---

http://www.incadat.com/ ref.: HC/E/USf 83
[08/08/1995; United States Court of Appeals for the Third Circuit; Appellate Court]
Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995)

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Argued: June 27, 1995; Decided: August 8, 1995; Rehearing and Rehearing In Banc Denied: August 24, 1995

Before: Mansmann, Greenberg and Sarokin C.JJ.

E. Feder, Appellant v. M. Evans-Feder

MANSMANN, C.J.:In this case of first impression for this circuit, we have before us a petition filed by one parent against the other under the Hague Convention on the Civil Aspects of International Child Abduction. E.F. asserts that M.E.-F. "wrongfully retained" their son, C.E. F. ("E."), in the United States and requests that E. be returned to him in Australia. Concluding that the United States was E.'s "habitual residence", Hague Convention, Article 3a, the district court held that the retention was not wrongful and denied Mr. F.'s petition.

We, however, conclude that Australia was E.'s habitual residence and hold that Mrs. F.'s [FN1] retention of E. was wrongful within the meaning of the Convention. We will therefore vacate the district court's denial of Mr. F.'s petition and remand the case for a determination as to whether the exception that Mrs. F. raises to the Convention's general rule of return applies to preclude the relief Mr. F. seeks.

I.

We begin by reviewing the evidence presented in this case. The facts as found by the district court leading to Mrs. F.'s retention of E. are not in dispute.

Mr. and Mrs. F. are American citizens who met in 1987 in Germany where each was working: she as an opera singer, and he was an employee of ***bank. E., their only child, was born in Germany on July 3, 1990.

In October, 1990, the family moved to Jenkintown, Pennsylvania because Mr. F. had accepted a management position with * in Philadelphia. When *** terminated Mr. F.'s employment in June of 1993, he began exploring other employment opportunities, including a position with the *** Bank of Australia. Although Mr. F. greeted the possibility of living and working in Australia with enthusiasm, Mrs. F. approached it with considerable hesitation. Nonetheless, that August, the F.s traveled to Australia to evaluate the opportunity, and while there, toured Sydney, the city where Mr. F. would work if he were to accept the position with *** Bank. They spoke with Americans who had moved to Australia, consulted an accountant about the financial implications of living in Australia and met with a relocation consultant and real estate agents regarding housing and schools. Mrs. F. also spoke with a representative of the Australian Opera about possible employment for herself.**

In late August or early September of 1993, the * Bank offered Mr. F. the position of General Manager of its Personal Banking Department. Finding the offer satisfactory from a professional and financial standpoint, Mr. F. was prepared to accept it. Mrs. F., on the other hand, was**

reluctant to move to Australia. She had deep misgivings about the couple's deteriorating marital relationship; in October, 1993, she consulted with a domestic relations attorney regarding her options, including a divorce. Nevertheless, for both emotional and pragmatic reasons, Mrs. F. decided in favor of keeping the family together and agreed to go to Australia, intending to work toward salvaging her marriage.

Upon Mr. F.'s acceptance of the bank's offer, the F.s listed their Jenkintown house for sale and sold numerous household items that would not be of use in Australia. Toward the end of October, 1993, Mr. F. went to Australia to begin work. Mrs. F. remained behind with E. to oversee the sale of their house in Jenkintown; Mr. F., in the meantime, looked for a house to buy in the Sydney area, sending pictures and video tapes of houses to Mrs. F. for her consideration. In November of 1993, Mr. F. purchased, in both his and Mrs. F.'s name, a 50% interest in a house in St. Ives, New South Wales, as a "surprise birthday present" for his wife. [FN2]

Mr. F. returned to Pennsylvania on December 13, 1993. Even though the Jenkintown house had not sold, Mr. F. arranged for a moving company to ship the family's furniture to Australia and bought airline tickets to Australia for Mrs. F. and E. The F.s left for Australia on January 3, 1994, where they arrived on January 8, 1994, after stopping briefly in California and Hawaii. Mrs. F. was ambivalent about the move; while she hoped her marriage would be saved, she was not committed to remaining in Australia.

Once in Australia, the F.s finalized the purchase of their St. Ives house, but lived in a hotel and apartment for about four and one-half months while Mrs. F. supervised extensive renovations to the house. E. attended nursery school three days a week and was enrolled to begin kindergarten in February, 1995. Mrs. F. applied to have E. admitted to a private school when he reached the fifth grade, some seven years later. Although E. is not an Australian citizen and was not a permanent resident at the time, Mrs. F. represented to the contrary on the school application.

In an effort to acclimate herself to Australia, Mrs. F. pursued the contacts she had made during the F.s' August, 1993 trip and auditioned for the Australian Opera Company. She accepted a role in one of the company's performances set for February, 1995, which was scheduled to begin rehearsals in December, 1994.

Mr. F. changed his driver's license registration from Pennsylvania to Australia before legally obligated to do so and completed the paperwork necessary to obtain permanent residency for the entire family; Mrs. F. did not surrender her Pennsylvania license nor submit to the physical examination or sign the papers required of those seeking permanent residency status. All of the F.s obtained Australian Medicare cards, giving them access to Australia's health care system.

According to Mrs. F., her marriage worsened in Australia. In the early spring of 1994, she and Mr. F. discussed her unhappiness in the marriage as well as her desire to return to the United States. Mr. F. attributed the couple's difficulties to the stress of his new job and requested that Mrs. F. stay in Australia, anticipating that their problems would subside once the family moved into their new home. Once again, for both personal and practical reasons, Mrs. F. agreed.

The family moved into the St. Ives home in May, 1994; the F.s' relationship, however, did not improve. Ultimately, Mrs. F. decided to leave her husband and return to the United States with E. Believing that Mr. F. would not consent to her plans if her true intent were known, Mrs. F. told Mr. F. that she wanted to take E. on a visit to her parents in Waynesboro, Pennsylvania in July. Mr. F. made arrangements for the trip, buying two round-trip tickets for departure to the United States on June 29 and returning to Australia on August 2.

Mrs. F. and E. left Australia as scheduled and upon their arrival in the United States stayed with her parents. In July, 1994, Mr. F. traveled to the United States on business, and arranged to meet his wife and son at their still unsold house in Jenkintown. When Mr. F. went to the house on July 20, 1994, he was served with a complaint that Mrs. F. had filed in the Court of Common

Pleas of Montgomery County, Pennsylvania on July 14, 1994, seeking a divorce, property distribution, custody of E. and financial support. Shortly thereafter, Mr F. returned to Australia and Mrs. F. and E. moved into the Jenkintown house.

In September, 1994, Mr. F. commenced a proceeding in the Family Court of Australia in Sydney, applying for, inter alia, declarations under the Hague Convention on the Civil Aspects of International Child Abduction. On October 4, 1994, the Judicial Registrar of the Family Court of Australia heard argument and issued an opinion declaring that E., Mr. F. and Mrs. F. were habitual residents of Australia immediately prior to Mrs. F.'s retention of E. in the United States; that Mr. F. had joint rights of custody of E. under Australian law and was exercising those rights at the time of E.'s retention; and that Mrs. F.'s retention of E. was wrongful within the meaning of the Convention. [FN3]

On September 28, 1994, Mr. F. commenced this action against Mrs. F. by filing a petition pursuant to the Convention in the United States District Court for the Eastern District of Pennsylvania, alleging that his parental custody rights had been violated by Mrs. F.'s "wrongful removal and/or retention" [FN4] of E. and requesting the child's return. Mrs. F. opposed the petition, denying that E.'s removal from Australia and retention in the United States were wrongful and asserting that even if they were, E. cannot be returned to Australia because there is a "grave risk" that his return will expose him to "physical or psychological harm" or place him in an "intolerable situation."

On October 14, 1994, the district court conducted an evidentiary hearing and on October 31, 1994, issued an opinion and order denying Mr. F.'s petition. Feder v Evans-Feder (E.D. Pa. 1994) 866 F. Supp. 860. Concluding that Mr. F. failed to prove that "E.'s habitual residence in the United States as of January 8, 1994 had changed to Australia by the time Mrs. F. refused to return him from Pennsylvania in the summer of 1994[,]" the court held that "the habitual residence of C.E. F. is in the United States and that his mother has not wrongfully retained him here." Id. at 868.

The court's holding was based on the view that although "Mr. F. may have considered and even established Australia as his habitual residence by June of 1994 . . ., Mrs. F. assuredly did not[,]" as "she never developed a settled purpose to remain [there]." Id. Because of its decision regarding E.'s habitual residence, the court did [221] not reach the merits of Mrs. F.'s claim that E.'s return to Australia would place him at risk. Id. This appeal followed.

II.

The Hague Convention on the Civil Aspects of International Child Abduction reflects a universal concern about the harm done to children by parental kidnapping and a strong desire among the Contracting States to implement an effective deterrent to such behavior. Hague Convention, Preamble; 42 U.S.C. s. 11601(a)(1) (4). Both the United States and Australia are signatory nations. The United States Congress implemented the Convention in the International Child Abduction Remedies Ate, 42 U.S.C. s. 11601 et seq., expressly recognizing its "international character" and the "need for uniform international interpretation" of its provisions. 42 U.S.C. s. 11601(b)(2), (3)(B). In Australia, the Convention was implemented by the Family Law (Child Abduction Convention) Regulations made pursuant to s 111B of the Family Law Act 1975.

The Convention's approach to the phenomenon of international child abduction is straightforward. It is designed to restore the "factual" status quo which is unilaterally altered when a parent abducts a child and aims to protect the legal custody rights of the non-abducting parent. [FN5] Pub. Notice 957, 51 Fed.Reg. 10494, 10505 (1986). Thus, the cornerstone of the Convention is the mandated return of the child to his or her circumstances prior to the abduction if one parent's removal of the child from or retention in a Contracting State has violated the custody rights of the other, and is, therefore, "wrongful". Hague Convention,

Article 12. [FN6] The general rule of return, however, has exceptions. If, for example, "there is a grave risk that [a child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation[,]" return is not mandatory. Hague Convention, Article 13(b).

Under Article 3 of the Convention, the removal or retention of a child is "wrongful" where:

a. It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention, Article 3.

For purposes of the Convention, " 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence[.]" Hague Convention, Article 5a. The conflict of laws rules as well as the internal law of the child's habitual residence apply in determining a parent's custody rights. Elisa Perez-Vera, Explanatory Report by Elisa Perez-Vera, in 3 Actes et documents de la Quatorzieme session 426, 445-46 (1982). [FN7] If a child's habitual residence is a State which has more than one territorial unit, the custody rights laws of the territorial unit apply. Hague Convention, Article 31.[FN8]

Pursuant to the International Child Abduction Remedies Act, state and federal district courts have concurrent original jurisdiction of actions arising under the Convention. 42 U.S.C. s. 11603 (a). Any person seeking the return of a child under the Convention may commence a civil action by filing a petition in a court where the child is located. Id. s. 11603(b). The petitioner bears the burden of showing by a preponderance of the evidence that the removal or retention was wrongful under Article 3; the respondent must show by clear and convincing evidence that one of Article 13's exceptions apply. Id S. 11603(e)(1)(A), (2)(A).

III.

A.

The question of E.'s habitual residence immediately prior to the retention is the threshold issue we must first address. [FN9] The Hague Convention on the Civil Aspects of International Child Abduction does not provide a definition for habitual residence; case law analyzing the term is now developing. We are not, however, without guidance; the Court of Appeals for the Sixth Circuit and the High Court of Justice of the United Kingdom have considered the meaning of "habitual residence" in a Hague Convention case.

In Friedrich v Friedrich (6th Cir. 1993) 983 F.2d 1396, a German father filed a petition for the return of his son, T., alleging that T.s' mother, a citizen of the United States and a member of the United States Army stationed in Bad Aibling, Germany, had wrongfully removed the child from Germany, where the family lived, to Ironton, Ohio. A few days before Mrs. Friedrich left Germany with T., Mr. Friedrich had forced his wife and child from the family's apartment and Mrs. Friedrich had assumed the role of T.s' primary caretaker. Emphasizing her caretaking role and intentions to return eventually to the United States with T., Mrs. Friedrich argued that T.s' habitual residence had shifted from Germany to the United States. The court, however, held that Germany was T.s' habitual residence. Focusing on the child, "look[ing] back in time, not forward[,]" and finding any future intentions that Mrs. Friedrich had harbored for T. to reside

in the United States irrelevant to its inquiry, the court concluded that T.s' habitual residence could be "'altered' only by a change in geography [which must occur before the questionable removal] and the passage of time, not by changes in parental affection and responsibility." Id at 1401-1402 [FN10]

In re Bates, No. CA 122 89, High Court of Justice, Family Div'n Ct. Royal Courts of Justice, United Kingdom (1989), a mother petitioned the court under the Convention for the return of her child, T., asserting that T. had been wrongfully removed from New York to London by the child's nanny at the father's request. The father, born and raised in England, was a successful musician who enjoyed international fame; the mother was a United States Citizen who shared her husband's life of world-wide public engagements, rehearsals and recording sessions. The father owned a home in London which served as the family's "base". In the early part of 1989, the father's band was about to embark on a tour, starting with the United States, going next to the Far East, and ending with a stay of indefinite duration in London. The parents rented or borrowed a friend's New York apartment, having decided that T. and her mother would live in New York while the father was on tour. Because T.'s speech skills were deficient for a two-and-a-half year old child, the mother consulted a New York speech therapist with whom she discussed arrangements for therapy sessions for T. during their stay. Toward the end of January, 1989, the family moved into the New York apartment. After accompanying the father on various engagements in British Columbia and the United States during the first week of February, 1989, T., her mother and her nanny returned to New York, even though her father only reluctantly agreed to that course, preferring to have Tatjana return with the nanny to the London home. Two days after the father's departure for the Far East, T.'s nanny telephoned him to report a heated argument with T.'s mother. The father authorized the nanny to take T. immediately to England, which she did.

In her petition, the mother alleged that T.'s habitual residence was New York and that her rights of parental guardianship under New York law had been breached by the child's removal. In deciding the question of habitual residence, the court initially observed that the concept is fluid, fact-infused and largely free from technical rules and presumptions, id slip op. at 9, [FN11] and recognized that although "[t]he residence whose habituality has to be established is that of the child[,] [i]n the case of a child as young as T., the conduct and the overtly stated intentions and agreements of the parents during the period preceding the act of abduction are bound to be important factors and it would be unrealistic to exclude them". Id. slip op. at 10.

In its opinion, the court set forth a governing principle for ascertaining the elements of habitual residence, which we find instructive:

[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Id. (citation omitted).

Applying this principle to the facts, the court concluded that because New York had acquired a "sufficient degree of continuity to enable it properly to be described as settled[,]" it was T.'s habitual residence within the meaning of Article 3 of the Convention:

The New York plan had acquired a more settled purpose by the time that the parties were in Seattle and Vancouver in the first few days of February, and the father's departure on his Far East tour was immediately imminent. New York had by then become the city in which the mother wanted to stay and in which the father had reluctantly agreed to allow her to stay with

T., at least until the band returned to London in April 1989. The extent to which New York would feature in their lives thereafter would depend very much on the decision which the parents then made about their personal lives....

... I am satisfied that the arrangements that had been agreed, however acrimoniously, before the abduction date between the two parents for T.'s care, accommodation and therapy treatment in New York during the period of three months or so that would be due to elapse before the father's return to London amounted to a purpose with a sufficient degree of continuity to enable it properly to be described as settled.

Id slip op. at 9-1. [FN12]

Guided by the aims and spirit of the Convention and assisted by the tenets enunciated in Friedrich v Friedrich and Re Bates, 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 and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

When we apply our definition of habitual residence to the facts, we conclude that Australia was E.'s habitual residence immediately prior to his retention in the United States by Mrs. F. E. moved, with his mother and father, from Pennsylvania to Australia where he was to live for at the very least the foreseeable future, and stayed in Australia for close to six months, a significant period of time for a four-year old child. In Australia, E. attended preschool and was enrolled in kindergarten for the upcoming year, participating in one of the most central activities in a child's life. Although Mr. and Mrs. F. viewed Australia very differently, both agreed to move to that country and live there with one another and their son, and did what parents intent on making a new home for themselves and their child do -- they purchased and renovated a house, pursued interests and employment, and arranged for E.'s immediate and long-term schooling. That Mrs. F. did not intend to remain in Australia permanently and believed that she would leave if her marriage did not improve does not void the couple's settled purpose to live as a family in the place where Mr. F. had found work.

We thus disagree with the district court's conclusion that the United States, not Australia, was E.'s habitual residence and with its analysis of the issue in several respects. In rejecting Australia, the court placed undue emphasis on the fact that the majority of E.'s years had been spent in the United States, ignoring the approximately six months that E. lived in Australia immediately preceding his return to the United States and the circumstances of his life in Australia. Moreover, the court disregarded the present, shared intentions of both Mr. and Mrs. F. with regard to E.'s stay in Australia, focusing instead on Mrs. F. exclusively and on the facts which indicated that she did not intend to remain in Australia if her marriage ended at some future date. [FN13] Finally, we find the court's reliance on In re Application of Ponath, 829 F.Supp. 363 (D. Utah 1983) where the court found that a child was habitually resident in the United States as alleged by the respondent-mother, not in Germany as alleged by the petitioner-father, misplaced. There, what began as a voluntary visit to the father's family in Germany by the mother and child, both of whom resided in the United States, turned into "coerced residence" by virtue of the verbal, emotional and physical abuse that the father successfully used to prevent his wife's and child's return to the United States. Id at 368. Such is clearly not the case here.

We thus hold that E. was habitually resident in Australia immediately prior to his retention by Mrs. F. in the United States.

B.

Our analysis, however, does not end here. Having concluded that E. was a habitual resident of Australia, we must now determine whether his retention by Mrs. F. was wrongful under Article 3 of the Convention. This determination involves two inquiries: whether the custody rights Mr. F. enjoyed under Australian law were breached by the retention and whether Mr. F. was exercising those rights at the time. [FN14]

With regard to Mr. F.'s custody rights under Australian law, we recall that the Convention calls into play a State's choice of law rules as well as its internal custody rights laws. See supra p. 221. We must, therefore, initially determine what law Australia would apply in this case. Among the documents included in the minutes of the discussions of the Fourteenth Session of The Hague Conference are a "Questionnaire on international child abduction by one parent", and the "Replies of the Governments to the Questionnaire". 3 Actes et documents de la Quatorzieme session 9, 9-11, 61, 61-129 (1982) ["Convention Documents"]. Australia's reply to questions 17 and 18, which ask respectively "[w]hat are your choice-of-law rules in child custody cases?" and "[a]re there any norms of constitutional or other fundamental law in your country which would override the usual choice-of-law rules in custody cases?", Convention Documents at 11, provides in pertinent part that Australian courts apply Australia's Family Law Act 1975 to custody questions:

Under the Family Law Aet [1975], if the court has jurisdiction [FN15] to hear an application for custody of, or access to, a child . . . it applies the provisions of the Act governing the determination of custody and access applications regardless of the nationality or place of domicile or habitual residence of the child.

Convention Documents at 65. See also PETER E. NYGH, CONFLICT OF LAWS IN AUSTRALIA, Ch. 27 (5th ed. 1991).

Thus, Mr. F.'s custody rights are determined by Australia's Family Law Act 1975, of which we may "take notice directly ... without recourse to the specific procedures for the proof of that law...." Hague Convention, Article 14. [FN16] Under the Act, in the absence of any orders of court, each parent is a joint guardian and a joint custodian of the child, [FN17] and guardianship and custody rights involve essentially the right to have and make decisions concerning daily care and control of the child. [FN18] Family Law Act 1975 s 63(E)(1) (2), (F)(1). See also Hague Convention, Art. 5(a).

Turning next to the Convention's requirement that Mr. F. was actually exercising the custody rights he had at the time of the retention, Hague Convention, Article 3b, we observe that Mrs. F. conceded both in the district court and before us on appeal that Mr. F. had and was exercising joint custody with respect to decisions concerning their son. Accordingly, we hold that Mrs. F.'s unilateral decision to retain E. in the United States was wrongful within the meaning of Article 3 of the Convention.

IV.

As we recognized, there are exceptions to the Hague Convention on the Civil Aspects of International Child Abduction general rule that a child's return is mandatory where he or she has been wrongfully retained by a parent. Hague Convention, Article 13. Here, Mrs. F. raised one of the exceptions, asserting that E.'s return would expose him to a grave risk of psychological or physical harm or otherwise place him in an intolerable situation. Hague Convention, Art. 13(b). In light of its conclusion that Mr. F. failed to satisfy his burden of proof on the threshold question, the district court did not reach this issue.

This case, therefore, must be remanded for the district court to consider in the first instance whether as the International Child Abduction Remedies Act requires, Mrs. F. can establish the exception by clear and convincing evidence. 42 U.S.C. s. 11603(b). We note that the exceptions are narrowly drawn, lest their application undermines the express purposes of the Convention.

Indeed, the courts retain the discretion to order return even if one of the exceptions is proven. Pub. Notice 957,. 51 Fed.Reg. 10494, 10509 (1986). If needed, the district court should supplement the record on this issue, and as it so appropriately did before, render its decision as expeditiously as is possible since time is of the essence given E.'s young age.

We also note that in order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon "undertakings" from the petitioning parent. Thomson v. Thomson, 119 D.L.R.4th 253 (Can. Sup. 1994). The district court, on its own initiative, heard testimony about the undertakings Mr. F. was willing to make in the event that E. returned to Australia and was not accompanied by Mrs. F. Given its denial of Mr. F.'s petition, however, the court did not assess the need for or the adequacy of those undertakings. If on remand the court decides that E.'s return is in order, but determines that Mrs. F. has shown that an unqualified return order would be detrimental to E., the court should investigate the adequacy of the undertakings from Mr. F. to ensure that E. does not suffer shortterm harm. See Re O, 2 FLR 349 (U.K. Fam. 1994) (exacting appropriate undertakings is legitimate in Convention cases).

Finally, Mr. F. has requested fees and costs. Section 11607(b)(3) of the International Child Abduction Remedies Act requires any court ordering the return of a child under the Convention to award fees and costs to the petitioner unless the respondent establishes that such order would be "clearly inappropriate". 42 U.S.C. 11607(b)(3). In the event that Mr. F. ultimately prevails on remand, the district court should also consider and decide this issue.

V.

For the foregoing reasons, we will vacate the district court's denial of Mr. F.'s petition and remand the case to the district court for further proceedings on the exception raised by Mrs. F. and if necessary, on the questions of undertakings by Mr. F. and his request for an award of fees and costs.

SAROKIN, Circuit Judge, dissenting.

I respectfully dissent, not necessarily because I disagree with the majority's analysis of the facts, but rather with the standard by which these facts are reviewed. The issue presented to the district court was the determination of a four year-old boy's "habitual residence," either Jenkintown, Pennsylvania, where he has lived almost his entire life and where his mother now resides, or Sydney, Australia, where he stayed for five months in 1994 and his father now resides. Resolution of this issue determines where the child shall reside pending conclusion of his parents' custody dispute.

The district court held an evidentiary hearing and ruled that the boy was habitually resident in Jenkintown. The majority subjects this determination to plenary review and vacates the order of the district court, which likely will result in an order that the child be sent to Sydney where his father lives. Although the majority's opinion does not and is not meant to resolve the ultimate issue of custody, it has immediate impact on the child's place of residence, and ultimately and realistically it will impact upon the final custody determination. Where a child resides and develops ties awaiting a final decision on custody invariably affects that decision. Therefore, we should disturb the existing relationship and a finding of habitual residency, even on a temporary basis, with great hesitancy and only when the facts and law clearly mandate it.

In my view the issue of habitual residence is essentially a factual one, and the findings of the district court should not be disturbed unless they are clearly erroneous. Because I respectfully believe that the majority has established an incorrect standard of review, and because I would affirm the district court's finding as supported by the evidence and not clearly erroneous, I dissent...

I.

The U.S. Senate ratified the 1980 Hague Convention on Civil Aspects of International Child Abduction ("the Convention") and enacted supplementary implementing legislation, the International Child Abduction Remedies Act of 1988, 42 U.S.C.A. 11601 et seq. (West 1995) ("ICARA" or "the Act"), only recently, and thus reported cases pursuant to the Convention are relatively scarce. Although three appellate decisions have reviewed ICARA petitions disposed of after an evidentiary hearing, none has enunciated an. explicit standard of review. See Prevot v. Prevot (In re Prevot) (6th Cir. 1995) 59 F.3d 556; Rydder v. Rydder (8th Cir. 1995) 49 F.3d 369; Friedrich u Friedrich (6th Cir. 1993) 983 F.2d 1396. Hence, ours is the first court of appeals in the nation to analyze the appropriate standard of review for determinations of "habitual residence," and we must tread carefully because of its immediate effect upon the residency of the child involved.

In a footnote, the majority announces that because the determination of habitual residence is a mixed question of fact and law, historical or narrative facts will be reviewed for clear error, and the "choice and interpretation of legal precepts and its application of those precepts to the facts" will be subjected to plenary review. Maj. Op. at 222, n. 9. This is certainly the proper standard for mixed questions of law and fact, but I cannot agree that "habitual residence" presents such a question.

Preliminarily, I remark that federal and state courts have struggled over this precise issue, with some making findings of fact and others conclusions of law regarding a child's habitual residence. Compare Wanninger v. Wanninger (D. Mass. 1994) 850 F. Supp. 78, 81 ("the court finds that the children were 'habitually resident' in Germany"); Meredith v. Meredith (D. Ariz. 1991) 759 F. Supp. 1432, 1436 (habitual residence is finding of fact); David B. v Helen O. (Fam. Ct. 1995) 164 Misc.2d 566, 625 N.Y.S.2d 436, 438 ("the court's finding with respect to the habitual residence issue is dispositive") & 441 n. 3; Roszkowski v. Roszkowska (Ch. Div. 1993) 644 A.2d 1150, 1157, 274 N.J.Super. 620, 634; Cohen v Cohen (Sup. Ct. 1993) 158 Misc.2d 1018, 1024, 602 N.Y.S.2d 994, 998 (habitual residence is "factual determination"); with Prevot v. Prevot (In re Prevot) (W.D. Tenn. 1994) 855 F. Supp. 915, 920 (habitual residence is conclusion of law), rev'd on other grounds, 59 F.3d 556 (6th Cir. 1995); In re Ponath (D. Utah 1993) 829 F.Supp. 363, 367; Slagenweit v. Slagenweit (N.D. Iowa 1993) 841 F. Supp. 264, 269, appeal dismissed without op., 43 F.3d 1476 (8th Cir. 1994); Falls v Downie (D. Mass. 1994) 871 F. Supp. 100, 102. Encompassing all, the district court here wrote that it "finds and concludes that the habitual residence of C.E.F. is in the United States." Feder v Evans-Feder (E.D. Pa. 1994) 866 F. Supp. 860, 868 (emphasis added). [FN20]

First, "habitual residence" is not defined in either the Convention or the Act, and consequently one must look to the legislative and negotiating history. Unfortunately, neither the legislative history of the Act nor the U.S. Department of State legal analysis submitted to the Senate by President Reagan during ratification reveal the proper standard of review. See H. Report No. 525, 100th Cong., 2d Sess., 1988 U.S.C.CAN. 386, 392-96; U.S. Department of State, Legal Analysis, Hague. International Child Abduction Convention ("Legal Analysis"), 51 Fed.Reg. at 10504.

The term is discussed in one document, however, that reveals its meaning to the Convention. According to the U.S. Department of State, the report by the official Hague Conference Reporter for the Convention is "recognized by the Conference as the official history and commentary on the Convention." Legal Analysis, 51 Fed.Reg. at 10503. This "official history and commentary" explains:

'habitual residence' ... is, in fact, a familiar notion of the Hague Conference, where it is understood as a purely factual concept, to be differentiated especially from that of the 'domicile.'

Elisa Perez-Vera, "Report of the Special Commission," Conference de La Haye de droit international prive: Actes et documents de la Quatorzieme session, Vol. III, Child Abduction, 1160 at 189 (emphasis added). Examination of a treaty's negotiating history is appropriate where the plain language itself is unclear. See Sale v. Haitian Ctrs. Council (1993) --- U.S. --- [113 S.Ct. 2549, 2565-67, 125 L.Ed.2d 128]. In this regard, analysis of negotiating history is akin to consideration of legislative history in a case of statutory construction. Accordingly, the official history's characterization of habitual residence as "a purely factual concept" is powerful evidence that its drafters intended a determination of habitual residence to be one of fact, not of law.

Second, the jurisprudence of habitual residence has generally reflected the fact-bound nature of the inquiry. The Sixth and Eighth Circuits have approved a British construction of the term:

It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions.

In re Bates, No. CA 122-89, slip op., High Court of Justice, Family Div'n Ct. Royal Courts of Justice, United Kingdom (1989), at 9 (quoting Dicey and Morris, The Conflict of Laws, at 166); Rydder, 49 F.3d at 373; Friedrich, 983 F.2d at 1401. See also Ponath, 829 F. Supp. at 365. "The intent is for the concept [habitual residence] to remain fluid and fact based, without becoming rigid." Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993). Even the Bates decision, treated by the majority as authoritative, referred to a "finding of wrongful removal," Bates, slip op. at 9, which of course depends on a determination of habitual residence. Such descriptions are consistent with my conviction that habitual residence is a factual finding.

Third, very recently the Sixth Circuit has characterized the question of whether a parent is exercising his or her custodial rights as a "finding." Prevot, 59 F.3d at 560, n. 4. The actual exercise of custodial rights, like "habitual residence," is an element of a petitioner's proof that a removal or retention was "wrongful." See Convention, Article 3; 42 U.S.C.A. 11603(e)(1). I agree with the Sixth Circuit and perceive absolutely no reason to treat a determination of habitual residence, as required in Article 3(a), as a legal conclusion, but that of the actual exercise of custodial rights, as required in Article 3(b), as a factual finding.

Fourth, the Act's use of the phrase "establish by a preponderance of the evidence" to describe a petitioner's burden of proving wrongful removal from a place of habitual residence signals that habitual residence is a fact question. 42 U.S.C.A. s. 11603(e)(1).

Finally, the majority's treatment of habitual residence confuses "ultimate facts" with "mixed questions of fact and law." While an ultimate fact may depend on subsidiary findings of fact, it is nonetheless a factual finding and must be reviewed for clear error. Pullman-Standard, Div. of Pullman, Ine. v. Swint (1982) 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66. For example, the following determinations have been characterized as "ultimate facts" and reviewed for clear error: intentional discrimination, Pullman-Standard, 456 U.S. at 287, 102 S.Ct. at 1789; "more than minimal planning," United States v Cianscewski (3d Cir. 1990) 894 F.2d 74, 83; "equivalence" in a patent dispute Interdynamics, Inc. v. Wolf (3d Cir. 1982) 698 F.2d 157, 176 n. 36; and "a bankruptcy court's ultimate finding of fact," Bittner v Borne Chemical Co. (3d Cir. 1982) 691 F.2d 134, 138. To scrutinize ultimate facts by a standard less deferential than that of clear error is "untenable," American Home Products Corp. v. Barr Laboratories, Inc. (3d Cir. 1987) 834 F.2d 368, 371 and to the extent our circuit once reviewed ultimate facts in part for legal mistake, "we were wrong." Martin v. Cooper Electric Supply Co. (3d Cir.1991) 940 F.2d 896, 908 n. 11, cert. denied, 503 U.S. 936 (1992) 112 S.Ct. 1473, 117 L.Ed.2d 617]. Indeed, if the question of E.'s habitual residence had been submitted to a jury rather than a judge, I would doubt that we would set aside the same decision on the grounds that it was mandated as a matter of law.

Accordingly, I conclude that the determination of a child's habitual residence is best described as a factual finding. I would review the district court's ruling on E.'s habitual residence for clear error, see Fed. R.Civ.P. 52(a), and I would not disturb it unless left with the definite and firm conviction that a mistake had been committed. Oberti v. Board of Educ. (3d Cir. 1993) 995 F.2d 1204, 1220. Even if I "might have come to different factual conclusions based on this record, [I] defer to the findings of the district court unless [I am] convinced that the record cannot support those findings." Id.

II.

I agree with the majority opinion 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 and which has a 'degree of settled purpose' from the child's perspective." Maj. Op. at 224. Yet, "the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant." Ponath, 829 F.Supp. at 367. Having reviewed the findings of the district court, however, I am not left with a "definite and firm conviction" that a mistake has been committed. Oberti, 995 F.2d at 1220. Therefore, I would affirm.

I believe the habitual residence determination requires a weighing of those facts which indicate a settled purpose to reside in one location or another, as well as those which suggest close ties to a particular community.

As of January 8, 1994, the parties agreed that the scales tipped decisively in favor of Jenkintown as E.'s habitual residence. Maj. Op. at 220; Feder, 866 F. Supp. at 865. Yet as of this date, a number of the facts relied on by the majority had already been placed on the Sydney side of the balance. As of that date: (a) Mr. F. had a settled purpose to live in Australia; (b) Mrs. F. had agreed to go to Australia, with E. but "without any commitment to remain there," Feder, 866 F. Supp. at 863; (e) Mr. F. had purchased a home in Australia for the family; (d) the couple had put their Jenkintown home on the market; (e) the couple had sold many of their household possessions in Pennsylvania; and (f) Mrs. F. and E. had temporary immigration status to reside in Australia. Nonetheless, the parties agreed that these factors, alone or in sum, did not make Australia E.'s habitual residence, absent some dispositive subsequent conduct.

The question thus becomes, what if anything occurred in the subsequent five and one-half months sufficient to alter the balance? The district court carefully canvassed the evidence introduced at the hearing and determined that it was insufficient to alter the balance that existed before Mrs. F. and E. traveled to Sydney. The court observed that Mrs. F. had obtained one day of employment, a single performance with the Sydney Opera, scheduled for thirteen months after her arrival; E. attended pre-school part-time, enrolled in kindergarten for the upcoming year, and was placed on a waiting list for a private school; and Mrs. F. and E. had obtained Australian Medicare cards. Feder, 866 F.Supp. at 864. On the other hand, unlike her husband, Mrs. F. declined to surrender her Pennsylvania driver's license or to obtain an Australian one.' Nor did she or E. submit to the physical examination necessary to acquire permanent immigration status in Sydney, or sign any papers in support of the application Mr. F. filed on their behalf Id. These events, all comparatively trivial, do not persuade me that the district court committed clear error. Rather, they seem to confirm that Mr. F. always had a settled purpose to reside in Sydney, but Mrs. F. arrived without a settled purpose to remain, and departed never having developed one. Nor do these events indicate anything about E.'s own intentions.

I agree with the majority that there is a temporal element to this inquiry. For example, two weeks in Australia certainly would not suffice for E. to establish a habitual residence there, and after two years his mother would have been hard put to argue that Jenkintown remained his home. Moreover, given that "habitual residence" should not be over-encumbered with legal rules, I would not establish a bright-line time period necessary to establish residence. Yet I cannot conclude that five and one-half months is so obviously sufficient that I would reverse the

district court's finding as clearly erroneous. In this regard, I note that Article 12 of the Convention directs that even when a child has been wrongfully removed from his habitual residence, if the child has spent a year (prior to the filing of the petition) in a new location, return may be thwarted by a demonstration that the child "is now settled." Thus in another context, the Convention recognizes that at least one year must pass before a child can be sufficiently "settled" so as to affect the location where custody will be adjudicated.

In addition, as of the date of the alleged wrongful removal, E. had lived far longer in Jenkintown than in Sydney. While it may be that Mr. F. had, and Mrs. F. did not have, a settled purpose to reside in Sydney, it is significant that E. stayed with his mother in Jenkintown until she left, traveling to Sydney only when she did. This indicates some correspondence between the purposes of mother and child. While it is virtually impossible to ascertain the settled purpose of such a young child, it is more closely aligned here to that of the mother. That is not meant to indicate that the mother's purpose should necessarily predominate, but rather that the facts of this matter support that conclusion.

Finally, we must be mindful of the consequence of a reversal here, since it will likely result in an order for the child's return to Australia, unless Mrs. F. can prove by clear and convincing evidence that E. would be at "grave risk" were he returned to Sydney. Absent such proof, the child will be taken from his mother's home in Jenkintown, where he has spent virtually all of his years, in contrast to the time spent with his father in Australia. Since this ruling is temporary pending a custody adjudication, he may again be ordered back to the United States. Although the best interests of the child will be determined ultimately, they should not be ignored in these preliminary proceedings. Such tugging and shuttling can only be detrimental. Thus, absent clearly erroneous fact-finding by the district court, its ruling should remain undisturbed.

Accordingly, I would affirm the district court's finding that E.'s habitual residence is the United States. 21

FOOTNOTES

1. Although the caption reads "Evans-Feder", M.A.E.-F. refers to herself in her brief as "Mrs. F." and we adopt that designation.

2. The ** Bank purchased the remaining 50% interest and financed the F.'s interest in the house.

3. Mrs. F. was served with the Judicial Registrar's opinion on October 7, 1994. Mrs. F. did not enter an appearance in the Australian court, although the record indicates that she received notice of the proceeding. In his brief, Mr. F. informs us that the Australian action is pending and includes a request on his part for custody of E.

In the district court, Mr. F. requested that "full faith and credit" be extended to the Judicial Registrar's declaration that E. was a habitual resident of Australia. The court refused Mr. F.'s request. Feder v. Evans-Feder, 866 F.Supp. 860, 866 (E.D.Pa. 1994). This issue was not raised on appeal.

4. According to the Hague International Child Abduction Convention; Text and Legal Analysis found at Pub.Notice 957, 51 Fed.Reg. 10494 (1986), "'wrongful removal' refers to the taking of a child from the person who was actually exercising custody of the child. 'Wrongful retention' refers to the act of keeping the child without consent of the person who was actually exercising custody." Id. at 10503. Since Mr. F. consented to Mrs. F.'s removing E. from Australia to the United States, but did not consent to the child's being retained there, we view this case as involving an alleged "wrongful retention"

5. The Hague Convention on the Civil Aspects of International Child Abduction does not settle custody disputes, stating that "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Hague Convention, Article 19.

6. Article 12 provides that "[w]here a child has been wrongfully removed or retained in terms of Article 3 . . . the authority concerned shall order the return of the child forthwith." Hague Convention, Article 12. The Convention does not require that a child be returned to his or her habitual residence, although in the classic abduction case, this occurs. Where a prevailing party has moved from the child's habitual residence, the child is returned to that party, wherever he or she may be. Pub.Notice 957, 51 Fed.Reg. at 10511.

7. Elisa Perez-Vera was the official Hague Conference reporter. Her Explanatory Report is recognized as the official history and commentary on the Convention. Pub.Notice 957, 51 Fed.Reg. at 10503.

8. In the United States, the law in force in the state in which the child was habitually resident (as possibly pre-empted by the International Child Abduction Remedies Act, 42 U.S.C. s. 11601 et seq.) would apply to determine whether a removal or retention was wrongful. Pub.Notice 957, 51 Fed.Reg. at 10506.

9. Unlike the dissent, we believe that the determination of habitual residence is not purely factual, but requires the application of a legal standard, which defines the concept of habitual residence, to historical and narrative facts. It is, therefore, a conclusion of law or at least a determination of a mixed question of law and fact. Universal Minerals, Inc. v. C.A. Hughes & Co. (3d Cir. 1981) 669 F.2d 98, 102-03. On such questions we employ a mixed standard of review, accepting the district court's historical or narrative facts unless they are clearly erroneous, but exercising plenary review of the court's choice of and interpretation of legal precepts and its application of those precepts to the facts. Id.

10. Having determined that Germany was T.s' habitual residence, the Court of Appeals remanded the case to the district court with instructions to determine whether any of Mr. Friedrich's actions had terminated his custody rights under German law and whether any of the exceptions to the Hague Convention on the Civil Aspects of International Child Abduction general rule of return applied. Friedrich v. Friedrich (6th Cir. 1993) 983 F.2d 1396, 1403.

11. In Rydder v. Rydder (8th Cir. 1995) 49 F.3d 369 , a case arising under the Convention, th Court of Appeals for the Eighth Circuit was guided by this observation from Re Bates, No. CA 122-89, High Court of Justice, Family Div'n Ct Royal Courts of Justice, United Kingdom (1989 in affirming the district court's treatment of the children's Swedish residence registration as a legal fiction of little consequence to the determination of their habitual residence. Rydder, 49 F.3d at 373.

12. The court then determined that the mother's rights of parental guardianship under New York law had been breached and that T.'s return would not expose her to a grave risk of physical or psychological harm, as the father asserted. Accordingly, the court granted the mother's petition. Re Bates, No. CA 122-89, slip op. at 11.

13. For essentially the same reasons, we disagree with the dissent's view that the United States was E.'s habitual residence immediately prior to the retention. As the country of E.'s relatively distant past and Mrs. F.'s unilaterally chosen future, it does not coincide with our understanding of habitual residence nor satisfy the definition we have enunciated.

14. We may decide both of these questions since the first is a question of law and the second involves an admission on Mrs. F.'s part. See infra p. 226.

15. In reply to question 9 of the "Questionnaire on international child abduction by one parent", "[w]hat bases do your courts use for assuming jurisdiction in child custody cases?", 3 Actes et documents de la Quatorzieme session 9, 10 (1982) ["Convention Documents"], Australia stated that under the Family Law Act 1975, such proceedings may be instituted if either party to the marriage is an Australian citizen or either party to, or the child of, the marriage is present in Australia. Convention Documents at 64.

16. We observe that the Australian court to which Mr. F. made application for declarations under the Hague Convention applied Australia's Family Law Act 1975 to determine whether Mrs. F.'s retention of E. was wrongful. See supra p. 220. The court's opinion, however, does not indicate whether a conflict of laws analysis was done.

17. Section 63(F)(I) states:

Subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section) each of the parents of a child who has not attained 18 years of age is a guardian of the child and the parents have the joint custody of the child. Family Law Act 1975 s 63(F)(1).

18. Subsections 63E(I) and (2) provide:

63E(I) [Guardianship of child] A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to the child, all the powers, rights and duties that are, apart from this Act, vested by law or custom in the guardian of a child, other than:

(a) the right to have the daily care and control of the child; and (b) the right and responsibility to make decisions concerning the daily care and control of the child.

63E(2) [Custody of child] A person who has or is granted custody of a child under this Act has:

(a) the right to have daily care and control Of the child; and

(b) the right and responsibility to make decisions concerning the daily care and control of the child.

Family Law Act 1975 s 63(E)(1), (2).

19. Under the Act, state and federal courts have concurrent jurisdiction over ICARA petitions. 42 U.S.C.A. Sec 11603(a).

20. I thus think the majority errs by characterizing the district court as "concluding that the United States was E.'s 'habitual residence.'" Maj. Op. at 218 (emphasis added).

21. I add a note to endorse the majority's suggestion that, in the event the district court determines a return order would pose no "grave risk" to E. but would nonetheless be detrimental to him, the court may evaluate the adequacy of undertakings offered by Mr. F. Maj. Op. at 226. The "permissible involvement" of a court deciding a petition "extends beyond bluntly saying that there shall be a return or that there shall not. The court can influence the outcome by making clear that without undertakings, or with only the undertakings that are offered. Article 13(b) will apply, but that further or other undertakings are a prerequisite for a child's return." Re O, 2 FLR 349 (U.K.Fam.Div 1994). The district court may, for example, require Mr. F. to pay for mother and child to fly back to Sydney, permit them to live at the former matrimonial home while he lives elsewhere, and provide them with a car and living expenses. Id. The district court may also need to investigate whether undertakings offered in the United States would be binding and enforceable in Australia, if their implementation is necessary to avoid "grave risk" to the child returned. See id.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law