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THE CASE FOR CONSIDERING A CHILD'S OPINION IN DETERMINING HABITUAL RESIDENCE IN HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION CASES

Samantha Rumsey*

I. Introduction

Imagine you are a twelve-year-old child with both U.S. and Argentine citizenship. Your whole family lived in Argentina together until your parents divorced four years ago. Then, your father moved to the United States, while you stayed in Argentina with your mother. Two years ago, your mother agreed to let you live with your father for an open-ended period of time. She thought it would be good for you to spend time with your father and to improve your English. Now, your mother wants you to return to Argentina, but your father will not let you go. In a few months, a U.S. court will decide whether your father is wrong for keeping you in the United States. The outcome of these proceedings will depend heavily upon a determination of your “country of habitual residence.” You firmly believe that Argentina is your home, and while you have enjoyed your time in the United States, you are looking forward to returning to your school, friends and family in Argentina. You are confused and upset when you learn that you will not be appointed your own lawyer and that the court will not take your opinion into account when making this important decision.¹

Many children in the United States are in this frustrating and painful situation.² In 2012, parents in the United States opened more than 900 cases alleging international child abduction, representing over 1,000 abducted or wrongfully-retained children.³ In deciding a child's

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¹ This is a hypothetical, illustrative example.

² See *New Outgoing Cases—CY 2012*, DEPARTMENT OF STATE (Nov. 24, 2013, 8:37 PM), http://travel.state.gov/abduction/resources/resources_3860.html.

³ *Id.*

“country of habitual residence,” which is often a key issue in international child abduction cases, U.S. courts do not use a standard that directly takes a child’s opinion into account.⁴ Moreover, in many circumstances, the courts that adjudicate these cases do not provide children with independent representation.⁵ As a result, courts silence children in proceedings that profoundly impact their lives.

The Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”), which governs international child abductions in both the United States and other signatory countries, creates a procedure for the prompt return of internationally abducted children.⁶ The stated objectives of the Hague Convention are: first, “to secure the prompt return of children wrongfully removed or retained in any Contracting State”; and second, “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.”⁷ The Hague Convention also sets out the circumstances under which the removal or retention of a child is considered wrongful:

- (1) Where the removal or retention 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
- (2) 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.⁸

⁴ Several circuits take a child’s level of acclimatization to or past experiences in a country into account when determining country of habitual residence; none of these circuits, however, specifically designate as a factor a child’s testimony as to what country they feel should be that in which they are habitually resident. *See, e.g.,* Barzilay v. Barzilay, 600 F.3d 912, 918 (8th Cir. 2010); Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006); Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).

⁵ *See* Merle H. Wiener, *Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Child Abduction Cases*, 58 AM. U. L. REV. 355, 377 (2008).

⁶ *See generally* Convention on the Civil Aspects of International Child Abduction of 1980, Oct. 25, 1980, 19 I.L.M. 1501 (1980) [hereinafter Convention]. The International Child Abduction Remedies Act implements the Convention within the United States. 42 U.S.C. §§ 1601–1610 (2008).

⁷ Convention, *supra* note 6, at art. 1.

⁸ *Id.* at art. 3 (emphasis added).

Under this framework, determining a child’s state of habitual residence is absolutely essential to analysis under the Hague Convention because the child’s country of habitual residence supplies the domestic law that determines whether a child’s removal violated a parent’s rights.⁹ Yet, despite the importance of country of habitual residence determinations, the text of the Convention does not define this term.¹⁰ The Convention drafters deliberately chose not to define the term in order to “leave the notion free from technical rules which can produce rigidity and inconsistencies.”¹¹

Early decisions *outside* the United States sought to obey the drafters’ wishes and avoid overcomplicating the issue of habitual residence with layers of inflexible doctrine.¹² An English opinion widely cited in American courts expressed this aspiration:

It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.¹³

In U.S. courts, however, this hope quickly evaporated. For more than twenty years, U.S. circuit courts of appeals have disagreed over how “habitual residence” should be defined. Specifically, courts have differed as to whether more weight should be given to the child’s experience and level of acclimatization or to the parents’ “settled purpose” to live with a child in a given place.¹⁴ Even those courts that more heavily emphasize the child’s experience in their

⁹ *Id.*

¹⁰ *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995).

¹¹ *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001) (citing J.H.C. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 144 (10th ed. 1980)).

¹² *Redmond v. Redmond*, 724 F.3d 729, 742 (7th Cir. 2013) (discussing the Convention’s failure to define the term habitual residence and discussing foreign courts’ early decisions interpreting the term).

¹³ *Id.* (citing *Re Bates* (1989), No. CA 122/89 (High Ct. of Justice, Fam. Div., Eng), 1989 WL 1683783).

¹⁴ *Compare, e.g., Feder*, 63 F.3d at 224 (“[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.”), *and Friedrich*, 983 F.2d at 1401 (“To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.”), *with Mozes*, 239 F.3d

analysis do not directly take the child’s opinion into account as a factor for deciding country of habitual residence.¹⁵

This Comment argues that U.S. courts should consider a child’s opinion when deciding his or her country of habitual residence in Hague Convention cases.¹⁶ This Comment further contends that courts should appoint counsel for children in all Hague Convention cases because mandatory representation is the best way to give children a strong voice in habitual residence determinations. Simply put, considering children’s views and giving them dedicated attorneys to advocate for these beliefs would result in more accurate and child-friendly determinations of country of habitual residence. Finally, this Comment presents a model standard for determining country of habitual residence and looks to other countries’ approaches to providing children with representation.

Part II of this Comment outlines the two main approaches to determining country of habitual residence that have been adopted by U.S. courts. Part III sets out the alternate tests used in both common law and civil law foreign jurisdictions. Part IV discusses the U.S. trend against appointing counsel to represent children in Hague Convention cases. Part V presents arguments in support of the creation of a child-centric system for determining country of habitual residence and offers U.S. courts a model standard for determining country of habitual residence. Part VI

at 1076 (“[T]he 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.”).

¹⁵ See Eran Stthoeger, *International Child Abduction and Children’s Rights: Two Means to the Same End*, 32 MICH. J. INT’L L. 511, 529 (2011) (“As for the methods of obtaining the child’s views, courts tend to do so through a welfare officer or psychologist working on behalf of the court, or through the parents.”).

¹⁶ It is important to note that children have the best chance of voicing their opinion in Hague Convention cases by utilizing the “child’s objection” exception to the Convention’s mandatory return requirement. This gives a judicial authority the option to “refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” See Convention *supra* note 6, at art. 13. This exception, however, was intended by the Convention drafters to be used sparingly. See Christina Piemonte, Comment, *International Child Abduction and Courts’ Evolving Considerations in Evaluating the Hague Convention’s Defenses to Return*, 22 TUL. J. INT’L COMP. L. 191, 194 (2013) (citing Convention, *supra* note 6, at arts. 1, 2, 12, 13, 20). The intention that this exception be used in a limited fashion supports this Comment’s proposition that a child’s opinion should be taken into account specifically with respect to country of habitual residence determinations. See discussion *infra* Section V.C.

describes how other Hague Convention signatory countries have implemented the requirement of appointed counsel and argues that the appointment of independent counsel for the child in every U.S. Hague Convention case would lead to more child-friendly determinations of country of habitual residence. Part VII concludes this Comment.

II. U.S. Courts' Tests For Determining Country Of Habitual Residence

U.S. circuit courts fall roughly into two camps with respect to their approaches to deciding a child's country of habitual residence. The first group emphasizes the child's perspective and gives secondary consideration to parents' intentions. The second set focuses on parental intent and only gives consideration to the child's perspective in extraordinary cases.

A. Emphasis on the Child's Perspective

The Third, Sixth and Eighth Circuits have each held that a determination of country of habitual residence should focus on the child's perspective, though they have differed in how much weight they give to parents' intentions as an additional factor for consideration. All three circuits fail to directly consider a child of reasonable age and maturity's *opinion* as to what is his or her country of habitual of residence.

The Sixth Circuit in *Friedrich v. Friedrich* was the first federal appellate court to approach the question of which country is a child's habitual residence by focusing on the perspective of the child.¹⁷ In this case, a German man and an American woman stationed for military service in Germany married and had a child.¹⁸ After about a year and a half, a marital dispute resulted in the mother taking the child to the United States without the father's consent or knowledge.¹⁹ The German father filed a petition in the United States alleging that his son's

¹⁷ *Friedrich*, 983 F.2d at 1396.

¹⁸ *Id.* at 1398.

¹⁹ *Id.* at 1399.

removal from Germany was wrongful.²⁰ The court first emphasized that a habitual residence inquiry must “focus on the child, not the parents, and examine past experience, not future intentions.”²¹ The court also explicitly noted that changes in parental affection and responsibility could not alter habitual residence.²² In this case, the court did not attempt to elicit the child’s opinion about whether Germany or the United States was his country of habitual residence; the court likely did not consider the child’s views, however, because he was very young at the time of the wrongful retention.²³

In *Feder v. Evans-Feder*, the Third Circuit joined the Sixth Circuit and held that country of habitual residence determinations should focus on the child’s perspective.²⁴ The court, however, qualified this holding by stating that while the standard must “focus on the child,” it must also consider “the parents’ present, shared intentions regarding their child’s presence there.”²⁵ As in *Friedrich*, the possibility of taking an affected child’s *opinion* into account was not considered; this failure, however, potentially related to the fact that the child at issue was only four years old at the time of unlawful removal.²⁶

In *Karkkainen v. Kovalchuk*, another Hague Convention case, the Third Circuit confronted a very different set of facts.²⁷ Maria Kovalchuk was born in Russia to married parents, who divorced when she was five years old.²⁸ After their divorce, Maria’s father moved

²⁰ *Id.*

²¹ *Id.* at 1401.

²² *Id.* at 1402 (“[H]abitual residence can be “altered” only by a change in geography and the passage of time, not by changes in parental affection and responsibility.”).

²³ *Friedrich*, 983 F.2d at 1398.

²⁴ *Feder*, 63 F.3d at 224 (“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.”).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Karkkainen*, 445 F.3d at 285–87.

²⁸ *Id.* at 285.

to the United States and her mother moved to Finland.²⁹ Maria's parents agreed that she would live with her mother in Finland, and Maria lived there until she was eleven years old.³⁰ At eleven, after acquiring U.S. Permanent Resident Status, Maria expressed a desire to move to the United States permanently.³¹ She said goodbye to her teacher and friends, and as soon as the Finnish school year ended, she went to the United States to live with her father with her mother's permission.³² At the end of the summer, Maria desired to stay in the United States, and over her mother's objections, Maria's father did not send her back to Finland.³³ Subsequently, litigation ensued.³⁴ In determining Maria's country of habitual residence, the Third Circuit clarified its holding in *Feder* and held that that in making a country of habitual residence determination a trier of fact should focus on: (1) "acclimatization and settled purpose 'from the child's perspective'"; and (2) parental intent, both with respect to how it affects a child's perspective *and* by giving "independent weight to 'the parents' present *shared* intentions regarding their child's presence' in a particular place."³⁵

The *Karkkainen* court was also unique in that it explicitly stated that shared parental intent should be given great weight in cases of very young children and less weight in cases of older children.³⁶ The court, did not decide exactly how much weight shared parental intent should be given in cases of older children, such as Maria.³⁷ Additionally, even though the court

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 286.

³² *Id.* The facts of the case indicate that Maria's mother gave her explicit permission to live in the United States for the summer. In a later conversation, Maria's stepfather told her that she was free to make the decision to remain in the United States at the end of the summer. Because her mother did not disagree with this statement, "Maria was left with the impression that she had been given permission to move permanently to the United States if she wished." *Id.*

³³ *Karkkainen* 445 F.3d at 286.

³⁴ *Id.* at 286.

³⁵ *Id.* at 292 (citing *Feder*, 63 F.3d at 224).

³⁶ *Id.* at 296.

³⁷ *Id.*

repeatedly stated that Maria was mature and intelligent,³⁸ the court did not directly consider Maria's opinion about her country of habitual residence.³⁹

In *Barzilay v. Barzilay*, a case in which an Israeli citizen alleged his former wife wrongfully retained his children in the United States, the Eighth Circuit adopted the rationale of *Feder*.⁴⁰ The court held that, "the 'settled purpose' of a family's move to a new country is the central element of the habitual residence inquiry" and that this purpose "must be from the child's perspective."⁴¹ The court further emphasized that the determination should be "particularly sensitive to the perspective and circumstances of the child."⁴² Despite the court's decision to focus on the child's perspective, it did not consider the opinion of the eldest child affected by the proceedings, who was twelve years old at the time the alleged wrongful retention occurred.⁴³

B. Emphasis on the Parents' Perspectives

In contrast, other circuit courts choose to emphasize the parents' perspectives. The seminal case finding that parental intent should determine a child's habitual residence is the Ninth Circuit's decision in *Mozes v. Mozes*.⁴⁴ Many courts have modeled their approach to determining habitual residence after this decision.⁴⁵ In *Mozes*, the court held that in order to determine whether a child acquires a new habitual residence, judges should give the most weight

³⁸ *Id.* at 286 ("Maria is both mature and intelligent for her age"); *id.* at 294 ("Maria is 'uniquely talented and highly intelligent,' an experienced traveler with strong English skill, and mature for her age.").

³⁹ In a subsequent case related to the wrongful retention of a five-year-old child, *Tsai-Yi Yang v. Fu-Chiang Tsui*, although the court did not consider the child's opinion they did seem to indicate that this would be appropriate in the cases of older children stating, "[a]s the record does not reflect Raeann's perspective on her habitual residence, we must focus on the parents' present, shared intentions." 416 F.3d 199 (3d Cir. 2005).

⁴⁰ *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010).

⁴¹ *Id.*

⁴² *Id.* at 920.

⁴³ *Id.*

⁴⁴ *Mozes v. Mozes*, 239 F.3d 1067, 1067 (9th Cir. 2001).

⁴⁵ See D. MARIANNE BLAIRE ET AL, FAMILY LAW IN THE WORLD COMMUNITY 440 (2d ed. 2009) (citing *Tsai-Yi Yang v. Fu-Chiang Tsui*, 416 F.3d 199, 272 (3d Cir. 2005); *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006); *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005); *Ruiz v. Tenorio*, 392 F.3d 127 (11th Cir. 2004); *Silverman v. Silverman*, 338, F.3d 886 (8th Cir. 2003); see also *Papakosmas v. Papakosmas*, 483 F.3d 617 (9th Cir. 2007) (adopting *Mozes*' country of habitual residence rule); *Holder v. Holder*, 392 F.3d 1009 (9th Cir. 2004) (also adopting *Mozes*' country of habitual residence rule).

to the intentions or purposes of the “person or persons who are entitled to fix the place of the child’s residence.”⁴⁶ The court qualified this rule by stating that the settled intention of the parents must be accompanied by “an actual change in geography” and the passage of a sufficient length of time for the child to have become acclimatized.⁴⁷

The court also addressed when, if ever, evidence of acclimatization of a child can suffice to establish a child’s habitual residence despite uncertain or conflicting parental intent.⁴⁸ In answering this question, the court held that a child could lose his or her habitual attachment to a place without a parent’s consent only in circumstances where “the objective facts point unequivocally to a person’s ordinary or habitual residence being a particular place.”⁴⁹ The court further elaborated that this means that a child must show that his or her “relative attachments have changed to the point where requiring return to the original forum would now be tantamount to taking the child ‘out of the family and social environment in which its life has developed.’”⁵⁰ This holding set a high bar for individuals trying to show that a child’s acclimatization can overcome parental intent.⁵¹

The Eleventh Circuit adopted a similar definition of “country of habitual residence” in *Ruiz v. Tenorio*.⁵² In this case, an American couple and their two children moved to Mexico after seven years living as a family in the United States.⁵³ While in Mexico, the father took a job, the family began construction on an “American-style” home, and the children attended

⁴⁶ *Mozes*, 239 F.3d at 1077.

⁴⁷ *Id.* at 1078.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1081.

⁵⁰ *Id.*

⁵¹ See Tai Vivatvaraphol, *Back to Basics: Determining A Child’s Habitual Residence In International Child Abduction Cases Under the Hague Convention* 77 *FORDHAM L. REV.* 3325, 3349 (2009); see also Gitter, 396 F.3d 124, 134 (adopting the *Mozes* approach and emphasizing that it is only in “relatively rare circumstances” that “a child’s acclimatization to a location abroad will be so complete that serious harm can be expected to result from compelling his return to his family’s intended residence”).

⁵² *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004).

⁵³ *Id.* at 1249.

school and forged friendships.⁵⁴ After about two years in Mexico, the couple separated; and, a few months later, the mother removed the children to the United States.⁵⁵ Applying the *Mozes* definition,⁵⁶ the court held that although the case was “close,” the parents had never formed a settled intent to abandon the children’s habitual residence in the United States.⁵⁷ Moreover, it held that the children had not sufficiently acclimated to Mexico to overcome their parents’ lack of shared intent.⁵⁸

In *Koch v. Koch* the Seventh Circuit also adopted the rule in *Mozes*, but added a new emphasis, arguing that the rule was not rigid and that courts applying it should be “keenly aware of the *flexible, fact-specific nature* of the habitual residence inquiry envisioned by the Convention.”⁵⁹ In this case, Mr. and Mrs. Koch and their two children moved from the United States to Germany when one of the children was only eleven days old and the other was a toddler.⁶⁰ Both parties agreed that the move was a semi-temporary way both for the family to save money and for Mr. Koch to accrue work experience.⁶¹ After two years in Germany, Mr. Koch took the children to the United States without their mother’s knowledge or consent.⁶² Several months later, Mr. Koch returned to Germany; but after about five months, he removed the children to the United States for the second time.⁶³ At the time of the second removal one child had lived her whole life⁶⁴ in Germany, and the other had lived three of his five years in

⁵⁴ *Id.* at 1249–51.

⁵⁵ *Id.* at 1250.

⁵⁶ *Id.* at 1252.

⁵⁷ *Id.* at 1256.

⁵⁸ *Ruiz*, 392 F.3d at 1255.

⁵⁹ *Koch v. Koch*, 450 F.3d 703, 716 (7th Cir. 2006) (quoting *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004)) (emphasis added).

⁶⁰ *Id.* at 706.

⁶¹ *Id.*

⁶² *Id.* at 707.

⁶³ *Id.* at 708.

⁶⁴ Here, “whole life” excludes the period of wrongful removal.

Germany.⁶⁵ Based on a flexible inquiry, the court held that the parents had abandoned the children's habitual residence in the United States.⁶⁶ Moreover, it held that even if the parents had not chosen to abandon the United States, the children had become acclimated to Germany to an extent that it had become their habitual residence.⁶⁷ This case serves as an example of the most weight that can be given to a child's perspective in a court that follows the *Mozes* rule.

C. The Impact of Immigration Status on “Degree of Settled Purpose”

Although courts generally follow one of the above previous approaches when determining a child's habitual residence, an additional factor that can have an impact on determinations of habitual residence is immigration status. While an unlawful or precarious immigration status does not preclude one from becoming a habitual resident under the Hague Convention, it prevents one from doing so rapidly.⁶⁸ Specifically, a lack of lawful immigration status presents a problem for a parent advocating that the United States is his or her child's country of habitual residence when the court is focused on the parents' perspective or “settled purpose” as the most important factor in determining country of habitual residence.⁶⁹

For example, in *Alonzo v. Claudino*, two undocumented Honduran citizens disputed their eight-year-old daughter's habitual residence in a Hague Convention case.⁷⁰ Mother, father, and daughter resided in the United States, but no one in the family had lawful immigration status.⁷¹ The mother argued that her daughter's habitual residence was the United States because the daughter had lived there for two years and because both the mother and father made the decision

⁶⁵ *Koch*, 450 F.3d at 709.

⁶⁶ *Id.* at 717.

⁶⁷ *Id.* at 717–718.

⁶⁸ *Mozes v. Mozes*, 239 F.3d 1067, 1082 n.45 (9th Cir. 2001) (citing E.M. Clive, *The Concept of Habitual Residence*, 1997 JURID. REV. 137, 147 (1997)).

⁶⁹ *Id.* (“[Immigration status is also a highly relevant circumstance when, as here, the shared intent of the parents is in dispute.”).

⁷⁰ *Alonzo v. Claudino*, No. 1:06CV00800, 2007 WL 475340 (M.D.N.C. Feb. 7, 2007).

⁷¹ *Id.* at *1.

to come to the United States.⁷² Ultimately, the court—following a parent-centric approach—held that the “degree of settled purpose” necessary to establish habitual residency in the United States for the purpose of the Convention does not exist when the child and parent advocating for the United States as the habitual residence country are not lawfully present in the United States⁷³

Alonzo and other cases holding that a lack of lawful immigration status is an obstacle to acquiring habitual residence in a country are particularly problematic, because they entirely disregard the perspective of the child.⁷⁴ Consider, for example, the common case of a Guatemalan child who has lived since age two with her undocumented immigrant parents in the United States and considers herself American in every way but on paper. If a court follows the *Alonzo* rule strictly, the determination of this child’s habitual residence will have no nexus with reality; the court will be forced to hold that she habitually resides in Guatemala, despite her complete lack of connection with the country. Instead of the current approach, U.S. courts should give much less weight to a parent and child’s immigration status and instead focus on where the individual child believes his or her home to be.

III. International Approaches to Determining Country of Habitual Residence

U.S. courts rarely cite international case law⁷⁵ when deciding which standard to use in country of habitual residence determinations.⁷⁶ Nonetheless, because one of the Hague

⁷² *Id.* at *5.

⁷³ *Id.* at *6 (“It is impossible to be settled when you are subject to arrest and deportation at any time[.] . . . [Moreover,] Ms. Pineda has taken no steps to acquire legal status in the United States.”).

⁷⁴ *Id.*; *see also* Carrasco v. Carrillo-Castro, 862 F.Supp.2d 1262, 1274 (D.N.M. 2012) (holding that father’s lack of immigration status in the United States weighed against finding the United States to be his child’s country of habitual residence); Miltiadous v. Tetervak, 686 F.Supp. 2d 544, 551 n.9 (E.D.Pa. 2010) (holding that a mother’s uncertain immigration status in the United States weighed against a finding that the United States was her children’s country of habitual residence).

⁷⁵ Justice Scalia is arguably the Supreme Court Justice who most frequently criticizes U.S. courts’ use of international law. *See, e.g.,* Atkins v. Virginia, 536 U.S. 304, 347-48 (Scalia, J., dissenting) (“But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to [the majority’s] appeal . . . to the views of . . . members of the so-called ‘world community’ Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”); Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (arguing that an international organization’s account of what it considers to be

Convention's goals is uniform interpretation and application of its text, and because the Supreme Court and the Vienna Convention advocate consideration of the "decisions of the United States' sister signatories" in order to achieve this goal, this Comment looks at foreign decisions.⁷⁷

A. Common Law Approaches

Common law countries, as a general rule, tend to align with *Mozes* and its progeny.⁷⁸ For example, one of the most frequently cited common law cases is *Re Bates*, an English decision which articulated and adopted the principle of "settled purpose."⁷⁹ In that case, the court stated that all that is required for a residence to be habitual is that the parent's purpose of living where he or she does must have, "a sufficient degree of continuity to enable it properly to be described as settled."⁸⁰ Specifically, the court said that a parent may possess this settled purpose even if he or she only intends to live in the country in question for a limited period.⁸¹ Based on this rule, the court held that where an apartment was originally intended by both parents to be a temporary base, it acquired a more settled purpose because of the parents' actions, including making arrangements for the child's care, accommodations, and speech therapy.⁸² Therefore, the court found the country in which this apartment was located to be the habitual residence.⁸³ The flaw in using this case as an absolute model, however, is that it did not address whether the "overtly stated intentions" of an older child should be taken into account when determining habitual residence.

"civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this nation.").

⁷⁶ *Tai Vivatvaraphol*, *supra* note 51, at 3354.

⁷⁷ *Id.* See also *Abott v. Abbott* 560 U.S. 1, 16 (2010) (citing 42 U.S.C. (b)(3)(B) §11601 (2008)) (holding that considering the views of sister signatories is important in interpreting treaties generally and emphasizing that this "principle applies with special force in [Hague Convention cases]" because "Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework.").

⁷⁸ *Id.*

⁷⁹ *Re Bates*, (1989) CA 122/89 (High Ct. of Justice, Fam. Div., Royal Cts. of Justice) 1989 WL 1683783.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

A second key common law case, *Cooper v. Casey*, adopted an approach similar to that of *Bates*.⁸⁴ The court elaborated further on the *Bates* rule for determining country of habitual residence and set forth two principles: first, a young child's habitual residence is the same as that of his or her parents and neither parent can unilaterally change it without the other parent's consent.⁸⁵ Second, the habitual residence of a married couple is the country that the couple has voluntarily adopted for settled purposes as part of their regular lives.⁸⁶ Again, this case is problematic because it did not address how the approach would vary if it were applied to determining the habitual residence of an older or mature child.

B. Civil Law Approaches

Civil law countries have frequently adopted more objective approaches to determining habitual residence under the Hague Convention.⁸⁷ Compared to common law countries, these nations' approaches line up more squarely with *Friedrich* and its progeny.⁸⁸ For example, in *Wilner, Eduardo Mario v. Osswald, María Gabriela*, Argentina's Supreme Court of Justice faced a case in which a mother removed her three-year-old child, who had lived her entire life in Canada, from the country and brought her to Argentina.⁸⁹ The court adopted a child-centric approach⁹⁰ to determining country of habitual residence and emphasized that any interpretation that makes a child's habitual residence dependent on the parents' domicile is mistaken.⁹¹ The

⁸⁴ 18 Fam LR 433 (Austl.).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Tai Vivatvaraphol, *supra* note 51.

⁸⁸ *Friedrich v. Friedrich*, 983 F.2d 1396, 1396 (6th Cir. 1993).

⁸⁹ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/1995, "Wilner, Eduardo Mario v. Osswald, María Gabriela / recurso de hecho," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-1269) (Arg.), translated and available at <http://web.archive.org/web/20070526143121/http://www.hcch.net/incadat/fullcase/0362.htm>.

⁹⁰ *Id.* ("The term habitual residence as used in the Convention refers to a factual situation that implies stability and permanence and alludes to the center of the minor's life, excluding any reference to minors' depending domicile.").

⁹¹ *Id.*

court then held that since the child had developed her life in Canada, the locale of her family and school, her habitual residence was Canada.⁹²

A Swedish court faced with a similar case also put the emphasis in determining country of habitual residence on the child's perspective.⁹³ In *Johnson v. Johnson*, the court held that "habitual residence is where there is constancy with regard to the duration of the period concerned, among other factors."⁹⁴ The court then added that such an inquiry should take into account all relevant objective circumstances that can show a child's permanent attachment to one country over another, including the child's existing social ties.⁹⁵

In sum, the approaches of both U.S. and international courts leave much to be desired in terms of their methods for determining country of habitual residence—specifically, the explicit opinion of the child. While the Third, Sixth, and Eighth Circuits come the closest to considering children's opinions by focusing on the child's perspective, even these fail to take the children's opinions directly into account when determining country of habitual residence. The next section discusses the U.S. trend against appointing lawyers for children in Hague Convention proceedings, which further limits American children's ability to influence country of habitual residence determinations. The remainder of the Comment presents arguments in support of (1) including the child's opinion as a heavily-weighted factor in country of habitual residence determinations and (2) requiring all U.S. courts to appoint attorneys to represent children in Hague Convention cases.

⁹² *Id.*

⁹³ Vivatvaraphol, *supra* note 51, at 3359.

⁹⁴ *Id.*

⁹⁵ *Id.*

IV. U.S. Trend Against Appointing Counsel For Children In Hague Convention Cases

Although U.S. courts have the authority to appoint guardians *ad litem*, counsel, or both for children in Hague Convention cases,⁹⁶ in practice, separate representation is “far less common than warranted.”⁹⁷ There are several reasons for the rarity of appointed counsel in these types of cases. First, in many traditional custody cases, third parties, such as mediators, social workers, or grandparents have a stake in the legal proceedings, and these individuals are able to either advocate for the child’s rights or ask the court to appoint an attorney for the child.⁹⁸ In Hague Convention cases, however, it is less common for such interested persons to be involved in proceedings,⁹⁹ and therefore, it is less common for someone to speak up and request that the judge appoint counsel for the child.¹⁰⁰ Additionally, since a relatively small number of Hague Convention cases are brought each year¹⁰¹ and many judges are unfamiliar with the intricacies of these cases,¹⁰² some judges may assume Hague Convention cases deal with purely jurisdictional issues.¹⁰³ Consequently, fact finders may believe that a dedicated representative for the child is

⁹⁶ Weiner, *supra* note 5, at 377 n.214. Some courts adjudicating Hague petitions appoint a guardian *ad litem*: Danaipour v. McLarey, 286 F.3d 1, 8 (1st Cir. 2002); Lieberman v. Tabachnik, No. 07-CV-02415-WYD, 2007 WL 4548570 (D. Colo. Dec. 19, 2007); McManus v. McManus, 354 F. Supp. 2d 62, 69 (D. Mass. 2005); Olguin v. Santana, No. 03 CV 6299(JG), 2004 WL 1752444 (E.D.N.Y. Aug. 5, 2004). Some courts appoint an attorney who acts in the dual role of both the guardian *ad litem* and the child attorney: Kufner v. Kufner, 519 F.3d 33, 37 (1st Cir. 2008); Wasniewski v. Grzelak-Johannsen, No. 5:06-CV-2548, 2007 WL 1461794, at *1 (N.D. Ohio May 16, 2007). In divorce and custody proceedings, courts sometimes appoint two individuals, both a guardian *ad litem* and an attorney for the children: Schult v. Schult, 699 A.2d 134, 135 (Conn. 1997); Schain v. Schain, No. FA000156786S, 2002 WL 450387, at *8 (Conn. Super. Ct. Feb. 26, 2002).

⁹⁷ Sthoeger, *supra* note 15, at 529.

⁹⁸ See generally ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW (Aspen Publishers, eds. 6th ed. 2009).

⁹⁹ Weiner, *supra* note 5, at 378 n.220 (explaining that courts use mediation infrequently in Hague Convention cases). One reason that social workers are less frequently involved in Hague Convention cases than in other family custody matters may be that no evaluation of the best interests of the child is required in Hague Convention cases.

¹⁰⁰ *Id.* at 377.

¹⁰¹ See *New Outgoing Cases*, *supra*, note 3.

¹⁰² Weiner, *supra* note 5, at 392 (“No matter whether the case is heard in state or federal court the judge is unlikely to have adjudicated a Hague Convention case before.”).

¹⁰³ To categorize the Hague Convention as a treaty governing primarily jurisdiction would be inaccurate. The Hague Convention allows a country of removal to assess whether an individual residing within its jurisdiction committed a wrongful *substantive* act by removing a child from another country. When a removal is determined to be wrongful,

not necessary. The average young age of many children involved in Hague Convention cases¹⁰⁴ may also lead judges to believe that the appointment of counsel would not be helpful in such cases. Finally, in some cases, judges reject requests for the appointment of counsel for a child.¹⁰⁵

V. Why U.S. Courts Should Create A Child-Centric System For Determining Country Of Habitual Residence

As shown above, even the most child-centric courts in the United States and abroad often fail to consider a child’s personal perspective or opinion about his or her country of habitual residence in making habitual residence determinations under the Hague Convention.¹⁰⁶ This is far from the trend in other areas of law that affect children; many domestic and international laws require the consideration of a child’s opinion in proceedings that affect his or her life. Moreover, common-sense arguments support the need to include children’s opinions in making these determinations. Finally, and perhaps most significantly, children’s opinions are already considered in Hague Convention cases in the limited context of the Convention’s objection-to-return exception.¹⁰⁷ Below, this Comment discusses these areas of the law and explains why courts should follow the trends they create in order to revolutionize the process for determining habitual residence under the Hague Convention.

the result is *not* the transfer of the case to the home country’s court, but a requirement that the country of removal secure the prompt return of the child.

¹⁰⁴ See Janet Chiancone et al., *Issues in Resolving Cases of International Child Abduction by Parents*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.), Dec. 2011 at 4 (A survey by the ABA Center on Children and the Law found that of 97 U.S. parents “whose children had been taken to or retained in another country by the other parent” found that the average age of abducted children was five years.) See also Swiss Federal Office of Justice, *International Child Abduction and Contact Conflicts* at 20, available at <http://www.ejpd.admin.ch/content/dam/data/gesellschaft/kindesentfuehrung/bro-kindsentfuehrung-e.pdf> (“The average age of the children involved [in Swiss international child abduction cases] is approximately seven years.”).

¹⁰⁵ See, e.g., *Clarke v. Clarke*, No. 08-690, 2008 WL 2217608, at *4 n.3 (E.D. Pa. May 27, 2008) (finding no authority in state law for an appointment in a Hague case); *Hasan v. Hasan*, No. 03-11960-GAO, 2004 WL 57073, at *4 (D. Mass. Jan. 13, 2004) (claiming an appointment would lead the court to litigate the children's best interests, something prohibited by the Convention).

¹⁰⁶ See, e.g., *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993).

¹⁰⁷ Convention, *supra* note 6, at art. 13

A. International Laws Guaranteeing a Child's Right to be Heard

Although the section of the Hague Convention dealing with country of habitual residence determinations does not give national courts adjudicating cases much guidance as to whether or not a child's views should be considered, other sections of the Hague Convention explicitly require consideration of the child's opinion.¹⁰⁸ One such area is Article Thirteen, which sets out the situations in which a state is *not* required to carry out the return of a child to his country of habitual residence.¹⁰⁹

Article Thirteen creates one particularly relevant exception which states that a court "may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account its views."¹¹⁰ The biggest interpretative challenge with this exception is related to determining at what age a child acquires sufficient maturity to take advantage of it.¹¹¹ The Hague Convention itself contains no "threshold age" for hearing a child's objections, but some U.S. courts have created such a threshold.¹¹² For example, one court held that the children's objection clause "simply does not apply to a nine-year-old,"¹¹³ seemingly establishing that as a matter of law a nine-year-old may not raise an objection under Article Thirteen, Section Two.¹¹⁴ Another U.S. court held that courts are *not* precluded as a matter of law from considering the views of an eight-year-old under Article Thirteen.¹¹⁵

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Anastacia M. Greene, *Seen and Not Heard? Children's Objections Under the Hague Convention On International Child Abduction*, 13 U. MIAMI INT'L COMP. L. REV. 105, 128 (2005).

¹¹² *Id.*

¹¹³ *Id.* (citing *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super. Ct. 1992)).

¹¹⁴ *Id.* at 129.

¹¹⁵ *Id.* (citing *Raijmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953 (E.D. Mich. 2001)).

In contrast, some U.S. courts focus more on the individual child's maturity when determining whether a child is old enough to take advantage of the "objection to return" exception. In *In re Interest of Zarate*, an Illinois court focused on the eight-year-old objecting child's individual comprehension level and discounted her objection because during an interview, she could not identify the year she was born, list all of her school classes, or distinguish between her natural father and her stepfather."¹¹⁶ Other U.S. courts rely on the decisions of counselors and psychologists to determine whether the child is sufficiently mature to have his views considered.¹¹⁷ As a general rule, U.S. courts generally favor a "narrow" construction of what constitutes age and maturity and are reluctant to consider children's objections.¹¹⁸

English and South African courts have taken a different approach. For example, in *Re S*, the English Court of Appeals held:

When Art. 13 speaks of an age and maturity level at which it is appropriate to take account of a child's views, the enquiry which it envisages is not restricted to a generalized appraisal of the child's capacity to form unexpressed views which bear the hallmark of maturity. It is permissible (and indeed will often be necessary) for the court to make specific enquiry as to whether the child has reached a stage of development at which, when asked the question, 'Do you object to a return to your home country?' he or she can be relied on to give an answer *which does not depend upon instinct alone*, but is influenced by the discernment which a mature child brings to the questions, [for example, considering the] implications for his or her own best interests in the long and short term."¹¹⁹

¹¹⁶ *In re Interest of Zarate*, 1996 WL 734613 at *4 (N.D. Ill. 1996).

¹¹⁷ Greene, *supra* note 111, at 131–32. Testimony of psychologists is not dispositive, however, and often, judges simply base the decision on their own examination and observations of the child.

¹¹⁸ See *England v. England*, 234 F.3d 268 (5th Cir. 2000) ("Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.").

¹¹⁹ *Re S (Minors) (Abduction: Acquiescence)* 1 FLR 819 (Court of Appeal, 1994) (emphasis added).

This more relaxed standard allows English courts the flexibility to accept the objections of young children in cases where such consideration is warranted.¹²⁰ South Africa also considers the objections of young children,¹²¹ both by using both a flexible standard and by requiring dedicated representation for all children in Hague Convention proceedings.¹²² This combination has allowed South African courts to consider the objections of children as young as five and eight years old.¹²³

The English and South African approaches provide the best option for determining whether a child's opinion should be taken into account, because they allow all children who are able to form a reasoned opinion about their best interests to have a voice in the proceedings that profoundly affect their lives. This broad approach to determining whether a child is mature enough to be heard should be applied to considering a child's opinion on his or her country of habitual residence.

The United Nations Convention on the Rights of the Child ("U.N. Convention"), ratified by every nation in the world except the United States, Somalia, and South Sudan,¹²⁴ is another international instrument that codifies children's right to be heard.¹²⁵ The treaty expresses the principle that children are entitled to freedom of expression and assures that children have a voice in legal proceedings and custody decisions that directly affect their interests.¹²⁶ The United States' failure to ratify the U.N. Convention means that the treaty is not binding law in

¹²⁰ Greene, *supra* note 111, at 158.

¹²¹ Trynie Boezaart, *Colloquium: Listening to Children's Voice: Listening to the Child's Objection*, 2013 NZ L. REV. 357, 369 (2013) ("Neither the CRC nor the Abduction Convention sets a minimum age for children to be afforded an opportunity to air their views.").

¹²² *Id.*

¹²³ *Id.* (citing *KG v. CB* [2012] 4 SA 136 (Supreme Court of Appeal) and *Central Authority v. MR (Ls Intervening)* [2011] 2 SA 428 (GNP HC)).

¹²⁴ UNICEF, *THE STATE OF THE WORLD'S CHILDREN 2012* 16 (2012), available at http://www.unicef.org/sowc2012/pdfs/SOWC%202012-Main%20Report_EN_13Mar2012.pdf

¹²⁵ Convention on the Rights of the Child, U.N. GAOR, 45th Sess., 61st Plen. Mtg., U.N. Doc. A/RES/44/25 (1989) [Hereinafter U.N. Convention].

¹²⁶ *Id.*

the United States, but the U.S. Secretary of State did sign the original treaty.¹²⁷ This signature, along with the U.N. Convention’s widespread acceptance and support, make the principles it articulates persuasive in American courts.¹²⁸

The most relevant provision of the U.N. Convention is Article Twelve.¹²⁹ This Section provides that, “a child who is capable of forming his or her views has the right to express those views freely in all matters affecting the child.”¹³⁰ This provision should be considered by U.S. courts in their formulation of standards for determining country of habitual residence in Hague Convention cases. If U.S. courts were to take this provision into account, they would be forced to acknowledge that the current dominant interpretations of habitual residence—which consider only evidence of a child’s acclimatization and settled parental intent—are in direct violation of Article Twelve. In order to comply with this important piece of international law, U.S. courts should create opportunities for children to speak their minds and have their thoughts considered in Hague Convention cases.

B. U.S. Laws Guaranteeing a Child’s Right to be Heard

Traditionally, under U.S. law, children had very little voice in the resolution of disputes regarding their own residence, care, and access to each parent.¹³¹ Today, however, U.S. courts are more open to considering children’s wishes in traditional custody disputes.¹³² A child’s wishes are often considered as a part of a “best interests of the child”-style determination.

¹²⁷ LUISA BLANCHFIELD, CONG. RES. CTR., *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES* 1 (Cong. Res. Ctr., ed., 2009) (“On February 16, 1995, then-Secretary of State Madeleine Albright signed the Convention on behalf of the United States.”).

¹²⁸ Rebeca Rios-Kohn, *The Convention on the Rights of the Child, Progress and Challenge*, 5 *GEO J. ON FIGHTING POVERTY* 156–57 (1998).

¹²⁹ U.N. Convention, *supra* note 125, at art. 12.

¹³⁰ *Id.*

¹³¹ D. MARIANNE BLAIR ET AL, *FAMILY LAW IN THE WORLD COMMUNITY* 422 (2009).

¹³² *Id.*

Section 402 of the Uniform Marriage and Divorce Act (“UMDA”) attempts to codify existing law dealing with child custody in disparate U.S. jurisdictions.¹³³ For this reason, it serves as a good representation of how U.S. state courts consider a child’s opinion in child custody determinations. UMDA Section 402 states: “The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including: . . . (2) The wishes of the child as to his custodian[.] . . .”¹³⁴ The fact that a child’s wishes are such a prominent factor in determining custody in domestic disputes serves as a strong argument for why courts should consider this same opinion in Hague Convention cases.

Additionally, individual U.S. courts assign a great deal of weight to children’s wishes in making custody determinations. This trend is illustrated by the Superior Court of Pennsylvania case, *Johns v. Cioci*.¹³⁵ In *Johns*, the court held that when an adjudicator is trying to determine which of two equally suitable households a child should live in, the preference of the child can “tip the scales in favor of one or the other.”¹³⁶ Moreover, the court stated, “even if [two] households are not equivalently suitable for rearing [a child], the child’s preference is a factor that must be carefully considered in custody decisions, keeping in mind the child’s maturity and intelligence, as well as the reasons that the child offers for the preference.”¹³⁷

C. Common Sense Arguments in Favor of Including a Child’s Opinion in Country of

Habitual Residence Determinations

Perhaps the strongest argument in favor of weighing children’s opinions as the most important factor in country of habitual residence determinations in Hague Convention cases is simple common sense. If judges give children the opportunity to set forth their opinions about

¹³³ Unif. Marriage & Divorce Act § 402 [Best Interests of the Child], Comment.

¹³⁴ Unif. Marriage & Divorce Act § 402 [Best Interests of the Child].

¹³⁵ *Johns v. Cioci*, 865 A.2d 931 (Pa. Super. Ct. 2004).

¹³⁶ *Id.*

¹³⁷ *Id.*

what country they consider to be home, the process may reveal relevant information that otherwise never would have been exposed.¹³⁸ Moreover, hearing a child’s explanation of why he or she considers one country to be “home” can often provide a stronger picture of the child’s “level of acclimatization” than other objective factors.¹³⁹ Finally, allowing a child to express him or herself is the easiest way for a judge to determine whether the child’s interests conflict with those of his or her parents.

Those critical of weighing children’s opinions heavily in country of habitual residence determinations may argue that children can be unduly influenced by the parent they live with or that children who are victims abuse may be coerced by their abusive parent into lying in court. This is a valid concern. These problems can be remedied, however, by requiring courts to appoint a dedicated attorney for the child in all Hague Convention cases.¹⁴⁰ This, and further arguments in support of requiring court appointed counsel to represent children in all Hague Convention cases are handled more thoroughly in Part VI below.

D. Proposed Standard for Determining Country of Habitual Residence

With the above arguments in mind, important changes should be made to the way U.S. courts deal with Hague Convention cases. Specifically, courts should adopt a uniform standard for determining country of habitual residence. In figure one, below, this Comment proposes a starting point for such a standard:

¹³⁸ Linda D. Elrod, *Please Let Me Stay: Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663, 686 (2011) (“The judge can learn much from discovering the child’s self-perception of his or her interests and the reasons given for any objection.”).

¹³⁹ *Id.*

¹⁴⁰ Because such an attorney will meet with the child independently and advocate for his or her best interests, this advocate will be uniquely situated to discover undue influence or coercion by one or both parents.

Figure 1. Model Standard

- a. When determining country of habitual residence for the purpose of the Hague Convention On The Civil Aspects Of International Child Abduction, courts should balance three key factors: (1) the child’s level of adjustment and acclimatization to each place that is claimed to be his country of habitual residence; (2) the settled intent of the individuals with the right to fix the child’s residence; and (3) the child’s perspective and personal opinion as to which country is his home.
- b. Factor (3) should only be considered if the child is old enough to articulate such an opinion. This factor should be given additional weight if the child is of a “significant age and maturity level”.¹⁴¹
- c. Factor (3) should be discounted if one parent or a third party has unduly influenced the child. The parent alleging undue influence bears the burden of proving this allegation.

This standard is ideal for two reasons. First, it will require courts to put more emphasis on children’s opinions about where they consider home, bringing the United States into compliance with respected international law such as the U.N. Convention. This consequence will result in more accurate country of habitual residence determinations. Second, a uniform standard will provide parents with improved capacity to predict whether a planned removal or retention of their child is wrongful and therefore result in increased compliance with the Hague Convention.¹⁴²

¹⁴¹ For the purposes of Figure 1, “significant age and maturity level” should be defined as in the English decision *Re S (Minors) (Abduction: Acquiescence)* 1 FLR 819 (Court of Appeal, 1994).

¹⁴² See *Mozes v. Mozes*, 239 F.3d 1067, 1072–73 (9th Cir. 2001) (“Habitual residence is the central—often outcome determinative—concept on which the entire system is founded. Without intelligibility and consistency in its

VI. Courts Should Appoint Counsel to Represent Children in Hague Convention Cases

In contrast with the United States, other Hague Convention signatory countries require appointed counsel in international child abduction cases. The United States should follow the lead of these nations, as doing so would lead to fairer, more child-friendly determinations of country of habitual residence.

A. The Swiss Model

After much frustration over the domestic application of the Hague Convention, in 2007, the Swiss Parliament enacted a law that ensures representation for children in all Hague Convention cases.¹⁴³ Article Nine of this law states: “The court shall order that the child be represented and designate as a representative a person experienced in welfare and legal matters. This person may file applications and lodge appeals.”¹⁴⁴ Part of the motivation for this article was that the Parliament had found that judges rarely exercised their authority to appoint representatives for children in divorce and Hague Convention cases.¹⁴⁵ This rule is admirable in particular because, by eliminating parents’ and courts’ discretion on the issue of appointing counsel, the rule has reduced inequities in the protection of children’s interests.¹⁴⁶

application, parents are deprived of crucial information they need to make decisions and children are more likely to suffer the harms the Convention seeks to prevent. Imagine for, for example, a parent trying to decide whether to travel with a child to attempt reconciliation with an estranged spouse in another country or whether to consent to a child’s trip abroad to stay with in-laws. Such parents would be vitally interested in knowing under what circumstances a child’s habitual residence is likely to be altered.”)

¹⁴³ Swiss Federal Act Art. 9(3), Dec. 21, 2007, feuille fédérale suisse [FF] 37 (2008), available at <http://www.admin.ch/ch/f/ff/2008/33.pdf> (translated in Andreas Bucher, *The New Swiss Federal Act on International Child Abduction*, 4 J. PRIV. INT’L L. 139, 163 (2008)).

¹⁴⁴ *Id.*

¹⁴⁵ Weiner, *supra* note 5, at 377 (quoting Andreas Bucher, *The New Swiss Federal Act on International Child Abduction*, 4 J. PRIV. INT’L L. 139, 150) (noting that Article 9(3) is innovative because it makes it “compulsory for the judge to designate a representative who acts as custodian for the child.”).

¹⁴⁶ Weiner, *supra* note 5, at 376.

B. The South African Example

The Constitution of the Republic of South Africa focuses on children's best interests as the most important consideration in all matters concerning the nation's children.¹⁴⁷ Moreover, South Africa has legislation in place requiring that, "a child that is of such an age, maturity and stage of development as to be able to participate has the right to express his or views and the right that those views must be given due consideration" in all matters that affect him or her.¹⁴⁸ The nation further ensures children's rights to have a voice in Hague Convention proceedings by requiring that a child "must have legal representation in all Abduction Convention applications."¹⁴⁹ In practice, the legal representative functions in a fashion similar to a guardian *ad litem* in the cases of young children, while with older children the lawyer can take instructions directly from the child and act accordingly.¹⁵⁰ This system has been particularly positive because with the addition of advocates for children, South African courts have been able to take the opinions of young children into account in Hague Convention cases.¹⁵¹ This success serves as a strong argument that requiring counsel for children in all Hague Convention cases in the United States would both be feasible and allow children's voices to be heard.

C. Argument for Requiring Counsel for Children in All Hague Convention Cases

U.S. courts should follow Switzerland's and South Africa's lead and require counsel for children in all Hague Convention cases.¹⁵² The decision a court makes in a Hague Convention case

¹⁴⁷ See CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA Feb. 4, 1997, Ch. 2, s 28. ("A child's best interests are of paramount importance in every matter concerning the child.")

¹⁴⁸ Boezaart, *supra* note 121, at 366.

¹⁴⁹ *Id.* (citing Central Authority of the Republic of South Africa v. JW and HW (C Du Toit intervening) unreported case 34008/2012 (GNP) at 23).

¹⁵⁰ *Id.* at 369 (citing Christopher Woodrow & Carina Du Toit, *Child Abduction* in COMMENTARY ON THE CHILDREN'S ACT 17.31-17.34 (CJ Davel & AM Skelton eds. Looseleaf ed. 2007).

¹⁵¹ *Id.* at 369-70 (citing examples of South African cases in which the Court appointed curators *ad litem* to represent children between ages four and six).

¹⁵² While requiring independent counsel for children would have a positive impact in a number of child custody contexts, in Hague Convention such representation would be especially beneficial. See Weiner, *supra* note 5, at 379

regarding whether a child was wrongfully removed from his country of habitual residence is extremely important in determining whether the child must be returned to another nation. Consequently, these determinations indelibly impact the lives of hundreds of children annually.¹⁵³ Moreover, there is a growing consensus in the U.S. legal community that children should always have an independent client-directed lawyer in proceedings that affect them.¹⁵⁴ Finally, requiring counsel in all Hague Convention proceedings would allow the model standard proposed in Figure 1¹⁵⁵ to be implemented in the most successful fashion possible.

VII. Conclusion

When determining country of habitual residence in Hague Convention cases, U.S. courts should move away from their current jurisprudence and adopt a child-centric approach that incorporates the opinion of the child, such as the test set forth in Figure 1.¹⁵⁶ Moreover, in order to properly implement this new test, the United States should require the appointment of independent counsel for the child in every Hague Convention case. Together, these two changes would bring U.S. law into line with international law, increase predictability in Hague Convention cases, and create fairer outcomes for children caught in the middle of complicated custody battles.

(“A Hague case differs from a custody case in that a Hague proceeding does not adjudicate the child’s best interests. Consequently, neither parent will necessarily be focused on the child’s best interest, nor will the court. That reality makes a representative for the child imperative because there is a great chance that the parents’ positions will conflict with the child’s interests.”)

¹⁵³ *Id.* at 378.

¹⁵⁴ *See* Elrod, *supra* note 138, at 670 n.36 (citing Annual Meeting of American Bar Assoc., August, 2011) (noting that, in August, 2011, the American Bar Association voted to adopt the ABA Section of Litigation’s Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings which requires appointment of a lawyer for children in all abuse and neglect cases).

¹⁵⁵ *See supra* Figure 1.

¹⁵⁶ *Id.*