INTERNATIONAL CHILD ABDUCTION

AND THE HAGUE CONVENTION

IN NEW ZEALAND:

TWO YEARS LATER

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1. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction (known as the "Hague Convention") has been operating in New Zealand for a little over two years. The Convention, signed at The Hague on 25 October 1980, was the product of international concern about the abduction of children by parents across international borders. Before the 1980s, there was little international co-operation on the subject. Custody orders and decrees made in one jurisdiction were generally unenforceable and not always recognised in other jurisdictions. Until recently, the courts in common law jurisdictions had failed to develop a consistent approach to the handling of international child abduction cases.

The Hague Convention requires children to be promptly returned to their country of origin, and for contracting countries to assist each other to that end. Very simply, the Convention is concerned only with proper forum. There is no provision for judgment about the merits of a dispute between parents.

When parents make custody applications in more than one country to achieve a desired result, they are described as "forum shopping". Unfortunately New Zealand has acquired an international reputation as a country of choice to which to bring children. Judge Brown presented a paper two years ago entitled "New Zealand - The Abductor's Paradise Lost?", where he said:[1]

> Certainly there is a clear sense at the present time that New Zealand is the recipient of some fleeing parents who are very aware of its hitherto non-Convention status.

The 1990 Christchurch case involving Hilary Morgan received a high media profile, and this contributed in no small way to our reputation. The child had been taken into hiding by her grandparents for 2½ years while her mother was in prison in the United States for repeatedly disobeying court orders and frustrating the child's access with her father. The

Washington Post headlined a front page story: *"New Zealand a haven for foreign custody disputes"*.[2]

Despite the Hague Convention now being effective in New Zealand, it may take both time and publicity for our notoriety to be replaced. A comment made by an American County Court Judge in April 1992 about New Zealand serves to illustrate. The mother of a 6 year old boy had come to New Zealand from Texas with the child without the father's knowledge, in breach of an interim court order stating that neither parent may leave the jurisdiction of the Court. At a hearing following the departure, the presiding Judge in Texas said:[3]

> New Zealand is famous for doing as they very well please in matters of child custody, regardless of what some other nation might have entered in an order.

Applying the Hague Convention, in that case the New Zealand Family Court[4] ordered that the child be returned to the United States with the father for the hearing of final matters to take place in Texas.

The New Zealand Guardianship Amendment Act 1991 was enacted to implement the Hague Convention. The cornerstone of this legislation is the concept of "rights of custody". The obligation to return an abducted child arises only if it was in breach of "rights of custody", according to the law of the country in which the child was habitually resident immediately before the breach. The terms "rights of custody" and "rights of access" are separately defined in both the Convention and the Amendment Act, but case law on the content of these rights has become complex.

Where the terms "abduction" and "kidnapping" appear in this paper, they are not used in any precise or technical sense. The word "abduction" appears only in the Convention title, and is qualified by the word "Civil".[5] The Convention speaks of "wrongful removal or retention" instead of abduction,[6] but the word "abduction" will be used here, as in cases and other literature, as shorthand for the phrase..

Lastly on the matter of terminology, the Hague Convention was drafted simultaneously in the French and English languages. It must be accepted that the process of drafting international treaties may result in "infelicities of expression".[7]

This paper is designed to provide an overview of the operation of the Hague Convention in New Zealand. Primarily, it examines the law relating to the key provisions of the Guardianship Amendment Act 1991. This entails a focus on children abducted *to New Zealand from other contracting countries*, since applications for their return are made under New Zealand law. The requirements of an application for return, and possible defences, are fully considered.

The paper begins with a brief consideration of the incidence of international child abduction, and then an outline of remedies outside the operation of the Hague Convention, both in New Zealand and overseas. The main part of the paper presents discussion on the Convention and the Guardianship Amendment Act, including implementation, procedural aspects, and the enforcement of "rights of access" as distinct from "rights of custody".

The provisions of the Convention have been interpreted and applied in other jurisdictions for longer than its two years of operation in New Zealand. There is a substantial body of foreign case law which is growing apace.[8] The largest numbers of reported decisions are from England and Australia.

Close attention will be paid to overseas cases because of the importance of uniformity in the application of international treaties. Prominence is, however, given to the handful of reported or other substantive New Zealand Family Court[9] decisions on which there is little other commentary. Information and cases are up to date as at 1 October 1993 unless otherwise stated.[10]

Generally the Hague Convention is described as an international success story. A recognised expert in the area recently said:[11]

> [T]he Convention has worked well in most instances and is becoming ever more effective. On the whole, courts and administrative agencies exhibit a genuine appreciation of the Convention's purposes and creativity in solving the challenges. ...

At the same time this paper identifies a number of areas of difficulty. One of the most significant is the frequently misunderstood concept of "rights of custody", and the peculiar wording of its definition in our Guardianship Amendment Act, which adds a further dimension to the problem. Also unresolved are important jurisdictional issues relating to enforcement of foreign "rights of access", and the relationship between the Guardianship Amendment Act and the principal Guardianship Act 1968.

2. THE INCIDENCE OF INTERNATIONAL CHILD ABDUCTION

Research and accurate statistics on international child abduction are lacking. Awareness and recognition of the problem has increased greatly in recent years, and the application of the Hague Convention no doubt continues to be a part of that. The Hague project began with an elaborate socio-legal study and a questionaire sent to all member governments in 1978.

Child abduction has been described as "an epidemic of disturbing proportions".[12] Ten years ago in the United States, it was estimated that as many as 100,000 children were abducted each year, and that only about 10% were recovered.[13] Other estimates assert that between 230,000 and 751,000 children are kidnapped by parents each year,[14] (however these figures include abductions inside as well as outside international borders).

While there is evidence that the prevalence of international child abduction is steadily increasing, the number of cases affecting any particular country in one year will be relatively small. Five years ago, a conservative estimate was made that 200 children a year are taken abroad from the United Kingdom.[15]

Up-to-date statistics on the operation of the Hague Convention are difficult to acquire, however early figures are encouraging. It becomes apparent that a large proportion of cases do not proceed to a court hearing for various reasons, including voluntary returns, other agreements, and occasionally a failure to locate children.

In Australia, figures on the operation of the Convention after the first three years, (as at 31 January 1990), indicated that 75 applications had been made in that country, 38 in respect of children abducted to Australia, and 37 in respect of children abducted from Australia. 43 of these resulted in the return of children to their country of habitual residence. In only four cases were orders for the return of the children denied by a court. The Australian figures for the year ended 30 June 1991 indicate that there were a further 37 applications under the Convention during that year.[16]

The United States Department of State reports that almost 400 cases of international abduction were processed in 1992. In May of this year the American-based support and campaign organisation, *One World: For Children*, reported that it was currently handling over 500 active files.[17] In the first three years of the Convention's operation in the United States, 335 applications were received requesting the return of children from the United States or access with children in the United States. There were only six court orders denying return during this period, and apparently none in the first 15 months. After the first three years, 96% of requests for the return of a child from the United States, an 86% of applications for return to the United States, were successful.[18]

At the time of writing, there have been approximately 40 applications under the Hague Convention over the last two years, to the New Zealand Secretary for Justice. About half of these concern children abducted *from* New Zealand, and half concern children abducted *to* New Zealand. Interestingly, a majority of files have involved abductions of children by their mothers. It is estimated that at least half of the New

Zealand cases have been settled without the need for a court hearing.

To date, there have been four Family Court hearings for return of a child abducted to New Zealand, which could be described as fully defended.[19] At other hearings, no real opposition has been offered, or defences have been abandoned during a hearing.[20] There has been one fully argued application to enforce foreign access rights.[21] The Secretary for Justice has eight files currently pending under the Convention.[22]

General growth in the number of child abductions can be attributed to both legal and social factors. Common explanations cited are the ease and speed of modern international travel, and increasing numbers of marriages between different races and cultures, coupled with an increase in broken relationships and reconstituted families. It has also been said that the Courts have exacerbated the problem because of their eagerness, even with the best of motives, to assume jurisdiction in custody matters.[23] In this sense the legal system itself has encouraged, rather than discouraged, child abduction. In many ways, New Zealand's geographic isolation has accentuated the problem.

It is not possible to draw an accurate profile of a potential child kidnapper, but experience suggests that parents who abduct their children are invariably members of high conflict families. It is common for the parent to have strong connections in another country, or to be dissatisfied with judicial decisions relating to custody or access. Whatever the motivations, international child abduction creates extremely tense and emotional family situations. The experience will be devastating for the parent left behind, and quite often harmful to the child. The process of recovering such children has been described as "arduous, expensive and often fruitless",[24] but the Hague Convention has gone some way to alleviating this. Organisations offering advice and support include *One World: For Children*,[25] *Reunite (National Council for Abducted Children)*,[26] and *Children Abroad Self Help Group*.[27]

3. CHILD ABDUCTION OUTSIDE THE HAGUE CONVENTION

3.1 The Welfare Principle

Prior to the Guardianship Amendment Act 1991, common law dictated a case-by-case approach. The only "rule" of private international law was said to be that the welfare of the child was paramount. In New Zealand, of course, courts were bound to apply section 23 of the Guardianship Act 1968. Judges were obliged to examine the merits of the case, and either determine the actual custody issue, or decide that the foreign jurisdiction should determine the issue.

The Guardianship Amendment Act is not a panacea. When a non-signatory country is involved, or where the wrongful act occurred before the Convention was effective between two countries, the earlier judicial approach still applies. Where the Hague Convention is not directly applicable, the only legal option available to the left-behind parent is to obtain a court order, and travel to the country to which the child has been taken and institute proceedings in that country, seeking to have the order recognised and enforced.

The best interests principle has been widely criticised on this subject for lack of a coherent and consistent approach. There was a great variety of practice from one jurisdiction to another and even within jurisdictions. The case law is fully discussed elsewhere,[28] and only the key authorities will be referred to here.

The leading authority is the 1951 Privy Council decision of *McKee v McKee*.[29] It is enough to indicate that some courts have interpreted it as requiring a review of the merits in full, others as requiring the preemptory return of the child, and others as requiring a return in the absence of evidence of harm to the child. In England[30] and Australia[31] all of those approaches were permissible, the choice between them apparently being governed by "welfare considerations". One author has suggested that the issue often depended on "the

circumstances of the abduction, the quality of advocacy and the personal view of the Judge".[32]

In New Zealand, the often cited Court of Appeal case, *Re B (Infants)*,[33] held that an investigation into the merits of the case would normally be required. There has been a move towards greater recognition of overseas orders in many, but not all, of the more recent cases:[34] *C v C*, *E v F*, *L v L*, *C v M*, *Howett v Howett*, and *McGowan v Chorba*.

An important aspect of the welfare principle is described by Professor McLean:[35]

> [T]he "welfare principle" is not actually self-defining. It embodies the assumptions prevalent in a particular society, on such matters as whether a young boy is better brought up by his father or his mother. So an appeal to the welfare principle is *not* to some international standard but to the values of a particular legal system.

It is to be further remembered that the best interests of the child is not a legal yardstick in all overseas countries.[36]

3.2 Relevance of the Hague Convention in non-Convention case

Even where the Hague Convention is not directly applicable, courts have readily taken the policy behind the Convention into account in reaching a decision. Not just in situations where the wrongful act occurred before the Convention's effective date, but also involving countries who are not parties to the Convention. While this approach is now accepted as normative, in such circumstances the welfare of the child is still the paramount consideration.

The matter was first considered by the Full Court of the Family Court of Australia in *Barrios v Sanchez*.[37] The children in question had been retained by the father in Australia after being brought from Chile on a holiday with the consent of the mother. The Court upheld a decision to return the children to Chile, stating:[38]

> [W]e think it is ... open to a Court ... to pay regard to the policy of the Convention, particularly having

> regard to the fact that Australia is a party to it ... We think that the clear policy of Convention is that save in exceptional circumstances, children who have been removed from their lawful custodial parent in another country without the authority of the Court should be returned to that parent. In the present case we think it is appropriate to take this into account as an element to be considered.

In Australia, that approach has also been adopted in *Antoniou v Antoniou*[39] in ordering the return of a child to Cyprus, and most recently in *Van Rensburg v Paquay*[40] where a decision to return children to South Africa was upheld.

The attitude in England has been similar. The Court of Appeal in *Re F (a minor) (abduction)*[41] reversed a Judge's decision refusing return of a child since Israel was not a party to the Hague Convention. A further example is the Court of Appeal decision of *G v G (minor) (abduction)*,[42] where the children were returned to Kenya.

Several cases have gone beyond applying the policy of the Convention, and effectively construed the document on an article-by-article basis. In *C v C (abduction: jurisdiction)*,[43] Cazalet J refused to order a child's return to Brazil, (a non-member country). This was based on the defence that the child would be subject to a grave risk of being placed in an intolerable position because the matter would not be heard in Brazil for over a year.

The Court of Appeal allowed additional evidence to be introduced in *Re S (minors) (abduction)*[44] on an application for return of children to Italy, since evidence of the father's violence and behaviour, and the effect of this on the children, would have required some investigation as a defence under the Convention.

The provisions of the Hague Convention were also closely considered by the Manitoba Court of Appeal in *Re Lavitch v Lavitch*[45] where the children were removed to Canada from California before the United States was a signatory to the Convention. It was held that any risk of harm to the children and their objections should have been considered, as these are defences available under the Convention.

In New Zealand the High Court has likewise confirmed that in cases where the Convention does not apply, the courts should:[46]

> [p]roperly have regard to principles of the Convention as a factor to take into account in deciding how the court should exercise its discretion on the application before it.

After citing the *Barrios v Sanchez* case, Tompkins J explained that the policy of the Convention was an element to be considered, albeit subservient to the paramountcy of the welfare of the child. He upheld a decision for the child to be returned to Tahiti for matters of custody to be decided in that jurisdiction.

Boshier J of the Family Court applied the Convention more specifically in *Lynch v Lynch*.[47] He considered it:[48]

> incumbent on [him] to consider definite sections in the Act and in the Convention itself and to put into effect what the Act intends to the greatest degree possible.

Such a specific consideration of sections of the Guardianship Amendment Act would not be binding, and it is suggested that the policy approach is more likely to be followed in New Zealand.

3.3 Guardianship Amendment Act 1979

In 1979, the best interests test in international cases was significantly modified when sections 22A to 22L were added to the principal 1968 Act. This set up a scheme of reciprocal registration and enforcement of foreign orders between New Zealand and prescribed overseas countries. That scheme is still available. The effect of registration is that custody or access orders can be enforced, varied, or discharged as if they were local orders. Interim orders and orders made ex parte are excluded. Reciprocal provisions in the prescribed overseas countries allow the registration and enforcement of New Zealand orders overseas.

Section 22C provides exceptions to the scheme. A New Zealand court may only consider the matter afresh if the parent resisting registration can satisfy the court that the welfare of the child is likely to be adversely effected or that there has been a sufficient change in circumstances. A number of cases were decided on the application of section 22C.[49]

The scheme was only ever fully operational between New Zealand and Australia, which detracted significantly from its potential impact. The United Kingdom was a prescribed overseas country within the definition, however the reciprocal legislation was never enacted in the UK. Section 31 of the Guardianship Amendment Act 1991 removed the United Kingdom from the list of prescribed overseas countries, but that does not affect orders already registered.

While the importance of registering overseas custody orders has been overshadowed by the Hague Convention, it is strongly suggested here that these provisions will still be useful in some cases and should be retained. This particularly applies to "access orders", in light of the very unclear state of the law on jurisdiction for enforcing rights of access under the Hague Convention.

4. OTHER POSSIBLE REMEDIES

Before a detailed analysis of the Hague Convention and its relevance for New Zealand, reference should be made to other possible remedies used internationally, even though they will not often arise for New Zealanders in the normal course of events.

The remedy offered by the Guardianship Amendment Act 1991 is by no means exclusive. Section 30 provides that nothing under the Amendment Act prevents a court, at any time, from making an order for the return of a child otherwise than pursuant to the provisions of the Amendment Act.

4.1 Other International Agreements

The other main international Convention designed to resolve problems arising from international child abduction is the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children, prepared by the Council of Europe and signed at Strasbourg on 20 May 1980 (known as "the European Convention"). It can only apply between the 21 Council of Europe nations. Accordingly, non-European countries cannot become members. As at August 1992 apparently 13 countries had signed the European Convention, and most of these had also signed the Hague Convention.[50] The European Convention is narrower in its scope, dealing not with the return of children, but with reciprocal recognition and enforcement of custody decisions in contracting countries.

The administration and operation of both Conventions is through the medium of the same administrative body known as a "Central Authority" established in each jurisdiction. An application for registration under the European Convention must be commenced within six months of an abduction (as opposed to 12 months under the Hague Convention). Other differences include the requirement that there be a court order not merely factual custody, and the European Convention has retrospective effect, meaning orders can be registered and enforced even where the removal took place before ratification.[51]

The provisions under which registration might be refused for the European Convention are considered wider than the grounds of defence under the Hague Convention. Under articles 9 and 10 these include lack of opportunity to properly defend proceedings, a finding that "the effects of the decision are manifestly incompatible" with family law principles, a change of circumstances affecting the welfare of the child, or an insufficient connection between the child or parent and the country making the decision. There is evidence, at least in England, that the courts apply an equally strict approach to defences under the European Convention, as under the Hague Convention.[52]

While some commentators complain that the exact relationship between the two Conventions is unclear,[53] the Second Special Commission meeting held at The Hague in January 1993 remarked on an absence of practical difficulties on the inter-relationship.[54] Under the European Convention, a court's powers are suspended if an application under the Hague Convention is already pending. In practice, the Hague Convention is probably more widely used by countries with both.

Other small scale international agreements exist, including a bilateral Convention between France and Portugal, and a trilateral Convention between Belgium, France and Luxembourg.[55]

4.2 Criminal Sanctions

The criminal law offence of kidnapping will generally be ineffective for child abduction since it is based on absence of consent from the person kidnapped. Most countries have criminal provisions specifically relating to child abduction.

The Child Abduction Act 1984 (UK) created an offence in England, Wales and Scotland where "connected persons" take or send a child out of the United Kingdom without the "appropriate consent". A connected person is generally the child's parent or guardian, and the appropriate consent means the consent of each person who is a parent or guardian, or with leave of the court.

In Canada,[56] similar amendments were introduced to the Criminal Code in 1987 creating an offence of abduction of a child by a person with natural or legal parental ties where there is no custody order. In most of the United States, there are similar offences for abduction by parents, although it has not yet been made a federal offence.

By way of comparison, it is submitted that New Zealand's child abduction offence is rather ineffective since it is based on lawful "possession" of a child rather than ideas of consent. Section 210 of the Crimes Act 1961 provides that:

(1) Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to deprive any parent or guardian or other person having the lawful care or charge of any child under the age of 16 years with a possession of the child, or with intent to have sexual intercourse with any child being a girl under that age, unlawfully -

(a) takes or entices away or detains the child; or

(b) receives the child, knowing that the child has been so taken or enticed away or detained.

(2) It is immaterial whether or not the child consents, or is taken or goes at the child's own suggestion, or whether or not the offender believed the child to be of or over the age of 16.

(3) No one shall be convicted of an offence against this section who gets possession of any child, claiming in good faith a right to the possession of the child."

It is accepted that criminal proceedings should only be used in rare and extreme circumstances of child abduction. Police opinion has generally been that it is a domestic matter, not appropriate for criminal sanction, and that prosecution would lead to further bad feeling and ongoing conflict between parents. At the Second Special Commission meeting at the Hague in January 1993, it was agreed that recourse to criminal procedures ought not to be encouraged.[57] Having said that, it is submitted that criminal charges will occasionally be appropriate. Criminal provisions along the lines of the English legislation would be more suitable than section 210 of the Crimes Act 1961.

In recognition of the deterrent effect of criminal charges, the House of Lords established a common law offence of parental kidnapping in 1984 in *R v D.*[58] The Law Lords held that the four factors justifying prosecution in that case were the appalling nature of the father's conduct in terrifying the mother, the repetition of the conduct, the fact that the child was a ward of court, and that there were other offences committed in connection with the kidnapping. The law on false imprisonment of children was clarified and brought into line with the House of Lords decision by the Court of Appeal in *R v Rahman*[59].

More recent English cases confirm that kidnapping by parents should generally be dealt with as contempt of court, and only in exceptional cases by criminal prosecution.[60] Cases which illustrate that the punishment of child abduction by contempt is alive and well are *Re M (A Minor) (Contempt: Abduction)*,[61] where a sentence of 12 months was upheld on appeal, and *Khan v Khan*,[62] where the New South Wales Court of Appeal upheld a sentence of two years for defiance of a custody order.

Section 20(3) of New Zealand's Guardianship Act 1968 renders it a criminal offence to take or attempt to take any child out of New Zealand without leave of the court with intent to defeat any claim to custody or access. Prosecutions under this are rare.[63] The offender is liable on summary conviction to a fine not exceeding $500 or to imprisonment for up to 3 months, or both. The equivalent Australian provision which was inserted in the Family Law Act 1975 (Aust) a few years ago,[64] creates an indictable offence.

4.3 Tort

In the United States, tort actions have sometimes been pursued in child abduction cases. The causes of action include intentional infliction of emotional distress, false imprisonment, harboring and civil conspiracy. Until recently there was a nationwide trend to recognise the existence of a separate cause of action called intentional interference with custodial rights. Before *Larson v Dunn*[65] was decided in 1990, all the State Supreme Courts that had previously addressed the issue had concluded that the tort existed. But in *Larson v Dunn* the Minnesota Supreme Court determined that supporting this cause of action would only compound the harm already suffered by children.[66] The children were only located with the help of the FBI after 7 years, and the father had been denied all contact during that period.

The recognised benefits of the tort of interference with custodial rights include recovery of costs incurred in searching for a child, and pursuing actions against grandparents and other relatives who know the child's

whereabouts. However, there are examples of ridiculously large awards of damages against abducting parents, such as $53 million awarded by a jury in one case.[67]

In the interests of deterring child abduction, it is desirable that "victimised" parents can claim reimbursement for out-of-pocket expenses and pursue remedies against relatives who know where children are. This would be more suitably achieved in New Zealand by way of legislation. While not supporting the creation of tort redress in New Zealand for child abduction, the writer agrees with the dissenting opinion in *Larson v Dunn* that depriving the left-behind parent of any compensation will not necessarily promote better family relations.

4.4 Interstate Legislation

Legislation exists in some countries for child abduction within the constituent states of the country. In the United Kingdom, the Family Law Act 1986 provides for a system of recognition and enforcement of custody orders within England, Wales, Scotland and Northern Ireland. It also sets out uniform rules governing tort jurisdiction, based on criteria establishing the child's closest connection with a jurisdiction. This will normally be founded on the child's "habitual residence", as under a Hague Convention.[68]

There are two key pieces of legislation in the United States, the Uniform Child Custody Jurisdiction Act 1969 (UCCJA) and the Parental Kidnapping Prevention Act 1980 (PKPA).[69] Again, these govern jurisdictional rules and enforcement of custody decrees interstate. The main limitation of the UCCJA was that adoption was not mandatory, although all 50 states have now adopted it. The PKPA addresses the problem by way of federal legislation, designed to enhance jurisdictional and enforcement criteria. Jurisdictional difficulties with the federal courts continue to arise.[70] The equivalent legislation in Canada is the Extra-Provincial Custody Orders Enforcement Act 1974.[71]

It should be noted that in principle the UCCJA can apply to international cases, so that overseas custody orders can be registered and enforced where a parent has wrongfully taken a child to the United States.[72]

Abduction within New Zealand is beyond the scope of this paper. The care and residence of children are matters of custody and guardianship, determined in accordance with the basic principle in section 23 of the Guardianship Act 1968 that the welfare of a child is paramount. The whole range of remedies available to a parent within New Zealand depend upon having an order for custody, whereas that is not essential for the return of children internationally, under the Hague Convention.

5. IMPLEMENTATION OF THE HAGUE CONVENTION

5.1 Beginnings

The Hague Conference process involves a highly structured, 4-year cycle for addressing topics of private international law. It generally involves selection of a topic to be dealt with, followed by background research on the subject and preparation of multi-national treaties. The Permanent Bureau of the Hague Conference employs 4 lawyers, all of whom are required to be of different nationalities.

The genesis of the Hague Convention on child abduction was general agreement that children wrongfully removed from his or her country of residence should be promptly returned. To this end, legal factors which facilitate abduction should be eliminated. The proposal was first put to the Hague Conference in 1976 by Canada and Switzerland for formal consideration on its agenda. By 1980 a Draft had been prepared, and at the 14th session of the Hague Conference on Private International Law on 25 October 1980, the Convention on the Civil Aspects of International Child Abduction was adopted. It was signed immediately on behalf of Canada, France, Greece and Switzerland. It is documented that during the negotiations, the formulations of exceptions to the

Convention proved to be the most important, but also the most difficult task. There was a "serious split of opinion".[73] Some delegations favoured a clear rule of recognition of foreign decisions with minimal exceptions, while others favoured far reaching discretion of courts to re-examine the best interest of the child. Article 13 of the Convention is the result of the consensus reached. 29 nations were represented at the Conference in the Hague in 1980, thereby becoming parties to the Convention. New Zealand was not among them.

5.2 Contracting Countries

The Hague Convention comes into force on a country by country basis. As at July 1993 it has been *ratified* by 20 countries (being members of the original Hague Conference), and *acceeded to* by an additional 10 countries. These are:

> Argentina, Australia, Austria, Belize, Burkino Faso, Canada, Denmark (except the Faroe Islands and Greenland), Ecuador, France, Germany, Greece, Hungary, Ireland, Israel, Luxembourg, Mauritius, Mexico, Monaco, The Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Spain, Sweeden, Switzerland, United Kingdom of Great Britain (meaning England, Wales, Scotland and Nthn Ireland), the United States of America, and Yugoslavia.[74]

Accesion instead of ratifications are made by countries that are not members of the Hague Conference. Pursuant to article 38 of the Convention, and accession is effective only between the acceeding country and those contracting states that have accepted the accessions. Other nations may, or may not, register their acceptance of each accession.

Acceptance of the Convention by each country acquires more than simply signing it. Chapter *Re I* of the Convention requires that instruments of ratification, acceptance or approval be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands. Accordingly in the Australian decision of *Hooft van Huysduynen v van Raijswijk*,[75] the Netherlands was held not to be a convention country because, although it was a signatory, it had not taken the matter any further than that at the time of the abduction.

Article 35 stipulates that the Hague Convention does not apply retrospectively. This has been applied and confirmed in a number of cases, including the House of Lords decision *H v S.*[76] Therefore, there is always a need to check that the wrongful removal or retention in issue occurred after the date that the Convention came into force between the two countries. New Zealand's accession has been accepted by the following contracting states, and is effective from the dates shown:[77]

Argentina	1 October 1991
Australia	1 June 19932
Belize	1 December 1991
Canada	1 July 1992
Denmark	1 October 1991
France	1 January 1992
Germany	1 February 1992
Hungary	1 December 1991
Ireland	1 October 1991
Israel	1 February 1992
Luxembourg	1 October 1991
Mexico	1 December 1991
the Netherlands	1 September 1991
Norway	1 October 1992
Portugal	1 August 1992
Spain	1 July 1992
Sweden	1 August 1992
Switzerland	1 September 1992
the United Kingdom (meaning England, Wales, Scotland and Nthn Ireland)	1 October 1991
USA	1 October 1991

More accessions were anticipated to have been completed during 1993, including Belgium and Italy (who had signed but not ratified the Convention in July 1993), Greece, Turkey, Finland, Belgium, the Phillipines and additional South American countries.[78]

It is noticeable that a majority of the member nations are from Europe. Australia and New Zealand are the only Asian or Pacific countries to have ratified or exceeded to the Convention so far. It is said that an "urgent need" exists for countries in the Asian and Pacific regions to adopt the reciprocal procedures to return abducted children.[79] Expressions of interest have come from Japan and China (who are members of the Hague Conference), and from Hong Kong,

Indonesia, Singapore and the Phillipines. Some of these countries were represented by delegates at the Second Meeting of the Special Commission at the Hague to review the Convention's operation, held in January 1993.[80]

Quite clearly, the impact of the Hague Convention on the problem of international child abduction depends to a large degree on the number of countries adopting it. The effectiveness of any international treaty must always be limited in this way. Accession to the Convention by as more nations would be desirable and welcomed. It is encouraging that as many as 44 countries were represented at the Second Meeting of the Special Commission in January 1993.

So far Islamic countries have shown no interest in joining a multilateral treaty on child abduction. In some instances there would be considerable problems in following the Convention unless internal changes could be made because of customs and values on which law is based. The difficulties are highlighted by the recent book by BM and fil about her in her escape from Iran with her daughter.[81] The Australian decision in *Scott v Scott*[82] is also illustrative. The Full Court upheld a decision declining to exercise jurisdiction over an Australian child who had been living Egypt for several years. The Court took notice of the fact that any Australian decision would probably not be enforced by an Egyptian Court, and the child was not permitted to leave Egypt. In the absence of the father's co-operation, the mother was disqualified from obtaining the child's custody because she had renegated Islam.

5.3 Implementing Legislation

It was decided at the outset by the Hague Conference that legislation implementing the Convention into domestic law for each country was desirable.[83] Most countries have simply enacted a statute which declares that the Convention has the force of domestic law and introduces further procedural provisions. Examples of implementing legislation are the Family Law (Child Abduction Convention) Regulations 1987 (Australia), the Child Abduction and Custody Acts 1985 (United

Kingdom), the International Child Abduction Remedies Act 1988 (USA), and section 47 of the Children's Law Reform Act 1980 (Canada).

New Zealand's instrument of accession was deposited at the Hague in May 1991. The Guardianship Amendment Act 1991, which implements the Hague Convention, came into force on 1 August 1991. The full text of the Convention itself is annexed to the Amendment Act as a schedule. It has been said that the Amendment Act creates a "parallel" statutory code to the Convention, however, there are many subtle differences between the Act and the Convention. It is submitted that the most significant of these is in the definition of "rights of custody", and this is explored later in this Paper.

The enactment of the Amendment Act was awaited "with some impatience".[84] The New Zealand Government had expressed an intention to implement the Hague Convention as early as 1988, however the Bill was not introduced into Parliament until early 1990. The timing of the introduction no doubt had much to do with the furore over the Hilary Morgan case in Christchurch. It was in February of 1990 that her father, Dr Foretich, discovered her whereabouts in Christchurch.

On account of this, it appears there was some haste in preparing the Bill for introduction. There were few changes to the Bill as introduced, before it was finally enacted. In light of the discrepancies between the texts of the Convention of the Act it is interesting to note that there was apparently a very early draft of the Guardianship Amendment Bill which simply gave the text of the Convention the force of domestic law.

There are a limited number of reservations which contracting countries may enter when adopting the Hague Convention, and these will be referred to where appropriate. In addition, article 36 of the Convention permits two or more contracting countries to agree to limit the restrictions to which a child's return may be subject under the Convention. In other words, countries may only agree to expand their return obligations. Examples are agreeing to extend jurisdiction to

children beyond age 16, or agreeing to apply the Convention retrospectively. The New Zealand Secretary for Justice is not proposing to make use of this article.

6. OBJECTIVES OF THE HAGUE CONVENTION

As already indicated, the Hague Convention concentrates on the prompt return of children who have been removed from their habitual residence in breach of custody rights being exercised under the law. Article 1 states that the objects of the Convention are:

> (a) to secure the prompt return of children, wrongfully removed to or retained in any contracting state; and
>
> (b) to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

As Sammon[85] observes, there are at least two themes which constantly emerge when dealing with interpretation of the Convention. The first theme is that a court in a child's country of origin is best equipped to determine the final issue of custody in most cases. While this view emerges in almost every case, some cases are commonly cited as examples. In *Director General of Community Services v Davis*[86] the full Court of the Australian Family Court held that it was the clear intention of the Convention to limit the discretion of the Court in the country to which the children have been taken "quite severely and stringently", subject only to the exceptions to be found in the Convention. In *Davis* the court further said that one of the general purposes of the Convention is to discourage, if not eliminate, the harmful practice of unilateral removal or retention of children internationally. Similarly, the full court observed in *Gazi v Gazi*[87] that:

> The primary purpose of the Convention, the relevant

> legislation and regulations, is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return to the country of their habitual residence of children who are wrongly removed or retained in another country in breach of existing rights of custody or access.

A further example is the important English Court of Appeal decision, *Re A (a minor) (abduction)*,[88] where Nourse L J stated that:

> Except in certain specified circumstances, the judicial and administrative authorities in the country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on the grounds of choice of forum or on a consideration of what is in the best interest of the child or otherwise.

The second emerging principle of interpretation is that the welfare of the child is not paramount in Hague Convention proceedings, at least not as family lawyers traditionally understand it. The Preamble to the Convention cites the conviction of member nations that the interests of children are of paramount importance in matters relating to custody. However, this must be carefully read in light of section 35 of the Guardianship Amendment Act 1991, which amends section 23 of the Guardianship Act 1968. The key to understanding the operation of the Convention is that the welfare and the interest of the child are presumed to be secured by deterring abductions. Some commentators say that this is a complete departure from the welfare principle, however the better view is probably that it has been qualified rather than overridden.[89] Again, authority for this theme is widespread.

Section 16 of the Guardianship Amendment Act 1991, (imple article 16), supports the distinction which runs through the legislation, between a decision on an application for the return of a child, and a decision on the merits of the case. No decision on the merits can be made while an application for return of the child is pending. This does not mean that the merits of the custody issue will go undetermined. It means simply that they will be determined in the Court where it is most appropriate, namely, where the child normally lives.

This strong international policy to return abducted children find courts in an unfamiliar role. Eekelaar[90] observes that:

> "This entails a willingness on the part of a state to exercise a degree of self-denial regarding its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case."

Generally the Convention, and its defences, have been applied in *spirit*. There has been broad consensus at the Special Commission Meeting at the Hague, (already been referred to), that in general the Convention works well in the interests of children and meets the needs for which it was drafted.

7. AN APPLICATION FOR RETURN OF A CHILD

7.1 Initiating Proceedings

Where a child has been *abducted to New Zealand*, there are three methods to initiate proceedings:

(a) an application to the Central Authority in the foreign country, who must then apply to the Secretary for Justice in New Zealand;

(b) an application to the New Zealand Central Authority, who are then obliged to "take action under the Convention to secure the prompt return of the child";

(c) an application directly to the Family Court under section 12.

Ultimately the Court will be faced with a section 12 application for a child abducted to New Zealand. If the removal or retention of the child is wrongful, it should not matter which way the proceedings originate. In an application under section 10 would be advisable if the whereabouts of the child are unknown, since section 10(2) requires the Secretary for Justice to take all appropriate measures to discover where the child is.

Where a child has been *abducted from New Zealand* to a contracting country, similar options will apply in the foreign

country. The New Zealand Secretary for Justice will assist with any application it receives under section 9 for return of a child abducted from New Zealand.

Article 29 of the Convention preserves the ability of the applicant who is claiming a breach of custody or access rights, to bypass the Central Authorities and make an application directly to the courts of a contracting state, whether or not under the provisions of the Convention. Several experts at the Second Special Commission Meeting in January 1993 agreed that "direct" applications are perfectly admissible under the Convention and occur quite frequently.[91]

In spite of this, it must also be accepted that the Central Authorities play a crucial role in facilitating the operation of the Convention. It would be helpful if Central Authorities could still be informed of direct applications, so that results can be properly co-ordinated and monitored.

7.2 The Applicant

There is no list of persons who qualify as applicants for the return of a child. A close reading of section 12 makes it clear that any person whose rights of custody have been breached may proceed. This includes a natural or adoptive parent, a guardian, or anyone who has obtained custody rights pursuant to a court order. If grandparents or foster parents have actually been exercising custody of a child, they would be eligible to seek the child's return pursuant to the Convention. Section 2 of the Act defines "person" to include any institution or other body having rights of custody in respect of a child. Hence an application might be made by institutions such as childcare agencies which are exercising custody rights.

Normally an application under section 12 will be made by the person claiming a breach of rights of custody, however the section does not restrict who actually makes the application. Each domestic legal system has its own terminology for referring to rights which touch upon the care and control of

children. It is necessary to look at the content of the rights and not merely their names.

Section 12(1) states that a person claiming a breach of rights of custody, *or any person acting on that person's behalf*, may apply. This seems to be basis upon which the application was made by the Child Abduction Unit from the District Attorney's office in the recent New Zealand decision, *In the matter of Escobar*[92]. Judge Inglis stated that the application was "properly made through the proper channels". A Californian Judge had made an order determining that the mother in violation of an earlier court order, and:[93]

> as a result the Child Abduction Unit attached to the District Attorney's office became involved on the father's behalf and is the applicant in the proceedings now before this court (see s12(1)). As its name suggests, the Unit was set up to investigate and handle both international and interstate child abductions.[94]

7.3 Children Protected by the Convention

For the Convention to apply the child must have been "habitually resident" in a contracting state immediately before any breach of "custody rights". The child must also have been taken to or retained in another contracting state after the date that the Convention entered into force between the two countries. It applies only to children under the age of 16. Article 4 makes it clear that even if a child is under 16 at the time of the wrongful act, the Convention ceases to apply when the child reaches 16. The cut-off age will occasionally give rise to problems in practice where siblings have been removed or retained overseas, one being over 16 and others being under 16. As already noted, the Convention does not bar the return of such a child by other means.

The Act does not define who may or may not be an abductor. It is assumed that in most cases this will involve a parent of the child. However, it is the wrongful act itself that is significant, and the class of potential child abductors has not been limited. In the English decision of *Re Bates (minor)*,[95] the father was a member of a rock band that travel extensively, and the removal was carried out by the nanny on

his instructions. There is a New Zealand example where the mother from Australia was applying for return of a child against the grandparents in New Zealand.[96]

7.4 Wrongful Conduct under the Convention

Section 12(1) sets out the jurisdictional requirements of an order for return of the child. The first point is that the application is for *return* and not for *custody*, and the terminology should not be confused.[97] If the grounds of the application are made out, section 12(2) states that, subject to the defences in section 13:

> "The Court *shall* make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order."

Thus once the requirements are fulfilled, there is a quasi-automatic return of children. In the New Zealand case of *Wolfe v Wolfe*, Judge Carruthers called the result a "very clear, decisive and somewhat draconian one."[98]

The requirements under section 12(1) for an order for return are:

12(1)(a)	that a child is present in New Zealand; and
12(1)(b)	that the child was removed from another contracting state in breach of that person's right of custody in respect of the child; and
12(1)(c)	that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and
12(1)(d)	that the child was habitually resident in that contracting state immediately before the removal.

Satisfying section 12 will to a large extent depend on evidence. There are, however, three major legal issues which deserve lengthy discussion: *rights of custody*, *wrongful retention*, and *habitual residence*. These will be discussed in turn.

Article 3 states that the removal or retention of a child is wrongful where:

(a) it is breach of rights of custody attributed to a person, and 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 the removal or retention those rights were actually being exercised, either jointly or alone, or would have been so exercised but for the removal or retentions.

Accordingly wrongful conduct to which the Guardianship Amendment Act 1991 applies hinges around the concept of "custody rights" determined by the law of the child's habitual residence.

7.5 Rights of Custody

Article 5 of the Convention provides that "rights of custody" *includes* the right to determine place of residence. It states:

> "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.

The definition of rights of custody has been called a "touchy"[99] area under the Convention, and has given rise to "delicate issues".[100] At the outset it must be emphasised that whether a person has "rights of custody" is ascertained by looking to the law of the country of the child's habitual residence for an answer. Thus courts find themselves in the unusual position of interpreting and applying overseas law directly.[101]

7.5.1 Factual Custody

The first key point in understanding the meaning of "rights of custody" is that, technically speaking the Convention does not seek enforcement of custody orders, but seeks to restore the *factual* status before the abduction. It is said that the Convention deals with "custody rights, not custody decisions".[102]

It was always intended that the Hague Convention would recognise custody rights which accrue by operation of law, not just those granted in a court order. This was confirmed by the full court of the Family Court of Australia in *Gsponer v Director General of Community Services*.[103] Although the Convention does not exhaustively list all the possible sources from which custody rights may derive, it does identify three sources in the final paragraph of article 3: by operation of law, by reason of a court decision, or by reason of an agreement having legal effect. While a custody order is not required to invoke the Convention, there may be situations where the left-behind parent could benefit from having obtained one.

7.5.2 International Definition

The second key point is that the expression "rights of custody" is not intended to:[104]

> [c]oincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention.

The term "custody rights" under the Convention should be considered as referring to a collection or bundle of rights, which take on more specific meaning by reference to the law of the country of the child's habitual residence.

It is very tempting to equate "rights of custody" with the New Zealand concept of guardianship, since the right to determine where a child is to live is considered a matter of guardianship within section 3 of the Guardianship Act 1968. Where an application for return is made in a foreign country for a child *abducted from New Zealand*, this analysis is fine. Both parents, whether married or unmarried, will have "rights of custody" unless those rights are suspended by a Court order. Thus, even if there is a judicial determination vesting custody in one parent, arguably the other parent still has "rights of custody" within article 5 of the Convention, by virtue of being a guardian.

If, on the other hand, an application for return is made in New Zealand for a child *abducted from another country*, the way in which "rights of custody" in the Convention might coincide with our domestic law is not relevant.

7.5.3 Rights of Custody *and* Rights of Access ?

The third key point in understanding the term is that "rights of custody" and "rights of access" are not mutually exclusive. "Rights of access" is defined in section 2 of the Guardianship Amendment Act as:

> "The right to visit a child; and includes the right to take a child for a limited period of time to replace other than the child's habitual residence."

The crucial issue that arises from article 5 is that a parent who is *entitled to be consulted as to where his or her child will live* has "rights of custody" within the Convention, *even* if they also have "rights of access".[105] The result would be the same if a court had specifically stated that a child should not be removed from the jurisdiction without the consent of both parents or the court.

The leading authority is *C v C*,[106] a decision of the English Court of Appeal. In that case consent orders had been made giving the mother custody, but restraining both parties from removing the child from Australia without the consent of the other, and this is what the mother had done.

The Court of Appeal held that the definition in article 5 of the Convention had to be read into article 3, and was capable of a wider meaning than the ordinarily understood, domestic concept of custody. Lord Donaldson M R stated:

> "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 the local authority, or it may, as in this case, be a divided right - insofar as the child is to reside in Australia, the right being that of the

> mother; but, insofar as any questions 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.*"

Similarly, in *Re A (a minor) (wrongful removal of a child)*[107], the fact that both parents continued to have rights as joint guardians ("custodians") was sufficient for "rights of custody" under the Convention to order a return to Australia, despite the mother having been granted custody under an Australian order.

There is a French Court of Appeal decision to the same effect as *C v C.*[108] While the father had been granted temporary custody in England, he had also been ordered not to take the children out of England without the mother's consent, and accordingly the mother claimed "rights of custody".

It appears that the *C v C* interpretation is what was originally intended by the drafters of the Hague Convention. Either way, many commentators have interpreted the expression "rights of custody" to mean something much narrower. Consider these examples which describe the purpose of the Convention:

> "It is suggested that a narrow definition based on the right to actual custody under Northern Ireland law is to preferred. It is in keeping with the Convention's aim, which is the protection of the child, not of parental rights... otherwise the number of potential cases would increase and perhaps prevent concentration on the more serious cases.[109]
>
> "The common features of these situations are that a child is removed (usually by a parent) from its *accustomed custodian* (usually the other parent)."[110]
>
> "The traumatic loss of contact with *the* parent who has been in charge of the child's upbringing.[111]

It is submitted that the *C v C* definition of "rights of custody" properly meets the Convention's purposes. That is, those who should have been consulted before a child was removed to or retained in an overseas country but were not consulted, can assert their "rights of custody" for the

child's return. The appropriate consent or permission to remove the child from the jurisdiction should have been sought before the child was wrongfully removed or retained. The law relating to such permission is quite clear, both for temporary and permanent removals from the jurisdiction.[112]

7.5.3 Access-only Rights

The reference to rights held jointly is important. In most countries parents will be joint "guardians" of the child in the absence of any order or agreement to the contrary.

In a minority of cases, a parent may not have the right to object to the child being removed from the jurisdiction, either by operation of law or a court order. It is convenient to describe these rights as *access-only* rights, that is, rights of access without the right to be consulted about the child's place of residence.

Re J[113] provides an example of access-only rights. The House of Lords held that the father in Australia did not have "rights of custody" as recognised by the Convention at the time of the wrongful act. The mother left Western Australia with the child without consulting the father. According to local law, and in the absence of a court order, the guardianship of the [ex-nuptial] child rested solely in the mother since the parents were unmarried. The father immediately applied for and obtained an order in Western Australia vesting sole custody in him after her departure. However, the House of Lords decided that when the mother's actions had become wrongful, the child's habitual residence had changed to England, and return was refused.

In *Re J*, Lord Donaldson sounded a precautionary note, possibly in order to quell any alarm bells which might have been sounded as a result of that case, by way of the following obiter:

> But, in the ordinary case of a married couple in my judgment, it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction

> wrongfully and in breach of the other parent's rights. Accordingly, this decision can not be applied to the ordinary case of the married couple.

By the same analysis, in the absence of a court order, it is apparently the case that unmarried fathers of ex-nuptial children under local laws in Northern Ireland,[114] England[115] and Georgia(USA)[116] for example, could apparently not claim "rights of custody" since the mother would have exclusive rights.

Further, considering the first New Zealand decision on enforcement of access rights, *Secretary for Justice v Sigg*,[117] it is suggested that the father could not be described as having "rights of custody". This is because a decree of the Utah court was in force specifically providing for visitation rights in the event that the mother elected to reside "in New Zealand or elsewhere outside the State of Utah".

Bruch comments:[118]

> Sometimes Central Authority staff members have had the impression that the requesting party had no real intention to request or obtain the child's custody [in the domestic sense] ...the motivation in some of these cases may be to secure the child's permanent residence in the place where the requesting party lives, but in the care of the person who removed the child. Use of the Convention for this purpose is dubious.

With respect, such a motivation is perfectly acceptable in the policy of the Convention. The point is that the left-behind parent had a right to be consulted about the child's country of permanent residence. That issue must be determined by the courts in the child's habitual residence.

7.5.4 Still Confused

Confusion about 'rights of custody" remains high. A "troubling" German decision[119] refused to return a child that had been removed from Spain on the theory that the father, who had joint custody rights as a matter of law and saw his daughter for several hours each day, was exercising only visitation, not custody rights.

The Family Court of Australia recently considered the concept of "rights of custody" in *Police Commissioner of South Australia v Temple*.[120] In that case the mother had taken the children from England to Australia for a holiday with the father's consent, but retained the children in Australia intending to live there. At one point in the judgment, Murray J said:[121]

> "I therefore hold that "rights of custody" do not in the context of the Convention include a right to access."

Reconciling this statement with *C v C*, Murray J must mean that "rights of custody" does not include a right to *access-only*. The decision itself supports this. The Judge went on to hold that the father had "rights of custody" within the meaning of the English Children Act 1989, since he had "parental responsibility" under that Act, and therefore had the right under English law to give or withhold consent to removal of the child from England. The father had a right to determine the child's place of residence. The *Temple* decision has been upheld on appeal by the Full Court of the Family Court, though this point was not raised in the appeal.[122]

7.5.5 New Zealand Legislation

The overseas position has deliberately been explained in full before we turn to consider the New Zealand definition of "rights of custody". Its definition in section 4 of the Guardianship Amendment Act 1991 is subtly narrower than article 5. Section 4(1) of the Act provides that a person has a rights of custody if:

> Under the law of the contracting state in which the child was habitually resident immediately before removal, that person has, either alone or jointly with any other persons -
>
> (a) the right to the possession and care of the child; *and* [emphasis added]
>
> (b) to the extent permitted by the right referred to in paragraph (a) of this subsection, a right to determine where the child is to live.

On the face of it, section 4 means that the right to determine a place of residence is not, in itself, sufficient to constitute a right of custody. The "and" reads that the right to possession and care of the child is required as well.

It is submitted that this wording is a fundamental flaw in the New Zealand legislation. The writer is aware of concerns raised in the consultation process in drafting the Guardianship Amendment Bill, that the New Zealand definition of rights of custody should be drafted to *exclude* "guardianship".

The overseas analysis demonstrates that "rights of custody" under the Convention was supposed to *include* the New Zealand concept of guardianship. In light of the haste in which our Guardianship Amendment Bill was introduced into Parliament, the writer suspects a misunderstanding existed about the definition in section 4. All other jurisdictions have adopted the wording of the definition of "rights of custody" exactly as it is set out in the Convention.

Concern has been expressed by New Zealand commentators[123] in New Zealand that because of the difference in wording in section 4, a *C v C* type argument may not be successful. Judicially, the section 4 issue has not been completely resolved.

On one hand, Tompkins J of the High Court in *Lehartel v Lehartel*[124] made an obiter statement that it was "at least doubtful" whether section 4 was satisfied because the parties did not each satisfy the first limb, namely the right to possession of the child. (This was in the face of a condition in an order of the Tahitian Court of Appeal that the child could not be taken out of the country except with the explicit agreement of the father).

On the other hand, the Family Court Judge in the *Lynch v Lynch* decision[125] made obiter statements that it was helpful to look at article 5 as well as section 4 on "rights of custody", and the "important decision" of *C v C* was cited. Both parents

in the case were held to have the right to determine where the child should live.

The issue was squarely addressed by the Family Court in *Wolfe v Wolfe*[126], where at the time of the removal from Texas the father had temporary possessory conservatorship ("access") under a court decree. Judge Carruthers found:[127]

> It is implicit I think in the order ...that there is a right to determine where the child is to live. ...I conclude, therefore, that both limbs of the definition in section 4 are satisfied and that there is, therefore, in this case a right of custody within the purpose of the definition and under the law of the contracting state...
>
> [After citing *C v C*]... The obiter view to the contrary expressed in *Lehartel v Lehartel* I do not regard as helpful in this case. *Lehartel* was decided on other grounds. What is important here is the emphasis that the law involved is that of the contracting state. [On] the evidence which I have about the law in Texas ...it is established there that a custody determination includes visitation rights I conclude for those reasons that there was here a removal of this child in breach of Dr Wolfe's rights of custody.

The issue can probably not be regarded as settled until it is properly addressed by the High Court. At the Second Special Commission Meeting in The Hague in January 1993 it was stressed that the term "rights of custody" should be interpreted in an international way.[128] Bearing in mind the objects of the Hague Convention, and the international character of the legislation, the obiter comments of the High Court in *Lehartel* should be put to rest.

7.5.6 Court's Rights of Custody

The English Court of Appeal has held that where interim custody and access orders have been made by a court and the child has been removed before orders are finalised, that court has "rights of custody" which had been infringed by the removal of the child: *B v B (abduction)*[129]. The mother's removal of the child from Ontario amounted to a breach of the Ontario Court's rights of custody.

This case confirms similar earlier rulings made in Family Division Courts in *H v N (child abduction)*[130] and *Re J (a minor) (abduction)*[131] and *Re R (Wardship: Child Abduction) (No. 2)*.[132] In the latter two of these cases wardship proceedings in relation to the child were said to confer "rights of custody" on the Court, since the right to determine a place of residence is retained by the Court under the wardship jurisdiction.

By similar analysis, the Family Court of Australia held in *Barraclough v Barraclough*[133] that the right to determine the current residency of the children vested in the UK court, as the children were wards of that Court. The father had earlier made an application for wardship, and the United Kingdom court had already refused an order that the children be returned to him. He was not entitled to a "second bite at the cherry" by applying to an Australian court for their return.

In New Zealand, the argument about courts' "rights of custody" was accepted by way of a passing reference in *Wolfe v Wolfe*.[134] Final matters of custody and visitation were scheduled to be heard in Texas, and the mother's removal of the child was held to be wrongful also because of the court's rights.

It is appropriate here to mention a remarkable Canadian case, *Re S v A*.[135] A woman of Indian-descent, born in Alaska, gave birth to a child in New York and decided that the child be adopted by non-Indian parents, and she took the child to British Columbia. The British Columbia Supreme Court held that her Indian tribe of descent possessed "rights of custody" with respect of the child. Legislation in the United States gives Indian tribes jurisdiction over custody proceedings involving native children and the right to intervene in such cases. This illustrates the breadth of "rights of custody" under the Convention.

7.5.7 Relevance of a Court Decision subsequent to the Wrongful Act

What is the relevance of a court decision on the merits of custody, after the wrongful act of the abducting parent?

If the decision is by a court in the country requested to return to the child, article 16 of the Convention and section 16 of the Guardianship Amendment Act 1991 make it plain that any such decision shall not inhibit the application for return. If a New Zealand court has made a decision *before* the application for return, section 13(3) (incorporating article 17) provides that the Court shall not refuse an order for return by reason only that there is a custody order relating to the child in force. The Court may have regard to the reasons for making the order, it being likely that the decision would have been made without a full appreciation of the facts.[136]

Where a custody decision is instead made in the country of habitual residence, it must be stressed that any such decision cannot in itself be a ground either for or against ordering the return of the child. This is because the Convention only covers abductions which were wrongful at the time of the removal or retention. Arguably, if the initial removal was not wrongful, a later retention could be said to begin on the date of the subsequent overseas order: in *Re J.*[137]

7.6 Wrongful Retention

The legal meaning of "wrongful retention" has also received judicial attention. Section 12 of the Guardianship Amendment Act refers to "removal" of a child, and removal is defined in section 2 of the Amendment Act to include both removal and retention which is wrongful within the meaning of article 3, (which means that the act is in breach of rights of custody). Hence the Amendment Act requires the concept of retention to be read into the word "removal" throughout.

"Wrongful retention" of a child has almost uniformly been held by courts to be a single event for the purposes of the Convention, rather than a continuing event. The leading authority is the House of Lords decision in *Re H and S*[138] where it was held that the "removal" of a child and

"retention" of a child are mutually exclusive concepts. The Court said that retention is not like a removal continued, but that retention, like removal, occurs on a specific occasion.

Clearly, it is contrary to ordinary language to say that retention occurs on a single occasion. Lord Brandon admitted that the word "retention" usually connotes a continuing state of affairs. The writer accepts that a retention must at least begin on a particular day, which is when the child's habitual residence is to be determined. With respect, one would have thought it better to describe retention as a continuing state of affairs occurring on a daily basis, but that the only relevant date under the Convention is the date on which the retention first becomes wrongful.

The Law Lords refer to retention after a "limited" or "specified" period of time. With reference to the definition of access under section 2 of the Amendment Act, this probably refers to retention after an authorised period of holiday or access overseas. The retention becomes wrongful when it exceeds what was authorised by the person who gave consent for the holidays.

Further developing the meaning of retention, Lord Brandon in *Re H and S* states:[139]

> a child can only come within [wrongful retention] if it has been first removed rightfully (eg. under a court order or an agreement between its two parents) out of the state of its habitual residence and subsequently retained wrongfully (eg. contrary to a court order or an agreement between its two parents) instead of being returned to the state of its habitual a residence."

Also with respect, ordinary language dictates that a child can be both wrongfully removed and wrongfully retained. Perhaps it would be preferable to accept this, with a qualification that the only relevant date under the Convention is the date on which the first wrongful act occurs. This date, is of course, the date on which a child's habitual residence is determined.

A contrary analysis can be found in the Australian decision of *Barraclough and Barraclough*.[140] Kay J expressed an opinion that the words "it *is* in" at the beginning of article 3(a) "are words of continuity and present tense ... and are not properly capable of interpretation of referring only to the time that the retention of the child initially took place."

In light of these authorities, it is not clear whether wrongful retention in New Zealand is to be treated as an event occurring on a specific occasion or as a continuing state.

The proper construction of "wrongful retention" was also the point in issue the Scottish case of *Kilgour v Kilgour*.[141] The mother had taken two children from the family home in Ontario to Scotland. The father conceded that a wrongful removal argument would not be successful since at the time of the removal the Convention was not in force force between Ontario and Scotland. Prosser J rejected the father's alternative argument that retention was a continuing act (so that in this case retention would become wrongful on the date that the Convention entered into force between the two countries). The decision confirms the strict requirement of article 35 of the Convention that it can not be applied retrospectively. The Court also accepted the mother's argument that both removal and retention were specific acts.

Note that the English Court of Appeal has accepted in *Re A v Another (Minors: Abduction)*[142] that a parent can agree to extend the period of proper retention, after which a retention becomes wrongful. In that case the father had agreed to allow the mother and child to stay longer in Arizona for the mother's sister's birthday. At that point the retention became wrongful, and the issue thereafter was whether the father acquiesced in the situation.

7.7 Habitual Residence

The third major issue that has been the subject of legal analysis is "habitual residence". The child must have been habitually resident in the country from which it was wrongfully taken immediately before the breach, that is

the removal or the retention. Habitual residence is, of course, essentially a question of fact.

The expression "habitual residence" is not defined anywhere in the Hague Convention or the Guardianship Amendment Act, nor for that matter, in any other Convention in private international law. The Second Special Commission meeting at The Hague in January 1993 recorded that habitual residence raised some problems of application in practice, although in most cases courts had no difficulty applying it.[143]

The original Hague Conference deliberately adopted the expression "so as to avoid the problems of legal domicle" as defined and interpreted. Domicile imports notions of intent, and it was intended to substitute this with a completely factually-based concept, that is, the place that is the centre of the child's life.

The concept of "habitual residence" is novel in New Zealand, although it has become common place in English family law statutes. The term has also been used in various other Hague Conventions, although it is said that case law in connection with those Conventions is "not very useful".[144] The old English cases which may be of assistance construe the expression "ordinary residence", which is said to resemble the concept of "habitual residence". The Court of Appeal *Re P (GE)*[145] explained that a child's ordinary residence could not be changed by one parent without the consent of the other.

In *Shah v Barnet London Borough Council*[146] (a case of five conjoined appeals), the House of Lords construed "ordinarily resident" according to its natural and ordinary meaning. It was said that a person was ordinarily resident in the United Kingdom if [he] habitually and normally resided lawfully in the United Kingdom from choice and for a settled purpose throughout the prescribed period, apart from temporary or occasional absences. Furthermore, a specific and limited purpose such as education, could be a settled purpose. It was irrelevant the applicant's permanent residence or "real home" might be outside the United Kingdom whether his future intention or expectation might to live outside the country.

It is significant that in the English High Court, Stephen Brown P equated "habitual residence" with "ordinary residence" in *V v B (a minor) (abduction)*.[147]

The House of Lords considered the meaning of "habitual residence" under the Convention in the important decision of in *Re J*.[148] It was accepted that the words should be given their ordinary and natural meaning. The Law Lords took the view that there is a significant difference between a person ceasing to be habitually resident in one country, and becoming habitually resident in another. They said that habitual residence can cease in a single day but it takes an "appreciable period of time and a settled intention" to establish a new country of habitual residence. They further held that a young child in the sole custody of one parent has the same habitual residence as that parent.

In *Re J*, the mother left Australia with the intention of no longer living there. The result of her evidence was that she was not habitually resident anywhere. The Court accepted this, and therefore the child's retention (after the father had obtained an order in Australia) was not protected by the Hague Convention.

This allows abducting parents to escape the jurisdiction of the Convention by asserting that they are not returning to their previous country of residence, and they have not yet decided to live elsewhere. Effectively they are in "legal limbo".[149] The writer respectfully agrees with much of the commentary on the *Re J* decision which criticises its technical and inflexible approach counter to the spirit of the Convention. Locally, it has been suggested that the decision "does violence" to the Convention's underlying premise.[150] The authors of Butterworths *Family Law Service* have argued:[151]

> The damage of the approach is that a person with sole custody either by court order, agreement or operation of law, may be able to do what the mother in *Re J* did: get on a plane and intend not to come back. If the logic of the House of Lords is followed, at the time retention in the foreign country the child is no longer habitually resident in the country of removal, and in fact not

> habitually resident anywhere, so the Convention cannot apply.

This was exactly the argument put forward by the mother in the New Zealand decision, *Secretary for Justice v Sigg*,[152] albeit on the enforcement of rights of access under the Guardianship Amendment Act 1991. Judge Bremner took note of the criticisms of *Re J*, and if necessary to his decision, he would have rejected the mother's assertions that she was "just visiting New Zealand". The mother in that case had brought the children to New Zealand in August 1992. At the hearing in December she insisted that she was not living in New Zealand, and that she had "given herself" until the New Year to make a decision about where to live.

Judge Bremner applied a robust approach, holding that:[153]

> On the broad facts in this case, her intention is clear. She is going to stay in New Zealand until she makes a decision, whenever that may be. In the meantime she and the children are leading a relatively settled life.

It is submitted that *Re J* might also be criticised on the ground that the Court allowed the child's habitual residence to be changed unilaterally by one parent without the consent of the other.[154] It is critical to the operation of the Convention that generally, a child's habitual residence can only be altered with the consent of both parents. It was explained at the Second Special Commission Meeting in January that a parent can only change the child's former habitual residence unilaterally if that parent has "rights of custody" at the relevant time [to the exclusion of others].[155]

Since "habitual residence" is a factually-based concept, there may be some limits. For example, in the Australian decision of *Gollogly v Owen*,[156] the father's application for return of the children to Alaska failed because he could not demonstrate that the children were "habitually resident" in Alaska immediately before he obtained a custody order there. The mother had hidden the children in Australia for 3 years without disclosing their whereabouts.

In England, a gloss has been put on the *Re J* decision by Butler-Sloss LJ of the Court of Appeal in *Re F (a minor) (child abduction)*[157] that "courts should not strain to find the lack of habitual residence where on a broad canvass the child has settled in a particular country". And recently, it was held in *Re N (a minor) (abduction)*[158] that the mother's evidence was wholly consistent with an intention not to stay permanently in England at the time of the wrongful act (at least until she changed her mind in August 1992 when she learnt of a Swedish Court decision awarding custody to the father). An interesting factual situation arose in which the child's parents constantly travelled around the world in rock band, with residences in England and New York.[159]

8. SECTION 13: DEFENCES

Section 13 of the Guardianship Amendment Act lists the limited exceptions to an otherwise absolute duty on the Court to order return of a child under section 12. There is now a substantial volume of case law dealing with the various factors under section 13, which largely incorporates article 13 of the Convention. Generally, the courts have interpreted the exceptions narrowly, allowing their use only in clearly meritorious cases.

The onus of proving an exception is clearly on the person asserting it. The English Court of Appeal in *Re E (a minor) (abduction)*[160] said that there was a "very heavy burden indeed" upon a person who seeks to bring himself or herself within the exceptions of section 13 after allegedly abducting a child.

If a section 13 ground is established, the consequence is simply that the Court is no longer bound to order the return of the child. The Court therefore has a discretion to exercise, and may still order the child to be returned, as confirmed in *Re A (minors) (abduction: acquiescence) (No. 2)*[161] and *Gsponer v Director-General*.[162] In exercising that discretion it is probable that the merits of the dispute and

the welfare of the child will be paramount, but the Court may still order the prompt return of the child based on considerations of international comity: *Graziano v Daniels*.[163]

There are six exceptions under section 13, and each will be considered in turn.

8.1 More than One Year and Settled

Section 13(1)(a) provides an exception where:

> the application was made more than one year after the removal of the child, and the child is now settled in his or her new environment.

While the draft Hague Convention was being negotiated, a 6 month time limit was extended to one year. Both conditions in the exception, more than one year and the child being settled, must be established. The ground of inquiring whether a child is settled in his or her new environment has been described as coming close to a review on the merits by a court.[164] Only a few cases have involved this exception, and their approaches have not been unified.

On the issue of when the one year period will commence, the English case of *Re Mahaffey (minor)*[165] interpreted article 13 to mean that the relevant date from which time run should be the date of the act itself, not the date that the act became wrongful. In New Zealand, the wording of section 13(1)(a) confirms the English approach.

The leading authority on the meaning of "settled in a new environment" is the Australian decision of the Full Court, *Graziano v Daniels*.[166] The Court held that the test of "settling" must be more exacting than that the child is happy, secure and adjusted to his or her surrounding circumstances. The word "settled" has two constituent elements. First, a physical element of being established in a community and an environment. The second, an emotional constituent denoting security and stability.

Further, the "settlement" must relate to a new environment and must encompass "place, home, school, people, friends ...but not per se the relationship with the mother which has always existed". The environment must have attained a significance for the child. Also, the fact that a child has lived in a country for more than one year does not by itself raise a presumption that the child has become settled in his or her new environment. The Court considered and approved the English decisions of *Re Mahaffey (a minor)* and *Re Novak*.[167]

That can be called the restrictive approach. It was discussed at the Second Special Commission Meeting in January 1993 that a different approach has been developed by some courts. In some cases it has been held that the child is settled when it has lived almost exclusively within its "new" family. In other words, the environment is taken to mean the immediate household of the abducting parent.[168]

On a practical note, if the commencement of a return application has been delayed because the child's whereabouts have been concealed from that parent, it is questionable whether the abducting parent should be permitted to benefit from such conduct to fulfill this exception. The Court should be made aware of the reasons for any delay.

8.2 Not Exercising Custody Rights

Section 13(1)(b)(i) provides an exception if:

> the applicant was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed.

There is a corresponding requirement in section 12(1)(c) that at the time of removal, rights of custody were actually being exercised, or would have been so exercised but for the removal. Section 4(2) of the Guardianship Amendment Act 1991 is also relevant. It deems an applicant to be actually exercising custody rights even if the applicant has agreed to the child being in the possession of some other person.

While the requirement of custody rights being exercised appears in both section 12 and section 13, it is probably clear from section 13 that the burden lies on the abducting parent to establish that the right was not actually being exercised (at the time of the removal or retention).[169]

As for the content of exercising "rights of custody", Eekelaar[170] suggests that it would be sufficient for a parent with "rights of custody" to show that "he or she has retained the expectation to be consulted about the child's place of abode". There is no case law on this point.

8.3 Consent or Acquiescence

Section 13(1)(b)(ii) provides an exception if:

> the applicant consented to, or subsequently acquiescent the removal.

This provision means that a left-behind parent must be cautious that their conduct is not construed as acceptance of the situation. It is submitted that if the child's whereabouts are known, courts should be slow to construe acquiescence from ambiguous behaviour such as regular communications and a period of time passing by. There have been very few cases on consent, but quite a number on subsequent "acquiescence".

One of the first authorities was *Re A v Another (minors: abduction)*.[171] The mother had taken the children to England from Arizona with the father's consent, but failed to return them as agreed. Despite statements from the father that he would not remove the children, the Court of Appeal confirmed the lower Court's decision that the father had not acquiesced. The fact that the father had sought and obtained a custody order in Arizona disproved any such acquiescence.

That decision has been cited and approved in a number of Court of Appeal decisions concerning acquiescence, including *Re S (a minor) (abduction)*,[172] and *Re F (a minor) (child abduction)*.[173] In the latter case, the Court of Appeal stated that acquiescence was a combination of a sufficient period of time coupled with inactivity by the left-behind

parent, so as to demonstrate an implied acceptance of the changed position.

The issue was addressed again by the Court of Appeal in *Re A (minors) (abduction)*.[174] The father had written a letter expressing his sorrow at the situation, explaining that he loved the children too much to fight for their return. The Court held that the difference between consent and acquiescence was simply one of timing. Consent would precede the wrongful act, whereas acquiescence would follow it.

The Court found that acquiescence may be signified by: express words which must be clear and unequivocal; by conduct leading the other parent to believe there is acceptance; by conduct and consistent with an intention to insist on return, and consistent only with acceptance; or by passive acquiescence inferred from silence and inactivity for a period where different conduct would be expected from the aggrieved parent.

On the question whether acquiescence could be subsequently withdrawn, it was held that it could not, except that an immediate withdrawal might lead a court to question whether the acquiescence was real in the first place. The rule that acquiescence cannot be subsequently withdrawn also arises from the decision of Stephen Brown P in *Re CT (a minor) (abduction)*.[175]

The position may be different in Australia following the decision in *Police Commissioner of South Australia v Temple*[176] The second *Re A* decision on acquiescence was cited and approved. The father had consented to the long term residence of the child in Australia on the condition that he should have reasonable access, but he almost immediately changed his mind after receiving a letter from the mother. It was held that the father had not acquiesced to the child living in Australia because it was conditional, and "acquiescence must be clear and unqualified". The decision was confirmed on appeal although appealed on different grounds.

The English Court of Appeal decision in *Re A(Z) (child abduction)*[177] confronted the issue about whether the parent

alleged to be acquiescing has to have specific knowledge of their rights under the Hague Convention. The facts were that German parents agreed that the child should live in the care of an uncle and aunt. In court proceedings initiated by the aunt, the father stated that he did not intend to make any applications, and he subsequently executed a power of attorney in favour of the aunt to deal with the child's welfare for one year.

On an objective view of the father's conduct, it was held that his acts "led irresistably to the conclusion" that he had acquiesced in the situation. The father did not have to have knowledge of rights under the Hague Convention. Whether he knew or not was said to be one of the circumstances taken into account.

Another example is *W v W (child abduction: acquiescence)*[178] where the father instructed both American and English lawyers who were ignorant of the Hague Convention. On advice he agreed to the mother staying in England, and in a subsequent application for the children to be returned to the United States it was held that he could not rely on his solicitors' professed ignorance of the Convention to override his acquiescence.

The acquiescence defence has been considered twice in New Zealand. Firstly, in *Wolfe v Wolfe* the consent and acquiescence arguments were rejected. The father had hired a detective at a cost of $11,000 to track the mother and child down in New Zealand. And for some time the father had acted on assurances from the mother that she would return to Texas for court hearing dates. Accordingly the delays were not unreasonable.[179]

Finally, acquiescence was the main issue considered very recently in the Family Court decision of *Secretary for Justice (ex parte) Peachy v Duncan*.[180] The mother had removed the child from Australia without the father's consent, the father had followed to New Zealand 2½ weeks later to arrange access with the child, and the father returned to Australia after 6 days. He sought legal advice from two solicitors in Australia who did not assist him with the Hague Convention. His application for return of the child was initiated some six

months after the removal, but it was held that he wasted no time once he knew of the procedures.

Judge Brown cited several quotations from the English Court of Appeal cases before rejecting an argument of "passive" acquiescence. After considering what level of knowledge of the Convention is required, it was held that in the circumstances the father could not have been "reasonably expected to act otherwise". The argument about express acquiescence in relation to a telephone call was also rejected and the Judge made an order for the child's return to Australia.

8.4 Grave Risk of Harm or Intolerable Situation

Section 13(1)(c) provides an exception if:

> there is a grave risk that the child's return -
>
> (i) would expose the child to physical or psychological harm; or
>
> (ii) would otherwise place the child in an intolerable situation.

This is by far the most commonly argued exception in the international experience of the Convention. When pleaded only in very general terms the defence has generally been unsuccessful. The courts are very wary of reopening the door to examining custody disputes case by case, on their merits. The defence has been described as "internationally disfavoured".[181] There are great numbers of cases under this head, and it will only be possible to refer here to key overseas decisions and any New Zealand decisions. In the great majority of cases where this exception has been argued, return has not been refused on this ground.

Boswell[182] states that article 13(b) "is not, and has never been, a best interest test". While the exception is an obvious and necessary safeguard, it is designed for exceptional circumstances only. It was intentional that none of the grounds for refusal should be equivalent to examining

the child's best interests. An "omnibus survey of the child's general condition" is inappropriate.[183]

It was noted by the Permanent Bureau at the Hague[184] that only in a few cases have courts undertaken a broader inquiry into the merits of cases in the general interest of the child than seems to be justified by the "concrete criteria" set out in article 13(b). Hilton's advice on handling a Hague Trial is:[185]

> Best interests. Stay away from this, avoid it, do not let it come before the Court. The Convention is not a best interest test. Do not let this come in, object over and over to any introduction of best interests.

In the Australian case of *Gsponer*,[186] it was held that there were three distinct possibilities in the defence to be read separately: *physical harm, psychological harm,* and *intolerable situation*. At the same time it was emphasised that there must be a "grave risk" of the occurrence of one or more of these events. In addition, the word "otherwise" before "intolerable situation" modifies the type of psychological or physical harm required. It is not simply a grave risk of any physical or psychological harm, but a grave risk of substantial or weighty psychological harm. This interpretation was approved by the Full Court in *Davis*.[187] It also accords with the decisions of the English Court of Appeal in *C v C*[188] and *Re A (a minor) (abduction)*.[189]

Similarly, Judge Inglis in a recent New Zealand case[190] stated that the words "or otherwise place the child in an intolerable [position]" give emphasis to the gravity of the degree of risk of harm that is required. In relation to psychological harm, the English Court of Appeal stated in *Re A (a minor) (abduction)*[191] that:

> "Not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm."

Generally referring to the exception in section 13(1)(c), the New Zealand Judge in *Wolfe*[192] noted in passing that the language is "forceful and vigorous".

In *C v C*[193] the English Court of Appeal held that a grave risk of psychological harm to the child must not arise simply from a refusal by the abducting parent to return to the country of habitual residence with the child. It has been stressed that generally, the abducting parent should not be able to create a situation which is harmful to the child and then take advantage of it in order to prevent compliance with the Convention. A careful division should be made between what is intolerable for the child, and what may be intolerable for the abducting parent.

Further, the issue is not whether the parent applying for return poses a risk to the child. Boswell carefully describes the essential issue as:[194]

> "Whether the child's habitual residence poses a grave risk because of its inability to protect the child upon the child's return. [Normally], the child is returned to its habitual residence because it has in place, social systems for the protection of the child pending application and/or resolution of the custody proceedings."

This inquiry will be highly relevant in cases involving abuse, domestic violence or other illegal activities. Did the abducting parent exhaust all the avenues of protection available before the removing the child? There is a common and increasing practice, at least in England, for the Court to "require" undertakings to elevate the risk of harm to the child upon return. This is further discussed below. Although it is indicated here that there are suggestions that courts sometimes go too far.

The New Zealand case of *S v M*[195] provides an example of a defence under section 13(1)(c). After an access visit with the mother in New Zealand the two children had not returned to Australia. There was evidence that the father had been convicted of drugs charges, and according to the children he was continuing to deal with drugs. The children were fearful and wished to escape the drugs-scene which they associated with their home and which they perceived as potentially dangerous. Judge MacCormick held that there was no grave risk

that the children's return would expose them to physical or psychological harm or other intolerable situation. (The return was not ordered on the basis of a different exception).

In *Evans v Evans*,[196] an English father made allegations against an Australian mother that she was not fit to look after their child because of promiscuity and drug taking. The English Court of Appeal ordered that the child should be returned to Australia, noting that the Australian Courts were the proper courts in which to investigate the allegations made by the father. The Court of Appeal did not doubt "that the Australian Courts would deal with them appropriately".

In *Re Bates (minor)*[197] evidence of the mother's temper, rough handling of the child, and the mother's cocaine habit were insufficient to invoke this exception. In *V v B (a minor) (abduction)*[198] the Court did not accept that the child would be subjected to harm from verbal racial abuse and discrimination from the mother and her family.

Issues of domestic violence were raised in the New Zealand decision *Damiano v Damiano*.[199] Two incidents occurred in Canada where the father threatened the lives of the children and the mother. The mother removed the children to New Zealand without the father's consent, and the father made an application for the children to be returned to Canada. It was held that no grave risk would be occasioned to the children if they returned to Canada, provided that safeguards were in place. Judge Boshier confirmed that harm to the children must be "fair and substantial", and that intolerable means "simply and demonstrably not able to be countenanced". Other examples of cases which have involved assaults, violence or threats to kill include *Parsons v Styger*,[200] *Re M (minors)*,[201] and *Gsponer*,[202] all of which were unsuccessful on the ground of grave risk.

This exception was also raised in the New Zealand *Wolfe* case[203]. The mother argued that there was a grave risk of harm to the child from the father's alleged sexually deviant behaviour. The Judge did not accept that there was any such risk, concluding that the mother had an unhealthy obsession

with the child and with keeping the child away from his father. The mother had elevated items she discovered into a "nightmare of horror and drama, which the evidence simply does not support".

One of the very few cases where the return of the child was refused on the grounds of a grave risk is the Scottish decision of *MacMillan v MacMillan*.[204] The mother had wrongfully removed the child from Canada to Scotland. She argued that the child would be exposed to a grave risk upon return because of the father's long history of alcoholism and depression. The appeal court held that it was "beyond argument" that there was a grave risk in the child's return.

In another Scottish case, *Viola v Viola*[205] it was argued that the child would exposed to an intolerable situation because one of the caregivers, a grandfather, spoke only Italian and no English. This argument was rejected and the child was returned.

8.5 Child's Objections

Section 13(1)(d) provides an exception if:

> the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views.

This has been described as a most interesting area of case law.[206] In some unusual circumstances, particularly where a grave risk of harm or intolerable situation is also argued, courts have refused to return a mature child on the basis of their objections. It can be observed that the older and more mature the child, the greater chance there will be of the Court taking into account their objections, particularly as they near the age of 16.

There is a divergent view on what can amount to a child's objection, especially in the English courts. This came about from the decision of Bracewell J of the High Court, Family Division in *Re R (a minor: abduction)*.[207] The case involved exceptional facts. A 14 year old girl was removed from

Germany to England by the mother. She objected in the strongest possible terms to being returned, even to the point of contemplating suicide if forced to do so. The Court exercised its discretion in declining to make an order to return the child to Germany, deciding that the word "object":

> imported a strength of feeling which went far beyond the usual ascertainment of the wishes of the child in a custody dispute.

This has become known as the "Bracewell gloss". The Judge also held that questions must be addressed as to whether or not the views expressed by a child of appropriate age and maturity and understanding were expressed out of freewill and choice; whether or not they were genuine views; or whether they had been influenced by someone in contact with the child.

In a more recent decision, *S v S (Child Abduction) (Child's views)*,[208] The English Court of Appeal held that the word "object" did not mean anything stronger that its littler meaning. There was no warrant for importing a gloss on the words such as Bracewell J did in *Re R*. The word "objects" does not import a strength of feeling far beyond the usual ascertainment of the wishes of a child in custody disputes.

This was the first time that the English Court of Appeal had given guidance on the children's objections exception, although it had been factually discussed in previous decisions such as *Re S (A Minor) (Abduction)*,[209] *Re M (Minors)*[210] and *P v P (Minors) (Child Abduction)*.[211]

The difficulty is that Justice Bracewell's gloss has already been adopted and applied in a number of decisions, and continues to be applied. For instance in the Australian *Temple*[212] case, the Judge cited and approved the dicta of Bracewell J. In any event, Murray J was not satisfied that the child in question, aged 9 was of sufficient age and maturity for her wishes and attitudes, "even if they could be categorised as objections, to give the weight required to tip the scales".

The leading New Zealand decision on childrens objections is *S v M.*[213] This involved 2 Australian children aged 14 and 11 who were being retained in New Zealand. The Australian father had allegedly been dealing with drugs, as discussed above. Judge MacCormick exercised his discretion not to order the children's return on the basis of their "clear and reasonably stated" objections. It was said that they both appeared mature for their age and that they were certainly articulate. The Judge quoted from commentary on *Re R*, stating that he concurred with it and endeavoured to apply it in the circumstances of the present case. The Judge went on to hold:[214]

> The other statements and concerns already outlined above mounted to genuine and forthright objections, which appeared to be well grounded, to have elements of fear, and to be uninfluenced by other persons such as the Respondent mother. While *B* may have been influenced to some extent by her older sister *A* I would not regard this as significant influence. The children put their own position in their own words. They expressed themselves differently, although the essential concerns and fears were similarly grounded.

The children's objections to returning to Canada were also considered by the Family Court in *Damiano*,[215] however the children's objections were not found to be sufficiently persuasive. The Judge was cautious about the ages of the two younger children, being 8 and 6. There were also some obiter observations made in the spirit of the Bracewell gloss:[216]

> The first requirement is clearly that there is an objection on the part of a child. Preference is not sufficient. There must be a quite emphatic reluctance that extends to the unacceptable. It is only if that threshold is reached, that the Court can move on to consider if the objection is one to which the Court ought to take note.

8.6 Human Rights and Fundamental Freedoms

Section 13(1)(e) provides an exception if:

> the return of the child is not permitted by the

> fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

This exception gives effect to article 20 of the Convention. Section 13(2) is also relevant, permitting the Court to consider, among other things, the law of New Zealand relating to political refugees or political asylum, and any discrimination likely to result.

Apparently the discussions surrounding this provision at the original Hague Conference were extremely strained. This public policy clause was nevertheless adopted by a margin of one vote. The resulting language of article 20 has no known precedent in other international agreements as a guide to interpretation. However, it should not need to be emphasised that this exception, like the others, was intended to be restrictively interpreted and applied.

The Hague Convention does not require contracting countries to adopt article 20, and the United Kingdom is among those governments that have not included this article in their internal legislation. Argued defences based on human rights or fundamental freedoms have been extremely rare, and so far, there is no authority on the application of this provision. There has, however, been some speculation on what might be as successful exception under article 20.

For example, one author has predicted that returning a child to a famine in Somalia or to civil war in former Yugoslavia, may be prevented under article 20 of the Convention.[217] Situations suggested by delegates at the Hague of returning a child to a destitute parent, or to some fanatical religious sect, would probably be caught by other exceptions.[218]

It is likely that Courts would be cautious to include situations where principles of family law of the requested-country differ from those in the requesting-country, for instance if the state of habitual residence operated a system of preferred custody rights for one parent. Eekelaar explains that:[219]

> [F]amily law in particular reflects different cultural patterns and, if the Convention is to operate successfully there must be mutual respect among States for these differences. The child's future should normally be determined according to the cultural practices of the place of [his] habitual residence. However, it may be that the circumstances prevailing in the requested State are such that to return the child there would be seriously endanger [his] future exercise of basic human rights and fundamental freedoms, or those of parent who would accompany him ...an example might be a case of child refugees.

Dicta from Lord Donaldson MR in *Re F (Minor: Abduction Jurisdiction)*[220] has some relevance:

> There is no evidence that the Israeli courts would adopt and approach to the problem of Ben's future which differs significantly from that of the English courts. It is not a case in which Ben or his father are escaping any form of persecution or ethnic, sex or other discriminations. In a word, there is nothing to take it out of the normal rule that abducted children should be returned to their country of habitual residence.

The Courts will want to avoid open-ended surveys of a quasi-political nature, while at the same time granting relief in those rare cases where the child would be returned in circumstances which would be repugnant to the essential spirit and morality of the local law.

The human rights exception was raised in the New Zealand *S v M* case.[221] It is submitted that it was inappropriately pleaded in the circumstances. This was the case where the Australian father had allegedly been dealing in drugs. Counsel for the mother maintained that a return of the children would contravene the provisions of the United Nations Convention on the rights of the Child, to which New Zealand is a signatory.

Judge MacCormick held that the exception only allowed consideration of the situation in a particular overseas country, rather than the situation of a particular home or household. He further said that the only way that section 13(1)(e) could have any application is to maintain that the court was required to take the social step of not returning the children to Australia in order to protect them from the

elicit/unlawful use of drugs or their involvement of the production or trafficking of drugs.

9. AN ORDER FOR RETURN

If an order to return a child is to be made, article 12 of the convention does not specify to whom or to where the child is returned. It is said that the failure to specify a particular place or person was intentional.[222] The English courts have interpreted "return" to mean return to the habitual residence, not return to the applicant.

Section 12(2) of the Guardianship Amendment Act specifies that the court has power to return the child to "such person or country as is specified in the order". There is sufficient flexibility in this formulation to deal with circumstances that may arise. In particular, it has been contemplated that occasionally the applicant-parent may have changed his or state of habitual residence since the child was removed.

On the face of section 12(2) there is no power for a court to impose "conditions" to the order for return of a child. On the face of it, the New Zealand court only has two choices.

There is a growing, but divergent practice in some jurisdictions to attach conditions or require undertakings from the abducting parent as a requisite to making the order. The practice has been particularly common in England, often appearing in cases where there has been evidence of harm to the child. For instance, the English Court of Appeal in *C v C*[223] "required" undertakings from the father so as to mitigate the adverse effect on the child's welfare of the return. Those undertakings, which were said to deal with the "entirely justifiable concerns of the court" included providing the mother with accommodation and transport in Australia upon her return.

A further example from the English Court of Appeal is the case of *Re G (a minor) (abduction)*,[224] where the court took into account undertakings from the father which were designed to

protect the child from a risk of psychological harm, only until the application could come before the Australian court.

A New Zealand author remarks that:[225]

> There is room here for imaginative solutions in terms of arranging the return of children subject to proper safeguards, but there is thin line between this process and the beginning of the process of re-evaluating the dispute which the Convention tries to avoid.

A court should take it upon itself to minimise any harm to the child arising from return, at least until the appropriate authorities other country assumes responsibility. It is submitted, however, that there must be limits to what conditions could reasonably be attached to an order. It appears that courts have sometimes exceeded what is reasonable.

The Full Court of the Family Court in Australia has reached a different view than the English Courts. In the *Temple* case,[226] Murray J returned the child to England subject to certain conditions. She took notice of undertakings given by the father to pay certain maintenance and security money. On appeal the Full Court said:[227]

> In my view, regulation 15(3) does not enable the court to place conditions on the return of the child. It merely enables the court to place conditions on the temporary removal of the child from one place to another before the return is ordered. It is conceded that Her Honour was in error in thinking that she could impose conditions of the kind she imposed. In any event, I consider that the substance of Her Honour's orders went far beyond what could be require legitimately on the facts of this particular case in order to avoid a grave risk.

The views in New Zealand are at odds to each other. In the *Damiano v Damiano*[228] decision, Judge Boshier paid close regard to safeguards which he insisted on putting in place. These related to exclusive occupation of the family home by the mother in Canada, conditions equivalent to a non-molestation order, and supervised access only. Major questions arise about the enforceability of such conditions in Canada. The court also made "notes" (which it conceded did not form part of an order) about the importance of the mother

receiving counselling in Canada and the father receiving treatment for his violent behaviour. It may be that a court has no further power than the ability to express wishes on the mechanics of returning the child. This was the view implicit in *Wolfe v Wolfe*[229].

In *Damiano*, the Judge also made an "interim custody order" in favour of the mother, expressing a wish that in her custody the children would return to Canada. It is submitted that this step is both unnecessary and inappropriate in light of section 16. A court may not make an order or decision relating to custody while the proceedings are pending, and reference to article 16 of the Convention indicates that a decision on the merits of custody should only be made if the child is not ordered to be returned.

In the recent *Escobar* case,[230] counsel had reached agreement on a number of matters relating to return of the child to California. Judge Inglis noted:

> These matters of agreement are noted, and it is necessary to add the following observations of my own. First, on my reading of the 1991 Act, the court has no discretion to make its order for the return of James conditional on compliance with any of the above heads of agreement. ... third, I have doubts about any suggestion that James' return should be linked to recovery of child support or arrears of child support. ... I am not prepared, nor is there power, to impose conditions.

It is submitted that any conditions imposed should go no further than facilitating the actual return of the children and alleviating any risk of harm in the interim.

10. PROCEDURAL ASPECTS

10.1 Central Authorities

As we have seen, the Guardianship Amendment Act 1991 is part of an international framework where assistance and applications for the return of children are coordinated through state departments of contracting states. Article 6

imposes an obligation upon contracting countries to establish "Central Authorities" to carry out specific obligations, and to generally facilitate the operation of the convention.

In New Zealand, the state department is the Justice Department, and section 7 designates the Secretary for Justice as the Central Authority. In practice, there is one person in the Justice Department who coordinates the Central Authority role, Heather Tavassoli. This work now makes up about 30% of her job.

In respect of a child abducted to New Zealand, section 10 of the Amendment Act particularises the Central Authority's duties to include discovery of the child's whereabouts, ensuring the child's safety and preventing prejudice to any interested party, securing the voluntary return of the child, and facilitating the making of a court application by or on behalf of the applicant.

Article 7 of the Convention also defines the role of the Central Authority, and it is convenient to set that out in full:

> in particular, either directly or through any intermediary, they shall take all appropriate measures -
>
> (a) To discover the whereabouts of a child who has been wrongfully removed or retained;
>
> (b) To prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
>
> (c) To secure the voluntary return of the child or to bring about an amicable resolution of the issues;
>
> (d) To exchange, where desirable, information relating to the social background of the child;
>
> (e) To provide information of a general character as to the law of the estate in connection with the application of the convention;
>
> (f) To initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

(g) Where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

(h) To provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

(i) To keep eachother informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

It has been noted that voluntary return is able to be negotiated in a considerable number of cases. This is fundamental to the purpose of the Convention. In many cases negotiations will not commence until the application to a court is made, since advance warning to the abducting parent may prejudice the situation.

Where necessary the police assist with resources to locate a child. They have not yet failed to find a child in New Zealand when requested in a Hague Convention matter[231].

Internationally, the powers and resources available to a Central Authority vary considerably from country to country. One of the Convention's main strengths, but probably also one of its weaknesses, is the vital part that each Authority plays in the successful operation of the Convention.

10.2 Legal Representation

The Central Authority has a general duty under section 23 of the 1991 Act to ensure, where an application is made and the applicant is not legally represented, that a barrister or solicitor is appointed to represent the applicant "where the circumstances require".

The fees and expenses of the legal representative are to be paid out of public funds, but under section 23(2) the Court has a discretion to order a refund to the Crown. There is provision in the Convention (through article 42) for a contracting country to express a reservation about article 26 which otherwise makes it clear that payment from an applicant

towards legal costs should not be required. New Zealand expressed such a reservation, and this was the cause of Australia's delayed acceptance of New Zealand's accession until 1 June 1992. Interestingly, in practice the New Zealand Central Authority invariably appoints legal counsel for all overseas parents applying in New Zealand. The following countries have also made a reservation not binding them to meet all legal costs:[232]

> Belize, Canada, Denmark, France, Germany, Israel, Luxemburg, The Netherlands, Norway, Sweden, The United Kingdom, and The United States.

Section 28 of the 1991 Act provides that a person who has removed a child to New Zealand may be required to meet "the whole of any costs of or incidental to returning the child, including the cost and travelling expenses of any necessary escort". This applies whether an order for return is made or whether the child is returned voluntarily. It is possible to argue that the provision could also be used to meet a refund of private costs of locating a child.

A very interesting issue has arisen under section 23 as to who the counsel appointed by the Central Authority actually represents. Who is the applicant under section 12, the Central Authority or the parent, or both of them? There is quite a variation in who judges and practitioners perceive the parties to be. This is evidenced by the variation in names of the parties in court decisions, both in New Zealand and overseas.

From the writer's survey of New Zealand decisions, including pre-trial hearings, representation was perceived in many different ways. At times the applicant was said to be:

> the parent;
> the Central Authority;
> "both the Central Authority and the parent";
> the Secretary for Justice "on behalf of" the parent;
> the "Central Authority on behalf of the father in effect appearing in support of the Authority's application";
> the Child Abduction Unit "on behalf of" the parent.

In one case the Authority and the parent were separately represented. Thus, there is confusion about who the appointed solicitor properly represents.

The issue was raised by a New Zealand Judge in the following way:[233]

> I raised with [counsel] the question of the representation of the mother of the child. He has been instructed by the Central Authority. The mother has her own solicitors in Australia, with whom he has been in contact and he has clearly been undertaking work for them. Attention may be drawn to section 23 of the Amendment Act. ... It will be up to [Counsel] to clarify with the Authority as to whether or not he has in fact appointed to represent her, bearing in mind that she has Australian solicitors. ... It would seem to me to be appropriate that [Counsel] be appointed to represent the mother, because this is clearly a matter in which she must have legal representation at the hearing."

Section 23 does say that counsel shall be appointed to represent "the applicant". The answer may turn, in part, on whether the Central Authority itself can make an application on behalf of a person with "rights of custody" pursuant to section 12.

In the writer's view, a solicitor appointed should represent the parent, and not the Central Authority. While the Authority will support return of the child in most cases, sometimes there might be a conflict between the interests of the Central Authority and the applicant-parent. It is submitted that the concern of the Central Authority should be with the welfare of the child in question,

> The difficulty ... is that it might give the appearance that the state is "taking sides" between the parties. I am inclined to accept this objection. If the state is to intervene at all it should do so on behalf of the child and not one of the adult parties.[234]

10.3 Expeditious Proceedings

Section 14 of the Guardianship Amendment Act 1991 obliges the Court to:

> So far as it is practicable, give priority to the proceedings in order to ensure that they are dealt with expeditiously.

It provides that where an application is not determined within six weeks, the authority may request an explanation from the Registrar of the Court. While such requests have almost never been made, the guideline serves as a useful reminder.

There is a delicate balance to be struck between applications for return being dealt with expeditiously and in summary form, versus making procedural protections available so that factual assertions can be disputed and defenses can be raised.

In a recent decision of the Full Court in Australia, *Gazi v Gazi*,[235] the husband's counsel withdrew at the last moment and the wife was not present for cross-examination. The court said that cross-examination on affidavits would normally be inappropriate in Hague Convention matters.

Similarly, in the Full Court decision of *Temple*,[236] the Court cautioned that the procedures adopted in that case were inappropriate and there was "no room for the leisurely procedures which have been pursued in this case". It was said that ordinarily matters should be dealt with in a summary fashion. The delays which affidavit trials involved should be avoided and oral evidence should be received whenever practicable. The application had been made six months before it was heard, which was "far too long" by the six week standard.

These views are consistent with the expressed judicial practice in England, such as in *Re Bates (Minor)*,[237] *Re F (a Minor) (Child Abduction)*[238] and *Re N (a Minor) (Abduction)*[239]. An opportunity should be given for defences to be properly raised, but delays in legal proceedings as a result are not tolerated. Courts have been vigilant to discourage anything perceived to be delaying tactics.[240] There will be an element of education for judges, counsel and court staff here so that applications are not managed along the same lines as other Family Court proceedings. A shortened appeal time would also be of assistance.

At the Second Special Commission meeting in the Hague in January 1993 the question of whether the applicant-parent was required to attend the hearing in person was discussed.[241] In many cases this should not be required and evidence should be based on affidavits. Some experts acknowledged that physical presence of the applicant was highly desirable and that it can be a reassuring factor in obtaining an order for return. This would be more so when defenses are validly raised.

Attendance in person, however, will occasion considerable expense and inconvenience. In an unreported New Zealand case recording an order for return by consent, an application for reimbursement of airfares for the father coming to New Zealand from England was refused. Judge Evans said he understood the applicant's concern and his reasons for coming to New Zealand, but the trip was "not vital" in his view.[242]

10.4 Court Jurisdiction

Family Courts or District Courts derive jurisdiction from section 8 of the 1991 Act to entertain proceedings under the Hague Convention. Various powers and obligations are imposed on "judicial or administrative authorities" by the Convention.

Warrants may issued under two sections. A warrant can be made upon written application under section 24 where there are reasonable grounds for believing that any person will attempt to conceal the whereabouts of the child. Under section 26, upon application or of the court's own motion, a warrant may be issued to enforce an order for return. The judicial practice of one Judge to issue a warrant which is to lie in Court until it is required, is noted.[243] There is also power under section 25 of the 1991 Act to make an interim order preventing the child's removal from New Zealand, exercising powers equivalent to section 20 of the principal Act.

Section 15 of the 1991 Act provides very wide interim powers for the Court to give interim directions for the purpose of securing the welfare of the child or of preventing changes in circumstances. This provision has been used in several cases

to stipulate where the child shall live pending the hearing of an application.

Also, on an interim application in the *Wolfe*[244] case, Judge Keane held that section 15 allowed him to direct the child to stay in his father's care until the hearing, in effect exercising "interim access". The father had not seen his child for almost 12 months. Section 15 could not, of course, be used to make an interim custody determination because section 16 prohibits this.

One unresolved matter is the relationship between the Guardianship Amendment Act 1991 and the principal Guardianship Act 1968. This may not be purely academic. Technically, the 1991 Act is an amendment to the principal Act, although in many ways it is arguably a code. The inter-relationship was addressed in the sense that section 23 of the Guardianship Act 1968 on the paramountcy of a child's welfare has been amended by section 35 of the 1991 Amendment Act.

Further, specific powers have been provided in the Amendment Act for the issuing of warrants (ss24 and 26), orders preventing the removal of a child out of New Zealand (ss 25), and the preparation of psychological reports (section 36). It is submitted that these sorts of applications are to be made under the Amendment Act, and not the principal Act.

Notably the Amendment Act does not refer to or cross-reference the section on appointment of counsel to represent a child. This either means that there is no power to appoint counsel for a child in Hague Convention matters, or that the jurisdiction of the Guardianship Act 1968 is still governing. In fact counsel for the child has been appointed in quite a number of New Zealand Hague Convention matters. Indeed it is envisaged by Priestley that such an appointment would undoubtedly be made in cases where section 13 defenses are invoked.[245]

There is a convincing argument that any application under, or use of, the Guardianship Act 1968 implies an acceptance of New Zealand as the proper jurisdiction to determine custody matters. The same might be said of some applications under the Children, Young Persons and Their Families Act 1989.

10.5 Miscellaneous

10.5.1 Confidentiality of Information

Section 64A of the Australian Family Law Act 1975 is a useful section which allows the Court to make orders for the production of documents and records to assist in locating a child who has been wrongfully removed. First, an order must be in force and a warrant must have issued. The operation of that provision, especially in cases of domestic violence, has recently been reviewed.[246]

There may be a power at common law to require a solicitor acting for a parent in hiding to disclose the child's whereabouts. The Full Court of the High Court of Australia held in *Re Bell ex parte Lees* [247] that the paramountcy of the welfare of a child is a public policy exception to solicitor-client privilege. In such a case it is said that a higher public interest arises, although this proposition has been described in New Zealand as "controversial".[248] A similar power must have been used in a recent South African case[249], where a South African Court ordered the lawyer acting for an abducting parent to disclose his client's whereabouts.

10.5.2 Passports and Interpol

Where an order has been made that a child may not be removed out of New Zealand without consent of the court, that order can be registered as a CAPPS listing through the Interpol Computer Network. Between about one-third and one-half of the 804 alerts lodged in 1993 so far have related to children.[250] This is a 24 hour facility, and practitioners who use it will acknowledge the service is excellent.

New Zealand passports are issued in accordance with the Passports Act 1980. The written consent of only one parent or guardian is required for a passport to issue, however Departmental policy is that passports will not be issued if there is a Court order to that effect. Where passports are held by the Family Court, there are certain procedures which should be followed for their release.[251] Where passports are held by solicitors, the English Court of Appeal has held that the solicitor owes a common law duty of care to the other parent.[252]

10.5.3 Article 15

Article 15 of the Convention allows Courts, prior to ordering the return of a child, to request a "decision or other determination" from the authorities in the child's country of habitual residence, stating that the removal or retention was wrongful. Section 18 of the 1991 Act permits New Zealand Courts to do the same in reciprocation. It has been observed that these provisions would not be resorted to routinely because it may cause delay.[253] The determination from the other contracting country could not be determinative, only highly persuasive.

11. RIGHTS OF ACCESS

The enforcement of "access rights" has not received much attention in the Courts or in commentary. However, the issue is presenting some major difficulties in terms of the operation of the Convention. The relevant law is complex and confusing. One of the stated objects of the Convention, as we have seen, is to ensure that rights of custody and of access under the law of one contracting state are effectively respected in other contracting states. But rights of "custody" and of "access" are not accorded equal treatment under the terms of the Convention.

Access rights are dealt with specifically in only one place. Section 20 of the 1991 Act provides that an Authority shall make such arrangements as may be appropriate to organise or secure the effective exercise of the applicant's rights of access where it receives an application from a person claiming:

(a) to have rights of access in respect of a child; and

(b) that the child is habitually resident in New Zealand; and[254]

(c) that the child is present in New Zealand.

Article 21 further provides that:

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

Firstly, it follows from the analysis of "rights of custody" above that most parents with access rights might also have "rights of custody". Disregarding the peculiarities of the S4 definition of "rights of custody", it should be remembered that if the parent with access rights also has the right to determine where the child shall live, that parent also has "rights of custody" within the Convention. Such a parent could choose either to enforce "rights of custody" or "rights of access" under the convention. The corollary is that a parent with *access-only* rights [without the right to be consulted about where the child shall live], can only apply to enforce rights of access under the Convention.

The following questions arise: Does the Hague Convention provide jurisdiction for an application to a Court to enforce rights of access? Does the Convention only give powers to Central Authorities? If there is jurisdiction separate from local law: Can the court order a "return" of the child? When the court is faced with a court order for access, must it enforce the order on its face or does it have power to modify

the order? If there is no Court order securing access rights, what is the criteria to be applied? Can the Convention apply retrospectively to breaches of rights of access?

At the Second Special Commission Meeting in January 1993, it was recognised that article 21 provides no firm legal provisions to enforce access rights.[255] A number of experts considered this to be a major problem, while many others considered that Central Authorities would assist in giving effect to the access provisions. The experts appear to have assumed that Court jurisdiction to enforce access exists. It is unclear whether the original Hague Conference envisaged such a role. Some commentators do, while other do not.[256] It has been indicated that the matter in respect of access rights was deliberately left more vague than "rights of custody".[257]

11.1 English Cases

The first English Court to address the access issue was *B v B (Minors: Enforcement of Access Abroad)*.[258] The father had been granted access under a Canadian order, and the children were now wards of the English court. It was held that the Convention did not apply because the children had been removed from Ontario before it was in force between those contracting states. The Court exercised its wardship jurisdiction to review the question of access, and in doing so made the following important obiter comments:[259]

> I am reluctant to comment further on the scope and operation of the Convention in relation to rights of access, but I have been asked to give what guidance I can. The difficulty about the provisions is that they do not impose directly any specific duties on the judicial authority of a contracting state in relation to access and there is no express definition or limitation of the principals on which a court should exercise its discretion. ... In the absence of any express reference to the judicial discretion in cases in which there has been a breach of access rights only, I am not persuaded that the general rule [as to welfare of the child], which applies to any proceedings in any court, has been displaced or that the convention was intended to secure the enforcement of rights of access in the same way as rights of custody. This court will always,

> of course, respect rights of access prescribed in an order of another contracting state in a proper case and seek to give practical effect to such rights, often in a necessarily modified form, if it accords with the Minor's welfare to do so; but the 1985 Act does not provide new criteria for the exercise of the judges discretion in the matter.

Those doubts were removed by Bracewell J in *C v C (Minors) (Child Abduction)*[260]. She held that she had jurisdiction under the Convention to make orders as to access, and further that the welfare of the child was the first and paramount consideration when determining questions of access under the Convention. It was also held that the Court had power to modify the original order for access to meet new circumstances, and further, that orders could be made requiring access to take place both inside and outside the United Kingdom. Considering a New York Court order defining access, the judge ordered that supervised access commence in England.

The same approach was adopted by Eastham J in *Re C (Minors) (enforcing foreign access order)*[261]. The Judge fully discussed the obiter from *B v B*, finding that the court had a discretion in relation to the access order of the foreign court, but that the Court must pay regard to the foreign decision and must respect it unless it was contrary to the welfare of the child. The mother had been resisting access of the child with the father because the father was a homosexual and had AIDS, but the English Court confirmed the American order and found nothing "severely detrimental" to the child in visiting the father.

In December 1992 a decision of the English Court of Appeal, *Re G (a Minor)(enforcement of access abroad)*[262] "sounded a death knell for article 21".[263] In a unanimous decision the Court of Appeal disapproved the dicta from *B v B*, essentially holding that the court had no power to make orders as to access, and that article 21 only imposes obligations on Central Authorities. The following selection of statements is taken from the judgment of Butler-Sloss LJ:[264]

> In my view the Convention focuses both upon the co-operation between Central Authorities and the enforcement of the return of a child wrongfully removed or retained outside the state of the child's habitual residence ...the construction of article 4 adopted by Waterhouse J in *B v B* is too narrow ...I agree therefore that article 21 applies to this appeal. It is not entirely easy with the paucity of information about the actual working of article 21 to be clear how it is to be effective ...article 21 applies at the administrative level to bring the application to the attention of the central authority of the contracting state. ...This in effect exhausts the direct applicability of the convention ...There are no teeth to be found in article 21 and its provisions have no part to play in the decision to be made by the Judge.

The Court expressed the view that the father should have applied for a contact (or access) order under the Children Act 1989, the domestic law in England. By reason of the arguments about accepting jurisdiction under domestic law, the result of *Re G* is concerning. One commentator observes that "this dubious decision relegates access matters to national law".[265]

An application to enforce foreign access rights came before the Family Division in England in March 1993: *Re T (Minors) (international child abduction: access)*[266] The court had been requested to give guidance as to the appropriate procedure for international access under the Children Act 1989. As a result of the Court of Appeal decision, the role of the Central Authority was limited to one of "executive co-operation". The duty of Central Authorities under article 21 was said to be the appointment of solicitors to act on behalf of an applicant for the purpose of an access application under domestic law.

11.2 Secretary for Justice v Sigg

The access has only arisen in New Zealand in *Secretary for Justice v Sigg*[267] As noted earlier, a Utah decree providing the mother custody and control, and the father visitation, specifically provided for visitation in the event the mother moved out of Utah. She brought the children to New Zealand. The father applied to the Central Authority for an order securing his access to the children. He sought an order directing the "removal" of the children from New Zealand to

Utah so that he could exercise his access rights. Ironically, the hearing of this matter commenced the day after the decision in *Re G*, and the Court was not aware of that decision.

Judge Bremner held that although the right to apply to a Court to enforce access is not specified in the Guardianship Amendment Act, no section prevents it either. The differences in the legislation between "rights of custody" and "rights of access" were said to go to the scope of the Court's powers and orders that could be made, not to jurisdiction. Section 8(1) was relied on for the Court's jurisdiction. Hence the *Sigg* decision reached the opposite result to *Re G* on the question of jurisdiction.

The Judge went on to hold that there had not yet been an actual breach on the face of the Utah order, and he declined to vary or read terms into the order. It was possible within the timeframe stated in the decree that access could still take place. It is clear that he considered the Court only had power to enforce the overseas custody order on its terms. He said:[268]

> Unless the parties agree on the place of access, or there is a decision of a court of competent jurisdiction on this point, I am in no position to make a ruling. I am being asked, in effect, to enforce the Utah decree, which is completely silent on the matter. ... And there the matter rests until the mother and father resolve the issue.

The upshot is that Judge Bremner did not consider he had jurisdiction to modify the foreign decree, nor jurisdiction to order that the children be returned to Utah.

The father returned to Utah without spending further time with this children. The Judge said the result concerned him, and that he was:

> "Surprised that the father has not applied to this court under the Guardianship Act for access as a fall-back to the main application."

Hence the Court in *Sigg* intimated that jurisdiction to enforce foreign access rights could arise either under the convention

or under domestic law. With respect, there are arguably difficulties with a parent applying under domestic law and accepting the Court's jurisdiction in that regard. Judge Bremner commented:

> I have not considered the question of the father's access to the children in New Zealand in terms of the decree ... I would add that had I been asked, I might well have made orders securing the effective exercise of the father's access in New Zealand.

Given that the Judge had already found no power but to enforce the terms of the foreign decree, he must mean that he might reach that result under the best interests test under domestic law.

Two further points from *Sigg* deserve mention. The judge held that habitual residency was not a prerequisite for the court to exercise jurisdiction, only a requirement for the application made to the central authority under section 20. It is unlikely that a two step process in jurisdiction is intended by the Convention, and on the terms of section 20 habitual residents is what is required. On the facts of the case, it was held that the mother and children were habitually resident in New Zealand. The issue whether habitual residence is necessary, or indeed appropriate, as a prerequisite under section 20 has been noted above.[269]

Finally, the decision might give rise to some confusion between the enforcement of custody rights as opposed to access rights. The judge said that on the facts of the case the children were not wrongfully removed.

> At the most, I can say that they were unreasonably or inappropriately removed. Had it been established that that motive for removal was to frustrate access, I would take a different view. In my view and for the reasons following I do not hold that the children are being wrongfully retained, not as yet.

While there was no application to enforce "rights of custody" before the court, the judge was no doubt anticipating a later application of that type. It must be emphasised that wrongful removal or wrongful retention are concepts which only relate to the enforcement of custody rights, not access rights.[270]

For what it is worth,[271] the writer's preferred view of the matter of access rights is that the 1991 Act and the Convention should confer independent jurisdiction on a Court to enforce rights of access. In exercising that jurisdiction Courts should pay very high regard to an overseas access order, but ultimately treat the welfare of the child as paramount. To that end, if necessary the court may direct where access is to occur, direct the child's "return", or order access in different terms to a foreign order. A result in terms of *Re G*, that parents can only enforce rights of access under the domestic law of the country the children are present in, would be unfortunate.

1 D Brown "New Zealand - The Abductor's Paradise Lost?" in *The Family Court Ten Years On* [Conference proceedings published by NZLS 1991]. The author was not a District Court Judge when he presented that paper.

2 Documented in "Child Abductions and the Guardianship Amendment Act 1991: Two crucial provisions." (1991) 3 FLB 29.

3 A transcript filed in the course of proceedings in *Wolfe v Wolfe* [1993] NZFLR 273; (1993) 10 FRNZ 174, namely a transcript from *Wolfe v Wolfe* (unrep) County Court No 2, Galveston, Texas, 92-FD-0109 (09-04-92).

4 *Wolfe v Wolfe* (NZ), above n3

5 The Hague Convention does not address or affect any criminal aspects of child abduction.

6 Note that the Guardianship Amendment Act 1991 speaks only of "removal", which is defined in section 2 to include wrongful retention.

7 H A Leal "International Child Abduction" in B Landau (ed) (*Children's Rights in The Practice of Family Law* (1986, Carswell, Toronto) at 211, 235.

8 The Special Commission meeting at The Hague in January 1993 considered more than 250 key court decisions coming from more than a dozen countries: *Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (18-21 January 1993), 12. (Called *1993 Report*)

9 There are not yet any New Zealand High Court decisions under the Guardianship Amendment Act 1991, but the writer understands that the first appeal is pending. A tale of cases appears at the end of this Paper.

10 Two applications for return were scheduled to be heard in Nelson in the week beginning 20 September 1993, however the writer is not aware of the results of these cases.

11 C S Bruch "International Child Abduction Cases: Experience under the 1980 Hague Convention", 2. [Printed pages from The First World Congress on Children's Rights, Sydney, July 1993.]

12 S Abrahms *Children in the Crossfire: The Tragedy of Parental Kidnapping* (1983, Atheneum, New York), xii.

13 Cited by B Berger "Domestic Kidnapping" (1990) Law Inst J 609.

14 Cited by L K Williams and D A Hilton "Parental Kidnapping: Profile of the Kidnapper and Steps for Prevention, 2. [Printed papers from Child Abduction: Interstate-Intrastate-International, Adelaide, 16 March 1991]

15 Cited by P M Bromley and N V Lowe *Family Law* (7ed, 1987, Butterworths, London), 339.

16 Selected from S Fowler "New Zealand, Abductor's Paradise Lost?" in *The Family Courts Ten Years On* [Conference proceedings published by NZLS 1991], 41; and Justice Kay "International Abduction of Children - An Australian Perspective", 5. [Printed Papers from 9th Commonwealth Law Conference, Auckland, April 1990]

17 *International Voice* (1993) 1:5 (May 1993 Newsletter of *One World: For Children*).

18 Selected from C Bruch, above n11, 2 and PH Pfund "The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for all Petitioners" (1990) 24 FLQ 35, 47.

19 *Wolfe v Wolfe*, above n3; *S v M* [1993] NZFLR 585; (1993) 10 FRNZ 277; *Damiano v Damiano* [1993] NZFLR 548; *Secretary for Justice (ex parte Peachy) v Duncan* (unrep) 7 September 1993, FC Hamilton, Brown J, FP 889/92.

20 For example, *In the matter of Escobar* (unrep) 21 September 1993, FC Napier, Inglis J, FP 153/93 and *Dunstan v Steadman* (unrep) 22 July 1992, FC Otahuhu, Robinson J, FP 320/92.

21 *Secretary for Justice v Sigg* [1993] NZFLR 340; (1992) 10 FRNZ 164.

22 Thanks to Heather Tavassoli of The New Zealand Justice Department for the information on current files.

23 H A Leal, above n7, 212, and S Abrahms, above n12, 88.

24 D Brown *Abduction of Children to Overseas Countries* NZLS Seminar, April 1988, 1.

25 *One World: For Children*, PO Box 1018, Owosso, MI 48867-1018, United States. President and Co-founder of this organisation is Betty Mahmoody who escaped from Iran with her daughter 7 years ago.

26 *Reunite (National Council for Abducted Children)*, P O Box 4, London WC1X 8XY, United Kingdom.

27 *Children Abroad Self Help Group*, 33 Barlow Road, Keighley, West Yorkshire, United Kingdom.

28 The following should be consulted for a more comprehensive treatment: *Family Law Service* loose-leaf, Butterworths, Wellington, para 6.111 (ii); B Davis "The New Rules on International Child Abduction by Parents" (1982) 32 UTor LJ 281; S Fowler, above n16, *Family Law* (loose-leaf, CCH, Sydney) paras 20-050 to 20-205.

29 [1951] AC 357.

30 For example, *Re L (Minors)* [1974] 1 WLR 250; *Re C* [1978] 2 All ER 230; *Re R (Minors)* 1981 2 Fam LR 416.

31 For example, *Khamis and Khamis* (1979) 4 Fam LR 410; *Reihana and Reihana* (1980) FLC 90-385; *Schwarz and Schwarz* (1985) FLC 91-618; *El Alami and El Alami* (1988) FLC 91-930.

32 C J Crowley "International Aspects of a Family Law Practice - The Australian Perspective", unpublished [From database of W Hilton, Attorney, Los Angeles.]

33 [1971] NZLR 143

34 *C v C* [1973] 1 NZLR 129; *E v F* [1974] 2 NZLR 435; *L v L* (unrep) CA, 22 June 1989, M68/79 (Noted at 9 NZULR 78); *C v M* (unrep) HC Auckland, 15 June 1982, M 727/82; *Howett v Howett* (1988) 5 NZFLR 161; *McGowan v McGowan* (1989) 5 NZFLR 417.

35 J D McLean "International Abduction of Children Towards an Effective Legal Response", 302. [Printed Papers from 9th Commonwealth Law Conference, Auckland, April 1990.]

36 For example, the custody criteria in Algeria, India and Nigeria are governed by customary law: J Atkinson "Family Law on Six Continents" (1993) 15 Fam Advocate 18.

37 (1989) FLC 92-054

38 Above n37, 77, 609

39 (1990) FLC 92-146

40 unreported, Full Court FC, Perth, 18 March 1993, WA2/93, noted in (1993) 8 Aust Fam Lawyer, 51.

41 [1991] 1 FLR 1; [1990] 3 WLR 1272

42 [1991] 2 FLR 506

43 Noted at [1993] Fam Law 185

44 [1993] 1 FCR 789

45 (1986) 24 DLR (4th) 248

46 *Lehartel v Lehartel* [1993] 1 NZLR 578

47 [1992] NZFLR 523

48 Above n47, 524

49 *Crain v Crain* (unrep) HC Christchurch, 1 February 1991, CP 19/91; *Jury v Jury* (1984) 3 NZFLR 33; *Re T (or W v M)* (1986) 4 NZFLR 17; *Crew v Crew* (1987) 3 FRNZ 214; *G v T* (1989) 5 FRNZ 248; *McTainsh v McTainsh* (1980) FLC 90-814.

50 According to I Balfour "There's an Abducted Child in the Waiting Room" (1992) JLS Scotland 292, 294.

51 As illustrated by *L v L (Child Abduction)* [1992] 2 FCR 821.

52 For example, [1990] 2 FLR 385 and [1990] 1 FLR 387. Detailed discussion of the provisions can be found in J M Eekelaar, above n28.

53 G F de Hart "Briefing on the Hague International Child Abduction Convention and Related Federal Legislation", unpublished [From database of W Hilton, Attorney, Los Angeles.]

54 *1993 Report*, above n8, 58.

55 *Report of the First Special Commission Meeting on the Operation of the Hague Convention on the Civil Aspects of International Child Abduction* (26 October 1989), 39. (Called *1989 Report*)

56 See B Johnstone "Parental Child Abduction Under the Criminal Code" (1987) 6 Can JFL 271.

57 *1993 Report*, above n8, 64

58 [1984] AC 778, noted at [1984] Fam Law 310.

59 Noted by A N Khan "False Imprisonment of a Child by a Parent" (1986) 16 Fam Law 69.

60 *R v C (Kidnapping: Abduction)* noted at [1991] Fam Law 523, and *El Yamani v Sherry* (unrep) CA, 3 October 1992, 1325/W2/92, noted at (1993) Archbold News 2. In New Zealand contempt charges in the context of a custody/access dispute were discussed in *CL v CL* (1985) 3 NZFLR 455.

61 Noted at [1992] Fam Law 14.

62 (1989) 13 Fam LR 408. Fresh charges were later considered as a result of the child still not being returned to the mother: (1990) 14 Fam LR 315.

63 D Brown, above n24, 3.

64 Section 70A, Family Law Act 1975 (Aust).

65 460 NW2d 39 Mim (1990).

66 Many of the commentators on the case support its findings: for example D Oberdorfer "Larson v Dunn: Toward a Reasoned Response to Parental Kidnapping" [1991] 75 Mim LR 1701; S M Dobbs "Tort Recovery for Interference with Custodial Rights in Minnesota" [1991] 17 WM LR 1159; J R Hillebrand "Parental Kidnapping and the Tort of Custodial Interference: Not in a Child's Best interests" [1992] 25 Ind LR 893.

67 Cited by J R Hillebrand, above n66, 910.

68 For more extensive discussion on the Family Law Act 1986, see S M Cretney "Child Abduction: the New Law" (1986) 130 Sol J 827, and C Sachs "Child Abduction" [1988] 18 Fam Law 81.

69 For more extensive discussion on the UCCJA and the PKPA, see S N Katz Child Snatching: The Legal Response to the Abdiuction of Children (1981, ABA Press, Chicago); S T Dickens "The PKPA: Application and Interpretation (1984) 23 JFL 419; J K Pettenati "The Effect of the PKPA of 1980 on Child Snatching" (1982) 17 New E LR 499; L S Hersha "Child Snatching: The Federal Response" (1982) 33 Syracruse LR 1103.

70 Discussed by A S Charlow "Jurisdictional Gerrymandering and the PKPA" (1991) 25 FLQ 299, and A T Wilson "The PKPA: Is there an Enforcement Role for the Federal Courts? (1987) 62 Wash LR 841.

71 See E G Ewaschuk "Abduction of Children by Parents" (1978) 21 Crim LQ 176.

72 Section 23 UCCJA.

73 B M Bodenheimer "The Hague Draft Convention on International Child Abduction" (1980) 14 FLQ 99; and PH Pfund above in 18, 37.

74 Yugoslavia's ratification has been regarded as ineffective because of the current political situation in that country: Justice Nygh "The Hague Convention at work in Australia" (1993) 15 Fam Advocate 24, and J E A Boswell "Analysis of the Use of Article 13b of the Convention", 1. [Printed papers from The First World Congress on Children's Rights, Sydney, 1993].

75 *(No. 1)* (1990) FLC 92-119.

76 [1992] NZFLR 84

77 For up to date information contact the Central Authority, Department of Justice, P O Box 18, Wellington, Telephone 472-5980.

78 J E A Boswell, above n4, 1.

79 L Cain "Countries Urged to take Action on Child Abduction Problem" *LAWASIA Publication*, March 1992.

80 *1993 Report*, above n8.

81 B Mahmoody *Not withoiut my Daughter* (1987)

82 (1991) FLC 92-241.

83 G F de Hart (ed) *International Child Abductions - A Guide to Applying the 1988 Hague Convention with Forms* (1989, Fam Law Section, ABA, Chicago), 11.

84 J Priestly "Child Abduction Update" (1991) 355 Law Talk, 5.

85 G Sammon "The Hague Convention - An Australian Perspective", 20. [Printed papers from Child Abduction: Interstate-Intrastate-International, Adelaide, 16 March 1991]

86 (1990) FLC 92-182

87 (1993) FLC 92-341,623

88 [1988] 1 FLR 365, 368

89 Above n2, 30.

90 J M Eekelaar, above n28, 305.

91 *1993 Report*, above n8, 38.

92 Above n20. Alternatively, the application in *Escobar*, might arguably be analysed as the Court's application on the basis that the Court's rights of custody were breached since proceedings were pending before the Court. See the argument below at 7.5.6.

93 Above n 20

94 It is a moot point whether the Act and the Convention contemplate the Central Authority might make the application under section 12. See the discussion below at 10.2.

95 (unrep) Waite J, 23 February 1989, CA122/89 WC2

96 Pre-Trial Minute of *MacLeod v MacLeod* (unrep) 26 November 1992, FC New Plymouth, van Dadelszen J, FP 284/92.

97 A "custody order" pursuant to section 12 of the Guardianship Amendment Act 1991 was mentioned by the Judge in a Pre-trial decision of *Swaid v Swaid* (unrep) FC Ashburton, 17 August 1993, FP 47/93.

98 Above n3, 280.

99 G F de Hart, above n53.

100 *1989 Report*, above n55, 11.

101 K B Farquhar "The Hague Convention on International Child Abduction Comes to Canada". [1983] 1 Can JFL 5, 22.

102 H A Leal, above n7, 217.

103 (1989) FLC 92-001

104 *1993 Report*, above n8, 16.

105 B Davis, above n28, 48, and J M Eekelaar, above n28, 310.

106 [1989] 1 WLR 654

107 Noted at [1988] Fam Law 383

108 CA Aix-en-Provence (23 March 1989)

109 R Larvey "Child Abduction and the Law of Custody" [1987] 38 NILQ 170, 173.

110 K B Farquhar, above n101, 8 [emphasis added]

111 K B Farquhar, above n101, 10

112 See *Family Law Service*, above n28, para 6.143. The leading case are *Poel v Poel* [1970] 3 All ER 659, *Chamberlain v de la Mare* (1983 4 FLR 434, *Lonslow v Hennig* [1986] 2 FLR 378, *Holmes and Holmes* (1988) FLC 91-919, and the New Zealand cases cited in footnotes 9 and 12, *Family Law Service*, para 6.143.

113 [1990] 3 WLR 492

114 R Lavery, above n109, 172.

115 M Everall "The Hague Convention: The Children Act and Other recent Developments [1992] Fam Law 164, 166. See also [1991] Fam Law 456 which dispels concerns about the impact of the Children Act 1989 on the Hague Convention.

116 W M Hilton "Handling a Hague Trial" (1992) 6 AM JFL 211.

117 Above n21. Further discussed below at para 11.

118 Above n11, 8

119 Noted by C A Bruch, above n11, 8.

120 (1993) FLC 92-365

121 Above n120, 79-827

122 *Police Commissioner v Temple* (unrep) Full Court, 25 June 1993, APSA10/93.

123 *Family Law Service*, above n28, 6.111 and above n2, 30.

124 Above n46.

125 Above n47.

126 Above n3

127 Above n3, 277.

128 *1993 Report*, above n8, 30.

129 [1992] 3 WLR 865

130 [1990] 2 FLR 439

131 [1990] 1 FLR 276. A query is raised by M Everall about a *parent* who has been granted access and where there is an order preventing removal of the child from the jurisdiction without leave of the Court [as distinct from consent of the parent]: "Child Abduction after the Hague Convention" [1990] Fam Law 169. It is suggested that such a parent should not be confined to enforcing "rights of access" under the Convention since *someone* has the right to object to the removal, and it is therefore wrongful.

132 [1993] 1 FLR 249

133 (1987) FLC 91-838

134 Above n3, 277.

135 (1990) 65 DLR (4th) 222.

136 Courts should preferably refrain from making custody orders where it is apprehended that an application for return is imminent, as in *Escobar*, above n20, 4.

137 Above n113 (which failed on grounds of habitual residence).

138 Above

139 Above n76, 92

140 Above n133, 76-316

141 (1987) SLT 568

142 [1991] 2 FLR 241

143 *1993 Report*, above n8, 28.

144 Above n53

145 [1964] 3 All ER 977.

146 [1983] 1 All ER 226. Also see *Kapur v Kapur* [1984] FLR 920, noted at [1985] 15 Fam Law 22.

147 [1991] 1 FLR 266

148 Above n113

149 Butterworths *Family Law Service*, para 6.111

150 D Brown, above n1, 45.

151 Butterworths *Family Law Service*, para 6.111. Similar criticisms have been made about the Canadian decision *Dickson v Dickson* (1990) SCLR 693: E B Crawford "Habitual Residence of the Child as the Connecting Factor in Child Abduction Cases: A Consideration of Recent Cases" (1992) Jurid R 177.

152 Above n21

153 Above n21, 347

154 C S Bruch, above n11, 5

155 *1993 Report*, above n8, 30. The Canadian decision *Hill v Hill* supports this: [1989] O J 353.

156 (1990) FLC 92-103

157 [1992] 1 FLR 548. The mother and father had travelled to Brisbane with 19 packing cases of furniture. The Court held that the evidence demonstrated a settled intention to live in Australia, so the mother was able to successfully apply for the child's return to Australia after the father had abducted the child to England.

158 [1993] 2 FCR 330

159 Above n95

160 [1989] 1 FLR 135

161 [1992] 3 WLR 538

162 Above n103

163 (1991) FLC 92-212

164 J M Eekelaar, above n28, 313

165 (unrep) HC (Fam), 8 October 1990, CA 910/90, Stephen Brown

166 Above n163

167 Above n165, and [1991] 1 FLR 413

168 *1993 Report*, above n8, 42. Cases discussed by C S Bruch, above n11, 15.

169 J M Eekelaar, above n28, 319.

170 J M Eekelaar, above n28, 310.

171 Above n142

172 [1991] 2 FLR 1

173 Above n157

174 Above n43, The dissenting Judge criticised the majority for giving "acquiescence" too technical a meaning.

175 [1992] 2 FLR 92

176 Above n120

177 [1993] 1 FLR 733

178 [1992] 2 FCR 502

179 Above n3, 278.

180 Above n19.

181 J E A Boswell, above n 74, 6.

182 J E A Boswell, above n 74, 7.

183 J M Eekelaar, above n28, 312.

184 *1989 Report*, above n55, 27.

185 W M Hilton, above n117

186 Above n103

187 Above n86

188 Above n106

189 Above n88

190 *Escobar*, above n20, 6.

191 Above n88, 372

192 Above n3, 277.

193 Above n106

194 J E A Boswell, above n 74, 6.

195 Above n19

196 Above n160

197 Above n95

198 Above n147

199 Above n19

200 *Parsons v Styger* (1989) 67 OR (2d) 1

201 Above n165

202 Above n103

203 Above n3

204 *MacMillan v MacMillan* (1989) SLT 350

205 *Viola v Viola* (1988) SLT 7

206 M Bennet, "Recent Developments in English case law involving the Hague Convention" [Printed Papers from First World Congress on Children's Rights, Sydney, July 1993]

207 [1992] 1 FLR 105

208 [1993] 2 All ER 682

209 Above n172

210 Above n165

211 [1992] 1 FLR 155

212 Above 120

213 Above n19

214 Above n19, 591

215 Above n19

216 Above n19, 555

217 L Vinion "When Custody Conflicts Cross the Border" (1993) 15 Fam Adv 30.

218 B Davis, above n28, 56.

219 J M Eekelaar, above n28, 314

220 Above n41

221 Above n19

222 *1993 Report*, above n8, 22

223 Above n106

224 [1989] 2 FLR 475

225 D Brown, above n1, 46

226 Above n120

227 Above n122, 3

228 Above n19

229 Above n3, 281

230 Above n20, 9

231 Thanks to Karen Blackmore of INTERPOL, NZ Police for information on Police involvement.

232 C S Bruch, above n11, 3

233 (unrep) von Dadelszen J, FC New Plymouth, 26/11/92, (PTC Minute)

234 Above n28, 308

235 Above n87

236 Above n122

237 Above n95

238 Above n157

239 Above n158

240 For example, see *P v P* [992] 1 FLR and 155, and above n160

241 *1993 Report*, above n8, 26

242 *Secretary for Justice (ex parte Williamson) v Williamson* (unrep) FC Rotorua, 19 January 1993, FP 426/92

243 In *Scavuzzo v McLellan* (unrep) FC Rotorua, 2 June 1992, FP 150/92, and *Williamson*, above n242

244 Above n3, interim decision unreported: *Wolfe v Wolfe* FC Wellington, 29 January 1993, FP 743/92

245 Above n84, 6

246 Family Law Council *Section 64A of the Family Law Act - Power of the Family Court to require the Provision of Information for the Recovery of Children* (September 1992, Report to the Minister for Justice, Canberra)

247 (1980) FLC 90-850

248 D L Mathieson *Cross on Evidence* (4NZed, 1989, Butterworths, Wellington) para 10.29

249 "Mother foiled in search for son" *The Sydney Morning Herald*, 2 August 1993

250 As at 24 September 1993: above n231

251 *Maharaj v Marahaj* (unrep) FC Wellington, 11 June 1990, FP 46/89

252 *Al-Kandari v Brown*, noted at [1988] Fam Law 382. See also R Stevens "Solicitor's Holding client's Passports in Potential Child Abduction Cases" [1992] Fam Law 402.

253 J M Eekelaar, above n28, 320, and G F de Hart, above n83, 34

254 It may have been unnnecessary, and perhaps improper to have *habitual residence in New Zealand* as one of the criteria for applying to secure rights of access under s 20. The corresponding article, article 21, does not require that the child be habitually resident in the country to which it has been taken. Further, article 4 seems to imply quite the contrary: that any [custody or access] rights in respect of a child who is [still] habitually resident in the country from which it was removed, are enforceable under the Convention. The obiter comments in b2 at 257 and in g4 also support this.

255 *1993 Report*, above n8, 50

256 For example, see K B Farquhar, above n101, and B M Bodenheimer, above n73

257 K B Farquhar, above n101

258 Above. It is possible on the wording of article 35 that the retrospectivity rule does not apply to the enforcement of rights of access: *1993 Report*, above n8,32.

259 [1988] 1 All ER 652, 658

260 [1992] 1 FCR 163

261 [993] 1 FCR 770

262 Above n259

263 S Davis "The Hague Convention: Article 21: Its Application or Not?" [Printed papers from The First World Congress on Children's Rights, Sydney, July 1993.] 9

264 Above n259

265 C S Bruch ,above n11, 16

266 [1993] 3 All ER 127

267 Above n 21

268 Above n21, 348

269 Above n259

270 The headnotes from both the NZFLR and FRNZ law reports add to the confusion.

271 The work from these authors probably supports the same view: B Davis, above n28, G Sammon, above n85, P H Pfund, above n 18, G F de Hart, above n53, and M Everall, above n116.

HAGUE CONVENTION CASES

Reported New Zealand Cases

Damiano v Damiano
[1993] NZFLR 548 (Boshier J)

Lehartel v Lehartel
[1993] 1 NZLR 578 (Tompkins J)

Lynch v Lynch
[1992] NZFLR 523 (extracts) (Boshier J)

S v M
[1993] NZFLR 585; (1993) 10 FRNZ 277 (MacCormick J)

Secretary for Justice v Sigg
[1993] NZFLR 340; (1992) 10 FRNZ 164 (Bremner J)

Wolfe v Wolfe
[1993] NZFLR 273; (1993) 10 FRNZ 174 (Carruthers J)

Unreported New Zealand Cases (including Judicial Minutes)

Dunstan v Steadman
unrep, Robinson J, FC Otahuhu, 22/07/92, FP 320/92

In the matter of Escobar
unrep, Inglis J, FC Napier, 21/09/93, FP 153/93

MacKenzie v MacKenzie
unrep, McAloon J, FC Nelson, 02//09/93, FP 113/93 (PTC Minute)

MacLeod v MacLeod
unrep, von Dadelszen J, FC New Plymouth, 26/11/92, FP 284/92 (PTC Minute)

Pacicca v Pacicca
unrep, McAloon J, FC Nelson, 02/09/93, FP 260/93 (PTC Minute)

Scavuzzo v McLellan
unrep, Evans J, FC Rotorua, 02/06/92, FP 150/92 (consent return)

Secretary for Justice (ex parte Peachy) v Duncan
unrep, Brown J, FC Hamilton, 07/09/93, FP 889/92

Secretary for Justice (ex parte Williamson) v Williamson
unrep, Evans J, FC Rotorua, 19/01/93, FP 426/92 (consent return)

Shillingford v Ridding
unrep, Lowe J, FC Auckland, 16/03/93, FP91/92, (access by consent)

Swaid v Swaid
unrep, Costigan J, FC Ashburton, 17/08/93, FP 47/93
(PTC/Jud Conf Minute)

Wolfe v Wolfe
unrep, Keane J, FC Wellington, 29/01/93, FP 743/92
(interim access)

UK Cases

Re A (A Minor) (Abduction)
[1988] 1 FLR 365, noted [1987] Fam L 406; [1988] Fam L 54 (CA)

Re A (A Minor) (Wrongful Removal of Child)
unrep, Ewbank J, (Fam) 13/01/88, CA 1223/87 London WC2, noted [1988] Fam L 383

Re A & Anor (Minors: Abduction)
[1991] 2 FLR 241; [1991] FCR 460, noted [1991] Fam L 423; [1991] Fam L 44 (CA)

Re A (Minors) (Abduction: Acquiescence)
[1992] 2 FLR 14; [1992] Fam 106; [1992] 1 All ER 929; [1992] 2 FCR 97, noted [1992] Fam L 381 (CA)

Re A (Minors) (Abduction : Acquiescence) (No. 2)
[1992] 3 WLR 538; [1993] 1 All ER 273 (CA)

Re A(Z) (Child Abduction)
[1993] 1 FCR 733; [1993] FCR 683

B v K
[1993] 1 FCR 382, noted [1993] Fam L 17

B v B (Minors: Enforcement of Access Abroad)
[1988] 1 All ER 652; [1988] 1 WLR 526, noted [1988] Fam L 206

B v B (Abduction) also *Re NB (A Minor) (Abduction)*
[1992] 3 WLR 865; [1993] 1 FCR 271 (CA)

Re Bates (Minor)
unrep, Waite J (Fam), 23/02/89, CA 122/89 London WC2

C v C also *Re C (A Minor) (Abduction)*
[1989] 1 FLR 403; [1989] 2 All ER 465; [1989] 1 WLR 654, noted [1989] Fam L 228 (CA)

C v C (Minors) (Child Abduction)
[1992] 1 FLR, noted [1992] Fam L 199

C v C (Abduction: Jurisdiction)
unrep, Cazalet J (Fam), 29/11/91, noted [1993] Fam L 185

Re CT (A Minor) (Abduction)
[1992] 2 FCR 92

Re C (Minors) (Enforcing Foreign Access Order)
[1993] 1 FCR 770

Re D (A Minor)(Child Abduction)
[1989] 1 FLR 97, noted [1988] Fam L 336

Re E (A Minor) (Abduction) also *Evans v Evans*
[1989] 1 FLR 135, noted [1989] Fam L 105 (CA)

Re E (A Minor)
unrep, Cumming Bruce J (Fam), 15/05/91, noted [1993] Fam L 15 (CA)

Re F (A Minor) (Abduction)
[1991] 1 FLR 1; [1990] 3 WLR 1272; [1990] 3 All ER 97; [1991] FCR 227, noted [1991] Fam L 178

Re F (A Minor) (Child Abduction)
[1992] 1 FLR 548, noted [1992] Fam L 195

F v F (Abduction: Habitual Residence)
[1992] 2 FCR 595, noted [1993] Fam L 199

G v G (Minor) (Abduction)
[1991] 2 FLR 506; [1991] FCR 12, noted [1991] Fam L 519 (CA)

Re G (A Minor) (Abduction)
[1989] 2 FLR 475, noted [1989] Fam L 473 (CA)

Re G (A Minor) (Enforcement of Access Abroad)
[1993] 2 WLR 824 (CA)

H v N (Child Abduction)
[1990] 2FLR 439, noted [1990] Fam L 82

Re H (Minors) (Wardship: Surety)
unrep, CA, 29/03/90, noted [1990] Fam L 434 (CA)

Re H (Minors) (Abduction)
[1990] 2 FLR 439; [1991] 2 WLR 62, noted [1991] Fam L 177 (CA)

Re H and S (Abduction: Custody Rights)
[1992] NZFLR 84; [1991] 2 FLR 262, noted [1991] Fam L 426 (HL)

Re J (A Minor) (Abduction: Custody Rights) also *C v S (A Minor) (Abduction)*
[1990] 2 All ER 961; [1990] 3 WLR 492; [1990] 2 FLR 442; [1991] FCR 129, noted [1991] Fam L 57(CA)

Re J (A Minor) (Abduction)
[1990] 1 FLR 276; [1989] 3 WLR 825, noted [1989] Fam L 177

Re M (Minors)
unrep, Stephen Brown P, 25/07/90

Re N (Minors) (Abduction) also *Re Novak*
[1991] 1 FLR 413, noted [1991] Fam L 367

Re N (A Minor) (Abduction)
[1993] 2 FCR 330 (CA)

P v P (Minors) (Child Abduction)
[1992] 1 FLR 155, noted [1992] Fam L 197

Re R (Minor: Abduction)
[1992] 1 FLR 105, noted [1991] Fam L 475

Re R (Wardship: Child Abduction) (No 2)
[1993] 1 FLR 249, noted 1993 Fam L 216

Re S (A Minor) (Abduction)
[1991] 2 FLR 1, noted [1990] Fam L 224 (CA)

Re S (Minors) (Abduction)
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