

**THE HAGUE CONVENTION
ON INTERNATIONAL CHILD ABDUCTION:
POLICY, ISSUES AND FUTURE REFORMS**

REBECCA MOCKETT*

Introduction

The aim of this paper is to examine the policy problem of international child abduction. International child abduction involves the abduction of a child by a parent from their home country (place of habitual residence) to another state. Prior to the establishment of the Hague Convention, the legal position regarding international child abduction was unsatisfactory.¹ An overseas custody order was unlikely to be recognised and enforced in another state and the only real remedy available was for the parent left behind to attempt to gain a custody order in the country where the child had been abducted to. This provided a very unjust situation, as the legal proceedings were normally lengthy and at a high cost and placed the left behind parent at a disadvantage of having to fight a court case in unfamiliar surroundings. Furthermore, there were potentially embarrassing situations for courts in which two jurisdictions would reach different decisions on the custody of a child and would appear to be questioning the law in the other jurisdiction. The response from the international community saw the Hague Conference on Private International Law propose the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) in 1980.

The Hague Convention was essentially a compromise as it was not possible for all states to agree to the harmonisation of the rules of jurisdiction or criteria for the recognition and enforcement of existing custody orders.² Instead of using traditional private law remedies, the

* Candidate for LLB (Hons); BA, University of Auckland.

¹ David McClean, *The Hague Convention on the Civil Aspects of International Child Abduction Explanatory Document* (Commonwealth Secretariat, Britain, 1997), 2.

² Paul R. Beaumont and Peter E. McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, New York, 1999), 21.

Hague Convention provides a procedural framework that operates through Central Authorities in each state, and is based on the summary return mechanism. This mechanism automatically returns an abducted child to their place of habitual residence.³ The basis for the summary return mechanism is the assumption that automatic return is in the best interests of the child.⁴ At the time of the drafting of the Convention, international child abduction cases were based on the paradigm abduction case that involved the non-resident and non-custodial parent (usually the father) abducting his child in order to gain a more favourable custody order in another jurisdiction.⁵ In the situation of the paradigm abduction case, automatic return is in the child's best interests as the child is returned to their primary carer, to an environment that they are familiar with and allows the custody dispute to be heard in the place of habitual residence.⁶ The compromise evident in the Convention was between states' original reluctance to cede their ability to look into the merits of individual cases and the simplicity that the summary return mechanism provides.⁷

Since 1980, socio-legal and technical developments have led to change in the profile of the child abductor. It is now more common for the abductor to be female, the primary caregiver, and to be returning to their country of origin to escape domestic violence.⁸ The change in the paradigm abduction case has led to inevitable difficulties in the assumption that summary return is in the child's best interests. There is a tension between the summary return mechanism that does not consider the individual welfare of the child, the fundamental principles of New Zealand family law, and the United Nations Convention on the Rights of the Child (UNCRC) which holds the welfare of the child as of paramount importance. This tension was recognised with the passage of the Guardianship Amendment Bill 1991, which incorporated

³ Beaumont and McEleavy, above n 2, 21.

⁴ Margaret Casey and Lex de Jong, 'Hague Convention on Civil Aspects of Child Abduction' Seminar presented to the New Zealand Law Society, New Zealand, March 1995.

⁵ Beaumont and McEleavy, above n 2, 3.

⁶ Elisa Pérez- Vera *Explanatory Report* (1982) Hague Conference on Private International Law <<http://hcch.e-vision.nl/upload/exp128.pdf>> (at 20 May 2006).

⁷ Beaumont and McEleavy, above n 2, 20-21.

⁸ Mary O'Dwyer, "Current Issues in Hague Convention Cases: A New Zealand Perspective" (2002) 4 BFLJ 5.

the Convention into New Zealand law, yet little was understood as to its implications. The policy process regarding the Convention seems to have been driven by public perception of the need for the government to act after highly publicised international child abduction cases. The context of domestic violence also poses conceptual difficulties for the summary return mechanism. In light of these tensions, New Zealand has remained steadfast in its application of the Convention. However, New Zealand has been prepared to extend the scope of the Convention to allow not just parents with rights of custody to seek an order for return, but also those with rights of access. It is evident that the Convention needs to adapt to the changing context of child abduction. The difficulty is to attain reforms that do not undermine the entire functioning of the Convention. The focus of this paper is on the tensions between the Convention, the best interests of the child, domestic violence and the New Zealand interpretation of rights of custody.

A. The Hague Convention

1. Provisions of the Convention

The preamble of the Hague Convention states that the purpose of the Convention is “to protect children internationally from the harmful effects of their wrongful removal or retention...”⁹ This purpose is principally met through the objectives of the Hague Convention as set out in Article 1. They include the prompt return of children wrongfully removed or retained in any Contracting State and to ensure that rights of custody under the law of one Contracting State are respected in the other Contracting State.¹⁰ In order to invoke the Hague Convention and obtain the return of an abducted child there are four requirements. Firstly, that the child was removed from the child’s place of habitual residence to a Contracting State. Secondly, that the removal of the child breached the parent in the home country’s rights of custody. Thirdly, at the time of the removal, those rights of custody must have actually

⁹ Hague Convention on the Civil Aspects of International Child Abduction, opened for signature 1980, 19 ILM 1501, preamble, (entered into force November 1980) (“Hague Convention”).

¹⁰ Nigel Lowe, Mark Everall and Michael Nicholls, *International Movement of Children* (Jordan Publishing Limited, England, 2005) ch 12, 198.

been exercised by the parent in the home country. Lastly, that the child was habitually resident in the home country immediately before the removal.¹¹

The Convention provides five defences that may defeat an order for return. Firstly, the application was made more than one year after the removal of the child and that the child is now settled in the new environment.¹² Secondly, that the applicant was not exercising custody rights at the time of the removal or that the applicant consented to the removal.¹³ Thirdly, that there is a grave risk that the return would expose the child to physical or psychological harm or would place them in an intolerable situation.¹⁴ Fourthly, that the child objects to being returned (often called the “child objects” defence), if at an age and degree of maturity that it is appropriate to give weight to their view.¹⁵ Lastly, that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.¹⁶

2. Underlying Assumptions

The Convention is designed to minimise the effects of abduction upon the child and provide a deterrent to parents contemplating abduction.¹⁷ These goals are met through the summary return mechanism.¹⁸ These goals and the summary return mechanism reflect two underlying assumptions. The first assumption is that summary return is in the best interests of the child. This assumption is only true in the context of the paradigm abduction case as envisaged in 1980. The difficulty with this assumption is that developments in society since the time of drafting have led to a change in the prototype abductor. The second assumption

¹¹ Care of Children Act 2004, s 102. The Care of Children Act 2004 replaced the Guardianship Amendment Act 1991.

¹² Care of Children Act 2004, s 106(1)(a).

¹³ Care of Children Act 2004, s 106(1)(b)(i)-(ii).

¹⁴ Care of Children Act 2004, s 106(1)(c)(i)-(ii).

¹⁵ Care of Children Act 2004, s 106(1)(d).

¹⁶ Care of Children Act 2004, s 106(e).

¹⁷ Anne- Marie Hutchinson, Rachel Roberts and Henry Setright, *International Parental Child Abduction* (Family Law, United Kingdom, 1998), 4.

¹⁸ *Ibid.*

is that child abduction is harmful. The change in the profile of the child abductor has revealed the high incidence of child abduction in order to escape domestic violence.¹⁹ In the context of domestic violence, the abduction may actually remove the child from harmful circumstances. Therefore, the assumption that summary return is in the best interests of the child and that the abduction is harmful are questionable in the context of the changed prototype abduction and domestic violence.

2. Compromise and Tensions

At the drafting of the Convention, the summary return mechanism was decided upon as a compromise.²⁰ This mechanism provided a simple alternative to harmonising rules and received a great deal of political support.²¹ It also resolved the problem of conflicting custody orders being made by different jurisdictions and the subsequent disregard for the principle of comity that requires respect for the laws of other states. The main debate between states centred on the exceptions to summary return.²² There was significant support by some states for only allowing narrow exceptions to summary return to prevent the Convention being weakened.²³ The summary return mechanism was a novel idea and represented a major change, as the courts would no longer be able to determine abduction cases on the basis of the best interests of the individual child.²⁴ Therefore, some states were hesitant to accept the summary return mechanism and successfully advocated for the inclusion of a public policy clause. This clause allowed states to refuse an order for return if it was incompatible with its fundamental principles of the law relating to the family and children.²⁵ This clause would have resolved the tension between the summary return mechanism and the fundamental principle of New Zealand family law. However, there was fierce opposition to this clause, as it was seen as

¹⁹ O'Dwyer, above n 8, 9.

²⁰ Beaumont and McEleavy, above n 2, 21.

²¹ *Ibid* 21.

²² *Ibid* 22.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ *Ibid* 23.

weakening the Convention, and it was eventually replaced with a more restrictive clause.²⁶

The political momentum that followed the Hague Convention facilitated the making of concessions in order to reach a solution.²⁷ The concessions made were that courts would no longer be able to inquire into the individual merits of child abduction cases and that the exceptions to summary return were very narrow. Accordingly, states gave up the right to refuse an order for return on the basis that it was not in the best interests of the child. Consequently, the operation of the Convention has led to tensions between the assumption that summary return is in the best interests of the child and an individualistic approach that determines the best interests of the child on a case by case basis. It has been noted that the Convention emphasises the good of children generally by seeking to deter parents from unlawfully abducting a child and, as a result, the "Convention is a step removed from an individualistic child-centred approach inherent in the best interests of the child philosophy prevalent in family law."²⁸ This tension is highlighted by the paramountcy of the best interests of the child in the UNCRC and New Zealand family law and the subordination of the best interests of the individual child in the Convention. As noted above, particular focus will be placed on the tension between summary return and the best interests of the child and the context of domestic violence. In addition, this paper will discuss the tension between New Zealand's rigid application of the Convention generally, and the liberal approach New Zealand has adopted towards rights of custody.

B. Incorporation of the Hague Convention into New Zealand Law

The Hague Convention was incorporated into New Zealand law through the Guardianship Amendment Act 1991 that implemented the particulars of the Convention through legislative provisions rather than incorporating the Convention directly. At the time the Guardianship Amendment Bill 1990 (the Bill) was introduced, politicians were aware of the unsatisfactory legal situation regarding child abduction as there

²⁶ Ibid.

²⁷ Beaumont and McEleavy, above n 2, 21.

²⁸ Ibid. 13.

had been highly publicised international child abduction cases in New Zealand.²⁹ In the Morgan/Foretich case, an American woman claimed her husband had abused her child and abducted the child to New Zealand.³⁰ Despite an American court finding that there was inconclusive evidence of abuse, the mother was able to gain a custody order in her favour in New Zealand.³¹ This case was seen as epitomising the fact that New Zealand had become a safe haven for child abductors and highlighted the need for New Zealand to ratify the Hague Convention.³²

As is common in the policy process, often a highly publicised event forces the government to legislate to rectify a situation. In the case of child abduction, it is probable that the heightened publicity of the Morgan/Foretich case meant that the Government needed to be seen to be doing something and was a strong motivation behind the incorporation of the Convention. Therefore, it is questionable as to whether the ratification of the Convention by the Government was driven by the impact of the problem of child abduction on public consciousness, rather than the desire to resolve the problem of child abduction itself.

1. Policy Considerations

The arguments for and against the Hague Convention were evident during the Parliamentary Debates. The general focus of the debates was over the adequacy of the exceptions to summary return. Paul East was concerned that the discretion to refuse to return a child was not wide enough to prevent a court from having to return a child to a detrimental situation.³³ He recognised that the discretion is very limited and not as wide as the basic and fundamental principle of New Zealand family law that the welfare of the child is always paramount.³⁴ This highlighted that there was recognition during the policy process of the

²⁹ (1990) 507 New Zealand Parliamentary Debates 1544 (Warren Kyd).

³⁰ *Re the M Children* (2002) 21 FRNZ 67.

³¹ *Re the M Children*, above n 30, 67.

³² Sarah Prestwood, 'Child abduction: hide and seek' *The Dominion* (Wellington, New Zealand, 3 November 2001) 1, 4.

³³ (1990) 507 New Zealand Parliamentary Debates 1541 (Paul East).

³⁴ *Ibid.*

tension between the Convention and New Zealand family law. However, this is contradicted by Lianne Dalziel's comment that New Zealand family law is very much focused on the interests of the child and "that, of course, is the priority being adopted in the Bill tonight".³⁵ The Convention does not prioritise the interests of the child, as is done so in New Zealand family law. The initial concern expressed by members of the opposition and Paul East, were resolved through acceptance that the exceptions to summary return must be narrow in order to prevent a full custody hearing after every application for a child to be returned.³⁶

In submissions to the Justice and Law Reform Select Committee, the New Zealand Law Society and Professor Angelo of Victoria University both noted concern over section 23 of the Guardianship Act which required courts to "regard the welfare of the child as the first and paramount consideration" and the possibility that this section could defeat the Convention.³⁷ This shows that the tension between the Convention and the best interests of the child that are fundamental to New Zealand family law is again recognised. The Select Committee clarified, that, although the Hague Convention is based on the premise that the best interests of the child are of paramount importance, this is qualified by the fact that in international child abduction cases the interests of the child are best met through summary return.³⁸ The assumption that summary return is in the best interests of the child continued to be a major justification for the procedures within the Hague Convention and has later proven to be problematic in some situations. At the time the Bill was introduced, there did not appear to be any international obligations that the Convention needed to be reconciled with. Although there are inconsistencies between the UNCRC and the Convention, New Zealand did not ratify the UNCRC until 1993.³⁹

³⁵ (1991) 513 New Zealand Parliamentary Debates 1201 (Lianne Dalziel).

³⁶ (1991) 513 New Zealand Parliamentary Debates 1202 (Paul East).

³⁷ Carolyn Pritchett, *Summary of Issues Raised During the Hearing of Evidence and in Written Submissions to the Justice and Law Reform Select Committee on the Guardianship Amendment Bill 1990* (24 July 1990), 4.

³⁸ Secretary for Justice to Justice and Law Reform Committee, 24 July 1990.

³⁹ Peter Boshier, 'Care and Protection of Children: New Zealand and Australian Experience of Cross-Border Cooperation' (2005) 5 NZFLJ 63.

The incorporation of the Hague Convention into New Zealand domestic law was characterised by acceptance of the assumptions within the Convention. Particularly, the assumption that summary return was in the best interests of the child and that the prototype abductor was true for New Zealand.⁴⁰ Although there was no national interest analysis done for this time period, a memorandum for the Cabinet Legislation Committee shows that, firstly it was accepted that the Convention was aimed at the prototype abductor and that this was not questioned. Secondly, that the Convention met the best interests of the child through summary return.⁴¹ Furthermore, this memorandum states that the Bill provides no areas of contention or policy implications that require further analysis.⁴² During the policy process, there was no discussion over whether these assumptions and the framework the Hague Convention operates within are relevant for New Zealand. The underlying tension between the paramountcy of the best interests of the child and the operation of the summary return mechanism in the Convention has been recognised in the Select Committee stage and specifically legislated to prevent any confusion. However, during the parliamentary debates, it is clear that some of the politicians did not understand that the Convention is not in line with New Zealand family law. It was concluded that summary return with limited exceptions was necessary to prevent a full custody hearing from occurring after every application for a child to be returned.⁴³

2. Subsequent Developments

Since the implementation of the Bill, the legislation has not significantly changed. It was necessary to amend the Act in 1994, as the definition of “rights of custody” in the Guardianship Amendment Act 1991 was narrower than the definition in the Convention. There has been a wide range of case law involving the Convention and common issues that the courts have dealt with include questions regarding habitual residence, rights of custody and the established defences to an order for return. It appears that the driving force behind the development of the

⁴⁰ New Zealand Parliamentary Debates, above n 33, 1540.

⁴¹ Minister of Justice *Memorandum for Cabinet Legislation Committee* (1989), 1.

⁴² *Ibid.*

⁴³ (1991) 513 New Zealand Parliamentary Debates 1202 (Paul East).

law in this area is a strong desire to continue to uphold the spirit of the Convention and the summary return mechanism. In addition, the principle of comity continues to restrain judges from making decisions that appear to criticise another state's legal system. For example, judges are reluctant to allow the establishment of the grave risk defence in the situation of domestic violence as it is seen to be saying that the legal system of the place of habitual residence is unable to protect the victim and child upon return.

C. International Child Abduction and the Best Interests of the Child

The Convention assumes that the best interests of the child are met through the summary return mechanism. As the Convention is based on the prototype abductor, it is presumed that the child will be returned to their primary carer, their home and that that the custody dispute will be heard in an environment that is familiar. However, this approach to child abduction allows the individual child's best interests to be subordinated to the interests of children collectively.⁴⁴ The Court in *S v S* summarised this position by saying:

The provisions of the Act and the Convention also make it clear that the issue before the Court is not the best interests of the children as such, but rather the choice of forum where those best interests are to be determined.⁴⁵

Essentially, the Convention is about determining the forum for the custody dispute to be heard rather than ascertaining the best interests of the child on a case by case basis. A strong criticism of the Convention is that this approach will at times lead to the return of a child when it is not in their best interests and may cause harm. The difficulty with the approach in the Convention was evidenced in *KS v LS*⁴⁶ and *A v A*,⁴⁷ which are discussed below. As has been discussed, the Convention's approach to the best interests of the child is inconsistent with New Zealand family law in general and the UNCRC.

⁴⁴ Beaumont and McElevay, above n 2, 29.

⁴⁵ *S v S* [1999] 3 NZLR 528, 530 (CA).

⁴⁶ [2003] NZFLR 817.

⁴⁷ (1996) 14 FRNZ 348.

In *KS v LS*,⁴⁸ a mother abducted her daughter to New Zealand from Australia. The Family Court in New Zealand found that in the circumstances a return order would expose the child to grave risk of psychological harm and place the child in an intolerable situation, as the mother had been diagnosed with breast cancer and was unable to return to Australia with the child.⁴⁹ The Family Court held that it was in the best interests of the child that the mother and child were not separated.⁵⁰ The High Court overturned this decision on the basis that the judge in the Family Court had erred in the emphasis placed on the mother's illness and had not displaced the presumption of summary return, nor met the high threshold for the defence.⁵¹ The High Court continued with the approach that the best interests of the child are met through summary return and determination of the custody dispute in the place of habitual residence.

Another controversial case was that of *A v A*⁵², in which the mother abducted her child from Denmark to New Zealand. The mother claimed that the father had sexually abused the child. Despite evidence that the child had a real fear of returning to Denmark because the abuse may continue, an order for return was still made. The mother then took the child into hiding, as she was so concerned for the welfare of the child if an order for return was made.⁵³ These cases highlight the tension between the summary return mechanism and the best interests of the child, which may not warrant an order for return.

1. New Zealand Family Law

In New Zealand, the consideration of the welfare and best interests of the child is a fundamental basis and guiding principle in family law.⁵⁴ In section 4(1)(a)-(b) of the Care of Children Act 2004, it states that the welfare and best interests of the child should be the first and

⁴⁸ *KS v LS*, above n 46, 817.

⁴⁹ *Ibid.*

⁵⁰ *KS v LS*, above n 46, 818.

⁵¹ *Ibid.*

⁵² *A v A*, above n 47, 348.

⁵³ *Ibid.*

⁵⁴ Boshier, above n 39, 64.

paramount consideration in the administration and application of this Act and in any other proceeding involving the guardianship of the child.⁵⁵ Similarly, the Child, Young Persons and Families Act (CYPF Act) states that one of the guiding principles it applies to achieve its objectives is that the welfare and best interests of the child is the primary consideration and that young people must be protected from harm, their rights upheld and welfare promoted.⁵⁶ However, the Care of Children Act 2004, in section 4(7), expressly prevents the paramountcy principles in section 4 from overriding the provisions relating to child abduction. It is clear that there is an inconsistency between the paramountcy of the best interests and welfare of the child that is fundamental to New Zealand family law and the operation of the Convention, as was recognised by legislators in section 4(7).

During the incorporation of the Convention into New Zealand law, this tension between the Convention and New Zealand family law was partly recognised. At the Select Committee stage, a specific clause was inserted into the Bill to prevent the fundamental principles of family law from overriding the Convention. However, the Parliamentary Debates show that some of the politicians did not understand the tension between the Convention and New Zealand family law. During the drafting of the Convention, states were concerned that they would no longer be able to refuse to return a child if it was not in the child's best interests. This tension was not resolved, as a wide discretion to refuse an order for return was problematic as it would defeat the Convention. It would have been difficult to agree to harmonise family law rules, and the procedural framework in the Convention was a pragmatic compromise that required concessions in order to reach a workable solution. Within New Zealand, there was no discussion on how the Convention was a compromise and the implications that resulted.

The situations that have arisen in *KS v LS* and *A v A* highlight that the policy process in New Zealand did not contemplate that the application of the Convention would lead to the return of children in extremely detrimental situations. There was a general acceptance that the Convention was a step forward in the area of child abduction and it

⁵⁵ Care of Children Act 2004, s 4(1 (a)-(b)).

⁵⁶ Boshier, above n 39, 66.

could not be rendered unworkable by allowing substantive hearings every time an application for return was made. There is increasing criticism towards the Convention for placing the interests of children as a class above the interests of the individual child through the summary return mechanism.⁵⁷ In light of the emphasis on the welfare and best interests of the child in both New Zealand family law generally and the CYPF Act, the Convention places the interests of the child in a contrary position.

2. United Nations Convention on the Rights of the Child

Since the drafting of the Convention, there have been significant developments in the law relating to children's rights.⁵⁸ The Convention is based on traditional notions of parental rights and the welfare of the child rather than specific children's rights.⁵⁹ The Convention sought to balance the welfare of the individual child with the welfare of children generally by adopting the summary return mechanism.⁶⁰ In recent times, there has been increasing criticism that the summary return mechanism is inconsistent with the UNCRC. The UNCRC details the rights of children as being entitled to the same basic human rights as adults and additional rights as a result of being a child.⁶¹ Article 3 of the UNCRC states that the best interests of the child shall be a primary consideration in all actions concerning children. It is apparent that there is a tension between the approach to the best interests of the child in the Convention and article 3 of the UNCRC.

The main judicial attempt to reconcile the Convention and the UNCRC is that the best interests of the child are only relevant to substantive custody disputes and not Hague Convention applications, as they are only concerned with establishing the best forum for the custody dispute to be heard and not the individual merits of the case.⁶² Accordingly, it is said that the jurisdiction to determine the child's best interests is simply

⁵⁷ O'Dwyer, above n 8, 9.

⁵⁸ Rhona Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002)

12 *Transnat'l L. & Contemp. Probs.* 393, 397.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.* 401.

⁶² *Ibid.* 436.

transferred to the state where the child was abducted from.⁶³ This is not a compelling argument as it does not accord with Article 3 where the best interests of the child must be the *primary* consideration. There are two further criticisms to this argument. Firstly, the actual return of the child itself can impact on a child's welfare as it may expose the child to harm. Secondly, after the return of a child, the courts are reluctant to allow a child to be moved again. The child's need for stability is likely to override a decision that it is in the best interests of the child to be permitted to leave the country.

Furthermore, this argument requires that the courts in the home country apply the principle that the best interests of the child are paramount in determining the custody dispute. During the drafting of the Convention, it was noted that the summary return mechanism may not be appropriate as states have different levels of social and legal development.⁶⁴ However, the state hearing the application for return is unlikely to refuse the return if the legal system in the state the child is to be returned to does not determine custody disputes on the basis of the best interests of the child. This is because judges are reluctant to make decisions that appear to be criticising the legal system of another jurisdiction as this is highly offensive. The argument that the summary return mechanism is consistent with the best interests of the child is very weak. It cannot be guaranteed that return is in the best interests of the child and that the subsequent custody dispute will be determined in accordance with the best interests of the child.

There is also increasing awareness that the policy of expediency in the Convention which requires the child to be returned as quickly as possible and which does not allow expert reports, oral evidence, cross examination or counsel for the child is inconsistent with the UNCRC. Article 12 of the UNCRC states that parties must ensure that a child who is capable of formulating his or her own view, is given the right to express those views freely in all matters affecting the child, and have their views given due weight according to their age and maturity.⁶⁵ There is a tension between the perception of the child as dependent under the Hague Convention (as was the general perception of the

⁶³ Ibid.

⁶⁴ Beaumont and McElevay, above n 2, 19.

⁶⁵ O'Dwyer, above n 8, 10.

child at the time of drafting the Convention), and the notion that the child is a unique individual, who is entitled to participate in matters that affect them.⁶⁶ Article 12 of the UNCRC requires proceedings under the Hague Convention to adopt a procedure that allows a child the information and support required to form and express their view and have it understood properly.⁶⁷ Accordingly, in *VP v A*,⁶⁸ Judge Doogue accepted that legal and social changes since 1980 required the courts to take a more child-focused interpretation of the Hague Convention. He ordered that in the situation of the “child objects” defence being raised, the child has the right to counsel.⁶⁹ Accordingly, the development of children’s rights as evidenced in the UNCRC is beginning to affect the interpretation and application of the Convention.

3. Policy Recommendations

The summary return mechanism was a compromise between protecting the interests of the individual child, and protecting the interests of children generally.⁷⁰ The result was that an inevitable tension arose between the summary return mechanism, and the best interests of the individual child which is prevalent in New Zealand family law, and the UNCRC. Prior to the Convention, abduction cases could be decided upon the best interests of the child in the state the child had been abducted to. The problem was that the concept of “best interests” is indeterminate, with a wide range of factors being considered. Therefore, judges had a wide discretionary power in custody dispute cases.⁷¹ This wide discretionary power led to great uncertainty and varied decisions, meaning that abductors may have gained a more favourable outcome in another jurisdiction.⁷² Part of the function of the summary return mechanism is to protect children generally by

⁶⁶ Emma Parsons and Pauline Tapp, ‘Case Note: The Hague Convention in the 21st Century -An Issue of Process: *VP v A*’ (2005) 5 NZFLJ 23, 25.

⁶⁷ *Ibid.*

⁶⁸ [2004] FRNZ 141.

⁶⁹ *VP v A*, above n 69, 141.

⁷⁰ Beaumont and McElevay, above n 2, 21.

⁷¹ Jude Reddaway and Heather Keating, ‘Child Abduction: Would Protecting Vulnerable Children Drive a Coach and Four through the Principles of the Hague Convention’ (1997) Int’l J. Children’s Rts. 77, 79.

⁷² *Ibid* 84-85.

detering parents from abducting their child to another state in an attempt to gain a more favourable custody order. The summary return mechanism avoids an embarrassing situation, where a court decides a custody dispute differently from another jurisdiction.⁷³

The use of the summary return mechanism in the Convention has led to a tension between the fundamental principles of New Zealand family law and the UNCRC. Both New Zealand family law and the UNCRC place the welfare of the child as the paramount consideration in determining custody disputes. The assumptions within the Convention focus on the best interests of the child being met through the summary return mechanism. In this approach, the best interests of the child are often subordinated in order to ensure the Convention is not undermined. The implications of this tension were seen in *KS v LS* and *A v A*. In these cases, the New Zealand courts were forced to return a child when it is not in their best interests. As has been shown, the actual return may cause harm to the child and it cannot be guaranteed that other states will determine custody disputes on the basis of the best interests of the child.

In order to conform to the UNCRC and general family law principles, the courts should move towards an approach that would allow for situations in which an order for return can be refused where it is clearly not in the best interests of the child. This more child focused approach would allow the courts greater scope to refuse an order for return when it could result in harm to the child. This child-focused approach is criticised because it may marginalise the deterrent effect of the Convention and defeat the purpose of the Convention.⁷⁴ However, this is a weak argument as the courts would only utilise this approach in limited situations. Furthermore, this approach would not require the courts to look into the merits of each individual case as this would defeat the purpose of the Convention.⁷⁵

In reality, there is little political will to bring about significant changes to the application of the Convention. New Zealand has often stated the need to uphold the Convention when faced with the tension between

⁷³ Ibid 86.

⁷⁴ Schuz, above n 58, 397-398.

⁷⁵ Ibid 451.

the best interests of the child and the summary return mechanism. In order to remain effective in protecting children and combating the practice of child abduction, there is a need for the application of the Convention to continue to adapt to developments within society.

D. International Child Abduction and Domestic Violence

Increasingly, child abduction situations involve a mother who has custody, returning to her country of origin in order to escape domestic violence.⁷⁶ Domestic violence poses conceptual difficulties for the Hague Convention, as the summary return mechanism may return a child to a situation of domestic violence. This was seen in *M v M*⁷⁷ and *H v C*,⁷⁸ where an order for return was upheld despite serious domestic violence. Originally, it was thought the summary return mechanism adequately protected domestic violence victims. This was based on the assumption that the batterer would be the father and the abductor and therefore, the return of the child would be the safest option.⁷⁹ The Hague Convention does provide for the “grave risk” defence,⁸⁰ which prevents the return of a child. However this defence has been narrowly interpreted by the courts.⁸¹

The “grave risk” defence is often unsuccessful, because courts prefer to continue to opt in favour of summary return where the Contracting State that the child is to be returned to can adequately protect the child.⁸² This dilemma raises questions over whether New Zealand should continue to apply the summary return mechanism in the context of domestic violence, especially given the inadequacy of the “grave risk” defence. Undertakings and mirror orders are policy instruments

⁷⁶ Merle H Weiner, ‘International Child Abduction and the Escape from Domestic Violence’ (2001) 69 *Fordham L. Rev.* 593, 595- 596.

⁷⁷ [2001] NZFLR 769.

⁷⁸ [15 February 2001] Family Court, Wellington.

⁷⁹ Roxanne Hoegger, ‘What if She Leaves? Domestic Violence Cases under the Hague Convention and the Insufficiency of the Undertakings Remedy’ (2003) 18 *Berkeley Women’s L.J.* 181, 187.

⁸⁰ *Care of Children Act 2004*, s 106(1)(c)(i)-(ii).

⁸¹ *Ibid.*

⁸² Merle H Weiner, ‘The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad’ (2003) 11 *Am. U.J. Gender Soc. Pol’y & L.* 749, 755.

that are frequently used to protect the child upon return.

In *M v M*,⁸³ the mother abducted her four children from the United States to New Zealand. The mother objected to returning to the United States on the basis that the return would expose the children to grave risk of psychological harm and would place them in an intolerable situation as the father had been convicted of sexual assault against two of the children, and of assaulting the mother.⁸⁴ Despite Bisphan FCJ concluding that there was evidence that returning to the United States would expose the children to psychological harm, the decision was made that the harm would be of a limited nature and extent and, therefore the children were ordered to be returned to the United States.⁸⁵ Similarly, in *H v C*⁸⁶, an order was made for return of the children to Australia despite evidence of very serious domestic abuse including wounding with a knife. The mother was also suffering from depression as a result of the violence and there was evidence that if she was returned to Australia the depression and further drug abuse would be likely to occur.⁸⁷ The Court held that the defence of grave risk was not established and that there was adequate protection available in Australia. The driving force behind these decisions would appear to be the desire to uphold the Convention and not allow the high threshold for establishing the “grave risk” defence to be lowered. There has consistently been a genuine concern that allowing more discretion when making orders for return will render the Convention unworkable.

1. Best Interests of the Child

Within the Convention, the emphasis on the mechanism of summary return being in the best interests of the child is based on the assumption that the effects of child abduction are always harmful to the child. However, with domestic violence, the abduction by the fleeing parent may have removed the child from a dangerous situation. Merle Weiner, states that most research relating to the effects of domestic violence is based on negative effects upon the child as a result of living

⁸³ *M v M*, above n 78, 769.

⁸⁴ *Ibid.*

⁸⁵ *M v M*, above n 78, 779-780.

⁸⁶ *H v C*, above n 79.

⁸⁷ *Ibid.*

in secrecy after being abducted.⁸⁸ It has been said that a true representation of the effects of child abduction is more like a continuum, with the effects being dependent on the particular circumstances.⁸⁹ For example, a child being abducted and removed from a harmful environment is unlikely to be as negatively affected as a child who is abducted by a batterer and forced to live in hiding.

Given the nature of domestic violence, the summary return mechanism is inconsistent with the best interests of the child. Children are affected by domestic violence in numerous ways and the effects of domestic violence cannot be separated from custody issues.⁹⁰ It has been found that if a parent abuses the other parent, there is a high likelihood that they will also abuse the child.⁹¹ There is often an incorrect assumption in domestic violence cases that parental separation will stop a child from being detrimentally affected by domestic violence. Domestic violence still affects children if they no longer see it happening, as the victim's emotional distress is evident. There are also concerns that a batterer may continue to harass the other parent once the child and abductor have returned and use the child as a means to facilitate violence. It is evident that the summary return mechanism is inconsistent with the best interests of the child and does not fit with the nature of domestic violence.

2. "Grave Risk" Defence

The "grave risk" defence allows an application for the return of a child to be refused where there is a grave risk that his or her return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation. This defence was drafted to accommodate situations in which summary return would be detrimental to the child, yet the drafters were careful to avoid a general public policy or welfare defence that would defeat the overall purpose of the Convention to deter abductions and provide a fast return mechanism.⁹²

⁸⁸ Weiner, 'International Child Abduction and the Escape from Domestic Violence', above n 77, 619.

⁸⁹ Ibid 620.

⁹⁰ Hoegger, above n 80, 184.

⁹¹ Ibid 185.

⁹² Schuz, above n 55, 441.

The onus is on the person trying to claim the defence. This was intended to put the dispossessed person in the same position as the abductor.⁹³ However, in the situation of domestic violence, the victim who has abducted their child to escape violence will be at a disadvantage and the batterer will be given the upper hand.

The courts have been faced with the dilemma of a Convention that is aimed at abductions by non-custodial parents and the changed profile of the typical abductor. They, have thus tended to protect the integrity of the Convention and allow summary return even in questionable circumstances.⁹⁴ In order to establish the defence, the abductor must show that the place of habitual residence is unable to provide for the protection of the child upon return.⁹⁵ The courts are hesitant to say that another state cannot provide for the protection of a victim of domestic violence, as this is seen as offensive and indicative that the other legal system is inadequate. In *El Sayed v Secretary for Justice*⁹⁶, the defence of grave risk was established in the situation of serious domestic violence. The High Court held that the grave risk defence did not require a narrow interpretation and that the harm did not have to relate to the return to the country of habitual residence.⁹⁷ Although the High Court in *KS v LS*⁹⁸ agreed that the defence was established in *El Sayed*, it was clarified that the correct approach to the defence of grave risk is still to focus on the ability of the place of habitual residence to protect the child upon return.⁹⁹ In addition, the defence is still intended to be given a narrow interpretation.¹⁰⁰

Recently, the Court of Appeal in *HJ v Secretary for Justice*¹⁰¹ quashed an order for return and held that the defence of grave risk was established in the situation of serious domestic violence. This decision signalled a

⁹³ Pérez, above n 6, 460.

⁹⁴ Schuz, above n 55, 443.

⁹⁵ John Caldwell, 'The Hague Convention and a grave risk to children: recent developments' (2003) 4 BFLJ, 191.

⁹⁶ [2003] 1 NZLR 349.

⁹⁷ *Ibid.*

⁹⁸ [2004] NZFLR 817.

⁹⁹ *Ibid.* 193.

¹⁰⁰ *Ibid.*

¹⁰¹ [2007] 2 NZLR 289.

major change to the approach taken by the courts to Convention cases and domestic violence. Remarkably, this decision does not appear to have been criticised for its potential to weaken the Convention. This decision showed that domestic violence is being taken seriously and is authority for the presumption that return is not to replace an evaluative analysis of the facts when the defence is raised. The approach in *HJ* and approval of the use of the defence in *El Sayed* by the High Court in *KS v LS* shows that there are some circumstances of domestic violence in which the courts will be prepared to reject the presumption of automatic return. This is because the potential harm to the child is so serious that an inquiry into whether the home country can protect the child is almost irrelevant.¹⁰² The interesting question is whether New Zealand will be criticised for weakening the approach under the Convention.

3. Undertakings and Mirror Orders

Given the high threshold required to meet the “grave risk” defence, undertakings provide a means for the court to protect the child upon return. Undertakings include actions such as restraining orders, temporary custody arrangements, provision of costs for the return and possible assurances to go straight to the Family Court upon return.¹⁰³ The use of undertakings is designed to provide protection for the child until the receiving jurisdiction takes over responsibility for the child.¹⁰⁴ The difficulty with undertakings is the inability of the state issuing them to ensure that they are enforced in the state the child is returning to. In an attempt to deal with this difficulty, courts have begun to use mirror orders. Mirror orders provide that measures such as protection orders are granted in both the state hearing the Hague Convention application and the state in which the child is to be returned to.¹⁰⁵ In addition to this, Hague Convention liaison judges are used to facilitate communication between the two jurisdictions and ensure that protection measures are adequate pending the return of the child. The

¹⁰² *KS v LS*, above n 99, 193.

¹⁰³ Joseph Kay, ‘The Hague Convention - Order or Chaos?’ (2005) 19 *AJFL* 245, 279-282.

¹⁰⁴ Danny Sandor, ‘Review of the Hague Child Abduction Convention: protecting both children and adults until and upon return?’ (2001) 15 *AJFL* 80, 82.

¹⁰⁵ *Ibid* 83.

Special Commission Report of the Permanent Bureau in 1997 recommended that Article 7(h) of the Hague Convention place an obligation on Central Authorities to protect the welfare of the child upon his or her return.¹⁰⁶

A strong criticism is that often the perpetrator of domestic violence will not obey measures such as restraining orders and no matter what protection is ordered the child will still be in danger upon return. In a study done by 'reunite' (a child abduction charity) it was found that in 66.6 percent of the cases studied, undertakings were not honoured by the left behind parent upon the return of the child.¹⁰⁷ It has been said by some commentators that undertakings and mirror orders represent an effective compromise between the need to maintain the principle of summary return that is fundamental to the philosophy of the Convention, and finding a means to protect victims of domestic violence.¹⁰⁸ This is questionable, as the courts seem to be forfeiting the need to guarantee the safety of the child in order to uphold the Convention. It is clear that undertakings and mirror orders are a dubious compromise that allows the summary return principle to continue and seemingly still provide protection to domestic violence victims. This is an area that needs reform in order to address the nature of domestic violence in relation to child abduction situations.

4. Policy Recommendations

In 1997, the Special Commission, which reviews the Convention, first recognised the connection between domestic violence and the changed profile of the abductor. Despite this finding, little reform has been made to the Convention to deal with this issue.¹⁰⁹ The difficulty is that the recognition of domestic violence in situations of child abduction seems to warrant a different remedy. This is because the abduction is less morally reprehensible. However, there is a tension between the philosophy of the Convention that assumes that the best interests of

¹⁰⁶ Ibid 87.

¹⁰⁷ Marilyn Freeman, 'Outcomes for Abducted Children' [2004] IFL 171, 174.

¹⁰⁸ Hoegger, above n 80, 196.

¹⁰⁹ Permanent Bureau *Report of the third Special Commission meeting* (1997) Hague Conference on International Private Law < http://hchc.evision.nl/index_en.php?act=publications.details&pid=2271&dtid=2 > (at 3 August 2006).

the child warrants automatic return, and the recognition that in situations of domestic violence, summary return may expose the child to harm. The current situation requires rectification, as the Convention works in favour of the abuser.¹¹⁰ The victim is at a disadvantage because in most situations, the child will have to be returned, and the child is likely to be placed in close proximity to the abuser.¹¹¹ The recent decision in *HJ v Secretary for Justice*, to allow serious domestic violence to defeat an order for return, may initially resolve this tension between summary return and domestic violence. However, this decision is likely to eventually attract criticism, as it undermines the Convention. It is still necessary to resolve the tension within the operation of the Convention towards domestic violence. Possible policy options to address the problem of domestic violence include a specific domestic violence defence and the extension or codification of undertakings and mirror orders.

A specific domestic violence defence would allow an order for return to be defeated, upon the establishment of domestic violence, and a substantive hearing on the custody dispute to occur. This is advantageous because the victim is not subjected to having the child removed from them, and the child is likely to remain with the primary carer.¹¹² A specific domestic violence defence is the most straightforward method of addressing this issue, and would send a strong message concerning potential harm to children from domestic violence.¹¹³ The use of a domestic violence defence is criticised in two ways. Firstly, it is seen as contradicting the deterrence aim of the Convention. This is because it would potentially make it possible for abductors to gain a better custody order, than before they abducted the child.¹¹⁴ Secondly, such a defence may diminish the effectiveness of the Convention. This is because application procedures would be lengthened, and courts would be able to delve further into substantive

¹¹⁰ Weiner ‘International Child Abduction and the Escape from Domestic Violence’, above n 77, 634.

¹¹¹ *Ibid.*

¹¹² Barbara Lubin, ‘International Parental Child Abduction: Conceptualising new remedies through application of the Hague Convention’ (2005) 4 WUGSLR 415, 444.

¹¹³ Weiner, ‘International Child Abduction and the Escape from Domestic Violence’, above n 77, 694.

¹¹⁴ Sandor, above n 105, 87.

hearings instead of automatic return. However, the defence would require clear evidence of domestic violence, and is not likely to be able to be used by opportunistic parents wanting to gain a better custody order. Despite the logic behind a specific defence, there is little political will to interfere into what is regarded as a successful instrument.¹¹⁵

Another policy option is the codification of undertakings or the extension of mirror orders. In order for undertakings to be a widespread solution to domestic violence there needs to be authorisation of undertakings in the Convention to allow them to be enforceable in all contracting states.¹¹⁶ As undertakings are not enforceable, states have preferred to use mirror orders. Mirror orders are enforceable in both the state hearing the application for return, and the state the child is being returned to. There is also a need for further education regarding domestic violence, to ensure that the use of undertakings and mirror orders is effective, and most relevant to the behaviour that jeopardises the victim and child's safety. It is also important to note that undertakings and mirror orders will only be valid if a state has effective measures to combat domestic violence. As noted during the drafting of the Convention, not all states have the same level of social and legal development.¹¹⁷ It has also been established that there are situations of domestic violence, in which no matter what undertakings are given or mirror orders made, the victim and the child will still not be safe upon return. As it is very difficult to change the Convention, mirror orders are a preferred policy instrument. However, both mirror orders and undertakings do not guarantee the safety of the abductor and child.

E. Rights of Access and Rights of Custody

The Convention uses the distinction between rights of custody and rights of access as a basis for quantifying what constitutes a wrongful removal or retention of a child.¹¹⁸ Again, this was a compromise, as in

¹¹⁵ Marilyn Freeman, 'Primary Carers and the Hague Child Abduction Convention' [2001] IFL 140, 145.

¹¹⁶ Freeman, 'Primary Carers and the Hague Child Abduction Convention', above n 115, 678.

¹¹⁷ Beaumont and McEleavv, above n 2, 19.

¹¹⁸ Ibid 45.

custody disputes there can be many competing claims. For example, there is the claim of the abductor, the left behind parent, the child and other relatives. In order to deal with each of these claims, a substantive hearing into the merits of each claim would be required and the summary return mechanism would be impractical. The decision to focus on protecting the rights of the custodial parent was seen as the most simple and practical formula.¹¹⁹ Under the Convention, rights of custody give rise to a right to apply for the return of an abducted child, and rights of access only give rise to access arrangements. At the time of the drafting of the Convention, it was presumed that the abductor would be the non-custodial parent, and that the left behind parent would have rights of custody. At this time, it was common for one parent to have primary responsibility for the child, and the other parent to have defined access arrangements.¹²⁰ Therefore, protecting the parent with rights of custody would be in the best interests of the child, as the abducted child would be returned to their primary carer and home country.

In recent times, an increase in the breakdown of marriages and relationships has led the Courts to use less traditional means of allocating responsibility for children.¹²¹ As the prototype abduction situation is no longer true, it has become more difficult to maintain the distinction between the custodial and the non-custodial parent. The New Zealand courts have taken a liberal approach to the definition of rights of custody, and allowed a parent with rights of access to obtain an order for return. This was evidenced in the cases of *Gross v Boda*¹²² and *Dellabarca v Christie*.¹²³ This approach is contrary to the wording of the Convention and international jurisprudence on the matter. New Zealand has been criticised by other jurisdictions for the unilateral extension of the scope of the Convention. This criticism of the New Zealand approach was seen in the English decision of *Hunter v Murrow*.¹²⁴ The consequence is that New Zealand courts may allow a child to be returned to a parent that has not had substantial contact

¹¹⁹ *Ibid.*

¹²⁰ *Ibid* 210.

¹²¹ Lowe, Everall and Nicholls, above n 10, 257.

¹²² [1995] NZFLR 49 (CA).

¹²³ [1996] NZFLR 829.

¹²⁴ [2005] EWCA Civ 976.

with their child. There has been little reaction to this development within New Zealand and it is unlikely that the Government realises there is a problem.

1. The New Zealand Approach

Instead of incorporating the Hague Convention as a whole directly into domestic law, New Zealand chose to implement it through legislative provisions. In doing so, the Guardianship Amendment Act 1991 initially defined rights of custody as the right to the possession, and care of the child, and the right to determine where the child lived.¹²⁵ This definition was actually narrower than the definition in the Convention and consequently required amending by the Guardianship Amendment Act 1994.¹²⁶ The 1994 amendment changed the definition of rights of custody to include rights relating to the care of the child, and the right to determine the child's place of residence.¹²⁷ Rights of access are defined as the right to take a child for a limited period of time to a place other than the child's habitual residence.

In *Gross v Boda*,¹²⁸ the Court of Appeal held that the father's visitation rights that included every other weekend and alternating holidays gave him intermittent possession, and was sufficient to qualify as rights of custody. Cooke P disagreed with the distinction between rights of custody and rights of access, and stated that "no convincing reason has been given in argument for postulating a sharp dichotomy between the two concepts".¹²⁹ Therefore a parent with substantial intermittent rights to the possession and care of the child could be said to have rights of custody.¹³⁰ Similarly, in *Dellabarca v Christie*,¹³¹ the father was held to have rights of custody arising from his entitlement to daytime access every Wednesday and one weekend day every third week, as this was considered to be a right relating to the care of the person of the

¹²⁵ Guardianship Amendment Act, s 4.

¹²⁶ Paul Geraghty (ed.), *Family Law in New Zealand* (11th ed, LexisNexis New Zealand Limited, New Zealand, 2003) vol 1, ch 6, 592.

¹²⁷ *Ibid*.

¹²⁸ *Gross*, above n 123, 49.

¹²⁹ *Ibid*.

¹³⁰ *Ibid* 55-56.

¹³¹ *Dellabarca*, above n 124, 829.

child. These cases highlight that extending the definition of rights of custody, can allow a parent with only rights of access to successfully obtain the return of the child.

In the introduction of the Guardianship Amendment Bill 1991, Hon. William Jefferies, Minister of Justice, stated that ratifying the Convention, demonstrated New Zealand's commitment to international cooperation.¹³² This is an interesting statement, as New Zealand has taken a contradictory stance towards the application of the Convention. In the face of changing trends in child abduction situations, New Zealand has relentlessly upheld the Convention. New Zealand has allowed children to be returned in the context of circumstances such as domestic violence. However, New Zealand has been willing to unilaterally extend the scope of the Convention, and allow the return of a child to a parent who only exercises rights of access that are not protected by the Convention. There has been such disapproval of the New Zealand approach, that the principle of comity that usually restrains courts from criticising the legal system of another state has not prevented the resulting condemnation.

2. Criticisms

The difficulty with the New Zealand approach to rights of custody is that it allows a parent who never had actual care of the child to apply for the return of the abducted child.¹³³ Consequently, an order for return may send a child to a parent and situation that is totally unfamiliar. The Convention, through the summary return mechanism, intends to return a child to their primary carer and a familiar environment. Although summary return does not always bring this result, there is still no justification for the New Zealand approach. The extension of rights of custody does not further the intentions of the Convention. Furthermore, upon return of the child, a substantive hearing is unlikely to grant custody to a parent with only access rights, and what is known as an 'empty shuttle' occurs. An empty shuttle occurs when an abducted child is returned to their home country and the abducting parent is then given permission to leave the country with the child. This is a pointless procedure, as the parent with rights of

¹³² (1990) 507 New Zealand Parliamentary Debates 1540 (W.P. Jefferies).

¹³³ *A v A [Child Abduction]* (2001) 21 FRNZ 540.

access is unlikely to be granted custody, and as a result there is a considerable waste of time, resources and cost by all parties involved.

This criticism towards the New Zealand approach was evident in *Hunter v Murrow*¹³⁴. In this case, the mother abducted the child from New Zealand to London.¹³⁵ The High Court in New Zealand held that the father's contact, which was limited to two or three times a week was sufficient to establish rights of custody. This was unusual, as the child had never lived with the father, and he would have been unlikely to be granted custody in a full hearing. The English court disagreed with the New Zealand decision, and refused the order for return. The basis for this decision was that the father only had contact arrangements not rights of custody.¹³⁶ Thorpe LJ stated that New Zealand had wrongly interpreted simple contact arrangements as custody rights, and that this impedes the uniform construction of the Convention.¹³⁷ In *S v H*,¹³⁸ Hale J considered that it would be 'Draconian' to grant an order for return where a parent only exercised rights of access. The English approach to determining whether rights of custody exist is to view the expression broadly, but maintain the essential distinction between rights of custody and rights of access.¹³⁹ The result is that the New Zealand position is at odds with other jurisdictions, and the primary carer and the secondary parent are treated as being equal.

3. Policy Recommendations

Thorpe LJ in *Hunter v Morrow* discusses how there is a general movement away from the distinction between rights of custody and rights of access.¹⁴⁰ Accordingly, it is suggested by counsel that the determinative factor should be parental responsibility. If the parent holds parental responsibility by virtue of marriage, agreement or operation of law, then they would also have rights of custody.¹⁴¹ The

¹³⁴ *Hunter*, above n 125, 976.

¹³⁵ *Hunter*, above n 125, 976.

¹³⁶ *Ibid* [22].

¹³⁷ *Ibid*.

¹³⁸ [1998] Fam 49, 57.

¹³⁹ *Re: V- B (Abduction: Custody Rights)* [1999] 2 FLR 192.

¹⁴⁰ *Hunter*, above n 125, [35].

¹⁴¹ *Ibid*.

New Zealand approach seems to be in line with changing social and legal developments regarding child custody. The simple distinction between the primary carer and the secondary parent is no longer realistic. In New Zealand, as of 1 July 2005, section 18 of the Care of Children Act 2004 states that unmarried fathers whose particulars are registered on the child's birth certificate have parental responsibility.¹⁴² Therefore, the distinction between rights of custody and rights of access may have less significance in the future.

In *Hunter*, Thorpe LJ expresses regret in refusing the order for return as it prevents the father from playing an active role in the child's life which had occurred prior to the removal of the child.¹⁴³ The New Zealand approach seems to prioritise the involvement of both parents in the child's life. In *Hunter*, the only real remedy available for the father is to relocate in order to continue contact with his child. There seems to be something inherently unjust in the arbitrary removal of the child by the mother. The mother did not claim domestic violence or any specific reason for her departure with the child. The situation in *Hunter* warrants a close examination of the distinction between rights of custody and rights of access. New Zealand would be wise to advocate for further investigation into these issues through the Hague Conference Special Commission.

On the other hand, the New Zealand approach undermines and weakens the Convention. The New Zealand position is very unusual as it seems to even contradict the traditional approach New Zealand has taken to the application of the Convention. As discussed above, New Zealand has tended to uphold the Convention, and summary return even in the face of evidence of domestic violence. However, the decision in *HJ v Secretary for Justice* to refuse an order for return in the context of domestic violence may have signalled a new direction for New Zealand. It is possible that New Zealand is now willing to step outside the framework of the Convention in determining Convention applications. This is a dangerous approach as it leads to uncertainty and criticism from other states. There is strong support for only allowing significant changes to the Convention to be made by legislators and not

¹⁴² *Ibid*, [36].

¹⁴³ *Ibid* [34].

done through the discretion of judges.¹⁴⁴ New Zealand must seek change to the Convention through legitimate channels and ensure that its decisions are in line with international jurisprudence on the rights of custody.

F. Future Reform

Throughout this paper, I have highlighted the inadequacies of the Convention in meeting the changing needs of society today. The philosophy of the Convention is based on the assumption that the best interests of the child are met through summary return. As has been highlighted, this assumption is only correct in the context of the prototype abduction. However, as the prototype abductor is no longer true of most abduction situations the philosophy of the Convention is questionable. The tension between the assumptions in the Convention and developments within society has proven to be problematic. In particular, there is need for reform in order to ensure the best interests of the child are always met and that the needs of domestic violence victims are met. In addition, there is a need to address New Zealand's liberal approach to the definition of rights of custody.

1. Best Interests of the Child

The summary return mechanism reflects a compromise between ensuring the best interests of the individual child are met, and protecting children generally by deterring future abductions. Given developments within society, the assumption that the summary return mechanism is in the best interests of the child is no longer correct. The case law has shown that the approach in the Convention can lead to the return of child when it is not in their best interests. This was evident in the cases of *KS v LS* and *A v A*. There is a further need to reconcile the approach in the Convention with the fundamental principles of New Zealand family law, and article 3 of the UNCRC, which holds the best interests of the child as of paramount importance.

There is no simple solution to this inconsistency. On one side of the argument is the notion that the Convention needs to be amended so

¹⁴⁴ Beaumont and McElevay, above n 2, 83.

that an order for return can be refused, when it is clearly not in the best interests of the child. The other side of the argument is that the determination of custody disputes on the basis of the best interests of the child is indeterminate, and varies immensely between jurisdictions. Prior to the Convention, the difficulty of using the “best interests” of the child as the determinative factor in custody disputes produced a great number of inconsistencies between jurisdictions. The inconsistency between jurisdictions provides an incentive for an abduction, as the parent may gain a more favourable custody decision in another jurisdiction.

This amendment is not meant to defeat the operation of the Convention, and allow substantive hearings in all Convention applications. This is a difficult point to agree with. In practice this amendment is likely to allow courts to delve further into substantive hearings. In addition, there is a general perception that the summary return mechanism is a strength of the Convention, as it provides certainty. Therefore, qualifications to the summary return mechanism are likely to produce uncertainty and weaken the application of the Convention. It seems apparent that it is not possible to retain the Convention in its current state, and allow greater scope for the refusal of an order for return on the basis of the best interests of the child.

2. Domestic Violence

The drafters of the Convention originally thought that they had provided adequately for the protection of domestic violence victims. This was based on the assumption that the abductor would be the abuser, and that the summary return mechanism would return the child to safety. Again, the change in the profile of the abductor has challenged the assumptions in the Convention. The idea that the abductor would be the victim of domestic violence was not contemplated during the drafting of the Convention. It has become increasingly common for the victim to abduct their child in order to escape domestic violence. In both *M v M* and *H v C*, the mother abducted her child in order to escape horrendous domestic violence and the courts still ordered the return of the child.

This new situation poses a serious difficulty for the Convention in two ways. Firstly, the Convention assumes that the abduction produces

harmful effects to the child. In the context of domestic violence this is questionable, as the abduction removes the child from the harmful situation. In *M v M*, the abduction had clearly removed the child from a harmful situation, yet this was not enough to prevent an order for return. There is little research available on whether this situation is still harmful to the child, yet common sense would say it is not. Secondly, the presumption in favour of summary return in the situation of domestic violence can lead to an order for return exposing the child to harm either from experiencing or witnessing domestic violence. Two policy options suggested are the inclusion of a specific domestic violence defence and the strengthening of the use of undertakings and mirror orders.

The high incidence of domestic violence seems to warrant the inclusion in the Convention of a specific domestic violence defence. A domestic violence defence is a simple method of addressing this trend within society and protecting the child. The difficulty with this defence is that there are questions raised over the threshold level of violence that would be required to establish the defence. The defence is also criticised because it is again seen as weakening the Convention by allowing substantive hearings in applications for return. At this stage, there is little political will to make such a major reform to the Convention. However, as the policy process seems to react to specific events, I would predict that further situations such as those in *M v M* and *H v C* will eventually force the international community to address this issue. The plight of victims of domestic violence has become an increasingly important domestic issue in the last decade, and may eventually extend to the context of child abduction.

At present, the issue of domestic violence and child abduction has been dealt with through the use of undertakings and mirror orders. As undertakings are technically not enforceable in other states, there is a preference for courts to use mirror orders. There is little incentive to make undertakings enforceable through their codification in the Convention. This is because it is difficult to make changes to the Convention, and mirror orders are viewed as a satisfactory alternative. Mirror orders provide a dubious compromise to the use of a specific domestic violence defence. Mirror orders do not guarantee that the perpetrator will obey the protection measures and therefore, do not ensure the safety of the child or victim upon return. The real issue here

is that the summary return mechanism in the Convention is not appropriate in relation to the situation of domestic violence. Neither undertakings nor mirror orders deal with this tension. Until the policy process is forced to react to the situation of domestic violence and abductions, the use of mirror orders is the only option available.

3. Rights of Custody and Rights of Access

As there are often many competing claims in a custody dispute, it was necessary to reach a pragmatic solution during the drafting of the Convention and focus solely on protecting rights of custody. Accordingly, the Convention makes a distinction between rights of custody and rights of access. The New Zealand courts have interpreted rights of custody liberally, and allowed the return of a child to a parent exercising only rights of access. This approach is problematic, as it may lead to the return of a child to a parent that the child has never lived with, this was seen in *Gross v Boda* and *Dellabarca v Christie*. This approach also contradicts the intention of the Convention to return a child to their primary carer and a familiar environment. Therefore, the New Zealand approach is inconsistent with the wording in the Convention and was criticised by the English courts in *Hunter v Murrow*.

This issue is further complicated by developments within society that have led to less traditional means of allocating responsibility for a child. The distinction between rights of custody and rights of access has become more difficult to maintain. In accordance with these developments, it was suggested by counsel in *Hunter v Murrow* that parental responsibility should be the determinative factor and not rights of custody. The advantage of this position is that it would allow the child to have contact with both parents. The disadvantage is that allowing parental responsibility to be the determinative factor in abduction cases, may still allow the return of a child to a parent they have never lived with and an unfamiliar environment. This situation is unlikely to be in line with the best interests of the child.

The solution to New Zealand's unilateral approach is difficult to ascertain. On the one hand this approach is justified by developments within society. On the other hand, this approach is inconsistent with the essential distinction between rights of custody and rights of access in the Convention. The solution may lie in Thorpe LJ's comments in

Hunter. Firstly, he notes that it is impractical to revise the Convention, as any changes have to be agreed by all Contracting States.¹⁴⁵ Secondly, he notes that article 31(3)(b) of the Vienna Convention on the Law of Treaties (the Vienna Convention), allows a construction that reflects subsequent practice in the application of the treaty, and establishes the agreement of the parties regarding its interpretation.¹⁴⁶ This section could be used to allow the application of the Convention to develop in accordance with social and legal changes since the drafting of the Convention. In the situation of rights of custody, New Zealand would need to prove that other states agreed with the liberal interpretation of rights of custody. In *Hunter*, counsel was unable to prove that this was the case.¹⁴⁷

In consequence, the New Zealand approach is still out of step with international norms regarding the application of the Convention. This unilateral approach is also criticised for weakening the Convention, by extending its scope beyond what was ever intended. There are two options for New Zealand in light of the above discussion. Firstly, New Zealand could rectify the situation and not allow the return of a child to a parent with only rights of access. Therefore, New Zealand would avoid further criticism from other states and uphold the provisions of the Convention. Alternatively, New Zealand could continue with the liberal approach and hope that other jurisdictions will eventually follow. This would then allow the application of article 31(3) (b) of the Vienna Convention. Despite the criticism that New Zealand has received for its liberal approach, there does not seem to have been a realisation of this problem within New Zealand. There has been little scholarly attention on this issue and it is not an issue that is highly visible to the public. Therefore, New Zealand is likely to continue with its liberal interpretation of rights of custody.

4. Observations

The above issues pose significant challenges to the operation of the Convention. Since the drafting of the Convention, social and legal developments within society have led to difficulties in implementing the

¹⁴⁵ *Hunter*, above n 124, [30].

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid* [32].

Convention. Article 31(3)(b) of the Vienna Convention provides the opportunity to adapt the application of the Convention to meet the changing context of child abduction. The inherent difficulty is that to deal with the challenges of the above issues, it is necessary to use methods that ultimately undermine the framework the Convention is based upon. For example, in order to ensure that a child is not returned to a situation of domestic violence, a specific domestic violence defence is appropriate. However, this defence would weaken the summary return mechanism in the Convention and allow courts to hold substantive hearings. The summary return mechanism is an essential component of the Convention and as stated previously is often viewed as a strength of the Convention.

The policy process seems to require a highly publicised event to force the government to rectify a particular policy problem. The incorporation of the Convention into domestic law in New Zealand followed the highly publicised Morgan/Foreitch case. This case resulted in public outcry at the inadequate legal situation regarding child abduction in New Zealand and forced the Government to react. The difficulty with this approach to solving a policy problem is that the response is often hurried and lacks a substantial analysis of all the issues involved. It is apparent that the government is unaware of the major tensions between the assumptions in the Convention and changes that have occurred in society since the drafting of the Convention. Therefore, one may question whether it will take further highly publicised cases for the government to recognise the inherent tensions within the Convention and rectify the situation.

Conclusion

It is clear that there is a tension between the assumptions in the Convention and changing social trends. It is impractical to attempt to revise the Convention, as this requires the agreement of a large number of states. The most realistic option for reform is the use of the Vienna Convention to allow the interpretation of the Convention to adapt to the changing context of child abduction. However, the difficulty is that the changes required undermine the functioning of the Convention. The balance must be struck between allowing the Convention to respond to changes in society and ensuring the essential elements of the Convention remain functional.

