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“Rights of Custody” Under the Hague Convention

Martha Bailey*

I. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction clearly distinguishes between the remedies available to protect “rights of custody,” and those available to protect “rights of access.” An order for the return of a child to the country of her or his habitual residence will be made only to enforce rights of custody. The Convention protects rights of access without an order of return. However, in some circumstances, an “access parent” may be considered to hold rights of custody and thus be entitled to an order for the child’s return under the Convention. Courts in various jurisdictions have ruled that access parents have rights of custody within the Convention’s meaning if the custodial parent may not legally move with the child to another jurisdiction absent the access parent’s consent or a court order. This article argues that these assorted courts correctly interpret the Convention.

In addition, it critically discusses the Canadian Supreme Court’s anomalous approach to the issue in two recent decisions, Thomson v. Thomson and V.W. v. D.S. In those decisions, the related issue of a custodial parent’s relocation rights was analyzed by the Canadian Supreme Court. The distinctive views of two members of the Supreme Court of Canada on that issue underpin the Court’s atypical interpretation.

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2. Throughout this paper I will use the term “custodial parent” to mean the parent with day-to-day care and control of the child, and “access parent” to mean a parent who does not have day-to-day care and control. But the meaning of these terms under the domestic laws of contracting states varies. Some contracting parties have abandoned the use of the terms “custody” and “access” altogether and have moved to a continuing shared parental responsibility model. See, e.g., Family Law Reform Act, No. 167 of 1995 (Austl.); Children Act, vol. 4 ch. 41 (U.K. 1989) (Eng. and Wales); Children Act, ch. 36 (U.K. 1995) (Scot.); ME. REv. STAT. ANN. tit. 19, §§ 214, 752 (West 1964). Contracting states can abandon the terms custody/access or define these terms in any way they wish in their domestic laws; this is unimportant in applying the Convention. The question to ask under the Convention is whether a parent has “rights of custody” within the meaning of the Convention. Whatever words are used under the domestic law, does the parent have “rights relating to the care of the person of the child” or “the right to determine the child’s place of residence?”

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of rights of custody under the Convention. This article points out that the interpretation of rights of custody adopted by most jurisdictions is consistent with both liberal and restrictive rules regarding relocation by the custodial parent.

II. THE CONVENTION AND ITS INTERPRETATION

The Convention’s objectives, set forth in Article 1, are “to secure the prompt return of children who have been 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.” Article 12 provides that when a child has been wrongfully removed to or retained in Canada, an order will be made for return of the child to the country of his or her habitual residence, unless the application for return has been brought more than a year after the wrongful removal or retention and the child is now settled in his or her new environment. Further exceptions to the rule of automatic return are set out in Articles 13 and 20.

Although the Convention protects rights of both custody and access, it provides for a child’s return only when there has been “wrongful” removal or retention. A removal or retention is “wrongful” only if it is in breach of rights of custody. Access rights are afforded less protection, and a parent who has only access rights may not use the Convention to obtain a return of the child who has been removed by the custodial parent.

Access rights are not specifically defined in the Convention. However, Article 5(b) states that “‘rights of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.” A parent who has only the right to visit and

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3. Convention, supra note 1, art. 1.
4. Id. at art. 12.
5. Id. at arts. 13-20.
6. Article 3 of the Convention provides:

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

Id.

7. Convention, supra note 1, art. 5(b).
be visited by the child will not be entitled to an order for return, but is entitled to assistance from the Central Authorities under Article 21.8

In some cases an access parent may be considered to maintain rights of custody and be entitled to an order that the child be returned. Article 5(a) of the Convention provides that "'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." If the access parent has more than the right to visit the child and "to take a child for a limited period of time to a place other than the child's habitual residence," and shares the right to determine the child's place of residence, then the access parent has "rights of custody" within the meaning of the Convention.

When the Convention was first drafted, A.E. Anton expressed doubt on this question:

It is less clear, but the definition of "rights of custody" in Article 5 at least suggests, that the breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of right of custody in the sense of Article 3. A suggestion that the definition of "abduction" should be widened to cover this case was not pursued.9

However, other early commentary on the Convention clearly indicated that removal by the custodial parent without the other parent's consent in violation of an order, agreement or law would violate the access parent's "rights of custody." John Eekelaar wrote:

8. Article 21 provides:

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of the child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Constitution, supra note 1, art. 21. The Convention has no clear provisions to enforce access rights, and Central Authorities have no mandatory duties in this regard, only an obligation to promote cooperation. For discussion of the deficiencies of the access enforcement provisions of the Convention, see Nigel Lowe, Problems Relating to Access Disputes Under the Hague Convention on International Child Abduction, 8 INT'L J.L. & FAM. (1994).

In common law, the term “custody” does not simply mean the actual possession of the child (this is often referred to as “care and control”) but refers to a bundle of “rights” respecting the child. These will include the day to day care of the child, but can also comprehend the rights to determine the child’s religion, education and place of residence. Sometimes these “rights” may be fragmented and shared between a number of persons, or between a person and an institution. Now, States may define the term “custody” in whatever way they choose, but what is essential for determining their obligations under the Convention is the definition used in the Convention. This definition is open-ended in that it specifies rights of custody as including rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence (Article 5). Such rights, by whatever name they might be called in a State’s domestic legal system, are “rights of custody” for the purpose of the Convention and are protected by it. There is nothing to suggest that such rights cannot be separated. Hence, if the right to day to day care is vested in A and the right to determine the child’s place of residence in A and B, both A and B have rights of custody under the Convention. This may be of crucial significance if, for example after a divorce, the court grants joint custody to both parents but care and control to one only. A joint custodian would normally be entitled to be consulted as to where the child should live, and if the custodian who has care and control removes the child without consulting him or her, that is a wrongful removal. The result would be the same if the court had specifically stated that a child should not be removed from the jurisdiction without the consent of one parent (or the court) for, although the expression “custody” may not have been used, that parent would possess a right to determine the child’s place of residence which falls within the protection of the Convention.

10. A parent with “joint legal custody” who does not have day to day care and control and who has expressly given up the right to determine the child’s place of residence in an agreement probably would not have rights of custody within the meaning of the Convention. This view was expressed in Jvaldi v. Jvaldi, 672 A.2d 1226, 1232 (N.J. Super. Ct. App. Div. 1996), where the court said:

Although plaintiff and defendant have joint legal custody under the separation agreement, the right to custody as contemplated by the Convention consists of ‘in particular, the right to determine the child’s place of residence.’ Any fair reading of the separation agreement reveals that plaintiff does not have that right.

Id. (citations omitted).

11. JOHN EEEKELAAR, THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL
Recent commentators, who have had the benefit of reviewing the cases decided under the Convention, have also concluded that in cases of non-removal orders, agreements or laws, the access parent does have a right of custody within the meaning of the Convention. Linda Silberman reviewed the case law on this issue and concluded that several cases have provided a gloss as to other types of parenting arrangements and custodial orders that create custody rights. For example, when there are restrictions on the movement of the custodial parent or concepts of joint custody or guardianship, the Convention appears to offer protection.12

As the recent commentaries suggest, courts that have addressed this question have ruled that an access parent with the right to consent to the child’s removal from the jurisdiction has a right of custody within the meaning of Article 5 of the Convention, because such a parent has “the right to determine the child’s place of residence.”13 In C v. C., the parents consented to an order under which they would have joint guardianship. The mother would have custody, and neither party could remove the child from Australia without the consent of the other. The mother removed the child to England in violation of the consent order. The Court of Appeal unanimously ruled that the mother had wrongfully removed the child in violation of the father’s rights of custody. Lord Donaldson M.R. wrote:

We are necessarily concerned with Australian law because we are hidden 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 Convention definition of “rights of custody.” Equally, it matters not in the least whether those rights would be regarded as rights of custody under English law, if they fall within the definition.

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“Custody,” as a matter of non-technical English, means “safe keeping, protection; charge, care, guardianship” (citation omitted); but “rights of custody” as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is “the right to determine the child’s place of residence.” This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right-in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention.

The Full Court of the Family Court of Australia addressed this question in 1991, and adopted, with some hesitation, the position of the English Court of Appeal in C. v. C. The case before it was very similar to C. v. C. A consent order granted custody to the wife and access to the husband. The order included an injunction restraining each of the parties from removing either of the children from the State of Western Australia and the Commonwealth of Australia. The wife removed the children. The court ruled that the husband had rights of custody by virtue of the injunction, and that the wife’s removal was wrongful. The court adopted C. v. C.’s reasoning, although it stated that interpreting rights of custody to include an injunction was “something of a quantum leap.” The court gave two reasons for its decision. The first reason was that “uniformity itself is highly desirable, particularly between common law countries,” and the second reason was that it was a result “which is in conformity with the spirit of the Convention which is to ensure that children who are taken from one country to another wrongfully, in the sense of in breach of court orders or understood legal rights, are promptly returned to their country so that their future can properly be determined within that society.”

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14. C. v. C., 1 W.L.R. at 663.
15. In re Marriage of Jose Garcia and Muriel Ghislaine Henriette Resins, Appeal No. 52 of 1991 (Full Court of Australia Family Court) (Q.L.).
16. Id. at 3.
17. Id. at 4. The court added, “I might add a third one perhaps; namely, that there would be some irony in a situation where the Court of Appeal in England declared the Australian Court to be one thing and the Australian Court declared it to be another, but one need not pursue that.”
The State of New York adopted the same approach in David S. v. Zamira. This decision was recently cited with approval by the United States Sixth Circuit Court of Appeals in Friedrich v. Friedrich:

For a particularly difficult situation, ably resolved, see David S. v. Zamira. The court here held that an order giving the non-custodial parent visitation rights and restricting the custodial parent from leaving the country constitutes an order granting 'custodial' rights to both parents under the Hague Convention.

The first case arising under the Convention in Israel (which ratified the Convention on December 1, 1991 and implemented it by statute on May 20, 1991) also determined that a law restricting a custodial parent's departure from the country without the access parent's consent gave the access parent a right of custody within the meaning of the Convention. The custodial mother brought her child to Israel without the father's knowledge or consent and applied for sole custody. The father lacked day to day care and control of the child, but had continuing parental responsibility under French law. The father petitioned the Tel Aviv District Court for return of the child under the Convention and sought and obtained sole custody in France. The Israeli court found that bringing the child to Israel was both a wrongful removal in violation of the father's rights of custody and a denial of the father's visiting rights. Foxman v. Foxman, another Israeli decision that confirmed and expanded on this interpretation of rights of custody, was cited by the Québec Court of Appeal in V.W. v. D.S. 21

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19. 78 F.3d 1060, n. 4 (6th Cir. 1996).

20. Pnina Tuma v. Daniel Charles Meshullam, (1992) (Isr.), discussed in Becky Cohen, The Practice of Israel in Matters Related to International Law, 26 Isr. L. Rev. 559, 567-71 (1992). See Silberman, supra note 12, at 18. Cohen concludes her discussion of the case by noting at 571 that the Court recognized the importance of imminent action as a major aim of the Convention. In view of this aim the Court based its decision on previous decisions made by the French Courts as well as on facts and information gathered by those Courts pertaining to this case. The Court also determined that international conventions after their incorporation into Israeli law should be given a uniform interpretation that conforms to its interpretation by the other contracting parties.

Cohen at 571.

Linda Silberman analyzed several French cases, one of which held that a custodial mother's removal of a child to France, in violation of a court order that she remain in England or Wales, was not wrongful because only the father's rights of access, not custody rights, were violated. 22 Silberman further indicated that other French cases, including an appeals court decision, have ruled that a restriction on movement creates "rights of custody" within the meaning of the Convention. 23 A more recent ruling on this issue by a French appeals court was referred to by the Supreme Court of Canada in its unanimous decision in M.P. v. G.L.B. 24 In that case, the custodial mother removed the child to France in violation of a non-removal clause in the parties' court-sanctioned agreement. The father then applied for a change of custody. The Québec Court of Appeal awarded custody to the father and the mother's appeal to the Supreme Court of Canada was subsequently dismissed. In the meantime the mother applied for variation of their agreement in France, so she could live with the child in France. The father applied for an order of return under the Convention, and succeeded after he had obtained custody in Canada. When the mother appealed this order, the Court of Appeal of Montpellier affirmed the order to return the child to Québec. It declared on May 9, 1994 that in view of the 1991 agreement not to remove the child, failure to return the child had been unlawful from August 13, 1992, the time when the mother was in violation of the non-removal clause. According to the Canadian Supreme Court in M.P. v. G.L.B., this judgment may be currently on appeal in the Court of Causation in France. 25 As it stands, it is another example of a court interpreting a non-removal clause to give an access parent rights of custody within the meaning of the Convention.

Courts have concluded that agreements, orders, or laws that prohibit a child's removal without the access parent's consent create rights of custody. This approach is sensible for several reasons. First, the words of the Convention, in particular the words in Article 5 that "rights of custody shall include . . . the right to determine the child's place of
residence," support this interpretation. Second, this interpretation accords with the basic premise of the Convention, which is that the state in which the child is habitually resident should be the place where any custody disputes are resolved. As Silberman points out:

The State of habitual residence has the most significant interest in resolving the dispute and will usually be best situated with information to determine the ultimate merits of any custody controversy. In addition, parents will be deterred from unilaterally taking or removing children from their habitual residences. To that end, countries adhering to the Convention agree to return children to have all issues of custody decided in the jurisdiction where the child was habitually resident.

Disputes as to whether a custodial parent should be able to relocate with the child despite an order, agreement, or law prohibiting the move are custody disputes, and, as such, are properly adjudicated in the country in which the child habitually resides.

Additionally, this interpretation is consistent with the U.N. Convention on the Rights of the Child. This provides that a child shall not be separated from her or his parents against their will, except when competent authorities determine that such a separation is necessary for the best interests of the child. States shall respect the right of the child who is separated from a parent to maintain contact with her or his parents on a regular basis, unless it is not in the child’s best interest. If an agreement, order, or law prohibits the child’s removal without the access parent’s consent, a custodial parent who wishes to move must obtain a court order to grant the move, and such an order would be made according to the child’s best interests. If a custodial parent violates an order, agreement, or law by removing a child and is not ordered to return the child to have the issue adjudicated in the country of the child’s habitual residence, then, arguably, the child is deprived of her or his rights under the Convention on the Rights of the Child. In cases where a non-removal order, agreement, or law is in place, courts should interpret the Convention so that a custodial parent may not avoid an examination based on the best interests of the child in the country of the child’s

26. Convention, supra note 1, art. 5.
27. Silberman, supra note 12, at 11.
29. Id.
habitual residence, and to deprive the child of the right to have such a determination made.\textsuperscript{31}

Finally, contracting states that have addressed this issue have agreed on this interpretation of rights of custody. Other states should adopt the same interpretation, if possible, for the sake of uniformity. Under the Convention, courts are to determine violations of rights of custody under the law of the state in which she habitually resided prior to removal or detention. However, a court is not bound by another jurisdiction's interpretation of the Convention, and must determine whether a removal is wrongful based on its own interpretation of the Convention. Under Article 15 of the Convention, a court may request that an applicant obtain such an opinion from the state authorities of the child's habitual residence determining whether wrongful removal under Article 3 occurred.\textsuperscript{32} This opinion is intended only to assist the court in which the application is heard to determine the law of the other contracting state.\textsuperscript{33} A court obtaining an Article 15 opinion that a removal is wrongful may reject that conclusion if it adopts a different interpretation of the Convention. It would seem that the law of the habitual residence governs the question of whether the applicant shared the right to determine the child's place of residence. Whether this right is a "right of custody" within the meaning of the Convention is determined by the jurisdiction in which the application is brought.

Despite this freedom to interpret the Convention, courts strive to uniformly interpret the Convention. Many courts assert their autonomy in rendering decisions. In \textit{C. v. C.}, for example, Lord Donaldson wrote:

\begin{quote}
I wish to emphasize the international character of this legislation. The whole purpose of such a code is to produce a situation in which the courts of all contracting states may be expected to
\end{quote}


\textsuperscript{32} Convention, \textit{supra} note 1, arts. 3, 15.

\textsuperscript{33} See Lord Donaldson M.R.'s discussion on this point in \textit{C. v. S.}, 2 All E.R. 449, 452 (C.A. 1990):

\begin{quote}
It cannot, as I see it, have been the intention that the courts of the other contracting state should be asked to determine the issue of the applicability of art 3 in so far as it turns on the meaning of the convention itself, because that is something which the courts of both countries are equally able to determine. Indeed, they would be expected to arrive at similar determinations. If, unhappily, this did not occur, the court which is being asked to order the return of the child would be bound to apply its own view of the convention, particularly where, as here, the convention only takes effect by virtue of a domestic Act of Parliament.
\end{quote}

\textit{Id.}
interpret and apply it in similar ways, save in so far as the national legislatures have decreed otherwise.\textsuperscript{34}

If courts did not apply this principle of uniform interpretation, the Convention's efficacy would be diminished, and the commitment to return children might be weakened by lack of reciprocity on the part of other states. The effects of non-uniformity may soon be felt due to the Canadian Supreme Court's decisions in \textit{Thomson v. Thomson} and \textit{V.W. v. D.S.}.

\textbf{A. Thomson v. Thomson}

In \textit{Thomson},\textsuperscript{35} the first Convention case to come before the Supreme Court of Canada, the Court ordered that a child who had been brought to Canada by the mother be returned to Scotland. When the mother left Scotland, an interim custody order existed that included a non-removal clause. The Supreme Court ruled that the child had been wrongfully removed because the non-removal clause of the mother's interim custody order preserved the jurisdiction in the Scottish court to determine the issue of custody on the merits in a full hearing. Therefore, the Scottish court became an institution with rights of custody immediately before the removal of the boy, and the mother's breach of those custody rights constituted a wrongful removal within the meaning of the Convention.\textsuperscript{36} Justice La Forest in his majority judgment, wrote:

\begin{quote}
It will be observed that I have underlined the purely interim nature of the mother's custody in the present case. 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. Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent. The right of access is, of course, important but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody. The return of a child in the care of a person having permanent custody will ordinarily be far more disruptive to the child since the child may be removed from its habitual place of residence long after the custody order was made. The situation also has serious
\end{quote}

\textsuperscript{34} C. v. C. at 412.


\textsuperscript{36} Here the Court was following the reasoning of Sir Stephen Brown in \textit{B. v. B.}, [1993] 2 All E.R. 144 (C.A.) (Eng.) (discussing abduction and custody rights).
implications for the mobility rights of the custodian (emphasis added). 37

These obiter comments suggested that Justice La Forest would not consider an access parent to have rights of custody within the meaning of the Convention simply because there is a non-removal clause in the custody order. 38 These comments also suggested that the Scottish court would not have had rights of custody if the mother’s custody order and the non-removal clause had been final.

Justice La Forest’s reasoning is questionable. First, it is not always easy to distinguish between an interim and a final order, and there may be uncertainty in having the right to a return order depend on this distinction. 39 Next, it is unclear that non-removal clauses are designed only to ensure permanent access rights, as Justice La Forest suggested. 40 John Eekelaar discussed the difference between mere access rights on one hand, and access rights coupled with a non-removal order or agreement on the other:

[I]f a parent who has the day-to-day care of the child but who is under an obligation (whether imposed by court order or agreement or otherwise) to allow the other parent to visit the children removes the children, thus rendering it impossible for the visits to take place, such removal is not wrongful under the Convention. The reason for this is that disputes about access are notoriously difficult to unravel (it might be alleged that the absent parent was visiting very infrequently, or that the children disliked the visits), and to order the return of the children when such matters may well be in dispute is to provide too drastic a remedy. But it must also be remembered that, if the parent with access rights also has the right to determine where the children shall live, . . . the latter right is a “right of custody” within the convention and, if breached, may be remedied by return of the children. It seems right to draw a distinction in this manner because a parent with the latter right who can be held to be “actually exercising” it is likely to be more involved with the

38. Justice La Forest also has expressed deference to the custodial parent vis à vis the child on the issue of mobility rights. See R.B. v. Children’s Aid Society of Metropolitan Toronto, [1995] 122 D.L.R.4th 1, where Justice La Forest stated “it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live.” Id. at 42.
40. Id.
children, and it seems proper that, if any dispute over its exercise arises, this should be resolved at the place where the children habitually reside.41

Justice La Forest, however, failed to consider that an access parent with a shared right to determine the child’s place of residence may be different from, and entitled to a different remedy than, an access parent without such a right.

There is yet another problem with Justice La Forest reasoning. If an agreement, order, or law prohibiting removal of the child from the jurisdiction without the access parent’s consent does not constitute rights of custody, difficulties arise in determining the rights of many parents who lack day to day care and control of the child. A parent may have joint legal custody, but be in the same position as an access parent who has a shared right to determine the child’s place of residence by virtue of a non-removal clause. Under Justice La Forest’s approach it is unclear whether such a parent would be entitled to a return order. In jurisdictions that have continuing shared parental responsibility after separation, both the “custodial” and the “access” parent continue to have the right to determine the child’s residence. Should a parent with “parental responsibility” but who is in precisely the same position as a Canadian parent who has an order for access and a non-removal clause be entitled to an order for return? In fact, Canadian courts have not hesitated to order the child’s return in such cases.42 There is no apparent reason for distinguishing between a parent with access and a non-removal clause on one hand, and a parent who does not live with the child but who has joint legal custody or parental responsibility on the other. All of these parents share the right to determine the child’s residence and therefore, should have “rights of custody” within the meaning of the Convention. But if Justice La Forest’s approach were applied consistently, none of these parents would be considered to have rights of custody.

42. Chalkley v. Chalkley, [1994] 10 W.W.R. 114 (Man. Q.B.) (dismissing leave to appeal to Supreme Court of Canada, L’Heureux Dubé, J. dissenting). The affidavit of the Official Solicitor that the applicant had “parental responsibility” under the Children Act 1989 and therefore “rights of custody” within the meaning of the Convention was accepted without question. The fact that the child was not residing with the applicant at the time of the removal, and that the applicant was in the same position as a parent with access and a non-removal clause did not give concern to the court. Id.
B. V.W. v. D.S.

The Supreme Court of Canada returned to this issue in V.W. v. D.S.. Unfortunately, it adopted the approach suggested by Justice La Forest’s obiter comments in Thomson. The Supreme Court suggested that a right of non-removal did not create rights of custody in the access mother. At the conclusion of its analysis it determined that the custodial father’s removal of the child from Maryland, U.S.A., to Québec, Canada, in violation of the existing custody/access order, was not wrongful.

The parties in V.W. separated in 1986, and custody and access were contentious from the outset. In 1987, an order for joint custody with the mother to have primary care was made. In 1988, custody was varied after a contested trial. The father was given custody, and the mother was given supervised access, on the basis of allegations that the mother had committed acts of satanism and sexual abuse. The trial judge refused to consider the evidence of sexual abuse, but said that the mother was the primary cause of whatever disturbance the child was suffering. In 1989, the father took the child from Maryland to Michigan. The mother then brought an action in Maryland to enforce and expand her rights of access. In that proceeding, the father consented to a psychiatric evaluation order, dated March 13, 1990. However, he had already moved to Québec with the child on February 13, 1990 without consulting or warning the mother. He had also failed to take the child for a scheduled access visit. On March 22, 1990, the Maryland court issued a contempt order against the father. On May 8, 1990, the Maryland court, in the absence of the father and child, granted the mother’s application for variation and awarded her custody. This order was upheld on appeal. On May 6, 1991, the father applied for custody in Québec, and the mother responded by demanding the return of the child under the Convention. The trial judge ordered the immediate return of the child to Maryland.

The Québec Court of Appeal upheld the trial judgment, rejecting the father’s arguments that: 1) the Convention did not apply, because he had a final custody order at the time of the move, and the Convention does not provide for return of the child to protect access rights; 2) the Convention application had been brought more that a year after the child’s move to Québec, and the child was now settled in Québec; and 3) there was a grave risk of physical or mental harm if the child was returned, and the child objected to the return and was mature enough to have her views taken into account.

The latter two arguments were rejected on the basis of the evidence. With regard to the father’s first argument, the Québec Court of Appeal considered that the access arrangements between the parties created a custody right in the mother, in particular because an implied agreement existed that the father would not remove the child without the mother’s consent. The Québec Court of Appeal followed the principles that have been applied by other jurisdictions in interpreting the Convention, and it cited and followed the English Court of Appeal’s decision in C. v. C.. The Court of Appeal referred accurately to the purposes of the Convention, and it stressed the importance of a uniform interpretation of the Convention. The custodial father appealed to the Supreme Court of Canada.

The Supreme Court of Canada rejected all of the arguments put forward by the mother to support her claim that the Convention applied. It ruled that the child’s removal was not wrongful within the meaning of the Convention, because the father had a final custody order at the time of the removal, and the mother had only access rights. The Supreme Court rejected the argument that either the mother or the Maryland court had rights of custody because of the Maryland court’s continuing jurisdiction to vary the custody order. Although the Québec legislation implementing the Convention expands the circumstances under which a child will be returned to include cases where “proceedings for determining or modifying the rights of custody have been introduced . . . where the child was habitually resident and the removal or retention might prevent the execution of the decision to be rendered,” the Supreme Court stated that the proceedings pending in Maryland at the time of the child’s removal were for modifying access rights, not custody rights, and therefore the mother could not rely on this provision of the Québec Act. It was further ruled that there was no wrongful retention because the mother’s ex parte custody order obtained in Maryland after the child’s removal did not confer on the mother rights of custody that rendered the child’s retention in Québec wrongful. After deciding that the Convention did not apply to that case, the Supreme Court upheld the order that the child be returned to Maryland, reasoning that such an order

45. See V.W., 134 D.L.R.4th at 503.
47. See V.W., 134 D.L.R.4th at 504, 506. This ruling seems questionable in light of the fact that the proceedings pending in Maryland at the time of the removal did in fact result in a change of custody. Also, a claim for modification of custody may always be added to a claim for modification of access, and it seems problematic to make the right to an order for return depend on whether a claim for modification of custody has already been added.
48. See id. at 505.
could be made based on the best interests of the child under Québec's domestic legislation.

Justice L'Heureux-Dubé, who wrote the main opinion, suggested that an access parent does not have rights of custody, even if the custodial parent is prohibited from removing the child from the jurisdiction without the access parent's consent. Although *V. W. v. D.S.* involved an implicit non-removal clause, Justice L'Heureux-Dubé suggested that even an explicit non-removal clause would not give the access parent rights of custody. 49 While acknowledging the ruling in *Thomson* that in the case of an interim custody order and a non-removal clause the court has rights of custody, Justice L'Heureux-Dubé stated that, apart from cases of an interim order restricting a move, a "large and liberal" interpretation of custody is to be applied. 50 This apparently means that a removal in violation of a final order restricting a move will not be considered wrongful within the Convention's meaning. Her Ladyship's "large and liberal" label of her interpretation of right of custody is misleading, but apparently indicates that the custodial parent will have the large and liberal right to remove the child in violation of an order, agreement, or law. 51 Justice L'Heureux-Dubé stated:

49. Her Ladyship said that

although *Thomson* did not determine whether an implicit restriction on removing a child under a court order or statute confers rights of custody within the meaning of the Act on either the court or the non-custodial parent, this court's limitation of the effect of an express non-removal clause in a permanent custody order casts serious doubt on the validity of the respondent's argument.

_id. at 504._

50. Her Ladyship also stated:

Although it is true that an interim custody order combined with an order restricting the removal of a child might temporarily deprive the person awarded custody of the right to determine the child's place of residence by making any removal of the child wrongful within the meaning of s. 3 of the Act, aside from this exception, the large and liberal interpretation to be given to the concept of custody under the Act is not affected.

_id. at 501._

51. That L'Heureux-Dubé labels her own interpretation "large and liberal" is misleading. Most other courts would classify her interpretation, which excludes access parents, as "narrow." Her Ladyship, however, made a point of insisting that her approach was "large and liberal" and that other interpretations were "narrow." She said:

While the Court of Appeal described its interpretation of the concept of custody as (translation) "large," it actually adopted a very narrow interpretation in order to find that, although the respondent had only access rights, she had rights of custody within the meaning of the Act when the child was removed.

_id. at 502._
[R]ights of custody within the meaning of the Act cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence, but, on the contrary, must be interpreted in a way that protects their exercise. 52

Justice L'Heureux-Dubé has repeatedly expressed her disapproval of the notion that access parents should have any decision-making power with regard to their children or be able to interfere with the decisions of the custodial parent, 53 and her opinion in V. W. v. D.S. may be seen as an additional expression of this view. 54

Justice L'Heureux-Dubé has tended to assume that the rights and interests of children are best protected by upholding the exclusive authority of custodial parents, 55 and has not given attention to conflicts

53. See, for example, Her Ladyship's dissenting opinion in Young v. Young, [1994] 108 D.L.R.4th 193 (Can):

[T]he need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent, as it is the inability of the custodial parent to sufficiently protect those interests which poses the real threat to the welfare of the child. 1d. at 214.

54. It would perhaps be clearer to say that L'Heureux-Dubé's interpretation of "rights of custody" is "narrow" in the sense that only a narrow range of people and institutions would meet her test, and that her notion of the rights of custodial parents is "large" because in her view custodial parents generally have all the rights and responsibilities relating to the child-rearing decisions and access parents generally have no such rights and responsibilities, and limited power to challenge the decisions of the custodial parent. She states: "[T]he Civil Code of Quebec has adopted a liberal concept of custody — one that does not include access rights — that gives the custodian the exclusive power to make all decisions in respect of the child, including the choice of the child's place of residence." V.W., 134 D.L.R.4th at 512.

In L'Heureux-Dubé J.'s minority opinion in Gordon, 134 D.L.R.4th at 354, there is another misleading statement on this issue:

As this Court stressed in [V.W. v. D.S.], it is significant that the international community has adopted a wide concept of custody under the Convention which entitles the right to determine the place of residence of a child unless specifically taken away by such means as an explicit non-removal clause included in an interim custody order.

Id. This statement is misleading because the "international community" has adopted an interpretation of "rights of custody" that is different from that of Her Ladyship and that includes an access parent who has a right under an agreement, order, or law to object to the removal of the child. Her Ladyship did not refer to any of the decisions of the "international community" on this issue, so her attribution of her own distinctive interpretation of "rights of custody" to the "international community" is surprising.

55. See id. at 222: "It is precisely to ensure the best interests of the child that the decision-making power is granted to the custodial parent, as that person is uniquely situated to assess, understand, ensure and promote the needs of the child." Id.
between the rights and interests of the custodial parent and the child in "private" custody/access disputes. In V.W. v. D.S., the Court failed to consider the implications of Justice L'Heureux-Dubé's distinctive interpretation of rights of custody. Her interpretation is that the issue of removal must be determined in the state of the child's habitual residence based on her best interests, in cases where the access parent has a non-removal clause and does not consent to removal.

Contrary to most courts addressing this question (but understandably, given her distinctive views on the Convention), Justice L'Heureux-Dubé did not mention the desirability of uniform interpretation of the Convention, and indeed decisions by other jurisdictions were not cited or addressed in her opinion. Even the decisions cited by the Québec Court of Appeal in this case were passed over. Although several articles are cited by Her Ladyship, she unfortunately refrained from citing or responding to the portions of these authorities that state that an order, agreement, or law prohibiting a child's removal without the access parent's consent constitutes rights of custody. V.W. v. D.S. was wrongly decided with regard to the issue of whether removal of a child in violation of an agreement, order, or law is wrongful within the meaning of the Convention. Perhaps the judgment will be taken as a precedent only with regard to its specific fact situation. Although the Supreme Court of Canada's decision was unanimous, six justices concurred with Justice L'Heureux-Dubé, subject to a reservation as to Her Ladyship's views of custodial parents' rights and obligations. Because Justice L'Heureux-Dubé's opinion was based on her views of custodial parents' rights and obligations, the reservation expressed by six justices leaves some uncertainty as to the judgment's authority. Also, V.W. v. D.S. involved an implicit, rather than an explicit, prohibition against removing the child. It is possible that courts will accept that where there is an explicit prohibition, the access parent does have rights of custody. Justice L'Heureux-Dubé's opinion seems to reject that possibility, but her comments on that issue are obiter dicta.

C. The Relocation Issue

Justices La Forest and L'Heureux-Dubé expressed their support for the "mobility rights" of the custodial parent in Thomson and in V.W. v. D.S., and did so again, more directly, in Gordon v. Goertz,56 which was

56. Gordon v. Goertz, [1996] 134 D.L.R.4th 321. The Ontario Court of Appeal applied this decision in Woodhouse v. Woodhouse, [1996] 136 D.L.R.4th 577 (C.A. Ont.), and refused to allow a custodial mother to move with the children to Scotland. The dissent indicated that there is some uncertainty as to the correct interpretation of Gorcjon and continuing disagreement as to
heard and decided along with *V.W. v. D.S.* Gordon was not a Convention case, but rather a relocation case. The issue of relocation is governed by domestic legislation, either the federal *Divorce Act* or the relevant provincial custody/access legislation. In relocation cases, the issue is whether the custodial parent should be permitted to move with the child, and in Gordon the Supreme Court of Canada considered the principles that should be applied in relocation cases.

The standard to be applied to relocation cases has been particularly controversial in Canada over the past year, since the Ontario Court of Appeal’s decision in *MacGyver v. Richards*. In that case the custodial mother was permitted to relocate with her child in order to join her new partner, a corporal in the Armed Forces, who was then posted to Tacoma, Washington. The majority of the Ontario Court of Appeal said that, while the test for determining issues relating to custody and access was the best interests of the child, a presumptive deference should be given to the decisions of the custodial parent. Some Canadian courts accepted the “presumptive deference” approach, but others adopted the test enunciated in an earlier decision of the Ontario Court of Appeal, *Carter v. Brooks*. This was the authoritative mobility rights case in Ontario prior to *MacGyver*. In *Carter*, a different panel of the Ontario Court of Appeal stated that the sole governing principle was the best interests of the child, which should be determined by considering all relevant factors, without the application of any presumptions.

In Gordon, the court unanimously decided that the mother should retain custody in Australia, with a modification of the father’s access rights, although the Canadian Supreme Court was split on which test should be applied. Seven of the nine justices rejected the “presumptive deference” approach and endorsed the Carter approach. The majority stated that the custodial parent’s views on relocation are entitled to a great deal of respect, but that the issue should be decided according to the child's best interest after accounting for all relevant factors. This approach avoided any presumptions. Justice La Forest concurred with

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59. Justice Abella, for the majority, reasoned that there should be “particular sensitivity and a presumptive deference to the needs of the responsible custodial parent who, in the final analysis, lives the reality, not the speculation, of decisions dealing with the incidents of custody.” *Id.* at 571.
61. The majority summarized the principles to apply in relocation disputes in Gordon, 134 D.L.R.4th at 341-42:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
Justice L'Heureux-Dubé's minority opinion that the presumptive deference approach should be adopted. Justices La Forest and L'Heureux-Dubé are more protective of the custodial parent's mobility rights than is the majority of the Supreme Court. Their opinions in Thomson and in V.W. v. D.S. on the proper interpretation of rights of custody may have flowed from their distinctive views on the rights of custodial parents, leading them to opinions that are inconsistent with those of other contracting states and which do not support the Convention's objectives.

Following the precedents set by other jurisdictions as to the interpretation of rights of custody is not necessarily inconsistent with strong support for mobility rights of custodial parents. If a custodial parent violates an order, agreement, or law by removing a child and is ordered to return the child, the relocation issue will then be determined in the state of the child's habitual residence, which is the most appropriate

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly, the judge should consider, inter alia: a) the existing custody arrangement and the relationship between the child and the custodial parent; b) the existing access arrangement and the relationship between the child and the access parent; c) the desirability of maximizing contact between the child and both parents; d) the views of the child; e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child; f) disruption to the child of a change in custody; g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

Id. Appellate courts in other North American jurisdictions have recently addressed the issue of relocation, and, as in Canada, a central concern has been whether there should be a presumption against allowing a move, a presumption in favor of allowing a move, or a best interests test with no presumptions. See, e.g., these U.S. decisions: In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996); In re Tropea, 642 N.Y.S.2d 575 (1996); Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996).

The approach of the majority of the Supreme Court of Canada in Gordon v. Goertz resembles that of the Court of Appeals of New York, which said: "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child." Tropea, 642 N.Y.S.2d at 580.
forum. That state may well argue that it is generally in the child's best interest to allow the custodial parent to move as she or he sees fit. Ordering the child's return ensures that the decision is taken in the country of the child's habitual residence. This presumably discourages violations of the order, agreement, or law that prohibits a unilateral move. If the country of the child's habitual residence does not readily allow moves, the custodial parent may indeed be frustrated. But if the Convention is not applied to ensure that the decision is taken in the country of the child's habitual residence, the custodial parent may be encouraged to violate the non-removal order, agreement, law, and to "forum shop," a practice that the Convention was intended to prevent.

III. CONCLUSION

The Supreme Court of Canada has interpreted rights of custody, wrongful removal, and wrongful retention more narrowly than courts in other jurisdictions. Parents, particularly custodial parents who violate a non-removal agreement, order, or law, will find a friendlier reception in Canada than in other contracting states. In Canada they will less likely be ordered to return the child to the country of the child's habitual residence. The Canadian Supreme Court's interpretation of the Convention has been largely the work of two justices, whose expressed concern for the mobility rights of custodial parents seems to underpin their approach to interpretation of the Convention. Their opinion that non-removal clauses, agreements, and laws do not create rights of custody in the access parent is problematic because it does not conform with the language or objectives of the Convention. It does not respect the right of the child to have the issue of removal determined in the country of the habitual residence, and it differs from the interpretation of other contracting states. The Supreme Court's failure to attend to the principle of uniform interpretation is of particular concern, not because Canada must automatically follow the lead of other jurisdictions, but because the Court did not even address the relevant international precedents, much less provide a reasoned rejection of them. It is hoped that V. W. v. D.S. will be applied restrictively, so that at least explicit non-removal orders, agreements, or laws will ground a claim for return of the child.