10 **IN THE HIGH COURT OF AUSTRALIA** No. B28 of 2012
BRISBANE REGISTRY

BETWEEN: **R.C.B as litigation guardian of E.K.V. C.E.V, C.I.V, and L.R.V**

Plaintiff

AND: **THE HONOURABLE JUSTICE COLIN JAMES FORREST, ONE OF THE JUDGES OF THE FAMILY COURT OF AUSTRALIA**

20 First Defendant

DIRECTOR-GENERAL, DEPARTMENT OF COMMUNITIES (CHILD SAFETY AND DISABILITY SERVICES)

Second Defendant

L.K.G

Third Defendant

T.V

Fourth Defendant

30 **PLAINTIFF'S SUBMISSIONS**

Part I: Publication of Submissions

1. These submissions are in a form suitable for publication on the internet.

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Part II: Issues Arising in the Proceeding

2. The central issues are:

   (a) whether Commonwealth legislation may either require or allow a Chapter III court to function contrary to the rules of natural justice; and

   (b) if the answer is in the negative, whether sub-section 68L(3) of the *Family Law Act 1975* (Cth) is unconstitutional as having that effect.

3. Subsidiary issues may arise as to the scope or content of the rules of natural justice, as applying to persons who are sought to be removed from Australia by judicial order without their consent, when the persons concerned are both:

   (a) minors; and

   (b) Australian citizens.

4. Determination of these issues will answer the ultimate questions in this proceeding; viz. –

   (a) whether sub-section 68L(3) of the *Family Law Act 1975 (Cth)* is unconstitutional:

      (i) as either requiring or allowing a Court created under Chapter III of the *Constitution* to exercise its jurisdiction in a manner which is fundamentally unjudicial; or

      (ii) in accordance with the principles articulated in *South Australia v Totani* [2010] HCA 39.

   (b) whether the Orders of 26 June, 27 June 2011, 4 May 2012 and 16 May 2012 should be quashed on the grounds that the First Defendant:

(i) failed and refused to afford the affected children an opportunity to have separate and independent representation;

(ii) failed and refused to take into account the interests of the affected children; and

(iii) otherwise acted contrary to the rules and principles of natural justice with respect to the affected children; and

(c) how the costs of the proceeding should be paid.

PART III: Notices Under Section 78B of the *Judiciary Act 1903 (Cth)*

5. The Plaintiff served notices under Section 78B of the *Judiciary Act 1903 (Cth)* on 24 May 2012.

PART IV: Citation

6. The decision of Forrest J of the Family Court of Australia of 23 June 2011 is reported as

Department of Communities (Child Safety Service) & Garning, [2011] FamCA 485.

7. The decision of Forrest J of the Family Court of Australia dated 16 May 2012 is reported as:

Garning & Department of Communities, Child Safety and Disability Services, [2012] FamCA 354.

PART V: Material Facts

8. The material facts are not in dispute.

9. The four Plaintiffs, who sue through their aunt as litigation guardian, are:

(a) Australian citizens;

(b) minors, aged between nine (9) and fifteen (15) years; and

(c) the children of the Third Defendant (mother) and the Fourth Defendant (father).

10. The mother and father are divorced.

11. The mother currently resides in Australia, and intends to continue doing so. The father currently resides in Italy, and intends to continue doing so.

12. The Plaintiffs travelled to Australia with the mother on 23 June 2010, and have remained in Australia since that time. They wish to remain in Australia with the mother.

13. It may be accepted, for the purposes of this proceeding, that the mother breached her personal obligations to the father in failing to return the Plaintiffs to Italy. There is no suggestion, however, that the Plaintiffs themselves have done anything illegal or wrong.

14. On 18 February 2011, the Second Defendant – the Director-General of the Department of Child Safety (Queensland) – filed an application initiating proceedings under the *Family Law (Child Abduction Convention) Regulations 1986* ("**the Regulations**"), promulgated to give effect to section 111B of the *Family Law Act 1975 (Cth)* ("**the Act**").

15. On 23 June 2011, the First Defendant – Forrest J – ordered (relevantly) that the Plaintiffs be returned to Italy.

16. Prior to the final hearing, Forrest J ordered that a family consultant report be prepared. Whilst his Honour found that the children had expressed a desire to remain in Australia[1], it was not a strength of feeling beyond the

[1] Reasons of 23 June 2011, para [115]

10 mere expression of preference or of ordinary wishes[2]. The mother was found not to have established any of the available defences[3].

17. In a judgment delivered on 9 March 2012, the Full Court of the Family Court of Australia (Bryant CJ, Faulks DCJ and Coleman J) dismissed an appeal by the mother from the orders of 23 June 2011.

18. On 4 May 2012, Forrest J ordered the mother to deliver each of the Plaintiffs to the Brisbane International Airport at a date not before 16 May 2012. Subsequently, on 14 May 2012, his Honour issued warrants for possession of each of the children.

19. On 16 May 2012, Forrest J refused to hear:

20 (a) first, an application by the mother to discharge the return order made under Regulation 19A of the Regulations; and

(b) second, an application by the litigation guardian to intervene in those proceedings.

20. This proceeding was initiated by the Plaintiffs invoking the Court's original jurisdiction under Section 75(v) of the *Constitution*. Relief against the orders of Forrest J is sought by way of Mandamus, Prohibition and Certiorari.

21. Subsequently, the Second Defendant undertook not to remove the children from the jurisdiction pending determination of this proceeding.

PART VI: Plaintiffs' Argument

30 **(a) Summary**

22. A Court's discretion pursuant to section 68L(3) of the Act to order separate representation of a child's interests in proceedings arising under the

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2 *ibid.*, paras [116], [118]
3 *ibid.*, paras [125], [128]

Regulations only accrues on the finding of fact that "exceptional circumstances"[4] justify that exercise of discretion.

23. Thus, save for "exceptional circumstances", the effect of section 68L(3) is to abrogate fundamental rights of procedural fairness and natural justice that must otherwise inure to a child who is the subject of the proceedings.

24. To the extent, therefore, that section 68L(3) mandates that a Court proceed on that basis, and in a manner inconsistent with natural justice, the law is invalid as either:

(a) conferring on the Family Court a non-judicial power; or

(b) compelling or authorising the Family Court to exercise a judicial power otherwise than in a judicial manner.

(b) Legislative history

25. The Regulations were made under section 111B of the Act, which authorises regulations to make such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain from Australia any advantage or benefit, under the *Convention on the Civil Aspects of International Child Abduction* signed at The Hague on 25 October 1980 ("**the Convention**").

26. Regulation 16(3) of the Regulations provides limited exceptions, or a rebuttable presumption, to a Court making an order for the return of a child on an application for a Return Order. Those exceptions include, *inter alia,* where:

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[4] Section 68L(3)(a).

(a) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation[5]; or

(b) where:

(i) the child objects to being returned[6]; and

(ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes[7]; and

(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views[8].

27. The Regulations, and the Convention, were considered by this Court in *De L v Director-General, New South Wales Department of Community Services*[9] where it was determined that where issues arise, or appear to the court to arise in proceedings under the Regulations involving a child of an age and degree of maturity so as to render it appropriate to take the child's views into account, the child should ordinarily be separately represented under section 68L (as it then stood).[10]

28. Section 68L was subsequently amended by the *Family Law Amendment Act 2000*[11]. The Further Revised Explanatory Memorandum to the amending legislation[12] makes it plain that the purpose of the amendment was to:

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5 sub-regulation (3)(b)
6 sub-regulation (3)(i)
7 sub-regulation (3)(ii)
8 sub-regulation (3)(c)(iii)
9 (1996) 187 CLR 640; see, also, *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at [23] – [27], [34] – [40] per Gaudron, Gummow and Hayne JJ.
10 *De L v Director-General, New South Wales Department of Community Services* (supra) at pages 659, 660 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ (Kirby J dissenting).
11 Act no. 143 of 2000
12 The use of such extrinsic material as an aid is permitted: Section 15AB of the *Acts Interpretation Act 1901*.

(a) restrict the availability of separate representation for a child in proceedings under the Convention only to "exceptional cases"; and

(b) thereby overturn the effect of *De L v Director-General, New South Wales Department of Community Services (supra)*.[13]

(c) Invalidity

29. In determining questions of validity and effect, the practical operation of Section 68L(3) of the Act must be considered.[14] The Act offers no guidance as to the matters relevant to the determination of whether "exceptional circumstances" exist in a particular case. Not only does that have the effect of leaving the section devoid of content; it is a readily conceivable possibility that "exceptional circumstances" may never arise or be established.

30. The use of the adjective "exceptional" itself highlights the non-judicial character of the power which the Family Court is called upon to exercise in determining whether to allow separate representation. There may be other contexts in which that adjective is meaningful, because there is a clear preponderance of cases which are "unexceptional" (in the sense of being common, routine, ordinary, or "run of the mill"). But, in the present context, that adjective poses a false dichotomy: there is no means of defining the features which are common to "unexceptional" cases, so that one can identify a specific case, lacking one or more of those features, as being "exceptional".

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[13] Further Revised Explanatory Memorandum at paragraphs [291] to [294]. Inconsequential changes were effected by amendments implemented by Act no. 46 of 2006: see Revised Explanatory Memorandum to *Family Law Amendment (Shared Parental Responsibility) Bill* 2005, paragraphs [851] to [863].

[14] *ICM Agriculture Limited v Commonwealth* (2009) 240 CLR 140 at 198 and 199 [138] per Hayne, Kiefel and Bell JJ.

31. It is open to conclude that the legislature's confinement of the exercise of the discretion to "exceptional circumstances" is, in truth, a cynical attempt to overcome the appearance of what is otherwise a draconian and invalid law. It purports to give the appearance of a judicial process by the imposition of a threshold test which is both:

    (a) in terms, incapable of refinement; and

    (b) in practice, impossible for a child to satisfy.

32. The amendments to section 68L of the Act made subsequent to *De L v Director-General, New South Wales Department of Community Services* (*supra*) do not erode the genesis of the section. Whilst the "paramountcy principle" does not apply in proceedings under the Regulation, it nevertheless remains that the welfare of the child, and the child's views, are central to the exercise of discretion under Regulation 16.[15]

33. Properly contextualised, the determination of a proceeding arising under the Regulations is not a procedural hearing but, rather, a determination of substantive issues affecting a child's rights, liberty and welfare. The denial of natural justice by legislative amendment to a person whose substantive rights are affected is offensive to both the rule of law, and the separation of powers.

34. It is of no moment that a child is not a "party" to the proceeding; principles of natural justice apply to the exercise of administrative powers where there are no parties; and they apply with no less force in the exercise of judicial powers where there are no parties – or where a person who is not a party, *eo nomine*, nonetheless will be affected in that person's rights, liberty or

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[15] *De L v Director-General, New South Wales Department of Community Services* (supra) at 661 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

welfare. The application of such principles depend more on the substantial nature of the proceeding as opposed to the form which the proceedings may take.[16]

35. The amendments to section 68L of the Act effect judicial constraint on natural justice being afforded to a child who is the subject of a proceeding under the Regulations, insofar as it creates a need to find, as a matter of fact and as a pre-condition to enlivening the discretion to order separate legal representation, the existence of "extraordinary circumstances" to justify the making of that order.

36. Such amendments are not merely cosmetic; nor do they attach a new legal consequence to the determination of proceedings arising under the Regulations. By amending the legislation with the plain intention of overturning the effect of *De L v Director-General, New South Wales Department of Community Services* (*supra*), the legislature has purposefully and impermissibly removed from the person most aggrieved by a Court's determination of the proceeding the fundamental principles of natural justice, namely the right to be heard and to be legally represented.

37. Legislative infringement of Chapter III of the *Constitution* is a concept "which is not susceptible of precise and comprehensive definition".[17] Whilst in certain instances Parliament can, to the extent that it may be "within its constitutional competence", enact legislation which alters the law as declared by the Court,[18] it nevertheless constitutes an impermissible

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[16] *J v Lieschke* (1986) 162 CLR 447 at 459, 460 per Brennan J (as his Honour then was).

[17] *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 249 – 250 per Mason J (as his Honour then was); *Nicholas v The Queen* (supra) at 233 [148] per Gummow J; *South Australia v Totani* [2009] HCA 39 at [134] per Gummow J.

[18] *Australian Education Union v General Manager of Fair Work Australia & Ors* (2012) 286 CLR 641 at [50] per French CJ, Crennan and Kiefel JJ.

10 interference with judicial power if, as has occurred here, Parliament were to purport to set aside the decision of a Court exercising federal jurisdiction[19].

38. In *International Finance Trust Company Limited v New South Wales Crime Commission*[20] the Chief Justice observed:[21]

> Procedural fairness or natural justice lies at the heart of the judicial function. In the federal constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the Constitution. It requires that a Court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and
20 argument, the case put against it.

Those observations reflect well established common law principles.[22]

39. For the following reasons, it is irrelevant that the Court retains a discretion under section 68L(3) of the Act to afford a child separate legal representation where " exceptional circumstances" exist:

(a) ***First,*** if "exceptional circumstances" are not found to exist, section 68L(3) impermissibly operates to deprive a child of the right to be heard in the determination of the proceeding, to which the child is not a party, but, necessarily, the person most directly affected.

(b) ***Secondly,*** the structure of section 68L is such that there is no express
30 provision requiring a child to be served with or given notice of the application before it is determined.

(c) ***Thirdly,*** a Court may determine the question of whether there are "exceptional circumstances" adversely to a child, without that child

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19 (Supra) at 642 [53] per French CJ, Crennan and Kiefel JJ.
20 [2009] HCA 49.
21 At paragraph [54].
22 See *Nicholas v The Queen* (1998) 193 CLR 173 at 208 [74] per Gaudron J; at 232 [146], 233 [148] per Gummow J; *Delta Properties Pty Ltd v Brisbane City Council* (1955) 95 CLR 11 at 18.

being afforded the right or opportunity to be heard on whether such circumstances exist.

(d) ***Fourthly,*** the potential failure of a Court to address whether "exceptional circumstances" exist before determining the proceeding would, in and of itself, constitute a denial of procedural fairness.[23]

40. It is impermissible for the legislature to define the terms upon which a power is conferred and then remove any right for an affected person to review or enforce that decision. In a proceeding under the Regulations, there is no avenue of recourse or standing to appeal available to a child where either:

(a) the child suffers an adverse determination; or

(b) the Court simply does not turn its mind to whether exceptional circumstances even exist.

41. Thus, the amendment constitutes impermissible interference with the judicial process by directing the Court to find, as a matter of fact, the existence of "exceptional circumstances" before ordering that an affected person be separately legally represented, and implicitly but inevitably abrogate the common law right to procedural fairness. In so doing, it purports to direct the manner in which the power of the Court is to be exercised and mandates the Court to act in a manner contrary to natural justice. Such an effect deprives the Court of important characteristics of judicial power,[24] a feature which necessarily infringes Chapter III of the

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[23] *Drinichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389 at 394, 408.
[24] *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 669 [47]; *South Australia v Totani* [2010] HCA 39 at [62], [71] per French CJ; at [132] per Gummow J.

Constitution,[25] and which is repugnant to the judicial process in a fundamental degree.[26]

42. A further factor which militates strongly against the validity of Parliament's intent in effecting the amendments, but which lies in conformity with the reasoning of this Court in *De L v Director-General, New South Wales Department of Community Services* (supra), is that the removal of procedural fairness and natural justice to an affected child is inconsistent with Article 12 of the *United Nations Convention on the Rights of the Child*, which is in the following terms:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters effecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of natural law.

43. Further, whilst this Court's decision in *De L v Director-General, New South Wales Department of Community Services* (supra) was not referred to, its reasoning is consistent with the now prevailing view in England that a child the subject of Hague Convention proceedings ought be heard unless it is inappropriate to do so.[27]

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[25] *International Finance Trust Company Limited v New South Wales Crime Commission* (supra) at [55] per French CJ; *Chu Khenz Lim v Minister for Immigration* (1992) 176 CLR 1 at 36, 37 per Brennan, Deane and Dawson JJ.

[26] *International Finance Trust Company Limited v New South Wales Crime Commission* (supra) at [155], [159], [160] and [161] per Heydon J.

[27] *Re D (a child) (abduction: rights of custody)* [2006] UKHL 51; (2007) 1 All ER 783 at 804 [57] – 806 [62] per Baroness Hale of Richmond.

44. Any conception that affording a child separate legal representation will delay determination of the proceeding is misplaced: first, it accords with basic rights of natural justice; and, second, it should assist in the prompt and just disposition of Convention applications.[28]

PART VII: Applicable Provisions

45. The applicable legislative provisions as at 23 June 2011 when the Orders were made is attached as "Annexure A" to this submission.

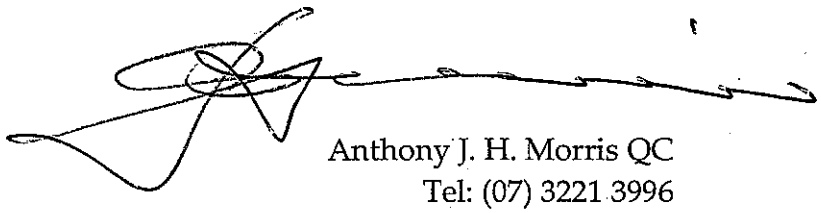
PART VIII: Orders Sought

46. The Plaintiff submits that the Questions Reserved should be answered –

(a) **Question 1:** Section 68L(3) of the *Family Law Act 1975 (Cth)* is unconstitutional.

(b) **Question 2:** Yes.

(c) **Question 3:** The Second Defendant should pay the Plaintiff's costs of and incidental of the Questions Reserved.



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Dated filed: 22 June 2012

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[28] De *L v Director-General, New South Wales Department of Community Services* (supra) at 660 per Brennan CJ, Dawson, Toohey JJ.

ANNEXURE A

APPLICABLE PROVISIONS

1. The following constitutional provisions, statues and regulations are relevant to the Questions Reserved in their current form.

2. Section 75 of the *Constitution*:

> **Original jurisdiction of High Court**
> In all matters:
> (i) arising under any treaty;
> (ii) affecting consuls or other representatives of other countries;
> (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
> (iv) between States, or between residents of different States, or between a State and a resident of another State;
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
> the High Court shall have original jurisdiction.

3. Regulation 16 of the *Family Law (Child Abduction Convention) Regulations 1986*:

> **16. Obligation to make a return order**
> (1) If:
> (a) an application for a return order for a child is made; and
> (b) the application (or, if regulation 28 applies, the original application within the meaning of that regulation) is filed within one year after the child's removal or retention; and
> (c) the responsible Central Authority or Article 3 applicant satisfies the court that the child's removal or retention was wrongful under subregulation (1A);
> the court must, subject to subregulation (3), make the order.
> (1A) For subregulation (1), a child's removal to, or retention in, Australia is wrongful if:
> (a) the child was under 16; and

(b) the child habitually resided in a convention country immediately before the child's removal to, or retention in, Australia; and

(c) the person, institution or other body seeking the child's return had rights of custody in relation to the child under the law of the country in which the child habitually resided immediately before the child's removal to, or retention in, Australia; and

(d) the child's removal to, or retention in, Australia is in breach of those rights of custody; and

(e) at the time of the child's removal or retention, the person, institution or other body:

(i) was actually exercising the rights of custody (either jointly or alone); or

(ii) would have exercised those rights if the child had not been removed or retained.

(2) If:

(a) an application for a return order for a child is made; and

(b) the application is filed more than one year after the day on which the child was first removed to, or retained in, Australia; and

(c) the court is satisfied that the person opposing the return has not established that the child has settled in his or her new environment;

the court must, subject to subregulation (3), make the order.

(3) A court may refuse to make an order under subregulation (1) or (2) if a person opposing return establishes that:

(a) the person, institution or other body seeking the child's return:

(i) was not actually exercising rights of custody when the child was removed to, or first retained in, Australia and those rights would not have been exercised if the child had not been so removed or retained; or

(ii) had consented or subsequently acquiesced in the child being removed to, or retained in, Australia; or

(b) there is a grave risk that the return of the child under the Convention would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or

(c) each of the following applies:

(i) the child objects to being returned;

(ii) the child's objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;

(iii) the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

(4) For the purposes of subregulation (3), the court must take into account any information relating to the social background of the child that is provided by the Central Authority or other competent authority of the country in which the child habitually resided immediately before his or her removal or retention.

(5) The court is not precluded from making a return order for the child only because a matter mentioned in subregulation (3) is established by a person opposing return.

4. Section 68L of the *Family Law Act 1975*:

68L. Court order for independent representation of child's interests

(1) This section applies to proceedings under this Act in which a child's best interests are, or a child's welfare is, the paramount, or a relevant, consideration.

(2) If it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court:

(a) may order that the child's interests in the proceedings are to be independently represented by a lawyer; and

(b) may make such other orders as it considers necessary to secure that independent representation of the child's interests.

(3) However, if the proceedings arise under regulations made for the purposes of section 111B, the court:

(a) may order that the child's interests in the proceedings be independently represented by a lawyer only if the court

considers there are exceptional circumstances that justify doing so; and

(b) must specify those circumstances in making the order.

(4) A court may make an order for the independent representation of the child's interests in the proceedings by a lawyer:

(a) on its own initiative; or

(b) on the application of:

(i) the child; or

(ii) an organisation concerned with the welfare of children; or

(iii) any other person.

(5) Without limiting paragraph (2)(b), the court may make an order under that paragraph for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child's views are on the matters to which the proceedings relate.

(6) Subsection (5) does not apply if complying with that subsection would be inappropriate because of:

(a) the child's age or maturity; or

(b) some other special circumstance.