

## THE INTERNATIONAL ABDUCTION OF CHILDREN BY A PARENT OR GUARDIAN

Memorandum by the Commonwealth Secretariat and a  
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Law Ministers will recall that at their Winnipeg Meeting, the problem of parental abduction of children from the parent with lawful custody was discussed. It was seen as one of immense social importance requiring concrete and early action to achieve greater co-operation in the enforcement of custody orders. Ministers emphasised that their concern was for the welfare of the children involved and felt that the existence of Commonwealth arrangements could reduce the number of unhappy incidents all too common in their jurisdictions.

2. The Commonwealth Secretariat invited Mr. J. M. Eekelaar, a Fellow of Pembroke College, Oxford to review the position and make recommendations for the consideration of Ministers at their Barbados Meeting, and his paper is attached.

3. In his paper Mr. Eekelaar reviews the legal principles which have developed within the Commonwealth in response to this problem. Although his review principally embraces decisions of Commonwealth courts, he makes reference to the legislative measures taken in some jurisdictions to redress injustice and minimise distress in this area. After a brief discussion of developments in the U.S.A., Mr. Eekelaar reviews attempts made at the international level to secure agreement between states on appropriate measures to be taken to enhance co-operation in these cases.

4. Mr. Eekelaar then examines and compares the two principal international instruments designed to deal with the problem of "parental kidnapping" (the European Convention adopted by the Council of Ministers last year, and the Preliminary Draft Convention adopted by the Special Commission of the Hague Conference on Private International Law during the same year).

5. Mr. Eekelaar concludes that in many respects The Hague document is superior to the European Convention, and offers substantial advantages to Commonwealth countries over the latter Convention. He urges that Commonwealth countries disposed to take steps to combat the problem of international child abduction should take an interest in the final drawing up of The Hague Convention when it is further considered at a Plenary Session of the Conference late in 1980. He suggests that, ultimately, Commonwealth countries should make that Convention the basis of an international system to protect children from the ordeals presently encountered.

6. Law Ministers may wish to discuss the matter in the light of Mr. Eekelaar's review and recommendations and decide how it should be taken further. If The Hague approach commends itself, in principle, to a number of Ministers, they might wish to consider how best to influence the deliberations of the Plenary Sessions later this year for the benefit of the Commonwealth and international community.

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By J. M. Eekelaar, LL.B., B.C.L., M.A., Fellow of Pembroke College, Oxford; Research Fellow, Centre for Socio-Legal Studies, Wolfson College, Oxford; Vice-President, The International Society on Family Law

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## Introduction

It might be useful, in formulating a "Commonwealth" view of the inter-jurisdictional problems raised by the abduction of children by a parent or guardian across international frontiers, first to examine the ways in which this difficulty has presented itself to Commonwealth courts and the kinds of solutions they, as reported in the law reports, have sought. The examination will in the first instance be a chronological one and it will be followed by an attempt to isolate and analyse specific sets of problems which have occurred. The next step will be to compare the stance generally adopted by Commonwealth courts and (where relevant) legislation with that taken in the United States and the approaches of those international agreements which are relevant. Finally, an attempt will be made to evaluate possible approaches to the problem.

## The English experience

2.1 We commence our account with a review of the course which the English courts have taken. They must be seen in a context where the basic assumption about the ability of the English courts to exercise jurisdiction in child cases is that they may do this with respect to any child who is physically present within the country.<sup>1</sup>

2.2 This is not the only assumption, although for the present purposes it is perhaps the most important because it determines the form that the question takes in England, and other Commonwealth countries which follow this rule<sup>2</sup> when the case of an abducted child comes before the court. The question that is asked is not whether the court *has* jurisdiction to deal with the case but whether the jurisdiction *should be exercised* in such a way that the court investigates the merits of the case in detail or whether it should make what is sometimes called a "peremptory" order for return of the child, i.e. without a full investigation of the competing claims.

2.3 So far as the modern problem is concerned<sup>3</sup> the story, as reflected in the reported cases, commences with a case in 1940<sup>4</sup> concerning an Englishwoman who married a Belgian and subsequently returned to England with the child of the marriage

which had been born in Belgium in 1928 and had lived there since its birth. It is not clear from the report how long after the child's birth this happened, but in 1937, without notifying the mother, the father commenced divorce proceedings in Belgium and the Belgian court made an *ex parte* interlocutory order that she return the child to the father. This was served on her in 1938, over a year after it was made and, indeed, in the following year she was fined in her absence by the Belgian court for failing to comply with it. The father then instituted wardship proceedings in England with the demand that the mother be ordered to return the child to him. Morton J. regarded himself as being bound by section 1 of the Guardianship of Infants Act 1925 (now the Guardianship of Minors Act 1971, s. 1) to make an assessment of the child's best interests and to base his decision on that assessment as the "first and paramount consideration, whether orders may have been made by the courts of any other country." He was prepared to pay some attention to the Belgian order, but there was no evidence that the Belgian court had taken into account the child's interests and in any case the child had now been in England for two years. He decided that the child should remain in England, at least "for the time being", and seemed to anticipate that the Belgian court would eventually go into all the merits itself when finally disposing of the divorce proceedings.

2.4 The case is of importance because it provided the basis of much discussion in the next significant case, *McKee v. McKee*<sup>5</sup>, a decision of the Privy Council on appeal from the Supreme Court of Canada. This case has exerted a very powerful influence over the approach of Commonwealth courts to this problem, but it also reflected a diversity of judicial opinion which was to recur in later cases. In itself it serves as a telling example of the inadequacies of the legal system when confronted by this problem, especially when those inadequacies are exploited by parents and lawyers to their (or their client's) advantage without much apparent concern for the interests of the child. It is perhaps not irrelevant that in *McKee* the father was himself a lawyer. The legal proceedings had started as far back as 1942 when, in divorce proceedings, the Superior Court of California gave custody to the father. In 1945 this was modified by transferring custody to the mother, with access to the father. The father's exploitation of the appeal system in California gave him two more years with the child. When he had lost his final appeal, he surreptitiously removed the child to Ontario where, in 1947, the mother sought the custody of the child in habeas corpus proceedings. After an eleven day hearing, Wells J. decided that the child's best interests

1 *Re P. (G.E.)*, [1965] Ch. 568.

2 New Zealand: Guardianship Act 1968, s. 5(1); Australia: Family Law Act 1975, s. 39(4)(c).

3 It is not entirely new. Conflicts between English and Scottish courts caused difficulty in the nineteenth century: see for example, *Stuart v. Moore* (1861) H.L.C. 440.

4 *In re B's Settlement, B. v. B.* [1940] Ch. 54, hereafter referred to as *re B* (1940).

5 [1951] A.C. 352, hereafter referred to as *McKee*.

would be served by leaving him in Ontario and the Ontario Court of Appeal, after a six day hearing, agreed (Robertson C. J. O. dissenting). The Supreme Court of Canada reversed this by a 4–3 majority. The judgment of Cartwright J., for the majority, is a significant statement of what was later to emerge, in the mid-sixties, as a dominant view. He said:

...no case to which we were referred is authority for the proposition...that where, as in the case at bar, an infant and both of his parents are citizens of a foreign state in which they all are domiciled and have always resided, when the question of such infant's custody had been fully litigated in the courts of such state, and those courts after full and careful hearings have reached a decision that one of the parties is to have custody, the other party upon such decision being given, by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the Court whose jurisdiction he himself invoked and in breach of his own agreement which had been ratified by such Court, becomes entitled as of right to have the whole question re-tried in our Courts and to have them reach a new and independent judgment as to what is best for the infant."<sup>6</sup>

Cartwright J. distinguished *Re B.* (1940) on the grounds that in that case the mother was a British national, *bona fide* resident in England and that, in any case, the Belgian order was only interlocutory.

2.5 The Judicial Committee of the Privy Council reversed the Supreme Court of Canada. Lord Simonds stated that "it is clear that it was the duty of Wells J. to determine the issue before him by reference to the familiar principles which are applicable in regard to the custody of infants..." (i.e. that the welfare of the child is paramount) and that failure to do this was to deprive the child of the protection to which he was entitled as a resident within the Crown's protection. "Once it is conceded that the court of Ontario has jurisdiction to entertain the question of custody...the consequence cannot be escaped that it must form an independent judgment on the question, though in so doing it will give proper weight to the foreign judgment." He conceded that a case might arise where it could be decided that it was in the child's best interests that the court "should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry" but this is described as a "drastic course".

2.6 It was not until 1965 that the problem is again reported, and this seems to have been the beginning of a rash of such cases, for in the mid-sixties the judges often commented on the growing frequency of the problem.<sup>7</sup> In *Re Kernot, K. v. K.*<sup>8</sup> an Englishman had married an Italian woman in Italy in 1961 and in the following year brought the child to England and instituted wardship proceedings. Plowman J. had

ordered the child to be returned to the mother in Italy and this had had the effect of bringing the parties together again for a short period. But in October 1963 they separated again and an agreement was incorporated into an Italian court order that the husband should have custody and the wife rights of access. Shortly afterwards the husband again brought the child to England. The mother followed and instituted wardship proceedings, seeking care and control and permission to take the child back to Italy. Buckley J. gave a number of reasons for holding that he should conduct a full investigation into the merits of the case. One was that it seemed that, as the father was a United Kingdom national, the Italian courts would apply English law to the case and Buckley J. thought he could do this rather better than an Italian court could. However, the argument which must have had overriding consideration was that the mother had invoked the court's paternal jurisdiction and this was one which "one would think, apart from authority, the court ought to be very slow to leave to be exercised by any other tribunal." This develops the logic of the *McKee* judgment (to which the judge referred) that the court cannot escape its duty to form an independent judgment about the child's interests. Deference to a foreign decision is seen as a *delegation* of that duty which cannot be allowed except in the most drastic circumstances.<sup>9</sup>

2.7 The following year saw the first attempt of an English court to derogate from the *McKee* principle.<sup>10</sup> Like *McKee*, it was a case where the father was an American attorney. He married a Scottish lady in the United States and five years after their second child was born they separated under an agreement according to which she was granted custody of the children but agreed not to remove them from a named district in New York without the father's consent. In subsequent variation proceedings a New York court added the rider that this restriction should not include vacation trips. Then the mother took the children to England, apparently with a view to persuading her second husband to follow her there, but she did not inform the father. He obtained a New York order for the return of the children which, on the mother's failure to comply, was converted into an order granting him exclusive custody. The mother now instituted wardship proceedings in England to protect her position and the father countered by seeking an order for the immediate return of the children. Cross J. said that common-sense showed that

"...these children are American children and their home has always been in the United States. The action of their mother in bringing them to this country...without their father's consent or any order of the American court, in the hope that she might be able to set up home here and in effect cut them off from their father entirely was in my mind most reprehensible.... Now for the court to go

6 [1950] 3 D.L.R. 577 at 582–3.

7 See *In re H. (infants)*, [1966] 1 W.L.R. 381, 389; *re E.(D) (An Infant)*, [1967] Ch. 287, 289; *in re T (Infants)*, [1968] Ch. 704, 714; *Re A (infants)*, [1970] 3 All E.R. 184, 186.

8 [1965] Ch. 217, hereafter referred to as *Kernot* (1965).

9 Buckley J. seemed to contemplate this possibility only if the child were physically outside the jurisdiction and there was no, or only very tenuous connection, between England and the child and its parents.

10 *In re H. (infants)* [1966] 1 W.L.R. 381 hereafter referred to as *In re H* (1966).

into the merits of this case will inevitably result in a great advantage to the mother and a great disadvantage to the father.<sup>11</sup>

He concluded by saying:

“In infancy cases the welfare of the infant is, of course, the chief consideration; but it is far from being the only consideration. When, in what I may call for short a kidnapping case, the judge has to decide whether to send the child back whence he came or allow the case to be fought out to the end over here, he has to weigh various considerations which may to some extent conflict with one another. On one side there is the public policy aspect, the question of comity and forum conveniens. Again, on the same side, there is the question of the injustice which may be done to the wronged parent if the court delays matters and allows the kidnapped child to take root in this country. On the other side, the court has to be satisfied, before it send the children back, that the children will come to no harm.”<sup>12</sup>

Cross J. distinguished *re B.* (1940) on the ground that the Belgian hearing had not been a full one; he distinguished *McKee* by saying that the reason why the Supreme Court had erred in that case was because it held that the trial judge had no right at all to go into the merits. It was a question of discretion and, if the trial judge chose to make the investigation, this could not be said to have been wrong. Finally, he found *Kernot* (1965) to be different because the father there had been a United Kingdom national, the Italian court would have applied English law and in any case the Italian court had given the father custody. None of these points of difference seems convincing, however, for, as has been pointed out, those earlier cases had rested primarily on a conception of the near non-delegable duty of the English court when exercising its paternal jurisdiction to place the child's interests as the paramount consideration and to be satisfied on that score. He ordered the children to be returned to New York. On the appeal from Cross J., Willmer L. J. put the two sides of the argument very clearly—the “common sense” view that the children's future should be decided in the country “where they belong” and the view that the court should not abdicate its responsibility towards its wards. However, he did not think that that responsibility always required a full investigation, and if *McKee* had decided that, he would not follow it. A Privy Council decision is not binding on English courts. But he accepted Cross J.'s reasons for distinguishing it.

2.8 Cross J. restated his “new” principle, which I will refer to as the “Cross” principle, in the following form in *re E(D) (An Infant)*.<sup>13</sup>

“... a judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.”

This statement marked what turned out to be the high water mark of the reaction against *McKee*. Even in the case in which it was made, which was a flagrant case of abduction by a grandfather (assisted by a

lawyer) and deception of a New Mexico judge whom Cross J. recognised as being the “one person in the world in a position to make (the decision) with full knowledge of all the relevant facts”, he held that nevertheless the children should not be returned. But this was a very unusual case in involving the death of the mother and the judge was satisfied that to return the children would be disastrous for them. In *re T. (Infants)*<sup>14</sup> the “Cross” principle was extended. An Englishwoman had gone to Canada and had met and married a Canadian there. While the husband was on a short holiday, she returned to England with the two children. The husband took six months leave and came over to England where, to protect her position, the wife instituted wardship proceedings. The husband attempted to take the children back to Canada with him but was stopped at the airport by members of the wife's family. Pennycuik J., however, made an order giving him leave to take the children back with him and the mother appealed on the ground that he had failed to consider whether it was in their best interests to be with the husband or the wife. It will be observed that, in this case, there had been no proceedings in Canada but the Court of Appeal did not consider this a significant difference from the earlier cases. Both Harman and Russell L. JJ. seemed to think that the court had in fact heard all the evidence that was available, but it is clear that they did not regard the function of the proceedings as being to discover which parent it was better for the children to live with. The point of a case of this kind, said Harman L. J., “is that these children belong in Canada and, other things being equal, there they should go.” Thus the position at this stage seemed to be that, even if there were no order of the foreign court, if the children properly “belonged” to a foreign jurisdiction, the English courts should order their return there unless this would harm them. It should be added, however, that there was a strong parallel motive in that case and this was that the court considered that it was only if the children remained in Canada that they could maintain a relationship with their father and this assumption about their interests strongly influenced the decision.<sup>15</sup>

2.9 The new principle received further support in *re G. (an infant)*,<sup>16</sup> even though this was not a case of abduction at all. The parties had married and lived in England but the husband retained his Scottish domicile and he returned to Scotland after the marriage broke up. There he instituted divorce proceedings and the Scottish court granted him custody, although this may have been done more because the mother was ignoring these proceedings than out of consideration of the child's welfare. The father instituted proceedings seeking an English order in the same terms as the Scottish. Buckley J. showed his deference to *McKee* and *re B.* (1940) by saying that they showed that the foreign order was not binding and that the child's welfare was paramount. Nevertheless, he

11 [1966] 1 W.L.R. 381, 389.

12 *Ibid.*, at p. 393.

13 [1967] Ch. 287, 289, hereafter referred to as *re E.(D)* (1967).

14 [1968] Ch. 704, hereafter referred to as *re T.* (1968).

15 See para. 5.6 below.

16 [1969] 2 All E.R. 1135, hereafter referred to as *re G.* (1969).

pointed out that, because Scotland was the country of the parties' matrimonial domicile, the Scottish and not the English courts had divorce jurisdiction and the English court should defer to the divorce court. "I think," he said, "that, as between two courts of co-ordinate jurisdiction, one in this country and the other in Scotland, *prima facie* the right course is for the matter to be investigated in the Scottish court which had seisin of the matter before these proceedings began and which has made the order I have mentioned." He emphasised that he did not have sufficient evidence to make a final determination of the "merits" relating to the child's welfare, but he did feel satisfied that the child would not suffer "any serious emotional or physical disadvantages" by being left with the father.

2.10 A qualification to the emerging principle was introduced in *Re A (infants)*.<sup>17</sup> Here the parents, both English, had gone to Jersey soon after their marriage, and two children had been born there. When marital difficulties arose, the father took the children to stay with his parents in England. It had been agreed between the parents that he should do this, but also that he should return them to Jersey after a short time. This the husband did not do and the wife tried, unsuccessfully, to take them back with the help of "three detectives". Wardship proceedings were instituted by both parties, the mother arguing that this was a case where a peremptory order for the return of the children should be made. The Court of Appeal disagreed. This was not a "kidnapping" case, said Harman L. J., since there had been no removal of the children by stealth and it was "not as if the father has, so to speak, by fraud induced the mother to agree that they should come over here and had then suddenly sprung on her the idea that they would not go back." He appeared to accept the new principle for "genuine" kidnapping cases, but for this situation he fell back on the principle that the children fell within the protective jurisdiction of the court. It may be observed at this stage that a refusal to consider this type of case as falling within the same category of cases as those already considered would exclude from the ambit of the abduction problem all those cases where a child visits another jurisdiction under terms of an access order and the visited parent refuses to return the child. This, as the United States experience has shown, is a very significant part of the problem.

2.11 In *re TA (infants)*<sup>18</sup> Rees J. re-affirmed the new principle as being that where children, ordinarily resident abroad, had been removed to England by force, stealth or fraud, the court would order their return unless positively satisfied that to do so would cause real danger to their mental, physical or moral well-being. Yet one may wonder at its application in the case. The parties were Maltese and, after fifteen years of marriage there, they separated and a Maltese court awarded custody of the four girls to the father. The mother took them to England and the hearing of the wardship proceedings took place only four

months after their arrival. Yet the judge decided that they should stay in England in the care and control of the mother. The judge commented adversely on the husband's moral behaviour and observed that the children were extremely hostile towards him, having "settled happily at school and life in England". No attention was paid, as it had been in *re T.* (1968), to the question of maintaining contact with the father and, more significantly, the Maltese order was ignored. The English court appeared fairly clearly to be substituting its own view of the husband's behaviour and the children's welfare for that of the Maltese court.

2.12 *Re L (minors) (wardship: jurisdiction)*<sup>19</sup> saw a decisive return to the *McKee* approach in a judgment delivered by Buckley L. J. who, nine years earlier, had followed it in *Kernot*. An Englishwoman who had married a German in Germany and lived there with him had become unhappy with her marriage and, without informing her husband, brought the two children to England and settled them in schools here where she intended to stay. Her husband traced her and, a year after their arrival, Cumming-Bruce J. directed their return to Germany. A stay of execution of this judgment was refused because the husband undertook to return the children to England should the order be reversed on appeal. The appeal was dismissed but in the course of his judgment Buckley L. J. criticised the reasoning of Cumming-Bruce J. That judge had said that on balance it would have been better for the children to be in England but that, as it was a kidnapping case, different considerations applied and the children should be returned to their "natural surroundings" unless this would be harmful to them, which, in this case, it would not. Buckley L. J. thought that this reasoning was inconsistent with the House of Lords decision in 1970 of *J. v. C.*<sup>20</sup> which asserted in general terms the paramountcy of the welfare principle in the exercise of the wardship jurisdiction even if the contest over the child was between a parent and someone who was a stranger in blood to the child. Even if there had been a foreign order "an English court is nonetheless bound in duty to protect the child's welfare without being bound to enforce the foreign order or to follow it."<sup>21</sup> This is reminiscent of the judge's unwillingness, expressed in *Kernot*, to rely upon a foreign court's assessment of the child's welfare because this would be an improper delegation of the English court's duty. Nevertheless, he did say that there might be cases which, if brought to the court expeditiously on the child's arrival in England, should result in the child's immediate return because a judge might decide that the removal of the child from its surroundings was so disruptive that a prolongation of its stay in England, even to enable a full investigation to be made, would be contrary to its interests. This, he thought, was the true basis of *In re H.* (1966) and was a sustainable ground for the decision of Cumming-Bruce J. There is, of course, a decisive shift from the "Cross" principle under which children are returned to the

17 [1970] 3 All E.R. 184, hereafter referred to as *Re A* (1970).

18 (1972) 116 Sol. Jo. 78, hereafter referred to as *re TA* (1972).

19 [1974] 1 All E.R. 913, hereafter referred to as *re L.* (1974).

20 [1970] A.C. 668.

21 [1974] 1 All E.R. 913, 925.

foreign country either (i) because that would comply with the order of the foreign court or (ii) because it is more appropriate *that the issue be determined* in that forum.

2.13 In this state of the authorities it is not surprising that the position taken in the mid-seventies was uncertain. In *Re M-R (a minor)*<sup>22</sup> the husband had taken the children to England without the wife's agreement but in an attempt to induce her to follow him there. She then obtained an *ex parte* interim custody order in her favour. Lord Salmon is reported as saying that a court could make a "peremptory" order for the return of the child "if it considered it to be in the best interests of the child" (which reflects Buckley L. J.'s exposition in *Re L*) but concluding that he could make the peremptory order if satisfied that this would cause no harm to the child (the "Cross" view). In *re K (Infants)*<sup>23</sup> the trial judge had made a "peremptory" order for the return of four children to Canada, fifteen months after her arrival in England. The court assumed she had kept them in England without her husband's consent. He subsequently instituted divorce proceedings in Canada. The Court of Appeal allowed the mother's appeal. Stamp L. J. said that a "peremptory" order might often be appropriate and he appeared to approve the "Cross" principle, although he thought the trial judge had been wrong to order the return of these children because there was evidence that the return was "fraught with dangers" for them. Ormrod L. J. went further and, echoing Buckley L. J. in *re L*, said that the "Cross" principle might require reconsideration in the light of *J. v. C*.

2.14 Eventually Ormrod L. J. had the opportunity to review the whole situation. This was in *Re C. (minors) (wardship; jurisdiction)*.<sup>24</sup> As in *re E(D)* (1967) the case involved an abduction (this time by the father) in breach of an interim custody order of a California court and while that court was in the process of investigating the merits. Within a month of their arrival in England there was a wardship hearing and the trial judge, having heard much evidence, decided that the children should remain in England. The appeal, which was heard a week later, was dismissed. Ormrod L. J. described Buckley L. J.'s judgment in *Re L* (1974) as being the *locus classicus* as to how English courts should approach the problem. He expressly rejected the trial judge's interpretation of that judgment, which was that he should make a peremptory order for return of the children unless satisfied that there was some obvious physical or moral danger to the children in that course. This was a "serious" misdirection. The proper approach was the one applicable to all decisions concerning child custody—that of the children's best interests. He therefore examined all the circumstances, one of which was evidence that it was "highly likely" that the California court would have in any case granted custody to the father because California law preferred a parent in a dispute between a parent and

stranger in blood unless an award to the parent would be "detrimental" to the child. Relying, *inter alia*, on that information and the view of the divorce court welfare officer, who had paid a brief visit to the father and his new wife, he concluded that the children's interests would be better served by them staying in England than by returning them to California where the court was likely, at the end of the day, to award them to the father, with the result that they would come back to England again.

## The Commonwealth experience

3.1 The experience of Commonwealth countries has been of a similar conflict of judicial response. In New Zealand, for example, in *Re B. (Infants)*<sup>25</sup> the Court of Appeal held that it was required by the terms of the Guardianship Act 1968, section 23(1), to resolve custody disputes in accordance with the welfare principle and that it would, therefore, have to be satisfied on the merits of the case relating to the child's welfare, ignoring possible questions of international comity. In that case the children had been removed from Australia to New Zealand but at a time when there was no Australian order in force. Although an interim order was later made in Australia, no question of recognising any final order arose. But in *C. v. C.*<sup>26</sup> the father had taken the child to New Zealand in breach of a Canadian order made after full investigation. Speight J. followed the decision in *Re B* (1971: N.Z.) and decided, on the merits, that the mother should have custody. But he was nevertheless prepared to derive "substantial assistance" from the decision of the Canadian court. He commented on the extreme hardship which had been caused to the mother who had to follow the absconding father to New Zealand and to undertake proceedings there, and to mitigate this he ordered the father to pay her travel expenses. In *E. v. F.*<sup>27</sup> the child was in New Zealand with his father under access arrangements contained in an English custody order. While there he apparently decided he preferred to stay in New Zealand, despite the requirement that he return to England. The father sought the guidance of the court. Mahon J. expressed misgivings about a policy which required him to investigate the merits of the case when it was proposed to depart from the arrangements in a foreign custody order, but did so nevertheless. Yet the arrangements had been made when the child was a good deal younger and it is quite possible that an English court would have deferred to his strong preference to remain in New Zealand, in which case it would have been extravagant to have transferred the hearing, and the child, to England for the matter to be determined.

25 [1971] N.Z.L.R. 143, hereafter referred to as *Re B* (1971: N.Z.); see D. J. S. Laing, "The Status of Foreign Custody Orders in New Zealand", 7 V.U.W.L.R. 351..

26 [1973] 1 N.Z.L.R. 129, hereafter referred to as *C. v. C.* (1973: N.Z.).

27 [1974] 2 N.Z.L.R. 435, hereafter referred to as *E. v. F.* (1974: N.Z.).

22 (1975) 5 Family Law 55.

23 (1976) 6 Family Law 150.

24 [1978] 2 All E.R. 230, hereafter referred to as *re C* (1978).

3.2 In Australia, the Family Law Act 1975 made provision for the registration of foreign custody orders. It is enacted that where an "overseas custody order", which is an order made in a "prescribed overseas country" is registered in a court under the Act, the Australian court shall not, "where it becomes aware of the order" exercise jurisdiction in proceedings for custody of or access to the child unless *either* every party concerned has consented to this *or* it is satisfied that there are substantial grounds for believing that the welfare of the child will be adversely affected if the court does not exercise jurisdiction. Furthermore, even if it does exercise jurisdiction, it shall not make any custody or access order unless satisfied that either the child's welfare will be adversely affected if the order is not made or that there has been a change of circumstances of the child justifying the order.<sup>28</sup> The New Zealand Guardianship Amendment Act 1979 enacts corresponding provisions in New Zealand so that, effectively, there now exist arrangements for the reciprocal recognition and enforcement of custody orders between Australia and New Zealand. Of course such provisions are unlikely to be invoked in cases of secret abduction, for there the difficulty is that one of the parents has acted in irregular fashion. Nevertheless, in *In the Marriage of P. and B.*<sup>29</sup> McGovern J. held that the Australian provisions could provide an analogy as to how a court should approach a case where a child is subject to an *unregistered* overseas order. In such a case, it was held, the court should not interfere unless by consent of the parties or on satisfaction that the child's welfare required this. Instead, the court should act in the interests of comity and, provided it was satisfied that no harm would come to the child by it, the child should be returned if the foreign court was the forum *conveniens*. Although another judge has taken a different view,<sup>30</sup> the Full Court in an unreported case<sup>31</sup> supports Goldstein J.'s approach.

3.3 In Canada, the decision in *McKee* was binding on all courts. Commenting on the course of decisions since that case, Christine Davies has observed that more recently the courts have tended to stress "that the welfare of the child is better served if he is to be returned to his place of ordinary residence and custody determined there."<sup>32</sup> But if the child has developed roots in the province in which the case is brought or if the court is fearful for its welfare if the child is returned, the court will investigate the merits. Nevertheless differences of judicial opinion could still be found, as in *Oakes v. Oakes*<sup>33</sup> and *Re Stalder and Wood*.<sup>34</sup> The situation is complicated by the

possibility that custody orders may be made both under provincial child welfare law provisions or under the federal Divorce Act. An order under the latter jurisdiction has effect throughout Canada and supersedes a provincial order. This means that the weight to be given to an extra-provincial order may depend on the nature of both the existing and the previous proceedings. For example, if the present proceedings are within the divorce jurisdiction, a court may be less hesitant to make an order if the competing order was a provincial one, and if the present proceedings are under the provincial jurisdiction the court may be powerless to make an order in the face of an existing order under the divorce jurisdiction, although the point is controversial.<sup>35</sup>

3.4 These factors made the enactment of clarifying legislation urgent in Canada and this has been provided in the form of the Extra-Provincial Enforcement of Custody Orders Act drawn up by the Uniform Law Conference in 1974 and enacted in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Prince Edward Island and Saskatchewan (Nova Scotia adopting a variant of it). The statute does not apply to orders made under the divorce jurisdiction. Its scope is limited to cases where there is an existing custody order in effect and its principle is that a local court should give effect to this order if made in any foreign "province, state or country" as if the court itself had made the order unless satisfied that the child did not, *at the time when the order was made*, "have a real and substantial connection" with the province, state or country where the order was made. But the court may depart from that order, and vary it according to its own judgment, if it is satisfied that at the time the application before it the child no longer has the "real and substantial connection" with the foreign province, state or country and now has such connection with the jurisdiction of the forum. There is an emergency jurisdiction allowing the court to disregard the rules set out above if it is satisfied that the child would suffer "serious harm" if an existing custody order was complied with.

## The U.S. Uniform Act

4.1 The final approach to be summarised is that of the United States Uniform Child Custody Jurisdiction Act. Reference to this is justified by the fact that it was the first and most significant attempt to rationalise an approach to this problem within the common law legal systems. The Act has been written about extensively.<sup>36</sup> Its provisions have been adopted in 26 states. It is necessary therefore only to sketch out its main features. The Act is confined to relationships

28 Family Law Act 1975, s. 68.

29 (1978) A.L.M.P. 3491 31 F.L.R.; (1978) F.C.C. 77, 315.

30 *In the Marriage of Kress*, (1976-7) 13 A.L.R. 309, where Goldstein J. took the view that section 64(1)(a) of the Act, which establishes the welfare principle as paramount in custody proceedings, required a full investigation.

31 *In the Marriage of Khamis*, 1978: discussed in Attachment A to the Australian Reply to the Hague Questionnaire.

32 Christine Davies, "Interprovincial Custody", 56 Can. B.R. 17, 23 (1978).

33 (1975) 56 D.L.R. (3d) 737 (App. Div. N.B.).

34 (1975) 54 D.L.R. (3d) 157 (C.A., Man.).

35 See Christine Davies, *loc. cit.*

36 See Brigitte M. Bodenheimer, "Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification", 65 Cal. L.R. 978 (1977); "The International Kidnapping of Children; the United States Approach", 9 Family Law Quarterly 83 (1977); and literature cited therein. Richard Stern, "Stemming the Proliferation of Parental Kidnapping: New York's Adoption of the UCCJA" 45 Brooklyn L.R. 89.

between the states of the United States, although it may be applied by analogy in an international case.<sup>37</sup> Unlike the Canadian Act, it is not confined to situations where there is an out-of-state decree. This is because it approaches the problem in the classic manner of the conflict of laws by attempting to create uniform jurisdictional rules. Thus the forum may only exercise jurisdiction if these rules are complied with. The rules are complex and make use of two key concepts. One is the concept of the "home state". This is the state in which *the child* "immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six months" (or since birth if the child is under six months). Thus a court may exercise jurisdiction if it is a court of a state which is the "home state" of the child at the time the proceedings start or had been the home state within six months of that time if the child is absent "because of his removal or retention by a person claiming his custody or for other reasons" provided that a parent or person acting as such continues to live in the home state. The other key concept is that of a "significant connection" with the court's state, although this term, unlike "home state", is undefined. This provides an alternative ground for exercising jurisdiction and the court may do so if it thinks it is in the best interests of the child to exercise jurisdiction because "(i) the child and his parents, or the child and at least one contestant, have a significant connection with this state" and (ii) "there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships." Subject to two provisos set out below, the upshot of this is that, if some other state and not that of the forum is the child's home state and no significant connection between the child and a contestant and the forum's state can be found which enables substantial evidence to be brought before the forum, the court should decline to hear the case. This is so whether or not there exists any out-of-state order. The two provisos allow the court to exercise jurisdiction despite failure to satisfy the above if (i) the child is physically present and "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent" or it appears that no other state would have jurisdiction under substantially similar jurisdictional rules or another state has declined to exercise jurisdiction on the ground that the present forum is most convenient. But even where the court may have jurisdiction in terms of the rules, two circumstances are spelt out in which the court may nevertheless decline jurisdiction. One is where the court finds that it is not the convenient forum and another court is more appropriate; the other is where the petitioner for an initial decree has wrongfully taken the child out of another state "or has engaged in similar reprehensible conduct".<sup>38</sup> These are, of course, discretionary provisions and the Act directs the court's attention to the welfare of the

child and the desirability of communicating with the out-of-state court.<sup>39</sup>

4.2 The Act has explicit provisions relating to the recognition of an out-of-state custody order. This *shall* be recognised if the other court has exercised jurisdiction under statutory provisions which substantially accord with those of the Act or in factual circumstances meeting these standards. The home court may modify the order only if the other court no longer has jurisdiction in accordance with the standards of the Act and if it itself now has jurisdiction. But if it does exercise jurisdiction under these terms, it must give due consideration to the transcript and other records of the previous proceedings.

## Reflections on the common law approaches

5.1 It is of course difficult to construct a coherent set of principles from cases from such diverse jurisdictions and across forty years. Nevertheless, the outlines of some kind of pattern can perhaps be discerned, in retrospect. I will divide the cases very broadly between those where a foreign order exists when the case comes to hearing and where there is no such order, although more refined sub-divisions will have to be made.

### Where there is a foreign order

5.2 These cases include those where an order existed at the time of the abduction from the foreign jurisdiction or the improper retention of the child in the present jurisdiction and those where an order has been made in the foreign court *after* the abduction or retention. In both cases the essential question is the same: should the decision of the foreign court be reopened? The abducting or retaining party will argue that the abduction or retention has itself changed the circumstance and (perhaps) that other new factors have arisen. To this, the "Cross" principle replies that, unless these new events raise a strong *prima facie* case that compliance with the foreign order will harm the child, the court should follow the foreign order. In *McKee* (where the foreign order had been made before the abduction), Lord Simonds said that the court must form its "independent judgment" on the whole question of the child's welfare, but it could give "proper" weight to the foreign judgment. The tension between this approach and the "Cross" principle depends on the weight which it is proper to attach to the foreign judgment. It can be resolved by holding that the "proper" weight is to regard it as providing compelling evidence as to what is best for the child, to be departed from only in exceptional circumstances. This, it will be remembered, was the way in which Speight J. in *C. v. C.* (1973: N.Z.)

37 See *Shalit v. Shalit*, (1978) 8 Family Law 2.

38 This also applies if a petitioner seeks to have an earlier decree modified and he or she has wrongfully taken or retained the child or violated any provision of the existing order.

39 Perhaps strangely, the interest of the child is not referred to in the provision allowing a court to decline jurisdiction on an application for an initial decree for reprehensible conduct: the court may decline "if this is just and proper under the circumstances". The child's interests are referred to in the case of an application for a modification decree by a person guilty of impropriety and in connection with the *forum non conveniens* rule.

moved away from the *McKee*-based approach of *Re B.* (1971: N.Z.) and in the direction of the "Cross" principle.

5.3 It is possible that this approach could be described as truly reflecting the judicial practice examined above were it not for one major factor. This is that, in some cases, there must have been a strong suspicion that the foreign order itself was not based upon the welfare principle. The order of the Maltese court in *re TA* (1972) on the face of it, seems to be based more on notions of patriarchal right than children's welfare. In *In the Marriage of Khamis* [see note 31], Watson J. in the Family Court of Australia pointed out that an order which was not based on the child's welfare would have little significance in Australia. In *C. v. C.* (1973: N.Z.) one reason why Speight J. was prepared to place great weight on the Canadian decision was because he knew the Canadian courts followed the welfare principle. This, it is suggested, may be a central problem in establishing some kind of principle similar to the "Cross" principle at an international level. While it may be reasonable to assume that states or provinces within a federal system will apply broadly similar notions of the welfare principle in custody determinations, and therefore to require state or provincial courts to accord great value to such determinations as indicators of the child's interests, this may not be so between foreign countries.

5.4 Where the foreign order is interim only, it cannot be expected to be based on a full assessment of the child's interests. It will normally be an attempt to "hold" the situation pending inquiry. Sometimes, however, it seems that the order represents a pre-conceived idea of where a child should be, as in *re B* (1940) where it is hard to see any obvious *prima facie* reason why the interim order should have been in favour of the father. On other occasions, the order appears to have been made to punish the abducting parent, as in *re H.* (1966). In *re Kernot* (1965) there had been no judicial assessment of the child's interests at all; the order simply incorporated the parties agreement. In such cases, it is easy to understand judicial reluctance to "abdicate" their function of determining those interests in favour of the foreign judgment.<sup>40</sup>

#### **Where proceedings in a foreign court are in process at time of abduction or retention**

5.5 This category will include cases where a child is removed (or retained) while proceedings are in train but no order has yet been made, but also includes cases where although there was no order (even of an interim nature) when the abduction or retention occurred, such an order may have subsequently been obtained in the foreign court. In these situations there is a strong inclination to order the child to be returned to the jurisdiction of the court which is already seized of the matter. This happened in *re G.*

(1969) where Buckley J., who in other cases followed the *McKee* approach, ordered the child into the jurisdiction (Scotland) in which divorce proceedings had (properly) been instituted. This might be thought a particularly strong example because there had been no abduction of the child at all; the father simply returned to Scotland when his marriage broke up; the child had never been there. Yet the Scottish court was considered the *forum conveniens* and the child delivered into its jurisdiction in the absence of evidence that this would cause it serious harm. It seems possible that the Court of Appeal might have acted in a similar manner in *Re K (Infants)*,<sup>41</sup> where Canadian divorce proceedings had been instituted some time after the children had been brought to England, if the Court had not been convinced that it would have been dangerous to return the children. It seems that similar considerations underlay the decisions of Cross J. in *In re H.* (1966). There had been a good deal of litigation concerning access arrangements in New York prior to the removal of the children and it could be said that those matters were not completely settled there. Indeed, there was much conflicting evidence from American psychiatrists which remained to be assessed by the New York court. It is also clear that, were he not convinced that the circumstances were exceptional, Cross J. would have returned the children to New Mexico in *re E(D)* (1967) as the matter had been put under way in the New Mexico court and should be completed there. However, it must be said that *Re C.* (1978) is contrary to this practice, but this was largely because the court was convinced that the California court would, when it had finished its deliberations on the merits, have decided to order the children to return to England.

#### **Where there have been no proceedings in a foreign court at the time of the abduction or retention**

5.6 These cases have proved to have been very difficult and it seems that the dominant reaction has been to approach the solution through a practical assessment in each case as to what was best to do for the children. In *re T.* (1968) it will be recalled, the Court of Appeal took the view that there was no essential difference between cases where a child was removed in breach of an order of a foreign court and where he was removed surreptitiously even where there had been no such proceedings at that time. If the children "belonged" to a foreign country, that is where they should go if issues concerning their custody arose for determination. However, certain other factors were present in that case which should qualify this approach. In fact it seems that the court did hear extensive evidence, perhaps all that was available, and the court formed a strong view, clearly based on its assessment of the children's welfare, that they should be put in a position where they could retain their ties with their father. This could only be achieved by their return to Canada. In *re A* (1970) the court refused to order the return of the children to Jersey, where the father had failed to return them despite his original agreement to do so. It is true that

<sup>40</sup> See the observations of MacDonald J. in *Walker v. Walker*, 1974 3 W.W.R. 48 (S.C., B.C.), where he came to an independent judgment differing from a California order because the order had not been preceded by a full hearing; see also Watson J. in *In the Marriage of Khamis* (1978) (above note 31).

<sup>41</sup> (1976) 6 Family Law 150.

Harman L. J. thought that this was not a case of acting "by stealth", but it remains that the father did "change his mind". It might be wondered whether the court would have adopted the same attitude if the children had visited him under access arrangements embodied in a Jersey court order and he had acted in breach of it even though he had not intended to do so when the children came to him. *Re L* (1974) was a strong affirmation of the court's duty to decide the case on the merits and it, too was a case where the children had been removed from abroad before any proceedings were instituted there. The decision that the children should go back to Germany was based on an assessment of their welfare. So also the decision in *Re B*. (1971:N.Z.) that the court should decide the merits was made in a context where the children had been removed from the foreign country (Australia) before proceedings had been instituted there. The mother had simply returned to New Zealand (her native country) with the children, contending her married life had become intolerable, and she and the children had been there for a year when the hearing took place. Similarly, in *Norman v. Norman (No. 1)*,<sup>42</sup> where a father had taken the children from their school in Switzerland and brought them out to Australia in an effort to persuade his wife to follow him there from England, Smithers J. decided, both on the basis of the children's interests and on forum conveniens, that the issue should be decided in Australia even though the wife had subsequently obtained an ex parte order in England for their return there. Among other things, he took into account the chances of a family reconciliation if the wife were to come out to Australia.

Of course some cases seem to have a different emphasis,<sup>43</sup> but it can perhaps be suggested that the courts seem to be more ready to examine the merits if the abduction or retention did not violate an existing order nor result from an attempt to evade proceedings already instituted.

#### Particular factors taken into account

5.7 Where a court is investigating the merits of the issue, all factors relevant to that issue may of course be examined. But there are special factors taken into account which are relevant to international abduction cases. Some of these are considered here:

##### *Inconvenience and expense to the innocent party*

5.8 There can be little doubt that this consideration has weighed heavily with courts which have wished to restore abducted children to their country of origin. A striking illustration of the hardships that can be caused to that parent is found in *Re E(D)* (1967) where the mother endured great hardships in following and secretly observing her children. Similarly, in *In re T* (1968) the Canadian father had been put to great difficulty (e.g. having to obtain six months leave) in coming to England and contesting proceedings there, and, as has been observed,

Speight J. was greatly concerned about the hardship caused to the Canadian mother in *C. v. C.* (1973:N.Z.). These difficulties can perhaps in some cases partly be met by ordering the abductor to recompense the innocent party (as in *C. v. C.*).<sup>44</sup> But in *In re H.* (1966) Cross J. was greatly concerned about a more fundamental disadvantage suffered by the innocent party: viz. the fact that his or her chances of being awarded diminish the longer the child is away from them and develops roots in its new environment. This prejudice can, of course, be avoided only by an order for the return of the child.

##### *Distance*

5.9 In his article on the New Zealand approach, D. J. S. Laing finds one ground for supporting that approach as against that of Cross J. the fact that, owing to its geographical location, the problem does not arrive so frequently in that country. This factor could also influence the readiness of a court to order the return of the child. This in itself could be a very expensive undertaking, perhaps even beyond the means of the parties. It could also be very disruptive to the child, a factor which may have influenced the decision of Smithers J. to hear the merits in Australia in *Norman v. Norman* (1968: Aus). It is not a point which seems to have concerned the English courts very much, but in *Re C.* (1978), which marked a return to the *McKee* approach, it is probable that the factor of distance, coupled with the impression formed by the court that the California court would simply return the children to England, again played an important part in determining the court to hear the merits in England. The practical consequences of such travelling and disruption might be thought much more severe than if the competing jurisdictions were, for example, England and Scotland, and it is possible that this might be an unconscious factor distinguishing the outcome of a case like *Re C.* (1978) and that in a case like *re G.* (1969).

##### *Prediction of decision of foreign court*

5.10 We have seen that already in *re Kernot*, (1965) the English court took it upon itself to decide an issue because, among other reasons, it thought that the Italian court would simply apply English law. Most strikingly, in *Re C.* (1978) a strong factor in determining the English court to decide the merits was its understanding that the California court was very likely to make an order that the children should be with their father, who was in England. Furthermore, although this point did not seem to concern the judge in *E. v. F.* (1974: N.Z.), the chance that an English court might have returned the child to New Zealand would seem to have provided a further reason for the issue being determined in New Zealand. These are, it seems, legitimate considerations, for indeed it would be futile to transfer the parties, witnesses and children to a jurisdiction which might itself decline jurisdiction or simply transfer the children back. This argues very strongly for some degree of co-operation between courts so that it can be discovered whether

42 (1968) 12 F.L.R. 29, hereafter referred to as *Norman* (1968): Aus.).

43 For example *Re M-R (A minor)*, (1975) 5 Family Law 55; *Re K (Infants)*, (1976) 6 Family Law 150.

44 Power to make such an order against an abductor has been put on a statutory footing in New Zealand: Guardianship Amendment Act 1979, s. 2, inserting a new Section 22G into the Guardianship Act 1968.

some of the assumptions made by the forum court about its attitudes are in fact correct.

#### *Availability of evidence*

5.11 Undoubtedly the courts have placed a good deal of weight upon the question of which court is likely to have the best evidence before it to determine the children's welfare. In *Norman*, (1968: Aus) for example, where the ability of the husband to cope with his new job would be an important factor, the judge observed that evidence on this could best be given in Australia. This factor also seemed a reason in *Re L.* (1974) for preferring the case to be heard in Germany and why, were it not for the exceptional nature of the case, Cross J. would have ordered the return of the children in *re E(D)* (1967).

#### *Deterrence*

5.12 This is a very obvious reason for making "peremptory" orders for the return of children, and it is articulated by Cartwright J. in *McKee* and Cross J. in *re H.* (1966) and Harman L. J. in *In re T* (1968).

## **Observations on United States and Canadian provisions**

### **Uniform Child Custody Jurisdiction Act**

5.13 As Brigitte M. Bodenheimer has pointed out<sup>45</sup> the working of the Uniform Act has been made difficult by three practices. One is the willingness of some courts still to transfer custody from one parent to the other, not on the basis of the child's interests, but as a punishment against the abductor. Are such orders to be recognised under the Act? Although the Act itself has no provision excluding them, she submits that its "underlying policies" permit refusal to recognise them.<sup>46</sup> As was pointed out above, the fact that a foreign order had the appearance of being a penal order might have been a reason for refusal of English courts to defer it. If provisions are to be agreed on the recognition and enforcement of foreign custody orders, there needs to be some assurance that the foreign court has acted on principles acceptable to the forum.

5.14 The other difficulties mentioned by Bodenheimer are those which arise where the original order divided custody between the parents—that is, where custody is to alternate between them. These of course are compromises (and one wonders how far they are founded on a view of the child's interests) and may become frustrated by the movement of a parent. In such circumstances the original order can hardly be enforced: indeed, as Bodenheimer says, the original decision really left the question undetermined, and the forum will have to make its own decision on the merits. Also a problem were cases where the original order has undergone "excessive modification." Although this might be

dubious practice, Bodenheimer thinks that the modifications should still be recognised under the Uniform Act, otherwise the second forum would be acting in an appellate capacity. Excessive modification might possibly have been the root cause of the difficulties that led to the abduction in *McKee*. However, if foreign orders are to be accorded any recognition, and there is assurance that the foreign court is acting according to the children's interests, it would seem to be necessary to recognise and enforce all subsequent adjustments by the foreign court. This would be the case under the Uniform Act.

5.15 Questions of distance and prediction of the decision of the "foreign" court do not play any explicit role in the Uniform Act. Apart from the emergency jurisdiction and that which is exercisable if no other state has jurisdiction, the forum will not have jurisdiction to hear the case unless the ground rules are satisfied. These require the forum to be in the child's "home state" or the child and a contestant to have a "significant connection" with the state. It may be that the concept of "significant connection" is sufficiently wide so that, on the facts present in cases such as *Re C.* (1978), and *Norman v. Norman* (1968:Aus), that is, if practical considerations (such as distance and prediction of outcome) argue in favour of assumption of jurisdiction, this establishes a "significant connection", and allows the case to be heard. Availability of evidence in the forum is referred to as a necessary condition over and above the significant connection test to enable jurisdiction to be assumed under this head. Better availability of evidence in another state is referred to as one reason why a court, although qualifying under the jurisdiction rules to hear the case, may, in its discretion, decline to do so.

### **Extra-Provincial Enforcement of Custody Orders Act**

5.16 As stated above, this enactment is confined to the enforcement by the forum of foreign orders made by a court of a "province, state or country" with a real and substantial connection with that jurisdiction. No provision is made for difficulties that may arise in the case of penal or indeterminate orders, problems of distance or dangers of excessive movement of children. Nor does the Act extend to abductions where there is no custody order in force.

## **The Law Commissions' Working Paper**

6.1 The English and Scottish Law Commissions have published a Working Paper, with tentative conclusions, concerning the problem of conflicts in custody matters within the United Kingdom.<sup>47</sup> The publication deals with two major concerns: establishing a common basis for the exercise of jurisdiction in custody matters throughout the United Kingdom and providing for a system of recognition,

<sup>45</sup> *loc. cit.* note 36 above.

<sup>46</sup> See *Brooks v. Brooks* 530 P. 2d. 547 (1975), where the Court of Appeal in Oregon refused to recognise a Montana decree which was made "without any evidence of the circumstances of the children" simply as a "punitive" measure.

<sup>47</sup> The Law Commission, Working Paper No. 68; The Scottish Law Commission, Memorandum No. 23: *Custody of Children: Jurisdiction and Enforcement within the United Kingdom* (H.M.S.O.) (1976).

within the United Kingdom, of U.K. custody orders. The cause of the problem is that as between Scotland (and to a much lesser extent, Northern Ireland) and England and Wales, jurisdictional rules on this matter vary and the jurisdiction of the courts is confined to their own country.

6.2 The Commissions believe that the establishment of common jurisdictional rules will go a long way to resolving the difficulties. They suggest, in the first place, that proceedings for divorce, nullity or separation should have pre-eminent status so that, where such proceedings are pending, no other U.K. court should exercise jurisdiction in "independent" custody proceedings (this includes wardship proceedings) "if, and only if, the child in question is habitually resident in that country at the date of the commencement of the proceedings". The concept of "habitual residence" is clarified by a presumption of habitual residence in the country where the child has resided "cumulatively for the longest period in the year immediately preceding the commencement of the proceedings" but no account will be taken of a period of residence during the previous year which has been obtained by the change of the child's residence without lawful authority. The Commissions were undecided as to whether jurisdiction should be conferred by the consent of the parties. Emergency jurisdiction based on mere physical presence would be allowed if this was necessary "for the protection of the child."

6.3 The Commissions propose a general scheme for the recognition and enforcement of custody orders within the U.K. This would involve the registration of the order in the supreme court of another part of the U.K. which should be enforced by that court unless there is a later and competing order of another U.K. court. This scheme would apply to interim orders.

6.4 Certain other ideas are put forward by the Commissions, notably in relation to preventive action, which will be considered later. It is not the purpose of this paper to offer detailed consideration of the Commissions' ideas, but simply to consider their possible adaptation in an international context. In this respect, one major difference between the circumstances facing the Commissions and the international picture is that, within the U.K., all courts are enjoined to give the child's interests paramount consideration in questions relating to its custody. This is seen as a significant point by the Law Commissions.<sup>48</sup> The Commissions set out a number of objectives which they consider jurisdictional rules should seek to attain. They should attempt to ascertain a forum "with which the child and, preferably, other persons concerned, have the closest long-term connections"; the forum should also be convenient for them, which means not only that it should be reasonably accessible, but that the relevant evidence should be available without undue difficulty; the rules should be clear and such that the decision should be recognised abroad; they should discourage

forum shopping.<sup>49</sup> To these objectives there can be little objection. But within the context of a small, culturally homogeneous geographical unit, like the United Kingdom, they may be more easily attained than in an international context. If, for example, an English court declines jurisdiction on the ground that the child's habitual residence is Scotland, to transfer the hearing to Scotland (which may or may not require the transfer of the child there: a child may retain his habitual residence there while remaining at school in England) is a relatively easy matter. So also, the recognition of an interim order in another jurisdiction may involve the return of the child from Scotland to England or *vice versa*, and this is comparatively simple. Nor would it be very disruptive should the final determination require the return again of the child to the jurisdiction from which he had recently been sent back. Finally, the machinery for registering orders within the United Kingdom is likely to work more expeditiously than any procedure that is likely to be devised in registering overseas orders and co-operation between courts will be more easily achieved.

## International developments

7.1 These have been well documented, in particular by the Preliminary Document prepared by C. A. Dyer for the Permanent Bureau of the Hague Conference<sup>50</sup> and the Memorandum presented by the Government of Canada to the Meeting of the Commonwealth Law Ministers in Winnipeg in August 1977. These developments can be chronologically summarized:

**1960:** 48th Conference of the International Law Association at Hamburg adopted a draft Convention on the Recognition of Orders on the Custody of Infants. It considered primary jurisdiction should be placed on the courts of the country in which the child is ordinarily resident. If there is no order in that country, subsidiary jurisdiction is conferred on the courts of the country of the child's nationality or where divorce and related proceedings affecting the child are pending. The draft Convention had provision for recognition and enforcement of custody orders. The Convention has never been ratified.

**1961:** Convention of 5 October concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Children. This has been ratified by seven European countries.<sup>51</sup> The Convention is notable for the primacy accorded to the provisions of the state of a child's nationality. Hence, although the "judicial or administrative" authorities of his "habitual residence" are allowed, under Article 1, to take measures for the protection of his person or property (in this is understood to

<sup>49</sup> Law Commissions, *op. cit.* para. 3.36.

<sup>50</sup> C. A. Dyer, *Questionnaire and Report on International Child Abduction by One Parent* (1978), hereafter referred to as the Dyer Report.

<sup>51</sup> Federal Republic of Germany, Austria, France, Luxembourg, the Netherlands, Portugal, Sweden. It is set out in (1961) 10 I.C.L.Q. 53.

<sup>48</sup> Law Commissions, *op. cit.* paras. 1.7, 1.9 and 2.28.

include custody orders), this is subject to "a relationship subjecting the infant to authority, which arises directly from the domestic law of the state of the infant's nationality" and it is the latter relationship which must be recognised by contracting states. It is true that the "authorities" in the state of the child's habitual residence may take measures for his protection if he is threatened by serious danger to his person or property, but these need not be recognised by other contracting states.<sup>52</sup> Furthermore, while it is provided that measures taken by the authorities of the state of habitual residence remain in force if habitual residence is changed until the authorities in the new state of habitual residence replace them after consultation with the former habitual residence, it is expressly provided that if the child was previously under the protection of the state of his nationality, the measures of that state shall remain in force in the state of the new habitual residence.<sup>53</sup>

It is clear that the drafters of the Convention did not address themselves successfully to the problem of abduction in its modern form.<sup>54</sup> The primacy of measures of the state of nationality is totally irrelevant to the solution of this problem. Nor are there provisions for the enforcement, in one jurisdiction, of orders in another or for the return of abducted children.

**1976:** Two draft conventions were prepared by a Committee of Experts of the Council of Europe: "Draft European Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children" and "Draft European Convention Relating to an International Tribunal on Matters of Custody of Children". The latter has received very little support at The Hague would be irrelevant for Commonwealth purposes, so will be ignored here. The former was adopted in Strasbourg in November 1979. Its provisions will be considered in detail later. In broad outline, its objective is to require states to restore a child "forthwith" to his state of origin if he has been removed or retained contrary to a "decision" of a competent authority of a state of which the child and his parents were the sole nationals and the child had his habitual residence in that state provided that the request for restoration is made within six months of the reduction or retention. Foreign custody orders are to be recognised and enforced in varying degree depending on the speed in which an application to restore the child is made. Provision is also made for the establishment of Central Authorities in contracting states with the tasks of facilitating communication between states on these matters, discovering the whereabouts of children and ensuring the return of children when enforcement is granted.

**7.2 1979** The Special Commission of The Hague Conference discussed the problem in March 1979 and, after setting out its conclusions, a Preliminary Draft Convention was agreed in November 1979.

<sup>52</sup> Article 8.

<sup>53</sup> Article 5.

<sup>54</sup> An attempt to introduce an article dealing with cases of evasion of the authorities having jurisdiction failed: Dyer Report, 42.

This draft also makes use of the concept of Central Authorities, which had been used under other Hague Conventions, with tasks similar to those envisaged under the European Convention. This Preliminary Draft will be compared in detail to the European Convention later, but at this point it will be observed only that one of its major differences from the latter is that it is not, as the European Convention is, premised upon the existence of a prior "decision" in the state of origin. The European Convention is, at bottom, a scheme for recognition of foreign custody decisions. The Hague scheme is not directed at such recognition but instead seeks to achieve restoration of the child where he has been removed or retained in breach of custody rights actually being exercised by another person. Such rights are those conferred by the law of the state in which the child was habitually resident immediately before the removal or retention, whether through operation of law or by reason of a judicial or administrative decision or by reason of an agreement having the force of law in that state. Thus the prior existence of a decision in the state of origin will be relevant in determining whether the removal or retention was in breach of such custody rights, but would not of itself be the basis of the return of the child.

## Assessment

8.1 As a fundamental principle, it is necessary to agree that improper abduction or retention of children is contrary to the welfare of children generally, even if in a particular case it may not be against an individual child's interests. There seems little disagreement over this. Apart from preventive measures, to be discussed later, discouragement of such practices requires arrangements to be internationally agreed for the return of children from the place to which I shall hereafter refer as the "recipient state". Furthermore, if staying access with a parent in a country other than that of the child's normal home is to be encouraged (thus maintaining contacts between a child and both its parents after a divorce), the stability and feasibility of such arrangements will be encouraged by the establishment of effective means by which they can be enforced.

8.2 Although the Conclusions of the Special Commission of The Hague Conference seem to envisage applying the same rules to abduction made in breach of an existing decision as to a removal "by stealth or force" it is not clear whether these two situations can be treated in quite the same way. We will first consider the case of an abduction or retention contrary to an existing order.

### Abduction or retention contrary to existing order (other than interim)

8.3 It seems that an appropriate procedure would be to notify the country in which the child is found (or suspected to be present) of the relevant decision which the appropriate authorities in that country would be obliged to enforce. This is broadly the approach of the U.S. Uniform Act, the Canadian Act, the European Convention and the proposal

submitted to the Permanent Bureau by the United Kingdom representatives. Enforcement should not require reference to a court for decision or confirmation, since this would cause delays in a situation where speed is of the highest importance. However, it must remain open to anyone resisting the enforcement of the order to challenge it before the courts of the recipient state. On what grounds should it be open to resist the order?

8.4 A clear ground of challenge would be that the "foreign" order was not the kind of order contemplated by the procedure. Here it is necessary to refer to the basis on which the original court exercised jurisdiction. It is not possible to avoid the jurisdictional question, at least at this stage. Would it be enough if the original state was the state of the child's nationality, or its mere presence, or domicile and so on? The question of jurisdiction has been much discussed and a few remarks on this will be made below<sup>55</sup> but at this stage it need be said only that the concept of "habitual residence" seems to be the most appropriate. Thus, if it could be shown that the original decision was not made in the state of the child's habitual residence at the time the proceedings leading to the decision were instituted, it should not be entitled to automatic enforcement under this procedure. (This is not to say that it would not, in other circumstances, be relevant).

8.5 The court making the decision must have the best interests of the child as its guiding principle in child custody decisions. It should be enough if this is the general principle of law in that jurisdiction and it need not be set out *expressis verbis* in the judgment in question. I do not think that it would be difficult to get most countries to agree to adopt this standard, especially in the aftermath of the International Year of the Child. Of course, as has been well pointed out<sup>56</sup> the "welfare principle" is an indeterminate one. What is conceived of as being in the best interests of a child might vary from culture to culture. I do not think this should be held against it; indeed, such variation seems to me to be healthy and very much within the spirit of Commonwealth co-operation. It exists extensively even within single cultures (note the polar opposite views taken by the Freudian psychoanalytic school represented in Goldstein, Freud and Solnit, *Beyond the Interests of the Child* and the growing advocacy of alternating custody in the U.S.A.). What is important is that courts, and societies generally, at least agree that the child's welfare is the primary question to which attention must be addressed. One cannot and should not seek more in an international, or even national, context. Unless there are reasons for doubting the good faith of a state that is prepared to declare its acceptance of this principle, other states must be prepared to allow due scope for possibly competing notions of a child's best interests which may be taken by a competent court of the state of the child's habitual residence. It should be a condition for participating in any convention that a state accepts to ensure that this

principle is enjoined upon its competent authorities in deciding these questions.

8.6 The decision should be challengeable on the ground that to return the child would be seriously detrimental to its interests. Most approaches to this problem allow such an emergency clause. There may be obviously extreme cases, as where the child is suffering from physical ill-health where it may be clearly applicable, or circumstances such as those in *re E(D)* (1967). It would be necessary to frame this exception carefully lest it became a loophole whereby the merits of the case generally are re-opened.

8.7 Should the decision be open to challenge (and re-litigation) on the ground of change of circumstances? One has in mind a case such as *E. v. F.* (1974:N.Z.) where the original decision was an old one and it was certainly possible that the English court would have recognised a change in circumstances and allowed the child to remain in New Zealand. Such circumstances could also arise if the original decision had been departed from by mutual agreement between the parties, which probably frequently happens as the years pass. It seems unsatisfactory, especially if the countries are as far apart as England and New Zealand, to be compelled to undergo the expense and disruption of litigating again in England provided that the New Zealand court could be apprised fully of the English proceedings and provided relevant evidence obtainable there was communicated to it. On the other hand, it could be argued that to allow a case which has started in one jurisdiction to be "continued" in another, especially if the child is there in breach of the original arrangements, is to encourage that which we are concerned to stop.

8.8 It may be that there is room for different arrangements between different countries in this respect. If the facts of *E. v. F.* (1974:N.Z.) had arisen in a case involving, say, Germany and France, the balance of advantage, it would seem, would be to send the case (and, presumably, the child) back to the country of the original decision to see whether that decision should be varied. This might even be reasonable between the United Kingdom and the U.S.A. owing to the relative ease of travel between them. But travel between many Commonwealth countries may not be so simple and, if the difference between the cultures is great, as it might be if the countries concerned were, say, Nigeria and Canada, one wonders whether one should put a Nigerian parent to the expense and difficulty of sending a child back to Canada when the Canadian court may, and is even likely to, decide that the circumstances had changed so much since its original order that the child should be sent back to Nigeria again.

8.9 Hence I would suggest, for consideration, that the availability of challenge on the ground of change of circumstances should be a matter which might be subject to bilateral arrangement. In many cases I would suggest that it should not be a ground for challenge at all. But where it might be allowed, it should be carefully defined and circumscribed. For example, it could be framed so as to allow challenge

55 Para. 8.16.

56 See Dyer Report, 30.

only if such change of circumstances is shown as to make it likely, on the balance of probabilities, that a court in the original jurisdiction would vary the original order and it is in the child's interests that the "new" court should hear the issue. The provision should be accompanied by measures for co-operation over the obtaining of evidence in the original country and perhaps even for meeting the expenses incurred by the other party for attending the proceedings. I would not exclude an abduction or retention as one of the causes of the change of circumstances. It is unlikely that such an action would be likely to lead the original court to vary its order, but circumstances could arise where it would be unrealistic to exclude new factors introduced by an abduction or retention.

8.10 Should the original decision be challengeable on the ground that there was no proper hearing? The Council of Europe Convention refers to the requirement of proper notices having been served, and the judicial practice surveyed showed that courts were less likely to pay regard to foreign decisions taken without full consideration of the evidence.<sup>57</sup> Interim orders made after proceedings had commenced in the original state are another matter, for they represent a holding operation. It seems that, on principle, only decisions made after proper hearing should be entitled to automatic enforcement. The difficulty is that some *ex parte* decisions are made *after an abduction* and are really penal orders designed to secure the return of the child. It seems, therefore, that, unless the order is an interim order made *after proceedings had commenced* (as in *re C* (1978)) or an *ex parte* order made *after an abduction thought to be unlawful* (both these situations to be considered below), a foreign decision should be open to challenge on the ground that it was not made after full hearing. But this would not apply to an order which was based on the consent of the parties.

#### **Abduction or retention after commencement of proceedings but before decision after full hearing**

8.11 Here, as has been observed, the judicial practice seems to be to require the return of the case to the jurisdiction in which it was commenced. There may or may not be an interim order in the original jurisdiction requiring this return, but such an order would not seem to be essential. It should surely be enough if proceedings had been instituted. But return should be resistible on grounds 1 to 3 mentioned under (a) above. Ground 4 (change of circumstances) would not apply, because that ground refers to a change of circumstances since the decision was made, and here there would be no decision.<sup>58</sup> Similarly, ground 5 would be inapplicable. The only question would be whether return should be resistible on the ground that the foreign court, if it made the order, would decide in favour of the abductor. This was largely the basis for the Court of Appeal decision in *re C* (1978) and was considered relevant in *Kernot* (1965). As in the situation covered in ground 4 above, there does seem some justification in refraining from

sending children a great distance if it is likely that they will only be returned. On the other hand, there are differences. Ground 4 above referred to change in circumstances and the question is which court is the more convenient to hear about these new circumstances. It need not always be the original court. But in this situation the abductor is speculating about the way the "original" court would decide the matter initially. Nor in ground 4 above is the speculation about *how* the original decision might be varied; it is simply *that* the situation had changed so much since the original decision that it is likely they would impinge on it in some way. It seems unsatisfactory to indulge in the kind of speculation as in *re C* (1978). I would suggest that return of the child in these circumstances should be resistible only for reasons 1 to 3 above and a case such as *re C* (1978) should be treated as one where the non-return of the children should be justified, if at all, or the ground that their return would be seriously detrimental to their interests.

#### **Abduction where there has been no final decision nor had proceedings been commenced at the time of the abduction**

8.12 These cases can take a number of forms; for example, those where the parties had already separated and regulated custody by agreement and one party removes (or retains) the children in breach of that agreement (see *re A* (1970)); or where the abduction is quite unexpected by the other party, as was probably so in cases like *re T* (1968) and *re L* (1974). There is provision in the European Convention for the enforcement of decisions which have been "confirmed" by the competent authorities in the state of origin.<sup>59</sup> If this refers to a procedure such as a "consent decree", then the principles would be the same as those applicable to a decision in the state of origin.

8.13 If there is no such formally confirmed order and the arrangement has been informal only, or if the abduction is unexpected, then the problem, can be approached from two angles. One is that adopted in the European Convention which requires an aggrieved party to approach a court in the state of origin and obtain a declaration that the removal or retention was "improper". A favourable decision would be treated like any other decision of the competent court of the state of origin. This in effect happens if, after improper removal or retention, one party obtains an *ex parte* order for the return of the child. The other angle is to concentrate about the state to which the child has been removed (or where it is retained) and require the courts in that state to order the return of the child notwithstanding that there is no order in the state of origin.

8.14 The problem about the first approach is that the abductor could argue that the order in the state of origin was made without proper notice to him or full hearing and he might contest matters like the terms of any alleged agreement (or even its existence) and he may deny that the removal was improper. There is

<sup>57</sup> See *re B*, (1940) as explained in *In re H*, (1966); *Walker v. Walker*, 1974 3 W.W.R. 48.

<sup>58</sup> See *Brooks v. Brooks*, 530 P. 2d. 547 (1975).

<sup>59</sup> Article 8(3).

nothing *per se* illegal in a parent taking a child away from another parent, especially if he alleges that this is done for the child's benefit (or, as in cases like *re H* (1966), *re M-R (a minor)*<sup>60</sup> and *Norman v. Norman* (1968): Aus.), to induce the other parent to come to the recipient country. Hence the European Convention leaves it open to the state of origin to declare in each particular case whether it is one of 'improper removal' or not. Since such a decision will, under the Convention, receive almost automatic recognition and enforcement, it is necessary to allow the defendant the opportunity of showing, if he can, that the removal was not improper. Of course it might be thought correct and in accord with the principles of the Convention that that issue should be determined (if contested) at the state of origin. On the other hand, it could lead to litigation in both the country of origin and the recipient state and gives rise to possibilities of delay which will be considered again when the European Convention and The Hague Preliminary Draft are considered in detail.

8.15 The Hague Preliminary Draft adopts the other angle. The Special Commission had concluded that the jurisdiction of the recipient state should be limited wherever the child was retained there "without the consent of the lawful custodian" whether or not this was brought about by stealth or force or whether it was in breach of a decision of the state of origin. This approach is similar to that of the English courts where they have ordered the return of children on the ground that they "belong" in the state of origin. It should be remembered that, if orders for the return of children were dependent on the acquisition of a decision in the state of origin and it became normal to provide reciprocal enforcement of such orders, a tendency might develop to abduct children before the unsuspecting party has had time to institute proceedings. This consideration argues in favour of any scheme which achieves the rapid return of children in cases of such "anticipatory" abductions.

#### **Habitual residence**

8.16 In the above discussion, it has been assumed that it would be generally agreed that the country which should have the responsibility of determining the child's best interests is the country of the child's habitual residence. This was the conclusion of the English and Scottish Law Commissions and is the test favoured in a Report by the Province of Ontario to the Sixtieth Annual Meeting of the Uniform Law Conference in Canada in 1978 which is critical of the "close and substantial connection" test used in the Canadian Act. It is also the principle adopted by the Special Commission of The Hague Conference. There seems to be a strong objection in principle in making nationality the determining factor as to whether provisions for the protection of children can be activated. It perpetuates an approach which seems to regard a state as having some kind of "rights" over a child bearing its nationality, or even a child of parents bearing its nationality, even though neither the parent nor the child necessarily has any other connection with the state. This quasi-proprietorial claim

of states is surely to be resisted. Fortunately it has not played a very large part in the private international law of Commonwealth countries and should be rejected. The "close and substantial connection" test would normally coincide with an "habitual residence" test. It is, however, less determinate than the latter and, if used in conjunction with it, could lead to courts in different countries claiming jurisdiction. This has been a weakness in the U.S. Uniform Act.<sup>60</sup> The most desirable solution appears to be the sole adoption of the "habitual residence" test.

#### **Time limits**

8.17 The U.S. Uniform Act makes use of time limits (six months "living with his parents") in establishing what is a child's "home state"; the Conclusions of the Special Commission of the Hague Conference state that, where an application to the recipient state is made more than six months after its removal from the state of origin, the court of the recipient state can hear the case on its merits only if the child has been habitually resident within its jurisdictions for at least a year. As Bodenheimer has pointed out such time limits could work to the benefit of an abductor who has evaded detection successfully for a sufficient length of time, and in the case of the U.S. Act, she suggests that the provision defining "home state" as that in which the child has lived during the previous six months would not be interpreted to inure to the benefit of such a person. The jurisdiction of the previous "home state" would take priority. Yet jurisdiction based rules will encounter problems such as this. Under the scheme suggested above similar problems would arise. But if the party in the state of origin has acted promptly in applying for a request for return, this should be treated as a significant factor. It may be reasonable to suggest, therefore, that if that party has made no such application within six months of the abduction or retention, the court in the recipient state should have discretion to hear the merits if this is in the child's interests. In other cases the position outlined above should continue to apply, so that if, for example, the party in the state of origin acted within the six months but the abductor was not traced until, say, two years later, the court should still be obliged to honour the request subject to the exceptions already set out. One of these is, of course, that the return would be seriously detrimental to the child and inevitably the chances that this would be so increase the longer the child remains away from its country of origin. But this seems to be inevitable and a balance has to be struck between the interests of children generally and of the child in question. I feel it better to leave the matter to be determined under the "serious detriment" exception than to enact some time limit in this context because such a limit can operate in an arbitrary way. But to put some time limit within which the application to return must be made is a different matter because lodging such an application is within the control of the party in the

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<sup>60</sup> See Richard Stern, article cited in note 36.

state of origin who should be encouraged, if the return of the child is to be requested, to act speedily.

### **Prevention**

8.18 The Conclusions of the Special Commission of the Hague Conference do not mention this topic but a certain amount of information is found in the replies of various Governments to the Questionnaire contained in the Dyer Report. It does not present a very hopeful picture. The measures seem meagre and, one suspects, mostly ineffective. They range from putting the child in a home or with foster parents (or even into the custody of the police) while the parents are in dispute (hardly, it seems, a beneficial result for the child) to threats of tort action against an abducting parent, which might be thought to have deterrent effect. Australia provides an elaborate answer, mentioning the power of a court to require passports to be handed in if there is a threat of abduction and also provisions for warning points of departure from the country and serving notice on a carrier not to transport certain persons.<sup>61</sup> In the United Kingdom there is provision for notifying the Home Office of an expected abduction and this leads to warnings being sent to departure points from the country. Clearly the effectiveness of such measures depends to some degree on matters of geography. A departure abroad from Australia is generally a more elaborate affair than one from Luxembourg and even the United Kingdom is at an advantage from its island character. But for many countries, any effective measures of prevention are very difficult and, other than exhortation, it is difficult to see what can be achieved in this regard in an international agreement.

### **Alternate custody**

8.19 The United States answer to the Dyer Questionnaire mentions, quite rightly, the importance of trying to prevent abductions and unlawful retentions by achieving amity between the parties as often as possible. This should be a matter of highest priority in family law at all levels, but, again, is hardly a matter for an international convention. Some groups, particularly in the United States, see the grant of alternate custody as an answer to abduction problems. They argue that if the child is shared between the parents after their divorce the incentive to remove or retain the child permanently from the other parent is reduced. This is very likely to be true, for it seems natural that a parent who has lost an attempt to win custody of the child and who is unable to exercise regular access to the child will be tempted to take the law into his own hands.

8.20 However, the whole question of alternate custody raises difficult questions of practicability and, more important, of assessment of the child's

interests. In spite of claims by the interested groups, I have seen no convincing evidence that these arrangements are necessarily in the children's interests. But whether this is so or not, it must be a matter to be decided within the domestic legal systems in a genuine effort to apply the welfare principle. Should it be decided that alternate custody, or (in a least extreme alternative), extended staying access, is in the best interests of a child and if this involves the child staying for periods of time in different countries, such arrangements would be greatly assisted by an international agreement on the principles outlined above. The arrangements could be incorporated in a court order (by consent or otherwise) in the state of origin and would be entitled to recognition in the recipient state. Indeed, it might be very useful, as a precautionary measure, if such decisions were routinely registered with a Central Authority in the recipient state.

## **The European and The Hague Conventions Compared**

9.1 Member states of the Council of Europe must now decide whether to sign and ratify the Draft European Convention adopted by the Council of Ministers in November 1979.<sup>62</sup> In November 1980, delegates to the Hague Conference will meet in Plenary Session to decide whether to adopt the Preliminary Draft Convention. It is open to non-members of the Council of Europe to accede to the European Convention. Since the European Convention and The Hague Preliminary Draft (hereafter referred to as The Hague Document) diverge in some important respects it seems urgent to decide which, if either, of the proposed conventions is to be preferred. Each Convention (attached as Annexes) will, therefore, be critically considered in the light of the foregoing discussion.

### **The duty of Central Authorities**

9.2 Both documents make use of the concept of Central Authorities as the prime administrative agencies for implementing the conventions. There is little difference in the duties placed upon them. The Hague Document is more insistent on attempts being made to settle the matter on a voluntary basis, which is desirable. One important difference may lie in the express reference in The Hague Document empowering Central Authorities to "initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, where appropriate, the determination of issues relating to rights of custody or access." (Article 7 f). There is no comparable provision in the European Convention but there are indications that Central Authorities may play such a role. They are to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or the

<sup>61</sup> Recommendations are set out in a Confidential Report to the Attorney-General of an Interdepartmental Committee on Prevention of Removal of Children from Australia by One Parent. See also New Zealand's Guardianship Amendment Act 1979, inserting a new section 20 into the Guardianship Act 1968.

<sup>62</sup> The United Kingdom Government is considering whether to sign and ratify the Council of Europe Convention: *Daily Telegraph* 15 January 1980.

applicant” and also “to secure the recognition or enforcement of the decision (of the state of origin)”. (Article 5 (1)b & c). This presumably may include the initiation of judicial proceedings. But the inter-relationship between administrative and judicial proceedings under the European Convention is obscured by the provision in Article 8(2) that “if, in accordance with the law of the state addressed, the authorities cannot comply with paragraph 1 of this article (restoration of the child) without judicial authority, none of the grounds of refusal specified in this Convention shall apply to the judicial proceedings.” The grounds for refusal are set out in Articles 9 and 10 and will be considered in detail later. Article 8(2) cannot mean that there can be *no* grounds of refusal if restoration of the child depends on judicial order (which may be the case in many countries) so the effect of the provision must be to remove the controlling effect of Articles 9 and 10, which seek to limit the grounds of refusal to those set out in those articles, where the child’s return requires judicial order. Since the achievement of agreed limitations of grounds of refusal to return a child is the major purpose of constructing a Convention of this type, Article 8(2) could undermine the major purposes of the endeavour. The Hague Document contains no such limitation for the terms of Article 11, which set out the requirement to return the child, apply both to judicial and administrative authorities.

### **The nationality principle**

9.3 A major complication of the European Convention lies in the role played in its provisions by the nationality principle. While states are put under a general duty (Article 7) to recognise and enforce custody decisions of other contracting states, the obligation placed on Central Authorities to “cause steps to be taken forthwith to restore the custody of the child” (Article 8) will not arise unless *both* parents *and the child himself* have as their *sole* nationality that of the state where the decision of which they are seeking enforcement is made. If this is satisfied, the return of the child, if requested within six months of the decision or removal, should be automatic. There are no provisions for refusal, not even if the return might seriously endanger the child’s welfare. (But see para. 10.1 below). This is surely to pay excessive deference to the claims of the state. Yet, as will be seen, failure to comply with this narrow principle could result in failure to secure the rapid return of the child, even if there are no grounds for fearing for its safety on return. The introduction of the nationality principle thus creates a severe lack of balance in the structure of the Convention which can only be mitigated by extensive use by states of their rights to enter reservations. Further difficulty is raised by Article 8(3) which applies if a person has taken a child out of one country into another under “an agreement officially confirmed by a competent authority”. In such circumstances if the child is not returned in accordance with the agreement, it is stated that “custody of the child shall be restored in accordance with (Article 8 (1)b and (2))”. Paragraph (1)b requires a request for restoration to be made within

six months of the removal (it is not clear what relevance paragraph (2) has). No mention is made of compliance with paragraph (1)a, which contains the nationality principle. Does this mean that, in this situation, that principle is not to apply? If not in that situation, why to any situation?

9.4 Non-compliance with the nationality principle will not, however, totally frustrate the operation of the Convention. The obligation to “cause steps to be taken forthwith” to restore the child will not arise if the principle is not satisfied, but the general duty to recognise and enforce the custody decision (Article 7) remains. This duty, however, is qualified by the provision of specific grounds for refusing to recognise and enforce the decision. The grounds available depend on whether the application for restoration is made within six months of the removal of the child (Article 9) or falls outside that time limit (Article 10). These grounds will be considered later. At this point it is necessary only to observe that they are potentially very wide indeed so that failure to satisfy the nationality principle may rob the applicant of any real assistance the Convention can give.

9.5 There can be no doubt that the absence of any reference to nationality in The Hague Document is a great improvement on the European Convention. The overriding principle here is that of “habitual residence.” The applicant may be “any person” claiming breach of custody rights (Article 8) but these must be rights he was *actually exercising* in accordance with the law of the state in which the child was habitually resident immediately before its removal or retention. It is the situation of the child and its relationships which matter and it is surely right to direct attention to the circumstances prevailing and the legal conditions in the place where the child was habitually resident.

### **The requirement of a decision**

9.6 A fundamental difference in approach between the two documents is that the European Convention is premised on the prior existence of a “decision” in the state of origin whereas The Hague Document is not. Even if an abduction takes place in that state before any such decision exists, it only becomes “improper” for the purposes of the Convention if declared as such by the state of origin (Articles 1 and 12). Under The Hague Document there must simply be a “breach of rights of custody actually exercised” by a person according to the law of the state of the child’s habitual residence. (Article 3). These rights may arise by operation of law, by judicial or administrative decision or by agreement. Which approach is to be preferred?

9.7 If a decision about custody already exists there would, in practice, be little difference between the two systems, subject to the position concerning grounds for refusal, to be discussed in paras. 9.12–9.19 below. Where there is no such decision at the time of the removal or retention, the aggrieved party would be at some disadvantage under the scheme of the European Convention. He or she must first approach his

authorities (presumably, the courts) for a decision declaring the removal or retention to be wrongful. Apart from expense (which will in turn depend on the provisions for legal aid in the country concerned) the main difficulty will be that of time. If she knows the whereabouts of the defendant she must serve him with notice of the proceedings and the defendant must be given sufficient time to arrange his defence. (Article 9(1)a). This might take some time, and it may be possible for the defendant to employ delaying tactics. The importance of this is that, in order to take advantage of Articles 8 and 9 of the Convention, the application for restoration of the child must be made to the Central Authority of the recipient state within six months from the date of the improper removal. (Article 8(1)b). It is not difficult to imagine cases where an aggrieved person fails to meet this time requirement due to no fault of his or her own.<sup>63</sup>

9.8 In a case where an abduction has taken place where no prior decision exists, an aggrieved party acting under The Hague scheme seems to be in a better position, although much might depend on the efficiency of the machinery introduced under it. Here too, an application must be made within six months from the breach of custody rights (Article 11)<sup>64</sup> but need only allege a breach of custody rights. Such an application no doubt must be accompanied by documents indicating the exercise of such rights and, were one to be obtained, could also be supplemented by proof of a decision subsequently obtained in the state of origin supporting that claim. Similarly, in the case of a retention where a parent exercising access rights abroad failed to return the child, the European Convention allows proceedings for restoration only where the child has been retained contrary to “an agreement officially confirmed by a competent authority” in the state of origin. (Article 8(3)). Under The Hague Document it would be sufficient simply if the agreement “had the force of law” in that state. Violation of any rights of custody or access under such an agreement would in itself be sufficient to make application for restoration.

9.9 Although the absence of any requirement of prior decision or “official confirmation” of an agreement would put an applicant under The Hague Document at an advantage compared to an applicant under the European Convention, this must be seen in the light of the grounds for refusal specified in each document. These will be considered in detail later<sup>65</sup> but it may be stated here that these could favour the applicant under the European Convention (provided he satisfies the requirements of Articles 8 and 9) because the authorities in the recipient state will in effect simply implement the decision upon which he relies whereas the applicant under The Hague Document is at some risk of an investigation being made in that state.

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63 Although the requirement to give notice does not apply if the defendant has concealed his whereabouts, difficulty might arise if it is known but is a place from which he cannot easily arrange for his defence in the state of origin.

64 See para. 9.11 below.

65 Paras. 9.12–9.19 below.

### Time limits

9.10 Both documents contain provision seeking to encourage expeditious applications for the return of abducted or retained children. But those in the European Convention are more complex and are intimately related to the nationality principle. Essentially, the scheme is that if *both* the six month time limit *and* the nationality principle are satisfied, no grounds for refusal should be available and the child should be returned “forthwith”. If the time limit is satisfied but not the nationality principle, only the grounds for refusal set out in Article 9 (see below, para. 9.14) apply. If *neither* are satisfied, the very broad grounds for refusal under Article 10 (see below, para. 9.16) are permitted. There is no provision for extending the six month period even where, for example, the applicant has been unable to trace the defendant or the child.

9.11 By comparison, The Hague Document contains a simple and elegant solution. Here, too, the application must be made within six months of the breach of custody rights in order to activate the duty to return the child “forthwith”. However, this period only runs from the date of discovery of the child if his whereabouts have been “unknown” (*semble*, to the applicant). (Article 11). The Document makes no express reference to any *additional* grounds of refusal if the time limited is overrun, as the European Convention does. It simply states that its provisions are not to “limit” the power of judicial or administrative authorities to order the return of the child after the expiration of the time limit. (Article 15). Thus the recipient state will, in such cases, be left to follow its own internally fashioned solution to the problem in cases of late applications. It seems that the highly complex provisions of Article 10 of the European Convention amount to no more than the same thing. While simplicity is not in all cases to be preferred as an end in itself, there can be little doubt that the complexities of the European provisions on this could add to the difficulties of attaining uniform compliance and interpretation.

### Grounds for refusal

9.12 The two documents differ markedly in their provisions relating to grounds for refusing to return a child to an applicant. This is partly a reflection on the differing approaches which have already been outlined. Hence, the European Convention contains provisions justifying a refusal which relate to the circumstances in which the decision upon which the application for return is based was given and The Hague Document permits the basis for the application under its provisions, viz., the actual exercise of custody rights, to be challenged.

9.13 The provisions of the European Convention are the more complex. A distinction is drawn between applications falling under Article 8 and other applications. As stated earlier, Article 8 is only satisfied if the conditions relating to nationality and the time limit are met. In addition, it is required that the child should have had his habitual residence in the territory of the state of which he and his parents are the sole

nationals at the time of the institution of the proceedings in question or of the improper removal. In such a case it is envisaged that the restoration of the child should be automatic. No grounds for refusal are specified, although what the position is if the restoration requires judicial authority is unclear owing to the obscurity of Article 8(2) (See para. 9.2 above).

9.14 If the nationality principle is not satisfied but the application is nevertheless made within six months of the removal, Article 9 sets out the exclusive grounds for refusal. They are that (i) the decision in the state of origin was made in the absence of the defendant or his legal representative and he was not notified of the proceedings in sufficient time to enable him to arrange his defence (unless he had concealed his whereabouts); (ii) the decision was taken in the absence of the defendant or his legal representative and “the competence of the authority giving the decision was not founded” on the habitual residence of the defendant or on the last common habitual residence of the child’s parents (one of whom still being habitually resident there) or on the habitual residence of the child; (iii) before the child was removed there was a decision relating to the child’s custody in the state addressed incompatible with the decision in the state of origin provided that when it was given the child had spent longer in the state addressed (the recipient state) over the previous year than in the state of origin. The purpose of this is partly to establish a jurisdictional requirement of habitual residence as a basis for the recognition of foreign custody decisions. The technique differs slightly from that used under Article 8, for that Article only applies if the *child actually was* habitually resident in the state of origin when removed or when the proceedings were instituted, whereas under Article 9 it is sufficient if the competence of the authority making the decision was *founded on* habitual residence of the defendant, the parents *or* the child. There is room for uncertainty here. Presumably jurisdiction exercised on the basis of (for example) nationality or consent would not be “founded” on habitual residence. Would it be open to argue that the habitual residence requirements were *in fact* satisfied? Why should this distinction exist between Articles 8 and 9?

9.15 It is similarly curious that the protection given by Article 9 to an absent defendant who is not given sufficient notice of the proceedings should be withheld from a defendant who happens to be a sole national of the state of origin. It is surely reasonable that such a defect, at least if not brought about by the defendant’s own fault, should be a basis for non-recognition of the decision and therefore a sound ground for refusal. However, it has already been pointed out that the opportunities this may give a defendant for delaying the acquisition of a decision could cause the applicant to fail to meet the six month time limit which must be complied with in order to bring the application within Articles 8 or 9.

9.16 Where Articles 8 and 9 are inapplicable, due to failure to comply with the nationality principle or with the time limits, an application may be met with additional grounds of refusal set out in Article 10.

However, these additional grounds are not exclusive, as the grounds in Article 9 are intended to be, so states will be free to add other grounds if they so choose. If this is so, there is hardly any point in setting out these additional grounds. Indeed, they are so wide that they can hardly represent any controlling factor at all. In particular, the ground entitling refusal that “the effects of the decision (in the state of origin) are manifestly incompatible with the fundamental principles of the law relating to the family and children in the state addressed” (Article 10 (1)a) seems to allow the state addressed to apply its own policies for dealing with the case in accordance with its own family law principles untrammelled by the Convention. It is therefore difficult to see the point of the inclusion of another ground for refusal which is carefully worded to allow refusal “where it is found that by reason of a change in the circumstances, including the passage of time *but not including* a change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child.” (Article 10 (1)b). It may well be “manifestly incompatible” with the fundamental principles of a state’s family law to follow a decision which is “manifestly no longer in accordance with the welfare of the child” whether this is due to a change of residence alone or for any other reason.

9.17 In contrast to such obscurities, the provisions of The Hague Document offer clarity and simplicity. The grounds for refusal operate so as to restrict the prima facie duty of the recipient state to return a child forthwith on an application made within six months of the breach of custody rights. There are three. (1) If the (defendant) establishes that “at the time of the alleged breach the applicant was not actually exercising the custody rights or acting in good faith”; (2) if the (defendant) establishes that “there is a substantial risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;” (3) if “the judicial or administrative authorities find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” (Article 12).

9.18 The first of these seems necessary as it is in effect a denial of the premise upon which the application for return is based. However it raises the danger that the applicant may be drawn into a dispute in the recipient state over the question whether he or she was “actually” exercising custody rights. This may not be very different from assessing the merits of the case, which the Document seeks to avoid. (Article 16). It may be that this fear is exaggerated and that the authorities of the recipient state will be satisfied with documentary evidence that (for example) the applicant is the child’s mother and that the child was living in the same residence as her at the time of the removal. Of more concern is the provision allowing the defendant to seek to establish that the applicant was not, at the time of the alleged breach, “acting in good faith.” Would this permit allegations of marital misconduct (the mother secretly seeing another man with a view to leaving the husband and taking the children with her

to live with the other man), of attempts to prevent the defendant from seeing the child in breach, perhaps, of access arrangements? If so, the whole issue of merits would be introduced and a major goal of the Convention subverted. Unless these doubts can be satisfactorily settled, it is to be hoped that this clause of Article 12a. will be removed at the Plenary Meeting at The Hague in November 1980.

9.19 The ground for refusal based on apprehension of risk of harm to the child is a common and, it seems, essential provision and its absence from the European Convention is a serious omission. It might be remarked that its presence should assist towards the excision of the clause relating to the applicant's bad faith because such bad faith should only be of relevance if the return of the children to the applicant would entail a substantial risk to their welfare. The additional clause allowing refusal if this would "otherwise place the child in an intolerable situation" could also prove useful. It is probably wide enough to cover the case, of which concern was expressed above,<sup>66</sup> that a child might be futilely returned where the expectation is reasonably held that the authorities in the state of origin are likely to send him back again to the recipient state. It was suggested that this issue might be subject to bilateral arrangements, but the existence of such a clause could achieve the same effect by being sensibly applied in differing contexts.

#### Reservations

9.20 The Hague Document has not finally determined the scope of reservations to be admitted to the Convention. The European Convention allows reservation liberally. Article 18 allows any contracting state to make reservation that it shall not be bound by Article 12, which brings abductions made before any decision in the state of origin into the Convention by permitting the aggrieved party to obtain a decision that the removal was improper. If this were not enough, Article 17 allows any contracting party by reservation to introduce the wide grounds of refusal of Article 10 into cases covered by Articles 8 and 9. The carefully constructed gradations between Articles 8, 9 and 10 can thus be undermined. Since, as has been explained above, Article 10 (1)a supplies a ground of such width, any application of that to an application which has succeeded in satisfying the rigours of Articles 8 and 9 would effectively nullify the purposes of entering the Convention at all.

#### The Hague document: a Commonwealth perspective

10.1 It will be clear that the European Convention is unsatisfactory in a number of respects. In order to avoid the automatic return provisions of Article 8, states are likely, by reservation, to introduce into that Article the wide ground for refusal of Article 10(1)a and probably do likewise for Article 9. This is a far

wider ground of refusal than apprehension of harm for the child on its return. The Convention, then, seems to offer a very uncertain basis for *uniform* international action. The Hague Document will therefore be examined to see how far its adoption would be reconcilable with the position already reached in some Commonwealth countries and also how far they correspond to some of the goals of policy suggested in this report as desirable.

10.2 As far as judicial developments are concerned, it was seen that the predominant view currently accepted is that the courts retain their jurisdiction to determine the merits of the case of a child abducted into their country but that much weight will probably be placed on a foreign order, especially one made after full hearing and based upon the welfare principle, and, if there is no such order, it may well be decided that it is in the child's interests to return without delay to the country where he "belongs". The Hague Document is not a scheme for the automatic recognition and enforcement of foreign custody orders and to that extent is similar to this judicial approach. Under this scheme, any prior decision would be relevant only insofar as it indicated that the applicant had been exercising custody rights and that these were breached. The courts normally set their face against unilateral breaches of such rights occurring within their own jurisdiction. Such are thought, *prima facie*, to be contrary to a child's interests and it seems to be entirely within the spirit of Buckley L. J. in *re L.* (1974) that, where an application is brought expeditiously, it should be considered to be in the child's interests to return it and restore the exercise of the disrupted relationship. That is, the emphasis of The Hague Document on *relationships* rather than *decisions* accords with this practice, for the decision is seen only as evidence of relationships and, accordingly, of where it is, *prima facie*, in the child's best interests to be. It is true that acceptance of the principles of the document would, theoretically, deprive the court of jurisdiction to make a full ranging investigation into the merits of the case and thus strike at the heart of the *McKee* principle. But it is suggested that it would not affect the *actual practice* of the courts in such cases and that their ultimate responsibility for the welfare of the child would be adequately secured by the presence of the ground for refusal based on apprehension of harm to the child or of placing him in an intolerable situation.

10.3 Like the U.S. Uniform Act, legislation taken in Commonwealth countries has been based on schemes of recognition and enforcement of foreign custody orders. This would suggest an approach closer to that of the European Convention than The Hague Document. However, adherence to the latter would in no way *conflict* with such steps for recognition already taken. The existence of a (registered or unregistered) order would provide strong and, in most cases, incontrovertible evidence whether the removal or retention has been in breach of an applicant's custody rights. The registration of orders would indeed further the objects of the scheme. The requirement that the rights breached must be those applicable in the state of the child's habitual residence

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<sup>66</sup> Para. 5.10 above.

might be thought to have a potentially restrictive effect on systems of automatic registration and enforcement of orders such as those of Australia and New Zealand. But in an international context such an explicit restriction seems desirable. The bilateral character of the Australian and New Zealand schemes, which enables those countries to "prescribe" which overseas orders to bring within their scheme allows them to choose overseas countries which exercise jurisdiction on a basis similar to habitual residence. The express reference to habitual residence would thus seem a reasonable safeguard for what would, in effect, be a significant broadening for Australia and New Zealand of their present schemes.

10.5 As argued above<sup>67</sup> the fact that The Hague Document covers cases of abduction where there has been no prior order is of special importance where reciprocal recognition and enforcement of custody orders becomes widespread. To this extent the document fills a gap left in the legislative schemes in the Commonwealth.<sup>68</sup> The question whether this problem is better approached by requiring the aggrieved party first to seek a decision in his own jurisdiction or by allowing him to make an immediate application to the recipient state has been discussed above.<sup>69</sup> Subject to some reservations about the extent of permitted grounds for refusal of return, the view was taken that the balance of advantage probably lay with the course adopted by The Hague Document. It should be noted that this position is similar to that taken in the U.S. Uniform Act. Finally, the grounds for refusal of return (subject to the reservation already mentioned) in The Hague Document are very similar to those accepted in the Australian, New Zealand and Canadian legislation.

10.6 Does The Hague Document in general meet the suggested guidelines for an approach to this problem set out in section 8 of this Report? A machinery for notifying any relevant order or decision in a country to which a child was taken could certainly be constructed within its provisions and the principle that that country will return a child removed or retained there contrary to the rights appearing in such an order is established. The principle that these should be the rights prevailing at the child's habitual residence is satisfied; the right to refuse return where this is likely to harm the child is satisfied; futile return can be avoided by use of the provision justifying refusal if this would place the child in an intolerable situation; an interim order, made *ex parte*, would not of itself be a ground for ordering the child's return but simply an indicator of where the child "belonged". The only guideline which is not expressly satisfied is the important one that orders should be recognised only if made in a state recognising the child's welfare as paramount in such cases. The problem is somewhat obviated by the fact that the scheme is not one of enforcing the foreign decision but simply returning the child to its prior condition. But this answer is not very satis-

factory for the custody rights of which breach is alleged might have been determined by court order and this may not have given sufficient consideration to the child's interests. It would still be my wish that contracting states would assert their recognition of the welfare principle on entering the Convention. The point might be made that by the very act of entering the Convention (in good faith) a state is implementing a policy which places the welfare of children in a pre-eminent position because it is seeking to establish a system which promotes stability for children above the claims of individual adults irrespective of the claims the *adult* may have (whether based on nationality or otherwise) to have the matter dealt with differently.

10.7 On questions of cost, the European Convention requires contracting states not to claim payment from any applicant in respect of measures taken by the Central Authority under Article 5 and this includes "where applicable the costs incurred by the assistance of a lawyer." The Hague Document also states that Central Authorities shall bear their own costs in applying the Convention (Article 22). However, as far as the use of lawyers is concerned, The Hague Document merely requires Central Authorities to "provide or facilitate the provision of legal aid and advice" where this is "appropriate" (Article 7g). It does require Contracting states to allow nationals and persons habitually resident in any other contracting state the same facilities for legal aid and advice as its own nationals and habitual residents enjoy but there is recognition that these facilities may vary so the Document expressly permits Central Authorities to require payment for legal services which are not met through any legal aid system (and there may be none) and also to require payment for expenses incurred in repatriating the child.

10.8 On the basis of this survey it appears that The Hague Preliminary Draft offers substantial advantages to Commonwealth countries over the European Convention. The Hague Document will be further considered at a Plenary Session of The Hague Conference late in 1980. It is strongly urged that Commonwealth countries which are disposed to take steps to combat the problem of international child abduction will take an interest in the final drawing up of The Hague Convention and, eventually, make that Convention the basis of an international system to protect children from these ordeals.

## Summary

1. The Report is designed to provide a review of the legal principles which have developed in Commonwealth law as a response to the problem of the international abduction of children. These principles are primarily to be found in court decisions, although in recent years the legislative bodies of some countries have enacted additional provisions, to which reference is also made. I have made use of all materials known to me but the possibility certainly exists that some significant decision or legislative act has not been noticed. Having made this review, reference is made

67 Para. 8.15.

68 See Ontario Report at the Uniform Law Conference of Canada, August 1978.

69 Paras. 9.6-9.9 above.

in brief to developments in the United States and then to attempts at international level to secure agreement between states on the best way to co-operate in these cases. The Report concludes by comparing the two major international instruments extant covering the problem, the European Convention adopted by the Council of Ministers of the Council of Europe in November 1979 and the Preliminary Draft Convention adopted by the Special Commission of The Hague Conference on Private International Law during the same month. An attempt is made to indicate which of the two instruments would be more suitable for a basis for Commonwealth action.

2. Section 2 gives a critical analysis of the progress of English law on this issue covering the forty years following 1940. It is shown that the courts initially adopted the position that, if a child was brought into their jurisdiction, it was in principle irrelevant whether this was done surreptitiously or contrary to a foreign order because, if the child's future was raised before them, they were bound to decide the issue in accordance with their own assessment of the child's best interests. To give automatic effect to a foreign order would be an improper delegation of their task. This principle was affirmed rigorously by the Judicial Committee of the Privy Council in *McKee v. McKee* (1951) on appeal from the Supreme Court of Canada. This judgment lodged this approach firmly in Canadian law and, despite certain doubts about it, it remained the dominant judicial approach there until dissatisfaction of its application led to legislative action in a number of provinces following the year 1974. In England, during the mid-1960's, the courts began to express doubts about the *McKee* principle and a new principle developed, largely fashioned by Cross J., according to which the judge should give effect to the orders of a foreign court unless satisfied that it was beyond reasonable doubt that to do so would inflict serious harm on the child. This approach enjoyed some success, but after some criticisms, was rejected in 1978. The *McKee* principle was restated, although it was recognised that a judge might, in certain cases, reasonably come to the conclusion that it was in a child's best interests to be immediately returned to a country with which it maintained close links and for its future to be determined in that country.

3. Section 3 concentrates more exclusively on the experience elsewhere in the Commonwealth. The same kinds of fluctuation in judicial opinion are also found, particularly in New Zealand, where the courts found themselves enjoined by statute to apply the *McKee* principle, but expressed misgivings about it. In 1975 the Family Law Act of Australia set up a structure for the registration in that country of custody decisions of prescribed overseas countries which were, in principle, to be enforced in Australia and which would, if found to exist, deprive the Australian courts of jurisdiction to hear the case unless circumstances were exceptional. New Zealand adopted the same system at the end of 1979. In Canada, the Uniform Law Conference drew up a model Extra-Provincial Enforcement of Custody Orders Act in 1974, enacted now (in substance) in

eight provinces. Ontario has not, however, adopted it but has made proposals for amending and widening it.

4. Section 4 gives a brief description of the Uniform Child Custody Jurisdiction Act which has been enacted by many states of the United States. This is concerned primarily with defining circumstances when a state may properly exercise jurisdiction in custody cases with an out-of-state element. This is generally thought to have had a beneficial effect in the United States in deterring against child abduction and making arrangements for access exercised outside a child's home state more secure.

5. Section 5 attempts to assess the common law approaches to the problem. The major problem areas are divided into two types of situation: one where a child has been removed or retained in breach of an extant order and the other where there is no such order. Even under the re-asserted *McKee* principle, a court could give "proper" weight to a foreign order, so the problem resolved itself into one of knowing what weight was "proper" to give to such an order. It seemed that where it appeared likely that the foreign order was not based on true investigation nor upon an application of the welfare principle (that the child's interests should be treated as paramount), courts tended to put little weight on the order. On the other hand, where such an order was an interim order made after proceedings had been commenced in the foreign country, there seemed to be a strong inclination for the child to be returned to the jurisdiction which is already seised of the matter. In the second situation the courts seemed to adopt a more pragmatic approach. If they felt that the children "belonged" in the country from which they had been taken, they would be returned. But the courts seemed more open, in such cases, to consider the context of the case broadly and conclude, where they thought it proper, that no benefit would be achieved by returning the children. It was very clear that courts would not return children if they felt that this was to risk causing them serious harm.

6. Certain special factors seemed to be particularly relevant in these cases in an attempt to arrive at the most just decision. Courts tended to be concerned about the cost and inconvenience caused to the innocent party in having to follow the abductor to another country. On the other hand, they also seemed to take into account the inconvenience, expense and disruption to the children which would be incurred if they ordered their return, and this became an overriding factor if the court believed that the foreign court would, when it eventually heard the case, only send the child back again. Another factor of importance was whether the court believed that it or the foreign court had better access to evidence relevant to assess the children's welfare.

7. Section 6 considers the suggestions made by the English and Scottish Law Commissions concerning cases within the United Kingdom when conflict occurs between different jurisdictions in that country. In particular, it is noted that the Commissions use the

concept of “habitual residence” as a basis for exercising jurisdiction. It is also noted that a system of reciprocal recognition of orders may be easier to attain in a small, culturally homogeneous community than in an international context.

8. Section 7 considers the progress of attempts to secure international agreements on this and related topics. It concludes with a brief account of the major features of the European Convention and The Hague Preliminary Draft Convention.

9. Section 8 attempts to set out some general principles which might serve as guidelines in any approach to the problem. It is assumed that it is considered desirable that the practice of abducting children across international frontiers is harmful to children generally, even if it may not be so in every individual case to the child concerned, and that accordingly international action is desirable.

10. Where there has been an abduction or retention contrary to an existing order, it was thought that it would be appropriate to have a procedure for notifying the country in which the child was found (or suspected to be present) of the relevant decision and that this should of itself provide the sufficient condition for action by the notified state in accordance with the decision. However, it should be open to objection by the abductor on certain grounds. The following grounds were thought, in principle, to be reasonable:

- (a) that the order was not made in the country of the child’s habitual residence at the time of the abduction;
- (b) that there are strong grounds for believing that the decision was not based on the principle that the child’s welfare was paramount;
- (c) that to return the child is likely to be seriously detrimental to his interests;
- (d) in certain cases it might be reasonable to oppose return on the ground of the disruption this would in itself cause to the child. This would depend very much on the circumstances of the case, one important factor being distance (geographical or cultural) between the countries concerned and likelihood that the foreign court might itself modify its order and send the child back. The child’s own views, if capable of ascertainment, might also be relevant.
- (e) that the order was not made after a proper hearing, unless it was of interim nature, made after proceedings had commenced. Where the abduction had taken place before any order had been made, but proceedings had been commenced, return should again be ordered on notice that such proceedings had commenced subject to the same grounds for refusal, *mutatis mutandis*, mentioned under (a) to (c) above. Ground (d) should not apply because that assumed the possibility of a change of circumstances since the foreign decision was made, while here there would be no such decision. Nor would ground (e) apply. Nor, in such a case, should the consideration alone that the foreign court might send the child back be conclusive: return should only be refused if this would create a real risk of harm for the child.

11. Where there has been an abduction or retention in the absence of any order or proceedings in the foreign state, two possible approaches are possible. One would be to require the aggrieved party to obtain an order in (her) home state requiring the child’s return, to lodge that with the recipient state and to make that order the basis for the order returning the child. But this entails giving the abductor an opportunity to defend his action in the proceedings in the state of origin. This is the approach of the European Convention and causes certain difficulties, discussed later in the Report. The other approach, adopted in The Hague Preliminary Draft, is to allow the aggrieved party direct access to the recipient state to allege the improper removal, to demonstrate the child’s prior habitual residence in the state of origin, and obtain the child’s return on that basis alone. This approach follows that of the judicial decisions ordering immediate return of children (based on an assessment of their own interests) to the country where they “belonged”.

12. The jurisdictional question is then considered and it is concluded that the concept of habitual residence is the most desirable. In particular, no attention should be paid to the nationality either of the child or his parents as this reflects some kind of notion of a state asserting quasi-proprietorial rights over the child where the true concern should be directed at the child’s welfare, which demands that a child should not be lightly removed from the environment in which it has his closest relationships and associations and that it is normally best for his future to be determined in that environment. (para. 8.16).

13. The question of time limits is next considered (para. 8.17). It is considered desirable that there should be encouragement for the aggrieved party to act swiftly and thus for the special policy requiring a presumption in favour of rapid return of the child to be limited for a period of, say, six months after the removal or retention. However, this period should not begin to run until an abductor who had concealed himself had been found, otherwise skill at concealment would be rewarded. However, it would have to be recognised that the longer the abductor concealed himself, the more likely it would be that he could resist the child’s return on the ground that it would be seriously detrimental to his interests.

14. Paragraph 8.18 pays very brief attention to the question of prevention. This is thought to depend very much on the circumstances of each country. No doubt countries can learn from each other what techniques have proved most successful in limiting the extent of abductions.

15. Paragraph 8.19 considers proposals that have sometimes been made for systems of “alternate custody” which have been alleged to reduce the risk of abduction which, it is claimed, arises when parents feel aggrieved at custody decisions of courts. Some scepticism is expressed on the desirability and feasibility of such arrangements but it is conceded that, where such arrangements are made successfully, they may well benefit the children and where this involves children crossing state frontiers, international agree-

ments which give such arrangements greater security will be of benefit to the parties and their children.

16. Section 9 of the Report compares the provisions of the European Convention and The Hague Preliminary Draft (called The Hague Document) in some detail. The major observations are the following:

(a) While both documents would establish Central Authorities with similar functions, the European Convention suffers from lack of clarity concerning the interrelationship between judicial and administrative authorities. In particular, Article 8(2) is drafted in such a way as to appear to exclude from the major provisions of the Convention concerning rapid return of children all cases where the recipient state cannot secure the return of a child without judicial authority. The extent of this limitation is not obvious, but could be extreme. There is no such limitation in The Hague Document.

(b) The European Convention creates a three tiered structure under which a child's return is automatic if the nationality principle and a six month time limit are satisfied. If the nationality principle is not satisfied the grounds for returning the child depend on whether the time limit is satisfied or not. The provisions for automatic return are not subject to any safeguards permitting refusal based on apprehension of harm to the child. This undue prominence given to the claims of nationality creates an imbalance in the European Convention which The Hague Document avoids.

(c) The scheme of the European Convention is premised on the existence of a prior decision in the state of origin. Thus, if an abduction or retention takes place before any such decision is made, the aggrieved party must seek such a decision in (her) home state before applying for the child's return. This can cause difficulties, especially as it is provided that, where the whereabouts of the abductor are known, (he) must be given time to arrange his defence. This problem could become acute because, in order to obtain the benefit of the major provisions of the Convention securing the rapid return of the child, the application must be made to the recipient state within six months of the removal or retention. There is no provision for extension of this period. Under The Hague Document, the aggrieved party needs no prior decision. (She) need only approach the authorities in the recipient state and allege that there has been a breach of custody rights which she was actually exercising and which were recognised by the state in which the child was habitually resident. Whether this puts this applicant in a better position than the applicant under the European Convention depends on a consideration of the grounds for refusal (summarised below, paragraph 18).

17. Both the European and The Hague schemes encourage rapid action by giving special status to application for return made within six months of the removal, although in the case of the latter, this time begins to run only when the abductor has been found. In the European Convention, the advantage is that the timely applicant is subject to fewer grounds for refusal than the later one. However, the drafting of the Euro-

pean Convention on this issue is unduly cumbersome and The Hague Document appears to achieve much the same result by simply saying that nothing in its provisions prevents the recipient state from returning the child after the expiration of the time limit: in other words, it is left to the individual laws of each country how to deal with such cases.

18. The grounds for refusal differ sharply between the documents. The European Convention distinguishes between applicants who satisfy *both* the nationality principle and the time limit and those who satisfy only the latter. In the first case, return is automatic; in the second, refusal is allowed if the decision is not *founded* on the habitual residence of the defendant, the parents or the child or if the defendant was absent and not given due notice of the proceedings. These provisions raise interpretative problems and opportunities for delay (paras. 9.14–9.15). That the return might seriously harm the child is not a ground for refusal creates the risk that states will use their powers of reservation to introduce wide grounds of refusal in such cases. In all other cases, Article 10 specifies further grounds for refusal which are not exclusive and very wide indeed. Under The Hague Document the grounds of refusal refer firstly to the question whether the applicant was actually exercising custody rights which (she) alleges were breached. This can be challenged. It is observed that this provision carries the risk that the merits could be opened to investigation in the recipient state, which the Convention seeks to avoid, and the degree to which this risk is run would depend on how far the relevant authorities in a recipient state are prepared to accept *prima facie* evidence by the applicant of the actual exercise by (her) of custody rights. More serious is the potential ground of refusal on the allegation that the applicant was not acting in good faith. This seems to be an invitation to try the merits in the recipient state and the hope is expressed that this clause will be deleted at the Plenary Session of the Conference. The Hague Document also allows refusal if the return of the child raises apprehension of risk of harm to the child or "otherwise place the child in an intolerable situation". This ground is supported, not only because such an emergency ground seems essential, but also because it seems to meet possible objections to returning a child if this would cause him severe disruption, especially if it is thought that the home state is likely to send him back in the end.

19. Paragraph 9.20 refers to the reservations permitted in the European Convention. These are very extensive and, if taken advantage of to any degree, which seems inevitable, could seriously weaken any impact which the Convention would have.

20. Section 10 concludes the Report by looking at The Hague Document from a Commonwealth perspective. It is concluded that the European Convention contains too many uncertainties to form the basis for uniform international action. The Hague scheme is compared with the position currently reached in the Commonwealth on this issue and

evaluated as to whether it successfully achieves the goals considered earlier in the Report to be a desirable basis for action. It is concluded that, while the adoption of the scheme would be inconsistent with the *McKee* principle in theory, it would in effect codify the way in which it is currently implemented. In particular, the principle of seeking to restore actually exercised custody rights rather than automatically enforcing foreign orders is fully consistent with current judicial practice. Adherence to the scheme would not, however, give rise to inconsistency in those jurisdictions which have adopted limited schemes of recognition and enforcement of foreign custody orders. Such orders provide excellent evidence of existing custody rights and their registration would enhance the purposes of The Hague scheme. Indeed, the scheme would fill the area left open by those provisions, *viz.* cases of abduction before any foreign order is made. The limitation of the scheme to restoration of custody rights exercised in the country of the child's habitual residence is in line with Commonwealth views on jurisdiction and would be a valuable safeguard in any international commitment.

21. It is considered that The Hague Document successfully meets the guidelines considered relevant for such a scheme. Although it does not expressly require contracting states to commit themselves to undertake that the child's interests should be the primary goal in their legal principles governing these cases (and it is thought that this would be a desirable commitment) it is suggested that the very entry by a state into a Convention of this kind, if made in good faith, shows a commitment to place the welfare of children above the claims some adults and other sectional interests might make in these cases.

22. It is pointed out that the provisions as to costs in both schemes are similar but that The Hague Document is based on the assumption that not all contracting parties will have widespread legal aid schemes operative in their countries.

23. The Report concludes by urging all Commonwealth countries disposed to combat the problem of international child abduction to take an interest in the final drawing up of The Hague Convention and to make that Convention the basis of an international system to protect children from these ordeals.

## ANNEX A

# HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

## PRELIMINARY DRAFT CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

adopted by the Special Commission  
on November 16th, 1979

### CHAPTER I—SCOPE OF THE CONVENTION

#### *Article 1*

The objects of this Convention are—

- a* to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and
- b* to secure in all Contracting States the effective enjoyment of the rights of custody and of access.

#### *Article 2*

Contracting States will take all appropriate measures to secure within their territories the implementation of the objects of the Convention. They shall use the most expeditious procedures available.

#### *Article 3*

The removal or the retention of a child is to be considered wrongful when it is in breach of rights of custody actually exercised by a person [or institution], either jointly or alone, based upon the

law of the State in which the child was habitually resident immediately before the removal or retention, whether through operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having the force of law in that State.

#### *Article 4*

The Convention shall apply to any child under the age of [16] years who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

#### *Article 5*

For the purposes of this Convention—

- a* "rights of custody" are rights relating to the care of the person of the child, and in particular the right to determine the child's place of residence;
- b* "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.

## CHAPTER II—CENTRAL AUTHORITIES

### Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States and States with more than one system of law shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the relevant Central Authority in that State.

### Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through other competent authorities in their States, they shall—

- a* take steps to discover the whereabouts of wrongfully removed or retained children;
- b* take or promote the taking of such provisional measures as may be necessary to prevent further harm to the child or further prejudice to interested parties;
- c* exchange, where appropriate, information relating to the social background of the child;
- d* take or cause to be taken all steps appropriate either to ensure the voluntary return of the child or to bring about an amicable resolution of the issues;
- e* provide information of a general character as to the law of their State relating to the application of the Convention;
- f* initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, where appropriate, the determination of issues relating to rights of custody and access;
- g* where appropriate, provide or facilitate the provision of legal aid and advice, including the services of legal counsel;
- h* provide such administrative arrangements as may be necessary and appropriate to achieve the safe return of the child.

## CHAPTER III—RETURN OF CHILDREN

### Article 8

Any person who claims that there has been a breach of his custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

- a* details concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
  - b* the date of birth of the child;
  - c* the grounds on which the applicant's claim for return of the child is based;
  - d* all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
- The application may be accompanied or supplemented by—
- e* a certified copy of any relevant decision or any agreement having the force of law;
  - f* a certificate or a sworn declaration emanating from a competent authority of the State of the child's habitual residence, or from a qualified person, concerning the contents of the law of that State with respect to custody rights;
  - g* any other relevant document.

### Article 9

Prior to the institution of legal proceedings, the Central Authority of the State where the child is to be found shall take or cause to be taken all appropriate measures in order to obtain the return of the child by consent.

### Article 10

The judicial or administrative authorities of Contracting States shall act expeditiously on applications for the return of children.

If these judicial or administrative authorities have not reached a decision within six weeks after their receipt of the application, the Central Authority of the requested State shall so inform the applicant and the Central Authority of the requesting State, stating the reasons. The requirements imposed upon the Central Authority by this paragraph apply only where the Central Authority has been informed of the application.

### Article 11

Where there has been a breach of custody rights in term of article 3 and, at the date of the application to the judicial or administrative authority of the State where the child is located, a period of less than six months has elapsed from the date of the breach of custody rights, the authority shall order the return of the child forthwith.

However, where the residence of the child was unknown, the period of six months referred to in the previous paragraph shall run from the date of the discovery of the child, subject to the proviso that the total period shall not exceed one year from the date of the breach.

### Article 12

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 who has removed or retained the child establishes that—

- a* at the time of the alleged breach the applicant was not actually exercising the custody rights or acting in good faith; or
- b* there is a substantial risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authorities may also refuse the return of the child if they find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In evaluating the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority of the child's habitual residence.

#### *Article 13*

In determining whether or not the child should be returned, the judicial or administrative authority shall have regard to the law of the State of the habitual residence of the child before the removal, as that law is specified in article 3.

#### *Article 14*

The Central, judicial or administrative authorities of a Contracting State may request the authorities of the State of the habitual residence of the child to take all practicable steps to obtain a decision or other determination relating to the fact that the child has been removed or retained and that the child's removal or retention was wrongful within the meaning of article 3 of the Convention.

#### *Article 15*

The provisions of this Chapter do not limit the power of judicial or administrative authorities to order the return of the child after the expiration of the time limits set out in article 11.

#### *Article 16*

A decision concerning the return of the child shall not be construed as one relating to the merits of custody rights.

### CHAPTER IV—RIGHTS OF ACCESS

#### *Article 17*

An application for fixing or protecting the exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

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

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

### CHAPTER V—GENERAL PROVISIONS

#### *Article 18*

No security, bond or deposit, however described, shall be required [of a person habitually resident in a Contracting State] as a condition of the initiation of judicial proceedings falling within the scope of this Convention.

#### *Article 19*

No legalisation or similar formality may be required in the context of the Convention.

#### *Article 20*

Any application, communication or other document addressed to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may object to the use of either French or English, but not both, by making the reservation provided in article X.

#### *Article 21*

Nationals of the Contracting States and persons who are habitually resident in the territory of those States shall be entitled in matters concerned with the application of the Convention to legal aid and advice in any other Contracting State as if they themselves were nationals of and habitually resident in that State.

#### *Article 22*

Each Central Authority shall bear its own costs in applying the Convention.

Central Authorities and other administrative authorities of Contracting States shall not impose any charges in relation to applications submitted under this Convention but may—

- a* require the payment of any charges which are not met through the legal aid system and which arise from the employment of legal counsel;
- b* require the payment of the expenses incurred or to be incurred in repatriating the child.

#### *Article 23*

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well-founded, the Central Authority is not obliged to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted of its objections.

*Article 24*

A Central Authority may require that any application be accompanied by an authorization empowering it to act on behalf of the applicant, or to designate a person or institution so to act.

*Article 25*

This Convention shall not prevent any person whose custody or access rights have been breached applying directly to the judicial or administrative authorities of a Contracting State.

[*Article 26*

Any application submitted to the Central Authorities of the Contracting States in accordance with the terms of this Convention, together with documents and other information appended thereto or provided by a Central Authority, shall be admissible in the courts of the Contracting States.]

*Article 27*

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

- a* any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b* any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

*Article 28*

In relation to a State which in matters of custody of children has two or more systems of law applicable to

different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

*Article 29*

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

*Article V*

(Relations with other Conventions: to be decided by the Fourteenth Session.)

*Article W*

(Temporal application of the Convention: to be decided by the Fourteenth Session.)

*Article X*

(Reservation accepted.)

*Article Y* (to be included among the final clauses)

If a Contracting State has two or more territorial units which have their own rules of law in respect of custody of children, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry for Foreign Affairs of the Kingdom of the Netherlands, and shall state expressly the territorial units to which this Convention applies.

**ANNEX B**

**EUROPEAN CONVENTION ON RECOGNITION AND ENFORCEMENT OF DECISIONS CONCERNING CUSTODY OF CHILDREN AND ON RESTORATION OF CUSTODY OF CHILDREN**

The member States of the Council of Europe, signatory hereto,

Recognising that in the member States of the Council of Europe the welfare of the child is of overriding importance in reaching decisions concerning his custody;

Considering that the making of arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced will provide greater protection of the welfare of children;

Considering it desirable, with this end in view, to emphasise that the right of access of parents is a normal corollary to the right of custody;

Noting the increasing number of cases where children have been improperly removed across an international frontier and the difficulties of securing adequate solutions to the problems caused by such cases;

Desirous of making suitable provision to enable the custody of children which has been arbitrarily interrupted to be restored;

Convinced of the desirability of making arrangements for this purpose answering to different needs and different circumstances;

Desiring to establish legal co-operation between their authorities,

Have agreed as follows:

### *Article 1*

For the purposes of this Convention:

- a. *child* means a person of any nationality, so long as he is under 16 years of age and has not the right to decide on his own place of residence under the law of his habitual residence, the law of his nationality or the internal law of the State addressed;
- b. *authority* means a judicial or administrative authority;
- c. *decision relating to custody* means a decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or the right of access to him;
- d. *improper removal* means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; improper removal also includes:
  - i. the failure to return a child across an international frontier at the end of a period of the exercise of the right to access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised;
  - ii. a removal which is subsequently declared unlawful within the meaning of Article 12.

## PART I

### *Central authorities*

#### *Article 2*

1. Each Contracting State shall appoint a central authority to carry out the functions provided for by this Convention.
2. Federal States and States with more than one legal system shall be free to appoint more than one central authority and shall determine the extent of their competence.
3. The Secretary General of the Council of Europe shall be notified of any appointment under this Article.

#### *Article 3*

1. The central authorities of the Contracting States shall co-operate with each other and promote co-operation between the competent authorities in their respective countries. They shall act with all necessary despatch.
2. With a view to facilitating the operation of this Convention, the central authorities of the Contracting States:
  - a. shall secure the transmission of requests for information coming from competent authorities and relating to legal or factual matters concerning pending proceedings;

- b. shall provide each other on request with information about their law relating to the custody of children and any changes in that law;
- c. shall keep each other informed of any difficulties likely to arise in applying the Convention and, as far as possible, eliminate obstacles to its application.

### *Article 4*

1. Any person who has obtained in a Contracting State a decision relating to the custody of a child and who wishes to have that decision recognised or enforced in another Contracting State may submit an application for this purpose to the central authority in any Contracting State.
2. The application shall be accompanied by the documents mentioned in Article 13.
3. The central authority receiving the application, if it is not the central authority in the State addressed, shall send the documents directly and without delay to that central authority.
4. The central authority receiving the application may refuse to intervene where it is manifestly clear that the conditions laid down by this Convention are not satisfied.
5. The central authority receiving the application shall keep the applicant informed without delay of the progress of his application.

### *Article 5*

1. The central authority in the State addressed shall take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities, in order:
  - a. to discover the whereabouts of the child;
  - b. to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or of the applicant;
  - c. to secure the recognition or enforcement of the decision;
  - d. to secure the delivery of the child to the applicant where enforcement is granted;
  - e. to inform the requesting authority of the measures taken and their results.
2. Where the central authority in the State addressed has reason to believe that the child is in the territory of another Contracting State it shall send the documents directly and without delay to the central authority of that State.
3. With the exception of the cost of repatriation, each Contracting State undertakes not to claim any payment from an applicant in respect of any measures taken under paragraph 1 of this Article by the central authority of that State on the applicant's behalf, including the costs of proceedings and, where appli-

cable, the costs incurred by the assistance of a lawyer.

4. If recognition or enforcement is refused, and if the central authority of the State addressed considers that it should comply with a request by the applicant to bring in that State proceedings concerning the substance of the case, that authority shall use its best endeavours to secure the representation of the applicant in the proceedings under conditions no less favourable than those available to a person who is resident in and a national of that State and for this purpose it may, in particular, institute proceedings before its competent authorities.

#### Article 6

1. Subject to any special agreements made between the central authorities concerned and to the provisions of paragraph 3 of this Article:

- a. communications to the central authority of the State addressed shall be made in the official language or in one of the official languages of that State or be accompanied by a translation into that language;
- b. the central authority of the State addressed shall nevertheless accept communications made in English or in French or accompanied by a translation into one of these languages.

2. Communications coming from the central authority of the State addressed, including the results of enquiries carried out, may be made in the official language or one of the official languages of that State or in English or French.

3. A Contracting State may exclude wholly or partly the provisions of paragraph 1.b of this Article. When a Contracting State has made this reservation any other Contracting State may also apply the reservation in respect of that State.

## PART II

### *Recognition and enforcement of decisions and restoration of custody of children*

#### Article 7

A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State.

#### Article 8

1. In the case of an improper removal, the central authority of the State addressed shall *cause steps to be taken forthwith* to restore the custody of the child where:

- a. at the time of the institution of the proceedings in the State where the decision was given or at the time of the improper removal, if earlier, the child and his parents had as their sole national-

ity the nationality of that State and the child had his habitual residence in the territory of that State, and

- b. a request for the restoration was made to a central authority within a period of six months from the date of the improper removal.

2. If, in accordance with the law of the State addressed, the requirements of paragraph 1 of this Article cannot be complied with without recourse to a judicial authority, none of the grounds of refusal specified in this Convention shall apply to the judicial proceedings.

3. Where there is an agreement officially confirmed by a competent authority between the person having the custody of the child and another person to allow the other person a right of access, and the child, having been taken abroad, has not been restored at the end of the agreed period to the person having the custody, custody of the child shall be restored in accordance with paragraphs 1.b and 2 of this Article. The same shall apply in the case of a decision of the competent authority granting such a right to a person who has not the custody of the child.

#### Article 9

1. In cases of improper removal, other than those dealt with in Article 8, in which an application has been made to a central authority within a period of six months from the date of the removal, recognition and enforcement may be refused only if:

- a. in the case of a decision given in the absence of the defendant or his legal representative, the defendant was not duly served with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence; but such a failure to effect service cannot constitute a ground for refusing recognition or enforcement where service was not effected because the defendant had concealed his whereabouts from the person who instituted the proceedings in the State of origin;
- b. in the case of a decision given in the absence of the defendant or his legal representative, the competence of the authority giving the decision was not founded:
  - i. on the habitual residence of the defendant, or
  - ii. on the last common habitual residence of the child's parents, at least one parent being still habitually resident there, or
  - iii. on the habitual residence of the child;
- c. the decision is incompatible with a decision relating to custody which became enforceable in the State addressed before the removal of the child, unless the child has had his habitual residence in the territory of the requesting State for one year before his removal.

2. Where no application has been made to a central authority, the provisions of paragraph 1 of this Article shall apply equally, if recognition and

enforcement are requested within six months from the date of the improper removal.

3. In no circumstances may the foreign decision be reviewed as to its substance.

#### *Article 10*

1. In cases other than those covered by Articles 8 and 9, recognition and enforcement may be refused not only on the grounds provided for in Article 9 but also on any of the following grounds:

a. if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed;

b. if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child;

c. if at the time when the proceedings were instituted in the State of origin:

i. the child was a national of the State addressed or was habitually resident there and no such connection existed with the State of origin;

ii. the child was a national both of the State of origin and of the State addressed and was habitually resident in the State addressed;

d. if the decision is incompatible with a decision given in the State addressed or enforceable in that State after being given in a third State, pursuant to proceedings begun before the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child.

2. In the same cases, proceedings for recognition or enforcement may be adjourned on any of the following grounds:

a. if an ordinary form of review of the original decision has been commenced;

b. if proceedings relating to the custody of the child, commenced before the proceedings in the State of origin were instituted, are pending in the State addressed;

c. if another decision concerning the custody of the child is the subject of proceedings for enforcement or of any other proceedings concerning the recognition of the decision.

#### *Article 11*

1. Decisions on rights of access and provisions of decisions relating to custody which deal with the right of access shall be recognised and enforced subject to the same conditions as other decisions relating to custody.

2. However, the competent authority of the State addressed may fix the conditions for the implemen-

tation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter.

3. Where no decision on the right of access has been taken or where recognition or enforcement of the decision relating to custody is refused, the central authority of the State addressed may apply to its competent authorities for a decision on the right of access, if the person claiming a right of access so requests.

#### *Article 12*

Where, at the time of the removal of a child across an international frontier, there is no enforceable decision given in a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person.

### **PART III**

#### *Procedure*

#### *Article 13*

1. A request for recognition or enforcement in another Contracting State of a decision relating to custody shall be accompanied by:

a. a document authorising the central authority of the State addressed to act on behalf of the applicant or to designate another representative for that purpose;

b. a copy of the decision which satisfies the necessary conditions of authenticity;

c. in the case of a decision given in the absence of the defendant or his legal representative, a document which establishes that the defendant was duly served with the document which instituted the proceedings or an equivalent document;

d. if applicable, any document which establishes that, in accordance with the law of the State of origin, the decision is enforceable;

e. if possible, a statement indicating the whereabouts or likely whereabouts of the child in the State addressed;

f. proposals as to how the custody of the child should be restored.

2. The documents mentioned above shall, where necessary, be accompanied by a translation according to the provisions laid down in Article 6.

#### *Article 14*

Each Contracting State shall apply a simple and expeditious procedure for recognition and enforcement of decisions relating to the custody of a child. To that end it shall ensure that a request for enforcement may be lodged by simple application.

#### *Article 15*

1. Before reaching a decision under paragraph 1.b of Article 10, the authority concerned in the State addressed:

- a. shall ascertain the child's views unless this is impracticable having regard in particular to his age and understanding; and
- b. may request that any appropriate enquiries be carried out.

2. The cost of enquiries in any Contracting State shall be met by the authorities of the State where they are carried out.

Requests for enquiries and the results of enquiries may be sent to the authority concerned through the central authorities.

#### *Article 16*

For the purposes of this Convention, no legalisation or any like formality may be required.

### **PART IV**

#### *Reservations*

##### *Article 17*

1. A Contracting State may make a reservation that, in cases covered by Articles 8 and 9 or either of these Articles, recognition and enforcement of decisions relating to custody may be refused on such of the grounds provided under Article 10 as may be specified in the reservation.

2. Recognition and enforcement of decisions given in a Contracting State which has made the reservation provided for in paragraph 1 of this Article may be refused in any other Contracting State on any of the additional grounds referred to in that reservation.

##### *Article 18*

A Contracting State may make a reservation that it shall not be bound by the provisions of Article 12. The provisions of this Convention shall not apply to decisions referred to in Article 12 which have been given in a Contracting State which has made such a reservation.

### **PART V**

#### *Other instruments*

##### *Article 19*

This Convention shall not exclude the possibility of relying on any other international instrument in force between the State of origin and the State addressed or on any other law of the State addressed not derived from an international agreement for the purpose of obtaining recognition or enforcement of a decision.

#### *Article 20*

1. This Convention shall not affect any obligations which a Contracting State may have towards a non-contracting State under an international instrument dealing with matters governed by this Convention.

2. When two or more Contracting States have enacted uniform laws in relation to custody of children or created a special system of recognition or enforcement of decisions in this field, or if they should do so in the future, they shall be free to apply, between themselves, those laws or that system in place of this Convention or any part of it. In order to avail themselves of this provision the States shall notify their decision to the Secretary General of the Council of Europe. Any alteration or revocation of this decision must also be notified.

### **PART VI**

#### *Final clauses*

##### *Article 21*

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

##### *Article 22*

1. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 21.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

##### *Article 23*

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, by a decision taken by the majority provided for by Article 20.d of the Statute and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

#### Article 24

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

#### Article 25

1. A State which has two or more territorial units in which different systems of law apply in matters of custody of children and of recognition and enforcement of decisions relating to custody may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that this Convention shall apply to all its territorial units or to one or more of them.
2. Such a State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territorial unit specified in the declaration. In respect of such territorial unit the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territorial unit specified in such declaration, be withdrawn by notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

#### Article 26

1. In relation to a State which has in matters of custody two or more systems of law of territorial application:
  - a. reference to the law of a person's habitual residence or to the law of a person's nationality shall be construed as referring to the system of law determined by the rules in force in that State

or, if there are no such rules, to the system of law with which the person concerned is most closely connected;

- b. reference to the State of origin or to the State addressed shall be construed as referring, as the case may be, to the territorial unit where the decision was given or to the territorial unit where recognition or enforcement of the decision or restoration of custody is requested.
2. Paragraph 1.a of this Article also applies *mutatis mutandis* to States which have in matters of custody two or more systems of law of personal application.

#### Article 27

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in paragraph 3 of Article 6, Article 17 and Article 18 of this Convention. No other reservation may be made.
2. Any Contracting State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

#### Article 28

At the end of the third year following the date of the entry into force of this Convention and, on his own initiative, at any time after this date, the Secretary General of the Council of Europe shall invite the representatives of the central authorities appointed by the Contracting States to meet in order to study and to facilitate the functioning of the Convention. Any member State of the Council of Europe not being a party to the Convention may be represented by an observer. A report shall be prepared on the work of each of these meetings and forwarded to the Committee of Ministers of the Council of Europe for information.

#### Article 29

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

#### Article 30

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention, of:

- a. any signature;

- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Convention in accordance with Articles 22, 23, 24 and 25;
- d. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Luxembourg, the.....1980, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to any State invited to accede to this Convention.