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# INTERNATIONAL CHILD RELOCATIONS FROM U.S. STATES

*Jeffrey A. Parness\**

## I. INTRODUCTION

Child caretaking in the United States today frequently is undertaken by two or more adults who do not operate under court orders or private agreements. The adults may, but need not then, be parents under law.<sup>1</sup> There are usually constraints on one of the adults who desires to relocate with the child within his/her state or to another American state.<sup>2</sup> When an international relocation with the child is desired, moves from any American state are governed by The Hague Convention on Civil Aspects of International Child Abduction (“Convention”).<sup>3</sup> Here, *inter alia*, issues arise regarding the child’s “habitual residence,” as well as who possesses “rights of custody” and whether there had been exercises of such custodial rights by the nonrelocating child’s caretakers.<sup>4</sup>

Though the Convention guides only international child relocations, it generally defers to the American state custody laws in the states of the children’s “habitual residences.”<sup>5</sup> While common sense suggests the principles guiding international relocations should be comparable to, if not more difficult than, intrastate or interstate moves, surprisingly this is sometimes not the case, as illustrated by a 2016 Seventh Circuit ruling on an international child relocation from Illinois.<sup>6</sup>

While the issue of “habitual residence” has been deemed “pivotal” in many international child relocation cases, receiving much attention,<sup>7</sup> this

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<sup>1</sup> See Junc Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1297 (2005).

<sup>2</sup> See Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1753–54 (2007).

<sup>3</sup> International Child Abduction Remedies Act, 22 U.S.C. § 9001 (1988); see also Maryl Sattler, Note, *The Problem of Parental Relocation: Closing the Loophole in the Law of International Child Abduction*, 67 WASH. & LEE L. REV. 1709 (2010).

<sup>4</sup> Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L. Q. 9, 10–11 (1994).

<sup>5</sup> *Id.* at 11.

<sup>6</sup> See *Martinez v. Cahue*, 826 F.3d 983 (7th Cir. 2016).

<sup>7</sup> The attention arises, in part, due to the inter-circuit split on how to assess a change in a “habitual residence.” See, e.g., *Londono v. Gonzalez*, 988 F. Supp. 2d 113, 125 n.1 (D. Mass. 2013) (describing and citing to inter-circuit differences).

article focuses on possessions and exercises of “custody rights” in Convention proceedings.<sup>8</sup> Unfortunately, here common sense is sometimes lacking. This article also comments on the challenges posed by issues of “custody rights” due to expanding U.S. state-law doctrines on de facto (and comparable) parentage, as well as on nonparent childcare orders over parental objections.<sup>9</sup>

The article concludes by urging more sensible approaches to cases involving international child relocations from the United States. It proposes that current state statutory provisions and common law rulings on intrastate and interstate child relocations be consulted, and at least somewhat employed. Further, it illustrates the challenges posed in child relocation settings by the emerging de facto parent doctrines, founded on imprecise norms typically utilized only after childcare disputes arise, as well as by nonparent childcare interests, which sometimes override superior parental rights in order to serve the best interests of children.

## II. ONE INTERNATIONAL CHILD RELOCATION FROM ILLINOIS

In *Martinez v. Cahue* in 2016, the U.S. Court of Appeals for the Seventh Circuit considered a childcare dispute involving two unwed legal parents—a birth mother and a biological father who had signed a voluntary acknowledgement of paternity (VAP) at the time of the child’s birth.<sup>10</sup> The child was born in 2006 in Illinois and was raised there until 2013 by his biological parents, who mainly lived separately but “appear to have cooperated effectively well” with respect to childcare.<sup>11</sup> The birth mother, a Mexican citizen, was the primary caretaker.<sup>12</sup> The father childcared to February 2010 through cooperative efforts with the mother;<sup>13</sup> thereafter, until the Summer of 2013 he operated under “a private written custody agreement” by which he pledged not to “fight custody in court” and he was “guaranteed ‘constant access’ and overnight visits ‘2 nights a week.’”<sup>14</sup> The agreement was never memorialized in a court order.<sup>15</sup>

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<sup>8</sup> Convention principles and resulting cases are reviewed in Silberman, *supra* note 4. See also Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494-01 (Mar. 26, 1986).

<sup>9</sup> See Silberman, *supra* note 4, at 33. See generally Carbone, *supra* note 1 (discussing the evolution of parenting as family dynamics have changed).

<sup>10</sup> *Martinez*, 826 F.3d at 987

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

In the Summer of 2013 the mother relocated with the child to Mexico, having received the father's written permission to travel to Mexico "on vacation."<sup>16</sup> Later, the parents agreed the child would visit the father in Illinois during "school vacations."<sup>17</sup> An April 2014 visit went as planned, but a Summer 2014 visit ended with the father not returning the child to Mexico.<sup>18</sup> The mother flew to Illinois in late August 2014 to "reclaim" her child, surprised the father, and took her child to her parents' home in Illinois.<sup>19</sup> That prompted an Illinois state court child custody petition by the father, who won an "emergency motion" causing the police to seize the child and return him to his father.<sup>20</sup> The mother tried, but failed, to overcome the "temporary" Illinois custody order.<sup>21</sup>

In March 2015, the mother filed a petition for custody under the Convention with the Mexican Central Authority.<sup>22</sup> In December 2015, she "commenced emergency proceedings" in an Illinois federal court seeking the child's return to Mexico.<sup>23</sup> Finding there was no "shared parental intent" for the child's relocation to Mexico, the district court deemed, under the Convention, that Illinois "remained" the child's "habitual residence" during the year the child lived in Mexico.<sup>24</sup>

On appeal, the Seventh Circuit found habitual residence of the child had been established in Mexico<sup>25</sup> and that the father's "retention" of the child was "wrongful" under the Convention.<sup>26</sup> In doing so, it determined that the father's lack of intent regarding the child's residence in Mexico had little "salience" as he "did not obtain a custody order during the time that mattered,"<sup>27</sup> which he needed to do under Illinois law per the Convention in order to avoid a presumption of sole custody in the birth mother.<sup>28</sup> This presumption was garnered from an Illinois criminal law indicating that an unwed birth mother had sole custody, and thus could relocate with the child and exercise her "exclusive right to establish" the child's "habitual

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<sup>16</sup> *Id.* The federal district court determined that the father did not know the mother intended to establish residence with the child in Mexico—a finding accepted on appeal. *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 987–88. A planned December 2013 visit did not occur. *Id.*

<sup>19</sup> *Id.* at 988.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The mother answered the petition and attended a September 17, 2014 hearing. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* She acted after learning the father had obtained a new U.S. passport for the child. *Id.*

<sup>24</sup> *Id.* This obviated any need to consider whether the child's "habitual residence" in Illinois was reestablished between July 2014 and December 2015. *Id.*

<sup>25</sup> *Id.* at 992 This was as of the time father retained the child in Illinois in August 2014. *Id.*

<sup>26</sup> *Id.* at 993.

<sup>27</sup> *Id.* at 990–991

<sup>28</sup> *Id.*

residence,” in the absence of a “valid court order” favoring the father.<sup>29</sup> Any such relocation was subject only to “scrutiny” by an Illinois court employing a child’s best interests, which would be prompted by a petition for review of a pending or completed international relocation.<sup>30</sup> Here, the court observed, there was no such petition by the father before or after the 2013 relocation to Mexico.<sup>31</sup> With this observation, the court may have recognized the father’s standing to object to a relocation under an Illinois statute while rejecting such a recognition under the Convention, which itself defers to state laws on “custody rights”<sup>32</sup>

The Seventh Circuit deemed neither the father’s VAP, nor his seven years of childcare (whether as a primary or secondary caretaker), established that he had “custody” as required by the Convention in order to make the mother’s relocation an abduction from a “habitual residence” in Illinois.<sup>33</sup> Such “custody” under the Convention was solely held by the mother in 2013 (and before and after) because the Illinois criminal statute on child abduction “presumed that, when the parties have never been married to each other, the mother had legal custody of the child unless a valid court order states otherwise.”<sup>34</sup> Here, there was no court order on custody.<sup>35</sup>

While the VAP did prompt for the father under Illinois law “all of the rights and duties of a parent,”<sup>36</sup> the Seventh Circuit distinguished a VAP, as well as any paternity court judgment and any oral or written custodial agreement, from a court custody order.<sup>37</sup> The Seventh Circuit recognized that the mother’s move to Mexico “may have violated the terms of the couple’s private custody agreement,” but it “did not violate a right of custody for Convention purposes.”<sup>38</sup>

The dependence of the father’s right of custody, for Convention purposes, on the existence of a court order was also said by the Seventh Circuit to be supported by noncriminal Illinois laws.<sup>39</sup> One such statute presumed a mother’s “legal custody” if no court order granted “custody to the father,” unless the father “has had physical custody for at least six months

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<sup>29</sup> *Id.* (citing 720 ILL. COMP. STAT. 5/10-5(a)(3) (2017)).

<sup>30</sup> *Id.* at 991 (citing 720 ILL. COMP. STAT. 5/10-5(a)(3) (2017)).

<sup>31</sup> *Id.* (“[The father] never took the proper steps to secure the rights on which he is trying to rely.”).

<sup>32</sup> *Id.* at 989.

<sup>33</sup> *Id.* at 991–92.

<sup>34</sup> *Id.* at 990–91 (citing 720 ILL. COMP. STAT. 5/10-5(a)(3) (2017)).

<sup>35</sup> *Id.* at 991.

<sup>36</sup> *Id.* (citing 750 ILL. COMP. STAT. 46/305(a) (2017)).

<sup>37</sup> *Id.* at 991–92.

<sup>38</sup> *Id.* at 992.

<sup>39</sup> *Id.* at 990.

prior to the date when the mother seeks to enforce her custodial rights.”<sup>40</sup> The federal court determined that the father’s “constant access” to, and regular “overnight visits” with, the child for at least three years under a written agreement did not constitute such statutory “physical custody,” as his pact with the mother “provided him only with agreed visitation rights.”<sup>41</sup>

A second Illinois statute simply declared that for two legal parents, “joint custody does not arise automatically.”<sup>42</sup> Rather, joint custody requires a court order upon a finding of “the best interests of the child.”<sup>43</sup> Again the court determined a custody order for Convention purposes means a joint custody, not a visitation, order.<sup>44</sup> Terminology again mattered, in a setting, incidentally, where the terms—custody and visitation—have been jettisoned from Illinois statutes and replaced by the phrases “parenting responsibilities” and “parenting time.”<sup>45</sup>

The Seventh Circuit ruling on “custody rights,” for Convention purposes, is limited to court custody orders, and thus is not inclusive of court visitation (or other) significant childcare orders benefitting nonrelocating parents.<sup>46</sup> This ruling undermines major goals of the Convention. As one court noted, in international child relocations, judges must be guided by the Convention’s purposes and “not simply look” to the relevant legal provisions in the preremoval country of habitual residence.<sup>47</sup> A key purpose is to have the preremoval country of habitual residence “decide upon questions of custody and access,” with a “strong presumption” favoring that residence.<sup>48</sup> As to the requisite that the nonrelocating parent have a right of custody which is being exercised, such a right “is to be broadly interpreted so as to bring as many cases as possible under the purview of the Convention.”<sup>49</sup>

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<sup>40</sup> *Id.* at 991 (citing 750 ILL. COMP. STAT. 45/12(a)(2) (2014) (repealed 2016)).

<sup>41</sup> *Id.* It proceeded to note that even had the agreement “spoken to custody,” the result would be the same as “Illinois courts generally do not respect private agreements affecting custody.” *Id.* (citing *In re Marriage of Linta*, 18 N.E.3d 566, 570 (Ill. App. Ct. 2014) (stating that no custody pacts are allowed in premarital agreements)).

<sup>42</sup> *Id.* (citing 750 ILL. COMP. STAT. 5/602.1(b) (2014)).

<sup>43</sup> *Id.* (citing 750 ILL. COMP. STAT. 5/602.1(c) (2014)).

<sup>44</sup> *Id.* (noting Illinois did not accord the father the “lesser right” to “determine a child’s country of residence”).

<sup>45</sup> 750 ILL. COMP. STAT. 5/600, 602.7–8 (2017)

<sup>46</sup> See *Martinez*, 826 F.3d 983.

<sup>47</sup> *Moura v. Cunha*, 67 F. Supp. 3d 493, 498–99 (D. Mass. 2014) (citing *Whallon v. Lynn*, 230 F.3d 450, 455–56 (1st Cir. 2000)).

<sup>48</sup> *Id.* at 499 (citing *Danaipour v. McLarcy*, 286 F.3d 1, 13 (1st Cir. 2002)).

<sup>49</sup> *Loftis v. Loftis*, 67 F. Supp. 3d 798, 809 (S.D. Tex. 2014) (citing *Abbott v. Abbott*, 560 U.S. 1, 19 (2010)). Outside the Convention, intrastate and interstate relocations within the United States have also prompted calls for broad recognition of the interests of all nonrelocating child caretakers. See, e.g., *American Academy of Matrimonial Lawyers Proposed Model Relocation Act: An Act Relating to the Relocation of the Principal Residence of a Child*, 10 J. AM. ACAD. MATRIM. LAW. 1, 3 (1998). Section

A court custody order has not been deemed necessary to establish “custody rights” under the Convention. Thus, the U.S. Supreme Court has recognized that a nonrelocating parent’s *ne exeat* right to consent before an international removal was a “right of custody” under the Convention, where the nonrelocating parent then only had court-ordered visitation, which was being exercised.<sup>50</sup> It did recognize that this “right of custody” must be distinguished under the Convention from “rights of access,” which do not prompt the remedy of return to the habitual residence, per court order, available to a nonrelocating parent with “rights of custody.”<sup>51</sup> “Rights of custody” “include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence,” while “rights of access” “include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”<sup>52</sup>

Concerns with the Seventh Circuit ruling go beyond disservice to the Convention’s goals involving respect for children’s initial “habitual residences.” The ruling has horrifying implications beyond unwed Illinois fathers, who, in some instances, may have been the primary or exclusive caretakers, where their opportunity for Illinois court “scrutiny” is limited to a postrelocation judicial inquiry into their children’s current best interests, assuming they know which process to employ. Consider unwed lesbian partners, whose eggs prompted births, whose childcare interests were recognized in valid, written agreements, and who childcared with the birth mothers, but who never obtained court orders before (their) children were relocated (not abducted) overseas by their birth mothers.<sup>53</sup> And consider unwed gestational surrogates who, before or after birth, relocate internationally without notice to the intended parents who failed to secure a

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101(3) defines “person” entitled to childcare to include a person “entitled by virtue of a court order or by an express agreement that is subject to court enforcement”. *Id.* But see AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.17(1) (2002) (speaking only to the effects of one parent’s relocation on another parent’s ability to exercise childcare responsibilities).

<sup>50</sup> *Abbott*, 560 U.S. at 6, 22.

<sup>51</sup> *Id.* at 9. Exceptions to the return remedy for a nonrelocating parent with custody rights include a “grave rise” of harm to the child upon return or the child’s objection, assuming the child has reached a sufficient age and maturity level so that it is appropriate to “take account” of the child’s views. *Id.* at 22 (citing Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494-01, Art. 13(b) (Mar. 26, 1986)).

<sup>52</sup> *Viragh v. Foldes*, 612 N.E.2d 241, 246, 250 (Mass. 1993) (noting that when access rights are made more difficult for nonrelocating parents, relocating custodial parents may be ordered to pay expenses related to the exercises of those access rights) (quoting The Hague Convention on the Civil Aspects of International Child Abduction; Text and Legal Analysis, 51 Fed. Reg. at Art. 5(a)-(b)).

<sup>53</sup> See, e.g., 750 ILL. COMP. STAT. 46/701 (stating that assisted reproduction births are outside the Gestational Surrogacy Act).

(child or fetal) custody order.<sup>54</sup> Finally, consider stepparents whose premarital or midmarital agreements assuring them, subject to later court oversight, of continuing parental-like, if not parental, interests in their stepchildren upon marriage dissolution are avoided by international relocations.<sup>55</sup> In all these settings, there is often little incentive for a nonbirth mother with childcare interests to secure a child custody order other than the fear of an international relocation, especially where there are recognized constraints on birth mothers to relocate with their children intrastate or interstate.

In fact, it is harder today under *Martinez* for one legal parent to relocate from a habitual residence in Illinois to another habitual residence in Illinois, or to a habitual residence in another American state, over the objection of another legal parent than it is for an unwed birth mother to relocate outside the country.<sup>56</sup> Both under the former and the current Illinois laws, intrastate and interstate relocations at the behest of a primary parental caretaker are harder than international relocations where a secondary parental caretaker has no child custody order.

As noted, in the international setting the nonrelocation childcare parent without a court custody order can only seek judicial scrutiny of any relocation under a child's current best interests test.<sup>57</sup> By contrast, in the interstate setting today in Illinois, one childcare parent has a right to a hearing before an interstate child relocation by the other parent.<sup>58</sup> A hopeful relocating married parent must seek judicial permission to relocate, whether or not the nonrelocating parent has a court order on childcare, as long as the nonrelocating parent has childcare recognized in "a written agreement that allocates significant decision-making responsibilities, parenting time, or both."<sup>59</sup> Comparable limits operate for unwed parents.<sup>60</sup> In determining whether to grant permission to relocate interstate, the best interests analysis encompasses several statutory factors, including some which focus more on

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<sup>54</sup> See, e.g., *id.* act 47/1; D.C. CODE 16-408(a) (2017) (stating that a petition for parentage in surrogacy setting "may be filed by the intended parent or parents or the surrogate").

<sup>55</sup> Since July 2012, the National Conference of Commissioners on Uniform State Laws has recognized, in its Uniform Premarital and Marital Agreements Act, the relevance of agreements on "custodial responsibility" when judges determine childcare issues upon marital dissolutions. Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343, 348 (2015).

<sup>56</sup> See *Martinez v. Cahue*, 826 F.3d 983 (7th Cir. 2016).

<sup>57</sup> *Id.* at 991 (citing 750 ILL. COMP. STAT. 45/13.5 (2016) (repealed 2016)).

<sup>58</sup> 750 ILL. COMP. STAT. 5/609.2(f) (2016).

<sup>59</sup> *Id.* act 5/600(f). The agreement is a "parenting plan". *Id.*

<sup>60</sup> See, e.g., *id.* act 46/808. Under the Parentage Act of 2015, a court considering a "relocation judgment modification" must be guided by the factors specified in the Marriage and Dissolution of Marriage Act. *Id.*



the intentions of, and the effects upon, the parents and the child's extended family members than on the intentions of, and effects upon, the child.<sup>61</sup>

In the intrastate setting today in Illinois, a nonrelocating childcare parent has a comparable hearing right, with the same petition requirement for the wishful relocating parent, as long as the desired new residence is far enough away from the child's "current primary residence."<sup>62</sup>

The noninternational relocations standards in Illinois at the relevant times in the Seventh Circuit case differed a bit, but were still more protective of the nonrelocating parent.<sup>63</sup> Thus, before January 1, 2016, there was no single statutory approach to intrastate and interstate child relocations. For intrastate child relocations, the "general rule" was that a "custodial parent" may move anywhere in Illinois "without judicial approval."<sup>64</sup> Yet it was recognized that in determining custody, a court could "condition custody upon the custodian living within a reasonable distance from the non-custodial parent to facilitate visitation."<sup>65</sup>

For interstate relocations, an Illinois court was authorized to grant leave "to any party having custody of any minor child or children to remove such child or children from Illinois whenever such approval is in the best interests of such child or children," with the "burden . . . on the party seeking removal."<sup>66</sup> Unlike current laws, this authorization was not accompanied by specific statutory factors that were to be utilized in best interests analyses.<sup>67</sup> The Seventh Circuit did not explain why these Illinois norms, in effect in 2013 when the mother relocated with her child to Mexico, would not apply as well to international relocations, as the Convention does defer to the laws of the state of the child's habitual residence, which was Illinois in 2013.<sup>68</sup>

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<sup>61</sup> *Id.* act 5/609.2(g) (listing reasons why a parent wishes to relocate or objects to relocation, including the presence of extended family members at existing and proposed new location).

<sup>62</sup> *See id.* act 5/600(g) (addressing both some intrastate and interstate relocations). The factors considered by a court when a nonrelocating parent objects revolve around a child's best interests. *Id.* act 6/609.2(g).

<sup>63</sup> *See id.* act 5/609.2(g); *Martinez v. Cahue*, 826 F.3d 983, 992–93 (7th Cir. 2016).

<sup>64</sup> *See, e.g., In re Marriage of Samardzija*, 850 N.E.2d 880, 887 (Ill. App. Ct. 2006) ("In general, a parent with primary physical custody of the children need not obtain judicial approval before moving to another location within Illinois...").

<sup>65</sup> *Id.* Of course, such a condition could not unduly burden a custodian's constitutional rights, as with the right to travel. *See, e.g., Arthur B. LaFrance, Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 94 (1996); David V. Chipman & Mandy M. Rush, *The Necessity of "Right to Travel" Analysis in Custodial Parent Relocation Cases*, 10 WYO. L. REV. 267, 280 (2010).

<sup>66</sup> *See, e.g., In re Marriage of Collingbourne*, 791 N.E.2d 532, 544 (Ill. 2003) (applying former 750 ILL. COMP. STAT. 5/609(a) (2010 (repealed 2016))).

<sup>67</sup> *Id.* at 546–552 (reviewing and applying common law factors on best interests).

<sup>68</sup> *See Martinez*, 826 F.3d at 990–93.

In addition, the Seventh Circuit ruling, as long as it stands,<sup>69</sup> can prompt violations of the federal constitutional childcare interests of prospective and actual legal parents. In *Lehr v. Robertson*, the U.S. Supreme Court recognized that a biological father of a child born of sex to an unwed mother had both a parental opportunity interest in establishing a “custodial, personal or financial relationship” with his child once born, as well as a parental childcare interest in a child with whom he had established such a relationship.<sup>70</sup> *Lehr* is not yet widely applied to childcare opportunity interests arising from intended parental childcare contracts involving, e.g., lesbian partners with assisted reproduction pacts<sup>71</sup> or stepparents with premarital or midmarriage pacts.<sup>72</sup> *Lehr*, as well, is not yet widely applied to lesbian partners or stepparents who, with such pacts, have already established “custodial, personal or financial” relationships that are parental-like in nature.<sup>73</sup> But, its rationales are applicable.<sup>74</sup>

### III. INTERNATIONAL CHILD RELOCATIONS FROM OTHER STATES

Of course, international child relocations from “habitual residences” in states outside of Illinois are also guided by the Convention.<sup>75</sup> Sometimes, at least, issues can arise regarding not only whether custody was exercised by the nonrelocating child caretaker, as it did in the Seventh Circuit case, but also whether the nonrelocating child caretaker who was exercising custody possessed “rights of custody . . . under the law of the state in which the child

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<sup>69</sup> While an Illinois state court did not review the circumstances in *Martinez* (as it might have if a federal court had abstained or certified uncertain state law questions), the Seventh Circuit’s take on Illinois “custody rights,” albeit for Convention purposes, is not binding in later Illinois state court proceedings. See, e.g., *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 765 (Ill. 2013) (“Illinois courts, not federal courts, are arbiters of state law.”).

<sup>70</sup> *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

<sup>71</sup> Recognitions that such pacts prompt interests under *Lehr* are particularly appropriate for nonbirth mothers who are biologically tied, via donated gametes, to children born to their partners.

<sup>72</sup> Here, again, recognitions that such pacts prompt interests under *Lehr* are particularly appropriate for certain stepparents (typically stepfathers) who are biologically tied to children earlier born to their current spouses, as where children were once, but no longer are, subject to a marital paternity presumption (e.g., wife had extramarital sexual relations leading to a marriage dissolution; the disestablishment of her former husband as the legal father; and a later marriage between the birth mother and biological father).

<sup>73</sup> *Lehr*, 463 U.S. at 262.

<sup>74</sup> When U.S. Supreme Court certiorari review of the Seventh Circuit ruling was sought, the petition did focus on *Lehr*. See Petition for Writ of Certiorari at 9–10, *Cahuc v. Martinez*, 826 F.3d 983 (2016) (No. 16-582), cert. denied, 137 S.Ct. 1329 (2017) (arguing that under *Lehr*, petitioner had an “interest in personal contact with the child which receives substantial protection under the Due Process Clause of the Fourteenth Amendment,” and urging the child’s constitutionally protected liberty interest in the “care and society” of her father and “an unconstitutional gender-based classification”).

<sup>75</sup> Silberman, *supra* note 4, at 14–15.

was habitually resident immediately before the removal.”<sup>76</sup> Thorny questions arise with the latter where there are intended parent doctrines.<sup>77</sup>

A review of precedents on “custody” exercises under the Convention follows. It demonstrates that explicit court orders are typically not needed by nonrelocating child caretakers who wish to challenge possible or actual international child relocations.

Next, there is a review of who possesses “rights of custody” under the Convention. It demonstrates the challenges facing nonrelocating child caretakers who are neither biological nor adoptive parents with established “custodial, personal or financial” relationships with the affected children.<sup>78</sup> Such caretakers might possess “rights of custody” under the ever-increasing recognitions, at least in the United States, of intended parent doctrines which arise under varying names, including de facto parent, presumed parent, and equitable adoption parent.<sup>79</sup>

Finally, there is a brief review of American state child relocation statutes. It demonstrates that often the limits on parental moves with children can be applied to international as well as interstate relocations, though the factors in assessing these two types of moves may need to vary a bit, as do interstate and intrastate moves.<sup>80</sup>

### A. Exercises of Rights of Custody

As noted by the Seventh Circuit, an international child relocation “is wrongful under the Convention” where it is a “breach of rights of custody . . . under the law of the state in which the child was habitually resident immediately before” the relocation, when at the time of relocation, “those rights were exercised . . . or would have been so exercised but for” the relocation.<sup>81</sup> Though noting “the pivotal question . . . is generally that of

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<sup>76</sup> *Id.* at 11.

<sup>77</sup> See, e.g., Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752-763 (2013). In Illinois, intended parent childcare doctrines operate in assisted non-surrogacy and surrogacy reproduction settings, but not in post-birth settings where children are born of sex. See, e.g., 750 ILL. COMP. STAT. 47/1-75 (Gestational Surrogacy Act); 750 ILL. COMP. STAT. 46/701-710 (suggesting that assisted reproduction births are outside the Gestational Surrogacy Act); *In re Scarlett Z.-D.*, 28 N.E.3d 776, 781, 792-95 (Ill. 2015) (stating that “equitable adoption,” a common law doctrine, “does not apply to proceedings for parentage, custody, and visitation”; such proceedings are dependent on legislation, which necessarily arises as a result of a “policy debate” in which all may be heard).

<sup>78</sup> See *infra* Part III(B).

<sup>79</sup> See generally Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE 87 (2017), <http://ndlawreview.org/2017/03/formal-declarations-of-intended-childcare-parentage/> (analyzing the developments and challenges of intended parent doctrines).

<sup>80</sup> See *infra* Part III(C).

<sup>81</sup> *Martinez v. Cahuc*, 826 F.3d 983 (7th Cir. 2016) (citing Hague International Child Abduction

habitual residence,”<sup>82</sup> the Seventh Circuit resolved the case on the question of whether the nonrelocating child caretaker, clearly a parent, was exercising “rights of custody,” ruling there was no such exercise as there was no court order supporting the childcare.<sup>83</sup> This resolution is problematic on policy grounds, as noted. Fortunately, the need for a court order to demonstrate exercises of parental custody rights has not been found necessary under the laws of other states of “habitual residence,” in and outside of the United States.<sup>84</sup> Thus the Seventh Circuit ruling can be easily overcome by a new or a corrected understanding of Illinois laws on what constitutes exercises of “rights of custody” by parents.

Differing standards on exercises of custodial rights, including mandates on prior court orders, may arise where such custodial rights, for Convention purposes, are exercised by both parents and nonparents. Parental childcare rights are protected under federal constitutional due process precedents,<sup>85</sup> while non-parental childcare rights, as for child caretaking grandparents, aunts, or stepparents, are today chiefly creatures of only state statutes, and perhaps some common law precedents.<sup>86</sup> Where nonparent childcare interests are recognized, they usually involve, as they must given superior parental childcare interests, less childcare opportunities than are afforded to

Convention; Text and Legal Analysis, 51 Fed. Reg. 10494-01, Art. 3 (Mar. 26, 1986)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 994 (stating that the relocating parent “had sole custody . . . under Illinois law”).

<sup>84</sup> A U.S. state law case is *Gutierrez v. Fox*, 394 P.3d 1096, 1106 (Ariz. Ct. App. 2017) (finding that a hopeful relocating birth mother, from Arizona to Wisconsin, needed the unwed biological father’s consent to the relocation, or a court order authorizing the relocation, where father, who was “without a specific court order designating parental decision-making,” had signed a voluntary paternity acknowledgement and been listed on the child’s birth certificate). Non-U.S. cases include *Sabogal v. Velarde*, 106 F.3d 689, 700 (D. Md. 2015) (finding parental custody authority for each biological parent under Peruvian law on *patria potestas*, a Roman law concept); *Patrick v. Rivera-Lopez*, 708 F.3d 15, 19 (1st Cir. 2013) (finding “parental responsibility,” under laws of England and Wales, where unwed biological father married birth mother in Puerto Rico after birth); *Hofman v. Sender*, 716 F.3d 282, 291 (2d Cir. 2013) (finding married biological father had “custody rights” under laws of Quebec as he was involved in “family decisions” on where he, birth mother, and their children might move); *Neumann v. Neumann*, 187 F. Supp. 3d 848, 855 (E.D. Mich. 2016) (stating both Mexico and Germany broadly confer joint custody rights to married biological parents “unless limited by judicial decree”); *In re Stead v. Menduno*, 77 F. Supp. 3d 1029, 1034 (D. Colo. 2014) (finding unwed biological father had custody rights, under New Zealand law, as he lived with birth mother during pregnancy and was listed on birth certificate).

<sup>85</sup> See, e.g., Jeffrey A. Parness, *Constitutional Constraints on Second Parent Laws*, 40 OHIO N. U. L. REV. 811, 837-42 (2014) (reviewing how federal constitutional childcare interests constrain emerging de facto parent laws).

<sup>86</sup> See, e.g., Jeffrey A. Parness, *Third Party Stepparent Childcare*, 67 MERCER L. REV. 383, 387-93 (2016) (reviewing both general and special stepparent childcare laws); Jeffrey A. Parness & Alcx Yorko, *Nonparental Childcare and Child Contact Orders for Grandparents*, 120 W. VA. L. REV. (reviewing current U.S. state grandparent childcare laws).

recognized parents.<sup>87</sup> Thus, nonparents may only be eligible for visitation, as distinct from custody.<sup>88</sup> Yet such visitation as well as custody (or parental responsibility) interests under state laws may be interpreted to constitute exercises of “custody rights” for Convention purposes.<sup>89</sup>

### *B. Possessing Rights of Custody*

As noted by the Seventh Circuit, an international child relocation “is wrongful under the Convention” where it is a “breach of rights of custody . . . under the law of the state in which the child was habitually resident immediately before” the relocation when at the time of relocation, “those rights were exercised . . . or would have been so exercised but for” the relocation.<sup>90</sup> Though noting “the pivotal question . . . is generally that of habitual residence,”<sup>91</sup> the Seventh Circuit resolved the case on the question of whether the nonrelocating child caretaker was exercising “rights of custody,” deeming there was no such exercise as there was no court order supporting the childcare.<sup>92</sup>

With this absence of exercised custodial rights, there was no relevance in the question of whether the nonrelocating child caretaker, the acknowledged biological father of the child assumedly born of consensual sex, possessed “rights of custody” to be exercised.<sup>93</sup> In other cases, the issue of who possesses “custody rights” can be very germane, as where a nonrelocating child caretaker has, in fact, been exercising custodial rights in a state of the child’s “habitual residence,” but where a legal parent, hoping to relocate internationally, asserts he/she has sole custody of the child under the law of the state of “habitual residence.”<sup>94</sup> Here, terminology can be confusing as even a parent with “sole” custody under a court order nevertheless may not have unilateral decision-making authority regarding an international relocation.<sup>95</sup>

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<sup>87</sup> *Troxel v. Granville*, 530 U.S. 57, 65, 75 (2000) (recognizing that federal constitutional parental “liberty interests” limit American state laws allowing nonparent child visitation orders over parental objections).

<sup>88</sup> *Id.* at 72.

<sup>89</sup> See, e.g., *Martinez v. Cahuc*, 826 F.3d 983, 993 (7th Cir. 2016) (noting that any type of contact with the child that is regular “qualifies as ‘exercising . . . custody rights’ under the Convention”) (quoting *Walker v. Walker*, 701 F.3d 1110 (7th Cir. 2012)).

<sup>90</sup> *Id.* at 989 (citing Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494-01, Art. 3 (Mar. 26, 1986)).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 994 (stating that the relocating parent “had sole custody . . . under Illinois law”).

<sup>93</sup> *Id.* at 991.

<sup>94</sup> *Id.* at 990-93.

<sup>95</sup> See, e.g., *Garcia v. Angarita*, 440 F. Supp. 2d 1364, 1379 (S.D. Fla. 2006) (stating that the father

Questions involving possessions of custody rights by those who have undertaken earlier significant childcare taking can arise both for would-be child relocators and for child caretakers opposed to proposed child relocations initiated by others. Of course, not all who significantly engage in childcare may possess “rights of custody” under the Convention. But until recently, distinctions were easier to draw under American state laws between those who did or did not possess “custody rights.” Traditionally, childcare rights in relocation disputes were limited to actual biological parents, presumed biological parents (i.e., husbands of birth mothers), and adoptive parents, assuming that childcare interests had not been earlier formally terminated by the government or abandoned. Distinctions today are more difficult to draw as, increasingly, intended parentage doctrines recognize childcare interests in newly-designated parents who are without biological or adoptive ties.<sup>96</sup> These doctrines (herein “de facto parentage”) depend on childcare intentions and/or parental-like acts occurring at no particular point in time.<sup>97</sup>

In the international child relocation setting involving removals from the United States to a foreign country, the de facto parentage doctrines of individual U.S. states can determine who possesses “custody rights” for Convention purposes as relocating or nonrelocating caretakers. These doctrines typically establish parity as between established de facto parents and established biological or adoptive parents.<sup>98</sup> Unlike biological or adoptive ties which are typically recognized under law as establishing parentage long before any relocation issues arise, de facto parentage often requires judicial establishment at the time relocation issues arise.<sup>99</sup>

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retained the right under Colombian law to bar his child’s move abroad, though the mother had a “sole custody” order); *Furnes v. Reeves*, 362 F.3d 702, 715 (11th Cir. 2004) *overruled in part by* *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2013) (finding that the parent had custody right regarding moving abroad from Norway, though other parent could unilaterally decide where in Norway child would live).

<sup>96</sup> See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (2013) (recognizing de facto parentage and parentage resulting from reproductive assistance).

<sup>97</sup> See, e.g., *Guardianship of K.N.*, 73 N.E.3d 271, 275 (Mass. 2017) (defining de facto parenting as participating in the child’s life, living with the child, and performing significant caretaking functions with the legal guardian’s consent).

<sup>98</sup> See, e.g., *Smith v. Guest*, 16 A.3d 920, 931-932 (Del. 2011) (de facto parents are on equal footing with biological and adoptive parents); ME. STAT. tit. 19-A, § 1891(4) (2016) (stating that the de facto parentage adjudication “establishes parentage”).

<sup>99</sup> Biological parents of children whose parental rights were not earlier established, as by signing VAPs around the time of birth, on occasion can later become de facto parents, as by residing with and rearing children while holding them out as their own. Such parents could include men whose consensual sex with birth mothers led to births and women who contributed ova leading to childbirths for other women through assisted reproduction.

De facto parentage doctrines often require judicial inquiries long after birth that are guided by criteria occurring at no precise points in time.<sup>100</sup> Thus, while some state laws mandate a two-year period of residency by a nonparent with a child in order for the nonparent to qualify as a possible de facto parent, these laws also usually also require, e.g., that an alleged de facto parent hold the child out as one's own; develop a parental-like relationship with the child; and/or provide economic support to the child.<sup>101</sup> Elsewhere, only some indefinite period of residency with a child is required.<sup>102</sup> De facto parentage can be sought not only to secure what the Convention recognizes as "custody rights," but also to make possible judicially-mandated child support.<sup>103</sup>

In the international child relocation setting involving removals from the United States to a foreign country, there is also some possibility that nonparent childcare doctrines of individual U.S. states can determine who possesses "custody rights" under the Convention as relocating, or especially as nonrelocating, caretakers. These doctrines allow certain nonparents to secure judicial childcare orders over parental objections, if there are parents. As with de facto parentage, "custody rights" arising under such nonparent childcare doctrines for Convention purposes could be first employed at the time international relocation issues arise.

One exemplary international child relocation case recognized there were rights of custody under the Convention in Irish maternal grandparents who were testamentary child guardians under Irish law pursuant to the deceased birth mother's will.<sup>104</sup> Given these rights, a U.S. federal appeals court ordered the father, the deceased birth mother's husband when her 3 children were born, to return the children from Florida to Ireland, where they all had been living before a 2005 removal, at least "until the guardianship of the children

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<sup>100</sup> For a general review of imprecise American state de facto parentage laws, see Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. 481, 492-94 (2015).

<sup>101</sup> See, e.g., N.M. STAT. ANN., § 40-11A-204(A)(5) (West 2017); N.D. CENT. CODE ANN. 14-20-10(1)(e) (West 2017); OKLA. STAT. ANN. tit. 10, § 7700-204(A)(5) (West 2017); WYO. STAT. ANN. 14-2-504(a)(v) (West 2017). But see D.C. CODE ANN. § 16-831.01(1)(B) (West 2017) (stating that a de facto parent is one who "live[s] . . . in the same household for at least 10 of the 12 months immediately" before custody proceedings are begun).

<sup>102</sup> See, e.g., MONT. CODE ANN. § 40-6-105(1)(d) (West 2017) (stating that it is when "the person receives the child into the person's home"); D.C. CODE ANN. 16-831.01(1)(A) (West 2017) (stating that a de facto parent is one who "lived with the child in the same household at the time of the child's birth or adoption by the child's parent").

<sup>103</sup> See, e.g., DEL. CODE ANN. tit. 13 § 8-201(c), 8-204(a)(5), 8-203, 501(a) (West 2017) (stating that the duty to support a child under 18 rests with parents, who include de facto and presumed parents—two forms of nonbiological, nonadoptive parents); ME REV. STAT. ANN. 19-A § 1891(a), 1853 (2017) (stating that the de facto parent is a parent for all purposes unless specifically exempted).

<sup>104</sup> *Hanley v. Roy*, 485 F.3d 641 (11th Cir. 2007).

is properly determined by appropriate Irish court.”<sup>105</sup> The testamentary guardianships arose from the will of the birth mother who died in 2000 in Ireland, where the will was probated in 2003.<sup>106</sup> Under Irish law, the guardians need not even have had physical custody of the children for them to have “custody rights” for Convention purposes.<sup>107</sup>

Nonparent childcare doctrines, like *de facto* parentage doctrines, typically employ at least some criteria that occur at no precise points in time. Certain American state nonparent childcare statutes are more general, recognizing interests in any “person” who has acted in imprecise ways.<sup>108</sup> Other statutes are particular to certain people, like grandparents<sup>109</sup> or stepparents.<sup>110</sup> Yet in both *de facto* parent and nonparent childcare settings, any childcare interests prompting “custody rights” might be first asserted when international child relocations are sought.

Whether recognized or alleged *de facto* parents or nonparents with childcare interests have state-recognized “custody rights” for Convention purposes often should be determined by whether the same or comparable childcare interests would be recognized in intrastate or interstate child relocation settings. Unfortunately, to date there is little explicit recognition in intrastate and interstate relocation cases of the interests of either *de facto*

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<sup>105</sup> *Hanley*, 485 F.3d at 643–44, 650.

<sup>106</sup> *Id.* at 644.

<sup>107</sup> *Id.* at 646 (quoting GEOFFREY SHANNON, *CHILD LAW* 46 (2005)). Professor Silberman describes two Convention cases where third parties (Hungarian Guardianship Authority and the Aleut Indian tribe) might have had custody rights for Convention purposes. Silberman, *supra* note 4, at 18–19.

<sup>108</sup> See, e.g., S.D. CODIFIED LAWS 25-5-29 (2017) (stating “any person other than the parent of a child” can seek custody of or visitation with “any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship”); COLO. REV. STAT. 14-10-123(1)(c) (2017) (stating that there is nonparent childcare standing when exercise of “physical care of a child for a period of one hundred eighty-two days or more”); WIS. STAT. § 767.13(1) (West 2017) (stating there may be visitation for “a person who has maintained a relationship similar to a parent-child relationship with the child”). This is the approach suggested in Nat’l. Conference of Comm’rs. on Unif. State Laws, *Non-Parental Child Custody and Visitation Act*, AM. B. ASS’N. (Apr. 7, 2017), [https://www.americanbar.org/content/dam/aba/administrative/family\\_law/council/2016-17/17spring\\_tab%2005.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/family_law/council/2016-17/17spring_tab%2005.authcheckdam.pdf) This is a draft for the May 4-7, 2017 Style Committee Meeting. *Id.*

<sup>109</sup> See, e.g., ALASKA STAT. § 25.20.065 (2016) (stating grandparent may get visitation when they have had “ongoing personal contact” with grandchild); GA. CODE ANN. § 19-7-3(c)(1) (West 2017) (stating that grandparent may get visitation if otherwise harm to “health or welfare” of grandchild); N.D. CENT. CODE ANN. 14-09-05.1(1) (West 2017) (stating that grandparents of nonmarital child can gain “reasonable visitation right” where child’s best interests served and no interference with “parent-child relationship”).

<sup>110</sup> See, e.g., TENN. CODE ANN. § 36-6-303 (2017) (stating that a stepparent is eligible for “reasonable visitation rights” when “actually providing or contributing towards the support of the child”); OR. REV. STAT. § 109.119(3) (West 2017) (stating that there may be stepparent custody or visitation where “child-parent relationship exists,” or there is an “ongoing personal relationship”); UTAH CODE ANN. § 30-5a-103 (West 2017) (stating that there may be eligibility for custody when stepparent, *inter alia*, contributed to “child’s wellbeing”).



parent or nonparent child caretakers. Clearly, where de facto parents are generally on par with biological and adoptive parents in childcare settings, their voices in international child relocation disputes should be heard.

By contrast, nonparent child caretakers are not generally on par with parental caretakers. Yet, state laws could still recognize that they possess “custody rights” applicable in Convention cases, as the Convention defers to the laws of “habitual residences” without limiting “custody rights” to those deemed parents.<sup>111</sup> Of course, in the United States, any such rights must respect the superior parental childcare interests protected under the U.S. and relevant state constitutions. Yet, for example, there may be no such parental interests, as when there is no living childcare parent and a newly-appointed child guardian seeks to relocate with the child outside of the United States.

### *C. Application of American State Relocation Statutes to International Relocations*

As in Illinois, other state relocation statutes—on their face—apply to at least some international relocations. While these statutes should be employed in determinations of who possesses “custody rights” under the Convention, as it defers to “the law of the State in which the child was habitually resident,” they may not be wholly applicable to issues of whether those in possession were “actually” exercising these rights, as there is no similar Convention deference here.<sup>112</sup> In fact, custody exercise issues in Convention settings sometimes are judicially determined under Convention case precedents involving custody exercises in differing states.<sup>113</sup>

While helpful in international relocation cases, many American state relocation statutes should not be dispositive because they are limited in scope. Thus, while there is precedent recognizing nonparents can possess “custody rights” for Convention purposes,<sup>114</sup> U.S. state child relocation statutes sometimes speak only of parental relocations.<sup>115</sup> Further, these statutes

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<sup>111</sup> See Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10494-01, Art. 3 (Mar. 26, 1986).

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., *Walker v. Walker*, 701 F.3d 1110, 1121–23 (7th Cir. 2012) (using precedent regarding children of habitual residence in Israel, in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), to decide whether a father was exercising custody rights over his children, whose habitual residence was in Australia). See also *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 702 (D. Md. 2015) (using precedent involving habitual residence in Australia, in *Walker*, and Germany, in *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996), to determine whether father was exercising custody rights over his children, whose habitual residence was in Peru).

<sup>114</sup> *Hanley v. Roy*, 485 F.3d 641, 646 (11th Cir. 2007).

<sup>115</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-408(A) (2017); KAN. STAT. ANN. § 23-2225(a) (2017);

sometimes apply only to residence changes “to another state,” without explicit reference to moves to another country (or to a new home within the current state of residence).<sup>116</sup> Finally, such statutes sometimes speak only to child relocations when there is “a permanent parenting plan or final order.”<sup>117</sup> Yet an unwed parent with no court order may seek to relocate, as in *Martinez*, as may a wed parent who is separated but has no ongoing marriage dissolution proceeding.<sup>118</sup>

#### IV. CONCLUSION

The Convention places limits, for good reason, on international child relocations from the United States.<sup>119</sup> These limits recognize the need to take account of the “custody rights” of nonrelocating child caretakers.<sup>120</sup> Beyond the Convention, a similar need is usually recognized in intrastate and interstate child relocations. As the Convention defers to the laws on child “custody rights,” if not their exercises, in the states of the children’s “habitual residences,” international child relocations should often be guided in comparable ways to intrastate and interstate child relocations on issues of who has “custody rights.”<sup>121</sup>

At least in the United States, there are issues in state child relocation cases arising from the emergence of *de facto* (and similar) childcare parentage doctrines. Here, “custody rights” go beyond biological and adoptive parents. These doctrines often require judicial determinations at the time of relocations, where they are guided by norms dependent upon imprecise acts occurring at no precise points in time, quite unlike parentage and custody rights founded on biology, marriage, and adoption.

Comparably, there are sometimes issues in Convention cases due to earlier childcare by nonparents. American state laws on nonparent childcare should sometimes prompt “custody rights” for Convention purposes, as where there are currently no biological or adoptive parents with “custody rights” and where nonparents have acted in parental-like ways for children sought to be relocated internationally by others.<sup>122</sup>

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MONT. CODE ANN. § 40-4-217(1) (West 2017); N.H. REV. STAT. ANN. § 461-A:12(II) (2017).

<sup>116</sup> See, e.g., N.D. CENT. CODE ANN. § 14-09-07(1)–(2) (2017).

<sup>117</sup> See, e.g., TENN. CODE ANN. § 36-6-108(a) (West 2017).

<sup>118</sup> See *Martinez v. Cahuc*, 826 F.3d 983 (7th Cir. 2016).

<sup>119</sup> Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494-01 (Mar. 26, 1986).

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*