

RIGHTS OF CUSTODY AND ACCESS UNDER THE HAGUE CHILD ABDUCTION CONVENTION—“A QUESTIONABLE RESULT?”

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In 1980, members of the Fourteenth Session of the Hague Conference created the Hague Convention on the Civil Aspects of International Child Abduction.¹ The Convention's prime concern was to ensure the prompt return of children, wrongfully removed or retained in breach of rights of custody,² so that decisions about their future may be taken in the jurisdiction that is assumed the best placed to do so. However, in their eager pursuit to fulfill that goal, the interpreters of the Convention may have sacrificed definitional precision. It is therefore possible that correctness of approach has, at times, been sacrificed to the flexibility required to ensure the abducted child's return. The outcome has been a haze of inconsistent judicial results.

The Convention distinguishes between rights of custody and rights of access.³ Removal or retention of a child is considered wrongful where it is in

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1. See Hague Convention on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. 98, reprinted in 19 I.L.M. 1501 (1980) [hereinafter Convention]. Adopted by the Fourteenth Session of the Hague Conference on Private International Law. The United States enacted legislation implementing the Hague Abduction Convention in the International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 42 U.S.C. §§ 11601-11610 (1988)).

2. See Convention, *supra* note 1, art. 1.

3. See *id.* art. 5. Article 5 states:

For the purposes of this Convention—

- (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Id.

breach of rights of custody, and a court can only issue a return order when those rights are breached.⁴ It follows that a breach of a right of access will not prompt a return order. Indeed, there is clear evidence that the Hague Convention intentionally dealt with rights of access separately,⁵ thereby indicating that the return-order remedy would not apply to a mere right of access breach. Commentator Elisa Perez-Vera explains this distinction in the Convention's Explanatory Report:⁶

Although the problems which can arise from a breach of access rights, especially when the child is taken abroad by its custodian, were raised during the Fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals or retentions which it sought to prevent.⁷

Perez-Vera further explained that "a questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holder of one type of right by those who held the other."⁸

4. *See id.* art. 3 & 12. Article 3 states:

The removal or the retention of a child is to be considered wrongful where—
 (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
 (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Id. art. 3. Article 12 states:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Id. art. 12.

5. *See id.* art. 21.

6. *See* Elisa Perez-Vera, Explanatory Report in Acts and Documents of the Fourteenth Session of the Hague Conference on Private International Law 14 (1982) [hereinafter Perez-Vera Report] available at Hague Conference on Private International Law, Explanatory Report on Convention #28 (last visited Oct. 20, 2000) <<http://www.hcch.net/e/conventions/expl28e.html>>. The Perez-Vera Report is the official legislative history of the Hague Convention of the Civil Aspects of International Child Abduction. *See id.* at 427.

7. *Id.* at 444-45.

8. *Id.*

Thus, the Convention drafters were unwilling to extend the return remedy, namely a court-issued return order, to such a right of access breach.

The right of custody, however, that triggers the return remedy is amorphous in character, and rather less certain a concept than suggested by Perez-Vera. When faced with a request for a return order, a court where a child currently resides must decide whether the laws of the State of the child's habitual residence provide a right that equates to a right of custody under the Convention for the parent who is left behind.⁹ Although, under Article 15 of the Convention, a declaration may be sought from the court of the state of the child's habitual residence that a child's removal or retention was wrongful within the meaning of Article 3 of the Convention, or in other words that it was in breach of rights of custody, this declaration will not bind the requested court. Thus, there is an inherent fluidity in the concept, and much will depend on the subjective interpretation of the court concerned.

This fluidity has caused significant disparity in the ways that different jurisdictions treat rights of access in Hague Convention proceedings. This can be clearly seen in cases where the court of habitual residence has placed a removal restriction, usually in the form of a non-removal clause, on the custodial parent. The restrictive order ensures that the non-custodial parent's rights of access are continually enjoyed as envisaged. Mixed results have occurred where the custodial parent has, notwithstanding the restriction, removed the child to another country. The English Court of Appeal case *C. v. C.*, is an example of circumstances in which the Convention's return mechanism was triggered when a custodial parent removed a child from Australia in breach of a removal restriction.¹⁰ In *C. v. C.*, a non-custodial father had the ability to give or withhold his consent to the removal of the child from Australia; the court recognized this ability as a right of custody for the purposes of Articles 3 and 5¹¹ of the Convention as it was a right to determine the child's place of residence.¹²

9. See *C. v. C.* (Minor: abduction: rights of custody abroad), 1 W.L.R. 654 (Q.B. 1989). In *C. v. C.*, Lord Donaldson stated:

We are necessarily concerned with Australian law because we are bidden by art 3 [of the Convention] to decide whether the removal of the child was in breach of 'rights of custody' attributed to the father either jointly or alone under that law, but it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the convention definition of 'rights of custody'. Equally it matters not in the least whether those rights would be regarded as rights of custody under English law, if they fall within the definition.

Id. at 667F. See also *infra* note 12 and accompanying discussion.

10. See *id.* See also Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994). Silberman states "[f]or example, when there are restrictions on the movement of the custodial parent or concepts of joint custody or guardianship, the Convention appears to offer protection." *Id.* at 17.

11. See Convention, *supra* note 1, arts. 3 & 5.

12. See *C. v. C.* The presiding Judge Lord Donaldson, referring to the right to determine a child's place of residence, stated:

The view pronounced by the Australian court in *C. v. C.* appears to conflict with the view of some scholars; particularly, commentator A. E. Anton who states his view of the aim of the Convention:

It is less clear, but the definition of "rights of custody" in Article 5 at least suggests, that the breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of a right of custody in the sense of Article 3. A suggestion that the definition of 'abduction' should be widened to cover this case was not pursued.

... This provision reflects the awareness of delegates that a parent who technically has a right to the custody of the child may have acquiesced in the assumption of control over the child by another person or may even have thrust the child upon him. It was thought to be inappropriate, therefore, to allow the former to benefit from the Convention.¹³

However, the view in *C. v. C.* is apparently supported by the commentator John Eekelaar who states, "[h]ence, if the right to day to day care is vested in A and the right to determine the child's place of residence in A and B, both A and B have rights of custody under the Convention."¹⁴

Decisions on non-removal clauses, which label factual rights of access as rights of custody, rely on the wording of the Convention and the definition of rights of custody contained therein.¹⁵ However, there is an alternative and persuasive argument that non-removal clauses are simply judicial tools to ensure access and, as such, do not *in reality* give rise to the right to determine the child's place of residence. Thus, this line argues that a non-removal clause does not create rights of custody within the meaning of the Convention, and, therefore, there should be no remedy of a return order. Although some scholars disagree,¹⁶ many courts have adopted this alternative line of reasoning in their decisions.¹⁷

This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right, in so far as the child is to reside in Australia, the right being that of the mother but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court.

Id. at 663G/H.

13. A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 546 (1981).

14. The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation prepared for Commonwealth Jurisdictions, para 2:1 (Feb. 1981) (on file with Commonwealth Secretariat, Marlborough House, London) [hereinafter Hague Convention Explanatory Documentation].

15. See Convention, *supra* note 1, art 5 ("rights of custody" shall include . . . the right to determine the child's place of residence.").

16. See Martha Bailey, "Rights of Custody" Under the Hague Convention, 11 BYU J. PUB. L. 33, 51-53 (1997). Bailey disagrees and argues that disputes as to whether a custodial parent should be able to relocate with the child despite an order, agreement or law prohibiting the move are custody disputes and, as such, are properly adjudicated in the country in which the child habitually resides. The author of this article argues that this is more a case of custody in form than in content—the custody decision having already been determined and what re-

mains is, therefore, a matter of access. Bailey further states that failure to return children to the State of habitual residence for the relocation issue to be decided will result in parents, from jurisdictions which do not readily agree to relocation, engaging in forum shopping. In practice, the relocation question will usually be decided on the best interests principle. Moreover, the cases will not, in most instances, involve genuine custody disputes and will usually result in permission being granted to leave the jurisdiction. Forum shopping occurs because of the lack of uniformity, not because of the refusal to return for relocation proceedings. Bailey also asks why the parent, with shared legal custody or parental responsibility, who does not live with his or her child should be treated differently from the parent with access rights and a non-removal clause. They should not be treated differently. In both cases it is a question of the *actual exercise* of the right. If the former is actually exercising only a right of access, he should be treated in the same manner as the latter. Support for this view can be found in the writings of John Eekelaar, who states:

Where the right in question is only the right to determine the child's place of residence, it may be more difficult to understand what is meant by this right being 'actually exercised.' However, it is probable that in practice this will not be difficult to establish: a person's conduct may easily show that he or she has retained the expectation to be consulted about the child's place of abode.

John Eekelaar, *International Child Abduction By Parents*, 32 U. TORONTO. L.J. 281, 310 (1982). The question then is, what right is being *actually exercised*? For more discussion see *infra* note 27 and accompanying text.

17. See Silberman, *supra* note 10, at 18. There, Silberman discusses the French case, *Ministere Public v. Mme Y*, where a mother removed her child from England to France in contravention of a court order, however, she had not "wrongfully removed" her child for the purposes of the Convention. The court determined that the father's rights of access, not his rights of custody, had been breached. See *Recueil Dalloz Sirey*, June 18, 1992, 315-16 (reported in *Ministere Public v. Mme Y*, Trib. gr. inst. de Perigueux (Mar. 17, 1992)). The alternative rationale was reflected in the Canadian Supreme Court case *Thomson v. Thomson*, where the court held that a non-removal clause in an interim Scottish custody order created rights of custody in the Scottish court because it was intended to preserve the court's jurisdiction to make a final custody determination. See *Thomson v. Thomson* [1995] 119 D.L.R. 4th 253 (Can.). See also Canada: Supreme Court Decision in *Thom[son] v. Thom[son]* (Hague Convention in the Civil Aspects of International Child Abduction), 34 I.L.M. 1159, 1174 (1995). The Canadian Supreme Court determined that by virtue of an interim custody order with a non-removal clause "the Scottish court became "an institution or any other body . . . under the law of the State in which the child was habitually resident immediately before the removal or retention" having custody rights within the meaning of Article 3." *Id.* (quoting the Hague Convention, *supra* note 1, art. 3). However, the Canadian Supreme Court stated that this would not apply to a permanent non-removal clause in a custody order that is intended to preserve rights of access by the non-custodial parent because such rights are not given the same level of protection as custody by the Convention. See *id.* at 1174-75. In a concurring opinion, Justice Claire L'Heureux-Dube stressed that such a non-removal clause does not result in a wrongful removal in circumstances where the custodial parent moves with the child to a new jurisdiction. See *id.* at 1180. In *D.S. v. V.W.*, the Canadian Supreme Court followed *Thomson*, reversing the decision of the Court of Appeal. See *D.S. v. V.W.* [1996] 134 D.L.R. 4th 481, 503 (Can.). There, the father had been granted child custody and the mother possessed only access rights supported by an implied restriction on removal. See *id.* at 485. The father moved with the child from Michigan to Quebec without consulting or notifying the mother. See *id.* Although the father was ordered to return to the United States on another point, the Canadian Supreme Court was certain that the mother did not possess a right of custody; therefore, the father's removal of the child was not wrongful under the Convention. See *id.* at 505. The court stated that even an explicit non-removal clause would not give the non-custodial parent a right of custody and that the Act suggests a "large and liberal" interpretation of the custody concept:

Arguably, of even greater concern than the non-removal clause cases are those in which the child has been returned simply by virtue of a bare right of access,¹⁸ which does not even purport to carry with it a right to determine the child's place of residence. In these cases, courts issue return orders after distorting the facts to accommodate a perceived duty to return the child. This would suggest that there has been an equalization of the intentionally sepa-

rights of custody within the meaning of the Act cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence, but, on the contrary, must be interpreted in a way that protects their exercise.

Id. at 499. The Canadian Supreme Court added that the Court of Appeal, although describing its interpretation of the concept of custody as "large," had actually adopted a very narrow interpretation when it found that, although the mother had only access rights, she had rights of custody when the child was removed. *See id.* at 499-501. The Canadian Supreme Court stated:

By confusing, for all practical purposes, the concepts of custody rights and access rights, this interpretation amounts to saying that any removal of a child without the consent of the parent having access rights could set in motion the mandatory return procedure provided for in the Act and thus indirectly afford the same protection to access rights as is afforded to custody rights.

Id. at 503. Therefore, the right of the custodial parent is to be construed in a "large and liberal" manner. The court reasoned that a narrow reading of the concept of custody would contradict the very object of the Act, namely to protect rights of custody and the exercise of the attributes thereof, including the choice of the child's place of residence. *See* discussion *infra* note 25.

18. *See* *Gross v. Boda*, [1995] 1 N.Z.L.R. 569. In *Gross*, the mother had sole care and custody of the child and the father had reasonable rights of access under the law of Arizona, including contact every other weekend, alternating holidays and summer vacation. *See id.* The New Zealand Court of Appeal held that the husband's visitation rights were rights of intermittent possession and care for the child for the indefinite future. *See id.* The court also found that the custodial parent's right to determine the child's residence is subject to the existing visitation order of the non-custodial parent so that the parents jointly had the right to determine where the child was to live because the father's right of access had to be observed. *See id.* at 573. Compare the holding of *Gross* with the English case, *S. v. H. (Abduction: Access Rights)*, [1997] 1 F.L.R. 971, described *infra* note 40. *See also* *Dellabarca v. Christie*, [1998] CA 55/57 (unreported New Zealand Court of Appeal case on file with the author). In *Dellabarca*, the New Zealand Court of Appeal disapproved of the requirement that the claimant must have the right to determine the child's place of residence in order to have a right of custody. *See id.* at 7-11. The court stated that "claimants may succeed if they show that they have any [original emphasis] qualifying right relating to the care of the person of the child, one of which rights may [original emphasis] be the right to determine the place of residence." *Id.* at 6. The right to determine the place of residence is just one of the qualifying rights. *See id.* In cases such as this, where the father had relatively insubstantial access—he was to have "regular access to the child, plus one week in January 1996, with the access arrangements to be reviewed" every six months, the Court of Appeal concluded that a removal would be in breach of the father's rights of custody as, along with regular access, he would have "corresponding responsibilities of care" that rose to the level of rights "involving the direct care of the person." *Id.* at 11. In this particular case, the child contact agreement between the parties did extend such rights to the father, however the court determined that the agreement lacked legal effect. *See id.* at 11-12. Nevertheless, the established principle remains—relatively insubstantial access may give rise to a right of custody.

rate rights of custody and access under the Convention,¹⁹ at least in the eyes of some courts.

There is no doubt that the drafters of the Convention intended that the holders of rights of custody and access would be entitled to different remedies when those rights are breached. However, this intentional distinction has become blurred. Has the “questionable result” envisaged by Perez-Vera²⁰ become a very real concern, wherein the Convention is applied inconsistently on an uneven playing field where the results can differ depending upon the jurisdiction in which proceedings take place?

Some blame for this situation may lie with the provisions of the Convention that deal with the issue of access.²¹ These provisions have been regularly and severely criticized for the lack of “teeth” contained therein.²² In England and Wales, Article 21 of the Convention has been interpreted as merely requiring the Central Authority to obtain lawyers to present an application for access before the local courts; where, only domestic legislation related to the best-interests principle is employed.²³ Priscilla Steward notes, “[w]ith regard to access rights, the Hague Abduction Convention at best grants the judicial authority so much discretion that it can either do something to help non-custodial parents enforce their access rights or it can do nothing at all.”²⁴

19. The convention defines rights of access and rights of custody separately. See Convention, *supra* note 1, art. 5.

20. Perez-Vera Report, *supra* note 6, at 444.

21. See Convention, *supra* note 1, arts. 5 & 21.

22. See Nigel Lowe, *Problems Relating to Access Disputes Under the Hague Convention on International Child Abduction*, 8 INT’L J.L. & FAM. 374 (1994). Where Lowe summarizes the current English position on Article 21 of the Convention:

3. Article 21 imposes no duties upon judicial authorities and unlike Article 12 creates no rights in private law which a parent can directly enforce in respect of a child. Instead

4. Article 21 imposes executive duties upon Central Authorities, inter alia, ‘to promote peaceful enjoyment of access rights’ and ‘to take steps to remove, as far as possible, all obstacles to the exercise of such rights’ and a *discretion* to ‘initiate or assist in the institution of proceedings with a view to organising or protecting these rights’ which is satisfied by making appropriate arrangements for the applicant by providing solicitors to act on his behalf.

Id. at 380. Moreover, it was stated at the Hague Conference Second Special Commission on the Civil Aspects of International Child Abduction that “whilst article 21 recognises rights of access, it has no firm legal provisions to enforce such rights.” Permanent Bureau of the Hague Convention on Private International Law, *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Jan. 18-21, 1993, reprinted in 33 I.L.M. 225, 244 (1994).

23. See *Re G (A Minor) (Enforcement of Access Abroad)*, [1993] 1 F.L.R. 669 (C.A.). See also *Re T and Others (Minors) (Hague Convention: Access)*, [1993] 2 F.L.R. 617. *Re T* establishes that an application for a S8 Children Act 1989 contact order would not attract the special automatic legal aid entitlement which applies to Hague Convention applications under the Civil Legal Aid (General) Regulations 1989 (SI 1989/339) reg. 14(9). See also *infra* note 49 and accompanying discussion.

24. Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights*

It is perhaps little wonder that, in light of the above and apparent injustices suffered by the parent whose right of access has been breached, some courts have striven to find solutions which, indeed, may be questionable, thereby straining the meaning of the term "right of custody" to include what are, in reality, rights of access.²⁵ This, in turn, has created a situation of uncertainty, opening the door to unmeritorious requests for return which could be successfully dealt with by more robust provisions on access.²⁶

Another difficult area concerns what is in name a right of custody, but is, in its actual exercise, a right of access.²⁷ For example, the Central Authority for England and Wales issued a Practice Note regarding the rights of custody for unmarried fathers.²⁸ The practice note stated that if an unmarried father in England and Wales has parental responsibility²⁹ then "he clearly has rights of custody within the meaning of the Convention."³⁰ Furthermore, the Practice Note stated that under such circumstances:

unless the child is removed for less than one month by a person having a residence order, the removal or retention of the child away from the

Under the Hague Convention on the Civil Aspects of International Child Abduction, 21 FORDHAM INT'L L.J. 308, 351 (1998).

25. Other courts, however, have clearly held that rights of access, even connected to restrictions on removal, do not amount to rights of custody. See *D.S. v. V.W.* [1996] 134 D.L.R. 4th 481 (Can.). See also Canada: Supreme Court Decision in *Thompson v. Thompson* (Hague Convention in the Civil Aspects of International Child Abduction), *supra* note 17, at 1174. This is a demonstrable example of the uneven playing field referred to in the Perez-Vera Report. See *Perez-Vera Report*, *supra* note 6.

26. See *Steward*, *supra* note 24, at 312. Priscilla Steward argues "that the aspect of the Hague Abduction Convention addressing access rights is ineffective because it has forced some courts to misconstrue provisions of the Hague Abduction Convention in order to carry out the Convention's intent." *Id.*

27. See *supra* discussion accompanying note 16.

28. See *Practice Note, The Central Authority for England and Wales Child Abduction and Custody Act 1985, Hague Convention on the Civil Aspects of International Child Abduction Applications for Return Orders by Unmarried Fathers*, October 14, 1997, [1998] 1 F.L.R. 491, [1998] 1 F.C.R. 253 [hereinafter *Abduction Practice Note*].

29. See *The Children Act of 1989* (Eng.) (last visited Oct. 20, 2000) <<http://www.doh.gov.uk/busguide/childhtm/anna.htm>>. The Act partially defines parental responsibility as "all the rights, powers, authority and duties of parents in relation to a child and his property." *Id.* at § 1.3. This, of course, begs the question as to the precise nature of all those rights, duties, powers, etc. The authors of Bromley's Family Law suggest that this includes the right to have contact with the child. See *BROMLEY'S FAMILY LAW* 350 (Nigel Lowe & Gillian Douglas eds., 1998). However, this would, of course, be subject to a contrary order of the court so that a father, who has parental responsibility for his child, may not even be entitled to have contact with that child if the court has made an order to this effect.

30. *Abduction Practice Note*, *supra* note 28. For support see *Re W (a minor) (unmarried father)*, *Re B (a minor) (unmarried father)*, [1998] 2 F.L.R. 146. Where Justice Hale stated that because S1 Child Abduction Act of 1984 (domestic criminal legislation on child abduction), in England, contains a right of veto for a parent with parental responsibility to the removal of the child from his country of habitual residence, this equates to a right of custody under the Convention (in terms of Article 5 thereof—the right to determine the child's place of residence) notwithstanding that there is no right to the care of the person of the child. See *id.*

United Kingdom without the father's consent or the leave of the court is wrongful within the meaning of [Article] 3 of the [C]onvention, because it breaches the father's rights of custody.³¹

Under this interpretation of the Convention, a father, with parental responsibilities but without a right to direct contact with his child, could secure the return of his child who has been removed out of the United Kingdom by the primary caregiver mother without the father's consent, the removal being wrongful as it breached his right of custody.³² This very broad interpretation of rights of custody must, as some commentators argue, be tempered by a full investigation into the actual exercise of those rights³³ to avoid the questionable results discussed above and envisaged in the Perez-Vera report.

This expansion of the rights of custody may be a response to a greater awareness of the right to family life enshrined within Article 8 of the European Convention on Human Rights and Fundamental Freedoms.³⁴ Rights of custody have been expanded in England to recognize the position of those who have significant day-to-day involvement in a child's life, including the unmarried fathers who lack a declared right of custody. It is indeed common that such a father may have failed to appreciate the significance of formalizing the parent-child relationship. English courts have been prepared to hold that such people are not to be denied the possibility of redress under the Hague Convention simply because they do not possess the formally recognized right of custody; indeed, rights which have not yet been formally expressed, termed "inchoate rights,"³⁵ may very well amount to rights of cus-

31. *Abduction Practice Note*, *supra* note 28. See also The Children Act of 1989, § 13, Private Law Orders (last visited Oct. 20, 2000) <<http://www.doh.gov.uk/busguide/childhtm/anna.htm>>. The removal does not breach the father's rights of custody if a person removes the child for less than one month where there is a residence order in force. See *id.* § 13(2).

32. Whether this would occur would depend on the existence of other relevant factors set out in the Convention. Even if the circumstances of this example were held to be insufficient to satisfy the test of "actually exercising" in relation to the right of custody under Article 3 of the Convention, the father with parental responsibility *and* contact, who only saw his child sporadically and had no other involvement in the child's life, would, no doubt, find it easier to fulfill the criteria. See Convention, *supra* note 1, art. 3.

33. See Anne-Marie Hutchinson, Chair Reunite: National Council for Abducted Children 3 (July 1997) (unpublished paper presented at the International Society of Family Law Conference in Durban, on file with the author).

34. See European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (1950-52), art. 8 (entered into force Sept. 3, 1953).

35. *Re B (A Minor) (Abduction)*, [1994] 2 F.L.R. 249, 261. A useful exploration of the term can be found in the *Re B* judgment by Justice Waite, who stated:

is it to be confined to what lawyers would instantly recognise as established rights—that is those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child con-

today.³⁶ This has been reflected in the judgment of Justice Hale in *Re W and Re B*³⁷ in which the court held, *inter alia*, that the removal of a child from his or her father may be wrongful under the Hague Convention if, for example, the father lacks formal parental rights, but has been the designated primary caregiver by the child's mother.³⁸ Thus, the lack of formal parental or custodial rights may not be determinative of the outcome when the Convention is applied.

It could therefore be suggested that this development is another example of the fluidity of the concept of rights of custody. And, indeed, fluidity is not always a bad thing. Some argue that it has allowed for the inclusion of those for whom, in the interests of the child, redress under the Hague Convention should be afforded. Based upon that viewpoint, one may argue that, by analogy, the broadened concept should be similarly extended to encompass rights of access. However, this argument is fundamentally flawed because the creators of the Hague Convention intended to provide the remedy of a return order only for breaches of rights of custody. Indeed, the Convention did not intend to deal with rights of access in this way.³⁹

There are inherent dangers in extending rights of custody to include rights of access⁴⁰ because it may result in children being returned from pri-

cerned?

Id. at 261.

36. *See id.* (distinguishing *Re J* (A Minor) (Abduction: Custody Rights), [1990] 2 A.C. 562). *See also* *Re O* (Child Abduction: Custody Rights) [1997] 2 F.L.R. 702. In *Re O*, grandparents were held to have rights of custody in their grandchild for whom they had assumed care when the mother had left. *See id.*

37. *See* *Re W* (a minor) (unmarried father), *Re B* (a minor) (unmarried father), [1998] 2 F.L.R. 146.

38. *See id.* This case concerned two unmarried fathers who sought declarations under Article 15 of the Hague Convention that the removal of their children from England and Wales was wrongful within the meaning of Article 3. *See* Convention, *supra* note 1. In both cases, the mothers had sole parental responsibility and took the children abroad. In *Re W*, the father was, however, on the verge of acquiring parental responsibility through the court although he was not carrying out duties and enjoying privileges of a custodial or parental character. *See W*, [1998] 2 F.L.R. 146. The court, in the opinion by Justice Hale, found that, although the father did not have rights of custody, the removal was nevertheless in breach of a right of custody that arose in the court by virtue of the pending custody proceedings. *See id.* Additionally, during the course of her judgement, Justice Hale stated:

that prima facie, removing a child who is habitually resident in this country will also be wrongful under the Hague Convention if: (a) the father has parental responsibility either by agreement or court order; or (b) there is a court order in force prohibiting it; or (c) there are relevant proceedings pending in a court in England and Wales. [Defined as] . . . proceedings for residence, parental responsibility or to prohibit the removal of the child as these are 'rights of custody' under the [C]onvention. [or] (d) the father is the primary carer for the child, at least if the mother has delegated such care to him.

Id.

39. *See* Perez-Vera report, *supra* note 6, at 444-45.

40. *See* *S. v. H.* (Abduction: Access Rights), [1997] 1 F.L.R. 971. In *S. v. H.*, a single

mary caregivers in support of rights which do not, in their actual exercise, amount to rights of custody. This becomes vital when considering a recognized and recent change in the pattern of child abduction, namely the increasing numbers of abductions perpetrated by primary caregiver mothers.⁴¹ The current pattern runs contrary to the popular consciousness of the classic “images of children snatched from school or from their homes, bundled into a car and whisked away to some distant land, usually by their fathers.”⁴² Courts, therefore, must be sure that children being returned, particularly those from primary caregiver abductors, are being returned in support of genuine rights of custody. Moreover, courts must carefully examine the nature and actual exercise of the rights involved so as to ensure that what is *actually being exercised*⁴³ is a right of custody and not, in fact, some other sort of right, like that of contact, which should be dealt with in another way.⁴⁴

Without commonality of approach to the interpretation of rights of custody, there is a high risk that parents will engage in forum shopping, an ac-

mother with sole custody brought up her child alone and was not prohibited by law from removing the child out of the country. *See id.* Justice Hale held that “[t]his case seems to me to fall on the other side of the line which must have been intended.” *Id.* It could not be said that, the mere possibility of a parent who has only rights of access succeeding in an application to prevent the mother taking the child abroad, amounts to “rights of custody.” *Id.* *But see* Gross v. Boda, [1995] 1 N.Z.L.R. 569; *see supra* text accompanying note 18. One aspect of this problem was highlighted by family law scholar John Eekelaar when he stated:

it is not clear that it will always be appropriate for the children to be returned to the care of a parent who has hitherto not been actually caring for them. If it would not be appropriate to do this, the court may want to be satisfied that the abducting parent returns with the children so as to be able to continue their day-to-day care. If that parent refuses to do this, the court may have to be satisfied that other appropriate arrangements are available for the children when returned . . . but if these cannot be made it may be necessary to refuse the order, at least for the time being, on the ground that to return the children would place them in an intolerable situation.

Eekelaar, *supra* note 16, at 315.

41. *See* Report of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (March 17-21, 1979) available at Hague Conference on Private International Law, Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (last visited Oct. 30, 2000) <<http://www.hcch.net/e/conventions/reports28e.html>>.

42. Nigel Lowe & Alison Perry, *International Child Abduction—The English Experience*, 48 INT’L & COMP. L.Q. 127, 132 (1999).

43. It is quite possible, of course, for a parent to be given what amounts to a right of custody under the Convention by the law of the State of the child’s habitual residence, but for that parent to be actually exercising something more akin to a right of contact. *See* The Children Act of 1989, § 3 (Eng.) (last visited Oct. 20, 2000) <<http://www.doh.gov.uk/busguide/childhtm/anna.htm>>. *See also* Convention, *supra* note 1, art. 3 and the relevant discussion at note 32.

44. *See* S. v. H. (Abduction: Access Rights), [1997] 1 F.L.R. 971. That decision emphasizes the clear distinction between rights of custody, which may be enforced through an order for return under the Convention, and rights of access, which are protected only by requiring the Central Authority to facilitate their exercise. *See also* Convention, *supra* note 1, art. 21.

tivity that the Convention aimed to eradicate.⁴⁵ Canadian case law clearly exemplifies one approach to the issue, which can be seen in the judgments of *Thomson* and *D.S. v. V.W.*⁴⁶ Concurrently, opponents of this view vociferously argue their corner.⁴⁷ The danger in treating a right of access as a right of custody is that the child may be returned from the primary custodial caregiver in support of a mere right of access. Very often, children will be involved in upheaval, disturbance, emotional insecurity and anxiety⁴⁸ in order to determine access arrangements which could be better dealt with another way.⁴⁹ It is not being suggested that it is proper to remove children without

45. Research conducted for the American Bar Association Center on Children and the Law recently carried out a research study of issues in resolving cases of international child abduction. The draft summary refers to the broad ranges in outcomes across Hague Convention countries as reflecting a problematic lack of uniformity which, according to the report, has the potential of eroding the spirit of reciprocity upon which the treaty is based and which raises serious concerns about the Hague Convention's efficacy as a multinational treaty. (On file with Author).

46. See *supra* text accompanying note 17.

47. See Bailey, *supra* note 16.

48. See Eekelaar, *supra* note 16, at 313. Eekelaar notes that the child might be placed in an intolerable situation by being returned to the State of habitual residence where there is a strong chance that the court would simply send the child back again. Case law in New Zealand has followed this line of reasoning. See *Ali v. Ali*, FP 048/1083/90 (Otago District Court, Apr. 2, 1998) (N.Z.). In *Ali v. Ali*, the judge viewed the outcome of the Australian proceedings which the mother would immediately institute on return as inevitable so that return might therefore be an empty gesture. See *id.*

49. By properly providing for the making of new access arrangements and for the enforcement of those already in existence. Rights of access must be properly, instead of nominally, protected under the Convention. There is some assistance on the horizon offered by Article 35 of the Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children. See The Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children, Oct 19, 1996, art. 35, available at Hague Conference on Private International Law, Convention #34 (last visited Oct. 30, 2000) <<http://www.hcch.net/e/conventions/menu34e.html>>. Although this is not, as yet, in force, there is optimism that it soon may be. Under Article 35 of the Convention, a non-custodial parent, wishing to establish access to a child who is habitually resident in another contracting State, may apply to the authorities of his own contracting State for a determination on his suitability to exercise access. See *id.* The information, evidence and finding of the State of habitual residence of the parent must be considered by the Contracting State exercising jurisdiction before it reaches its decision. See *id.* The Explanatory Report by Paul Legarde states "this co-operation . . . serves in a certain way to complete and reinforce the co-operation, which is not always effective, provided . . . by Article 21 of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*" *Id.* Although it is acknowledged that

[a]rticle 35 does not confer a right upon the authorities of the non-custodial parent's State of habitual residence to make a decision as to access rights. It is hoped that the existence of [Article] 35 will provide a coherent mechanism for parents whose children live in another State to apply for and secure appropriate rights of access.

Anne-Marie Hutchinson & Margaret Bennett, *The Hague Child Protection Convention*, 28 FAM. L. 35, 38 (1998). However, this still would not bring the application within the usually

the agreement of those with custody or by order of the court, but we do not live in a perfect world. People's lives follow diverse and varied paths, and removal in some circumstances may be more understandable than in others.⁵⁰ Courts need to look carefully at the nature of the right actually being exercised by a parent requesting a return order to determine that this is not merely a nominal right of custody, and does, in fact, amount to a right of custody under the Convention. If it does,⁵¹ then the child, subject to the other provisions of the Convention, should be returned. If it does not, courts should be slow to use the powers of interpretation granted under the Convention to frustrate its original intentions and aims.

more favorable regime of the Convention so that an amendment to the Hague Convention may be required to deal effectively with this problem.

50. See *Ryding v. Turvey*, [1998] N.Z.F.L.R. 313. In *Ryding*, Judge Inglis recognized such distinctions when he stated:

[I]n any event, in a case where the abduction has provided the child with a haven from emotional and psychological abuse or an intolerable situation, removal of the child from that haven and returning the child to home base, however protected, may be to provide a cure that is worse than the original disease.

Id.

51. And this may be through judicial decision, operation of law, agreement, or through inchoate rights of custody being exercised.

