

COMMENTS

PROVISIONALLY PERMANENT? KEEPING TEMPORARY CUSTODY ORDERS TEMPORARY UNDER THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

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INTRODUCTION

In 1980, the Hague Conference on Private International Law¹ created the Hague Convention on the Civil Aspects of International Child Abduction² (Convention) as an attempt to supply parents with a legal tool to assist them in achieving the return of children removed across international boundaries without consent of the left-behind parents.³ The Convention has been in force in the United States for

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¹ The 1980 Hague Conference consisted of twenty-seven member states, three participating states, three international governmental organizations, and three nongovernmental organizations. See *Procès-verbaux et Documents de travail de la Première commission*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, ENLEVEMENT D'ENFANTS [ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION] 253, 253-55 (1982) (listing the members of the First Commission of the Hague Conference on Private International Law).

² Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, at 1, 22,514 U.N.T.S. 97, 98 [hereinafter Convention], reprinted in 51 Fed. Reg. 10,493 (Mar. 26, 1986).

³ See Hague International Child Abduction Convention; Text and Legal Analysis, Letter of Transmittal, 51 Fed. Reg. 10,494, 10,495 (Mar. 26, 1986) [hereinafter President's Letter] (providing President Reagan's summary of the Convention to the United States Senate: "[It] is designed to secure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained outside that country. It also seeks to facilitate the exercise of visitation rights across

more than thirteen years,⁴ and a significant body of foreign and domestic case law interpreting its provisions has developed. While courts have begun working toward consistent interpretations of the fundamental provisions of the Convention,⁵ and have worked diligently to apply these interpretations to the complex factual, legal, and emotional situations that arise in the context of the removal of a child across international boundaries, areas for improvement remain.

When custody proceedings are started, but not completed, prior to the international abduction of a child, the custody issues become particularly complex. One issue is how an interim decision issued by a foreign tribunal prior to the child's removal should affect a court's decision on a petition for return under the Convention.⁶ In this Comment, I argue that U.S. courts should adopt an approach that respects the temporary character of an interim order rather than automatically recognizing the terms of the order at face value. Courts should rarely interpret interim custody orders as altering the parties' custody rights under the Convention. Rather than accept interim de-

international borders.”). International child abduction presents a particularly complex problem because often both the person who removes the child and the person left-behind have some basis for claiming custody—often each is a parent of the abducted child. See Elisa Pérez-Vera, *Explanatory Report*, in 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 1, at 426, ¶ 11, at 429 [hereinafter Pérez-Vera, *Report*] (“The problem . . . concerns [an abductor] who . . . belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother.”). For purposes of this Comment, I shall use the words “abduction” and “removal” interchangeably. Though the title of the Convention refers to “international child abduction,” the drafters chose not to use “abduction” or “kidnapping” in the body of the treaty to avoid the criminal connotations that accompany those terms. See *id.* ¶ 53, at 441 (differentiating the connotations of the words “abduction” and “removal” based on “the relationship which normally exists between ‘abductor’ and ‘child’ and . . . the intentions of the former”).

⁴ See H.R. REP. NO. 100-525, at 1 (reporting the implementation of the Convention in the United States), reprinted in 1988 U.S.C.C.A.N. 386, 386.

⁵ But see Marilyn Freeman, *Rights of Custody and Access Under the Hague Child Abduction Convention—A “Questionable Result?”*, 31 CAL. W. INT’L L.J. 39, 39 (2000) (“[C]orrectness 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.”).

⁶ For purposes of this Comment, I shall use “interim custody order” to mean an order, issued by a court with jurisdiction over custody proceedings, that establishes temporary care and custody arrangements until the court is equipped to issue a final custody decision. See generally LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 8:02 (1997) (“A temporary [custody] order gives the parents and the child some definite arrangements during the time before the [final decision] and ensures that at least one parent has full legal authority for schooling, medical care and the like.”).

cisions at face value, courts should consider the legal and factual realities of the family members prior to entry of the interim order. This approach is consistent with the broad purpose and scope of the Convention as well as its goal of ensuring that an abducted child is promptly returned to the country best situated to decide the child's future—the country where he or she lived prior to the abduction.

U.S. courts have been entrusted by Congress to decide petitions brought pursuant to the Convention fairly, expeditiously, and in keeping with the Convention's broad design, despite the challenges the cases present. Understanding the broad scope of the custody rights protected by the Convention is often the first challenge facing a court asked to decide a Convention petition. I suggest that the scope of the Convention extends, under most circumstances, to protect those rights held by a left-behind parent prior to international removal of his or her child and not yet terminated by a *final* decision of a court with jurisdiction over that parent's custody rights.

Part I of this Comment provides an overview of the Convention's purposes, provisions, and scope. In Part II, I introduce a recent Colorado case in which the parties disputed the effect of a German court's interim order on their custody rights with respect to their daughter. In Part III, I argue that interim custody decisions should not alter parties' custody rights for purposes of a subsequent petition for return under the Convention. In Part IV, I apply that analysis to the provisions of the interim order at issue in the Colorado case and conclude that the specific provisions of that order should not have altered the approach taken in that case from the approach proposed in Part III.

I. THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION: BACKGROUND, PURPOSES, AND SCOPE

The Fourteenth Session of the Hague Conference on Private International Law adopted the Hague Convention on the Civil Aspects of International Child Abduction on October 24, 1980, and opened the Convention for signature on October 25, 1980.⁷ The United States signed the Convention on December 23, 1981.⁸ Congressional

⁷ President's Letter, *supra* note 3, at 10,495.

⁸ H.R. REP. NO. 100-525, at 5. The United States Senate ratified the Convention by a vote of ninety-eight to zero on October 9, 1986. Patricia M. Hoff, *Legislative History of the Hague Convention on the Civil Aspects of International Child Abduction*, in INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE 1988 HAGUE CONVENTION 16, 16 (Gloria F. DeHart ed., 1989).

adoption of the International Child Abduction Remedies Act (ICARA)⁹ in 1988 implemented the Convention in the United States.

The Convention requires prompt return of any child under the age of sixteen who has been wrongfully removed from his or her country of habitual residence.¹⁰ If a petitioner successfully proves that the child was wrongfully removed from his or her place of habitual residence, a respondent may prevent the return only by proving one of the exceptions set forth in the Convention.¹¹ This Part will first provide an overview of the purposes of the Convention and then will outline the scope of the remedies and exceptions established therein.

⁹ 42 U.S.C. §§ 11,601-11,610 (2000).

¹⁰ Convention, *supra* note 2, at arts. 3-4, 12. The Convention also requires the remedy of return in the case of a child who has been wrongfully retained in a country other than his or her habitual residence. *Id.* at arts. 3-4, 12. For purposes of this Comment, "remove" or "removal" will mean "remove or retain" or "removal or retention."

¹¹ *See id.* at art. 13 (providing exceptions to the remedy of return if the respondent can prove that the petitioner was not "actually exercising" his or her custody rights at the time of removal or had acquiesced in the removal, if return would create "grave risk" to the child, or upon a mature child's objection); *id.* at art. 20 (providing the "human rights" exception). In addition to the exceptions in Articles 13 and 20, Article 12 allows a court to refuse return if the removal occurred more than one year ago and "it is demonstrated that the child is now settled in [his or her] new environment." *Id.* at art. 12. Some authorities refer to this provision as an exception. *See* ICARA § 11,603(e)(2)(B) (implying that Article 12 contains one or more exceptions); *Lops v. Lops*, 140 F.3d 927, 945 (11th Cir. 1998) ("Respondents had not established an affirmative defense under the 'well-settled' exception."). Others do not include it among the exceptions provided for by the Convention. *See* Pérez-Vera, *Report*, *supra* note 3, ¶¶ 106-18, at 459-62 (stating that the exceptions to return are to be found in Articles 13 and 20 and discussing the Article 12 provision in terms of reducing the obligation of a court to return a child and "preserving the contingent discretionary powers of internal authorities in this regard"); Richard J. Podell, *The Hague Convention on the Civil Aspects of International Child Abductions*, in 101+ PRACTICAL SOLUTIONS FOR THE FAMILY LAWYER 127, 129 (Gregg Herman ed., 1996) (listing only Articles 13 and 20 as providing exceptions). Elisa Pérez-Vera was the official reporter of the Convention; her *Explanatory Report* is recognized as the "official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." *Blondin v. Dubois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999) (quoting Hague International Child Abduction Convention; Text and Legal Analysis, Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,503 (Mar. 26, 1986) [hereinafter Legal Analysis]).

A. Objectives

The Convention includes two explicit objectives: “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”¹² Several purposes motivated both the creation of the Convention and its implementation in the United States. It was intended primarily to protect children from the harmful effects of international child abduction.¹³ Scholars and legislators saw international cooperation as the most effective method of combating the increasing number of international abductions.¹⁴ The Convention was also intended to serve as a deterrent to international child abductions,¹⁵ to prevent alterations to custodial rights as the result of

¹² Convention, *supra* note 2, at art. 1.

¹³ See Legal Analysis, *supra* note 11, at 10,504 (“A fundamental purpose of the Hague Convention is to protect children Children who are wrongfully moved from country to country are deprived of the stable relationships which the Convention is designed promptly to restore.”); see also ICARA § 11,601(a)(2) (“The international abduction of children . . . is harmful to their well-being.”). The official report intimates that the “best interests of the child” are served by the twin aims of the Convention, “the one preventive, the other designed to secure the immediate reintegration of the child into [his or her] habitual environment.” Pérez-Vera, *Report*, *supra* note 3, ¶ 25, at 432.

¹⁴ See ICARA § 11,601(a)(3) (“International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.”); see also GERALDINE VAN BUEREN, THE BEST INTERESTS OF THE CHILD—INTERNATIONAL CO-OPERATION ON CHILD ABDUCTION 5 (1993) (“Although parental child abduction has been an offence in the United Kingdom since . . . 1984, the reality is that there is a high probability of success where children are taken to certain non-treaty states. This means that an essential element of the treaty system, the deterrent factor, is absent.” (footnote omitted)); J.M. Eekelaar, *The International Abduction of Children by a Parent or Guardian*, in COMMONWEALTH SECRETARIAT, MEETING OF COMMONWEALTH LAW MINISTERS, BARBADOS, 28 APRIL—2 MAY, 1980, at 199, 210 (1980) (“[D]iscouragement of [international child abduction] requires arrangements to be internationally agreed for the return of children . . .”).

¹⁵ See ICARA § 11,601(a)(4) (“The Convention provides a sound treaty framework to help resolve the problem of international abduction . . . of children and will deter such wrongful removals”); Eekelaar, *supra* note 14, at 210 (explaining that deterrence is “an essential element” of the treaty system); see also Pérez-Vera, *Report*, *supra* note 3, ¶ 16, at 429 (summarizing one of the Convention’s methods: “since one . . . characteristic . . . [is] that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences”). Deterrence of abduction has been seen as a primary reason for returning children to the country from which they were abducted since well before the drafting of the Convention. See Eekelaar, *supra* note 14, at 208 (noting that deterrence “is a very obvious rea-

unilateral action by individuals,¹⁶ and to prevent “forum-shopping”¹⁷ in custody disputes. It does not serve to create or enforce a custody decision; in fact, authorities in the country to which the child has been removed are expressly prohibited from deciding the merits of a custody dispute unless they first determine that the child is not required to be returned under the Convention.¹⁸

son for making ‘peremptory’ orders for the return of children,” as articulated by several English judges in the 1950s and 1960s). Some scholars believe that the Convention has been effective in deterring abduction. See VAN BUEREN, *supra* note 14, at 22 (stating that “there is reason to believe that the Child Abduction Convention is discouraging parental [kidnapping]” (quoting Caroline La Gette, Note, *International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT’L L.J. 287, 288 (1990))). For a discussion of why treaties are necessary to combat international abduction and the advantages of multilateral treaties in addressing the problem, see generally *id.* at 5-6, 39.

¹⁶ See *Croll v. Croll*, 229 F.3d 133, 142 (2d Cir. 2000) (Sotomayor, J., dissenting) (identifying “the Convention’s goal of preventing parents from unilaterally circumventing the home country’s custody law”); see also ICARA § 11,601(a)(2) (“Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.”); Pérez-Vera, *Report, supra* note 3, ¶ 11, at 428 (“[T]he situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child.”).

¹⁷ Prevention of international forum-shopping has been described as “a paramount purpose of the Hague Convention.” *Turner v. Frowein*, 752 A.2d 955, 972 (Conn. 2000); see also *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (describing a “primary purpose” of the Convention “to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court”). Prevention of forum-shopping is one of the methods by which the Convention deters international child abduction. By denying the legal advantage an abductor seeks to obtain in a custody dispute by choosing “the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims,” the Convention reduces the incentive to abduct the child across international boundaries. Pérez-Vera, *Report, supra* note 3, ¶ 14, at 429; see also President’s Letter, *supra* note 3, at 10,495 (explaining that the Convention works to deny “[t]he international abductor . . . legal advantage from the abduction”).

¹⁸ See ANNE-MARIE HUTCHINSON ET AL., INTERNATIONAL PARENTAL CHILD ABDUCTION 4 (1998) (explaining that the Convention is not “designed to enforce or provide a decision on custody between parents or other carers”); see also Convention, *supra* note 2, at art. 19 (“A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.”); *id.* at art. 16 (prohibiting a court in the country of refuge from deciding on the merits of the custody dispute until it has been determined that the child is not to be returned under the Convention); Pérez-Vera, *Report, supra* note 3, ¶ 36, at 435 (“[T]he Convention is certainly not a treaty on the recognition and enforcement of decisions on custody.”).

B. *Removal and Rights of Custody*

When a child has been wrongfully removed from his or her habitual residence less than one year prior to the commencement of an action under the Convention, a court "shall order the return of the child forthwith."¹⁹ Removal is "wrongful" if (1) "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"; and (2) "at the time of removal . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."²⁰ Thus, a petitioner must demonstrate that the respondent breached custody rights that were both in existence and actually exercised prior to the removal. ICARA places the burden of proving wrongful removal on the person seeking return of the child.²¹

In addition to the availability of the remedy of return for a removal in breach of custody rights, the Convention provides some protection for a parent's rights of access to his or her child.²² Article 21 requires signatory nations "to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject"; in order to fulfill this mission, signatories must "take steps to remove, as far as possible, all obstacles to the exercise of such rights."²³ The protection afforded to access rights is significantly more limited than that given to custody rights.²⁴

¹⁹ Convention, *supra* note 2, at art. 12. Return is required if proceedings under the Convention are commenced within one year of the wrongful removal; the court must order the return of the child if proceedings are commenced more than one year after the removal *unless* it is demonstrated that the child is now settled in his or her new environment. *Id.*

²⁰ *Id.* at art. 3(a)-(b).

²¹ § 11,603(e)(1)(A).

²² "Rights of access" are defined to "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention, *supra* note 2, at art. 5(b).

²³ *Id.* at art. 21.

²⁴ See PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 210 (1999) ("[T]he Convention does not seek to regulate [access] rights 'in an exhaustive manner.' Rather the obligations imposed . . . are limited, focusing solely on co-operation between Central Authorities and not on substantive measures aimed at actively upholding access rights." (footnotes omitted)). A Central Authority is a body designated by a signatory state "to discharge the duties which are imposed by the Convention." Convention, *supra* note 2, at art. 6. The Central Authorities of the signatory states are directed to "co-operate with each other and

The Convention provides limited guidance by virtue of a brief, nonexhaustive definition regarding "rights of custody." In Article 5, "rights of custody" are defined as "includ[ing] rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."²⁵ Rights of custody protected by the Convention "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of" the state of habitual residence—it is not necessary that custody rights were defined by judicial decree prior to removal.²⁶

Much of the litigation concerning the "rights of custody" prong has focused on interpretation of the custody law of the state of habitual residence and on the application of that law to the particular factual situation before the court.²⁷ The parties often lack a formal custody determination prior to removal,²⁸ in which case the court must determine the scope of *ex lege* custody rights under the law of the state of habitual residence.²⁹ When one party seeks the remedy of return, the court must consider the distinction between custody rights and access rights, since the return remedy is only available following a breach of custody rights.³⁰ Where an interim custody order has been issued by the state of habitual residence, foreign courts have sometimes looked to that order to determine the respective rights of the

promote co-operation amongst the competent authorities in their respective State[s] to secure the prompt return of children and to achieve the other objects of this Convention." *Id.* at art. 7.

²⁵ Convention, *supra* note 2, at art. 5(a).

²⁶ *Id.* at art. 3; see also Pérez-Vera, *Report, supra* note 3, ¶ 68, at 446 (emphasizing the Convention's protection of "custody rights which were exercised prior to any decision thereon" and the frequency with which removal occurs prior to any judicial decision regarding custody).

²⁷ See, e.g., Whallon v. Lynn, 230 F.3d 450, 454-59 (1st Cir. 2000) (reviewing principles of Mexican custody law and applying that law to the litigants' dispute); Friedrich v. Friedrich, 78 F.3d 1060, 1064 (6th Cir. 1996) (outlining German custody law and finding that the facts demonstrated the left-behind parent had custody rights under that law); Currier v. Currier, 845 F. Supp. 916, 920-22 (D.N.H. 1994) (applying German custody law stating that a marital agreement granting sole custody to one of the parties is without legal effect until approved by a court order).

²⁸ See BEAUMONT & MCELEAVY, *supra* note 24, at 17-18 & n.13 (reporting that abduction occurs prior to a custody decree in "at least 50% of cases").

²⁹ *Ex lege* custody rights are those that arise by operation of law, either by statute or as a matter of common law principles. *Id.* at 48-49.

³⁰ See, e.g., S. v. H., [1998] Fam. 49, 51, 56 (Fam.) (describing the difference between custody rights and access rights as "fundamental" because of their differing remedies under the Convention and the deliberate intent of the drafters to make the distinction).

parties. An interim order might describe the various responsibilities and rights of the parties in factual terms, rather than by using terms of art of the custody law of the state of habitual residence or following the Convention's use of the terms "custody" and "access."³¹ This has created problems for courts determining where the line between "rights of custody" and "rights of access" lies for Convention purposes—the definitions provided in the Convention text are not exhaustive, and predicting how a foreign jurisdiction's custody law would treat a particular factual situation may be difficult.³² The scope of custody rights protected by the Convention will be discussed in greater detail in Part III, which analyzes the proper interpretation of custody rights with respect to interim orders issued prior to a removal incident.

In order to obtain the return remedy, the left-behind parent must have possessed custody rights and must have been exercising them prior to the removal.³³ Determination of whether custody rights were actually exercised prior to the removal usually involves close consideration of the factual situation of the parties and child as it existed prior to the removal.³⁴ In *Friedrich v. Friedrich*,³⁵ the Sixth Circuit considered the actions of a child's parents following an abrupt separation, particularly the petitioner father's contact with and care of the child.³⁶

³¹ The orders entered by the German court in *Shealy v. Shealy*, 295 F.3d 1117 (10th Cir. 2002), discussed *infra* notes 67-69, are examples.

³² A court considering a petition for return may request a determination from the "authorities of the State of the habitual residence . . . that the removal or retention was wrongful." Convention, *supra* note 2, at art. 15. However, this provision does not seem to be invoked frequently and, given the expeditious treatment of Convention petitions, doing so more often may be impracticable. See *id.* at art. 11 (mandating expeditious proceedings for the return of children and allowing that "[i]f the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State . . . shall have the right to request a statement of the reasons for the delay").

³³ See *id.* at art. 3(b) (providing that removal is wrongful if "at the time of removal or retention [custody rights granted by the state of the child's habitual residence] were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention").

³⁴ Just as the scope of custody rights is determined by reference to the law of the country of habitual residence, determination of whether a person was exercising his or her custody rights is made according to the law of the country of habitual residence. *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993).

³⁵ 78 F.3d 1060 (6th Cir. 1996).

³⁶ See *id.* at 1064-69 (considering the contact between the father and child and its impact on determining the father's exercise of his custody rights). For a more detailed account of the facts, see *Friedrich*, 983 F.2d at 1398-99.

When considering whether the father had been “actually exercising” his custodial rights at the time of the child’s removal, the court stated that “in the absence of a ruling from a court in the country of habitual residence, [courts should] liberally find ‘exercise’ whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.”³⁷ The court offered three reasons for its broad interpretation of the “actual exercise” element:

First, American courts are not well suited to determine the consequences of parental behavior under the law of a foreign country. It is fairly easy for the courts of one country to determine whether a person has custody rights under the law of another country. It is also quite possible for a court to determine if an order by a foreign court awards someone “custody” rights, as opposed to rights of “access.” Far more difficult is the task of deciding . . . if a parent’s custody rights should be ignored because he or she was not acting sufficiently like a custodial parent. A foreign court . . . should refrain from making such policy-oriented decisions . . .

Second, an American decision about the adequacy of one parent’s exercise of custody rights is dangerously close to forbidden territory: the merits of the custody dispute. . . .

Third, the confusing dynamics of quarrels and informal separations make it difficult to assess adequately the acts and motivations of a parent. An occasional visit may be all that is available to someone left, by the vagaries of marital discord, temporarily without the child. . . . Reading too much into a parent’s behavior during these difficult times could be inaccurate and unfair. . . . [A]s a general rule, any attempt to maintain a somewhat regular relationship with the child should constitute “exercise.”³⁸

In framing the “actual exercise” element of wrongful removal in this way, *Friedrich* created what I will call a “custody plus” paradigm of wrongful removal, placing more emphasis on the actual possession of custody rights and less on the exercise of those rights. This paradigm is sensible because it maintains a broad interpretation of the Convention—in keeping with the Convention’s broad purpose—but does not render the Convention’s inclusion of the “actual exercise” element in its definition of wrongful removal superfluous.

³⁷ *Friedrich*, 78 F.3d at 1065.

³⁸ *Id.* at 1065-66 (footnotes omitted).

C. *Habitual Residence*

Habitual residence is a critical component of the Convention, yet it is not defined in the Convention or in ICARA.³⁹ Instead, a judicial understanding of the meaning of "habitual residence" has developed through case law following the seminal construction of the term in *Friedrich*.

Friedrich involved a dispute between a mother and father following the mother's removal of their son from Germany to the United States. Mrs. Friedrich was an American stationed in Germany with the United States Army; Mr. Friedrich was a German citizen.⁴⁰ The Friedrichs were married in Germany in 1989, and their son, Thomas, was born in Germany that year.⁴¹ Except for a ten-day visit with his maternal grandparents in the United States in 1991, Thomas lived exclusively in Germany from his birth until his mother removed him when he was approximately two years old.⁴²

When asked to consider whether the district court properly held that Thomas's habitual residence was in the United States, the Sixth Circuit reversed, holding that Germany was Thomas's state of habitual residence.⁴³ Despite the fact that Thomas had always resided in Germany, Mrs. Friedrich argued that Thomas's habitual residence was in the United States because he was a United States citizen, he used a United States address as his permanent address for the purposes of military documentation, and Mrs. Friedrich planned for Thomas to return to the United States with her when she left the military.⁴⁴ The court of appeals reversed the district court's holding that Thomas's habitual residence had been altered to the United States when Mrs. Friedrich and Thomas left the family apartment.⁴⁵ According to the Sixth Circuit, a child's habitual residence is determined by reference to the child's past experience and ordinary residence, not the parents'

³⁹ See Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 20 (1994) ("The Convention does not provide a definition of habitual residence, but identifying the State of habitual residence is critical."); see also *Friedrich*, 983 F.2d at 1400 ("The Convention does not define 'habitual residence.'").

⁴⁰ *Friedrich*, 983 F.2d at 1398.

⁴¹ *Id.*

⁴² *Id.* at 1398-99.

⁴³ *Id.* at 1398, 1400-02.

⁴⁴ *Id.* at 1401.

⁴⁵ *Id.*

future intent.⁴⁶ Thus, the habitual residence is the country where the child is accustomed to living, rather than another country with which the child has certain legal ties.⁴⁷ The habitual residence “cannot be so easily altered” as to change immediately upon the separation of the child’s parents simply because one parent might intend to remove the child to another country.⁴⁸

D. Preventing Return

Once the petitioner has established that removal of the child from his or her habitual residence breached the petitioner’s exercised custody rights, the respondent in a Convention case may avoid the return remedy either by rebutting the petitioner’s case or by proving one of several exceptions established by the Convention.⁴⁹ Articles 12, 13, and 20 provide the exceptions available to the respondent,⁵⁰ all of which are “narrow.”⁵¹

Under Article 12, a respondent may attempt to prove that a wrongfully removed child should not be returned to the country of habitual residence because the child has been in the new country for more than a year and is settled in his or her new environment.⁵² The

⁴⁶ *Id.*

⁴⁷ *See id.* (“Although these ties may be strong enough to establish legal residence in the United States, they do not establish habitual residence. . . . On its face, habitual residence pertains to customary residence . . .”); *see also* Pérez-Vera, *Report, supra* note 3, ¶ 66, at 445 (stating that the Hague Conference regards the concept of habitual residence “as a question of pure fact, differing in that respect from domicile”).

⁴⁸ *Friedrich*, 983 F.2d at 1401.

⁴⁹ *Friedrich* described a burden-shifting paradigm in which the petitioner first attempts to prove that the removal of the child was wrongful; if the petitioner is successful, the burden shifts to the respondent to prove one of the exceptions to return provided by the Convention. *Id.* at 1400.

⁵⁰ *See supra* note 11 (explaining these Convention exceptions).

⁵¹ *See* ICARA, 42 U.S.C. § 11,601(a)(4) (2000) (“Children who are wrongfully removed or retained . . . are to be promptly returned unless one of the *narrow exceptions* set forth in the Convention applies.” (emphasis added)); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (“All four of these exceptions are ‘narrow.’” (citation omitted)); Pérez-Vera, *Report, supra* note 3, ¶ 34, at 434 (“[The exceptions] are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter.”).

⁵² Article 12 provides: “The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year [from the date of wrongful removal] shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.” Convention, *supra* note 2, at art. 12. For cases construing and applying the “well-settled” exception, see *Miller v. Miller*, 240 F.3d 392, 402 n.14 (4th Cir. 2001); *Lops v. Lops*, 140 F.3d 927, 945-46 (11th Cir. 1998); *In re Robinson*, 983 F. Supp. 1339, 1344-46 (D. Colo. 1997); Wojcik

respondent has the burden of proving this exception by a preponderance of the evidence.⁵³

Article 13 allows a court to refuse to return the child if the petitioner consented to or subsequently acquiesced in the removal, if return would expose the child to a "grave risk" of harm or "otherwise place the child in an intolerable situation," or if, under certain conditions, the child objects to being returned.⁵⁴ The respondent has the burden of proving acquiescence or the objection of the child by a preponderance of the evidence.⁵⁵ The respondent must prove "grave risk" by clear and convincing evidence.⁵⁶

The final exception to return is found in Article 20 of the Convention, which provides that return "may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."⁵⁷ The respondent must prove the applicability of this exception by clear and convincing evidence.⁵⁸

v. Wojcik, 959 F. Supp. 413, 418-21 (E.D. Mich. 1997). See also Legal Analysis, *supra* note 11, at 10,509 (discussing the purposes behind, and application of, the "well-settled" exception).

⁵³ ICARA § 11,603(e)(2)(B).

⁵⁴ Article 13 provides that return is not required if "the person, institution or other body having the care of the person of the child . . . consented to or subsequently acquiesced in the removal or retention," Convention, *supra* note 2, at art. 13(a), or if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation," *id.* at art. 13(b). In addition, Article 13 permits "the judicial or administrative authority" to "refuse to order the return of the child if it finds 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." *Id.* at art. 13.

⁵⁵ ICARA § 11,603(e)(2)(B). For cases construing and applying the "acquiescence" and "objection of the child" defenses, see, for example, Gonzalez-Caballero v. Mena, 251 F.3d 789, 793-95 (9th Cir. 2001); Whallon v. Lynn, 230 F.3d 450, 460-61 (1st Cir. 2000); *Robinson*, 983 F. Supp. at 1343-44.

⁵⁶ ICARA § 11,603(e)(2)(A). For cases construing and applying the "grave risk" exception, see, for example, Blondin v. Dubois, 238 F.3d 153, 157-61 (2d Cir. 2001); England v. England, 234 F.3d 268, 270-72 (5th Cir. 2000); *Friedrich*, 78 F.3d at 1067-69; Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376-78 (8th Cir. 1995).

⁵⁷ Convention, *supra* note 2, at art. 20.

⁵⁸ ICARA § 11,603(e)(2)(A). For discussion of the "human rights" exception, which is rarely applied, see BEAUMONT & MCELEAVY, *supra* note 24, at 172-76. See also Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 851 (Ky. Ct. App. 1999) (rejecting respondent's "human rights" defense); Pérez-Vera, *Report*, *supra* note 3, ¶ 118, at 461-62 (considering the Article 20 "human rights" exception and explaining its "clearly exceptional" nature).

II. MEET THE SHEALYS

Gregory Shealy recently asked a federal court in Colorado to return his four-year-old daughter, Sierra, to her home in Germany.⁵⁹ Mr. Shealy alleged that his wife had removed Sierra from Germany to the United States without his knowledge or consent and in breach of his custody rights under German law.⁶⁰ His petition was denied.⁶¹ *Shealy v. Shealy* raises interesting questions concerning the proper treatment of foreign interim custody decisions under the Convention and will serve as a case study of the applicability of Convention provisions to a case of removal following issue of an interim custody order.

Sierra Hope Shealy was born in 1996 to Gregory and Regina Shealy, both U.S. citizens.⁶² Regina Shealy, a sergeant in the United States Army, was transferred to a duty station in Germany in 1997; Mr. Shealy and Sierra joined her there soon after.⁶³ In May 2000, Mr. and Sergeant Shealy began experiencing marital difficulties, and Mr. Shealy moved out of the residence he shared with Sergeant Shealy and Sierra and into a separate apartment.⁶⁴

In July 2000, Sergeant Shealy sought a determination from a local German court that she should have sole legal custody of Sierra.⁶⁵ The German court, pursuant to an agreement between Mr. and Sergeant Shealy, and without conducting a hearing on the merits of the custody claim, issued an interim order concerning the custody arrangement of the parties.⁶⁶ The German interim decision, issued July 26, 2000, awarded Sergeant Shealy "domicil-determination-rights" over Sierra, but also provided that she would "not be able to take the child from the German jurisdiction, . . . [or] to take the child from the Federal Republic of Germany without the father's consent, unless [m]ilitary

⁵⁹ *Shealy v. Shealy*, 295 F.3d 1117, 1120 (10th Cir. 2002).

⁶⁰ Amended Emergency Petition for Return of Child to Petitioner at 7-8, *Shealy v. Shealy* (D. Colo. 2001) (No. 01-D-972) (on file with author).

⁶¹ *Shealy*, 295 F.3d at 1119.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Reporter's Transcript at 174, *Shealy v. Shealy* (D. Colo. 2001) (No. 01-D-972) [hereinafter Transcript] (on file with author); Response to Emergency Petition for Return of Child to Petitioner at 3, *Shealy v. Shealy* (D. Colo. 2001) (No. 01-D-972) (on file with author).

⁶⁵ Transcript, *supra* note 64, at 174.

⁶⁶ *Id.* at 175-76.

[o]rders make a removal necessary.”⁶⁷ It further provided that Mr. Shealy had the right

[t]o have the child . . . on every second weekend . . . from Thursday after Kindergarten, at the earliest at 12.00 hrs, until Sunday at 18.00 hrs (06 p.m.). . . . The father also have [sic] the rights, to take the child . . . daily from Kindergarten at 12.00 hrs until evenings 17.30 hrs (05:30 p.m.) unless there are vacations in the Kindergarten or the mother is on leave. The parties agree, that the father is permitted to be with the child during half of the vacation time.⁶⁸

The court added that “[Sergeant Shealy’s] request for the parental care will not be maintained.”⁶⁹ The court ordered evaluations of Mr. Shealy, Sergeant Shealy, and Sierra by social workers; the German judge planned to determine, based on those evaluations, which parent was more suitable for permanent custody.⁷⁰

Sergeant Shealy was scheduled to meet with a social worker on March 20, 2001; she failed to appear for the meeting, however, because she removed Sierra from Germany to the United States on March 19.⁷¹ When Mr. Shealy discovered that Sierra was missing and ascertained her location, he brought an action in the District of Colorado requesting that Sierra be returned to Germany pursuant to the Convention.

III. THE PROBLEM OF INTERIM CUSTODY ORDERS: KEEPING TEMPORARY ORDERS TEMPORARY

Interim custody orders present an interesting problem under the Convention because we must determine whether they fall within the scope of the custody rights protected by the Convention. Consideration of a particular factual scenario like the Shealys’ enables us to imagine other ways in which a similar interim custody order might play out in the real world, and provides a framework for considering the policy concerns affecting the outcome.

It does not appear that the proper treatment of an interim custody order has been directly and fully considered by any court in the United States. A number of courts have decided Convention petitions

⁶⁷ Translation, Decision of the Local Court, Idar-Oberstein (Mar. 27, 2001) [hereinafter Translation of Local Court Decision] (on file with author).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Shealy v. Shealy, 295 F.3d 1117, 1120 (10th Cir. 2002).

⁷¹ *Id.*

when removal of the child followed entry of an interim order in the country of habitual residence.⁷² Some of those cases involved interim decisions in favor of the left-behind parent—they provide little assistance in resolving the question of whether an interim custody order in favor of the abducting parent should be considered as having altered the custody rights of the left-behind parent. Even in those cases that have involved interim orders from the country of habitual residence in favor of the abducting parent, however, courts have failed to explicitly consider how those orders should affect the left-behind parent's rights. United States courts should more carefully consider the finality of any custody order before determining whether or not custody rights have been violated by a removal. Courts faced with a removal following issuance of an interim order in the country of habitual residence must develop a consistent, workable theory of both the meaning of custody rights under the Convention and the jurisdictional rights and responsibilities of the courts in the countries interested in the child's situation.

The German order at issue in *Shealy* does not present a pristine issue of proper treatment of interim custody orders because it did not grant the mother sole custody. Furthermore, proper treatment of the German court's order raises questions regarding the non-removal, clause and the military necessity exception included as conditions of the parties' custody order.⁷³ This contrasts with a hypothetical interim order explicitly granting temporary sole custody to one parent and including no nonremoval clause. The outcome in *Shealy* raises the question of the interim order's effect on the custody rights of parties to a Hague Convention petition, a problem that has not yet

⁷² See, e.g., *Higgins v. Higgins*, No. 00-CV-6381, 2001 U.S. Dist. LEXIS 3959, at *4-5 (E.D. Pa. Feb. 2, 2001) (granting a mother's petition for return of her children, who were removed from Germany by their father following a German court's temporary custody order in the mother's favor); *Turner v. Frowein*, 752 A.2d 955, 969-78 (Conn. 2000) (considering a father's petition for return initiated after he had received temporary custody from a court in the country of habitual residence); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 849, 852 (Ky. Ct. App. 1999) (ordering the return of a child "wrongfully removed" by the mother who had been granted temporary custody of the child but ordered not to remove the child from Greece, finding that such prohibition, coupled with the father's extensive visitation rights, fell within the meaning of "custodial right").

⁷³ The temporary character of the order should be the primary issue, however, as it seems that one could not determine the effect of the nonremoval clause or the military necessity exception until one determines the effectiveness of the order itself. On appeal, the Tenth Circuit upheld the district court's finding that, *because* the German custody order was only temporary, "Mr. Shealy retained joint custody rights that he was exercising." *Shealy*, 295 F.3d at 1121.

received consistent treatment by courts in the United States or other signatory nations. The following discussion will consider first how interim custody orders should be treated in Convention cases generally, and then how the *Shealy* court should have treated the specific German order at issue.

Imagine a "typical" situation in which this problem might arise. Stephanie, a United States citizen, and Andrew, an Australian citizen, were married in Kentucky and had a child, April, one year after their marriage. Several months later, the family moved to Australia and lived there for the next four years, until Andrew and Stephanie began experiencing marital difficulties. Stephanie filed for divorce in an Australian court, seeking sole custody of April. Andrew responded by claiming that he was the more suitable parent, and requested that the court grant him sole custody instead. The Australian court issued an interim order, based on an agreement of the parties, under which Stephanie would have custody of April, but April would spend each afternoon after preschool with Andrew and would stay with him each week from Sunday afternoon until Wednesday evening. The court implemented this arrangement until a full hearing could be held, and scheduled a series of meetings during which a court-appointed social worker would meet separately with Stephanie and April and with Andrew and April in order to evaluate the suitability of each parent. The court also scheduled a hearing on the merits of the custody dispute to be held two weeks after the completion of the evaluative meetings. Andrew attended his first meeting with the social worker. Two days before Stephanie's first meeting, however, she took April to Colorado, withdrawing her Australian divorce petition and filing a new divorce petition in Colorado state court, again seeking sole custody of April. When Andrew learned of their location several days later, he filed a petition in district court in Colorado, seeking April's return to Australia under the Convention. The district court then determined that April's habitual residence is Australia, but must now decide whether Stephanie's removal of April was "wrongful" within the meaning of the Convention. The parties do not dispute that Andrew was very involved in April's care, and that they had been operating under the terms of the interim order until the time of April's removal from Australia.

A. *The Broad Scope of the Convention's Protection of Custody Rights*

It is because of the broad scope of the custody rights protected by the Convention that courts should take into account the temporary character of an interim foreign custody order. The respondent in a Convention petition may assert that a foreign temporary order granted him or her custody of the child as well as terminated the other parent's rights, and that removal was therefore not wrongful. In order to accomplish the Convention's goal of protecting a broad range of custody rights and restoring the status quo that existed prior to removal, temporary orders should not be seen as altering the custody rights of the parties. The broad scope of custody rights that the Convention was intended to protect is evident in the Convention itself. Although the Convention states that a finding of wrongful removal should be based on a breach of custody rights attributed by the law of the country of habitual residence,⁷⁴ courts and commentators have interpreted the custody rights protected by the Convention as not limited to those which may be found under a restrictive interpretation of the family law of the country of habitual residence.⁷⁵

1. Source of Custody Rights

The scope of the custody rights protected by the Convention is wider than the specific family laws of any individual signatory nation, even those of the country of habitual residence of a child whose return is being sought. Courts analyzing the meaning of "rights of custody" under the Convention should look beyond the particular custody laws of the country of habitual residence to consider the purposes and structure of the Convention itself. As the English Family Division observed in *Re W*:

"The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression 'rights of custody,' for example, does not coincide with any

⁷⁴ Convention, *supra* note 2, at art. 3(a).

⁷⁵ See *infra* note 79 (providing authority in support of a broad reading of custody rights).

particular concept of custody in domestic law, but draws its meaning from the definitions, structure and purposes of the Convention."⁷⁶

The dual nature of the custody rights protected by the Convention, which draws meaning from the custody laws of the country of habitual residence as well as from the Convention itself, has been similarly articulated elsewhere. For example, the court in *C. v. C.*, reviewing a petition for return by an Australian father whose child had been removed from Australia to England by the child's mother, stated:

We are necessarily concerned with Australian law because we are bidden by [Article 3] 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 [C]onvention 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.⁷⁷

In other words, courts should look to the law of the country of habitual residence to determine the factual substance of parties' rights with respect to the child—whether, for example, an unmarried father has the right to determine which school his child should attend, or whether a mother has the right to have the child stay in her home three nights per week following a divorce—but should decide whether those rights constitute custody rights that are protected by the Convention according to the meaning of "rights of custody" under the Convention itself.⁷⁸

⁷⁶ [1998] 2 F.L.R. 146, 151-52 (Fam.) (quoting *Report of the Second Commission Meeting to Review the Operation of the Civil Aspects of International Child Abduction Held 18-21 January 1993*, 33 I.L.M. 225 (1994)).

⁷⁷ [1989] All E.R. 465, 473 (C.A. 1988) (Lord Donaldson).

⁷⁸ Professor Silberman has stated that the Convention creates "an autonomous treaty definition of custody rights quite apart from domestic law interpretations of custody, which may differ from State to State." Silberman, *supra* note 39, at 17. The English Court of Appeal has described the dual inquiry into custody rights another way, explaining that the inquiry is whether the left-behind parent has custody rights under the law of the country of habitual residence that fall within the Convention's definition of custody rights. If so, the court in the country to which the child has been removed determines whether the removal breached those rights of custody. See *Re F*, [1995] Fam. 224, 231 (C.A.) ("Having found that the father retains rights as a parent by Colorado law which fall within the Convention definition, . . . equally it is a matter of English law whether the mother is in breach of those 'rights of custody' by her removal of the child.").

2. Broad Scope of Custody Rights

Rights of custody under the Convention are to be interpreted broadly,⁷⁹ in part because a “flexible interpretation of the terms used [in the Convention] . . . allows the greatest possible number of cases to be brought into consideration.”⁸⁰ A court’s interpretation of the effect of an interim foreign custody decision must account for the expansive nature of the custody rights protected by the Convention. The fact that a court in the country of habitual residence may have granted the abducting parent certain custody rights pending additional investigation or evaluations, or a final hearing on the merits of the custody dispute, should not be dispositive of the parties’ respective custody rights. The court should instead look to the factual circumstances prior to removal and to the purposes of the Convention in de-

⁷⁹ Compare *Croll v. Croll*, 229 F.3d 133, 146 (2d Cir. 2000) (Sotomayor, J., dissenting) (describing the Convention as containing a “broad notion of custody rights” and a “notably more expansive conception of custody rights” than would be derived from an interpretation based on a dictionary definition of “custody”), *with id.* at 139 (“Nothing in the Hague Convention suggests that the drafters intended anything other than [an] ordinary [dictionary] understanding of custody.”). See generally BEAUMONT & MCELEAVY, *supra* note 24, at 45 (“The drafters and subsequently judicial and administrative authorities have sought to avoid potential lacunae by seeking to give a wide interpretation to custody rights.”); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 636-41 (2000) (discussing the expansive nature of the Convention’s use of the term “rights of custody” and stating that the term “has consistently received a wide interpretation”); Deborah M. Huynh, Note, *Croll v. Croll: Can Rights of Access Ever Merit a Remedy of Return Under the Hague Convention?*, 26 *N.C. J. INT’L L. & COM. REG.* 529, 551-52 (2001) (opining that “understanding the expansive meaning of ‘custody’ is fundamental,” and describing the Convention’s concept of custody as “open-ended,” “broad,” and “inclusive”).

The Pérez-Vera report explains that the sources of custody rights under the law of the country of habitual residence should be “understood in [their] widest sense, as embracing both written and customary rules of law—whatever their relative importance might be—and the interpretations placed upon them by case law.” Pérez-Vera, *Report, supra* note 3, ¶ 66, at 445. In addition, the *Explanatory Report* observes:

[A]s the preliminary proceedings of the Commission demonstrate, [the language of Article 3] was intended right from the start to expand considerably the range of provisions which have to be considered [A] proposal was made during the Fourteenth Session that this article should make it clear that the reference to the law of the habitual residence extends also to the rules of private international law. The fact that this proposal was rejected was due to the Conference’s view that its inclusion was unnecessary and became implicit anyway once the text neither directly nor indirectly excluded the rules in question.

Id. ¶ 66, at 445-46 (footnotes omitted).

⁸⁰ Pérez-Vera, *Report, supra* note 3, ¶ 67, at 446.

termining whether the left-behind parent had rights of custody within the meaning of the Convention.

B. *Suggested Analytical Approaches to Interim Orders*

Assigning too much weight to an interim order favoring the abductor undermines the Convention's purposes of preventing unilateral changes in the forum of custody disputes and deterring international child abductions. A parent who had been exercising custody under the laws of the habitual residence since the child's birth, but who had agreed to allow the other parent to have interim custody pending evaluation by the court, might lose all his or her rights the moment the other parent moved the child across an international boundary. However, giving no weight to an interim custody decision would mean that a left-behind parent who had not previously had any custody rights with respect to a child, but had obtained custody based on an interim decision of the country of habitual residence prior to the removal, would never have access to the remedy of return under the Convention. The proper resolution of this dilemma cannot be that a court should decide to give effect to, or to ignore, an interim decision based solely on whether the interim decision granted or withdrew custody rights from the petitioner. Instead, an appropriate result may be achieved by either of two analytical approaches to an interim custody decision's effect on the respective custody rights of parties to a Convention petition: (1) the court may view the situation in the light most favorable to a finding of custody rights held by the left-behind parent, in order to effect a full consideration of the abduction claim and to comport with the purposes of the Convention; or (2) the court may view the interim decision as an undertaking of jurisdiction by the court in the country of habitual residence, or as a determination that the custody decision should be made there, and grant deference to the foreign court's action.

1. Viewing Custody Rights in the Light Most Favorable to the Left-Behind Parent

The first approach—viewing the preremoval factual and legal situation in the light most favorable to a finding that the left-behind parent had “rights of custody” prior to the removal—derives its support primarily from the purposes and policies behind the Convention and ICARA, and effects a full consideration of the practical realities of the parties' family situation prior to the removal.

The Convention was adopted as a measure of protection for children like April, in the hypothetical scenario above, against the harmful effects of international child abduction.⁸¹ In my hypothetical, the Colorado court decided that Australia was April's habitual residence. April's father and mother shared the rights and responsibilities of caring for April in the country of habitual residence until the time of their separation and, subsequently, according to the terms of the interim order. If the Colorado court were to decide that the interim order should be viewed as vesting sole custody in Stephanie and abrogating Andrew's custody rights, April's ties with her familiar environment and with her father may be permanently severed, resulting in the type of harm that occurs when children are internationally abducted.⁸² This would be a drastic result to impose on a child, based solely on an interim order in which the Australian court had not yet had the opportunity to consider the merits of competing custody claims.

Similarly, treating the interim order as if it nullified Andrew's custody rights would undermine a number of the other purposes underlying the Convention's adoption. The deterrent effects⁸³ of the international return remedy would certainly be frustrated. Courts often enter some type of provisional order pending a final custody decision. If United States courts were known to treat such an order as a final custody determination when considering whether removal was wrongful under the Convention, the United States would become a haven for parents wishing to avoid the jurisdiction of foreign courts over their custody disputes through international abduction. Parents would need only file a request for custody with the foreign court and obtain an interim decision, with no consideration of the merits, in their favor in order to have that decision effectively validated and finalized by a unilateral move to the United States.⁸⁴ Reducing the steps

⁸¹ See *supra* note 13 and accompanying text (describing such protection as one of the Convention's primary purposes).

⁸² See, for example, *Re B*, [1995] 2 F.C.R. 505, 518-19 (C.A.), in which an English court determined that "the child . . . would suffer if his expectation of returning to the only country he had ever known . . . was destroyed." See also *id.* at 517 ("The objective is to spare children already suffering the effects of [a] breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country . . .").

⁸³ See *supra* note 15 and accompanying text (explaining the Convention's deterrent function).

⁸⁴ Ultimately, the left-behind parent might still obtain custody because, following the refusal of return, a custody determination on the merits might be requested in the United States. There is no requirement, however, that a judicial custody decision be

necessary before removal will be considered "rightful" makes it easier for parents to remove children from one country to another and therefore reduces the deterrent effect of the Convention.

The Convention's purposes of preventing forum-shopping and unilateral custody alterations⁸⁵ would also suffer by according an interim order the same status as a final order. Permitting a parent to obtain an interim order from a foreign court and then withdraw from that jurisdiction and invoke the jurisdiction of another nation in the custody matter would allow the parent to "test the waters" of various nations' custody laws, and their courts' perspectives on the situation, before deciding to battle in one of the jurisdictions. For example, Stephanie might have acquired knowledge of the approach and demeanor of the Australian judge at the initial hearing. She could even have attended several meetings with the social worker to determine whether or not the social worker would be sympathetic to Stephanie's position or to discover what April would tell the evaluator about their relationship and that of April and Andrew. If, after participating in and observing the various proceedings, she were uncertain about her chances of success, or felt that her chances were better in her own country of origin than in that of her estranged husband, Stephanie could have taken April abroad, unilaterally giving greater effect to the court's interim order than the court intended.

In *Re F*, the English Court of Appeal decided that a married father's ex lege joint legal custody rights under Colorado law were not eliminated for Convention purposes when his wife, the child's mother, acquired an interim custody order and then removed the child from the United States.⁸⁶ In that case, an American father and a Welsh mother had married in Colorado and lived there with their son.⁸⁷ When the marriage began to deteriorate, the mother obtained an interim custody order from a Colorado court and then removed the child to Wales.⁸⁸ The father petitioned for return under the Convention.⁸⁹ The Court of Appeal determined that the father and

made if neither party requests one, and the balance of power would likely have shifted in the abductor's favor. See *supra* note 17 (discussing the legal advantage obtained by the abducting parent by virtue of selecting the forum in which the custody dispute will be adjudicated).

⁸⁵ See *supra* notes 16-17 and accompanying text (outlining these two Convention goals).

⁸⁶ [1995] Fam. 224, 230 (C.A.).

⁸⁷ *Id.* at 227.

⁸⁸ *Id.*

⁸⁹ *Id.* at 228.

mother had “equal and separate rights of custody” under Colorado law at the time of removal, and that either parent could unilaterally remove the child from Colorado without violating Colorado law.⁹⁰ Nevertheless, the court concluded that “lawful removal” by one parent could not destroy the other parent’s custody rights, and that the mother’s removal of the child breached the father’s custody rights because he was prevented from exercising those rights in the United States.⁹¹ The court held that this constituted a wrongful removal within the meaning of the Convention.⁹² The court further held that the removal breached the father’s rights, despite the existence of the interim order in the mother’s favor—the order was “of a limited nature,” did not abrogate the father’s custody rights because it did not destroy the father’s right to decide that his child should live within the United States, and did not alter the fact that the father would have been exercising his rights of custody had the child not been removed by the mother.⁹³

The court’s decision that the removal was wrongful was grounded entirely on its finding of breach of the father’s custody rights; since the court held that removal was wrongful because of that breach, it did not reach the question of whether the Colorado court had custody rights by virtue of the proceedings pending there at the time of removal.⁹⁴ The court determined that the removal breached the father’s rights under the Convention because of

the mother’s unilateral decision to remove the child without the consent of the father and with the knowledge that if he knew he would have opposed her removal of the child. By the removal she frustrated and rendered nugatory his equal and separate rights of custody, in particular that the child should reside in the [United States]. In so doing she was . . . in breach of the father’s rights of custody under the Convention and the removal was wrongful.⁹⁵

By taking this approach, the court correctly balanced the father’s and mother’s respective rights under Colorado custody law and the protection offered by the Convention for a broad range of ways in

⁹⁰ *Id.* at 230.

⁹¹ *Id.*

⁹² *Id.* at 231.

⁹³ *Id.* at 230.

⁹⁴ *Id.* at 231. See *infra* Part III.B.2.b for a discussion of decisions in which courts have held that removal was wrongful because it breached custody rights held by a court in the country of habitual residence by virtue of pending custody proceedings in that court.

⁹⁵ *Re F.*, [1995] Fam. at 231.

which custody rights may be held and exercised. The decision was soundly based on the principles behind the Convention's adoption and represents a pragmatic approach to the complex legal and factual situations surrounding international child abductions.

In my hypothetical, Stephanie and Andrew had joint legal custody until the interim order was entered. In addition, both were highly involved in April's care and upbringing, both before and after an interim decision that was not made on the merits of the case. Viewing the situation in the light most favorable to a finding that Andrew had and was exercising custody rights prior to the removal would give appropriate weight to the parties' respective custody rights; there is no reason that the form of an interim decision should trump the substance of the pre-existing legal rights of the parties and their actual relationships and behavior, both before and during the interim arrangement. Andrew, Stephanie, and April had lived in Australia for most of April's life; the parents had cared for April in Australia, and she was accustomed to her way of life there. It is absurd for an alien court to determine custody based on the problematic premise that a provisional remedy of a court that has undertaken to evaluate the child's best interests (but has not yet had a full opportunity to do so) alters the factual and legal situation of the parties in any meaningful way under the Convention. The court should return the child, enabling the court whose jurisdiction the parties originally invoked and which has the closest connection to the situation to appropriately complete what it began.

2. Deference to Foreign Courts

The second approach—viewing the foreign interim decision as an acceptance of jurisdiction by the foreign court or as a determination that the custody decision should be made there—derives support from the Convention's purposes, cases holding that an interim order vests rights of custody in the foreign court itself, and principles of comity.

a. *The Convention's policies*

The purposes of the Convention support this approach in the same way they support an approach in which the foreign court meaningfully considers the actual factual and legal circumstances of the parties prior to removal rather than accepting interim orders at face

value.⁹⁶ Deferring to a foreign court's acceptance of custody might create concerns that a court would too easily abdicate its responsibility to protect the child's interests to a foreign court that was itself improperly exercising jurisdiction over the initial custody dispute, such as where a previous abduction had occurred or where an interim custody determination was secured during a temporary visit to the foreign nation. However, the habitual residence requirement should serve to allay any such concern. Custody rights are defined by reference to the laws of the country of habitual residence and habitual residence is determined by the domestic court.⁹⁷ There would be no need to defer to an interim order from a third-party nation that did not itself have proper jurisdiction over the custody claim.⁹⁸

b. *The foreign court's custody rights*

A number of courts have indicated that the nature of an interim custody order is such that, until final custody arrangements are made by the court, rights of custody are vested in the foreign court itself, and that these rights may be violated by removal prior to final disposition of the case. No United States court had considered the issue un-

⁹⁶ See *supra* notes 80-84 and accompanying text for a discussion of how the Convention's policies support an approach based on a practical view of the parties' factual circumstances prior to removal.

⁹⁷ See Convention, *supra* note 2, at art. 3(a) (providing that wrongful removal or retention is determined under the law of the state in which the child was habitually resident); see also *supra* notes 76-80 and accompanying text (discussing the scope and source of the custody rights protected by the Convention).

⁹⁸ Professor Eekelaar addressed this concern when the Convention was still in draft form:

A clear ground of challenge would be that the "foreign" order was not the kind of order contemplated by the procedure. Here it is necessary to refer to the basis on which the original court exercised jurisdiction. . . . Would it be enough if the original state was the state of the child's nationality, or [his or her] mere presence, or domicile and so on? . . . [T]he concept of "habitual residence" seems to be the most appropriate. Thus if it could be shown that the original decision was not made in the state of the child's habitual residence at the time the proceedings leading to the decision were instituted, it should not be entitled to automatic enforcement under this procedure.

Eekelaar, *supra* note 14, at 211. Return may be made to a country other than that of the habitual residence, for example, if the parent requesting return has emigrated following the removal. Pérez-Vera, *Report*, *supra* note 3, ¶ 110, at 459-60. The petitioner's relocation following the child's removal does not affect the custody rights determination at the time of removal. Custody rights form the basis for a finding of wrongful removal, and, under Article 3, the determination of custody rights requires reference to the laws of the country of habitual residence, not to that of a third-party country acting improperly with respect to the child.

til recently,⁹⁹ but the courts of several other signatory nations have faced the issue. Where courts have decided that a foreign court had custody rights under the Convention, the decisions turn on the involvement of the foreign court in custody proceedings and acceptance of jurisdiction by that court.

It has been widely accepted that a court is a body that may have custody rights under the Convention.¹⁰⁰ The issue thus becomes whether the foreign court in any particular case had acquired those rights prior to the removal. A court's custody rights may arise from its power to decide others' rights of custody in a custody dispute concerning the child, or from a determination that the court had the "right to determine the child's place of residence."¹⁰¹

One case in which the court decided that a court itself had custody rights was *Re H*,¹⁰² a case involving an application by a father for return of his child to Ireland. The child had been removed by his mother to England in the midst of a custody dispute in an Irish court. The mother had been granted custody, and the father interim access, in 1996.¹⁰³ In 1998, the father filed an application for custody; at the initial hearing the Irish court adjourned the matter for four months

⁹⁹ The Western District of Virginia recently expressed its belief that no court in the United States had previously addressed the issue of whether a foreign court had custody rights under the Convention. *Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 603 (W.D. Va. 2001).

¹⁰⁰ See *Re H*, [2000] 2 A.C. 291, 299-306 (H.L.) (appeal taken from Ir.) (collecting cases from numerous countries, including England, Ireland, Canada, and New Zealand, which held that a court may have custody rights with respect to a child, and stating that neither the court nor a report on the operation of the Convention had found any contrary decisions); see also Convention, *supra* note 2, at art. 3(a) (providing that removal is wrongful when it breaches "rights of custody attributed to a person, an institution or any other body" (emphasis added)).

¹⁰¹ Convention, *supra* note 2, at art. 5(a). See *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 588, for the Canadian Supreme Court's discussion of how custody rights may vest in a court, without any requirement that the court be exercising its "wardship" jurisdiction. The court held:

[W]hen a court has before it the issue of who shall be accorded custody of a child, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child. . . . [T]he Court of Chancery has long exercised wardship over children in need of protection in the exercise of its *parens patriae* jurisdiction. But I see no need to rely on jurisdiction emanating from this doctrine

Id.

¹⁰² [2000] 2 A.C. 291 (H.L.).

¹⁰³ *Id.* at 300.

after the parties consented to an interim custody and access arrangement.¹⁰⁴ The House of Lords held that the Irish court had custody rights with respect to the child because its jurisdiction over the custody dispute had been invoked, a date for disposition of the matter had been set, and the court had power to decide the place of the child's residence.¹⁰⁵

In another English case, *Re W*,¹⁰⁶ a left-behind father sought a declaration of wrongful removal under the Convention.¹⁰⁷ The father had initially petitioned for custody of his two children in 1996. In early 1997, the mother and father provisionally agreed that the father would have contact with the children for several months, after which a court welfare officer would enter a report and the court would hold a final hearing on the request for custody. A few days before the final hearing date, the mother and stepfather took the children to Australia, intending to remain there. Upon consideration of the Article 15 request, the Family Division concluded that removal had been wrongful within the meaning of the Convention because it breached the custody rights of the court with "relevant proceedings pending" in the original custody dispute.¹⁰⁸ The court added that "proceedings will obviously be pending for this purpose if interim orders have been made and directions given for a final hearing."¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 304-05. The court also addressed whether the father had standing to bring the Convention petition if he did not have rights of custody but the Irish court did. The court held that "the application for the restoration of the child should be made by the person whose application to the court conferred on it a right of custody rather than the court itself having to undertake that responsibility." *Id.* at 306.

¹⁰⁶ [1998] 2 F.L.R. 146 (Fam.).

¹⁰⁷ Article 15 provides:

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal . . . was wrongful within the meaning of Article 3 of the Convention

Convention, *supra* note 2, at art. 15.

¹⁰⁸ *Re W*, [1998] 2 F.L.R. at 160-62.

¹⁰⁹ *Id.* at 162. In support of her decision, Judge Hale relied on an earlier Court of Appeal case and found that, "[h]aving made what is no more than an interim custody order, the Ontario court, in my judgment, retained what Article 5(a) of the Hague Convention calls "the rights to determine the child's place of residence."" *Re W*, [1998] 2 F.L.R. at 159 (quoting *Re B*, [1997] F.L.R. 594, 600 (C.A.) (Swinton Thomas, L.J.) (quoting *B. v. B.*, [1993] Fam. 32, 42 (C.A.) (Leggatt, L.J.))). She also quoted from *Re B*, [1998] 2 F.C.R. 212, 219 (C.A.), in which the court had stated that "as an interim custody order had been made, so rights of custody remain in the court." *Re W*, [1998] 2 F.L.R. at 159-60.

One court in the United States has acknowledged that the existence of a pending custody case may confer custody rights on a court itself, rights that may be breached in turn by removal.¹¹⁰ In *Fawcett v. McRoberts*, a federal court in the Western District of Virginia held that a father who removed his child from Scotland to the United States in the midst of an ongoing custody battle breached the custody rights of the Scottish sheriff court with jurisdiction over the initial custody dispute.¹¹¹ The court observed that “by participating in the sheriff court proceedings . . . Mr. McRoberts understood the role of the sheriff court in adjudicating the dispute between himself and his former wife, and can not now deny [that court’s] interest in this case.”¹¹² The court found *Re H* particularly persuasive in reaching this result.¹¹³ In addition, the court declined to follow *Croll v. Croll*,¹¹⁴ rejecting the Second Circuit’s restrictive interpretation of custody rights¹¹⁵ and distinguishing the facts on the grounds that *Croll* involved a permanent order of the Hong Kong court, while *Fawcett* involved a removal “in the midst of pending proceedings in which the only order issued was not final.”¹¹⁶ The interim nature of a foreign order cannot be ignored when deciding whether removal from the country of habitual residence breached the custody rights of another person or court.

The distinction between permanent and interim orders has been made elsewhere. The majority in *Croll* decided that a *ne exeat* clause¹¹⁷ in a permanent foreign custody order did not confer custody rights on the noncustodial parent that would warrant return of a child under the Convention; the court expressly distinguished certain foreign cases in which return had been ordered on the basis that “*temporary* custody” had been “conditioned on non-removal of the child pending further proceedings.”¹¹⁸ In dissent, Judge Sotomayor rejected the distinction between interim and final orders; her opinion, how-

¹¹⁰ See *Fawcett v. McRoberts*, 168 F. Supp. 2d 595, 603 (W.D. Va. 2001) (“While the question of whether a court has been held to have ‘rights of custody,’ appears not to have been addressed in the courts of the United States, it has been before the tribunals of our co-signatory Nations.”).

¹¹¹ *Id.* at 603, 606.

¹¹² *Id.* at 603.

¹¹³ See *id.* at 603-04 (reviewing *Re H* at length with approval).

¹¹⁴ 229 F.3d 133 (2d Cir. 2000).

¹¹⁵ *Fawcett*, 168 F. Supp. 2d at 604-06.

¹¹⁶ *Id.* at 606.

¹¹⁷ See *infra* notes 158-59 and accompanying text for further development of the role played by *ne exeat* clauses within the Convention’s scheme of custody rights.

¹¹⁸ *Croll*, 229 F.3d at 143 (emphasis added).

ever, must be understood in the context of her conclusion that the child's removal was wrongful because it breached the nonremoval clause in the foreign custody order. She expressed her belief that a *ne exeat* clause should be enforced whether contained in an interim or final order:

I am unpersuaded by the argument that *ne exeat* clauses in permanent non-removal orders relate solely to access rights Nor do I consider significant the . . . distinction between interim and permanent custody orders. To be sure, a court issuing an interim custody order has a strong interest in preventing a child's removal before it has the opportunity to make its final custody determination. But nothing in the Convention's language or official history supports the notion that this interest is any more important than the court's interest in enforcing the final custody order once issued. The dichotomy between an interim and permanent custody order is, therefore, for the purposes of the Convention, a distinction without a difference.

. . . I would [find] that rights arising under a *ne exeat* clause constitute "rights of custody" for the purposes of the Hague Convention.¹¹⁹

Judge Sotomayor rejected the distinction between permanent and interim orders in order to implement a more expansive view of the custody rights of the left-behind parent, an interpretation that would recognize custody rights for the left-behind parent *despite* a permanent custody order in the abductor's favor. Judge Sotomayor, if distinguishing between permanent and temporary custody orders without nonremoval clauses, would likely apply her expansive view of custody rights. The result would be that the interim, rather than permanent, nature of the order would be a "distinction *with* a difference," leading to return of the child for a final custody decision in the country of habitual residence. This result suggests that if some aspect of the interim order, whether it be the inclusion of a *ne exeat* clause or simply the order's temporary character, leaves jurisdiction in the foreign forum or confers some residue of custody rights on the left-behind parent, then the child should be returned.

These cases reflect the idea that a court obtains custody rights when it has jurisdiction over a pending custody case because it is empowered to determine the child's place of residence.¹²⁰ Removal of a child by a parent with an interim custody order in his or her favor

¹¹⁹ *Id.* at 152-53 (Sotomayor, J., dissenting).

¹²⁰ *See also* Re W, [1998] 2 F.L.R. 146, 158-61 (Fam.) (quoting a series of cases holding that a court in the country of habitual residence had custody rights because it had the "right to determine the child's place of residence" after issuing an interim custody order).

breaches the issuing court's custody rights and is actionable under the Convention on that basis.¹²¹ Therefore, the question of whether an interim custody order in favor of the abducting parent eliminates the left-behind parent's custody rights merely begins the wrongful-removal inquiry. A court hearing a Convention petition must then consider whether the court in the country of habitual residence, by undertaking to resolve the custody dispute, itself acquired custody rights that were breached by removal and warrant the remedy of return.

C. *The Foreign Court's Acceptance of Jurisdiction*

A determination that the foreign court had custody rights is sufficient to warrant return, but is not necessary to that result. The foreign interim custody order represents the foreign court's acceptance of jurisdiction, and demonstrates that court's intent to decide the case.¹²² This is sufficient to warrant return. The Convention expresses a preference that custody disputes be resolved in the country of the child's habitual residence and the preremoval status quo restored.¹²³ The preremoval status quo encapsulates the legal rights of the parties, the family relationships, and the actual living experience of the child. "[T]he conduct [that constitutes wrongful removal] is that which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning [him or her] into an instrument and principal victim of the situation."¹²⁴ When proceedings have begun in the habitual residence's court system, the legal situation is clearly in flux—since the Convention preserves both legal and practical alignments, an interim order should not alter the par-

¹²¹ See *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 588 (Can.) ("[W]hen a court is vested with jurisdiction to determine who shall have custody of a child, it is while in the course of exercising that jurisdiction, exercising rights of custody within the broad meaning of the term contemplated by the Convention.").

¹²² See *Eekelaar*, *supra* note 14, at 212 ("Interim orders made after proceedings have commenced in the original state . . . represent a holding operation. It seems that, on principle, only decisions made *after proper hearing* should be entitled to automatic enforcement." (emphasis added)).

¹²³ See *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996) ("[T]he Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court."); Pérez-Vera, *Report*, *supra* note 3, ¶ 16, at 429 ("The Convention, in order to [deprive the abductor's actions of any practical or juridical consequences,] places at the head of its objectives the restoration of the status quo" (citations omitted)).

¹²⁴ Pérez-Vera, *Report*, *supra* note 3, ¶ 57, at 442.

ties' respective rights under the Convention. Instead, the child should be returned to the country of habitual residence, restoring the pre-removal factual status quo in order to await final disposition, on the merits, of the parties' legal rights.

In 1980, with the Convention in draft form, Professor Eekelaar prepared a review of the existing jurisprudence of international child abduction cases in British Commonwealth and United States courts in order to evaluate the Convention and another proposal to remedy the parental abduction problem, concluding that the Convention was the more desirable alternative.¹²⁵ His analysis drew distinctions among abduction cases in which no custody decision had been made in the country of habitual residence; those in which proceedings had begun but had not been completed, including where interim orders had been made; and those in which a final order had been issued.¹²⁶ Traditionally, a court hearing a case involving international parental child abduction preferred to decide the merits of the custody dispute itself, despite the existence of a foreign custody order, because deference to a foreign court was considered to be a "delegation" of the court's duty to form its own judgment about the child's best interests.¹²⁷ In the mid-1960s, a new approach began to develop.¹²⁸ According to the "Cross principle," the court in the country of refuge should "pay regard to the orders of the proper foreign court, unless [it] is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child."¹²⁹ Courts that followed the Cross principle relied on the fact that a foreign court had already taken jurisdiction of the matter.¹³⁰

¹²⁵ Eekelaar, *supra* note 14, at 219-23.

¹²⁶ *Id.* at 200-18.

¹²⁷ *See id.* at 199-200 (surveying early twentieth-century cases in which courts elected to retry custody disputes instead of returning the child to the country of habitual residence for further proceedings).

¹²⁸ *Id.* at 200.

¹²⁹ *Id.* at 201 (quoting *Re E. (D.)*, [1967] Ch. 287, 289 (Ch.) (Cross, J.)).

¹³⁰ *See id.* at 202 ("[A]s between two courts of co-ordinate jurisdiction, one in this country and the other in [the habitual residence], prima facie the right course is for the matter to be investigated in the [court in the country of habitual residence,] which had seisin of the matter before these proceedings began . . ." (citations omitted)); *see also id.* at 206 (reviewing pre-Convention jurisprudence in situations where foreign custody proceedings had been initiated at the time of removal, and indicating courts' "strong inclination to order the child to be returned to the jurisdiction of the court which is already seised of the matter").

Courts were less likely to follow the foreign order if it was not based on the child's best interests. *See id.* (citing "exceptional" cases where courts declined to return children to the state of habitual residence because of fears for the children's safety). Interim orders generally are not "based on a full assessment of the child's interests." *Id.*

In developing an international framework for dealing with abduction cases, Professor Eekelaar suggested that if a custody proceeding had begun in the country of habitual residence, the child should be returned to “the jurisdiction in which it was commenced,” unless (1) that jurisdiction had not been properly invoked;¹³¹ (2) the law of the country of habitual residence did not apply the best interests of the child principle to child custody cases; or (3) return would be “seriously detrimental” to the child.¹³² He thought that the Convention satisfied all of these requirements except the second. He decided that the negative implications of failing to satisfy this one requirement were reduced by the fact that “the scheme is not one of enforcing the foreign decision but simply returning the child to [his or her] prior condition.”¹³³

D. *International Comity*

Finally, my second analytical approach—in which domestic courts should defer to the foreign court’s acceptance of jurisdiction in cases involving foreign interim orders—is supported by principles of comity. A number of courts have acknowledged some distinction between an interim and a final custody order.¹³⁴ The distinction should be

Thus, in pre-Convention jurisprudence, not recognizing the foreign custody order meant that the court in the country of refuge would hear the merits of the custody dispute rather than ordering the child’s return. *See id.* at 199-200, 203 (reviewing cases in which a court, declining to return the child despite the existence of a foreign custody order, itself decided the child’s best interests). The Convention alters the analysis because it requires return to the country of habitual residence unless the custody rights of the left-behind parent have not been breached. Instead of considering the merits of the case in the country of refuge when an interim order is not recognized, the court should look to the pre-order rights of the parties to determine whether custody rights existed and, if so, order the return of the child.

¹³¹ *See supra* notes 97-98 and accompanying text (discussing the role of habitual residence in ensuring that the foreign jurisdiction was properly invoked).

¹³² Eekelaar, *supra* note 14, at 211-12.

¹³³ *Id.* at 219.

¹³⁴ For example, when the respondent in *Tabacchi v. Harrison*, No. 99 C 4130, 2000 U.S. Dist. LEXIS 1518 (N.D. Ill. Feb. 8, 2000), moved to dismiss the case on the basis that an Italian court had already granted her temporary custody, the American court dismissed her argument out of hand, stating: “[T]he Italian court’s decision did not involve a final resolution of custody but merely granted Harrison *temporary* custody, ‘without prejudice to the necessity and the urgency of an in depth technical evaluation of the parental fitness of both parties’” *Id.* at *26 n.5. The Supreme Court of Canada has also acknowledged that the outcome of a Convention case might differ when based on an interim order from that in a case in which a permanent custody order had been issued: “It will be observed that I have underlined the purely interim

more universally recognized, and should be explicitly applied by courts hearing petitions for return when the question of wrongful removal arises. Common law principles of comity allow this result because an interim order does not represent a final judgment of the foreign court.

Courts in the country of refuge are not required to give full effect to a foreign judgment.¹³⁵ Under general principles of comity, however, U.S. courts do accord some degree of deference to foreign judgments. Comity is a matter of discretionary deference to the laws or judgments of foreign jurisdictions, founded on "international duty and convenience" and mutual respect.¹³⁶ In recognition of principles of comity, courts have given a great degree of deference to the decisions of foreign courts in Convention cases.¹³⁷ Deference to a foreign interim custody order, however, might take the form of deferring to the temporary nature of the order, and not simply to its terms.

nature of the mother's custody I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody." *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 589; *see also supra* notes 110-16 and accompanying text (discussing the weight given to a foreign interim custody order in *Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D. Va. 2001)); *cf. supra* text accompanying note 119 (discussing Judge Sotomayor's rejection of any distinction between interim and permanent custody orders when the order contains a *ne exeat* clause).

¹³⁵ *See* *Hilton v. Guyot*, 159 U.S. 113, 227 (1895) ("[J]udgments rendered . . . [in a] foreign country . . . are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. b (1971) ("Judgments rendered in a foreign nation are not entitled to the protection of full faith and credit.").

¹³⁶ 16 AM. JUR. 2D *Conflict of Laws* §§ 15, 17 (1998).

¹³⁷ United States courts generally abide by the principle of comity when dealing with Convention cases:

American courts will normally accord considerable deference to foreign adjudications as a matter of comity. . . .

. . . [W]e see nothing in ICARA or its legislative history to indicate that Congress wanted to bar the courts of this country from giving foreign judgments the more flexible deference normally comprehended by the concept of international comity.

Diorinou v. Mezitis, 237 F.3d 133, 142-43 (2d Cir. 2001); *see also id.* at 138-40, 142-45 (discussing principles of international comity and their application in Convention cases); *Blondin v. Dubois*, 189 F.3d 240, 248-49 (2d Cir. 1999) ("In the exercise of comity that is at the heart of the Convention . . . , we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it.").

Courts are wary of deferring to foreign judgments if they do not comport with domestic public policies.¹³⁸ Principles of due process and the accompanying requirement that litigants be afforded a full, fair hearing may constitute such overriding policies.¹³⁹ If courts were to find that left-behind parents have no cognizable custody rights once an interim order has been issued in favor of the abducting parent, such public policies, if not constitutional mandates, are at risk of losing their force. Deference to the terms of an interim judgment issued before full consideration of the merits of the dispute does not comport with the usual contours of comity followed by U.S. courts.

Deferring to decisions of foreign courts helps to protect U.S. children, who may also be victims of international parental abduction, by creating an atmosphere of international reciprocity. If the United States acknowledges and respects the ability of other nations to protect children, the courts of those nations will respond in kind. Children will then be more likely to be promptly returned to their countries of habitual residence, including the United States, so that the forum with the closest relationship and greatest interest in the child will be enabled to decide what custody arrangements will be in the child's best interest.¹⁴⁰

¹³⁸ See *Falco Adkins v. Falco Antapara*, 850 S.W.2d 148, 154 (Tenn. Ct. App. 1992) (Franks, J., dissenting) (doubting the safety of the children if returned to Panama and refusing to give effect to Panamanian order requiring return, stating that "our courts are at liberty to give or refuse effect to such judgments as may be found just and equitable"); see also 16 AM. JUR. 2D *Conflict of Laws* § 15 (1998) ("Thus, comity will not be accorded a foreign judgment, rendered by a competent court, if it violates a strong public policy of the state.").

¹³⁹ For example, the Colorado Court of Appeals has qualified the common law comity doctrine with a fair hearing requirement:

Colorado courts recognize a decree from a foreign country as valid and enforceable under the common law principle of comity. . . . However, conclusive effect may be given to a foreign judgment only if there has been an opportunity for a full and fair trial before a court of competent jurisdiction and only if the underlying claim for relief is not repugnant to the public policy of the state.

In re Marriage of Seewald, 22 P.3d 580, 583 (Colo. Ct. App. 2001) (citations omitted).

¹⁴⁰ In *Turner v. Frowein*, the Connecticut Supreme Court observed:

The treaty, properly enforced, should ensure that, when children from the United States are abducted to any one of the treaty countries, the courts of that country will not make their own determinations regarding custody without first considering the ability and willingness of the United States to protect its own children.

752 A.2d 955, 972-73 (Conn. 2000). From an international perspective, where countries with disparate levels of economic and political development, and contrasting systems of law, sign the same Convention, some diversity of approach results, and the instinctive pull towards comity may be reduced. It

When a court refuses to read an order granting interim custody to a removing parent as terminating the other parent's custody rights, it may in fact be giving effect to that order rather than nullifying it. By declining to give full effect to the *terms* of the interim order, the court respects the *temporary nature* of the order as designed by the foreign court, as well as the jurisdiction of the foreign tribunal and its capacity to identify and protect the best interests of the children habitually resident there.

The United States's ratification of the Convention may have altered U.S. courts' obligation to give effect to foreign custody orders because the Convention represents a "special compact" regarding recognition of foreign custody rights.¹⁴¹ It does not follow, however, that interim custody orders should conclusively establish the custody rights at issue in a return petition, because the Convention does not restrictively define "rights of custody." The Convention binds signatory nations to give effect to the custody rights granted by other signatories, but it does not bind them to any specific meaning of "custody rights." Instead of finding the left-behind parent's custody rights completely abrogated by a removal under the auspices of an interim order in the abductor's favor, U.S. courts should consider the petitioner's rights of custody in light of the Convention's purposes, the practical realities of the situation, and the courts' broad interpretation of the Convention's meaning of custody rights.

The Convention's return remedy is partially grounded on the premise that the authorities of the country of habitual residence are in the best position to consider the merits of the custody case and decide the future of the child.¹⁴² It makes little sense that a domestic court should see an interim custody order—issued when the foreign court has not yet resolved the dispute on the merits—as altering the preexisting custody rights of the parties. When a court adopts that approach, it may reject the petition for return based on the paradoxi-

is, however, a fundamental tenet of the Convention that each contracting State must trust the others to deal fairly with cases of returning children, as well as with applications for returns.

HUTCHINSON ET AL., *supra* note 18, at 9.

¹⁴¹ See *Falco Adkins*, 850 S.W.2d at 154 (Franks, J., dissenting) ("*Absent a special compact*, no sovereign is bound to give effect within its dominions to a judgment rendered by the tribunals of another country." (emphasis added)).

¹⁴² See BEAUMONT & MCELEAVY, *supra* note 24, at 90 (explaining that the Convention's drafters believed that the habitual residence "should designate the forum conveniens for a subsequent merits hearing as to the custody of an abducted child" because the authorities there "should be best placed to determine the child's future").

cal conclusion that removal was not wrongful. This result would thwart the exact process the Convention seeks to accomplish by returning the child to the country of his or her habitual residence, on the basis that such a process had already begun.¹⁴³ It would also enable a parent, by his or her unilateral action, to give permanent effect to an order that the court intended as only a temporary measure. Thus, the Convention would effectively serve to validate and finalize a remedy that the foreign court intended as temporary, and allow a court in another nation to substitute its own judgment for that of a foreign court that had already demonstrated its willingness and ability to deal with the custody matter.

IV. THE NONREMOVAL CLAUSE AND MILITARY NECESSITY EXCEPTION: SHOULD THE SHEALYS' INTERIM DECISION HAVE BEEN TREATED DIFFERENTLY?

Having proposed an approach to foreign interim custody orders in Convention petitions, I turn now to some variations on a "simple" interim custody order. As was true for the Shealys, courts sometimes anticipate potential issues or disputes that may arise in the time between entry of an initial interim custody order and final resolution of the case and may include special provisions in the interim order in an attempt to avert them.

The interim custody order entered by the German court in the Shealys' case was issued in connection with Sergeant Shealy's initial request for sole custody.¹⁴⁴ The parties later agreed to temporary joint custody—the German order formalized this agreement, pending the scheduled evaluative meetings with the social worker.¹⁴⁵ The German interim decision, issued March 26, 2001, awarded Sergeant Shealy "domicile-determination-rights" over Sierra, while prohibiting her

¹⁴³ Professors Beaumont and McElevy have stated:

An issue of particular interest is whether Article (3)(2) was intended to incorporate custody rights originating from "interim decisions"? Were temporary orders of this type to be included, a parent could be deprived of the Convention remedy without the merits of the custody issue having been fully investigated. Therefore, unless an express declaration is made to the contrary, it is submitted that a provisional award of sole custody should not be recognised as allowing a parent to remove a child to, or retain a child in, a foreign jurisdiction.

Id. at 51-52.

¹⁴⁴ Shealy v. Shealy, 295 F.3d 1117, 1120 (10th Cir. 2002).

¹⁴⁵ Transcript, *supra* note 64, at 174, 176; Translation of Local Court Decision, *supra* note 67.

from removing Sierra from Germany without Mr. Shealy's consent unless required to do so by military reasons.¹⁴⁶ In addition, it established a detailed arrangement under which Sierra would stay with Mr. Shealy each afternoon after kindergarten and from Thursday afternoon until Sunday evening.¹⁴⁷ Finally, the order denied Sergeant Shealy's request for "parental care."¹⁴⁸ The court scheduled evaluations of the Shealys to aid the court in its decision regarding the more suitable parent. Sergeant Shealy never met with the social worker because she left Germany with Sierra one day before her first scheduled appointment.¹⁴⁹

When considering whether Sierra was wrongfully removed from Germany, the court found that Sierra was a habitual resident of Germany, notwithstanding Sergeant Shealy's argument that Sierra was a habitual resident of the United States by virtue of her residence on a U.S. military base.¹⁵⁰ The court then considered the effect of the interim custody decision on the issue of whether the removal was wrongful. The parties did not dispute that Mr. Shealy retained rights of custody, and the court decided that Mr. Shealy indeed had custody rights after entry of the German order.¹⁵¹ Instead, the court focused on the military necessity provision that was included in the German order. Because the court found that Sergeant Shealy complied with the terms of the military necessity provision by receiving transfer orders, despite its reservations regarding the circumstances surrounding their issue,¹⁵² it determined that the removal was not wrongful under the Conven-

¹⁴⁶ Translation of Local Court Decision, *supra* note 67.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Shealy*, 295 F.3d at 1120.

¹⁵⁰ Transcript, *supra* note 64, at 179-81. This finding was appropriate under the Sixth Circuit's holding in *Friedrich v. Friedrich*: "As a threshold matter, a United States military base is not sovereign territory of the United States. The military base [in question] is on land which belongs to Germany and which the United States Armed Services occupy only at the pleasure of the German government." 983 F.2d 1396, 1401 (6th Cir. 1993).

¹⁵¹ See *Shealy*, 295 F.3d at 1121 (discussing the district court's findings regarding Mr. Shealy's custody rights).

¹⁵² The court's concern related to the fact that Sergeant Shealy actively requested the transfer orders in order to avoid meeting with the social worker and a final resolution of the custody issue by the German court, and to the fact that, although she was not required to report to her new duty station in the United States for another four months, she left Germany one day before the appointment. Transcript, *supra* note 64, at 15-19.

tion.¹⁵³ Judge Daniel refused to “look behind” Sergeant Shealy’s transfer orders by questioning the timing of, and reasons for, their issue.¹⁵⁴ He decided that the military necessity exception had been satisfied and that removal was therefore not wrongful.¹⁵⁵

If the questionable circumstances surrounding the issue of Sergeant Shealy’s transfer orders and the timing of her removal of Sierra from Germany are irrelevant to the Convention issue—a fact that is far from clear—then Judge Daniel’s conclusion regarding wrongful removal would be correct *if* the interim order could alter rights under the Convention. The court, however, should have more carefully considered the implications of the interim nature of the custody decision on the Convention petition. By failing to analyze the interim nature of the custody rights granted to the parties, the impact of the interim nature of the decision with respect to those rights, and whether the military necessity provision altered those rights at all, the court failed to properly carry out its role in a Convention case and failed to accomplish the purposes of the Convention itself.¹⁵⁶

It is true that the district court judge did not need to look behind the military necessity exception because, for purposes of the Convention, the exception was irrelevant. It was irrelevant because it was contained in an order that, for the reasons discussed in Part III, had no bearing on the custody rights of the parties with respect to the Convention petition. Rather than refusing to look at the reasons behind the orders and holding that removal was not wrongful, the court should have looked at the factual realities of the parties’ lives in Germany—a perspective correctly adopted when the court ascertained that Sierra’s habitual residence was in Germany—and held that the interim order did not alter the parties’ custody rights under the Convention. It appears that Mr. Shealy and Sergeant Shealy had nearly equal caring functions in Sierra’s life—in terms of both time and qual-

¹⁵³ See *Shealy*, 295 F.3d at 1121 (noting the district court’s finding that Sergeant Shealy’s actions complied with the military necessity exception).

¹⁵⁴ Transcript, *supra* note 64, at 181.

¹⁵⁵ *Id.* The Tenth Circuit affirmed this ruling. See *Shealy*, 295 F.3d at 1123-24 (declining to find the trial court’s decision with respect to the military necessity exception erroneous).

¹⁵⁶ The result is made even worse by the fact that it was based solely on the military necessity exception included in the interim decision. Not only was the German decision temporary in nature—imbuing a Convention decision based on it with all the problems discussed in Part III, including the fact that the child’s best interests had not yet been determined by the German court—but allowing the military necessity clause to define the parties’ rights converted a provision that was not based on any consideration of Sierra’s best interests into a tenet of German custody law.

ity—both before the German order and under its provisions. The international removal certainly disrupted Sierra's familiar family relationships.¹⁵⁷ The Convention's spirit and purposes would have been achieved by a finding that the interim order did not abrogate Mr. Shealy's custody rights under the Convention. In addition, the German court had undertaken to decide the custody dispute and proceedings were ongoing. The district court should have deferred to that court's acceptance of jurisdiction or, alternatively, found that removal before proceedings were finalized breached that court's own rights of custody. Under any of these approaches, removal was wrongful, and Sierra should have been returned to Germany for completion of the custody proceedings there.

The military necessity exception was an exception to the *ne exeat* clause contained in the interim order. *Ne exeat* clauses contained in custody orders in the abducting parent's favor have been held, although not universally, to confer cognizable custody rights either on the left-behind parent or on the issuing foreign court.¹⁵⁸ Courts have been more willing to treat *ne exeat* clauses contained in interim custody orders as conferring custody rights on the interim noncustodial parent or the court than they have to treat *ne exeat* clauses contained

¹⁵⁷ See Pérez-Vera, *Report, supra* note 3, ¶ 57, at 442 (explaining that the behavior the Convention seeks to prevent is "that which changes the family relationships which existed before or after any judicial decision, by using a child and thus turning [him or her] into an instrument and principal victim of the situation").

¹⁵⁸ Compare *Thorne v. Dryden-Hall*, [1997] 148 D.L.R.4th 508 (Can.) (holding that removal of two children from the United Kingdom to Canada despite a nonremoval clause was wrongful because it breached the English court's right to determine the children's place of residence), and *In re Marriage of Resina*, Appeal No. 52, at 5-9 (Austl. Fam. Ct. 1991) (concluding that removal of children from Australia to France was wrongful because it breached a nonremoval clause), with *Croll v. Croll*, 229 F.3d 133, 140 (2d Cir. 2000) (refusing to return the child after removal in breach of a *ne exeat* clause because "a *ne exeat* clause . . . confers only a veto, a power in reserve, which gives the non-custodial parent no say (except by leverage) about any child-rearing issue other than the child's geographical location"), and *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 583-89 (Can.) (outlining three approaches to the issue of whether nonremoval clauses constitute rights of custody under the Convention, and, emphasizing the interim nature of the custody order, finding that removal in breach of the clause was wrongful). See generally Martha Bailey, *Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 N.Y.U. J. INT'L L. & POL. 17, 30-34 (2000) (discussing the impact of a nonremoval clause on the custody rights of the parties to a Convention petition); Christopher B. Whitman, Recent Development, *Croll v. Croll: The Second Circuit Limits "Custody Rights" Under the Hague Convention on the Civil Aspects of International Child Abduction*, 9 TUL. J. INT'L & COMP. L. 605 (2001) (reviewing the *Croll* court's decision with respect to the impact of a *ne exeat* clause on custody rights).

in permanent custody orders in that way.¹⁵⁹ Had the Shealys' non-exception clause been part of a final custody order, Sergeant Shealy would have had a stronger argument that Sierra's removal following her mother's receipt of transfer orders did not breach the custody rights as established in the order, because the nonremoval clause only operated as long as no military necessity arose, and because the foreign court would have completed its custody determination on the merits.¹⁶⁰

¹⁵⁹ See Freeman, *supra* note 5, at 43 n.17 (discussing the distinction drawn by the Canadian Supreme Court between non-exception clauses in interim and permanent custody orders); Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 230-31 (2000) (contrasting the holding in *Thomson* requiring return of a child based on a nonremoval clause contained in an interim custody order with the court's dicta "suggesting that restrictions on removal in final custody orders were designed to protect access" but not custody rights).

¹⁶⁰ The district court should have more carefully evaluated her timing and the reasons behind the issue of the orders. Sergeant Shealy's behavior in actively seeking a transfer in order to remove Sierra from Germany under the guise of the military necessity exception, and in removing her to the United States more than four months before she was required to report to her new duty station in the United States, should have influenced the court's consideration of the military necessity exception. In *Re W*, by comparison, the court was "emboldened to conclude" that the children were wrongfully removed because of the mother's questionable behavior:

[T]he behaviour of the mother . . . was calculated to frustrate the process of the court [in the country of habitual residence]. Having resisted the father's contact with the children for some time, she privately agreed to a much more liberal regime than she had been prepared to concede at court. . . . The idea of moving to Australia was under active investigation from much of the time between February and September 1997 but no hint of this was given to the father, the court welfare officer or the court. . . .

. . . There is something particularly repugnant about a litigant seeking to frustrate the processes of the law in this way. This emboldens me to conclude that the removal of the . . . children was wrongful within the meaning of the convention because it was in breach of rights of custody attributable to the court.

[1998] 2 F.L.R. 146, 160-61 (Fam.) (emphasis added). Sergeant Shealy's behavior seems to have been similarly reprehensible and calculated to "frustrate the processes" of the German custody proceeding. The Convention seeks to prevent this sort of unilateral maneuvering in custody disputes, and such circumstances should be considered when deciding a Convention petition.

Other courts have also found the "contemptuous conduct" of the abductor to constitute a factor to consider when determining whether removal breached the other parent's custody rights. See *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 849 (Ky. Ct. App. 1999) (describing the distinction between visitation rights and custody rights as "meritless" if "the removing parent . . . engaged in 'contemptuous conduct' in removing the child from [his or her] habitual residence"); *David S. v. Zamira S.*, 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991) ("Respondent's contention that the petitioner is not entitled under the Hague Convention to have their son returned, because he only had visitation ('access') rights and not custody, might have some merit but for the respondent's contemptuous conduct . . .").

Based on the conditional nature of the nonremoval clause, the court could have distinguished the cases holding that *ne exeat* clauses in permanent custody orders confer custody rights on the other parent or on the issuing court. However, the temporary nature of the custody order should prevail over the military necessity exception. The exception is unrelated to the harms the Convention seeks to avoid and has little to do with the welfare of the child. In contrast, the interim order reflects the German court's intent to decide the merits of the Shealys' custody dispute—the type of decision, by a tribunal in the country of habitual residence, which the Convention seeks to protect and promote.

Custody rights protected by the Convention may arise *ex lege*, by judicial or administrative decision, or by virtue of a legally effective agreement between the parties.¹⁶¹ If a “judicial or administrative decision” relating to the custody rights of parties to a Convention petition is ineffective because it was entered on an interim basis, the court should determine custody based on the other sources of custody rights available to the parties. Stated another way, the court should give little weight to any abrogation of rights that may be read into an interim order, and should instead focus on the rights of the parties prior to that order. In the Shealys' case, since no custody agreement unrelated to the interim order was in place, the court should have reviewed the parties' *ex lege* custody rights. As married parents, the Shealys had equal rights of custody under German law.¹⁶²

¹⁶¹ See Convention, *supra* note 2, at art. 3 (“The rights of custody . . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”); BEAUMONT & MCELEAVY, *supra* note 24, at 48-61 (discussing the primary, though not exclusive, sources of custody rights under the Convention).

¹⁶² The evidence in *Shealy* included a confirmation from a German attorney that provided the court with a brief statement of the application of basic German custody law to the Shealys' case:

[D]ue to the German legislation both parents are entitled to joint custody of the shared child. This applies also after a separation, and even after a divorce, if there is no other judicial court order. In the questioned case concerning the married couple Shealy, a custody proceeding was pending, a decision had not been made yet, which means that the married couple Shealy are entitled to joint parental care, that means to joint custody, in respect to the shared daughter Sierra Hope Shealy.

Only the domicile-determination-right for the parties' child had been awarded to Mrs. Shealy. The domicile-determination-right is not identical with the parental custody. Therefore Mrs. Shealy had at no time the sole custody of the parties' daughter.

Confirmation from Anne Sprunck-Preiss, Attorney, Becker & Sprunck-Preiss (Apr. 26, 2001) (on file with author).

The district court's treatment of the military necessity exception was somewhat disjointed. At oral argument, Judge Daniel asked Sergeant Shealy's counsel to "address [*Re F*] and the Pérez-Vera report . . . both of which essentially state that the temporary order allowing Miss Shealy to leave the country is not determinative of whether her husband, Gregory Shealy's, custody rights were violated."¹⁶³ Sergeant Shealy's attorney distinguished those precedents on the basis that Mr. Shealy and Sierra were in Germany only because of command sponsorship as Sergeant Shealy's dependents; that sponsorship was the only reason Mr. Shealy had or exercised any custody rights in Germany.¹⁶⁴ When announcing its decision, however, the court accepted Germany as Sierra's habitual residence and did not find that Mr. Shealy lacked custody rights in Germany or under German law.¹⁶⁵ Instead, it found that Sergeant Shealy did not violate Mr. Shealy's custody rights because she had transfer orders that, the court believed, satisfied the military necessity exception.¹⁶⁶ The court acknowledged the precedent reducing the impact of interim custody orders, but elevated the status of the military necessity clause above that of the temporary nature of the order containing it.

The court construed the military necessity exception to mean Sergeant Shealy could not breach Mr. Shealy's custody rights if their daughter's removal followed a military transfer order. Even if her actions complied with that provision and that compliance allowed her to

Because of the dual nature of the inquiry into custody rights, *see supra* notes 74-79 and accompanying text, the district court should have looked to the German order to determine what rights were granted to the parties, and to the broad scope of rights protected by the Convention to determine whether those constituted custody rights. The German court awarded Sergeant Shealy interim "domicile-determination-rights." Confirmation from Anne Sprunck-Preiss, *supra*. "Rights of custody," however, include more than the right to determine where the child will live. *See* Convention, *supra* note 2, at art. 5 (explaining that the term "*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" (emphasis added)). Even if the interim order were given effect, it did not strip Mr. Shealy of all of his custody rights. *Cf. Thorne*, [1997] 148 D.L.R.4th at 513 (holding that a custody order "leaves to both parents the remaining parental rights and responsibilities" if it "states simply that 'the child shall live with [the mother,] and therefore' does not grant [her] all of the rights encompassed by the word custody").

¹⁶³ Transcript, *supra* note 64, at 158.

¹⁶⁴ *Id.* at 158-59, 164.

¹⁶⁵ *See id.* at 174 ("[The Shealys] agreed that instead of [Sergeant Shealy] seeking sole custody, the parties would agree to joint custody."); *see also* Shealy v. Shealy, 295 F.3d 1117, 1122-23 (10th Cir. 2002) (agreeing with the district court's disposition of the military necessity issue).

¹⁶⁶ Transcript, *supra* note 64, at 181-82.

remove the child, her actions, under *Re F*, nevertheless breached Mr. Shealy's custody rights by interfering with his ability to exercise those rights in Germany.¹⁶⁷ Sergeant Shealy's custody rights, either prior to or following entry of the interim order, may have allowed her to remove Sierra from Germany, but that removal still violated Mr. Shealy's right to exercise his custody rights in Germany. Removal under these circumstances therefore constituted wrongful removal whether or not the interim order, and its military necessity exception, is given effect.

The interim custody order should not have been found to alter the parties' custody rights because it did not reflect a decision on the merits made by the German court. With no judicial or administrative decision in the state of habitual residence altering the parties' rights, the district court should have restored the status quo by returning Sierra to Germany for completion of the pending proceedings, accomplishing the Convention's goal. Even if the interim order effectively altered Sergeant Shealy's rights by granting her the right to remove Sierra from Germany in the event of military necessity, Mr. Shealy's rights of custody within the meaning of the Convention were nevertheless violated by the removal. The military necessity exception may have altered one right in Sergeant Shealy's "bundle" of custody rights,¹⁶⁸ but it did not abrogate Mr. Shealy's custody rights.¹⁶⁹

¹⁶⁷ See *supra* notes 86-95 and accompanying text (discussing *Re F*). Analyzing *Re H*, Professors Beaumont and McElevay stated:

If an individual is a child's sole custodian there are, prima facie, no restrictions on him relocating with that child. If there *are* such restrictions, that implies that the custody right must in some way be limited. Where this is so it must be that another body or individual holds a corresponding right in relation to the child. Therefore, should the primary carer remove the child abroad, . . . he would have breached the custody rights of the other party, if their consent had not been sought.

BEAUMONT & MCELEVAY, *supra* note 24, at 72-73.

¹⁶⁸ See *Croll v. Croll*, 229 F.3d 133, 139 (2d Cir. 2000) ("The plural 'rights' [in Article 5 of the Convention] references a bundle of rights exercised by one or more persons having custody . . ."); see also *Whallon v. Lynn*, 230 F.3d 450, 457 (1st Cir. 2000) (relying on *Croll* to adopt a "bundle" theory of custody rights, the various components of which are "divisible" and may be held "jointly or alone").

¹⁶⁹ The Pérez-Vera report explained that the Convention was intended to protect *all* the ways in which custody of children can be exercised. Actually, in terms of article 3, custody rights may have been awarded to the person who demands that their exercise be respected, and to that person in his own right or jointly. . . . Now, from the Convention's standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has

The Convention seeks to protect the “practical realities” of a family’s custody arrangements.¹⁷⁰ The Shealys’ preremoval practical reality—particularly from the perspective of a four-year-old child unlikely to understand the intricacies of “command sponsorship” and “military necessity”—reflected residence of mother, father, and child in Germany, with care and control of Sierra shared by Mr. and Sergeant Shealy. The Convention’s “underlying principle” is “to secure a swift return of the abducted child to the state in which the child was habitually resident without undertaking a full investigation of the merits of the abductor’s case, unless specific criteria set out in the Convention prevail.”¹⁷¹ In *Shealy*, Sierra’s habitual residence was Germany, the left-behind parent had custody rights that could no longer be exercised following removal, a court in the foreign state had exercised jurisdiction to decide the merits of a custody dispute between two parents with equal rights of custody but had not yet completed the task, and none of the exceptions to return provided by the Convention applied or were argued to apply. The district court should have declined jurisdiction of the custody issues in light of the German court proceeding; the U.S. court was not required to recognize the interim order or the military necessity exception contained therein.¹⁷²

Sierra’s return to Germany would have accomplished the policies and purposes of the Convention. Consistently returning the child in custody disputes similar to the Shealys’ would deter parents from internationally abducting their children under the guise of rights granted by interim custody orders—making them aware that such removal is actionable under the Convention and will only temporarily avoid the custody laws of the country of habitual residence. Similarly, return would prevent forum-shopping by rendering Sergeant Shealy’s

interfered with their normal exercise. The Convention’s true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

Pérez-Vera, *Report*, *supra* note 3, ¶ 71, at 447-48.

¹⁷⁰ VAN BUEREN, *supra* note 14, at 16.

¹⁷¹ *Id.* at 17.

¹⁷² See Legal Analysis, *supra* note 11, at 10,507 (“Even when custody rights are conferred by court decree, technically speaking the Convention does not mandate recognition and enforcement of that decree. Instead, it seeks only to restore the factual custody arrangements that existed prior to the wrongful removal or retention . . .”).

unilateral attempt to alter the jurisdiction of her custody dispute ineffective. In addition, return would have prevented Sergeant Shealy from "legitimizing the situation for which [she was] responsible"¹⁷⁸ by effectively transforming an interim order into a de facto final order elevating Sergeant Shealy's purported right to exercise her custody rights in the United States over Mr. Shealy's right to exercise his in Germany. Finally, return would effectuate the Convention's purpose of allowing the merits of the custody dispute to be heard in a tribunal in the country closest to the Shealys' family situation during Sierra's lifetime and nearest the information necessary to adjudicate the merits of the dispute.

CONCLUSION

International child abduction creates difficult cases, in both emotional and legal terms. Despite these challenges, courts in the United States have been entrusted by Congress to fairly and expeditiously decide petitions brought pursuant to the Hague Convention on the Civil Aspects of International Child Abduction in keeping with the Convention's broad design. Understanding the broad scope of the custody rights protected by the Convention is often the first challenge facing a court asked to decide a Convention petition.

I have suggested an analytical approach to Convention petitions under which a court would not take a foreign interim custody order at face value, but rather would consider it in light of all the factual and legal circumstances of the child and the parties prior to the removal, as well as the willingness and ability of the foreign court to resolve the matter. This approach is consistent with that adopted by a number of foreign jurisdictions. It also more accurately reflects the purposes of the Convention and the complex realities presented by an international abduction case than the approach taken by the *Shealy* court. Had the District of Colorado followed this approach, Sierra would have been promptly returned to Germany, enabling the German court to complete its task of deciding to which parent it would be best to entrust her care.

Although there were no allegations of abuse in *Shealy*, a very broad invocation of the return remedy has raised some concerns that the remedy and the exceptions to return do not offer sufficient protection for battered spouses who move their children across international

¹⁷⁸ D.S. v. V.W., [1996] 134 D.L.R.4th 481, 500 (Can.).

boundaries in an attempt to flee domestic violence.¹⁷⁴ My approach does not ignore the grave realities of domestic violence or the complex and sad circumstances that may lead to some international abductions. It simply allows the judicial system of the country of habitual residence to protect children and spouses of violent offenders.¹⁷⁵ If the child faces a grave risk of harm upon return to the habitual residence, the Article 13(b) exception may be invoked to prevent return.¹⁷⁶ The issue of protection from harm should be considered when determining whether any exceptions to return apply, not when determining whether removal violated custody rights and whether removal was wrongful. Perhaps the Convention's broad view of custody rights should be balanced by granting courts discretion to look more carefully at the risks children and abducting parents faced that led the parents to take such drastic action. However, those policy considerations should be dealt with, if at all, through either revision of the Convention,¹⁷⁷ if the signatories desire expressly to offer more protection for abused parents, or through application of the exceptions.

¹⁷⁴ See, e.g., Silberman, *supra* note 159, at 224-25, 241 (calling for "creative responses directed to concerns about . . . protecting children and a spouse from domestic violence," but wary that "exception[s] will begin to swallow the rule [favoring return]" (citation omitted)); Weiner, *supra* note 79, at 601 (discussing the shortcomings of the Convention with respect to victims of domestic violence and suggesting a "total defense" to the remedy of return for battered women). The Convention may have failed to adequately address potential issues of domestic violence because the drafters envisaged the abductors primarily as noncustodial fathers who were dissatisfied with the outcomes of custody disputes. See Silberman, *supra* note 159, at 223-24 (observing that "many 'abductors' have turned out to be custodial mothers—mothers who have lived abroad during the marriage, who have obtained custody when the marriage fails, and who desire to return to their home country after the breakdown of the marriage").

¹⁷⁵ See *Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir. 1999) (requiring "consideration of the range of remedies that might allow *both* the return of the children to their home country *and* their protection from harm"); *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) ("[C]ourts in the abducted-from country are as ready and able as we are to protect children. . . . [W]e can expect that country's courts to [protect children from danger]. . . . When we trust the court system in the abducted-from country, the vast majority of claims of harm . . . evaporate." (citations omitted)).

¹⁷⁶ See Convention, *supra* note 2, at art. 13(b) (acknowledging an exception to the remedy of return upon proof of "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"); *supra* note 54 and accompanying text (describing the "grave risk" exception).

¹⁷⁷ See Weiner, *supra* note 79, at 599-600 (evaluating Convention revisions that would protect victims of domestic violence, such as orders of protection, a domestic violence defense to return, and allowing the removing parent to litigate custody in the country of habitual residence from a safe location abroad).

Domestic violence does not bear on the prima facie issue of whether a left-behind parent had rights of custody under the law prior to the removal. Rather, violence bears on which parent *should* have custody when the dispute has reached some level of finality—that is, when a court having jurisdiction, as well as all necessary evidence, to resolve a custody dispute makes an ultimate custody determination. A court presented with a petition for return is not such a court—the Convention and ICARA only grant limited jurisdiction to decide the case under the provisions of the Convention and explicitly withhold jurisdiction to determine custody.

The approach to interim orders I suggest concerns how the Convention should be properly interpreted with respect to its language and stated purposes, not how it could better have been drafted to protect women and children from violent fathers. A broad approach to interpretation of custody rights does not abdicate the responsibility to protect children's best interests; it simply recognizes that the country of habitual residence is better situated to do so. A broad reading of custody rights will also serve to protect American children abducted abroad by promoting international comity; American parents will be able more easily to secure return of their own children removed to other countries if the United States is seen as an international partner in returning children whose custody is properly decided in their country of habitual residence. Finally, my approach would promote amicable custody agreements—if interim custody were not held to abrogate the temporarily noncustodial parent's custody rights, he or she would not have to fear loss of his or her custody rights by agreeing to interim custody for the other parent. Thus, courts should look behind interim custody orders to the real experiences of children and their families and should acknowledge other nations' ability and willingness to act in children's best interests. By doing so, courts will more effectively contribute to the scheme created by the international community to address the global child abduction problem.