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The Gitter Standard: Creating a Uniform Definition of Habitual Residence under the Hague Convention on the Civil Aspects of International Child Abduction

Carshae DeAnn Davis*

INTRODUCTION

Each year hundreds of children are kidnapped by one parent and taken across international borders while the other parent suffers from the traumatic loss of a child.¹ Between October 1, 2003, and September 30, 2004, 154 of these abducted children were returned after a Hague application had been filed on their behalf.² The Hague Convention on the Civil Aspects of International Child Abduction (“Convention”)³ was enacted to protect children from parental abduction and illegal retention across international borders. In order to fulfill the Convention’s purpose of ensuring “the prompt return of children wrongfully removed,”⁴ a Contracting State must respect the laws of other Contracting States and return all kidnapped children to the state of their habitual residence. This allows for the restoration of the “status quo which is unilaterally altered”

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¹ For current information on child abduction on both the national and international levels, see generally the National Center for Missing & Exploited Children, available online at <<http://www.missingkids.com>> (visited Apr 22, 2006).

² US Department of State, *Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction* (2005), available online at <http://travel.state.gov/family/abduction/hague_issues/hague_issues_2537.html> (visited Apr 22, 2006) (“[W]hile Hague cases constitute about 30 percent of the total volume of abduction cases . . . they represent . . . over 50 percent of children returned.”). The Hague Application must be filled out by a parent for each abducted child in order for the parent to receive assistance under the Hague Convention. Additional information on the application process is available online at <http://travel.state.gov/family/abduction/hague_issues/hague_issues_575.html> (visited Apr 22, 2006).

³ Hague Conference on Private International Law, *Convention on the Civil Aspects of International Child Abduction* (1980), 19 ILM 1501 (1980) (hereinafter “Convention”).

⁴ Id at art 1.

through parental child abduction.⁵ The Convention applies to children who are under the age of sixteen and who were habitual residents of a Contracting State at the time of the abduction.⁶

Under the Convention, courts must establish the child's state of habitual residence. This question is of utmost concern because it is the state of habitual residence that determines the law that is to be applied, whether there has been a wrongful removal, and the jurisdiction to which the child is to be returned.⁷ Neither the Convention nor the Perez-Vera Report⁸ defines "habitual residence." Instead of applying an idiosyncratic definition created by domestic law, courts interpret the term according to "its ordinary meaning free from technical rules."⁹ This ensures "uniformity of application" that allows courts "to reconcile their decisions with those reached by other courts in similar situations."¹⁰ Existing case law must be examined to determine how US courts are defining habitual residence, as well as to create a uniform standard to help the United States further the Convention's goals. The objectives of the Convention are "to secure the prompt return of children wrongfully removed," and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."¹¹ To guarantee that a child's acclimatization as well as his desires are not overlooked, the Convention includes two exceptions that permit a court to "stay the

⁵ *Feder v Evans-Feder*, 63 F3d 217, 221 (3d Cir 1995). See also *Friedrich v Friedrich*, 983 F2d 1396, 1400 (6th Cir 1993) ("[The] primary purpose of the Convention [is] to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.").

⁶ Convention, art 4 (cited in note 3); *Sheikh v Cabill*, 546 NYS2d 517, 519 (Sup Ct NY 1989) ("The Hague Convention provides for the prompt return of children abducted to or wrongfully retained in a country when both that country and the country of the child's habitual residence are parties to the Hague Convention and for so long as the child is under age 16.").

⁷ For a general discussion, see Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 UC Davis L Rev 1049, 1063 (2005); Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 L & Contemp Probs 209, 225 (1994).

⁸ Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, Acts and Documents of the Fourteenth Session (1980), Volume III, Child Abduction 426 (1982) (hereinafter "Perez-Vera Report"). The Perez-Vera Report is "recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all states becoming parties to it." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed Reg 10494, 10503 (1986).

⁹ *In re J. (A Minor) (Abduction: Custody Rights)*, [1990] 2 AC 562 ¶573 (UK).

¹⁰ *Mozes v Mozes*, 239 F3d 1067, 1072 (9th Cir 2001).

¹¹ Convention, art 1 (cited in note 3). The Convention also seeks "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Id at preamble (cited in note 3).

proceedings or dismiss the application for the return of the child” altogether.¹² Article Twelve includes an acclimatization exemption that prevents the return of the child in the event that the child is “settled in [his] new environment,”¹³ and Article Thirteen allows for the child’s objections to overrule parental intent as long as the child is mature enough to make his own decisions as to his habitual residence.¹⁴

This Development offers a discussion and analysis of the most recent cases that have formulated a definition of “habitual residence” in the context of the Convention. As the definition has evolved, US courts have differed as to how much weight should be given to the various components of the definition. It is my contention that the Gitter Standard¹⁵ is the most comprehensive standard that thoroughly contemplates the acclimatization of the child. To define habitual residence, the first prong of the Gitter Standard asserts that courts should inquire into the last shared intent of those entitled to fix the child’s residence. The second prong states that the court should determine whether the evidence “unequivocally points to the conclusion that the child has acclimatized to the new environment.”¹⁶ Taken together, the two prongs protect the child’s best interest when it can be proven that the child has become acclimatized to his surroundings and is considered mature enough to contest his return to the country of habitual residence. The standard also takes into consideration the exceptions in Articles Twelve and Thirteen of the Convention by allowing the proven acclimatization of the child to trump parental intent. In the event that the child is a newborn, the Gitter Standard should be expanded to include the Delvoye Standard.¹⁷ This Development further asserts that in cases that were wrongly decided, habitual residence would have been correctly defined and properly assigned had the court applied the Gitter Standard.

¹² Id at art 12.

¹³ Id (“The judicial or administrative authority . . . shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”).

¹⁴ Id at art 13 (“The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”).

¹⁵ *Gitter v Gitter*, 396 F3d 124, 134 (2d Cir 2005).

¹⁶ Id at 134–35.

¹⁷ The Delvoye Standard should only be adopted if the child in question is a newborn. The standard itself is merely an extension of the settled purpose standard which focuses on the intent of the parents and physical presence, but it provides an exception for a child that is a newborn when a change in physical presence is not detrimental to the child’s well-being. *Delvoye v Lee*, 329 F3d 330 (3d Cir 2003), cert denied 540 US 967 (2003). For a general discussion, see Stephen E. Schwartz, Comment, *The Myth of Habitual Residence: Why American Courts Should Adopt the Delvoye Standard for Habitual Residence under the Hague Convention on the Civil Aspects of International Child Abduction*, 10 *Cardozo Women’s L J* 691 (2004).

The first Section sets forth the definition of habitual residence created by the *Mozes*¹⁸ court and explains how the Gitter Standard expands upon the prior definition, by placing more emphasis on whether a child has become acclimated to his environment. The second Section discusses two recent cases that would have had a different outcome had the Gitter Standard been properly applied. The third Section explores how habitual residence is determined when one country is not a party to the Convention, as well as how non-Contracting States acknowledge the importance of a child's desires and level of acclimatization, which places their logic closely in line with that of the court in *Gitter*. Previous commentaries have acknowledged the need for a uniform standard,¹⁹ and this Development concludes by reexamining the reasons why the Gitter Standard is the standard that should be uniformly adopted.

I. THE DEVELOPMENT OF THE GITTER STANDARD

In the United States, the International Child Abduction Remedies Act ("ICARA") implements the provisions of the Convention.²⁰ ICARA provides that "[a]ny person seeking to initiate judicial proceedings under the Convention . . . may do so by commencing a civil action . . . in any court which has jurisdiction over such action."²¹ Circuits are split on the definition of habitual residence because they have followed a case-by-case approach rather than adopting a uniform standard. Courts must develop a uniform standard to be applied in similarly situated cases in order to realize the Convention's objectives. Although a uniform standard adopted by the United States would not be binding on international courts, it would create a "form of 'soft law,' available to national courts looking to find the 'best interpretation' of a difficult point."²²

¹⁸ 239 F3d 1067.

¹⁹ Linda Silberman's article, *Interpreting the Hague Abduction Convention*, claims that in order for national courts to create a uniform standard of interpretation they should

(1) observe principles of interpretation that focus on the object and purpose of the Convention . . . , (2) make use of travaux preparatoires in determining the object and purposes of the Convention, (3) look to foreign case law . . . , and (4) treat the jurisprudence developed in courts of other Convention countries as relevant precedent.

Silberman, 38 UC Davis L Rev at 1082 (cited in note 7). This development fully supports the proposition of a uniform standard and concludes that the Gitter Standard best serves the goal of uniformity.

²⁰ International Child Abduction Remedies Act, Pub L No 100-300, 102 Stat 437 (1988), codified at 42 USC §§ 11601-10 (2000).

²¹ Id at § 11603(b).

²² Silberman, 38 UC Davis L Rev at 1084 (cited in note 7).

A. *MOZES V MOZES*: THE FOUNDATION OF *GITTER*

The Ninth Circuit, in *Mozes v Mozes*, developed a standard for “habitual residence” in a case of first impression.²³ The *Mozes* court needed to decide whether Israel or the United States was the habitual residence of Arnon and Michal Mozes’s four children. In deciding the children’s habitual residence the court examined the settled intent of the parents and the circumstances of the children.²⁴

In formulating its standard, the court first looked to the “settled purpose standard,” which some courts have used in determining habitual residence.²⁵ The settled purpose standard requires that the court look to whether the child has been physically present long enough to allow for acclimatization and analyze “the child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there.”²⁶ The *Mozes* court recognized that “‘settled purpose’ alone is powerless”²⁷ when it acknowledged that in order to form a new habitual residence one must have a settled intent to abandon the previous residence.²⁸ The court made it clear that this intent can be revealed by one’s actions, does not need to be declared, and does not have to be formulated prior to departure, but can be formed during an initially temporary stay.²⁹

As the court discussed the settled intent requirement, it found that children “normally lack the material and psychological wherewithal to decide where they will reside;” therefore a court’s decision should ultimately focus on the intent of

²³ 239 F3d 1067. All parties involved were Israeli citizens and had lived in Israel their entire lives. In April of 1997, with the consent of her husband, Michal moved with the children to Los Angeles, California, where she took steps to adjust to life in a new country. Both parties conceded that Michal and the children were to live in the United States for fifteen months, but after living in Los Angeles for a year Michal filed for divorce and custody of the four children. *Id.* at 1069.

²⁴ *Id.* at 1073–81.

²⁵ See *In re Ponath*, 829 F Supp 363, 367 (Utah Cent Div 1993) (“The concept of habitual residence must, in the court’s opinion, entail some element of voluntariness and purposeful design. Indeed, this notion has been characterized in other cases in terms of ‘settled purpose.’”); *In re Bates*, No CA 122-89, High Court of Justice, Family Divn Ct Royal Courts of Justice, United Kingdom (1989), quoting *R. v Barnet London Borough Council ex parte Shah* [1983] 2 A.C. 309, 314 (UK) (holding that “there must be a degree of settled purpose. [The purpose] may be specific or general. All that the law requires is that there is settled purpose.”).

²⁶ *Feder*, 63 F3d at 224.

²⁷ 239 F3d at 1074.

²⁸ *Id.* at 1075 (finding that if one does not abandon the old habitual residence then “one is not habitually residing; one is away for a temporary absence of long or short duration”). See *Harkness v Harkness*, 577 NW2d 116, 123 (Mich App 1998) (“[T]he court found no indication that the parties intended to abandon [their former] residence and to establish a new residence in the United States.”).

²⁹ *Mozes*, 239 F3d at 1075.

those “entitled to fix the place of the child’s residence.”³⁰ The court did not speak to a situation in which the child does in fact have the “wherewithal” to decide their own residence, and it is this omission that weakens the *Mozes* court’s reasoning.

Problems are more likely to arise when there is a divergence of parental intent as opposed to when both parents agree on the child’s habitual residence. In order to address these potential issues, the *Mozes* court aligned prior cases on a spectrum based on their facts.³¹ At one end of the spectrum are cases where a family moves after manifesting a settled intent to change its habitual residence despite one parent not being in complete agreement.³² In this instance courts “are generally unwilling to let one parent’s alleged reservations . . . stand in the way of finding a shared and settled purpose.”³³ At the other end of the spectrum are cases where a child’s change in habitual residence was “intended to be of a specific, delimited period.”³⁴ Courts usually do not allow the change in one parent’s intentions to lead to a change in the child’s habitual residence.³⁵ In the middle are the cases in which initially both parents consented to allow the child to stay abroad for a “period of ambiguous duration.”³⁶ In this instance, courts either find that there was a settled intent between the parties inferring a change in habitual residence, or that there was a lack of settled intent and decisions regarding the child’s length of stay were not finalized. A lack of settled intent signals to the court that the previous habitual residence was not in fact abandoned.

The court in *Mozes* held that the parents’ settled intent alone is not enough to transform a child’s habitual residence, but there must also be a change in geography and a passage of time that is sufficient to acclimatize the child to its new surroundings.³⁷ The threshold issue is finding what level of acclimatization

³⁰ Id at 1076, quoting E.M. Clive, *The Concept of Habitual Residence*, Jurid Rev pt 3, 137, 144 (1997).

³¹ Id at 1076–78.

³² Id at 1076.

³³ Id at 1077. See *Feder*, 63 F3d at 224 (“That Mrs. Feder did not intend to remain in Australia permanently and believed that she would leave if her marriage did not improve did not void the couple’s settled purpose.”).

³⁴ *Mozes*, 239 F3d at 1077.

³⁵ Id.

³⁶ Id.

³⁷ Id at 1078. See *Feder*, 63 F3d at 224 (determining “that a child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization”); *Friedrich*, 983 F2d at 1402 (finding “habitual residence can be ‘altered’ only by a change in geography and the passage of time”); *Feder*, 63 F3d at 224 (“We believe that a child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization.”).

is necessary to find an alteration in a child's habitual residence.³⁸ It is important to note that happiness does not provide a good measure for acclimatization. Parents may be able to manipulate their children and convince them that it would be more enjoyable to live with one parent instead of the other. The *Mozes* court concluded that it "makes sense to regard the intentions of the parents as affecting the length of time necessary for a child to become habitually resident, because the child's knowledge of these intentions is likely to color its attitude."³⁹ The court further cautioned that "courts should be slow to infer . . . that an earlier habitual residence has been abandoned,"⁴⁰ but the *Gitter* court attempted to create an objective test that focuses on proof of a child's acclimatization and gives less weight to the parents' settled intent.⁴¹

B. THE GITTER STANDARD

In formulating a standard to determine whether the child's habitual residence had been changed from Israel to the United States, the *Gitter* court looked to other circuits that had considered the issue—paying close attention to the *Mozes* opinion. The court also looked to the decisions of foreign tribunals and the Perez-Vera Report.⁴² By considering the reasoning and judgments of prior decisions and conforming to the historical commentary of the Convention, the *Gitter* court created a comprehensive standard that leads to equitable results.⁴³

The court found *Mozes* to be instructive, and it noted the importance *Mozes* placed on the settled intentions of the parents in determining a child's habitual residence. By focusing on intentions, a court distinguishes between a permanent and a temporary presence in a given locale.⁴⁴ In determining intent, a court should first focus on the intent of the parents, as opposed to the child, since

³⁸ Neither the district court nor the court of appeals in *Mozes* answered the question of whether or not the "United States had supplanted Israel as the locus of the children's family and social development." *Mozes*, 239 F3d at 1084. The court discussed the problems that may arise by looking to the acclimatization of the child when there is a lack of settled intent between the parents, and it ultimately concluded that it is more important to look to parental intent.

³⁹ *Id.* at 1079–80.

⁴⁰ *Id.* at 1079.

⁴¹ *Gitter*, 396 F3d at 134. See generally Andrea Rodriguez, *Recent Decision, Gitter v Gitter 396 F3d 124 (2d Cir 2005)*, 18 NY Intl L Rev 169 (2005).

⁴² *Gitter*, 396 F3d at 131.

⁴³ The court considered the various sources because it acknowledged that there is a "need for uniform international interpretation of the Convention." *Id.*, quoting the Public Health and Welfare Act, codified at 42 USC § 11601(b)(3)(B).

⁴⁴ *Gitter*, 396 F3d at 132.

they are in the best position to “fix the child’s residence.”⁴⁵ The Gitter Standard emphasizes that the parental intent be *shared* and not merely *settled*.⁴⁶ Again, the easy case arises when the parents agree on both the child’s habitual residence as well as any intent to change it. The more difficult case occurs when the parents disagree as to the true nature of the child’s habitual residence, thus forcing the courts to determine the parents’ intent at the last moment it was shared.⁴⁷

The *Gitter* court agreed with *Mozes* that “the first step toward acquiring a new habitual residence is forming a settled intention to abandon one left behind.”⁴⁸ But the *Gitter* court states that in order to meet the first prong of the standard, there needs to be an “inquir[y] into the shared intent of those entitled to fix the child’s residence at the *latest* time their intent was shared.”⁴⁹ A court must focus on the parents’ intent at the most recent moment that it was shared as opposed to focusing on the period of time when their intent was first settled; this usually occurs when the parents reach their initial conclusion with respect to the child’s habitual residence. By concentrating on the most recent event, the court accounts for the chance that the parents may have changed their minds or that their overall circumstances may have changed.

The *Gitter* court also adopts the notion, put forth by *Mozes*, that “a change in geography is a necessary condition” in forming a new habitual residence.⁵⁰ The second prong of the Gitter Standard expands the definition set forth by *Mozes* by stating that there is a shift in habitual residence, “*notwithstanding* the intent of those entitled to fix the child’s habitual residence, [if] the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings.”⁵¹ The second prong reduces the strength of shared parental intent and grants more weight to the child’s acclimatization.⁵²

The Gitter Standard closely follows the aims of the Convention by being concerned with the well-being of the child and reducing the negative effects that

⁴⁵ Id, quoting *Mozes*, 239 F3d at 1076.

⁴⁶ *Gitter*, 396 F3d at 133 (“[W]e will presume that a child’s habitual residence is consistent with the intentions of those entitled to fix the child’s residence at the time those intentions were *mutually shared*.” (emphasis added)).

⁴⁷ Id.

⁴⁸ Id at 132, quoting *Mozes*, 239 F3d at 1075.

⁴⁹ *Gitter*, 396 F3d at 134 (emphasis added).

⁵⁰ Id at 133, quoting *Friedrich*, 983 F2d at 1402.

⁵¹ *Gitter*, 396 F3d at 133–36 (emphasis added). The Second Circuit did not reach the decision as to whether or not the child’s habitual residence was changed from the United States to Israel, but it remanded the case back to the district court so that the new legal standard could be applied to the facts of the case to determine whether they pointed “unequivocally” to the child’s acclimatization.

⁵² Id at 135. The court realized that there was no shared intent between the parents, but it still remanded the case to determine whether the child was sufficiently acclimatized to Israel.

may arise from being abducted. The Convention aims to prevent parental abductions, so the court requires that the facts must “unequivocally point” to a change in habitual residence before the child’s acclimatization trumps his or her parents’ intent. This second prong of the Gitter Standard closely resembles Article 12 of the Convention, allowing courts to deny the return of a child if it is found that he or she is settled in his or her new environment.⁵³ Therefore, older, more mature children who do not “lack the material and psychological wherewithal to decide where they will reside”⁵⁴ will have a say in choosing their residence.⁵⁵

In the case of newborns, the Gitter Standard should incorporate the portion of the definition developed in *Delvoye* that develops a flexible exemption that is unique to newborn children.⁵⁶ *Delvoye* held that “[w]here a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem . . . that the child will normally have no habitual residence until living in a country on a footing of some stability.”⁵⁷ At such a young age it is more important to keep the child with his or her primary care giver. Prior to the age of five any “[s]udden disruptions between the child and the parent of primary bonding and emotional attachment . . . [is] far more harmful and damaging than any stress of cultural adaptation.”⁵⁸ In that instance the Gitter Standard would maintain its shared intent requirement, but would relax the second prong and let parental intent control the establishment of the child’s habitual residence. The child’s welfare is of primary concern, and the Gitter Standard allows for the child’s interests and acclimatization to be

⁵³ Convention, art 12 (cited in note 3).

⁵⁴ *Mozes*, 239 F3d at 1076. See *Rajmakers-Eghaghe v Haro*, 131 F Supp 2d 953, 957–58 (ED Mich 2001) (holding that the views of an eight-year-old could be considered under the maturity exception since the Convention did not establish a minimum age at which a child was old or mature enough to object to their return to the state of habitual residence). But see *Gonzalez Loticero v Nazor Lurashi*, 321 F Supp 2d 295, 298 (DPR 2004) (holding that the maturity exception is to be applied narrowly and that the thirteen year old child is not mature enough for his views to be taken into account).

⁵⁵ In order to succeed in claiming that a child has reached a sufficient level of maturity, the parent who opposes the child’s return must establish the child’s maturity by a preponderance of the evidence. 42 USC § 11603(e)(2)(A) (2000).

⁵⁶ *Delvoye*, 329 F3d at 330. For a general discussion, see Schwartz, Comment, 10 Cardozo Women’s L J at 691 (cited in note 17). See also *Whiting v Krassner*, 391 F3d 540 (3d Cir 2004) (finding that the shared intent of the parents is of greater importance when a child is so young that acclimatization is difficult to satisfy).

⁵⁷ *Delvoye*, 329 F3d at 333, quoting E.M. Clive, *The Concept of Habitual Residence*, Jurid Rev part 3, 138, 146 (1997).

⁵⁸ Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 Fam L Q 557, 584 (1998).

considered in determining habitual residence, despite any shared mutual intent or lack thereof.

II. COURTS TEND TO PLACE TOO MUCH EMPHASIS ON PARENTAL INTENT WHEN THEY DO NOT PROPERLY APPLY THE GITTER STANDARD

In finding that the children's habitual residence did not change due to their parents lack of shared settled intent, the Eleventh Circuit in *Ruiz v Tenorio*⁵⁹ failed to inquire into the children's degree of acclimatization to their new environment. The parents—an American mother and Mexican father—lived in Minnesota for seven years prior to moving to Mexico, where they stayed for approximately two years and ten months before the mother took her children to Florida and refused to return.⁶⁰ The move to Mexico was made on the condition that if it did not “work out” the family would return to the United States.⁶¹ The conditional nature of the move as well as the objective facts of the case established that the parents lacked a shared mutual intent to stay in Mexico and acquire a new habitual residence. While the court stopped its discussion at the lack of shared intent and did not inquire into the degree of acclimatization of the children,⁶² the Gitter Standard would have expanded this discussion to include an increased focus on the children's welfare and level of acclimatization. The sons were eight and two when they moved to Mexico, and were about eleven and five when taken back to the United States.⁶³ The children were at critical ages in their development, and therefore it may be assumed that they were becoming acclimated to their surroundings due to their attendance in school and their involvement in various social engagements and lessons.⁶⁴ By not considering the wishes of the children, the court's oversight circumvented the exceptions that the Convention provides in Articles Twelve and Thirteen.⁶⁵

The Convention “allows the ‘objection’ of [a] child not merely to be ‘weighed’ by the court, based on the child's age and circumstances, but to be

⁵⁹ 392 F3d 1247 (11th Cir 2004).

⁶⁰ Id at 1249–50.

⁶¹ Id at 1249.

⁶² The court relied on *Mozes* for guidance in determining that courts should be slow to find a change in habitual residence “unless objective facts point unequivocally to a change or the court can ‘say with confidence that the child's . . . attachments . . . have changed to the point where requiring return . . . would . . . be tantamount’ to changing the child's family and social environment in which its life has developed.” *Ruiz*, 392 F3d at 1254, quoting *Mozes*, 239 F3d at 1081.

⁶³ *Ruiz*, 392 F3d at 1249–50.

⁶⁴ Id at 1255.

⁶⁵ Convention, arts 12–13 (cited in note 3).

potentially dispositive in blocking the return of the abducted child.”⁶⁶ Therefore, in *Ruiz*, the court would have closely followed the aims of the Convention by considering the wishes of the children. If the Gitter Standard had been applied, the court would have remanded the case to further investigate whether the children had become acclimated to their new environment and would not have allowed the lack of the parents’ shared intent to be dispositive in determining the case’s outcome. Since the Convention’s main purpose is to return abducted children to their state of habitual residence and to protect them from the “harmful effects of their wrongful removal or retention,”⁶⁷ more importance should be given to measuring the degree to which children have acclimated to a given locale.⁶⁸

Other courts have granted a change in habitual residence by mentioning the child’s acclimatization but basing their conclusions on the existence of shared intent. In *Sasson v Sasson*,⁶⁹ the court found that the child’s habitual residence was the United States instead of Israel since the family intended to settle in the United States and there was no subsequent shared intent to return to Israel.⁷⁰ The court noted that there was no wrongful retention because there was no change in shared intent, but if their shared intent had changed, the case would likely have come out the other way. Instead of placing so much weight on intent, the court—as in *Gitter*—should have focused on the level of the child’s acclimatization to her new surroundings. The child had been in the United States for twenty-two months, attended school, built and maintained strong relationships, and developed a mastery of the English language.⁷¹ Altogether this was “sufficient for acclimatization and a ‘degree of settled purpose’ from the child’s perspective.”⁷² Under *Gitter* these objective facts would “point unequivocally” to the child’s acclimatization and either determine a new state of

⁶⁶ Skoler, 32 Fam L Q at 562 (cited in note 58).

⁶⁷ Convention, preamble (cited in note 3).

⁶⁸ Paul Beaumont and Peter McEleavy, *The Hague Convention on International Child Abduction* 96 (Oxford 1999) (“[N]otwithstanding the . . . nature of a person’s presence, a time must come when such a residence becomes habitual . . . [I]t would be difficult to affirm that whatever an individual’s alleged intention he should not be connected to a country that has been his place of residence over a period of years.”). But see id at 90 (“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.”).

⁶⁹ 327 F Supp 2d 489 (DNJ 2004).

⁷⁰ Id at 501.

⁷¹ Id.

⁷² Id. But see *Holder v Holder*, 392 F3d 1009 (9th Cir 2004) (holding that eight months is not a long enough time for children to become acclimated to their surroundings and overcome parents’ failure to maintain a shared intent to abandon a previous habitual residence).

habitual residence or enforce the current state of habitual residence. A greater focus on the acclimatization of the child, by acknowledging the various facts of the case, would have allowed the court to create a list of factors that could be used to determine if a child has become accustomed to his or her environment. If a court allows a child's habitual residence to change simply based on the child's happiness in that place, the parents will in turn have an incentive to manipulate their children. The key is to make sure that the second habitual residence has supplanted the first by looking to the objective facts of each case and then determining whether the child has adapted to her environment.⁷³

III. "HABITUAL RESIDENCE" AS ADOPTED BY FOREIGN COURTS IN NON-CONVENTION CASES

Looking to foreign courts in non-Convention cases can be of great assistance in determining how to define habitual residence.⁷⁴ There is no statutory authority that extends the principles of the Convention to countries that are not Contracting States; therefore, the application of domestic law may be consulted. In non-Convention cases British courts grant greater deference to the wishes and level of acclimatization of the child, which demonstrates the importance of these factors in determining habitual residence.

In *Re J*⁷⁵ a mother refused to leave England, a Contracting State, and return with her child to Saudi Arabia, which is not a Contracting State. The Court was forced to determine the difference between the laws of the country to which the child is to be returned—Saudi Arabia—and those of England, and how the differences may affect a child in an abduction case. The House of Lords acknowledged that if this were a Convention case, there would have been wrongful retention since the mother stayed in England beyond one year.⁷⁶ However, this acknowledgement was not dispositive since Convention principles did not apply.

The House of Lords laid out the three main rules used in determining whether or not a child should be returned to its habitual residence in non-

⁷³ See *Robert v Tesson*, 2005 WL 1652620, *19 (SD Ohio June 29, 2005) (holding that due to the facts of the case, the United States, as opposed to France, was the "focus of the children's family and social development").

⁷⁴ The House of Lords' treatment of Convention and non-Convention cases, along with established US precedent, provides a good measure for determining habitual residence. Accordingly, my discussion is limited to the non-Convention cases decided within the British court system.

⁷⁵ (*a child*) (return to foreign jurisdiction: convention rights) [2005] UKHL 40, 3 All ER 291 (HL 2005) (UK).

⁷⁶ *Id.* at ¶ 5. The mother and the child went to England with the father's consent under the assumption that the visit would only last for the duration of her one-year master's degree course of study.

Convention cases. First, courts have a “statutory duty to regard the welfare of the child as its paramount consideration.”⁷⁷ The welfare principle applies as long as British courts have jurisdiction.⁷⁸ In non-Convention cases, the welfare principle prevails, and the courts must act according to it without trying to apply Convention concepts in an analogous manner.⁷⁹ Second, the welfare principle may be superseded only by statute, such as one that enacts the Convention.⁸⁰ Third, the Court has the ability to force an immediate return of the child to a foreign jurisdiction without a complete investigation into the merits of the case.⁸¹ In a summary of the principles asserted by the court, Lord Justice Buckley discussed the importance of returning a child to his native country—the place where he is most acclimated:

To take a child from his native land, to remove him to another country where, maybe, his native tongue is not spoken, to divorce him from the social customs and contracts to which he has been accustomed, to interrupt his education in his native land and subject him to a foreign system of education, are all acts . . . which are likely to be psychologically disturbing to the child, particularly at a time when his family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country.⁸²

When the two habitual residences in dispute are both parties to the Convention, British courts place great deference on the exercise of parental

⁷⁷ Id at ¶ 18. See *Re JA* (child abduction: non-convention country) [1998] 2 FCR 159, ¶172 (UK) (“The court cannot be satisfied that it is in the best interests of the child to return it to the court of habitual residence . . . unless this court is satisfied that the welfare test will apply in that foreign court.”).

⁷⁸ *Re J* [2005] UKHL 40 at ¶ 19.

⁷⁹ See *Re P* (a minor) (child abduction: non-convention country) [1996] 3 FCR 233, [1997] Fam 45 (UK).

⁸⁰ *Re J* [2005] UKHL 40 at ¶ 20. The Court defers to the Convention *when it applies* in order to prevent parents from unilaterally changing a child’s habitual residence and in turn obtain a “tactical advantage in the dispute” by changing jurisdictions. Id.

⁸¹ Id at ¶ 26.

⁸² *Re L* (minors) (wardship: jurisdiction) [1974] 1 All ER 913, 925-26, [1974] WLR 250, ¶ 264 (UK). See *Re R* (minors) (wardship: jurisdiction) [1981] 2 FLR 416, ¶ 425 (“Kidnapping . . . is to be strongly discouraged, but the discouragement must take the form of a swift, realistic and unsentimental assessment of the best interests of the child, leading . . . to the prompt return of the child to his or her own country, but not the sacrifice of the child’s welfare to some other principle of law.”).

authority,⁸³ which is in complete opposition to the factors taken into consideration in non-Convention cases. The Court in non-Convention cases weighs variables such as the child's "wishes and feelings, his physical, emotional, and educational needs . . . the effect of change, his . . . characteristics and background, including . . . ethnicity, culture, and religion."⁸⁴ The Court also looks to the "degree of connection" to each country as well as the length of time that the child stayed in each country, which is not to be confused with the concept of acclimatization in determining habitual residence under Convention cases.⁸⁵ The Court further protects the child by allowing a case to be tried in a British court when there is a genuine issue of the child's best interest that cannot be adequately tried in the foreign country.⁸⁶

It is clear that in non-Convention cases the child's interests are of primary concern. Although the British courts do not apply the principles of the Convention, they do apply ones that are very similar to those used in *Gitter*. By weighing the multiple variables and looking to the time and connection a child has with a given country, British courts are evaluating whether or not a child has become acclimated to her environment. These variables trump parental intent if it can be shown that their intent conflicts with the maintenance of the child's welfare. The logic resembles that of the second prong of the Gitter Standard in that the proven acclimatization of a child is important in determining habitual residence. The courts' recognition of the importance of the child's wishes and feelings strongly resembles the exceptions allowed by the Convention.

IV. CONCLUSION

The Convention's purpose to "restore the status quo and deter parents from crossing international borders in search of a more sympathetic court"⁸⁷ is best achieved through the implementation of a uniform standard. The *Gitter* court has developed the most comprehensive standard which should be used as the framework to guide courts in the future. The Gitter Standard protects the child's best interests by requiring that courts ascertain the last shared intent of

⁸³ See *Re S* (a minor) (custody: habitual residence) [1998] AC 750, ¶759 [1997] 4 All ER 251 (HL 1997) (UK) ("S's habitual residence was that of his mother so that the question is what was the mother's habitual residence at the relevant times."); *Re A* (a minor) (wardship: jurisdiction) [1995] 2 FCR 298, [1995] 1 FLR 767 (UK) (finding that a child would have the same habitual residence as his parents unless there was an express agreement that stated otherwise).

⁸⁴ *Re J*, [2005] UKHL 40 at ¶ 38.

⁸⁵ *Id* at ¶¶ 33–34.

⁸⁶ *Id* at ¶¶ 39–45. In *Re J* the court allowed the appeal because the mother would lack jurisdiction in Saudi Arabia that would enable her to take the child out of the country without the father's consent. *Id* at ¶ 39.

⁸⁷ *Friedrich*, 983 F2d at 1400.

the parents and ensure that the evidence clearly supports the child's acclimatization. The decision-making factors considered by courts in non-Convention cases further buttress the significance of the welfare and wishes of the child. The administrative costs of implementing a similar system would be too great since courts would be required to weigh each of the variables in regard to each child. This would be a time and labor intensive procedure that may be deemed inefficient since the court's ultimate goal should be to return the child to her habitual residence as soon as possible. Instead, the court should note the existence of each factor and use them as a method of measuring the degree of acclimatization within the second prong of the Gitter Standard. In order to follow the true aims of the Convention a court must take a holistic approach by acknowledging all factors relevant to a child's well-being, and only then can it decide the child's true state of habitual residence.



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