

1991

Little Hilary: Happy at Last? New Zealand's Family Court and the Matter of Hilary Foretich

Suzanne McGrath Dale

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

 Part of the [Comparative and Foreign Law Commons](#), [Family Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Dale, Suzanne McGrath (1991) "Little Hilary: Happy at Last? New Zealand's Family Court and the Matter of Hilary Foretich," *Penn State International Law Review*: Vol. 9: No. 2, Article 9.

Available at: <http://elibrary.law.psu.edu/psilr/vol9/iss2/9>

This Note is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Little Hilary: Happy at Last? New Zealand's Family Court and the Matter of Hilary Foretich¹

*A Kikuyu proverb tells us: "When elephants fight it is the grass that suffers." Here, the grass is a little girl. . . She is the principal figure in a drama of appalling proportions, no matter what the outcome.*²

Hilary Foretich was eight years old in 1990.³ Since before she was born, she was a bone for her parents to quarrel over, most of the time in legal proceedings, frequently in the public press.⁴

Because various adults deemed it to be in her best interests, Hilary has been examined in detail by an assortment of physicians and psychologists,⁵ visited with her father irregularly and under awkward conditions,⁶ and was totally separated from both parents for two and a half years while being transported around the world under an alias.⁷

In February, 1990, Hilary was discovered in a new jurisdiction, New Zealand, which also claimed to act in her best interests.⁸ New Zealand's definition of what constitutes a child's best interests includes declaring all Family Court proceedings confidential and making it illegal to report them.⁹ The court moved to maintain Hilary's status quo by awarding her grandparents, William and Antonia Morgan, temporary custody and ordering them not to leave the court's jurisdiction and moved to protect her legal interests by appointing a lawyer to act for her.¹⁰ In addition, the court moved to

1. This Note was originally written in June, 1990, after Hilary Foretich was discovered in New Zealand but before the Family Court adjudicated her case.

2. *Morgan v. Foretich*, 546 A.2d 407, 413 (D.C. App. 1988).

3. *Id.* at 408.

4. Elson, *A Hard Case of Contempt*, TIME, Sept. 18, 1989, at 66 [hereinafter Elson]. *Efforts Grow to Shield Girl in Custody Battle*, New York Times, Feb. 27, 1990, at A19, col. 1. Hilary was born a week after her parent's hastily arranged, five months long marriage broke up.

5. *A Mother's Tale: Why I'm Taking no Chances with the Courts*, U.S. NEWS & WORLD REPORT, June 13, 1988, at 30 [hereinafter *A Mother's Tale*].

6. *Morgan v. Foretich*, 546 A.2d 407, 409 (D.C. App. 1988).

7. Cropp, *A Life of Strangers and Seedy Motels*, New York Times, Feb. 26, 1990, at A12, col. 3.

8. Berringer, *Child's 15,000-Mile Odyssey In a Troubling Custody Case*, New York Times, Feb. 25, 1990, at 22, col. 5.

9. Elson, *supra* note 4, at 19.

10. *As Far Away as You Can Get*, TIME, March 5, 1990, at 20; Elson, *supra* note 4, at 19.

protect Hilary's privacy interests by issuing an injunction forbidding the showing of a television documentary about her case.¹¹

Because the New Zealand Family Court appears to have been the first legal authority to be truly concerned for Hilary Foretich's welfare and best interests, this Note contends that New Zealand should not be obliged to return Hilary to the jurisdiction of United States courts. This Note also contends that the ultimate disposition of custody and visitation rights should be the prerogative of the New Zealand court and that prior or pending United States orders should not necessarily be considered binding on that court.

*The States signatory to the present Convention, [f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody. . . [h]ave resolved to conclude a Convention to this effect*¹²

The protection of children and the regulation of matters relating to their custody have been of increasing interest to the international legal community. In 1961, the Ninth Session of the Hague Conference on Private International Law developed a convention intended "to establish common provisions on the powers of authorities and the law applicable in respect of the protection of [children]."¹³ A replacement for a convention signed in 1902,¹⁴ the 1961 document considers which judicial or administrative authority shall have the right to exercise power over a child's person or property.¹⁵

By 1980, "the increasing number of cases where children have been improperly removed across an international frontier," caused parental custody and visitation rights and the welfare of children to become matters of major concern to the international community.¹⁶ The Council of Europe developed a convention concerning child custody in the spring of 1980.¹⁷ The Fourteenth Session of the Hague Conference on Private International Law followed suit in the fall of the same year with a convention on international child abduction.¹⁸

Both Conventions call for reciprocal recognition of a state's custody and visitation orders and for the cooperation of signatory states

11. *Parents See Girl in Custody Fight*, New York Times, March 19, 1990, at A16, col. 6 [hereinafter *Parents See Girl*].

12. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 [hereinafter *Hague Convention*].

13. Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, *opened for signature* Oct. 5, 1961, 658 U.N.T.S. 145.

14. *Id.* art. 18, at 153.

15. *Id.* arts. 1-11, at 145-59.

16. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, *opened for signature* May, 1980, 19 I.L.M. 273 [hereinafter *European Convention*].

17. *Id.*

18. Hague Convention, *supra* note 12.

in enforcing those orders within their own boundaries, including returning an abducted child to its custodial parent.¹⁹ The Hague Convention stresses a preference for the voluntary return of an abducted child,²⁰ and where a return must be ordered, the welfare of the child is an aspect of major concern. Guidelines include consideration of the length of time a child has been removed from its custodial parent, the child's preferences, and the situation awaiting the child's return.²¹

Both Conventions make provision for enforcing rights of access (visitation). The European Convention provides for enforcement of access orders on the same grounds as those for custody orders but allows the State to modify or refuse an access order.²² The Hague Convention stresses the removal of obstacles to the exercise of access rights but makes little provision for either modification or refusal.²³

Many nations are not party to either of these Conventions.²⁴ Although the United States has ratified the Hague Convention,²⁵ there is no treaty obligation to recognize a non-signatory's custody orders.²⁶ However, a portion of the Uniform Child Custody Jurisdiction Act (UCCJA) provides for recognition and enforcement of foreign custody orders.²⁷ This, together with the current international trend toward mutual recognition of custody orders, is a persuasive argument for reciprocity in those cases where the other concerned country is not a signatory to either the Hague Convention or the European Convention or has not enacted internal laws regarding recognition of foreign orders.

The Hilary Foretich case has involved two countries, one of which is a signatory to the Hague Convention, another which is

19. European Convention, *supra* note 16, arts. 2-5, at 274-75; Hague Convention, *supra* note 12, art. 7, at 1502.

20. Hague Convention, *supra* note 12, art. 10, at 1502.

21. *Id.* arts. 12 and 13, at 1502-03.

22. European Convention, *supra* note 16, art. 11, at 227.

23. Hague Convention, *supra* note 12, art. 21, at 1503.

24. P.M. HOFF, J. SCHULMAN, A.E. VOLENIK & J.E. O'DANIEL, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 10-11 (1982) [hereinafter P.M. HOFF]; Hague Convention, *supra* note 12, at 1501; Berringer, *supra* note 8, at 22.

25. International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified at 42 U.S.C. 11601-10 (1989)). "The United States of America deposited its instrument of ratification of the Hague Convention on the Civil Aspects of International Child Abduction . . . on April 29, 1988. The Convention entered into force for the United States on July 1, 1988." Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (1988).

26. Even between signatories there are limits to the right to invoke relief. "[The] Petitioner must satisfy two threshold issues: 1) lawful rights of custody at the time of the removal or retention; and 2) that such removal or retention is from the child's 'habitual residence' . . . Custody rights are determined by the law of the child's habitual residence." Meredith v. Meredith, ___ F. Supp. ___ (WESTLAW, 1991 WL 42289 (D. Ariz.), 3). Foretich is ineligible for relief under the Hague Convention because he did not have legal custody of Hilary at the time of her removal from her "habitual residence."

27. P.M. HOFF, *supra* note 24, at 10-1.

not.²⁸ However, the two countries do not have totally different philosophies regarding international custody matters. By its ratification of the Hague Convention, the United States has expressed a willingness to be bound by the "welfare of the child" doctrine emphasized by that agreement. New Zealand, which does not consider itself bound by the Convention, has already stressed its reliance on the same doctrine. However, although the two jurisdictions can be said to share a concern for Hilary's welfare and best interests, it must first be decided what her best interests are.

My job is to protect the child and make sure that anything that's done is in her interests. . . Sometimes parents overlook the interest of their child, they are so busy pushing their own barrow.²⁹

Throughout Hilary Foretich's short history, quite a few barrows have been pushed, not all of them hers and not all of them in her interest. It is indisputable that if Hilary was sexually abused, that abuse must be stopped and Hilary receive treatment. It is also indisputable that if her father, Dr. Eric Foretich, is innocent of the accusations made against him by his former wife, Dr. Elizabeth Morgan, he should be exonerated. These two contentions are apparently only aspects of the same issue, one which centers on Hilary's best interests. Instead, they became a breeding ground for a bundle of frequently contradictory interests.

Elizabeth Morgan, suspecting that Hilary had been sexually abused, determinedly and unrelentingly moved to protect her daughter. Before she acted on her own, Morgan sought the Court's help in protecting Hilary from a possibly abusive situation by moving for modification of Foretich's visitation rights. But when Morgan was faced with what she regarded as an untenable situation, sending Hilary to her father for a two-week, unsupervised visit, she finally, flatly, refused to continue working through the legal system and sent her daughter into hiding.³⁰

Morgan seemed to be acting only in Hilary's best interests. However, there were aspects of her behavior which do not agree with that argument. Instead of taking every step she could to protect her child's privacy and reputation by preventing the public revelation of private information, Morgan demanded and actively courted disclosure.

The Superior Court of the District of Columbia issued an order restricting public disclosure of the details of Morgan's sexual abuse

28. Berringer, *supra* note 8, at 22.

29. Cropp, *supra* note 7, at 12 (quoting Isabel Mitchell, Hilary Foretich's court-appointed lawyer in New Zealand).

30. Morgan v. Foretich, 546 A.2d 407, 408-09 (D.C. App. 1988).

charges. Morgan moved to modify the order and unseal the record.³¹ She also objected to the public being barred from that part of her contempt hearing in which she "recit[ed] allegations as to specific acts of sexual abuse upon H."³² While public revelation of such details might have embarrassed the father and turned opinion against him, it would have served no legal purpose and would have exposed Hilary to gossip and speculation which could not possibly benefit the child or be in her best interests.

Morgan courted disclosure outside the courtroom as well. It was probably inevitable that the press would discover the Morgan-Foretich case, especially after Morgan was imprisoned on contempt charges and stayed there, month after month. But while Morgan could not control the press' access to her story, she could have controlled the press' access to her. However, she chose "to go public" with her daughter's story. She published an explanation of why she went to jail; she gave interviews; she permitted photographs to be taken.³³ In jail because she was protecting her daughter's interests by refusing to reveal her whereabouts, Elizabeth Morgan succeeded in focusing the spotlight of world attention on herself and on Hilary and her problems.

If Morgan's behavior seems suspiciously self-serving, Eric Foretich's attitudes were also suspect. He denied Morgan's charges and mounted a vigorous defense of his innocence. He took and passed lie detector tests.³⁴ He searched diligently and expensively for his daughter and found her. But was he serving his own interests or Hilary's?

Although Foretich invited Hilary's guardian *ad litem* to supervise their short visits, that supervision ceased as soon as the visits became overnight ones.³⁵ Did Foretich fear that accepting supervision implied he had something to hide? But he had already been supervised, at his own instigation, and his reputation was already dented if not permanently damaged. He could not harm himself; why not protect himself and his daughter by providing an impartial witness to their visits whose presence would ward off further innuendo and accusations?

Foretich also objected to recommendations that Hilary be evaluated by neutral experts and did not withdraw that objection until after the child had disappeared.³⁶ Although Hilary's guardian first made the recommendation in 1986 and although Morgan also ar-

31. *Id.* at 409.

32. *Id.* at 412.

33. *A Mother's Tale*, *supra* note 5, at 30; Elson, *supra* note 4, at 66.

34. Elson, *supra* note 4, at 66.

35. *Morgan v. Foretich*, 546 A.2d 407, 409 (D.C. App. 1988).

36. *Id.* at 414.

gued for the use of neutral experts as a wise and fair alternative to adversarial proceedings, Foretich objected.³⁷ Why did he wait to withdraw his objection until Hilary had been gone eight months and was no longer available to be examined?

There was a third party to this case. While Hilary's parents were busily pushing their own barrows and apparently forgetting whose interests were most important, the court was in an ideal position to remember and to protect those interests. Yet for some reason, the court chose to put Foretich's interests ahead of his daughter's.

The court found the evidence against Foretich to be "in equipoise" and refused to terminate or modify his visitation rights.³⁸ While the evidence did not prove him to be guilty of abuse, neither did it prove him to be innocent. Did the court feel that by ordering supervised visitation Foretich's innocence would be placed in doubt?

Hilary's guardian sought and was denied emergency stays of weekend visitation orders.³⁹ The court could have ordered supervision as an alternative to a stay. Such an order was within the court's discretion, as much so as a refusal. Why, then, did the court not act to protect Hilary's best interests, just in case the half of the evidence which indicated she had been abused was correct?

The court also chose not to order Hilary's evaluation by a neutral team of experts. Hilary's guardian had consistently suggested that option for nearly a year prior to the 1987 hearings. The appeals court had favorably mentioned such a possibility. Morgan had urged it.⁴⁰ The court, however, refrained from promoting Hilary's interests by trying to discover, once and for all, whether she had or had not been abused. Instead, the court chose to do nothing.

Finally, the court acted precipitately in ordering the two-week, unsupervised visit which eventually caused Morgan to secrete her child. While still receiving evidence during hearings to rule on a new set of motions which included Foretich's visitation rights, the court ordered the extended, unsupervised visit on the grounds that summer was drawing to a close and Hilary would soon return to school.⁴¹ The court reasoned, "to further delay the defendant-father's entitlement to summer visitation with his child until [a ruling was made] results in a denial of said summer visitation by default."⁴² In order to preserve Foretich's right to one summer visit, the court was unwilling to put the child's interests ahead of the father's.

Mother, father, court: all failed to promote Hilary's interests in

37. *Id.* at 413.

38. *Id.* at 410.

39. *Id.* at 409.

40. *Id.* at 413-14.

41. *Id.* at 409.

42. *Id.*

a happy, safe childhood, free from the insecurities, fears, and invasive publicity she was obliged to suffer. By 1990, it was time for a neutral and compassionate authority to consider and settle her case in the light of what is really best for her.

[A]ll decisions relating to the welfare and future of children have to be decided on the 'best interests' of the children principle and no other [interpretations] are to be put on that test.⁴³

It became New Zealand's turn to protect Hilary Foretich's best interests. Current international law encourages recognition and enforcement of another state's custody and visitation orders. The Hague Convention directs that children should be returned to the jurisdiction which granted the original orders but allows a jurisdiction to refuse to return a child where her welfare and best interests would be affected.⁴⁴ Although New Zealand is not a signatory of the Hague Convention and is not bound by it, the New Zealand courts stated that the judge in Hilary's case would be bound by his interpretation of what was best for Hilary⁴⁵ and not necessarily by the interests of international comity. However, because the Hague Convention is so specifically concerned with a child's best interests, it provides a practical guide as to how, in accordance with international law, a court should decide such a case as this.

The Convention stipulates several grounds which permit a state to refuse to return a child. Article 12 allows a state to refuse to return a child if more than a year has lapsed since the child was taken and if it is shown that the child is presently settled in its new home.⁴⁶ Hilary left the United States in 1987.⁴⁷ She had been in New Zealand for nearly two years before being discovered, had lived in the same place for that time, and had attended a private school.⁴⁸ The court could rationally decide that these circumstances constituted being settled.

Article 13(a) of the Convention says that a state is not required to order the return of a child if the legal custodian agreed to the child's removal.⁴⁹ Morgan's custody of Hilary has never been revoked,⁵⁰ and she initiated Hilary's odyssey.⁵¹ Article 13 also permits a court to refuse to return a child if the child objects and if she is

43. *In re C.*, (C.A. 1977), reprinted in 5 Fam. L. Rep. 2248, 2249.

44. Hague Convention, *supra* note 12, arts. 8-13, 19 I.L.M. at 1502-03.

45. Berringer, *supra* note 8, at 22.

46. Hague Convention, *supra* note 12, 19 I.L.M. at 1502.

47. Berringer, *supra* note 8, at 22.

48. *Parents See Girl*, *supra* note 11, at 16.

49. Hague Convention, *supra* note 12, 19 I.L.M. at 1502.

50. *Morgan v. Foretich*, 546 A.2d 407, 408-09 (D.C. App. 1988).

51. Cropp, *supra* note 7, at 12.

thought to be old enough and mature enough that her views should be considered.⁵² The New Zealand court indicated its interest in Hilary's feelings by ordering a professional evaluation of the effect seeing her father again would have on her.⁵³ Although the court could decide that Hilary, at eight, would not be not old enough or mature enough for her opinions to be given the greatest possible weight, the court would be justified in taking them into consideration.

There is, however, a most trenchant argument against obliging New Zealand to return Hilary to the United States. The Convention permits a state to refuse to return a child if "there is a grave risk that his or her return would expose the child to a physical or psychological harm or otherwise place the child in an intolerable situation."⁵⁴ The court could decide that evidence did not indicate Hilary would suffer harm if she were returned. However, the family situation as it existed when Hilary disappeared was certainly intolerable for a child, and that alone would be grounds for refusing to return Hilary.

Nothing was settled legally after Hilary left the United States. The District of Columbia court order requiring Morgan to produce Hilary for the two-week, unsupervised visit with her father is apparently still in effect.⁵⁵ A companion case in the Virginia courts might need to be re-tried due to erroneous exclusion of evidence which indicated that Hilary had been abused by her father. *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988).⁵⁶ For over two years both parents, and their various supporters and critics, exchanged insults and opinions in the press and on television.⁵⁷ There are hard feelings, accusations and questions on all sides of the case and no decisions or agreements except that Hilary has suffered the most from the prolonged disagreement.⁵⁸ There is nothing at all tolerable in this situation for Hilary. By itself, the unsettled and unsettling status of Hilary's case in the United States would be abundant reason for New Zealand to keep her within its jurisdiction.

Once a state decides not to return a child, it must make a decision about that child's care. New Zealand decided not to return Hilary to the United States until its courts adjudicated the matter and questions of custody and visitation were resolved. The Convention does not specifically address the question of whether one jurisdiction

52. Hague Convention, *supra* note 12, 19 I.L.M. at 1502.

53. Berringer, *supra* note 8, at 22.

54. Hague Convention, *supra* note 12, art. 13(b), 19 I.L.M. at 1502.

55. Berringer, *Girl In Custody Case Emerges in New Zealand*, New York Times, Feb. 24, 1990, at 9, col. 4.

56. *Morgan v. Foretich*, 546 A.2d 407, 414 (D.C. App. 1988).

57. Elson, *supra* note 4, at 66; *Parents See Girl*, *supra* note 11, at 16.

58. *A Mother's Tale*, *supra* note 5, at 30.

should over-rule another's custody orders. It does direct that the merits of custody should not be decided until after a jurisdiction decides not to return a child.⁵⁹ It also notes that while a state may take notice of foreign judicial decisions and custody orders, a state is not required to recognize or enforce another state's decisions or orders. This suggests, therefore, that if a state has the right to decide to retain a child, it should also have the right to decide who will have charge of her.

The Convention addresses the question of rights of access or visitation even less specifically, directing only that a state should "promote the peaceful enjoyment of access rights. . . ." and noting that the state may initiate or assist in proceedings which would either specify or organize these rights.⁶⁰ Rationally, if a state has the right to adjudicate custody rights, it should also have the right to adjudicate visitation rights, modifying or terminating them in whichever manner the court feels will best serve the child's interests.

The questions of custody and visitation rights which were being heard when Hilary Foretich disappeared have not been settled. To date, the United States court involved has not indicated it wishes to resume hearings.⁶¹ The litigants transferred their attention to the New Zealand courts and placed New Zealand in the fortunate position of being able to stabilize a little girl's life and provide her with some measure of security and happiness. Both international law and the disposition of the New Zealand courts dictate that in matters of custody and right of access the child's welfare and best interests should be put before all other claims and interests. Therefore, New Zealand should not be obligated to return Hilary to the legal and personal turmoil which await her in the United States. It is in her best interests for her new country to exercise its jurisdiction to decide who will have custody of her, who will be allowed to visit her, and the circumstances of both.

POSTSCRIPT

November 21, 1990, the New Zealand Family Court handed down a decision in the Hilary Foretich case.⁶² Finding that "Hilary's 'physical, educational, spiritual and emotional needs are being met,'" the court awarded Elizabeth Morgan custody of her daughter, subject to certain limitations.⁶³

Hilary is required to remain in New Zealand, and the court has

59. Hague Convention, *supra* note 12, art. 16, 19 I.L.M. at 1503.

60. *Id.*

61. Berringer, *supra* note 55, at 9.

62. Twomey, *Morgan-Foretich Fight Ends—for Now*, The Washington Post, Dec. 1, 1990 (LEXIS, Nexis file, Currnt lib.).

63. *Id.*

retained her passport.⁶⁴ She must remain in Christchurch, where she presently lives, and she must continue to attend her present school.⁶⁵ Morgan is required to submit a report on Hilary's progress to the court every six months⁶⁶ and is barred from publicizing Hilary's story,⁶⁷ including New Zealand publication of Morgan's book on the case.⁶⁸

Eric Foretich is presently barred from visiting Hilary although he may eventually be permitted to send her gifts and letters.⁶⁹ Bi-annually, he will receive photographs of his daughter and reports on her health and school work.⁷⁰ The court explained its decision to deny Foretich visitation on the grounds that such visits would again place Hilary in "the center of parental conflict with inevitable disruption to her emotional security."⁷¹

The court order clearly favors Hilary's interests over those of her parents. Keeping Hilary in New Zealand is against the interests and the wishes of both parents. Morgan is currently married to a United States federal judge and has indicated she wishes to return to the U.S.⁷² Foretich has said he is obliged to give up his custody battle because "I can't physically take her from New Zealand, and I'm not going to move there."⁷³ However, the court said that permitting Hilary to return would subject her to media scrutiny which could be emotionally detrimental.⁷⁴

The court specifically did not decide the question of whether Hilary was actually sexually abused.⁷⁵ Instead, saying Hilary believes her father abused her, whether he actually did or not,⁷⁶ the court faulted Morgan and her parents for perpetuating the abuse issue.⁷⁷ The court observed, "it is now part of the family ethos that [Hilary] is an abused child, and it would be impossible for her not to identify with the convictions of her mother and maternal grandparents."⁷⁸

64. *Id.*

65. Legal Times, Dec. 10, 1990 (LEXIS, Nexis file, Currnt lib.) [hereinafter Legal Times 12/10/90].

66. *Ruling on Custody Ends Bitter Case*, The New York Times, Dec. 1, 1990 (LEXIS, Nexis file, Currnt lib.).

67. Legal Times 12/10/90, *supra* note 65.

68. Twomey, *supra* note 62.

69. *Id.* Foretich has said that the court order requires him to make arrangements for any visitation with the New Zealand court. Castaneda, *New Zealand Gives Custody to Morgan*, The Washington Post, Nov. 30, 1990 (LEXIS, Nexis file, Currnt lib.).

70. Twomey, *supra* note 62.

71. Legal Times, 12/10/90, *supra* note 65.

72. Twomey, *supra* note 62.

73. Castaneda, *supra* note 69.

74. Twomey, *supra* note 62.

75. *Id.*

76. *Id.*

77. Legal Times 12/10/90, *supra* note 65.

78. Twomey, *supra* note 62. Two weeks after the New Zealand Family Court denied

The court also gave consideration to Hilary's future, in spite of Foretich's suggestion the order did not address that issue.⁷⁹ The court noted the extreme animosity which characterized Morgan's and Foretich's dispute and doubted if much would change, even if Foretich were found innocent of the abuse charge.⁸⁰ The court laid much of the burden on Morgan for the needed change. She must "relax her determination that Dr. Foretich should not have a meaningful part to play in Hilary's life. . . .When that happens, progress can be made."⁸¹

Adjudication of custody rights, visitation, and the limits attached to both: the dictates of international law placed these issues in the hands of the New Zealand Family Court with the stricture that Hilary Foretich's welfare and best interests are of paramount importance. Unlike her parents and previous courts, the New Zealand court made the best of a very bad situation, and, by the terms of its November order, obviously intends that situation to improve under the court's supervision. Eventually Hilary may have a chance to be happy.

Suzanne McGrath Dale

Foretich visitation rights with Hilary, not on grounds that she had been abused but merely because she believed she had been abused, a Fairfax County (VA) Circuit Court judge indicated that he might deny Foretich visitation with his elder daughter for similar reasons. The judge in the custody dispute between Foretich and his second wife had previously found that allegations Foretich had abused the older girl were not proven. The judge suggested the girl's mother had coached her. Weil, *Foretich May be Barred from Seeing Other Child*, The Washington Post, Dec. 8, 1990 (LEXIS, Nexis file, Currnt lib).

Foretich has been accused of abusing both his daughters. Neither charge has been proven, and yet two courts have or are contemplating denying him visitation because both girls believe they have been abused. It is possible Foretich did abuse the children and that there simply is not enough evidence to prove the allegations. It is also possible that he did not. In neither case does the truth of the matter seem to be the basis for the judge's decisions, only the belief of a child.

What is so chilling in these two cases is the concept of "constructive abuse" that both courts seem to be promoting: as long as the child believes, for whatever reason, it has been abused, treat the "abusing" parent as if the charges are true, even though they may be false. If other courts follow this new doctrine, children may become lethal weapons for parents to use against each other and other adults. The potential for injustice in this "constructive abuse" has frightening, historic parallels in the Salem (MA) witch trials and the McCarthy-era hunt for Communists, and the doctrine should be used sparingly, if at all.

79. Legal Times 12/10/90, *supra* note 65.

80. Twomey, *supra* note 62.

81. *Id.*

