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## **HOME IS WHERE THE HEART IS: DETERMINING THE STANDARD FOR HABITUAL RESIDENCE UNDER THE HAGUE CONVENTION BASED ON A CHILD-CENTRIC APPROACH**

### **I. Introduction**

There's no place like home—but what happens when an individual is removed from the only home they have ever known? Familial child snatching is a widespread problem wreaking havoc with the law.<sup>1</sup> The Hague Convention on the Civil Aspects of International Child Abduction<sup>2</sup> (“Hague Convention”) provides for the immediate return of children who are unlawfully removed from their country of habitual residence.<sup>3</sup> The Hague Convention was drafted as a response to the problem of estranged parents wrongfully taking a child across international borders from one signatory<sup>4</sup> nation to another, and provides for the child's prompt return to the appropriate forum.<sup>5</sup> Under Article 12, when a child who is a habitual resident of one signatory state is unlawfully<sup>6</sup> removed to another signatory state, the latter must order the return of the child.<sup>7</sup> While aiming to provide a standard for quickly and efficiently returning the child in question to his or her country of habitual residence, the Hague Convention has proven to

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<sup>1</sup> For a chart reflecting the number of international parental abduction cases reported to the United States Central Authority in 2012, see <http://travel.state.gov/content/childabduction/english/legal/compliance/statistics.html>.

<sup>2</sup> As of 2013, there are 90 contracting states to the Hague Convention on the Civil Aspects of International Child Abduction. See [http://www.hcch.net/index\\_en.php?act=conventions.statusprint&cid=24](http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24).

<sup>3</sup> *Hague Conference on Private Int'l Law*, 19 I.L.M. 1501 (1980).

<sup>4</sup> A signatory state is a state that contracts to “commit to have in place judicial and administrative remedies for the return of children taken from the State of their habitual residence to another signatory State in violation of the left-behind parent's custody rights under the law of the State of the child's habitual residence.” See *Redmond v. Redmond*, 724 F.3d 729, 737 (7th Cir. 2013).

<sup>5</sup> The Hague Convention does not define “habitual residence,” but courts have been instructed to interpret the phrase according to “the ordinary and natural meaning of the two words it contains [, as] a question of fact to be decided by reference to all the circumstances of any particular case.” *C v S*, 2 All E.R. 961, 965 (Eng.H.L. 1990).

<sup>6</sup> See *infra* Part III.

<sup>7</sup> Elisa Perez-Vera, Explanatory Report ¶¶ 11, 13, & 16 in 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982).

be an impediment rather than a solution to the problem. Because the courts have been left to formulate their own standards, a split in the federal circuit courts has emerged. The Third, Sixth, and Eighth Circuits have shaped a standard that focuses on the objective signs of a child's acclimatization, while the Second and Ninth Circuits have adopted a standard that focuses on the parents' last shared subjective intentions to determine the child's habitual residence.<sup>8</sup>

In its recent decision in *Redmond v. Redmond*,<sup>9</sup> the Seventh Circuit illustrated how sharp the divide truly is among the circuits regarding the standard that should be used in determining habitual residence.<sup>10</sup> *Redmond* involved a father who filed a Hague Convention petition<sup>11</sup> claiming that the mother wrongfully retained their child in the United States. Although the parents initially agreed that their son would be raised in Ireland, the Seventh Circuit held that, for purposes of the Hague Convention, his habitual residence was Illinois.<sup>12</sup> He was born in Illinois, and with the exception of seven and half months of his infancy, he lived there and maintained frequent contact with family members, received recurrent care from Illinois doctors, attended school, and established many friendships in the area.<sup>13</sup> The Seventh Circuit reversed the district court's holding that Ireland was the child's habitual residence.<sup>14</sup> The district court's decision was problematic because it considered the parents' "last shared intent" about where the child

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<sup>8</sup> Compare *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993), *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995), and *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010), with *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001), and *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005).

<sup>9</sup> 724 F.3d 729 (7th Cir. 2013).

<sup>10</sup> See *id.* at 744.

<sup>11</sup> In order to file a Hague Convention petition, the first step is to contact the country officer assigned to the child's case and determine what options are available. It is important to submit a Hague petition as soon as practicable following an abduction or wrongful retention. A custody order is not necessary in order to file a petition. The Hague petition form should be filled out and submitted with the requisite supporting documentation. Before submitting the petition, it is recommended that individuals consult with an attorney. Once submitted, the petitioner should stay in close contact with the appropriate country officer. For information on downloading a Hague Convention petition, see <http://travel.state.gov/content/childabduction/english/from/hague-app.html>.

<sup>12</sup> *Redmond*, 724 F.3d at 732.

<sup>13</sup> See *id.* at 743.

<sup>14</sup> *Id.* at 732.

would live as a dispositive factor.<sup>15</sup> The district court failed to consider the child’s perspective and disregarded what a child in his position would have viewed as his habitual residence.<sup>16</sup> The Seventh Circuit acknowledged that the district court erred because it wrongly treated the parents’ last shared intent as a fixed doctrinal test, rather than focusing on the child’s perspective and acclimatization to the United States.<sup>17</sup>

In its analysis, the Seventh Circuit stated, “conventional wisdom thus recognizes a split between the circuits” that follow a standard focusing on the parents’ perspectives and “those that use a more child-centric approach.”<sup>18</sup> The court asserted, “in substance, all circuits—ours included—consider *both* parental intent and the child’s acclimatization, differing only in their emphasis.”<sup>19</sup> *Redmond* appropriately illustrates the current problem because it demonstrates that the essence of the disagreement between the circuits is how much weight to give parental intent versus the child’s perspective.<sup>20</sup>

The establishment of habitual residence is a critical threshold determination in Hague Convention proceedings. This note argues that courts should adopt a hybrid subjective and objective reasonable person standard focusing on the child’s perspective and past experience. The Hague Convention provides a legal process for countries to work together on international parental child abduction cases. In order for the Hague Convention to even apply, the child must have been *habitually resident* in one signatory country, and wrongfully removed to or retained in another signatory country.<sup>21</sup> Courts in children’s habitual residences are in the best position to make custody determinations and therefore it is a priority to ensure that they return there. Part II

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<sup>15</sup> *Id.* at 744.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 746–47.

<sup>18</sup> *Redmond*, 724 F.3d at 745.

<sup>19</sup> *See id.* at 746.

<sup>20</sup> *Id.*

<sup>21</sup> Perez-Vera, *supra* note 7, at ¶ 11.

of this note examines the history of the Hague Convention and highlights its central purpose. Part III discusses when the Hague Convention applies, and introduces the vagueness of the habitual residence determination. Part IV analyzes the variant approaches of the circuit courts, including both the child-centric and parental intent models, and examines the case law leading up to *Redmond*. Finally, Part V argues that a single standard for determining habitual residence is imperative to fulfill the fundamental goals of the Hague Convention. This note proposes that a hybrid subjective and objective standard focusing on which country a reasonable person in the situation would view as their habitual residence would most effectively adhere to both the spirit and the letter of the Hague Convention's stated purpose.

## **II. History and Purpose of the Hague Convention**

Adopted in 1980, the Hague Convention intends to prevent parents from fleeing internationally with their children in the hopes of receiving a favorable custody determination in a more amenable jurisdiction.<sup>22</sup> While at first glance one might assume that the Hague Convention, a treaty which includes terms like “abduction” and “force,” was composed as a response to concern regarding forceful kidnappings by strangers, that is far from the case.<sup>23</sup> On the contrary, it was drafted as a response to the unilateral and wrongful removal or retention of children by a parent, guardian, or other family member.<sup>24</sup> Those who seek to remove a child from one country to another in these situations often attempt to attain physical and legal care and custody over the child, usually related to them, in the new jurisdiction.<sup>25</sup>

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<sup>22</sup> Perez-Vera, *supra* note 7, at ¶ 11.

<sup>23</sup> See *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

<sup>24</sup> *Id.* at 1069–70.

<sup>25</sup> *Id.* at 1070.

Signatory states to the Hague Convention<sup>26</sup> commit to protect children from the deleterious effects of their wrongful removal or retention, which occur after they are displaced from the family and social environment in which they have developed.<sup>27</sup> Still, the Hague Convention is more than that. A primary objective of the Hague Convention is to maintain the existing state of affairs and allow the country with the greatest connection to the child to make decisions about the child's custodial arrangement and future.<sup>28</sup> When a court determines that a particular country is the child's habitual residence, the court should order that the child be immediately returned, unless certain exceptions apply.<sup>29</sup> The return of the child is not necessarily required if the petitioner was not actually exercising the custody rights at the time of removal or retention, if the petitioner consented to the removal or retention, if the child objects to being returned and has reached an age of maturity, or if returning the child to the country of habitual residence would pose a serious threat of physical or psychological harm to the child or violate human rights.<sup>30</sup> Thus, the determination of a child's habitual residence has a profound and enduring impact on the child.

### **III. Applying the Hague Convention: The Ambiguity of the Habitual Residence Factor**

In order for the return remedy to apply under the Hague Convention, a child's removal or retention must be found to be wrongful under the treaty. A showing of wrongful removal or retention hinges upon demonstrating two requirements.<sup>31</sup> Article 3 states in pertinent part:

[T]he removal or the retention of a child is to be considered wrongful where

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<sup>26</sup> *Hague Convention on Private International Law: Final Act*, 19 I.L.M. 1501 (1980).

<sup>27</sup> Perez-Vera, *supra* note 7, at ¶ 11.

<sup>28</sup> See *Abbott v. Abbott*, 560 U.S. 1, 20 (2010).

<sup>29</sup> *Hague Convention*, art. 13, 19 I.L.M. at 1501

<sup>30</sup> *Id.*

<sup>31</sup> *Hague Convention*, art. 3, 19 I.L.M. at 1501

- 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.<sup>32</sup>

As a caveat, Article 4 provides that the Hague Convention applies to a child who habitually resided in a signatory state immediately before any breach of custody or access rights, as long as the child is under the age of 16.<sup>33</sup>

Once it is clear that the Hague Convention is applicable to a particular situation, courts generally employ a four-part test to resolve the issues stemming from Article 3.<sup>34</sup> First, a court must ask when the removal or retention at issue took place.<sup>35</sup> Next, it should analyze the circumstances directly prior to the removal or retention to discern which country was the child's habitual residence.<sup>36</sup> After further examination to see whether "the removal or retention breach[ed] the rights of custody<sup>37</sup> attributed to the petitioner under the law of habitual residence,"<sup>38</sup> the court must decide whether the petitioner was "exercising those rights at the time of the removal or retention."<sup>39</sup> The crux of the problem lies in the second question of a Hague Convention analysis – determining the state of "habitual residence." The Hague Convention itself neither defines nor elaborates on the term "habitual residence." Minimal case law exists

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<sup>32</sup> *Hague Convention*, art. 3, 19 I.L.M. at 1501.

<sup>33</sup> *Hague Convention*, art. 4, 19 I.L.M. at 1501.

<sup>34</sup> See *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> An example of breaching custody rights would be if one parent sought sole custody over a child outside the habitual residence and thus disregarded the rights of the other parent, protected by law, and interfered with their normal exercise. See *Perez-Vera*, *supra* note 7, at ¶ 11.

<sup>38</sup> *Mozes*, 239 F.3d at 1070.

<sup>39</sup> *Id.*

regarding the interpretation of the Hague Convention, and cases that do address it fail to provide concrete guidance on the meaning of the term “habitual residence.”<sup>40</sup> As recognized in *Redmond*, the circuits are currently split regarding the appropriate standard to be used. This split has its roots in the disagreement over what factors should be considered in determining a child’s habitual residence, and the weight to be given to the parents’ and child’s perspectives. Because “[t]he Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court,”<sup>41</sup> the determination of habitual resident is essential.

#### **IV. The Variant Approaches of the Circuit Courts**

This part of the note will analyze the different approaches the circuits take in conducting habitual residence determinations. Generally, the Third, Sixth, and Eighth Circuits have shaped a standard that stresses the importance of focusing on the child’s perspective, while the Second and Ninth Circuits have formulated a standard that emphasizes the parents’ last shared intentions.

##### **A. The Third, Sixth, and Eighth Circuits: The Child’s Perspective**

The majority of the circuits tasked with interpreting the proper test for habitual residence under the Hague Convention have explicitly recognized the primacy of the child’s point of view. When determining which country is the child’s habitual residence, these circuits approach the inquiry by focusing on the child’s perspectives and past experience, and place significantly less weight on, and occasionally disregard, the parent’s intentions and future plans. These cases highlight the notion that focusing on the parents’ shared intent at the time the child was born

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<sup>40</sup> In *Abbott v. Abbott*, the Court looked at other countries’ interpretation of the Hague Convention, but noted that while Congress has instructed that a uniform interpretation is inherent in the Convention’s framework, the Court “should not substitute the judgment of other courts for our own.” *See Abbott v. Abbott*, 560 U.S. 1, 42 (2010). The Court also stated: “[W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” *Id.* (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

<sup>41</sup> *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).



sheds little light on the question of the child’s habitual residence at the time of the alleged wrongful removal, which often occurs years later.

The Sixth Circuit was the first federal appellate court to determine whether the unilateral removal of a child from one country to another by a parent was “wrongful.” In its 1993 decision *Friedrich v. Friedrich*, one of the earliest applications of the Hague Convention in the United States, the Sixth Circuit heard the case of Emanuel Friedrich, who appealed the denial of his petition for the return of his son, Thomas, to Germany.<sup>42</sup> Thomas’s mother, Jeana Friedrich, removed him from Germany to the United States days after the couple separated without either Emanuel’s knowledge or consent.<sup>43</sup>

Acknowledging that the Hague Convention fails to define “habitual residence,”<sup>44</sup> the court noted that no United States cases supplied guidance on the interpretation of habitual residence, and that minimal case law existed on the Hague Convention at all.<sup>45</sup> The Sixth Circuit posited that habitual residence should not be mistaken for domicile,<sup>46</sup> and formulated its own standard to determine the habitual residence, stating, “the court must focus on the child, not the parents, and examine past experience, not future intentions.”<sup>47</sup> The court explained that a child can have only one habitual residence, and it was imperative for courts to look back in time rather than forward.<sup>48</sup>

Because it is natural that a family may choose to relocate over the course of a child’s life, the Sixth Circuit elaborated on what should be considered when deciding whether a child’s

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<sup>42</sup> *Friedrich*, 983 F.2d at 1398.

<sup>43</sup> Thomas was 21 months old when Mr. Friedrich filed the action alleging that Mrs. Friedrich wrongfully removed him from Germany. *See id.*

<sup>44</sup> *Id.* at 1400.

<sup>45</sup> *Id.* at 1400–01.

<sup>46</sup> The court noted that while common law domicile is more of a technical term of art, habitual residence is a factual determination that looks to the individual facts and circumstances of each situation without relying on pre-suppositions. *See Id.* at 1401.

<sup>47</sup> *Id.*

<sup>48</sup> *Friedrich*, 983 F.2d at 1401.

habitual residence has changed.<sup>49</sup> The court asserted that habitual residence can only be modified by a change in geography and the passage of time, and not by changes in parental care and responsibility.<sup>50</sup> The court stressed that the requisite change in geography had to occur *before* the alleged unlawful removal in order to be given any effect.<sup>51</sup> To hold otherwise or to focus the inquiry solely on the parental perspective would enable parents to abduct their children and later characterize their wrongful removals as changes in habitual residence.<sup>52</sup> Such a standard would render the Hague Convention virtually meaningless.<sup>53</sup> As other circuits have noted, this idea highlights the court’s emphasis on the importance of the child’s point of view, clearly establishing that “the Sixth Circuit focuses on habitual residence from the child’s perspective, downplaying parental intent.”<sup>54</sup>

When applying its new standard to the facts of the case, the Sixth Circuit found that the factors listed by Mrs. Friedrich pertained to her plans for the future, and disregarded Thomas’s point of view.<sup>55</sup> Mrs. Friedrich argued that although Thomas’s ordinary residence was always in Germany, Thomas was a habitual resident of the United States because he possessed United States citizenship—the address for his United States documentation was listed as Ohio—and Mrs. Friedrich eventually intended to return, with Thomas, to the United States.<sup>56</sup> The court reasoned that it was erroneous to rely on factors that solely reflected the intention of Mrs. Friedrich, when it is the perspective of the *child* that is significant.<sup>57</sup> The court stated that even though Mrs. Friedrich established a connection between Thomas and the United States, and may

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<sup>49</sup> *Id.* at 1401–02.

<sup>50</sup> *Id.* at 1402.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Redmond*, 724 F.3d at 744.

<sup>55</sup> *Friedrich*, 983 F.2d at 1401.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

have intended for Thomas to move there at some point in the future, Thomas was born in and resided solely in Germany for his entire life.<sup>58</sup> Therefore, any future plans to reside in the United States were immaterial to the habitual residence inquiry.<sup>59</sup> Deeming it a “simple case,” the Sixth Circuit held that because Thomas was born in Germany and lived there for his entire life before his mother took him to the United States, Germany was Thomas’s habitual residence at the time of his removal. Consequently, the court ordered Thomas’s return to Germany for the resolution of the custody dispute under German law.<sup>60</sup>

In 1995, the Third Circuit faced the same issue of determining a standard for interpreting habitual residence in *Feder v. Evans-Feder*.<sup>61</sup> *Feder* involved Edward M. Feder and Melissa Ann Evans-Feder, two American citizens who met in Germany in 1987 and whose son, Evan, was born in Germany in 1990.<sup>62</sup> The family moved several times; first to Pennsylvania in 1990, then to Australia in January 1994.<sup>63</sup> Shortly thereafter, the couple’s relationship deteriorated.<sup>64</sup> Mrs. Feder decided she wanted to leave Mr. Feder and return to the United States with Evan, so she told Mr. Feder that she wished to take Evan to visit her parents in Pennsylvania.<sup>65</sup> On June 29, 1994, Mrs. Feder took Evan to the United States and never returned to Australia.<sup>66</sup> Mr. Feder alleged that Mrs. Feder had wrongfully retained their son in the United States and demanded that

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Pursuant to *Hague Convention*, art. 3, 19 I.L.M. at 1501, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child’s habitual residence.

<sup>61</sup> 63 F.3d 217 (3d Cir. 1995).

<sup>62</sup> *Id.* at 218.

<sup>63</sup> *Id.* at 219.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 219–20.

<sup>66</sup> *Id.* at 220.

Evan be returned to Australia.<sup>67</sup> The district court concluded that the United States was Evan's habitual residence.<sup>68</sup>

On appeal, the Third Circuit reversed, looking to the minimal precedent to hold that a child's habitual residence is where he or she has been physically present for a period of time sufficient for acclimatization and perceives a "degree of settled purpose."<sup>69</sup> The court further reasoned that when determining what satisfies this standard, the court must engage in an analysis focusing on the child and analyzing the child's circumstances, coupled with the parents' present, shared intentions.<sup>70</sup>

When applying this standard to the facts of the case, the Third Circuit concluded that Australia was Evan's habitual residence immediately prior to his removal to the United States by his mother.<sup>71</sup> Evan remained in Australia for close to six months prior to the removal, and the court viewed this as a meaningful amount of time for a four-year old child.<sup>72</sup> He attended pre-school in Australia and was enrolled in kindergarten for the coming year.<sup>73</sup>

The court noted that although Mr. and Mrs. Feder differed on their opinions regarding living in Australia, they still clearly set out to make a new home for themselves and their family there.<sup>74</sup> They bought a new house, pursued employment, and organized Evan's long-term schooling.<sup>75</sup> The court asserted that the fact that "Mrs. Feder 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. Feder had found

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<sup>67</sup> *Feder*, 63 F.3d at 220.

<sup>68</sup> *Id.* at 224.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Feder*, 63 F.3d at 224.

<sup>75</sup> *Id.*

work.”<sup>76</sup> This conclusion highlights the Third Circuit’s emphasis on the principles announced in *Friedrich* regarding the downplaying of parental intent and the concept that courts should look to the past rather than the future when attempting to ascertain habitual residence. The court deemed the fact that Mrs. Feder did not intend to remain in Australia irrelevant.<sup>77</sup> It was more important that Evan lived in Australia for the period leading up to his “removal,” rather than where Evan would live, or where Mrs. Feder *intended* Evan to live, in the future.

Although the *Feder* court’s analysis did consider the *parents’* actions, the crux of the inquiry still focused on the *child’s* perspective. While it gave more weight to the parent’s settled purpose than the Sixth Circuit did in *Friedrich*, the Third Circuit gave significantly more weight to Evan’s perspective, and concluded he was physically present for a sufficient amount of time to become acclimatized with his situation in Australia, thus achieving an adequate “degree of settled purpose” from his perspective.<sup>78</sup>

In explaining its holding, the appellate panel discussed its disagreement with the district court’s opinion which held that the United States was Evan’s habitual residence.<sup>79</sup> The Third Circuit found that the district court placed unnecessary emphasis on the fact that Evan had spent the majority of his life in the United States, and ignored the circumstances of his life in Australia leading up to the alleged wrongful removal.<sup>80</sup>

While *Feder* seems to conflict with the holding of *Friedrich*, in which the Sixth Circuit focused on the fact that the child spent his entire life in Germany, the cases can certainly be factually distinguished. While a child can only have one habitual residence at a particular instance, habitual residence can change over time depending on a family’s individual

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<sup>76</sup> *See Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

circumstance.<sup>81</sup> Habitual residence *can* be altered by change in geography, and when a child relocates, they re-start the “acclimatization” process.<sup>82</sup> Thus, what matters is not necessarily where the child spent the majority of his or her life, but rather, the last place in which the child spent enough time and would consider herself, from her perspective, settled in that place. While the Third and Sixth Circuits do not share an identical standard for determining habitual residence, they do share a commitment to placing significantly more weight on the child’s perspectives and the past, rather than the parent’s intentions and the future.

In 2010, the Eighth Circuit similarly struggled when determining the standard to apply when deciding a child’s habitual residence in *Barzilay v. Barzilay*.<sup>83</sup> Sagi Barzilay appealed from the district court’s dismissal of his petition claiming that his former wife, Tamar, unlawfully retained their three children in Missouri and sought an order compelling their relocation to Israel.<sup>84</sup> Sagi and Tamar were Israeli citizens who were married in Israel in 1994 and bore three children.<sup>85</sup> The oldest child, an Israeli citizen, was born in Israel and the other two children, holding dual American and Israeli citizenship, were born in Missouri.<sup>86</sup> In 2001, Sagi and Tamar obtained American work visas and moved from the Netherlands, where they had lived for approximately two years, to Missouri.<sup>87</sup> Tamar and the children had lived in Missouri since 2001 up until the court proceedings.<sup>88</sup> The oldest child had not lived in Israel since her early youth, and the other two children had never lived there.<sup>89</sup> The district court found that the

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<sup>81</sup> See *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010).

<sup>82</sup> *Id.*

<sup>83</sup> See *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010).

<sup>84</sup> *Id.* at 914.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Barzilay*, 600 F.3d at 914.

<sup>89</sup> *Id.* at 914–15.

children’s country of habitual residence was the United States because they had lived in Missouri for about five years prior to the commencement of the wrongful retention action.<sup>90</sup>

The Eighth Circuit articulated that the first step in Hague Convention cases is to determine when the alleged wrongful removal or retention took place, because in determining habitual residence, the significant time to analyze is immediately before the removal or retention.<sup>91</sup> The court then highlighted several factors set out by the district court which are relevant to the habitual residence inquiry including “the settled purpose of the move to the new country from the child’s perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country.”<sup>92</sup> The court elaborated on these elements, noting that the settled purpose does not mean that the individuals will stay in a new location forever, but the family must have a “sufficient degree of continuity to be properly described as settled.”<sup>93</sup> Moreover, the settled purpose should be discerned from the child’s perspective, although parental intent should also be considered.<sup>94</sup> The court reiterated the analysis of the district court and agreed with its conclusion that the children’s place of habitual residence was the United States.<sup>95</sup> The district court had found that, because two of the children lived in Missouri for their entire lives—the oldest had lived there for five years—and there was no suggestion in the record that the children had spent any considerable amount of time in another country, from the children’s perspective the “settled purpose of the family’s residence in Missouri was to remain there permanently.”<sup>96</sup> While noting that parental intent was ambiguous in this case, the district court decided that Sagi and Tamar had abandoned

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<sup>90</sup> *Id.* at 917–18.

<sup>91</sup> *Id.* at 918.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Barzilay*, 600 F.3d at 918.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

their previous habitual residence when they moved to Missouri and planned to remain there indefinitely.<sup>97</sup>

The Eighth Circuit affirmed the district court's decision and held that the children were sufficiently acclimatized to life in the United States.<sup>98</sup> The court explained that the oldest child was the only one who experienced a substantial change in geography, and by 2006 she had spent approximately five years—half of her life—in the United States.<sup>99</sup> Furthermore, the two younger children had lived in Missouri for their entire lives.<sup>100</sup> The court also gave considerable weight to the fact that the children attended school in United States, and had never attended to school in Israel.<sup>101</sup> The Eighth Circuit agreed that, under the Hague Convention, the children's country of habitual residence was the United States.<sup>102</sup> There was no evidence demonstrating that the children spent any meaningful amount of time outside of the United States since 2001, or that they had reason to believe that their home was a place other than Missouri.<sup>103</sup> In so holding, the Eighth Circuit focused on the children's perspective, giving considerable weight to which country the *children* would view as their home.

### **B. The Second and Ninth Circuits: The Parents' Shared Intent**

Although a majority of circuit courts that have addressed the issue have found that focusing on the child's perspective in habitual residence determinations most effectively fulfills the purpose of the Hague Convention, some courts have stressed the importance of focusing on the parents' perspective. These circuits apply a standard that solely examines the shared intentions of the parents or others entitled to fix the child's residence when determining which

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<sup>97</sup> *Barzilay*, 600 F.3d at 918.

<sup>98</sup> *Id.* at 919.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Barzilay*, 600 F.3d at 918.

<sup>103</sup> *Id.*



country is the child's habitual residence. These cases highlight the notion that focusing on the parents' shared intent is inevitable because children lack the wherewithal to decide where they want to reside.

The Ninth Circuit's decision in *Mozes v. Mozes* is the leading case that focuses on the parents' perspective in determining a child's habitual residence.<sup>104</sup> Arnon and Michal Mozes were Israeli citizens who were married in 1982 and had four children between the ages of seven and sixteen at the time of the disputed removal.<sup>105</sup> The family lived in Israel until 1997, when Michal and the children moved to Los Angeles, California, with Arnon's consent.<sup>106</sup> The parents agreed that the children would benefit from attending school in the United States, so Michal moved with the children to Beverly Hills, where she leased a home, bought automobiles and registered the children for school.<sup>107</sup> While Arnon and Michal conceded that Arnon agreed to have Michal and the children remain in the United States for fifteen months, they disagreed as to what arrangement existed beyond that.<sup>108</sup> A year after they settled in the United States, Michal sought dissolution of the marriage and custody of the children.<sup>109</sup> Arnon then filed a petition seeking to have the children returned to Israel, claiming that Michal wrongfully retained the children in the United States when she sought dissolution of the marriage and custody of the children.<sup>110</sup> The oldest child elected to return to Israel voluntarily<sup>111</sup>, and Arnon appealed the district court's denial of his petition with regard to the three other children.<sup>112</sup>

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<sup>104</sup> *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

<sup>105</sup> *Mozes*, 239 F.3d at 1069.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> "The oldest child elected to return to Israel, and did so by mutual agreement of the parents." *See Mozes*, 239 F.3d at 1069.

<sup>112</sup> *Mozes*, 239 F.3d at 1069.

The court posed the question of whose settled intention dictates whether a *child* has deserted a prior habitual residence, and asserted that while the intuitive answer would be the child, this approach is flawed.<sup>113</sup> The court asserted that there is an “obvious problem” with focusing on the child’s perspective and disregarding parental intent.<sup>114</sup> The court noted that children often lack the wherewithal to determine where they will reside.<sup>115</sup> The court thus concluded that “the intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child’s residence.”<sup>116</sup> When parents jointly plan to raise a child in a place and live there, that place becomes the child’s habitual residence.<sup>117</sup> The court determined that a child’s country of habitual residence could ultimately change if the parents mutually decide to abandon one habitual residence in favor of another.<sup>118</sup> However, the unilateral intention of only one parent is insufficient to establish a new habitual residence for a child.<sup>119</sup>

The court explained that even though children can be exceptionally adaptable and form strong attachments in short periods of time, it does not necessarily follow that the child expects or intends those relationships to last.<sup>120</sup> The court further reasoned that children may participate in activities of daily life and still retain awareness that they have another life to go back to.<sup>121</sup> The Ninth Circuit asserted that appropriate inquiry was not solely whether the children had become settled in the United States, but whether the United States had replaced Israel as the

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<sup>113</sup> *Id.* at 1076.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1075–77.

<sup>118</sup> *Mozes*, 239 F.3d at 1075–77.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1079.

<sup>121</sup> *Id.*

center of the children’s familial and social development.”<sup>122</sup> Because the district court failed to answer this question, the Ninth Circuit remanded the case.<sup>123</sup>

It is important to note that the court acknowledged that a difficulty arises “when the persons entitled to fix the child’s residence no longer agree on where it has been fixed.”<sup>124</sup> Thus, the court, which focused on the parents’ intent, implicitly recognized a significant flaw in its own analysis. The court attempted to address this issue by dividing these situations into three categories.<sup>125</sup> The first includes cases where the family demonstrated a settled purpose to alter habitual residence even though one parent had reservations about the move.<sup>126</sup> The court stated that in these situations, one parent’s qualms about moving would not prevent a finding of a shared and settled purpose.<sup>127</sup> The second category includes cases where the child’s move from an established habitual residence was intended to be only for a limited period.<sup>128</sup> The court noted that in these situations, the changed intentions of one parent does not lead to an alteration of the child’s habitual residence.<sup>129</sup> The third category consists of cases where the petitioning parent had previously agreed to let the child remain abroad for an uncertain duration.<sup>130</sup> The court stated that sometimes the court will infer a mutual abandonment of the child’s previous habitual resident, and sometimes the court will not be able to recognize a settled mutual intent from which abandonment can be presumed.<sup>131</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *Mozes*, 239 F.3d at 1084.

<sup>124</sup> *Id.* at 1076.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1077.

<sup>129</sup> *Mozes*, 239 F.3d at 1077.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

*Gitter v. Gitter*,<sup>132</sup> out of the Second Circuit, also formulated a habitual residence standard emphasizing a focus on the parents' intentions. *Gitter* involved two individuals born in Israel, who later met in New York, married, and had a son, Eden.<sup>133</sup> After Eden's birth, Mr. Gitter wanted to move to Israel, and although Mrs. Gitter was hesitant, she was ultimately convinced.<sup>134</sup> About a year after the family had moved, Mrs. Gitter took their son on a trip to New York and never returned to Israel.<sup>135</sup> Mr. Gitter filed a petition seeking Eden's return to Israel under the Hague Convention.<sup>136</sup>

In reviewing Mr. Gitter's petition, the Second Circuit was greatly influenced by the Ninth Circuit's decision in *Mozes*. The court reiterated the "importance of intentions (normally the shared intentions of the parents or others entitled to fix the child's residence) in determining a child's habitual residence."<sup>137</sup> The court elaborated on the Ninth Circuit's reasoning that merely observing the child's behavior was a defective approach because it may produce remarkably different results depending on the time frame.<sup>138</sup> For these reasons, the court concluded that it would specifically focus on the intent of those entitled to decide the place of the child's residence, which are likely to be the parents.<sup>139</sup>

When examining the pertinent facts, the Second Circuit looked to whether Mr. and Mrs. Gitter shared the intent that Israel would remain Eden's habitual residence.<sup>140</sup> The court agreed with the district court in finding that Mr. and Mrs. Gitter only agreed to move to Israel on a

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<sup>132</sup> 396 F.3d 124 (2d Cir. 2005).

<sup>133</sup> *Id.* at 128.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> The district court concluded that Eden's habitual residence remained the United States throughout the Gitters' stay in Israel. *Id.* at 131.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 132 (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001)).

<sup>139</sup> *Gitter*, 396 F.3d at 132.

<sup>140</sup> *Id.* at 135.

conditional basis.<sup>141</sup> Concluding that Mr. and Mrs. Gitter did not intend for Israel to be Eden's habitual residence, and taking into account the fact that the district court was unaware of the proper legal standard, the court remanded the case so that the district court could view the facts in light of the opinion.<sup>142</sup>

The Second Circuit acknowledged that because the Hague Convention is focused on the habitual residence of the *child*, it would appear logical to focus on the *child's* intentions.<sup>143</sup> However, weary of the fact that young children often lack the capacity to decide where they will reside, the court followed *Mozes* and agreed "it is more useful to focus on the intent of the child's parents or others who may fix the child's residence."<sup>144</sup>

*Redmond v. Redmond*, one of the most recent cases addressing the standard for determining habitual residence, recognized the magnitude of the circuit split regarding the standard that should be used in determining habitual residence.<sup>145</sup> The court did not follow any of the other circuits' approaches, and noted that it was imprudent to set the relative weights of parental intent and the child's perspective in stone.<sup>146</sup> The court posited, "the habitual residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions."<sup>147</sup> The Seventh Circuit failed to set forth a structured standard, and did not resolve how to balance the parents' and child's perspectives, inadvertently deepening the divide.

## **Part V: Eliminating the Divide: A Hybrid Subjective and Objective Reasonable Person Standard Focusing on the Child's Perspective**

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 132.

<sup>144</sup> *Id.*

<sup>145</sup> *Redmond*, 724 F.3d at 744.

<sup>146</sup> *Id.* at 746.

<sup>147</sup> *Id.*

This part argues that it is necessary for courts to follow a uniform approach when deciding a child's habitual residence, focusing on the perspective of the child rather than the parents, and examining past experiences rather than future intentions. It proposes a hybrid subjective and objective standard concentrating on which country a reasonable person in the particular situation would view as his or her country of habitual residence. The federal circuit courts remain divided regarding what the standard for determining habitual residence should be. While the Third, Sixth, and Eighth Circuits have shaped a standard that focuses on the child's perspective, the Second and Ninth Circuits have formulated a standard that emphasizes the parents' last shared intentions.<sup>148</sup> Congress itself has emphasized "the need for uniform international interpretation of the Convention."<sup>149</sup>

It is vitally important for the Supreme Court to step in to resolve the existing split and provide a uniform standard. Clarity and uniformity is particularly essential when dealing with jurisdictional and international disputes.<sup>150</sup> The Hague Convention is designed to address international adjudications by foreign nations that inherently possess materially dissimilar legal, cultural, and social systems. These grave differences demonstrate that a fixed standard is necessary to properly regulate enforcement. Lack of consistency also complicates the enforcement process by decreasing the certainty of the outcome and becoming an unnecessarily lengthy process, which can be detrimental to the child involved.<sup>151</sup>

Courts are inconsistently enforcing individuals' rights due to the variation of habitual residence standards employed within the federal circuits. The Ninth Circuit holds that courts

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<sup>148</sup> See *supra* Part IV.

<sup>149</sup> *International Child Abduction Remedies: The Public Health and Welfare*, 42 U.S.C. § 11601(b)(3)(B).

<sup>150</sup> The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and Parental Kidnapping Prevention Act (PKPA) are acts that "provide uniformity of law, necessary in a time when the mobility of the American public makes it imperative to have laws regarding child custody determinations uniform from state to state." See <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCCJEA>

<sup>151</sup> See <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCCJEA>

should focus on the parents' shared intent because children lack the wherewithal to decide where they want to reside.<sup>152</sup> However, this approach is flawed because parents often disagree as to their last shared intent in Hague Convention cases, leaving the courts with an ill-suited standard. The Third Circuit holds 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."<sup>153</sup> Nevertheless, case law has failed to determine what exactly is an appropriate amount of time sufficient for acclimatization.<sup>154</sup> The Eighth Circuit characterizes its habitual residence test as the location where a family possesses "a sufficient degree of continuity to be properly described as settled."<sup>155</sup> However, there is a shortage of guidance regarding what constitutes a "sufficient degree." These inconsistencies further strengthen the necessity for a uniform standard.

The goal of the Hague Convention is to maintain the status quo as well as protect the best interests of the child.<sup>156</sup> What a parent may have "hoped" for a child is irrelevant to what the child actually experienced. Because the Hague Convention is concerned with a *child's* habitual residence, it is only logical that the child's perspective of habitual residence should be the only perspective considered. This standard most closely relates to the principles set forth by the Sixth Circuit in *Friedrich*, which found that "to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."<sup>157</sup> Ordering a return remedy under the Hague Convention enables the courts of the home country to determine what is in the *child's* best interests, and should focus on the *child's* experience and perspective.

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<sup>152</sup> *Mozes*, 239 F.3d at 1069.

<sup>153</sup> *Feder*, 63 F.3d at 224.

<sup>154</sup> *Id.* at 224.

<sup>155</sup> *Barzilay*, 600 F.3d at 918.

<sup>156</sup> *Friedrich*, 983 F.2d at 1400.

<sup>157</sup> *Id.* at 1401.

An appropriate approach would be a hybrid subjective and objective standard focusing on which country a reasonable person in the situation would view as their country of habitual residence. This subjective component will enable a court to consider the child's age, capacity, and maturity, and the objective component will allow a court to consider a child's perspective, from a reasonable person in that situation's point of view.<sup>158</sup> A child who spends their entire life in country A and never lived in country B would likely view country A as their habitual residence. In this situation, even if a parents intended for country B to be the child's habitual residence, it would undeniably serve the best interests of the child to remain in country A.<sup>159</sup> This standard is reconcilable with *Friedrich*, emphasizing both the child's perspective and past experiences. It is imperative that courts focus on what the child actually experienced, rather than what the parents intended for the child to experience because it is the most efficient way to satisfy the goals of the Hague Convention, which aims to protect the best interests of the *child*.<sup>160</sup>

The Second and Ninth Circuits<sup>161</sup> misconstrue the standard set out by those courts that emphasize the child-centric approach. The courts that focus on the child's perspective do not suggest that in order to determine habitual residence courts must look at where the child perceived he or she would reside in the future. Rather, these courts analyze, from the child's point of view, the place in which they spent considerable time *before* the alleged wrongful

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<sup>158</sup> This hybrid standard has been used in the context of child tortfeasors. Courts subjectively examine the child's age, intelligence, and experience while objectively examining what is expected of an ordinary child of a particular age in a particular situation. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10 (a) (2010). (the conduct of a child is compared to that of a reasonable child of the same age, intelligence, and experience).

<sup>159</sup> Clearly intact families move all the time without regard for their child's perspectives. However, this proposed standard is more concerned with whether the child actually felt established in a particular place, rather than whether the child intended for this place to be his or her habitual residence.

<sup>160</sup> *Abbott v. Abbott*, 560 U.S. 1, 46 (2010).

<sup>161</sup> *See Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).



removal and would consider themselves settled.<sup>162</sup> The Second and Ninth Circuits mistakenly focus on future intentions rather than past reality. When a couple first has a child, they can intend to raise that child in any place they choose. However, when determining habitual residence, this intent is irrelevant if the child establishes a settled lifestyle in a completely different place. The Second and Ninth Circuit cases illustrate that focusing on the parents' last shared intent leads to inconsistent outcomes and do not enable courts to make decisions in the best interests of the child.

The Ninth Circuit<sup>163</sup> alleges that children lack the wherewithal to decide where they *will* reside, but this claim is misguided. The habitual residence inquiry is more concerned with where a child has been in the past, and where they were settled leading up the alleged wrongful removal. The proposed standard can apply to very young children without any problem, and the way in which the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) defines “home state” is particularly instructive when determining a child’s habitual residence under the Hague Convention. The UCCJEA is a Uniform Act drafted by the National Conference of Commissioners on Uniform State Laws in 1997.<sup>164</sup> The UCCJEA was drafted to achieve uniformity in state laws regarding jurisdiction and custody matters in order to avoid disputes between competing jurisdictions.<sup>165</sup> The UCCJEA’s primary purpose is to vest “exclusive and continuing jurisdiction” for child custody litigation in the courts of the child’s “home state.”<sup>166</sup>

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<sup>162</sup> See *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010).

<sup>163</sup> *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001).

<sup>164</sup> *Stephens v. Fourth Judicial Dist. Court*, 331 Mont. 40, 42 (2006).

<sup>165</sup> The UCCJEA has been adopted by 49 states, the District of Columbia, Guam, and the U.S. Virgin Islands. See <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act>

<sup>166</sup> Annotation, *Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act* (2002), 100 A.L.R.5th 1, 20, Section 2 [b].

The UCCJEA and the Hague Convention are comparable because both “provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed,” and do so from the child’s perspective.<sup>167</sup> The UCCJEA defines “home state” as the state where the child has lived with a parent for six continuous months prior to the commencement of the proceeding, or since birth for children younger than six months.<sup>168</sup> If the child has not lived in any state for at least six consecutive months, the court will look to see which state has “significant connections” with the child and at least one parent *and* “substantial evidence concerning the child’s care, protection, training, and personal relationships.”<sup>169</sup> Once a court has selected an appropriate “home state,” that state may assume child-custody jurisdiction.<sup>170</sup> The “home state” determination thus focuses on the child and where they have spent the majority of his or her life, rather than any shared intention the parents may have had. It is clear that the home state determination is an approach from the child’s perspective, specifically because the state must have significant connections with the child and at least one parent—but not both parents. Additionally, the court applying the UCCJEA is interested in the substantial evidence regarding the *child’s* “care, protection, training, and personal relationships” rather than the parental intent for any of these factors. The UCCJEA’s determination of home state suggests that the child’s perspective, regardless of age, trumps parental intent, and that past experiences take precedence over future intentions.

In *Delvoye v. Lee*,<sup>171</sup> the Third Circuit addressed the Ninth Circuit’s claim that a child-centric approach is problematic because young children are not capable of possessing a

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<sup>167</sup> *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir.2005).

<sup>168</sup> *Wagner v. Wagner*, 887 A.2d 282, 287 (Pa. Super. Ct. 2005).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> 329 F.3d 330 (3d Cir. 2003).

perspective. The case involved a habitual residence determination for a 2-month-old baby.<sup>172</sup> The court noted that an infant's habitual residence is not necessarily the habitual residence of the parents, and emphasized that a young child "will normally have no habitual residence until living in a country on a footing of some stability."<sup>173</sup> What this demonstrates is that even for the youngest children, habitual residence must be viewed from the child's perspective.<sup>174</sup> Focusing on the parents in any capacity is insufficient to deem that place the child's habitual residence because courts must look at the circumstances of the child to determine the country that served as the focal point of the child's lifestyle and social development, even if that consists of a short period of time. The Third and Eighth Circuits have stated that in no way does an infant's habitual residence automatically become that of its mother.<sup>175</sup> It would be inconsistent with the Hague Convention to derive a child's habitual residence from its mother, because it would "create an impermissible presumption that the child's habitual residence is wherever the mother happens to be."<sup>176</sup>

This proposed standard focusing on the child is further bolstered by several inherent weaknesses of any approach focusing on parental intent. In *Gitter* the Second Circuit stated: "In the easy case, the parents (or others entitled to determine the child's residence) will agree on where the child's habitual residence is fixed, and we are likely to conclude that the child's habitual residence is as intended."<sup>177</sup> However, at the same time the court recognized that "in nearly all of the cases that arise under the Convention, however, the parents have come to

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<sup>172</sup> *Id.* at 333.

<sup>173</sup> *Id.*

<sup>174</sup> See *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2003). (noting that although the child was only 8 months old, habitual residence should be determined from the *child's* perspective).

<sup>175</sup> See *Delvoe*, 329 F.3d at 333; *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir.1995).

<sup>176</sup> *Nunez-Escudero*, 58 F.3d at 379.

<sup>177</sup> *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005).

disagree as to the place of the child's habitual residence.<sup>178</sup> This explicit acknowledgement of the tension inherent in its own approach demonstrates the significant problem, at the outset, with focusing on parental intent because there is most likely a disagreement over which country the parents intended as the child's habitual residence. Another unavoidable flaw in following the Second and Ninth Circuit's approach is that an emphasis on shared parental intent does not work when the parents are estranged essentially from the outset.<sup>179</sup> The majority of Hague Convention cases involve parents who are estranged.<sup>180</sup> An obvious problem in such disputes is that the parents often possess different intentions for the habitual residence of their child in common. These inconsistent solutions to various situations demonstrate that focusing on the parent's last shared intent is not an effective method because it proves to be erratic and unpredictable.

## **VI. Conclusion**

Since the adoption of The Hague Convention on the Civil Aspects of International Child Abduction in 1980, courts have struggled to set forth a standard to determine a child's habitual residence. Lack of guidance from the Hague Convention itself has forced the federal circuit courts to shape their own standards, leading to erratic application of the Hague Convention and unpredictable outcomes in the respective proceedings. The Third, Sixth, and Eighth Circuits have constructed a standard that focuses on the child's perspective while the Second and Ninth Circuits have formulated a standard that emphasizes the parents' last shared intentions. In a Hague Convention proceeding, courts should conduct a hybrid subjective and objective reasonable person test focusing solely on the child's perspective, which looks to past experience. Any analysis to the contrary—which focuses on parents' shared intent—is flawed in numerous significant ways. Hague Convention proceedings primarily arise when parents no longer agree

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<sup>178</sup> *Id.*

<sup>179</sup> *See Redmond*, 724 F.3d at 747; *Kijowska v. Haines*, 463 F.3d 583, 587 (7th Cir. 2006).

<sup>180</sup> *Redmond*, 724 F.3d at 747.

on the child's habitual residence. Additionally, Hague Convention cases often involve estranged parents. To focus on the perspectives of people involved in this sort of dynamic is ineffective and disadvantageous. It is unfitting to focus on the parents' perspective when it is the *child's* habitual residence that must be determined. A uniform standard is imperative in order for the Hague Convention's purposes to be properly fulfilled, and courts should adopt a hybrid subjective and objective reasonable person standard focusing on the child's perspective and past experience.