

# **The Hague Child Abduction Convention's Grave Risk of Harm Exception: Traversing the Tightrope and Maintaining Balance Between Comity and the Best Interests of the Child**

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## **Abstract**

This article provides a critical analysis of divergent judicial opinions about how Australian courts should interpret the 'grave risk of harm' exception in the *Hague Convention on Civil Aspects of International Child Abduction*. Conflicting views about the extent to which the exception to a child's return should permit consideration of a child's best interests may be a manifestation of the balancing act that must be performed during return proceedings. The Convention seeks to protect children from the harmful effects of international parental child abduction through prompt return, whilst also accommodating situations where non-return is justified on welfare considerations. Perhaps the Family Court's restrictive interpretation of the exception is a display of the tightrope becoming unsteady; by swaying towards comity, the individual child's welfare is sacrificed. The High Court has arguably managed to master the art of maintaining balance whilst traversing the tightrope, by expeditiously examining the child's welfare and the potential consequences awaiting them if returned to their habitual residence.

## **I INTRODUCTION**

This article critiques the Australian judiciary's interpretation of the 'grave risk of harm' exception to a child's return under the *Hague Convention on Civil Aspects of International Child Abduction* ('the Convention').<sup>1</sup> When a child is abducted from another *Convention* country to Australia, a left-behind parent may utilise the *Convention* to seek their child's return through the initiation of return proceedings in an Australian court. During return proceedings the abducting parent may raise several limited exceptions in an attempt to prevent the child's return. One such exception

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<sup>1</sup> *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, 1343 UNTS 89 (entered into force 1 December 1983); The Convention is given effect to by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

provides that the court may refuse to order a child's return if there is a grave risk that returning them to the place that was their habitual residence immediately prior to their abduction would expose them to physical or psychological harm, or otherwise place them in an intolerable situation.<sup>2</sup> Australian case law reveals divergent judicial opinions about the extent to which the grave risk of harm exception should permit consideration of the individual child's welfare. This article critiques the breadth of this exception's application and suggests that a true state of balance, where the best interests of all children are attained, may realistically be difficult to achieve. However, the High Court's broad approach to interpreting the exception is arguably justified on the basis that it goes some way to remedy the social implications arising from the feminisation of international parental child abduction.

The Family Court of Australia, along with dissenting High Court judges, have demonstrated a tendency to interpret the exception restrictively.<sup>3</sup> In *P v Commonwealth Central Authority*,<sup>4</sup> the Full Court of the Family Court said that there is a long line of authority both in Australia and internationally that the grave risk of harm exception is to be construed

<sup>2</sup> Convention art 13(b). See also *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(b). See generally Carol S Bruch, 'The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases' (2004) 38(3) *Family Law Quarterly* 529; Merle H Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69(2) *Fordham Law Review* 593; Miranda Kaye, 'Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four' (1999) 13(2) *International Journal of Law, Policy and the Family* 191; Regan Fordice Grilli, 'Domestic Violence: Is it Being Sanctioned by the Hague Convention?' (1997) 4(1) *Southwestern Journal of Law and Trade in the Americas* 71; Roxanne Hoegger, 'What if She Leaves – Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy' (2003) 18(1) *Berkeley Women's Law Journal* 181; Taryn Lindhorst and Jeffery L Edleson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Northeastern University Press, 2012); Suzanne Christie 'The 'Grave Risk' or 'Intolerable Situation' Defence in Cases of Domestic Violence Under the Hague Child Abduction Convention' (2013) 3(4) *Family Law Review* 191; Galit Moskowitz 'The Hague Convention on International Child Abduction and the Grave Risk of Harm Exception' (2003) 41(4) *Family Court Review* 580.

<sup>3</sup> See, eg, *Bassi, DK and Director General of Community Services* [1994] FLC 92-465; *Murray v Director of Family Services ACT* [1993] FLC 92-416; *Gsponer v Johnstone* (1988) 12 Fam LR 755; *Laing v Central Authority* [1996] FLC 92-709; *Director-General Department of Families, Youth and Community Care v Hobbs* [1999] FamCA 2059 (24 September 1999); *P v Commonwealth Central Authority* [2000] FamCA 461 (19 May 2000); *Director-General, NSW Department of Community Services v JLM* (2001) 28 Fam LR 243; *State Central Authority, Secretary to the Department of Human Services v Mander* [2003] FamCA 1128 (17 September 2003); *State Central Authority v Papastavrou* [2008] FamCA 1120 (22 December 2008); *State Central Authority v Sigouras* [2007] FamCA 250 (23 March 2007); *HZ v State Central Authority* [2006] FamCA 466 (6 July 2006).

<sup>4</sup> [2000] FamCA 461 (19 May 2000).

narrowly. Taking a narrow approach to the exception increases the ambit of the *Convention's* reach by expanding the types of situations in which children will be returned under the *Convention*. It is also an outward manifestation of the value placed upon promoting comity between *Convention* countries, and a desire to protect the best interests of children generally through the action of prompt return.<sup>5</sup> Accordingly, under this approach, consideration of the best interests of the individual child is limited during return proceedings.<sup>6</sup> The Family Court's approach has been supported by dissenting judges in the High Court of Australia, most notably Kirby J, on the basis that '[a]n overbroad interpretation of the exceptions would tend to undermine the achievement of the *Convention's* core purposes and defeat its underlying policy.'<sup>7</sup>

In the small number of *Convention* cases that have been heard by the High Court of Australia, the majority judges have consistently criticised the Family Court's approach when interpreting the exceptions as being overly narrow or restrictive.<sup>8</sup> In *DP v Commonwealth Central Authority* ('*DP*'),<sup>9</sup> the majority of the High Court said that establishing the grave risk of harm

<sup>5</sup> Elisa Pérez-Vera, *Explanatory Report of the Convention on the Civil Aspects of International Child Abduction*, Actes et Documents of the XIVth Session, Vol III, 1980, 426, 430–2.

<sup>6</sup> Michael Freeman, 'The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?' (1997) 11(3) *International Journal of Law Policy and the Family* 360.

<sup>7</sup> Michael Kirby, 'Children Caught in Conflict – The Child Abduction Convention and Australia' (Speech delivered at the Inaugural Peter Nygh Memorial Lecture, Halifax, Nova Scotia, Canada, 23 August 2009) <[http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2424B.Peter\\_Nygh\\_Lecture-Halifax\\_2009.pdf](http://www.michaelkirby.com.au/images/stories/speeches/2000s/2009+/2424B.Peter_Nygh_Lecture-Halifax_2009.pdf)>. See, eg, the minority opinions in *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640; *DP v Commonwealth Central Authority* (2001) 206 CLR 401; *MW v Director-General of the Department of Community Services* [2008] HCA 12 (28 March 2008); *LK v Director-General, Department of Community Services* (2009) 237 CLR 582.

<sup>8</sup> *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640, which was an appeal from *De Lewinski v Director-General, New South Wales Department of Community Services* [1996] FLC 92-674 (Full Court of the Family Court of Australia); *DP v Commonwealth Central Authority* (2001) 206 CLR 401, which was an appeal from *Director-General, NSW Department of Community Services v JLM* (2001) 28 Fam LR 243 (Full Court of the Family Court of Australia); *MW v Director-General of the Department of Community Services* [2008] HCA 12 (28 March 2008), which was an appeal from *Wencelslas v Director-General, Department of Community Services* (2007) 37 Fam LR 271 (Full Court of the Family Court of Australia); *LK v Director-General, Department of Community Services* (2009) 237 CLR 582, which was an appeal from *Kilah v Director-General, Department of Community Services* (2008) 39 Fam LR 431 (Full Court of the Family Court of Australia); *RCB as litigation guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest* (2012) 247 CLR 304; *Garning v Director-General, Department of Communities (Child Safety Services)* [2012] FamCAFC 35 (9 March 2012).

<sup>9</sup> (2001) 206 CLR 401. This decision involved hearing two appeals together, with the appellants being *DP* and *JLM* respectively.

exception does not warrant the conclusion that the wording of the exception should be construed narrowly rather than broadly.<sup>10</sup> If an abducting parent raises the grave risk of harm exception but is unsuccessful, there is no guarantee that post-return judicial proceedings will take place to determine the parenting dispute or examine any risk of harm concerns. Consequently, the High Court has emphasised that the fact that there 'may' be judicial proceedings post-return in the child's habitual residence should not limit the applicability of the exception to the full extent that its language permits.<sup>11</sup> This has been demonstrated by the High Court's preparedness to examine the potential outcomes awaiting a child post-return, when determining the exception's applicability during *Convention* return proceedings.

First, this article explains the balancing act that must be performed by the Australian judiciary when the grave risk of harm exception is raised during *Convention* return proceedings. Second, this article critiques several Family Court and all High Court judgments that concern the interpretation of the grave risk of harm exception. Finally, conclusions will be drawn about whether or not an appropriate balance between upholding comity among *Convention* countries, and protecting the individual child's best interests and welfare, is achieved.

## II BALANCING COMITY AND THE BEST INTERESTS OF THE INDIVIDUAL CHILD DURING RETURN PROCEEDINGS

The *Convention*'s core objective is to deter international parental child abduction and protect children from its harmful effects,<sup>12</sup> after a parent has used 'force to establish artificial jurisdictional links on an international level, with a view to obtaining custody.'<sup>13</sup> Fostering comity<sup>14</sup> between *Convention* countries by promptly returning children to their habitual residence is said to enliven the most appropriate forum by restoring the geographical status quo.<sup>15</sup> The child's habitual residence is considered to be the most appropriate forum in which to determine the substantive

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<sup>10</sup> Ibid 418.

<sup>11</sup> Ibid 423.

<sup>12</sup> *Convention* preamble.

<sup>13</sup> Pérez-Vera, above n 5, 426, 428.

<sup>14</sup> See generally Joel R Paul, 'Comity in International Law' (1991) 32(1) *Harvard International Law Journal* 1; Lord Collins of Mapesbury et al (eds), *Dicey, Morris and Collins: The Conflict of Laws* (Sweet & Maxwell, 14th ed, 2010); Ronald Harry Graveson, *Conflict of Laws* (Sweet & Maxwell, 7<sup>th</sup> ed, 1974).

<sup>15</sup> Danielle Bozin-Odhiambo, 'Reexamining Habitual Residence as the Sole Connecting Factor in Hague Convention Child Abduction Cases' (2012) 3 *Family Law Review* 4.

parenting dispute if the parties choose to seek to resolve it post-return.<sup>16</sup> Comity has been aptly described as

a rule of choice of law, courtesy, politeness, convenience or good will between sovereigns, a moral necessity, expediency, reciprocity, or considerations of high international politics concerned with maintaining amicable and workable relationships between nations.<sup>17</sup>

Restoring the status quo through prompt return is perceived as the ideal approach to thwart an abductor's attempt to gain an unfair advantage, by forum shopping to obtain a more favourable custody arrangement in a different jurisdiction.<sup>18</sup>

Restoration of the geographical status quo seeks to ensure that any decision regarding a child's best interests is informed by moral and cultural assumptions appropriate to the child.<sup>19</sup> Respect for a *Convention* country's domestic laws requires that the judicial system of the *Convention* country to which a child is taken does not engage in determining parental responsibilities and rights. This is because in doing so a court would risk

expressing particular cultural, social etc. attitudes ... thus basically imposing their own subjective value judgements upon the national community from which the child has recently been snatched.<sup>20</sup>

The Family Court, and dissenting judges in the High Court, have chosen to interpret the grave risk of harm exception narrowly as a way of promoting this rationale.<sup>21</sup>

The promptness of the return process is, however, explicitly qualified in the sense that the abducting parent can raise several limited exceptions to a child's return.<sup>22</sup> These exceptions focus on ensuring that the individual

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<sup>16</sup> Pérez-Vera, above n 5, 426, 431.

<sup>17</sup> Paul, above n 14, 3.

<sup>18</sup> Pérez-Vera, above n 5, 426; See also Guido Rennert, 'Is Elimination of Forum Shopping by Means of International Uniform Law an 'Impossible Mission?'' (2005) 2 *Macquarie Journal of Business Law* 119.

<sup>19</sup> Pérez-Vera, above n 5, 426, 429.

<sup>20</sup> Ibid 431.

<sup>21</sup> Ibid 430.

<sup>22</sup> The exceptions are as follows:

- i. the grave risk of harm exception, see *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(b);
- ii. the child objects to being returned to their habitual residence (if it is appropriate to take into account the child's views given the child's age and degree of maturity) exception, see *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(c)(i)–(iii);
- iii. the left-behind parent was not exercising rights of custody or consented to, or acquiesced in, the removal or retention exception, see *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(a)(i)–(ii);

child's best interests inform the decision about whether or not to return the child in appropriate circumstances. The High Court of Australia has challenged the assumption that the return of a child under the *Convention* is return for the purpose of determining the parenting dispute (otherwise known as custody proceedings).<sup>23</sup> The orthodox view of the High Court has been to recognise the reality of many returns by explaining that:

the content of the exceptions must be understood against the other provisions of the Regulations which ... make plain that there may be an order for return with no expectation that there will be any judicial process in the country to which the child will be returned in which any question about what is in the best interest of the child will be raised or addressed. ... the construction of the Regulations cannot proceed from a premise that they are designed to achieve return of children to the place of their habitual residence for the purpose of the courts of that jurisdiction conducting some hearing into what will be in that child's best interests.<sup>24</sup>

To what extent should an individual child's best interests be examined during *Convention* return proceedings? Return proceedings have traditionally been viewed as summary in nature which in itself creates a practical dilemma. Findings of fact are often made 'on the papers' without the benefit of oral evidence and the cross-examination of witnesses on disputed facts. It can be problematic when an exception to the child's return is raised by an abducting parent due to the limited ability to explore conflicting evidence.<sup>25</sup> In *MW v Director-General, Department of Community Services*,<sup>26</sup> the High Court recognised that, although these applications are typically dealt with via affidavit evidence without the benefit of cross-examination,<sup>27</sup> the *Convention's* prompt return policy does not preclude issues of disputed fact (including risk of harm concerns) from being examined through the expeditious giving of oral evidence, which is subject to cross-examination.<sup>28</sup> Despite this, the extent to which a child's

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- iv. the child's return would offend basic principles of human rights and fundamental freedoms exception, see *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(d); and
  - v. if more than a year has passed and the child has become settled in their new environment exception, see *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(2)(c). Note that even if an exception to return is established by the abducting parent, judicial discretion to dismiss the return order application must still be exercised.

<sup>23</sup> This is demonstrated by the fact that the High Court of Australia has overturned the Full Court of the Family Court of Australia's narrow reading of the *Convention's* exceptions to return in all *Convention* cases that have come before it.

<sup>24</sup> *DP v Commonwealth Central Authority* (2001) 206 CLR 401, 414 (Gaudron, Gummow and Hayne JJ).

<sup>25</sup> The problems associated with this were articulated in *Laing v Central Authority* (1996) 21 Fam LR 24, 33.

<sup>26</sup> [2008] HCA 12 (28 March 2008).

<sup>27</sup> *Ibid* [38].

<sup>28</sup> *Ibid* [46]–[56].

best interests should be considered when interpreting the grave risk of harm exception during return proceedings remains contentious.

### III INTERPRETING THE GRAVE RISK OF HARM EXCEPTION

For some time academics and commentators have explored the effects of the feminisation of international parental child abduction on the *Convention's* operation.<sup>29</sup> Since the *Convention's* inception there has been a trend away from abducting non-custodial fathers to abducting primary-caregiving mothers.<sup>30</sup> Abducting mothers are often principally motivated by: a need to flee domestic violence and/or child abuse; a desire to return to their homeland; a longing to return to family and social support networks; and a desire to improve their economic situation.<sup>31</sup> This change in the gender dynamics underpinning abductions has had an impact on the operation and effectiveness of the *Convention's* exceptions to return. Given that the grave risk of harm exception is most often raised in circumstances of alleged domestic and family violence, how we interpret this exception moving forward is particularly important.

The grave risk of harm exception requires the existence of a grave risk that the child's return to their habitual residence would expose them to physical or psychological harm, or otherwise place them in an intolerable situation.<sup>32</sup> The assessment relates specifically to the return of the child to the *Convention* country that was their habitual residence immediately prior to the abduction rather than the left-behind parent. The *Convention* does not define the gravity of risk required to successfully establish the

<sup>29</sup> Lindhorst and Edleson, above n 2; Jeffrey Edleson and Taryn Lindhorst, 'Research for the Real World: Mothers and children seeking safety in the U.S.: A Study of International Child Abduction Cases Involving Domestic Violence' (Speech delivered at the NIJ Research for the Real World Seminar, The National Institute of Justice, 12 October 2011) <<http://www.nij.gov/multimedia/presenter/presenter-edleson/pages/presenter-edleson-transcript.aspx>>; Linda Silberman, 'The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues' (2000) 33 *New York University Journal of International Law and Politics* 221; Grilli, above n 2; Kaye, above n 2; Weiner, above n 2.

<sup>30</sup> Nigel Lowe, *A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part 1 – Overall Report*, Preliminary Document No 3, for the attention 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, October 2006, 22. See also Nigel Lowe, *A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part 1, Preliminary Document No 3, of September 2008 (2007 update).

<sup>31</sup> See Danielle Bozin, 'Equal Shared Parental Responsibility and Shared Care Post-Return to Australia under the Hague Child Abduction Convention' (2014) 37(2) *University of New South Wales Law Journal* 603, 617.

<sup>32</sup> *Convention* art 13(b). See also *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(b).

exception. Courts have interpreted the degree of physical or psychological harm required as being restricted by the words 'or otherwise place the child in an intolerable situation.'<sup>33</sup> This means that the exception's interpretation is restricted in the sense that the courts have required that the situation of grave risk must be intolerable. In *Friedrich v Friedrich*,<sup>34</sup> the United States Court of Appeals provided two examples of circumstances which will qualify as grave risks of harm frequently cited by Australian courts.<sup>35</sup> The first is where the return will place the child in imminent danger, such as returning the child to famine, disease or a war zone. The second is where the child will be subjected to serious neglect, abuse or extraordinary emotional dependence, and authorities in the child's habitual residence are either incapable or unwilling to adequately protect the child.<sup>36</sup>

The Australian judiciary's consistent position prior to the High Court's decision in *DP* in 2001 was that a grave risk could be appropriately dealt with in a child's habitual residence post-return, once the *Convention* process is complete.<sup>37</sup> This approach is most often applied on the basis that a child can be afforded protection by the relevant authorities post-return. Alternatively, an undertaking can be given by the left-behind parent promising, for example, not to perpetrate acts of domestic violence, to provide financial support, or to allow the abducting parent and child exclusive use of a residence.<sup>38</sup> This restrictive approach protects the *Convention's* objective of prompt return, and promotes comity between *Convention* countries. It means that during return proceedings the Court can avoid making determinations on the individual child's best interests when interpreting the gravity of harm required.<sup>39</sup>

In *Bassi, DK and Director General of Community Services ('Bassi')*,<sup>40</sup> the Family Court interpreted the exception narrowly to find that the degree of risk of physical or psychological harm deriving from family violence was not sufficiently grave to warrant non-return.<sup>41</sup> This case concerned the

<sup>33</sup> See, eg, *Harris v Harris* (2010) 245 FLR 172; *Director-General, Department of Families, Youth and Community Care v Bennett* (2000) 26 Fam LR 71; *Director-General, Department of Families, Youth and Community Care v Hobbs* [2000] FLC 93-007.

<sup>34</sup> 78 F 3d 1060 (6th Cir 1996).

<sup>35</sup> See *Director-General, Department of Families, Youth and Community Care v Bennett* (2000) 26 Fam LR 71; *Director-General, Department of Families, Youth and Community Care v Hobbs* [2000] FLC 93-007.

<sup>36</sup> 78 F 3d 1060, 1069 (6th Cir 1996).

<sup>37</sup> (2001) 206 CLR 401.

<sup>38</sup> Undertakings will be discussed within this article in the context of an examination of specific cases. See Hoegger, above n 2.

<sup>39</sup> The case law will be discussed within this article. See Jeanine Lewis, 'Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity' (2000) 13 *Transnational Lawyer* 391.

<sup>40</sup> [1994] FLC 92-465.

<sup>41</sup> *Ibid* [35].

abduction of two girls, aged 13 and 6, from the United Kingdom to Australia by their mother. There was a history of family violence and the father had been convicted of assault on the mother only one and a half months before the abduction. The severity of the violence was such that there was

sufficient material for the [C]ourt to reach the view that the husband engaged in violent, drunken, obsessional behaviour in the presence of the children and that he made threats to the life of their mother, the children and himself in their presence.<sup>42</sup>

The wife alleged that on two occasions the husband had threatened her with a kitchen knife, and one of the children had intervened in an attempt to protect her. This resulted in the child's hand being cut by the knife.<sup>43</sup> This incident was indicative of direct harm to the children. The wife regarded

the husband's threats to kill her as being not just a personal vendetta against her but also his cultural reaction to a situation where he would consider it necessary to kill her to protect his own dignity and family name.<sup>44</sup>

The Court accepted affidavit evidence from witnesses in support of the mother's claims:

[T]hat the husband drinks alcohol to excess, that he is of violent disposition and has frequently been violent, that he has actually physically injured the children in the course of physical attacks on the wife, that he has threatened to kill the children and that by reason of his cultural and social background his threats should be taken seriously.<sup>45</sup>

However, the Court noted that the decision of the Full Court of the Family Court in *Director-General of Family and Community Services v Davis*<sup>46</sup> is authority for the proposition that the degree of harm must be substantial and to a level comparable to an intolerable situation.<sup>47</sup> This requisite degree of risk had not been established.

In assessing the gravity of the risk at hand the Court considered that, despite the wife's allegations, she 'continued to allow the children to visit the husband and his parents on weekends prior to her removal of the children.'<sup>48</sup> Furthermore, one of the children had stated to the Family Report writer that she 'did not believe her father would hurt her or N [her younger sibling] however, she believe[d] he would hurt her mother and this

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<sup>42</sup> Ibid [60] (Johnston J).

<sup>43</sup> Ibid [31].

<sup>44</sup> Ibid [7] (Johnston J).

<sup>45</sup> Ibid [33] (Johnston J).

<sup>46</sup> (1990) 14 Fam LR 381.

<sup>47</sup> [1994] FLC 92-465 [34].

<sup>48</sup> Ibid (Johnston J).

cause[d] her anxiety.<sup>49</sup> Importantly the Court also made reference to *Murray v Director of Family Services ACT*,<sup>50</sup> in which the Full Court of the Family Court concluded that 'it would be presumptuous and offensive in the extreme'<sup>51</sup> to assume that a country such as New Zealand [the child's habitual residence in that case] was unable to protect a child from a grave risk of harm upon return. In that case Nicholson CJ and Fogarty J expressed the view that welfare considerations are not relevant to return proceedings because the Court hearing the application is solely concerned with determining forum.<sup>52</sup>

Ultimately, in *Bassi*, the Family Court exercised its discretion not to return the eldest child. However, the Court did this on the basis of a different exception: that the child objected to being returned and her maturity was such that her wishes should be considered.<sup>53</sup> Discretion not to return was also exercised in relation to the youngest child. However, again not on the basis of there being a grave risk of harm, but rather that she would be placed in an intolerable situation if returned to England without her sibling.

Similarly, in *Gsponer v Johnstone*,<sup>54</sup> the Family Court interpreted the grave risk of harm exception restrictively in the context of family violence. This restrictive interpretation was that the child's welfare could be considered post-return in the child's habitual residence once the *Convention* process was concluded. The mother had abducted her child from Switzerland to Australia. She submitted evidence that during the marriage she had been subjected to what was described as significant episodes of violence at the hands of her husband.<sup>55</sup> She also claimed that the child had been the direct target of assault and mistreatment on several occasions.<sup>56</sup> She argued that these circumstances constituted a grave risk of harm to the child. The Full Court of the Family Court stated that, once the child had been returned:

[N]o doubt the appropriate court in that country [Switzerland] will make whatever orders are then thought to be suitable for the future custody and general welfare of that child, including any interim orders.<sup>57</sup>

The Family Court adopted the view that:

[C]ourts should not assume that once a child is returned, the courts in that

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<sup>49</sup> Ibid.

<sup>50</sup> [1993] FLC 92-416.

<sup>51</sup> Ibid [176] (Nicholson CJ and Fogarty J, with Finn J substantially agreeing).

<sup>52</sup> Ibid [161].

<sup>53</sup> See *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16(3)(c).

<sup>54</sup> (1988) 12 Fam LR 755. See also *Laing v Central Authority* [1996] FLC 92-709; *Director-General Department of Families, Youth and Community Care v Hobbs* [1999] FamCA 2059 (24 September 1999).

<sup>55</sup> (1988) 12 Fam LR 755, 767.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid 768 (Fogarty, Frederico and Joske JJ).

country are not appropriately equipped to make suitable arrangements for the child's welfare.<sup>58</sup>

These cases reveal an inherent tension between the promotion of comity between *Convention* countries, and assessing a child's best interests during return proceedings. Here the Family Court is resolving this incompatibility by facilitating comity and the best interests of children generally. This is being done on the basis that the individual child's best interests can be reserved for consideration in the child's habitual residence post-return.

The judiciousness of this approach is best explained by Kirby J, one of the dissenting judges in *DP*.<sup>59</sup> His Honour agreed with the Family Court's narrow interpretation of the exception whilst warning of the dangers of interpreting the exceptions to a child's return too broadly. His Honour explained why comity should be promoted as the principal objective to safeguard the best interests of children generally by stating:

Unless Australian Courts, including this Court, uphold the spirit and the letter of the Convention as it is rendered part of Australian law by the Regulations, a large international enterprise of great importance for the welfare of children generally will be frustrated in the case of this country. ... To the extent that Australian Courts, including this Court, do not fulfil the expectations expressed in the rigorous language of the Convention and the Regulations, but effectively reserve custody decisions to themselves, we should not be surprised if other countries, noting what we do, decline to extend to our Courts the kind of reciprocity and mutual respect which the Convention scheme puts in place. And that, most definitely, would not, in aggregate, be in the best interests of children generally and of Australian children in particular.<sup>60</sup>

However, the majority of the High Court in *DP* said that greater weight should be placed upon whether a grave risk exists in fact.<sup>61</sup> In this case, two actions (the appellants being *DP* and *JLM*) were heard concurrently because they both concerned the interpretation of the grave risk of harm exception. The High Court said that courts should assess the consequences of return when the grave risk of harm exception is raised, and that this requires 'the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the child.'<sup>62</sup> In *DP's* case,<sup>63</sup> the abducting mother claimed that the child would be at grave risk if returned

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<sup>58</sup> Ibid.

<sup>59</sup> (2001) 206 CLR 401.

<sup>60</sup> Ibid 449.

<sup>61</sup> (2001) 206 CLR 401.

<sup>62</sup> Ibid 417.

<sup>63</sup> *P v Commonwealth Central Authority* [2000] FamCA 461 (19 May 2000). The initial 'P' was the pseudonym given to the applicant in this case as reported by the Full Court of the Family Court. This case reached the High Court under the name *DP v Commonwealth Central Authority* (2001) 206 CLR 401.

to Greece, because Greece lacked appropriate medical facilities to treat her son's autism. In *JLM's* case,<sup>64</sup> the abducting mother claimed that the child would be at grave risk if returned to Mexico because she was suffering from a major depressive disorder. The child's return could put her at serious risk of committing suicide.

In *DP*, the High Court majority overturned the Full Court of the Family Court's preference for a restrictive interpretation of the grave risk of harm exception.<sup>65</sup> In each case the Family Court had decided that the fact that judicial proceedings 'may' take place post-return, along with the father's willingness to provide undertakings, addressed the contention of grave risk.<sup>66</sup> On appeal the High Court explicitly said that the fact that there may be judicial proceedings in a child's habitual residence does not in itself address the assertion of a grave risk of harm.<sup>67</sup> Gaudron, Gummow and Hayne JJ stated:

What must be established is clearly identified: that there is a grave risk that the return of the child would expose the child to certain types of harm or otherwise place the child in 'an intolerable situation'. That requires some prediction, based on the evidence, of what may happen if the child is returned. In a case where the person opposing return raises the exception, a court cannot avoid making that prediction by repeating that it is not for the courts of the country to which or in which a child has been removed or retained to inquire into the best interests of the child. The exception requires courts to make the kind of inquiry and prediction that will inevitably involve some consideration of the interests of the [individual] child.<sup>68</sup>

In *DP's* case, the High Court said that the issues that needed to be explored during return proceedings included: whether or not the child was at grave risk due to unavailability of appropriate and accessible facilities for the treatment of his autism; and what facilities were available in Greece, in particular the region where the child would be returned.<sup>69</sup> Gleeson CJ asked:

[A]s a practical matter, what would be the circumstances in which the child and the mother would live upon return to Greece? How accessible would any facilities for treatment be?<sup>70</sup>

The High Court emphasised that these questions should not be reserved for

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<sup>64</sup> *Director-General, NSW Department of Community Services v JLM* (2001) 28 Fam LR 243.

<sup>65</sup> *Ibid* 418 (Gaudron, Gummow and Hayne JJ).

<sup>66</sup> *Director-General, NSW Department of Community Services v JLM* (2001) 28 Fam LR 243; *P v Commonwealth Central Authority* [2000] FamCA 461 (19 May 2000).

<sup>67</sup> *DP v Commonwealth Central Authority* (2001) 206 CLR 401, 423.

<sup>68</sup> *Ibid* 417.

<sup>69</sup> *Ibid* 408 (Gleeson CJ).

<sup>70</sup> *Ibid*.

consideration post-return once the *Convention* process is complete, but rather answered during *Convention* return proceedings. In *JLM*'s case, the High Court said that it was not open to the Full Court of the Family Court to find that there was no evidence before the primary judge to support his Honour's finding that a grave risk existed.<sup>71</sup> The primary judge reached the conclusion that a grave risk existed in fact based on the evidence of a psychiatrist treating the mother, who had said that the mother had no will to live beyond the time when she had to hand the child to the father.<sup>72</sup> In addition, the primary judge had relied on evidence given by another mental health professional, who was a friend of the mother, that there was a real risk that the mother would commit suicide if the child was returned to Mexico.<sup>73</sup> There had been no challenge to this evidence. Neither had any additional evidence been presented before the Full Court of the Family Court. Consequently, the High Court said that the fact that the Full Court of the Family Court had not reviewed the evidence, and accepted or rejected it, meant that it was not open to conclude that the primary judge had erred in his findings.<sup>74</sup> The High Court also expressed that the Full Court of the Family Court's view that the mother was the source of the risk of harm did not reflect an understanding of her major depressive illness.<sup>75</sup>

The High Court also considered whether undertakings given by the fathers in *DP* and *JLM* were adequate to address the claim that there was a grave risk of harm to the child if returned.<sup>76</sup> In *DP*'s case the father undertook that he would not remove the child from the mother's care until a court in Greece heard the custody matter.<sup>77</sup> He also agreed that he would not enforce a pre-existing custody order that he had obtained from a Greek Court.<sup>78</sup> Importantly the High Court questioned the adequacy and enforceability of undertakings given by left-behind parents explaining that:

For our part we gravely doubt the efficacy of an undertaking in this form. If the undertakings to be given by the father about his future conduct in Greece were to be enforceable, it would seem to have been necessary to suspend the order for return until production of evidence to the Family Court of the giving of undertakings by the father which would be enforceable in Greece at the suit of the mother.<sup>79</sup>

In *JLM*'s case the father undertook to cooperate with the mother to ensure

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<sup>71</sup> Ibid 424–6.

<sup>72</sup> Ibid 426.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid 427.

<sup>76</sup> Ibid 420–1.

<sup>77</sup> Ibid 420.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 421 (Gaudron, Gummow and Hayne JJ).

that custody proceedings took place in Mexico post-return.<sup>80</sup> The High Court noted that the mother had submitted uncontested evidence that bribery may be a necessary prerequisite for success in such proceedings. Consequently, the High Court said that accepting such an undertaking as a condition for the child's return was wrong.<sup>81</sup> In both *DP's* case and *JLM's* case the majority of the High Court overturned the Full Court of the Family Court's decision to order the child's return based on a narrow interpretation of the grave risk of harm exception.<sup>82</sup>

Despite the High Court's decisions concerning DP and JLM in *DP*, the extent to which an individual child's best interests should be examined during return proceedings still remains contentious. This may be because a degree of incompatibility exists between the promotion of comity between *Convention* countries, and assessing the individual child's best interests during return proceedings. The divergent judicial opinions of the Family Court of Australia and the High Court of Australia, about the extent to which the grave risk of harm exception should permit consideration of a child's best interests, may be a manifestation of the intricacies of the balancing act that must be performed by courts during *Convention* return proceedings. However, arguably, the High Court's broad approach to interpreting the exception provides an appropriate response that goes some way to remedy the problematic social dynamics arising from the changing face of international parental child abduction

It is not surprising that the broad approach to interpreting the grave risk of harm exception advocated by the High Court in *DP* has not been applied consistently.<sup>83</sup> Post *DP*, the Family Court has applied both a narrow and broad approach to interpreting the exception. For example, in *State Central Authority, Secretary to the Department of Human Services v Mander*,<sup>84</sup> the parents' relationship was characterised by a history of violence perpetrated in their children's presence. The mother abducted the children from the United Kingdom to Australia. The Family Court at first instance held that the grave risk of harm exception was satisfied.<sup>85</sup> The Court applied a broad interpretation of the exception and exercised judicial discretion to refuse to order the children's return. This was despite Kay J noting that 'the English legal system provides ample legal protection, and the English police and social services provide excellent care for battered women.'<sup>86</sup> The Family Court applied *DP* whilst acknowledging its potential to produce outcomes that conflict with the *Convention's* principle objectives. Kay J stated:

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<sup>80</sup> Ibid 425.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 417–18, 426–7, 453, 456.

<sup>83</sup> Ibid.

<sup>84</sup> [2003] FamCA 1128 (17 September 2003).

<sup>85</sup> The left-behind applicant father did not appeal this decision to the Full Court of the Family Court.

<sup>86</sup> [2003] FamCA 1128 [114] (17 September 2003).

Although I found it a difficult case to come to grips with in light of the very strong underlying message within the Convention, ultimately I am satisfied of the existence of a grave risk of harm in this case. ... There have been years of sporadic violence in the presence of the children. It has necessitated constant court proceedings, and regular invocation of criminal sanctions. The problem persisted until the mother left England. I am confident a return to England would most likely lead to a continuation of the problems that have dogged these children for all of their lives in England. It is beyond argument the exposure of children to violence between their parents cannot be seen to be in the children's interests. I feel ... discomfort ... in light of the strong underlying currents of the Convention and the need to overcome the scourge of wrongful removal. But the High Court has reminded us on several occasions that the Convention is to be read as a whole. It is a Convention with exceptions.<sup>87</sup>

Another post-*DP* example is *State Central Authority v Papastavrou*.<sup>88</sup> In this case the Full Court of the Family Court was satisfied that the primary-carer mother had suffered very serious physical abuse at the hands of the father over a prolonged period of time.<sup>89</sup> The Court also accepted that this past behaviour constituted a serious and weighty risk for the children in the future.<sup>90</sup> Despite this the Court construed the exception narrowly, and held that the mother had not established the grave risk of harm exception.<sup>91</sup> The Court explained that its decision was based on the conclusion that where and with whom the children should live, and whether or not the mother had good cause to leave the relationship, were all matters for the courts in the children's habitual residence.<sup>92</sup> The mother raised as a concern the ability of Greek authorities to respond appropriately to protect her and the children if there was another incident of family violence post-return.<sup>93</sup> The Court accepted that she presented convincing evidence which established a prima facie case on this issue,<sup>94</sup> and the Central Authority had not offered evidence in response.<sup>95</sup> Despite this, the Full Court of the Family Court was satisfied by the father's willingness to offer what were unenforceable undertakings. He agreed to permit the mother and children to have exclusive occupation of a flat, and to not enter the premises without her permission. He also undertook to pay expenses and not initiate criminal

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<sup>87</sup> Ibid [111]–[112].

<sup>88</sup> [2008] FamCA 1120 (22 December 2008). See also *State Central Authority v Sigouras* [2007] FamCA 250 (23 March 2007); Sally Nicholes, 'Family Court Spreads Cloak of Protection – Case Note; State Central Authority and Papastavrou' (2009) 83(8) *Law Institute Journal* 32.

<sup>89</sup> [2008] FamCA 1120 (22 December 2008) [59], [125].

<sup>90</sup> Ibid [125].

<sup>91</sup> Ibid [130].

<sup>92</sup> Ibid.

<sup>93</sup> Ibid [77].

<sup>94</sup> Ibid [106]. The mother presented expert evidence explaining the inadequacies of Greece domestic violence protections: at [87]–[89].

<sup>95</sup> Ibid [106].

proceedings against the mother in Greece.<sup>96</sup> Upon this basis the Court held that the mother had not established the grave risk of harm exception. The undertakings were relied upon because the Court said that the only period with which it was concerned was the time up until when the mother was able to put the father's promises before a Greek court. This was even though the Court acknowledged that Greek courts do not have a similar system providing for the enforcement of these undertakings.<sup>97</sup>

Again post *DP*, in *HZ v State Central Authority*,<sup>98</sup> the Full Court of the Family Court held that the grave risk of harm exception was not established in the context of family violence. Throughout the parties' marriage they had lived with their children in the paternal grandparents' home in Greece. At the end of a 10-week holiday in Australia the mother informed the father that she would not be returning with the children. It was accepted that the mother and children had been subjected to constant violent and inappropriate behaviour. However, at first instance and on appeal, the Family Court held that the grave risk of harm exception was not established. The Full Court of the Family Court explained that:

Greece was clearly the appropriate forum for issues relating to the welfare of the children to be determined. In the circumstances, it was appropriate for the trial judge to place significant weight on the first of the objects of the *Convention*, namely the prompt return of the children who had been wrongfully retained in Australia.<sup>99</sup>

The Court explored the international jurisprudence on cases with similar facts of family violence. The Court noted that non-return orders were only made when the facts were very compelling, and determined that there was no clear statement of principle.<sup>100</sup> Despite the authority of *DP*, ultimately the fact that the children did not have to return to the grandparents' home, and could in principle seek protection under Greek law, was determinative. Whether or not a grave risk of harm existed in fact was not explored on the basis that post-return a Greek court may not necessarily find that the children had to reside permanently in Greece, or require the children to live in circumstances that put them at physical or emotional risk.<sup>101</sup>

Conversely in *Department of Communities (Child Safety Services) v Garning* ('*Garning*'),<sup>102</sup> the grave risk of harm exception was not established. It is submitted that *Garning* turns on its facts however, as the Family Court reached this finding after a detailed examination of whether

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<sup>96</sup> In Greece the act of international parental child abduction is a criminal offence.

<sup>97</sup> [2008] FamCA 1120 (22 December 2008) [106].

<sup>98</sup> [2006] FamCA 466 (6 July 2006).

<sup>99</sup> Ibid [45] (Kay, Coleman and Warnick JJ).

<sup>100</sup> Ibid [57].

<sup>101</sup> Ibid 418.

<sup>102</sup> [2011] FamCA 485 (23 June 2011).

or not a grave risk of harm existed in fact. The Court did not eschew addressing the contention of risk. In this case four girls were abducted from Italy to Australia by their Australian born mother. This case was appealed to the High Court after a return order was made by Forrest J, however, on grounds other than the grave risk of harm exception.<sup>103</sup> The exception was only considered and rejected by the Family Court at first instance. The grave risk of harm was said to include the father's state of mental health. He had suffered from depressive episodes that appeared to have been brought on by the death of one of the couple's children.<sup>104</sup> The Family Court examined a history of physical and verbal violence perpetrated by the father against the mother and children, prior to the couple's separation in 2007 (some four years before the return proceedings).<sup>105</sup> In addition, the Court accepted the evidence of a child psychologist who had interviewed the children, who concluded that the children had experienced a degree of authoritative and inappropriate physical disciplining by the father. Yet the Court also noted that the children had expressed positive interactions and a level of attachment with their father post-separation. This was evidenced by the children 'warmly describing positive memories and activities that they participated in together.'<sup>106</sup>

Following the broad approach advocated by the High Court in *DP*, the Family Court in *Garning*<sup>107</sup> placed weight upon whether a grave risk existed in fact.<sup>108</sup> Forrest J assessed the consequences of return for the four children by engaging in a detailed inquiry of affidavit evidence provided by the parents and witnesses, a letter from the father's psychiatrist, and reporting by the child psychologist who assessed the children. The Court accepted the mother's evidence that she was subjected to emotional, verbal and physical violence prior to and leading up to separation.<sup>109</sup> However, the abuse was mostly historical.<sup>110</sup> The Court also accepted that the father had been hospitalised for his depression on three occasions before March 2007. Since that time the evidence showed that he had received outpatient treatment, and had progressed well despite the stress of a difficult

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<sup>103</sup> See *RCB as Litigation Guardian of EKV, CEV, CIV and LRV v Hon Justice Colin James Forrest* (2012) 247 CLR 304, where proceedings were brought on behalf of the children by their maternal aunt as litigation guardian on grounds of due process, but importantly for the purposes of this article the mother did not appeal the Family Court's interpretation of the exceptions to return.

<sup>104</sup> *Garning* [2011] FamCA 485 (23 June 2011) [8].

<sup>105</sup> *Ibid* [83].

<sup>106</sup> *Ibid* [96] (Forrest J).

<sup>107</sup> [2011] FamCA 485 (23 June 2011).

<sup>108</sup> For post-*Garning* cases where the Family Court continued to assess the degree for risk see, eg, *Department of Family and Community Services and Viduka* [2015] FamCA 640 (4 August 2015); *State Central Authority v Castillo* [2015] FamCA 792 (10 September 2015).

<sup>109</sup> *Garning* [2011] FamCA 485 (23 June 2011) [89].

<sup>110</sup> *Ibid* [87].

separation with his wife.<sup>111</sup> Forrest J found the mother's evidence to be 'internally contradictory'<sup>112</sup> because she had expressed that she was prepared to allow the children to spend holiday time with the father if they were permitted to remain in Australia. In addition, the Court also considered it significant that the mother had not taken steps prior to the abduction to amend the existing Italian agreement by consent that the father have contact with the children.<sup>113</sup>

In *DP*, the High Court said that Australian courts should not avoid interpreting the gravity of harm exception; that is, they should not make a determination about the individual child's best interests by assuming that the child will be afforded protection by the authorities in their habitual residence post-return. In *Garning's case*,<sup>114</sup> the Family Court's rejection of the grave risk of harm exception was not based upon an unwillingness to examine the factual circumstances awaiting the children upon return. The Court did not avert addressing the contention of risk by simply saying that the Italian authorities and courts could deal with the risk. Forrest J examined the circumstances awaiting the children upon return in detail. His Honour then decided that despite concerns about the father's overly authoritative parenting style, he could not find evidence before him

that returning the girls to Italy, where their ongoing parenting arrangements [could] clearly be subject to further consideration in the courts of Italy, place[d] them at a risk of physical or psychological harm that can be described as reaching the level of 'grave'.<sup>115</sup>

#### IV CONCLUSION

The *Convention's* drafters acknowledged a teleological connection between the action of prompt return, and the promotion of comity between *Convention* countries and the best interests of children generally.<sup>116</sup> However, they also recognised that the *Convention* must still strike a delicate balance between protecting children generally from the harmful effects of international parental child abduction, and accommodating situations where a child's unilateral removal is justified and in fact in their best interests.<sup>117</sup> Perhaps the differing judicial opinions of the Family Court and High Court, about the extent to which the grave risk of harm exception should permit consideration of an individual child's best interests, are a

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<sup>111</sup> Ibid [84].

<sup>112</sup> Ibid [95] (Forrest J).

<sup>113</sup> Ibid [100].

<sup>114</sup> [2011] FamCA 485 (23 June 2011).

<sup>115</sup> Ibid [101] (Forrest J) (emphasis added).

<sup>116</sup> Pérez-Vera, above n 5, 426, 429–30.

<sup>117</sup> Ibid 432.

manifestation of the intricacies of the balancing act that must be performed by courts hearing return proceedings.

The Family Court has exhibited a propensity to resolve the incompatibility between facilitating comity between *Convention* countries and examining a child's best interests in favour of the former. This choice has been rationalised with the assumption that the individual child's best interests are most appropriately reserved for consideration post-return in the child's habitual residence.<sup>118</sup> From a practical perspective accepting this assumption as accurate has been the easy solution. This is because *Convention* return proceedings are suited to being summary in nature and 'they are not ideally designed to determine contradicted issues of fact.'<sup>119</sup> Contradicted issues of fact can include each party's submissions concerning their child's best interests when the grave risk of harm exception is raised by the abducting parent.

The feminisation of international parental child abduction, and the social implications that this has had, arguably justifies the High Court's broader approach to the exception's interpretation. A true state of balance is the attainment of the best interests of all children. Realistically this balance may be difficult to achieve. Perhaps the restrictive interpretation of the exception advocated by the Family Court of Australia and dissenting High Court judges is a display of the tightrope becoming unsteady. Comity between *Convention* countries is swayed towards, whilst the child's welfare is sacrificed. The High Court has arguably managed to master the art of maintaining balance whilst traversing the tightrope, by expeditiously examining the child's welfare and the potential consequences awaiting the child if they are returned to their habitual residence.

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<sup>118</sup> Ibid 431.

<sup>119</sup> Rhonda Schuz, 'Policy considerations in determining the habitual residence of a child and the relevance of context' (2001) 11(1) *Journal of Transnational Law and Policy* 101, 104.