

UNIVERSITY OF THE WESTERN CAPE**MINI THESIS****FACULTY OF LAW**

NAME: PEARL DEIDRE ANDREWS

STUDENT NUMBER: 8813334

PROPOSED DEGREE: A Mini-Thesis submitted in partial fulfillment of the requirements for the degree Masters Legum in the Faculty of Law, University of the Western Cape.

DEPARTMENT: Faculty of Law

SUPERVISOR: Professor Julia Sloth-Nielsen

TITLE OF THESIS:

Links between International Child Abduction and Relocation: Moving towards like-mindedness in relocation disputes internationally - Is it time for a protocol regulating international relocation disputes?

DATE: 15 NOVEMBER2012

KEYWORDS:

1. Relocation disputes
2. International Protocol/ Instrument/Treaty
3. International Family Law Jurisprudence
4. Child Abduction (Hague Convention)
5. Best interests of the child
6. Fundamental Issues
7. Uniform and Consistent approach (like-mindedness)
8. Cross-border relationships (International Marriages (Families))
9. Impacts
10. Mediations



ABSTRACT

REGISTERED TITLE OF THESIS:

Links between International Child Abduction and Relocation: Moving towards like-mindedness in relocation disputes internationally – Is it time for a protocol regulating international relocation disputes?

P. D. ANDREWS

LLM Degree Mini-thesis, Faculty of Law, University of the Western Cape

‘...parental child abduction is about more than the incidental abductions, it is about the dangers of globalization of interpersonal relations and marriage for women’

-Betty de Hart¹

This by implication would mean that the best way to prevent child abduction is to desist from international marriages and moving abroad.² The modern reality is that relationships are being formed internationally.³ In the same breath, relationships are easily un-formed and the family fractured.⁴ The emotional impact of any breakup is usually tense, and it follows by implication that this will be exacerbated if a child is involved. For reasons that will be expounded on in the thesis, many caregivers, usually mothers have opted to abduct their children. Some have opted to apply formally to relocate. Relocation disputes are widely regarded as one of the most controversial and difficult issues in family law internationally. These disputes usually arise pursuant to a relational breakdown, when the resident parent (usually the mother) seeks to relocate with the children either domestically or internationally. This causes a significant impact

¹ De Hart B ‘A paradise for Kidnapping Parents: Legal, political and media discourses on Parental Child Abduction in the Netherlands (1970 – 2009)’ (2010) 1.3 *Journal of Family Law and Practice* 27.

² De Hart B (2010) 27.

³ Thorpe LJ ‘Relocation – The Search for Common Principles’ and ‘The Continued search for common principles’ (2010) 1.2 *Journal of Family Law and Practice* 4; see also Boshier P: ‘Have Judges been missing the point and allowing relocation too readily?’ (2010) 1.2 *Journal of Family Law Practice* 10.

⁴ Thorpe LJ (2010) 1.

on contact arrangements with the other parent (usually the father).⁵ Depending on the country in which they find themselves and the laws applicable to relocation with the child, mothers are faced with the decision to remove the child either lawfully or wrongfully.

International family law jurisprudence has been developed over time to assist with custody and relocation disputes. ‘Much has been written on the Hague Convention – its flaws and its successes, its effectiveness and utilization.’⁶ This thesis aims to look specifically at relocation disputes within the context of international parental child abduction; more specifically, it sets out to explore whether there is a link between those phenomena, and whether the Hague Convention is sufficient for dealing with relocation disputes. I hope to make a convincing argument that if there were an international instrument regulating relocation, there would be uniformity and consistency. People’s confidence in the legal processes would be restored, motivating them to apply formally to relocate and, in doing so, the incidence of child abductions would be reduced.



NOVEMBER2012

⁵ Taylor N and Freeman M: ‘Relocation: The International Context’ (2010) 1.2 *Journal of Family Law and Practice*.19.

⁶Schnitzer-Reese EA ‘International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court’ (2004) 2 *Northwestern Journal of International Human Rights* 5.

DECLARATION

I declare that “*Links between International Child Abduction and Relocation: Moving towards like-mindedness in relocation disputes internationally -Is it time for a protocol regulating international relocation disputes?*” is my own work, that it has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.



Name: PEARL DEIDRE ANDREWS

Date 15 November 2012

Signed:.....

ACKNOWLEDGMENTS

First, I would like to thank Yahweh my Elohim for the strength, wisdom and understanding that He has given me. Without Him I would never have been able to do this on my own strength.

There are a number of people to whom I owe a debt of gratitude as they have in their own meaningful way made an invaluable deposit into my life during the preparation of this thesis. In particular, I wish to express my heartfelt gratitude and thanks to my supervisor, Prof. Julia Sloth-Nielsen, for her encouragement, supervision and guidance. I am humbled that you have taken me under your wing. You have helped me to believe that I could follow my dream and that the world could be my oyster.

I would like to thank my husband, David Edward Windsor Andrews, for his incredible love, prayers, motivation, support, encouragement and understanding. Thank you for sacrificing this year with me. You have been my pillar of strength, for which I will be eternally grateful.

To my four beautiful daughters Erin, Hannah, Sahra and Rebekah, son Donovan, and granddaughter Reese, thank you for your love, support and understanding during the period while I was busy studying. Last, I would like to thank my grandmother, Anne Alexander, for your encouragement, love and support. Thank you for always being there for me, Ma.

I love you all, and dedicate this work to my family.

YHWH Bless you.

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ABBREVIATIONS

AAML	American Academy of Matrimonial Lawyers
ACRWC	African Charter on the Rights and Welfare of the Child
CAA	Civil Aviation Authority
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEFL	The Commission on European Family Law
ECHR	European Convention on Human Rights
EU	European Union
HAGUE CONVENTION	Hague Convention on the Civil Aspects of International Child Abduction
HCCH	Hague Conference on Private International Law
ICARA	International Child Abduction Remedies Act
ICMEC	International Centre for Missing and Exploited Children
INCADAT	International Child Abduction Database
IPKPA	International Parental Kidnapping Prevention Act
ULC	Uniform Law Commission
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
UNCRC	United National Convention of the Rights of the Child
UNICEF	United Nations Children's Fund
USA	United States of America

PREFACE

‘Borders divide jurisdictions but families reunite them’⁷ is such a profound concept. The proverbial phrase ‘what a small world’ is now more apt than ever. This international cross-flow of families has over time generated a new crop of legal issues in the realm of private international law, comprising rules a court would apply whenever there is a case involving a foreign element. These legal dilemmas are complex, but do not defy solutions if countries make sincere efforts to resolve such complications.⁸ Countries around the world have had different domestic approaches to this dynamic. There is a growing argument that the restriction of the parents’ right of free movement increases the risk of abduction of the child.⁹ This is but one of the examples of the interrelatedness between the parental child abductions and relocations. There seems to be a robust debate around the need for another protocol to regulate relocations, a debate I strongly support. International jurisprudence around these issues should be brought in line with the growing needs of the modern family. The only way to move towards common global thinking and understanding is to lobby for the support of countries internationally in order to expedite the implementation of an instrument regulating relocations so that there can be uniformity and consistency.

⁷Malhotra A ‘To Return or Not to Return: Hague Convention *versus* Non-Convention Countries’ (2010) 1.3 *Journal of Family Law and Practice* 59.

⁸Malhotra A (2010) 59.

⁹Lamont R ‘Linking Child Abduction and the Free Movement of Persons in European Law’ (2010) 1.3 *Journal of Family Law and Practice* 44.

CHAPTER 1

1. INTRODUCTION

Child abduction is today an international problem¹ and a fraught legal issue, one arising in a situation where different national legal systems have conflicting positions regarding the return of children to their habitual countries of residence.²

In modernity, the world has grown both smaller and more complicated than it was,³ and with the greater ease of international travel and opportunity for bi-cultural marriage – as well as the rise in divorce rates – the incidence of child abduction continues to increase.⁴ Cross-border relationships and marriages are ever-more commonplace, yet when they break down, the introduction of an international legal dimension compounds an already complex dynamic. This presents considerable challenges not only to the people concerned but courts the world over, which have had to make difficult decisions, especially in relation to children caught in the cross-fire of broken relationships and the ensuing disputes over custody and relocation. Because of the far-reaching problems of maintaining access or contact internationally, it is a situation that would appear to increase the risk of international abduction.⁵ As Justice Thorpe states:

The frequency and intensity of parental disputes over relocation are a relatively modern phenomenon. They are a by-product of communication and travel technology exemplified by the wide-bodied jet and the world-wide web. National frontiers are lowered as we create a global world.⁶

If the problem is that the relocation disputes are characterised by a ‘frequency and intensity’ which could lead to abduction, the body of law being developed internationally suggests that endeavours are under way to achieve greater consistency in approach to these disputes.⁷

¹Lamont R ‘Linking Child Abduction and the Free Movement of Persons in European Law’ (2010) 1.3 *Journal of Family Law and Practice* 39.

²Malhotra A ‘To return or not to return: Hague Convention *versus* Non – Convention Countries’ (2010) 1.3 *Journal of Family Law and Practice* 51.

³Malhotra A (2010) 51.

⁴The Hague Conference on International Law: Outline ‘Hague Abduction Convention’ (2008) 1.

⁵Malhotra A (2010) 51.

⁶Thorpe LJ ‘Relocation – The Search for Common Principles’ (2010) 1.2 *Journal of Family Law and Practice* 4.

⁷Taylor N and Freeman M ‘Relocation: The international Context’ (2010) *Journal of Family Law and Practice* 19.

While the international movement of children can be divided into two facets – on the one hand, the court-ordered sanction of movement, following a successful application to relocate and, on the other, lawless movement or abduction⁸ – there are certain common threads in abduction and relocation matters inasmuch as the cross-border migration of children directly engages international family law. Approaches to relocation have been recognised as having an impact on child abduction and a bearing on the operation of the Hague Convention of 1980.⁹ Created and developed to facilitate a common standard to prevent or deter the wrongful removal of children, the Convention encapsulates the principles to be applied internationally to ensure the swift return of abducted children.¹⁰ There is no doubt that abduction has a detrimental effect on the family unit and all others concerned,¹¹ nor is there doubt that families should be spared this traumatic experience.

In this vein, in countries such as the United States and United Kingdom, guidelines to relocation disputes have been established and implemented in domestic laws, but whether they could simply be applied on an international scale remains to be seen and tested. The effectiveness of these domestic laws can only be assessed after they have been in operation for a reasonable period, whereafter empirical research should be undertaken. This information will be vital in assisting the process of an international instrument regulating relocation disputes, as the key problem-areas will hopefully be identified and the necessary provisions put in place in order to circumvent possible delays and loopholes in the protocol. The Hague Convention has presented challenges, such as the failure to set out appeal procedures, which have been the cause of delays.

2. RESEARCH PROBLEM

This dissertation explores relocation disputes in the context of international parental child abduction, which is regulated by the Hague Convention on International Child Abduction;¹² more specifically, it examines whether there is link between relocation disputes and abduction, and raises the question of whether the Convention is sufficient for dealing with such disputes.

⁸Thorpe LJ (2010)4.

⁹Boshier P 'Have Judges been missing the point and allowing relocation too readily?' (2010) 1.2 *Journal of Family Law and Practice* 11.

¹⁰Thorpe LJ (2010) 4.

¹¹Freeman M 'International Child Abduction: The effects' (2006) *The reunite Research Unit Report Forward*.

¹²The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

The thesis of the dissertation is, essentially, that there is a need for an international instrument to regulate relocation disputes; the focus of this work is in turn to lay the basis for such an instrument, an undertaking informed by extent research on the subject and recommendations flowing from international conferences on it. The reality is that there is no uniformity in approach to relocation, meaning that, conversely, there is a need – as evidenced by the jurisprudence emerging internationally – for greater consistency in how disputes are addressed. It is the writer’s submission that the introduction of an international instrument to regulate relocations would help in achieving the primary objectives of the Hague Convention, namely to discourage parental abductions.

While the exact provisions of the protocol can be fleshed out between the countries, what is important at the outset is that the concept be accepted in principle, mindful of several pertinent considerations (discussed in this dissertation) that should be included in the protocol. Defining the fundamental issues arising from relocation disputes provides a basis from which to develop the protocol in the interests of consistency – although, once applied in practice, the protocol would yield a diversity of outcomes, it would be a circumscribed diversity, because there are only certain specified outcomes that can be reached.¹³ In the same way that international jurisprudence has helped to develop the laws and interpretations around international child abduction, so will a similarly coherent jurisprudence be defined and shaped over time in respect of relocation disputes.

In short, since the matter of international marriages and families is here to stay, it would be prudent to put measures in place to protect children by regulating relocation in much the same way as the Hague Convention deals with child abductions. This dissertation therefore endeavours to explore the approaches to relocation and lay the basis for the aims above.

3. METHODOLOGY

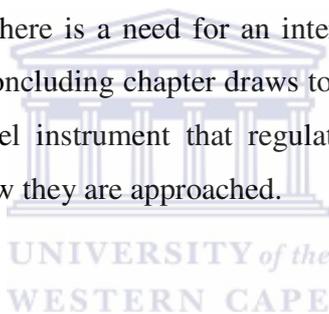
This study is based primarily on desktop and library research involving critical engagement with the existing literature on the subject. A literature review was conducted in which numerous works were critically appraised and their theories and findings compared and contrasted. Current

¹³ Elrod LD ‘Moving on: Best interests of Children in Relocation cases’ (2010) 1.2 *Journal of Family Law and Practice* 51.

international jurisprudence was also examined in order to support the argument that there is a need for a properly regulated protocol.

4. A BRIEF OVERVIEW OF CHAPTERS

The mini-thesis is divided into five chapters. Chapter One deals with the research problem and justifies the choice of topic. Chapter Two considers the strengths, weaknesses and challenges of the Hague Convention, looking globally at how it has been applied to domestic laws. Chapter Three focuses on resolution disputes, how they arise and how they are dealt with internationally. Underlying themes such as gender issues and the right to free movement are discussed in order to explore international trends in this emerging discourse in international family law. Chapter Four examines the links between the Hague Convention on International Child Abduction and relocation as well as recommendations flowing from international conferences, thereby laying the basis for the submission that there is a need for an international instrument to bring about uniformity and consistency. The concluding chapter draws together the chains of argumentation, and asserts the need for a parallel instrument that regulates relocation matters and thereby enables universal consistency in how they are approached.



CHAPTER 2

1. INTERNATIONAL CHILD ABDUCTIONS

1.1 Introduction

This chapter focuses on international child abductions, looking briefly at the history of, and motivation for, the implementation of the international treaty that regulates the return of children wrongfully removed or retained in countries which are not their place of habitual residence; thereafter, the strengths, weaknesses and challenges of the Hague Convention are discussed. One of the main principles concerning children's rights in general, namely the best interest of the child, will be examined in terms of its relevance to child abduction. Attention will also be given to international approaches to child abduction and their outcomes. Although the chapter's focus is global, most of the references are drawn from South African jurisprudence on this topic. This chapter aims to show that the primary objective of the Convention has been defeated, mainly because its processes are cumbersome and, in many instances, the return remedy, meant to be speedy, is instead protracted.

1.2 Background to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

During the 1970's, a trend in what was perceived as legal kidnapping by one parent became a growing international problem. The return of such children became a serious challenge and source of concern.¹⁴ Because of the difficulty of obtaining international co-operation to recognise and enforce orders made in other jurisdictions, the urgent need arose for a Hague Conference.¹⁵ This led to the Hague Convention on the Civil Aspects of International Child Abduction being adopted at the fourteenth session of the Hague Conference on Private International Law in plenary session on 24 October 1980.¹⁶ The focal objective was to regulate and secure the expeditious return of children who have been wrongfully removed from their place of habitual residence or wrongfully retained.¹⁷ In addition, the Hague Convention aims to ensure that rights

¹⁴ Clark B. 'Child Abduction' in Schafer *Family Law Service* (2010) Issue 45 at page 1.

¹⁵ Clark B. (2010) 1.

¹⁶ Entered into force on 25 October 1980. Du Toit, C. 'The Hague Convention on the Civil Aspects of International Child Abduction' in T Boezaart (ed) *Child Law in South Africa* (2009) 351; see also Clark, B. (2010) 1.

¹⁷ Article 1 of the Hague Convention; see also Woodrow C and Du Toit C 'Child Abduction' in Davel CJ and Skelton AM *Commentary on the Children's Act* (2010) 17-2; see also Clark B (2010) 1.

of custody and access under the law where the child is habitually resident are respected in the country to which the child has been removed or in which the child is being retained.¹⁸

There are currently 88 contracting States to the Hague Convention, including South Africa.¹⁹ States that have ratified the Hague Convention are bound to apply the principles of the Hague Convention to ensure that its objectives are upheld, principally to respect the jurisdiction of the courts in the country from which the child was removed. There is a reciprocal understanding between member states for the decisions of a court in another jurisdiction to be mutually respected. However, much of the Hague Convention's success depends on a uniform and consistent approach by all member states to the application of the Hague Convention.²⁰

2. THE HAGUE CONVENTION WITHIN THE SOUTH AFRICAN CONTEXT

The Hague Convention was ratified by South Africa and incorporated into domestic legislation in terms of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (Hague Convention Act).²¹ The Hague Convention has been applicable in South Africa only since 1997,²² but the Hague Convention Act was later repealed by the Children's Act.²³ The latter incorporates the whole of the Hague Convention in Chapter 17;²⁴ however, the existing case law in respect of Hague abduction cases is still applicable.²⁵

3. OVERVIEW OF THE PRINCIPLES AND OBJECTIVES OF THE HAGUE CONVENTION

The Convention does not provide any substantive rights.

The preamble of the Hague Convention sets out the principles which underpin the Hague Convention:

The States to the present Convention-

¹⁸KassanDG 'How can the voice of the child be adequately heard in family law proceedings' LLM Dissertation, unpublished, UWC (2004) 26; Article 1; Du Toit C (2009) 351; see also Malhotra A (2010) 1.3 *Journal of Family Law and Practice* 51: 'A broader definition encompasses the removal of a child from his/her environment where the removal interferes with parental rights or right to contact'.

¹⁹ Available at www.hcch.net/index_en.php%3Fact%3Dt (accessed 16 September 2012).

²⁰Du Toit C (2009) 352.

²¹Du Toit C (2009) 351.

²²Du Toit C (2009) 352.

²³Act 38 of 2005.

²⁴Section 275 Act 38 of 2005.

²⁵Du Toit C (2009) 351.

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody.

Desiring 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’.

In the case of *Pennello v Pennello*²⁶ the court aptly describes the Hague Convention’s purpose as follows:

The primary purpose of the Convention is to secure the prompt return (usually to the country of their habitual residence) of children wrongfully removed to or retained in any Contracting State, viz to restore the status quo ante the wrongful removal or retention as expeditiously as possible so that custody and similar issues in respect of the child can be adjudicated upon by the courts of the state of the child’s habitual residence. The Hague Convention is predicated on the assumption that the abduction of a child will generally be prejudicial to his or her welfare and that, in the vast majority of cases, it will be in the best interests of the child to return him or her to the state of habitual residence. The underlying premise is thus that the authorities best placed to resolve the merits of a custody dispute are the courts of the state of the child’s habitual residence and not the courts of the state to which the child has been removed or in which the child is being retained.²⁷

The return of the child is to the jurisdiction of the country (also referred to as the place of habitual residence) from which the child was removed. The understanding is that the child is not being returned to the left-behind parent.²⁸ Instead, the underlying objective is to restore the pre-abduction or pre-retention position and act as a deterrent for parents crossing international borders ‘in search of a more sympathetic forum’.²⁹ Contracting States have a legal duty to ensure that Hague Convention applications are dealt with expeditiously.³⁰

²⁶*Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA).

²⁷*Pennello* par 25.

²⁸C Woodrow C and Du Toit C (2010) 17-3.

²⁹C Woodrow C and Du Toit C (2010) 17-4.

³⁰Woodrow C and Du Toit C (2010) 17-4; see also Hague Convention article 11, Du Toit C (2009) 352; Boshier P ‘The Strengths and Weaknesses of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – A New Zealand Perspective’ (International Family Law Conference Cumberland Lodge, Windsor England 4 – 7 August 2009) 1.

The elements for a removal or retention to be regarded as wrongful are as follows:³¹

- (a) The effect of the removal or retention is that it will be regarded as breaching a party's rights of custody in accordance with the law of the State in which the child was ordinarily resident, immediately before the removal or retention of the child.
- (b) At the time of the removal or retention, the party who alleges the infringement of the right of custody was actually exercising or would have been exercising those rights, but for the removal or retention.

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights can apply to the Central Authority where the child is habitually resident or to the Central Authority of another Contracting State for assistance in securing the return of the child.³²

The Hague Convention recognises the need for empathy, and attempts, through its prescribed processes, to minimise the negative psychological effects of abduction.³³ It is for this reason that the Convention is predicated on the understanding that the return remedy should be prompt.³⁴

There are, however, certain exceptions to the mandatory return which are set out in articles 12 and 13 of the Convention. These arise in situations where, inter alia:

- (a) the child may have become settled in his or her new environment where proceedings have commenced after the expiration of one year;³⁵
- (b) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;³⁶
- (c) 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;³⁷ or,

³¹ Article 3 of the Hague Convention.

³² Articles 7 and 8 of the Hague Convention.

³³ Schnitzer-Reese EA 'International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court' (2004) 2 *Northwestern Journal of International Human Rights* 5.

³⁴ Article 1(a) of the Hague Convention; see also Article 11 of the Hague Convention: 'The judicial or administrative authorities of Contracting States shall act *expeditiously* [my emphasis] in proceedings for the return of children'.

³⁵ Article 12 of the Hague Convention; see also *KG v CB* [2012] JOL 28641 (SCA).

³⁶ Article 13(a) of the Hague Convention; *Central Authority v Houtman* [2006] JOL 16644 (C).

(d) child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.³⁸

The Hague Convention is founded on numerous postulates. These include the notion that the abduction of the child will have been prejudicial to his or her welfare as most children will have been removed from the country, community, family and surroundings in which they were settled; in the majority of instances, the abduction will create trauma for a child and it is therefore in the best interests of most children to be returned to their country of ordinary residence.³⁹ Furthermore, issues relating to custody in respect of children can best be decided by the courts in the child's country of habitual residence because such courts will have access to the most recent evidence concerning the child's circumstances.⁴⁰ Another postulate is that the Hague Convention deters parents from choosing a forum which may be more likely to give a favourable outcome relating to custody disputes; as such, the Convention disallows the hearing of evidence on the merits of the custody dispute.⁴¹

Having looked at the general substance of the Hague Convention, it is necessary to examine the Convention's strengths and weaknesses in order to appraise its effectiveness.

4. STRENGTHS OF THE CONVENTION

The Convention has been described as an instance of an international treaty that has stood the test of time,⁴² and its provisions have been lauded for being carefully considered and expertly drafted.⁴³ One example of this is the wording of Article 3(a), which defines wrongful removal or retention; another is the direct instruction, as it were, concerning the merits of rights of custody as set out in Article 16 and reinforced in Article 19, which states: 'A decision under this

³⁷ Article 13(b) of the Hague Convention; *Sonderup v Tondelli and Another* (CCT 53/00 [2000] ZACC 26; 2001 (2) BCLR 152; 2001 (1) SA 1171.

³⁸ Article 13; see also *Woodrow C and Du Toit C* (2010) 17-17; see also *Central Authority v B* [2007] ALL SA 602 (SE), where the court held that a seven-year-old child was clearly sufficiently mature to make an informed decision and denied the return order, based on the child's objection; see also *Central Authority for the Republic of South Africa and Another v B* (2011/21074) [2011] ZAGPJHC 191; 2012 (2) SA 296 (GSJ); [2012] 3 ALL SA 95 (GSJ).

³⁹ *Du Toit C* (2009) 353-354.

⁴⁰ *Du Toit C* (2009) 353-354.

⁴¹ *Du Toit C* (2009) 353-354; see also *Malhotra A* (2010) 52.

⁴² *Boshier P* (2009) 5,6,7.

⁴³ *Boshier P* (2009) 3.

Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.’

A further strength of the Convention is the clarity of its objectives, aims and tests. Upon closer examination of the objectives, it is clear that the interests of children are of paramount importance in matters relating to their custody; it is clear, too, that there is a focus on protecting children internationally from the harmful effects of their wrongful removal or retention. The Convention establishes procedures to ensure the prompt return of the abducted child to the state of his or her habitual residence as well as secure protection for rights of access. The legal tests are easily understandable. In essence it provides clear guidance as to what steps should be taken and which factors considered for there to be a *prima facie* case for the issuance of a return order of the child to his or her place of habitual residence.⁴⁴

The next section examines the weaknesses and challenges facing the Convention.

5. WEAKNESSES OF THE CONVENTION

Certain of the Convention’s crucial concepts lack strict definition. For example, terms such as ‘rights of custody’ lack complete definition, while terms such as ‘habitual residence’ have no definition.⁴⁵ These definitions have been established through case law and domestic laws. In South Africa, for instance, it is the case that, where the parents of the children are married, they enjoy equal full parental responsibilities and rights according to Section 19 and 20 of the Children’s Act.⁴⁶ Sections 21(a) and (b) of the Children’s Act set out the circumstances under which an unmarried father can acquire parental responsibilities and rights. Unmarried fathers will automatically have custody rights under the Hague Convention if there has been compliance as set out in Section 21 of the Children’s Act. Different countries may have different definitions of rights of custody, and the lack of a strict definition leaves room for inconsistencies.

Habitual residence, on the other hand, has no definition. It is a question of fact and has to be determined with reference to the circumstances of each case. In the case of *Chief Family*

⁴⁴ These factors are set out in articles 3 and 4.

⁴⁵ Duncan W ‘Keeping the 1980 Hague Child Abduction Convention up to Speed. Is it time for a Protocol?’ (2010) 1.3 *Journal of Family Law and Practice* 4; see also Boshier P (2009) 4; this point is stressed in the preamble as well as in articles 1, 2, 11 and 12.

⁴⁶ Act 38 of 2005.

*Advocate v Houtman*⁴⁷ the court stated that one has to look at whether the child has a factual link with the requesting state culturally, socially and linguistically to determine whether it was the child's country of habitual residence.

The relevant difficulties include defining habitual residence in respect of younger children because the child's habitual residence will be dependent on the circumstances of the parents and the parents' intention. In the case of *Re P-J (Children)*⁴⁸ the court indicated that there are three indicators to determine habitual residence: physical presence; physical presence for a reasonable period of time; and presence such that it is for a settled purpose with a settled intention.⁴⁹

Other challenges have arisen from the incorporation of an international treaty into different legal systems with differing national policies and interpretations.⁵⁰ This will be dealt with in more detail further on in this thesis when discussing the approaches that other countries have taken in the interpretation and implementation of the Hague Convention.

Furthermore, the Convention is silent on appeal rights. States are at liberty to determine these in accordance with their independent legal systems. In South Africa, Section 34 of the Constitution⁵¹ provides that 'every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. It is therefore possible that an applicant may decide to exhaust all remedies in the hierarchy of the courts, an eventuality which may take years before finality is achieved.⁵²

After a court has ruled that a child has been wrongfully removed and should be returned, the complex task of facilitating the return arises, and in certain instances judges have inserted conditions in return orders that were burdensome and, arguably, unfair.⁵³ It has been contended

⁴⁷ 2004 SA 274 (C); *Senior Family Advocate, Cape Town & Another v Houtman* [2006] JOL 16644 (C), where it was held that 'it is clear that habitual residence must be determined from the circumstances of each case'; see also *The Central Authority for the Republic of South Africa v Ondionye Charles Iguwa* (10/15111) 27 August 2010 (unreported case).

⁴⁸ [2009] EWC Civ 588.

⁴⁹ Du Toit (2009) 357.

⁵⁰ Boshier P (2009) 7.

⁵¹ Act 108 of 1996.

⁵² This process in South Africa will begin at the High Court, thereafter proceed to an appeal to a full bench, followed by the Supreme Court of Appeal, and if there is a dispute around a constitutional issue, the Constitutional Court.

⁵³ Boshier P (2009) 12; *KG v CB and Others* [2012] JOL 28641 (SCA) at par 62, the mirror orders that were made by the court included that the warrant of arrest for the mother will be withdrawn in the United Kingdom and that the

that the Convention has not fared well in jurisdictions where judges and legislators have adopted a rigid approach and have not joined in the international endeavours to help the Convention enter the modern era.⁵⁴

Although the Hague Convention is renowned as a treaty regulating the cross-border movement of children, the question remains whether it has had the desired overall effect, namely, deterring parents from abducting their children.⁵⁵ Can it be said that this instrument is sufficient to prevent parental child abduction? In addition to the weaknesses mentioned above, further challenges have been identified in the application and interpretation of the Hague Convention.

6. CHALLENGES FACING THE 1980 HAGUE ABDUCTION CONVENTION

Because the Hague Convention is meant to be a speedy remedy,⁵⁶ the challenge is to ensure that its procedures operate expeditiously and that enforcement is both sensitive and effective. In the matter of *KG v CB and others*,⁵⁷ the judge stated:

These delays are totally unacceptable, especially in the context of proceedings under the Convention. The primary object of the Convention is to secure the speedy return of children removed to or retained in any contracting state, to restore the *status quo ante* the wrongful removal or retention as expeditiously as possible so that custody and similar issues in respect of the child can be adjudicated on by the courts of the country from which the child was removed.

A further challenge is to ensure that, in cases where there are allegations of domestic violence, Article 13 is correctly applied and the return of the child affords adequate protection for the child and accompanying carer. From the jurisprudence dealing with this defence, it can be noted that the courts have looked at different criteria. For example, in that case of *Sonderup v Tondelli*, it was held that the child may be harmed by a court ordered return and that the risk described had

father will not institute or cause to be instituted any proceedings for the arrest, prosecution or punishment of the mother for any past conduct. Here, the father was also ordered to pay for suitable accommodation, personal maintenance in favour of the mother, medical expenses, schooling and economy-class air tickets.

⁵⁴Duncan W (2010) 4.

⁵⁵Ranton D 'Hague and Non-Hague Convention Abductions: Notes for Reunite Website on Hague Convention Law as at 20th October 2009' page 2 available at www.reunite.org/edit/files/articles (accessed 16 September 2010).

⁵⁶Article 1.

⁵⁷ [2012] JOL 28641 (SCA) at par 58; see also *Central Authority for the Republic of South Africa v Bronowicki* [2008] ZAGPHC 261, where the application was brought after the expiration of the one-year period provided for in Article 12.

to be a grave one; in other words, it must expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Another challenge is to ensure that international consistency is maintained in the interpretation of key Convention concepts. This issue will be examined in greater detail in the discussion of global trends relating internally to the application and interpretation of the Hague Convention.

A related challenge is ensuring that co-operation and communication between Central Authorities is smooth, responsive and swift in order to avoid unnecessary delays in securing the prompt return of the child.⁵⁸ Central Authorities are designated to discharge duties which are imposed by the Convention on those authorities.⁵⁹

Other challenges include: addressing issues of effective access to procedures, for the abducting parent as well as for the left-behind parent; bringing about universal adoption of the Convention and ensuring its effective interoperability between what are sometimes very different legal cultures; encouraging awareness of, and the application of, preventive strategies; and improving the support for cross-frontier rights of contact between parents and children.

It is also important that Judges dealing with Hague Convention matters are properly trained to do so. The concept of a 'liaison judge' is not mentioned in the Hague Convention. According to Judge Griesel⁶⁰, active cooperation is needed between Judges in order for the Convention to operate successfully.⁶¹ The challenge in this regard is to ensure that Judges in the Contracting States are adequately prepared to deal with Convention cases, and that, through networking and direct judicial communications; they have the opportunity to develop the necessary mutual confidence and trust as well as engage in direct co-operation in resolving specific cases.⁶²

With certain of the strengths, weaknesses and challenges of the Convention having been identified, it is necessary to examine issues relating to the best interest of the child. This is a principle that looks good on paper, but in many instances the practical challenge turns around its

⁵⁸ Article 7 of the Hague Convention; see also Section 276(1) of Act 38 of 2005.

⁵⁹ Article 6 of the Hague Convention; see also Section 276(2) of Act 38 of 2005; see also *Central Authority for the Republic of South Africa v Bronowicki* [2008] ZAGPHC 261 par 3 'No explanation has been furnished for the seemingly inordinate delay'.

⁶⁰ Judge of the Western Cape High Court.

⁶¹ Griesel B 'The role of the liaison judge under the Hague Convention' in Sloth-Nielsen J *Trials & Tribulations, Trends and Triumphs* (2008) 24- 252.

⁶² Duncan W (2010) 5.

interpretation and application in cases involving the Convention. What follows is a discussion of best interest and how it has been applied in Hague Convention matters.

7. BEST INTEREST OF THE CHILD AND THE HAGUE CONVENTION

While the preamble to the Convention states that the interests of children are of paramount importance, from the wording of the Hague Convention the court is prohibited from looking at the best interests of the individual child concerned except when dealing with the exceptions.⁶³ In South Africa, the domestication of international treaties into law has ensured that children's rights are protected, and the developing jurisprudence in relation to children's rights has seen paradigm shifts in how children are viewed and treated. Against this backdrop, the next section discusses how the best interest principle has been applied in South Africa in relation to the Hague Convention.

7.1 Best interest within the South African context

International treaties such as the United Nations Convention of the Rights of the Child (UNCRC)⁶⁴ and African Charter on the Rights and Welfare of the Child (ACRWC)⁶⁵ enjoy a significant status in the South African legal framework with regard to developing laws and jurisprudence concerning the best interest of the child. Major features of these conventions have been incorporated into Section 28 of the South African Constitution and the South African Children's Act, with the latter setting out fourteen factors which *must* be taken into consideration whenever relevant.

In the matter of *Sonderup v Tondelli and Another*⁶⁶, the abducting parent argued that the Hague Convention violates section 28(2) of the Constitution because it precludes the court from looking at the best interest of the child. The Constitutional Court stated:

The Convention itself envisages two different processes – the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term best interests, and the interplay of the long-term and short-term best interests of

⁶³Du Toit C (2009) 369.

⁶⁴Article 3 of the UNCRC.

⁶⁵Article 4 of the ACRWC.

⁶⁶2001 (1) SA 1171 (CC).

children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters.⁶⁷

The Constitutional Court proceeds from the assumption that the Hague Convention does limit the short-term best interests of the child but that, as with all Constitutional rights, the best interest right may be limited in terms of section 36.⁶⁸

The Court then goes on to consider the short-term best interests of children in jurisdictional proceedings under the Hague Convention and determines that the limitation of children's best interests in terms of section 28(2) of the Constitution is justifiable considering the importance of the purpose of the Hague Convention – that the court in the best position to determine custody issues should determine such issues, that forum shopping should be discouraged, that comity between nations in respect of co-operation in cases of cross-border abduction be encouraged – and that such purpose is consistent with the values endorsed in an open democratic society.⁶⁹

The view is held that the Constitutional Court decided it was justifiable to limit the best interests of the individual child involved in a Hague matter in order to protect the best interests of children in general.⁷⁰

Cognisance should be taken of the fact, then, that the best interest principle is not without limitation and that the purposes of the Hague Convention – namely, to encourage comity between Convention countries and facilitate co-operation in cases of child abduction across international borders – need to be respected and upheld.⁷¹

Although it does not have direct bearing on Hague Convention cases, Judge Sachs⁷² commented that 'the very expansiveness of the paramountcy principle appears to promise everything but deliver very little in particular'.⁷³ The case of *S v M*⁷⁴ dealt with the process of weighing up the best interest of the child. Here it was stated that 'it is not an overbearing and unrealistic trump, it

⁶⁷ *Sonderup v Tondelli and Another* at par 28 at 1183 G/H-184A/B.; see also Skelton A 'Constitutional Protection of Children's Rights' in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 282.

⁶⁸ Du Toit C (2009) 369.

⁶⁹ Du Toit C (2009) 369.

⁷⁰ Du Toit C (2009) 370; see also Skelton A (2000) 282.

⁷¹ Woodrow C and Du Toit C (2010) 17-2.

⁷² Constitutional Court Judge of South Africa.

⁷³ Skelton A (2000) 283.

⁷⁴ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC).

cannot be interpreted to mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations'.⁷⁵ The court stated the following:

A truly child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interest of the child.⁷⁶

The return provisions of the Convention are based on the premise that the country of habitual residence will be better placed to deal with disputes of custody. The reality that presents itself in most abduction cases, however, does not appear to be aligned with the primary objective of the Hague Convention, because of systemic and bureaucratic failures. Du Toit makes a telling point when she observes that 'the question of best interest must also be re-examined if a long period of time has passed since the removal of the child'.⁷⁷ This accords with the reasoning in *S v M* that it is not in the best interest of the child to apply a predetermined formula.

The next section of this chapter focuses on international approaches to the Hague Convention. The United States of America (USA), Australia, New Zealand, England and Europe have been selected to convey the diversity in the approaches to, and outcomes of, Hague Convention matters across the globe.

8. GLOBALISATION

Snitzer-Reese likens the Convention's reach to a fishing net with large holes. She says:

[C]ast this net and you *might* catch some fish, but it is more likely that the fish will swim out through the readily available holes. The holes of the net represent those countries which are not party to the Convention; the fish are the abducting parents, and they swim, abducting kids in tow, directly towards the holes, where they in fact find protection from the world community that seeks to prosecute them.⁷⁸

⁷⁵*S v M* at par 26; Skelton A (2000) 283 'Justice Sachs concludes that "the fact that the best interest of the child are paramount does not mean that they are absolute"'.
⁷⁶Du Toit C (2009) 371; *S v M* at par 55.
⁷⁷Du Toit (2009) 370.
⁷⁸Schnitzer-Reese EA (2004) 6.

Thanks to the creation and rapid assimilation of the 1980 Hague Convention into the domestic laws of many countries, international family law has developed a common standard to prevent or deter the wrongful removal of children. What follows is a brief overview of the domestic laws of certain countries that are signatories to the Convention, an overview which seeks to illustrate inconsistencies in the way in which the latter has been applied and interpreted.

8.1 United States of America

The 1980 Hague Convention came into force in the USA on 1 July 1988 following the implementation of the International Child Abduction Remedies Act of 1988.⁷⁹ In terms of US law, an international treaty is recognised as the ‘supreme law of the land’. Therefore, the 1980 Hague Convention takes precedence over any conflicting Federal or State laws except for the Constitution of the United States.⁸⁰ Custody disputes in US courts may concern orders not implicated in the Hague Convention; in these cases, the court is obliged to examine domestic law in order to establish whether it has jurisdiction and what the extent of its authority is. Jurisdiction in respect of custody cases is determined by federal and state laws, which include the International Parental Kidnapping Prevention Act (IPKPA) and, in certain states which have adopted it, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The Convention, ICARA, the IPKPA and UCCJEA all propose returning the child to the child’s place of his or her habitual residence in order to decide on custody issues.⁸¹

IPKPA was enacted in acknowledgment of the problem created by the absence of a remedy for children abducted to non-Hague countries. It is therefore a federal offence if a child is removed from the country with the intent to obstruct the lawful exercise of parental rights. IPKPA was enacted as a deterrent and in recognition of the problem created by the gap in the Hague Convention.⁸²

⁷⁹International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 (hereinafter ICARA).

⁸⁰ 2007 Good Practice Report on Enforcement under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Page 35, available at http://www.icmec.org/en_X1/icmec_publicati... (accessed 16 September 2012).

⁸¹ The Hague Convention on International Child Abduction: A Child’s Return and the Presence of Domestic Violence. (2005) pages 3-4 available at <http://www.courts.wa.gov/./appendixG.pdf> (accessed 16 September 2012).

⁸² Sattler M ‘The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction’ *67 Wash. Lee L. Rev* 1709 (2010) 1717-1718.

State and federal courts are conferred with original and concurrent jurisdiction over a Convention proceeding in terms of ICARA. To make a determination establishing jurisdiction, courts must find that a removal was wrongful, and to do so, it must be established whether or not the child was taken from his or her habitual residence in contempt of custody orders. In similarity to the provisions in the Hague Convention, courts in whose jurisdiction the child is wrongfully removed or retained do not entertain evidence on the merits of the custody claim. If there is conflict between an international treaty and federal statute, the most recent provision will apply.⁸³

In order to rely on the Hague Convention's remedy of return, the petitioning parent must establish, by a preponderance of the evidence, that the child's abduction was wrongful. Determining the child's place of habitual residence is an important determining factor to establish whether a removal or retention is wrongful. Habitual residence is not defined in the Convention or ICARA; instead, the courts have interpreted habitual residence in accordance with its ordinary meaning. 'Habitual residence' has also been analysed as a mixed question of fact and law, based on the distinctive circumstances of a particular case. The need for uniform interpretation has been recognized by ICARA.⁸⁴

In the USA, the Hague Convention and various other domestic laws and treaties are in place to protect against international child abduction. There is, however, acknowledgment that the Hague Convention is not sufficient in dealing with parental child abduction, as it can be relied on as a remedy only if the child has been taken to a contracting state – if taken elsewhere, then the Convention is ineffective.

8.2 New Zealand and Australian Perspective

8.2.1 New Zealand

In New Zealand, most Convention matters arise in relation to Australia.⁸⁵ At the International Family Court Conference,⁸⁶ Boshier, a Chief Judge of the Family Court in New

⁸³ The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence (2005) 6.

⁸⁴ The Hague Convention: A Child's Return and the Presence of Domestic Violence (2005) 8.

⁸⁵ Boshier P (2009) 1.

⁸⁶ Held at Cumberland Lodge, Windsor, England on 4 – 7 August 2009.

Zealand, identified certain strengths and weaknesses in the Hague Convention, saying that in Australia principal caregivers commonly leave because they either travel to, or fail to return from, their respective countries, or else flee abusive relationships. Boshier's account accords with the reasons generally given for parental relocations, and these will be discussed in detail in the next chapter.

The courts are aware that they are obliged to order a return for most of those applications, thereby furthering the Hague Convention's main objectives, but time delays are recognised as a significant problem. According to statistics from New Zealand's Ministry of Justice, less cases than average are finalised within the six-week period provided for in the Hague Convention;⁸⁷ on the other hand, successful applications to relocate in New Zealand are steadily increasing.⁸⁸

Moreover, the terms of the return orders are at times not reasonable,⁸⁹ a challenge noted in earlier discussion. Boshier holds the view that 'to comply with a number of onerous conditions seems contrary to the principles of the Convention'.⁹⁰

Furthermore, as a result of the different approaches taken in interpreting 'rights of custody', the outcomes will differ on similar facts regardless of an acceptance of applicable law⁹¹, a situation illustrating the inconsistencies that emerge in the Convention's interpretation and application.

A case that aptly illustrates the strengths and weakness of the Convention is *Department of Child Safety and Hunter*⁹², in which a mother removed her child to Queensland in Australia. An application for a return order was subsequently made in the Court of Australia, with one of the main points of contention being the interpretation of 'rights of custody'. It was found that the father did not have any rights of custody at the time of removal, meaning that the removal was consequently not wrongful; as a result, the application was dismissed.

On the one hand, the case shows that two contracting states were able to work co-operatively on acceptable, applicable law principles because there was a swift progression of the case through

⁸⁷Statistics over period 2006 – 2008; Boshier P (2009) 4.

⁸⁸Hanaghan M 'Going, Going...Gone – To Relocate or Not to Relocate, That is the Question' (2010) *Journal of Family Law Practice* 37.

⁸⁹Boshier P (2009) 8.

⁹⁰Boshier P (2009) 13.

⁹¹Boshier P (2009) 7-8.

⁹²[2009] FamCA 263, 26 March 2009.

all of the Courts (that is, a strength). However, as a result of difficulties in defining 'rights of custody' in dealing with Article 15 applications and negotiating the multiple rights of appeal that are available, the boy's father had to wait one year to find out that the return order could not be granted. This demonstrates the complexities associated with such applications.⁹³

The strengths and weaknesses highlighted by Boshier accord with our earlier discussion of this topic. His view is that, despite these challenges, member states should be true to the Convention and consciously work at making it a success; at the same time, he cautions 'that courts should be vigilant in not being complicit in the wrong that has already been committed'.⁹⁴

8.2.2 Australia

The Commonwealth of Australia ratified the Hague Convention in 1986.⁹⁵ Australia has three important legislative provisions dealing with international child abduction.⁹⁶ Section 111B was inserted into the Family Law Act 1975 (Cth) in order to give effect to the treaty obligations created by the Convention, which provides for the making of regulations 'to enable the performance of the obligations of Australia [and] to obtain for Australia any advantage or benefit under [the Convention]'.⁹⁷ The general principles applied in Australia and the United Kingdom (discussed below) are the same, namely, to secure the prompt return of an abducted child to his or her place of habitual residence in order to ensure that the courts there determine any issue relating to custody.

Australia has a federal system: if the CAA decides to accept an application for a child's return under the Convention, it will send it to the appropriate State Central Authority to have it pursued. In respect of non-Convention cases – in other words, ones in which the child may have been

⁹³Boshier P (2009) 1-2.

⁹⁴Boshier P (2009) 13-14.

⁹⁵ Nicholls M 'International Child Abduction: Australian Law, Practice and Procedure' (2010) 1.3 *Journal of Family Law Practice* 64.

⁹⁶ 'The return of children under the Convention is provided for in Part XIII A A, Div 2, s 111B of the Family Law Act 1975 (Cth) and the Family Law (Child Abduction Convention) Regulation 1986. Recognition of overseas orders relating to children made in prescribed overseas jurisdictions is provided for in Part VII, Division 13, Subdivision C of the Family Law Act 1975 (Cth) ('Registration of overseas orders') and jurisdiction, recognition and enforcement of orders is provided for in Part XIII A A, Div 4, s 111CA of the Family Law Act 1975 (Cth) and the Family Law (Child Protection Convention) Regulations 2003, which together bring the 1996 Hague Protection Convention into effect in Australia.'; Nicholls M (2010) 63.

⁹⁷Faulks J 'Habitual residence under the Hague Child Abduction Convention in Australia: "coach and four" or chaise?' (2010) 1.3 *Journal of Family Law and Practice* 9.

taken to a state that has not ratified the Hague Convention – the best interest of the child is the sole principle governing the determination of an application for the return of a child from Australia.⁹⁸ Section 67V of the Family Law Act 1975 makes it clear that in deciding whether to make a return order, the best interest of the children is the court’s paramount consideration.⁹⁹

In interpreting ‘rights of custody’ within the meaning of the Hague Convention, the court in the case of *McCall and McCall*¹⁰⁰ ‘made it clear that the concept of “rights of custody” within the meaning of the Regulations is sui generis and has no necessary connection with rights of custody under Australian domestic law’. The concept ‘habitually resident’ also has a wide meaning.¹⁰¹ The Australian Family Law and Practice¹⁰² stipulates: ‘Whether a person enjoys rights of custody in relation to a child, and whether his or her rights of custody have been breached is a matter for the courts of the jurisdiction which has to determine this issue, and not for the courts of the child’s home country’.¹⁰³

In summary, therefore, the Australian approach to rights of custody rests on whether the child was habitually resident in the requesting state immediately before his or her removal or retention and whether he or she is settled in the new environment. This is no different to the general principles applied in Australia and England, which will be discussed next. The Hague Convention’s provisions relating to securing the prompt return of the child to the country of habitual residence are applicable.¹⁰⁴

8.3 England

The United Kingdom of Great Britain and Northern Ireland signed the Hague Convention in November 1984. It was incorporated into the English domestic law by the Child Abduction and Custody Act 1985(Schedule 1).¹⁰⁵

Although England and Wales are a common-law jurisdiction, most of the child law is governed by statute. The Family Law Act 1986 deals with jurisdiction and enforcement of orders within

⁹⁸Nicholls M (2010) 67.

⁹⁹Nicholls M (2010) 64.

¹⁰⁰(1995) FLC 192-551.

¹⁰¹Nicholls M (2010) 65.

¹⁰²CCH Australia Ltd, Vol. 1, par 24-108.

¹⁰³Nicholls M (2010) 66-67.

¹⁰⁴Nicholls M (2010) 67.

¹⁰⁵Ranton D (2009) 3.

the United Kingdom and within the context of international child abduction. The 1980 Hague Convention is implemented in England and Wales (and for the United Kingdom) through the Child Abduction and Custody Act 1985.¹⁰⁶

The United Kingdom is party to two international Conventions concerning the return of an abducted child, namely, the Hague Convention on the Civil Aspects of International Child Abduction and the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children.¹⁰⁷

In January 2005, the Right Honorable Lord Justice Thorpe was appointed Head of the International Family Law for England and Wales, this being the first such appointment. His interventions have aided the development of a common international family law discourse, particularly in the formation of a global network of liaison judges specialising in family law. The thinking is that other jurisdictions in the world may also be prompted to make similar appointments.¹⁰⁸

In terms of the Child Abduction Act of 1985, it is a criminal offence in England and Wales for a parent or guardian of a child, or any person who has a custody/residence order relating to the child, to take or send the child out of the United Kingdom without the consent of any other person or persons having rights to the child.¹⁰⁹

In terms of Section 4 of the 1985 Act, all Hague Convention cases are heard at first instance by the Family Division of the High Court, the highest court of original jurisdiction in family cases. Any applications for further orders to assist in the enforcement of the return order are dealt with by the same court.¹¹⁰

Return orders have incorporated certain undertakings. Because of the comity between parties, these undertakings within return orders may reassure the abducting parent and, in all likelihood, reduce the risk of enforcement challenges, ultimately ensuring the safe return of the child. The most frequently used undertakings in England and Wales include: making provision in respect

¹⁰⁶ Good Practice Report (2007) 9.

¹⁰⁷ Viklund A 'Residence Orders: Hague Convention (On the Civil Aspects of International Child Abduction) 2 available at <http://www.sfla.co.uk/hagueconvention.htm> (accessed 16 September 2012).

¹⁰⁸ Malhotra A (2010) 53.

¹⁰⁹ Viklund A p2.

¹¹⁰ Good Practice Report (2007) 9.

of maintenance or housing; ordering an upfront payment of money in respect of maintenance, rent and moving costs; ensuring that there is adequate arrangements for interim residency of the child pending the custody proceedings in the country of habitual residence; ensuring that there is an agreement in place to withdraw or not institute criminal proceedings against the returning parent; ordering an undertaking to not molest, harass or approach the returning parent; and registration of undertakings and terms of the return order in a court in the requesting Contracting State (e.g. securing a mirror order).

The effectiveness of undertakings in general and their enforceability outside England and Wales was identified in the 2007 Good Practice Report on Enforcement Under the Hague Convention as a relevant issue to consider. The Report goes on to state:

If a move is made to the increased use of ‘mirror orders’ or ‘safe harbour’ orders, this will have the impact of delaying enforcement further unless more streamlined processes are implemented for the registration of such orders in requesting Contracting States.¹¹¹

What this suggests is that a more streamlined process should be implemented in keeping with the speedy return remedy of the Convention, because the return orders are onerous and perhaps unrealistic, thus hindering the objectives of the Convention.

The Hague Convention is intended to extend to all countries globally. However, the European Union has its own approach to regulating international child abduction, one based on the return remedy created by the Hague Convention but applicable only to abductions occurring between member states. What follows is a closer examination of the European approach to international child abductions.

8.4 The European approach

The Brussels II Revised,¹¹² a treaty designed to simplify litigation within the European Union (EU), provides additional dimension to the operation of the return remedy set out in the Hague

¹¹¹ Good Practice Report (2007) 10-11.

¹¹² Brussels II Regulation (EC) 2201/2003 is a European Union Convention on conflict of law issues in family law between member states, in particular those related to divorce, child custody and international child abduction. It was passed with Convention Council Regulation (EC) No 1347/2000 of 29 May 2000 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children.

Convention, the aim being to reinforce the remedy's application across EU Member States.¹¹³ The notion of free movement of persons, a cornerstone tenet of the EU, shapes the way in which the Brussels II Revised Regulation operates in cases of international child abduction, and places the emphasis on reciprocal trust between Member States in Europe;¹¹⁴ this principle of mutual trust is located in the context of the domestic family laws of all Member States, and it requires that respect be conferred upon their respective decisions despite any differences of interpretation that might arise. The provisions of Brussels II Revised relating to international child abduction are an endorsement and reinforcement of the return remedy in the Hague Convention 1980 and the requirement that hearings should not hinge on the custody of the child; instead, the child's place of habitual residence is regarded as the appropriate forum for such a hearing.

It is interesting to note that the EU, in addressing child abduction within the European framework, was tapping into an area of law already effectively regulated. It has been argued that the free movement of persons in Europe has aggravated the problem of child abduction by having made it easier to take place, principally in the Schengen area.¹¹⁵ Harmonisation and unification in the area of international family law has received increased attention in recent years.¹¹⁶ The principle of free movement of persons, which is a directly enforceable right of citizenship, has been said to cause tension in domestic law, not only in terms of child abductions but also in respect of relocation disputes.¹¹⁷ If a relocation application is refused, this conflicts with the parents' right to free movement and increases the risk of a parent abducting the child; on the other hand, if the relocation is allowed, it could have the result of frustrating the left-behind parent's right to access as well as impacting on the child's relationship with both parents and extended family. (This issue will be dealt with in further detail in the next chapter.)

8.5 Non-Convention countries

Other than Israel, no Middle Eastern or North African country is party to the Hague Convention, and these countries are said to offer a safe haven for the abducting parent. This situation brings

¹¹³Lamont R (2010) 39.

¹¹⁴Lamont R (2010) 39.

¹¹⁵Lamont R (2010) 41.

¹¹⁶Boele-Woelki K (2005) 162.

¹¹⁷Lamont R (2010) 44.

with it insurmountable legal difficulties for the child and left-behind parent.¹¹⁸ The provisions of the Hague Convention cannot be enforced in these countries unless there are bilateral agreements between countries. The remedies are limited, and more often than not the children are either not returned promptly or not returned at all.

9. CONCLUSION

This chapter has examined the Hague Abduction Convention with a view to assessing its overall effectiveness in dealing with parental child abductions. In reviewing the jurisprudence pertaining to Hague abduction matters, it has become evident that courts in different jurisdictions have interpreted certain provisions such 'rights of custody' and 'habitual residence' in differing ways. Certain countries and regions – the USA, Australia and Europe, for example – have incorporated additional domestic laws and parallel treaties in an attempt to close certain gaps in the Convention. This chapter recognises that there is no available remedy if abducting parents find safehavens in countries that have not ratified the convention. In Europe, for instance, the view is held that the Convention conflicts with domestic laws and the citizen's right to freedom of movement.

Various challenges, strengths and weaknesses were identified, a notable challenge being the facilitation of a child's speedy return to the country of habitual residence. Undue delays caused by protracted processes have been said to defeat the objectives of the Hague Convention, which in turn would be in direct conflict with the best interest of the child.

International child abductions remain a real problem, one exacerbated by inconsistent, complex and, in some instances, unrealistic return remedies. The need for a more uniform approach has been expressed, but loopholes remain which cannot be closed without either the amendment of the Convention or the possible enactment of another treaty that would regulate relocation disputes. Later, in Chapter 4 of this thesis, many commonalities between relocation and child abductions will be highlighted. The links between the relocation and child abduction are clear, primarily if cognisance is had to the reasons why parents opt to relocate or abduct their children.

¹¹⁸Schnitzer-Reese EA (2004) 6.

More often than not, these disputes hinge around custody and access rights. The Convention falls short of providing a means to enforce access rights.¹¹⁹

The next chapter focuses on relocation disputes, looking at what gives rise to relocations, whom they affect, and the nature of the international trends in this emerging discourse in international family law; underlying themes include gender issues and the right to free movement. The objective is to lay the basis for arguing that an international instrument is needed to achieve a universal approach to relocation matters and that, moreover, a parallel treaty will have the effect of deterring child abductions.



¹¹⁹Murphy J 'The internationalisation of family law' in *International dimensions in family law* (2005) 252.

CHAPTER 3

1. RELOCATION DISPUTES

1.1 Introduction

This chapter begins with a synopsis of the underlying reasons for relocations before proceeding to examine South Africa's developing family-law jurisprudence, paying specific attention to the Children's Act 38 of 2005 as it relates to relocations. A global perspective is provided on how relocations are dealt with internationally. Various themes are explored and the outcomes which have been established thus far are discussed, the objective being to show that there is a lack of uniformity in the way relocation disputes are addressed. This chapter shows that there is a lack of legislative guidance to assist courts in making decisions in relocation matters, and that, furthermore, there is a need for consistency. Based on the developing international jurisprudence, certain countries have developed guidelines in their domestic laws in order to regulate relocation disputes. Would the enactment of an international instrument be the answer for bringing about uniformity and consistency?

1.2 Overview

Boshier¹²⁰ describes relocation disputes as cases which 'often involve two competent and committed parents, one with sound reasons for wishing to relocate, the other with equally valid reasons for resisting the application'.¹²¹ This is precisely why relocation disputes are generally regarded as one of the most contentious and difficult issues in family law internationally.¹²² International child relocation is said to be complex – as will be seen later in the discussion around the best interest of the child – and often encompasses more than the legal sphere.¹²³ To add to the legal confusion, there appears to be little research on outcomes in relocation cases to guide parents, lawyers, judges or custody evaluators as to what is in the best interest of children. Gender biases in relocation cases have also been highlighted: these are seen

¹²⁰Principal Family Court Judge of New Zealand.

¹²¹Boshier P 'Have Judges been missing the point and allowing relocation too readily?' (2010) 10.

¹²²Taylor N and Freeman M 'Relocation: The International Context' (2010) 1.2 *Journal of Family Law Practice* 19.

¹²³HCCH 'Hague Conference on Private International Law: Preliminary Note on International Family relocation' *Preliminary Document No 11 of January 2012 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention* 12 available at www.hcch.net/index_en.php?act...cat... (accessed on 24 September 2012).

as part of the 'gender wars' to emerge when fathers' and mothers' groups, social scientists, mental health professionals and others have contributed to discussions.¹²⁴

The reality is that primary caregiver parents often find themselves in a position where they have to make a critical decision about moving to a different jurisdiction. Often they have very sound reasons for wanting to move, but the complexities of negotiating the move are insurmountable thanks to issues around parental rights, access and the right to freedom of movement, not to mention the emotional impact this has on all the parties concerned. The processes involved in obtaining a court ordered relocation are cumbersome, and, if disputed, could take a long time before a final decision is made in the courts. It is no surprise, then, that parents feel trapped and predisposed to make a conscious decision to take the law into their own hands.

If the process were more streamlined, consistent and uniform, would it alleviate child abductions? Is it time for a protocol regulating relocations in order to guide decision-makers on how to take decisions when dealing with relocation disputes, and would it possibly reduce the incidence of parental child abductions?

The effect of relocation on all interested parties is examined in the next section, which looks at the underlying reasons for making the decision to relocate.

2. UNDERLYING REASONS FOR THE DESIRE OR DECISION TO RELOCATE, LOOKING AT THE INTERESTS OF THE MOTHER, FATHER AND CHILD

Some of the underlying reasons for wishing to relocate include: returning home to be close to family for emotional support; the relocating parent wants to be with a new partner originating from the country to which she wishes to move; the relocating parent wishes to start afresh in a new country with which she has no prior connection; seeking better employment prospects in another country; making a lifestyle choice by opting to live elsewhere; escaping an abusive relationship; and escaping the obligations of co-parenting.¹²⁵

¹²⁴Elrod LD (2010) 52.

¹²⁵Freeman M 'Themes from the reunite Relocation Research Project' (2010) 1.2 *Journal of Family Law and Practice* 98; See also Elrod LD (2010)57-58.

Relocation potentially affects all the parties involved: mother, father, child or children, and extended family.¹²⁶ In order to better understand why there should be defined factors to consider in relocation matters, it is important to be mindful of the extent to which relocation will affect the family.

2.1 Mother's interest

Mothers are usually the primary carers of their children. Pursuant to a break-up of a marriage, they find themselves having to make hard decisions, especially if they have settled in a country that is not their country of origin or birth.¹²⁷ They would invariably not have a family support-structure around them, and would face difficulty in gaining employed and accessing state support.¹²⁸ This is perhaps a reason why mothers opt to abduct their children.

2.2 Father's interest

There are left-behind fathers who are committed and involved parents, as well as families where there has been no history of violence or abuse and where the child's relocation is the cause of great sacrifice and readjustment for the left-behind father and family. These fathers and families bear the emotional consequences of the relocation and face either the possibility of never seeing the child(ren) again or the task of having to resolve the practical logistics of conducting a long-distance relationship. In some cases, this situation results in a complete loss of the parent-child relationship and causes serious practical and emotional problems for left-behind fathers and families.¹²⁹

2.3 Children's interest

The children will ordinarily and logically want to continue seeing both sides of their family, and, in particular, not only the potentially left-behind parent, but also the wider family with whom

¹²⁶Freeman M (2010) 99.

¹²⁷Freeman M (2010) 99.

¹²⁸Freeman M (2010) 100.

¹²⁹Freeman M (2010) 101.

they have been involved. There is also a wider interest which includes the extended family, such as grandparents, cousins, uncles, aunts and new half-siblings.¹³⁰

Before expounding on the various international approaches to relocation, it is necessary to touch on the history, understanding and interpretation of the best interest of the child as well as child participation in order to lay the foundation for the later discussion about the relevance of these principles.

2.3.1 Introduction to best interest of the child and child participation

The preamble to the Hague Convention on the Civil Aspects of International Child Abduction stipulates that the interests of children are of paramount importance. In the matter of *L v Finland* (application number 25651/94), the court stressed that ‘the consideration of what is in the best interests of the child is of crucial importance’.¹³¹

Best interest principles and rights have been a consideration for more than 20 years. The United Nations Convention on the Rights of the Child (UNCRC) is regarded as the definitive international instrument in the area of children’s rights; it is also the most highly ratified instrument in international law, and was ratified by South Africa on 16 June 1995.¹³² Most notably, Article 3 requires that the best interests of the child are a primary consideration in all matters concerning children, but Article 9(3) contains a further consideration with important bearing on relocation disputes.¹³³ This provision calls upon State Parties to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interest.

¹³⁰ Freeman M (2010) 101; see also *Re H* [2010] EWCA Civ 1200, which concerned the importance of sibling relationships. On appeal Lord Justice Thorpe held that the trial judge had insufficiently weighted the right of the child to a wider family life which would include their half-siblings.

¹³¹ Thorpe LJ (2010) 5.

¹³² Sloth-Nielsen J ‘Children’s Rights in the South African Courts: An Overview since ratification of the UN Convention on the rights of the child’ (2002) 10:137-156 *The International Journal of Children’s Rights*; Sloth-Nielsen J ‘Children’s Rights in the South African Courts: An Overview since ratification of the UN Convention on the rights of the child (Community Law Centre, University of the Western Cape) 2; Viviers A ‘Legal Access to Services by Non-South African Children’ (2008) *UNICEF* available at <http://achaonline.un.org/OchLinkClick.aspx?...> (accessed 11 September 2012); see also www.au.int/pages/.../acrwc-ratifications-table (accessed 12 October 2012).

¹³³ UNCRC.

The Committee on the Rights of the Child¹³⁴ specifically addressed the best interest principle and views of the child, thereby reaffirming their commitment to the realisation of Article 12 and stating that '[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention'.¹³⁵ Furthermore, the Committee reiterated the crucial importance of both the best interest of the child and the views of the child.¹³⁶

Child participation in relation to relocation disputes bears particular relevance as it is one of the important pillars of the UNCRC. Article 12(1) of the UNCRC assures the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him or her, with these views given due weight in accordance with the child's age and maturity.¹³⁷

As will be seen in the later discussion of developing jurisprudence, these principles are of cardinal significance.

Relocations disputes are dealt with differently throughout the world, and the examination in the next section of global trends will commence by looking at South Africa.

3. RELOCATION IN THE SOUTH AFRICAN CONTEXT

South Africa's domestic laws have been guided by the provisions set out in the UNCRC. The UNCRC enjoy a significant status in the South African legal framework. The courts are obliged to consider international law,¹³⁸ and this provides an important opportunity to interpret the provisions of the Bill of Rights within the broader context of international treaties such as the UNCRC.¹³⁹ The South African Constitution¹⁴⁰ contains provisions that govern the manner in which international law is incorporated or adopted into its domestic law to form part of

¹³⁴ In General Comment No.12 (2009) 'The right of the child to be heard' (Fifty- First session, Geneva, 25 May – 12 June 2009) 5

¹³⁵ General Comment no. 12 at par 2.

¹³⁶ General Comment no. 12 at par 71.

¹³⁷ Thorpe LJ (2010) 7; see also Skelton A(2009) 88 'In *F v F* the court held that in deciding whether or not relocation would be in the child's best interests, the court had to evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases'; see also Kilkelly U (2010)29.

¹³⁸ Sections 39 and 231 -233 of SA Constitution see also Strydom H and Hopkins K 'International Law' in WoolmanS *et el* (eds) *Constitutional Law of South Africa* 2nded (2008) (Volume 2) 30-6,7,9 and 11; see also Mezmur B D 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SAPR/PL* 15.

¹³⁹ Skelton A 'Constitutional Protection of Children's Rights' in Boezaart T *Child law in South Africa* ed. (2009) 11-272.

¹⁴⁰ Act 108 of 1996.

substantive law.¹⁴¹ Major features of the UNCRC have been incorporated into Section 28 of the South African Constitution.

Before the commencement of the Children's Act 38 of 2005, relocation applications by the primary caregiver were generally granted by the courts. The approach adopted in older cases was that the primary caregiver had the right to decide where the child should live unless the non-primary caregiver could justify that the proposed relocation would be prejudicial to the child. Although they were taken into account, the interests of the child were not central to the enquiry; instead, it was the rights of the primary caregiver which were given paramountcy. This approach was later rejected and replaced with the 'best interest of the child',¹⁴² a principle based on the common law and the Constitution¹⁴³ which 'prescribe that the child's best interest must determine the outcome when a court has to make an order regarding a child'.¹⁴⁴

The case that brought about this shift was *Shawzin v Laufer*¹⁴⁵, where the dominant issue for decision was the best interest of the children. The question to be answered was whether it would be in the best interest of the children to go with their mother or be separated from her and stay with their father and a stepmother. The court considered the effect this would have on the children, the father as well as the standard of living the children would have should they move. The judge stated:

I do not think that to be able to live in affluence is of educative value to boys of that age; their education and happiness in these formative years depend, or should depend, on other things in life. In the present case the boys are entitled to live in a decent home and that they will get. To take them away from their mother, who has looked after them since birth, would obviously have serious psychological consequences. They are still of an age when they would call for their mother first if something were to happen

¹⁴¹ See Sections 39(1) (a)-(b); Section 39(2) and Section 233.

¹⁴² Article 16(1) (d) of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) provides that the child's best interest are paramount; Section 3(1) of the Convention on the Rights of the child require that the child's best interest must be 'a primary' consideration; Section 4 of the African Charter of the Rights and Welfare of the Child states that the best interest of the child is 'the primary' consideration and Section 28(2) of the South African Constitution states that '[a] child's best interest are of paramount importance in every matter concerning the child'.

¹⁴³ Act 108 of 1996.

¹⁴⁴ Cronjé D S P and Heaton J 'South African Family Law' 2ed (2004) 157 ;

¹⁴⁵ 1968 (4) SA 657 (A), 'Our high court attaches such importance to the child's best interest that, as upper guardian, it will not even ignore inadmissible evidence if such evidence could prove what is in a child's best interests' (footnote 2 on p157 of 'South African Family Law'. see also *B v S* 1995 (3) SA 571 (A).

to them. A stepmother, with her own children, even if willing and able to help look after them, as is the case here, cannot, generally speaking, match the devotion of a natural mother.¹⁴⁶

In the end, the court's ruling was predicated on the option that would cause the least amount of uncertainty for the children, and the appeal was dismissed.

The Constitution does not define what constitutes best interest.¹⁴⁷ It is said that 'the best interest of the child is sometimes criticised, *inter alia* as being too indeterminate to be a useful tool, engendering conflict and litigation, and entrenching the rights of parents rather than children'.¹⁴⁸ The Children's Act sets out clearer guidelines to be followed when applying the 'best interest of the child' standard.

3.1 The Children's Act

The Children's Act has brought about a paradigm shift in family law. The terms 'parental power' and 'parental authority', as previously used under the common law, are replaced by 'parental responsibilities and rights'; 'custody' and 'access' are now referred to as 'care' and 'contact'.¹⁴⁹ Parental responsibilities and rights are shared between parents.¹⁵⁰ If regard is had to the definition of care, it is evident that there are added responsibilities. These changes in turn have an impact on relocation, especially in cases where parents have joint care of the children. After the dissolution of a marriage, both parents have guardianship of a child.¹⁵¹ Within the South African context, both parents retain guardianship of a child after the dissolution of a marriage unless the court orders otherwise. It is clear from Section 18¹⁵² that if a parent wishes to relocate outside of South Africa, the consent of both parents is needed but relocation within the borders

¹⁴⁶ *Shawzin v Laufer* 1968 (4) SA 657 (A) at page 466.

¹⁴⁷ Albertus L and Sloth-Nielsen J 'Relocation Decisions: Do Culture, Language and Religion Matter in the Rainbow Nation?' (2010) 1.2 *Journal of Family Law and Practice* 88; see *Jackson v Jackson* 2002 (2) SA 303 (SCA).

¹⁴⁸ Cronjé D S P and Heaton J (2004) see footnote 5 on p157; See also Van Heerden B, Cockrell A and Keightley R (eds) 'Boberg's Law of Persons and the Family' 2ed (1999) 502-504.

¹⁴⁹ Section 1 of Act 38 of 2005 defines 'care' and 'contact' respectively.

¹⁵⁰ Section 18 of Act 38 of 2005 sets out what parental responsibilities and rights are.

¹⁵¹ Sections 19 and 20 of Act 38 of 2005.

¹⁵² Section 18 of Act 38 of 2005 sets out the responsibilities and rights that parents have in respect of their children; more specifically section 18(3)(iii) and (iv) states that the person acting as guardian must either grant or refuse consent to the child's departure or removal from the Republic and for the application of a passport.

of South Africa follows a slightly different requirement.¹⁵³ If one of the parents wishes to relocate for any of the abovementioned reasons, the left-behind parent will be denied his legal rights of contact with the child. This right also extends to unmarried fathers.¹⁵⁴ The case of *Fraser v Children's Court, Pretoria North*¹⁵⁵ brought about a significant breakthrough, because previously in adoption cases consent was not required of the father of an extra-marital child; the old Child Care Act¹⁵⁶ required the consent only of the mother. In the *Fraser* case, this position was declared unconstitutional on the basis that it discriminated unfairly against fathers by virtue of their marital status (or lack thereof) as well as on the grounds of gender.¹⁵⁷ Furthermore, Section 18(3)(c)(iii) and (iv) of Act 38 of 2005¹⁵⁸ requires both parents to consent to a child's departure or removal from the country.

The best interests of the child are said to be paramount in such cases.¹⁵⁹ Section 9 of the Children's Act states that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance must be applied.¹⁶⁰ This provision reinforces the constitutional imperative set out in section 28(2).¹⁶¹ A child-focused approach is hence evident in the legislative provisions set out in the Children's Act.¹⁶²

The case of *RC v CS*¹⁶³ aptly dealt with the issues relating to best interest of the child in a relocation application. The applicant sought an order in terms of Section 18¹⁶⁴ because the respondent had repeatedly refused to consent to the relocation, requesting that she be granted permission to remove her minor child permanently from South Africa to France. In doing so, the

¹⁵³Domingo W (2011)152.

¹⁵⁴ Section 21 of Act 38 of 2008; see also *S v J* [2011] 2 ALL SA 299 (SCA), where the Supreme Court of Appeal held that the appellant, a father of a child born out of marriage, is the holder of full parental responsibilities and rights in terms of s18 of the Children's Act 38 of 2005 and that the child should permanently reside with him.

¹⁵⁵ 1997 2 BCLR 153 (CC), 1997 2 SA 261 (CC).

¹⁵⁶74 of 1983.

¹⁵⁷Cronjē D S P and Heaton J (2004) 270.

¹⁵⁸ 'Subject to subsections (4) and (5), a parent of other person who acts as guardian of a child must – (c) give or refuse any consent required by law in respect of the child, including – (iii) consent to the child's departure or removal from the Republic; (iv) consent to the child's application for a passport'.

¹⁵⁹*Jackson v Jackson* 2001 (2) SA 303 (SCA) at Par 34.

¹⁶⁰ Domingo W "For the sake of the children": South African Family Relocation Disputes' (2011) 14.2 *PER / PELJ* 151/226 available at <http://www.ajol.info/index.php/pej/.../55318> (accessed on 24 September 2012).

¹⁶¹ 'A child's best interests are of paramount importance in every matter concerning the child'.

¹⁶²Albertus L and Sloth-Nielsen J (2010) 97.

¹⁶³ [2011] JOL 28064 (GSJ)

¹⁶⁴Act 38 of 2005.

court had to decide what is in the best interest of the minor child.¹⁶⁵ The court referred to the decision of *Cunningham v Pretorius*,¹⁶⁶ in which Judge Murphy stated the following:

The letter and spirit of the new framework giving supremacy to the best of the minor child sets a standard which is not proof on a balance of probability. What is required is that the court acquires an overall impression and brings a fair mind to the facts set up by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the Court must render a finding of mixed fact and opinion, in the final analysis a structured value judgment, about what it considers will be in the best interests of the minor child.¹⁶⁷

The court in the case of *RC v CS* went on to consider the relevant provisions of Section 7 of the Children's Act¹⁶⁸ relating to relocation.¹⁶⁹ More specifically, it considered the provisions set out in Sections 7(1)(d), (e) and (f), which in the main require consideration of any change in the child's circumstances, including the likely effect on the child of any separation from both or either of the parents or any brother or sister or other child or any other caregiver or person with whom the child has been living.¹⁷⁰

In this case, the child had two half-brothers, one from each side of his parents. This factor was taken into account by the clinical psychologist and Family Advocate;¹⁷¹ it is that a factor which also ties in with the provision relating to the need for the child to remain in the care of his or her parent, family and extended family, as well as to the need for the child to maintain a

¹⁶⁵ Par 26.

¹⁶⁶ [2010] JOL 25638 (GNP).

¹⁶⁷ *Cunningham v Pretorius* at par 10.

¹⁶⁸ Section 7 of Act 38 of 2005, sets out 14 sub-sections of factors which comprise the best interest of the child.

¹⁶⁹ Skelton A and Proudlock P 'Interpretation, objects, application and implementation of the Children's Act' in C J Davel and Skelton AM Commentary on the Children's Act (2010) 2-7 'The question of what exactly a child's best interest are is a factual question that has to be determined according to the circumstances of each case. Over the years the judiciary has laid down guidelines in this regard'.

¹⁷⁰ Section 7(1)(d); see also Albertus L and Sloth-Nielsen J (2010) 92.

¹⁷¹ Par 42; see also *Jackson v Jackson* 2001 (2) SA 303 (SCA) at par 27 'The full court was also influenced by the separation of the children from Darren (the respondent's son of a previous marriage) which emigration would involve; *Stock v Stock* 1982 (3) SA 1280 (A) at 1290H-129A '...where there are several children in the family, it may well be deemed inadvisable to separate siblings'.

connection with his or her family, extended family, culture and tradition.¹⁷² The respondent argued that the child would miss out on the extended family benefits.¹⁷³

Crucial in the context of relocation is the requirement to take into account the practical difficulty and expense of a child having contact with the parents. Whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents on a regular basis is an essential deciding factor when the 'best interest of the child' standard is to be applied.¹⁷⁴ The court regarded these provisions as key in the application, and indicated that the said provisions had to be read in conjunction with the opinion expressed by the clinical psychologist and Family Advocate.¹⁷⁵

In determining what is in the best interest of the minor child, the court had to decide which of the parents was better able to promote and ensure the child's moral, physical and emotional welfare.¹⁷⁶ The nature of the personal relationship between the child and the parents; or any specific parent and the child; and any other caregiver; or person relevant in those circumstances were taken into consideration.¹⁷⁷ The court found that the relationship between the child and both parents was excellent.¹⁷⁸ The attitude of the parents, or any specific parent, towards the child and the exercise of parental responsibilities and rights in respect of that child, is also a factor that was considered.¹⁷⁹

The court, after considering the foregoing factors, granted the applicant the right to relocate to France.

What is also relevant to relocation is the concept of parenting plans, one which was introduced in the Children's Act to assist disputing parents in reaching agreement about access and custody as well as, more broadly, their parental responsibilities and rights in respect of the child.¹⁸⁰ The Act seeks to restrict litigation from ensuing by requiring parties to seek first to reach agreement on a

¹⁷² Section 7(1)(f); *RC v CS* at par 43.

¹⁷³ Par 58.

¹⁷⁴ Section 7(1)(e); See also *Cunningham v Pretorius* referenced in par 61 in *RC v SC*.

¹⁷⁵ Par 29.

¹⁷⁶ Par 39.

¹⁷⁷ Section 7(1)(a).

¹⁷⁸ Par 40.

¹⁷⁹ Section 7(1)(b); Par 41.

¹⁸⁰ Section 33 of Act 38 of 2005; see also Albertus L and Sloth-NielsenJ(2010) 97.

parenting plan,¹⁸¹ if needs be with the assistance of a social worker, psychologist or Family Advocate, or after mediation.¹⁸² At this juncture, it is apt to briefly mention the benchmark decision of *MB v NB*,¹⁸³ wherein it was mentioned that one of the matters that had to be considered was whether the dispute should have been referred for possible settlement by mediation.¹⁸⁴ This casts a heavy onus on attorneys to recommend mediation to their clients. Judge Lewis in the cases of *S v J*¹⁸⁵ also expressed the same view that ‘litigation has not been in any of the parties’ interests’, and stated:

I endorse the views expressed by Brassey AJ in *MB v NB* that mediation in family matters is a useful way of avoiding protracted and expensive legal battles, and that litigation should not necessarily be a first resort.¹⁸⁶

The role that mediation can play in relocation disputes is discussed in further detail in the next chapter. What follows is an examination of how the courts have addressed relocation disputes in South Africa. The courts have not been in agreement about the best approach to adopt, and the examination begins with an overview of the developing jurisprudence on the matter.

3.2 CASE LAW

Although diverse approaches have been adopted in South Africa, they can be usefully categorised into two distinctive types: the pro-relocation approach and neutral approach.¹⁸⁷

3.2.1 The pro-relocation approach

The pro-relocation approach carries presumption which favours the primary caregiver. The non-relocating parent would have to show that relocation is clearly detrimental to the children, otherwise relocation would be authorised. This is illustrated in the case of *Van Rooyen v VanRooyen*¹⁸⁸ where Judge King stated the following:

¹⁸¹Section 33 (2) of Act 38 of 2005.

¹⁸² Albertus L and Sloth-Nielsen J (2010) 93; see also Section 33(5) of Act 38 of 2005.

¹⁸³2010 (3) SA 220 (GSJ).

¹⁸⁴*MB v NB* at par 48.

¹⁸⁵[2011] 2 ALL SA 299 (SCA).

¹⁸⁶*S v J* at Par 54.

¹⁸⁷Domingo W (2011)153.

¹⁸⁸1999 (4) SA 435 (C) 439G-H.

It is trite that the interests of the children are – all else being equal – best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal familial world and the circumstances necessitate that the best must be done in the children's interests to structure a situation whereby access by the (non-primary caregiver) is curtailed but contact between him and the children is effectively preserved.¹⁸⁹

In the *Godbeer v Godbeer*¹⁹⁰ case, the court held that if the primary care-giving parent makes a decision to move and has given mature and rational thought to the matter, then the presumption is that the relocation is in the best interest of the child.¹⁹¹

The leading South African case in point is *Jackson v Jackson*.¹⁹² The custodial parent, the father of two girls aged 7 and 9½, brought in an action for leave to remove the children from South Africa to Australia. The leave was granted by the trial court of first instance but overturned by the full court of the Natal Provincial Division. An appeal against the decision was lodged with the Supreme Court of Appeal. At the initial hearing of the application, the applicant stated that in his opinion people in Brisbane were happier and safer than in South Africa and that life had become worse in Durban in particular; that people in South Africa were depressed and had forgotten how to have fun; that children, like his two girls, were suppressed and could not lead a normal life as he did as a child; and that South Africa had become burdened with crime, AIDS, education problems and health care problems that would be passed on to his children. It was these factors which convinced him that it would be in the best interests of his children to move to Australia.¹⁹³ The Court's rationale for giving special consideration to the primary caregiver's desire to relocate is explained by Judge Cloete:

The fact that a decision has been made by the custodian parent does not give rise to some sort of rebuttable presumption that such decisions is correct. The reason why a Court is reluctant to interfere with the decisions of a custodian parent is not only because the custodian parent may, as a matter of fact, be in a better position than the non-custodian parent in some cases to evaluate what is in the best interests of a child

¹⁸⁹Par 439G-H.

¹⁹⁰2000 (3) SA 976 (W).

¹⁹¹Domingo W (2011)154.

¹⁹²2002 (2) SA 303 (SCA).

¹⁹³Albertus L and Sloth-Nielsen J (2010) 91.

but, more importantly, because the parent who bears the primary responsibility of bringing up the child should as far as possible be left to do just that. It is however, a constitutional imperative that the interests of children remain paramount. That is the ‘central and constant consideration’.¹⁹⁴

The court in *F v F*¹⁹⁵ echoed the same reasoning as in *Jackson*, namely, that courts will not lightly interfere in the decisions of primary caregivers. As in *F v F* and *K v K* below, the future plans of the primary caregiver are crucial.

In the case of *K v K*¹⁹⁶ the relocation was sought by a father wishing to go to Israel, his place of birth and where his family resided. He held the view that his daughter would receive a better education in Israel. Moreover, he averred that an armed-robbery incident further motivated his decision to relocate as it left the child traumatised. The court carefully considered the future plans of the applicant within the context of the child, and concerns were raised, namely, that the child did not speak Hebrew and this would be detrimental to her schooling as Hebrew is the language of instruction. The court was not provided with details of the progress that the child was making with Hebrew lessons. Furthermore, no detail was provided in respect of the study programme to facilitate the integration of the child into the community and country. In addition, no indication was given of how long it would take the child to learn sufficient Hebrew to enable her to communicate in Israel. No detail was provided as to whether the child, in view of the language barrier, would be able to integrate socially and culturally or make friends.

Flowing from these concerns, the court was unable to determine whether it would be in the child’s best interests that she be removed from her school and friends in South Africa. It is interesting that, although the child expressed the views that she wished to emigrate to Israel as it would take away hurtful memories and solve her problems, the court felt that her views were naïve and unrealistic and could not be decisive. At that time the child was nine years old.¹⁹⁷ The court further held that she was not of an age to appreciate the effects of a removal from her friends and familiar school and surroundings. No assessment had been made about the suitability of educating the child in a language she could not speak. In the end, the father was not granted

¹⁹⁴ At par 34; see also *Domingo W* (2011)154-155.

¹⁹⁵ 2006 (3) SA 42 (SCA); at Par 34.

¹⁹⁶ [2009] JOL 23557.

¹⁹⁷ *K v K* at par 30; She was born on 20 May 1999.

permission to relocate.¹⁹⁸ Based on the applicant's reasons for wanting to emigrate, the court found that the applicant had not provided sufficient detail to persuade the court that it would be in the child's best interest to emigrate to Israel. The guiding principle, in short, was the best interest of the child.

The case of *B v M*¹⁹⁹ is also relevant even though it was decided prior to the advent of the Children's Act. The case concerns a mother who wanted to relocate from one city to another within South Africa with her children from a previous marriage. She applied to the court for an order allowing her to relocate with the children since their father, who had joint custody of the children, refused to consent to the relocation. The court granted the order. The Guardianship Act²⁰⁰ applied at that time, and required all guardians to consent to relocation within the country. In this case the court rejected the approach in *Jackson v Jackson*. The court took guidance from previous established principles which were applied to relocation matters. The court accepted that cognisance must be had that the relationship will be interrupted between the child and the left-behind parent. The effect that relocation will have on the left-behind parent must also be taken into account, but does not have to be the deciding factor in whether to permit relocation or not.²⁰¹

In *AC v KC*²⁰² the applicant mother was a cytologist and received an attractive contract offer for three years to work in Abu Dhabi. Although the applicant had a job in South Africa, the job offer would reportedly pay three times as much once tax breaks and allowances were added. The oldest child (aged about 10–11) was a 'top 10' learner and was 'proficient in English'. The second child, aged about 9–10, was an average learner with a concentration problem. Both children attended an Afrikaans-medium school. The children were not able to be educated in Arabic, but the plan was to attend an American English-medium school in Abu Dhabi, with Arabic as a subject. Afrikaans was clearly not a part of the curriculum. The report by the Family Advocate²⁰³ expressed misgivings about the younger child in respect his learning problems and language constraints. The appellant raised concerns about the lack of information regarding the respondent's financial position generally, the education of the children, the possible problems

¹⁹⁸ Albertus L and Sloth-Nielsen J (2010) 93-94.

¹⁹⁹ [2006] 9 BCLR 1034 (W).

²⁰⁰ Act 192 of 1993.

²⁰¹ Skelton A (2009) 87.

²⁰² (A389/08) [2008] ZAGPHC 369 (13 June 2008).

²⁰³ The statutory authority with the responsibility to provide the court with an assessment of the best interest of the child.

relating to where they would live, and whether the court was in a position to make a determination about all the aspects in section 7 of the Children's Act. He alleged that her decision was bona fide but not reasonable, and complained that the lower court did not deal 'with all the aspects that the legislature regarded as important as contained in section 7'.²⁰⁴ The court was also informed that there was quite a large Afrikaans community in Abu Dhabi as well as an Afrikaans church.

The court premised its final decision almost exclusively on the reasonableness of the applicant's decision and motives.²⁰⁵ In the end, it appeared that the court was influenced by the perceived financial advantages of the move.²⁰⁶

This case is said to have incorrectly allowed the best interests of the mother to usurp the best interests of the child.²⁰⁷ This decision has been criticised by the author Albertus,²⁰⁸ who is of the view that the 'reasonable man' test should not have been allowed to displace the best interest of the child and that the allegations of the appellant father relating to the second child's emotional and intellectual needs should have been properly addressed. This should have included due consideration to provide the child with support systems whilst abroad. Lastly, Albertus points out that 'although appropriate weight should be attached to the primary caregiver's interests, courts must guard against the assumption that a decision taken by the primary caregiver is equivalent to the child's best interests as was emphasized in *F v F*(2006) 1 ALL SA 577 (13)'.²⁰⁹

In the case law referred to, it is evident that the pro-relocation approach invariably favours the primary caregiver. In applying this presumptive approach, there is a risk of assuming that the best interest of the primary caregiver is also in the best interest of the child. On the other hand, arguments against relocation are often about a non-primary caregiver's interest in maintaining a relationship with the child. All of these are legitimate interests, which suggests that a neutral position should perhaps be adopted, one that seeks to balance the interests of the parents and the

²⁰⁴Par 9.

²⁰⁵Par 13.

²⁰⁶Albertus L and Sloth-Nielsen J (2010) 95.

²⁰⁷Domingo W (2011)155/226.

²⁰⁸ Albertus L 'Relocation disputes: has the long and winding road come to an end? A South African perspective' (2010) *Speculum Juris*70.

²⁰⁹Latiefa Albertus.

child.²¹⁰In so doing, each case should be considered on its own merits within the ambit of a child-centred orientation. There should therefore be no presumption in favour of either parent. It is important that the court apply discretionary powers in the best interest of the child.²¹¹

What follows is a discussion of the neutral approach as it has been taken by the courts.

3.2.2 The neutral approach

In the neutral approach, there is neither a presumption in favour of nor against relocation. Each case is decided on its own merits. A court needs to evaluate a proposed move in terms of the child's welfare and interests.²¹²

In the case of *Cunningham v Pretorius*²¹³ the applicant wished to relocate to Austin, Texas, to start a new life after remarriage. The child's mother tongue was Afrikaans, and the child was said to have a 'language disability', the nature, cause and extent of which was a matter of some disagreement.²¹⁴In essence, though, the child had a backlog with Afrikaans.²¹⁵ Section 11(1) of the Children's Act was therefore applicable. It concerns the rights of children with disabilities, and requires that the child be provided with appropriate care within the family community in order to enable him or her to participate actively in sound cultural, religious and educational activities, thereby promoting his or her the child's dignity, self-reliance and active participation. The applicant was of the view that the child would benefit from a better education system and superior facilities for his learning difficulties. The respondent argued that it would not be in the best interests of the child to be schooled in English when he was not yet proficient in his first language. The judge was sensitive to the child's language needs and granted the application, despite the possibility that the child's mother tongue would be lost.²¹⁶This case demonstrates that

²¹⁰Domingo W (2011)156.

²¹¹ Clark B 'Post-divorce relocation by a custodian parent: are legislative guidelines for the exercise of judicial discretion desirable' (2003) *SALJ* 6, available at <http://juta/nxt/print.asp?NXTScript=nxt/gateway.dll&NXTHost=juta&d=&multi=0&...> (accessed 06 November 2012).

²¹² Domingo W (2011)156-157.

²¹³ (31187/08) [2008] ZAGPHC 258 (21 August 2008).

²¹⁴ *Cunningham v Pretorius* par 17.

²¹⁵ *Cunningham v Pretorius* par 18; 'The child attended speech therapy on a weekly basis because he was experiencing developmental difficulty in auditory perception, expressive vocabulary, expressive language, story repetition, receptive language and other areas of language development' at par 26.

²¹⁶ Albertus L and Sloth-Nielsen J (2010) 95-96.

both parents were placed on an equal footing and their interests fairly balanced against the child's best interests.²¹⁷

In the case of *HG v CG*²¹⁸ the parents had joint care of their fourteen-year-old son and a set of eleven-year-old triplets. They lived in separate homes but in the same housing complex, so that the children could maintain close contact with both parents. The mother wanted to relocate to Dubai, as she had been retrenched and was planning to marry a wealthy businessman who worked in Dubai. Unlike all the early cases mentioned above, which start off with the guiding legal principles set out in the *Jackson* case, Judge Chetty was guided by the Constitution and the Children's Act. Interestingly, Judge Chetty does not make reference to any previous cases on relocation. Instead, in terms of Sections 10 and 31 of the Children's Act, the court relies heavily on the wishes of the children, who in this case were of sufficient age and maturity to express their views;²¹⁹ the services of a social worker and clinical psychologist were engaged. The judge stated:

In my view children who are 14 or 11 years of age are of necessity immature and the caution enjoined by that consideration is underlined by the circumstances that, as will be elucidated later, I find that it cannot be excluded that the children have from time to time been subjected to, and have succumbed to, pressure by the one or the other parent, which has induced them to express inconsistent and contradictory views in certain aspects depending on which parent's views they felt obliged at the time to reflect.²²⁰

The court dismissed the application for relocation to Dubai, finding that the children were happy in Pretoria and that it would be best for them if they remained there with their mother as the primary caregiver.

The neutral approach takes into consideration all competing interests, such as the relocating parent's right to freedom of movement and family life, interests which should be acknowledged, respected and protected.²²¹ A paradigm-shift occurs in this thinking and approach, such that

²¹⁷Domingo W (2011)157.

²¹⁸2010 (3) SA 352 (ECP); [JOL 25707(E).

²¹⁹Domingo W (2011)157.

²²⁰Par 15.

²²¹Skelton A(2009) 88; See also *B v M* [2006] 2 BCLR (W) par [158] and *F v F* 2006 (3) SA 42 (SCA) par [10].

the question no longer concerns with which parent the child should live but, rather, how the child's time will be shared between the parents.²²² This approach clearly takes into account the best interest factors set out in the Children's Act insofar as they relate to relocation matters.

Having established the South African position with regards to relocation disputes, the study next examines the legal criteria that are used internationally in respect of relocation matters, with the focus falling on global trends and approaches.

4. INTERNATIONAL PERSPECTIVES ON RELOCATION

The approaches to relocation in Australia, New Zealand, the USA, the United Kingdom and Europe will be discussed to examine the global development of international family law as it relates to relocation disputes. These countries represent different continents, and the aim of the discussion is to provide a global perspective on emerging trends in support of the argument that a universal approach is needed to ensure uniformity and consistency in the resolution of relocation disputes; in the interests of continuity, the countries discussed are the same ones analysed in the previous chapter.

Some countries/states adopt a more neutral approach to resolving relocation disputes (e.g. Australia, New Zealand), while others are either pro-relocation (e.g. England/Wales) or anti-relocation (e.g. Alabama, Louisiana, Sweden). In some countries, custodial parents have the right to solely determine where they and their child will reside, while others (e.g. New Zealand) require both guardians to agree on the child's place of residence. The statutory frameworks governing relocations in the courts vary internationally; so, too, does the approach that is adopted in determining the child's welfare/best interests in a relocation dispute:²²³ in the USA, for example, the American Academy of Matrimonial Lawyers (AAML) has developed a Model Relocation Act.²²⁴

4.1 United States of America

²²²Domingo W (2001) *PER* 5.

²²³ Taylor N and Freeman M (2010) 24; see also Thorpe LJ 'Relocation – The Continued Search for Common Principles' (2010) 1.2 *Journal of Family Law Practice* 7; See also Henaghan (2010) 33.

²²⁴Domingo W (2001) *PER* 8.

The USA has a federal system comprising 50 sovereign states and a strong federal government. Federal considerations include constitutional rights; notably, the Supreme Court has recognised that Americans have a constitutional right to internal inter-state travel.²²⁵ In the light of this, while many courts in America have held that the parent's right is subject to the best interests of the child, the approach has been criticised for restricting a parent's right to travel as well as his or her right to relocate;²²⁶ by the same token, however, exercising such rights stands to have negative consequences for the non-custodial parent who seeks to continue a relationship with the child.²²⁷ The other constitutional rights that parents have raised in relocation cases are the right of privacy, the custodial parent's fundamental right of autonomy in child-rearing, due process and equal protection; these have been unsuccessful in court.²²⁸

Relocation laws are not uniform throughout all the states in the USA. States such as Arkansas, Oklahoma, South Dakota and Washington retain presumptions favouring relocation.²²⁹ On the other hand, California, Kansas, Montana and Wyoming favour relocation because they place the burden on the party opposing the move.²³⁰ Alabama has a presumption against relocation.²³¹

In ten states – namely, Arizona, Connecticut, Idaho, Illinois, Louisiana, Minnesota, Missouri, Nebraska, North Dakota and West Virginia – the burden is placed on the custodial or residential parent to show that the move would substantially improve the child's quality of life.²³²

There are states that use a shifting burden, which means in essence that the custodial parent must prove by a preponderance of the evidence that the proposed relocation was motivated by a legitimate purpose and that the relocation bears reasonable relation to that purpose. The burden then shifts to the non-relocating parent to establish why relocation would not be in the child's best interests or would harm the child.²³³

²²⁵Messitte P J and Kreeger J L 'Relocation of Children: Law and Practice in the United States' (2010) *Journal of Family Law and Practice* 60 'A custodial parent who wishes to relocate – for reasons of employment, health, remarriage, or just for a change of scenery – enjoys the right to travel and implicitly to move, which presumably entails the right to take the child with him or her'; see also Boshier P (2010)14-15.

²²⁶Elrod L D (2010)52.

²²⁷Elrod L D (2010)52.

²²⁸Elrod L D (2010)52.

²²⁹Messitte P J and Kreeger J L (2010) 63.

²³⁰Messitte P J and Kreeger J L (2010) 63.

²³¹Messitte P J and Kreeger J L (2010) 63; see also Elrod L D (2010)52.

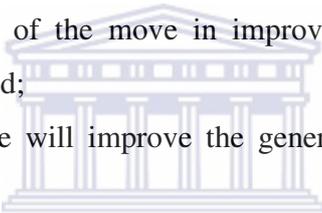
²³²Messitte P J and Kreeger J L (2010) 63, 'The burden is placed on the party seeking the relocation'.

²³³Messitte PJ and Kreeger JL (2010) 63.

Three states favour relocation if there is a primary custodian, but not if the parents share equal residential time. There is a move towards analysing each case to determine what would be in the best interest of the child before making a decision, thereby abandoning the presumption which may exist. The New York Court of Appeals noted:

[I]t serves neither the interests of the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests that artificially skew the analysis in favour of one outcome or another. Courts should be free to consider and give appropriate weight to all of the factors that may be relevant to a determination of whether proposed relocation would be in the best interests of the children involved.²³⁴

Over time, certain common factors have been used by courts to assist them in coming decision about relocation. These factors include:

- 
- (a) the prospective advantages of the move in improving general quality of life for the custodial parent and the child;
 - (b) whether the proposed move will improve the general quality of life for the custodial parent and the child;
 - (c) whether the proposed move is inspired by a desire to defeat or frustrate visitation;
 - (d) whether the custodial parent is likely to comply with substitute visitation orders;
 - (e) whether the noncustodial parent's opposition to the move is intended to secure financial advantage in respect of continuing support obligations; and,
 - (f) whether realistic substitution visitation pattern can be devised.²³⁵

In the USA, 'the clear trend is moving in the direction of adopt a neutral "best interest" of the child approach, placing the burden equally on both parents to show the child's best interests'.²³⁶ This has translated in the formulation of the AAML²³⁷ and ULC²³⁸ Model Acts, which has aided the courts in making judgments when considering relocation disputes. These considerations include: the quality and relationship and frequency of contact between the child

²³⁴ Elrod LD (2010)55; see also Messite PJ and Kreeger JL (2010) 63, '...six States, including New York, either by statute or case law, track the recommendations of the Uniform Law Commission and entertain no presumptions, providing for an equal burden'.

²³⁵ Elrod LD (2010)55.

²³⁶ Elrod LD (2010)54.

²³⁷ American Academy of Matrimonial Lawyers.

²³⁸ Uniform Law Commission.

and each parent; the likelihood of improving the quality of life for the child; the views of the child (depending on the child's age and maturity); and the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the child.²³⁹ This list, however, is not exhaustive.

From the above it is clear that states within the US have failed to achieve any agreement over the fundamental issues involved in relocation disputes, and instead a wide range of approaches has been adopted. The constitutional rights of parents involved in these disputes, or the safety needs of victims of domestic violence, are not a consideration for all states when dealing with relocation matters. Proposals have been made by scholars around important reforms, such as compulsory alternative dispute-resolutions, in order to consider the needs of all the affected parties in these types of disputes and thereby ensure that relocation does not present a major risk for children affected by the separation of parents after a divorce.²⁴⁰ Generally, most courts in the US focus on rendering decisions in the best interest of the child as well as in the 'overall interest of both the child and the parents'.²⁴¹

4.2 New Zealand and Australian perspective

4.2.1 New Zealand

Similarly to South Africa, New Zealand does not have a specific legislative section relating to relocation. The issue is considered a guardianship matter and is regulated in the main by Section 44 of the Care of Children Act 2004, which ushered in an important change that was bound to influence the judiciary's approach to relocation cases.²⁴² Every decision must consider the welfare and best interests of the child as the paramount consideration. This approach was reaffirmed by the Court of Appeal in the case of *Bashir v Kacem*,²⁴³ one involving major inter-parental conflict. Prior to the Care of Children Act, the Guardianship Act 1968 also stressed the welfare of the child as the paramount consideration, which is evident in the decisions made in

²³⁹Messite P J and Kreeger J L (2010) 64.

²⁴⁰Glennon T 'Divided parents, shared children: Conflicting approaches to relocation disputes in the USA' (2008) 4.2 *Utrecht Law Review* 71-72 available at www.utrechtlawreview.org/index.php/ulr/article/view/66/66 (accessed on 24 September 2012).

²⁴¹Messite P J and Kreeger J L (2010) 65.

²⁴²Boshier P (2010) 12.

²⁴³[2010] NZCA 96.

cases of *Stadniczenko v Stadniczenko I*²⁴⁴ and *D v S*²⁴⁵, both of which stressed that the welfare of the child is the paramount consideration.²⁴⁶ The Court of Appeal case of *D v S* sets out the current position in New Zealand. The removal of children from New Zealand to Ireland was refused, and this amounted to a review of the English decision in *Payne v Payne*²⁴⁷; insofar as placing emphasis solely on one of the relevant considerations in a relocation application was deemed inconsistent with the ‘all-factor child-centred approach required under New Zealand law’.²⁴⁸ In New Zealand, the requirement is that the assessment of the reasonableness of a parent’s desire to relocate must be weighed against the disadvantage to the children of having reduced contact with the left-behind parent.²⁴⁹

The case of *B v K*²⁵⁰ considered the principles set out in Section 5 of the Care of Children Act 2004²⁵¹ and the relevance of conflict between parents in relocation decisions. The court found that the protection of a child’s safety and the maintenance of continuing relationships with both parents, as set out in Section 5(e) and Section 5(b) respectively of the Care of Children Act, are mandatory.²⁵²

4.2.2 Australia

Although Australian law has undergone legislative change in this area, certain fundamental legal precepts have remained constant. The enactment of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) has imposed new obligations on judicial officers hearing and determining parenting disputes, including relocation disputes. Specific consideration is given to: the benefit afforded to a child of maintaining a meaningful relationship with both parents; the practical difficulty and expense of spending time, and communicating, with a parent; and the impact on the child’s right to maintain personal relations and direct contact with both parents.²⁵³

²⁴⁴[1995]NZFLR 493.

²⁴⁵[2002] NZFLR 116.

²⁴⁶Boshier P (2010)11.

²⁴⁷[2001] 1 WLR 1826 [2001] EWCA 166.

²⁴⁸Freeman M ‘Relocation and the child’s best interests’ (Paper presented at the Miller Du Toit Cloete and University of Western Cape Conference held on 18 March 2010) 10, available at <http://www.millerdutoitcloeteinc.co.za/Paper%20-%20Freeman%20Marilyn.doc> (accessed 06 November 2012).

²⁴⁹Freeman M ‘Relocation and the child’s best interests’ 10.

²⁵⁰[2010] NZCA 96.

²⁵¹In July 2005 and replaced the Guardianship Act of 1968.

²⁵²Freeman M ‘Relocation and the child’s best interests’ 11.

²⁵³Freeman M (2010) 107.

Whilst there are differences, the Australian approach appears to be in broad concord with that of New Zealand: it is a 'best interest and welfare' approach with no presumption in favour of, or against, relocation.²⁵⁴ By contrast, England is known as a pro-relocation jurisdiction, and its approach is considered in the following section.²⁵⁵

4.2.3 The English approach

The English courts have based their decisions in relocation applications on the welfare of the child, which is regarded as the paramount consideration. If the relocation is likely to have a detrimental impact on the welfare of the child, it would have a significant influence on the decision of the court.²⁵⁶

The leading Court of Appeal case, *Payne v Payne*, shows how the courts have applied these aforementioned factors. This case involved a relocation dispute between a mother who sought to return to her native country, New Zealand, with her daughter. The father was strongly opposed to the move and wanted his child to remain in England. The trial judge made an order permitting the mother to move the child permanently to New Zealand, having found that the effect on the mother of being forced to remain would be 'devastating' and that 'her unhappiness, sense of isolation and depression would be exacerbated to a degree which could well be damaging to [the child]'. In the Court of Appeal, Thorpe LJ concluded that the welfare of the child is the paramount consideration, and held that refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Thorpe LJ proposed that the 'discipline' to be followed in relocation cases should be as follows:

- (a) The judge must question whether the mother's request is both genuine and realistic. If not, it should be refused.
- (b) If the answer is in the affirmative, then the judge must examine whether the father's opposition is motivated by a genuine concern for the child's welfare, what its impact on his relationship with his child would be and whether that would be offset by the extension of the child's relationship with the maternal family and homeland.

²⁵⁴Boshier P (2010) 13.

²⁵⁵Freeman M 'Relocation and the child's best interests' 9.

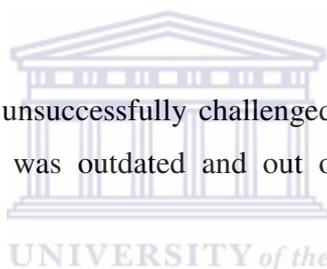
²⁵⁶Thorpe LJ (2010) 5.

- (c) The judge must thereafter ask what the impact of the refusal would be on the mother.
- (d) Finally, the second and third issues must be brought together in a review that considers the child's welfare as the paramount consideration.

Using these guiding factors, the court of Appeal granted permission for the mother to leave England and Wales.²⁵⁷

The judgment in *Payne v Payne* is said to consider two categories of cases in which the court has recognised that the proposed relocation is consistent with the welfare of the child. The first category is the repatriating mother whose only attachment to England came about as a result of the marriage. The second category is the mother who has married a man who originates from outside the borders of England/Wales or his employment necessitates that he works in another jurisdiction. It was suggested, furthermore, that a third category is emerging, namely, the life-style choice category.²⁵⁸

The *Payne v Payne* decision was unsuccessfully challenged in *re G*.²⁵⁹ In this case the father argued that the leading authority was outdated and out of step with modern views of the dynamics of family life.



The case of *W (Children)*²⁶⁰ concerned the successful appeal by a mother against the refusal of permission to relocate to Australia. The President hearing the case considered the judgments of *Payne v Payne* and *G v G* and found that the judge had failed to give enough weight to the mother's welfare in his consideration of what was in the child's welfare and omitted to take a number of aspects into account, including that the court could make orders about direct contact. The resultant outcome confirmed that *Payne v Payne* should continue to be followed.

From the above discussion it is clear that the welfare of the children is the overriding consideration in the area of relocation, and, as such, the court may prohibit the primary carer only from a move that is incompatible with the welfare of the children.²⁶¹

²⁵⁷ Kil Kelly U (2010)30-31.

²⁵⁸ Justice Thorpe (2010) 5-6.

²⁵⁹ [2008]1 FLR 1587; see also *D (Children)* [2010] EWCA Civ 50.

²⁶⁰ [2011] EWCA Civ 345.

²⁶¹ Thorpe LJ (2010)7.

Lord Justice Thorpe describes the Human Rights Act 1998 as ‘a landmark event in the law of England and Wales’, as it incorporated the European Convention of Human Rights into the domestic laws of England.²⁶² The right to family life set out in Article 8 has a direct bearing on relocation applications, especially in respect of the left-behind parent. The developed principles determining relocation applications are said to be consistent with the European Convention on Human Rights.²⁶³

4.2.4 The European approach

Since the late 1990s there has been a positive move towards harmonisation of family law. The Commission on European Family Law (CEFL), established in 2001, is as a result hereof. The CEFL contains non-binding principles that are aimed at harmonising family law in Europe.²⁶⁴ However, it is controversial piece of legislation, and currently there is still an absence of harmonised family law in the European legal framework. This has been identified as an obstacle to the free movement of persons, and impacts on the maintenance of continuity in family relationships when residence is changed.²⁶⁵

The courts are aware that, where practically possible, the child’s relationship with both his parents should be maintained, and if relocation is allowed, this could potentially frustrate the relationship. On the other hand, if relocation is refused, it will conflict with the parent’s right to free movement. If the relationship between the parent wishing to relocate and his or her child is recognised, the refusal to allow the child to relocate abroad affects the parent’s (European) right of free movement if they cannot relocate with their child. As previously mentioned, there are common reasons why parents may wish to relocate. However, it should be borne in mind that in many instances they will still be tied to the host state through the continuation of their former relationship. Some women in these circumstances view this as a restriction on their right of free

²⁶² Thorpe LJ ‘The Search for Common Principles’ 2.

²⁶³ ECHR.

²⁶⁴ Anatololskaia M ‘Family law and national culture: Arguing against the cultural constraints argument’ (2008) *Utrecht Law Review* 26.

²⁶⁵ Boele-Woelki K ‘The principles of European family law: its aims and prospects’ (2005) 1. 2 *Utrecht Law Review* 161, ‘There is little doubt that the absence of uniformity in the areas of private law facilitating economic activities forms an obstacle to the development of the free movement of goods, services and capital. In the same way, the absence of harmonized family law creates an obstacle to the free movement of persons and the creation of a truly European identity and an integrated European legal space’.

movement, which raises the risk of the child being abducted. Strictly speaking, the parent has the right to move freely, but just cannot do so if she wishes to relocate with the child.

More often than not, the law of relocation is regarded as a domestic issue of a particular country. It is said that the ambit of European law is such that, if domestic law affects an individual right of free movement, this falls within the scope of European law in general.²⁶⁶

If a parent has a valid custody order, it would empower him or her to make decisions about the relocation of the child. In countries such as Sweden, Germany and Austria, the parent with a sole custody order may relocate without the consent of the other parent or a specific court order to that effect.²⁶⁷

All told, the above discussions demonstrate the inconsistencies that are observable worldwide. It has been said that an obstacle to developing a universal approach to relocation applications is that many of the world's countries have different views on the role of parents and the place of the children within the family.²⁶⁸ Conversely, in recent years international family law has been the focal point of increasing attention on the harmonisation and unification of the law.²⁶⁹ The debate around international relocation in particular is informed by several underlying themes, themes which influence the approaches taken by different states. This study will address two of them: joint parental responsibilities after separation, and relocation and relevant gender issues.

5. UNDERLYING THEMES

5.1 The growing trend towards joint parental responsibilities after separation

Preliminary research into international family relocation yielded a number of findings published as a preliminary note by the Permanent Bureau.²⁷⁰ This note demonstrates that states have taken different approaches to international family relocation; in particular, it was found that there is increasing interest in finding common principles that can be applied to international relocation

²⁶⁶Lamont R (2010)44.

²⁶⁷Justice Thorpe (2010)7.

²⁶⁸Boshier P (2010)11.

²⁶⁹Boele-Woelki K (2005)162.

²⁷⁰HCCH: Prel. Doc. No 11 – January 2012.

cases.²⁷¹ In emphasizing that both parents should have a meaningful and active relationship with their children, the note stated:

This growing trend towards joint parental responsibilities and shared care could lead to a more restrictive approach to relocation applications in those jurisdictions where relocation is subject to court approval, as it emphasises the importance of each parent's active involvement in their child's life.²⁷²

In circumstances such as these, the left-behind parent will have a strong argument to oppose the relocating parent's proposed move.²⁷³ In the realm of family law, clear gender issues are evident and bear mentioning in the discussion around relocation. A decision against relocation could be perceived as restrictive towards the custodian parent, that person usually being the mother.

5.2 Gender issues

The preliminary note referred to above also looked at gender issues in relation to relocation. The research findings show that it is generally accepted that the primary carer parent is usually the mother. It therefore follows that a restrictive approach to relocation mostly affects women's freedom of movement; a liberal approach to relocation, on the other hand, affects the rights of the left-behind parent, in most cases the father, to participate actively in a meaningful relationship with the child. The implication is that an added financial burden is placed on the father in maintaining contact with the child, one dependent on where the child has been moved to; in turn, this burden may have a negative impact on the relationship or terminate it completely. It is thus important that these issues not be forgotten when deciding what will be in the best interest of the child.²⁷⁴

The judge in the case of *F v F*²⁷⁵ took into account the gender dimension in relocation cases, holding that:

²⁷¹ HCCH (Prel. Doc. No 11)4.

²⁷² HCCH (Prel. Doc. No 11) 10.

²⁷³ HCCH (Prel. Doc. No 11) 11.

²⁷⁴ HCCH (Prel. Doc. No 11) 11-12.

²⁷⁵ 2006 3 SA 42 (SCA) at par 12.

It is important that courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts – who have no reciprocal legal obligation to maintain contact with the child may relocate at will – may, and often does, indirectly constitute unfair gender discrimination. Despite the constitutional commitment to equality, the division of parenting roles in South Africa remains largely gender based...The refusal of relocation applications therefore has a potentially disproportionate impact on women, restricting their mobility and subverting their interests and the personal choices that they make to those of their children and former spouses.

The court in *B v M*²⁷⁶ also took into account the gendered nature of roles of the parties after a divorce, thus restricting the movement of the woman who is the primary caregiver. In this case, Judge Satchwell states that ‘careful consideration needs to be given to applying the best interest principle in a manner which does not create adverse effects on a discriminatory basis – in this case gender discrimination’.²⁷⁷

The impact of relocation on a child should be the main focus. The reality is that gender impacts every sphere of family law, even if one looks at the person who is responsible for the payment of maintenance and the trends that have emerged there.²⁷⁸

In this examination of some of the underlying themes in relocation matters, such limited empirical research as is available demonstrates that the outcomes of these applications can be narrowed. The next section deals briefly with the outcomes and certain of the research findings.

6. OUTCOMES AND RESEARCH FINDINGS

Although it is hard to predict the outcome of a relocation dispute, four common outcomes have been identified:

- (a) the court allows the parent to relocate with the child;
- (b) the court disallows the relocation request, but the status quo is preserved because the parent decides not to move without the child;

²⁷⁶2006 3 ALL SA 109 (W).

²⁷⁷*B v M* at par 158.

²⁷⁸Domingo W (2011)161.

- (c) the court disallows relocation and the parent moves without the child, resulting in primary custody being transferred to the nonmoving parent; or,
- (d) the relocation is allowed and the other parent chooses to follow to the new community.²⁷⁹

The need for more empirical research around outcomes in relocation cases has been identified in order to guide parents, lawyers, judges or custody evaluators as to what is in the best interests of children.²⁸⁰ Research data have been collected which show the trends on the effects of relocation on children, and the next section focuses on the themes that have emerged.

7. EMPIRICAL RESEARCH TRENDS ON POST-RELOCATION DISPUTE TRENDS

Twelve themes have emerged from empirical research into post-relocation disputes trends.²⁸¹ Boshier lists these findings:

- (a) Most applicants have more than one reason for wanting to relocate, but the majority want to return home to a familiar environment where they have access to extended family support.
- (b) Of the sampling of participants interviewed, it was found that approximately two-thirds of the participants initially relocated.
- (c) While almost half of relocation cases settle by consent, they may settle on the basis of the general position (being informed of case law trends) rather than the position of the individual child in the particular case.
- (d) Legal costs were reported by family members as a major source of financial stress and sometimes financial ruin.
- (e) Some children endure burdensome (and often extremely expensive) travel if relocation occurs.
- (f) Inter-parental conflict is a factor in many proposed relocation cases.
- (g) Allegations of violence feature in all studies, although the divergence between the ways the mothers and the fathers described their experiences was stark and revealed strongly gendered discourses.

²⁷⁹Elrod LD (2010)51.

²⁸⁰Elrod LD (2010)52.

²⁸¹ Taylor N and Freeman M 'International Research Evidence on Relocation: Past Present and Future' (paper presented to the International Judicial Conference on Cross-border Family Relocation, 23-25 March 2010) at pages 9, 10, 16, 17 18, 19.

- (h) Some parents would like a monitoring system to be in place following relocation proceedings to review what happens after a child has either relocated or stayed. They felt this is the only way that information about the practical effect of court orders could be ascertained.
- (i) Mediation is not the answer for everyone but, with skilled and experienced specialist practitioners, mediation might well provide an environment in which relocation issues can be successfully addressed in a realistic and productive manner.
- (j) The effect of the relocation decision has profound effects on the parent who 'lost'. What is also clear is that parent's willingness to recognise and encourage their child's relationship with the other parent was a powerful influence on the degree of co-operation that existed following the relocation dispute and its impact on the child.
- (k) When considering the link between international child abduction and relocation, the argument that, if the relocation process is too restrictive, parents will simply leave the country without the required consents and, if it is too liberal, potential left-behind parents may take the child before the court has the chance to make a relocation decision, is overly simplistic.
- (l) Most children were relatively happy, well-adjusted and satisfied with how things had worked out after they had overcome the trauma of the relocation. Furthermore, children noted that having an opportunity to express their views in any legal proceedings, and be listened to, was important to them.²⁸²

Research was also conducted on the effects on parties affected by international child abduction cases.²⁸³ One of the findings is that the return of the child 'seems to produce a pattern of more profound effects, some of which are long-lasting'.²⁸⁴ However, more empirical research is needed on relocation disputes and child abductions. The emotional impact they have on parties is real, and it is clear that the cumbersome nature of the international instruments and processes is

²⁸²Boshier P (2010) 16-17.

²⁸³ Freeman M 'International Child Abduction: The effects' *Reunite International Child Abduction Centre* available at [http://www.londonmet.ac.uk/depts/lgir/law/...](http://www.londonmet.ac.uk/depts/lgir/law/) (accessed on 12 November 2012); see also Freeman M 'Relocation – the reunite Research' (2009) available at www.reunite.org (accessed on 12 November 2012).

²⁸⁴ Freeman M *Reunite* 63; see also Freeman M 'Relocation and the child's best interests' (2010) 8 'There are many similarities between the situation which faces and abducted child and the one which faces the relocated child...it would not therefore be surprising if relocated children also suffer serious effects'.

not in the best interest of the child concerned; conversely, there is a need to streamline the processes and close the gaps in order to create uniformity for those wishing to relocate.

8. CONCLUSION

The main concern flowing from the preceding discussions is the obvious lack of legislative guidelines to assist courts in making decisions around relocation. Over time, courts have come up with criteria largely based on previous jurisprudence and international trends. Domingo summarises the main criteria as including: the best interest of the child; the purpose of relocating; the interest of the relocating parent; the interest of the non-relocating parent; the relationship between the child(ren) and parents; the gendered nature of the roles within the post-divorce family; and the views of the child.²⁸⁵

In the South African context, the understanding of what constitutes best interest is based on international standards set out in international human rights and children rights protocols, but despite these guiding principles, there remain huge disparities and inconsistencies. Nevertheless, the emerging decisions from the courts indicate that the judicial thinking is undergoing change. The viewpoint of Justice Sachs merits endorsement when he observes that a child-centred approach should be adopted in legal deliberation, a focus that requires an in-depth consideration of the needs and rights of the particular child in the 'precise real-life situation' he or she is in.²⁸⁶

On the basis of a comparative examination of how relocation is dealt with internationally, it is evident that there are disparities in the way the matter is being addressed. Elrod suggests that this is the case because outcomes are likely to hinge on several factors, including: the existence of a statute or case precedent making it either easy or difficult for a parent to relocate with a child; the type of parenting arrangement that currently exists; and the attitude of the judge who hears the motion. In addition, relocation disputes have the potential to be expensive, emotionally-charged and time-consuming.²⁸⁷ While there is general agreement on the need to adopt a child-

²⁸⁵ Domingo W (2011)161-162.

²⁸⁶ Skelton A 'Constitutional Protection of Children's Rights' in Davel CJ (ed) *Introduction to Child Law in South Africa* (2000)11- 283.

²⁸⁷ Elrod LD (2010) 51-52.

centred approach, the challenge has been how exactly to go about securing children's rights in respect of relocation.²⁸⁸

The following chapter examines the links between relocation disputes and child abductions in order to lay the basis for the submission that there is a need for an international instrument to bring about uniformity and consistency.



²⁸⁸Kilkelly U (2010)24.

CHAPTER 4

1. PARALLELS AND LINKS BETWEEN THE HAGUE CONVENTION AND RELOCATION

1.1 Introduction

The preceding chapters provided an overview of international child abductions and relocation disputes; the present chapter sets out to identify some of the parallels and links between child abduction and relocation. Recommendations and comments made at various international conferences in relation to relocations and child abductions will be examined. Flowing from these recommendations, the use of mediations and the role of the liaison judge will be touched on. This chapter closes with an argument as to why an international protocol regulating relocation disputes is desirable and what the possible content of the instrument could be.

1.2 Parallels and links between Hague Convention cases and relocation disputes

The following parallels and links have been identified for discussion in this chapter, namely: movement of the child; the objectives of the Hague Abduction Convention and relocation; rights of custody and access; defining habitual residence; conflicting laws; views of child; burdens of proof; the best interests of the child; presumptions in favour of the residential parent; relocation/abduction processes; and urgency caused by undefined appeal processes. This is not an exhaustive list, as some parallels and links have already been discussed in detail in the preceding chapters and only aspects which were not mentioned will be highlighted.²⁸⁹

1.2.1 Movement of children

It is common cause that the link to this discussion involves children who were moved from their place of habitual residence. This could involve a move within the country of habitual residence or a cross-border move; the movement under study will primarily concern children moved from one jurisdiction to another either lawfully or unlawfully. The reason for drawing this link is to show the interconnectedness between the two. Such a move will have an impact on a parent's right to custody and access.²⁹⁰ In South Africa, for example, a parent does not lose guardianship

²⁸⁹ For example, reasons for relocation and child abductions, views of the child, best interest of the child.

²⁹⁰ Heaton J 'Parental responsibilities and rights' (chapter 2) [Original Service, 2007] 3-15.

over a child after a divorce or separation.²⁹¹ In certain instances, the order regulating custody and access will have a *ne exeat* clause, meaning that the caregiver parent must obtain consent from the other parent if he or she wishes to relocate or take the child out of the country.²⁹² In the case of *Sonderup v Tondelli*, it was held that when a parent takes a child abroad in violation of *ne exeat* rights, that parent effectively nullifies the custody order of the country of habitual residence.²⁹³ This is the type of situation that the Hague Convention seeks to avoid, and it ties up with the following link, namely the objectives of the Hague Convention *vis-a-vis* relocation.

1.2.2 Objectives of the Hague Convention *vis-a-vis* relocation

In a preliminary report²⁹⁴ drawn up by William Duncan²⁹⁵ to review the operation of the Hague Convention, a connection was established between child abduction and the situation where a parent who is the primary caregiver obtains permission from a court to relocate to another jurisdiction with the child, but the contact orders made in that context are not respected in the country to which the parent and child have relocated. According to Duncan, such a situation ‘could affect the willingness of judges to allow relocation, which may in turn encourage abductions by primary care givers’.²⁹⁶ This means there was a recognition that the restrictive approach to relocation has an adverse effect on the Hague Convention. If regard is had to this interpretation, then it is the case that the Hague Convention is not the answer. Its principal objectives are to protect children from the harmful effects of being removed from their place of habitual residence by attempting to restore the *status quo ante* in an expeditious way.²⁹⁷ It follows

²⁹¹ Heaton J and Cronje DSP ‘South African Family Law’ 2ed (2004) 162 ‘Except for consenting to the minor’s marriage, adoption, or removal from South Africa, an application for a passport for the minor if he or she is below the age of 18 years, and the alienation or encumbrance of the minor’s movable property, either parent may exercise any aspect of guardianship independently. This position is usually unchanged upon divorce’.

²⁹² *Sonderup v Tondelli* CCT 53/00 par 21 ‘In this case there was a non-removal (“*ne exeat*”) provision in the order of the Supreme Court of British Columbia of 7 July 1999. It has been held by courts in several jurisdictions that such a non-removal provision can, depending on the circumstances, confer a right of custody within the meaning of the Convention’; See also *Croll v Croll* 229 F.3d 133,139 (2d Cir 2000) ‘a non-removal provision does not found a right of custody’; see *Abbot v Abbot*, 560 U.S. (2010) in which the court held that a parent’s *ne exeat* right is a ‘right to custody under the Hague Convention’.

²⁹³ *Sonderup v Tondelli* at par 23; see also *KG v CB* [2012] JOL 28641 (SCA) par 34.

²⁹⁴ Preliminary Document No 4 for the 2001 Special Commission to Review.

²⁹⁵ Deputy Secretary General of the 2001 Special Commission.

²⁹⁶ HCCH *Preliminary Document No 11* (January 2012) 6 ‘In its conclusions and Recommendations, the Fourth Meeting of the Special Commission noted “Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognized that a highly restrictive approach to relocation applications have an adverse effect on the operation of the 1980 Convention”’.

²⁹⁷ Murphy J ‘International child abduction’ Chapter 8 in *International dimensions in family law* (2005) 213.

therefore that parents should be encouraged to negotiate and finalise the relocation lawfully before choosing to abduct their children.²⁹⁸ Recognising this as a cause for concern, the 2008 Guide to Good Practice Report (Transfrontier contact concerning children) highlights that:

It is important that the terms of and conditions of a contact order made in the context of relocation are given maximum respect in the country in which relocation occurs.²⁹⁹

The report acknowledges furthermore that all measures should be taken to secure the rights of children to maintain their personal relationship and contact with both parents.³⁰⁰ Practical arrangements to effect contact and, where applicable, to enforce contact orders are also encouraged.³⁰¹ Understanding rights of custody within the meaning of Article 21 of the Hague Convention is of importance.

1.2.3 Rights of custody and rights of access

The Guide to Good Practice Report acknowledges that a court, in making decisions on relocation, should secure contact rights to the left-behind parent.³⁰² The dispute in both relocation and child abduction cases has an impact on the left-behind parents' right of access. In the case of *Central Authority v EM*³⁰³, it was held that one of the requirements for an applicant who wishes the court to order the return of the child in terms of the Hague Abduction Convention is that the applicant actually had to be exercising those rights at the time of the wrongful removal or retention and or would have so exercised such right were it not for the removal or retention.³⁰⁴

Within the meaning of Article 21 of the Hague Convention, the term 'rights of custody' should generally be regarded as including rights of access or contact. The understanding of rights of access is not confined to those already established by court. According to the Good Practice Guide:

²⁹⁸ HCCH (Prel. Doc. No 11) 7.

²⁹⁹ HCCH 'Transfrontier contact concerning children: General principles and a guide to good practice' *Hague Conference on Private International Law* (2008) 38.

³⁰⁰ HCCH *Guide to good practice* (2008) x.

³⁰¹ HCCH *Guide to good practice* (2008) xvi.

³⁰² HCCH *Guide to good practice* (2008) xiii.

³⁰³ *Family Advocate, Cape Town, and Another v EM* 2009 (5) SA 420 (C) at par 12.

³⁰⁴ Article 3 of the Hague Convention.

The right to apply under Article 21 of the 1980 Convention to make arrangements for recognizing or securing the effective exercise of “rights of access” should not be limited to cases where there is an existing court order recognizing or establishing rights of access, but should include cases where the applicant relies on access rights which arise by operation of law or has status to seek the establishment of such rights.³⁰⁵

Eekelaar holds the view that the definition of custody rights in the Hague Convention is open-ended in order to allow courts to give wider interpretation to custody rights for the purposes of the Hague Convention. Custody rights may, however, be restricted in terms of the law of the country of habitual residence. Parties to the Hague Convention agree to extend the meaning of custody rights for the purposes of the Hague Convention, to fit within the meaning of Article 5.³⁰⁶ Determinations as to whether the Hague Convention is applicable will be influenced by the established definition of ‘rights of custody’ in each Contracting State.³⁰⁷ This means, therefore, that if a child is taken to a non-Convention state, there is little or no recourse available (as will be seen in the next section).

1.2.4 Conflicting laws

Only member states to the Hague Convention have an obligation to comply with the provisions therein. Reliance is made on comity between parties. If a child is abducted to a non-Convention state, then little or no recourse is available because, unless a bilateral agreement is in place, that state has no obligation to ensure the expeditious return of the child. This is problematic, as there are still countries that have not ratified the Convention.

With regard to relocation disputes, it has been established that there are different approaches in jurisdictions worldwide. The implications are far-reaching in that these differences in approach give rise to inconsistencies. If the relocation is granted, this would mean that the country to which the child is relocating will have to recognise and enforce the new contact arrangements insofar as they relate to practical implications of the relocation such as costs and travel.³⁰⁸

³⁰⁵ HCCH *Guide to good practice* (2008) xix.

³⁰⁶ Woodrow C and Du Toit C (2010) 17-10.

³⁰⁷ HCCH (Prel. Doc. No 11) 26.

³⁰⁸ HCCH (Prel. Doc. No 11) 4.

In these circumstances, two questions may reasonably be asked:

- (a) would an international instrument setting out a uniform approach be useful, and,
- (b) what does social-science research indicate as the 'right' approach to relocation applications?³⁰⁹

The answers to these questions are by no means clear-cut, as the preliminary research confirms that countries have taken many different approaches to international family relocations. There is growing interest in finding uniform principles to apply to international family relocation arrangements.³¹⁰ The Hague Convention sets out clear procedures that should be followed when dealing with an application involving child abduction, which will be discussed next.

1.2.5 Procedures and guiding principles

The Convention is clear on who should bring the application. In terms of its Article 6, member states are required to designate a Central Authority to discharge the duties imposed by the Hague Convention. In South Africa, for example, the Family Advocate,³¹¹ acting as Central Authority, is obliged to adopt an adversarial role. In other words, the Central Authority brings the application on behalf of any person, institution or other body claiming that a child has been removed or retained in breach of custody rights.³¹²

1.2.6 Burden of proof in relocation disputes *versus* burden of proof in relation to Hague Convention matters

The way in which the burden of proof is allocated in relocation cases serves as a further illustration of inconsistencies in addressing relocation disputes. In the United States, for example, there is a combination of burdens. Certain states place the burden on the custodial or residential parent to show that the move would substantially improve the child's quality of life. For instance, in Connecticut the relocating parent has the burden of proving by a preponderance of evidence that the proposed relocation is for a legitimate purpose, that it is reasonable in the light of the purpose, and that it is in the best interest of the child. Other states in America use a

³⁰⁹Boshier P (2010) 15.

³¹⁰ HCCH (Prel. Doc. No 11) 4.

³¹¹ Section 277 of Act 38 of 2005.

³¹² Article 7 of the Hague Convention.

shifting burden. In such instances, the custodial parent must prove by a preponderance of the evidence that the proposed relocation was motivated by a legitimate purpose and the relocation bears reasonable relation to that purpose; the burden then shifts to the non-relocating parent to establish why relocation would not be in the child's best interest.³¹³

The Hague Convention likewise provides for shifting burdens. If one looks at Article 12(2) of the Hague Convention, for instance, where proceedings have commenced after a year has passed since the abduction, there is a material shift in the enquiry from strict adherence with the Hague Convention principles to taking the welfare of the individual child into account.³¹⁴ In addition, when defences are raised in terms of Article 13 of the Hague Convention as to why the child should not be returned to his or her state of habitual residence, the initial hurdle for the applicant is to show that the requirements of articles 3, 4 and 5 of the Convention have been met. Thereafter the onus shifts, and it is up to the abducting parent to prove the defences in articles 12(2), 13 or 20 on a preponderance of probabilities.³¹⁵

It is recognised that in many Convention States the procedural principles applicable to general custody disputes will also apply to relocation cases, which include the allocation of the burden of proof. Because of the perception that the relocation process is too restrictive, the fear is that parents desiring to relocate may opt to take the law into their own hands and leave the country without following the required procedures for doing so. On the other hand, if the process is too liberal, the potentially left-behind parents may feel they have nothing to lose by abducting the child before the court has a chance to make the relocation decision.³¹⁶ Moreover, the cumbersome processes involved add to the frustrations of the parties, a matter which is discussed in the following section.

1.2.7 Urgency *vis-a-vis* delays caused by undefined appeal processes

The Hague Convention is intended to be a speedy remedy. Article 11 provides the remedy in the event of any delays, which is that if the judicial or administrative authority of the requested state

³¹³Elrod LD (2010) 55.

³¹⁴Du Toit C: 'Constitutional and International Protection of Children's Rights' 15-370.

³¹⁵*Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC); *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA); *KG v CB* [2012] JOL 28641 (SCA).

³¹⁶Freeman M (2010) 105.

has not reached a decision within six weeks from the date of commencement of the proceedings, the Central Authority of the requested state has the right to request reasons for the delay.

The reality is that the legal systems of many countries are not designed to determine issues within six weeks. It will therefore be advantageous to the parent who has abducted the child to prolong the return. The longer the child is away from the country of habitual residence, the more difficult any decision to return the child will become. The Central Authority has an obligation to bring all Hague Convention matters on an urgent basis or request preferential dates for the hearing. Usually oral evidence is not led. Many judges have an inherent aversion to summary pronouncements in which a party is prohibited from giving evidence.³¹⁷

A party has the right to appeal the finding of a court and cannot be denied this right. In some countries such as South Africa there is a hierarchy within the courts system: for example, if the parent is dissatisfied with the outcome in the High Court, the next option is the Supreme Court of Appeal and the Constitutional Court, if a constitutional ground for the appeal can be adduced. If the time period were to be calculated, the expeditious remedy envisaged by the Hague Convention will be of no value. In that case a final determination whether the child should be returned can take up to 12 months or more.³¹⁸ Although Article 12 of the Hague Abduction Convention contains an exception to the mandatory return of the child where the proceedings were launched more than a year after the abduction and it is demonstrated that the child is settled in his or her new environment, both of these questions would have to be proven before the court has the discretion to refuse the return of the child.³¹⁹

The challenge is to find common principles to apply to international family relocation as well.

2. WHY AN INTERNATIONAL PROTOCOL IS DESIRABLE

In the past decade the Hague Conference's work has reflected both the increasing importance of the question of international family relocation as well as the ongoing effort to achieve greater international consistency in the approach to cross-border relocation disputes. As early as 2001,

³¹⁷Nygh P 'The international abduction of children' in Jaap Doek, Hans van Loon and Paul Vlaardingerbroek's *Children on the Move: How to Implement their right to family life* (1996) 35.

³¹⁸Nygh P (1996) 36.

³¹⁹ Article 18 of the Hague Convention still allows the court the unfettered discretion to order the return of the child even if it is demonstrated that the child has settled in his/her new environment.

the Special Commission established to review the operation of the 1980 Convention³²⁰ had noted a connection between the occurrence of abduction and situations where a parent who is the primary caregiver obtains permission from a court to relocate to another jurisdiction with the child but finds that contact orders made in that context are not respected in the country to which the parent and child have relocated. It was recognised that this kind of situation could affect the willingness of judges to allow relocation, which may in turn encourage abductions by primary caregivers.³²¹ The Special Commission has discouraged this type of unlawful, unilateral action taken by parents, and encouraged attempts to resolve differences among the legal systems in order arrive at a common approach to, and common standards for, relocation.³²²

The next section focuses on some of these recommendations and comments

3. RECOMMENDATIONS AND COMMENTS

3.1 Attempts to agree on common standards in relocation disputes

In the emerging jurisprudence on relocation it is acknowledged that there is a need for greater consistency in view of wide international divergence in approaches to relocation. The debate has migrated into the realm of international family law, where there appears to be recognition of the benefits of a uniform approach.³²³ Some such attempts are examined below.

3.1.1 2008 National Conference of Commissioners on Uniform State Law

In countries such as the USA numerous efforts have been made to achieve uniformity in the domestic approach to relocation across 50 states. In 2008, the National Conference of Commissioners on Uniform State Laws drafted a model Relocation of Children Act. This Act provides a list of factors the court should consider in determining the best interest of the child, namely:

³²⁰Preliminary Document No 4.

³²¹ HCCH 'Hague Conference on Private International Law: Note International Family Relocation' drawn up by the Permanent Bureau' *Preliminary Document No 11 of January 2012 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, p6, available at www.hcch.net/index_en.php%Fact%Dp... (accessed 03 October 2012).

³²² HCCH (Prel. Doc. No 11) 7.

³²³Thorpe LJ(2010) 8.

- (a) the quality of relationship and frequency of contact between the child and each parent;
- (b) the likelihood of improving the quality of life of the child;
- (c) the views of the child (depending on the child's age and maturity; and,
- (d) the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the child.

Unfortunately, there has been no agreement, and each state still applies its own law. The divergent approaches to the burden of proof and application of presumptions in relocation cases have proven to be some of the issues causing difficulty in arriving at domestic agreement. It is encouraging, nevertheless, that there are ongoing efforts to achieve uniformity in family law systems in order to establish greater international consistency in with regards to relocation.³²⁴

3.1.2 International Family Justice Judicial Conference

At the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions 2009, hosted by Lord Justice Thorpe and his Office on International Family Justice, several resolutions concerning relocation were taken, namely:

- (a) that common principles should be applied, both nationally and internationally, in the judicial resolution of relocation disputes in the best interests of the children;
- (b) participating jurisdictions should ensure that relocation disputes are resolved as speedily as possible; and,
- (c) more research and longitudinal studies should be conducted into the impact of relocation decisions on the children and parents concerned, whether relocation is permitted or not (including comparative studies on the impact of the non-custodial parent's decision to relocate).³²⁵

3.1.3 The International Conference on Cross-Border Family Relocation

The Hague Conference on Private International Law and the International Centre for Missing and Exploited Children³²⁶, with the support of the US Department of State, hosted The

³²⁴Taylor N and Freeman M (2010) 25.

³²⁵Taylor N and Freeman M (2010) 25-26.

³²⁶ICMEC.

International Conference on Cross Border Family Relocation in Washington DC, USA.³²⁷ The purpose for the conference was to develop a better understanding of the dynamics of relocation and the factors which are germane in judicial decision-making.³²⁸ At the end of the conference the delegates issued and adopted a document called the 'Washington Declaration on International Family Relocation'. This declaration makes 13 recommendations, which includes a list of 13 principles to guide a judge confronted with a relocation dispute.³²⁹ The declaration has several key features:

- (a) it emphasises that the best interests of the child should always be the paramount consideration, without any presumptions for or against relocation;
- (b) it was decided that reasonable notice should be given of the relocating parent's intention to the parent left behind in the move;
- (c) it highlights the objective of achieving voluntary settlement of relocation disputes through mediation and similar facilities;
- (d) it stresses the importance of having systems in place to ensure the enforcement of the orders for relocation and access regulations in the state of destination;³³⁰
- (e) it identifies the need for closer international judicial co-operation in relocation matters, and suggests that, in order to achieve this, there needs to be a more consistent judicial approach towards relocation cases;³³¹ and,
- (f) it recognises that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.³³²

3.1.4 The International Child Abduction, Forced Marriage and Relocation Conference

At the International Child Abduction, Forced Marriage and Relocation Conference, hosted by the Centre for Family Law and Practice at London in 2010, conclusions and resolutions were

³²⁷ Conference held in March 2010 was attended by 50 judges and experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, the United Kingdom and USA.

³²⁸ Taylor N and Freeman M (2010) 26.

³²⁹ Boshier P (2010) 17-18.

³³⁰ HCCH (Prel. Doc. No 11) 7.

³³¹ The Washington Declaration on International Family Relocation recorded the agreements the judicial delegates and other experts reached. Point 4 stated: 'In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively by the following factors ...'

³³² Taylor N and Freeman M (2010) 26; point 12 of the Washington Declaration.

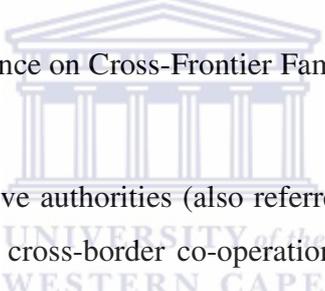
reached on the approach to be adopted for international relocation disputes.³³³ The Washington Declaration's call for further research was also endorsed.^{334,335}

3.1.5 Guides to Good Practices

Areas of good practice as well as shortcomings are contained in the various Guides to Good Practices of the Hague Conference on Private International Law. These Guides look at enforcement and makes concomitant recommendations.³³⁶ The Guide to Good Practice on Preventative Measures (2005) and the Guide to Good Practice on Transfrontier Contact (2008) specifically address international family relocation. Both Guides emphasise the importance of ensuring the recognition and enforcement in the country of relocation of contact orders made within the context of international family relocation.

3.1.6 The Second Malta Judicial Conference

The Second Malta Judicial Conference on Cross-Frontier Family Law Issues, held in 2006, made the following recommendations:

- 
- (a) The centralised administrative authorities (also referred to as Central Authorities) which act as a principal point for cross-border co-operation in securing cross-frontier contact rights and in combating the unlawful transfer and retention of children should:
 - (i) be professionally staffed and sufficiently resourced;
 - (ii) there should be consistency in their operation;
 - (iii) they should have internal links with child protection, law enforcement and other related services.
 - (b) They should ensure that externally they should have capacity to co-operate effectively with central authorities in other countries.
 - (c) Their role to promote the amicable resolution of cross-frontier disputes concerning children was emphasised.

³³³ Conference attended by 150 participants from 18 jurisdictions; Paragraph 7, International Relocation of Children, endorsed the view of The Washington Declaration of the necessity of additional research in the area of relocation

³³⁴ Para 7.

³³⁵ Taylor N and Freeman M (2010) 26; see also Professor William Duncan 'Keeping the 1980 Hague Child Abduction Convention up to Speed. Is it time for a Protocol?' (2010) 1.3 *Journal of Family Law and Practice* 6.

³³⁶ Lowe N, Patterson S, and Horosova K: 2007 Good Practice Report on Enforcement Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction- available at www.icmec.org/en_X1/icmec_publicati... (accessed on 08 October 2012).

- (d) International family mediation and conciliation was strongly recommended as a means to resolving relocation disputes. Emphasis was placed on encouraging the facilitation of parental agreements without causing unnecessary delays. (The incorporation of mediation into relocation disputes is discussed further in this chapter.)
- (e) It was acknowledged that procedures for parental agreements needed to be put in place in order for them to be judicially approved and made enforceable in the countries concerned.³³⁷
- (f) If agreements were to fail, then there should be processes in place to facilitate the speedy and effective access to court.
- (g) It was found to be in the interest of the children that uniform rules of jurisdiction should apply and that custody and contact orders made on the basis of those rules should, as a general principle, be recognised in other Convention states. The reasoning was that competing jurisdictions add to family conflict, discourage parental agreement, and can encourage the unlawful removal or retention of children.
- (h) Many states are now seemingly considering implementation of the uniform rules of jurisdiction set out in the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Permanent Bureau of the Hague Conference on Private International Law was encouraged to provide states, on request, with technical assistance in this process.
- (i) Specialised family courts in various jurisdictions were welcomed.
- (j) The establishment of the international network of liaison judges was encouraged, as was appointing liaison judges to states not party to The Hague Children's Conventions. (The point is discussed in more detail later in this chapter.)³³⁸

3.1.7 The Third Malta Judicial Conference

³³⁷ HCCH 'Hague Conference on Private International Law: Second Malta Judicial Conference on Cross – Frontier Family Law Issues Hosted by the Government of Malta in Collaboration with the Hague Conference on Private International Law.' (On 19-22 March 2006) At p7- available at www.hcch.net/index_en.php%3Fact%3De... (accessed on 08 October 2012).

³³⁸ HCCH 'Second Malta Judicial Conference' (2006) 8-9.

The Third Malta Judicial Conference on Cross-Frontier Family Law Issues, held in 2009, made the following recommendations:

- (a) In the interest of international child protection, ongoing efforts should be made to improve co-operation at the judicial and administrative levels between states (both Hague and non-Hague Party States). ‘Non-Hague State Parties’ should be encouraged and assisted in developing the capacities and structures which enable such co-operation to take place. Continuing efforts should also be made to cultivate reciprocal trust and understanding between ‘Hague State Parties’ and ‘non-Hague State Parties’.³³⁹
- (b) Parties were encouraged to consider ratifying the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children and The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Parties were encouraged to understand the benefits of a legal framework for the resolution of international disputes concerning:
 - (i) custody and contact with children; and,
 - (ii) for the protection of children at risk in cross-border situations.³⁴⁰
- (c) It was recognised that there is a need for legal co-operation in child protection matters between states in different jurisdictions, and more specifically that there should be mutual recognition of decisions based on common grounds of jurisdiction. In the absence of common grounds of jurisdiction and recognition, the legal means should exist to replicate a foreign decision under domestic law.³⁴¹
- (d) The urgent need to develop a more effective structure for the mediation of cross-border family disputes was recognised between a State Party to the Hague Convention and a non-State Party. It was recommended that a Working Party,³⁴² under the guidance of the Hague Conference on Private International Law, be established to draw up a plan of action for the development of mediation services to assist in the resolution of cross-

³³⁹ HCCH ‘Hague Conference on Private International Law: Third Malta Judicial Conference on Cross – Frontier Family Law Issues Hosted by the Government of Malta in Collaboration with the Hague Conference on Private International Law’ (24 March 2009) At p3- available at www.hcch.net/index_en.php%3Fact%3De... (accessed on 08 October 2012).

³⁴⁰ HCCH ‘Third Malta Judicial Conference’ (2009) 3.

³⁴¹ For example, by a ‘mirror’ order; see also HCCH ‘Third Malta Judicial Conference’ (2009) 3.

³⁴² The Working Party should comprise experts drawn from the States concerned, as well as independent experts with experience and expertise in the field of international family mediation.

frontier disputes concerning custody of, and contact with, children. It was also recommended that they should be guided by the principles contained in the United Nations Convention on the Rights of the Child and, in particular, ‘the right of the child to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contact with both parents’.³⁴³ Structure and methods of mediation should be promoted which:

- (i) are compatible with different legal and administrative systems;
- (ii) are capable of utilising existing resources available in private and public sectors;
- (iii) are respectful of the rights of the parties including the child;
- (iv) ensure fairness between the parties within the mediation process and respect cultural differences;
- (v) operate within, or in conjunction with, existing legal procedures;
- (vi) are without prejudice to the rights of the parties to have access to judicial proceedings; and,
- (vii) avoid delay or the misuse of mediation to impede the progress of legal proceedings.

Practical measures to ensure that agreements successfully mediated should be considered as well as their legal enforceability in countries. The Working Party was tasked with establishing potential methods in which states could facilitate access to mediation services, including the dissemination of mediation services internationally, in order to assist in initiation in international cases.³⁴⁴

- (e) Direct judicial communications in international child protection cases was emphasised. States were encouraged to designate International Hague Network Judges, including states which are not parties to the relevant Hague Conventions. If necessary, the Permanent Bureau could be of assistance in regard to the designations. The criteria set are that the judges who are designated should be sitting judges with appropriate authority and experience in the area of international child protection. In this process for the designation

³⁴³ Article 9(3) UNCRC.

³⁴⁴ HCCH ‘Third Malta Judicial Conference’ (2009) 4.

of International Hague Network Judges, the independence of the judiciary should be respected.³⁴⁵

- (f) It was recognised that judges and other professionals from ‘Hague State Parties’ and ‘non-Hague State Parties’ who deal with international family disputes and child-protection matters should have opportunities to increase their knowledge and understanding through:
- (i) information sessions;
 - (ii) seminars and conferences;
 - (iii) participation in judicial networks; and,
 - (iv) receiving ‘The Judges Newsletter on International Child Protection’.^{346,347}
- (g) The issuing of a visa, passport or other travel document to enable a parent to have contact with his or her child remains a contentious issue. Authorities deciding whether or not to issue a visa, passport or other travel document for this purpose should be mindful of, and take into account, the rights and welfare of the child, as well as that of the parent.³⁴⁸

3.1.8 The Special Commission held on 25-31 January 2012

The Special Commission, held in 2012, made the following conclusions and recommendations with regard to international family relocation:

- (a) It recognised that the Washington Declaration was an important basis for further work and reflection.³⁴⁹
- (b) It supported further study and information-gathering concerning the different approaches adopted in various legal systems to international family relocation, specifically in relation to private international law issues and the application of the 1996 Convention.³⁵⁰
- (c) It recognised the value of the 1996 Convention in relation to international family relocation and encouraged states to consider ratifying the Convention.³⁵¹

³⁴⁵ HCCH ‘Third Malta Judicial Conference’ (2009) 5.

³⁴⁶ Published by the Permanent Bureau and available on the Hague Conference website at www.hcch.net under ‘Publications’.

³⁴⁷ HCCH ‘Third Malta Judicial Conference’ (2009) 5.

³⁴⁸ HCCH ‘Third Malta Judicial Conference’ (2009) 6.

³⁴⁹ Para 83.

³⁵⁰ Para 84.

³⁵¹ Para 85; HCCH ‘Hague Conference on Private International Law’ Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (25-31 January 2012) Conclusion s and Recommendations (Part II)

- (d) The Special Commission also recommended that the Permanent Bureau:
- (i) promote the use of the Emerging Guidance and General Principles on Judicial Communications; and,
 - (ii) continue to encourage the strengthening and expansion of the International Hague Network of Judges.³⁵²
- (e) The general continuation of the Malta Process and a Fourth Malta Conference were supported. The Special Commission suggested that future emphasis be placed on the involvement of government representatives in the process.³⁵³
- (f) It was recommended by the Special Commission that the Hague Conference on Private International Law, through its Permanent Bureau, continue its work to support the effective practical operation of the 1980 and 1996 Convention by inter alia:
- (i) focusing on the promotion, implementation and effective practical operation of the 1980 and 1996 Conventions;
 - (ii) encouraging regional activities including conferences, seminars and training; and,
 - (iii) considering ways to enhance the effectiveness of Special Commission meetings to review the practical operation of the 1980 and 1996 Conventions.³⁵⁴

The above recommendations and comments, emanating from conferences worldwide, have made proposals about how to resolve differences between legal systems in order arrive at common standards for, and a common approach to, relocation. Many of the proposals concern speedy finalisation of relocation disputes, the utilisation of mediation services, and the need to appoint specially-trained liaison judges to hear these matters. Given that such recommendations have been made at almost all of these conferences, the next section turns to examine the benefits of mediation in relocation matters and the appointment of liaison judges.

adopted by the Special Commission p2 – available at www.hcch.net/index_en.php%3Fact%3Dp... (accessed on 08 October 2012).

³⁵²HCCH ‘Special Commission’ (2012) p1.

³⁵³HCCH ‘Special Commission’ (2012) p2.

³⁵⁴HCCH ‘Special Commission’ (2012) p2.

4. MEDIATIONS IN BOTH RELOCATION AND CHILD ABDUCTION CASES

4.1 Child abduction cases

Reunite³⁵⁵ has offered a mediation service since 2002 in cases of cross-border family disputes involving children. They offer mediations in cases of international parental child abduction, contact across international borders, and relocation applications. Their primary focus is on the best interest of the child and ensuring that the child continues to have a positive relationship with both parents and the extended family.³⁵⁶

In the USA, mediation is available through an independent charity known as Child Find of America. The programme is designed to prevent parental abduction and to return parentally abducted children to a legal environment through free, confidential dispute resolution.³⁵⁷ Mediation services are also offered in Australia in cases of child abduction. Respondents are offered assistance in coming to terms with return decisions or in achieving voluntary returns.³⁵⁸

Duncan³⁵⁹ has identified several challenges facing the Hague Convention, among them the following: 'How to build a culture of negotiation and agreement around issues of relocation and contact, and how to develop the use of mediation and similar dispute-resolution approaches where abductions have occurred'.³⁶⁰ The thinking is that if matters are mediated, there will be a speedier remedy than if the processes set out in the Hague Abduction Convention are followed; the latter have proven less expeditious than desired. Mediation procedures may therefore be used

³⁵⁵ UK-based charity specialising in international parental child abduction available at www.reunite.org/ (accessed on 2 October 2012).

³⁵⁶ 2007 Good Practice Report on Enforcement under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction p13 available at www.hcch.net/index_en.php%3Fact%3Dc (accessed on 09 October 2012); Carter D 'Mediation and Relocation: The use of mediation in relocation cases' -

HCCH: Special Edition No. 1 'International Judicial Conference on Cross-Border Family Relocation' (23-25 March 2010) *The Judges' Newsletter on international Child Protection Edition 78* available at http://www.hcch.net/index_en.php?act=publications_details&pid=5260 (accessed 09 October 2012);

³⁵⁷ The programme also offers a national network of volunteer professional mediators experienced in divorce, custodial and family mediation.

³⁵⁸ 2007 Good Practice Report on Enforcement under the Hague Convention p44.

³⁵⁹ Deputy Secretary General, Hague Conference on Private International Law.

³⁶⁰ Duncan W (2010) 4.

in an attempt to obtain the voluntary return of the child and facilitate reestablishment of normal family relations after the return has been affected.³⁶¹

From the foregoing it would appear that mediation services are being used successfully in child abduction cases internationally.³⁶² Because mediation is a relatively new concept in this area of international family law, it is important that cases which are mediated be monitored and evaluated to assess the long-term effectiveness, as well as successes and failures, of the mediated agreements. It has been suggested that there be central entry-points for these cases so that they can be tracked to ensure uniformity in the application of the Convention.³⁶³

It is submitted that currently there is sufficient indication that mediation could prove useful in relocation cases. It is therefore worth considering what approaches have been taken in utilising it.

4.2 Relocation Cases

As mentioned, Reunite³⁶⁴ conducts mediation services in parental child abduction cases, and it was suggested that their research project could also be useful to parents in international relocation cases. The Hague Conference on Private International Law has considered mediation in terms of both international child abduction and wider cross-border matters, and a continuous feasibility study on cross-border mediation in family matters is being undertaken at the recommendation of the Council on General Affairs and Policy of The Conference. It has been recognised that international child abduction cases involve many of the same issues as relocation cases.

While mediation is not necessarily the solution for all disputes, the notion of using it in resolving relocation disputes should not be dismissed out of hand: it is said that, in the hands skilled and experienced specialist practitioners, mediation is able to produce successful results.³⁶⁵ Feedback on Reunite's mediation services indicates that agreements reached in mediation have a better

³⁶¹ Nicholson C 'Introduction to the Hague Convention on the Civil Aspects of International Child Abduction' [Chapter 13] in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 232-235.

³⁶² HCCH (Prel. Doc. No 11) 14.

³⁶³ Carter D (2010)78-79.

³⁶⁴ "Mediation in International Parental Child Abduction", October 2006- Reunite research report at <http://www.reunite.org> (accessed 13 November 2012).

³⁶⁵ Freeman M (2010) 105-106

prospect of working than those ordered by the court without the input of parents.³⁶⁶ Mediation is increasingly used in America, for example, to resolve child relocation disputes. Several states have incorporated mediation into their family dispute-resolution regimes.³⁶⁷ A further potential advantage of mediation is that it could be beneficial to parties who are unable to afford expensive court litigation.³⁶⁸

The question which remains is whether the option of mediation should be incorporated into a protocol for regulating international relocation disputes.

4.3 The way forward in respect of mediation

The 2006 Special Commission supported a child-friendly approach to relocation disputes, suggesting that it is better if an agreement is reached between parents. It was acknowledged that, seen within this context, mediation has a significant preventative role to play. Views differ on which vehicle – be it domestic law, the Guide to Good Practice on Mediation under the 1980 Convention,³⁶⁹ or another means – should be used to promote amicable agreement, but there is nevertheless support in principle for the use of mediation. As noted, it is believed that, with the aid of skilled practitioners, mediation provides an environment where issues can be successfully addressed; it has also been suggested that the same level of success may be achieved in cases of relocation.³⁷⁰

This reinforces a key argument made in this study, namely, that there exists a definite link between child abductions and relocations; the contention throughout this thesis has been that were there an alternative route available to them, parents would be much less inclined to take the law into their own hands by abducting their children. Recently there have been fewer reported relocation applications in South Africa, and it is surmised that the reason is that more disputes are now being mediated. Given the successful use and implementation of mediation processes by other countries, it is clear that they are valuable and should be incorporated into the

³⁶⁶ Cater D (2010) 78.

³⁶⁷ Messitte PJ and Kreeger JL 'Relocation of Children: Law and Practice in the United States' (2010) 1.2 *Journal of Family Law and Practice* 65.

³⁶⁸ Messitte PJ and Kreeger J (2010) 66.

³⁶⁹ HCCH (Prel. Doc. No 11) 9.

³⁷⁰ Freeman M (2010) 106.

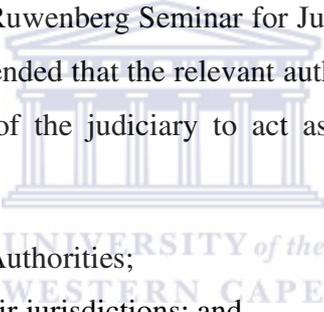
protocol document on relocation, potentially as one of the preliminary steps to be followed before the formal proceedings.

The next section examines the role under the Hague Convention of liaison judges, who perform a crucial function in facilitating the exchange of information, knowledge, experience and expertise in relation to child protection across international borders. Given the importance of this function in working towards international consistency and uniformity, the question presents itself: Should the use and role of these judges be incorporated into an international protocol?

5. THE ROLE OF LIAISON JUDGES

5.1 Under the Hague Convention

The concept of an International Hague Network of Judges specialising in family matters was initially suggested at the 1998 De Ruwenberg Seminar for Judges on the International Protection of Children. There, it was recommended that the relevant authorities in the different jurisdictions designate one or more members of the judiciary to act as a conduit of communication and liaison:

- 
- (a) with their national Central Authorities;
 - (b) with other judges within their jurisdictions; and,
 - (c) with judges in other Contracting States relating to issues relevant to the 1980 Hague Child Abduction Convention.

The rationale was that such a network would assist communication and co-operation between judges at the international level and thereby promote the effective operation of the 1980 Hague Convention.³⁷¹ After its inception, there was great support for the expansion of the Network at both the Fourth and Fifth meetings of the Special Commission for reviewing the operation of the 1980 Hague Convention. The reasoning was that the Network would provide transparency, certainty and predictability to communications both for the judges involved as well as the parties

³⁷¹ HCCH 'Hague Conference on Private International Law: Emerging Rules Regarding the development of the international Hague Network of Judges and draft general principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the international Hague network of judges' Prel. Doc. No 3 A (March 2011) at p6 – Revised of July 2012, available at www.hcch.net/index_en.php%3Fact%3Dp... (accessed 09 October 2012); see also Griesel B (2008) 24-252.

and their representatives.³⁷² The idea, moreover, is that these judges understand and respect the legal requirements of the respective jurisdictions and ensure that communications are carried out in a cost-effective, timeous way without compromising judicial independence.³⁷³

Another important role of the liaison judge is to act as a teacher with the objective of training judges locally as well as in other jurisdictions. This would prove especially critical in countries without specialised family courts, given that judges need training to be able to understand the Convention and make decisions appropriately aligned with its aims. As such, it is clear that the designation of liaison judges would promote international consistency.³⁷⁴

Liaison judges are appointed to assist networking between judges concerned with international child protection. Flowing from this, it has been suggested that an international database be established containing relevant information about laws and procedures in each Convention state. The information provided via the judges should convey significant decisions and other judicial measures to the Hague Conference with a view to their inclusion in the existing International Child Abduction Database (INCADAT).³⁷⁵

It is interesting that, while the concept of a 'liaison judge' is not mentioned in the 1980 Hague Convention, the designation of liaison judges is being promoted primarily to facilitate uniformity and consistency in approaches to this area of family law. The support for liaison judges is evident from various international conferences. The question which has to be answered now is whether the concept of liaison judge is important in relocation matters and, more pertinently, whether it should be incorporated into the protocol for regulating relocations.

5.2 Liaison judges in respect of relocation cases

It is generally accepted that relocation disputes are among the most difficult matters for judicial officers to adjudicate.³⁷⁶ In the earlier discussions about relocation, it was established that very often similar facts may give rise to differing outcomes, and primarily so because of the way in

³⁷² HCCH 'Prel. Doc.No 3 A' (2011) 7.

³⁷³ HCCH 'Prel. Doc.No 3 A' (2011) 8 and 12.

³⁷⁴ Griesel B (2008) 252.

³⁷⁵ HCCH 'Hague Conference on Private International Law: The Malta Judicial Conference on Cross – Frontier Family Law Issues Hosted by the Government of Malta in Collaboration with the Hague Conference on Private International Law.' (On 14-17 March 2004) 11.

³⁷⁶ Boshier P (2010) 10.

which the judges interpret the issues.³⁷⁷ It is for precisely this reason that the urgent call is being made for instituting an internationally uniform approach to relocation matters.³⁷⁸ The challenges that judges face arise because so little is known about:

- (a) what is good for children generally;
- (b) assessing the strengths and weaknesses of parent-child relationships in a particular family; and,
- (c) predicting what impact any decision will have on any particular child and the members of that child's family.³⁷⁹

5.3 Position in respect of South Africa

The importance of South Africa's joining the network of judges was established more than ten years ago.³⁸⁰ South Africa duly joined the International Hague Network of Judges, and Judge Belinda Van Heeden has been the International Liaison Judge for South Africa since 1998.³⁸¹

5.4 The way forward

It is remarkable how fast this judicial network is growing,³⁸² so much so that it also includes two members from non-States Parties³⁸³ to the 1980 Hague Convention. The office of the liaison judge has been encouraged to play a greater role in respect of direct judicial communications around relocation matters; more specifically, that role is to:

- (a) establish a relocation order;
- (b) recognise and enforce a relocation order;
- (c) potentially give effect to a 'mirror order'; and,
- (d) modify a relocation order, where necessary and possible.³⁸⁴

³⁷⁷Boshier P (2010) 10.

³⁷⁸Taylor N and Freeman M (2010) 19.

³⁷⁹Elrod LD (2010) 52.

³⁸⁰Griesel B (2008) 253.

³⁸¹ Available at http://www.justice.gov.za/sca/judges_cv.html (accessed 14 November 2012).

³⁸² The Network now includes 48 Network Judges from 35 States, which includes Costa Rica, Finland, Germany, Israel, Kenya, Nicaragua, South Africa, Spain and Venezuela..., available at www.hcch.net/./genaff2011pd03e.pdf (accessed on 09 October 2012).

³⁸³Gabon and Kenya.

³⁸⁴Lortie P 'Judicial Networking and Direct Judicial Communications' available at http://www.hcch.net/index_en.php?act=publications.details&pid=5260 (accessed on 09 October 2012) under Special

From the foregoing it is apparent that liaison judges have a vital role to play in relocation applications. Their role and function is clearly defined, and it has been established that they will be instrumental in facilitating uniformity and consistency in family law, especially in relation to the protection of children. It is submitted that the designation of liaison judges should be incorporated into the protocol regulating relocation and that they be given clearly-specified roles and functions therein.

6. EXAMPLE OF A PARALLEL INSTRUMENT TO THE HAGUE CONVENTION

6.1 The Luxembourg Convention

The Luxembourg Convention³⁸⁵ follows a similar pattern to the Hague Convention, a notable difference being that it allows the decision to be made in the state of origin after the removal of the child has been declared ‘improper’. Almost all members of the Luxembourg Convention are also parties to the Hague Convention, and as such applications can be brought concurrently under both conventions.³⁸⁶ This example strengthens the argument that a parallel instrument could address shortcomings in the Hague Convention by regulating relocation disputes.

7. SOUTH AFRICA

Owing primarily to a lack of legislative guidelines for assisting courts in their decision-making, the South African approach to relocation has not been consistent, and under the circumstances it is submitted that a model Relocation Act fashioned along the same lines as those of the AAML would be beneficial in a country with no clear guidelines on the topic, save for the diversity of approaches that are reflected in its jurisprudence.

8. PROPOSED CONTENT OF THE INSTRUMENT

With the need for a protocol having been identified, it is necessary to consider the nature of its content. At this stage, guidance can be taken from the factors listed in section 3.1.1 above; these are foundational to the Model Relocation Act, and entail considerations such as whether

Edition No. 1 ‘International Judicial Conference on Cross- Border Family Relocation’(2010) *The Judges’ Newsletter on international Child Protection Edition* 90-91.

³⁸⁵Nygh P(1996) 29 ‘The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children done on 20 May 1980 at Luxembourg under the auspices of the Council of Europe (The “Luxembourg Convention”)’.

³⁸⁶Nygh P(1996) 30-31.

relocation would improve the quality of life for the child, the child's participation (depending on his or her age and maturity), and measures to preserve the child's relationship with the left-behind parent. These are among the considerations that should be included in the protocol. In addition, monitoring procedures should be set in place in the form of compulsory follow-up after relocation to observe what happens once the child is relocated. This will assist in establishing the practical aspects of court orders and checking on the well-being of the child.³⁸⁷

Careful consideration must also be given to the vehicle to be used. Several possibilities present themselves, one of which is the Hague Conference on International Private Law. If so, then the negotiations and adoption of a protocol would involve all Contracting States and be based on consensus. Once the content of a protocol has been agreed to, it would be for each Contracting State to decide independently whether to ratify it. Therefore, each provision must be carefully weighed to attract buy-in from member states. The challenge is whether enough consensus could be reached to make the protocol a success.³⁸⁸

9. CONCLUSION

The connection between the Hague Convention and international relocation disputes has been firmly established. Loopholes in the processes were identified to cement the argument that there is a need for gaps to be closed. The recommendations and comments flowing from debates at various international conferences were examined and taken as suggestive indicators of the global legal community's views on the challenges surrounding child abductions and relocation disputes.

The following, and concluding, chapter extrapolates key issues highlighted in Chapters 2, 3 and 4, and thereby solidifies the argument that a universal approach is required if relocation disputes are to be addressed with efficacy, justice and the curtailment of harmful sequelae.

³⁸⁷Freeman M (2010) 105.

³⁸⁸Duncan W (2010)8.

CHAPTER 5

1. SUMMATION

1.1 Summation with regard to the effectiveness of the Hague Convention

While the Hague Convention has been lauded as an international treaty that has stood the test of time, international child abductions remain a real problem. A number of challenges facing the Hague Convention were identified.³⁸⁹ One of the main challenges relates to the more universal adoption of the Convention and also raises the question of whether it has indeed had the desired overall effect of deterring parents from abducting their children. In the analysis of the emerging international jurisprudence on child abduction, it became apparent that in many instances this primary objective is thwarted by cumbersome processes and protracted return remedies.

Global approaches to abduction reveal significant disparities and indicate that the challenge is to ensure that international consistency is maintained in the interpretation of key concepts such as 'rights of custody' and 'rights of access' within the meaning of the Convention. The need to improve support for cross-frontier rights of contact between parents and children was identified.

It emerged that countries such as the USA, England and Australia have incorporated additional domestic laws and protocols in an attempt to close gaps. If the Hague Convention were sufficient in itself to prevent child abduction, there would be no need for countries to supplement their laws in this manner.

Despite the existence of protocols such as the Hague Convention and Luxembourg Convention, the problem of child abduction has not yet been entirely eradicated.³⁹⁰ It was suggested that if international relocation disputes were properly regulated, parents would not choose the extreme course of abducting their children.

³⁸⁹Duncan W (2010)5.

³⁹⁰Nicholson C (2000) 232-233.

1.2 Summation with regard to relocation disputes

Relocation disputes are regarded as one of the most difficult issues in the realm of international family law as they affect the entire family in multiple ways. There is a clear lack of legislative guidelines to assist courts in making decisions around relocation.

In Chapter 3, diverse approaches were examined in various jurisdictions to establish the trends in this area of international jurisprudence. Certain legal systems adopted neutral, pro- or anti-relocation stances. In each of these approaches, the best interest of the child was applied and interpreted differently.³⁹¹

In view of these global trends and the increase in relocation applications, an urgent plea has been made for greater consistency in the approaches to relocation cases.

1.3 Recommendations

Several compelling suggestions have emerged at various legal conferences, and there is reason to believe that in due course the Permanent Bureau will be able to drive the process of shaping an international instrument for bringing about uniformity and consistency in approach to relocation.

The need has been recognised for legal co-operation in child protection matters between states. The debate has entered the realm of international family law, and numerous attempts have been made for states to agree on common standards in relocation disputes. There is also widespread recognition of the benefits of a uniform approach.

2. THE WAY FORWARD

Mutual understanding and trust between different legal systems should be promoted to ensure the success of any instrument regulating relocation.³⁹² Lord Justice Thorpe, a vigorous advocate for the principle of a common international standard, has stated:

There is every reason to favour a common standard adopted internationally. This could be achieved by a Convention or Protocol made available for ratification among the member states to The Hague Abduction Convention. States operating the Convention

³⁹¹Taylor N and Freeman M (2010) 25.

³⁹²Duncan W (2010) 5.

should support the creation of a parallel instrument standardising the factors to be taken into account in granting or refusing an application for lawful removal...³⁹³

The writer shares this view and agrees that parties who are members to the Hague Convention should be approached to support the protocol regulating relocation disputes.

3. CONCLUSION

It is clear that the international legal community is moving towards like-mindedness in respect of the way that relocation disputes should be addressed. The thinking in this rapidly developing discourse is certainly a positive step. The challenge which remains is that this meeting of minds needs to become a sharing of hands put to action. It is submitted that a comprehensive argument has been made in these pages for a parallel protocol regulating relocation disputes. Its primary objective would be to create uniformity and consistency in the global approach to relocation disputes; its focus would be on the protection of children and their interests, a matter that should always be of paramount importance.

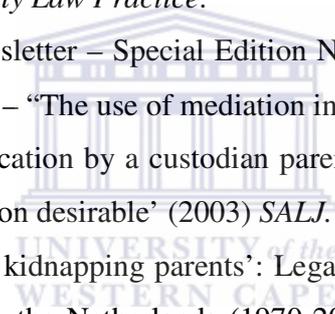


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³⁹³Thorpe LJ (2010) 9.

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