Croll v. Croll: The Second Circuit Limits "Custody Rights" Under The Hague Convention on the Civil Aspects of International Child Abduction

I. INTRODUCTION 605
II. HISTORICAL BACKGROUND 607
III. THE COURT'S DECISION 617
IV. ANALYSIS AND CRITICISM 623
V. CONCLUSION 626

I. INTRODUCTION

Stephen Halladay Croll and Mei Yee Croll, both U.S. citizens, were married in Hong Kong in 1982.[1] Their daughter Christina was born in Hong Kong in 1990 and lived with her parents until the couple separated in 1998.[2] After the separation Christina continued to live with her mother in Hong Kong, while her father, who also remained in Hong Kong, visited with Christina regularly.[3] Later in 1998, Mr. Croll commenced divorce proceedings in the District Court of the Hong Kong Special Administrative Region, Matrimonial Causes.[4] An "interim" custody order issued by the Hong Kong court on February 23, 1999. granted Ms. Croll "custody, care and control" of Christina and granted Mr. Croll a right of "reasonable access" to Christina.[5] The order also contained a *ne exeat* clause directing that Christina "not [be] removed from Hong Kong . . . until she attains the age of 18 years" without leave of the court or written consent of the other parent.[6]

On April 2, 1999, Ms. Croll brought Christina to the United States. Six days later, Ms. Croll filed an action in Family Court in New York County seeking custody of her daughter, child support, and an order of protection.[7] When Mr. Croll returned to Hong Kong from a business trip

1. *See* Croll v. Croll, 66 F. Supp. 2d. 554, 556 (S.D.N.Y. 1999).
2. *Id.*
3. *Id.*
4. *Id.* at 557.
5. *Id.* The "interim" order "provides that it is to become final in six weeks unless cause is shown otherwise[;]" i.e., the order became final on April 6, 1999. *Id.*
6. *Id.*; *see also* Croll v. Croll, 229 F.3d 133, 135 (2d Cir. 2000); BLACK'S LAW DICTIONARY 1054 (7th ed. 1999) (defining *ne exeat republica* as a "chancery writ ordering the person to whom it is addressed not to leave the jurisdiction of the court or the state").
7. *See Croll*, 66 F. Supp. 2d. at 557-58. The six-week interim period of the custody order of the District Court of the Hong Kong Special Administrative Region extended until April 6, 1999, thereby covering Ms. Croll's entry into the United States. *See id.* at 557.

on April 7, 1999, he discovered that his ex-wife and daughter had gone to the United States.[8] Unable to locate his family and on the advice of his attorney, Mr. Croll filed a missing person report with the police in Hong Kong.[9] Thereafter, on May 14, 1999, Mr. Croll filed a petition in the U.S. District Court for the Southern District of New York (District Court) seeking Christina's return to Hong Kong pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (Convention).[10]

Mr. Croll argued that he held and actively exercised the "rights of custody" protected by the Convention, and that Ms. Croll's removal of Christina from Hong Kong was wrongful because it breached these rights.[11] In her defense, Ms. Croll argued that Mr. Croll did not have "rights of custody," but merely a lesser "right[] of access" to Christina, the violation of which would not trigger the return remedy under the Convention.[12] In a case of first impression in the United States,[13] the district court found that the *ne exeat* provision in the custody order granted Mr. Croll the right "to determine Christina's place of residence," which qualified under article 5 of the Convention as a right of custody.[14] Accordingly, the district court found that Ms. Croll removed Christina from Hong Kong in violation of the Convention and ordered, subject to certain conditions, Christina's return to Hong Kong.[15]

Ms. Croll appealed to the United States Court of Appeals for the Second Circuit, arguing under a *de novo* standard of review that the district court erred in finding that Mr. Croll held and exercised "rights of custody" within the meaning of the Convention.[16] The Second Circuit reversed, and *held* that the combination of "rights of access" and the *ne exeat* provision did not confer upon Mr. Croll "rights of custody" under the Convention.[17] *Croll v. Croll*, 229 F.3d 133, 135 (2d Cir. 2000).

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8. *Id.*
9. *Id.*
10. *See id.*
11. *See id.* at 558-59.
12. *See id.* at 559.
13. *See Croll v. Croll*, 229 F.3d 133, 136 (2d Cir. 2000) ("[W]e and the district court in this case are the only courts in the United States to consider whether rights of access coupled with a *ne exeat* clause confer 'custodial rights' on a non-custodial parent within the meaning of the Hague Convention.").
14. *Id.*
15. *See Croll*, 66 F. Supp. 2d at 559, 562.
16. *See Croll*, 229 F.3d at 135, 136.
17. *Id.* at 135.

II. HISTORICAL BACKGROUND

The Preamble to the Convention states that it has been adopted "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[18] The Convention rests upon the principle that the courts of a child's country of habitual residence are best suited to resolve disputes regarding the custody of that child.[19] Accordingly, the Convention "places at the head of its objectives the restoration of the *status quo*"[20] by securing "the prompt return of children wrongfully removed to or retained in any Contracting State."[21]

To trigger the return procedures established by the Convention, a removal or retention must first be considered "wrongful" under article 3 of the Convention.[22] A wrongful removal is one that breaches "rights of custody" as defined by the Convention.[23] This article has been designated a "cornerstone" of the Convention because it stipulates that only the person who "actually exercised" rights of custody, or who would have exercised custody but for the removal, may invoke the Convention to secure a child's return.[24] The "vast majority of abduction cases arise in the context of divorce or separation"; therefore, the person seeking relief from article 3 will likely be the child's parent.[25] The issue becomes, therefore, how the Convention defines "rights of custody" and

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18. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, 51 Fed. Reg. 10,494, 10,498 (Mar. 26, 1986) [hereinafter Convention].

19. *See* Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 426, 434-35 (1980) (noting that the courts of a child's country are "best placed to decide upon questions of custody and access"); *see also* Convention, *supra* note 18, at 10,503 (noting that Elisa Pérez-Vera's explanatory report "is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention").

20. Pérez-Vera, *supra* note 19, at 429.

21. Convention, *supra* note 18, at 10,498.

22. *Id.*

23. *Id.* Article 3 provides, in pertinent part:

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

24. Convention, *supra* note 18, at 10,505.

25. *Id.* The "typical scenario" involves "one parent taking a child from one Contracting State to another Contracting State over the objections of the parent with whom the child had been living." *Id.*

how such rights are allocated between post-divorce or post-separation parents.

Although the Convention protects both rights of access and rights of custody, it does not offer the holders of those rights the same degree of protection;[26] i.e., the remedy of return is available only for wrongful removals that breach "rights of custody."[27] By contrast, where rights of access are breached, the Convention only authorizes signatory nations to "promote the peaceful enjoyment of access rights" and to "take steps to remove, as far as possible, all obstacles to the exercise of such rights."[28] In terms of available remedies, therefore, the distinction under the Convention between rights of custody and rights of access is important for parents seeking the return of their children across international borders.

Under article 3, custody rights may arise by "operation of law," "by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of" the child's state of habitual residence.[29] This provision illustrates the intent of the drafters "to defend those relationships which are already protected . . . by virtue of the law of the State where the child's relationships developed prior to its removal."[30]

Accordingly, under the Convention the term "custody rights" covers a collection of rights which may take on specific meaning by reference to the law of the country in which the child habitually resided prior to the removal or retention.[31] However, commentators agree that the essential definition of custody rights is provided not by the laws of the child's habitual residence, but by the Convention text itself.[32] Article 5 of the

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26. Thomson v. Thomson, [1994] S.C.R. 551, 589 (Can.) (holding that the right of access "was not intended to be given the same level of protection by the Convention as custody"); Martha Bailey, *The Right of a Parent to an Order for Return of a Child Under the Hague Convention*, 13 CAN. J. FAM. L. 287, 290 (1996) ("Access rights are not given the same level of protection . . . .").

27. Convention, *supra* note 18, at 10,498-499.

28. *Id.* at 10,500. Additionally, under the Convention the central authority in charge of carrying out the duties imposed by the Convention has the power to order a custodial parent to permit, and to pay for, periodic visitation by the noncustodial parent with access rights. *Id.* at 10,498, 10,500.

29. *Id.* at 10,498.

30. Pérez-Vera, *supra* note 19, at 444.

31. Convention, *supra* note 18, at 10,506.

32. *See* John M. Eekelaar, *International Child Abduction By Parents*, 32 U. TORONTO L.J. 281, 309 (1982) ("States may define the term 'custody' in whatever way they choose, but what is essential for determining their obligations under the convention is the definition used in the convention."); PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 74 (1999) (stating that the concept "rights of custody" is "independent of any construction with which it may be attributed under the laws of Contracting States").

Convention defines "rights of custody" as rights relating to the care of the child and, "in particular, the right to determine the child's place of residence."[33] Thus, an order of return is available as a remedy only for a removal or a retention that breaches "rights of custody," such as the right to determine the child's place of residence.[34]

Other sources of custody rights are not contained in the Convention because of the drafters' desire for a "flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration."[35] Commentators, including the chair of the Hague Conference Commission, agree that the text supports a broad definition of custody rights.[36] For example, although article 5 provides a specific example of custody rights in terms of determining the child's place of residence, that example must be construed in a manner consistent with the scope and purpose of the Convention.[37] As the official commentary indicates, "[a]lthough the Convention does not contain any provision which expressly states the international nature of the situations envisaged, such a conclusion derives as much from its title as from its various articles."[38] Accordingly, an interpretation of "the right to determine the child's place of residence" under the Convention necessarily should include a review of opinions issued by the courts of the signatory nations.[39]

In *David S. v. Zamira S.*, a father petitioned the Family Court of New York, Kings County, for the return of his children to Canada pursuant to the Convention.[40] Due to marital difficulties, the couple

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33. Convention, *supra* note 18, at 10,496.

34. *Id.* at 10,496.

35. *See* Pérez-Vera, *supra* note 19, at 446; *see also* BEAUMONT & MCELEAVY, *supra* note 32, at 46 (stating that the incorporation of private international law rules "was considered by the drafters to be advantageous, for it was believed that it would enable the Convention to encompass a wider range of custody rights and thereby afford greater protection to abducted children").

36. *See* A.E. Anton, *The Hague Convention On International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 545 (1981) (arguing that custody rights "are not limitatively defined in the Convention"); Eekelaar, *supra* note 32, at 309 ("This definition is open-ended" and includes, "in particular, the right to determine the child's place of residence.").

37. *See* PERMANENT BUREAU, REPORT OF THE SECOND SPECIAL COMMISSION MEETING TO REVIEW THE OPERATION OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, Part II, Conclusion 2 (1993) ("[T]he expression 'rights of custody', for example, does not coincide with any particular concept of custody in domestic law, but draws its meaning from the definitions, structure and purpose of the Convention.").

38. Pérez-Vera, *supra* note 19, at 442; *see also* Anton, *supra* note 36, at 544 ("[T]he title, preamble and structure of the Convention made it sufficiently clear that the Convention applies only to situations of an international character.").

39. *See* Air France v. Saks, 470 U.S. 392, 404 (1985) (finding that to determine the precise meaning of a treaty provision, we "find the opinions of our sister signatories to be entitled to *considerable weight*" (emphasis added) (citation omitted)).

40. *See* David S. v. Zamira S., 574 N.Y.S.2d 429, 430 (N.Y. Fam. Ct. 1991).

entered into a separation agreement that gave custody of their son, the only child born at the time, to the mother and provided visitation rights to the father.[41] The separation agreement also provided that the mother "shall make [the son] available [to the father] within the Metropolitan Toronto vicinity."[42] After their second child was born, the father obtained an interim *ne exeat* order from the Supreme Court of Ontario preventing the mother from removing the children from Ontario.[43] The court found that the mother's removal subsequent to the issuance of the interim *ne exeat* order was "wrongful" under the Convention because "the [father] was exercising his rights, as to his son, and would have exercised his rights, as to his daughter, but for her removal."[44] In addition, the fact that there was no formal declaration of custody did not pose a bar to the court's finding of wrongful removal under the Convention.[45] The interpretation of custody rights under the Convention in *David S.* has been cited favorably by U.S. courts.[46]

A similar result was reached in *Janakakis-Kostun v. Janakakis*, where a father petitioned a Kentucky court for the return of his child to Greece pursuant to the Convention.[47] While resolving the parents' marital difficulties and custody issues, the Greek courts issued an interim *ne exeat* order as to the parents' daughter, assigned temporary custody to the mother, and awarded liberal access rights to the father.[48] The court found that entry of the above-described orders prior to the mother's removal of the child "establish[ed] beyond a preponderance of the evidence that [the father] had custodial rights to [the child] under Greek law by virtue of judicial decision."[49] Other U.S. courts have withheld

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41. *Id.*

42. *Id.* The wife's "ability to relocate her residence with the children outside the Metropolitan Toronto area was restricted" by the separation agreement. *Id.*

43. *Id.*

44. *Id.* at 431. The Supreme Court of Ontario found that the mother "*wrongfully and improperly removed the said children from this jurisdiction*" duly served with the order containing the *ne exeat* provision.

45. *See id.* at 432 ("[T]his Court can find there was a 'wrongful removal' in the absence of any formal declaration of custody.").

46. *See* Friedrich v. Friedrich, 78 F.3d 1060, 1065 n.4 (6th Cir. 1996) (holding that "an order giving the noncustodial parent visitation rights and restricting the custodial parent from leaving the country constitutes an order granting 'custodial' rights to both parents under the Hague Convention"); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 849 (Ky. Ct. App. 1999) ("Visitation rights alone, such as those granted to [the father] in the [Greek court] order have been held to fall within the meaning of 'custodial right.'") (citing David S. v. Zamira S., 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1791)).

47. *Janakakis-Kostun*, 6 S.W.3d at 843.

48. *Id.* at 846.

49. *Id.* at 849. The Kentucky court found relevant the fact that the mother, "with the help of her father, a former Green Beret with multiple European contacts, smuggled [the daughter] out of Greece" in contempt of Greek court orders. *Id.*

from issuing the return remedy under similar circumstances.[50] However, those cases are factually distinguishable because the petitioning parent had access rights only, as opposed to access rights *in addition to* a valid *ne exeat* provision.[51]

Interpretations of the Convention by English courts have been consistent with those of U.S. courts, as in *C. v. C.*, where a father petitioned the High Court in England for the return of his child to Australia pursuant to the Convention.[52] The divorce order stated: "(1) The [mother] to have custody of . . . the child of the marriage and the [father] and the [mother] to remain joint guardians of the said child. (2) Neither the [father] nor the [mother] shall remove the child from Australia without the consent of the other."[53] Although ostensibly distinguishable from the above discussed cases because the father was a "joint guardian," as opposed to a noncustodial parent, the court's holding was driven solely by the rights conferred upon the father by the *ne exeat* provision.[54] The court found that the *ne exeat* provision amounted to a "right of custody" under the Convention.[55] In granting the return remedy, the court emphasized the "international character" of the Convention, and recognized that "[t]he whole purpose of [the Convention] is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways."[56]

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50. *See* Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998) (granting the mother custody of children and the father access rights, allowing the mother to remove the children from England to Pennsylvania); Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993) (granting of sole custody of the children to the mother and visitation rights to the father by Hungarian court, allowing the mother to remove the children to the United States).

51. *See Bromley*, 30 F. Supp. 2d at 861 n.7 ("No court order of non-removal exists in the present case."); *Viragh*, 612 N.E.2d at 246. In *Viragh*, the father's counsel "conceded that [the mother] could legally travel abroad with the children," and that "Hungarian law permits a custodial parent to take children abroad without permission from either the non-custodial parent or the Guardianship Authority." *Id.*

52. *See* C. v. C., 1 W.L.R. 654 (Eng. C.A. 1989).

53. *Id.* at 656 (Butler-Sloss, L.J.).

54. *Id.* at 658. Lord Justice Butler-Sloss noted that the trial judge's attention was not specifically drawn to the question "whether under Australian law [the *ne exeat* provision] was capable of constituting a right of custody within the Convention," and accordingly the court focused solely on this issue. *Id.* at 657-58.

55. *Id.* at 663 (Neill, L.J.).

> I am satisfied that this right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right of custody within the meaning of articles 3 and 5 of the Convention.

Id.

56. *Id.* (Lord Donaldson of Lymington, M.R.).

Likewise, in *B. v. B.*, a father petitioned the High Court of England for the return of his child to Canada pursuant to the Convention.[57] Following divorce proceedings, an Ontario court granted interim custody rights of the child to the mother, interim access rights to the father and, in a prior hearing, ordered that the child "shall not be removed from the jurisdiction in the interim."[58] The court found that, by virtue of the interim *ne exeat* order, the court itself had a right of custody "in the sense that it had the right to determine the child's place of residence," and the mother's removal of the child from its place of habitual residence breached that right.[59]

Australian courts have adopted a similar analysis, as in *In re Jose Garcia Resina*, where a father petitioned the Family Court of Australia for the return of his children from France pursuant to the Convention.[60] The couple had two children, an older daughter, who was not a child of the husband, and a younger daughter, who was born of the parties.[61] Following their separation, the Australian court granted the mother custody of their youngest child, granted the father access to that child, and issued an injunction restraining the parties from removing either child from Australia.[62] The court found the English decision in *C. v. C.* instructive and ordered the return of the children pursuant to the Convention because the removal violated the father's custody rights that were created by the *ne exeat* provision.[63] In reaching its conclusion, the court emphasized the importance of uniform decisions among common law countries and the desirability of results which are "in conformity with the spirit of the Convention."[64] Comparable results were reached in *Gross v. Boda*, where a father petitioned the Court of Appeal in New Zealand for the return of his daughter to the United States pursuant to the Convention.[65] In that case, an Indiana court entered an order awarding "sole care and custody" of the child to the mother and "reasonable rights

57. B. v. B., 3 W.L.R. 865, 868 (Eng. C.A. 1992).

58. *Id.* at 867 (Sir Stephen Brown).

59. *Id.* at 870.

60. *In re* Jose Garcia Resina, No. 52-1991, slip op ¶ 5 (Fam. Ct. 1991) (Austl.).

61. *Id.* ¶ 2. Judge Fogarty reasoned that "in relation to the older child[,] one proceeds on the basis that if the applicant is not the father of that child then in Western Australia he would have no statutory rights of custody or guardianship in respect of that child." *Id.* ¶ 17.

62. *Id.* ¶ 4.

63. *See id.* ¶ 23 ("So the conclusion was reached [in *C. v. C.*] that an injunction of the same type as was granted here amounted to a 'right of custody' which, in relevant circumstances, would form the basis for a wrongful removal.").

64. *Id.* ¶¶ 22, 26 (Fogarty, J., Judgment 1) (noting that the spirit of the Convention is "to ensure that children who are taken from one country to another wrongfully, in the sense of in breach of court orders . . . are promptly returned to their country so that their future can properly be determined within that society").

65. *See* Gross v. Boda [1994] 1 N.Z.L.R. 569.

of visitation" with the child to the father, but did not include a *ne exeat* provision.[66] While their respective rights were interpreted as "rights of custody" and "rights of access" under the terms of the Convention, the court explained that "[i]t is the substance of those orders rather than the form and wording in which they are expressed which is important."[67] Citing *C. v. C.*, the court ruled that the father, while holding only access rights, also held jointly the right to determine the child's residence "because the reality is that his consent is required to a change in residence."[68] Although it was argued that the father could not have "rights of custody" because the definitions of rights of custody and access in article 5 of the Convention are mutually exclusive, the court rejected this approach.[69] In ordering the remedy of return, the court found that drawing such a distinction between access and custody rights would defeat the objective of the Convention, which is to ensure that questions of residence are addressed by the courts of the child's habitual residence.[70]

Unlike the courts of the United States, England, Australia, and New Zealand, the courts of Canada appear to offer a different interpretation of custody and access rights under the Convention. In *Thomson v. Thomson*, a father petitioned the Manitoba Court of Queen's Bench, Canada for the return of his son to Scotland pursuant to the Convention.[71] Previously, a Scottish court had granted interim custody of the child to the mother, interim access to the father, and issued a *ne exeat* order prohibiting the child's removal from Scotland.[72] Although the court found that the mother's removal of the child breached custody rights under the Convention and subsequently invoked the return remedy, the rights violated were not those held by the father, but rather those held by the court issuing the order.[73]

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66. *See id.* at 570.

67. *See id.* ("It is the essence of the rights thereby vested in the parties which must guide our decision.").

68. *See id.* at 574.

69. *See id.* at 571.

> A right of intermittent possession and care of a child will fall within . . . the definition of rights of custody also. No doubt it may also fall within the definition of rights of access, so there is a possibility of overlap. But no convincing reason has been given in argument for postulating a sharp dichotomy between the two concepts. Nor has anything to suggest mutual exclusiveness been derived from the Convention.

Id.

70. *See id.* at 574; *see also In re* Jose Garcia Resina, No. 52-199, slip op. ¶¶ 22, 26 (Fam. Ct. 1991) (Fogarty, J.) (Austl.).

71. Thomson v. Thomson, [1994] 3 S.C.R. 551, 558 (Can.).

72. *Id.*

73. *See id.* at 588-89 ("Here, the father under the court order appears to have had only a right of access, which the Convention does not equate with custody.").

The court held that the issuance of an interim custody order to a parent prior to the entry of a final ruling on the custody issue imparted to the court itself custody rights, in that it had the right to determine the child's place of residence under the Convention.[74] The court assumed that the nonremoval clause was inserted into the custody order "to preserve jurisdiction in the Scottish court to decide the issue of custody,"[75] and implied that a different result would follow if a "permanent" *ne exeat* order were at issue.[76] Therefore, the court granted the remedy of return to the father, but only because the court itself possessed the custody rights created by the *ne exeat* provision.

In another Canadian case, *D.S. v. V.W.*, a mother petitioned the Superior Court of Quebec for the return of her child to the United States pursuant to the Convention.[77] The divorce judgment granted the father custody of the child, and the mother was given "rights of supervised access."[78] The judgment did not include a *ne exeat* provision.[79] The court's denial of the mother's request for return of the child indicated that rights of custody under the Convention must be held exclusively by one parent.[80] While it rejected the argument that an "implicit" *ne exeat* provision could grant the noncustodial parent custody rights within the meaning of the Convention,[81] the court suggested that a removal by an "interim" custodial parent could be "wrongful" under the Convention if an explicit *ne exeat* provision were in force.[82]

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74. *Id.* at 588.
75. *Id.* at 589.
76. *Id.* Judge LaForest clarified the court's position by stating:

> I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody. Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent. The right of access is, of course, important, but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody.

Id.

77. *See* D.S. v. V.W., [1996] 134 D.L.R. (4th) 481.
78. *See id.* at 485.
79. *See id.* at 505 ("[W]hen he left Michigan for Quebec . . . he did have permanent custody of the child *without any restrictions* as to her removal." (emphasis added)).
80. *See id.* at 499.

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

Id.

81. *See id.* at 503.
82. *See id.* at 501.

The interpretation of custody rights in *Thomson v. Thomson* and *D.S. v. V.W.* are inconsistent with a more recent reading of the Convention by another Canadian court.[83] In *Thorne v. Dryden-Hall*, a father petitioned a Canadian court for the return of his children to the United Kingdom pursuant to the Convention.[84] The order governing the parents' rights stipulated that the children were to live with the mother, the father would have contact with the children, and that no one could remove the children from the United Kingdom without the written consent of either parent or the court.[85] The court interpreted "custody rights" in a broad sense that allowed such rights to be shared, as opposed to being exclusively held by one party.[86] Accordingly, the court found that the removal of the children from the United Kingdom breached the rights of custody held jointly by the English court and the father.[87]

The reasoning in *Thorne* appeared to qualify the distinction made in *Thomson* between permanent and interim *ne exeat* provisions, as well as the notion in *D.S. v. V.W.* that custody rights must be exclusively held.[88] Additionally, the narrow interpretation of custody rights in the latter two cases has not gone unnoticed by commentators.[89] Justice LaForest's suggestion in *Thomson* that a Scottish court would not have had rights of custody if the custody order and *ne exeat* clause had both been final, as opposed to interim, is "open to question."[90] Similarly, it has been noted that *D.S. v. V.W.* represents a "distinctive interpretation" of "rights of

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83. *See infra* notes 88-89 and accompanying text (giving criticism and commentary on *Thomson*).

84. [1997] 148 D.L.R. (4th) 508.

85. *See id.* at 510.

86. *See id.* at 513 ("The order itself states simply that 'the child shall live with [the mother].' It does not grant the mother all of the rights encompassed by the word custody."); *cf.* D.S v. V.W., 134 D.L.R. (4th) at 499 (holding that the right to choose the child's place of residence is exclusively held by the custodial parent).

87. *See Thorne*, 148 D.L.R. (4th) at 513 ("[A] 'right of custody,' i.e., the right to determine the child's place of residence, was reserved by the English court to be exercised with the consent of the respondent or by leave of the court. Neither was obtained.").

88. *See id.* at 513; *see also* James G. McLeod, Annotation, *Thorne v. Dryden-Hall*, 148 D.L.R. (4th) 508.

> [*Thorne*] adopts a more straightforward analysis of when and why a court should uphold a clause restraining a custodial parent from removing a child from a country without the consent of the other parent or a court order than did the Supreme Court of Canada in *Thomson v. Thomson*, and its reasoning should be accepted by other courts.

Id.

89. *See* Bailey, *supra* note 26, at 319 ("The Supreme Court of Canada has adopted a narrower interpretation of 'rights of custody,' 'wrongful removal,' and 'wrongful retention' than courts in other jurisdictions.").

90. *Id.* at 305.

custody" under the Convention.[91] Thus, while recognizing that "the concept of custody under the Act must be given a large and liberal interpretation," the court in *D.S. v. V.W.* found that custody rights must be exclusively held.[92]

A liberal interpretation of "rights of custody" that permits noncustodial parents with access rights and *ne exeat* rights to invoke the return remedy under the Convention appears to be favored by most jurisdictions that face the issue squarely.[93] The move to a general consensus on this position can be illustrated by reviewing the changing opinions of commentators since the drafting of the Convention.

The official reporter for the Convention stated that, at the time of the drafting, all efforts to coordinate views on "the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian," were unsuccessful.[94] The comments by the chairman of the Convention reflect the hesitancy to permit the return remedy where the petitioner exercised access rights only.[95] Although the drafters contemplated a broader definition of abduction that permitted the return remedy where *ne exeat* rights were held, the issue was not pursued.[96] There was, however, some early support for the proposition that custody rights, including the right to determine the child's place of residence, could be shared by both parents.[97] The idea was simple: if the

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91. *See id.* at 313. In particular, Bailey noted that Justice L'Heureux-Dubé has repeatedly expressed her disapprobation of the notion that access parents should have any decision-making power with regard to their children or be able to interfere with the decisions of the custodial parent, and her opinion in *D.S. v. V.W.* may be seen as an additional expression of her views on that issue.

92. *See* D.S. v. V.W., [1996] 134 D.L.R. (4th) 499, 501.

93. *Compare* David S. v. Zamira S., 574 N.Y.S.2d 429, 431-32 (N.Y. Fam. Ct. 1991); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 849 (Ky. Ct. App. 1999); C. v. C., 1 W.L.R. 654, 658-59 (Eng. C.A. 1989); B. v. B., 3 W.L.R. 865, 870 (Eng. C.A. 1992); *In re* Jose Garcia Resina, No. 52-1991, slip op. ¶ 23 (Fogarty, J.) (Austl.); *and* Gross v. Boda, [1994] 1 N.Z.L.R. 569, 574 (N.Z.); *with* Thomson v. Thomson, [1994] 3 S.C.R. 551, 589 (Can.); *and D.S. v. V.W.*, 134 D.L.R. (4th) at 499, 501.

94. *See* Pérez-Vera, *supra* note 19, at 445 (emphasizing how the drafters were concerned with putting access rights violations in the same category as custody rights violations).

95. *See* Anton, *supra* note 36, at 546. Anton explains that

> It is clear also from the definitions of custody and access in Article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of Article 3. It is less clear, but the definition of 'rights of custody' in Article 5 at least suggests, that the breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Article 3.

Id.

96. *Id.*

97. Eekelaar, *supra* note 32, at 309 ("In common law, the term 'custody' does not simply mean the actual possession of the child . . . but refers to a bundle of 'rights' respecting the child . . . [and] there is nothing to suggest that such rights cannot be separated.").

right to day-to-day care is vested in A and the right to determine the child's place of residence in both A and B, then both A and B have rights of custody under the Convention.[98]

The changing approach to the relationship between rights of custody and rights of access may be explained by the development of modern, post-separation custody arrangements. At the time of the drafting, for example, it is not clear to what extent the delegates imagined the intricate sharing of custody rights created by the addition of a *ne exeat* clause to a noncustodial parent's access rights.[99] The impact of modern custody arrangements on the interpretation of the Convention has been noted, especially with regard to sharing the right to determine the child's place of residence.[100] Consistent with this trend, a majority of the courts of signatory nations to the Convention have recognized that rights of custody are created by the addition of a *ne exeat* provision to access rights.[101]

III. THE COURT'S DECISION

In the noted case, the issue of first impression before the Second Circuit was whether "rights of access" coupled with a *ne exeat* clause confer "rights of custody" on a noncustodial parent within the meaning of the Convention.[102] In a 2-1 decision, the Second Circuit found that Mr. Croll could not claim custody of Christina under the Convention and therefore (1) the court lacked subject matter jurisdiction and (2) the petition failed to state a claim upon which relief could be granted.[103] The Second Circuit concluded that Mr. Croll's legal rights could not trigger the remedy of return for his child after considering the purpose and framework of the Convention, its wording, the intent of its drafters, and,

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98. *See id.*

99. *See* BEAUMONT & MCELEAVY, *supra* note 32, at 75, 77 ("[B]ut it is submitted that given the contemporary approach to custody settlements few delegates would have considered it as being more than a matter of minor importance.").

100. *See id.* at 75.

> At a substantive level the evolution in child law in certain Member States has impacted upon the Convention. There is now increased recognition of the role to be played by both parents in the life of a child following the break-up of a marriage or relationship. Consequently, even if one parent assumes the role of primary caregiver it is now more likely that the other will be allowed greater involvement than mere periodic visitation, whether through a judicially appointed order or a statutory right. *This is particularly the case in relation to deciding where a child should live.*

Id. (emphasis added).

101. *See supra* note 93 and accompanying text.

102. Croll v. Croll, 229 F.3d 133, 136 (2d Cir. 2000) ("[W]e and the district court are the only courts in the United States to consider [this issue].").

103. *See id.* at 135.

to a much lesser extent than the district court, the case law in other signatory states.[104] Central to its ruling was the premise that the exercise of rights of custody and rights of access are mutually exclusive events.[105] Thus, if it was found that Mr. Croll possessed "the lesser rights of access, jurisdiction [would be] lacking and Mr. Croll must rely on other remedies."[106]

In its analysis of "rights of custody," the Second Circuit first looked to the ordinary meaning that would be given to the terms in light of the object and purpose of the Convention.[107] Citing the Preamble of the Convention and comments by the official reporter, the Second Circuit established that the purpose of the Convention was to protect children from abduction across international boundaries.[108] This goal was to be accomplished by facilitating the return of the children to the state of their habitual residence, which was better suited than the removed-to-state to decide questions of custody.[109] The Second Circuit pointed out, however, that an order of return is available as a remedy only for a "wrongful" removal, meaning one that violated "rights of custody" as defined by the Convention.[110] Such rights are defined by the Convention as "'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.'"[111]

To unravel the meaning of "rights of custody" under the Convention, the Second Circuit examined definitions of "custody" found in a variety of dictionaries.[112] The definitions cited by the Second Circuit primarily reflect the first half of the Convention's definition, namely, "rights relating to the care of the person of the child."[113] None of the definitions cited include language regarding the second half of the definition, "the right to determine the child's place of residence," other

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104. *See id.* at 143 ("No consensus view emerges from the opinions issued by the courts of the signatory nations.").

105. *See id.* at 136 ("At issue on this appeal are two sets of rights recognized in the Convention to be distinct: rights of custody and rights of access."). *See generally id.* at 137-43.

106. *Id.* at 136.

107. *Id.* at 136 (citing *Vienna Convention on the Law of Treaties*, May 23, 1969, [1987] 1155 U.N.T.S. 331, 340).

108. *Id.* at 137.

109. *Id.*

110. *Id.*

111. *Id.* (quoting Convention, *supra* note 18, at 10,498).

112. *Id.* at 138 (citing BLACK'S LAW DICTIONARY 390 (7th ed. 1999); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) 597 (1986); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 357 (2d ed. 1987)).

113. Convention, *supra* note 18, at 10,498; *see also Croll*, 229 F.3d at 138 (giving definitions such as "'[t]he care and control of a thing or person,'" "'to feed him, clothe him, provide shelter, put him to bed, send him to school, see that he washes his face and brushes his teeth,'" and the "'duty of guardianship and preservation'" (citation omitted)).

than oblique phrases such as "control of a thing or person."[114] The Second Circuit concluded that "custody entails care, and in any event [dictionaries] confirm the intuition that custody is something other and more than a negative right or veto."[115]

Consistent with this position, the Second Circuit rejected Mr. Croll's argument that the *ne exeat* clause substantively amounted to a "right to determine the child's place of residence," and thus qualified as a right of custody under the Convention.[116] The Second Circuit stated that the language "the right to determine the child's place of residence" was useful for interpretation only because it was "indicative" of the person who exercised "care of the person of the child," as opposed to providing a separate and distinct definition of "rights of custody."[117] Moreover, the Second Circuit reasoned that the *ne exeat* clause only limited Ms. Croll's ability to expatriate Christina, and that the wielding of this "veto power, even if leveraged, falls short of conferring a joint right to determine the child's residence."[118] The Second Circuit speculated that the Convention would become "unworkable" if Mr. Croll's arguments were accepted, because Christina would be returned to "a parent whose sole right—to visit or veto—imposes no duty to give care."[119]

In addition to examining the words of the Convention, the Second Circuit focused on the intent of the drafters.[120] *Chan v. Korean Air Lines, Ltd.* provided the interpretive rule: if the stated intent of those who drafted the Convention "'suffice[s] to establish that the result the text produces is not necessarily absurd,'" the inquiry is at an end.[121] The Second Circuit offered as evidence of such intent a statement by the chair of the Hague Conference Commission that drafted the Convention.[122] The court also recognized the view that the "breach of a right simply to give or to withhold consent to changes in a child's place of residence is not to be construed as a breach of rights of custody in the sense of Article

114. *See Croll*, 229 F.3d at 138.

115. *Id.*

116. *Id.* at 139.

117. *Id.*

118. *Id.*

119. *Id.* at 140. The court's reasoning is circular here: the Convention would not become "unworkable" if the court granted the return remedy to Mr. Croll because it could do so only according to the terms of the Convention; that is, it would first have to determine that Mr. Croll had "rights of custody." Therefore, if the court agreed with Mr. Croll's argument that his access rights and the *ne exeat* provision created "rights of custody," then a return of Christina pursuant to such a determination would, by definition, be a return to a custodial parent.

120. *See id.* at 141-43.

121. *Id.* at 141 (quoting Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989)).

122. *Id.* The chairman of the Commission was A.E. Anton.

3."[123] The Second Circuit held that the *Chan* test was satisfied because Mr. Croll did not have "rights of custody," but rather was an "access only" parent who, by the terms of the Convention, could not invoke the return remedy.[124] The Second Circuit continued to characterize Mr. Croll as an "access only" parent by citing authority holding that a breach of access rights only would not permit the use of the return remedy.[125] In addition, the Second Circuit expressed concern over the appearance of granting the same degree of protection to custody and access rights when the Convention explicitly makes the return remedy available only for breaches of "rights of custody."[126]

The Second Circuit also rejected Mr. Croll's argument that bare access rights, as held by an "access only" parent, ought to be distinguished from the same bare rights as enforced by a *ne exeat* clause.[127] Mr. Croll argued that a removal in violation of access rights and a *ne exeat* clause is clearly an attempt by the abductor to "unilaterally circumvent[] the home country's courts in search of a more sympathetic forum," and that this is exactly the kind of situation the Convention seeks to prevent or remedy by returning the child to his or her habitual residence.[128] However, the Second Circuit held that the *ne exeat* provision merely "protects parental rights," that "it does not transmute one right into the other," and that granting the remedy of return to an "access only" parent "would effect a 'substitution' of rights, something the Convention expressly forbids."[129]

Regarding foreign case law, the Second Circuit found that no consensus view had emerged and quoted two sets of cases that appear to offer directly conflicting opinions as to whether a breach of access right permits a court-ordered return.[130] The Second Circuit contrasted an Australian case and an Israeli case, which both permitted the return remedy where a parent removes a child in violation of a *ne exeat* clause,[131] with two Canadian cases and a French case, in which the

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123. *Id.* (quoting Anton, *supra* note 36, at 546).

124. *See id.*

125. *Id.* at 141-42. This view is consistent with article 3 of the Convention, which states that a removal is "wrongful" only where it is in breach of "rights of custody." Convention, *supra* note 18, at 10,498.

126. *Croll*, 229 F.3d at 141-42 (quoting Pérez-Vera, *supra* note 19, at 444-45).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 143 ("No consensus view emerges from the opinions issued by the courts of the signatory nations . . . . Foreign courts are split on the issue presented in this case.").

131. *Id.*; see *In re* Jose Garcia Resina, slip op. ¶ 23, Judgment 1 (Fogarty) (noting that generally, the violation of a court order will "trigger" a return); *Croll*, 229 F.3d at 143 (citing C.A. 5271/92, Foxman v. Foxman (The High Court of Israel holding that both parents held "rights of

petitioners also held rights pursuant to a *ne exeat* provision but the return remedy was not permitted.[132] The latter cases denied the return remedy where the *ne exeat* provision was merely "implicit" in the custody decree,[133] where the *ne exeat* was permanent as opposed to interim,[134] and where the *ne exeat* provision was found merely "secondary."[135] Given the apparent "split" in foreign authority, the Second Circuit gleaned no instruction from courts that had previously addressed the issue. In accord with the above analysis, the Second Circuit reversed the district court's determination refusing to dismiss the case for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. The Second Circuit found instead that Mr. Croll could not claim custody of Christina by virtue of his access and *ne exeat* rights.[136]

The dissenting opinion by Judge Sotomayor reached the opposite conclusion. Specifically, he argued that the *ne exeat* provision of the Convention conferred on Mr. Croll "rights of custody."[137] The dissent asserted that the majority misconceived the legal import of the clause and, in so doing, undermined the Convention's goal of "'ensur[ing] that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States.'"[138] According to the dissent, the question presented is whether, wholly independent of Mr. Croll's access rights, the *ne exeat* clause confers rights of custody under the Convention.[139] In so construing the issue, the dissent avoided the danger cited by the majority of "transmut[ing] access rights into rights of custody."[140]

In contrast to the majority, the dissent derived a broad conception of "rights of custody" from the Convention's text, object and purpose, as well as the relevant case law.[141] Citing the official reporter for the Convention, the dissent "discern[ed] an intent of inclusion rather than

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custody" where neither could remove the child without the other's consent, or the consent of a rabbi)).

132. *See Croll*, 229 F.3d at 143.

133. *See id.* (citing D.S. v. V.W., [1996] 134 D.L.R. (4th) 481).

134. *See id.* (citing Thomson v. Thomson, [1994] 3 S.C.R. 551 (Can.)).

135. *See id.* (citing Ministere Pub. v. Mme Y, T.G.I. Périguex, Mar. 17, 1992, D. 1992).

136. *Id.* at 135, 143.

137. *Id.* at 144 (Sotomayor, J., dissenting) (quoting Convention, *supra* note 18, at 10,498).

138. *Id.* (Sotomayor, J., dissenting).

139. *Id.* at 145 (Sotomayor, J., dissenting).

140. *Id.* (Sotomayor, J., dissenting) ("The majority mischaracterizes the issue as being a question of whether the *ne exeat* clause 'transmute[s] access rights into rights of custody,'" but "[c]learly the *ne exeat* clause works no such magic.").

141. *Id.* at 146 (Sotomayor, J., dissenting) ("[T]he Convention and its official history reflect a notably more expansive conception of custody rights.").

exclusion, so as to effectuate the drafters' goal of making the treaty applicable to all possible cases of wrongful removal."[142] Given this approach, the dissent found that the *ne exeat* clause must include the "right to determine the child's place of residence" because the clause gives a parent "decisionmaking authority regarding a child's international relocation."[143] The dissent argued that its interpretation of the substance, rather than the form, of the rights created by the addition of a *ne exeat* clause is supported by the broad purpose of the Convention.[144] In addition, the dissent found the majority's view narrow and inconsistent with the Convention because it "ignore[d] the basic international character of the Hague Convention."[145] In light of this international context, the dissent argued, the term "place of residence" ought to be construed as applying to international relocations.[146]

The dissent also questioned the majority position that "a parent must possess a certain portion [of the "bundle" of custody rights] in order to be protected by the Convention," and that the right to determine the child's place of residence created by a *ne exeat* clause does not satisfy this test.[147] In the dissent's view, the phrase "rights of custody" contemplates a group of custody rights that are protected "regardless of whether a parent holds one, several or all such custody rights."[148] To support this interpretation, the dissent cited article 3 of the Convention, which explicitly protects custody rights whether held "jointly or alone."[149] The dissent also noted that the Convention gives no indication that "a parent must possess some minimum number of rights of custody in order to qualify for protection."[150]

Unlike the majority opinion, the dissent relied to a much greater extent on foreign case law and found that "[m]ost foreign courts addressing this question have interpreted the notion of 'rights of custody'

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142. *Id.*; *see also* Pérez-Vera, *supra* note 19, at 446 (The Convention favors "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.").

143. *Croll*, 229 F.3d at 146 (Sotomayor, J., dissenting) ("Thus the *ne exeat* clause vests both Mr. Croll and the Hong Kong court with "rights of custody" for the purposes of the Convention.").

144. *Id.* at 146-47 (Sotomayor, J., dissenting) ("In light of the Convention's broad purpose, the concept of 'wrongful removal' clearly must encompass violations of *ne exeat* rights.").

145. *Id.* at 147 (Sotomayor, J., dissenting).

146. *Id.* at 148 (Sotomayor, J., dissenting) ("Accordingly, the right to choose the country in which a child lives . . . constitutes a 'right to determine the child's place of residence' under Article 5, and thus a 'right of custody' under the Convention.").

147. *Id.* at 147 (Sotomayor, J., dissenting).

148. *Id.* (Sotomayor, J., dissenting).

149. *Id.* (Sotomayor, J., dissenting).

150. *Id.* (Sotomayor, J., dissenting).

broadly in light of the Convention's purpose and structure."[151] The dissent flushed out the facts of the cases cited by the majority, particularly those issued by the Supreme Court of Canada, and illustrated that the *ne exeat* provision has been widely held to confer rights of custody under the Convention.[152] In addition, the dissent questioned the distinction some courts have drawn between permanent and interim *ne exeat* provisions, finding that the interest in preventing the removal of a child is equally strong whether the provision is permanent or interim.[153] Therefore, given the "more compelling reasoning of the English, Australian, and Israeli cases," the dissent would join the courts in those countries in finding that rights arising under a *ne exeat* clause amount to "rights of custody" under the Convention.[154]

IV. ANALYSIS AND CRITICISM

In holding that Mr. Croll's access rights and the *ne exeat* provision did not amount to "rights of custody," the Second Circuit's decision was inconsistent with both U.S. case law[155] and decisions by courts of other signatory nations of the Hague Convention.[156] Its narrow construction of the text of the Convention was antithetical to the stated intent of its drafters.[157] Because the Second Circuit viewed the issue before it to be one of first impression, it did not rely upon any U.S. court decisions for guidance in interpreting the Convention.[158] However, *David S.* and *Janakakis-Kostun* both held that a noncustodial parent with access rights enforced by an interim *ne exeat* provision has "rights of custody" within

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151. *Id.* at 150 (Sotomayor, J., dissenting).

152. *See id.* at 150-53 (Sotomayor, J., dissenting).

153. *See id.* at 152 (Sotomayor, J., dissenting). Judge Sotomayor asserted:

> [A] court issuing an interim custody order has a strong interest in preventing a child's removal before it has the opportunity to make its final custody determination. But nothing in the Convention's language or official history supports the notion that this interest is any more important than the court's interest in enforcing the final custody order once issued . . . . [It is] a distinction without a difference.

Id. at 152-53; *see also* Croll v. Croll, 66 F. Supp. 2d 554, 557 (S.D.N.Y. 1999) ("The February 23, 1999 order provides that it is to become final in six weeks unless cause is shown otherwise."). Neither the district court nor the Second Circuit recognized that Ms. Croll's removal of Christina on April 2, 1999, was during the "interim" period of the divorce decree, which extended until April 6, 1999; accordingly, the majority's focus on "permanent" custody orders being distinguishable from "interim" orders is irrelevant.

154. *Croll*, 229 F.3d at 153 (Sotomayor, J., dissenting).

155. *See* David S. v. Zamira S., 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843 (Ky. Ct. App. 1999).

156. *See supra* note 93 and accompanying text; *see also Croll*, 229 F.3d at 143 (citing C.A. 5271/92, Foxman v. Foxman (The High Court of Israel holding that a *ne exeat* provision gave a parent "custody rights" under the Convention)).

157. *See supra* notes 35-36 and accompanying text.

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

the meaning of the Convention.[159] The facts of the noted case are strikingly similar to those in *David S.* and *Janakakis-Kostun*;[160] accordingly, the court in the noted case ought to have found a violation of "rights of custody" and affirmed the lower court's granting of the return remedy to Mr. Croll.

Although the court in the noted case concluded that "no consensus view emerges from the opinions issued by courts of the signatory nations," a majority of nations to address the issue have found a consensus view to exist.[161] In addition to U.S. courts, the courts of Australia, the United Kingdom, New Zealand, and Israel agree that a *ne exeat* provision creates "rights of custody" for an access parent under the Convention.[162] Such decisions are to be given "considerable weight" by U.S. courts interpreting the Convention.[163] Moreover, the Canadian decisions cited in support of the Second Circuit's opinion are factually distinguishable and have not escaped criticism,[164] leaving only the French courts to support the Second Circuit's interpretation of "rights of custody."[165] Therefore, despite the fact that Congress has declared the importance of "the need for uniform international interpretation of the Convention,"[166] the Second Circuit joined the minority of courts that construct a restrictive definition of "rights of custody" under the Convention.

The fundamental problem with the noted case is that the Second Circuit interpreted the Convention with an overly narrow reading that undermined the purpose, intent, and overall objective of the Convention.[167] As the chair of the committee that drafted the Convention stated, "'[c]ustody rights' are not limitatively defined in the Convention."[168] By holding that the remedy of return was categorically unavailable to a parent with mere "rights of access," the court's analysis strained to avoid the fact that a *ne exeat* provision confers to an otherwise

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159. *David S.*, 574 N.Y.S.2d at 492; *Janakakis-Kostun*, 6 S.W.3d at 849.

160. *See Croll*, 229 F.3d at 113; *David S.*, 574 N.Y.S.2d at 429; *Janakakis-Kostun*, 6 S.W.3d at 843. In all of these cases, the custody of a child was given to the mother, the father was given access rights, the custody decree was enforced with a *ne exeat* provision, and the mother removed the child in violation of that provision.

161. *Croll*, 229 F.3d at 143; *see also supra* note 93 and accompanying text.

162. *See supra* note 39 and accompanying text.

163. *See supra* note 39 and accompanying text.

164. *See supra* note 88 and accompanying text.

165. *See Croll*, 229 F.3d at 143.

166. 42 U.S.C. § 11601(b)(3)(B) (1997).

167. *See* Pérez-Vera, *supra* note 19, at 447 ("[I]t should be stressed now that the intention is to protect all the ways in which custody of children can be exercised," including situations where the court has "divid[ed] the responsibilities inherent in custody rights between both parents.").

168. Anton, *supra* note 36, at 545.

noncustodial parent a meaningful, decisionmaking role that falls under the Convention's definition of "rights of custody." When assessed in terms of substance rather than form, a *ne exeat* provision yields much more power than a mere negative or veto right. The *ne exeat* provision gives an otherwise noncustodial access parent the power, and hence the right, to impose specific conditions, such as to require that the child's residence is near a major transportation hub. The import of a *ne exeat* provision, as the dissent in the noted case pointed out, is that it gives the access parent the right to determine the child's place of residence.[169] Thus, the Second Circuit's formalistic analysis failed to recognize the rights of custody that flow naturally from the addition of a *ne exeat* provision to a custody arrangement.

In addition to ignoring the substantive rights created by a *ne exeat* provision, the Second Circuit failed to employ the "flexible interpretation" of Convention terms explicitly favored by the drafters.[170] Instead, the court relied upon dictionary definitions of "custody" that emphasize giving care to and exercising control over the child.[171] Contrary to the court's position that nothing in the Convention suggests an intent other than its dictionary definition of custody,[172] the Convention specifically defines a "right of custody" as the right to determine the child's place of residence.[173] On its face, then, the Convention presents a broader definition of "rights of custody" than that offered by the Second Circuit. Once the court settled upon this restrictive definition, it foreclosed the possibility of other sources of custody rights, such as those created by a *ne exeat* provision. This definitional approach conflicted with the drafters' intent that terms be interpreted flexibly so as to "allow the greatest possible number of cases to be brought into consideration,"[174] and thus yielded a result antithetical to the purpose of the Convention.

Furthermore, the court's view that it is unhelpful and insufficient to think of "rights of custody" in terms of designating a child's home country or territory is flatly contradicted by the language of the Convention. Article 5 unambiguously states that "'rights of custody' shall include . . . *in particular*, the right to determine the child's place of residence."[175] Neither the language of article 5 nor the official

169. *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting).

170. *See supra* note 142 and accompanying text.

171. *Croll*, 229 F.3d at 138; *see also supra* note 112 and accompanying text.

172. *See Croll*, 229 F.3d at 138.

173. Convention, *supra* note 18, at 10,498.

174. Pérez-Vera, *supra* note 19, at 446; *see also* Convention, *supra* note 18, at 100,498 (listing the various ways "rights of custody" may arise).

175. Convention, *supra* note 18, at 10,498 (emphasis added).

commentary support the Second Circuit's position that this definition of "rights of custody" serves merely to reiterate the identity of the custodial parent as defined in the first half of the definition.[176] Such a reading of the article would be redundant and, therefore, contrary to normal principles of interpretation.[177]

The Second Circuit's analysis also neglected to consider the international context in which "rights of custody" arise and in which they ought to be understood.[178] The Convention is a transborder agreement that seeks to return wrongfully removed children to the country of their habitual residence so that its courts can adjudicate the custody dispute.[179] Given the global purpose and jurisdiction of the Convention, its terms ought to be construed in a similar manner, such that the "right to determine the child's residence" created by a *ne exeat* provision encompasses not only the choice of a specific dwelling, but the choice of the country in which the child resides. This failure of the Second Circuit to fully appreciate the international context of "rights of custody" was also reflected in its cursory review of international case law. A more thorough analysis would have revealed the broad interpretation of "rights of custody" favored by a majority of international courts to evaluate "rights of custody" under the Convention.[180]

V. CONCLUSION

The noted case addressed an issue of first impression for U.S. courts: whether access rights and a *ne exeat* provision permitted Mr. Croll to exercise custody rights within the meaning of the Convention. It is this author's view that the Second Circuit's interpretation of "rights of custody" was inconsistent with the purpose, intent, and overall objectives of the Convention, especially the drafters' directive that courts construe and apply the Convention terms liberally. The Second Circuit's decision ran contrary to the majority of courts worldwide that have addressed the issue, and as a consequence undermined the uniform application of the

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176. *See Croll*, 229 F.3d at 139 (holding that the second half of the definition in article 5 is merely "an apt example of a right of custody because it is indicative" of the custodial parent who already exercises care and control over the child).

177. *See* Vienna Convention on the Law of Treaties, May 23, 1969, [1987] 1155 U.N.T.S. 331, 340. According to the Vienna Convention, a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *See also* Bromley v. Bromley, 30 F. Supp. 2d. 857, 860 (E.D. Pa. 1998) ("Other rules of construction may be used on difficult or ambiguous passages . . . . But where the text is clear . . . courts have no power to insert an amendment." (citation omitted)).

178. *See Bromley*, 30 F. Supp. 2d at 860; *see also supra* note 38 and accompanying text.

179. *See supra* notes 21-22 and accompanying text.

180. *See supra* note 93 and accompanying text.

Convention and weakened the deterrent effect of the Convention's return remedy.

By reinstating the removal order and ordering the return of Christina to Hong Kong, the chief goal of the Convention would be furthered; namely, remanding custody disputes to the courts operating under the laws that created the original custodial arrangement. If the Second Circuit decision withstands appeal, more custodial parents will be able to circumvent court-ordered custodial decisions by fleeing to another country, and thus frustrate the judicial process and further separate family members already impacted by the dissolution of a marriage.

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