

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

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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

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snatching is a widespread problem wreaking havoc on the law.¹ The Hague Convention on the Civil Aspects of International Child Abduction² (“Hague Convention”)³ provides for the immediate return of children who are unlawfully removed from their country of habitual residence.⁴ The signatory countries drafted the Hague Convention as a response to the problem of estranged parents wrongfully taking children across international borders from one signatory nation to another, and provides for the child’s prompt return to the appropriate forum.⁵ Under Article 12, when a child who is a habitual resident of one signatory state is unlawfully removed to another signatory state, the latter must order the return of the child.⁶

Nevertheless, while aiming to provide a standard for quickly and efficiently returning the child to his or her country of habitual residence, the Hague Convention has proven to be an impediment, rather than a solution, to the problem. As a result, there is a deep-rooted circuit split, since the federal circuit courts have been left to formulate their own standards. 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 focused on the parents’ last shared subjective intentions to determine the child’s habitual residence.⁷

¹ See U.S. DEPT. OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION - STATISTICS, available at <http://travel.state.gov/content/childabduction/english/legal/compliance/statistics.html> (providing statistics that reflect the number of international parental abduction cases reported to the United States Central Authority in 2012).

² See *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Members of the Organisation*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, available at http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24 (providing a list of the contracting states to the Hague Convention on the Civil Aspects of International Child Abduction).

³ Hague Convention on Private International Law, Oct. 25, 1980, 19 I.L.M. 1501 [hereinafter *Hague Convention*].

⁴ While the Hague Convention does not define “habitual residence,” 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).

⁵ See *Redmond v. Redmond*, 724 F.3d 729, 737 (7th Cir. 2013)(finding that 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.”)

⁶ See *Convention of the Civil Aspects of International Child Abduction, Explanatory Report by Elisa Perez-Vera* [Perez-Vera Report], ¶¶ 11, 13, & 16 (Vol. III), (1980), available at http://www.haguejudicialresources.org/Hague_Judicial_Resources/Perez-VeraReport.html.

⁷ Compare *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010), *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995), and *Friedrich v. Friedrich*, 983 F.2d 1396, 1400

In its recent decision in *Redmond v. Redmond*, the Seventh Circuit illustrated how sharply divided the circuits are regarding the proper standard to determine habitual residence.⁸ *Redmond* involved a father who filed a Hague Convention petition⁹ claiming that the mother wrongfully retained their child in the United States.¹⁰ Although the parents had initially agreed to raise their son in Ireland, the Seventh Circuit held that, for purposes of the Hague Convention, his habitual residence was Illinois.¹¹ The court explained that the child was born in Illinois, and with the exception of seven months during his infancy, he lived there, maintained frequent contact with family members there, received recurrent care from Illinois doctors, attended school, and established many friendships in the area.¹² In doing so, the Seventh Circuit reversed the district court's holding that Ireland was the child's habitual residence,¹³ finding the district court's decision problematic because it considered the parents' "last shared intent" about where the child would live as a dispositive factor.¹⁴ According to the Seventh Circuit, 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.¹⁵

In its analysis, the Seventh Circuit acknowledged a split between the circuits that follow a standard that focuses on the parents' perspectives, and "those that use a more child-centric approach."¹⁶ The court asserted, "in substance, all circuits—ours included—consider *both* parental intent and the child's acclimatization, differing only in their emphasis."¹⁷ The decision in *Redmond* appropriately illustrates the current problem, because it demonstrates that the essence of the disagreement between the circuits

(6th Cir. 1993), *with Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005), *and Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

⁸ *Redmond v. Redmond*, 724 F.3d 729, 744 (7th Cir. 2013).

⁹ 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. *See* U.S. DEPT. OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION—FILING A HAGUE APPLICATION, *available at* <http://www.travel.state.gov/content/childabduction/english/from/hague-app.html>.

¹⁰ *Redmond*, 724 F.3d at 731.

¹¹ *Id.* at 732.

¹² *Id.* at 743.

¹³ *Id.* at 732.

¹⁴ *Id.* at 744.

¹⁵ *Id.*

¹⁶ *Redmond*, 724 F.3d at 745.

¹⁷ *Id.* at 746.

is how much weight to give parental intent as opposed to the child's perspective.¹⁸

The Hague Convention provides a legal process for countries to work together on international parental child abduction cases.¹⁹ In order for the Hague Convention to apply, the child must have been *habitually resident* in one signatory country, and wrongfully removed to, or retained in, another signatory country.²⁰ Courts in the child's habitual residence are in the best position to make custody determinations, and therefore, it is a priority to ensure that they return there. Thus, the establishment of habitual residence is a critical threshold determination in Hague Convention proceedings. This Comment argues that courts should adopt a hybrid subjective and objective reasonable person standard that focuses on the child's perspective and past experience. Such a standard would most effectively adhere to both the spirit and letter of the Hague Convention's stated purpose. Part II of this Comment 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 unified standard for determining habitual residence is imperative to fulfill the fundamental goals of the Hague Convention.

II. THE HISTORY AND PURPOSE OF THE HAGUE CONVENTION

Adopted in 1980, the Hague Convention intended to prevent parents from fleeing internationally with their children in the hopes of receiving a favorable custody determination in a more amenable jurisdiction.²¹ One might assume that by including terms like "abduction" and "force," the drafters composed the treaty as a response to concern regarding forceful kidnappings by strangers.²² On the contrary, the drafters composed the treaty as a response to the unilateral and wrongful removal or retention of children by a parent, guardian, or other family member.²³

¹⁸ *Id.*

¹⁹ See generally, *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010); *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993); *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

²⁰ See Perez-Vera Report, *supra* note 6, at ¶ 11.

²¹ See Perez-Vera Report, *supra* note 6, at ¶ 11.

²² *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

²³ *Id.* at 1069–70.

Signatory states to the Hague Convention commit to protect children from the deleterious effects of a child's wrongful removal or retention, which occur after those children are displaced from the family and social environment in which they have developed.²⁴ Still, the Hague Convention is more than that. A primary objective of the Hague Convention is to maintain the existing state of affairs and to allow the country with the greatest connection to a child to make decisions about that child's custodial arrangement and future.²⁵ When a court determines that a particular country is the child's habitual residence, that court should order the child's immediate return, unless certain exceptions apply.²⁶ Nevertheless, this return is not necessarily required: (1) if the individual claiming wrongful removal was not actually exercising their custody rights at the time of removal or retention or consented to the removal or retention; (2) if the child objects to being returned and has reached an age of maturity; or (3) 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.²⁷ Thus, the determination of 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.²⁸ A showing of wrongful removal or retention hinges upon demonstrating two requirements.²⁹ Article 3 states, in pertinent part:

[T]he removal or the retention of a child is to be considered 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.³⁰

²⁴ See Perez-Vera Report, *supra* note 6, at ¶ 11.

²⁵ *Abbott v. Abbott*, 560 U.S. 1, 20 (2010).

²⁶ Hague Convention, *supra* note 3, art. 13.

²⁷ Hague Convention, *supra* note 3, art. 13.

²⁸ Hague Convention, *supra* note 3, art. 13.

²⁹ Hague Convention, *supra* note 3, art. 3.

³⁰ Hague Convention, *supra* note 3, art. 3.

Moreover, 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 sixteen.³¹

Once it is clear that the Hague Convention is applicable in a particular situation, courts generally employ a four-part test to resolve the issues stemming from Article 3.³² First, a court must ask when the removal or retention at issue took place.³³ Next, it should analyze the circumstances directly prior to the removal or retention to discern which country was the child's habitual residence.³⁴ After further examination to see whether "the removal or retention breach[ed] the rights of custody³⁵ attributed to the petitioner under the law of habitual residence," a court must finally decide whether the petitioner was "exercising those rights at the time of the removal or retention."³⁶

The crux of the problem lies in the second question of the Hague Convention analysis – determining the state of "habitual residence" – as the Hague Convention itself neither defines nor elaborates on the term.³⁷ Furthermore, minimal case law exists regarding the interpretation of the Hague Convention, and the cases that do address the term, fail to provide concrete guidance on the meaning of "habitual residence."³⁸

IV. THE VARIANT APPROACHES OF THE CIRCUIT COURTS

As recognized in *Redmond*, the circuits are currently split regarding the appropriate standard to be used.³⁹ This split has its roots in the disagreement over what factors the courts should consider in determining

³¹ Hague Convention, *supra* note 3, art. 4.

³² *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001).

³³ *Id.*

³⁴ *Id.*

³⁵ 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 6, at ¶ 11.

³⁶ *Mozes*, 239 F.3d at 1070.

³⁷ *See Abbott v. Abbott*, 560 U.S. 1, 42 (2010)(exploring other countries' interpretation of the Hague Convention, but noting 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 also id.* (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998))(stating that "while 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.").

³⁸ *Id.*

³⁹ *Redmond v. Redmond*, 724 F.3d 729, 744 (7th Cir. 2013).

a child's habitual residence, and the weight to give 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," the determination of habitual resident is essential.⁴⁰ 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.⁴¹ 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 parents' intentions and future plans.⁴² These cases highlight the notion that focusing on the parents' shared intent at the time the child was born 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.⁴³

The Sixth Circuit was the first federal appellate court to determine whether a parent's unilateral removal of a child from one country to another was "wrongful."⁴⁴ In its 1993 decision *Friedrich v. Friedrich*, the court engaged in one of the earliest applications of the Hague Convention in the United States.⁴⁵ The Sixth Circuit heard the case of Mr. Friedrich, who appealed the denial of his petition for the return of his son, Thomas, to Germany.⁴⁶ Thomas was twenty-one months old at the time of the petition, which alleged that Thomas's mother had removed him from Germany to the United States days after the couple separated, without Mr. Friedrich's knowledge or consent.⁴⁷

⁴⁰ *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

⁴¹ See, e.g., *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

⁴² *Friedrich*, 983 F.2d at 1401.

⁴³ See, e.g., *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

⁴⁴ *Id.* at 1398.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Acknowledging that the Hague Convention fails to define “habitual residence,”⁴⁸ the Sixth Circuit further 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.⁴⁹ The court posited that habitual residence should not be mistaken for domicile,⁵⁰ 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.”⁵¹ 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.⁵²

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 habitual residence has changed.⁵³ The court asserted that habitual residence could only be modified by a change in geography and the passage of time, and not by changes in parental care and responsibility.⁵⁴ The court stressed that the requisite change in geography had to occur *before* the alleged unlawful removal in order to be given any effect.⁵⁵ 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.⁵⁶ Such a standard would render the Hague Convention virtually meaningless.⁵⁷ As other circuits have noted, this idea highlights the court’s tendency to emphasize the importance of the child’s point of view and downplay parental intent.⁵⁸

When applying its new standard to the facts of the case, the Sixth Circuit found that Mrs. Friedrich’s focus on her future plans disregarded Thomas’s point of view.⁵⁹ 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—his United States documentation listed his address as Ohio—

⁴⁸ *Id.* at 1400.

⁴⁹ *Id.* at 1400–01.

⁵⁰ *See Friedrich*, 983 F.2d at 1401 (noting 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).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1401–02.

⁵⁴ *Id.* at 1402.

⁵⁵ *Id.*

⁵⁶ *Friedrich*, 983 F.2d at 1402.

⁵⁷ *Id.*

⁵⁸ *Redmond*, 724 F.3d at 744.

⁵⁹ *Friedrich*, 983 F.2d at 1401.

and because she eventually intended to return, with Thomas, to the United States.⁶⁰ 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.⁶¹ The court stated that even though Mrs. Friedrich established a connection between Thomas and the United States, and may 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.⁶² Therefore, any future plans to reside in the United States were immaterial to the habitual residence inquiry.⁶³ Deeming it a “simple case,” the Sixth Circuit ultimately held that Germany was Thomas’s habitual residence at the time of his removal.⁶⁴ Consequently, the court ordered Thomas’s return to Germany for the resolution of the custody dispute under German law.⁶⁵

In 1995, the Third Circuit faced the same issue of determining a standard for interpreting habitual residence in *Feder v. Evans-Feder*.⁶⁶ *Feder* involved two American citizens who met in Germany in 1987 and whose son, Evan, was born in Germany in 1990.⁶⁷ The family moved several times; first to Pennsylvania in 1990, then to Australia in January 1994.⁶⁸ Shortly thereafter, the couple’s relationship deteriorated.⁶⁹ Mrs. Feder decided that she wanted to leave Mr. Feder and return to the United States with Evan, telling Mr. Feder that she wished to take Evan to visit her parents in Pennsylvania.⁷⁰ On June 29, 1994, Mrs. Feder took Evan to the United States, but neither she, nor Evan, ever returned to Australia.⁷¹ In his petition, Mr. Feder alleged that Mrs. Feder had wrongfully retained their son in the United States, and demanded Evan’s return to Australia.⁷² The district court concluded that the United States was Evan’s habitual residence.⁷³

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1402.

⁶⁵ See Hague Convention, *supra* note 3, art. 3 (explaining that 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).

⁶⁶ 63 F.3d 217 (3d Cir. 1995).

⁶⁷ *Id.* at 218.

⁶⁸ *Id.* at 219.

⁶⁹ *Id.*

⁷⁰ *Id.* at 219–20.

⁷¹ *Id.* at 220.

⁷² *Feder*, 63 F.3d at 220.

⁷³ *Id.* at 224.

On appeal, the Third Circuit reversed, holding 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."⁷⁴ The court further reasoned that, when determining what satisfies this standard, a court must engage in an analysis focusing on the child and analyzing the child's circumstances, coupled with the parents' present, shared intentions.⁷⁵ 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.⁷⁶ 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.⁷⁷ The court also found the fact that Evan had attended preschool in Australia and enrolled in kindergarten for the coming year persuasive.⁷⁸

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.⁷⁹ They bought a new house, pursued employment, and organized Evan's long-term schooling.⁸⁰ 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 work."⁸¹ This conclusion highlights the Third Circuit's emphasis on the principles announced in *Friedrich*, downplaying parental intent and looking to the past rather than the future when attempting to ascertain habitual residence.⁸² The court deemed the fact that Mrs. Feder did not intend to remain in Australia irrelevant.⁸³ The fact that Evan lived in Australia for the period leading up to his "removal" was more important than where Mrs. Feder *intended* Evan to live in the future.⁸⁴

Although the *Feder* court's analysis considered the *parents'* actions, the crux of the inquiry still focused on the *child's* perspective. Furthermore, while it gave more attention to the parents' settled purpose

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Feder*, 63 F.3d at 224.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

than the Sixth Circuit did in *Friedrich*, the Third Circuit also gave significantly more weight to Evan's perspective, concluding that he was physically present for a sufficient amount of time to become acclimatized with his situation in Australia, achieving an adequate "degree of settled purpose" from his perspective.⁸⁵ Thus, 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, ignoring the circumstances of his life in Australia leading up to the alleged wrongful removal.⁸⁶

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 are factually distinguishable. Even though a child can only have one habitual residence at a particular point in time, habitual residence can change over time depending on a family's individual circumstances.⁸⁷ Habitual residence *can* be altered by change in geography, and when a child relocates, they re-start the "acclimatization" process.⁸⁸ 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.⁸⁹ 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 past residency, rather than the parents' intentions and the future.⁹⁰

In 2010, the Eighth Circuit similarly struggled when determining the standard to apply when deciding a child's habitual residence in *Barzilay v. Barzilay*.⁹¹ Mr. Barzilay appealed from the district court's dismissal of his petition claiming that his former wife unlawfully retained their three children in Missouri, and sought an order compelling their relocation to Israel.⁹² Mr. and Mrs. Barzilay were Israeli citizens who married in Israel in 1994 and had three children.⁹³ The oldest child, an Israeli citizen, was born in Israel, while the other two children, holding dual American and Israeli citizenship, were born in Missouri.⁹⁴ In 2001, Mr. and Mrs.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010).

⁸⁸ *Id.*

⁸⁹ *Feder*, 63 F.3d at 224.

⁹⁰ *See, e.g.*, *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

⁹¹ *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010).

⁹² *Id.* at 914.

⁹³ *Id.*

⁹⁴ *Id.*

Barzilay obtained American work visas and moved from the Netherlands, where they had lived for approximately two years, to Missouri.⁹⁵ The children resided in Missouri from 2001 until the commencement of relevant court proceedings in 2006.⁹⁶ The oldest child had not lived in Israel since her early youth, while the other two children never lived there.⁹⁷ Based on these facts, the district court found that the 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.⁹⁸

The Eighth Circuit articulated that the first step in Hague Convention cases is to determine when the alleged wrongful removal or retention took place.⁹⁹ According to the Eighth Circuit, when determining habitual residence, the significant time to analyze is immediately before the removal or retention.¹⁰⁰ The court highlighted several factors that are relevant to the 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."¹⁰¹ The court elaborated on these elements, noting that settled purpose does not mean that the individuals will stay in a new location forever, but that the family must have a "sufficient degree of continuity to be properly described as settled."¹⁰² Moreover, settled purpose should be discerned from the child's perspective, although parental intent should also be considered.¹⁰³

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.¹⁰⁴ The district court had found that two of the children lived in Missouri for their entire lives, and the oldest child had lived there for five years.¹⁰⁵ The court found nothing in the record to suggest that the children had spent any considerable amount of time in another country, and from the children's perspective, the "settled purpose of the family's residence in Missouri was to remain there permanently."¹⁰⁶ While noting that parental intent was ambiguous in this case, the district court decided

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 914–15.

⁹⁸ *Id.* at 917–18.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 918.

¹⁰¹ *Id.*

¹⁰² *Barzilay*, 600 F.3d at 918.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 917.

¹⁰⁶ *Id.* at 918.

that Mr. and Mrs. Barzilay had abandoned their previous habitual residence when they moved to Missouri and planned to remain there indefinitely.¹⁰⁷

The Eighth Circuit affirmed the district court's decision, holding that the children were sufficiently acclimatized to life in the United States.¹⁰⁸ The Eighth Circuit 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.¹⁰⁹ Furthermore, the two younger children had always lived in Missouri.¹¹⁰ The court also gave considerable weight to the fact that the children attended school in United States, and had never attended school in Israel.¹¹¹ The Eighth Circuit agreed that, under the Hague Convention, the children's country of habitual residence was the United States.¹¹² The court found no evidence demonstrating that the children spent any meaningful amount of time outside of the United States since 2001, or that the children had reason to believe that their home was a place other than Missouri.¹¹³ 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.¹¹⁴

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

Although the 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.¹¹⁵ These circuits apply a standard that solely examines the shared intentions of the parents when determining which 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.¹¹⁶

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

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 919.

¹⁰⁹ *Barzilay*, 600 F.3d at 919.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 918.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See, e.g.*, *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

¹¹⁶ *Id.*

residence.¹¹⁷ Mr. and Mrs. 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.¹¹⁸ The family lived in Israel until 1997, when Mrs. Mozes and the children moved to Los Angeles, California, with Mr. Mozes's consent.¹¹⁹ The parents agreed that the children would benefit from attending school in the United States, so Mrs. Mozes moved with the children to Beverly Hills, where she leased a home, bought automobiles and registered the children for school.¹²⁰ While Mr. and Mrs. Mozes agreed that Mrs. Mozes and the children would remain in the United States for fifteen months, they disagreed as to what arrangement existed beyond that.¹²¹

A year after they settled in the United States, Mrs. Mozes sought dissolution of the marriage and custody of the children.¹²² Mr. Mozes then filed a petition seeking to have the children returned to Israel. In his petition, Mr. Mozes claimed that Mrs. Mozes wrongfully retained the children in the United States when she sought dissolution of the marriage and custody of the children.¹²³ While the oldest child elected to return to Israel voluntarily, Mr. Mozes appealed the district court's denial of his petition with regard to the three other children.¹²⁴

The court addressed 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.¹²⁵ The court reasoned that there is an "obvious problem" with focusing on the child's perspective and disregarding parental intent, as children often lack the wherewithal to determine where they will reside.¹²⁶ 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."¹²⁷ According to the court, when parents jointly plan to raise a child in a place and live there, that place becomes the child's habitual residence.¹²⁸ While 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, it maintained that

¹¹⁷ *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

¹¹⁸ *Id.* at 1069.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Mozes*, 239 F.3d at 1069.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1076.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1075–77.

the unilateral intention of only one parent is insufficient to establish a new habitual residence for a child.¹²⁹

The Ninth Circuit explained that even though children can be exceptionally adaptable and form strong attachments in short periods of time, they do not necessarily expect or intend those relationships to last.¹³⁰ The court further reasoned that children might participate in activities of daily life and still retain awareness that they have another life to which they will return.¹³¹ The Ninth Circuit asserted that the 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 center of the children's familial and social development.¹³² Because the district court failed to answer this question, the Ninth Circuit remanded the case.¹³³

It is important to note that the Ninth Circuit acknowledged that a difficulty arises "when the persons entitled to fix the child's residence no longer agree on where it has been fixed."¹³⁴ The court, which focused on the parents' intent, implicitly recognized a significant flaw in its own analysis.¹³⁵ The court attempted to address this issue by dividing these situations into three categories.¹³⁶ The first includes cases where the family demonstrated a settled purpose to alter habitual residence, even though one parent had reservations about the move.¹³⁷ The court stated that, in these situations, one parent's qualms about moving would not prevent a finding of a shared and settled purpose.¹³⁸ The second category includes cases where the child's move from an established habitual residence was intended to be only for a limited period.¹³⁹ The court noted that, in these situations, the changed intentions of one parent do not lead to an alteration of the child's habitual residence.¹⁴⁰ The third category consists of cases where the petitioning parent had previously agreed to let the child remain abroad for an uncertain duration.¹⁴¹ The court stated that sometimes it will infer a mutual abandonment of the child's previous

¹²⁹ *Mozes*, 239 F.3d at 1075–77.

¹³⁰ *Id.* at 1079.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Mozes*, 239 F.3d at 1084.

¹³⁴ *Id.* at 1076.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1077.

¹⁴⁰ *Mozes*, 239 F.3d at 1077.

¹⁴¹ *Id.*

habitual residence, and other times the court will not be able to recognize a settled mutual intent from which to presume abandonment.¹⁴²

Gitter v. Gitter, out of the Second Circuit, also formulated a habitual residence standard emphasizing a focus on the parents' intentions.¹⁴³ *Gitter* involved two individuals who were born in Israel, later met in New York, married, and had a son, Eden.¹⁴⁴ After Eden's birth, Mr. Gitter wanted to move to Israel, and although Mrs. Gitter was hesitant, he ultimately convinced her.¹⁴⁵ About a year after the family had moved, Mrs. Gitter took their son on a trip to New York and never returned to Israel.¹⁴⁶ Mr. Gitter filed a petition seeking Eden's return to Israel under the Hague Convention.¹⁴⁷

In reviewing Mr. Gitter's petition, the Second Circuit was greatly influenced by the Ninth Circuit's decision in *Mozes*.¹⁴⁸ 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."¹⁴⁹ The court elaborated on the Ninth Circuit's reasoning, stating that merely observing the child's behavior was a defective approach because it may produce remarkably different results depending on the time frame.¹⁵⁰ For these reasons, the Second Circuit 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.¹⁵¹

When examining the pertinent facts, the Second Circuit looked at whether Mr. and Mrs. Gitter shared the intent that Israel would remain Eden's habitual residence.¹⁵² The court agreed with the district court in finding that Mr. and Mrs. Gitter only agreed to move to Israel on a conditional basis.¹⁵³ 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

¹⁴² *Id.*

¹⁴³ *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005).

¹⁴⁴ *Id.* at 128.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 131 (noting the district court's conclusion that Eden's habitual residence remained the United States throughout the Gitters' stay in Israel).

¹⁴⁸ *Id.* at 131.

¹⁴⁹ *Id.* at 132 (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 135.

¹⁵³ *Id.*

the opinion.¹⁵⁴ 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.¹⁵⁵ Nevertheless, 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.”¹⁵⁶

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.¹⁵⁷ The court did not follow any of the other circuits’ approaches, noting that it was imprudent to set the relative weights of parental intent and the child’s perspective in stone.¹⁵⁸ The court posited that, “the habitual residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.”¹⁵⁹ 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 amongst the circuits.

V. ELIMINATING THE DIVIDE: A HYBRID SUBJECTIVE AND OBJECTIVE REASONABLE PERSON STANDARD FOCUSING ON THE CHILD’S PERSPECTIVE

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. This Comment proposes a hybrid subjective and objective standard concentrating on which country a reasonable person in the child’s particular situation would view as his or her country of habitual residence. The federal circuit courts remain divided regarding the appropriate standard for determining habitual residence. 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.

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

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 132.

¹⁵⁶ *Gitter*, 396 F.3d at 132.

¹⁵⁷ *Redmond v. Redmond*, 724 F.3d 729, 737 (7th Cir. 2013).

¹⁵⁸ *Id.* at 746.

¹⁵⁹ *Id.*

particularly essential when dealing with jurisdictional and international disputes.¹⁶⁰ The Hague Convention is designed to address international adjudications by foreign nations that inherently possess materially dissimilar legal, cultural, and social systems. The grave differences in the circuit courts' reasoning 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.¹⁶¹

Courts are inconsistently enforcing individuals' rights due to the variation of habitual residence standards. While the Ninth Circuit holds that courts should focus on the parents' shared intent because children lack the wherewithal to decide where they want to reside, this approach is flawed.¹⁶² Parents often disagree as to their last shared intent in Hague Convention cases, leaving the courts with an ill-suited standard. Similarly, although 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," case law has failed to determine what exactly is an appropriate amount of time sufficient for acclimatization.¹⁶³ 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," but there is a shortage of guidance regarding what constitutes a "sufficient degree."¹⁶⁴ These inconsistencies further strengthen the necessity for a uniform international interpretation.

The goal of the Hague Convention is to maintain the status quo as well as protect the best interests of the child.¹⁶⁵ 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, 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

¹⁶⁰ See Why States Should Adopt UCCJEA, UNIFORM LAW COMMISSION, available at <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCCJEA> (explaining how 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.").

¹⁶¹ *Id.*

¹⁶² *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

¹⁶³ *Id.* at 224.

¹⁶⁴ *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010).

¹⁶⁵ *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.”¹⁶⁶ 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.

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.¹⁶⁷ A child who spends his or her entire life in country A, and never lived in country B, would likely view country A as his or her habitual residence. Thus, even if the child’s parents intended for country B to be the habitual residence, it would undeniably serve the best interests of the child to remain in country A.¹⁶⁸ This standard is reconcilable with *Friedrich*, as it emphasizes both the child’s perspective and past experiences. Furthermore, it is imperative that courts focus on what the child actually experienced, rather than what the parents intended for the child to experience, because the Hague Convention aims to protect the best interests of the *child*.¹⁶⁹

The Second and Ninth Circuits misconstrue the standard set out by those courts that emphasize the child-centric approach.¹⁷⁰ 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 removal and would consider themselves settled.¹⁷¹ The

¹⁶⁶ *Id.* at 1401.

¹⁶⁷ This hybrid standard has been used in the context of child tort-feasors. 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, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 10 (a) (2010) (stating that the conduct of a child is compared to that of a reasonable child of the same age, intelligence, and experience).

¹⁶⁸ 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.

¹⁶⁹ *Abbott v. Abbott*, 560 U.S. 1, 46 (2010).

¹⁷⁰ *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

¹⁷¹ *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

Second and Ninth Circuits, however, mistakenly focus on future intentions rather than past reality.

When a couple first has a child, they can choose to raise that child in any place they desire. But, 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's focus on the parents' last shared intent leads to inconsistent outcomes and does not enable courts to make decisions in the best interests of the child.¹⁷² While the Ninth Circuit alleges that children lack the wherewithal to decide where they *will* reside, this claim is misguided.¹⁷³ The habitual residence inquiry should be more concerned with where a child has been in the past, and where they were settled leading up to the alleged wrongful removal. 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.¹⁷⁴ The UCCJEA is a Uniform Act drafted by the National Conference of Commissioners on Uniform State Laws in 1997.¹⁷⁵ The UCCJEA was drafted to achieve uniformity in state laws regarding jurisdiction and custody matters in order to avoid disputes between competing jurisdictions.¹⁷⁶ 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."¹⁷⁷

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.¹⁷⁸ 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.¹⁷⁹ 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

¹⁷² *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

¹⁷³ *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001).

¹⁷⁴ Annotation, *Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act* (2002), 100 A.L.R.5th 1.

¹⁷⁵ *Stephens v. Fourth Judicial Dist. Ct.*, 331 Mont. 40, 42 (2006).

¹⁷⁶ *Child Custody Jurisdiction and Enforcement Act – Enactment Status Map*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Apr. 1, 2015) (showing that the UCCJEA has been adopted by 49 states, the District of Columbia, Guam, and the U.S. Virgin Islands).

¹⁷⁷ Annotation, *Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act* (2002), 100 A.L.R.5th 1.

¹⁷⁸ *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir.2005).

¹⁷⁹ *Wagner v. Wagner*, 887 A.2d 282, 287 (Pa. Super. Ct. 2005).

connections” with the child and at least one parent *and* “substantial evidence concerning the child’s care, protection, training, and personal relationships.”¹⁸⁰ Once a court has selected an appropriate “home state,” that state may assume child-custody jurisdiction.¹⁸¹ The “home state” determination thus focuses on where the child has 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.¹⁸² 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.¹⁸³ The UCCJEA’s approach suggests that the child’s perspective, regardless of age, trumps parental intent, and that past experiences take precedence over future intentions.¹⁸⁴

In *Delvoye v. Lee*, 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 perspective.¹⁸⁵ The case involved a habitual residence determination for a 2-month-old baby.¹⁸⁶ 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.”¹⁸⁷ This reasoning helps demonstrate that, even for the youngest children, habitual residence must be viewed from the child’s perspective.¹⁸⁸ Specifically, 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 point consisted of a short period of time.¹⁸⁹ The Third and Eighth Circuits have stated that in no way does an infant’s habitual residence automatically become that of its mother.¹⁹⁰ It would be inconsistent with the Hague Convention to derive

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 329 F.3d 330 (3d Cir. 2003).

¹⁸⁶ *Id.* at 333.

¹⁸⁷ *Id.*

¹⁸⁸ 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).

¹⁸⁹ *Id.*

¹⁹⁰ *Delvoye*, 329 F.3d at 333; *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995).

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."¹⁹¹

The 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 that, "[i]n 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."¹⁹² Yet, at the same time, the court recognized that "[i]n nearly all of the cases that arise under the Convention, however, the parents have come to disagree as to the place of the child's habitual residence."¹⁹³ This explicit acknowledgement of the tension inherent in its own approach demonstrates the significant problem 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 inevitable 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 essentially estranged from the outset, which is often the circumstance in Hague Convention cases.¹⁹⁴ An obvious problem in such disputes is that the parents often possess different intentions for the habitual residence of their child. These inconsistent solutions to various situations demonstrate that focusing on the parents' 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

¹⁹¹ *Nunez-Escudero*, 58 F.3d at 379.

¹⁹² *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005).

¹⁹³ *Id.*

¹⁹⁴ *Kijowska v. Haines*, 463 F.3d 583, 587 (7th Cir. 2006); *Redmond*, 724 F.3d at 747.

child's perspective, which looks to past experiences. Any analysis to the contrary—specifically one that focuses parents' shared intent—is flawed in numerous significant ways. Hague Convention proceedings primarily arise when parents no longer agree on the child's habitual residence, and often involve estranged parents. To focus on the perspectives of people involved in this sort of dynamic is ineffective and disadvantageous. Moreover, 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 to properly fulfill the Hague Convention's purposes. As such, courts should adopt a hybrid subjective and objective reasonable person standard that focuses on the child's perspective and past experiences.