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Court of Appeals of Texas,
 Austin.
 In re Jude L. VERNOR.
 No. 03-02-00580-CV.

Nov. 26, 2002.
 Order Overruling Rehearing Jan. 13, 2003.

Mother sought mandamus relief from temporary order of the County Court at Law requiring her to return her seven-year-old child from Australia to Williamson County within eleven days. The Court of Appeals, [Bea Ann Smith](#), J., held that: (1) mother's removal of child was not wrongful under the Convention on the Civil Aspects of International Child Abduction, and (2) temporary order requiring mother to return her child within eleven days was unreasonable.

Writ conditionally granted.

West Headnotes

[1] Mandamus 250 178

[250](#) Mandamus
[250III](#) Jurisdiction, Proceedings, and Relief
[250k178](#) k. Judgment or Order. [Most Cited Cases](#)

If a court's order is adequately reflected in the reporter's record, a formal written order is not essential to obtaining mandamus relief. [Rules App.Proc., Rule 52.3\(j\)\(1\)\(A\)](#).

[2] Child Custody 76D 802

[76D](#) Child Custody
[76DXI](#) International Issues
[76Dk802](#) k. Constitutional and Statutory Provisions and Treaties. [Most Cited Cases](#)
 The Convention on the Civil Aspects of International Child Abduction operates to restore the status quo as it existed before the wrongful removal of a child in a signatory nation. International Child Abduction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).


[3] Child Custody 76D 803

[76D](#) Child Custody
[76DXI](#) International Issues
[76Dk803](#) k. Grounds and Factors in General.
[Most Cited Cases](#)


To be entitled to relief under the Convention on the Civil Aspects of International Child Abduction, an applicant must establish that (1) he or she had rights of custody of the child at the time of the removal of the child and was exercising those rights; (2) the child was removed from the child's habitual residence; and (3) the removal breached the applicant's rights of custody. International Child Abduction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).

[4] Child Custody 76D 803

[76D](#) Child Custody
[76DXI](#) International Issues
[76Dk803](#) k. Grounds and Factors in General.
[Most Cited Cases](#)

Child Custody 76D 804

[76D](#) Child Custody
[76DXI](#) International Issues
[76Dk804](#) k. Habitual Residence. [Most Cited Cases](#)

Child Custody 76D 810

[76D](#) Child Custody
[76DXI](#) International Issues
[76Dk810](#) k. Defenses. [Most Cited Cases](#)
 Mother's removal of her child from Texas to Australia was not wrongful under the Convention on the Civil Aspects of International Child Abduction, and thus child's father was not entitled to an order of return under the Convention, even though child's habitual residence was in Texas; father had no custodial rights under Texas law at the time of the child's removal, and mother had no actual knowledge of father's paternity and custody action or the default judgment entered in favor of father at the time of the child's removal. International Child Abduction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).

[5] Child Custody 76D 808

76D Child Custody

76DXI International Issues

76Dk808 k. Return of Child. [Most Cited Cases](#)


Under the Convention on the Civil Aspects of International Child Abduction, an order of return of a child is available only for wrongful removals; there is no right of return under the Convention if the child was not taken in breach of the applicant's custody rights. International Child Abduction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).

[6] Child Custody 76D 800

76D Child Custody

76DXI International Issues

76Dk800 k. In General. [Most Cited Cases](#)
Obtaining relief under the Convention on the Civil Aspects of International Child Abduction does not require a prior court order. International Child Abduction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).

[7] Child Custody 76D 803

76D Child Custody

76DXI International Issues

76Dk803 k. Grounds and Factors in General. [Most Cited Cases](#)
Mere rights to visitation do not constitute “rights to custody” under the Convention on the Civil Aspects of International Child Abduction; rather, visitation rights are “rights of access” within the meaning of the Convention. International Child Abduction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).

[8] Child Custody 76D 800

76D Child Custody

76DXI International Issues

76Dk800 k. In General. [Most Cited Cases](#)
The available remedies under the Convention on the Civil Aspects of International Child Abduction are in the nature of administrative efforts to obtain visitation, including requiring the resisting parent to pay the travel expenses of the parent whose visitation rights have been frustrated. International Child Ab-

duction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).

[9] Child Custody 76D 823

76D Child Custody

76DXI International Issues

76Dk820 Evidence
76Dk823 k. Burden of Proof. [Most Cited Cases](#)

Under the Convention on the Civil Aspects of International Child Abduction, the applicant seeking the return of child bears the burden to prove rights of custody and wrongful removal. International Child Abduction Remedies Act, §§ 2-12, [42 U.S.C.A. §§ 11601-11610](#).

[10] Mandamus 250 3(2.1)


250 Mandamus

250I Nature and Grounds in General

250k3 Existence and Adequacy of Other Remedy in General

250k3(2) Remedy at Law

250k3(2.1) k. In General. [Most Cited Cases](#)


Mandamus 250 12

250 Mandamus

250I Nature and Grounds in General

250k12 k. Nature of Acts to Be Commanded. [Most Cited Cases](#)

Generally, an appellate court issues a writ of mandamus to correct a clear abuse of discretion when there is no adequate remedy at law.

[11] Mandamus 250 26


250 Mandamus

250II Subjects and Purposes of Relief

250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers


250k26 k. Exercise of Judicial Powers and Functions in General. [Most Cited Cases](#)

Mandamus will lie to remedy a clear failure by the trial court to analyze and apply the law correctly.

[12] Mandamus 250 26


[250](#) Mandamus

[250II](#) Subjects and Purposes of Relief
[250II\(A\)](#) Acts and Proceedings of Courts,
Judges, and Judicial Officers
[250k26](#) k. Exercise of Judicial Powers and
Functions in General. [Most Cited Cases](#)
Mandamus is available to correct a trial court's deprivation of fundamental constitutional rights.

[\[13\]](#) Mandamus [250](#) 42

[250](#) Mandamus

[250II](#) Subjects and Purposes of Relief
[250II\(A\)](#) Acts and Proceedings of Courts,
Judges, and Judicial Officers
[250k42](#) k. Motions and Orders in General.
[Most Cited Cases](#)
Mandamus is an appropriate remedy when a court abuses its discretion involving temporary orders in a suit affecting the parent-child relationship.

[\[14\]](#) Mandamus [250](#) 4(4)

[250](#) Mandamus

[250I](#) Nature and Grounds in General
[250k4](#) Remedy by Appeal or Writ of Error
[250k4\(4\)](#) k. Modification or Vacation of
Judgment or Order. [Most Cited Cases](#)
There is no adequate remedy by appeal from temporary orders because they are not appealable, and thus mandamus is an appropriate remedy when the court abuses its discretion involving temporary orders.

[\[15\]](#) Child Custody [76D](#) 505

[76D](#) Child Custody

[76DVIII](#) Proceedings
[76DVIII\(C\)](#) Hearing
[76Dk505](#) k. Scope of Inquiry. [Most Cited Cases](#)
A court abuses its discretion in imposing temporary orders affecting the parent-child relationship when it fails to give due regard for the current living situations of the parties, especially the stability of the child's current living situation, and when it fails to give due regard for the financial or practical ability of the parties to comply with the court's orders. [V.T.C.A., Family Code § 105.001\(a\)](#).

[\[16\]](#) Child Custody [76D](#) 808

[76D](#) Child Custody

[76DXI](#) International Issues
[76Dk808](#) k. Return of Child. [Most Cited Cases](#)

Mandamus [250](#) 53

[250](#) Mandamus

[250II](#) Subjects and Purposes of Relief
[250II\(A\)](#) Acts and Proceedings of Courts,
Judges, and Judicial Officers
[250k53](#) k. Vacation of Judgment or Order.
[Most Cited Cases](#)

Temporary order requiring mother to return her seven-year-old child from Australia to Williamson County within eleven days was unreasonable and warranted conditional mandamus relief; there was no emergency which justified the court's order that the child be returned within eleven days, the court's order seemed to reflect its anger with the mother rather than appropriate concern for the best interest of the child, the order ignored that the mother was a non-resident alien without a green card and that the child's passport had been temporarily surrendered to an Australian court, and the child had been living in Australia for over a year and was settled into school. [V.T.C.A., Family Code § 105.001\(a\)](#).
*203 [Daryl G. Weinman](#), Morehart and Weinman, Austin, for appellant.

[Cynthia Borgfeld Smith](#), Cynthia Borgfeld Smith, PC, Georgetown, for appellee.

Before Justices [KIDD](#), B.A. SMITH and [YEAKEL](#).

[BEA ANN SMITH](#), Justice.

Relator Jude L. Vernor, an Australian citizen domiciled in Australia, seeks mandamus relief from a temporary order of a county court at law in a paternity and custody action. On September 16, 2002, the court ordered that Ms. Vernor return her seven-year-old son from her parents' home in Australia to Williamson County, where his biological father lives, within eleven days. The court did not order Vernor herself to return, but threatened to name the child's father, Larry Carden (the real-party-in-interest), the primary custodial parent if Ms. Vernor failed to move

back to Williamson County with the child. Ms. Vernor alleges that she and the child fled Texas and sought refuge in Australia to escape domestic violence by Mr. Carden. She argues, among other things, that the order was arbitrary and unreasonable because it was impossible to comply with and it violated her constitutional rights and the Texas Family Code.

Ms. Vernor filed this mandamus action and asked for a stay on September 23, 2002. On September 24, this Court stayed the order that the child be returned by September 27 and stayed all proceedings in the county court at law pending resolution of the petition for mandamus relief. The child remains in Australia with his mother and maternal grandparents, where he has been attending school for more than a year. After reviewing the record and the law, this Court will conditionally grant the writ of mandamus.

BACKGROUND

Ms. Vernor once lived, worked, and owned a home in Round Rock. In 1994, she began a romantic relationship with Mr. Carden and a child of this union was born in Williamson County on July 1, 1995. The parents never married. Ms. Vernor has been the child's only caregiver since his birth. Ms. Vernor does not dispute that Mr. Carden is the child's biological father or that he exercised visitation with the child informally. She and Mr. Carden had a sporadic and stormy relationship. In 1995, Mr. Carden filed suit in Williamson County to establish his paternity of the child. On November 13, 1995, temporary orders issued naming Mr. Carden and Ms. Vernor joint managing conservators and restricting the child's domicile to Texas. Mr. Carden abandoned that lawsuit, however, and in 1998 it was dismissed for want of prosecution. Ms. Vernor alleges that Mr. Carden committed acts of domestic violence over the course of their relationship. At some point, Mr. Carden began attending anger-management counseling.

Mr. Carden alleges that Child Protective Services was investigating the removal of the child from Ms. Vernor's home before she disappeared in May 2001. According to Ms. Vernor, Mr. Carden repeatedly made false reports of child neglect and *204 abuse against her. Ms. Vernor testified that the child protective agency determined each allegation was unfounded. She asserts that Mr. Carden's harassment

through the false reports to police and the child protective agency increased in frequency until she left Williamson County.

The couple's troubled relationship erupted in a violent episode in April 2001, which the child witnessed. The details are sketchy, but Mr. Carden struck Ms. Vernor and dragged her some distance from her car when she and the child were attempting to flee his threats. At some point, the then six-year-old child tried to physically defend his mother from Mr. Carden's attack. Ms. Vernor sought refuge in a local battered women's shelter. She applied for a protective order against Mr. Carden in Williamson County on May 8, but her request was denied. On May 2 and 8, Mr. Carden's attempts to visit the child at his school were thwarted. Mr. Carden alleges that on May 17, Ms. Vernor withdrew the child from school. Ms. Vernor testified that she transferred her son to another school to protect him from his father; this was done while she and the child were still living at the shelter. Mr. Carden involved the child protective agency in searching for Ms. Vernor and the child.

Ms. Vernor and the child eventually moved to a shelter in Santa Fe, New Mexico. Mr. Carden somehow involved New Mexico police in searching for them. Ms. Vernor, an Australian citizen, and her son flew to Australia to live with her parents on September 10, 2001. It is undisputed that when she left, Ms. Vernor was unaware of any court proceedings involving her or the child, or any custody rights awarded to Mr. Carden.

Williamson County Default Judgment

On June 20, 2001, after Ms. Vernor fled to New Mexico, Mr. Carden filed a second suit in Williamson County, again seeking to establish his paternity and seeking custody of the child. He served Ms. Vernor with citation by publication in Williamson County, but having left Texas in May she was unaware of the suit.^{FN1} On September 10, the same day Ms. Vernor and the child left for Australia, Mr. Carden obtained a default judgment in his paternity and custody suit, which has since been vacated.^{FN2} The "Final Decree in Paternity Suit" found Mr. Carden to be the biological father of the child, named both parents joint managing conservators, and gave Mr. Carden the right to establish the "primary residence of the child." The decree did not restrict the child's resi-

dence to Williamson County or Texas.^{FN3} On October 10, Mr. Carden secured a writ of habeas corpus for return of the boy to Williamson County.

FN1. The fact that Mr. Carden involved the New Mexico police in searching for Ms. Vernor in that state in May tends to show that Mr. Carden was aware that Ms. Vernor was not physically present in Williamson County.

FN2. Ms. Vernor testified that she and her son departed for Australia on a pre-dawn flight on September 10, so that she was not in the country when the default judgment was signed, and she was unaware of the lawsuit or the judgment.

FN3. The earlier 1995 temporary orders that did restrict the child's residence to Texas had been dismissed in 1998, long before Ms. Vernor left for Australia.

The Australian Proceedings

After learning that Ms. Vernor had returned to Australia, Mr. Carden initiated an application for the return of the child under the Convention on the Civil Aspects of International Child Abduction (the "Convention")^{FN4} in the Family Court of *205 Melbourne, Australia. The Convention is a treaty, signed by both the United States and Australia, establishing legal rights and procedures for the prompt return of children who have been wrongfully removed from one signatory nation or wrongfully retained in another.^{FN5} The goals of the Convention are (1) to remove any incentive in abducting children across international borders and (2) to ensure that the rights of custody granted under the law of one signatory nation are effectively respected in the other signatory nations. Ms. Vernor was notified of these proceedings in Australia on December 12, 2001; she testified, without contradiction, that this was the first notice she received of the Williamson County paternity and custody suit.

FN4. Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670, [19 I.L.M. 1501](#), 1343 U.N.T.S. 89, [reprinted in 51 Fed.Reg. 10,493, 10,498 \(1986\)](#) [he-

reinafter the "Convention"].

FN5. *Id.* art. 1, [19 I.L.M. at 1501, reprinted in 51 Fed.Reg. at 10,498](#); [Miller v. Miller](#), 240 F.3d 392, 394 (4th Cir.2001).

In his Convention application filed in Australia, Mr. Carden alleged that he had been adjudicated the biological father and named a joint managing conservator of the child, citing to temporary orders which also restricted the child's residence to Texas. His application to the Australian court expressly stated:

5. The applicant under the Convention, LARRY JAY CARDEN, father of the child, ... has rights of custody in respect to the child by reason of the following factual and legal circumstances:

....

3. The mother and father were appointed joint managing conservators of the child by order of the District Court at Williamson County, Texas on November 13, 1995.

....

1. The District Court of Williamson County Texas, also ordered that the child not be removed from the physical boundaries of the State of Texas.

2. The applicant father regularly exercised his right of access and possession to the child.

3. On or about 5 September 2001 JUDE RAE VERNOR travelled to Australia with the child without the knowledge or consent of the applicant father LARRY JAY CARDEN.

....

1. The mother's removal of the child to Australia is in breach of the father's rights of custody as defined by Article 5 of the *Family Law (Child Abduction Convention) Regulations 1986* and is therefore wrongful within the meaning of Article 3.

Mr. Carden failed to reveal that the temporary order in his 1995 lawsuit, naming him as a joint managing

conservator and restricting the child's residence to Texas, had been dismissed in 1998 and was no longer in effect in 2001. We find reprehensible this misrepresentation apparently made to invoke the protections of the Convention.^{FN6} Mr. Carden also reported to the Australian authorities that Ms. Vernor was a mentally-unbalanced drug abuser who neglected and abused the child.

^{FN6}. At oral argument, counsel for Mr. Carden acknowledged that Ms. Vernor's removal of the child to Australia was not wrongful and that the Convention's protection was improperly invoked.

Unaware of Mr. Carden's misrepresentation, on December 17, 2001, the Australian Family Court ordered that: (1) the Department of Human Services of the State of Victoria "secure the welfare of the child"; (2) the Department investigate the allegations threatening the child's welfare; *206 (3) a warrant be issued for the child; (4) Ms. Vernor be restrained from removing the child from Australia or the State of Victoria; (5) Ms. Vernor be restrained from changing the residence of the child; and (6) the child's passport be surrendered to the Family Court. These orders are still in effect.

In response to Mr. Carden's accusations, the child, Ms. Vernor, and Ms. Vernor's parents underwent psychological evaluations and assessments by an Australian psychologist.^{FN7} At some point, the Australian Family Court abated its action so that the custody issue could be adjudicated in Williamson County, as the Convention provides. *See* Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, art. 15, T.I.A.S. No. 11,670, [19 I.L.M. 1501, 1503](#), 1343 U.N.T.S. 89, *reprinted in* [51 Fed.Reg. 10,493, 10,499 \(1986\)](#) (the "Convention") (provision allows country where child taken to request that courts, in country from where child taken, render a decision whether removal of child was "wrongful" within meaning of Convention).

^{FN7}. This psychologist's deposition was taken via satellite in conjunction with the Texas custody litigation, and a tape of the deposition was made a part of the record in this proceeding.

Default Judgment Vacated

After learning of the Williamson County default judgment, Ms. Vernor filed a motion for new trial, alleging improper service of citation by publication, failure to appoint an attorney ad litem for the party cited, and false testimony by Mr. Carden. Ms. Vernor asserted several defenses to Mr. Carden's being named joint managing conservator of the child with custodial rights, including Mr. Carden's physical abuse of her and the child. *See* [Tex. Fam.Code Ann. § 153.002 \(West 2002\)](#).

At the hearing on the motion for new trial on May 30, Ms. Vernor attempted to testify about Mr. Carden's acts of domestic violence. The trial court sustained Mr. Carden's objection and limited Ms. Vernor to testifying that Mr. Carden's acts of physical violence forced her into a battered women's shelter. On June 24, 2002, the Williamson County court vacated its September 2001 default judgment. Mr. Carden's attorney conceded at oral argument that the default judgment was defective because an attorney ad litem was not appointed to represent Ms. Vernor's interests in that lawsuit. *See* [Tex.R. Civ. P. 244](#); [Cahill v. Lyda, 826 S.W.2d 932, 933 \(Tex.1992\)](#).

The September 16 Temporary Order

[1] Pursuant to a pre-default request by Mr. Carden for temporary orders, evidentiary hearings were held in Williamson County in August and September. Ms. Vernor returned from Australia for two of these hearings. At the conclusion of these hearings, on September 16, 2002, in open court, the court orally ordered ^{FN8} Ms. Vernor to return the child to Williamson County by September 27, only eleven days later. Ms. Vernor was ordered to send the child from Australia to Williamson County alone or to return to Australia and accompany the child back to Texas. Ms. Vernor objected for many reasons, including: (1) the order of the Australian Family Court prohibited her from removing the child from Australia; (2) the fact that traveling on such short notice would result in exorbitant airfare in excess of \$6000; (3) the child was well-adjusted and attending *207 school in Australia and complying with the order would be very disruptive to his school schedule; (4) Ms. Vernor faced immigration difficulties for a prolonged stay because her resident-alien status had been revoked by the United States Immigration and Naturalization Service

due to her prolonged absence from the country; (5) Ms. Vernor had no money to move back; ^{FN9} and (6) Ms. Vernor feared for herself and her child's safety in Williamson County. The court overruled her objections and stated its ruling:

FN8. The court's various orders announced on September 16 have not been reduced to writing and signed by the court. If a court's order is adequately reflected in the reporter's record, a formal written order is not essential to obtaining mandamus relief. *In re Perritt*, 973 S.W.2d 776, 779 (Tex.App.1998); see also Tex.R.App. P. 52.3(j)(1)(A).

FN9. Ms. Vernor alleges that she sold her house in Williamson County when she was staying at the women's shelter. She claims that she has spent the sales proceeds for lawyers in Texas and Australia.

I do find that Larry Carden is the biological father of [the child]. I do appoint both parents temporary joint managing conservators[.] I order that [the child] must be returned to Williamson County by September 27th, 2002. If you, Ms. Vernor, return to the United States in Williamson County with [the child] you may establish the residence of [the child] in Williamson County. I hope you do return, ma'am, because [the child] needs both of you.... If Ms. Vernor returns to Williamson County and designates her intent by September 23rd to return to Williamson County, with [the child], she will establish the residency of [the child].

....

Ms. Vernor, if you do not return to Williamson County with [the child], [the child] will return without you and he will reside with Mr. Carden.

Ms. Vernor sought a stay of this order in this Court, along with mandamus relief. This Court issued a stay on September 24 and proceeded to hear oral arguments regarding mandamus relief on October 23, 2002.

HAGUE CONVENTION

The Australian Family Court has been apprised that

Ms. Vernor was proceeding to set aside the default judgment. The Australian solicitors for both parties are aware of these mandamus proceedings. They have requested information regarding any "decision or determination" about whether the removal of the child to Australia was unlawful under Texas law, so as to implicate the Convention. See Convention, art. 15, 19 I.L.M. at 1503, reprinted in 51 Fed.Reg. at 10,499. We understand that the Australian Family Court is awaiting an authoritative decision from Texas courts regarding the legal status of the removal of this child under Texas law.

[2] The purpose of the Convention is to inhibit the abduction of children across international borders by establishing procedures for their prompt return to their country of "habitual residence." Convention, preamble, 19 I.L.M. at 1501, reprinted in 51 Fed.Reg. at 10,498; see also Letter of Transmittal from the White House to the Senate, Oct. 30, 1985, 51 Fed.Reg. at 10,496. The Convention operates to restore the status quo as it existed before the wrongful removal of a child in a signatory nation. England v. England, 234 F.3d 268, 271 (5th Cir.2002). Congress implemented the Convention by enacting the International Child Abduction and Remedies Act ("ICARA"). 42 U.S.C.A. §§ 11601-11610 (West 1988). ICARA grants concurrent jurisdiction to state and federal courts to determine the merits of an abduction claim under the Convention, but not the merits of the underlying custody battle. *Id.* § 11603(a); England, 234 F.3d at 271.

*208 [3][4] To be entitled to relief under the Convention, an applicant must establish that (1) he or she had "rights of custody" of the child at the time of the removal of the child and was exercising those rights; (2) the child was removed from the child's habitual residence; and (3) the removal breached the applicant's "rights of custody." See Meredith v. Meredith, 759 F.Supp. 1432, 1434 (D.Ariz.1991); Flores v. Contreras, 981 S.W.2d 246, 249 (Tex.App.-San Antonio 1998, pet. denied). The relief available is an order for the automatic and mandatory return of the child to its country of habitual residence. Convention, art. 12, 19 I.L.M. at 1502, reprinted in 51 Fed.Reg. at 10,499.

The first issue is determining the child's "habitual residence," an undefined term in the Convention that was intended to be applied to the facts and circum-

tances of each case. See [Rydder v. Rydder](#), 49 F.3d 369, 373 (8th Cir.1995); [Convention](#), art. 4, 19 I.L.M. at 1501, [reprinted in 51 Fed.Reg. at 10,498](#). One federal court has described the “habitual residence” as the place where the child has been physically present for an amount of time sufficient for acclimatization and which has a “degree of settled purpose” from the child’s perspective. [Feder v. Evans-Feder](#), 63 F.3d 217, 224 (3d Cir.1995) (quoting *Re Bates*, No. CA 122-89, High Court of Justice, Family Div’l Ct., Royal Courts of Justice, United Kingdom (1989)). In this case, the child’s “habitual residence” in September 2001 was in Texas.^{FN10} Thus, Ms. Vernor removed the child from his “habitual residence” when she returned with him to Australia.

^{FN10}. Although Ms. Vernor and the child briefly stayed in New Mexico after leaving Texas and before traveling to Australia, Texas remained the child’s “habitual residence.”

The next issue is determining whether the child’s removal from his habitual residence was in breach of Mr. Carden’s rights of custody. Article 3 of the Convention provides that whether the party requesting return is truly vested with the right of custody is based on the “law of the State in which the child was habitually resident immediately before the removal or retention.” [Convention](#), art. 3, 19 I.L.M. at 1501, [reprinted in 51 Fed.Reg. at 10,498](#). Therefore, Texas law governs the rights of custody and wrongful removal issues.

[5][6][7][8][9] Rights of custody^{FN11} are defined in article 5 of the Convention as rights “relating to the care of the person of the child.” *Id.*, art. 5. An order of return is available only for wrongful removals; there is no right of return under the Convention if the child was not taken in breach of the applicant’s custody rights. [Croll v. Croll](#), 229 F.3d 133, 137-38 (2d Cir.2000), *cert. denied*, 534 U.S. 949, 122 S.Ct. 342, 151 L.Ed.2d 258 (2001); [Teijeiro Fernandez v. Yeager](#), 121 F.Supp.2d 1118, 1125 (W.D.Mich.2000); [Bromley v. Bromley](#), 30 F.Supp.2d 857, 861 (E.D.Pa.1998); [Viragh v. Foldes](#), 415 Mass. 96, 612 N.E.2d 241, 246-50 (1993).^{FN12} The applicant bears the *209 burden to prove rights of custody and wrongful removal. [Croll](#), 229 F.3d at 138.

^{FN11}. “Rights of custody” may arise by

judicial or administrative decision or by operation of law. Unlike the Uniform Child Custody Jurisdiction and Enforcement Act, [Tex. Fam.Code Ann. §§ 152.001-317](#) (West 2002), obtaining relief under the Convention does not require a prior court order. [Flores v. Contreras](#), 981 S.W.2d 246, 248 (Tex.App.-San Antonio 1998, *pet. denied*) (citing [Convention](#), [Text and Legal Analysis](#), 51 Fed.Reg. at 10,505).

^{FN12}. Mere rights to visitation do not constitute “rights to custody”; rather, visitation rights are “rights of access” within the meaning of the Convention. [Croll v. Croll](#), 229 F.3d 133, 137-38 (2d Cir.2000), *cert. denied*, 534 U.S. 949, 122 S.Ct. 342, 151 L.Ed.2d 258 (2001). The Convention distinguishes “rights of custody” from “rights of access,” defining the latter as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.” [Convention](#), art. 5b, 19 I.L.M. at 1501, [reprinted in 51 Fed.Reg. at 10,498](#). The Convention provides remedies for a party whose rights of access are breached, but those remedies do not include an order of return. *Id.* art. 21, 19 I.L.M. at 1503, [reprinted in 51 Fed.Reg. at 10,500](#). The available remedies are in the nature of administrative efforts to obtain visitation, including requiring the resisting parent to pay the travel expenses of the parent whose visitation rights have been frustrated. See, e.g., [Bromley v. Bromley](#), 30 F.Supp.2d 857, 860 n. 4 (E.D.Pa.1998); [Viragh v. Foldes](#), 415 Mass. 96, 612 N.E.2d 241, 246-50 (1993); [Convention](#), art. 21, 19 I.L.M. at 1503, [reprinted in 51 Fed.Reg. at 10,500](#).

At the time Ms. Vernor removed the child to Australia, Mr. Carden had no custodial rights under Texas law. Ms. Vernor alone had rights of custody to the child and she was the only person empowered to determine the child’s primary residence. Because the parties never married, Mr. Carden had to legally establish his paternity to be named a parent with custodial rights. His 1995 suit to establish paternity was dismissed for want of prosecution in 1998. On September 10, 2001, when she left for Australia, Ms. Vernor was the only legally recognized parent of the

child, the only person with custody rights, and the only person authorized to determine the child's residence. Although Mr. Carden was informally recognized as the boy's father and had informally spent time with the child, Mr. Carden had no legal rights to paternity, custody, or access when Ms. Vernor returned to Australia with the child. Thus, under Texas law the removal of the child was not wrongful.

By obtaining a default judgment decreeing his paternity and his custody rights on the same day that Ms. Vernor and the child had earlier departed for Australia, without any actual notice of the pending suit, Mr. Carden did not obtain custody rights that were breached by her departure. The default judgment was defective and has been vacated. The earlier suit for paternity had been dismissed and conferred no rights of paternity on Mr. Carden. It is undisputed that Ms. Vernor did not have actual knowledge of Mr. Carden's suit, much less the default judgment, when she left this country.

As Mr. Carden's attorney conceded in oral arguments, this child was not wrongfully removed from Texas and Mr. Carden is not entitled to an order of return under the Convention. The only order from a Texas court concerning Mr. Carden's paternity and custody rights is the temporary order pronounced in open court on September 16, 2002, more than one year after Ms. Vernor and the child returned to Australia.

MANDAMUS RELIEF

[10][11][12][13][14] Generally, an appellate court issues a writ of mandamus to correct a clear abuse of discretion when there is no adequate remedy at law. Walker v. Packer, 827 S.W.2d 833, 839 (Tex.1992). A court abuses its discretion when it reaches a decision so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law. Id.; Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex.1985); In re Wallingford, 64 S.W.3d 22, 24 (Tex.App.-Austin 1999, orig. proceeding). Mandamus will lie to remedy a clear failure by the trial court to analyze and apply the law correctly. See Walker, 827 S.W.2d at 840. It is available to correct a trial court's deprivation of fundamental constitutional rights. See, e.g., Republican Party v. Dietz, 940 S.W.2d 86, 94 (Tex.1997). Finally, mandamus is an appropriate remedy when a court abuses its discretion involving temporary orders ^{FN13} in *210 a suit affect-

ing the parent-child relationship. Dancy v. Daggett, 815 S.W.2d 548, 549 (Tex.1991); In re Lemons, 47 S.W.3d 202, 204-05 (Tex.App.-Beaumont 2001, orig. proceeding).

FN13. There is no adequate remedy by appeal from temporary orders because they are not appealable. See Little v. Daggett, 858 S.W.2d 368, 369 (Tex.1993); In re Powers, 974 S.W.2d 867, 869 (Tex.App.-Houston [14th Dist.] 1998, orig. proceeding).

[15] In a suit affecting the parent-child relationship, the court may make temporary orders on a range of issues "for the safety and welfare of the child." Tex. Fam.Code Ann. § 105.001(a) (West 2002). We believe that a court abuses its discretion in imposing temporary orders without due regard for the current living situations of the parties, especially the stability of the child's current living situation, and without regard for the financial or practical ability of the parties to comply with the court's orders. See id.; cf. Dancy, 815 S.W.2d at 549 (holding court abused its discretion in failing to reset hearing on temporary custody and child support orders when father's attorney could not attend hearing due to docket setting conflicts); In Re McCoy, 52 S.W.3d 297, 301-02 (Tex App-Corpus Christi 2001, orig. proceeding) (stating mandamus particularly appropriate when court enters void temporary orders in a child custody case because of "tremendous burden" complying with such orders can entail, especially when valid contradictory orders have been entered by court in another state).

[16] In resolving this difficult international custody dispute, the trial court must keep in mind that although a Texas father wants access to his child, an Australian mother who was never married to the child's father violated no court orders when she took the child to live with her family in Australia. Perhaps the trial court assumed the mother acted wrongly in leaving with the child for Australia. We have held that she did not. The court's temporary order is unreasonable in light of this holding and must be reassessed. There was no emergency that justified the court's order that the child and the mother return to Texas within eleven days, and even more arbitrary was the suggestion that the seven-year-old child return alone, from Australia to Texas, if the mother was unable to accompany him on such short order. The trial court threatened the mother that if she failed to

return, the court would award the father the primary right to determine the residence of the child, even though this father admitted committing acts of violence toward the mother, and there have been subsequent allegations of inappropriate acts towards the child.^{FN14} The court's order seemed to reflect its anger with the mother rather than appropriate concern for the best interest of the child. See [Saavedra v. Schmidt](#), 96 S.W.3d 533, 547 (Tex.App.-Austin 2002, n. pet. h.) (indicating Texas court justified in exercising temporary emergency jurisdiction to protect children from California court's temporary custody orders entered to punish parent rather than to address best interest of children).

^{FN14}. These allegations involved two separate instances and were reported by the child to the Australian psychologist verbally and through drawings. These alleged acts included striking and pulling the child's genitals.

Furthermore, the court's order that the mother return for an extended period before the custody dispute is resolved ignored the reality that the mother is a non-resident alien who no longer has a green card enabling her to work in this country. The very real immigration difficulties*211 of the mother, including her current inability to support herself in this country, coupled with the child's inability to travel because of the surrender of his passport temporarily to the Australian court, requires a more thoughtful resolution than that ordered by the trial court. The court's arbitrary and capricious treatment of the parties' situation is further exemplified by the denial of the mother's request that she be allowed to live with friends in Travis County upon her return, rather than in Williamson County where she has no place to live and no way to support herself, and by the court's requirement that the child attend school in the county of the father's residence during the pendency of this custody dispute.

Considering that the child has been living in Australia for over a year, it was unreasonable to so abruptly disrupt the child who is settled into his Australian school, where the evidence is that he is performing well.^{FN15} It appears that the mother's return to live with her parents on their farm in Australia has afforded this seven-year-old boy the first stable environment he has enjoyed in his young life—a stability

undermined in Texas by the volatility and hostility that characterized the relationship between his mother and father. The boy's maternal grandparents, in particular his grandfather, have been good role models. These are all factors the court must take into account in entering temporary orders that disrupt the child's schooling and stable family relations before any final custody decision is reached. Temporary orders must consider the best interest of the child as well as the convenience of the court and the needs of these feuding parents. If the boy's presence is required in Texas prior to a determination of the custody rights of his parents, the trial court should attempt to avoid disrupting the child's education and might take into account the extended recess between terms in the Australian school year so that any travel will be less disruptive of the child's schedule.

^{FN15}. Both the psychologist and the child's teacher in Australia testified by satellite deposition that the child has adapted well to his new surroundings and is progressing well in school academically and socially.

By requiring the mother and child to return to Texas without regard for their present circumstances, the Texas court seems to assume an outcome in the custody proceeding. Such an approach may have been based on the misrepresentation that the mother “wrongfully” removed the child from Texas, but the trial court must afford due regard to all reasonable possibilities that might be in this child's best interest. Just as more care must be exercised in crafting appropriate temporary orders, great skill will be required in balancing the rights of these hostile parents, who have not always exercised good judgment in the past, but who have both demonstrated their strong desire to parent this child. The difficulty of resolving their conflicts is aggravated by the distance between their homes in Texas and Australia. However, the court's paramount concern must be to seek temporary and permanent arrangements that will promote the best interest of the child, wherever that may be.

In making temporary orders compelling the parties or the child to travel, the court must take into account the financial abilities of the parties. The trial court should consider the range of possibilities for discovery and evaluation that would serve the best interest of the child while this suit is pending. Having reviewed the record, including the depositions con-

ducted with witnesses in Australia by satellite, we question the court's insistence on requiring the mother and child to be present in Texas to *212 be evaluated when such technology makes trans-continental communication effective. This is especially true in light of the limited means of both parties to this custody dispute. The means of discovery must be tailored to the means of the parties to afford them. For example, when psychological evaluations of the child, the mother, and the maternal grandparents have been conducted in response to the suit filed by the father in Australia, and the depositions of those professionals have been taken via satellite with ample opportunity for cross-examination by counsel for the father, the court must consider the financial burden of requiring that all such evaluations be repeated in Texas.

In assessing financial responsibility for whatever arrangements the court settles on to enable it to finally resolve this custody dispute, the court must seek to divide equitably between the two parties the financial obligations for professional evaluation, travel, interim support of the child, and other costs. It must also assure regular telephone access between the father in Texas and the child while he remains in Australia, perhaps permitting the father access to the child in Australia until this dispute is finally resolved. In its temporary orders, the trial court may impose whatever arrangements insure access to the child in the most reasonable manner.

We are sympathetic with the trial court's difficult challenge in making appropriate temporary orders that will enable it to equitably resolve this custody dispute in a timely and appropriate manner. The distance between the two countries and the limited means of the two parents must be considered. So must the immigration status of the mother and her ability or inability to support herself in this country be considered. Of no less importance is respect for continuity and stability in this child's life, something he has had little of in his seven years. What would most help the court would be some cooperation from these parents in service of what is best for the child they both seem to care for, even though they care little for each other. We conditionally grant the writ of mandamus, assured that the trial court will withdraw its temporary order of September 16, 2002, in favor of new orders that take into account the concerns we have expressed.

CONCLUSION

We conditionally grant the writ of mandamus. The parties are ordered to provide their Australian solicitors with copies of this decision within twenty-four hours of receiving it.

SUPPLEMENTAL OPINION

The Honorable Suzanne Brooks, the respondent in this cause, filed her own motion for rehearing and has submitted the full evidentiary record that was before the trial court when it entered its temporary order. The motion for rehearing suggests that if we review the entire record, we will conclude that the relator, who had previously presented only an incomplete record, failed to demonstrate her entitlement to mandamus relief. We have carefully reviewed the full record and find that the additional evidence submitted by the trial court pertains more to the permanent custody decision to be reached in this cause than to the appropriateness of the temporary order issued September 16, 2002. The full record does not remove the concerns about the temporary order that we expressed in our opinion. However, our opinion should not be read as favoring any particular outcome in the ultimate custody decision or in the redetermination of appropriate temporary orders in this matter, so long as the concerns that we have addressed are considered. Therefore, we overrule the motion for rehearing and decline*213 to assess additional costs in this cause.

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