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# Croll v. Croll: Can Rights of Access ever Merit a Remedy of Return under the Hague Abduction Convention

## **Cover Page Footnote**

International Law; Commercial Law; Law

# ***Croll v. Croll: Can Rights of Access Ever Merit A Remedy of Return Under the Hague Abduction Convention?***

## **I. Introduction**

In this age of globalization, the problem of international child abduction approaches a critical stage. International custody and access<sup>1</sup> cases are expected to become more common as world travel increases and the divorce rate rises in the decades to come.<sup>2</sup> According to United States Department of State reports, there are “about 1,000 open cases of international child abduction at any given time.”<sup>3</sup> These abductions “are often complicated by the fact that many abducted children are from multi-cultural relationships.”<sup>4</sup>

As an attempt to answer this problem, the Hague Convention on the Civil Aspects of International Child Abduction<sup>5</sup> (the Convention) creates a forum among signatories to decide “in which country custody determinations should be made.”<sup>6</sup> In the

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<sup>1</sup> Article 5 of the Hague Convention defines parental access as “includ[ing] the right to take a child for a limited period of time to a place other than the child’s habitual residence.” Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986), *available at* <http://www.travel.state.gov/hague-childabduction.html>. [hereinafter Hague Convention].

<sup>2</sup> Sue Fleming, *British Envoy’s Wife Campaigns For Abducted Kids*, REUTERS ENGLISH NEWS SERVICE, Oct. 4, 2000.

<sup>3</sup> Naedine Joy Hazell, *New Anti-Abduction Rules on Foreign Travel with Kids*, THE PLAIN DEALER, Aug. 27, 2000 (quoting Nancy Hammer, director of the international division of the National Center for Missing and Exploited Children). Ms. Hammer did not note whether the 1,000 open cases involve only United States children or children from other countries. *Id.*

<sup>4</sup> Concerning Implementation of the Hague Convention on the Civil Aspects of International Child Abduction: Prepared Statement Before the House Committee on International Relations (1999) (statement of Mary A. Ryan, Assistant Sec’y for Consular Affairs, U.S. Dep’t of State), *available at* <http://www.travel.state.gov/101499mar.html> [hereinafter Statement of Mary A. Ryan].

<sup>5</sup> Hague Convention, *supra* note 1, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. at 98.

<sup>6</sup> Statement of Mary A. Ryan, *supra* note 4.

first ten years that the United States has been a signatory,<sup>7</sup> over 2,000 children have been returned to the United States as a result of Hague Convention proceedings.<sup>8</sup> Nine countries were parties to the Hague Convention when the United States joined in 1988 and, as of August 1, 2000, that number has increased to over sixty.<sup>9</sup>

The Hague Convention proceedings, however, have not resulted in success for every left-behind parent.<sup>10</sup> Some impediments to the Convention's effectiveness include: varied implementation among foreign jurisdictions—including non-compliance among signatory countries;<sup>11</sup> difficulty locating children; slow processing of return cases;<sup>12</sup> non-enforcement of return orders in civil law countries; judicial consideration of young

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<sup>7</sup> The United States signed the Hague Abduction Convention on December 23, 1981. See Letter of Submittal from George P. Schultz, Secretary of State, to President Ronald Reagan (Oct. 4, 1985), *reprinted in* 51 Fed. Reg. 10,494, 10,496 (Mar. 26, 1986) [hereinafter Letter of Submittal].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* The following countries were signatories to the Convention as of August 1, 2000: Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Chile, China (Hong Kong and Macau Administrative Regions only), Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Fiji, Finland, Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Malta, Mauritius, Mexico, Moldova, Monaco, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Portugal, Romania, Saint Kitts and Nevis, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, Turkmenistan, United Kingdom, United States, Uruguay, Uzbekistan, Venezuela, and Zimbabwe. Hague Conference on Private International Law: Status Sheet Convention #28, available at <http://www.hcch.net/e/status/abdshte.html> (last modified Nov. 7, 2000).

<sup>10</sup> See Statement of Mary A. Ryan, *supra* note 4. "Left behind parent" refers to the parent who is seeking the return of an abducted child.

<sup>11</sup> *Id.* Currently, Austria, Honduras, Mauritius, Mexico and Sweden "have demonstrated a pattern of noncompliance" with Hague Convention application obligations for the return of American children. *Id.* Reasons for noncompliance vary. For example, the Honduran government claims that it "is not bound by the Convention due to an error in its domestic ratification process" and, therefore, "take[s] no action on applications filed by left-behind parents for the return of children in Honduras." *Id.* However, "Austria was found noncompliant due to an apparent lack of understanding in the Austrian judiciary about the aims of the Convention." *Id.*

<sup>12</sup> *Id.* The courts of some countries do not process cases in a timely manner despite Article 11's call for an "expeditious processing of return cases." *Id.* Article 11 "specifies that courts may be asked the reason for delay if they have not decided a Hague case within six weeks." *Id.* (citing Hague Convention, *supra* note 1, art. 11, T.I.A.S. No. 11,670, at 6-7, 1343 U.N.T.S. at 100).

children's consent; and extensive undertakings required of the left-behind parent.<sup>13</sup> Despite its imperfections, one way to measure the value of the Hague Convention to the United States is the approximately "72 percent of cases [that] result in [the] return [of] or access" to children to the United States today, as opposed to the "approximately 20 percent" of abducted children returned before the United States became a Convention signatory.<sup>14</sup>

In deciding whether the abducted child should be returned to the non-abducting parent, courts in signatory nations must determine which parent exercised rights of custody as defined by the Hague Convention. Under the Convention, only a parent with rights of custody can petition for return of their child.<sup>15</sup> In *Croll v. Croll*,<sup>16</sup> the Second Circuit ruled that a parent holding "rights of access" to the child combined with a non-removal clause<sup>17</sup> in the custody order does not hold rights of custody under the Hague Convention.<sup>18</sup> By their ruling, the court significantly narrowed the definition of custody rights and, consequently, who can exercise them.<sup>19</sup>

This Note reviews the facts and holding of *Croll v. Croll* in Part II.<sup>20</sup> The historical evolution of the two major viewpoints on rights of custody and rights of access is examined in Part III,<sup>21</sup> while the Second Circuit's majority and dissenting opinions are analyzed in Part IV.<sup>22</sup> Finally, this Note concludes that the Second Circuit's decision is inconsistent with the object and purpose of the Hague Convention as well as the relevant U.S. and foreign case law.<sup>23</sup>

<sup>13</sup> Statement of Mary A. Ryan, *supra* note 4.

<sup>14</sup> *Id.*

<sup>15</sup> *Croll v. Croll*, 229 F.3d 133, 135 (2d Cir. 2000) [hereinafter *Croll II*].

<sup>16</sup> *Id.* at 137.

<sup>17</sup> A non-removal clause in a custody order specifies that the custodial parent may not remove the child from the country of habitual habitation without the other parent's permission (also called a *ne exeat* clause by the *Croll* court). *Id.* at 135 n.1.

<sup>18</sup> *Id.* at 137.

<sup>19</sup> *Id.* at 143.

<sup>20</sup> See *infra* notes 24-71 and accompanying text.

<sup>21</sup> See *infra* notes 72-141 and accompanying text.

<sup>22</sup> See *infra* notes 142-200 and accompanying text.

<sup>23</sup> See *infra* text accompanying notes 142-201.

## II. Statement of the Case

### A. Facts

Stephen and Mei Yee Croll, both United States citizens, were married in Hong Kong in 1982.<sup>24</sup> Their daughter Christina was born in 1990.<sup>25</sup> She lived with both her parents until their separation in 1998.<sup>26</sup> After the separation, Christina lived in Hong Kong with her mother, while her father, who lived in Hong Kong as well, visited her regularly.<sup>27</sup> Divorce proceedings were initiated by Mr. Croll in 1998 in the District Court of the Hong Kong Special Administrative Region, Matrimonial Causes.<sup>28</sup> Ms. Croll did not take part in the divorce proceedings.<sup>29</sup> In the February 1999 custody order,<sup>30</sup> the Hong Kong Court granted Ms. Croll "custody, care and control" and Mr. Croll "reasonable access."<sup>31</sup> The custody order was "to become final in six weeks unless cause was shown otherwise."<sup>32</sup>

In April of 1999, Ms. Croll took Christina to New York. During an evidentiary hearing in District Court, she initially

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<sup>24</sup> Croll v. Croll, 66 F. Supp. 2d 554, 556 (S.D.N.Y. 1999) [hereinafter *Croll I*].

<sup>25</sup> *Croll II*, 229 F.3d at 135.

<sup>26</sup> *Croll I*, 66 F. Supp. 2d at 556.

<sup>27</sup> *Id.* The meaning of "regularly" was disputed between the parties. Mr. Croll claimed to have visited Christina two to three times weekly "and accompan[ie]d her to after-school activities," while Ms. Croll claimed that he "saw Christina approximately two times each month." *Id.*

<sup>28</sup> *Croll II*, 229 F.3d at 135.

<sup>29</sup> *Id.* The Crolls disputed "whether Ms. Croll . . . received legally sufficient notice of their pendency." *Croll I*, 66 F. Supp. 2d at 557.

<sup>30</sup> *Id.* The order directed that Christina

[B]e not removed from Hong Kong without leave until she attains the age of 18 years but provided that if either parent to [sic] give a general undertaking to the Court to return the said child to Hong Kong when called upon to do so, and unless otherwise directed with the written consent of the other parent, that parent may remove the said child from Hong Kong for any period specified in such written consent.

*Id.*

<sup>31</sup> *Id.* (quoting Croll v. Chiu, No. 7211 of 1998, Order at 2 (Dist. Ct. H.K. Spec. Admin. Reg., Feb. 23, 1999)).

<sup>32</sup> *Id.*

claimed the removal was with Mr. Croll's consent,<sup>33</sup> but later admitted that she intended to make New York Christina's place of residence.<sup>34</sup> Mr. Croll testified that after he returned to Hong Kong from a business trip on April 7, 1999, he discovered that Christina was not at her school or at the apartment she shared with her mother.<sup>35</sup> He filed a missing person report with the Hong Kong police.<sup>36</sup> Soon thereafter, he retained counsel in the United States and filed an application pursuant to the Hague Convention.<sup>37</sup> Upon her arrival in America, Ms. Croll filed for custody, child support, and an order of protection in the Family Court of New York County on April 8, 1999.<sup>38</sup>

*B. United States District Court for the Southern District of New York*

In June of 1999, Mr. Croll applied to the United States District Court for the Southern District of New York for Christina's return to her habitual residence of Hong Kong pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.<sup>39</sup> Ms. Croll moved to dismiss the petition on the grounds that the district court lacked subject matter jurisdiction and that the petition failed to state a claim under which relief could be granted.<sup>40</sup> Judge Sidney Stein found these grounds to be too insubstantial to dismiss the petition and ordered Christina's return to Hong Kong.<sup>41</sup>

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<sup>33</sup> *Id.* Ms. Croll testified at the evidentiary hearing for the district court trial "that Mr. Croll had previously consented to her relocating to the United States with Christina." *Id.* Mr. Croll conceded "that he and his ex-wife did discuss this possibility before they separated, but denied giving actual consent." *Id.*

<sup>34</sup> *Croll II*, 229 F.3d at 135. According to a non-removal clause in the order, either parent could request that the Hong Kong immigration department refuse to issue Christina a passport without the other parent's consent. *Croll I*, 66 F. Supp. 2d at 557.

<sup>35</sup> *Croll I*, 66 F. Supp. 2d at 557.

<sup>36</sup> *Croll II*, 229 F.3d at 135.

<sup>37</sup> *Croll I*, 66 F. Supp. 2d at 557.

<sup>38</sup> *Id.* at 558.

<sup>39</sup> *Id.*

<sup>40</sup> *Croll II*, 229 F.3d at 135.

<sup>41</sup> *Croll I*, 66 F. Supp. 2d at 556. According to the court, its duty under the Hague Convention was to determine whether the child was wrongfully removed from "her habitual residence within the meaning of the Convention and . . . to order . . . [her return]

Mr. Croll, as the petitioner, had the burden of proving by a preponderance of the evidence that Christina was “wrongfully removed or retained” within the meaning of Article 3 of the Hague Convention.<sup>42</sup> Judge Stein found that Mr. Croll met this burden.<sup>43</sup> Ms. Croll’s defenses to the repatriation order were: (1) non-exercise of right of custody at time of removal,<sup>44</sup> (2) consent,<sup>45</sup> and

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to Hong Kong unless certain narrowly-defined exceptions were present.” *Blondin v. Dubois*, 189 F.3d 240, 245-46 (2d Cir. 1999). The first two exceptions “may be established only by ‘clear and convincing evidence’” while the last two “need only be established by a preponderance of the evidence.” *See infra* notes 87-91 and accompanying text.

<sup>42</sup> Hague Convention, *supra* note 1, art. 3, T.I.A.S. No. 11,670, at 4-5, 1343 U.N.T.S. at 98-99. Article 3 reads:

A removal or retention is “wrongful” if “(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.

<sup>43</sup> *Croll II*, 229 F.3d at 136. First, Christina’s habitual residency was not disputed because she had lived in Hong Kong since her birth. Second, under the Hague Convention a court determines “whether a parent was exercising lawful custody rights over a child at the time of removal” by looking to “the law of the child’s habitual residence.” *Croll I*, 66 F. Supp. 2d at 559. Judge Stein found that the right to determine residency is “tantamount to a ‘right of custody’ within the meaning of the Convention.” *Id.* Precedent for his decision rested in the holdings of several courts that non-removal clauses “vest[] the non-custodial parent with a ‘right of custody’ within the meaning of the Convention.” *Id.*

<sup>44</sup> *Croll I*, 66 F. Supp. 2d at 560. First, Ms. Croll claimed Mr. Croll was not exercising his custody rights at the time she removed the child from Hong Kong because his visits were so infrequent as to be characterized as abandonment. *Id.* The court said that regardless of how often he was said to visit, he did visit and so “was exercising his right of custody at the time that Christina was removed from Hong Kong.” *Id.*; *see also* *Sampson v. Sampson*, 975 P.2d 1211, 1217 (Kan. 1999) (finding that “[t]he only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find ‘exercise’ [of custody rights] whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child”).

<sup>45</sup> *Croll I*, 66 F. Supp. 2d at 560. Ms. Croll argued two factors as the basis of a consent claim. *Id.* Mr. Croll impliedly gave his consent to Christina’s removal by not exercising his “right under the Hong Kong interim order to request that the immigration department not issue Christina a passport without his consent.” *Id.* Judge Stein did not find that Mr. Croll gave his implied consent by not contacting the immigration department because Mr. Croll did not believe, at that time, that Ms. Croll would take Christina out of the country permanently. *Id.* Ms. Croll also argued that, prior to



(3) grave risk of harm exception.<sup>46</sup> Judge Stein concluded, however, that Christina should be returned to Hong Kong pursuant to the Hague Convention because her removal was wrongful and none of the exceptions applied.<sup>47</sup>

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separating, the parties had discussed the beneficial effect that relocating would have on Christina. *Id.* at 561. The court did not find that these “casual discussions” constituted consent on Mr. Croll’s part to her removal. *Id.* This is especially true in light of the fact that he filed his petition for Christina’s return under the Hague Convention a few weeks after she left Hong Kong. *Id.*

<sup>46</sup> *Id.* at 560. According to the court, all exceptions should be narrowly construed so as not “to frustrate the objectives of the Convention.” *Id.* A systematic invocation of the exceptions by substituting the forum of the child’s habitual residence for that chosen by the abductor “would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.” Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 426, 434-35, ¶ 34 (1980) [hereinafter Perez-Vera Report]. Ms. Croll invoked the grave risk exception in Article 13(b) of the Convention as a defense. *Croll I*, F. Supp. 2d at 561 (providing that if “there is a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation,” that the “child need not be returned to the country where the child is habitually resident”) See *infra* note 89 and accompanying text. The court found that the 13(b) exception did not apply for two reasons. First, Hong Kong is not a “zone of war, famine or disease.” *Croll I*, F. Supp. 2d at 561.

[T]he Article 13(b) exception applies only when “return of the child puts the child in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease [or when there has been] serious abuse or neglect, or extraordinary emotional dependence [and] the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”

*Id.* (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986)). Second, incidents of Mr. Croll’s alleged rough treatment of Ms. Croll not only were not witnessed by Christina, but did not put her in danger nor were they reported to the police. *Id.* Ms. Croll, therefore, did not meet the clear and convincing evidence burden necessary to prove this exception. *Id.* at 562. The court added that Ms. Croll offered “no evidence to demonstrate that the Hong Kong courts would be incapable or unwilling to protect Christina adequately should she be in danger of being placed in a situation where she was at risk.” *Id.*

<sup>47</sup> *Id.* at 562. Because the parties were unable to agree to a certain undertaking as requested by the court, the court conditioned “Christina’s return to Hong Kong” on the following undertakings:

(1) Mr. Croll shall pay the US \$1,000 support for Christina each month pursuant to the ex parte order of the Hong Kong court dated May 3, 1999; (2) Mr. Croll shall pay for airline tickets to Hong Kong for Mei Yee Croll and for Christina; and (3) Mr. Croll shall pay tuition and fees for the current academic year for the school that Christina attended during the 1998-1999 academic year.

### C. Second Circuit Court of Appeals

The district court's order of return was stayed pending Ms. Croll's expedited appeal to the United States District Court of Appeals for the Second Circuit.<sup>48</sup>

#### 1. Majority Opinion

In Judge Jacobs' majority opinion, the outcome of the case hinged on the precise distinction between rights of custody and rights of access under the Hague Convention.<sup>49</sup> The question specifically before the court was "whether rights of access coupled with a *ne exeat*<sup>50</sup> clause confer 'custodial rights' on a non-custodial parent within the meaning of the Hague Convention."<sup>51</sup> The court held that such a clause "does not transmute access rights into rights of custody."<sup>52</sup> In analyzing the Hague Convention, the court explained that a treaty should be construed like a statute by "first look[ing] to its terms to determine its meaning."<sup>53</sup>

The court then looked to exact wording of the Convention to determine the meaning of custody—ultimately concluding that the

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*Id.*

<sup>48</sup> *Croll II*, 229 F.3d at 136. The court heard oral arguments on February 22, 2000.

<sup>49</sup> *Id.* If Mr. Croll had rights of custody, then "courts in the United States have jurisdiction to order . . . [the child's] return to Hong Kong . . . and the duty to do so." *Id.* If he had "the lesser rights of access, [however,] jurisdiction is lacking and Mr. Croll must rely on other remedies." *Id.*

<sup>50</sup> A *ne exeat* clause is defined as "[a] writ which forbids the person to whom it is addressed to leave the country, the state, or the jurisdiction of the court." BLACK'S LAW DICTIONARY 1031 (6th ed. 1990); see also *supra* note 17.

<sup>51</sup> *Croll II*, 229 F.3d at 136.

<sup>52</sup> *Id.* at 143.

<sup>53</sup> *Id.* at 136 (quoting *U.S. v. Alvarez-Machain*, 504 U.S. 655, 633 (1992)). Thus, Judge Jacobs first looked to the Hague Convention's purpose "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." *Id.* at 137 (quoting Hague Convention, *supra* note 1, Preamble). He agreed that the Hague Convention set forth as a guiding principle that the child's country of "habitual residence" is the "best place to decide 'questions of custody and access.'" *Id.* at 137 (quoting Perez-Vera Report, *supra* note 45, ¶ 34). However, Judge Jacobs noted that a remedy of return is available "only for wrongful removals or retentions" and a removal or retention of a child is only wrongful when exercised against the parent with rights of custody. *Id.* at 137. Therefore, under the Convention, the determination of where rights of custody lie would answer whether a remedy of return is allowed. *Id.*

language did not include rights of access within that meaning.<sup>54</sup> Mr. Croll argued that the Hague Convention's definition of custody contemplated those parents with rights of access.<sup>55</sup> The court, however, found Mr. Croll's argument unpersuasive.<sup>56</sup> Judge Jacobs reasoned that the power to determine a child's place of residence is distinguishable from a *ne exeat* clause because it is part of "an example of the powers, choices and arrangements entailed by the care of the child" that is part of the Hague Convention's definition of custody.<sup>57</sup> Another concern of the court in enforcing *ne exeat* clauses by a mandatory return of the child was the result of a child returning alone "to a parent whose sole right—to visit or veto—impose[d] no duty to give care."<sup>58</sup>

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<sup>54</sup> *Id.* at 138. The court used several American dictionaries to create an amalgamated definition that custody entails "the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things." *Id.* The court stated that this was the definition of custody intended by the Convention drafters. *Id.* at 139. Article 5 defines "rights of custody" generally as "rights relating to the care of the person of the child." Hague Convention, *supra* note 1, art. 5, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99.

<sup>55</sup> *Croll II*, 229 F.3d at 139. The Hague Convention's definition of custody includes "in particular, the right to determine a child's place of residence," which pertains to the right to veto a child's removal from his habitual residence that a parent is granted in a *ne exeat* clause of a custody order. *Id.* (quoting Hague Convention, *supra* note 1, art. 5, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99). Judge Jacobs reasoned that a right of custody protected by the Convention and meriting a return remedy is created in a non-custodial parent by the *ne exeat* clause, and thus gives that parent a "right to determine the child's place of residence." *Id.* at 139.

<sup>56</sup> *Id.* First, the court interpreted the *ne exeat* clause to convey only a veto power over Christina's expatriation, but not a "say over any other custodial issue, including Christina's 'place of residence' within Hong Kong." *Id.* Thus, no "joint right to determine the child's residence [is conferred] particularly since an earlier clause in the custody order awards 'custody care and control' solely to the mother." *Id.* Second, the court reasoned that Mr. Croll cannot be said to have complied with Article 3(b) because "[t]he right conferred by the *ne exeat* clause is not one that Mr. Croll 'actually exercised.'" *Id.* at 140. It is circular reasoning, according to the court, to claim that he would have exercised the right if Christina had not been removed "because the right itself concerns nothing but removal itself, and would never have been exercised had Mrs. Croll been content to stay in Hong Kong during Christina's minority." *Id.*

<sup>57</sup> *Id.* at 140. This is to be distinguished from a "*ne exeat* clause [which] confers only a veto, a power in reserve, that gives the non-custodial parent no say (except by leverage) about any child-rearing issue other than the child's geographical location in the broadest sense." *Id.*

<sup>58</sup> *Id.* This would violate the "foundational assumption in the Convention . . . that

The court found additional support for its interpretation of "rights of custody" in the writings of the Hague Conference Commission chair,<sup>59</sup> two accounts by the official reporter of the Hague Conference,<sup>60</sup> and the report of Secretary of State George P. Schultz upon his submission of the Convention to President Reagan.<sup>61</sup>

Mr. Croll argued that there was "a distinction between: (i) a bare right of access, recognized as such; and (ii) the same bare right of access enforced by a *ne exeat* clause."<sup>62</sup> The court

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the remedy of return will deliver the child to a custodial parent who (by definition) will receive and care for the child." *Id.* The court therefore says it "cannot plausibly read the Convention to compel the removal of a child from a parent who exercises all rights of care to a country in which no one has that affirmative power or duty." *Id.* The court found that Mr. Croll could not sustain his "burden of showing that the Hong Kong custody decree affirmatively granted him shared or partial custody in some normal sense of the word." *Id.* at 141.

<sup>59</sup> *Id.*

[T]he sole power to bar exit does not amount to the custodial bundle of rights because "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 rights 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."

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

[T]he Convention provides separate remedies to secure access rights versus custodial rights, and limits the return remedy to the breach of custody: "A questionable result would [be] 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 holders of one type of right by those who held the other."

*Croll II*, 229 F.3d at 142 (quoting the Perez-Vera Report, *supra* note 46, ¶ 65).

<sup>60</sup> *Croll II*, 229 F.3d at 142.

[A]lthough the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised . . . the majority view was that such situations could not be put in the same category as the wrongful removals which [the Hague Convention] is sought to prevent.

Perez-Vera Report, *supra* note 46, ¶ 65.

<sup>61</sup> *Croll II*, 229 F.3d at 142 (reporting that "'the remedies for breach of the 'access rights' of the noncustodial parent do not include the return remedy.' . . . The Secretary's view of the matter is entitled to 'great weight.'").

<sup>62</sup> *Id.* He reasoned that when access rights are coupled with an enforcing *ne exeat* clause, a return remedy "is needed to achieve the Convention's goal of preventing parents from unilaterally circumventing the home country's courts in search of a more

disagreed because it believed that *ne exeat* clauses “protect[] parental rights of access or custody alike; [they do] not transmute one right into the other.”<sup>63</sup>

## 2. Dissent

Judge Sotomayer felt the issue was “whether the *ne exeat* clause—wholly independent of Mr. Croll’s access rights—confers ‘rights of custody’ under the Convention.”<sup>64</sup> He believed the majority’s mischaracterization of the issue as a *ne exeat* clause “transmut[ing] access rights into custody rights under the Convention”<sup>65</sup> seriously undermined “the Convention’s goal of ‘ensuring that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States.’”<sup>66</sup> The dissent concluded that Christina’s removal was “in breach of rights of custody” that were actually exercised when Christina was removed from Hong Kong.<sup>67</sup>

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sympathetic forum” and thus “frustrating the *ne exeat* clause altogether.” *Id.*

<sup>63</sup> *Id.* The result would be an “overlooking [of] the stated intentions of the drafters” and “amending judicially the Convention’s explicit textual distinction between rights of custody and rights of access.” *Id.*; see also *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) (“[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on part an usurpation of power, and not an exercise of judicial function.” (quoting *The Amiable Isabella*, 5 L. Ed. 191 (1821))). Courts must construe, not make, treaties. *Id.*

<sup>64</sup> *Croll II*, 229 F.3d at 144 (Sotomayer, J., dissenting).

<sup>65</sup> *Id.* at 145 (Sotomayer, J., dissenting) (quoting *Croll II*, 229 F.3d at 143).

<sup>66</sup> *Id.* at 144 (Sotomayer, J., dissenting) (quoting Hague Convention, *supra* note 1, art. 1, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. at 98). Judge Sotomayer saw a requirement to look “beyond parochial definitions to the broader meaning of an international treaty.” *Id.* at 145. Assessing the ordinary meaning of treaty terms must be done “in their context and in the light of [the Hague Convention’s] object and purpose.” *Id.* (Sotomayer, J., dissenting) (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340 (stating general rule on the interpretation of treaties)). He found that “the Convention plainly favors ‘a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.’” *Id.* at 146 (Sotomayer, J., dissenting) (quoting Perez-Vera Report, *supra* note 46, ¶ 67). This purpose was effectuated by an inclusive rather than exclusive intent in the Hague Convention drafting. *Id.* (Sotomayer, J., dissenting). An inclusive intent can be read in the Hague Convention report itself that “the intention [of the Hague Convention] is to protect all the ways in which custody of children can be exercised.” *Id.* (Sotomayer, J., dissenting) (quoting Perez-Vera Report, *supra* note 45, ¶ 79).

<sup>67</sup> *Id.* at 144 (Sotomayer, J., dissenting). In addition, Article 3 “provides that ‘rights of custody’ may arise from a variety of sources, including by ‘operation of law or by

Specifically, Judge Sotomayer determined that the *ne exeat* clause vested “both Mr. Croll and the Hong Kong court with ‘rights of custody’” under the Hague Convention because it “provides a parent with decisionmaking authority regarding a child’s international relocation”<sup>68</sup> by its inclusion of “the right to determine the child’s place of residence.”<sup>69</sup> Judge Sotomayer also cited foreign case law to support his notion that “‘rights of custody’ [should be interpreted] broadly in light of the Convention’s purpose and structure.”<sup>70</sup> Thus, the dissent found that “Article 3(b) . . . pose[d] no barrier to finding that Christina’s removal was wrongful under the Convention.”<sup>71</sup>

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reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law” of the child’s country of habitual residence. *Id.* at 146 (Sotomayer, J., dissenting) (quoting Hague Convention, *supra* note 1, art. 3, T.I.A.S. No. 11,670, at 4-5, 1343 U.N.T.S. at 98-99). The drafters of the Hague Convention did “not generally define [the treaty’s] legal term” but they included Article 5 because of “the risk that ‘an incorrect interpretation of [custody and access rights] would . . . compromise the Convention’s objects.’” *Id.* (Sotomayer, J., dissenting) (quoting Perez-Vera Report, *supra* note 46, ¶ 83). Article 5 “offers further guidance on the meaning of the term ‘rights of custody.’” *Id.* (Sotomayer, J., dissenting) (citing Perez-Vera Report, *supra* note 46, ¶ 83).

<sup>68</sup> *Id.* at 146 (Sotomayer, J., dissenting).

<sup>69</sup> *Id.* (Sotomayer, J., dissenting) (quoting Hague Convention, *supra* note 1, art. 5, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99). Given the Hague Convention’s broad purpose, the concept of “wrongful removal” in Article 3 “clearly must encompass violations of *ne exeat* rights” because when a custodial parent removes a child from the country of habitual residence in violation of *ne exeat* rights, “she nullifies that country’s custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child.” *Id.* at 147 (Sotomayer, J., dissenting). When the Hague Convention is read “so narrowly as to exclude the return remedy” after a removing parent “seeks a custody order in the new country . . . to legitimize” the removal of the child, then “such a situation would allow . . . parents to undermine the very purpose of the Convention.” *Id.* (Sotomayer, J., dissenting).

<sup>70</sup> *Id.* at 150. (Sotomayer, J., dissenting). He believed that Mr. Croll would have actually exercised his right of authority in the *ne exeat* clause “to withhold or grant consent to removing Christina from Hong Kong” if not “for Christina’s unlawful removal.” *Id.* at 153 (Sotomayer, J., dissenting).

<sup>71</sup> *Id.* (Sotomayer, J., dissenting).

### III. Background Law

#### A. *Hague Convention on the Civil Aspects of International Child Abduction*

Adopted by signatory nations in 1980, the Hague Convention on the Civil Aspects of International Child Abduction has attempted to provide a solution to the growing problem of international custody battles.<sup>72</sup> The Hague Convention's purpose is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."<sup>73</sup> The Hague Convention was signed by the United States on December 23, 1981,<sup>74</sup> ratified on October 9, 1986,<sup>75</sup> and implemented in the United States by the International Child Abduction Remedies Act.<sup>76</sup>

Only children who are habitual residents of signatory nations and under 16 years of age before their abduction are covered under the Hague Convention.<sup>77</sup> Signatory nations must designate a central authority "to discharge the duties which are imposed by the Convention."<sup>78</sup> Applications for the return of children are directed to these central authorities.<sup>79</sup> In the United States, the central authority is the Office of Children's Issues in the Bureau of

<sup>72</sup> Hague Convention, *supra* note 1, Preamble, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. at 98.

<sup>73</sup> *Id.* These purposes are achieved "by returning the child to the parent or custodian with whom the child was residing prior to the abduction, regardless of the existence of a custody or visitation decree obtained by the abducting parent." Stephanie Vullo, *The Hague Convention on the Civil Aspects of International child Abduction: Commencing a Proceeding in New York for the Return of a Child Abducted from a Foreign Nation*, 14 *TOURO L. REV.* 199, 201 (1997).

<sup>74</sup> Letter of Submittal, *supra* note 7.

<sup>75</sup> INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS 14 (Gloria F. DeHart ed., 2d ed. 1993).

<sup>76</sup> 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)) [hereinafter ICARA].

<sup>77</sup> Hague Convention, *supra* note 1, art. 4, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99.

<sup>78</sup> *Id.* art. 6, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99.

<sup>79</sup> *Id.* art. 8, T.I.A.S. No. 11,670, at 6-7, 1343 U.N.T.S. at 100.

Consular Affairs in the Department of State.<sup>80</sup> After a petition is filed with a central authority, the agency will help locate the abducted child and then forward the petition to the nation from which the child was abducted.<sup>81</sup>

Courts hearing Hague Convention cases conduct a narrow inquiry into the wrongfulness of the abduction and apply a two-part test to the claims.<sup>82</sup> The first part requires that the removal be "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."<sup>83</sup> The second part requires that "those rights [of custody] . . . [must have been] actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention" at the time the abduction occurred.<sup>84</sup> The burden of proving that custody rights were not actually exercised at the time of the removal or retention, or that the applicant had consented to or acquiesced in the removal or retention, rests on the person opposing the return.<sup>85</sup> Hague Convention drafters point out "that proof that custody was not actually exercised does not form an exception to the duty to return if the dispossessed guardian was unable to exercise his rights precisely because of the action of the abductor."<sup>86</sup>

If one of the following four exceptions can be proved, however, the child's return is not mandatory even if the removal was wrongful.<sup>87</sup> First, if "the person, institution or other body [who

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<sup>80</sup> Exec. Order No. 12,648, 3 C.F.R. 579 (1988), *reprinted in* 42 U.S.C. § 11606 (1988). The State Department's role is limited to providing assistance in locating the child; it cannot act "as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention" and "is not responsible for the costs of any legal representation or legal proceedings nor for any transportation expenses of the child or applicant." International Child Abduction, 22 C.F.R. § 94.4 (1998); *see also* Vullo, *supra* note 73, at 206.

<sup>81</sup> Hague Convention, *supra* note 1, arts. 8-9, T.I.A.S. No. 11,670 at 6-7, 1343 U.N.T.S. at 100.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* art. 8, T.I.A.S. No. 11,670, at 6-7, 1343 U.N.T.S. at 100.

<sup>84</sup> *Id.*

<sup>85</sup> Perez-Vera Report, *supra* note 46, ¶ 115.

<sup>86</sup> *Id.*

<sup>87</sup> Hague Convention, *supra* note 1, art. 13, T.I.A.S. No. 11,670, at 8, 1343



cared for the] child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention,” the child need not be returned.<sup>88</sup> Second, if “there is a grave risk that [the child’s] return would expose [him] to physical or psychological harm or otherwise place the child in an intolerable situation,” he is not required to be returned.<sup>89</sup> Third, if the child’s return would not be permitted by “the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms,” then such a return is not warranted.<sup>90</sup> Finally, if the return proceeding began more than one year after the wrongful removal and “the child is now settled in its new environment,” the child does not have to be returned.<sup>91</sup>

Judicial and administrative authorities are empowered by the Hague Convention to take “into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child’s habitual residence.”<sup>92</sup> Judicial or administrative authorities may “refuse to order the return of [a] child if [they] find[ ] that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”<sup>93</sup>

### *B. United States Case Law*

The cases in the following section illustrate the range of interpretations attributed to rights of custody and rights of access under the Hague Convention among United States courts. In the 1991 New York state court case of *David S. v. Zamira S.*,<sup>94</sup> the court found that the mother had wrongfully removed her child

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U.N.T.S. at 101.

<sup>88</sup> *Id.* art. 13(a), T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

<sup>89</sup> *Id.* art. 13(b), T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

<sup>90</sup> *Id.* art. 20, T.I.A.S. No. 11,670, at 9, 1343 U.N.T.S. at 101. This public policy exception “could be invoked on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process.” *Id.*

<sup>91</sup> Hague Convention, *supra* note 1, art. 12, T.I.A.S. No. 11,670, at 7-8, 1343 U.N.T.S. at 100.

<sup>92</sup> *Id.* art. 13, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

<sup>93</sup> *Id.*

<sup>94</sup> 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991).

from Canada despite a Canadian court separation agreement giving the mother full custody—but with the proviso that she not leave Toronto—and giving the father visitation of the child.<sup>95</sup> Although the court recognized that a right of custody was created in the father pursuant to the non-removal clause, the court remarked in dicta that the mother's argument that such a right should not be created "might have some merit but for the respondent's contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario which give temporary custody of both children to the petitioner."<sup>96</sup>

*Viragh v. Foldes*<sup>97</sup> was the first United States case to specifically address the protection of access rights.<sup>98</sup> The Massachusetts court heard an argument that 'rights of custody' are broadly defined under the Convention and thus a parent with rights of access could have "rights of custody under [a foreign] law which [could be] violated by the wrongful retention of . . . children in the United States."<sup>99</sup> After considering the foreign law and finding it inapplicable, the court explained that "the Convention . . . clearly distinguishes between mandatory return due to wrongful removal or retention under Article 3, and discretionary return under Article 18."<sup>100</sup> Moreover, the court determined that the Hague Convention does not provide specific remedies for rights of access violations.<sup>101</sup> The court concluded instead that "the parent who has removed the children from their habitual residence, and made the exercise of access rights more difficult, may be ordered

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<sup>95</sup> *Id.* at 432.

<sup>96</sup> *Id.*

<sup>97</sup> 612 N.E.2d 241 (Mass. 1993).

<sup>98</sup> Eric S. Horstmeyer, *The Hague Convention on the Civil Aspects of Child Abduction: An Analysis of Tahan and Viragh and Their Impact on Its Efficacy*, 33 U. LOUISVILLE J. FAM. L. 125, 134 (1995).

<sup>99</sup> *Viragh*, 612 N.E.2d at 247. The argument was based on "Article 3 [which] provides that determination whether the party who has requested mandatory return is indeed vested with rights of custody should be based on the 'law of the State in which the child was habitually resident immediately before the removal or retention.'" *Id.* As support for his claim, the father cited a ruling by the Civil College of the Supreme Court of Hungary, which "applies the family law of Hungary to the terms of the Convention to establish the boundaries of wrongful removal and retention under Hungarian law." *Id.* at 248.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 247.

to pay the necessary expenses incurred by the noncustodial parent effectively to exercise rights of access."<sup>102</sup>

The recent Kentucky Court of Appeals case of *Janakakis-Kostun v. Janakakis*<sup>103</sup> upheld a Greek court order for return of a child wrongfully removed by her mother from Greece.<sup>104</sup> Despite the attachment to the mother's temporary custody order of an order prohibiting removal of the child from Greece, the mother brought the child into the United States in violation of the father's visitation rights.<sup>105</sup> The father was awarded custody by the Greek court after the mother left with the child, but even if he had still held visitation rights, the court cites *David S.* for the proposition that: (1) "[v]isitation rights alone . . . have been held to fall within the meaning of 'custodial right,'"<sup>106</sup> and (2) even when they do not equal custody rights, "such a distinction was meritless where a respondent, i.e., the removing parent, engaged in 'contemptuous conduct' in removing the child from its habitual residence."<sup>107</sup>

### C. International Case Law

Foreign signatory case law is divided into two competing interpretations of rights of custody and rights of access under the Hague Convention. The evolution of these interpretations is traced in this section.

The expansive view of rights of custody was set forth in the precedential English Court of Appeals decision of *C. v. C.*<sup>108</sup> According to an Australian custody order, both parents were joint guardians and "[n]either . . . shall remove the child from Australia without the consent of the other."<sup>109</sup> Thereafter, the father obtained (from an Australian court) a transfer of custody of the child to

<sup>102</sup> *Id.* at 249 (quoting Hague Convention, *supra* note 1, art. 26, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99).

<sup>103</sup> *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. App. 1999).

<sup>104</sup> *Id.* at 849.

<sup>105</sup> *Id.* at 846.

<sup>106</sup> *Id.* at 849 (citing *David S. v. Zamira S.*, 574 N.Y.S.2d 420 (N.Y. Fam. Ct. 1991)).

<sup>107</sup> *Id.*

<sup>108</sup> 1 W.L.R. 654 (1989) (Eng. C.A.).

<sup>109</sup> *Id.* at 656.

himself with no rights of access in the mother.<sup>110</sup> In a unanimous decision, the court determined that the Article 5 words—“‘rights of custody’ shall include . . . in particular, the right to determine the child’s place of residence . . .”—should be read into Article 3’s understanding of when a child’s removal would be wrongful “and may in certain circumstances extend the concept of custody beyond the ordinarily understood domestic approach.”<sup>111</sup>

The 1991 Australian case of *In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife*<sup>112</sup> was influenced by the precedent of *C. v. C.*<sup>113</sup> in deciding an appeal under the Hague Convention from a father who sought the return of his children from France.<sup>114</sup> Of the two children of concern in the appeal, the court specifically discussed what rights of custody the father had in the child who was his by marriage to the child’s mother.<sup>115</sup> The custody order issued by the Australian court gave the mother custody of the child, the father “reasonable access” and, in addition, contained “an injunction . . . restraining each of the parties from removing either of the children from . . . the Commonwealth of Australia.”<sup>116</sup> The court found that an injunction restricting a child from leaving the country without the parent’s agreement is a “right of custody” which would form

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 658. Because the court ruled that the removal of the child was wrongful under Article 3, the mother must “rely on the Australian courts for a decision as to the future home of the child.” *Id.* at 661. The court explained that due to the international character of the Hague Convention, the Australian or English law definition of rights of custody was irrelevant—only the Hague Convention Article 5 definition mattered. *Id.* at 663.

<sup>112</sup> *In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife*, Appeal No. 52, 1991 (Austl. Fam.).

<sup>113</sup> *Id.* ¶ 18. *C. v. C.* was so influential that a justice said that without the judgment of that case “it would not have been likely that one would have concluded that an injunction of the type which was relevant there and which is relevant here would have been understood in Australian domestic law as conferring rights of guardianship or custody.” *Id.* ¶ 20. The justice went on to say that when he first read the *C. v. C.* opinion he “thought it amounted to something of a quantum leap from what had hitherto been the understood interpretation of that term.” *Id.* ¶ 24.

<sup>114</sup> *Id.* ¶ 5.

<sup>115</sup> *Id.* ¶ 17.

<sup>116</sup> *Id.* ¶ 4.

the basis for a wrongful removal.<sup>117</sup>

However, the 1992 French court case of *Ministere Public v. Mme Y*<sup>118</sup> took a different view.<sup>119</sup> Although the mother was granted custodial rights by an English court “under the condition that she remain in England or Wales,” she took the child to France.<sup>120</sup> The holding of the French court indicated “that the removal was not wrongful because custody rights were not violated and the removal only interfered with the father’s rights of access and visitation.”<sup>121</sup>

During the same year, an Israeli appeals court took the opposite view. The 1992 case of *Pnina Turna v. Daniel Charles Meshullam*<sup>122</sup> was the “first case that arose under the Convention in Israel.”<sup>123</sup> The Supreme Court of Israel heard an application for return from a father whose “French divorce decree provided for joint custody.”<sup>124</sup> The court found that the mother’s removal of “the child to Israel without the father’s knowledge or consent . . . was both a ‘wrongful removal’ in violation of the father’s rights of custody and a denial of the father’s visiting rights.”<sup>125</sup> Similarly, in *Foxman v. Foxman*<sup>126</sup> the High Court of the Civil Appeals Court of

<sup>117</sup> *Id.* ¶ 23. The court reached this conclusion because (1) uniformity of law between common law countries was found “highly desirable,” and (2) this result conformed with the Hague Convention’s spirit of ensuring that “children who are taken from one country to another wrongfully, in the sense of in breach of court orders or understood legal rights, are promptly returned to their country so that their future can properly be determined within that society.” *Id.* ¶ 26.

<sup>118</sup> *Ministere Public v. Mme Y*, T.G.I. Perigueux (Mar. 17, 1992) (discussed in Silberman, *infra* note 119, at 18).

<sup>119</sup> See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 18 (1994).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> C.A. 1648/92, *Pnina Turna v. Daniel Charles Meshullam* (1992) (S. Ct. Isr.) (cited in Bailey, *infra* note 123, at 297-98. This case was referred to in *Croll v. Croll* as “*Tourna v. Meshulem*.” *Croll II*, 229 F.3d at 151)).

<sup>123</sup> Martha Bailey, *The Right of a Non-Custodial Parent to an Order for Return of a Child Under the Hague Convention*, 13 CAN. J. FAM. L. 287, 297 (1996).

<sup>124</sup> Silberman, *supra* note 119, at 18.

<sup>125</sup> Bailey, *supra* note 123, at 298.

<sup>126</sup> C.A. 527/92, *Foxman v. Foxman* (1992) (H.C. Isr.) (1992) (discussed in Martha Bailey, “*Rights of Custody*” *Under the Hague Convention*, 11 BYU J. PUB. L. 33, 39 n.21 (1997)).

Israel decided that a consultation clause contained in the parent's first custody/access agreement—which included a provision for mutual consultation on major changes or unusual events—“was implicitly included in the revised agreement, and concluded that the father had rights of custody within the meaning of the Convention.”<sup>127</sup>

In the 1993 case of *B. v B.*,<sup>128</sup> the English Court of Appeal unanimously overturned a lower court ruling that a mother did not wrongfully remove a child under the Hague Convention.<sup>129</sup> Before the mother took the child to England, a Canadian court had granted the father interim rights of access and the mother interim custody, pending a trial.<sup>130</sup> The Court of Appeal found the mother's removal to be unlawful because the Canadian court itself, “[h]aving made what is no more than an interim custody order,”<sup>131</sup> “had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence.”<sup>132</sup>

In 1994, the Supreme Court of Canada was confronted with its first Hague Convention case—*Thomson v. Thomson*.<sup>133</sup> This leading case marked a shift away from the previous broad interpretations of the Convention's definition of rights of custody/rights of access and towards a more narrow definition. In *Thomson*, a Scottish court issued “an interim custody order that included a non-removal clause” to a mother immediately before

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<sup>127</sup> *Id.*

<sup>128</sup> *B. v. B.*, 2 All. E.R. 144 (1993) (Eng. C.A.).

<sup>129</sup> *Id.* at 153.

<sup>130</sup> *Id.* at 146.

<sup>131</sup> *Id.* at 153.

<sup>132</sup> *Id.* at 149. The court found that this case was

[A]n example of just such an abduction as the Convention was designed to combat. In those circumstances we have no alternative but to adopt the course dictated by the Convention and order the child's return to Canada forthwith so that the Ontario court may proceed with its consideration of what is best for his welfare.

*Id.* at 153.

<sup>133</sup> [1993] 107 D.L.R.4th 695 (Can.), *aff'd*, [1994] 119 D.L.R.4th 253, (discussed in Bailey, *supra* note 123, at 303-04).

she removed the child from Scotland to Canada.<sup>134</sup> According to the Canadian Supreme Court “there had been a wrongful removal, because the non-removal clause of the mother’s interim custody order preserved the jurisdiction in the Scottish court to determine the issue of custody on the merits in a full hearing.”<sup>135</sup> Because the non-removal clause was placed in an interim custody order, the Canadian court found the mother’s breach of those custody rights constituted a wrongful removal within the meaning of the Convention.<sup>136</sup> In significant dicta, the court made clear, however, that if the non-removal clause had been part of a permanent custody order, the approach would not be the same because the different issue of “ensur[ing] permanent access to the non-custodial parent” would be raised.<sup>137</sup>

Three years after *Thomson*, the Supreme Court of Canada found a case to demonstrate that a permanent custody order would have changed the outcome. In *D.S. v. V.W.*,<sup>138</sup> the Canadian Supreme Court overruled a lower court which cited *C. v. C.* for the proposition that “access arrangements between the parties created a custody right in the mother, in particular because there was an implied agreement that the father would not remove the child without the mother’s consent.”<sup>139</sup> The higher court ruled that there was not a wrongful removal “within the meaning of the Convention, because the father had a final custody order at the time of the removal, and the mother had only [rights of] access.”<sup>140</sup>

<sup>134</sup> Bailey, *supra* note 122, at 303.

<sup>135</sup> *Id.* at 303-04.

<sup>136</sup> *Id.* at 304.

<sup>137</sup> *Id.* (quoting *Thomson v. Thomson*, [1994] 119 D.L.R.4th 253, 281 (Can.)). Some commentators believe the court is suggesting that it would neither “consider an access parent to have ‘rights of custody’ within the meaning of the Convention simply because there is a non-removal clause in the custody order [nor find] that the Scottish court . . . had ‘rights of custody’ if the mother’s custody order and the non-removal clause had been final.” *Id.* at 304-05.

<sup>138</sup> *D.S. v. V.W.*, [1996] 134 D.L.R.4th 481 (Can.) (discussed in Bailey, *supra* note 123, at 307-14).

<sup>139</sup> Bailey, *supra* note 123, at 308-09.

<sup>140</sup> *Id.* at 309. Further distinguishing *V. W.* from *Thomson*, the court “rejected the argument that . . . the Maryland court had ‘rights of custody’ because of the continuing jurisdiction of the Maryland court to vary the custody order.” *Id.* at 309-10. In addition, no wrongful retention was found “because the *ex parte* custody order obtained by the mother in Maryland after the removal did not confer on the mother ‘rights of custody’

The court further narrowed its interpretation of rights of custody by suggesting that “[a]lthough *D.S. v. V.W.* involved an *implicit* non-removal clause, . . . even an *explicit* non-removal clause would not give the access parent ‘rights of custody.’”<sup>141</sup>

#### IV. Analysis

The Second Circuit majority’s decision in *Croll*<sup>142</sup> represents a narrow interpretation of the protection of rights of access under the Hague Convention.<sup>143</sup> This section analyzes the appellate court’s majority ruling in light of treaty interpretation principles and perspectives of the dissent and other commentators.

As the Second Circuit majority explained, treaty interpretation, like statutory interpretation, requires first a “look to its terms to determine its meaning.”<sup>144</sup> The treaty’s text is then interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>145</sup> Because this is an international treaty, it is important to address the extent to which the court’s holding will affect Hague Convention enforcement. Therefore, one must turn to the language, purpose, and public policy considerations surrounding the Hague Convention for a more complete understanding of the issue and its implications. While the majority decision in *Croll* turned on its interpretation of “rights of custody” under the Convention,<sup>146</sup> it is necessary to balance all three principles of treaty interpretation so as to render a decision in harmony with the Hague Convention’s

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that rendered the child’s retention in Quebec wrongful.” *Id.* at 310. Return of the child to the father in Maryland was ordered. *Id.*

<sup>141</sup> *Id.* at 311.

<sup>142</sup> *Croll II*, 229 F.3d at 134.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 136 (citing *United States v. Alvarez-Machain*, 504 U.S. 665, 663 (1992) (treaties are construed in much the same manner as statutes) (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985))).

<sup>145</sup> *Id.*; see also *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (The clear import of treaty language controls unless “application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.”). Cf. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 n.5 (1989) (“Even if the text were less clear, its most natural meaning could properly be contradicted only by clear drafting history.”).

<sup>146</sup> *Croll II*, 229 F.3d at 134.



ideals.

*A. The Hague Convention's Language: Defining "Rights of Custody"*

Because the Hague Convention draws a line between rights of custody and rights of access, with only rights of custody accorded the return remedy,<sup>147</sup> it is critical to examine the issue of whether rights of access coupled with a non-removal clause is a right of custody under the Hague Convention. The return remedy is only available for wrongful removals or retentions that are "in breach of rights of custody attributed to a person, an institution, or any other body."<sup>148</sup> Therefore, as a first principle of Hague Convention interpretation, understanding the expansive meaning of "custody" is fundamental.

The court's majority found its definition of custody by using several American dictionaries, stating that this ordinary meaning was in harmony with the Hague Convention drafter's intention.<sup>149</sup> However, the Hague Convention itself defines rights of custody and of access.<sup>150</sup> One commentator wrote that Article 5 creates "an autonomous treaty definition of custody rights quite apart from domestic law interpretations of custody, which may differ from State to State."<sup>151</sup> Because this is an international treaty, its definitions must be flexible and broad enough to be used by all signatories.<sup>152</sup>

<sup>147</sup> Hague Convention, *supra* note 1, arts. 3, 12, T.I.A.S. No. 11,670, at 4-5, 7-8, 1343 U.N.T.S. at 98-99, 100.

<sup>148</sup> *Id.* Those rights of custody also had to be "actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *Id.* art. 3, T.I.A.S. No. 11,670, at 4-5, 1343 U.N.T.S. at 98-99.

<sup>149</sup> *Croll II*, 229 F.3d at 138-39. In considering what the Hague Convention means by the word "custody," the *Croll* majority cited *Joyner v. Dumpson* in which the Second Circuit considered a definition of legal custody which "concerned . . . the rights and duties of the person (usually the parent) having custody to provide for the child's daily needs—to feed him, clothe him, provide shelter, put him to bed, send him to school, see that he washes his face and brushes his teeth." *Joyner v. Dumpson*, 712 F.2d 770, 778 (2d Cir. 1983) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 827 n.17 (1977)).

<sup>150</sup> Hague Convention, *supra* note 1, art. 5, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99.

<sup>151</sup> Silberman, *supra* note 119, at 17.

<sup>152</sup> *See id.*

The Hague Convention definition of custody in Article 5 is open-ended and separable. At common law, custody rights were referred to as a bundle of rights that could be “fragmented and shared between a number of persons, or between a person and an institution.”<sup>153</sup> The majority’s argument—that the right to determine a child’s place of residence through a non-removal clause “falls short of conferring a joint right to determine the child’s residence”<sup>154</sup>—clashes with the inclusive nature of the Hague Convention definition. An early Hague Convention commentator explained, “such rights, by whatever name they might be called in a State’s domestic legal system, are ‘rights of custody’ for the purpose of the Convention and are protected by it. There is nothing to suggest that such rights cannot be separated.”<sup>155</sup>

The dissent contends that the Hague Convention’s “definition of rights of custody contemplates a bundle of rights that are protected regardless of whether a parent holds one, several or all such custody rights, and whether the right or rights are held singly or jointly with the other parent.”<sup>156</sup> Some commentators agree, concluding that in cases of non-removal orders, agreements or laws, “the access parent does have a right of custody within the meaning of the Convention.”<sup>157</sup> Joint custody rights are an example of separated rights of custody or access protected under the Hague Convention<sup>158</sup> “which may assume a number of forms, including situations in which one parent possesses sole physical custody of the child but shares certain decision making authority with the other parent.”<sup>159</sup> Hague Convention protection is recognized in these cases when there are restrictions on the movement of the custodial parent or where there are concepts of joint custody or

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<sup>153</sup> See Bailey, *supra* note 123, at 36; see also John Eekelaar, *International Child Abduction by Parents*, 32 U. TORONTO L.J. 281, 309-10 (1982).

<sup>154</sup> *Croll II*, 229 F.3d at 139.

<sup>155</sup> Bailey, *supra* note 123, at 36 (quoting John Eekelaar, *supra* note 153, at 309-10).

<sup>156</sup> *Croll II*, 229 F.3d at 147 (Sotomayer, J., dissenting).

<sup>157</sup> Bailey, *supra* note 123, at 37.

<sup>158</sup> Hague Convention, *supra* note 1, art. 3, T.I.A.S. No. 11,670, at 4-5, 1343 U.N.T.S. at 98-99.

<sup>159</sup> Several cases in both United States and foreign signatory courts have “provided a gloss as to other types of parenting arrangements and custodial orders that create custody rights.” Silberman, *supra* note 119, at 17.

guardianship.<sup>160</sup>

The following cases show that other courts recognize custody rights being created in “other types of parenting arrangements and custodial orders.”<sup>161</sup> In the New York Family Court case of *David S. v. Zamira S.*,<sup>162</sup> the court found “that an order giving the non-custodial parent visitation rights and restricting the custodial parent from leaving the country constitutes an order granting ‘custodial’ rights to both parents under the Hague Convention.”<sup>163</sup> Similarly, in *C. v. C.*<sup>164</sup> the Court of Appeal in England held that because of “an Australian decree [that] granted custody to the mother and joint guardianship to both parents . . . the father had custody rights within the meaning of the Convention.”<sup>165</sup> This was because “the Australian guardianship order gave him the right to prevent the child’s removal from Australia without his approval.”<sup>166</sup> Then, the Israeli Supreme Court case of *Pnina Turna v. Daniel Charles Meshullam*,<sup>167</sup> provided an example of a court ruling that a mother’s removal of a child from France was wrongful and in violation of the joint custody she held with the father and thus of his “rights of custody and . . . visiting rights.”<sup>168</sup>

Although the Hague Convention does not specifically define rights of access, both subsections of Article 5 give clear indications of drafter intent.<sup>169</sup> Included in rights of access in Subsection B is “the right to take a child for a limited period of time to a place other than the child’s habitual residence.”<sup>170</sup> Subsection A particularly includes in rights of custody “the right

<sup>160</sup> Bailey, *supra* note 123, at 37.

<sup>161</sup> *Id.* (quoting Silberman, *supra* note 119, at 17).

<sup>162</sup> *Id.* at 39 (citing *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991)).

<sup>163</sup> *Id.* (quoting *Zamira*, 74 N.Y.S.2d at 429).

<sup>164</sup> 1 W.L.R. 654 (C.A. 1989).

<sup>165</sup> Silberman, *supra* note 119, at 18.

<sup>166</sup> *Id.*

<sup>167</sup> C.A. 1648/92, *Pnina Turna v. Daniel Charles Meshullam* (1992) (S. Ct. Isr.).

<sup>168</sup> *Id.*

<sup>169</sup> Hague Convention, *supra* note 1, art. 5, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99.

<sup>170</sup> Bailey, *supra* note 123, at 34 (quoting Hague Convention, *supra* note 1, art. 5, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99).

to determine the child's place of residence."<sup>171</sup> Commentators have written that Subsection A refers to rights of access coupled with a non-removal clause because "if the access parent has . . . [the right] 'to take a child for a limited period of time to a place other than the child's habitual residence,' and shares the right to determine the child's place of residence, then . . . [these are] 'rights of custody' within the meaning of the Convention."<sup>172</sup>

### *B. Hague Convention Object and Purpose*

Understanding the Hague Convention's object and purpose explains why protecting the rights of left-behind parents are necessary to the effective operation of the Hague Convention. The drafters of the Hague Convention declare: "[t]he objects of the present Convention are . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States."<sup>173</sup> A non-removal clause in a custody order issued by one signatory country to a parent with rights of access is meant to be "effectively respected" by another signatory.<sup>174</sup> The majority recognized that implicit in the basic premise of the Hague Convention is that "a child's country of 'habitual residence' is 'best placed to decide . . . questions of custody and access.'"<sup>175</sup> This is the reason why the remedy for wrongful removal is to order the child "returned and any dispute over custody . . . litigated at the place of habitual residence."<sup>176</sup> As explained in the Perez-Vera Report, "the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e., of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal."<sup>177</sup> Those authorities will "be best situated with information to determine the ultimate merits of any

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<sup>171</sup> Hague Convention, *supra* note 1, art. 5, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99.

<sup>172</sup> Bailey, *supra* note 123, at 35.

<sup>173</sup> Hague Convention, *supra* note 1, art. 1(b), T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. at 98.

<sup>174</sup> *Id.*

<sup>175</sup> Perez-Vera Report, *supra* note 46, ¶ 34.

<sup>176</sup> Silberman, *supra* note 119, at 11.

<sup>177</sup> Perez-Vera Report, *supra* note 46, ¶ 19.

custody controversy.”<sup>178</sup> If children are not returned to left-behind parents, then the wrongfully removing parent is not deterred from “crossing international borders in search of a friendlier forum.”<sup>179</sup> The problem of forum shopping is the basic problem the drafters sought to address.<sup>180</sup> Early official commentary said, “[such a decision] bears a legal title sufficient to ‘legalize’ a factual situation which none of the legal systems involved wished to see brought about.”<sup>181</sup> Deterring parents by the recognition of non-removal clauses in custody orders of other signatories carries out the Hague Convention’s basic premise.

### *C. Public Policy: The Effect of Not Granting Return*

When interpreting a treaty with global effects, it is particularly important to consider its larger ramifications. What could result from the Second Circuit majority’s decision not to grant a right of return to left-behind parents holding a custody order with a non-removal clause? As demonstrated by Section B of this analysis, the premise of the Hague Convention is frustrated when the result of a court decision is forum shopping. The passage of time resulting from courts not honoring non-removal clauses by an expeditious<sup>182</sup> return allows the wrongfully removing and retaining parent to claim the “well-settled child” exception.<sup>183</sup>

When that occurs, a “new and artificial status quo” is created with “the passage of time.”<sup>184</sup> The longer the return is denied, the more likely the parent will make a successful argument that “to return the child following inordinate court delays or enforcement delays could in some way damage the child’s psychological welfare.”<sup>185</sup> Courts in signatory countries that accept this argument

<sup>178</sup> Bailey, *supra* note 123, at 41.

<sup>179</sup> *Id.* at 41 (quoting Hague Convention, *supra* note 1, art. 1, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. at 98).

<sup>180</sup> *Id.* at 42 (quoting Perez-Vera Report, *supra* note 46, ¶ 15).

<sup>181</sup> Perez-Vera Report, *supra* note 46, ¶ 15.

<sup>182</sup> Hague Convention, *supra* note 1, art. 11, T.I.A.S. No. 11,670, at 7, 1343 U.N.T.S. at 100 (defining “expeditious”).

<sup>183</sup> *Id.* art. 12, T.I.A.S. No. 11,670, at 7-8, 1343 U.N.T.S. at 100.

<sup>184</sup> Jan Rewers McMillan, *Getting Them Back: The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, 14 J. AM. ACAD. MATRIM. LAW. 99, 103 (1997).

<sup>185</sup> *Id.*

can “completely obliterate the purpose, intent, and overall objectives of the Convention.”<sup>186</sup>

A result of not recognizing child return for the left-behind parent with rights of access and a non-removal clause is inconsistent Hague Convention interpretation among the signatories.<sup>187</sup> Because other signatory courts have recognized that “agreements, orders or laws that prohibit a child’s removal without the access parent’s consent create rights of custody,”<sup>188</sup> fellow signatories “should adopt the same interpretation, if possible, for the sake of uniformity.”<sup>189</sup> Despite the fact that courts have autonomy in rendering their decisions,<sup>190</sup> and their determination of whether the removal was wrongful must be “based on [their] own interpretation of the Convention,”<sup>191</sup> many signatory courts have endeavored to “uniformly interpret the Convention.”<sup>192</sup> These judges keep the international character of the Hague Convention in mind because “the whole purpose of such a code is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways.”<sup>193</sup> When signatory courts interpret the Hague Convention with an eye to uniformity, they thwart the basic problem the drafters were trying to prevent: forum shopping by the wrongfully removing or retaining parent.<sup>194</sup>

In looking at the case law of other signatories, the Second Circuit majority saw “no consensus view emerge[] from the opinions issued by the courts.”<sup>195</sup> Because the court found “the cases worldwide are few, scattered, conflicting, and sometimes conclusory and unreasoned,”<sup>196</sup> it felt it was not bound to show “deference to a series of conflicting cases from foreign

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<sup>186</sup> *Id.* at 104.

<sup>187</sup> *See* Bailey, *supra* note 123, at 42.

<sup>188</sup> *Id.* at 40.

<sup>189</sup> *Id.* at 42.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 42-43 (quoting *C. v. C.*, 1 W.L.R. 654 (1989) (Eng. C.A.)).

<sup>194</sup> *Id.* at 43.

<sup>195</sup> *Croll II*, 229 F.3d at 143.

<sup>196</sup> *Id.*

signatories.”<sup>197</sup> However, in looking at the same cases, the dissent found that “most foreign courts addressing this question have interpreted the notion of ‘rights of custody’ broadly in light of the Convention’s purpose and structure.”<sup>198</sup>

However, there are a few signatory courts<sup>199</sup> that have, like the Second Circuit, “interpreted rights of custody, wrongful removal, and wrongful retention more narrowly than courts in other jurisdictions.”<sup>200</sup> These courts seem to interpret the Hague Convention with a concern “for the mobility rights of custodial parents.”<sup>201</sup> The Second Circuit has now joined their minority.

## V. Conclusion

The Second Circuit’s narrow interpretation of the Hague Convention does not balance the Hague Convention’s definition of custody with its overarching purpose of protecting children. By placing exaggerated emphasis on its own definition of custody at the expense of this purpose, the court came to a ruling that will likely increase the chances that parents who wrongfully remove or retain a child despite a non-removal clause in a custody order will shop for a more sympathetic court or wait to take advantage of the “well-settled child” exception. The Second Circuit’s opinion is inconsistent with the opinions of the majority of other signatory courts. Hopefully, the court’s holding will be restrictively applied to lessen its impact on Hague Convention cases.

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 150; see *C. v. C.*, *supra* notes 108-10 and accompanying text; *Resina*, *supra* notes 112-17 and accompanying text; *Pnina Turna*, *supra* notes 122-25 and accompanying text; *B. v. B.*, *supra* notes 128-31 and accompanying text; *Foxman*, *supra* notes 126-27 and accompanying text.

<sup>199</sup> See *supra* notes 122-27, 133-41 and accompanying text.

<sup>200</sup> See Bailey, *supra* note 123, at 53.

<sup>201</sup> *Id.* at 50.

