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***CROLL v. CROLL* AND THE
UNFORTUNATE IRONY OF THE HAGUE
CONVENTION ON THE CIVIL ASPECTS
OF INTERNATIONAL CHILD
ABDUCTION: PARENTS WITH “RIGHTS
OF ACCESS” GET NO RIGHTS TO
ACCESS COURTS**

I. INTRODUCTION

International parental child abduction is a complex and serious problem.¹ This problem has become increasingly common due to the relative ease and accessibility of international travel.² Due to the increase in the interconnectedness among citizens of different countries, it is not surprising that there has been an increase in international family relationships.³ As the number of international family relationships has increased, so too have the problems in the area of international child abductions.⁴ One of the main legal problems caused by international child abductions is that when a child has been taken abroad it is very difficult to enforce one's parental rights in one's home state.⁵ Instead, the left-behind parent must pursue a remedy in the country where the child is located.⁶ As the problems with enforcing parental rights internationally became apparent, it became more and more critical for the international community to reach a satisfactory agreement on what to do

1. 2004 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, U.S. Dep't of State (2004), available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_568.html (last visited Feb. 1, 2005) [hereinafter Report on Compliance].

2. Saniya O'Brien, Note, *The Trials and Tribulations of Implementing the Hague Convention on International Child Abduction: Improving Dispute Resolution and Enforcement of Parental Rights in the International Arena*, 35 GEO. WASH. INT'L L. REV. 197, 197 (2003).

3. *Id.*

4. *Id.*

5. ANNE MARIE HUTCHINSON & HENRY SETRIGHT, INTERNATIONAL PARENTAL CHILD ABDUCTION 3 (1998).

6. *Id.*

about international child abductions.⁷ The international community needed not only to decide the best way to prevent the occurrence of international child abductions, but also to provide the courts in different countries with a method for handling the complex problems that arise after an international child abduction.⁸ Consequently, The Hague Convention on the Civil Aspects of International Child Abduction,⁹ which was finalized and adopted in 1980,¹⁰ was created due to the worldwide recognition of the harmful effects on the children of parental kidnapping and the desire to deter future abductions.¹¹ While interna-

7. *Id.*

8. See Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad*, 11 AM. U.J. GENDER SOC. POL'Y & L. 749, 764-65 (2003) (illustrating the complexity of the problems presented by international child abduction). In her article, Weiner points out that:

[T]he Hague Convention was drafted based upon the prediction that a noncustodial father, or a father who was unlikely to win custody, would typically be the abductor....As it turns out, the drafters' vision of a typical abduction has proven incorrect. Published figures indicate that seventy percent of the abductors are now mothers, typically the child's primary caretaker. Often these mothers are victims of domestic violence, and they are fleeing transnationally with their children in order to escape domestic violence.

Id. In light of these concerns, courts often face the troublesome possibility of having to send domestic violence victims to return to their abusers, which was certainly not the original intent of the Convention. Therefore, some courts have attempted to fashion their own remedies to protect women who have fled to another country in order to escape domestic violence. These remedies aim to protect victims of domestic violence while still returning them to the country of habitual residence for custody determinations. For a critical view of these court-fashioned remedies, see Roxanne Hoegger, *What If She leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN'S L.J. 181, 183 (2003). Hoegger argues that these remedies are "illegal, dangerous, unfair, and inefficient." *Id.* She also argues that "return, as applied in domestic violence cases, denies women's autonomy, furthers cultural imperialism, and perpetuates class inequalities." *Id.* As a result, she argues that the Hague Convention should have an "explicit domestic violence defense" rather than the vague grave risk exception. *Id.*

9. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

10. Report on Compliance, *supra* note 1.

11. Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, Letter of Transmittal From the White House to the Senate of The United States [hereinafter Letter of Transmittal]. As of February 22,

tional child abduction continues to be a major concern,¹² many

2005, the Convention was in force between the United States and fifty-five treaty partners. U.S. Dep't of State Official Website, *List of Hague Convention Signatory Countries* at http://travel.state.gov/family/abduction/hague_issues/hague_issues_1487.html (last visited, Feb. 22, 2005). Additionally, a number of other countries have acceded to the Convention, but have not yet been accepted as partners by the United States. U.S. Dep't of State Official Website, *Hague Convention Abduction Issues*, at http://travel.state.gov/family/abduction/hague_issues/hague_issues_568.html (last visited Feb. 22, 2005). The State Department has provided a great deal of information to help parents whose children have been abducted internationally on its website. U.S. Dep't. of State Official Website, *Hague Convention Abduction Issues* at http://travel.state.gov/family/abduction/hague_issues/hague_issues_578.html (last visited Feb. 22, 2005). Whereas all of the original signatories of the Convention were obliged to accept all of the other original signatories, there is now a review process for any new country that wants to be a party to the treaty. U.S. Dep't. of State Official Website, *Hague Convention Abduction Issues*, at http://travel.state.gov/family/abduction/hague_issues/hague_issues_568.html (last visited Feb. 22, 2005). The review process gives every original signatory the right to choose whether to accept the new member. U.S. Dep't. of State Official Website, *Hague Convention Abduction Issues* at http://travel.state.gov/family/abduction/hague_issues/hague_issues_568.html (last visited Feb. 22, 2005). The stated rationale behind the review process is that member states want to ensure that new members are willing to comply with Convention so that it will be uniformly applied. See Report to Congress on International Child Abductions in Response to the Statement of Managers Accompanying F-103 Omnibus Appropriations Bill P.L. 108-07, available at http://travel.state.gov/family/abduction/hague_issues/hague_issues_573.html (last visited Feb. 22, 2005).

12. It is interesting to note that while international child abduction continues to be an area of major concern, neither the Hague Convention nor the European Convention on Recognition of Children sought to address the criminal aspects of child abduction. HUTCHINSON & SETRIGHT, *supra* note 5, at 10. While both of these conventions have sought to ensure that the home state's law is enforced, they have also tried to avoid having countries interpret and question foreign law. *Id.* at 3. Perhaps the reason that there has not been an agreement concerning criminal liability for international child abductions is that the difficulty of interpreting foreign criminal law would pose too large a problem. It has also been argued that the impact of criminal prosecutions or threats of prosecution would not greatly benefit the abducted child. Jacqueline D. Golub, Note, *The International Parental Kidnapping Crime Act of 1993: The United States' Attempt to Get Our Children Back—How is it Working?*, 24 BROOK. J. INT'L L. 797, 812 (1999) (discussing commentary presented at 1990 hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary). According to Golub:

Many opponents to the criminalization of international parental kidnapping feared that such a statute would actually impede the United States' ability to have its children returned from the international

feel that the Hague Convention accomplished much of what it set out to do.¹³ The Convention's return remedy for parents with rights of custody has proven to be quite successful, and "it has dramatically advanced both the deterrence of international abductions and the likelihood of having children returned."¹⁴ Nevertheless, while the Convention has achieved many of its initial goals, it still has an important flaw that has become more evident since it was adopted.¹⁵

community. Supporters of the Hague Convention opposed the criminalization of international parental kidnapping, citing the success of the Hague Convention as an encouraging end to the problem of parental abductions.

Id. While the U.S. Congress created the International Parental Kidnapping Crime Act to establish international parental abduction as a criminal act, the Act does not include cases where a child is illegally brought into the United States. See International Parental Kidnapping Crime Act of 1993, 18 U.S.C. §1204 (2005) [hereinafter IPKCA]. In addition, the United States has chosen the Hague Convention as the preferred remedy, but the IPKCA can be used under some circumstances, especially when children are abducted from the United States to countries which are not a party to the Hague Convention. *United States v. Amer*, 110 F.3d 873, 881–82 (2d Cir. 1997). While the Hague Convention has been considered successful and is the preferred remedy in returning children who are abducted internationally, it is, nevertheless, quite possible that an agreement about international criminal liability for international child abductions would help deter international child abductions. For a case where the United States sought to impose criminal liability after a parent was returned via a Hague proceeding see *United States v. Ventre*, 338 F.3d 1047 (9th Cir. 2003). In *Ventre*, the defendant tried to avoid criminal liability by claiming that being held criminally liable after being subject to Hague Convention proceedings would detract from the Hague Convention. *Ventre*, 228 F.3d at 1051–52. However, as the court notes, "the IPKCA criminalizes the removal of a child to another country with the intent to obstruct parental rights." *Id.* at 1052. As a result of this law, parents who want to interfere with another parent's custody rights cannot simply choose to move to a country that is not a signatory to the Hague Convention. This court also finds that the IPKCA demonstrates that the United States appreciates the seriousness of international child abduction. Therefore, the court holds that it is appropriate to proceed with a criminal investigation even after one has been returned pursuant to the Hague Convention. *Id.* at 1054.

13. According to the compliance report, "the Hague Abduction Convention, when it works, works well. But the Convention is not uniformly applied in all jurisdictions." Report on Compliance, *supra* note 1.

14. Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221, 223 (2000).

15. *Id.* at 222.

The Second Circuit's decision in *Croll v. Croll*¹⁶ has received much scholarly attention,¹⁷ and it is a good demonstration of one of the Hague Convention's main flaws.¹⁸ The *Croll* majority did not view a noncustodial parent's rights of access,¹⁹ even when coupled with a *ne exeat* clause,²⁰ to amount to rights of custody²¹ within the meaning of the Hague Convention.²² The court held that a *ne exeat* clause can protect rights of access as well as rights of custody, but it does not change rights of access into rights of custody.²³ As a result, while the court found that Mr. Croll had some limited remedies available to him under the Hague Convention, he was not entitled to a return remedy.²⁴

The *Croll* decision was quite controversial and has faced significant criticism.²⁵ Judge Sotomayor, in her dissent, argued

16. *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

17. See generally Christopher B. Whitman, *Croll v. Croll: The Second Circuit Limits "Custody Rights" Under the Hague Convention on the Civil Aspects of International Child Abduction*, 9 TUL. J. INT'L & COMP. L. 605 (2001) (criticizing the Second Circuit's narrow construction of the Hague Convention's text).

18. See generally Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of International Child Abduction*, 21 FORDHAM INT'L L.J. 308 (1997) (arguing that the Hague Convention's treatment of access rights has caused courts to misconstrue the Convention while attempting to meet its intent).

19. Under the Hague Convention, rights of access are quite similar to noncustodial visitation in the United States. According to the Convention, "rights of access shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." Hague Convention, *supra* note 9, at art. 5b.

20. A *ne exeat* clause is defined as a "writ which forbids the person to whom it is addressed to leave the country, the state, or the jurisdiction of the court." BLACK'S LAW DICTIONARY 1031 (6th ed. 1990). In the context of this case, the Hong Kong Family Court issued a *ne exeat* clause. *Croll*, 229 F.3d at 135. The goal of the *ne exeat* clause was to ensure that Mr. Croll maintained his right of reasonable access. *Id.* The clause ordered the Crolls' daughter, Christina, to remain in Hong Kong until she was eighteen years old unless she had her parents' consent or if she was granted leave of the court. *Id.*

21. The Hague Convention determined that "rights of custody shall include rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence." Hague Convention, *supra* note 9, at art. 5a.

22. *Croll*, 229 F.3d at 135.

23. *Id.* at 142.

24. *Id.* at 143-44.

25. Whitman, *supra* note 17, at 626-27.

that the *ne exeat* clause should have transformed Mr. Croll's rights of access into rights of custody.²⁶ Sotomayor recognizes that international case law has been split on whether the *ne exeat* rights amount to rights of custody.²⁷ Nevertheless, she asserts that the majority ignored most other foreign courts' interpretations of the Hague Convention by interpreting rights of custody too narrowly.²⁸ Judge Sotomayor believes that the

26. *Croll*, 229 F.3d at 144 (Sotomayor, J., dissenting). Judge Sotomayor points out that one of the purposes of the Hague Convention was to ensure that the law of one Contracting State is respected in other Contracting States. *Id.* Judge Sotomayor has a valid point that allowing a parent to take a child abroad "in violation of *ne exeat* rights granted to the other parent by an order from the country of habitual residence...nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody." *Id.* at 147. Additionally, Sotomayor points out that "[t]o read the Convention so narrowly as to exclude the return remedy in such a situation would allow such parents to undermine the very purpose of the Convention." *Id.*

27. *Id.* at 150.

28. *Id.* Judge Sotomayor points to the Family Court in Australia as an example of a country interpreting rights of custody broadly:

Australia...has characterized the "spirit of the Convention" as ensuring "that children who are taken from one country to another wrongfully, in the sense of in breach of court orders or understood legal rights, are promptly returned to their country so that their future can properly be determined within that society."

Id. (emphasis added). Based on this interpretation of the Hague Convention, Australia recognized "rights of custody" in an otherwise noncustodial father. In the Marriage of: Jose Garcia Resina and Muriel Ghislaine Henriette Resina, Appeal no. 52, 1991 (Fam.) (Austl.), para. 26. On this issue, there seems to be quite divergent opinions regarding the appeals court's handling of relevant foreign case law. Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 378-79 (2001). For example, Reimann credits the *Croll* case for attempting to take foreign law into account when interpreting the Hague Convention. *Id.* However, Reimann also notes that the court may not have found the foreign decisions to be that helpful due to the wide variety of decisions in relative case law. *Id.* It seems that Reimann believes that the court failed to use the foreign law properly in order to reach its decision, but he did think that it was a step in the right direction for an American court to look to foreign law when interpreting a treaty. *Id.* at 379. For an English case where rights of custody under the Convention were construed in a more broad fashion, see *C. v. C.*, [1988] 1 W.L.R. 654 (Eng.) :

[The] right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right

broadier interpretation is more in accordance with the purpose and structure of the Hague Convention.²⁹

In addition to Judge Sotomayor, others have criticized the Second Circuit for ignoring “compelling authority...with respect to both case law and scholarship as well as to the interpretation approved by the Special Commissions that review the operation of the Child Abduction Convention.”³⁰ Those who believe that the court’s interpretation was too narrow argue that it was contrary to the Hague Convention’s overarching purpose.³¹ The results of this decision can be far-reaching.³² In fact, some fear it will lead more parents to kidnap their children because they would not be as likely to be returned by a friendly forum.³³ Even among those who support the substantive outcome of the *Croll* decision, some have criticized the court for what they perceive to be a lack of deference to the existing international interpretations of the Hague Convention.³⁴

of custody within the meaning of arts 3 and 5 of the convention...this conclusion is in accordance with the objects of the convention.

Id.

29. *Croll*, 229 F.3d at 150.

30. Silberman, *supra* note 14, at 228–29.

31. See Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the 14th Session 426, 447 (1980). Pérez-Vera, whose report is the official history and commentary of the Convention, indicates that the Convention’s intention was to protect all of the ways that parents exercise child custody. *Id.* While some scholars choose to argue that the recognition of all types of child custody shows intent upon the framers of the Convention to include those with rights of access, it is clear based on the definitions provided by the Convention that the distinction was intended. Hague Convention, *supra* note 9, at art. 5. However, given the fact that Pérez-Vera also indicates that a child’s country is best suited to make custody and access determinations, it is quite puzzling that the Convention chose to make the distinction.

32. Deborah M. Huynh, Note, *Croll v. Croll: Can Rights of Access Ever Merit a Remedy of Return Under the Hague Abduction Convention?*, 26 N.C. J. INT’L L. & COM. REG. 529, 557 (2001).

33. *Id.*

34. See Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 281 (2002).

While the *Croll* decision has received much valid criticism, much of it is misdirected.³⁵ In *Croll*, the majority accurately interpreted and correctly applied the Hague Convention.³⁶ The decision, however, points out an inherent flaw in the Hague Convention, namely that the Convention does not place enough value on a noncustodial parent's rights of access—especially those who have agreements which contain a *ne exeat* clause.³⁷ As a result, the drafters, unfortunately, did not give the judicial or administrative authorities enough power to help enforce the laws of the child's habitual residence.³⁸ Therefore, it is necessary to create an amendment to the Convention which will grant noncustodial parents a remedy of return in situations where the custodial parent has violated the noncustodial parent's rights of access by removing the child from the child's habitual residence,³⁹ despite the existence of an order with a *ne*

35. Thomson v. Thomson, [1994] 3 S.C.R. 551, 589. ("The right of access is, of course, important, but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody.")

36. Weiner, *supra* note 34, at 308. Weiner maintains that:

Croll reaches the right substantive result: a *ne exeat* clause does not convert rights of access into rights of custody. Yet, *Croll* is still a failure of American Hague Convention jurisprudence. Although I believe the substantive result was right, the opinion rests on, and emphasizes the Convention's wording and the drafter's intent, and pays only minimal lip service to the purpose and design of the Convention and case law from sister signatories.

Id.

37. Of course, some foreign courts have found that a *ne exeat* clause does give a father veto power over a mother's ability to move, and it confers on him rights of custody. *C. v. C.*, [1988] 1 W.L.R. 654 (Eng.) (Judgment of L.J. Neill). However, even though some could argue that some foreign courts (even a majority) have come to a different conclusion than *Croll*, this still does not indicate that the *Croll* decision was wrong. After all, the main problem is the interpretation of rights of custody, which may very well be different in different countries. In fact, the discrepancy provides even more support for the notion that the Convention should have defined its terms to provide a better way for determining what constitutes rights of custody.

38. *Croll*, 229 F.3d at 135. ("Because courts in the United States have jurisdiction to enforce the Convention by ordering a child's return to her habitual residence only if the child has been removed in breach of a petitioning parent's custodial rights, the district court lacked jurisdiction to order return in this case.")

39. The Convention did not define the meaning of a child's habitual residence, so it has been left up to the courts of the Contracting States to determine what makes a country a child's habitual residence. *Pérez-Vera*, *supra*

exeat clause issued by a valid judicial body located in the child's habitual residence.⁴⁰

In Part II, this Note will describe the elements of the Hague Convention as it is presently constituted and its available remedies and exceptions. In Part III, this Note will examine the *Croll* decision and will demonstrate that the court accurately recognized the distinction between rights of custody and rights of access under the current Hague Convention. Part III will also argue that while the *Croll* decision is technically correct, it illustrates a weakness in the Convention. In Part IV, this Note will illustrate this weakness and suggest a solution by exploring the different ways in which courts in the United States have enforced court-ordered visitation, which demonstrate the high value placed on visitation by noncustodial parents. Part V will discuss how courts in foreign jurisdictions have interpreted situations similar to the *Croll* case and argue that these contrasting decisions further reveal an inherent problem with the Convention. It will suggest that the Hague

note 31, at 441 ("The convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it."). Therefore, "many of the significant terms used by the Child Abduction Convention – habitual residence, custody rights, grave risk of harm – are inherently ambiguous and subject to varying interpretations." Silberman, *supra* note 14, at 246. While different States may have different ways of determining the habitual residence of a child, it is generally determined with regard to the physical location of the child and the settled intention as to the residence of the custodial parent. HUTCHINSON & SETRIGHT, *supra* note 5, at 6. Nevertheless, habitual residence is a crucial question of fact that can determine whether a case can be brought under the Hague Convention. *Id.*

40. However, it is also worth noting that the *ne exeat* clause need not be the be all and end all. After all, since the best interests of a child are generally presumed to be better served by contact with both the custodial and noncustodial parents, there is no reason to limit the remedy of return to noncustodial parents. A remedy of return does not necessarily mean that the noncustodial parent will get custody of the child, and it does not mean that the custodial parent will not be allowed to move. Instead, such a remedy would merely ensure that the child's home state would have the opportunity to make the decision. As Weiner points out, "[n]owhere does the Convention suggest that the remedy of return delivers the child to a custodial parent. In fact, the Convention has no position on this issue, other than that the children are to be returned typically to the habitual residence." Weiner, *supra* note 34, at 320. Thus, a return remedy would likely lessen the incentive to move without the consent of the noncustodial parent and the court's permission.

Convention would similarly benefit from placing a high value on a noncustodial parent's rights of access, that the Convention should be amended to include some of the same remedies that U.S. courts have made available to noncustodial parents. Finally, this Note will suggest that granting a return remedy to parents with rights of access will help rectify the problems created by the Convention to better meet the Convention's stated objectives. While the return remedy will not always prevent a person with custody from moving with his or her child, it will make it more likely that the proper protocol will be followed. In addition, it will provide the left-behind parent with an adequate remedy for situations when the proper protocol is not followed.

II. THE HAGUE: ELEMENTS AND EXCEPTIONS

A. *The Purpose of the Hague Convention*

The express purpose of the Hague Convention (Convention) is to protect the interests of children in custody matters by providing a method "to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and 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."⁴¹ The Convention considers removal or retention to be wrongful when a parent removes a child from his or her habitual residence in violation of the other parent's rights of custody.⁴²

41. Hague Convention, *supra* note 9, at art. 1. The Hague Convention was created to "apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years." *Id.* at art. 4.

42. *Id.* at art. 3. Article three states:

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

Id.

B. The Procedure Set Forth by the Hague Convention

When a child abduction has occurred, the Convention affords the opportunity for a “requesting” Contracting State to make an application on behalf of the person seeking return of a child from another “requested” Contracting State.⁴³ Each Contracting State has established a central authority under the Convention for the purpose of processing such applications, although the way the central authorities have been set up differs in different States.⁴⁴ In the United States, a petitioner may file a petition with a state trial court or Federal District Court.⁴⁵ Different states follow different rules and procedures, and there will also be differences in the rules and procedures between state and federal Court.⁴⁶ After the filing of the petition, the Central Authority supports the petitioner by aiding the petitioner’s attorney.⁴⁷ In addition, the Central Authority sends a letter written by the State Department to the judge who will preside over the hearing which informs the judge about the Convention and explains its impact.⁴⁸ Generally, the procedures established by the Convention have been successful at returning children who have been wrongfully removed from their home state, especially when compared with countries that are not parties to the Convention.⁴⁹

C. Exceptions to the Remedy of Return

The Convention fashioned six narrow exceptions to the return remedy even in cases where it was proven that a child had been

43. HUTCHINSON & SETRIGHT, *supra* note 5, at 4.

44. *Id.*

45. *Id.* at 210.

46. *Id.*

47. *Id.*

48. *Id.*

49. See GEOFFREY L. GREIF & REBECCA HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 194–95 (1993). Greif and Hegar found that eighty-four percent of the abductions to Canada, the United Kingdom, and Australia resulted in recovery, whereas only forty-three percent of international abductions to non-Hague destinations led to recovery. *Id.* While there are a number of other factors that may affect this difference in the rates of recovery of abducted children, the Convention can certainly account for some of those results.

“wrongfully” removed or retained in a foreign country.⁵⁰ Many courts have been inclined to construe these exceptions narrowly and thereby order the return of the child even when an exception has been established. These courts recognize that courts in the “abducted-from country” are still equally or better suited to determine the proper outcome of cases.⁵¹ Therefore, the courts see little harm in returning a child to the courts of his or her habitual residence for dispute resolution.⁵² In fact, the Conven-

50. *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1357–58 (M.D.Fla. 2002). These exceptions, which were created to protect the best interests of the child, are as follows:

A court is not bound to order the return of a child if respondent demonstrates by a preponderance of evidence that: (1) the person having care of the child was not actually exercising the custody rights at the time of removal or retention ... or (2) the person having care of the child had consented to or subsequently acquiesced in the removal or retention of the child ... or (3) “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” ... or (4) the proceedings were commenced more than one year after the date of the wrongful removal or retention and “the child is now settled in its new environment.” ... Additionally, a court is not bound to order the return of a child if respondent demonstrates by clear and convincing evidence that: (5) there is a grave risk that the child’s return would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” ... or (6) return of the child would not be permitted by fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. [However], [e]ven if an exception is established, the Court has discretion to order the return of a child if return would further the aims of the Hague Convention.

Id. Note that inconsistent interpretations of article 13 are possible under the Convention because:

The Child Abduction Convention does not define what constitutes a grave risk of physical or psychological harm or an intolerable situation, nor at what age a child may decide for him or herself not to return, but rather depends upon the judge to make the determination within the object and purpose of the Child Abduction Convention as a whole.

Karin Wolfe, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT'L L. & POL. 285, 325 (2000).

51. *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996).

52. For an explanation of the rationale behind the exceptions to the return remedy, see *Pérez-Vera*, *supra* note 31, at 432.

tion was not intended to settle disputes about legal custody rights.⁵³ Instead, the Convention was intended to “restore the factual situation that existed prior to a child’s removal or retention”⁵⁴ so as to ensure that an “international abductor [was] denied legal advantage from the abduction to or retention in the country where the child is located.”⁵⁵ Unfortunately, the Convention did not go far enough to ensure that international abductors would be denied legal advantage from their abductions.⁵⁶ As the *Croll* case reveals, one can still escape the decree of a child’s habitual residence by absconding from the country as long as the parent they are leaving does not have rights of custody.⁵⁷

III. *CROLL V. CROLL*: BACKGROUND AND ANALYSIS

A. *The Facts of Croll*

In *Croll*, Stephen Croll filed a petition to force his wife, Mei Yee Croll, to return their child to Hong Kong under the Hague Convention.⁵⁸ Mr. and Mrs. Croll, who are both U.S. citizens, got married in Hong Kong in 1982.⁵⁹ Eight years later, Mrs. Croll gave birth to their child, Christina, in Hong Kong, and they lived there together for another eight years.⁶⁰ In 1998, Mr. and Mrs. Croll separated.⁶¹ Christina lived with her mother, but she continued to see her father regularly.⁶² That same year, Mr. Croll brought divorce proceedings in the District Court of the Hong Kong Special Administrative Region, Matrimonial Causes, and Mrs. Croll was granted “sole ‘custody, care and control’ of Christina.”⁶³ Mr. Croll, however, was to continue to

53. Letter of Transmittal, *supra*, note 11, at 2.

54. *Id.*

55. *Id.*

56. It is evident that the failure to provide a remedy for parents with rights of access can have deleterious effects on a child regardless of whether a child was removed from a parent with rights of custody or rights of access. See *Pérez-Vera*, *supra* note 31, at 428–29.

57. *Croll*, 229 F.3d at 135.

58. *Id.* at 134.

59. *Id.* at 135.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Croll*, 229 F.3d at 135.

have a right of 'reasonable access.'⁶⁴ In order to ensure that there was no misunderstanding as to the meaning of the custody decree, the Hong Kong court inserted a *ne exeat* clause, which stated that Christina could not leave Hong Kong until she reached the age of eighteen⁶⁵ without leave of the court or consent by both parents.⁶⁶

On April 2, 1999, while Mr. Croll was away on a business trip, Mrs. Croll and Christina traveled to New York City without leave of the court or Mr. Croll's consent.⁶⁷ Upon Mr. Croll's return, he was informed that his wife and child had gone to the United States.⁶⁸ When they had not returned more than a month later, Mr. Croll filed a Hague petition in the Southern District of New York in order to compel Christina's return.⁶⁹

When the case was brought in the District Court, both sides agreed that Christina was a habitual resident in Hong Kong within the meaning of Article 3 of the Hague Convention.⁷⁰ Mrs. Croll also did not claim that her right to remove Christina was based on one of the exceptions to the Convention's return remedy.⁷¹ Apparently, Mrs. Croll did not believe there was suf-

64. *Id.*

65. While the *ne exeat* clause provided that Christina could not leave until she was eighteen years old, unless she had permission from her father or the court, the Hague Convention only provides a return remedy for children under sixteen years of age. Hague Convention, *supra* note 9, at art. 4. Since Christina was only about eight years old at the time of the divorce, the Convention obviously still applied to her. *Croll*, 229 F.3d at 135. However, in jurisdictions where the courts decide to honor *ne exeat* clauses coupled with rights of access, it will be interesting to see whether courts would also choose to honor *ne exeat* clauses such as the one in *Croll*, which prohibits the noncustodial parent from taking a child out of the country until she is over eighteen, or if courts will limit the return remedy to children sixteen and under as provided in the Convention. Hague Convention, *supra* note 9, at art. 4. Since it is much less common for a child near the age of majority to be kidnapped, this may be a moot point. Either way, it is doubtful that a court would extend the return remedy beyond the age of sixteen—even if there was a violation of a *ne exeat* clause. Furthermore, since the Hague provides older children with the opportunity to voice their opinions in order to avoid return, the problem might be solved by asking the children's preference in such a case.

66. *Croll*, 229 F.3d at 135.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

ficient evidence to prove that Mr. Croll had failed to exercise his custody rights or that he had consented to her leaving.⁷² In addition, Mrs. Croll did not attempt to show that there would be a grave risk to Christina⁷³ if she were forced to return to Hong Kong.⁷⁴ Instead, Mrs. Croll argued that Mr. Croll did not have rights of custody over Christina and that he merely had rights of access, thus, he was not entitled to relief in the Federal District Courts because the court lacked subject matter jurisdic-

72. *Croll*, 229 F.3d at 135.

73. See Weiner, *supra* note 34, at nn.214–17. In reality, at the trial court level, Mrs. Croll attempted to enter evidence of domestic violence against herself and Christina. *Id.* Mrs. Croll alleged that she had previously attempted to get an order of protection against her husband, and that she filed a complaint with the police alleging assault. *Id.* at n.214. Mrs. Croll also testified to other instances of violence, including a fight that she alleged occurred in front of Christina. *Id.* In addition, Mrs. Croll alleged that Christina had been physically abused. *Id.* Nevertheless, the court never came to a factual determination as to whether Mr. Croll was a batterer, likely due in part to the fact that the charges Mrs. Croll had brought were dismissed based on lack of evidence. *Id.* at n.216. Instead, the court ruled that Christina did not witness any of the alleged abuse, so the evidence was not relevant to the Hague petition. *Id.* While the trial court did not seem to find the allegations of abuse relevant, it is possible the allegations had an impact on the Second Circuit's decision. It is possible that since there is a difficult burden in establishing a grave risk, the court may have found it easier to deny jurisdiction rather than try to grant a grave risk exception to the return remedy.

74. Hague Convention, *supra* note 9, at art. 13. The Hague Convention provides that:

[T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return established that a person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention or there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views...the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Id.

tion.⁷⁵ The District Court, however, accepted Mr. Croll's argument that the *ne exeat* clause provided by the Hong Kong Court gave him the right to determine his child's place of residence.⁷⁶ The court then found that Mr. Croll's right to determine Christina's place of residence was equivalent to rights of custody within the meaning of the Hague Convention.⁷⁷ Since Christina's removal from Hong Kong was deemed to be in violation of her father's rights of custody, her removal was found to be wrongful within the meaning of the Convention.⁷⁸

On appeal, the case was reviewed *de novo* in order to determine whether Mr. Croll had rights of custody or rights of access within the meaning of the Hague Convention.⁷⁹ The method for interpreting treaties is similar to the method for interpreting statutes.⁸⁰ Since the issue of whether rights of access joined with a *ne exeat* clause amounts to rights of custody under the Hague Convention had never arisen before the *Croll* case, this was a case of first impression.⁸¹ The Second Circuit distin-

75. *Croll*, 229 F.3d at 135.

76. *Croll v. Croll*, 66 F. Supp. 2d 554, 559 (S.D.N.Y. 1999).

77. *Id.*

78. *Id.*

79. *Croll*, 229 F.3d at 136.

80. *Id.* Here, the court explains that it must first look to the ordinary meaning of the Convention. *Id.* If the ordinary meaning is ambiguous, the court "may resort to extraneous tools of interpretations such as a treaty's ratification history and subsequent operation." *Id.*

81. *Id.* While this was a case of first impression, other federal courts have subsequently addressed this issue. Fourth and Ninth Circuits both followed *Croll's* reasoning. See generally *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003) (reversing district court's holding that Scottish law giving mother a right to determine a child's residence created a right of custody under the Convention); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002) (holding that *ne exeat* clause combined with visitation did not amount to right of custody under the Convention). For a critical view of the Hague Convention and the Ninth Circuit's interpretation in *Gonzalez v. Gutierrez*, see Sara J. Bass, Note, *Ne Exeat Clauses Proven Ineffective: How the Hague Convention Renders Access Rights Illusory*, 29 N.C. J. INT'L L. & COM. REG. 573 (2004). Conversely, the Eleventh Circuit chose not to accept *Croll's* interpretation of rights of access. Instead, it found that a Norwegian father's statutory *ne exeat* right coupled with a right of access amounted to a right of custody under Norwegian law. See *Furnes v. Reeves*, 362 F.3d 702, 715 (11th Cir. 2004) ("Given that the goal of the Hague Convention is to deter international abduction, we readily interpret the *ne exeat* right as including the right to determine the child's place of residence because the *ne exeat* right provides a parent with decision-making authority regarding the child's international relocation."). The court

recognized that the parents in Norway had joint parental responsibility; therefore, while Ms. Reeves could decide where in Norway the child could live, she had to remain in Norway or get consent to move. *Id.* at 709. Since Ms. Reeves did not ask permission to move beyond Norway, the court found the removal to be wrongful under the Hague Convention, and it issued a return order *Id.* at 710. The Eleventh Circuit reasoned that:

In American courts, we tend to think of custody rights primarily in the sense of physical custody of the child. However, in applying the Hague Convention, we must look to the definition of “rights of custody” set forth in the Convention and not allow our somewhat different American concepts of custody to cloud our application of the Convention’s terms. Specifically, in this case we must think of “rights of custody” as including “rights relating to the care of the person of the child,” and in particular, “the right to determine the child’s place of residence.”

Id. at 711. Interestingly, while the legal arguments put forth by the plaintiff, Furnes, are similar to the arguments made in *Croll and Gutierrez*, the factual backgrounds of the cases are quite different. In *Furnes*, the petitioner was more sympathetic, and the defendant much less so. *Furnes*, 362 F.3d at 704 (“Plaintiff Furnes and Defendant Reeves’s relationship was marked by constant conflict. Defendant Reeves...commonly thwarted Plaintiff Furnes’s attempts to exercise his visitation rights. Defendant Reeves also made serious allegations against Plaintiff Furnes...which were...groundless....In contrast,...Furnes was an understanding and cooperative parent and was able to offer Jessica a secure home.”). *Id.* at 704–05. While the Eleventh Circuit does construct valid arguments when interpreting Norwegian law, and these arguments are similar to those in Sotomayor’s passionate dissent in *Croll*, one can still wonder if the courts in *Croll*, *Gutierrez*, and *Furnes* allowed the character traits of the litigants to affect their respective decisions. Clearly, this would be the type of decision-making that the Convention tried to avoid. *Pérez-Vera*, *supra* note 31, at 430 (“The Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal.”). *Id.* The Eleventh Circuit’s decision addresses this concern by pointing out that they did not reach the merits of the custody case, but rather it simply ordered that it be addressed in the child’s habitual residence prior to the abduction. *Furnes*, 362 F.3d at 721. The court also criticized the *Croll* decision:

Accordingly, our construction of the *ne exeat* right does not alter the terms of the custody agreement. Rather, it simply would inconvenience Mrs. Croll as the custodial parent by requiring that she comply with its terms. The Convention’s purpose is to prevent the international abduction of children and is thwarted, not satisfied, by the Croll majority’s construction of the *ne exeat* right.

Id. While it is true that the main purpose of the convention is thwarted by *Croll*’s interpretation, the Convention’s failure to adequately define rights of access and rights of custody will continue to force courts to make their own

gushed rights of access from rights of custody and held that Mr. Croll's *ne exeat* clause did not elevate his rights of access to rights of custody.⁸² As a result, the court denied having jurisdiction under the Convention and reversed the order to return Christina to Hong Kong.⁸³

In finding that Mr. Croll merely had rights of access, the court rejected Mr. Croll's argument that since "a *ne exeat* clause gives an otherwise noncustodial parent a power that amounts to 'a right to determine the child's place of residence' [and that this clause] thereby creates a 'right of custody' that is protected by the Convention's return remedy."⁸⁴ While Mr. Croll was not granted the return remedy that he desired, the court argued that he was not without a remedy.⁸⁵ On the contrary, pursuant to one of the remedies under the Convention, the court suggested that Mr. Croll could obtain a "writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the noncustodial parent with access rights."⁸⁶ However, due to the great distance between Hong Kong and New York City, it is unlikely that this remedy will provide Mr. Croll with nearly the same amount of visitation as he enjoyed pursuant to the Hong Kong divorce agreement.⁸⁷ Therefore, this alternative is not only unrealistic, but unreasonable.

individual interpretations of foreign law until an amendment is created or a common definition becomes accepted.

82. *Croll*, 229 F.3d at 135.

83. *Id.* at 135–36.

84. *Id.* at 139.

85. *Id.*

86. *Id.* at 138.

87. Eric S. Horstmeyer, Note, *The Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Tahan and Viragh and Their Impact on its Efficacy*, 33 U. LOUISVILLE J. FAM. L. 125, 127 (1994). Horstmeyer recognizes the Convention's flaw when it comes to enforcing a noncustodial parents' visitation rights. *Id.* at 127. ("The Court was unable to fashion a remedy for the noncustodial parent because of his indigent status and his inability to fund his legal visitation in a foreign country. This decision illustrates the Convention's glaring weakness in terms of its ability to protect rights of access adequately."). While Horstmeyer has a strong argument that the courts have failed to interpret the Convention carefully enough to make it effective, this problem is further elucidated in *Croll*, due to the fact that the child was taken in violation of a *ne exeat* clause. Therefore, even if one were to argue that the father in *Viragh v. Foldes*, should not be entitled to a return

B. Analysis of Court's Interpretation of Custody Rights versus Access Rights

The Second Circuit correctly distinguished rights of custody from rights of access in accordance with Article 5 of the Hague Convention.⁸⁸ Custody rights are those “rights relating to the care of the person of the child, and, in particular, the right to determine the child’s place of residence.”⁸⁹ Rights of access, however, are defined as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.”⁹⁰ This distinction is quite important since the Convention only deems a removal to be wrongful where one has violated custody rights.⁹¹ Therefore, a parent with mere access rights cannot seek the return of the child for violation of these rights.⁹² Instead, a parent with access rights may attempt to prevent the breach of access rights by applying to the Central Authority of a Contracting State.⁹³ The treaty, however, is silent regarding remedies for noncustodial parents whose rights of access have been obstructed.⁹⁴ Given the fact that “unlawful

remedy because he did not have rights of custody, the *ne exeat* clause coupled with rights of custody surely should be enough to warrant a return remedy. *Viragh v. Foldes*, 612 N.E.2d 241 (Mass. 1993).

88. Hague Convention, *supra* note 9, at art. 5.

89. *Id.*

90. *Id.*

91. Silberman, *supra* note 14, at 225.

92. *Id.*

93. Hague Convention, *supra* note 9, at art. 6.

94. *Viragh*, 612 N.E.2d 241, 247 (Mass. 1993). *Viragh* acknowledges that:

[N]ations are instructed in art. 21 to “promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,” as well as to “take steps to remove, as far as possible all obstacles to the exercise of such rights.”

Id. In this case, the court found that even though the “children’s presence in the United States makes practically impossible the exercise of the precise visitation schedule ordered by the Guardianship Authority [t]hat, however, does not mean that [the noncustodial parent] is prevented from effectively exercising his access rights to the children in the United States.” *Id.* at n.9. This finding, however, should be questioned for it shows a lack of respect for the Guardianship authority in Budapest, and it seems as though it is letting the United States substitute its own decision for the decision in the habitual residence of the child. Whereas the Budapest Guardianship Authority determined that it would be in the best interests of the children for Mr. Gabor to have visitation on “alternate weekends, two weeks each in July and August,

unilateral removals – as well as real abductions – are harmful to children, whether the parent who removes is a mother or a father,”⁹⁵ there is no valid reason for the Hague Convention to distinguish between rights of access and rights of custody.⁹⁶

and three days during the children’s winter and spring holiday,” the U.S. court decided that other arrangements could be equally in the best interests of the child. *Id.* In *Viragh*, there was not a *ne exeat* clause. However, Hungarian law requires custodial parents to get permission from the noncustodial parent or the court before permanently removing a child from Hungary. *Id.* at 246. Clearly, such a law would have the same effect as a *ne exeat* clause. Nevertheless, since the court recognized that the Convention was silent with regard to rights of access, and since the court probably did not want to be involved in interpreting Hungarian law, the court did not grant the return remedy. Horstmeyer, *supra* note 87, at 138. It should also be noted that Mrs. Foldes had good reason for leaving Hungary without notifying Mr. Viragh, and the Supreme Judicial Court of Massachusetts had some good reasons for wanting to deny a return remedy:

Gabor had not been a model husband. He physically abused and verbally threatened Maria [Mrs. Foldes] on a number of occasions both prior to and following the divorce, one time attacking her when she was seven months pregnant with their second child. At the time Maria requested the divorce, Gabor was so distressed that he threatened to kill himself and the two children and also told Maria that, if she continued with her divorce action, she would never see the children again....She also believed....that Gabor would file a new law suit or petition for custody thus forcing her to remain in Hungary to appear and answer new allegations. It was Maria’s understanding that she would not be permitted to fly overseas during the last three months of pregnancy, and therefore any potential litigation in Hungary would result in her separation from Mihaly [her new husband] until after the birth of her child.

Viragh, 612 N.E.2d at 244. While there is certainly a compelling argument that Mrs. Foldes should not have been returned to Hungary, it would still show more respect for international law to have denied the return remedy based on the grave risk exception to the Convention. Hague Convention, *supra* note 9, at art. 13b. Unfortunately, since the burden of proving a grave risk is so difficult, and since the Convention does not give a return remedy unless the left-behind parent has a right of access, the court did not choose to follow this route. *Viragh*, 612 N.E.2d at 243.

95. Silberman, *supra* note 14, at 225 (citations omitted).

96. *Pérez-Vera*, *supra* note 31 at 432. Pérez-Vera noted that:

[I]n the literature devoted to a study of this problem, ‘the presumption generally stated is that the true victim of the ‘childnapping’ is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come

Similarly, since the Convention's goal was "to restore the factual situation that existed prior to a child's removal or retention,"⁹⁷ the Convention should allow the courts to do just that.

The court in *Croll*, however, was limited by the Convention's distinction between rights of custody and rights of access so it did not have the jurisdictional authority to issue a return remedy.⁹⁸ Since the Hong Kong courts had implemented the *ne exeat* clause into the Croll's divorce, when Mrs. Croll wanted to alter the divorce agreement, she should have attempted to have it altered in Hong Kong. As the dissenting judge in *Croll* pointed out, because Mrs. Croll was required to remain in Hong Kong, this "impliedly gave the [Hong Kong] court and the parent without physical custody the right to veto an international move, [and] it vested both with the power to determine the child's residence."⁹⁹ However, due to the distinction between rights of access and rights of custody under the Convention, the court was powerless to issue a return remedy, which would have been the proper solution under the circumstances.

C. Remedies Granted to Parents with Rights of Access

Under the Hague Convention, a parent who merely has rights of access cannot file a petition claiming that there was a wrongful removal.¹⁰⁰ If there is no allegation or evidence of wrongful removal or retention outside the country of habitual residence, then the District Courts do not have "independent authority to

with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.'

Id.

97. Hague Convention, *supra* note 9, at preamble.

98. *Pérez-Vera*, *supra* note 31, at 445. Pérez-Vera explains:

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

Id. Here, it is evident that the drafters of the Convention considered eliminating any distinction between rights of custody and rights of access, but chose not to do so. Therefore, while the court in *Croll* correctly interpreted the Convention, this illustrates the drafter's misconception of what is in the best interests of the child.

99. *Croll*, 229 F.3d at 151.

100. *Id.* at 135.

remedy the situation.”¹⁰¹ However, this is not supposed to leave the left-behind parent completely without recourse.¹⁰² Instead, the left-behind parent may file a claim for visitation rights in state court under the state’s visitation statute.¹⁰³ The Convention also allows the petitioner to file a petition with the Central Authority to aid in his or her request for the enforcement of visitation.¹⁰⁴ Unfortunately, however, the remedies presented to a noncustodial parent are insufficient;¹⁰⁵ they do not adequately serve the interests of justice, they may not be in the best inter-

101. *Bromley v. Bromley*, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998). As the court notes in *Terron v. Ruff*, No. 48683-7-1, 2003 Wash. App. LEXIS 456, at *7 (Wash. 2003), “In 1988, the United States Congress adopted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601, in order to implement the Convention. ICARA establishes specific burdens of proof for the parent seeking the return of the child under the Convention and for parents opposed to the child’s return.” *Id.* The standard of evidence to prove wrongful removal of a child is the preponderance of the evidence standard. *Id.*

102. *Terron*, 2003 Wash. App. LEXIS 456, at n.4 (“A separate provision, Article 21, provides that a party may apply to secure the ‘effective exercise of rights of access.’ In addition, the Convention imposes an obligation on Central Authorities to ‘make arrangements for organizing or securing the effective exercise of rights of access.’”).

103. *Bromley*, 30 F. Supp. 2d at 862. The court in *Bromley* expressed one rationale for refusing jurisdiction in the federal courts:

The arena of child custody matters, except for the limited matters of international abduction expressly addressed by the Convention, would be better handled by the state courts which are more numerous and have both the experience and resources to deal with this special area of the law. There is a growing trend towards establishing specialized state family courts, which avoid a piecemeal approach to domestic relations problems.

Id. Unfortunately, however, this remedy is unlikely to be satisfactory due to the lack of power to issue a return remedy. While the left-behind parent can file for visitation, it may be very difficult for the visitation actually to occur. Nevertheless, in some circumstances, this may be a suitable outcome.

104. See *Janzik v. Schand*, No. 99 C 6515, 2000 U.S. Dist. LEXIS 17154 (N.D. Ill. Nov. 27, 2000).

105. Linda Silberman, *Hague Convention on International Child Abduction: A Brief Analysis and Case Law Analysis*, 28 FAMILY L.Q. 9, 11 (1994). (“The Convention does not offer uniform international standards for determining custody rights.”). This failure makes it difficult for courts to determine whether a return remedy should be granted and forces the requested State to determine whether there were rights of custody under the requested State’s law when it is supposed to be enforcing determinations in the requesting State.

ests of the child, and they do not serve the purpose of the treaty.¹⁰⁶

IV. DOMESTIC POLICY REGARDING VISITATION AND RELOCATION

A. Presumption in Favor of Noncustodial Visitation

In order to propose a solution to the problem presented by the *Croll* case, this Note will examine how courts in the United States address similar issues. In general, U.S. domestic policy supports the idea that it would be unfair and contrary to the best interests of the child to prevent a noncustodial parent from visitation “absent exceptional or compelling circumstances.”¹⁰⁷ This is due to the recognition that a child is likely to be harmed by a custodial parent’s choice to separate the child from a parent who has been granted rights of access.¹⁰⁸ The rationale is that “visitation is a right jointly enjoyed by the noncustodial parent and the child and that interest is served best when ‘nur-

106. See GREIF & HEGAR, *supra* note 49, at 183–87.

107. *Pecorello v. Snodgrass*, 142 A.D.2d 920, 920 (N.Y. App. Div. 1988). In *Pecorello*, the court states that “absent exceptional or compelling circumstances, a geographic relocation by a custodial parent which will effectively deny a noncustodial parent visitation will not be permitted.” *Id.* at 920–21. In the *Pecorello* case, however, the court found that the custodial parent’s remarriage of a divorced parent was an exceptional circumstance and allowed her to relocate. *Id.* Unlike in *Pecorello*, in the *Croll* case, however, Mrs. Croll did not remarry and would be unable to demonstrate such an exceptional circumstance. Similarly, the Hague Convention has a system in place to prevent against returning an abducted child to a noncustodial parent:

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that...b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art 13b, 1343 U.N.T.S. 89. In addition, the Hague Convention “may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” *Id.* Therefore, there is no harm in extending the remedy of return based on rights of access barring such exceptional circumstances that are protected against in article 13b, but there is a harm in setting the dangerous precedent that will allow a custodial parent to move away from a noncustodial parent on a personal whim.

108. See *Pérez-Vera*, *supra* note 31, at 428.

tered by regular, frequent and welcomed visitation.”¹⁰⁹ Because of the value that courts place on a noncustodial parent’s rights to visitation, there is a “heavy burden of proving exceptional circumstances or pressing concerns for the welfare of the custodial parent or the child which would warrant relocation.”¹¹⁰

B. Best Interests of the Child

Due to the presumption that contact with both parents is in the best interests of a child, if Mrs. Croll had been divorced in the United States, it is unlikely that the court would have viewed her decision to move as being justified by exceptional circumstances. In fact, when Mrs. Croll brought Christina to the United States, she claimed that she only intended to remain for a few weeks.¹¹¹ Therefore, her decision to make a short visit to the United States would not likely lead one to the conclusion that there was a pressing concern or exceptional circumstance requiring the move—even if one were to believe her testimony that she thought about remaining permanently.¹¹² After all, if the move was motivated by some pressing concern, Mrs. Croll likely would have known when she left Hong Kong that she was leaving for good. Either way, it was clear that if she intended to move, the Hong Kong court required her to get consent from either Mr. Croll or from the court itself.¹¹³

In the United States, when the court attempts to determine the best interests of the child and whether to let a divorced parent relocate with his or her child, no single factor or circumstance is controlling.¹¹⁴ On the contrary, the court must balance many factors in deciding the best interests of the child.¹¹⁵ The

109. *Pecorello*, 142 A.D. 2d at 921 (Pine and Balio, JJ., dissenting) (citations omitted).

110. *Id.* at 921.

111. *Croll*, 229 F.3d at 135.

112. *Id.* at 135.

113. *Id.*

114. *Pecorello*, 142 A.D.2d at 922.

115. *Id.* While the court in *Pecorello* found there to be exceptional circumstances, there does seem to be a trend in American family law towards allowing parents to relocate and modify their visitation arrangements with less than exceptional circumstances. Enrico A. Mazzoli, Note, *The Court's Role Facilitating an Effective Relationship Between Noncustodial Parent and Child When the Custodial Parent Relocates with Child*, 37 BRANDEIS L.J. 259, 262 (1999). Courts are increasingly prone to changing the standard for allowing a

Hague Convention, however, does not specifically provide for an

move from the exceptional circumstances standard to the best-interests-of-the-child standard. *Id.* Additionally, more courts are finding that it is in the best interests of the child to move. *Id.* While the courts have moved towards allowing custodial parents to move for good reasons, this is not to say that is a forgone conclusion. In *McRae v. Carbno*, 404 N.W.2d 508 (N.D. 1987), the court denied a mother's motion to move closer to her parents and sisters with her child away from the noncustodial parent even though she had been offered a job in her new town. *McRae v. Carbno*, 404 N.W.2d 508, 510 (N.D. 1987). Taking into account the fact that the job did not pay significantly more than her current job, the court found that the mother had failed to prove the move was in the best interests of the child. *Id.* at 508, 510–11. Clearly, these cases show that there is a high burden to prove a move to be in the best interests of the child. As the dissent in *McRae* points out, however, visitation orders can be modified. *Id.* at 513. Therefore, the recent trend seems to be to allow the move but to modify the visitation arrangement to protect. See Edwin J. (Ted) Terry et al., *Relocation: Moving Forward, or Moving Backward*, 15 J. AM. ACAD. MATRIMONIAL L. 169 (1998). Terry points out that:

Courts that traditionally have taken a very restrictive view of relocation have recently retreated from their previously entrenched positions against allowing a primary custodian to move to another location with his or her children. In highly publicized cases from California and New York, the highest courts of both states enunciated new standards for determining the outcome of relocation cases. The fact patterns and the court's holdings are noteworthy because they signal some important changes in how relocation cases are being handled from coast to coast.

Id. Terry also points out that much of the difficulty that the courts have in deciding whether to let custodial parents relocate with their children is that there are two different theories proposed by social and forensic scientists about how to protect children of divorce from emotional scarring. *Id.* at 167–68. Terry notes that:

One holds that children need both of their parents and prosper socially and emotionally when both parents remain actively involved in their lives...The second proposition is that while children need contact with both parents, the quality of the relationship between the noncustodial parent and the child may be far more important than daily contact between them, and further, that the child's well-being is affected more by the stability of the new family unit – including the happiness and adjustment of the custodial parent.

Id. at 168. Regardless of which proposition one believes is more accurate and beneficial to the child, certainly these matters should be decided on a case-by-case-basis. In any event, “the clear trend today favors standards allowing modifications to accommodate relocation by the parent with primary custody, so long as the relocation occurs in good faith.” Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 40 (2002).

inquiry into the best interests of the child.¹¹⁶ While the ultimate decision regarding custody, visitation, and the best interests of the child should ultimately be left up to the home state, the Convention should allow the requested state to perform a best interests test in considering whether a child to be returned to his or her home state.¹¹⁷ However, since the court has no authority to consider the best interests of the child in cases where parents have rights of access, the court in *Croll* must refuse jurisdiction.

By refusing to return Christina to Hong Kong for a determination as to whether it would be in her best interests to move away from her father to the United States, there was no inquiry into what was in her best interests.¹¹⁸ As a result, by allowing a parent with rights of custody to move without the consent of the parent with rights of access or the permission of the courts, the child's best interests may be endangered without an inquiry into whether there was a sufficient reason to relocate and thereby disrupt the noncustodial parent's regular rights of access. In *Croll*, the court does not attempt to see whether there

116. *Pérez-Vera*, *supra* note 31, at 431. "While the Convention does not specifically address the interests of the child, it "upholds unequivocally the idea that access rights are the natural counterpart of custody rights, a counterpart which must in principle be acknowledged as belonging to the parent who does not have custody of the child." *Id.* at 432. Clearly, if the Convention viewed access rights to be such an important counterpart, then it must be amended in such a way that it can actually protect such rights.

117. This best interests test would not be to decide who should be awarded custody ultimately. *Pérez-Vera*, in her commentary to the Convention points out some of the problems with having the abducted-to countries performing best interests test and making custody determinations:

[W]e cannot ignor[e] the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social, etc. attitudes which themselves derive from a given nationally community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.

Pérez-Vera, *supra* note 31, at 431.

118. Actually, it is likely that the best interests of the child were determined in Hong Kong, for it is unlikely the Hong Kong matrimonial court would have included a *ne exeat* clause if they thought it was contrary to the child's best interests. Therefore, the problem is not that there was no best interests test, but, rather, that a parent is allowed to act contrary to a best interests determination.

was any proof of educational, health or economic need to relocate. Therefore, the Convention leaves all of the power in determining the best interests to Mrs. Croll simply by removing Christina from the home State.¹¹⁹

Whereas the Convention gives sole power to the custodial parent to decide where a child can live by failing to fashion a return remedy for violation of a parent's rights of access, in many parts of the United States, noncustodial parents have a statutory right to reasonable visitation as well as decision-making power with regard to the residence of their child.¹²⁰ In fact, some courts refer to a noncustodial parent's right to visitation as a natural right.¹²¹ Courts and legislatures recognize that reasonable visitation (unless proven otherwise) is in the best interests of the child.¹²² While the right of visitation is not unlimited, visitation requirements must be in the best interests of the child.¹²³ Therefore, if a court is to grant stringent visita-

119. Ironically, it is courts' inability under the Convention to consider a child's best interests which has been credited with making the Convention a success. Marguerite C. Walter, Note, *Toward the Recognition and Enforcement of Decisions Concerning Transnational Parent-Child Contact*, 79 N.Y.U. L. REV 2381, 2386 (2004) ("It is the Abduction Convention's simplicity, along with its purposeful avoidance of the difficult underlying issue of the best interests of the child, that is largely responsible for its success in attracting a large number of States Parties and in achieving a high level of returns of abducted children.").

120. *Adamson v. Chavis*, 672 So. 2d 624, 626 (Fla. Dist. Ct. App. 1996) (quoting Section 61.13(2)(b)(1), Florida Statutes (1994)). Here, the statute provides that:

It is public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities of childrearing. After considering all relevant facts, the father of a child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child.

Id.

121. *Maxwell v. LeBlanc*, 434 So. 2d 375, 376 (La. 1983). In *Maxwell*, the parent seeking visitation rights was an out-of-wedlock parent, but the court still found that parents are entitled to visitation even if they are not the legitimate parents of a child. *Id.* at 377.

122. *Id.* at 379.

123. *Id.* at 377. "The presumption in favor of visitation can only be overcome by conclusive evidence that the parent has forfeited his right of access by his

tion requirements, they too must be in the best interests of the child.¹²⁴

As a result of the great distance between New York and Hong Kong, reasonable visitation is unlikely to be feasible.¹²⁵ Mrs. Croll's actions, therefore, have created a situation similar to those where stringent visitation is granted. However, since there is no evidence that stringent visitation is in Christina's best interests, this situation is not only unfair to Mr. Croll, but it may very well be detrimental to Christina.¹²⁶ In addition, this power gives Mrs. Croll the discretion to decide how, when, and if visitation occurs. Public policy should not award such decision-making power to the custodial parent. This type of power would seem to encourage visitational vigilantism rather than enforce the belief that custodial parents must have a respect for the law of their home State. In order to prevent this from occurring, there should be an amendment to the Convention which would allow the possibility of a return remedy for parents who have rights of access coupled with *ne exeat* clauses so that the court in the child's habitual residence can make sure that relocation is in the best interests of the child.

conduct or that exercise of the right would injuriously affect the child's welfare." *Id.* at 379.

124. *Id.* at 378.

125. See generally *Viragh v. Foldes*, 612 N.E.2d 241 (Mass. 1993). In *Viragh*, the court found itself unable to fashion a remedy for the noncustodial parent due to the fact that he was indigent and unable to pay for trips to visit his child. Horstmeyer, *supra* note 87, at 138 (discussing *Viragh v. Foldes*, 612 N.E.2d 241 (Mass. 1993)). While it is not necessarily the case that Mr. Croll is indigent, it is clear that continued visitation between the United States and Hong Kong would prove to be quite costly and could utterly frustrate his right of access. *Croll*, 229 F.3d at 142.

126. *Maxwell*, 434 So. 2d at 379.

Visitation is important for a child's whole growth, mental, physical and spiritual and a denial of visitation can make a child feel rejected and confused. The child's experience of family continuity and connection is a basic and fundamental ingredient of his sense of self, of his sense of personal significance and his sense of identity. While a child is cut off from one of his parents...there is, for the child and the parent...a mutual sense of deep personal loss.

Id.

C. Modification of Visitation Agreements

Some states seek to ensure that the trial court visitation agreements are fair by providing trial courts with the statutory right to modify visitation rights if such a modification would be in the best interests of the child.¹²⁷ One recognized basis for such modification is when there has been a change of circumstances.¹²⁸ For example, in Missouri, if a custodial parent moves a considerable distance from a noncustodial parent, it can be deemed a change of circumstances, and the court may adjust visitation to meet the best interests of the child.¹²⁹ In *Dover v. Dover*, when a custodial parent moved more than two hundred miles away from the noncustodial parent, the court recognized that such a long distance impeded the noncustodial parent's visitation because it could diminish the quality of visitation and lead to resentment on the part of the child, the parent, or both.¹³⁰ As a result, the court modified the visitation schedule in order to make sure that it created the best opportunity for meaningful contact with that parent.¹³¹ This decision was due to Missouri's presumption that "frequent and meaningful communication with both parents is in the child's best interest."¹³²

Another way of illustrating how courts value visitation rights is to examine how difficult it is to lose such rights. In West Virginia, for example, visitation may be suspended only under the most severe circumstances, such as in cases of sexual abuse or aggravated domestic violence.¹³³ However, even in cases where visitation was interrupted due to sexual abuse and aggravated domestic violence, the courts have attempted to maintain the bond between noncustodial parents and their children.¹³⁴ In *Hawk v. Hawk*, the court did this by restoring supervised visitation as soon as it was no longer deemed detrimental to the child's well-being and if the noncustodial parent agreed to fam-

127. *Dover v. Dover*, 930 S.W.2d 491, 494 (Mo. Ct. App. 1996).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 496.

132. *Id.*

133. *Dover*, 930 S.W.2d at 496. See *Hawk v. Hawk* 506 S.E.2d 85, 88 (W. Va. 1998) ("Total suspension of visitation is justified only under the most severe circumstances.").

134. *Id.*

ily therapy counseling.¹³⁵ In fact, even in cases where the parent has had his or her parental rights terminated due to neglect or abuse, the court recognizes the importance of a strong bond between a parent and a child and may continue to allow visitation.¹³⁶

In the *Croll* decision, there is no discussion of abuse or neglect,¹³⁷ and it is clear that Mr. Croll had been exercising his rights of access.¹³⁸ However, as we can see from domestic policy, even if there had been abuse or neglect, there could still have been reason to believe that it was in Christina's best interests to maintain ties with her father.¹³⁹ Due to the courts' predilection towards allowing the noncustodial parent to maintain constant contact with the child, it is not surprising that courts are also reticent to permit the removal of a child from the jurisdiction without the noncustodial parent's consent.¹⁴⁰ Some courts have found that before a court will permit the removal of a minor child from the jurisdiction, "the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to con-

135. *Id.*

136. *In re Katie S. v. David S.*, 479 S.E.2d 589, 601 (W. Va. 1996). The court noted that:

Circuit courts should be aware that post-termination visitation, either with siblings or parents, may be in the best interest of the child, especially when there is a close bond and the child maintains love and affection for either her siblings or parents. Where no bond exists, the consideration of post-termination visitation is not required. When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court shall consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.

Id.

137. *See* Weiner, *supra* note 34.

138. *Croll*, 229 F.3d at 135.

139. *In re Katie S.*, 479 S.E.2d at 601.

140. *Id.*

tinue to live with that parent.”¹⁴¹ It is unlikely that the *Croll* case would have met this standard since the mother testified that she did not even know that she was going to stay in the United States.¹⁴²

D. Federal Statutes Aimed At Parental Abductions

While the rules regarding international child abduction are quite complex and require the cooperation of courts from different countries to interpret the Hague Convention, parental child abduction has also been a challenge for the courts within the United States. Therefore, Congress enacted a number of statutes in order to deter the abduction or unilateral removal of children by parents in order to obtain custody awards.¹⁴³ The

141. See *Parisien v. Parisien*, No. A-98-894, 1999 Neb. App. LEXIS 191, at *35 (Neb. Ct. App. July 6, 1999). See *McRae v. Carbn*, 404 N.W.2d 508, 509 (N.D. 1987). The *Mcrae* court noted:

Where the noncustodial parent has been given and has exercised visitation rights, the custodial parent has the burden of securing an order for a change of residence of the child to another state by demonstrating that it is in the best interests of the child to do so. There is a legally recognizable right of visitation between a child and the noncustodial parent, which is considered to be in the best interests of the child. The statutory recognition of visitation rights between a child and the noncustodial parent is consistent with placing the burden upon the custodial parent to show that moving the child to another state is in the child's best interest. There is no presumption that a custodial parent's decision to change a child's residence to another state is in a child's best interests.

McRae, 404 N.W.2d at 509.

142. Mrs. *Croll*'s testimony that she did not plan on staying in the United States is questionable because she did admit that “in the back of her mind’ she intended to remain in the United States permanently.” *Croll*, 229 F.3d at 135. However, since the court accepts her testimony, for the purposes of this Note, her testimony should be accepted as true.

143. *Peterson v. Peterson*, 464 A.2d 202, 204 (Me. 1983) (citing Congressional Findings and Declarations of Purposes for Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c)(6)) [hereinafter PKPA]. From *Peterson*, it is clear that one of the goals of the Uniform Child Custody Jurisdiction Act and the PKPA was to avoid a race to the courthouse effect. *Id.* By instituting a home state requirement, the statutes take away the incentive for a parent to take a child to a foreign jurisdiction in order to get a custody decree. *Id.* Therefore, in *Peterson*, even though the father filed first in Maine, the state did not actually have jurisdiction over the case, so it could not bar the mother from filing for custody in the child's home state. *Id.*

Uniform Child Custody Jurisdiction Act (UCCJA), which was later modified by the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA) have some of the same stated goals as the Hague Convention, but they attempt to meet those goals in different ways.¹⁴⁴

1. The Uniform Child Custody Jurisdiction Act

Under the UCCJA, the state that makes an initial custody decree (assuming it had jurisdiction to do so) maintains continuing jurisdiction as long as one of the parties remains in that state.¹⁴⁵ The Supreme Court of Washington in *Greenlaw v. Smith*¹⁴⁶ effectively protects and preserves the jurisdiction of its trial court even in situations where a child has established a

144. In Act Dec. 28, 1980, P.L. 96-611, § 7, 94 Stat. 3568, Congress found that:

[I]t is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other jurisdictions.

Id. Congress indicated the general objectives of the PKPA were to:

[P]romote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child; promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child; facilitate the enforcement of custody and visitation decrees of sister states; discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child; avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well being; and deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

Id.

145. *Greenlaw v. Smith*, 869 P.2d 1024, 1027 (Wash. 1994).

146. *Id.*

new “home state”¹⁴⁷ under the UCCJA. Therefore, even if the child has moved to a new home state, the old state has jurisdiction over the case, and it may modify the decree as it sees fit.¹⁴⁸ *Greenlaw* holds that as long as one of the parents remains and the child maintains sufficient contact with the state, no parent can simply escape its jurisdiction by moving to another state.¹⁴⁹ As the court in *Greenlaw* notes, “interpreting the UCCJA to allow an automatic shift in modification jurisdiction simply because a child establishes a new home state would not further the purposes of the Act as it would permit forum shopping and instability of custody decrees.”¹⁵⁰ This interpretation makes sense because it eliminates instability and also prevents parents from benefiting from their bad actions.¹⁵¹ After all, if one were to remove one’s child without consent and in violation of the court order, it would be unfair for the place where the parent moves to get home state jurisdiction.¹⁵² The court does not

147. Under the UCCJA, a state is considered to be the “home state” if it is where the child lived for at least six consecutive months with his or her parents. *Id.* at n.4

148. *Id.* at 1024.

149. *Id.*

150. *Id.* at 1033. Thus, the court interprets the UCCJA and PKPA:

[T]o mean that jurisdiction to modify a custody decree continues with the decree state so long as: 1) that state’s decree is entered in compliance with the UCCJA and PKPA; 2) one of the parents or other contestants continues to reside in the decree state; and 3) the child continues to have more than slight contact with the decree state. The child’s continued visitation with the parent who remains in the decree state may constitute more than slight contact within the decree state.

Id.

151. *Greenlaw*, 869 P.2d at 1033.

152. This is not to say that the home state jurisdiction will never change. It would still behoove the parent in the left-behind state to file for custody quickly in the home state and to maintain contact with the child so that the court will not voluntarily give up its jurisdiction to the new state. This is because “even though a decree state has jurisdiction to modify its own decree, that state is not required to retain jurisdiction if another state appears to be a more appropriate, more convenient forum.” *Id.* Since Mr. Croll filed in a short period of time, there is no reason to think that the Hong Kong Court would choose not to exercise its jurisdiction. *Croll*, 229 F.3d at 135. While he may not have continued to visit with his child, this is more due to the fact that visitation became impracticable, and it would be unfair to penalize him by saying that Christina no longer had slight contact with Hong Kong.

distinguish between reasonable visitation rights and custody rights but, rather, seeks to enforce them both equally because they are both legitimate concerns and should be considered equally important.

2. Parental Kidnapping Prevention Act

The PKPA was also designed to eliminate some of the same problems caused by interstate child kidnapping, such as forum-shopping and conflicting state decrees.¹⁵³ Congress also had policy reasons for wanting to penalize parents for attempting to evade custody decrees by taking children out of their home state.¹⁵⁴ While the PKPA was not created to grant or deny initial jurisdiction, it was created to ensure that the issuing state court would be granted full faith and credit to the custody decrees of other states.¹⁵⁵ When it comes to jurisdiction, preference is initially granted to the child's home state under the PKPA.¹⁵⁶ However, if no state has home state jurisdiction, another state may take jurisdiction as long as it has a significant connection to the child and either of the parties.¹⁵⁷ The reasoning behind allowing states to take emergency jurisdiction over cases is to ensure that there will be a forum in order to protect the best interests of the child.¹⁵⁸

E. Domestic Remedies for Enforcing Visitation Agreements

In cases where a parent attempts to circumvent a court's decision, as the mother did in *Croll*, courts in the United States take the responsibility of enforcing visitation agreements seriously. As the New Jersey state court noted:

It is well settled that the law favors visitation and protects against the thwarting of visitation rights....The courts should endeavor that children of separated parents should be imbued

153. For a comprehensive review of the circumstances leading up to the enactment of the PKPA, see Ann T. Wilson, *The Parental Kidnapping Prevention Act: Is There An Enforcement Role For The Federal Courts?*, 62 WASH. L. REV. 841 (1987).

154. 24 Am. Jur. 2d *Divorce and Separation* § 960 (2003).

155. *Id.*

156. *Greenlaw*, 869 P. 2d at 1024.

157. *Id.*

158. *Id.*

with love and respect for both parents, and where children are in custody of one parent, the court should endeavor to effect this facet of the children's welfare by conferring reasonable rights of visitation of the other parent. Accordingly, when one parent willfully violates the visitation of the other parent, the court must act swiftly and affirmatively.¹⁵⁹

One of the most drastic ways that the court may act to ensure that its decisions are followed is to order a change of custody.¹⁶⁰ In *Clark v. Bullard*, Mrs. Bullard had been awarded permanent custody of their child and moved to Florida without Mr. Clark's consent or knowledge.¹⁶¹ When this occurred, Mr. Clark made a motion for a change of custody which was denied.¹⁶² However, on appeal, the State Supreme Court added that if Mrs. Bullard continued to thwart Mr. Clark's visitation, the trial court could reconsider the motion to change custody.¹⁶³ While Mrs. Bullard remained in Florida, she continued to evade Mr. Clark, and he could not locate his child for six months, whereupon he again moved for a change of custody.¹⁶⁴ Mr. Clark served Mrs. Bullard's attorney, but the attorney was unable to contact Mrs. Bullard about the hearing.¹⁶⁵ After a hearing, the court ordered a change of custody, and Mr. Clark was given custody of his child.¹⁶⁶ Then Mrs. Bullard returned to Minnesota and moved for relief based on the fact that she had not been notified of the hearing, and the Court of Appeals reversed and remanded the case for a full evidentiary hearing.¹⁶⁷

After the trial, the court found that Mrs. Bullard had done everything possible to frustrate Mr. Clark's visitation privileges.¹⁶⁸ As a result, Mrs. Bullard had violated a Minnesota statute which said that "proof of an unwarranted denial of or

159. *Paterno v. Paterno*, 603 A.2d 137, 139 (N.J. Super. Ct. App. Div. 1991) (court maintained jurisdiction over all equitable remedies and powers of relief available to the court, but the defendant could also be found liable in criminal court).

160. *Clark v. Bullard*, 396 N.W.2d 41, 42 (Minn. Ct. App. 1986).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Clark*, 396 N.W.2d at 43.

167. *Id.*

168. *Id.*

interference with duly established visitation may constitute contempt of court and may be sufficient cause for reversal of custody.¹⁶⁹ Consequently, the court awarded Mr. Clark custody.¹⁷⁰ The Court of Appeals of Minnesota affirmed the modification of custody based on the findings that the trial court had not abused its discretion by transferring custody to Mr. Clark.¹⁷¹

While there have been cases where custody has been transferred due to the frustration of visitation, this is not the most common remedy for a number of reasons.¹⁷² Some courts do not elect to award custody to someone as a punishment to the custodial parent because the noncustodial parent is not necessarily a better caretaker of the child.¹⁷³ Consequently, it will not always be in the best interests of the child to switch custody in order to punish the custodial parent from evading the visitation order.¹⁷⁴ Nevertheless, it is well within the court's power to

169. *Id.* at 44 (citations omitted).

170. *Id.*

171. *Id.* at 45.

172. *Laloggia-Vonhegel v. Vonhegel*, 732 So. 2d 1131, 1133 (Fla. Dist. Ct. App. 1999). This case is a good example of a court deciding against a change of custody merely based on a parent's interference with visitation. In this case, the mother moved to from Florida to New York without providing notice to her ex-husband, and the trial court wanted to sanction her by making a temporary change of physical custody. *Id.* The decision, however, was reversed because the appellate court did not believe a change of custody to be the appropriate sanction. *Id.* The court found that:

[T]he general purpose of a civil contempt order is to obtain compliance with the trial court's initial order. The sanction of changing custody does not coerce compliance; rather, it may, in the absence of a finding that such a change is in the best interest of the children, penalize the children for the parent's contumacious conduct. In comparison, an award of make-up or additional visitation may serve both to redress the wrong to the parent and to effectuate compliance with the court's authority.

Id. As a result, the court reversed the change of custody because there was "insufficient evidence to ground a finding that it would be in the children's best interest to be placed in Mr. Von Hegel's custody, even temporarily." *Id.*

173. *Id.* ("The custodial parent's relocating the children to another state is insufficient by itself to warrant a change in custody."). In reversing the change of custody, the court demonstrated that there is an "extraordinary burden of proving a substantial and material change of circumstances such that it would be detrimental to the children to remain in the custody of [the custodial parent]." *Id.*

174. In *J.B. v. A.B.*, the court held that "the award of custody 'should not be an exercise in punishment of an offending spouse. In punishing the offending

award temporary legal and physical custody to the noncustodial parent when there are repeated violations of visitation orders.¹⁷⁵

Due to the potential pitfalls related to ordering a change in custody, courts are more inclined to hold parents in civil contempt for violating custody decrees in order to coerce them into complying with visitation rights.¹⁷⁶ In fact, parents can be held in civil or criminal contempt and sentenced to jail time even when they attempt to comply with the court order and do not intentionally disregard a court order.¹⁷⁷ Furthermore, one does

spouse one may also punish the innocent child, and our law will not tolerate that result.” *J.B. v. A.B.*, 242 S.E.2d 248, 256 (W. Va. 1978) (citations omitted). For a case in which a trial court’s modification of a change in custody is reversed, see *Arnold v. Gouvitsa*, 735 S.W.2d 458 (Tenn. Ct. App. 1987). In this case, the appeals court voided a trial court’s order to change custody based on a mother’s refusal to abide by its prior orders. *Id.* at 463. The decision, however, was voided in this case because of a jurisdictional matter. *Id.* at 463–64. Under the UCCJA, the court found that the trial court erred by making a custody determination under the guise of a contempt proceeding. *Id.* at 463. Since the custodial parent was not given notice regarding a custody proceeding, the court found that notice was defective, and the case was reversed. *Id.*

175. See *Shonkwiler v. Kriska*, 780 So. 2d 703, 704 (Ala. Civ. App. 2000). In this case, the father was granted temporary custody because the mother had deliberately moved twenty times in a four-year period in order to deny him visitation rights. *Id.* at 704. In addition, the mother had left the state with the children for a full year. *Id.* Consequently, the court found that it would be in the child’s best interests to temporarily switch custody over to the father. *Id.* In addition, the mother was sentenced to 30 days in prison. *Id.* at 705.

176. See *generally Ex Parte*: *Rebecca Ann Hudson*, 429 So. 2d 1100 (Ala. Civ. App. 1983) (affirming contempt order for indefinite period of time).

177. See *Kurincic v. Kurincic*, No. 76505, 2000 Ohio App. LEXIS 3957, at *1 (Ohio Ct. App. Aug. 31, 2000) for an example of a parent being held in civil contempt. See also *Whitman v. Whitman*, 2000 Ohio 1935, 1935 (Ohio Ct. App. 2000) for a case of criminal contempt. It is not easy to draw a line between civil contempt and criminal contempt, but the test for determining whether to impose a sentence of civil or criminal contempt was established in *United States v. Shillitani*. *US v. Shillitani*, 384 U.S. 364, 364 (1966). The test that the *Whitman* court used asks the appellate court to discern what the trial court primarily sought to accomplish by imposing sentence.

While both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by character and purpose of the punishment....The purpose of a civil contempt citation is to coerce, whereas the purpose of criminal contempt is to punish.

not even have to prevent visitation to be held in contempt; instead, it is enough to engage in behavior that undermines or alienates a child's relationship with his or her noncustodial parent.¹⁷⁸ In these instances, punishment is considered proper and justified because one cannot use the defense to a charge of civil contempt that one unintentionally disregarded the court order.¹⁷⁹ Generally, when one is placed in civil contempt, it is within the parent's power to get freed from jail by purging his or her contempt by complying with the order.

Judges are not limited to the remedy of incarceration, but, rather, are authorized to provide other remedial relief such as fines in order to coerce the plaintiff's compliance with the visitation schedule.¹⁸⁰ In *Olexovitch v. Carralero*, for example, when the court found that a mother had been alienating her child from her father, the court ordered her to take the child to therapy sessions in order to heal the relationship that she had attempted to wound.¹⁸¹

V. ANALYSIS OF INTERNATIONAL INTERPRETATIONS OF RIGHTS OF ACCESS

A. *Thomson v. Thomson*

While the Convention does not authorize a return remedy for parents with rights of access, it still leaves it up to the courts to decide whether a person had rights of access or rights of custody. In *Thomson v. Thomson*, both parents were seeking custody of their seven month old child in Scotland.¹⁸² The Scottish

Id. (citations omitted). In general, domestic relations cases are more likely to impose civil contempt than criminal contempt. *A.G. v. R.M.D.* 1986 Mo. App. LEXIS 4630, at *3 (Mo. Ct. App. Sept. 2, 1986).

178. See *Olexovitch v. Carralero*, 2001 Conn. Super. LEXIS 580 (Conn. Super. Ct. Feb. 23, 2001).

179. See *Pugh v. Pugh*, 472 N.E.2d 1089 (Ohio. 1984). "[N]o inquiry into intent to disobey is required to determine whether a civil contempt has been committed." *A.G. v. R.M.D.*, 1986 Mo. App. LEXIS, at *8-9. Since intent is irrelevant, good faith is also not considered a valid defense to civil contempt. *Id.* at *9. Instead, one just has to knowingly violate a court mandate. *Id.* at *10. However, judges may take intent into consideration when they are creating a punishment for civil contempt. *Id.*

180. *Olexovitch*, 2001 Conn. Super. LEXIS at 580.

181. *Id.*

182. *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 589 (Can.).

Court granted interim custody to the child's mother and interim access to the father.¹⁸³ Additionally, the court ordered that the child remain in Scotland pending a final order.¹⁸⁴ Nevertheless, Mrs. Thomson took the child to Canada and eventually decided to stay in violation of the court order.¹⁸⁵ If the Canadian court followed *Croll's* rationale that the father only had rights of access, it would have had to refuse jurisdiction to order a return remedy. However, the court in *Thomson* did not refuse jurisdiction.¹⁸⁶ Instead, the court found that "while the Convention does not provide specifically for remedial flexibility, a court must be assumed to have sufficient control over its process to take the necessary action to meet the purpose and spirit of the Convention."¹⁸⁷ The court found that ordering the return of the child would meet the purpose and the spirit of the Convention.¹⁸⁸

B. David v. Zamira

In 1991, a New York family court had to decide whether to return two children to Canada.¹⁸⁹ The facts in this case were similar to *Croll* in that the mother had custody of their son, and the father was granted regular visitation according to their separation agreement.¹⁹⁰ At some point after Zamira gave birth to their second child, David applied for an order to prevent Zamira from removing the children from Ontario and from getting passports for them.¹⁹¹ The Supreme Court of Ontario granted the request.¹⁹² Nevertheless, Zamira left Ontario and David filed an application pursuant to the Hague Convention.¹⁹³ The

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 589 (Can.).

189. *David v. Zamira*, 151 Misc. 2d 630. (N.Y. Fam. Ct. 1991).

190. *Id.* at 632.

191. *Id.* While Zamira had been granted custody of the older child when the couple separated, she was never granted custody of the younger child because she was born after the separation agreement. *Id.* Therefore, while one could argue that Zamira was only violating David's rights of access with regard to their older son, there is no question that she was violating his rights of custody with regard to their younger daughter. *Id.* at 635.

192. *Id.*

193. *Id.*

Ontario Ministry of the Attorney General forwarded the application to the U.S. Department of State, and the Department of State communicated with the New York State Clearinghouse for Missing and Exploited Children.¹⁹⁴ Eventually, the children were located in Brooklyn, New York.¹⁹⁵

When David located the children in New York, he returned to the Supreme Court of Canada and was granted temporary custody of both children.¹⁹⁶ One month later, the Supreme Court of Ontario made a finding that Zamira had wrongfully and improperly removed the children from Ontario.¹⁹⁷ The following month, the Supreme Court of Ontario issued a similar order stating that Zamira was withholding her children from David even though he was entitled to custody and access.¹⁹⁸ Then, David filed a motion for enforcement of the Supreme Court of Ontario's order.¹⁹⁹

In *David v. Zamira*, as in *Croll*, there was a *ne exeat* clause as a result of the separation agreement.²⁰⁰ This case differs from *Croll* in that it is governed by Canadian law, which ordinarily presumes that both parents are equally entitled to custody of a child.²⁰¹ While David had given up his right with regard to his

194. *Id.*

195. *David*, 151 Misc. 2d at 635.

196. *Id.*

197. *Id.* at 632–33.

198. *Id.* at 633.

199. *Id.*

200. *Id.*

201. *David*, 151 Misc. 2d at 634. The New York Supreme Court took judicial notice of the fact that in Ontario's Children's Law Reform Act, which provides that "father and mother of a child are equally entitled to the custody of the child." *Id.* It is worth noting that Ontario's recognition that parents are equally entitled to custody of the child is not universally revered. For example, the National Association of Women and the Law (NAWL) submitted a brief to the Special Joint Committee on Child Custody and Access in March of 1998. NATIONAL ASSOCIATION OF WOMEN AND THE LAW, *CUSTODY AND ACCESS: AN NAWL BRIEF TO THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS* (1998), available at <http://www.harbour.sfu.ca/freda/reports/custody.htm> (last visited Feb. 12, 2005). NAWL is a "national, non-profit, feminist organization active in legal research, law reform, and public education." *Id.* As part of its brief, NAWL believed there was a "growing and disturbing trend by Canadian courts to eliminate the distinction between sole custody with access and joint custody, by giving access parents almost the same rights as custodial parents." *Id.* NAWL also lists a great number of assumptions that it believes are inaccurate. *Id.* For example, NAWL believes

son in the separation agreement, which was executed prior to the birth of his daughter, David was still entitled to equal custody of his daughter.²⁰² Additionally, according to the separation agreement, Zamira was not permitted to leave Toronto, much less Canada.²⁰³

However, in contrast to *Croll*, the court was willing to ensure that the Canadian ruling would be allowed to take effect.²⁰⁴ In fact, the court disregarded the access rights versus custody rights debate by finding that Zamira's "contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario which give temporary custody of both children to the petitioner" made her argument lose its merit.²⁰⁵ Therefore, unlike in *Croll*, the court found that there was a wrongful removal within the meaning of the Hague Convention.²⁰⁶ Since the court also did not find any of the exceptions to the Hague Convention to be applicable, they ordered the return of the children.²⁰⁷

Croll and *David*, may seem inconsistent. However, there is no question that the court in *David* came to the correct decision, for it actually did what the Hague Convention should have set out to accomplish, which is to ensure that the country of habitual residence is able to determine custody disputes, under the presumption that the habitual residence is best equipped to handle such cases.²⁰⁸ This case can, however, be reconciled with *Croll* because of the differences between Canadian and U.S. law. Since Ontario presumes that both parents have rights of custody,²⁰⁹ the court did not find that they had to refuse jurisdic-

that maximum contact with both parents is not necessarily in the best interests of all children, frequent access is not necessarily more beneficial, and proximity is not necessarily an accurate way to predict regular contact. *Id.* Additionally, NAWL also "strongly opposes any presumption of joint custody, in any legislation whether it be federal, provincial or territorial. There is no evidence to support that a presumption of joint custody is in the best interests of the child and the needs of the child." *Id.*

202. *David*, 151 Misc. 2d at 634–35.

203. *Id.* at 635.

204. *Id.*

205. *Id.* Once David was granted temporary custody of both children, Zamira could not longer successfully argue that she was only violating his rights of access as opposed to rights of custody. *Id.*

206. *Id.*

207. *Id.* at 637.

208. See *Pérez-Vera*, *supra* note 31, at 446–47.

209. Children's Law Reform Act, R.S.O., ch. C.12, § 20(1) (1990) (Can.).

tion even though when interpreting an international treaty, treaty definitions should take precedence over State law.²¹⁰ Instead, the court found a wrongful removal and ordered that the child be returned under the terms of the Convention.²¹¹

Since there is no such presumption in Hong Kong, however, the *Croll* court could not proceed once it determined that Mr. Croll did not have rights of custody.²¹² However, even if Hong Kong did have such a presumption, it is the requested State's decision whether there are rights of access or rights of custody.²¹³ Therefore, due to some courts' aversion and inability to interpret foreign law, results in similar cases can be quite different. These two separate outcomes in factually similar situations point out that the Convention fails to precisely define the scope of protected rights. In *David*, the court was forced to interpret Canadian law in order to determine whether the parent had and was exercising rights of custody.²¹⁴ Similarly, in *Croll*, the court had to interpret Hong Kong law to determine whether the parent had and was exercising rights of custody.²¹⁵

The problem is that the Hague Convention was not designed for courts to interpret the family law of foreign countries; this procedure is fraught with problems and is bound to lead to misinterpretation and inconsistent adjudications.²¹⁶ Instead, the

210. In other words, since the court found that David had rights of custody, they avoided the Convention's definition of rights of access.

211. *David*, 151 Misc. 2d at 637.

212. *Croll*, 229 F.3d at 143-44.

213. *Pérez-Vera*, *supra* note 31, at 452 ("As for knowing when joint custody exists, that is a question which must be decided in each particular case, and in light of the law of the child's habitual residence.").

214. *David*, 151 Misc. 2d at 634.

215. *Croll*, F.3d at 135.

216. This difficulty is clearly evidenced in *Friedrich v. Friedrich*. *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) where an American service-woman was living abroad with her husband and child. Following an argument, Mrs. Friedrich brought the child to the United States, and Mr. Friedrich filed a petition under the Hague Convention. *Id.* In the first case, the petition was denied, but the Court of Appeals reversed and remanded the case because the trial court had failed to determine whether Mr. Friedrich had rights of custody under German law. *Id.* On remand, the district court found that there was sufficient evidence to show that Mr. Friedrich had rights of custody because under German law, both parents retain rights of custody unless the court issued a decree limiting the rights of one of the parents. *Id.* The court refused to decide whether Mr. Friedrich had actually exercised those custody rights because it felt that foreign courts should refrain from

Hague Convention should simply ensure that the custody determinations in a child's habitual residence are respected, for there is a strong presumption that the courts in the child's habitual residence are in the best position to protect the best interests of child.²¹⁷ Since there is no reason that a court in a child's habitual residence is any less capable of protecting a child's best interests in cases where a parent has rights of access, there is no reason that these court determinations should not be upheld and reinforced. The best way to ensure that these decisions are respected is by issuing a return remedy, which should be extended to situations in which a parent's rights of access have been unilaterally violated.

VI. CONCLUSION

The Hague Convention on the Civil Aspects of International Child Abduction has not settled with any certainty how States should handle cases where rights of access are violated.²¹⁸ While the *Croll* court tried to interpret the Convention as literally as possible, the court in *Thomson* made a decision based on what it thought were the interests of justice as well as the purpose and spirit of the Convention. Therefore, while *Croll* followed what it was mandated to do by the Convention, the result of that act is questionable because the solution did not reflect the purpose and spirit of the Convention. As a result, it is necessary for an amendment to the Hague Convention to harmonize the purpose and spirit of the Convention with the interests of justice. To do so, the Hague Convention should authorize a return remedy for parents with rights of access. Such an amendment would not only benefit the left-behind parent with rights of access, but would also benefit the international community because it would ensure that the custody determina-

making policy decisions, but, rather, allow the home state to determine the merits of the custody dispute. *Id.* at 1065.

217. *Pérez-Vera, supra* note 31, at 434-35. As Pérez-Vera noted:

[S]ignatory States [must] be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon the questions of custody and access.

Id.

tions of the habitual residence would be enforced. Most importantly, however, it would benefit the child, because there is no reason to believe that the harmful effects of separation from a parent are lessened based on whether the child's parent had custody or merely rights of access. In addition, the return remedy will ensure that the laws of the home state are respected and enforced, another important goal of the Convention. As a result of this change, even more abductions would be prevented, for there would be even less incentive to forum shop. Further, justice will be served because the best interests of the child will be given paramount importance. While the majority opinion claimed that the Convention would be unworkable if a *ne exeat* clause were to lead to a mandatory return,²¹⁹ this is simply evidence of the Convention's failure to take into consideration the likely harmful effect such a disruption will have on a child's life.

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219. *Croll*, 229 F.3d at 143. See Weiner, *supra* note 34, at n.125. Here, Weiner argues that the court's reasoning for claiming that the Convention would become unworkable if it required return of a parent who left the country in violation of a *ne exeat* clause was problematic ("The court's reasoning was tautological. Only by defining the issue at hand as 'rights of access' could it reach this result.").

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