friday of each week of travel at 6.30 pm Australian Eastern Daylight Time;
- (f) that upon X’s return to Australia from travel, subject to any other order that may have come to have been made by a court as to the payment of the bond monies in the event of a return or possible return to Australia by X on a date other than the proposed date of return from travel notified under this order, the parties do all things and execute all documents necessary to cause the bond monies to be repaid to the party who paid them into the bank account.

ORDERS FOR PASSPORTS FOR THE CHILDREN

Pursuant to section 11 of the *Australian Passports Act 2005* (Cth), the mother is authorised to apply for and receive Australian Passports for the children to enable them to travel outside of the Commonwealth of Australia.

That each of the parties within 21 days of being requested to do so by the other party do all acts and things and sign all documents necessary to make an application to the Australian Passport

Office (or such other department or instrumentality administering the *Australian Passports Act 2005* (Cth)) to enable X to be issued with or to renew an Australian passport in her name.

OR

For the purposes of the order above, the mother is permitted to provide a copy of these orders to the Department of Foreign Affairs and Trade.

That subject to these orders X's Australian passport be held by the mother.

That the mother do provide X's Australian passport to the father for the purposes of travel the father is to undertake pursuant to these orders and the father do return X's passport to the mother upon the conclusion of each period of travel he so undertakes.

That each of the parties execute all documents and do all such things as shall be necessary to give effect to these orders provided that should a party refuse or neglect or omit to execute any document after the same shall have been forwarded to him or her for a period of seven days, then and in such case, a Judicial Registrar or other judicial officer upon proof by affidavit of such refusal, neglect or omission is hereby appointed to execute and if the Judicial Registrar or other judicial officer is of the opinion that it shall be necessary to do so, to settle and to do all such other acts and things and to execute all such other documents that shall be necessary to give full force and effect to these orders and shall execute and do the same accordingly at the cost of the party refusing, neglecting or omitting to execute such document.

OR

In the event that the father refuses or fails to complete or sign any relevant document required to give effect to order 2 within 7 days of a request to do so, the mother be appointed pursuant to s 106A of the *Family Law Act 1975* (Cth) to sign the documents on the father's behalf as may be necessary to facilitate the children obtaining Australian passports at the sole cost of the father.

That each of the parties be restrained and an injunction is granted restraining each of them from taking any step to apply for or seek or renew any passport other than an Australian passport for X.