
Re-examining habitual residence as the sole connecting factor in Hague Convention child abduction cases

Danielle Bozin-Odhiambo*

This article critiques the usefulness of habitual residence as the sole connecting factor in Hague Convention child abduction cases. This is achieved by examining the quality of this jurisdiction in light of changes in the gender dynamics underpinning international parental child abduction and the transnational family phenomenon. Arguably, the child's habitual residence as a home environment of the nature anticipated by the Convention's drafters is an increasingly outdated construct. This is due to an increase in both the number of abducting primary-carer mothers, and their families' growing mobility. Judicial determinations of habitual residence made during Convention return proceedings are entrenched in the state-centric paradigm. This paradigm is becoming increasingly incompatible with the lives of families which experience international parental child abduction.

INTRODUCTION

The principal focus of scholarly debate concerning habitual residence in the context of international parental child abduction has been to call on courts to “clarify their jurisprudence on the issue of habitual residence and adopt a uniform standard for determining the state of the children’s habitual residence”.¹ This article seeks to broaden this debate, and facilitate dialogue about the emerging incompatibility between the quality of a child’s habitual residence and the achievement of the stated goals of the *Hague Convention on the Civil Aspects of International Child Abduction* (the Hague Convention).² This incompatibility means that we need to rethink the connecting factor’s appropriateness in those cases where its use does not achieve the Convention’s objectives.

This article critiques the usefulness of habitual residence as the sole connecting factor in Hague Convention child abduction cases. This is achieved by examining the quality of this jurisdiction in light of changes in the gender dynamics underpinning international parental child abduction and the transnational family phenomenon. Arguably, when the test for determining a child’s habitual residence is applied during Convention return proceedings, the analysis does not necessarily yield a jurisdiction which represents the child’s home environment. That is, an environment where they possess meaningful social, cultural, linguistic and economic connections. This outcome is contrary to the objective of prompt summary return provided within the Convention’s Explanatory Report;³ this objective being to return the child to stability, back into the arms of the parent charged with their upbringing and the environment in which their life has developed.⁴

The appropriateness of habitual residence as a concept in the context of international parental child abduction depends on whether its application achieves outcomes aligned with the original

* B Laws (Hon 1), B Bus Com; Lecturer, Griffith University Law School.

¹ Schwartz S, “The Myth of Habitual Residence: Why American Courts Should Adopt the Delvoe Standard for Habitual Residence under the Hague Convention on the Civil Aspects of International Child Abduction” (2003-2004) 10 *Cardozo Women’s Law Journal* 693.

² *Hague Convention on the Civil Aspects of International Child Abduction*, opened for signature 25 October 1980, TIAS 11670, 1343 UNTS 89 (entered into force 1 December 1983). These goals are articulated within the Hague Child Abduction Convention’s Explanatory Report and discussed within this article. Pérez-Vera E, *Explanatory Report on the 1980 Hague Child Abduction Convention*, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982).

³ Pérez-Vera, n 2, pp 429-431.

⁴ Pérez-Vera, n 2, p 432.

justifications for the Hague Convention's prompt return mechanism. If a child's habitual residence does not provide the most appropriate moral and cultural framework for constructing the "best interests of the child" legal standard then, as Beaumont and McEleavy suggest, there will be little sense in sending the child back there.⁵

Our present focus on the jurisdiction in which the parents intended their child to reside for settled purposes does not necessarily facilitate a child's restoration to stability. This is because the test is forward-focused and neglects to place a child's established connections at the forefront of the examination. We must look backward at a child's established social, cultural and linguistic connections as a way of moving forward. However, where a family leads a transnational lifestyle, examining a child's connections to a physical state or jurisdiction can be a futile and misguided exercise. This article proposes that in such circumstances the framework in which a child's identity is constructed and defined can be viewed as the primary-care setting, rather than a particular geographical space. Restoration or preservation of this home environment is of principal importance to ensure a child's stability and best interests, at minimum while the substantive parenting dispute is being resolved.

THE ORIGINAL RATIONALE FOR ADOPTING HABITUAL RESIDENCE AS THE SOLE CONNECTING FACTOR IN HAGUE CONVENTION CHILD ABDUCTION CASES

Contracting states honour the Hague Convention's child protection objective by facilitating the qualified summary return⁶ of children to the state deemed to be their habitual residence immediately preceding their abduction. The determination of which state is the child's habitual residence is pivotal. This is the jurisdiction to which the child is physically returned, and which will provide the forum where the substantive parenting dispute is considered most appropriately determined. If the substantive parenting dispute remains unresolved post-return, this is the jurisdiction in which the child and their primary caregiver must reside.⁷ The fundamental belief that the prompt return of children is in the best interests of children generally has been supported by a contestable assumption: that parenting disputes are best determined in the jurisdiction that was the child's habitual residence immediately preceding their abduction. The Hague Convention's efficacy is dependent on the legitimacy of this notion. The Convention's Explanatory Report explains that "the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child".⁸ Re-establishing "the status quo [in the child's habitual residence] disturbed by the actions of the abductor"⁹ was rationalised on the basis that to do otherwise would assist the abductor to gain an unfair advantage.¹⁰ The Convention was a response to what is colloquially called forum shopping. Prompt return prevents an abductor from being able to choose a new forum in which to adjudicate the substantive parenting dispute and alter the existing custody arrangement; a forum the abductor views as advantageous for their claims.¹¹

It is widely accepted that when the Hague Convention was drafted the majority of abductions were by the non-custodial parent (most often the father), dissatisfied with the custody decision in the child's habitual residence. Disgruntled with the prevailing custody arrangement the non-custodial

⁵ Beaumont P and McEleavy P, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999) p 88. See also Schuz R, "Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context" (2001-2002) 11 *Journal of Transnational Law & Policy* 111.

⁶ The Hague Convention's action of prompt summary return is qualified in the sense that an abducting parent does have the opportunity to raise one or more of the defences to the child's return during Convention return proceedings.

⁷ The connecting factor used in the Hague Convention determines not only the jurisdiction to which the child is physically returned, but also which jurisdiction's laws inform the Convention's threshold requirements and defences, along with the substantive parenting dispute post-return.

⁸ Pérez-Vera, n 2, p 428.

⁹ Pérez-Vera, n 2, p 430.

¹⁰ Pérez-Vera, n 2, p 429.

¹¹ Pérez-Vera, n 2, p 429.

parent would seize the opportunity to gain primary care of their child by abducting them overseas, usually to their country of nationality. Post abduction the abducting non-custodial parent would attempt to obtain a favourable custody order, contrary to the pre-existing primary-care order in the child's habitual residence.

This dynamic is implicit within the Hague Convention's Explanatory Report which provides that, "we are confronted in each case [which the Convention combats] with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person".¹² Harmful effects are deemed to be inevitable when a child is "taken out of the family and social environment in which its life has developed".¹³ The Convention's Explanatory Report adopted the views of Adair Dyer,¹⁴ who suggested that:

the true victim of the "childnapping" is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been charged of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.¹⁵

These statements reflect an assumption that in most cases the child has been taken from the secure environment provided by their primary carer in the child's habitual residence, to an environment which is unfamiliar to them. The Convention's drafters concluded that in these circumstances the "immediate reintegration of the child to its habitual environment"¹⁶ prior to their abduction is in the child's best interests. However, empirical research suggests that there has been a feminisation of international parental child abduction, and this traditional scenario does not depict the majority of contemporary Convention cases.¹⁷

The Hague Convention does not regulate the substantive parenting dispute on the basis that it is most appropriate that this dispute is litigated, or mediated to agreement, within "the moral framework of a particular culture".¹⁸ Prompt return to the child's habitual residence specifically was perceived as facilitating this. The idea that a child's best interests should be reserved for consideration in the child's habitual residence is justified within the Convention's Explanatory Report:

The legal standard "the best interests of the child" is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the ultimate interests of a child which are derived from the moral framework of a particular culture?¹⁹

The Hague Convention's drafters perceived the existence of an innate link between the construction of a child's identity, and the environment within their habitual residence immediately preceding their abduction. In essence, a determination of habitual residence pursuant to the Convention is a pronouncement of which moral and cultural framework of best interests should apply to an individual child. It is intended to represent a decision about the jurisdiction in which the child's identity predominately developed.

¹² Pérez-Vera, n 2, p 428.

¹³ Pérez-Vera, n 2, p 428.

¹⁴ Pérez-Vera, n 2, p 432.

¹⁵ Dyer A, *Questionnaire and Report on International Child Abduction by One Parent*, Preliminary Document No 1 (Hague Conference on Private International Law, August 1977) p 21.

¹⁶ Pérez-Vera, n 2, p 432.

¹⁷ Lowe N, "A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part 1 – Overall Report", Preliminary Document No 3 for the attention of the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, (Hague Conference on Private International Law, October 2006) p 22. See also Lowe N, "A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part 1 – 2007 Update", Preliminary Document No 3 (Hague Conference on Private International Law, September 2008).

¹⁸ Pérez-Vera, n 2, p 431.

¹⁹ Pérez-Vera, n 2, p 431.

Hence the Hague Convention's Explanatory Report identifies two rationales as supporting the appropriateness of habitual residence as the sole connecting factor in Convention cases. First, it was customarily thought that parents who abducted their children did so with the intention of "creating jurisdictional links which were more or less artificial".²⁰ The purpose was to alter the existing custody status quo and prompt summary return was seen as remedying this problem.²¹ Second, a child's habitual residence immediately preceding their abduction was viewed as providing the most appropriate moral and cultural framework in which to construct the "best interests of the child" legal standard.²² It is important that we now ask whether the justifications for choosing habitual residence as the sole connecting factor in Convention cases continue to hold true 30 years after its inception.

CONNECTING FACTORS IN INTERNATIONAL FAMILY LAW: THE CASE FOR HABITUAL RESIDENCE

Both choice of law and jurisdiction considerations arise when a family law dispute occurs across borders,²³ ie, in circumstances where the members of the family unit are connected to more than one country. McDougall refers to this as the "fragmentation of jurisdiction over family law disputes".²⁴ Nowhere are these issues more problematic and critical than in international parental child abduction cases.²⁵

Beaumont and McEleavy identify that the adoption of habitual residence as the sole connecting factor was undisputed from the very first Special Commission meeting convened to discuss a response to the emerging international parental child abduction problem.²⁶ It is possible that the concept's adoption was inevitable given the prevailing social and political setting, and the central role the concept had already assumed in numerous Hague Conference on Private International Law Conventions.²⁷ Habitual residence was perceived as "the most appropriate available concept to meet the demands of a fluid, modern society"²⁸ and, as such, it was relatively easy to reach consensus on its adoption.

Cavers explains that there was a shift from domicile and nationality, as commonly used connecting factors in family law, to habitual residence because of influences such as the increasing mobility of populations, migration and the introduction of dual nationality.²⁹ In addition, improvements in the status of women and the rise of stateless persons resulting from the two world

²⁰ Pérez-Vera, n 2, p 429.

²¹ The Hague Convention's function as a forum decider is evident in Art 19 which provides that a decision under the Convention concerning the return of a child shall not be taken to be a determination on the merits of any custody issue. Article 16 further expounds this point by providing that after receiving notice of a wrongful removal or retention, the judicial and administrative authorities of the Contracting State to which the child has been removed, or in which it has been retained, shall not decide on the merits of rights of custody.

²² Pérez-Vera, n 2, p 431.

²³ See Collins L et al (eds), *Dicey, Morris and Collins: The Conflict of Laws* (14th ed, Sweet & Maxwell Ltd, 2010).

²⁴ MacDougall D, "Transnational Litigation in Family Matters" in Lowe N and Douglas G (eds), *Families across Frontiers* (Martinus Nijhoff Publishers, 1996) p 63.

²⁵ Silberman L and Wolfe K, "The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies – International Child Abduction and Same-Sex Unions" (2003-2004) 32 *Hofstra Law Review* 233.

²⁶ Beaumont P and McEleavy P, n 5, p 88.

²⁷ See Droz G and Dyer A, "The Hague Conference and the Main Issues of Private International Law for the Eighties" (1981) 3 *Northwestern Journal of International Law & Business* 157.

²⁸ Graveson R, *Conflict of Laws* (7th ed, Sweet & Maxwell, 1974) p 194. See also Rogerson P, "Habitual Residence: The New Domicile?" (2000) 49 *International & Comparative Law Quarterly* 86.

²⁹ Cavers D, "'Habitual Residence': A Useful Concept?" (1971-1972) *The American University Law Review* 476. See also, Stone P, "The Concept of Habitual Residence in Private International Law" (2000) 29 *Anglo-American Law Review* 342; Winter L, "Nationality or Domicile? The Present State of Affairs" (1969) *Recueil des Cours II* 349; Clive E, "The Concept of Habitual Residence" (1997) *Juridical Review* 137.

wars are believed to have played a role.³⁰ Habitual residence has been described as establishing “an apt connection between a person and a territory that is distinct from the notion of legal headquarters”.³¹ Legal headquarters represents the character of permanency found in domicile and nationality.³² A person’s domicile is essentially where they reside or intend to reside permanently or indefinitely. It is a person’s permanent home. A period of absence from this jurisdiction is immaterial as they intend to return to that jurisdiction at some point in the future. Like domicile, nationality also signifies permanent membership to a state. Anthony Smith described what he calls “western nationalism” as being “ethnic-genealogical”.³³ This perspective binds individuals together in common nationality on the basis of shared ancestral culture.³⁴

The character of permanency of nationality and domicile lacks flexibility, and could not accommodate a mobile family unit with parents of different nationalities and domiciles. For example, around the time that the Hague Convention was drafted, in a typical family which experienced international parental child abduction the mother would have been a national of and had domicile in state A, the father in state B, and they would have resided with their child in state C. If a non-custodial father abducted the child to state B, a jurisdiction to which the child had no connection, returning the child to state C, their habitual residence, was perceived to offer a solution. It was the state in which the child had developed their identity and established meaningful connections. If the family relocated to another state, which the child then adopted as their home for the time being, their connection to state C would come to an end because they no longer continued to use it habitually. Using the parents’ domiciles or nationalities as connecting factors would not realise the Convention’s objective of restoring the child to an environment representing stability.

However, the case for habitual residence becomes less convincing in circumstances where the abducting parent is the child’s primary carer, and the child’s habitual residence immediately preceding their abduction is an environment where the child has few or no established and meaningful connections. Helge posits that “[t]he choice of law question should be this: to what country is a person so closely connected that some principles in the law of this country are part of that person’s individual and cultural identity”.³⁵ There is a desire for the Convention to facilitate a construction of the best interests of the child standard which embodies the child’s social and cultural identity; “law as a dimension of culture”.³⁶ Given this objective, if the child is removed by their primary caregiver from a habitual residence which the child does not identify with because, for example, they have resided there for only a short period of time, then the child’s habitual residence immediately preceding their abduction does not possess the home quality perceived by the Convention’s drafters³⁷ as justifying prompt return.

JUDICIAL DETERMINATIONS OF HABITUAL RESIDENCE MADE DURING HAGUE CONVENTION RETURN PROCEEDINGS

When the test for determining a child’s habitual residence is applied during Hague Convention return proceedings, the analysis does not necessarily yield a jurisdiction in which the child possesses meaningful cultural, social and linguistic connections. This outcome is contrary to the objective of prompt summary return.

³⁰ Cavers, n 29 at 476.

³¹ Cavers, n 29 at 483.

³² Cavers, n 29 at 483.

³³ Smith A, *National Identity* (Rev ed, Penguin Books of London, 1991) Ch 1.

³⁴ See Miller D, *On Nationality* (Oxford University Press, 1995) p 9.

³⁵ Thue H, “Connecting Factors in International Family Law” in Lowe and Douglas n 24, p 60.

³⁶ Thue, n 35, p 59.

³⁷ Beevers K and Milla Peréz J, “Child Abduction: Convention ‘Rights of Custody’ – Who Decides? An Anglo-Spanish Perspective” (2007) 3 *Journal of Private International Law* 202.

The concept of habitual residence was defined in the seminal case of *R v Barnett LBC Ex parte Shah (Nilish)* [1983] 2 AC 309 and has been described as “an individual’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration”.³⁸ Australian courts determine a child’s habitual residence by considering shared parental intention to reside in a jurisdiction for settled purposes, together with an “on the papers”³⁹ examination of the child’s acclimatisation in the jurisdiction.⁴⁰

LK v Director-General, Department of Community Services (2009) 237 CLR 582; 83 ALJR 525; [2009] HCA 9 is the most recent Hague Convention decision of the High Court of Australia to consider the test for determining a child’s habitual residence. In a unanimous decision the court confirmed that the past and present intentions of the parents are an important consideration. However, their Honours were of the view that determining a child’s habitual residence involves consideration of a multiplicity of circumstances in cases where the parent’s intentions are ambiguous. This is because, in such cases, focusing on the parents’ intentions is futile. The current approach is predominately forward-focused as the examination is centred on intention, rather than looking back at the child’s past connections. The test is not concerned with exploring whether the family has established substantial roots in the jurisdiction which the left-behind parent claims is the child’s habitual residence.⁴¹ Rogerson explains that during Convention return proceedings “subjective arguments of lack of connection with the country will not prevent habitual residence from being acquired”.⁴² Unless the parent’s shared parental intentions are ambiguous, the primary focus is whether the family is residing in a jurisdiction for settled purposes for an appreciable period of time.

Where a shared parental intention is found to exist, it has been accepted that a child’s habitual residence can change very quickly. For example, a child’s habitual residence can be altered in just one day,⁴³ even if the move is for a short period of time.⁴⁴ Settled purposes have included accepting a short-term job secondment in another country,⁴⁵ being stationed at an overseas military base for a

³⁸ Stone P, “The Concept of Habitual Residence in Private International Law” (2000) 29 *Anglo-American Law Review* 347. See also Vivatvaraphol T, “Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention” (2008-2009) 77 *Fordham Law Review* 3325.

³⁹ Hague Convention return proceedings are summary in nature which means that findings of fact are usually made “on the papers”, without the benefit of oral evidence and the cross-examination of witnesses on disputed facts. The problems associated with this were expressed in *Laing v Central Authority* (1996) 135 FLR 68; 21 Fam LR 24 at 33. However, in the High Court of Australia decision, *MW v Director-General, Department of Community Services* (2008) 82 ALJR 629; [2008] HCA 12, Gummow, Heydon and Crennan JJ said that although these applications are typically dealt with via affidavit evidence without the benefit of cross-examination (at [38]), the prompt return policy does not preclude issues of disputed fact from being examined through the expeditious giving of oral evidence which is subject to cross-examination (at [46]-[56]).

⁴⁰ Schuz R, “Habitual Residence of the Child Under the Hague Child Abduction Convention: Theory and Practice” (2001) 13 *Child and Family Law Quarterly* 1. For example, see *Secretary, Department of Human Services State Central Authority v CR* (2005) 196 FLR 18; [2005] Fam CA 1050; *DW v Director-General, Department of Child Safety* (2006) 197 FLR 371; [2006] FamCA 93; *Kilah v Director-General, Department of Community Services* (2008) 39 Fam LR 431; [2008] FamCAFC 81; *De Lewinski v Director-General, New South Wales Department of Community Services* [1996] HCA 9; *In the Marriage of R and SS Hanbury-Brown* (1995) 20 Fam LR 334; *Cooper v Casey* (1995) 123 FLR 239; *State Central Authority v McCall* (1994) 121 FLR 65; 18 Fam LR 326. Prior to the adoption of the settled purposes test Australian courts applied the United States approach from *Friedrich v Friedrich* 982 F 2d 1396 (1992). The test enunciated in this landmark decision required courts to focus on the child’s past experiences and connections to the jurisdiction in question, rather than the parents’ shared intentions about where the child should reside for settled purposes. For example, see *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993.

⁴¹ For example, see *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216.

⁴² Rogerson, n 28 at 94.

⁴³ For example, see *C v S (Minors: Abduction: Illegitimate Child)* [1990] 2 AC 562; [1990] 2 FLR 442; *C v T* [2001] NZFLR 1105.

⁴⁴ For example, see *Whiting v Krassner* 391 F 3d 540 (3rd Cir, 2004).

⁴⁵ For example, see *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216.

defined period of time,⁴⁶ and hesitantly relocating with uncertainty about staying in the jurisdiction and relationship.⁴⁷ An appreciable period of time need not be long.⁴⁸ For example, in *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548, Butler-Sloss LJ stated that a month can be an appreciable period of time.

An examination of the child's acclimatisation in the jurisdiction claimed to be their habitual residence is subsidiary to the identification of settled purposes. As a result, shared intention has dominated the assessment. A thorough factual examination of acclimatisation and settled purposes is problematic given the summary nature of return proceedings. Schuz contends that:

[t]he approach of many courts has been to focus exclusively on the purpose of the parents in relocating and, where typically the parents disagree about this, the whole dispute turns on the court's assessment of which parent is telling the truth. Given that Hague Convention proceedings are summary, they are not ideally designed to determine contradicted issues of fact.⁴⁹

Schuz also suggests that this is particularly unfortunate because the finding on disputed factual circumstances "is liable to be determinative of the outcome in cases, the human consequences of which are so drastic".⁵⁰

Because the test for determining habitual residence focuses forward on intention rather than backward on the child's established connections, the quality of the jurisdiction yielded by the test's application can be incompatible with accomplishing return to an environment with which the child identifies and in which he or she feels secure. This incompatibility was not evident during the Hague Convention's early years because of the nature of international parental child abduction at that time. When the Convention was drafted the child's habitual residence often accurately embodied all of the characteristics of their home environment, because the child was most often removed by their non-custodial parent to an environment which was unfamiliar to them. The child was deprived of the security of their primary-care setting within their habitual residence. This was the habitual environment in which their identity had been predominately constructed, having established social, cultural and linguistic connections over a period of time. However, we must now consider the effect of the growing number of abducting primary-carer mothers, and the transnational family phenomenon. Given these changes, does the return of children to their habitual residence: first, prevent abducting parents from creating artificial jurisdictional links to alter the existing custody status quo; and second, restore children to the most appropriate moral and cultural framework in which to construct their best interests?

THE FEMINISATION OF INTERNATIONAL PARENTAL CHILD ABDUCTION

There is growing concern about a lack of formal recognition within the Hague Convention of a gradual increase in the number of abducting parents who are primary-carer mothers.⁵¹ Academics and commentators have explored the effect of this change in gender dynamics on the operation and

⁴⁶ For example, see *Re A (Minors) (Abduction: Habitual Residence)* [1996] 1 WLR 25; [1996] 1 All ER 24; *Commissioner of Police v Claxton* [2003] FCWA 65; *Friedrich v Friedrich* 982 F 2d 1396 (1992).

⁴⁷ For example, see *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216; *Feder v Evans-Feder* 63 F 3d 217 (3rd Cir, 1995). See also Hung K, "There's No Place Like Home. Determining Habitual Residence: *Feder v Evans-Feder*" (1997) 26 (2) *Georgia Journal of International and Comparative Law* 487.

⁴⁸ For example, see *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993 at 995 (Waite J).

⁴⁹ Schuz, n 5 at 103-104.

⁵⁰ Schuz, n 5 at 104.

⁵¹ Several empirical studies reveal this phenomenon. Greif G and Hegar R, "How Parentally Abducted Children Fare: An Interim Report on Families who Recover Their Children" (1993) 21 *The Journal of Psychiatry and Law* 373; Greif G and Hegar R, "Parental Abduction of Children from Interracial and Cross-Cultural Marriages" (1994) 25(1) *Journal of Comparative Family Studies* 135; Plass P, Finkelhor D and Hotaling G, "Risk Factors for Family Abduction: Demographics and Family Interaction Characteristics" (1997) 12(3) *Journal of Family Violence* 333; Johnston J, *Final Report of Stage 1, Part B: Identification of Risk Factors – The Interview Study*. In *Prevention of Parent or Family Abduction through Early Identification of Risk Factors*, Report to the Office of Juvenile Justice and Delinquency Prevention, American Bar Association Centre on

effectiveness of the Convention's defences to return.⁵² This article focuses more broadly on the effect that the feminisation of international parental child abduction is having on the legitimacy of the assumption that parenting disputes are best determined in the jurisdiction that was the child's habitual residence immediately preceding their abduction.⁵³

A study by Professor Nigel Lowe of return applications made by left-behind parents in 45 Convention contracting states in 2003 revealed that, at that time, 68% of abducting parents were mothers, and 29% were fathers.⁵⁴ 85% of abducting mothers were the primary caregiver or joint primary caregiver. Only 30% of the abducting fathers were primary caregivers or joint primary caregivers. More recently, the present author's empirical study of Australian family law practitioners who have acted in Hague Convention cases⁵⁵ reflects comparable findings concerning gender and caregiver status. In this study the family law practitioner participants⁵⁶ were asked: "In the Hague Child Abduction Convention case/s you have acted in, approximately what percentage of abducting parents were primary carer mothers?"; 77.3% of the participants indicated between 76% and 100%, 18.2% said between 51% and 75%, and 4.5% said between 1% and 25%.

The author's empirical study also reveals some interesting qualitative and quantitative data concerning what motivates primary-carer mothers to abduct. Primary-carer mothers who remove their children from Australia do so for a number of reasons which do not correlate with the original reasons for abduction anticipated by the Hague Convention's drafters. These mothers are not principally motivated by a desire to alter the prevailing primary care and custody arrangement. Instead they are compelled by: a need to flee domestic violence and/or child abuse (45.5%); a desire to return to their homeland (72.7%) coupled with the longing to return to family and social support networks (63.6%); and a desire to improve their economic situation (36.4%). A primary-carer mother may also perceive removal as an opportunity to move on with life and pursue a new relationship, and determine the child's cultural upbringing. Additionally, these motivations may be coloured by a perception that the non-primary-carer father is not playing an active role in the child's life. This development contradicts the rationale that prompt return is in the best interests of children because it restores the pre-abduction custody arrangement by reversing the abductor's disturbance of the status quo. Primary-carer mothers who abduct are not disgruntled with the prevailing custody arrangement; neither are they removing their child from the stability of the primary-care setting.

If a child is removed by their primary-carer mother who is "the nearest and most fundamental family member [in their life] the objective of maintaining stability for such a child in his home environment cannot now be achieved by returning the child to the state of habitual residence".⁵⁷ It is important to note that a return order is an order for the child's return, not the abducting parent's. Consequently, in cases where the abducting parent is the child's primary-carer, the Convention's return mechanism is simply restoring the geographical status quo prior to the abduction for the child,

Children and the Law (1994); Chiancone J and Girdner L, *Final Report – Issues in Resolving Cases of International Child Abduction*, Report to the Office of Juvenile Justice and Delinquency Prevention, American Bar Association Centre on Children and the Law (2000).

⁵² Silberman L, "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues" (2000) 33 *New York University Journal of International Law and Politics* 221; Grilli R, "Domestic Violence: Is it Being Sanctioned by the Hague Convention?" (1997) 4(1) *Southwestern Journal of Law & Trade in the Americas* 71; Kaye M, "Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four" (1999) 13(2) *International Journal of Law, Policy and the Family* 191; Weiner M, "International Child Abduction and the Escape from Domestic Violence" (2000-2001) 69 *Fordham Law Review* 593.

⁵³ Silberman, n 52 at 221.

⁵⁴ Lowe, n 17.

⁵⁵ Bozin-Odhiambo D, "A Study of Outcomes Post-Return to Australia under the Hague Child Abduction Convention for Abducting Primary-Carer Mothers and Their Children". This empirical study is part of the author's doctoral research.

⁵⁶ In total, 42 Australian-based family law practitioners (both barristers and solicitors) participated in the study.

⁵⁷ Beaumont and McEleavy, n 5, p 90.

rather than the primary-care setting which represents stability.⁵⁸ Achieving geographical restoration at the expense of maintaining the primary-care setting devalues the primary-carer parent's role in a child's socialisation and development of a cultural and moral identity. This role is integral to the child's stability, especially in cases where a family is mobile and the child has minimal connections to their habitual residence immediately preceding their abduction.

Re R (Abduction: Habitual Residence) [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 provides a practical illustration of how these shifting gender dynamics affect the validity of the assumption that a child's habitual residence provides the most appropriate moral and cultural framework in which to determine the substantive parenting dispute. In this case a primary-carer mother was ordered to return her child to Germany, a jurisdiction where the family had no firm shared intention of putting down roots or making a home, and a state in which neither the mother nor the child had established meaningful connections. The English High Court described the primary-carer mother as "deeply ambivalent"⁵⁹ about relocating to Germany for her husband's short-term job secondment, as her marriage was an unhappy one. In addition to her uncertainty about whether or not to stay in the relationship and Germany, the child had only lived in Germany with her parents for short intervals over a five-month period of what was a temporary six-month secondment, with the possibility of an extension.

The wife, an Australian, and the husband, an Englishman, had met in London, where they had lived together, married and had their daughter. The husband worked for the London branch of a German company which posted him to Germany on a secondment. First the husband went to Germany alone, while the wife's Australian parents travelled to the United Kingdom and holidayed with her and the child in the Faroe Islands and France. Upon returning to London from this holiday the wife packed up the family's belongings and on 15 September 2002 went with the child to Germany. The family, however, "returned frequently to [the United Kingdom] for weekends for a mixture of both business and social activities".⁶⁰

The family lived in temporary accommodation before finding a larger flat. The lease for this flat ended on 21 January 2003, but could be extended. Between 16 and 29 December 2002 the husband travelled to both London and the United States on business. For some of that period the wife and child visited friends in London. Then, between the end of December 2002 and the beginning of January 2003 the couple and child holidayed in Austria. On 5 February 2003 the wife and child travelled to Australia with the husband's consent to visit her family. Once in Australia she sought the husband's consent to extend their stay so that she could attend her ill uncle's birthday. The husband refused and demanded the child's return to Germany as the child's habitual residence. On the 22 March 2003 the wife was served with Hague Convention return proceedings upon her arrival with the child at Heathrow airport in London. The wife always claimed that she never intended to stay in Australia with the child. She had planned to return to Germany, but via London so that she could "have an opportunity of seeing members of the wider family and, as it were, drawing breath before returning to what no doubt she correctly anticipated would be a very highly charged situation in Germany".⁶¹

The parties each presented contradictory evidence concerning the proposed length of their stay in Germany. The husband's employer provided a statement saying

[i]n August 2002 H commenced work in Germany on a full-time basis. He was told the posting was for an indefinite period and there was no specific date on which his work in Germany was due to end. At

⁵⁸ Most primary-carer mothers will choose to accompany their child back to the state deemed to be the child's habitual residence, despite the return order being for the child's return only.

⁵⁹ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [44].

⁶⁰ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [44].

⁶¹ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [16].

the time of the posting he sought from me an assurance the posting would be at least six months. I would expect H. to continue for the foreseeable future to work in Germany as we agreed from July 2002.⁶²

However, contrary to this evidence the mother provided a letter which had been sent to her on 6 August 2002 from a Miss L, the husband's father's partner. Miss L's letter included a statement where she referred to the child saying "[s]ix months is a very long time in her little life although for us elderlies it will probably pass in a flash and you will be back in the UK before we have got used to you going away".⁶³ Disputed facts are unable to be explored fully, for example, with cross examination, during Convention return proceedings which are summary in nature.

Munby J concluded, with what he described as "considerable reluctance",⁶⁴ that the child was habitually resident in Germany at the relevant time. His Honour said:

[i]t may very well be, indeed my assessment is that it was the case, that this was not a family which had put down substantial or established roots in Germany. It may very well be – and I am inclined to accept Miss Taylor's [the wife's] submission – that this family was not settled in Germany. But that, unhappily for mother in the present case, is not ... the relevant test.⁶⁵

The test for determining the child's habitual residence was whether the family was residing in Germany for a settled purpose, even if for a short duration.⁶⁶ His Honour found that "this family was living in Germany for a settled purpose; that is to say for the settled purpose of enabling father to fulfil that, albeit short-term, assignment by his employers".⁶⁷

Can it be said that the child's absence from Germany disrupted her stability, caused her to suffer the traumatic loss of contact with the primary caregiver charged with her upbringing, and resulted in the uncertainty which comes with having to adjust to unfamiliar cultural conditions?⁶⁸ In fact, it can be argued that her return to Germany may have produced this undesirable outcome. The harmful effects of return to the child's habitual residence would have been seriously compounded if the primary-carer mother had not accompanied the child upon return. In this case the mother was able to re-enter Germany. However, visa restrictions sometimes prevent an abducting parent from doing so.⁶⁹ If the mother had been unable to re-enter, the order would have achieved geographic restoration at the expense of maintaining the primary-care setting; of fundamental importance to the child's socialisation and development of an identity.

The fact that the primary-carer mother was the abductor in this case affected the validity of the rationales supporting prompt return to the child's habitual residence. The mother did not abduct her child to alter the existing custody status quo and seek a more favourable custody decision in a foreign jurisdiction. Furthermore, Germany did not constitute the most appropriate moral and cultural framework in which to construct the child's best interests. The child's identity was not constructed within this jurisdiction, and the child had almost no moral, social, cultural or linguistic connections to Germany, having spent very little time there. Furthermore, the family had no firm shared intention of making Germany a home environment of a nature that would warrant it being deemed the most appropriate framework in which to construct the child's best interests in litigation of the substantive parenting dispute.

⁶² *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [21].

⁶³ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [22].

⁶⁴ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [48].

⁶⁵ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [48].

⁶⁶ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [49].

⁶⁷ *Re R (Abduction: Habitual Residence)* [2003] EWHC 1968 (Fam); [2004] 1 FLR 216 at [49].

⁶⁸ Dyer, n 15, p 21; Pérez-Vera, n 2, p 432.

⁶⁹ For example, in the Australian context, prior to the abduction a primary-carer abducting mother's visa status in Australia may have been dependent on her ongoing domestic relationship with the child's father. The father may enjoy Australian citizenship or permanent residency, while the mother may hold a Partner Visa awaiting permanent residency. Upon separation and departure from Australia when abducting her child, the primary-carer mother's Partner Visa eligibility is lost. If she wishes to accompany her child who is returned back to Australia pursuant to the Convention, she will need to apply for a different class of visa.

Stability for this child was found in the primary-care setting with her mother, rather than a specific geographic location. Alternatively, if we apply the Hague Convention's state-focused approach, it is arguable that the jurisdiction which most closely fitted the description of being the moral and cultural framework with which the child identified was the United Kingdom. In this case applying the settled purposes test did not yield a habitual residence which represented the child's home environment. Furthermore, this case illustrates how the return of the child to the state of habitual residence can disadvantage a primary-carer mother whose maternal love compels her to continue to provide care for her child.⁷⁰ She will ultimately need to litigate the substantive parenting dispute in a jurisdiction where she and the child have few social, cultural, linguistic and economic ties, the family not having established substantial and meaningful roots. This outcome is contrary to the objective of prompt summary return expressed in the Convention's Explanatory Report.

Returning a child, abducted by their non-custodial father disgruntled with the prevailing custody status quo, to the child's habitual residence where they lived with their primary-carer mother for a meaningful period of time, is aligned with the objective of prompt return: restoring the child back into stability, the arms of their primary caregiver, and the environment in which their life developed. In such circumstances it can be said that the abducting father is altering the custody status quo to create artificial jurisdictional links. The child's habitual residence is likely to provide the most appropriate moral and cultural framework for constructing their best interests, not only because the child has strong connections to that jurisdiction, but the return facilitates restoration of the primary-care setting. If a primary-carer mother removes her child to a country where they have meaningful connections, such as a family and social support network, in an attempt, for example, to flee domestic violence or regain economic independence, it is questionable whether prompt return of the child is aligned with the Convention return mechanism's true objective. This especially applies in cases where there is a lack of meaningful connections in the child's habitual residence. In these circumstances the instability the child suffers is significantly minimised, as they have not suffered the loss of the parent charged with their primary-care, and they have connections with the jurisdiction to which they were taken.

Rather than defining the child's home environment using state boundaries, we could characterise it by acknowledging the primary-care setting as an environment of stability. This proposition becomes even more persuasive when we consider the effect that families' increased mobility has on whether the child's habitual residence has the quality of a home environment envisaged by the Convention's drafters. The challenges presented by a change in the gender dynamics underpinning international parental child abduction and the profile of abducting parents, are compounded by the increased mobility of these families. The combination of these two factors can affect the nature and quality of an abducting primary-carer mother's and child's connections to the child's habitual residence immediately preceding their abduction.

TRANSNATIONAL FAMILIES, TRANSNATIONAL MOTHERING AND CONTEMPORARY INTERNATIONAL PARENTAL CHILD ABDUCTION

The Hague Convention seeks to prevent the harmful effects of international parental child abduction, by returning children to the family and social environment in which their life has developed.⁷¹ It has sought to do this by focusing on the state or jurisdiction which is deemed to represent this environment. However, as families become more mobile, the child's habitual residence as a home environment of the nature anticipated by the Convention's drafters is becoming an increasingly outdated construct.

Arguably, the lives of transnational families who experience international parental child abduction cannot be appropriately regulated using the geographical limits imposed by judicial determinations of

⁷⁰ This point was raised by Gaudron J in the High Court of Australia overseas child relocation decision in *U v U* (2002) 211 CLR 238; [2002] HCA 36. Gaudron J expressed that "[a] mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of not having her reasons for relocating treated with the seriousness they deserve" (at [36]).

⁷¹ Pérez-Vera, n 2, p 428.

habitual residence. The Convention addresses the problem of international parental child abduction by compartmentalising the lives of transnational families using state boundaries. This paradigm is ill-suited to managing these families' social interactions. Where a family is characteristically mobile, it can be erroneous to presume that an abducting parent's act of removing their child from one geographical space to another results in the child being deprived of the cultural and moral framework with which they identify, and on which their security rests. This presumption can lead to a mistaken belief that a child is being taken to a foreign environment creating artificial jurisdictional ties, or ties less meaningful than those existing within the habitual residence.

As explained by Levitt and Schiller:

[t]he lives of increasing numbers of individuals can no longer be understood by looking only at what goes on within national boundaries. Our analytical lens must necessarily broaden and deepen because migrants are often embedded in multi-layered, multi-sited transnational social fields... As a result, basic assumptions about social institutions such as the family ... need to be revisited.⁷²

A central characteristic of transnational families is their quality as institutions of transnational social space.⁷³ Drawing on Levitt and Schiller's work, Sorensen conceptualises transnational families as a social reproduction taking place across borders.⁷⁴ "By their very nature, transnational families constitute an elusive phenomenon – spatially dispersed and seemingly capable of unending social mutation."⁷⁵ Lima explains that transnational families are "buffered by extensive social networks, allowing transnational experiences to form a fluid continuum, rather than a radical divide compartmentalizing life into two separate worlds".⁷⁶

Levitt and Schiller suggest that "if we remove the blinders of methodological nationalism, we see that while nation-states are still extremely important, social life is not confined by nation-state boundaries".⁷⁷ This approach is particularly constructive when evaluating the validity of the rationales provided for prompt return to the child's habitual residence. If we acknowledge the fluidity of transnational families' interactions, we cannot proceed based on an assumption that a home environment inevitably exists within the child's habitual residence immediately preceding their abduction. Consequently, prompt return to this jurisdiction will not automatically invoke the most appropriate framework for determining a child's best interests. Neither will the primary carer's abduction of the child necessarily create artificial jurisdictional ties.

The case of *Paz v Paz* 169 F Supp 2d 254 (SDNY 2001) illustrates how a family's mobile lifestyle can make it impractical for a court to determine a child's habitual residence by applying the settled purposes and acclimatisation test.⁷⁸ In this case neither of the jurisdictions involved were identifiable as the most appropriate moral and cultural framework in which to formulate the child's best interests. The child's identity had not been principally constructed in one jurisdiction. Faced with an inability to apply the usual test for determining the child's habitual residence, the court placed

⁷² Levitt P and Schiller N, "Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society" (2004) 38(145) *International Migration Review* 597.

⁷³ Lima F, "Transnational Families: Institutions of Transnational Social Space" in Pries L (ed), *New Transnational Social Spaces: International Migration and Transnational Companies in the Early Twenty-first Century* (Routledge, 2001) p 77. See also Faist T, "Transnationalization in International Migration: Implications for the Study of Citizenship and Culture" (2000) 23(2) *Ethnic and Racial Studies* 189.

⁷⁴ Sorensen N Nyberg, "Transnational Family Life Across the Atlantic: The Experience of Colombian and Dominican Migrants in Europe" (Paper presentation at the International Conference on Migration and Domestic Work in a Global Perspective, Wassenar, The Netherlands, 26-29 May 2005).

⁷⁵ Bryceson D and Vuorela U, "Transnational Families in the Twenty-first Century" in Bryceson D and Vuorela U (eds), *The Transnational Family: New European Frontiers and Global Networks* (Berg, 2002) p 3.

⁷⁶ Lima H, "Transnational Families: Institutions of Transnational Social Space" in Pries (ed), n 73, p 81.

⁷⁷ Levitt and Schiller, n 72 at 611.

⁷⁸ Interestingly, in this case it appears that a policy consideration which guided the court's decision to return the child to the United States was that it was in effect a return to the child's primary caregiver.

weight on the fact that the mother had established “a pattern of control” over where the child lived.⁷⁹ This reasoning signifies an implied recognition that the most appropriate environment for a child can be determined by their attachment to a particular parent rather than a geographical space, ie a state.

The husband and wife in this case were both Peruvian citizens. Their daughter was aged 12 at the date of return proceedings. The couple wed in Peru in 1987, and then relocated to New Zealand where their daughter was born. In September 1990, only two years after their daughter’s birth, the couple separated. The mother obtained a joint custody order from the Family Court in Auckland. Two years later, in October 1992, the order was amended to allow the mother to move with the daughter to Peru. The father followed and the couple reconciled. The family lived together in Peru between February 1993 and March 1998. The mother then moved with the daughter back to New Zealand. Again the father followed. However, only three months later the mother returned back to Peru alone, as she was unable to find employment. Two months later the father and child also moved back to Peru. However, the couple did not live together this time, and they entered into a shared-care custody arrangement. Then, in August 1998, the mother was offered employment in New York. She relocated in December of that year with the child. However, she was unable to secure a place for her daughter in a school. Consequently the child returned to Peru in February 1999. She attended school there until August of that year, when she was able to go back to New York and start a new semester of schooling.

Four months later the mother sent the child back to Peru, to spend the Christmas holidays with her father. The child then returned to New York in January of 2000. Only a month and a half later the mother again sent the child back to Peru, so that she could travel with her father to New Zealand for an extended stay. The mother claimed that the parties had an agreement that the child would be returned to New York in July 2000. However, the father kept the child in New Zealand until December of 2000, when he sent her back again to New York. The father alleged that their agreement was that the child travel to New York to spend the holiday period with her mother, and that she would be returned back to New Zealand by the mother after that. The mother then refused to allow him to take the child to New Zealand after the Christmas period. The father alleged that this act constituted wrongful retention, and that at the relevant time the child was habitually resident in New Zealand.

The factual circumstances in this case were complex due to the family’s mobility and the shuttling back and forth of the child’s care. The United States District Court for the Southern District of New York explained that:

[a]n examination of the undisputed facts reveals that after the parties left Peru in 1998, [the child’s] country of residence was changed at least nine times. Before her stay in New Zealand for ten months in 2000, [she] did not reside in any one country for an uninterrupted period longer than approximately six months.⁸⁰

The parties submitted conflicting evidence regarding their shared parental intention concerning where the child would reside for settled purposes immediately preceding the retention. Judge Cederbaum noted that the “parties dispute each other’s intentions with respect to almost every relocation in the past three years”.⁸¹ Furthermore, the family’s transnational character made an assessment of the child’s acclimatisation problematic. The child’s frequent relocation before her stay in New Zealand resulted in the court concluding that the father needed to demonstrate that the child “did more than merely adjust to her surroundings, something [the child] ha[d] had to do frequently”,⁸² for New Zealand to constitute her habitual residence. The court explained that the father had “established only that [the child] settled in New Zealand to the same extent that she settled in any previous location”.⁸³ Neither New Zealand nor the United States could be considered the jurisdiction in which the child had developed, so that its environment constituted the most appropriate moral and cultural framework in which to determine her best interests.

⁷⁹ *Paz v Paz* 169 F Supp 2d 254 (SDNY 2001) at [19].

⁸⁰ *Paz v Paz* 169 F Supp 2d 254 (SDNY 2001) at [15].

⁸¹ *Paz v Paz* 169 F Supp 2d 254 (SDNY 2001) at [17].

⁸² *Paz v Paz* 169 F Supp 2d 254 (SDNY 2001) at [15].

⁸³ *Paz v Paz* 169 F Supp 2d 254 (SDNY 2001) at [16].

Because of these difficulties, which were exacerbated by the lack of cross-examination during Convention return proceedings, the court had no choice but to refer back in time. The court focused on the fact that the child's mother was, after the parties' first separation, granted primary care. She was also permitted to relocate with the child to Peru, and there were significant periods of time when the child resided with her mother. The finding that the United States was the child's habitual residence had nothing to do with that state or jurisdiction being the environment in which the child's identity was constructed, and where she possessed the strongest social, cultural and linguistic connections. The United States was simply the jurisdiction where the primary-care setting existed at that particular moment in time for this transnational family.

LOOKING BACKWARD AS A WAY OF MOVING FORWARD

The Hague Convention has sought to prevent the harmful effects of international parental child abduction by returning children to the jurisdiction or state which is perceived to constitute their home. The social, cultural and moral environment in which a child's identity is constructed has been defined using state boundaries. This approach is becoming problematic because judicial determinations of habitual residence are entrenched in the state-centric paradigm which is incompatible with the lives of families who experience international parental child abduction, and the notion of transnational mothering. The child's habitual residence as a home environment of the nature anticipated by the Convention's drafters is an increasingly outdated construct. An escalation in the number of primary-carer mothers abducting their children, and their families' growing mobility, means that we must reconsider our state-focused approach if we wish to honour the Convention's drafters' desire to return children to an environment of stability.

Our present focus on the jurisdiction in which the parents intended their child to reside for settled purposes does not necessarily facilitate a child's restoration to stability, because it is forward-focused and neglects to place a child's established connections at the forefront of the examination. We must look backward at a child's established social, cultural and linguistic connections as a way of moving forward. It is proposed that the framework in which a child's identity is constructed and defined can be viewed as the primary-care setting rather than a particular jurisdiction or state, especially in cases where the family leads a mobile lifestyle. Restoration or preservation of this home environment is of principal importance to ensure a child's stability and best interests, at minimum while the substantive parenting dispute is being resolved.