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# Determining Habitual Residence Under the Hague Convention: Parental Intent Should be Dispositive

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## Part I: Introduction

The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or the "Convention") is an agreement that was adopted to deal with the issue "of child abduction by family members," which regularly transpires in relation to transnational custody disputes.[1] The Convention is "a treaty between multiple signatory countries wherein the countries agree to cooperate in returning children to their home country for custody proceedings."[2] The purpose of the Hague Convention is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence . . . ."[3] The role of a court in applying the Hague Convention, "is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's life."[4]

The question of how a child's habitual residence is determined under the Hague Convention is the subject of varying approaches among the United States Circuit Courts.[5] There are two potential standards for determining a child's habitual residence, which are parental intent ("parental standard" or "*Mozes* framework") and the child's perspective ("child standard").[6]

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[1] *See Barzilay v. Barzilay*, 600 F.3d 912, 916 (8th Cir. 2010).
[2] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[3] *Barzilay*, 600 F.3d at 916 (internal quotation marks omitted).
[4] *Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001).
[5] *See* Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[6] *Id*.

This Note will argue that parental intent should be conclusive in determining a child's habitual residence under the Hague Convention. Neither the Hague Convention nor its implementing legislation in the United States, the International Child Abduction Remedies Act ("ICARA") define the phrase "habitual residence."[7] In the majority of the cases that are filed under the Hague Convention, the child's parents disagree as to where the child's habitual residence is located.[8] The determination of the location of a child's habitual residence is important because "wrongful removal" can occur only if the child has been taken away from his or her habitual residence."[9]

Every circuit has confronted the question of how a child's habitual residence should be determined and has adopted one of the two approaches, either the parent standard or the child standard.[10] All of the circuits consider some common factors in making this determination, including: "changes in physical location, the location of personal possessions and pets, the passage of time, whether the family retained its prior residence or sold it before relocating, whether the child has enrolled in school, the parents' intentions at the time of a move, and whether the child has established relationships in the new location."[11] The divide in the circuits essentially involves whether the determination of a child's habitual residence is based on parental intent or the child's perspective.[12] This issue has yet to be addressed by the United States Supreme Court. This paper will discuss the background of the Hague Convention in Part II and the various approaches to the question of determining a child's habitual residence taken by

[7] *Silverman v. Silverman*, 338 F.3d 886, 897 (8th Cir. 2003) (internal quotation marks omitted).
[8] *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005).
[9] *Redmond v. Redmond*, 724 F.3d 729, 742 (7th Cir. 2012).
[10] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[11] *Id.*
[12] *See Id.*

the Circuit Courts in Part III. In Part IV, this paper will argue that the determination of a child's habitual residence should be based on parental intent.

**Part II: Background of the Hague Convention**

The Convention was adopted in October of 1980.[13] The United States helped formulate the Hague Convention and "became a signatory in 1981."[14] As of 2012, 87 countries had become signatories to the Hague Convention.[15] Congress enacted the ICARA "as the implementing legislation for the Hague Convention"[16] ICARA declares the Hague Convention "as the law of the United States, provides definitions, sets forth jurisdiction, and addresses certain details regarding how the United States will enforce the provisions of the treaty."[17]

The Convention contemplates a ubiquitous concern regarding the harm inflicted on children by parental kidnapping and a compelling desire amongst the signatory states to execute an effective restraint on such behavior.[18] The Hague Convention's approach towards international child abduction is straightforward.[19] The Convention aims to "restore the factual status quo which is unilaterally altered when a parent abducts a child and aims to protect the legal custody rights of the non-abducting parent."[20]

The Hague Convention was not drafted in direct "response to any concern about violent kidnappings by strangers."[21] Rather, the Convention purports to discourage parents from

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[13] Elisa Perez-Vera, *Explanatory Report in* Vol. III Hague Conference on Private Int'l Law, Actes et document de la Quatatorziem session, at 426 (Bunean Permanent de la Conference 1980), *available at* http://www.hcch.net/upload/expl28.pdf ("Perez-Vera Report").
[14] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995).
[19] *Id.*
[20] *Id.* (internal quotation marks omitted).
[21] *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

absconding with their children and traveling over international borders in anticipation of receiving a "favorable custody determination in a friendlier jurisdiction."[22] The Convention's main goal is to "secure the prompt return of children wrongfully removed to or retained in another signatory state."[23] The Hague Convention aims to deter abduction by "depriv[ing] [the abductor's] actions of any practical or judicial consequences."[24] The Convention achieves this goal "not by establishing any substantive law of custody, but rather by acting as a forum selection mechanism, operating on the principle that the child's country of habitual residence is best placed to decide upon questions of custody and access."[25] Thus, the basis for proceedings under the Convention is "not to establish or enforce custody rights, but only to provide for a reasoned determination of where jurisdiction over a custody dispute is properly placed."[26] Despite similarities, a Hague Convention case differs from a child custody case.[27] If the Hague Convention is applied, in many cases the ultimate "decision on custody will be made by the authorities of the child's habitual residence prior to its wrongful removal."[28] In sum, the Hague Convention simply addresses jurisdiction.[29] The Convention does not deal with substantive custody decisions.[30]

For the Convention to apply, it is essential that the abducted child was "habitually resident in a Contracting State immediately before any breach of custody or access rights."[31] In

[22] *Walker v. Walker*, 701 F.3d 1110, 1116 (7th Cir. 2012).
[23] *Redmond v. Redmond*, 724 F.3d 729, 737 (7th Cir. 2012).
[24] *Barzilay*, 600 F.3d at 916 (internal quotation marks omitted).
[25] *Id.* (internal quotation marks omitted).
[26] *Id.* (internal quotation marks omitted).
[27] *See Redmond*, 724 F.3d at 737 (internal quotation marks omitted).
[28] *Koch v. Koch*, 450 F.3d 703, 712 (7th Cir. 2006).
[29] *See Barzilay*, 600 F.3d at 916.
[30] *See Id.*
[31] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf (internal quotation marks omitted).

order to be litigable under the Convention, child abduction and retention cases have to be international.[32] Additionally, in cases involving the United States, the other country involved must also be a signatory to the Convention.[33] Signatory states are required to have judicial and administrative remedies established "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."[34] Proceedings under the Convention and ICARA "do not reach the merits of an underlying custody dispute."[35]

In the United States, a petitioner "invokes the protections of the Convention by filing a petition in state or federal court under ICARA."[36] The court must then resolve the case pursuant to the Hague Convention.[37] If a petitioner can establish a prima facie case under the Hague Convention, the child must be returned to the place of their habitual residence, unless the respondent demonstrates that an affirmative defense is applicable.[38] The petitioner bears the burden of proving a prima facie case "by a preponderance of the evidence."[39] Courts have found that a petitioner presents a prima facie case if three elements are met: "(1) prior to removal or wrongful retention, the child was habitually resident in a foreign country; (2) the removal or retention was in breach of custody rights under the foreign country's law; and (3) the petitioner actually was exercising custody rights at the time of the removal or wrongful retention."[40] It is also important to note that, although most courts find proof of a prima facie case after these three

[32] *Id.*
[33] *Id.*
[34] *Redmond*, 724 F.3d at 737.
[35] *Barzilay*, 600 F.3d 917.
[36] *Id.*
[37] *Id.* (internal quotation marks omitted).
[38] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[39] *Id.*
[40] *Id.*

elements are met, a fourth element is ultimately taken into consideration.[41] A petitioner must show that the abducted child is under the age of 16, pursuant to Article IV of the Hague Convention.[42] This provision states, "[t]he Convention shall cease to apply when the child attains the age of 16 years."[43]

The main inquiry in petitions pursuing the return of a child under the Convention is determining if the child has been "wrongfully" removed or retained as per the definition of the Convention.[44] It is essential to recognize that "wrongful removal" is a legal term that is defined in the Convention rather than "an ad hoc determination or a balancing of the equities."[45] Under the Hague Convention, Article III defines wrongful removal or retention as follows:

> "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
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> 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."[46]

The location of habitual residence is significant because the laws of that country govern the parents' custody rights.[47] Even though the determination of "habitual residence" is crucial, the phrase is not defined in the Hague Convention or the ICARA.[48] In 2010, the Hague Permanent Bureau took a poll from signatory countries to seek input regarding the practicability and desirability of a protocol to the Hague Convention to define "habitual residence."[49] No

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[41] *Id.*
[42] *Id.*
[43] *Id.* (internal quotation marks omitted).
[44] *Redmond*, 724 F.3d at 737.
[45] *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir 1993) (internal quotation marks omitted).
[46] Oct. 25 1980, T.I.A.S. No. 11670 ("Hague Convention"), art 3.
[47] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[48] *Id.*
[49] *Id.*

protocol of this nature has been enacted to date.[50] The United States was against the addition of a definition of "habitual residence."[51] The United States' reasoning is that it would be difficult for the signatory countries to reach an agreement on the meaning of the phrase.[52] Courts in the United States treat the question of habitual residence "as a mixed question of law and fact that is a highly fact-specific inquiry."[53] The habitual residence of a child is ascertained at the moment "immediately before the removal or retention."[54] Besides this basic direction, the Convention provides no guidance "as to which, if any, factors are to be given weight."[55] Therefore, a large mass of domestic and international law has been created.[56]

## Part III: Circuit Court Approaches to "Habitual Residence"

The different approaches adopted by the Circuit Courts as to how a child's habitual residence is determined will be discussed below. Section A will discuss the Circuit Courts that have adopted a parental standard and Section B will discuss the Circuit Courts that have adopted a child standard.

### A. Parental Standard

In 2001, the Ninth Circuit interpreted "habitual residence" for the first time within the meaning of the Convention.[57] In *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001), Arnon and Michal Mozes were Israeli citizens who had four children together.[58] The Mozes family lived in Israel until 1997.[59] In April of 1997, with Arnon's permission, Michal and the four

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* (internal quotation marks omitted).
[55] *Id.*
[56] *Id.*
[57] *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).
[58] *Id.*
[59] *Id.*

children moved to California.[60] The parents agreed that Michal would live in the United States for 15 months with the children.[61] Despite this consensus, the two disagreed over whether or not they had an agreement for the children to live in the United States beyond the 15 months.[62] Arnon filed a petition seeking the return of the children under the Hague Convention.[63] While the oldest child elected to return to Israel, the three younger children remained in the United States pursuant to the United States District Court for the Central District of California's denial of Arnon's petition.[64]

The Ninth Circuit stressed the importance of the determination of a child's habitual residence.[65] The court noted that "[h]abitual residence is the central – often outcome-determinative – concept on which the entire system is founded."[66] The Ninth Circuit noted that "being habitually resident in a place must mean that you are, in some sense, 'settled' there—but it need not mean that's where you plan to leave your bones."[67] The court also noted "[n]or could we justify limiting habitual residence to persons who settle in an area for some particular motive."[68] Before discussing whose intent is dispositive, the court stated that generally speaking, the first step in obtaining a new habitual residence is establishing a settled intention to desert the one left behind.[69] Otherwise, a child is not habitually residing, rather, one is elsewhere for a temporary absence of either a short or long period of time.[70] The individual does not need to possess this settled intent at the time of departure and the intent does not need to be explicitly

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Mozes*, 239 F.3d at 1069.
[64] *Id.*
[65] *Id.* at 1072.
[66] *Id.* (internal quotation marks omitted).
[67] *Id.* at 1074.
[68] *Id.*
[69] *Mozes*, 239 F.3d at 1075.
[70] *Id.*

stated if it is obvious from the individual's actions.[71] The court gave the example of an individual who has lived continuously in the same location for numerous years.[72] The court stated that it would be "hard-pressed" to find that the individual did not abandon their prior habitual residence.[73]

The Ninth Circuit then discussed intent regarding the determination of a child's habitual residence.[74] The court took issue with the Sixth Circuit, which had found that the child's intent is dispositive and the parents' intent is irrelevant.[75] The court explained that while the child's intent seems to be the obvious answer to the question of whose intent governs the determination, "[c]hildren, particularly the ones whose return may be ordered under the Convention, normally lack the material and psychological wherewithal to decide where they will reside."[76] The court held that "in . . . cases where the intention or purpose is relevant – for example, where it is necessary to decide whether an absence is intended to be temporary and short-term – 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."[77] The court acknowledged that issues frequently arise when the people who are entitled to choose the child's residence disagree as to where it is.[78] The court found that in these situations, the representations of the parties cannot be taken at face value.[79] The Ninth Circuit instructed that courts must review all of the available evidence and

[71] *Id*.
[72] *Id*. at 1074.
[73] *Id*.
[74] *See Id.* at 1076.
[75] *See Mozes*, 239 F.3d at 1076.
[76] *Id*.
[77] *Id*. (internal quotation marks omitted).
[78] *Id*.
[79] *Id*.

conclude whether the parent seeking the return of the child has already approved of the child establishing their habitual residence where the child currently resides.[80]

Ultimately, the court found that although the decision to change a child's habitual residence is contingent on the parents' settled intention, the parents cannot accomplish this change simply by wishful thinking.[81] The court noted that first, "it requires an actual change in geography. Second, home isn't built in a day. It requires the passage of an appreciable period of time, one that is sufficient for acclimatization."[82] If a child moves to a different country with both of their parents, who take actions to establish a regular home together, the time period does not need to be long.[83] "On the other hand, when circumstances are such as to hinder acclimatization, even a lengthy period spent in this manner may not suffice."[84]

The court acknowledged that a tougher question is presented when evidence of acclimatization should be adequate to determine a child's habitual residence, even if there is uncertain or contrary parental intent.[85] The court found that it is generally accepted that, "given enough time and positive experience, a child's life may become so firmly embedded in the new country as to make it habitually resident even though there be lingering parental intentions to the contrary."[86] Where there is no settled parental intent, "courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."[87] The court highlighted that the purpose of the Hague Convention is to prevent child abduction by lessening "the incentive of the would-be abductor to seek unilateral custody over a child in another country."[88] Ultimately, the

[80] *Id*.
[81] *Mozes*, 239 F.3d at 1078.
[82] *Id*. (internal quotation marks omitted).
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Mozes*, 239 F.3d at 1078.
[88] *Id*. at 1079.

court concluded that the easier the habitual residence of a child can be changed without the consent of both parents, the bigger the incentive to try.[89]

The court found that habitual residence is meant "to be a description of a factual state of affairs, and a child *can* lose its habitual attachment to a place even without a parent's consent."[90] In situations where "there is no settled intent on the part of the parents to abandon the child's prior habitual residence, courts should find a change in habitual residence if the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place."[91] The issue in cases like these is not only whether the child's life in the new country expresses a "minimal degree of settled purpose, but whether we can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would not be tantamount to taking the child out of the family and social environment in which its life has developed."[92]

The court held that in a situation like the Mozes family, where "children already have a well-established habitual residence [Israel], simple consent to their presence in another forum [California] is not usually enough to shift it there. Rather, the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration."[93] In sum, the Ninth Circuit held that a child's habitual residence is ascertained based on the parents' intent as to their child's residence and "the child's perspective of where he or she

[89] *Id.*
[90] *Id.* at 1081.
[91] *Id.* (internal quotation marks omitted).
[92] *Id.* (internal quotation marks omitted).
[93] *Mozes*, 239 F.3d at 1081.

is acclimated."[94] Ultimately, the Ninth Circuit remanded the case to the district court because the district court seemed "to have relied upon an understanding of [habitual residence] that gives insufficient weight to the importance of shared parental intent under the Convention" and did not answer the question of "whether the United States had supplanted Israel as the locus of the children's family and social development."[95]

In 2004, the Eleventh Circuit interpreted "habitual residence" for the first time within the meaning of the Hague Convention.[96] In *Ruiz v. Tenorio*, 392 F.3d 1247, 1249 (11th Cir. 2004), Melissa Green Tenorio and Juan Tenorio Ruiz had two children together, who were both born in the United States in 1992 and 1998.[97] In August of 2000, the couple moved from the United States to Mexico.[98] Then, in May of 2003, Melissa took their two children to the United States without Juan's knowledge or permission.[99] Juan filed a petition on July 29, 2003 seeking the return of his children under the Hague Convention, which the United States District Court for the Middle District of Florida denied.[100]

The Eleventh Circuit adopted the framework announced by the Ninth Circuit in *Mozes*.[101] The court stated that "[a]fter thoroughly canvassing the relevant case law, we conclude that the opinion of Judge Kozinski in *Mozes* is not only the most comprehensive discussion of the issue, but also sets out the most appropriate approach."[102] The court summarized the Ninth Circuit's analysis in *Mozes* and then ultimately concluded that the district court's denial of Juan's petition

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[94] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[95] *Mozes*, 239 F.3d at 1084.
[96] *Ruiz v. Tenorio*, 392 F.3d 1247, 1249 (11th Cir. 2004).
[97] *Id.*
[98] *Id.*
[99] *Id.* at 1250.
[100] *Id.*
[101] *Id.* at 1252.
[102] *Ruiz*, 392 F.3d at 1252.

was proper and affirmed the judgment. [103] The court focused on "the crucial finding of fact by the district court that Juan and Melissa never had a shared intention to abandon the prior United States habitual residence and to make Mexico the habitual residence of their children."[104] The court reasoned that there were various objective facts that showed that Melissa did not have the intention of living in Mexico permanently, which included credit cards and bank accounts that she maintained in the United States.[105] The court also noted that even Juan's intent regarding the permanence of the family's move to Mexico was unclear.[106] In short, the Eleventh Circuit adopted a parental standard for determining a child's habitual residence.

In 2005, the Second Circuit interpreted "habitual residence" for the first time within the meaning of the Convention in *Gitter v. Gitter*, 396 F.3d 124, 128 (2d Cir. 2005).[107] In *Gitter*, the child, Eden, was born in December of 2000 in New York.[108] Following Eden's birth, Mr. Gitter convinced Ms. Gitter that moving the family to Israel was a good idea for various reasons.[109] The family moved to Israel in March of 2001.[110] Once the Gitter family arrived in Israel, Mr. Gitter either sold or gave their family's belongings that had been placed in storage in New York to Ms. Gitter's sister.[111] Additionally, the Gitters enrolled their son in day care in Israel.[112] In February of 2002, Ms. Gitter traveled to New York with Eden. Ms. Gitter then conveyed to Mr. Gitter that it was her aspiration to remain in the United States with Eden.[113] Mr. Gitter ultimately convinced Ms. Gitter to return to Israel in the early months of 2002 by giving her his

[103] *See Id*. at 1252-54.
[104] *Id*. at 1254.
[105] *Id*.
[106] *Id*.
[107] *Gitter v. Gitter*, 396 F.3d 124, 128 (2d Cir. 2005).
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] *Gitter*, 396 F.3d 124, 128-29.

word that if after six months she was unhappy, then she could return back to the United States with Eden.[114] In June of 2002, Ms. Gitter returned to the United States with her son Eden, supposedly on a vacation, and did not return to back to Israel.[115] Mr. Gitter then filed a petition seeking the return of Eden under the Hague Convention.[116] The United States District Court for the Eastern District of New York denied Mr. Gitter's petition after determining that Eden's habitual residence "remained the United States throughout the Gitters' stay in Israel."[117]

The Second Circuit adopted a two-step analysis to determine a child's habitual residence.[118] The first step in the inquiry is for the court to look into the shared intent of the individuals who are qualified to choose the child's residence, typically the parents, "at the latest time that their intent was shared."[119] The Second Circuit instructed that in making this ascertainment the court ought to look "at actions as well as declarations."[120] Ordinarily, the shared intent of the child's parents controls the location of the child's habitual residence.[121] The court acknowledged that the Hague Convention is concerned only with the habitual residence of the child and therefore it might appear rational to focus the attention on the child's intentions.[122] However, the court noted, "children . . . normally lack the material and psychological [ability] to decide where they will reside."[123] The second step of the inquiry is for the court to ask whether the evidence clearly signals that the child "has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared

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[114] *Id.* at 129.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Gitter*, 396 F.3d at 134.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 132.
[123] *Id.* (internal quotation marks omitted).

intent."[124] In sum, the Second Circuit selected a test which would analyze parental intent as well as the child's level of acclimation to the residence in determining the child's habitual residence.[125]

The Second Circuit then applied this two-prong analysis to the facts of the case.[126] Under the first prong, the court found that the district court considered whether Mr. and Ms. Gitter jointly intended that Israel would be their son's habitual residence.[127] The court then held that the district court accurately concluded that Mr. and Ms. Gitter did not have a settled mutual intent for Israel to be Eden's habitual residence.[128] Under the second prong, the Second Circuit did not take a position.[129] The court remanded the case in order for the district court to apply the new standard that it had articulated in this case.[130] In short, the Second Circuit adopted a parental standard for determining a child's habitual residence.

In 2006, the Seventh Circuit interpreted "habitual residence" for the first time within the meaning of the Hague Convention.[131] In *Koch v. Koch*, 450 F.3d 703, 709-10 (7th Cir. 2006), Dane and Antonia Koch had two children together, who were both born in the United States.[132] The family moved to Germany when the youngest child was only eleven days old in April of 2002.[133] The couple experienced martial difficulties and in May of 2005, Mr. Koch took the children with him from Germany to the United States without Ms. Koch's permission or

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[124] *Gitter*, 396 F.3d at 134.
[125] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[126] *See Gitter*, 396 F.3d at 135.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *See Id.* at 136.
[131] *Koch v. Koch*, 450 F.3d 703, 709-10 (7th Cir. 2006).
[132] *Id.* at 706.
[133] *Id.*

knowledge.[134] Ms. Koch filed a petition seeking the return of her two children under the Hague Convention, which the United States District Court for the Eastern District of Wisconsin granted.[135]

The Seventh Circuit held that in determining a child's habitual residence, the first step in the analysis is to figure out if the child's parents shared an intent to abandon the previous habitual residence.[136] To determine the parents' intent, the court must consider actions in addition to declarations.[137] A child's habitual residence "is not determined by wishful thinking alone."[138] Rather, there must be a real change in geography and the passing of a considerable amount of time in order to establish a habitual residence.[139] "When the child moves to a new country accompanied by both parents, who take steps to set up a regular household together, the period need not be long."[140]

The Seventh Circuit pointed out that under the Ninth Circuit case of *Mozes v. Mozes*, 239 F.3d (9th Cir. 2001), courts do not need to ignore reality.[141] Rather, in *Mozes*, the Ninth Circuit had taken "the realities of children's and family's lives" into consideration "despite the parent's hopes for the future."[142] The Seventh Circuit noted that the Ninth Circuit held that "it was keenly aware of the flexible, fact-specific nature of the habitual residence inquiry envisioned by the Convention" and "courts must consider the unique circumstances of each case when inquiring into a child's habitual residence."[143] The court quoted *Mozes* and noted that "[h]abitual

[134] *Id.* at 708.
[135] *Id.* at 706.
[136] *Id*. at 715.
[137] *Koch*, 450 F.3d at 715.
[138] *Id*. (internal quotation marks omitted).
[139] *Id.*
[140] *Id*. (internal quotation marks omitted).
[141] *Id*.
[142] *Koch*, 450 F.3d at 716.
[143] *Id*. (internal quotation marks omitted).

residence is intended to be a description of a factual state of affairs, and a child *can* lose its habitual attachment to a place even without a parent's consent."[144] From this proposition, the Seventh Circuit concluded that the district court was correct in holding that the Koch children's habitual residence was Germany.[145] The court pointed out that the question in determining a child's habitual residence, is, as the Ninth Circuit in *Mozes* stated, "whether [a court] can say with confidence that the child's relative attachment to the two countries have changed to the point where requiring the return to the original forum would not be tantamount to taking the child out of the family and social environment in which its life has developed."[146] Ultimately, the court affirmed the district court's judgment.[147] The Seventh Circuit has since reaffirmed the analysis for how to determine a child's habitual residence that it adopted in *Koch* in *Walker*.[148]

In the 2009 case of *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009), the Fourth Circuit interpreted "habitual residence" within the meaning of the Hague Convention.[149] In *Maxwell*, Andrew and Kristina Maxwell met and married in 1999 in Australia.[150] The couple then moved to Massachusetts where their quadruplets were born in 2004.[151] In December of 2005, Andrew and Kristina experienced marital difficulties, and as a result, Andrew moved back to Australia while Kristina and the children moved to North Carolina.[152] In August of 2007, the couple decided to reconcile and discussed arrangements for Kristina and the quadruplets to move

[144] *Id.* at 717 (internal quotation marks omitted).
[145] *Id*.
[146] *Id*. (internal quotation marks omitted).
[147] *Id.* at 719.
[148] *See Walker v. Walker*, 701 F.3d 1110, 1119 (7th Cir. 2012) (The court highlighted that "in a case alleging wrongful retention, [the court] determine[s] a child's habitual residence by asking whether a prior place of residence . . . was effectively abandoned and a new residence established . . . by the shared actions and intent of the parents coupled with the passage of time.") (internal quotation marks omitted).
[149] *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009).
[150] *Id*. at 247.
[151] *Id*.
[152] *Id*.

to Australia.[153] Kristina contemplated that the move to Australia might simply be temporary and consequently purchased round trip tickets for her and the children to Australia for a three month period from December 4, 2007 until March 4, 2008.[154] After Kristina and the children arrived in Australia, the couple again experienced martial problems.[155] Andrew took the quadruplets' passports in an effort to prevent Kristina from leaving Australia with the children.[156] In February of 2008, the U.S. Embassy reissued the quadruplets' passports without Andrew's approval.[157] Kristina and the children immediately left Australia and returned to the United States.[158] Andrew then filed a petition seeking the return of the quadruplets under the Hague Convention, which the United States District Court for the Western District of North Carolina denied.[159]

The Fourth Circuit adopted a two-step analysis in determining a child's habitual residence.[160] The first step in the analysis is to consider parental intent.[161] The second step in the analysis is to consider "whether there was an actual change in geography coupled with the passage of an appreciable period of time, one sufficient for acclimatization by the children to the new environment."[162] Regarding the first step of the analysis, the Fourth Circuit provided numerous factors that can be considered to help determine parental intent, which include "parental employment in the new country of residence; the purchase of a home in the new country and the sale of a home in the former country; marital stability; the retention of close ties to the former country; the storage and shipment of family possessions; the citizenship status of

[153] *Id*.
[154] *Id*. at 248.
[155] *Maxwell*, 588 F.3d at 248.
[156] *Id*.
[157] *Id*. at 249.
[158] *Id*.
[159] *Id*.
[160] *Id*. at 251.
[161] *Maxwell*, 588 F.3d at 251.
[162] *Id*.

the parents and children; and the stability of the home environment in the new country of residence."[163] Regarding the second step of the analysis, the Fourth Circuit also provided various factors to be taken into consideration, including "school enrollment, participation in social activities, the length of stay in the relative countries, and the child's age."[164]

The Fourth Circuit applied this standard to the facts of the case and found that the quadruplets' habitual residence was the United States.[165] In regards to the first step of the analysis, the court found that "there was no shared parental intent to abandon the United States as the quadruplets' habitual residence."[166] The court found numerous facts that supported the conclusion that Kristina intended for the move to Australia to be temporary, including that "Kristina left many possessions behind in North Carolina; Kristina reserved round trip tickets for herself and the children; Kristina and the children traveled with Australian tourist visas that limited their stay in Australia to three months; and Kristina maintained her local financial accounts, North Carolina Medicare insurance, and the lease and insurance on her vehicle."[167] In regards to the second step of the analysis, the court found that the children never became acclimatized to Australia during the two month period that they lived there.[168] The court supported this conclusion by citing to the facts that "the quadruplets were not receiving therapy for their developmental disabilities in Australia despite the fact that they were receiving therapy when they lived in the United States. [Additionally], the quadruplets did not attend school or participate in social activities in Australia."[169] To summarize, the Fourth Circuit adopted a parental standard for determining a child's habitual residence.

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[163] *Id*. at 252.
[164] *Id*. at 254.
[165] *Id*.
[166] *Id*. at 253.
[167] *Maxwell*, 588 F.3d at 253.
[168] *Id*. at 254.
[169] *Id*.

In sum, the five Circuit Courts that have adopted the parental standard seem to focus on two major considerations in determining the location of a child's habitual residence, which are parental intent and the child's acclimation. As to the child acclimation consideration, Circuit Courts following the parental standard seem to analyze the degree to which a child has had time to possibly acclimate in a given location.

**B. Child Standard**

In contrast to the five circuits that have adopted the parental standard to determine a child's habitual residence, three circuits have utilized the child standard in resolving this issue. In 1995, in the case of *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995), the Third Circuit interpreted "habitual residence" for the first time within the meaning of the Hague Convention.[170] In *Feder*, the child, Evan, was born in July of 1990 in Germany.[171] In October of 1990, the Feder family relocated to Pennsylvania because of Mr. Feder's new job.[172] In 1993, the Feder family moved from Pennsylvania to Australia because of another job offer that Mr. Feder received.[173] On or about June of 1994, Ms. Feder left her husband and returned to the United States with her son Evan.[174] In September of 1994, Mr. Feder filed a petition under the Hague Convention seeking the return of Evan to Australia.[175] The United States District Court for the Eastern District of Pennsylvania denied Mr. Feder's petition.[176]

The Third Circuit vacated the district court's decision because it concluded 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

[170] *See Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995).
[171] *Id.* at 218.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 220.
[175] *Id.*
[176] *Feder*, 63 F.3d at 222.

perspective."[177] The court also noted that "a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."[178] The court applied this standard to the facts of the case and found that Evan's habitual residence was in Australia, given that "Evan moved, with his mother and father, from Pennsylvania to Australia where he was to live for at the very least the foreseeable future, and staying in Australia for close to six months, a significant period of time for a four-year old child."[179] The court also reasoned that while Mr. and Ms. Feder thought of Australia very differently, both decided to move to Australia and live there together with their son, "and did what parents intent on making a new home for themselves and their child do – they purchased and renovated a house, pursued interests and employment, and arranged for Evan's immediate and long-term schooling."[180] To summarize, the Third Circuit adopted a child standard for determining a child's habitual residence.

In the 1993 case of *Friedrich v. Friedrich*, 983 F.2d 1396, 1400-01 (6th Cir. 1993), the Sixth Circuit interpreted "habitual residence" for the first time within the meaning of the Hague Convention.[181] In *Friedrich*, Emanuel and Jessica Friedrich had one child together, Thomas, who was born in Germany in December of 1989.[182] The Friedrich family lived in Germany together until the summer of 1991.[183] In August of 1991, Ms. Friedrich flew to the United States with Thomas without Mr. Friedrich's permission or knowledge.[184] Mr. Friedrich filed a petition

[177] *Id.* at 224 (internal quotation marks omitted).
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Friedrich v. Friedrich*, 983 F.2d 1396, 1400-01 (6th Cir. 1993).
[182] *Id.* at 1398.
[183] *Id.* at 1399.
[184] *Id.*

seeking the return of his son under the Hague Convention, however, the United States District Court for the Southern District of Ohio denied the petition.[185]

The court held that Thomas's habitual residence was Germany and therefore reversed the district court's denial of Mr. Friedrich's petition.[186] The Sixth Circuit reasoned that a child's habitual residence cannot be confused with their domicile.[187] Courts must focus the attention on the child and not the parents in its determination of a child's habitual residence.[188] Courts must also examine past experience rather than future intentions.[189] The court went on to explain that a child can only have one habitual residence.[190] Habitual residence relates to customary residence before the removal.[191] "The court must look back in time, not forward."[192] In sum, the court "focused on the child's acclimation and past experiences in a specific location to establish habitual residence" and adopted a child standard in determining a child's habitual residence.[193]

In the 2007 case of *Robert v. Tesson*, 507 F.3d 981, 989 (6th Cir. 2007), the Sixth Circuit reaffirmed the analysis of a child's habitual residence that was adopted in *Friedrich,* which focused on the child's prior experiences and not the intent of the parents.[194] The court recognized that some other circuit courts consider "the subjective intent of the parents[,]" however it rejected this approach as "it has made seemingly easy cases hard and reached results that are questionable at best."[195] The court pointed out that the Convention is designed to

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[185] *Id.* at 1398.
[186] *Id*. at 1402.
[187] *Friedrich,* 983 F.2d at 1401.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id*.
[192] *Id*.
[193] Litigating International Child Abduction Cases Under the Hague Convention, Kilpatrick Townsend & Stockton LLP and the National Center for Missing & Exploited Children (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf
[194] *See Robert v. Tesson*, 507 F.3d 981, 989 (6th Cir. 2007).
[195] *Id.* at 989-91 (internal quotation marks omitted).

prevent cases in which "the child is taken out of the family and social environment in which its life has developed."[196] The court found that courts that examine parental intent often reach outcomes inconsistent with this objective.[197] Further, the court pointed out that the official commentary on the Convention, the Perez-Vera Report, declares that the Convention should be analyzed bearing in mind "the general principle . . . that children must no longer be regarded as parents' property, but must be recognised [sic] as individuals with their own rights and needs."[198] The court found that this proposition is best given effect by a standard that follows the child's view of where their home is, as opposed to one that subordinates the child's experience to their parents' personal wishes.[199]

In the 2003 case of *Silverman v. Silverman*, 338 F.3d 886, 897 (8th Cir. 2003), the Eighth Circuit interpreted the phrase "habitual residence" within the meaning of the Hague Convention.[200] In *Silverman*, Robert and Julie had two children together, who were both born in the United States.[201] The family moved across the United States and ultimately purchased a home in Minnesota, where the family lived until July of 1999, when they moved to Israel.[202] In June of 2000, Julie and the children traveled back to the United States, on what Julie told Robert was a summer vacation.[203] However, Julie and the children did not return to Israel.[204] Robert filed a petition seeking the return of his children under the Hague Convention, which the United States District Court for the District of Minnesota denied.[205]

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[196] *Id.* at 991 (internal quotation marks omitted).
[197] *See Id.*
[198] *Id.* at 992 (internal quotation marks omitted).
[199] *Id*.
[200] *Silverman v. Silverman*, 338 F.3d 886, 897 (8th Cir. 2003).
[201] *Id.* at 889.
[202] *Id*.
[203] *Id.* at 890.
[204] *Id*.
[205] *Id*. at 892.

The Eighth Circuit reversed the decision of the district court and found that in determining a child's habitual residence under the Hague Convention, "[t]he court must focus on the child, not the parents, and examine past experience, not future intentions."[206] The court noted that the federal courts all agree that habitual residence consists of some form of "settled purpose."[207] The settled purpose does not have to be to stay in a new place forever, however, the family "must have a sufficient degree of continuity to be properly described as settled."[208] The court added its view that the settled purpose must be from the child's perspective as opposed to the parents, recognizing however, parental intent is still taken into consideration.[209] The Eighth Circuit noted that the facts of this case are similar to the facts in the Third Circuit case, *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995). The court agreed with the Third Circuit that one spouse who harbors hesitation during a move does not destroy the settled purpose from the child's viewpoint.[210] Ultimately, the court reversed the district court's ruling and held that the habitual residence of the children was in Israel given that "Julie intended to move permanently to Israel prior to the move and, upon arrival in July, she intended to make Israel her home."[211] The court further noted that Julie was the main force behind the Silverman family's move to Israel [from Minnesota] and she always planned on returning back to Israel to raise her kids.[212] The court concluded that Julie's post-move desire to travel back to the United States did not change the finding that the habitual residence of the Silverman children changed from Minnesota to

[206] *Silverman*, 338 F.3d at 898 (internal quotation marks omitted).
[207] *Id.* (internal quotation marks omitted).
[208] *Id.* (internal quotation marks omitted).
[209] *Id*.
[210] *Id*.
[211] *Id*. at 900-01.
[212] *Silverman*, 338 F.3d at 900.

Israel.[213] To sum up, the Eighth Circuit adopted a child standard in determining a child's habitual residence.

In the 2010 case of *Barzilay v. Barzilay*, 600 F.3d 912, 918-920 (8th Cir. 2010), the Eighth Circuit reaffirmed the analysis that it adopted in *Silverman v. Silverman*, 338 F.3d 886 (8th Cir 2003).[214] The court highlighted the importance of focusing on the child's perspective in determining habitual residence.[215] In 2017, the Eighth Circuit again discussed *Silverman* and the propositions that it stands for, as discussed above.[216] The court further illuminated relevant factors in determining habitual residence from the child's perspective, including "the change in geography, the passage of time, and the acclimatization of the child to the new country."[217]

**Part IV: Parental Standard is the Proper Standard for Determining Habitual Residence**

Because of the split among the circuits, as well as the lack of decisional law on point in several circuits, the Supreme Court must articulate an appropriate standard for deciding a child's habitual residence. "A majority of the circuits have preferred the Ninth Circuit's approach and adopted the so-called *Mozes* framework."[218] This paper argues that parental intent should be dispositive, thus following the Second, Fourth, Seventh, Ninth, and Eleventh Circuits' approach and rejecting the child standard of the Third, Sixth, and Eighth Circuits. Initially, it should be noted that the parental standard or *Mozes* framework does not only consider parental intent, as the child's acclimation is also part of the analysis in determining where the child's habitual residence is located.[219] In other words, the parental standard and the child standard are not entirely in conflict with one another. Rather, the question is of emphasis. While the extent to

[213] *Id*.
[214] *See Barzilay v. Barzilay*, 600 F.3d 912, 918-920 (8th Cir. 2010).
[215] *See Id.* at 920.
[216] *See Cohen v. Cohen*, 858 F.3d 1150, 1153 (8th Cir. 2017).
[217] *Id.* (internal quotation marks omitted).
[218] *Redmond v. Redmond*, 724 F.3d 729, 745 (7th Cir. 2013) (internal quotation marks omitted).
[219] *See, e.g., Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005);

which a child has had time to potentially acclimate in a certain location may be an appropriate factor to consider as a potential indication of parental intent, the child's acclimation should not be the focus of the habitual residence analysis as the parental standard is easier to implement than the child standard.

The ease of application of the parental standard as opposed to the child standard is evident. The Fourth Circuit has provided several factors that may be considered in order to determine parental intent, most of which are objective and do not depend upon the parents subjective intentions, such as "parental employment in the new country of residence; the purchase of a home in the new country and sale of a home in the former country . . . the storage and shipment of family possessions; [and] the citizenship status of the parents and children."[220] When these factors are taken into consideration, there is little room for debate between the parents. It should be noted, however, that not all of the Circuit Courts have used these factors in ascertaining parental intent. Other Circuit Courts have considered the parents stated intent as part of the analysis.[221] The best approach would be to use the factors that the Fourth Circuit provided in *Maxwell*. The use of these factors will promote consistency in the decisions of Hague Convention cases among the Circuit Courts.

Additionally, as the Second Circuit pointed out in *Gitter*, the first step of the inquiry in determining a child's habitual residence is for the court to look into the shared intent of the individuals who are qualified to choose the child's residence, typically the parents, "*at the latest time that their intent was shared*." [emphasis added][222] The key phrase is "at the latest time that their intent was shared." Thus, the fact that the majority of cases filed under the Hague

[220] *Maxwell v. Maxwell*, 588 F.3d 245, 252 (4th Cir. 2009).
[221] *See, e.g., Gitter*, 396 F.3d at 129 (in determining parental intent, "the court should look, as always in determining intent, at actions as well as declarations.").
[222] *Gitter*, 396 F.3d at 134.

Convention consist of parents who disagree as to the location of their child's habitual residence will not prevent courts from applying the parental intent test because the determination of the child's habitual residence is not based on the parents *current* desires, rather it is based on their preferences at the last point in time when their intent was shared.

In adopting the child standard, the Sixth Circuit found that the Hague Convention is designed to prevent cases in which "the child is taken out of the family and social environment in which its life has developed" and that this principle is best given effect by a standard that follows the child's view of where its home is, "rather than one which subordinates the child's experiences to their parents' subjective desires."[223] This statement mischaracterizes the approach taken by the Circuit Courts that follow the parental standard. None of the Circuit Courts include "parents' subjective desires" as part of the analysis for determining a child's habitual residence. Shared parental intent "at the latest time that their intent was shared" is not equivalent to parents' subjective desires. Rather, shared parental intent involves the issue of whether the child's parents shared an intent to abandon the previous habitual residence.[224]

Further, focusing on parental intent, rather than the child's intent, is much less likely than the child standard to lead to confusion. Critics feel that looking at parental intent muddles the analysis of habitual residence. However, courts would find it even more difficult to decide a case based on the, sometimes unknowing, intent of the child. "[C]hildren . . . normally lack the material and psychological [ability] to decide where they will reside."[225] In all of the cases previously discussed in this paper, the children were very young, with ages ranging from four to

[223] *See Robert v. Tesson*, 507 F.3d 981, 991-92 (6th Cir. 2007) (internal quotation marks omitted).
[224] *Koch v. Koch*, 450 F.3d 703, 715 (7th Cir. 2006).
[225] *Id.* at 132.

thirteen years old, when the petition was filed under the Convention.[226] The argument against using the parental intent standard is further flawed because young children do not have the mental capacity to choose a habitual residence. The Third Circuit believes that "a child's habitual residence is the place where he or she has . . . a degree of settled purpose from the child's perspective."[227] Although practically speaking, a preteen or teenager may be able to experience "a degree of settled purpose," a young child arguably cannot reach such a conclusion. Most young children lack any understanding or awareness of where their home is, who they live with, how long they have lived there, etc. Moreover, even a child who has a rough idea of where their habitual residence is may not be able to convey that opinion to others, especially in the cases where the child involved is as young as four years old. In sum, the use of a child intent standard will be difficult for courts to apply because young children's feelings or wishes can be hard to determine with any accuracy.

Additionally, to the extent that courts must make ordinary custody determinations every day that consider a young child's presumed feelings about his or her living arrangements, one of the tools that is most often used is an evaluation conducted by a psychologist, social worker, etc. To use an approach such as this in a Hague Convention case would create a slippery slope for courts as the decisions would resemble substantive custody determinations, which the Convention expressly prohibits.[228] Rather, in Hague Convention cases, courts are limited to addressing the proper jurisdiction for the custody disputes.[229]

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[226] *See, e.g., Redmond v. Redmond*, 724 F.3d 729, 731 (7th Cir. 2013) (the child was four years old when the petition was filed); *Walker v. Walker*, 701 F.3d 1110, 1114-15 (7th Cir. 2012) (the child was thirteen years old when the petition was filed).

[227] *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

[228] *See Barzilay v. Barzilay*, 600 F.3d 912, 916 (8th Cir. 2010) (internal quotation marks omitted).

[229] *Id*.

Another potential issue with focusing primarily on the child's acclimation is that this may raise issues with respect to siblings. Some children adjust quicker than others to change. Therefore, in cases involving more than one child, there may be a brother who adjusted to a particular location and a sister who has not acclimated to the new location. Based on the background of the Convention discussed in Part II of this paper, it seems as though the drafters of the Convention likely did not contemplate that at the initial stage of determining jurisdiction based on a child's habitual residence, that courts could reach decisions that may separate young children from their siblings. This would seem much more analogous to a substantive law decision than a procedural determination of the proper jurisdiction for a case.

Finally, a potential issue that may arise in Hague Convention litigation is if there is a case before one of the Circuit Courts that has adopted the parental standard and there is a conflict between parental intent and the child's acclimatization. For example, if the Circuit Court finds that the location of the child's habitual residence under step one of the analysis (parental intent) was X and the location of the child's habitual residence under step two of the analysis (child acclimatization) was Y. If the Circuit Court finds that the child's habitual residence is location Y, then it seems as though in this scenario, the parental standard is essentially identical to the child standard as parental intent becomes irrelevant. As such, if the United States Supreme Court determines that the proper standard for determining a child's habitual residence is the parental standard, then it is crucial that the Court ascertain how the lower courts must treat this issue.

**Part IV: Conclusion**

The method for determining a child's country of habitual residence is important because a finding of wrongful removal, which then triggers the return of a child to that country, can only

arise if a child has been taken from their country of habitual residence in violation of custody rights.[230] "[E]very Hague Convention petition turns on the threshold determination of the child's habitual residence; all other Hague determinations flow from that decision."[231] While "[t]he framers of the Hague Convention intentionally left 'habitual residence' undefined, and intended that the term be defined by the unique facts in each case[,]" the Supreme Court needs to address this issue in the near future.[232] The uncertainty in the courts is only going to grow if the Supreme Court does not ascertain the appropriate standard for determining a child's habitual residence. A uniform approach is desperately needed in order to ensure consistent decisions in Hague Convention cases. To sum up, the best approach to determine a child's habitual residence is the parental standard, primarily because of its ease of application as contrasted with the child standard.

[230] *Redmond*, 724 F.3d at 742.
[231] *Id*.
[232] *See Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009).