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Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context

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Cover Page Footnote

Lecturer, Faculty of Law, Bar Ilan University and Sharei Mishpat Law College, Israel. The author is formerly a lecturer in law at the London School of Economics. The author is grateful to Mr. Adair Dyer (formerly Deputy Secretary-General of the Hague Conference) for reading an earlier version of this article and for his helpful comments. All responsibility for the article, of course, remains with the author.

POLICY CONSIDERATIONS IN DETERMINING THE HABITUAL RESIDENCE OF A CHILD AND THE RELEVANCE OF CONTEXT

RHONA SCHUZ*

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I. INTRODUCTION

A. Background

Habitual residence has been chosen as the main connecting factor in many of the multinational conventions concluded under the auspices of the Hague Conference on Private International Law for nearly one hundred years.¹ It is now also used in other international conventions² and in the domestic legislation of a number of countries, including England and Canada. However, there was very little discussion as to the meaning of the concept until the explosion of litigation under the Hague Convention on the Civil Aspects of Child Abduction³ (hereinafter “the Abduction Convention”) began in the 1980s. Under this Convention, the determination of habitual residence is often critical to the outcome of an application for the return of the child in international abduction cases.

While the immediate consequences of the determination of the habitual residence of a child in other contexts, such as under the new Hague Convention dealing with the Private International law aspects of Parental Responsibility and Measures for the Protection of Children⁴ (hereinafter the “Protection Convention”) and in domestic child legislation, do not seem to be so drastic, the implications may be just as great. For example, the finding that country “A” has jurisdiction because it is the place of the habitual residence of the child may lead to the making of a decision or

1. It was first used in the Hague Convention on Guardianship in 1902, *available at* <http://www.hah.net/f/conventions/textofhtml1902#c>, and is currently the main connecting factor in the preliminary draft of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.

2. *See, e.g.*, the EC Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters (“Brussels II”) 1998 O.J. (C221) 20.

3. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, *available at* http://travel.state.gov/hague_childabduction.html [hereinafter Abduction Convention].

4. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, *available at* <http://www.hch.net/e/conventions/text.34e.html> [hereinafter Protection Convention].

taking of a measure by a court or other authority in country "A" which is fundamental to the child's future.⁵ Similarly, the finding that "X" has parental rights in relation to the child because the law of country "B" which is the place of the child's habitual residence, governs this question, is of monumental significance to the life of the child. It is much too early to know how extensively the Child Protection Convention will be invoked, since the Convention has only been signed by a few countries and has not yet come into effect.⁶ Assuming that it does eventually attract a reasonable number of members, this Convention ought to be used considerably more than previous Hague Conventions because of the increased awareness of the importance of Hague Conventions in dealing with international child disputes as a result of the widespread use of the Abduction Convention.

Although the Reports of the Special Commission considered the Abduction Convention, the Reports pay only limited attention to the issue of determining habitual residence. Their overall impression is that courts have little difficulty in determining habitual residence in most cases.⁷ While this assertion is no doubt true, it does not mean that we can ignore the considerable difficulty experienced in "borderline" cases, most of which involve some form of relocation.⁸ The approach of many courts has been to focus exclusively on the purpose⁹ of the parents in relocating¹⁰ and, where typically the parents disagree about this, the whole dispute turns on the court's assessment of which parent is telling

5. Even though all of the member states use the best interests standard in adjudication of custody disputes, the subjective nature of this standard makes it inevitable that it will be applied differently by judges who come from different cultural backgrounds. Stephen Parker, *The Best Interests of the Child - Principles and Problems*, in *THE BEST INTERESTS OF THE CHILD* 26, 29-31 (Oxford University Press, 1994).

6. See Protection Convention, *supra* note 4.

7. See Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 33 I.L.M. 225, 234 (1994) [hereinafter Second Special Commission Report].

8. The Second Special Commission Report does refer to the situation of servicemen stationed abroad. *Id.* The Third Special Commission Report, available at <http://www.hcch.net/e/conventions/menu28e.html>, mentions the difficulty of alternating custody arrangements. However, the treatment of these problems is only cursory.

9. Thus it is the settled purpose formula of *Regina v. Barnet London Borough Council* that has been stressed. [1983] 2 A.C. 309, 344 (H.L. 1982) (Eng.).

10. See, e.g., *F v. S* [1991] 2 F.L.R. 349 (Eng.); *Re R* [1992] 2 F.L.R. 481 (Eng.). In these cases, the question of the jurisdiction of the English Court depended on the intention of unmarried mothers in relocating abroad. In both of these cases, the Court of Appeal overturned the prior Court's decision that the mother was no longer habitually resident in England.

the truth.¹¹ Given that Hague Convention proceedings are summary, they are not ideally designed to determine contradicted issues of fact.¹² Therefore it is particularly unfortunate that such a finding is liable to be determinative of the outcome in cases, the human consequences of which are so drastic.¹³

The present author has recently studied the connection between the habitual residence of the parents and that of the child in the context of the Child Abduction Convention and concluded that the optimal model is that where the habitual residence of the child is determined independently.¹⁴ In the course of the above study, it became clear that whichever model is adopted, and despite the apparently factual nature of the enquiry, ¹⁵determination of the habitual residence of a child is likely to be influenced by policy considerations, at least in borderline cases.¹⁶ It was thought that an examination of the actual and desired scope and impact of such considerations would be helpful in the search for a mechanism for deciding borderline cases. In order to make this research more meaningful it was

11. See, e.g., *Re F (A Minor) (Child Abduction)* [1992] 1 F.L.R. 548 (Eng.); see also *A v. A (Child Abduction)* [1993] 2 F.L.R. 225 (Eng.); *Moran v. Moran* [1997] S.L.T. 541 (Sess. 1995) (Scot.). Similarly, in the Australian case of *Laing v. Laing*, (1996) 21 Fam. L.R. 24 (See. 1995) (Austl.), much depended on whose version of the conversations and correspondence in relation to whether the husband had agreed to the wife's stay in Australia was accepted by the court.

12. Thus, often there is no oral evidence. *A v. A (Child Abduction)*, 2 F.L.R. at 235 (commenting that the judge was under "the disability in making findings of fact of not having heard the parties in the witness-box."). Similar comments were made by the Family Court of Australia in *Laing*, 21 Fam. L.R. at 33.

13. Although the decision under the Abduction Convention does not determine the merits of the custody dispute, it is undoubtedly influential. During the time that elapses pending the decision on the merits, facts are being created which will be relevant to the ultimate determination. In particular, the benefit of preserving the status quo will be one of the factors taken into account in determining the merits of the case and, in a borderline case, may even be conclusive. See Rohman et al., *The Best Interests of the Child in Custody Disputes*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS* 59, 77 (Weithorn ed., 1987). Thus, the location where the child is resident at the time of the substantive hearing is likely to influence the outcome. Moreover, while all of the member states decide custody disputes in accordance with the welfare of the child, the implementation of this test is not uniform. See Parker, *supra* note 5. Furthermore, there may be profound lasting psychological effects resulting from both the abduction and return. See generally Marilyn Freeman, *The Best Interests of the Child? Is The Best Interest of the Child in the Best Interests of the Children?*, 11 INT'L J.L. POL'Y & FAM. 360 (1997) (summarizing the empirical research).

14. Rhona Schuz, *Habitual Residence of the Child under the Hague Child Abduction Convention: Theory and Practice*, 13 CHILD & FAM. L.Q. 1 (2001).

15. For discussion of the nature of the determination of habitual residence, see *infra* at Part B.

16. The present author also suggested in an earlier article that the courts were likely to manipulate findings of habitual residence in order to ensure that adjudication occurred in the most appropriate forum. Rhona Schuz, *The Hague Child Abduction Convention: Family Law and Private International Law*, 44 INT'L & COMP. L.Q. 771, 792 (1995).

decided not to restrict the study to the Abduction Convention but also to examine and compare the policy considerations which would be relevant in others legislative contexts in which the habitual residence of the child is the main connecting factor.¹⁷

B. *The Nature of the Determination of Habitual Residence*

1. *The Debate*

It is a matter of contention whether determination of habitual residence of a child is a question of fact or a question of mixed fact and law.¹⁸ In the leading U.S. case of *Feder v. Evans-Feder*,¹⁹ which is one of the few cases where the issue is actually discussed,²⁰ the latter option was favored by the majority because in their view the determination “is not purely factual, but requires the application of a legal standard which defines the concept of habitual residence, to historical and narrative facts.”²¹ On the other hand, Justice Sarokin, dissenting, relying *inter alia* on the Perez-Vera Report, the relevant legislation and previous case law, concluded that the determination should be characterized as one of “factual finding.”²²

With respect, it is suggested that there has been a considerable amount of confusion in many of the judicial comments supporting the factual approach. On the one hand, they recite the official view that habitual residence has to be a matter of fact so that there will be uniform interpretation in all the member states.²³ Indeed, the main reason that the concept of habitual residence was chosen was to avoid the problems of

17. The choice of legislative instruments is discussed *infra* in Part C.

18. See the comment of Justice Sarokin that “federal and state courts have struggled over this precise issue, with some making findings of fact and others conclusions of law regarding a child’s habitual residence.” *Feder v. Evans-Feder*, 63 F.3d 217, 227 (3rd. Cir. 1995) (Sarokin, J., dissenting).

19. *Id.*

20. Previous cases have assumed without discussion, that the determination is a question of fact or of law. See, e.g., *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991) (question of fact); *In re Prevot*, 855 F. Supp. 915 (W.D. Tenn. 1994), *rev’d*, 59 F.3d 556 (6th Cir. 1995) (question of law).

21. *Feder*, 63 F.3d at 222.

22. *Id.* at 229. Justice Sarokin claims that the majority’s reasoning confused “ultimate facts” with “mixed questions of fact and law.” In his view, “while an ultimate fact may depend on subsidiary findings of act, it is nonetheless a factual finding”

23. The Official Reports to both the Abduction and Protection Conventions state that the question of habitual residence is a question of fact. See Perez-Vera Report on the Abduction Convention, Oct. 1980, vol. III ¶ 66, available at <http://www.hcch.net/e/conventions/menu28e.html> [hereinafter Perez-Vera Report]; Lagarde Report on the Child Protection Convention, Oct. 1996, vol. II ¶ 41, available at <http://www.hcch.net/e/conventions/exp134e.html> [hereinafter The Lagarde Report].

connecting factors, such as domicile, which had different legal definitions in different countries.²⁴ On the other hand, these very same cases provide definitions of habitual residence²⁵ and list the applicable principles for its determination.²⁶

2. Critique of the "Question of Fact" Approach

It is submitted that, the "factual" approach is too simplistic because it is not correct to assert "[t]he two words 'habitual' and 'residence' are quite capable of doing all the work which is required of them."²⁷ There are many borderline cases where it would not be "an abuse of language" to say that the child was habitually resident in country "C" or country "D" or in both of them.²⁸

From a purely factual point of view, the classic example of a situation that is borderline is where the child relocated shortly before the date on which the child's habitual residence has to be determined. The difficulty can be seen from the difference in views expressed by members of the Special Commission on the Protection Convention.²⁹ On the one hand, it was suggested³⁰ that "in normal cases, the habitual residence of a child changes when its parents move with their child from one State to another." On the other hand, there were delegates who thought

24. See L.I. De Winter, *Nationality or Domicile?*, in RECUEIL DES COURS 419 (A.W. Sijthoff, ed., 1970).

25. The most commonly cited definition is that of Lord Scarman in *Regina v. Barnet London Borough Council*. [1983] 2 A.C. 309, 343 (H.L. 1982) (Eng.). "A man's abode in a particular place or country which he has adopted voluntarily and for a settled purpose as part of the regular order of his life for the time being, whether of short or of long duration." *Id.* However, in the case of *Feder v. Feder*, 63 F.3d at 223, a revised definition was stated: "the place where he or she 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." This definition was accepted by the whole court and has been cited in subsequent U.S. cases.

26. See generally *Re B (Minors)* (Abduction No. 1), [1993] 1 F.L.R. 988, 991-92 (Eng.); *Cooper v. Casey*, No. EA102 of 1994, slip op. (Fam. Ct. Austl. May 5, 1995).

27. This assertion is made by E. M. Clive, *The Concept of Habitual Residence*, JURID. REV. 137, 147 (1997).

28. Thus, in the words of Justice Stevens, the reasoning by which habitual residence is determined "crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 n.17 (1984).

29. In the absence of agreement, the issue is simply ignored in the final version of the Convention, which makes no attempt to define habitual residence. The Lagarde Report simply recites baldly that when habitual residence is acquired following relocation is a question of fact. The Lagarde Report, *supra* note 23, ¶ 41.

30. See PROCEEDINGS OF THE EIGHTEENTH SESSION OF THE HAGUE CONFERENCE (Vol. 2) 322, Minutes No. 4 (Permanent Bureau of the Conference ed., 1998) [hereinafter Hague Conference Proceedings].

that habitual residence should only change after a certain period of time had been spent in the new State.³¹ Mr. Adair Dyer, Deputy Secretary-General of the Hague Conference, pointed out that the first view caused problems where one member of the family had agreed to move on the basis of some misrepresentation or misunderstanding.³² Thus, in his view, simply crossing the border was not sufficient and a "more pragmatic and flexible approach should be used."³³

It is submitted that the insistence of courts and writers that we are concerned with a question of fact stems from two concerns. First, there is a fear that habitual residence might become a technical term, with complicated legal requirements,³⁴ which could make it a potentially artificial connecting factor like domicile.³⁵ But this is very different from saying that it has to be determined in a legal vacuum without any legal guidance at all. The solution to this problem may be to acknowledge that the matter is not purely a question of fact but has "a largely factual emphasis."³⁶ Thus, the legal standard is intended to give guidance as to how to interpret the facts rather than to fetter the courts with rigid rules.

Second, the need to ensure *prompt* return of children means that appeals (especially where return has been ordered) should be deterred. As seen from the case of *Feder*,³⁷ if the determination of habitual residence is one of fact, then it can only be reviewed on

31. *Id.* at 113, ¶¶ 21-23.

32. *Id.* at 323, Minutes No. 4.

33. *Id.* This seems to be another way of saying that it is necessary to take into account policy considerations such as protecting vulnerable family members.

34. DICEY MORRIS, *CONFLICT OF LAWS* 152 (13th ed. 2000) (expressing the hope "that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions."). Similar sentiments are uttered in the leading U.S. cases of *Friederich v. Friederich*, 983 F.2d. 1376, 1401 (6th Cir. 1993) and *In re Application of Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993). See also *C v. S (Minor: Abduction: Illegitimate Child)*, [1990] 2 All E.R. 449, 454-55 (H.L.) (Eng.).

35. Indeed to some extent this fear has been realized by the English court's adoption of the parental rights' approach to the determination of the habitual residence of children. *Schuz*, *supra* note 14. Thus, Lord Justices have criticized first instance courts for making habitual residence into an artificial legal construct. *Re M (Abduction: Habitual Residence)* [1996] 1 F.L.R. 887, 895 (Eng.). However, it is hardly surprising that lower courts have "fallen into this trap" when the widely cited "Shah formula" itself emphasizes intention in much the same way as domicile does, albeit that the content of the required intention is much less stringent. *Regina v. Barnet London Borough Council*, [1983] 2 A.C. 309, 343 (H.L. 1982) (Eng.).

36. PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 90 (Oxford, 1999). It may well be that many of those who referred to the factual nature of the inquiry meant no more than this.

37. 63 F.3d 217 (3rd Cir. 1995).

appeal for clear error; whereas if it is a conclusion of law or a determination of mixed fact and law plenary review is permissible.³⁸ The solution to this concern is to provide specifically that the "clearly erroneous" standard³⁹ applies to review of determinations of habitual residence.⁴⁰

3. *The Relevance of the Nature of the Determination of Habitual Residence to the Role of Policy Considerations*

If the determination of habitual residence is indeed one of fact, then policy considerations should be of little relevance and the habitual residence of a person should be the same, irrespective of the legislative context in which the determination is made.⁴¹ However, the lack of appellate review and the fluidity of findings of ultimate fact mean that in borderline cases determinations are controvertible, and therefore there is considerable scope for the court to be influenced by policy considerations and to manipulate the facts in order to obtain the desired result.⁴²

On the other hand, if we recognize that we are not concerned with purely a question of fact, we will appreciate that the determination of habitual residence requires *interpretation* of that term. In order to interpret a term used in an international convention or domestic statute it is necessary to consider the context in which it is used and the objects and purpose of the legislative instrument in question.⁴³

38. *Id.* at 227. See also FRIENDENTHAL ET AL., CIVIL PROCEDURE 618 (3d. ed. 1989); but cf. Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991) (referring to the different approaches taken to this issue by federal circuits).

39. See Lee, *supra* note 38, at 290 (contending that this is the only standard which is "consistent with a proper conception of the appellate function" in relation to mixed questions of fact and law).

40. The phenomenon of characterizing issues as questions of fact for some purposes and questions of law for other purposes is known. See RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 223 (4th ed. 1991) (referring to a particular determination which was considered to be one of fact in that it had no precedent value, but one of law in that there was appeal from the jury's decision on the point).

41. The most widely cited definition of habitual residence, which was formulated by the House of Lords in the case of *Regina v. Barnet London Borough Council*, [1983] 2 A.C. 309, 310 (H.L. 1982) (Eng.), has been used in a wide variety of contexts. In his dissent, Lord Justice Scarman does specifically say in that case that the formula applies "unless it can be shown that the statutory framework or legal context in which the words are used require a different meaning." *Id.* at 343. However, the author has not come across any case holding that a different meaning should be given to the phrase.

42. The question of whether habitual residence is established has been described as a matter of impression and degree. *Moran v. Moran*, [1997] 1 S.L.T. 541 (Sess. 1995) (Scot.).

43. Article 31 of the Vienna Convention on the Law of Treaties provides, "[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to

Context and objectives reflect policy considerations. Since the policy considerations informing different legislative instruments are not uniform, it follows that the same term might not bear an identical meaning in a different context in which it appears. Thus, contradictory determinations of habitual residence in different contexts may be the result of legitimate interpretation rather than illegitimate manipulation.⁴⁴ Therefore, an examination of the relevant policy considerations, as well as how conflicts between them should be balanced, is a valuable exercise that can often be referred to openly in court.

In conclusion, regardless of which side of the debate is correct, there is room for influence of policy considerations. The difference is that if habitual residence is characterized as a question of fact, such influence cannot be referred to openly. However, if it is acknowledged that the determination involves interpretation and application of a legal concept, policy considerations can be taken into account openly, at least in borderline situations.

C. Choice of Legislative Instruments for Comparison

It may be convenient simply to compare the Abduction Convention with the Protection Convention. However, such a limited comparison seemed insufficient, given the fact that the latter is not yet in force and has to date attracted few signatories. Thus, it was thought appropriate to consider domestic legislation in which the habitual residence of the child is the main connecting factor. Legislation in both the United Kingdom and Canada⁴⁵ use the habitual residence of the child as the main

the terms of the treaty in their context and in the light of its object and purpose." *Id.* (emphasis added). Case law involving other issues under the Abduction Convention has held that the Convention is to be interpreted purposively. *Re B (Minors) (Abduction)* (No. 1), [1993] 1 F.L.R. 988, 991 (Eng.). The purposive approach has also been used in relation to determinations of habitual residence under domestic statutes. *Compare Fareed v. Latif*, [1991] 31 R.F.L.3d. 354, 363 (Can.) (quoting *Baker v. Baker*, [1985] 49 R.F.L.2d 216, 218 (Can.)) "The phrase 'habitual residence' contains words of wide import which have to be interpreted in the context of the legislation and the facts of the case." *with Regina*, 2 A.C. at 310 (construing "ordinary residence," which was equated with "habitual residence," counter to legislative intent).

44. BEAUMONT & MCELEAVY, *supra* note 36, at 113 (suggesting that a distinction can be drawn between the "interpretation" of habitual residence for the purposes of the Abduction Convention and where habitual residence is used in other contexts). *See also* P. Rogerson, *Habitual Residence: the New Domicile?*, 49 INT'L & COMP. L.Q. 86 (2000) (agreeing with Beaumont & McEleavy and arguing that the English courts pay mere lip-service to the principle that the concept bears the same meaning in all cases).

45. Each province in Canada has enacted virtually identical legislation regulating jurisdiction in relation to custody matters. For convenience, the author will refer to the

jurisdictional basis in child custody cases.⁴⁶ However, the Canadian legislation includes a definition of the habitual residence of the child and so its value in the present context is limited.⁴⁷

D. Outline of the Article

In order to analyze critically the effect of policy considerations on determinations of habitual residence in different contexts, it is necessary first to examine the objectives of the various legislative contexts in question and to describe the role of the connecting factor of habitual residence therein, which will be done in Parts II and III respectively. In the main section of the article, Part IV, the relevant policy considerations are set out, and their scope and impact are analyzed critically. Finally, in Part V, the methodology of balancing conflicting policy considerations is discussed and tested in a number of typical borderline situations.

II. OBJECTIVES OF THE CHOSEN LEGISLATIVE INSTRUMENTS

A. The Child Abduction Convention

This Convention provides a mechanism that obliges courts in member states to order the prompt return of children up to the age of sixteen who have been abducted. The Convention's central objective is to protect children from the harmful effects of

Ontario legislation. Details of the other legislation can be found in J.G. CASTEL, *CANADIAN CONFLICTS OF LAWS* 400 n.236 (4th ed. 1997).

46. In the U.S., the Uniform Child Custody Jurisdiction Act § 9, 9 U.L.A. 551 (1968) [hereinafter UCCJA] uses the concept of the child's "home state" as the main basis for jurisdiction to make child custody determinations. While the authors of E.F. SCOLES ET AL., *CONFLICT OF LAWS* 665 (West Group, 3d ed. 2000), use "home state" interchangeably with habitual residence, it is submitted that the two concepts are by no means synonymous. Section 2(5) of the UCCJA defines "home state" as "the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least 6 consecutive months, and in the case of a child less than 6-months-old the state in which the child lived from birth with any of the persons mentioned." UCCJA § 2(5), 9 U.L.A. 286. Thus, the critical question is the length and not the quality of the residence. Quality seems only to be relevant in determining whether absences from the home state are "temporary" and so do not interrupt the continuity of the six-month period. Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449, 475 (1998).

47. A child is habitually resident in the place where he or she resided: (a) with both parents; (b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or (c) with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred. Children's Law Reform Act, 2 R.S.O., ch. C-12, § 22(2) (1990).

international child abduction. Commentators have pointed out that the Convention does not focus on the welfare of individual children, but rather seeks to promote the best interests of children generally by ensuring that abducted children are returned promptly, and by deterring potential abductors.⁴⁸ An additional, perhaps subsidiary objective, is to ensure that the adjudication of the substance of the custody dispute takes place in the *forum conveniens*. Although this objective is not stated expressly in the Convention, it has been recognized by judges⁴⁹ and writers,⁵⁰ and would seem to explain the choice of habitual residence as the main connecting factor in the Convention.

The fact that application of the Convention protects children has caused some judges to take the view that the Convention should be applied wherever possible. Thus, any doubt as to whether the conditions for its applicability are fulfilled should be resolved in favor of the applicant.⁵¹ However, Beaumont and McEleavy argue that this policy is misconceived because: if a child does not have a factual connection to a State and knows nothing of it socially, culturally, and linguistically, there will be little benefit in sending him there.⁵²

On the other hand, the learned authors do recognize that non-application of the Convention in such a situation may also prevent the primary caregiver of the child from regaining care and control over the child.⁵³ This dilemma reflects the tension in the Convention between the child-parent connection on the one hand and the child-country connection on the other.⁵⁴ The connecting factor of habitual residence is at the heart of this tension.

48. Schuz, *supra* note 14, at 774-79.

49. See, e.g., *Murray v. Director of Family Services*, No. EA51 of 1993 (Fam. Ct. Austl., Oct. 6, 1993); *Re S* (Custody: Habitual Residence), [1998] 1 F.L.R. 122, 131 (Eng.) (quoting Perez-Vera Report, *supra* note 23, ¶¶ 19 & 66).

50. See, e.g., BEAUMONT & MCELEAVY, *supra* note 36, at 90.

51. *Cooper v. Casey*, No. EA102 of 1994, slip op. (Fam. Ct. Austl., May 5, 1995); *Re F* (A Minor) (Child Abduction) [1992] 1 F.L.R. 548, 555 (Eng.).

52. BEAUMONT & MCELEAVY, *supra* note 36, at 90.

53. *Id.* at 96.

54. This might be another way of expressing the conflict between the family law and private international law objectives of the Convention. Schuz, *supra* note 14, at 771-72. This tension is also reflected in the dispute over whether the child objection exception, found in Article 13(2), refers to the child's objection to returning to the other parent or to returning to the country of origin. Eventually, it was held by an English Court that an objection to either was sufficient. *Re M* (A Minor) (Child Abduction), [1994] 1 F.L.R. 390, 396 (Eng.); *Re M* (A Minor) (Abduction: Child's Objections), [1994] 2 F.L.R. 126, 135-36 (Eng.).

B. The Protection Convention

The Protection Convention addresses international jurisdiction, choice of law and recognition, in relation to measures aimed at protecting the child's person or property, including the allocation and exercise of parental responsibility.⁵⁵ The Convention is essentially a revision of the Convention of 1961. A revision was necessary because of deficiencies in the earlier Convention, which had few signatories. The objectives of the new Convention, which applies to children up to the age of eighteen, are essentially to provide an organized scheme for determining questions of international jurisdiction, choice of law, recognition and enforcement of judgments and measures in relation to nearly all aspects of parental responsibility and child protection.⁵⁶ It aims at avoiding conflicts between the measures taken by authorities in different member states.⁵⁷

C. Domestic Jurisdiction Rules

The jurisdictional provisions in domestic legislation are only designed to answer the question of whether the forum has jurisdiction in a particular case, and not whether any other country has jurisdiction.

One of the main purposes of the United Kingdom legislation was to create uniform jurisdiction rules governing residence and other similar orders for all parts of the United Kingdom⁵⁸ and to reduce the likelihood of concurrent jurisdiction.⁵⁹ Thus, jurisdiction may not be taken on the basis of presence where the child is habitually resident in another part of the United Kingdom.

55. See Protection Convention, *supra* note 4, art. 1.

56. *Id.* arts. 2, 3 (stating wide definitions); art. 4 (stating exclusions).

57. See *id.* pmb1, ¶ 3.

58. See Law Com. No. 138 ¶ 3.10 (1985). The Family Law Act of 1986 Part I sets out the English jurisdictional rules for making orders under section 8 of the Children Act of 1989. *Id.* These rules include residence, contact, and prohibited steps or specific issue orders. Jurisdiction in relation to other matters concerning children is still mainly governed by the common law rules. PETER M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 864-67 (13th ed. 1999).

59. As in the U.S. and other multi-jurisdictional political units, wide and often unclear jurisdictional rules led to forum shopping and abduction from one jurisdiction to another by parents seeking sympathetic courts. Abduction within a political unit is much easier because there is no need to cross an international border. In the U.S., the UCCJA § 2(5), 9 U.L.A. 286 (1968), and the Parental Kidnapping Prevention Act, 28 U.S.C. § 17338A (1994 & Supp. V 1999), are designed to combat this phenomenon. For a detailed discussion of the impact of this legislation see Blakesley, *supra* note 46, at 449-538.

It may be questioned why presence was retained as a basis of jurisdiction in other cases. The Law Commission was concerned that if presence were not sufficient, then in some cases there would be no court which could provide an effective remedy.⁶⁰ While this is no doubt correct, it would have been preferable to restrict jurisdiction based on presence to those cases, or at least to require that the applicant show why the case should be heard in England rather than the court of habitual residence. This is indeed the approach of the Canadian legislation,⁶¹ which only allows jurisdiction based on presence where additional criteria are satisfied.⁶²

Thus, it would appear that while the English legislation is designed to deter abduction *to* the forum from other parts of the political unit, it is not concerned with deterring abduction from abroad. In addition, the legislation attempts to deter abduction *from* the forum by deeming that habitual residence in England and Wales continues for a fixed time after abduction therefrom.⁶³

III. ROLE OF THE CONNECTING FACTOR OF HABITUAL RESIDENCE IN THE CHOSEN LEGISLATIVE INSTRUMENTS

A. Under the Child Abduction Convention

1. In Determining the Applicability of the Convention

The Convention is only applicable where the child has been abducted to a Convention country other than that of the child's habitual residence. Thus, operation of the Convention can be maximized by finding, wherever possible, that the child had a

60. See Law Com. No. 138 ¶¶ 4.24-4.25 (1985). It is of interest that in the consultation paper, the Commission had rejected presence as a general ground of jurisdiction. *Id.* ¶ 4.23.

61. See, e.g., Children's Law Reform Act, 2 R.S.O., ch. C-12, § 22(1) (1990) (Can.).

62. These include that substantial evidence concerning the best interests of the child is available in Ontario, *id.* § 22(b)(ii); that no application for custody or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident, *id.* § 22(b)(iii); that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario, *id.* § 22(b)(iv); that the child has a real and substantial connection with Ontario, *id.* § 22(b)(v); and that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario, *id.* § 22(b)(vi). Similarly, in the United States under the UCCJA, jurisdiction based on presence is only allowed by default where there is no court with jurisdiction as the "home state" or on the basis of "significant connection and substantial evidence." Blakesley, *supra* note 46, at 474. In practice, the difference between the situation in England and North America is not as pronounced if the English Courts make liberal use of their power to stay on the basis of *forum non conveniens* in cases where jurisdiction is based on presence alone.

63. See section 41 of the Family Law Act 1986, discussed *infra* at Part III.C.2.

habitual residence immediately before the abduction, and that this is in a country other than the place of refuge.⁶⁴ In removal cases, this will generally involve finding that the child has acquired a habitual residence in the country where he was living before the removal,⁶⁵ whereas in retention cases it will involve finding that the child has not acquired a habitual residence in the country where he was living immediately before the retention.⁶⁶

It is unclear from the Convention's provisions whether it is sufficient that the place of habitual residence immediately before the abduction is a Convention country, or whether it is also necessary that the removal⁶⁷ must be *from* the place of habitual residence.

The only case which discusses this point fully⁶⁸ is the decision of the Full Family Court of Australia in *Hanbury-Brown v. Hanbury-Brown*.⁶⁹ The court held that taking into account the preamble and the Convention as a whole, the latter interpretation is the correct one. In particular, the words "removal" and "return" are co-relative terms and thus since return is *to* the place of habitual residence⁷⁰ the only logical conclusion would be that "removal" is *from* the place of habitual residence. With respect, this reasoning is questionable, since the need for prompt return of the child arises whenever the child is wrongfully removed to a country other than that of the habitual

64. *In re F (A Minor) (Child Abduction)*, [1992] 1 F.L.R. 548 (Eng.). The English Court of Appeals admitted that it was keen to find that habitual residence in Australia has been acquired for this reason. Similarly, the Australian Full Family Court in the case of *Cooper v. Casey*, No. EA102 of 1994, slip op. (May 5, 1995), urged courts to avoid finding that a child has no habitual residence, as this could defeat the Convention's purpose and subject children to repeated abductions by both parents. *But see* BEAUMONT & MCELEAVY, *supra* note 36, at 112 (arguing that this approach is misconceived).

65. This does not hold true if the new country is not a Convention country. *See, e.g., In re A (Minors) (Abduction: Habitual Residence)*, [1996] 1 All E.R. 24, 33 (Eng.).

66. *Compare In re S (Minors) (Abduction: Wrongful Retention)*, [1994] 1 F.L.R. 70 (Eng.), *with* *Mozes v. Mozes*, 19 F. Supp. 2d 1108 (C.D. Cal. 1998).

67. The Convention applies either where the original removal is wrongful or where a lawful removal is followed by a wrongful retention.

68. It would seem to be implicit from the decision in *In re A (Minors) (Abduction: Habitual Residence)*, [1996] 1 All E.R. 24 (Eng.), that the first view was considered to be correct. In this case, the children were removed from Iceland, which is not a Convention country, where their father was stationed as a U.S. serviceman. *Id.* at 27. The father unsuccessfully argued that the children were habitually resident in the United States at the relevant time. *Id.* at 33. However, the court seems to have assumed that the Convention would have been applicable had his contention been successful. In other cases, judges have casually referred to the removal from the place of habitual residence requirement. *See, e.g., Croll v. Croll*, 66 F. Supp. 2d 554, 558 (S.D.N.Y. 1999), *rev'd*, 229 F.3d 133 (2d Cir. N.Y. 2000); *Meredith v. Meredith*, 759 F. Supp. 1432, 1435 (D. Ariz. 1991).

69. (1996) 20 Fam. L.R. 334 (Austl.).

70. *See infra* Part III.A.3.

residence, irrespective of the country from which the child was removed.⁷¹ In the absence of an express provision on the point, it would be more sensible not to impose this additional restriction,⁷² which is likely to lead either to a strained interpretation of the phrase “removed from”⁷³ or to manipulation of the finding of habitual residence.⁷⁴

2. *In Determining Whether the Removal or Retention Was Wrongful.*

The law of the habitual residence determines wrongfulness. Thus, in cases where the removal is not considered wrongful by the place of habitual residence,⁷⁵ the mandatory return provision will not be triggered even though the removal is considered wrongful by other relevant laws. Thus again, application of the Convention can be maximized by finding that the child has not become or is no longer habitually a resident in the country that does not consider the removal or retention as wrongful.

3. *As the Place to Where the Child is Returned*

While the Preamble states that the procedures under the Convention are to ensure the prompt return “to the State of their habitual residence,” Article 12, the main operative provision of the Convention, simply states that return should be ordered without specifying to which country.⁷⁶ According to the Perez-

71. Thus, the argument based on the co-relativity of the terms is *non sequitur*. While the Australian court is correct in holding that the international nature of the Convention means that it was only intended to apply where there is a wrongful removal from one country to another, it was not necessary for them to take it further by requiring that the removal be from the country of habitual residence.

72. This might prevent the application of the Convention, even where all the countries involved are member states.

73. Thus, the Australian court explained that even where a child is physically removed from a third country, as for example when the child is on vacation, this is considered a removal from the habitual residence since the habitual residence “cloak” remains with the child while on vacation. *Hanbury-Brown v. Hanbury-Brown*, (1996) 20 Fam. L.R. 334 (Austl.).

74. For example, if the child is abducted from a third country where s/he was resident temporarily, the court might be tempted to find that there is a settled purpose and the residence is therefore habitual.

75. Neither under internal law or by application of choice of law rules. *See generally* BEAUMONT & MCELEAVY, *supra* note 36, at 46-48.

76. Many judges and academic writers assume, without discussion, that return is to the country of habitual residence. *See, e.g.*, *Prevot v. Prevot*, 855 F. Supp. 915, 922 (W.D. Tenn. 1994), *rev'd*, 59 F.3d 556 (6th Cir. 1995); *Friederich v. Friederich*, 983 F.2d 1396, 1403 (6th Cir. 1993). *See also* Michelle Morgan Kelly, *Taking Liberties: The Third Circuit Defines “Habitual Residence” under the Hague Convention on International Child Abduction*, 41 VILL. L. REV. 1069, 1071 (1996).

Vera Report, this omission was deliberate in order to provide the courts with some flexibility.⁷⁷ Thus, if the applicant is now living in a third State, return to the applicant should be ordered.

However, the Family Court of Australia in *Hanbury-Brown*,⁷⁸ basing itself mainly on the Preamble, held that the correct construction of the Convention is that the child should be returned to the place of his or her habitual residence. With respect, it is a pity to limit the powers of the court of the refuge state by requiring that return be ordered to the place of habitual residence,⁷⁹ when a wider construction of the operative provisions of the Convention is equally plausible.

The adoption of the narrower construction is likely to lead to manipulation of the determination of habitual residence where it is thought appropriate to return the child to a third state. For example, assume that the custodial parent is on a sabbatical abroad at the time of the abduction. It seems absurd to order the child to be returned to the country of origin, where there is no one to look after him.⁸⁰ Thus, the court would have little option other than to hold that the place of the sabbatical is the place of habitual residence,⁸¹ despite the fact that normally habitual residence would not be changed in such circumstance.⁸² Similarly, where the applicant's habitual residence has changed since the time of the abduction, it would make no sense to order return to the former habitual residence.⁸³

77. Perez-Vera Report, *supra* note 23, ¶ 110.

78. (1996) 20 Fam. L.R. 334 (Austl.).

79. See Schuz, *supra* note 14, at 782-83 (contending that it is not imperative that the child be returned to the place where the trial on the merits is to take place).

80. See David McClean, "Return" of Internationally Abducted Children, 106 L.Q. REV. 375 (1990), but compare BEAUMONT & MCELEAVY, *supra* note 36, at 31 (arguing that it is inappropriate to allow the dispossessed parent to relocate unilaterally when such a privilege is denied to the abductor).

81. It would seem to be a clear abuse of language to hold with the Australian court's approach to the question of removal from the place of habitual residence that returning the child to a third country is really like returning him to the country of habitual residence because the child remains under the cloak of the country of habitual residence while in the third country.

82. *Morris v. Morris*, 55 F. Supp. 2d 1156 (D. Colo. 1999).

83. Thus, in the case of *In re A (Minors) (Abduction: habitual residence)* and others, if Iceland had been a Convention country, it would have been appropriate to order return to the United States, where the father had returned following the termination of his army service. [1996] 1 All E.R. 24.

B. *The Protection Convention*

It has been claimed that the concept of habitual residence has never "been given as crucial importance" as in this Convention.⁸⁴ The use of habitual residence as the main connecting factor in the Convention has been described by commentators as the "underlying principle of the Convention"⁸⁵ and as the "clear dominant theme which runs right through the Convention."⁸⁶ Thus, we will examine the role of habitual residence in relation to the three legal questions with which the Convention deals.

1. *Jurisdiction*

The habitual residence of the child is the main ground of jurisdiction⁸⁷ in relation to all matters, which are within the Convention.⁸⁸ The corollary of this principle is that contracting states may not take jurisdiction over children who are habitually resident in another contracting state other than in accordance with the Convention.⁸⁹ In particular, apart from emergency measures, jurisdiction may not be based on mere presence of the child.

Where the habitual residence is changed lawfully, the new habitual residence immediately acquires jurisdiction to deal with these matters. However, where habitual residence is changed as a result of wrongful removal or retention, the new state will not acquire jurisdictional competence until either (a) each person or body with rights of custody has acquiesced in the removal or retention or (b) the child has resided in the new State for a period of at least one year after the person having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return submitted during that period is still pending and the child is settled in his new environment.⁹⁰

84. Peter Nygh, *The New Hague Child Protection Convention*, 11 INTL. J. L., POL'Y & FAM. 344, 347 (1997).

85. A.M. Hutchinson & M.H. Bennett, *The Hague Child Protection Convention 1996*, FAM. L. 35 (1998).

86. Eric Clive, *The New Hague Convention on Children*, JURIDICAL REV. 169, 172 (1998).

87. Protection Convention, *supra* note 4.

88. These include all types of measures taken by judicial or administrative authorities for the protection of children whether of a public or private law nature, excluding maintenance obligations, trusts, succession, adoption, social security and public matters of a general nature. *Id.* art. 3.

89. In cases of urgency, Article 11, or pursuant to divorce jurisdiction provides that the conditions in Article 10 are satisfied. *Id.* arts. 10, 11.

90. *See id.* art. 7. For a discussion of the implication of this provision on the meaning of habitual residence, see *infra* Part V.B.4.

In relation to refugees or children whose habitual residence cannot be established, the State of the presence has jurisdiction.⁹¹

2. *Applicable Law*

While the *lex fori* applies to the actual exercise of the jurisdiction to take measures, the law of the habitual residence determines who has parental responsibility and how that responsibility can be exercised.⁹²

The Convention specifically provides that merely changing habitual residence cannot cause the loss of parental responsibility, although it may result in the acquisition thereof.⁹³ Thus, a court might be tempted to find that a new habitual residence has been acquired where this will have the effect of conferring parental responsibility on one party.⁹⁴

3. *Recognition and Enforcement*

There is automatic recognition and enforcement of measures taken by the authorities of other contracting states, subject to narrow exceptions. In practice, this will usually mean recognition and enforcement of the measures taken by the state of habitual residence.⁹⁵

C. *The Domestic Provisions*

1. *As the Main Basis of Jurisdiction*

Both English and Canadian legislation make habitual residence the main basis of jurisdiction in relation to custody. However, the significance of this is substantially undermined by

91. *See id.* art. 6. Otherwise the state where the child is present only has jurisdiction to take any necessary measure of protection in cases of urgency. *See id.* art. 11.

92. *Id.* art. 16. This rule applies both where parental responsibility is attributed by operation of law and where it is conferred by a judicial act.

93. *Id.*

94. For example, where the law of the old state does not confer parental responsibility on an unmarried father and the law of the new state does.

95. However, there is no review of the jurisdiction of the authorities that took the measures. Compare this with the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, under which recognition/enforcement of a custody decision may be denied where the jurisdiction of the authority making the decision was not based on the habitual residence of the defendant or of the child, or the last common habitual residence of both parents which is still the habitual residence of one of them. May 20, 1980, Eur. T.S. No. 106, art. 9, § 1(a-b).

providing that, subject to certain qualifications,⁹⁶ jurisdiction may also be based on presence.⁹⁷ Under the United Kingdom's legislation, the only qualification to jurisdiction based on presence is the negative requirement that the child is not habitually resident in another part of the United Kingdom.⁹⁸ Under the Ontario legislation, however, jurisdiction may only be based on presence when a list of conditions (some positive and some negative) is satisfied.⁹⁹ In particular, it must be shown that the child has a real and substantial connection with Ontario and that substantial evidence concerning the best interests of the child is available in Ontario.¹⁰⁰

The fact that jurisdiction may be based on presence reduces the significance of habitual residence. Where the child is present in the forum the case can be heard, without having to strain to find that the child is habitually resident in the forum. In such cases, the question of *forum conveniens* is a separate issue and therefore should not be taken into account in determining habitual residence.¹⁰¹ The Canadian statutes' conditions are clearly designed to determine whether the court to which the application is made, is the *forum conveniens*.¹⁰² While the English statute has no such provision, English courts refuse to exercise jurisdiction where respondents show that it is not a convenient forum.¹⁰³

2. Deemed Continuation After Wrongful Removal

The United Kingdom's legislation¹⁰⁴ provides that where a child under sixteen becomes habitually resident abroad without the agreement of all persons having the right to determine where he is to reside or in contravention of the order of the United Kingdom court, the child shall for the period of one year

96. These qualifications do not apply where exercise of the court's powers is necessary to protect the child. Family Law Act, 1986, § 2(2)(b) (Eng.); Children's Reform Act, 2 R.S.O., ch. C-12, § 23(b) (1990) (Can.).

97. In addition, Courts in which matrimonial proceedings between the parents have already been started have jurisdiction in relation to custody of the children of the marriage.

98. Family Law Act, 1986, § 3(b) (Eng.).

99. Children's Reform Act, 2 R.S.O. ch. C-12, § 22(1)(b) (1990) (Can.).

100. *Id.* § 22(1)(b)(ii), (v).

101. *See, e.g.,* Sutton v. Sodhi, 1989 ACWSJ LEXIS 15790 (1980) (where the two issues were considered separately).

102. *See* Smith v. Frank, 1999 ACWSJ LEXIS 13070 (1999) (Can.); Gilbert v. Gilbert, [1985] 47 Rep. Fam. L. 2d 199 (Can.); Sharpe v. Sharpe, [1991] 71 Man. R. (2d) 64 (Can.).

103. *In re S* (Residence Order: Forum Conveniens), [1995] 1 F.L.R. 314, 325 (Eng.); M v. B (Residence: Forum Conveniens), 2 F.L.R. 819, 825-26 (Eng.).

104. Family Law Act, § 41(1) (1986).

thereafter be treated as if he or she continues to be habitually resident in England and Wales.¹⁰⁵ The similarities between Section 41 of the English Act and Article 7 of the Child Protection Convention will be noted.¹⁰⁶ However, the main difference is that under the English provision, the one year period during which the English habitual residence continues is a fixed period and cannot be extended even if a request for return has been made or the child is settled in a new environment.

IV. POLICY CONSIDERATIONS WHICH AFFECT DETERMINATION OF HABITUAL RESIDENCE OF THE CHILD

A number of policy considerations appear to have influenced determination of habitual residence of a child under the Abduction Convention. The appropriate scope of these considerations and to what extent these considerations are equally relevant in the other contexts in which the determination may be made will be examined below.

A. That a Child Should be Protected from Abduction at All Times

1. Scope of the Policy of Protection from Abduction

Abduction may be effected either by "removal" or "retention" ("withholding") which is the terminology used to describe abduction in most of the legislative instruments in question. The question arises whether the policy of protection from abduction arises equally in relation to the different methods of abduction.

On the one hand, it might be argued that removal is more harmful for a child than retention because it involves the traumatic experience of being taken, usually without prior warning, from the child's home to another country; whereas retention is a more passive phenomenon simply involving failure

105. Since, under existing English case law, one parent cannot usually unilaterally change the habitual residence of the child, (see *C v. S (Minor) (Abduction: Illegitimate Child)*, [1990] 2 All E.R. 449, 455 (C.A.) (Eng.)), the provision is redundant and can operate only in exceptional cases. It is unlikely that it was the intention of the legislators that Section 41 should have such a narrow scope. Therefore, this Section could be seen as supporting the view that the parental rights' approach to determining the habitual residence of a child is no longer correct. Schuz, *supra* note 14.

106. Compare the Canadian legislation, which does not give any time limit for the deemed continuation of the habitual residence. Thus, the Ontario Act provides that "[t]he removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld." Children's Reform Act, 2 R.S.O. ch. C-12, § 22(3) (1990) (Can.). Presumably the provision ceases to apply if the foreign court does not order return.

to be returned to that home in accordance with an agreement between the parents.

While this distinction is valid and the lasting effects of the trauma should not be underestimated, the categorization as a removal or retention depends on the initial act only.¹⁰⁷ Thus, retention may be followed by a long period on the run, which will be very harmful to the child; whereas removal to a place with which the child is familiar and has substantial connections may cause little if any damage. Moreover, even if the child is retained in the country where he was visiting the non-custodial parent, adjusting to life there may be traumatic for the child. Living in a country where the child does not speak the language and has no friends is dramatically different than vacationing in a foreign country. Moreover, it is necessary to ensure that children are protected from retention after access visits or holidays so that parents and courts will not be discouraged from sanctioning such travel. Thus, in principle, the policy of protection against abduction should apply equally to removal and retention.

It might be argued that a distinction should be drawn between physical retention and retention by application to court¹⁰⁸ because, in the latter case, the court to which the application is made can protect the child without the need for protection under the Convention. However, the Abduction Convention was originally enacted because most domestic courts were not prepared to protect children from abduction by ordering their immediate return. Courts felt obliged to examine whether return was in the best interests of the child. In response, Article 16 of the Abduction Convention specifically provides that once courts are aware of the child's wrongful removal or retention,

107. Thus, removal and retention are mutually exclusive and one cannot follow the other. *In re H (Minors) (Abduction: Custody Rights)*, [1991] 2 A.C. 476, 500 (H.L.) (Eng.).

108. It has been held in England that where a parent, who has the child with him outside the country of habitual residence with the consent of the other parent, applies to a court for a residence order which will enable the child to remain in that country with him after the expiration of the consent, an unlawful retention of the child occurs. *In re B (Minors) (Abduction) (No. 1)*, [1993] 1 F.L.R. 988 (Eng.); *In re A.Z. (A Minor) (Abduction: Acquiescence)*, [1993] 1 F.L.R. 682, 684 (Eng.). See also the US case of *Mozes v. Mozes*, 19 F. Supp.2d 1108 (C.D. Cal. 1998). It is not entirely clear when the retention occurs. Compare *In re S (Minors) (Abduction: Wrongful Retention)*, [1994] Fam. 70, 81 (Eng.) (holding that retention could date from the un-communicated decision not to return the child), with *Watson v. Jamieson*, 1998 S.L.T. 180, available at 1996 WL 1802591 (doubting whether even informing the other party of the decision to retain is sufficient to amount to unlawful retention until some action is taken). Apparently in some countries, applications for retention made under the Convention will not be considered until after the date on which the child ought to have been returned has passed. BEAUMONT & MCELEAVY, *supra* note 36, at 42.

they should not make determinations of the child's best interests.¹⁰⁹ Thus the need to protect children from abduction is equally great when a lves the retention.

2. Manifestations of the Policy of Protection from Abduction

The policy of protection from abduction is manifested in the case law under the Abduction Convention in the form of two principles relating to habitual residence: (1) a child should not be without a habitual residence if at all possible; and (2) a child cannot be habitually resident in more than one country at any one time.¹¹⁰ It is important to consider the implications of these principles under the Abduction Convention, as well as whether these principles ought to apply equally in other contexts.

(a) A Child Should Not be Without a Habitual Residence if at All Possible

(i) Under the Abduction Convention

Courts are reluctant to find that a child has no habitual residence since this will deprive the child of the Convention's protection.¹¹¹ Some commentators argue that this approach is too simplistic because it does not consider whether the child has any real connection with either the country to which the child is returned or with the parent to whom the child is returned.¹¹² Thus, for example, if the custodial parent is the abductor, returning the child "home" may be inappropriate.¹¹³ Accordingly, the principle that a child should have a habitual residence at all times to ensure the child be protected from abduction should only apply where the child has a sufficiently close connection with the parent *or* the country to which the child is to be returned. Moreover, the strength of the protection consideration will depend *inter alia* on the closeness of this connection in

109. Abduction Convention, *supra* note 3, art. 16.

110. The policy of protection from abduction also requires finding that a child is habitually resident in a country other than the place of refuge and that there has been a breach of custody rights. *Id.* arts. 3, 4.

111. *In re F (A Minor) (Child Abduction)*, [1992] 1 F.L.R. 548, 555 (C.A. 1991) (Eng.).

112. BEAUMONT & MCELEAVY, *supra* note 36, at 90.

113. *Id.* at 7-13 (pointing out that the stereotypical abduction situation envisioned by the drafters of the Convention was that of a non-custodial father abducting the children as a reaction to or in anticipation of losing a custody dispute; whereas in practice most abductions are by custodial mothers, often wishing to return to their country of origin following the breakdown of the relationship or to join a new partner).

comparison with the closeness of the connection with the country to which the child is abducted.

(ii) *Under the Child Protection Convention*

The Protection Convention seems to envisage the possibility of the child being without a habitual residence.¹¹⁴ For example, the jurisdiction chapter specifically provides that the country where the child is present shall have jurisdiction when the child's habitual residence cannot be established.¹¹⁵ Similarly, Article 7 seems to contemplate the possibility that following a wrongful removal, the child will lose habitual residence in one state without immediately acquiring a habitual residence in another state.¹¹⁶ In order to prevent the place of refuge from acquiring jurisdiction, the Article provides that the jurisdiction of the state of the habitual residence continues to have jurisdiction until the child acquires habitual residence in another state *and* has resided in that state for at least one year after the "non-abducting" parent knows or should have known of the child's whereabouts.¹¹⁷ Thus, as a result of this specific provision, a finding of no habitual residence does not enable an abductor to alter jurisdiction in the case of abduction *from* a contracting state.¹¹⁸

The choice of law chapter does not offer guidance on cases involving children with no habitual residence. The significance of the absence of a choice of law provision regarding such situations should not be exaggerated. First, it is important to note that in relation to most issues, the law of the forum state will be applied and that habitual residence is only used in relation to parental responsibility. Second, since the attribution of parental responsibility under the previous habitual residence continues to apply in addition to that of the new habitual residence, a gap occurring in the child's habitual residence is not a problem, unless the child never had a habitual residence. Third, in relation

114. *But see id.* at 113 (commenting that where habitual residence is used as the sole or main connecting factor in a choice of law or jurisdiction Convention, it would be inappropriate for there to be a lacuna in a person's habitual residence).

115. Protection Convention, *supra* note 4, art. 6(2). The language might suggest that children do always have a habitual residence, but such residence is impossible to definitely establish. However, the Lagarde Report, *supra* note 23, suggests that there will be some cases in which there is no habitual residence.

116. Protection Convention, *supra* note 4, art. 7.

117. Or in the meantime the "non-abducting" parent acquiesces.

118. Where the child is abducted from a non-contracting state to a contracting state, a finding of no habitual residence confers jurisdiction on the courts of the place to which the child has been abducted. *Id.* art. 6, § 2.

to the exercise of parental responsibility, the law of the country where the exercise takes place will apply, subject to the general requirement that this is not manifestly contrary to public policy taking into account the best interests of the child.¹¹⁹

Thus ironically, there seems to be less difficulty in finding that a child has no habitual residence under the Protection Convention than under the Abduction Convention. This should prevent the need to make artificial findings of habitual residence in order to further the policy of the Protection Convention.

(iii) Under Domestic Legislation

The case of *M v. M (Abduction: England and Scotland)*¹²⁰ demonstrates the consequences under the English legislation of a finding that a child who is present in the forum does not have any habitual residence.¹²¹ In that case, the family lived in Scotland for two years, but intended to move to England. The mother unilaterally took the children to England and initiated proceedings both in relation to the children and for divorce.¹²² The lower court found that the children did not have any habitual residence. So in determining which court was the *forum conveniens*, the court focused entirely on the welfare of the children.¹²³ After deciding that the English Court was the *forum conveniens*, the court issued an order prohibiting the father from removing the children from England.¹²⁴ However, the court of appeal found that the judge had erred and that the children were habitually resident in Scotland.¹²⁵

This finding changed the picture entirely. While the English court still technically had jurisdiction because matrimonial proceedings had been initiated in England, those proceedings were stayed because Scotland, as the place of habitual residence, was the more appropriate forum.¹²⁶ Hence, if there had been no matrimonial proceedings, the English court would not have had jurisdiction because of the child's habitual residence in Scotland.¹²⁷ Thus, we can see that the policy of protecting

119. *Id.* art. 22. This provision is a general restriction on the application of foreign law under the Protection Convention.

120. [1997] 2 F.L.R. 263 (C.A.) (Eng.).

121. Family Law Act, 1986, §2 (Eng.).

122. *M v. M (Abduction: England and Scotland)*, [1997] 2 F.L.R. 263, 265 (C.A.) (Eng.).

123. *Id.*

124. *Id.* at 267 (citing the opinion of the lower court judge).

125. *Id.* at 268.

126. *Id.* at 272-73.

127. Family Law Act, 1986, §§ 2, 3 (Eng.).

children against abduction requires courts to avoid a finding that a child has no habitual residence in the intra-UK context.¹²⁸

In the situation where the child is not present in the forum, the finding that the child has no habitual residence seems to deprive the forum of any possibility of jurisdiction. While Section 41 is designed to ensure continuation of the jurisdiction of English courts, close examination of the language shows that the provision only applies to situations in which the child *has* acquired a habitual residence in a foreign country after a wrongful removal.¹²⁹ Thus, it seems that where as a result of the removal from England the child does not have any habitual residence, the English court will not continue to have jurisdiction. Such a result is clearly absurd and cannot have been intended by the legislature, who presumably did not envision the possibility of a lacuna in the habitual residence of a child. No doubt, the courts would ensure that the English court had jurisdiction in such a case either by holding that the habitual residence in England continued or that a new habitual residence had been acquired abroad, thus activating Section 41.¹³⁰ In other words, the policy of protecting children against abduction again requires that the child has a habitual residence at all times.

It is of interest to note that under the Ontario statutory definition,¹³¹ one of the situations in the sub-paragraphs of Section 22(2) above must have occurred at some stage. It follows that there must always be one which last occurred, and therefore, it would not be possible for a child to have no habitual residence at any time.¹³²

128. *D v. D (Custody: Jurisdiction)*, [1996] 1 F.L.R. 574, 581 (Fam.) (Eng.) (discussing that even if the children do not have a habitual residence the later decision of the Scottish court made at a time when the children were present in Scotland must take precedence).

129. Family Law Act, 1986, § 41 (Eng.).

130. *Id.*

131. Ontario Childrens Law Reform Act, 1990, § 2.2(2).

132. Under the UCCJA, *supra* note 46, it is possible that there will be no "home state." If there is no "home state" jurisdiction may be based on the child's significant connection to a country or on their presence in a country. Blakesley, *supra* note 46.

(b) *A Child Should Have Only One Habitual Residence at Any One Time*

(i) *Under the Abduction Convention*

Case law has rejected the idea of dual habitual residence under the Abduction Convention.¹³³ While normal usage of the phrase habitual residence would not eliminate the possibility of a person having more than one habitual residence at any one time, the Abduction Convention was drafted on the premise that a child would only have one habitual residence at any given time. Therefore, a finding that a child has concurrent habitual residences does not fit comfortably within the framework of the Convention.¹³⁴

Most importantly, a finding of dual habitual residence will usually not protect a child from abduction since the most likely destination of an abduction will be the child's other habitual residence.¹³⁵ However, in situations where a child retains a strong connection with two countries, it could be argued that removal of the child from one country to the other does not cause detriment and therefore, the child only needs protection from removal to third countries. A finding of dual habitual residence will achieve such protection.

(ii) *Under the Protection Convention*

Similarly, the provisions of the Protection Convention suggest that the drafters of the Convention did not envisage the possibility of dual habitual residence.¹³⁶ Dual habitual residence would lead to concurrent jurisdiction, which is one of the phenomena that the Convention intended to avoid. In particular, the wrongful removal of a child from one habitual residence to the

133. See, e.g., *Hanbury-Brown v. Hanbury-Brown*, (1996) 20 Fam. L.R. 334 (Austl.) (dismissing the contention that children had dual habitual residence); *Friederich v. Friederich*, 983 F.2d 1396 (D. Utah 1993); *In re V* (Abduction: Habitual Residence), [1995] 2 F.L.R. 992 (Fam.) (Eng.).

134. It is theoretically possible, however, for the Convention to apply whenever a child is abducted from *either* habitual residence.

135. See, e.g., *Watson v. Jamieson*, 1998 S.L.T. 180, available at 1996 WL 1802591 (regarding an alternating custody case where a finding of dual habitual residence would have been plausible but would not have changed the outcome).

136. Article 1, Protection Convention, *supra* note 4, refers in the singular to "the State" (whose authorities have jurisdiction) and to "the law" (which is applicable). The Lagarde Report, *supra* note 23, also clearly envisages that dual habitual residence is not possible. Paragraph 41 states that "the change of habitual residence implies both the loss of the former habitual residence and the acquisition of a new habitual residence." Lagarde Report, *supra* note 23, ¶ 41.

other would not preclude the country to which the child was removed from obtaining jurisdiction.¹³⁷ On the other hand, the introduction of a mechanism to facilitate cooperation between the authorities of contracting states could ensure that such cases are resolved in the most appropriate forum.¹³⁸

While it may seem that dual habitual residence would raise questions regarding the applicable law provisions, this fear is groundless. The law of habitual residence is only used in relation to parental responsibility. Once parental responsibility has been gained, it will not usually be lost by a change of habitual residence.¹³⁹ Thus, where a child has dual habitual residence, a parent will be treated as having parental responsibility if the parent has such responsibility under the law of *either* country. However, it would seem appropriate to apply the law of the habitual residence in which the exercise takes place. If the exercise takes place in a third country, it would seem appropriate to apply the law of the habitual residence that allows the exercise in question unless it is contrary to the public policy of the forum.¹⁴⁰

Allowing dual habitual residence would create the risk of inconsistent judgments in the two countries of habitual residence. However, this is no more problematic than inconsistent judgments resulting from a change in habitual residence. The solution would seem to be to recognize or enforce the later judgment.

(iii) Under Domestic Legislation

The English legislature did not anticipate the possibility of a child being habitually resident in two parts of the United Kingdom simultaneously. However, the fact that a child is habitually resident in a foreign country, as well as in England, should not affect the exercise of jurisdiction by an English court. Wrongful removal to the other habitual residence does not trigger the application of Section 41 because the child does not become habitually resident abroad in consequence of wrongful removal or retention.¹⁴¹ Thus the policy of protecting against abduction

137. Article 7 of the Protection Convention would not apply in such a situation because the child was already habitually resident in the country to which he or she is removed.

138. Protection Convention, *supra* note 4, arts. 8, 9, 30.

139. *Id.* art. 16, § 3.

140. *Id.* art. 22; Ontario Childrens Law Reform Act, 1990, § 2.2(2).

141. Family Law Act, 1986, §41 (Eng.).

would require a finding that England was the sole habitual residence at the time of the removal or retention, and that only thereafter was the foreign habitual residence acquired. The definition of habitual residence in the Ontario legislation does not allow for dual habitual residence as is evidenced by the fact that only one of the alternatives can have been the last to occur.¹⁴²

In summary, in all the contexts under discussion, the policy of providing protection from abduction requires that findings of dual habitual residence should be avoided in determining jurisdiction. However, if it is determined that a child does not need protection against abduction from two countries with which the child has a close connection, a finding of dual habitual residence will protect the child from abduction to a third country.

B. Abductors Should Not be Rewarded

1. Scope of the Policy

There are two reasons why abductors should not be rewarded. First, one of the aims of the Convention is to deter potential abductors from abducting their children by showing them that they will not obtain any benefit therefrom.¹⁴³ Second, basic principles of justice require that a person should not benefit from an illegal act.

These policies apply in each case of wrongful removal, whether or not the child is considered to be in need of protection and whether or not the removal causes detriment to the child. However, these factors may affect the weight of the consideration. While no removal should be condoned, a removal to a strange place, which will be detrimental to the child, needs to be deterred more than a removal back to the country of origin, which the child only recently left.

Similarly, these policies should be considered when a non-custodial parent refuses to return a child to the custodial parent at an agreed time. It is not clear whether the policy of not rewarding abductors is relevant when the act of retention consists of the non-custodial parent applying to the court before the date of return for an order that will enable that parent to

142. Children's Law Reform Act, 2 R.S.O., ch. C-12, § 22(2) (1990) (Can.). Similarly there can only be one "home state" under the UCCJA because the child can only have lived in one place for the last six months. UCCJA § 2(5), 9 U.L.A. 286 (1968).

143. *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995).

retain the child after the return date.¹⁴⁴ It may be argued that the aim of the Convention is to deter one party taking the law into their own hands by physically removing or retaining the child, rather than to deter submission to the law by making an application to a court. Furthermore, where the court is not the appropriate forum, the court can either refuse to hear the case or simply refuse the application. Either will result in non-return of the child on the required date being treated as a retention. While domestic courts are not always prepared to protect children sufficiently from removal and retention in the absence of an obligation to do so under the Abduction Convention, this is hardly the fault of the parent who applies for permission to retain a child. Thus, it is suggested that the policy of not rewarding abductors should not normally apply to cases where the act of retention is applying to court before the date of return.

2. *Re-abduction Cases*

The question arises as to how the policy of not rewarding abductors should apply to "re-abduction," cases where, the "innocent" parent chooses to get the child back by re-abducting the child rather than through lawful means. If it is held that the child has acquired a habitual residence in the place of refuge in the time period between the abductions, then the Abduction Convention would apply to the re-abduction and the first abductor will be able to obtain return of the child. Such a result means that the parent is rewarded for having been the first to abduct the child. On the other hand, if it is held that habitual residence is not changed following wrongful removal, then the Convention would not apply and the second abductor rather than the first would be rewarded.

Two possible solutions can prevent "rewarding" either parent. The first is to hold that the policy of not rewarding the first abductor is effectively neutralized by the policy of not rewarding the second abductor and thus neither should be taken into account. Alternatively, it may be argued that the policy of not rewarding the first abductor is stronger because the second abductor is simply restoring the *status quo* and the result of his action, if not the means, is in accordance with the policy of the Abduction Convention.

144. *In re S* (Abduction: Wrongful Retention), [1994] Fam. 70; *Re B* (Minors) (Abduction) (No. 2), [1993] 1 F.L.R. 993; *H v. H* (Child Abduction: Stay of Domestic Proceedings), [1994] 1 F.L.R. 530 (Fam.) (Eng.).

C. Not to Discourage Beneficial Foreign Travel

1. The Basis of the Policy

Classic examples of situations which are borderline in relation to habitual residence are short term relocations and relocations for specific purposes such as sabbaticals, academic exchanges, and tours of duty abroad by employees who work for multinational companies.

In the Abduction Convention case of *In re Morris*,¹⁴⁵ the U.S. District Court for the District of Colorado specifically stated that when a parent travels abroad for academic reasons such as taking a sabbatical and the time period is fixed at less than a year, one parent's unilaterally changed intent is not enough to shift the habitual residence of a minor child. The court stated that: "[t]o find otherwise would have significant negative policy implications by discouraging extended international travel and temporary international employment for scholastic and professional enrichment."¹⁴⁶

The basis for the assumption that acquisition of habitual residence would deter academics and their families from traveling is not stated expressly in *Morris*, but may be inferred. A parent may fear that if things go wrong and he or she "goes home" with the child, this will be considered a wrongful removal with the result that return would be ordered to the country of the sabbatical. Similarly, a parent considering whether or not to travel abroad for a Sabbatical may not wish to risk the possibility that the Court in the foreign country will have jurisdiction to hear disputes about the custody of the child because then the child may have to stay in that country pending a decision.

2. Scope of the Policy

Two questions arise as to the scope of the policy. Should the policy be restricted to temporary relocations of less than one year,

145. 55 F.Supp. 2d 1156 (D. Colo. 1999).

146. *Id.* at 1163. Clearly, sabbaticals, which are being spent in one place, could otherwise lead to acquisition of habitual residence since both academic study and employment are considered to be settled purposes within the widely-cited Shah formula. *Feder v. Evans-Feder*, 63 F.3d 217, 223 (3d Cir. 1995); *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995) (holding that working under two year contract was sufficient to establish habitual residence); *Kapur v. Kapur*, [1984] 1 F.L.R. 920, 927 (Fam.) (Eng.) (declaring that one year course was sufficient).

as suggested in *Morris*, and what categories of temporary relocation are included in this policy?

In relation to the first question, the rationale of not deterring beneficial foreign travel would seem to apply equally to relocations for longer than one year. However, in such cases this policy may be of less weight because the factors in favor of acquisition of a habitual residence in the foreign country will be stronger.¹⁴⁷

In relation to the second question, I suggest that where the very nature of the employment will involve working abroad, such as in the case of diplomatic staff, servicemen and jobs requiring foreign assignments, there is no fear of discouraging such travel. Those that choose to engage in such work simply have to accept the risks involved in living abroad, including the implications of a change of habitual residence.¹⁴⁸ Thus, the policy is restricted to cases where the travel abroad should be regarded as an opportunity for scholastic or professional enrichment¹⁴⁹ rather than as a normal part of the job.

This formulation of the policy raises questions regarding how the phrase "scholastic and professional enrichment" should be interpreted. Does there have to be a direct relationship between the travel and the activities in the state of origin? It is suggested that the main consideration should be whether the travel could be considered "beneficial" in the eyes of the state of habitual residence before the travel.¹⁵⁰

147. Clive, *supra* note 86, at 141 (commenting that he has not come across any case in which habitual residence has not been acquired where the child has been resident in the relevant country for twelve months). Also, one year was chosen as the period during which jurisdiction should not be lost after a wrongful removal. There were proposals during the drafting stage of the Protection Convention that habitual residence should only be acquired after one year generally or at least in cases of wrongful removal. *Id.* These were rejected on the basis that the time period required in each case is a question of fact. *Id.* Nonetheless, there seems to be some sort of consensus that habitual residence will normally be acquired after one year's residence. See also the discussion on how to balance conflicting policy considerations in cases of temporary relocations, *infra* Part V.B.3.

148. See, e.g., *In re A (Minors) (Abduction: Habitual Residence)*, [1996] 1 All E.R. 24, 31 (Fam.) (Eng.). The argument that the residence in Iceland was not voluntary was rejected on the basis that "when the father elected to join the U.S. forces such embraced the fact that he would, no doubt from time to time, be required to move to different countries following the Stars and Stripes." *Id.*

149. For example, the Jewish Agency sends Israeli teachers to work in Jewish communities throughout the world to teach Hebrew and Jewish studies. This ought to be seen as an "opportunity" for the teacher to gain professional enrichment by teaching in a foreign country.

150. For example, working as a volunteer for an international agency in a third world country should qualify, but simply going to work in such a country to experience life there should not.

The court in *Morris* considered travel in terms of the parent's purpose. However, this policy should also apply to situations where the travel is organized for the child's benefit. Travel for the benefit of the child includes a temporary relocation to the country where the other parent lives,¹⁵¹ in order to have greater access to that other parent and his/her culture.¹⁵²

Finally, it is also important to note that the need to allay the concerns of parties planning sabbaticals applies equally in relation to the Protection Convention and domestic legislation since acquisition of habitual residence in the foreign country will bestow jurisdiction on the foreign court and lead to application of that court's law.

D. Not to Discourage Parents from Trying to Save Their Marriage

1. The Scope of the Policy

Most countries, in varying degrees, support efforts to prevent the breakdown of marriages,¹⁵³ often because it is thought to be contrary to the child's best interests.¹⁵⁴ Two types of cases can be identified where finding that a new habitual residence has been acquired may discourage parents from trying to save their marriages and thus contradict the policy of matrimonial harmony for the child's best interests.

The first category of cases involves marriages that have begun deteriorating before the relocation.¹⁵⁵ For example, one parent may wish to relocate for employment or personal reasons and the other reluctantly agrees to move with the hope that the relocation

151. This is referring to a prolonged visit to the other parent's country and not to a rotating custody arrangement.

152. For reference to the concept of access to the respective cultures of both parents, see generally Adair Dyer, *The Hague Convention on the Civil Aspects of International Child Abduction - Towards Global Cooperation: Its Successes and Failures*, 1 INT'L J. CHILD. RTS. 273 (1993).

153. For example, by funding marriage guidance services, imposing a duty on lawyers and/or courts to promote reconciliation, Canadian Divorce Act, R.S.C. ch. 3 §§ 9, 10 (1985) and by providing that attempted reconciliations do not prejudice the right to petition for divorce, English Matrimonial Causes Act, 1973 ch. 18, § 2.

154. Thus, some jurisdictions make divorce harder to obtain where there are minor children. Family Law Act, 1996, § 11(5)(a) (Eng.). Similarly, under Swedish law there is a "waiting" period of six months to one year. Ake Logdberg, *The Reform of Family Law in the Scandinavian Countries*, in THE REFORM OF FAMILY LAW IN EUROPE 201-03 (A.G. Chlores ed., 1978). For an American proposal, see Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981).

155. See, e.g., *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); *Re F*, [1992] 1 F.L.R. 548, 558 (Fam.) (Eng.) (citing mother's affidavit); *In re B (Minors) (Abduction)* (No. 1), [1993] 1 F.L.R. 988 (Fam.) (Eng.).

other reluctantly agrees to move with the hope that the relocation will improve the marriage. When the marriage fails to improve, the "reluctant" parent may wish to return with the child to the country where the parties were formerly living. A finding that the child has become habitually resident in the country to where the parties have relocated will prevent any such unilateral return by the "reluctant" parent. If the Convention applies in such a situation, the "reluctant" parent may well not be prepared to take the risk of being "stuck" with the child in the new country if the marriage does not improve and so will refuse to accompany the other parent. Thus, any chance of saving the marriage will be lost and the policy of fostering reconciliation will not be furthered.

In the second category of cases, the parties separate and one parent takes the child to live in a new country with the consent of the other parent or of the court, at which point habitual residence in the original country is lost. Later, that parent returns in order to attempt reconciliation. When such attempt fails the parent unilaterally removes the child to the "new" country.¹⁵⁶ The question arises whether habitual residence is reacquired in the country of origin during the attempted reconciliation. Clearly, a positive answer to this question might deter the custodial parent from making such an attempt.

In both situations, the policy of not discouraging attempts to save marriages would require finding that no new habitual residence had been acquired. The question arises as to the length of time for which this policy applies. Clearly, the policy can only prevent a habitual residence from being acquired for a limited period of time. Thus, the longer that the parties live together after the relocation or reconciliation, the weaker the argument becomes until eventually at some point the attempt to save the marriage must be deemed to be successful based on the fact that the parties are still living together.¹⁵⁷

This policy consideration is equally applicable under the Child Protection Convention and domestic legislation.

156. See, e.g., *In re B*, [1994] 2 F.L.R. 915 (Can.).

157. Guidance as to the appropriate period of time can be found in domestic divorce legislation that provides for attempted reconciliations. See, e.g., *Matrimonial Causes Act, 1973*, 18, § 5 (Eng.) (establishing the period in England as six months).

2. The Case Law

While the author has not found any case where the policy of not discouraging attempts to save marriages is clearly laid out,¹⁵⁸ it is hinted at in the opinion of the district court in *Feder v. Evans-Feder*.¹⁵⁹ The court seemed concerned that Mrs. Feder should not lose out as a result of her "last attempt to save her troubled marriage."¹⁶⁰ The Appellate Court, however, discounted to a large extent Mrs. Feder's reservations in moving to Australia because only conduct and overtly stated intentions should be relevant. It is suggested that this approach is inconsistent with the policy of encouraging the saving of marriages because in a situation where one parent is trying to save the marriage, it is likely to be counter-productive for that parent to declare openly to the other that (s)he is only agreeing to accompany his/her spouse abroad in a final attempt to save the marriage.¹⁶¹ Rather, the "reluctant" party's motives should be relevant provided that there is some independent evidence of them.¹⁶²

158. In the case of *In re B*, 2 F.L.R. at 915, it was held that the period of the attempted reconciliation (a little over two months) in Ontario was not sufficient for a settled purpose necessary for habitual residence to be formed. This finding is far from self-evident given that in other cases as little as one month residence has been sufficient. Furthermore, in this case, under the law of Ontario, the child was habitually resident in Ontario because that was the last place where he had resided with his parents and Ontario was clearly the *forum conveniens*. Thus it is plausible that the judge was influenced perhaps subconsciously by the policy of not discouraging attempts to save marriages. But see *Laing v. Laing*, (1996) 21 Fam. L.R. 24, where the judge found, among other things, that a period of six weeks spent by the child in the U.S. during an attempted reconciliation between her parents would have been sufficient to re-establish her habitual residence there and that the residence of the parents together during this time was for a settled purpose. *Id.* at 40. This finding clearly ignores the policy of encouraging reconciliation. However, the failure to consider this policy can perhaps be explained by the fact that the judge actually found that the child had never lost her habitual residence in the U.S. in the first place.

159. *Feder v. Evans-Feder*, 866 F. Supp. 860 (E.D. Penn. 1994), *vacated by* 63 F.3d 217 (3d Cir. 1995).

160. *Id.* at 863; *Re B (Minors) (Abduction) (No. 2)*, [1993] 1 F.L.R. 993, 999 (referring to "a couple fighting commendably to save their marriage, for their own sake and that of the children.") He then goes on effectively to make this "fight" a settled purpose, sufficient to establish acquisition of habitual residence in Germany. *Id.* For an analysis of the case, see *infra* Part V.B.2.

161. *Feder*, 63 F.3d at 229.

162. For example, from a relative or friend that has been confided in or from a lawyer who was consulted, as in *Feder* itself. *Id.* at 219.

E. Agreements Should be Honored

1. The Scope of the Policy

Honoring agreements is a fundamental moral value and legal principle.¹⁶³ Even where the court's own jurisdiction is involved, it is reluctant to allow one party to breach an agreement. Thus, a court will usually refuse to exercise its jurisdiction in a civil action that is brought in breach of a foreign jurisdiction clause.¹⁶⁴

Application of this principle to Hague Convention abduction cases would not help where the child's current habitual residence was in a place other than that agreed by the parties because there would still be an obligation to return the child to the original place of habitual residence.¹⁶⁵ Thus, effect can only be given to the agreement if it is interpreted as an agreement that the country which is given exclusive jurisdiction be treated as the child's habitual residence. Since this is clearly in accordance with the intention of the parties, this will normally be the appropriate interpretation.¹⁶⁶ The policy that agreements should be honored requires that effect be given to this agreement unless there are good reasons to the contrary. *A fortiori*, effect should be given to agreements between the parties and court orders that provide either expressly or implicitly that a child's habitual residence should be in a certain country.¹⁶⁷

163. The rule, which is frequently applied in case law, that one parent cannot unilaterally change a child's habitual residence without the consent of other parent could be understood as an aspect of the policy of honoring agreements because, even though there will not usually be any express agreement about where the parties will live, there will be a tacit agreement. However, in such a case the policy of honoring agreements is simply another way of expressing the policy of protection against abduction because the attempt to change the habitual residence unilaterally will invariably involve a removal or retention without consent. In contrast, here we are concerned with the effect of the agreement of the parties that the child's habitual residence will or will not change as a result of a relocation (either temporary or permanent).

164. See the leading U.S. cases of *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 192 (1972) and *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) and the leading English cases of *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v. The Eleftheria*, [1970] P. 94 (Eng.), *Aratra Potato Co. v. Egyptian Navigation Co.*, [1981] 2 Lloyd's Rep. 119 (C.A.) (Eng.), and *D.S.V. Silo-Und Verwaltungs-Gesellschaft M.B.H. v. The Sennar (No. 2)*, [1985] 1 W.L.R. 490, 500 (H.L.) (Eng.).

165. For discussion of whether the child might be returned to a third country, see *infra* Part III.A.

166. However, an agreement that a child will return to a country after a period abroad (shuttle custody arrangements) should not be interpreted as an agreement that the child retains habitual residence in the first country, unless of course dual habitual residence is possible. See *supra* Part A.2.b.i.

167. In the Israeli case of *Moran v. Moran*, F.M.A. 90/97 (unreported), the district court, gave permission to one parent to take a child out of her home country while she studied abroad for two years. The court then ordered that Israel remain the child's

A typical situation, where the principle that agreements should be honored would be a relevant consideration would be where the parties have agreed that the children will travel abroad for a specific purpose and for a limited period of time. Where one parent later reneges on this agreement and does not wish the child to return, a determination that a new habitual residence has been acquired will assist that parent in breaching the agreement. The policy of honoring agreements is achieved, therefore, by not allowing a new habitual residence to be established for the child.¹⁶⁸ Conversely, where parties agree to relocate permanently, they effectively agree to change their habitual residence. A unilateral decision by one to go back to the country of origin may be seen as a breach of this agreement. Thus, the policy that agreements should be honored would require that a habitual residence be acquired in the new country.¹⁶⁹

The concept that an agreement as to habitual residence should be honored gives rise to a number of difficulties. Traditionally, courts have been reluctant to give effect to agreements between spouses (at least if they were made while they were living together harmoniously), either on the basis that the agreements were made without intent to create legal

habitual residence. In the later case of *Dagan v. Dagan*, F.M.A. 70/97 (unreported), Justice Porat claims that the condition in *Moran* was invalid and should not have been made, but Justice Rotlevi disagrees, arguing that such provision can prevent subsequent retention in the "new" habitual residence in contravention of the original court order.

168. This was the result in the Australian case of *In re Artso*, (1991) F.L.C. 81,633, where the parties came to Australia from England for a trial period. The wife was unhappy and returned to England. Her subsequent application for their return was successful because the children remained habitually resident in England. In the Australian Family Court case *De Lewinski v. the Legal Aid Comm'n of New South Wales*, the court held that the children's residence in Australia with their mother for six months was insufficient to establish habitual residence where the purpose of the stay was to visit the mother's family. Unreported, Family Court of Austl., Nicholson CJ, Ellis and Warnick JJ (July 11, 1997), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author). Furthermore, it was intended that they would return to the United States to resume residence with their father. Thus, the mother's refusal to return their children to the United States was wrongful.

169. See, e.g., *Paterson v. Casse*, Unreported, Family Court of Austl., Kay J (Nov. 2, 1995), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author). The parties came to Australia with the intention of remaining permanently if they could obtain residence. After two months, the father told the mother that he wished to return to Mauritius with the children. He subsequently brought proceedings under the Convention on the basis that his wife wrongfully retained the children in Australia. The court held that the children were no longer habitual residents in Mauritius because of the agreement between the parties to remain permanently. However, the judges did appreciate the difficulties involved in such agreements and specifically raised the question as to whether the breakdown of the marriage, to which apparently the parties had not turned their mind, would vitiate the agreement. *Id.*

relations or that the agreements were against public policy.¹⁷⁰ However, the modern approach is to promote "private ordering"¹⁷¹ subject to the Court's power to veto agreements inter alia because of inconsistency with the welfare of the child¹⁷² or because of abuse of disparity of bargaining power between the parties.¹⁷³ In the present context, the fact that the agreement relating to the habitual residence was inconsistent with the child's welfare would constitute a good reason for not honoring it.¹⁷⁴ However, the court cannot get involved in analyzing whether the agreement has been achieved unfairly because that is inconsistent with the summary nature of Abduction Convention proceedings.¹⁷⁵

The second and more substantive difficulty is that the "agreement" approach contradicts the physical factual nature of habitual residence. Thus, the Report of the Third Special Commission expressly rejects the power of agreements or court orders to create a habitual residence that does not match with the factual habitual residence of the child.¹⁷⁶

A third problem is that very often there will be a dispute about what was agreed upon between the parties. As soon as the court is prepared to take into account the fact of the agreement, then it is inviting the parties to submit large quantities of evidence, which will delay the proceedings.¹⁷⁷ Since the existence of the alleged agreement is simply one consideration in

170. For example, if the agreement contemplated divorce. See STEPHEN M. CRETNEY & JUDITH M. MASSON, *PRINCIPLES OF FAMILY LAW* 96-97 (6th ed. 1997).

171. See, e.g., Sally B. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1399-1403 (1984) (explaining that this policy is applied to ante-nuptial and separation agreements alike); CRETNEY & MASSON, *supra* note 170, at 397; Uniform Marriage and Divorce Act, § 306.

172. Thus, terms of any agreement which provide for support, custody, and visitation of children are often not considered binding on the court. However, in practice courts rarely interfere with agreements made by parents in relation to custody. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 954-56 (1979).

173. See Sharp, *supra* note 171, at 1403-06.

174. See, e.g., Schuz, *supra* note 14, at 785.

175. The intimate and intricate nature of intra-marital relationships makes it difficult to discern when the natural and often subtle pressures which cause one party to agree with the other overstep the boundary and become unfair exploitation or manipulation of the other's weakness or emotional blackmail.

176. Reports of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 8, ¶ 16.

177. In the Israeli case of *Dagan v. Dagan*, F.M.A. 70/97 (unreported), the Respondent brought forty documents, eight tapes and twelve witnesses, of which a substantial proportion related to the question of the intentions of the parties when going to live in the U.S. Justice Porat complained that much of the evidence was unnecessary and that conducting Hague Convention proceedings in such a manner frustrates the purpose of the Convention.

determining habitual residence, getting bogged down in issues of proving what was agreed is inappropriate. Furthermore, the summary nature of the proceedings means that the court in Abduction Convention cases is not ideally suited to deciding contradicted issues of fact.

However, while such difficulties are formidable, it is suggested that they should limit the scope of the application of the fundamental principle that agreements should be honored rather than extinguish it completely. The solution may be that the policy should only be relevant (i) in "borderline" cases where it is not an abuse of language to say that the child's habitual residence is in accordance with the agreement;¹⁷⁸ (ii) where it is very clear on the facts that an agreement existed; and (iii) there is no serious suggestion that the agreement was not made voluntarily.¹⁷⁹ The policy is equally applicable under the Child Protection Convention and domestic legislation.

2. *The Case Law*

In the sabbatical cases, there is support for the policy that one parent cannot unilaterally (i.e. in breach of agreement) change the nature of the child's residence in the place where the sabbatical is being spent.¹⁸⁰ In the case of *In Re S (Minors)(Abduction: Wrongful Detention)*, the mother's assertion that the children had acquired a habitual residence in England was seen as part of the wrongful retention because it was in breach of the parties' agreement that they would return to Israel at the end of the sabbatical.¹⁸¹

The question of the relevance of an agreement between the parties in determining the habitual residence of the child was discussed in the Israeli case of *Dagan v. Dagan*.¹⁸² In this case, an Israeli couple went to live in New Jersey with the intention of staying there for approximately two years. After two and a quarter years, when the husband refused to return to live in Israel, the wife returned to Israel with their one year old son, who had been born in New Jersey. The court unanimously agreed

178. Thus, for example, no effect would be given to an agreement, which provided that the child was habitually resident in a country where he had never been a resident or that he remained habitually resident in a country despite a prolonged absence.

179. Thus, for example, no effect would be given to an agreement which was made as a result of threats of violence or other coercive behavior as in *In re Application of Ponath*. 829 F. Supp. 363 (D. Utah 1993).

180. See, e.g., *In re Morris*, 55 F. Supp 2d. 1156 (D. Colo. 1999).

181. [1994] Fam. 70 (Eng.).

182. District Court F.M.A. 70/97 (T.A.) (not yet reported) (Isr.).

that the child was a habitual resident of New Jersey.¹⁸³ However, Justice Rotlevi indicated that if the evidence had shown that the agreement was to stay in the United States for a fixed period and the conduct of both parties had not shown an intention to extend the stay, then the agreement of the parties could have changed the child's habitual residence.¹⁸⁴

With respect, this view is not sustainable on the facts of this case because the child had never been resident in Israel. Thus, to hold that he was a habitual resident of Israel is simply inconsistent with the facts. An agreement should not be able to create a habitual residence in a place where the child has never been resident,¹⁸⁵ but may be relevant in determining whether the child's residence in a particular place has become habitual.¹⁸⁶ More commonly, the agreement should be able to prevent the loss of a habitual residence because it manifests a preservation of the links with the "old" country and limits the quality of the residence in the "new" country.¹⁸⁷

However, none of the cases address the question of what is the maximum length of time for which such an agreement could be effective. The longer the child is a resident in the new country, the stronger the policy considerations will be in favor of a new habitual residence being acquired. At some point such considerations will tip the balance.

183. *Id.*

184. Justice Rotlevi argues that if the advance agreement of one parent to the other removing the child is a defense to mandatory return (Abduction Convention, *supra* note 3, art. 13(a)), then the agreement of one parent in advance that the child's habitual residence will not be changed should also be a good defense. Moreover, an agreement that the court in the country of origin will retain jurisdiction over the child should be interpreted as an agreement that that country be treated as the child's habitual residence. However, Justice Porat insists that what is relevant is the physical situation and that the intentions and plans of the parties are irrelevant. *Id.* One flaw in Justice Rotlevi's reasoning is that a change of habitual residence may lead to the Convention not being applicable at all, whereas if the defense of consent is made, the court still has discretion to order return under the Convention. *Id.*

185. *In re M* (Abduction: Habitual Residence), [1996] 1 F.L.R. 887, 895 (C.A.) (Eng.).

186. *Paterson v. Casse*, (unreported) Family Court of Austl., Kay J (Nov. 2, 1995), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author); *Schroeder v. Vigil Escalare-Perez*, 664 N.E.2d 627, 632-33 (Ohio Com. Pl. 1995) (emphasizing the fact that "the parties had mutually agreed that [the child] would remain in the custody of the plaintiff for an indefinite period in Ohio"). Similar wording is used in the case of *Slagenweit v. Slagenweit*. 841 F. Supp. 264, 270 (N.D. Ohio 1993).

187. Thus, in the case of *Mozes v. Mozes*, 19 F. Supp. 2d 1108 (C.D. Cal. 1998), the fact that the parties agreed that the wife and children would spend fifteen months in the United States should have been a relevant factor. However, as in *Dagan*, there was some evidence that it was intended that this period might be extended and that the husband had indicated that he consented to such an extension. District Court F.M.A. 70/97 (T.A.) (unreported) (Isr.).

F. Disputes Should be Decided in the Forum Conveniens

1. The Relationship Between Habitual Residence and Forum Conveniens

One of the objectives of all the legislation under consideration is to ensure that disputes should be adjudicated in the *forum conveniens*. The choice of the factor of habitual residence was clearly designed to further this objective.¹⁸⁸ While the view that the habitual residence of the child will always be *forum conveniens* seems extreme,¹⁸⁹ it is clear that habitual residence is a factor of considerable weight in determining what is the *forum conveniens*.¹⁹⁰ Thus, conversely, in determining habitual residence in a borderline case involving directly or indirectly an issue of jurisdiction, which country is the *forum conveniens* ought to be a persuasive consideration.

2. The Relevance of Context

Despite the fact that the objective of adjudication in the *forum conveniens* is common to all the legislative instruments in question, determination of the *forum conveniens* may be affected by the legislative context in which it is being made.

(a) The Time Factor

Under the Abduction Convention, the critical point in time is immediately before the abduction or wrongful removal. This means that events occurring after that time should not be taken into account unless they constitute one of the exceptions, even though it is clear that such events may be very relevant in determining the *forum conveniens* for the substantive dispute.¹⁹¹ Under the Child Protection Convention and the domestic legislation, the critical point in time would be either the commencement of proceedings or the time at which the particular

188. Perez-Vera Report, *supra* note 23, ¶ 16; Lagarde Report, *supra* note 23, ¶ 5.

189. In *H v. H (Minors) (Forum Conveniens) (Nos. 1 & 2)*, [1993] 1 F.L.R. 958 (Eng.), Judge Waite rejected counsel's argument that the habitual residence is to be considered automatically as the natural forum. *Id.* at 963-64. However, other judges do not agree with this. In *re S (Residence Order: Forum Conveniens)*, [1995] 1 F.L.R. 314, 323-24 (Thorpe J.) (Eng.)

190. Even Judge Waite concluded that "the child's habitual residence is a factor in all cases persuasive, in many determinative, but in none conclusive." *H v. H*, 1 F.L.R. at 974.

191. Abduction Convention, *supra* note 3, art. 13, § 1. This is also true when twelve months has elapsed since the removal and the child has become settled in his new environment. *Id.* art. 12.

measure in question is taken.¹⁹² Thus, in the case of removal, post-removal events will clearly be relevant in determining habitual residence.¹⁹³

(b) *The Corollary of Determining the Forum Conveniens*

Under the Abduction Convention, the decision as to *forum conveniens* determines the critical issue of whether the child is to be returned.¹⁹⁴ This factor may work both ways. On the one hand, the court may be keen to find that the Convention is applicable in order to reverse the harmful effects of abduction and to deter others from abducting their children in accordance with the overall policy of the Convention.¹⁹⁵ On the other hand, the court may not wish to return the child in a particular case either because it thinks that the policy of the Convention does not so require or because it wishes to act in the best interests of the particular child, contrary to the policy of the Convention. In the latter case, the court may prefer to come to the “desired” result by manipulating the meaning of habitual residence rather than by a wide interpretation of the Article 13 defenses,¹⁹⁶ which is generally seen as undermining the Convention and therefore likely to be overturned on appeal.¹⁹⁷

Whereas, under the Child Protection Convention and domestic legislation, the decision as to whether the court has jurisdiction to take the measures in question will not *per se* bring about any change in the child’s place of residence.¹⁹⁸ Thus, the court is less likely to be tempted to take into account extraneous considerations.

(c) *Perceived Convenience*

The Child Protection Convention and the domestic legislation can apply in cases where there has been no abduction. In such cases, the child and both of the parents may all live in the same

192. Clive, *supra* note 86, at 173 (pointing out that the Protection Convention does not state which of these two points in time is the appropriate one).

193. Where the conditions of Article 7, Protection Convention, *supra* note 4, are fulfilled, the previous habitual residence retains jurisdiction for a fixed period of time.

194. Schuz, *supra* note 14, at 782-83 (explaining why return and adjudication do not necessarily have to go hand in hand).

195. See *supra* Parts II.A and IV.A.2.

196. Abduction Convention, *supra* note 3.

197. B v. B (Abduction: Custody Rights), [1993] Fam. 32 (C.A.) (Eng.); Nunez-Escudero v. Tice-Menley, 58 F.3d 374 (8th Cir. 1995); Roe v. Roe, C.A. 4391/96 50(3) P.D. 338 (Isr.).

198. See, e.g., Sutton v. Sodhi, [1989] 94 N.S.R.2d 126 (Can.).

country at the time of the determination of habitual residence. This scenario, which cannot normally¹⁹⁹ arise under the Abduction Convention, is likely to affect the determination of the *forum conveniens*. In borderline cases where all the parties are living in the forum, it will be more convenient to find that the authorities of that state have jurisdiction on the basis of habitual residence there.²⁰⁰

Whereas, in a similar abduction case, the court in the state of refuge which subsequently has to determine what the habitual residence of the child was immediately before the abduction cannot be influenced by the apparent convenience of determination in the country where all the parties are present, because this is no longer the case. Thus, for example, assume that the parties in *Re S*²⁰¹ had remained in England after their separation and there was a dispute about whom the child should live with while in England. On the assumption that the Protection Convention were in effect in England, the English court would only have jurisdiction to consider the mother's application for a residence order if the child is habitually resident in England. The fact that the parties are all in England at the moment will be an important factor in determining what is the *forum conveniens* in this situation. While much of the evidence about the parents' respective parenting abilities will be in Israel, it may be easier to bring evidence to England than to transport the parties to a court hearing in Israel. Thus, the policy consideration of adjudication in the *forum conveniens* will weigh differently in a non-abduction case than in the parallel abduction situation.

199. If one parent applies to the court in a foreign country for a custody order because the marriage has broken down while the parties are living abroad temporarily, the other party might apply for a return order under the Convention postponed to the date that visit was intended to end. *Paterson v. Casse*, (unreported) Family Court of Austl., Kay J (Nov. 2, 1995), available at http://www.austlii.edu.au/au/cases/cth/family_ct (copy on file with author).

200. Under the Protection Convention, jurisdiction can be transferred to that state from the state of habitual residence on the basis that it is the *forum conveniens*. Protection Convention, *supra* note 4, arts. 8, 9.

201. *In Re S (Minors) (Abduction: Wrongful Retention)*, [1994] Fam. 70 (Eng.).

V. BALANCING CONFLICTING POLICY CONSIDERATIONS: THEORY AND PRACTICE

A. General Considerations

1. Introduction

Having identified the policy considerations, which are likely to be relevant, the critical question is how conflicting considerations are balanced. Since courts rarely refer to policy considerations openly, this Part of the Article first considers the different balancing methods, which might be adopted. Then some borderline cases are analyzed to see to what extent the decisions and reasoning are consistent with the policy considerations hypothesis presented in this paper.

2. The Qualitative Method

The qualitative method of balancing requires determining the relative strength of each consideration on the particular facts of the case. For example, the weight of the policy of protecting the child from abduction will depend on how detrimental the particular abduction is to him, which in turn depends *inter alia* on whether he has any previous connection with the country of refuge. Similarly, the strength of the policy of adjudication in the *forum conveniens* depends on how clear it is that a particular country is indeed a more appropriate forum than another.

Where there are more than two relevant considerations which point in different directions, the weight of each consideration will be placed in the appropriate side of the scales and the habitual residence determined according to the heavier side. For example, where one policy consideration is strong, it might outweigh two weaker ones.

One problem with this approach is the difficulty of measuring the relative strength of different policy considerations when "like" is not being compared with "like." Under the comparative impairment approach,²⁰² the comparison is facilitated by

202. This approach is used in a variety of different contexts. For example, under the Government Interest Analysis approach to choice of law, a true conflict may be solved by determining which Government's interest would be more severely impaired. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1718 (1963). For a judicial application of this approach see *Bernard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976). Another example can be found, in a quite different context, in the frozen embryo dispute decided by the Israeli Supreme Court, C.A. 2401/94, *Nachmani v. Nachmani* (unreported), where one method of resolving the conflict between the wife's right to

examining the extent to which each particular policy involved would be impaired if effect were not given to it in the particular case. Given that the policy of protecting children from abduction has been expressly adopted by the countries who are members of the Abduction Convention, it seems likely that other policies will be subsidiary thereto. However, this will only be true where the particular case is really within the protection policy as envisioned by the drafters of the Convention.²⁰³

3. *The Quantitative Method*

In cases where there are more than two relevant considerations, the quantitative approach could be adopted where one result is supported by a greater number of policy considerations than the other. For example, two considerations which point in one direction should take precedence over one which points in the opposite direction.²⁰⁴

This approach is in some ways simpler than the weight approach, but has obvious drawbacks. In particular, it seems inappropriate that a weak consideration should be given the same weight as a strong one. Moreover, there is a degree of overlapping between some of the considerations, which reduces further the accuracy of the numerical method. For example, the considerations of protecting the child from abduction and not rewarding abductors are effectively two sides of the same coin. Moreover, the numerical approach does not allow for the importance in the relative weight of particular policy considerations to be adjusted the light of the context in which the determination is being made.²⁰⁵

parenthood and the husband's right not to be a parent was by examining which party's right would be more severely impaired if effect were not given to it. For a summary of the decision in this case, see Rhona Schuz, *The Right to Parenthood: Surrogacy and Frozen Embryos*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 237, 247 (A. Bainham ed., 1996).

203. Discussed *supra* at Part IV.A.

204. Such an approach is advocated by the President of the Israeli Supreme Court in relation to statutory interpretation, where the three sources from which the purpose of the statutory provision can be derived (the language of the statute, the legislative history, the fundamental principles and the general methodological and constitutional structure) do not all support the same interpretation of the provision. A. BARAK, *INTERPRETATION IN LAW* 2 748-58 (Nevo, 1993) (in Hebrew).

205. J.J. Fawcett, *Trial in England or Abroad: The Underlying Policy Considerations*, 9 *OXFORD J. LEGAL STUD.* 205, 229 (1989).

4. *The Relevance of Context*

The way in which the weight to be attached to a particular consideration may be affected by legislative context can best be illustrated by considering how a case made in one context would have been decided if, with the appropriate variation of facts, it were made in another context.

Consider the case *F v. S*,²⁰⁶ in which an unmarried mother took her child to Spain. The father instigated wardship proceedings in England and the question arose as to whether the English court had jurisdiction.²⁰⁷ The answer depended on the habitual residence of the child at the date of the commencement of the proceedings.²⁰⁸ The evidence as to the intention of the mother was contradictory.²⁰⁹ The appellate court overturned the judge's finding that the child and mother were no longer habitually resident in England.²¹⁰ This decision was no doubt influenced by the court's perception that England was the *forum conveniens*.

However, I suggest that, if the facts had been varied and the father had abducted the child from Spain to England, the picture would have looked rather different. In this scenario, the policies of protecting the child from abduction and of not rewarding abductors would have conflicted with the policy of adjudication in the *forum conveniens*. In the author's view, it is likely that more weight would have been given to the former policies and thus it would have been held that the child was habitually resident in Spain so as to ensure that return to the custodial parent could be ordered, despite the fact that England was considered the more appropriate forum.

B. *Specific Situations*

1. *Introduction*

In this section, case law relating to three situations in which difficulty has been encountered in determining habitual residence will be analyzed in light of the policy considerations. Judicial opinions and outcomes will be examined for evidence that this approach is used either consciously or subconsciously by the

206. [1991] 2 F.L.R. 349 (Eng.).

207. *Id.*

208. *Id.*

209. *Id.*

210. *F v. S (Wardship: Jurisdiction)*, [1993] 2 F.L.R. 686, 692 (C.A.) (Eng.).

judges, and for consistency with the two methods of balancing conflicting considerations.

2. "Disharmonious" Relocations

(a) *The Conflicting Considerations*

Here we are concerned with the situation where a marriage is in a crisis and one party reluctantly relocates with the other in the hope that the relationship will improve. On the one hand, as in all relocation cases, the policies of protecting children from abduction and not rewarding abductors require that a new habitual residence is acquired as soon as possible.²¹¹ On the other hand, the policy of not discouraging attempts to save marriages requires that the old habitual residence be retained. Furthermore, it may well not be clear which country is the *forum conveniens*.

(b) *The Case Law*

In the English case of *Re F*,²¹² the child had been in Australia with the parents for three months before the father returned with the child to England. The facts were sufficiently ambivalent to support either a finding that habitual residence in Australia had been acquired or that it had not.²¹³ As we have seen, the court expressly mentions the policy of ensuring that children are protected from abduction. However, there is no hint that the policy of encouraging attempts to save marriages, or *forum conveniens*, which would appear to support the opposite finding,²¹⁴ was taken into account. This could be because the

211. This assumes that the child spends long enough in the new country that returning him there is not like returning him to a strange country.

212. [1992] 1 F.L.R. 548 (C.A.) (Eng.).

213. The court treated the fact that the nineteen packing cases had been sent by sea as strong evidence that they intended to settle in Australia. *Id.* at 554. However, there was also considerable evidence in favor of the father's view that they were visiting for an extended holiday with the intention of considering whether to live there for any length of time. *Id.* at 549-50. For example, they had return tickets and the father had a visitor's visa. *Id.* The possibility that the parties indeed had different purposes does not seem to be considered. Indeed, such a scenario is consistent with the fact that the parties had had marital difficulties. *Id.* at 550. The boxes might have been sent because the wife wanted to send them and the husband did not want to cause a dispute by refusing. Furthermore, no consideration is given to the fact that in Australia they had not yet settled in any one place, but had lived in three different places in three months. *Id.*

214. In light of the fact that during the first eleven months of his life the child had lived in England in one place, and that during the three months he spent in Australia he had lived in three different cities, it would seem that more evidence would be available in England.

policy of protecting children was considered to be stronger because it was not entirely obvious that England was the *forum conveniens* and the evidence regarding saving the marriage was weak. Thus, this case would be consistent with the qualitative approach.

The American case of *Feder v. Evans-Feder*²¹⁵ is different from *Re F* in that Mr. Feder had employment in Australia and the parties bought a house there and lived there together with their four-year-old son for almost six months.²¹⁶ Moreover, the marital problems were more serious as evidenced by the fact that Mrs. Feder consulted a divorce lawyer before finally deciding to join her husband in Australia.²¹⁷

The district court seemed to have been sympathetic to Mrs. Feder's attempt to save the marriage,²¹⁸ but the circuit court discounted her motives.²¹⁹ Neither court referred to the policy of protecting children from abduction.²²⁰ In relation to the policy of *forum conveniens*, the district court emphasized the connections with Pennsylvania and referred to the mother and child going back home.²²¹ Similarly, the dissenting judge in the circuit court mentioned expressly that reversal of the district court's judgment would lead to the child being taken from his mother's home in Jenkintown, where he has spent virtually all of his years, in contrast to the time spent with his father in Australia and that he may later be returned to her in the U.S.²²² On the other hand, the majority judgment in the circuit court put emphasis on the child's connections with Australia, and in particular, the fact that he attended preschool part-time and was enrolled in kindergarten for the coming year.²²³

215. 866 F. Supp 860 (E.D. Pa. 1994).

216. *Id.* at 863-64. However in the case of *Walton v. Walton*, 925 F. Supp. 453 (S.D. Miss. 1996), the parties stayed in Australia for one and a half years and the child was not removed back to the same place in the United States where she had lived before the relocation. *Id.* at 454-55. Thus, it was clear that the policy of encouraging attempts to save marriages was clearly outweighed by other policy considerations.

217. *Feder*, 866 F. Supp. at 863.

218. This may have been because Mrs. Feder emphasized that the reason that she moved to Australia was in order to attempt to salvage the marriage. *Id.* at 868. Perhaps, the English court would have been more sympathetic to the father in the case of *Re F* if he had put forward a similar case.

219. *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3 Cir. 1995).

220. No return order was actually made by the appeals court because the case was remanded back to the district court, to consider whether any of the exceptions applied.

221. *Feder*, 866 F. Supp. at 868.

222. *Id.*

223. *Feder*, 63 F.3d at 237.

The above analysis of the opinions in terms of policy considerations shows that the case is consistent with the quantitative method of balancing considerations. Since the policies of encouraging marriages to be saved and of protecting children from abduction clash, *forum conveniens* is the determining factor. Each judge decided the case according to what he believed to be the *forum conveniens*.

While it is assumed that the decision is also consistent with the qualitative method, there is insufficient indication in the judgments as to the strength of the policy considerations to predict how much weight is given to the respective policies.

In the case of *Re B (Minors)(Abduction)(No. 1)*,²²⁴ a German wife and English husband lived in Scotland since their marriage.²²⁵ In 1991, the marriage had become unhappy and the mother took the children to Germany. The husband persuaded her to come back to Scotland, but agreed that after they sold their property there, they would go to live in Germany for a while to give them a breathing space to resolve their differences and plan a fresh course for their future family life.²²⁶ After six months in Germany, the husband realized that the marriage could not be saved, so while on a vacation in England, he applied to the court for a divorce, an order restraining removal of the children from England and a residence order.²²⁷ The mother responded by applying for the immediate return of the children to Germany under the Convention, on the basis that they had been unlawfully retained in England.²²⁸ Her case depended upon showing that the children were habitually resident in Germany.

An analysis of the conflicting policy considerations shows on the one hand that the policy of protecting the children from retention would require finding that a habitual residence had been acquired in Germany. On the other hand, however, the policy of not discouraging attempts to save a marriage would require finding that no such residence had been acquired, although it is not clear to what extent this policy should allow the "reluctant" parent to move to a third country.

What is the *forum conveniens*? Arguably, it is Scotland, where the parties had been living "normally" for most of the children's lives. However, between England and Germany, it

224. [1993] 1 F.L.R. 988 (Fam.) (Eng.).

225. *Id.* at 989.

226. *Id.*

227. *Id.*

228. *Id.*

would seem that Germany was a more natural forum. Thus, under the numerical approach, the balance would come down in favor of Germany as the habitual residence. All considerations seem weak here and thus it is not easy to apply the qualitative approach.

The court's decision that the children were habitually resident in Germany was based on the finding that the parties had a settled purpose of using their stay in Germany as a platform from which to resolve their differences and work out the future course of the marriage.²²⁹ While none of the policy considerations outlined above are mentioned expressly in the judgment, the court's concern that Abduction Convention proceedings should be decided quickly²³⁰ suggests that they gave priority to the need to protect children from abduction. Moreover, their statement that Germany was being used as a base for the parties to plan their future suggests that Germany was seen as a more appropriate forum than England.

It may be interesting to consider how the case would have been decided if the father had applied to the Scottish court for a residence order during a short family holiday in Scotland. It may be that under the qualitative approach the fact that Scotland was the *forum conveniens* together with the fact that greater weight ought to be attached to the policy of encouraging attempts to save marriages should have tipped the balance in favor of finding that no habitual residence had been acquired in Germany.

3. Fixed Term Relocations

(a) The Conflicting Considerations

On the one hand, the policy of protecting children from abduction requires that a new habitual residence is acquired as soon as possible.²³¹ On the other hand, the policy of encouraging beneficial foreign travel, where applicable, requires that the old habitual residence is retained. The question of *forum conveniens* depends very much on the facts of the case. The fact that the marriage has broken down and that one party wishes to stay permanently in the foreign country will be a relevant factor.

229. *Id.* at 991.

230. *Id.* Thus, habitual residence had to be determined by taking a general view rather than by an intricate examination of every word and action.

231. Again, this assumes that the child spends long enough in the new country that returning there is not like returning to a strange country.

(b) Case Law

The English case of *In Re S (Minors)(Abduction: Wrongful Retention)*²³² contains perhaps the most controversial finding of habitual residence made in any court decision. Following the present author's suggestion that the finding is inconsistent with the *Shah* formula,²³³ it has been described by leading authors as "difficult to accept"²³⁴ and by an experienced Israeli judge as "exceptional and wrong."²³⁵ Moreover, it was distinguished on quite inadequate grounds in the very similar U.S. case of *Mozes*.²³⁶

It will therefore be of some interest to apply the policy considerations approach to these two cases. Both involved Israeli children who had gone to live abroad for a period of at least one year. In the former case, both parents who had sabbatical positions at academic institutions in the United Kingdom accompanied the children.²³⁷ When there were marital difficulties, the father returned to Israel, but the mother decided to remain in England with the children on a permanent basis and applied to the English court for a residence order.²³⁸ The father claimed that the mother had wrongfully retained the children and sought their return to Israel.²³⁹ In the latter case, the father did not accompany the family, who were to spend fifteen months in Los Angeles in fulfillment of the wife's life long dream.²⁴⁰ After one year, following the wife's filing of an action for divorce and custody in the United States, the husband claimed wrongful retention and sought return of the children to Israel in accordance with the original plan.²⁴¹

In the former case, the English court decided that the children's habitual residence was at all times in Israel because the mother could not unilaterally change their habitual

232. [1994] 1 Fam. 70.

233. Schuz, *supra* note 14, at 791.

234. BEAUMONT & MCELEAVY, *supra* note 36, at 111.

235. Dagan v. Dagan, F.M.A. 70, ¶ 17 (1997) (unreported).

236. *Mozes v. Mozes*, 19 F.Supp. 2d 1108 (C.D. Cal. 1998). The basis of the distinction was that the children in *Re S* had only been in England for six months. In fact, a careful reading of that case shows that the children had been in England for at least eight months at the date of the wrongful retention (*Re S*, 1 Fam. at 73-74). Furthermore, it is unlikely that the decision of the English court would have been any different if the children had already been in England for a longer period.

237. *Re S*, 1 Fam. at 73.

238. *Id.* at 74.

239. *Id.* at 74-75.

240. *Mozes*, 19 F. Supp. 2d at 1111.

241. *Id.* at 1112.

residence.²⁴² The court does not seem to consider that the children's habitual residence could have changed on their arrival in England with both parents for a settled purpose.²⁴³ Conversely, the District Court for the Central District of California held that the Mozes children had become habitually resident in the United States.²⁴⁴

An analysis of policy considerations in *Re S* shows that the policy of not discouraging beneficial foreign travel, the policy that agreements should be honored and the policy of protection from abduction would all require that the children remain habitually resident in Israel. On the question of *forum conveniens*, it would seem that because the children had spent most of their life in Israel and that the father had returned there, Israel was the *forum conveniens*. Thus, *all* considerations pointed in the same direction, that the children remained habitually resident in Israel.

Moreover, there is nothing in the case to suggest that the decision would have been any different had the original sabbatical been planned to last for one and a half years and the retention had taken place after one year. The additional time spent in England would not seem to change the relevant policy considerations. While the arguments in favor of England being the *forum conveniens* would have strengthened as time went on, it is hard to accept that an extra four or five months would have tipped the balance.

Thus, it seems that it will be difficult to explain the decision in the case of *Mozes* by reference to policy considerations. While the policy of not discouraging beneficial travel is not relevant, the argument that Israel is the *forum conveniens* is stronger in this case. Since the children were older, the information about them available in Israel would probably be more significant. Moreover, since the father had not accompanied the family, all of the evidence about the father's relationship with his children was in Israel, where the father was still living. Given that the original plan had been for the mother and children to return after fifteen months,²⁴⁵ it would seem that Israel remained the *forum conveniens* for adjudication of the custody dispute. In any event, even if this is in doubt, the policy of protecting children against

242. *Re S*, 1 Fam. at 82.

243. *Id.*

244. 19 F. Supp. 2d at 1116.

245. However, there was some evidence that the father had agreed to an extension. *Id.* at 1111-12.

retention should have tipped the scales in favor of a determination that the children were still habitually resident in Israel. Thus, the decision is either wrong²⁴⁶ or based on other policy considerations particular to the facts of the case.²⁴⁷ Of course, it should be pointed out that if the period spent in the U.S. had been longer, then at some point in time the U.S. would have become the *forum conveniens* and the policy of protection from retention would have weakened.

(c) *An Alternative Solution*

The above examination of case law and analysis of the relevant considerations show that when relocation is for a period of up to one year, the policy considerations are likely to weigh heavily in favor of a retention of the original habitual residence. However, the longer the sabbatical extends over the one year period, it becomes increasingly less tenable both from a factual and policy perspective to hold that no habitual residence is acquired in the country where the sabbatical is being spent.

On the other hand, when the parties are intending to return to the country of origin after a fixed period, it does not seem appropriate to hold that the habitual residence there is lost. Moreover, the need to protect the children from abduction back to their country of origin when they are, in any event, meant to be returning there is likely to be a weak consideration. Similarly, it is not clear that a need to protect from retention exists in a country where the child is living for an extended period of time.

Thus, it is suggested that an appropriate method of dealing with longer sabbaticals is to hold that there is dual habitual residence in the country of origin and the country where the sabbatical is being spent. Such a finding not only accurately reflects reality, but also produces the desired result, that the child is not protected against abduction back to the country of origin or retention in the country where the sabbatical is being spent, but is protected against abduction to any third country. This is, of course, in accordance with the spirit of the agreement between the parties that they would be returning to the country of origin.²⁴⁸ While this solution may lead to conflicts between

246. For a discussion of the appeal of this case, which was decided after this Article was written, see *infra* Part VII.

247. There is some evidence that the father was seeking return of the children only as a tactic in negotiating a divorce settlement with the mother. *Mozes*, 19 F. Supp. 2d at 1112.

248. However, the removal may be before the agreed period has expired.

countries with concurrent jurisdiction, these conflicts should be resolved by cooperation and judicial discretion while taking into account the particular circumstances of the case rather than by inappropriate determinations that habitual residence has changed.

4. *Re-abduction Cases*

(a) *The Conflicting Considerations*

On the one hand, the policy of protection from re-abduction requires a finding that habitual residence has been acquired in the country of refuge unless the child was originally abducted by a non-custodial parent *and* has not yet formed any links with the place of refuge. On the other hand, the policy of not rewarding the first abductor requires that no such habitual residence is acquired. In determining *forum conveniens*, the abduction may be relevant since the fact that an abducted child is liable to be returned must, at least initially, affect the nature of his links with the country of refuge.

The dilemma of how to deal with the consequences of wrongful removal, which is not reversed by return, was faced by the drafters of the Child Protection Convention. The drafters had to decide under what circumstances the new state would acquire jurisdiction in relation to the child. As we have seen, the compromise, which was finally adopted, provided that jurisdiction would only be acquired by the state of refuge when the child's habitual residence has changed and either there is acquiescence in relation to the change in habitual residence or one year has elapsed since the other parent knew or ought to have known the location of the child, no application for return is pending, and the child is settled in the new environment.²⁴⁹

What does the inclusion of this provision tell us about the effect of abduction on habitual residence? It seems the provision was only required because of some uncertainty as to when a new habitual residence be acquired in such a situation. If it were thought that habitual residence could only be acquired upon one of the two conditions in Article 7²⁵⁰ being fulfilled, then it would

249. This provision is virtually identical to Section 41 of England's Family Law Act of 1986. Thus, the following discussion about Article 7 of the Protection Convention, *supra* note 4, applies equally to Section 41 of the English Act.

250. Protection Convention, *supra* note 4.

not be necessary to state those conditions.²⁵¹ Thus, it must be assumed that the drafters of the provision envisioned that a child's habitual residence could, in some circumstances, be changed as a result of wrongful removal or retention.²⁵² Otherwise, the provision would be redundant.

How does this provision balance the conflicting policy considerations? First, when there is acquiescence or consent the wrongful nature of the removal or retention is effectively cancelled out. Thus, the case becomes a simple relocation situation and the policy of not rewarding the abductor is not relevant because the abductor is no longer considered to be an abductor.

Second, the one-year time period combined with the requirement that the child be settled in his or her new environment seem to reflect the consideration of *forum conveniens*. In other words, where the child has been in the place of refuge for less than one year, it is assumed that that country has not become the *forum conveniens*. Thus, the policy of adjudication in the *forum conveniens* together with the policy of not rewarding the original abductor require that the old state retain its exclusive jurisdiction and would override the policy of protecting the child from re-abduction. Conversely, where the child has been in a the place of refuge for at least a year, that country may have become the *forum conveniens*. In this case, the policy of adjudication in the *forum conveniens* together with the policy of protecting the child from re-abduction would require that the state of refuge have exclusive jurisdiction and would override the policy of not rewarding the original abductor.²⁵³ This solution can be seen to be consistent with the quantitative approach.

251. Nygh, *supra* note 84, at 348 (claiming that the provision "implies that a child's habitual residence can only be changed (a) with the authority, consent or acquiescence of all parties having parental responsibility, and (b) by a period of factual residence in another State for some settled purpose"). With respect, for the reasons stated in the text, no such implication can be made from the provision. Indeed, perusal of the proceedings at the Hague Conference shows that the reason that Article 7 of the Protection Convention, *supra* note 4, deals with the effect of wrongful removal or retention on jurisdiction, and not on habitual residence, is because there was no consensus on the latter point. Hague Conference Proceedings, *supra* note 30, at 326.

252. See Clive, *supra* note 86, at 177.

253. It could also be argued that since return is no longer mandatory if the child has settled in his new environment, the second abductor has gone beyond simply carrying out the dictates of the Abduction Convention.

(b) *The Case Law*

However, the courts' approach to re-abduction cases under the Abduction Convention is not consistent with the preceding analysis. In the English case of *Re R (Wardship: Child Abduction)(No. 2)*, the court refused to order return of a child who had been removed from Canada by her father (the "re-abductor") in breach of a Canadian court decision.²⁵⁴ In the court's view, the child had not acquired habitual residence in Canada, even though she had lived there for eleven months.²⁵⁵ The reason for this was that for ten of those months, the mother (the "first abductor") had been under a duty to return the child to England to attend a wardship hearing.²⁵⁶ While the court based this ruling on the effect of an English court order on the nature of the residence (i.e. that it could not be settled), its main motivation seems to have been to ensure that the first abductor was not rewarded. Thus, the court says expressly that it would be wrong to allow the mother to rely on the provisions of the Hague Convention "to overcome her own disobedience to the order of this Court."²⁵⁷ No account seems to have been taken of the need to protect the child from re-abduction or the question of the *forum conveniens*. The decision seems to be particularly harsh since the mother's application to discharge the wardship summons had been granted and the father's appeal therefrom only allowed four days before the Canadian court decision (three weeks before the re-abduction). Furthermore, the original relocation to Canada was not an abduction, since at the time that she moved to Canada not only had the father consented, but she had exclusive custody rights to the child. It was only the subsequent wardship order that turned the mother into a "quasi-abductor." If the policy of not rewarding abductors had such a decisive influence in these circumstances,²⁵⁸ *a fortiori* it would do so in a "real" re-abduction case.²⁵⁹ Indeed, this is the attitude that we find in the U.S. re-abduction cases.

254. [1993] 1 F.L.R. 249, 256 (Fam.) (Eng.).

255. *Id.* at 255.

256. *Id.*

257. *Id.*

258. The court was clearly concerned that the decision of the English court should take precedence. See *id.* However, such a "national" factor should not be relevant in determining habitual residence. The Second Special Commission Report, *supra* note 7, specifically stated that habitual residence should be interpreted internationally.

259. But compare dicta to the effect that in "extreme" cases where the child had spent virtually his whole life in the country to which he had been abducted, "it would be an

In the case of *Cohen v. Cohen*²⁶⁰ a New York court accepted a mother's evidence that the purpose of the father's trip to Israel with the children was to vacation and not relocate.²⁶¹ Thus, the children did not acquire a habitual residence in Israel and the Convention did not apply to the mother's removal of them back to New York, which remained the place of their habitual residence. The judgment deals essentially with the disputed evidence of the parties. It seems to be taken for granted that the father cannot change the habitual residence of the children, without the mother's permission.²⁶² In this case, the children were only in Israel for five months.²⁶³

In the similar, but more extreme, case of *Isaacs v. Rice*,²⁶⁴ the child had been living in Israel for eleven years²⁶⁵ before the re-abduction. However, the court still found that the child's habitual residence had not changed because his mother never intended for him to be in Israel and because the Convention would be rendered meaningless if habitual residence could be altered by removal without the knowledge or consent of the other parent.²⁶⁶ Thus, since the child was "abducted" to his place of habitual residence, the Convention was not applicable.

With respect, this decision gives too much weight to the policy of not rewarding the first abductor and fails to take into account the policies of protecting the child from re-abduction and of litigation in the *forum conveniens*. Furthermore, the decision renders "habitual residence" an artificial connecting factor with no relationship to reality. It is particularly surprising that the court made such an absurd finding when the same result of not returning the child was easily achieved by applying the child objection exception.

affront to common sense" to hold that he was not habitually resident in that country. *Re B* (Abduction: Children's Objections), [1998] 1 F.L.R. 667, 671 (Fam.) (Eng.).

260. 602 N.Y.S.2d 994, 999 (N.Y. Sup. Ct. 1993).

261. *Id.*

262. However, the equation of the rules for change of habitual residence with those for change of domicile must reduce the precedent value of the case.

263. See also *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991), where the father re-abducted the child from England back to Arizona after nearly five months. With regard to the original abductor, the Court said, "[i]t would be inequitable and unjust to allow such conduct to create habitual residence." *Id.* at 1435. Similarly, in the Israeli case of *Illel v. Illel*, M.A. 1403/94, the Beersheba District Court, held that the child was still habitually resident in Israel when he was re-abducted back to Israel after five months in the United States, seems to have assumed that because the child had been removed unlawfully from Israel, he could not have acquired a new habitual residence in the U.S.

264. 1998 U.S. Dist. Lexis 12602.

265. The mother claimed that she did not know the whereabouts of the child. *See id.* at *3.

266. *Id.*

VI. CONCLUSION

The exact level and effect of the influence of policy considerations on a court is impossible to prove, unless those considerations and their impacts are discussed openly. However, it is submitted that the analysis and the authorities in this paper do establish that, whether or not determinations of habitual residence of a child are questions of fact, courts are influenced by policy considerations in borderline cases. Similarly, while it is not possible to give an exhaustive list of all of the relevant policy considerations, it is possible to identify a number of such considerations and to assess their scope.

Furthermore, analysis of case law in borderline situations shows that in most cases, the result can be explained by either a quantitative or qualitative approach to balancing the considerations. However, lack of express reference to the various relevant policy considerations means that there is a danger that too much importance is attached to some considerations and insufficient or no importance to others. This is evident particularly in the re-abduction cases where the policy of not rewarding abductors has been applied to the exclusion of all else.²⁶⁷

The concept of determining habitual residence by balancing policy considerations, which take into account the legislative context, may justifiably be attacked as leading to uncertainty and lack of uniformity.²⁶⁸ A number of answers can be given to this accusation. First, the only method of substantially removing the uncertainty inherent in determining habitual residence in borderline cases is to introduce fixed rigid rules, in which the period of time spent in the particular country has decisive or, at least, presumptive weight.²⁶⁹ Such a broad-brush approach is

267. In this respect, courts may simply be reflecting governmental policy. Thus, for example, in the discussions leading to the acceptance of the Protection Convention, the United States delegation insisted that a wrongful removal should never, as a point of principle, lead to a change in habitual residence. Hague Conference Proceedings, *supra* note 30, at 227, Working Paper No. 6. When it was clear that this view was not unanimous, the compromise adopted in Article 7, effectively let each state apply its own approach to this question, subject to the overall restriction that jurisdiction would not be acquired by the new state unless the provisions of that article were satisfied. *Id.* art. 7.

268. Lack of uniformity is caused by the possibility that a person's habitual residence may be different for different purposes. Furthermore, despite the universal nature of the policies mentioned, different weight may be given to different policies in different countries. This can be seen in the different views expressed by the various delegations about the correct approach to re-abduction cases in the Protection Convention. *See supra* note 267.

269. If the time period is conclusive, it would be necessary to provide a list of exceptions similar to that suggested by the United States in their Working Document No.

likely to frustrate the main objectives of the Conventions in question in a significant number of cases and so has quite rightly been rejected by the drafters.²⁷⁰

Secondly, while it is clearly desirable that a person's habitual residence should be in the same place for all purposes, this desire for harmony should not override the need to give effect to the purpose of the legislation in question.

Finally, since we cannot prevent judges from being influenced by unexpressed policy considerations, enumeration of the relevant policy considerations and use of rational methods to balance conflicting considerations will in fact inject certainty into the determination of habitual residence.²⁷¹

It is hoped that the analysis offered in this paper will provide helpful guidance to judges determining habitual residence in borderline cases and thereby contribute to ensuring that these decisions which can have such a critical effect on the lives of children will be the best possible.

VII. POSTSCRIPT

After this article had been written and accepted for publication, the 9th Circuit Court of Appeal handed down its decision allowing the appeal in the *Mozes* case.²⁷² Given the importance of the case, it was thought appropriate to append a postscript providing a brief discussion of the aspects of the judgment which are directly relevant to this article.

After a brief recital of the facts, the judgment of the court, delivered by Judge Kozinski, discusses the nature of the determination of habitual residence in order to identify its role as an appellate court. The court's conclusion that the correct classification is as a question of mixed fact and law is based on the realization that habitual residence is "the central - often

6. Hague Conference Proceedings, *supra* note 30, at 226-27. In suggesting a guideline figure of six months, Beaumont and McEleavy seem to be envisioning a presumption that habitual residence will not be acquired until the child has been resident for six months in the country in questions. BEAUMONT & MCELEAVY, *supra* note 36, at 112. It is not clear if this guideline is also intended to create a presumption that after six months residence a new habitual residence will be acquired.

270. The fixed time approach is less problematic when used in domestic legislation, partly because it only purports to determine whether or not a specific court has jurisdiction and does not have any bearing on whether a court in any other country has jurisdiction.

271. Furthermore, provided that the considerations mentioned are indeed relevant and the exercise of the balance reasonable there will be no scope for interference by an appellate court.

272. *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

outcome-determinative – concept on which the entire system is founded”²⁷³ and that: “[w]ithout intelligibility and consistency in its application, parents are deprived of crucial information they need to make decisions and children are more likely to suffer the harms the Convention seeks to prevent.”²⁷⁴

The Court clarifies that the standard of review is mixed and thus:

[t]o the extent that the question is essentially factual we review the district court’s determination only for clear error.... Where, however, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.²⁷⁵

This approach supports the author’s view that since we are concerned with interpretation of a legal term, there is room for open reference to policy considerations.²⁷⁶

The appellate court’s review of the legal basis of the district court’s decision revealed that the determination of habitual residence was based on “an understanding of that term that gives insufficient weight to the importance of shared parental intent under the Convention.”²⁷⁷ Thus, the court asked the question whether the children were sufficiently settled in the USA rather than whether “the United States had supplanted Israel as the locus of the children’s family and social development.”²⁷⁸ The case was therefore remanded back to the district court to allow it to ask the correct question. This supports the author’s conclusion that the first instance decision was wrongly decided because it is inconsistent with the conflicting policy considerations which ought to inform determinations of habitual residence in borderline cases.²⁷⁹

273. *Id.* at 1071. For a detailed analysis of the role of habitual residence, see *supra* Part III.

274. *Mozes*, 239 F.3d at 1072.

275. *Id.* at 1073 (quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) (en banc)).

276. See *supra* Part I.B.3.

277. *Mozes*, 239 F.3d at 1084.

278. *Id.*

279. See *supra* Part V.B.3.b.

Furthermore, a number of the policy considerations enumerated in Part IV of the article can be identified in the Court's reasoning. Firstly, the court refers expressly to academic exchanges by children and states that if it was not expected that the children would resume residence in their own countries at the completion of the year "few parents [would be] willing to let their children have these valuable experiences."²⁸⁰ In other words, the court sees such exchanges as "beneficial foreign travel" which would be discouraged if they were to lead to a change in the habitual residence of the child.²⁸¹

More importantly, the court's reassertion of the relevance of the shared intention of the parents to the determination of habitual residence²⁸² is based largely on the need to protect children from abduction at all times.²⁸³ The reasoning is that if habitual residence may be shifted without the consent of both parents on the basis of the child's contacts with the new country, then there is a greater incentive for a would-be abductor to try to change the child's habitual residence during an agreed temporary visit. If he succeeds then the child is no longer protected from a subsequent retention in that country. In addition, the renewed emphasis on the shared intentions of the parents promotes the policy of honoring agreements.²⁸⁴

However, the court appears to recognize that there are limits to these policies. Accordingly, it states that a child's habitual residence may change irrespective of the parents' intentions where "we can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child out of the family and social environment in which its life has developed."²⁸⁵

In other words, in these circumstances the policy of protecting the child from abduction is either inapplicable or is weak.²⁸⁶

280. *Mozes*, 239 F.3d at 1083.

281. See *supra* Part IV.C, although the author did not think that the *Mozes* case came within the category of "beneficial foreign travel."

282. The Court disapproved of judicial pronouncements (for example the much quoted dictum in *Friederich v. Friederich*, 983 F. Supp. 2d 1396) which stated that parental intentions were not relevant.

283. See *supra* Part IV.A.

284. See *supra* Part IV.E.

285. *Mozes*, 239 F.3d at 1081 (quoting Perez-Vera Report, *supra* note 23, ¶ 11).

286. It might be pointed out that the change in the "child's relative attachments" is likely to mean that the new country would be the *forum conveniens*. Accordingly, the policy of adjudication in the *forum conveniens* would require a finding of a change of habitual residence. See *supra* Part IV.F.

Thus, the court's reasoning appears to support the hypothesis of this article that in determining habitual residence of a child in borderline cases, the court is influenced by the relative strength and weaknesses of the conflicting policy considerations.

