

# Home is where the Heart is: Determining “Habitual Residence” under the Hague Convention on the Civil Aspects of International Child Abduction

Stephen I. Winter\*

## INTRODUCTION

We live in an interconnected world. People move, if not freely, then often with relative ease across international borders. Families, businesses, and national economies are often global in scope. One nation’s economic crisis can bankrupt nations an ocean away.<sup>1</sup> The challenges created by widespread migration often require focused international efforts.<sup>2</sup> One such challenge, international parental child abduction, posed a mounting problem for the world community in the latter part of the twentieth century.<sup>3</sup> In 1980, faced with this burdensome problem and lacking a uniform method of resolving the resulting legal disputes, twenty-three nations<sup>4</sup> assembled in The

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\* J.D. (2010), Washington University School of Law; B.S. (2006), University of Illinois at Urbana-Champaign. I would like to thank my family and friends for their constant support, love, and encouragement. Additionally, I would like to thank the outstanding editorial staff at the *Washington University Journal of Law & Policy* for their hard work and feedback throughout this process.

1. Thomas L. Friedman, Op-Ed., *Palin’s Kind of Patriotism*, N.Y. TIMES, Oct. 8, 2008, at A31 (“[T]he government of Iceland just seized the country’s second-largest bank and today is begging Russia for a \$5 billion loan to stave off ‘national bankruptcy.’ . . . [F]inancial globalization has gone so much farther and faster than regulatory institutions could govern it. Our crisis could bankrupt Iceland! Who knew?”).

2. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 12 (5th ed. 2009). Professor Legomsky cites United Nations figures showing that nearly three percent of the world’s population, approximately 175,000,000 people, migrated from their country of birth between 1990 and 2000. *Id.*; Trends in Migrant Stock: The 2003 Revision, United Nations Department of Economic and Social Affairs, Population Division, <http://un.org/esa/population/publications/migstock/2003TrendsMigstock.pdf>.

3. See International Child Abduction Remedies Act, 42 U.S.C. § 11601(a)(3) (2008).

4. This number does not include countries that participated in the proceedings but did not vote to adopt the Convention. Voting countries included “Australia, Austria, Belgium, Canada,

Hague to create the Hague Convention on the Civil Aspects of International Child Abduction (“Convention”).<sup>5</sup>

The United States Department of State alone receives hundreds of requests for assistance in recovering children removed from the United States.<sup>6</sup> At times, the circumstances surrounding the civil abduction of children can be shockingly dramatic.<sup>7</sup> For those

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Czechoslovakia, Denmark, Finland, France, Germany, Greece, Ireland, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela, and Yugoslavia.” Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, Acts and Documents of the Fourteenth Session (1980), 3 Child Abduction 426 n.1 (1982), <http://hcch.e-vision.nl/upload/expl28.pdf> [hereinafter “Perez-Vera Report”]. Additionally, Egypt, Israel, and Italy took part in the proceedings but did not vote. *Id.* “Morocco, the Holy See, and the Union of the Soviet Socialist Republics sent observers.” *Id.* The Hague Convention on the Civil Aspects of International Child Abduction recognizes the Perez-Vera Report “as the official history and commentary on the Convention and [as] a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it.” Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1996). Additionally, “many circuits hold Professor Elisa Perez-Vera’s report to be an authoritative source for interpreting the Convention’s provisions.” *Robert v. Tesson*, 507 F.3d 981, 988 n.3 (6th Cir. 2007).

As of October 24, 2008, eighty-one countries had either ratified or were in the process of being accepted as members to the Convention. Status Table, Hague Conference for Private International Law, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24).

5. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, reprinted in 19 I.L.M. 1501–1505 (1980) [hereinafter “Convention”]. The International Child Abduction Remedies Act implements the Convention within the United States. 42 U.S.C. §§ 11601–11610 (2008).

6. See Department of State’s Letter of Submittal to the President, S. TREATY DOC. NO. 99-11 (1985), reprinted in 51 Fed. Reg. 10,494 (Mar. 26, 1986) [hereinafter “Letter of Submittal”]. The Letter of Submittal notes that during the years leading up to the United States’ ratification of the Convention “about half of the several hundred requests to the Department of State for assistance in recovering children taken out of the United States have involved abductions to countries which participated in the preparation and negotiation of the Hague Convention.” *Id.*

7. For instance, in *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006), a physically abusive father removed his children from Germany without the mother’s knowledge, and the mother was unable to determine the location of her children for several months. *Id.* at 708; see discussion *infra* Part I.A.2. In *Papakosmas v. Papakosmas*, 483 F.3d 617 (9th Cir. 2007), a family moved to Greece due to the attacks on September 11, 2001, but the mother returned with her children after discovering that her husband brought his mistress to Greece and refused to send her away. *Id.* at 620; see discussion *infra* Part I.A.1. In *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) (“*Friedrich I*”), a heated argument resulted in a wife and son being kicked out of their apartment in Germany by the father. *Id.* at 1399; see discussion *infra* Part I.A.3. The American mother returned the next morning with multiple American soldiers to remove her possessions. *Friedrich I*, 983 F.2d at 1399.

privileged enough to live free of such stresses, the narratives of these cases often feel as if they are works of fiction. However, whether compelling or mundane, these events are always tragic, and their circumstances are all too real for the individuals affected. Parents certainly suffer, but often the children at the heart of these controversies are most direly affected.<sup>8</sup> The upheaval and family strain that results from the removal of a child from his or her home can represent a threat to that child's current and future well-being.<sup>9</sup>

#### *A. Purpose of the Convention*

The Hague Convention on the Civil Aspects of International Child Abduction establishes procedures that provide for the prompt return of children wrongfully retained or removed from their habitual residence.<sup>10</sup> One of the Convention's primary purposes is to "protect children internationally from the harmful effects of their wrongful removal or retention"<sup>11</sup> by promptly restoring the child's "pre-abduction status quo."<sup>12</sup> This acts to deter parents from moving

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One particular case has received attention from the national media in recent months. The Brazilian wife of a New Jersey man, David Goldman, abducted their young son to Brazil. The Today Show, Dateline, and Fox News, among other news programs, have featured Mr. Goldman's story. Bring Sean Home Foundation: The Campaign for the Return of Internationally Abducted Children, <http://www.bringseanhome.org/home.html> (last visited July 10, 2010).

8. The Perez-Vera Report states:

[I]n the literature devoted to a study of this problem, "the presumption generally stated is that the true victim of the 'childnapping' is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives."

Perez-Vera Report, *supra* note 4, at 431–32.

9. *See id.*

10. *See* Convention, *supra* note 5, art. 1.

11. Convention, *supra* note 5, at pmb.; *see also* Perez-Vera Report, *supra* note 4, at 431 ("[T]he struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests."). The Perez-Vera Report goes on to state that "children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs." *Id.*

12. *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996) ("Friedrich II"). The Convention, however, does not provide for the determination of custody. *See* Convention, *supra*

across international borders in an attempt to gain a tactical advantage through jurisdiction in a more sympathetic court.<sup>13</sup> The Convention thus “reflects a worldwide concern about the harmful effects on children of parental kidnapping.”<sup>14</sup> Wrongful removal or retention “deprives the child of the stable relationships which the Convention is designed promptly to restore”<sup>15</sup> and negatively affects the child by taking the child “out of the family and social environment in which its life has developed.”<sup>16</sup>

*B. The Essential (and Elusive) Concept of “Habitual Residence”*

Analysis under the Convention begins with a determination of the child’s state of habitual residence.<sup>17</sup> The child’s country of habitual residence provides the domestic law applicable to whether a child’s removal breached custody or access rights.<sup>18</sup> Only if in breach of

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note 5, art. 19; *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004) (“The Convention’s focus is thus *whether* a child should be returned to a country for custody proceedings and not *what* the outcome of the proceedings should be.”).

13. 42 U.S.C. § 11601(b)(3)(B); *Holder*, 392 F.3d at 1014 (stating that “the Convention is intended to prevent . . . [parents from using] ‘force to establish artificial jurisdictional links . . .’”); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (“*Friedrich I*”); Letter of Submittal, *supra* note 6, at 10,497 (“If the Convention machinery succeeds in rapidly restoring children to their pre-abduction or pre-retention circumstances, it will have the desirable effect of deterring parental kidnapping, as the legal and other incentives for wrongful removal or retention will have been eliminated.”); *see also* Perez-Vera Report, *supra* note 4, at 428–29.

14. President’s Letter of Transmittal to the Senate, S. TREATY DOC. NO. 99-11 (1985), reprinted in 51 Fed. Reg. 10,494, 10,495 (Mar. 26, 1986). The Secretary of State’s Letter of Submittal specifically states that the Convention’s “overriding objective was to spare children the detrimental emotional effects associated with transnational parental kidnapping.” Letter of Submittal, *supra* note 6, at 10,496.

15. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986).

16. Perez-Vera Report, *supra* note 4, at 428.

17. *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001) (“‘Habitual residence’ is the central—often outcome-determinative—concept on which the entire system is founded.”); *Friedrich I*, 983 F.2d at 1403 (“[T]he Hague Convention is clearly designed to insure that the custody struggle must be carried out, in the first instance, under the laws of the country of habitual residence.”).

18. Article 3 of the Convention provides:

The removal or the retention of a child is to be considered wrongful where—

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

these rights will the taking be considered “wrongful,” bring the removal or retention within the Convention’s scope, and require the child’s prompt return.<sup>19</sup>

The Convention does not define “habitual residence.”<sup>20</sup> Instead, the Convention deliberately left “habitual residence” undefined in order to “leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems.”<sup>21</sup> In doing so, the Convention sought to prevent habitual residence from acquiring an overly technical or idiosyncratic definition comparable to the notion of “domicile.”<sup>22</sup> Additionally,

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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.

The right of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Convention, *supra* note 5, art. 3.

19. Convention, *supra* note 5, arts. 1, 3, 4; *see also* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1063–64 (2005); *cf.* *Robert v. Tesson*, 507 F.3d 981, 988 (6th Cir. 2007) (“When faced with a petition for return of a child under the Hague Convention, the courts of signatory nations may only determine the merits of the abduction claim; the merits of the underlying custody claim are not to be considered.”).

20. *Friedrich I*, 983 F.2d at 1400. In *Mozes*, the Ninth Circuit noted that since the term’s first use in the 1954 Convention Relating to Civil Procedure, and despite its appearance “throughout the various Hague Conventions, none of them defines it.” *Mozes*, 239 F.3d at 1071. The Perez-Vera Report refers to “habitual residence” as “a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile.” Perez-Vera Report, *supra* note 4, at 445.

21. *Mozes*, 239 F.3d at 1071 (citing J.H.C. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 144 (10th ed. 1980)).

22. *See Robert*, 507 F.3d at 989; *Kijowska v. Haines*, 463 F.3d 583, 586–87 (7th Cir. 2006) (“‘Habitual residence’ sounds like ‘domicile,’ which in law refers to the place that a person considers to be his permanent home. . . . But it is not domicile.”); *Gitter v. Gitter*, 396 F.3d 124, 133 n.8 (2d Cir. 2005) (noting the widespread view that “habitual residence differs from domicile”); *Shah v. Barnet London Borough Council*, (1983) 2 A.C. 309 (U.K.); *see generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11–23 (1986). Additionally, *see Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004), where the court quoted the unpublished but influential British case of *In Re Bates*. The court stated:

the notion [of habitual residence is] free from technical rules, which can produce rigidity and inconsistencies as between legal systems. . . . The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions. . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

*Ruiz*, 392 F.3d at 1252 (alteration in original).

when enacting the Convention through the International Child Abduction Remedies Act (“ICARA”),<sup>23</sup> Congress recognized “the need for uniform international interpretation of the Convention.”<sup>24</sup> The Convention requires uniformity if is to effectively achieve its stated goals of, among other objectives, the deterrence of forum-shopping and the protection of a child’s well-being.<sup>25</sup>

Unfortunately, courts both domestically and internationally have interpreted “habitual residence” differently, and thus have failed to offer the world community an articulate and unified definition.<sup>26</sup> Some courts instruct that “habitual residence” should simply be interpreted “according to the ‘ordinary and natural meaning of the two words it contains[, as] a question of fact to be decided by reference to all the circumstances of any particular case.’”<sup>27</sup> Others, especially the American courts, have attempted to apply a variety of rubrics or “presuppositions and presumptions” when assessing habitual residence, with varying degrees of influence and success.<sup>28</sup>

### *C. My Proposal*

A determination of habitual residence must focus on the child’s acclimation and settled purpose. Consideration of parental intent is a

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23. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (2008).

24. § 11601(b)(3)(B). See Papakosmas v. Papakosmas, 483 F.3d 617, 624 (9th Cir. 2007); *Mozes*, 239 F.3d at 1071.

25. In *Mozes*, the Ninth Circuit expanded on these goals, stating:

The Convention seeks to protect children by creating a system of rules that will inform certain decisions made by their parents. “Habitual residence” is the central—often outcome-determinative—concept on which the entire system is founded. Without intelligibility and consistency in its 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.

*Mozes*, 239 F.3d at 1072; *Friedrich I*, 983 F.2d at 1400 (“Since the strict definition of ‘wrongful removal’ is based on the concept of ‘habitual residence,’ an ad hoc determination of the latter amounts to an ad hoc determination of the former.”); see also *supra* text accompanying note 13.

26. See *infra* Part I.A–B.

27. *Mozes*, 239 F.3d at 1071 (citing *C v. S*, (1990) 2 A.C. 562 (U.K.)); *cf. id.* at 1073 n.13 (“[T]here is no real distinction between ordinary residence . . . and habitual residence.”).

28. See, e.g., *Mozes*, 239 F.3d at 1067 (focusing primarily on parental intent); *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995) (balancing parental intent with the child’s acclimation); *Friedrich I*, 983 F.2d at 1396 (focusing on the factual circumstances surrounding the child’s past experience).

necessary part of this inquiry. Additionally, an emphasis on objective factual indications of where a child considers his or her home to be adds consistency and concreteness to an otherwise subjective standard.

#### *D. Outline of the Note's Structure*

Part I.A first outlines the three major divisions in habitual residence interpretation within the United States, paying particular attention to the approaches of the Ninth, Sixth, and Third Circuits. Next, Part I.B briefly addresses international trends in habitual residence interpretation among other signatory nations. After analyzing the shortcomings of each approach in Part II, Part III emphasizes a renewed emphasis on the child in all habitual residence determinations.

### I. HISTORY

#### *A. Trends among Courts in the United States*

American courts tend to align themselves into three major camps when determining a child's habitual residence. One approach, represented by the influential Ninth Circuit decision in *Mozes v. Mozes*,<sup>29</sup> focuses primarily on settled parental intent while taking into account the child's acclimation to his or her environment.<sup>30</sup> Another approach, prominently represented by the Third Circuit's decision in *Feder v. Evans-Feder*,<sup>31</sup> determines habitual residence by attempting to balance parental intent with the child's acclimation to his or her environment.<sup>32</sup> A third approach, typified by the Sixth Circuit's decision in *Friedrich v. Friedrich*,<sup>33</sup> focuses attention solely on the factual circumstances surrounding the child's past experiences.<sup>34</sup>

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29. 239 F.3d 1067 (9th Cir. 2001).

30. *Id.* at 1073–79.

31. 63 F.3d 217 (3d Cir. 1995); *see also* Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005); Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003).

32. *Feder*, 63 F.3d at 224.

33. *Friedrich I*, 983 F.2d 1396. The Sixth Circuit recently reaffirmed *Friedrich I* in *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

34. *Friedrich I*, 983 F.3d at 1401.

### 1. Focusing on Parental Intent

In *Mozes*, the Ninth Circuit outlined a standard by which courts could determine habitual residence that was significantly different from the majority of prior Convention interpretations.<sup>35</sup> In 1997, an Israeli woman and her children moved from Israel to Los Angeles.<sup>36</sup> Her husband, the children's father, consented to a temporary move of eighteen months.<sup>37</sup> After one year in the United States, the wife sought a divorce and the father filed a petition under the Convention for the return of his children to Israel.<sup>38</sup>

The Ninth Circuit elucidated an analytical framework it hoped would make the determination of habitual residence more consistent.<sup>39</sup> Noting the limitations of an approach based solely on subjective intent or factual circumstances,<sup>40</sup> the court proposed a new

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35. *Mozes* was both a new way to approach a habitual residence determination and a case of first impression in the Ninth Circuit. *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

36. *Id.* By 2001, the children ranged in age from seven to sixteen. *Id.*

37. *Id.* The move occurred because "both parents agreed that the children would profit from a chance to attend school [in the United States], learn English and partake of American culture." *Id.*

38. *Id.* The father only sought the return of his three youngest children, aged nine, five, and five. *Id.* The oldest child had voluntarily returned to Israel. *Id.*

39. *See id.* at 1071–74.

40. The court first stated that, while the most straightforward method of determining habitual residence would be to look at a person's behavior, this approach is flawed. *Id.* at 1073–74. Depending on the time frame examined, an observer could come to widely varying conclusions about a person's habitual residence. The court used, as an example, a person observing a child's behavior over the course of several summer months. If that child spent the summer at an overnight camp, then the observer would unreasonably conclude that the camp was the child's habitual residence. *Id.* at 1074. Instead, the court agreed with an English approach that examines a person's subjective intent, termed a person's "settled purpose":

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

*Shah v. Barnet London Borough Council*, (1983) 2 A.C. 309 (U.K.).

However, the court reasoned that while habitual residence logically encompasses a sense of being "settled," a court looking for this concept alone would not be able to distinguish between "borderline" cases where there might be settled intent, but not to make that place one's habitual residence. *See Mozes*, 239 F.3d at 1074.



rubric. The court stated that a person can only have a single habitual residence,<sup>41</sup> therefore the “first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind.”<sup>42</sup> Although the Convention focuses on the child, the Ninth Circuit determined that children often are not psychologically capable of choosing their residence.<sup>43</sup> Therefore, courts should instead look to parental intent.<sup>44</sup> However, the court also noted that it must take into account factual circumstances because Convention cases often involve parents who do not agree on their child’s residence.<sup>45</sup> Moreover, the Ninth Circuit found that the parents’ settled intent alone is not sufficient to alter a child’s habitual residence.<sup>46</sup> Enough time must pass to allow the child to acclimate to his or her new geographic location.<sup>47</sup>

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41. *Mozes*, 239 F.3d at 1075 n.17 (“This is consistent with the view held by many courts that a person can only have one habitual residence at a time under the Convention.”) (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) (“*Friedrich I*”), *Freier v. Feier*, 969 F. Supp. 436, 440 (E.D. Mich. 1996)).

42. *Mozes*, 239 F.3d at 1075. The court later clarified that this inquiry focused on whether the parent had a settled intent to abandon. *Id.* at 1076–78. A parent could demonstrate this intent through his or her words or deeds, and either intentionally or unintentionally. *Id.*

It is unclear why the court used this language, instead of asking the more proper question under the Convention of whether the United States remained the *children’s* habitual residence. Complete abandonment of a residence is similar to the technical and inappropriate concept of domicile. *See supra* note 22 and accompanying text.

43. *Mozes*, 239 F.3d at 1076 (“Children, particularly the ones whose return may be ordered under the Convention, normally lack the material and psychological wherewithal to decide where they will reside.”); *cf.* *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993). For further discussion, see *infra* note 117 and accompanying text.

44. *Mozes*, 239 F.3d at 1076. Specifically, the intention “of the person or persons entitled to fix the place of the child’s residence.” *Id.* (internal quotations omitted).

45. The court proceeded to place these factual circumstances into three general categories. The first category includes circumstances where the family unit had “a settled purpose to change habitual residence” even though one parent “may have had qualms about the move.” *Id.* at 1076. Under such circumstances, courts tend not to let one parent’s reservations prevent finding a “shared and settled purpose.” *Id.* at 1077. The second category encompasses situations where the child’s move was only meant to be for a specific period, but one parent changes their mind and intends to remain. *Id.* Here, courts tend not to find that the changed intentions of one parent alter a child’s habitual residence. *Id.* A third category includes situations where the petitioning parent previously consented to an indeterminate stay abroad. *Id.* If the court can infer that the child was meant to stay indefinitely, then the court will find an abandonment of the former habitual residence. *Id.* However, if there is no settled intent to abandon, then courts will examine the factual circumstances. *Id.* at 1077–78.

46. *Id.* at 1078.

47. *Id.*

However, while a child's acclimation might overcome a lack of settled parental intent, "courts should be slow to infer" that a child's acclimation to his surroundings has in fact resulted in the abandonment of that child's prior habitual residence.<sup>48</sup> The court reasoned that the Convention seeks to protect the stability of the child's environment<sup>49</sup> and prevent child abduction by reducing the incentives that accompany abduction.<sup>50</sup> The easier it is to shift habitual residence, "then the greater the incentive to try."<sup>51</sup> The ultimate question courts must ask is not whether a child has become settled, but "whether the United States had supplanted [the prior country] as the locus of the children's family and social development."<sup>52</sup>

The Ninth Circuit revisited and elaborated on its habitual residence analysis in *Holder v. Holder*.<sup>53</sup> In *Holder*, a military family with two young children<sup>54</sup> moved from the United States to Germany when the father was assigned to a four-year assignment.<sup>55</sup> Eight months after arriving in Germany, the mother traveled to the United States with the children and did not return.<sup>56</sup> The father petitioned under the Convention for the children's return to Germany. In determining the children's habitual residence, the Ninth Circuit first

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48. *Id.*

49. The court stated:

Since the Convention seeks to prevent harms thought to flow from wrenching or keeping a child from its familiar surroundings, it is tempting to regard any sign of a child's familiarity with the new country as lessening the need for return and making a finding of altered habitual residence desirable. Further, some courts regard the question whether a child is doing well in school, has friends, and so on, as more straightforward and objective than asking whether the parents share a "settled intent."

*Id.* at 1078–79.

50. *See, e.g., Mozes*, 239 F.3d at 1079 (It "could open children to harmful manipulation when one parent seeks to foster residential attachments during what was intended to be a temporary visit. . .").

51. *Id.*

52. *Id.* at 1084.

53. 392 F.3d 1009 (9th Cir. 2004).

54. The elder child "had barely finished kindergarten at the time [the father] commenced this petition. . . ." *Id.* at 1017.

55. *Id.* at 1012.

56. *Id.* The parents disagreed on whether they intended the trip to the United States to be a six-week vacation or an indefinite stay. *Id.*

restated the standard it presented in *Mozes*.<sup>57</sup> The court held that the parents never formed a settled intent to abandon the United States as the children's habitual residence, placing great weight on the "specific, delimited period" that the family planned to spend in Germany.<sup>58</sup> The court discounted objective indications of residence that other circuits consider determinative.<sup>59</sup> Additionally, the court elaborated on the issue of acclimatization.<sup>60</sup> If the child's life is "firmly rooted in [her] new surroundings," then that child is acclimated to her new home.<sup>61</sup> However, the court noted that children

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57. *Id.* at 1015. Specifically, the court said that there must be a settled intent to leave one's prior habitual residence combined with a change in geography and the passage of time sufficient to allow acclimation. *Id.* The court emphasized the fact-specific nature of the determination and clarified that focusing on the parents' settled intent was solely a surrogate for the settled intent of children considered developmentally incapable of determining their own residence. *Id.* at 1016–17 (describing children's habitual residence as the "fundamental inquiry" under the Convention). The court further noted "[t]hat children will not indefinitely bend to their parents' wishes," a concept specifically recognized by the Convention's proper application only to children under sixteen. *Id.* at 1017; see Convention, *supra* note 5, art. 4; Perez-Vera Report, *supra* note 4, at 450.

58. Although the court admitted it was a "close case," nearly four years had passed. This is a substantial amount of time in the life of a young child. See *Holder v. Holder*, 392 F.3d 1009, 1018 (9th Cir. 2004). Compare *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007) (children habitually resident in United States after approximately one year), and *Koch v. Koch*, 450 F.3d 703, 717 (7th Cir. 2006) (holding that three years spent in Germany, together with various other objective facts, is sufficient to conclude that a move was of a "settled nature"), and *Shalit v. Coppe*, 182 F.3d 1124, 1128 n.5 (9th Cir. 1999) ("[t]hree years is certainly enough time . . . to be considered 'settled'"), with *Papakosmas v. Papakosmas*, 483 F.3d 617 (9th Cir. 2007), and *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001).

59. These objective indications of residence include shipping or selling one's possessions. *Holder*, 392 F.3d at 1018. The court felt that these facts deserved less weight because the military had offered to transport all of the Holder's belongings. *Id.* The court also noted that being "settled" does not mean that location is where you plan to "leave your bones." *Id.* (quoting *Mozes*, 239 F.3d at 1077).

In a later case, the Ninth Circuit placed greater emphasis on the objective facts that might establish habitual residence. *Papakosmas*, 483 F.3d at 626. The Ninth Circuit's decision in *Papakosmas* is discussed *infra* Part I.A.I and notes 71 and 72.

60. A court must examine the child's acclimation when conducting a *Holder* or *Mozes* type analysis because "it is possible for a child's contacts standing alone to be sufficient for a change in habitual residence," although courts should do so only reluctantly. See *Holder*, 392 F.3d at 1019. The *Holder* court recognized that an "acclimatization" analysis could encompass "intangible factors" that further an inquiry into where the child's family and social environment were located. *Id.*

61. *Id.* ("The inquiry is . . . whether the children's lives have become firmly rooted in their new surroundings. Simply put, would returning the children to Germany be tantamount to sending them home?") (footnote omitted). However, the court emphasized that "acclimatization" is not "acculturation" and should not be measured through superficial cultural

can take part in daily life while understanding that “one has another life to go back to,” and that therefore the children’s eight months in Germany did not overcome the lack of parental intent to abandon the United States.<sup>62</sup>

The Ninth Circuit recently applied its habitual residence framework in *Papakosmas v. Papakosmas*.<sup>63</sup> In *Papakosmas*, a couple from the United States with two children decided to leave the United States for Greece.<sup>64</sup> The couple sold their businesses, house, furniture, and the family dog before moving.<sup>65</sup> A few months after their arrival, the mother discovered that her husband’s mistress had accompanied the family to their new home.<sup>66</sup> The husband refused to send his mistress away, and the mother could not leave because her husband controlled the family’s passports.<sup>67</sup> Eventually, the mother acquired the means to return to the United States with the children, and the father petitioned for their return.<sup>68</sup> The court first held that the

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comparisons. *Id.* The court used, as an example, a preference for *gummibaeren* over Hershey bars. *Id.*

62. *Holder*, 392 F.3d at 1020. Finding that different reasoning was necessary when considering a kindergartener’s circumstances as compared to an infant’s, the court examined each child’s circumstances in turn. *Id.* at 1019. The court noted that the elder son had begun to transition to life in Germany because he attended school, played organized sports, and experienced life outside the base. *Id.* The younger son’s situation forced the court to tackle how to determine the habitual residence of an infant. The court reasoned that an infant is usually habitually resident in his or her parent’s habitual residence. *Id.* The court noted, however, that “[t]he place of birth is not automatically the child’s habitual residence” and thus if born in a country in which the parents are not habitually resident, the child could be without a habitual residence entirely. *Id.* (citing PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 112 (1999), as suggesting that “a child may be without a habitual residence because ‘if an attachment [to a State] does not exist, it should hardly be invented.’”). The court concluded that the youngest child was habitually resident in the United States. Furthermore, the court concluded that it was not possible for a newborn child to acclimatize outside the parent’s home environment. *Holder*, 392 F.3d 1020–21. For further discussion of young children’s habitual residence, see *infra* note 117.

63. 483 F.3d 617 (9th Cir. 2007).

64. The terrorist attack on September 11, 2001, negatively affected the family’s hotel business and led to their move. *Id.* at 620.

65. *Id.*

66. *Id.*

67. *Id.*

68. Several dramatic events occurred before the mother acquired the means to return to the United States, including several trips to the United States Embassy and a family dispute that resulted in the father allegedly stabbing or otherwise injuring his wife with a knife. *Id.* at 620–21. The wound was not fatal, and the district court determined that it was likely self-inflicted.

parents did not have a settled intent to abandon their prior residence.<sup>69</sup> Instead, the objective facts indicated that the mother had only a conditional intent to move to Greece.<sup>70</sup> These facts included a lack of a going away party and the contents of cards given to the eldest child from his classmates, but what the court found most important was the parents' intent to continue doing business in the United States.<sup>71</sup> Second, the court asked whether the facts showed that the children's habitual residence changed despite the parent's lack of shared intent. In determining that it had not, the court noted that the family had never had a permanent home while in Greece and were only there for four months.<sup>72</sup>

The Eleventh Circuit adopted the Ninth Circuit's approach to habitual residence determinations in *Ruiz v. Tenorio*.<sup>73</sup> In *Ruiz*, a couple and their two children moved to Mexico.<sup>74</sup> Nearly three years later, the mother removed the children from Mexico and brought them to the United States.<sup>75</sup> While in Mexico, the father took a job, the family began construction on an "American-style" home, the children attended school, and they forged friendships.<sup>76</sup> The couple

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*Id.* Eventually, the United States Embassy provided the mother and children with the means to return to the United States. *Id.*

69. *Id.* at 624.

70. *Id.* at 623–24. The court cited *Ruiz v. Tenorio*, 392 F.3d 1247, 1249 (11th Cir. 2004) and *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005) to support its finding of conditional intent, and distinguished *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995) as containing stronger objective indications of a shared intent to abandon. *Papakosmas v. Papakosmas*, 483 F.3d 617, 625 (9th Cir. 2007).

71. *Papakosmas*, 483 F.3d at 624. The court found the cards given by the child's classmates to be "ambiguous at best and, in many cases, supportive of Yvette's contention that the move was temporary." *Id.* The court did not clarify why it felt that what the child's classmates thought about the child's move to Greece was important to a determination of the child's habitual residence and acclimation.

72. *Id.* at 626–27. Further evidence included the children's attendance at English-speaking schools, the older son threw tantrums, and the mother took a trip back to the United States after only two months. *Id.*

73. 392 F.3d 1247, 1252 (11th Cir. 2004).

74. The father intended the move to be permanent, although he told his mother-in-law that the move was only temporary. *Id.* at 1249.

75. *Id.* at 1249–50. The children were approximately five and eleven years old at the time of their removal from Mexico. *Id.*

76. *Id.* at 1249–50, 1255. However, although the mother and children held only tourist visas, the parents did not attempt to obtain Mexican citizenship or permanent legal status for them. The parents, however, did not attempt to change the children's official citizenship. *Id.* at 1255. The mother traveled with her children to the United States twice to visit her sister in

eventually separated, but the mother and children remained in Mexico for nearly six months before their removal.<sup>77</sup> While it was a “close case,” the court concluded that the children’s habitual residence never changed to Mexico.<sup>78</sup> The court’s analysis followed the rubric set forth by the Ninth Circuit in *Mozes*. First, the court held that the parents had not formed a settled intent to abandon the United States as the children’s habitual residence.<sup>79</sup> Next, the court held that the children had not sufficiently acclimated to Mexico to overcome their parents’ lack of shared intent.<sup>80</sup>

Another “close case” within the Eleventh Circuit forced the court to confront complications that arise from the deportation of one parent. In *Mikovic v. Mikovic*,<sup>81</sup> the United States deported a non-resident after he overstayed his visa.<sup>82</sup> He left behind his American wife and child.<sup>83</sup> Despite some marital trouble, his wife sold the couple’s home and belongings in order to move to Wales and live as a family.<sup>84</sup> She applied for and received residency status in Wales, enrolled the couple’s child in day care, signed a lease on a family home, applied for government health services, and received free medical treatment through the state program.<sup>85</sup> One year later, the

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Florida. While in Florida, she opened a bank account (purportedly because she intended to return) and obtained a Florida nursing license. *Id.* at 1250. The second trip resulted in her initial refusal to return with the children to Mexico, although the father convinced her to return to Mexico and give the marriage another chance. *Id.*

77. *Ruiz*, 392 F.3d at 1250.

78. *Id.* at 1256.

79. While acknowledging that the mother and father’s intent was ambiguous, the court emphasized that the father told his mother-in-law that they might return to the United States, the mother retained American bank accounts, had her mail forwarded to an American address, and transferred her nursing license within the United States. *Id.* at 1254.

80. *Id.* at 1253–55. The court did note, however, that there were relevant objective facts that might otherwise show acclimation. *Id.* at 1255. Impliedly, the court might therefore have found differently had there been either shared parental intent to abandon the United States as the children’s habitual residence or if the court did not need to consider shared parental intent at all.

81. 541 F. Supp. 2d 1264 (M.D. Fl. 2007).

82. Once deported, the father was unable to return to the United States for at least ten years. *Id.* at 1266.

83. *Id.*

84. *Id.* at 1266–68. Before the move to Wales, Mrs. Mikovic twice joined her husband in his native Slovakia for short periods. *Id.* On the second trip, she held a job for approximately five months, acquired permanent residency in Slovakia, and became pregnant. *Id.* She returned to the United States to have the child. *Id.*

85. *Id.* at 1268–69. Furthermore, she engaged in preliminary discussions about purchasing

wife secretly took their child and returned to the United States.<sup>86</sup> The court analyzed the child's habitual residence in light of the couple's larger history, and found that the parents did not have a settled intent to alter the child's habitual residence.<sup>87</sup> The court found the mother only intended the move to be contingent on the improvement of the couple's marriage.<sup>88</sup> As such, it held that the objective factors that demonstrated the child's acclimation to the United Kingdom during the "significant" stay in the country were insufficient to place the child's habitual residence in Wales as opposed to the United States.<sup>89</sup>

## 2. Balancing Parental Intent and Child Acclimation

In *Feder v. Evans-Feder*,<sup>90</sup> the Third Circuit held that a determination of habitual residence must focus on the child when examining the child's acclimation to his or her environment, the child's degree of "settled purpose," and the parents' present shared intentions regarding their child's location.<sup>91</sup> In *Feder*, an American couple with a three-year-old child moved to Sidney, Australia, after the husband accepted a position with a bank.<sup>92</sup> While apprehensive

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a home in Wales and attempted to obtain a Welsh passport. *Id.* at 1268–71. Her acceptance by the National Health Service is particularly intriguing in light of the court's eventual holding that the child's habitual residence was not Wales. *Id.* at 1283. One is eligible for the free medical services provided by the British government only if one is "deemed to be an 'ordinary resident' of the UK." *Id.* at 1283 n.16. An "ordinary resident" is an individual who is "living in the UK voluntarily for a settled purpose as part of the regular order of his or her life for the time being" with "an identifiable purpose for his or her residence here" if "that purpose [has] a sufficient degree of continuity to be properly described as settled." *Id.* This standard is strikingly similar to the required degree of settled purpose necessary for a finding of habitual residence, which the court earlier found to require abandonment of one's prior residence and "a sufficient degree of continuity to be properly described as settled." *Id.* at 1278 (quoting *Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004)).

86. *Id.* at 1271.

87. *Id.* at 1278. This "macro" view contrasts with what the court termed a "micro" view of the case, where it would determine habitual residence based on the parties' activities from when the mother and child first moved to Wales until they returned to the United States a year later. *Id.*

88. *Id.* at 1280.

89. *Id.* at 1280–81.

90. 63 F.3d 217 (3d Cir. 1995).

91. *Id.* at 224. The court based this holding largely upon the reasoning set forth in *Friedrich* and British Convention jurisprudence. *Id.*; *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993).

92. *Feder*, 63 F.3d at 218. Before moving, the couple thoroughly researched the move and

about the move, Mrs. Feder agreed to it in order to keep the family intact and work at her marriage.<sup>93</sup> The family put their home and various household items up for sale, purchased a house in Australia, and began to renovate it.<sup>94</sup> In Australia, the child attended nursery school and Mrs. Feder enrolled him in kindergarten.<sup>95</sup> Additionally, Mrs. Feder accepted a role with the Australian Opera Company and committed to a performance the following year.<sup>96</sup> After six months, Mrs. Feder traveled with her son to Pennsylvania under the auspices of visiting her parents, but actually intended to remain permanently in the United States.<sup>97</sup> Mr. Feder promptly filed in Australia under the Convention.<sup>98</sup>

The Third Circuit held that the boy was habitually resident in Australia.<sup>99</sup> The court focused on the child and reasoned that “a child’s habitual residence is . . . where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective.”<sup>100</sup> Therefore, any analysis must be based on the “child’s circumstances . . . and the parents’ present, shared intentions regarding their child’s presence there.”<sup>101</sup> The court determined that the child not only spent “a significant period of time [in Australia] for a four-year-old,” but that his parents had intended him to remain in Australia for the foreseeable future.<sup>102</sup> Moreover, he had participated in some of the “most central activities in a child’s life” while in

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its implications. They traveled to Australia, stayed in Sidney, spoke with American expatriates, a relocation consultant, and real estate agents, as well as consulted an accountant. *Id.* Additionally, the couple inquired with the Australia Opera regarding employment for Mrs. Feder. *Id.*

93. *Id.* at 219.

94. *Id.* Mrs. Feder personally oversaw the renovations. *Id.* The family also obtained Australian Medicare cards. *Id.* Mr. Feder filled out paperwork in order to obtain permanent residence for his family, but Mrs. Feder chose not to sign the necessary papers. *Id.*

95. *Id.* at 219. Mrs. Feder also applied for the boy’s admittance to a private school once he reached the fifth grade, even though that would not occur for seven years. *Id.*

96. *Id.*

97. *Id.* at 219–20. Upon her arrival in the United States, she filed for divorce and refused to return the child to Australia. *Id.* at 220.

98. *Id.*

99. *Id.* at 224.

100. *Id.*

101. *Id.*

102. *Id.*



Australia for those six months.<sup>103</sup> Instead of focusing on the mother's contingent intent, the court emphasized the parents' shared intentions.<sup>104</sup>

The Third Circuit recently took an opportunity to refine and clarify its analysis of habitual residence in *Karkkainen v. Kovalchuk*.<sup>105</sup> In *Karkkainen*, an eleven-year-old girl's parents allowed her to choose whether she wanted to live in the United States with her father or Finland with her mother.<sup>106</sup> With her mother's approval, she became a legal permanent resident of the United States and expressed her desire to live there permanently.<sup>107</sup> While in the United States, she took classes and strengthened her relationship with both her stepmother and stepmother's family.<sup>108</sup> Her mother had second thoughts about allowing her daughter to remain in the United States indefinitely and filed a petition under the Convention for her return.<sup>109</sup> While the Third Circuit admitted that it was a "close call," the court held that the girl was habitually resident in the United States.<sup>110</sup> The court reasoned that the record reflected the girl's

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103. These activities included attendance at preschool and enrollment in kindergarten. *Id.*

104. The contingent condition was if her marriage ended at an indefinite future date; however, the court held that this does not void "the couple's settled purpose to live as a family in the place where Mr. Feder had found work." *Id.*

The dissenting opinion by Judge Sarokin offers an interesting view on the proper standard of review regarding habitual residence determinations. He argues, in part, that by reviewing the finding of habitual residence as a mixed question of fact and law, an appellate court's decision may result in the detrimental "tugging and shuttling" of the child between geographic locations (and thus parents) during what are often lengthy court proceedings. *Id.* at 231 (Sarokin, J., dissenting). For instance, in *Feder* the court of appeals reversed the district court, and as a consequence the boy would need to return to Australia for further proceedings. *Id.* However, by the final appellate decision the boy had been with his mother in the United States for nearly a year. Instead, due to the "immediate effect upon the residency of the child involved," Judge Sarokin felt the court should review all findings of habitual residence solely for clear error. *Id.* at 227–29.

105. 445 F.3d 280 (3d Cir. 2006).

106. *Id.* at 285–86.

107. *Id.* at 285. While she became a legal permanent resident, she initially only visited her father and stepmother in the United States for brief periods. *Id.* at 285–86. Her parents' actions led her to believe that she would be able to remain in the United States. They helped her plan a trip to the United States over the summer, enrolled her in a private American school, and allowed her to leave Finland for the United States after she informed her mother that she would not return. *Id.* at 286.

108. *Id.*

109. *Id.* at 286–87.

110. *Id.* at 297–98.

acclimatization to the United States and her abandonment of Finland.<sup>111</sup> Moreover, her parents' initial shared intent to allow her to live in the United States facilitated the girl's rapid acclimation.<sup>112</sup>

In making its decision, the court elaborated on its approach to a habitual residence determination. The court first "considers whether a child has made a country her home before the date of her removal or retention."<sup>113</sup> This acclimatization and settled purpose inquiry takes into account the child's "experience in and contacts with her surroundings," as well as whether the child has become "firmly rooted" so that a return would take the child from her "family and social environment."<sup>114</sup> The court listed several specific factors from Convention case law "indicative of acclimatization and a degree of settled purpose from the child's perspective," including "school attendance" and "social engagements."<sup>115</sup> Shared parental intent is considered because the Convention attempts to prevent the unilateral alteration of the child's "status quo." Therefore, failing to consider shared parental intent could potentially cause the court to overlook whether a parent is acting unilaterally to alter what had been previously agreed to by both parents.<sup>116</sup> Additionally, the court noted that shared parental intent is important because it can alter how quickly a child is capable of acclimating.<sup>117</sup>

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111. As evidence of her acclimation, the court pointed to the girl's enrollment in school and participation in classes, her travel within the United States, her development of familial relationships, and the high maturity and intelligence that accelerated her acclimation. *Id.* at 294. Specific evidence of her abandonment of Finland included that she brought many of her belongings with her, she informed her friends and teachers that she would not return to Finland, and she communicated her decision to remain in the United States to her parents and stepparents over the summer. *Id.* The court acknowledged that there were factors present that weighed against a finding of acclimatization. Namely, the court questioned whether sufficient time elapsed for the girl to acclimate to the United States. *Id.* However, the agreement between her parents allowing her to remain in the United States if she chose was ultimately held to have allowed her to acclimate much more quickly than otherwise possible. *Id.* at 294–95.

112. *Id.* at 292; see also *infra* note 117.

113. *Karkkainen*, 445 F.3d at 292.

114. *Id.* at 291–92.

115. *Id.*; 445 F.3d at 293 (citing *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995), *Ruiz v. Tenorio*, 392 F.3d 1247, 1255 (11th Cir. 2004), and *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004)). The full list included "academic activities," "school attendance, social engagements, and attendance," as well as participation in athletics and trips within the new country. *Id.*; *Jenkins v. Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009).

116. *Karkkainen*, 445 F.3d at 292.

117. See *id.* at 294 ("[T]he intentions of a child's parents 'affect[] the length of time

Several other circuits have emphasized an inquiry into the child's acclimation while also considering parental intent. In *Koch v. Koch*,<sup>118</sup> the court adopted the standard set forth in *Mozes* while focusing its holding on the objective facts surrounding the child's acclimation.<sup>119</sup> While the district court found the *Mozes* framework inconsistent with the Convention's intent and the jurisprudence of other signatory countries,<sup>120</sup> the Court of Appeals adopted *Mozes*'s reasoning and held that the parents had abandoned their children's habitual residence in the United States.<sup>121</sup> The court reasoned that the parents' hope to someday return to the United States must be viewed

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necessary for a child to become habitually resident, because the child's knowledge of these intentions is likely to color its attitude to the contacts it is making.") (citing *Mozes v. Mozes*, 239 F.3d 1067, 1079–80 (9th Cir. 2001)).

In cases where the child is very young, shared parental intent is the primary method by which a court can determine habitual residence, because the child is incapable of acclimatization by itself. *Id.* at 296; see also *Whiting v. Krassner*, 391 F.3d 540, 547 (3d Cir. 2004) (discussing that a child younger than four lacks "the capacity to form his or her own intentions concerning residency"); *Delvoye v. Lee*, 329 F.3d 330 (3d Cir. 2003) (holding that an infant's habitual residence is the same as its mother's habitual residence). For further discussion of this concept, see Stephen E. Swartz, Note, *The Myth of Habitual Residence: Why American Courts Should Adopt the Delvoye Standard for Habitual Residence under the Hague Convention on the Civil Aspects of International Child Abduction*, 10 CARDOZO WOMEN'S L.J. 691 (2004).

However, shared parental intent holds less weight when considering the habitual residence of an older child. *Karkkainen*, 445 F.3d at 296–97.

118. 450 F.3d 703 (7th Cir. 2006).

119. In *Koch*, a German mother petitioned for the return of her two children to Germany after their American father secretly took them to the United States. *Id.* at 708. The couple eventually moved to Wisconsin, where they were married and had two children. *Id.* at 706. After the father's business failed, the family moved to Germany with their young children for an indeterminate amount of time, but for at least long enough to save some money and allow the father to build his resume. *Id.* One child was only eleven days old at the time the family moved; the other was approximately two years old. *Id.* The family took nearly all of their possessions with them. *Id.* A series of dramatic events culminated in the children's abduction by their father without their mother's knowledge. *Id.* at 707–08. Effectively disappearing, the mother did not know her children's whereabouts for nearly four months. *Id.* at 708.

120. *Id.* at 713. The district court preferred a "fact-based objective or behavioral approach" that focused on geography and duration. *Id.* at 714. It felt that this was in line with the approach utilized by other courts internationally, instead of "*Mozes*' assertion that the starting point of the habitual residence analysis is whether the parents intended to abandon the previous residence." *Id.* The district court felt that "[t]he *Mozes* rule had the unfortunate effect . . . of making seemingly easy cases hard, and sometimes leading to questionable results." *Id.* The court cited *Ruiz* as an example of how courts following the Ninth Circuit's approach can place "undue weight on the difficult to ascertain intentions of the parties." *Koch v. Koch*, 416 F. Supp. 2d 645, 651 (E.D. Wis. 2006).

121. *Koch*, 450 F.3d at 715–19.

in light of the family's actual actions and larger intentions, all of which led to the conclusion that the "move to Germany was of a settled nature."<sup>122</sup> Moreover, the children's habitual residence changed to Germany even if the parents had not chosen to abandon the United States, because the children had acclimated to Germany.<sup>123</sup> In *Gitter v. Gitter*,<sup>124</sup> the Second Circuit appeared to base its decision upon the *Mozes* framework, but its ultimate holding may belie what is

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122. *Id.* at 716–17. Actions that led to the objective conclusion of abandonment included that the family left the United States for an indeterminate period with most of their belongings, it would be nearly ten years before they accomplished their savings goal, and there was no evidence that either parent looked for work in the United States. *Id.* Additionally, they remained in Germany for three years and one child had spent her whole life in Germany, while the other had spent three of his five years in Germany. *Id.*

In an unreported case from 2007, the Seventh Circuit emphasized that habitual residence is essentially a fact-based determination based on the child's acclimation and circumstances. *See Thompson v. Brown*, No. 05C1648, 2007 WL 54100 (N.D. Ill. Jan. 3, 2007).

123. While the court noted that it "should be slow to infer in the absence of shared parental intent that children have changed their habitual residence through acclimatization," the facts objectively required the conclusion that "[r]emoval to the United States . . . was tantamount to taking the children out of the family and social environment in which their lives had developed." *Koch*, 450 F.3d at 717. In furtherance of this line of reasoning, the court cited *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995), for its focus on the child's acclimatization and settled purpose. *Koch*, 450 F.3d at 224; *see Kijowska v. Haines*, 463 F.3d 583, 588 (7th Cir. 2006).

Furthermore, the fact that the husband unilaterally removed the children from their mother and faced criminal charges in Germany due to spousal abuse militated against finding the United States to be the children's habitual residence. *Koch*, 450 F.3d at 719. For further discussion on the interaction between the Convention and victims of spousal abuse, see Dana Beth Finkey, Note, *The Hague Convention on the Civil Aspects of International Childhood Abduction: Where Are We, and Where Do We Go from Here?*, 30 HASTINGS INT'L & COMP. L. REV. 505 (2007); Barbara E. Lubin, Note, *International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention*, 4 WASH. U. GLOBAL STUD. L. REV. 415, 438 (2005).

Soon after the Seventh Circuit's holding in *Koch*, the court held in *Kijowska* that if parents never held a shared intention, then the *Mozes* framework becomes inapplicable to a determination of habitual residence. *Kijowska*, 463 F.3d at 587. Instead, the court must consider the child's acclimation, the child's degree of settled purpose, and (if the child is very young) the mother's habitual residence. *See id.* Additionally, the court emphasized that "habitual residence" should be interpreted on the basis of the words' "everyday meaning" so as to ensure uniformity of interpretation and thereby prevent "forum shopping [from coming] in by the back door" through selection of a forum that defines "habitual residence" in that party's favor. *Id.* at 585. *Kijowska* was a Polish mother who traveled to the United States with her six-month-old child in order to visit the child's estranged American father. *Id.* at 586. Immigration officials refused to grant the mother entry and forced her to return to Poland without her child after the father falsely told an immigration officer that she intended to overstay her tourist visa. *Id.*

124. 396 F.3d 124 (2d Cir. 2005).

in actuality reasoning more similar to a “balancing” argument.<sup>125</sup> Consistent with *Mozes*, it concluded that it is necessary to examine parental intentions in order to view the child’s factual circumstances with the proper degree of perspective.<sup>126</sup> The court determined that there was no shared parental intent to alter the child’s habitual residence, as the mother only agreed to move to Israel temporarily.<sup>127</sup> Ultimately, though, the court remanded the case for further findings related to the child’s acclimatization to life in Israel.<sup>128</sup>

### 3. Focusing on the Child

The Sixth Circuit set forth a method of determining habitual residence early on in American Convention jurisprudence that focused upon the child. In *Friedrich v. Friedrich*,<sup>129</sup> a German man married an American woman stationed in Germany and they had a child.<sup>130</sup> After a year and a half, a marital dispute resulted in the

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125. In *Gitter*, an Israeli couple had a child while living in the United States. *Id.* at 128. Mrs. Gitter conditionally agreed to move to Israel. *Id.* The family closed their American bank accounts, sold their cars, gave away their furniture, and enrolled their child in day care in Israel. *Id.* at 125. Unsatisfied with her circumstances in Israel, Mrs. Gitter secretly returned to the United States with her child when the boy was approximately two years old. *Id.* at 129.

For further discussion of *Gitter*, see Carshae DeAnn Davis, Comment, *The Gitter Standard: Creating a Uniform Definition of Habitual Residence under the Hague Convention on the Civil Aspects of International Child Abduction*, 7 CHI. J. INT’L L. 321 (2006).

126. *Gitter*, 396 F.3d at 132 (“[F]ocusing on intentions gives contour to the objective, factual circumstances surrounding the child’s presence in a given location,” which allows one to determine if a child’s presence is temporary or permanent.). However, the court noted that a court should be slow to find that a child’s habitual residence changed without the presence of shared parental intent. *Id.* at 133–34. As an example, the court discussed how a child would be “habitually resident” in a country if that child spent fifteen years there. *Id.* The usefulness of this example is unclear, as the Convention ceases to apply to children older than sixteen—which the court noted earlier in its opinion. See *id.* at 132 n.7; Convention, *supra* note 5, art. 4.

127. *Gitter*, 396 F.3d at 135.

128. The court reasoned that it lacked enough information to consider the second step of its analysis. *Id.* at 135–36. Additionally, the district court needed to determine if the boy had become “settled” within the United States while the proceedings moved through the courts. *Id.* at 136. If he had, then the Convention specifically mandated that the boy would be habitually resident in the United States. *Id.*; Convention, *supra* note 5, art. 12 (providing that “even where the proceedings have been commenced after the expiration of the period of one year . . . [judicial or administrative authorities] shall . . . order the return of the child, unless it is demonstrated that the child is now settled in its new environment”).

129. 983 F.2d 1396 (6th Cir. 1993).

130. *Id.* at 1398. Mrs. Friedrich was a member of the United States Army. *Id.* at 1398.

mother taking her son to the United States.<sup>131</sup> The court held that the boy was habitually resident in Germany, reasoning that a determination of habitual residence “must focus on the child, not the parents, and examine past experience, not future intentions.”<sup>132</sup> As such, that the boy was born on German soil to a German father, that the family lived in Germany, and that the boy’s ordinary residence was Germany were sufficient indicia to conclude that the boy’s habitual residence was also Germany.<sup>133</sup> The court reinforced its focus on the child by stating that Mrs. Friedrich’s intent to return to the United States after she left the military was “irrelevant.”<sup>134</sup> A child’s habitual residence could only change after a change in geography and the passage of time prior to the child’s removal.<sup>135</sup>

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131. The couple had a fight, which resulted in the mother and son’s move to the military base. *Id.* at 1398–99.

132. *Id.* at 1399. The father was unaware of his son’s removal from Germany until after the boy was already in the United States. *Id.* at 1399.

133. The British courts strongly influenced the court in *Friedrich*, which agreed with British decisions that equated habitual residence with ordinary residence. *See id.* at 1401. Moreover, the court discouraged the use of detailed and restrictive rules that would lead the term to acquire a technical definition, as “domicile” holds in the common law. *Id.* at 1401; *see also supra* note 22.

134. *Friedrich*, 983 F.2d at 1401. The court succinctly summarized its analysis when it stated:

A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward. All of the factors listed by Mrs. Friedrich . . . reflect the intentions of Mrs. Friedrich; it is the habitual residence of the child that must be determined. . . . Any future plans that Mrs. Friedrich had for Thomas to reside in the United States are irrelevant to our inquiry.

*Id.* at 1401.

135. *Id.* at 1401–02. The court further stated that changes solely in parental affection or responsibility are insufficient, as are ties to another country that simply establish legal residence. *Id.*

Ultimately, the court remanded the matter in order to determine the parent’s custody rights before the removal. *Id.* at 1402; *see also supra* note 19 and accompanying text. Unfortunately for all parties, the court did not order the child’s return to Germany until three years later. *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) (“*Friedrich II*”). At that time, the court affirmed a district court determination that the father was lawfully exercising his custody rights under German law at the time of the removal. *Id.* at 1067. In doing so, however, the court apparently overlooked the fact that the boy had now resided in the United States since August 2, 1991. *Friedrich*, 983 F.2d at 1399. After four and a half years, the boy was nearly six and had spent approximately three quarters of his life on American soil. The order to return the boy to Germany therefore may contradict the Convention’s goal to “preserve the status quo.” *Id.* at 1400.

In *Robert v. Tesson*,<sup>136</sup> and then again in *Jenkins v. Jenkins*,<sup>137</sup> the Sixth Circuit strongly reaffirmed its reasoning in *Friedrich* and refined that analysis to reflect a portion of the Third Circuit's approach to habitual residence. In *Robert*, an American woman and French man married and had twin boys.<sup>138</sup> The mother and children moved back and forth between France and the United States several times, staying in each country approximately six months to one year at a time.<sup>139</sup> At about five-and-a-half years old, the boys enrolled in an American school, socialized in the United States, and only rarely contacted their father.<sup>140</sup> Before their final move back to France, the mother bought round-trip tickets and sent only enough of her kids' clothes to last two seasons.<sup>141</sup> After a month in France, the mother left with the children and returned to the United States, leaving only a note.<sup>142</sup> The court first reaffirmed its analysis from *Friedrich*, including its emphasis solely on the child's experience.<sup>143</sup> The Third Circuit had refined *Friedrich's* standard, and the Sixth Circuit adopted its "settled purpose" test.<sup>144</sup> However, the court concluded that the Third and Ninth Circuits' examinations of parental intent contradicted the Convention's stated intent.<sup>145</sup> After focusing on the

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136. 507 F.3d 981 (6th Cir. 2007).

137. 569 F.3d 549, 556 (6th Cir. 2009) (affirming the court's prior analysis in *Robert v. Tesson*).

138. *Robert*, 507 F.3d at 984.

139. The family briefly moved to France for seven months when the boys were about one and a half years old. *Id.* at 984–85. After that, they moved first to Louisiana, then to France from 2001 to 2002, where the boys attended French school and became fluent, and then to Denver. *Id.* at 985–86.

140. *Id.* at 984–87.

141. She also applied for a French residence card and drivers license, which she later claimed was only meant to ensure equality in any potential French divorce proceedings. *See id.* at 986.

142. The note claimed, falsely, that the mother and kids were returning to the United States to visit to the boy's sick grandmother. *See id.* at 987.

143. *Id.* at 989.

144. The Third Circuit held that "a child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization, and where this presence has a 'degree of settled purpose from the child's perspective.'" *Id.* at 993.

145. The court discussed how a focus on parental intent inhibits the Convention from preventing the child's removal from its family and social environment. *Id.* at 991–92. Therefore, it is inconsistent with the Convention's goal to deter abduction. *Id.* While the "Hague Convention is intended to 'secure the prompt return of children wrongfully removed,' the focus on parental intent instead erect[s] . . . barriers to a child's return." *Id.* Furthermore, a focus on parental intent instead of the child's acclimation and settled purpose subordinates the

twins' circumstances, the court reasoned that they were habitually resident in the United States because they attended an American kindergarten and "formed meaningful relationships with their American relatives."<sup>146</sup>

In *Jenkins*, an Israeli couple with a young child moved to the United States.<sup>147</sup> The husband had accepted a corporate position that required his presence in Ohio for at least three years.<sup>148</sup> The family sold their belongings and residence in Israel, their son began preschool in the United States, they purchased a home, and the son made friends.<sup>149</sup> However, by the end of the first year, the wife unilaterally returned to Israel, began divorce proceedings, and petitioned under the Convention for the return of her son to Israel.<sup>150</sup> The court held that the boy was habitually resident in Ohio and reasoned that several factors evidenced the boy's acclimation to the United States.<sup>151</sup> The boy had developed English language skills equivalent to his Hebrew abilities, enjoyed a "weekly routine" in Ohio that included community social events, and had all of his possessions in his home in Ohio.<sup>152</sup>

### *B. International Trends*

No single method of determining habitual residence has emerged in international Convention jurisprudence, but there are discernible trends. Among English-speaking jurisdictions, the common approach is to consider both the child's factual circumstances and the settled

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child's experience rather than honor the Convention's desire to recognize children not as parental property, but "as individuals with their own rights and needs." *Id.* at 991–92; Perez-Vera Report, *supra* note 4, at 428–29, 431–32.

146. *Robert v. Tesson* 507 F.3d 981, 995–97 (6th Cir. 2007). Moreover, the court concluded that the contrast between the children's experience in the United States and their dearth of family contact and other ties to France offered dramatic evidence of their habitual residence in the United States. *Id.* at 997.

147. *Jenkins v. Jenkins*, 569 F.3d 549 (6th Cir. 2009).

148. *Id.* at 552.

149. *Id.* at 552–53.

150. *Id.* at 553.

151. *Id.* at 556.

152. *Id.* at 556–57.



intentions of the child's caregivers, with particular weight given to the objective facts surrounding the child's circumstance.<sup>153</sup>

While specific portions of the Ninth Circuit's overall method of analyzing habitual residence are highly influential in international case law, not all of the tenets set forth in *Mozes* and its progeny have been adopted worldwide. Specifically, several international jurisdictions have rejected the notion that one must have a settled intent to abandon an existing habitual residence before acquiring a new habitual residence.<sup>154</sup> Moreover, only a few jurisdictions place significant weight on parental intent.<sup>155</sup>

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153. *In re J.*, an English case, is considered one of the most influential proponents of this method. *See In re J.*, (1990) 2 A.C. 562 (U.K.); *Koch v. Koch*, 416 F. Supp. 2d 645, 648 (E.D. Wis. 2006) (summarizing international opinion on habitual residence), *aff'd on other grounds*, *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006).

For additional examples of cases from English-language jurisdictions, see State Cent. Auth. v. C.R., [2005] FamCA 1050 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FamCA/2005/1050.html> (taking into account objective indications of parental intent and factual circumstances of the child); *Zenel v. Haddow*, (1993) S.L.T. 975, 979 (Scot.) (holding objective facts pointing to habitual residence may trump caretaker intent); *H.A. v. M.B.*, [2008] 1 F.L.R. 289 (U.K.) (holding that child can gain habitual residence in a country despite parental intent to the contrary); *In re A.*, [2007] 2 F.L.R. 129 (U.K.) (holding brevity of stay in United States and change in mother's intent prevented alteration of habitual residence despite previous shared parental intent); *In re A.*, [1996] 1 All E.R. 24 (U.K.); *Dickson v. Dickson*, [1990] S.C.L.R. 692 (U.K.) (considering the parents' intentions but emphasizing the child's factual circumstances). For an additional international example, see *Chan v. Chow*, [2001] 199 D.L.R. 478 (Can.).

The Hague Conference on Private International Law operates the International Child Abduction Database ("INCADAT"). INCADAT is a free online case database that contains English-language summaries of many Convention cases and provides direct links to the full text of those decisions. The database is available at [www.incadat.com](http://www.incadat.com).

154. *See, e.g.*, *S.K. v. K.P.*, [2005] 3 N.Z.L.R. 590; *In re J.*, [1990] 2 A.C. 562 (U.K.). Including an intent to abandon in a habitual residence analysis results in a concept similar to common-law domicile. *See* sources cited *supra* note 22. The Convention, however, attempted to avoid the technicalities and constrictions inherent in the concept of domicile when it adopted habitual residence as its residency requirement. *See supra* note 22 and accompanying text.

155. One example is Israel. *See, e.g.*, Hague Conference on Private International Law, International Child Abduction Database, Summary of *Ploni v. Almonit* (Oct. 27, 2006), available at <http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=873&lng=1>; *see also* *B.L.W. v. B.W.L.*, [2007] 2 H.K.L.R.D. 193 (H.K.) (holding that parental intent is an essential factor when considering the habitual residence of young children).

## II. ANALYSIS

### A. *The Mozes Approach*

Parental intent has a place in a habitual residence determination, but the Ninth Circuit's inappropriate emphasis on parental intent is inconsistent with the Convention and fails to offer uniformity with foreign jurisdictions. The Convention seeks to prevent the child's removal from his or her family and social environment, deter parents from unilaterally altering a child's habitual residence, and restore the child's status quo.<sup>156</sup> It logically follows that the child, the very focus of the Convention's attention and intended beneficiary of the Convention's protections, should also be the focus when determining habitual residence. Habitual residence, after all, determines not only where that child will live while the ponderous judicial process transpires, but also the country whose law will apply to the dispute. However, the analysis used by the Ninth Circuit focuses its determination of the child's habitual residence not on the child, but rather on the *parents'* subjective settled intent.<sup>157</sup> This is problematic for several reasons.

*Mozes'* rationale can result in a child's removal from his or her family and social environment despite objective indications that the child has acclimated to his or her new circumstances. For instance, in *Ruiz*, the Eleventh Circuit focused on the lack of parental settled intent when it determined that the children were habitually resident in the United States—the nation of their abductor. To make this determination, the court downplayed the substantial objective evidence of the children's acclimation to Mexico, including that the children had lived exclusively in Mexico, attended school, and made friends for nearly three years.<sup>158</sup> Several other circuits have noted that the *Ruiz* children's removal from their "home"<sup>159</sup> in Mexico

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156. *Robert v. Tesson*, 507 F.3d 981, 988 (6th Cir. 2007).

157. *Id.* at 989–90.

158. For the facts of *Ruiz*, see discussion *supra* Part I.A.1.

159. Perhaps the court in *Robert* said it best: "A child who lives in Mexico, attends Mexican school, and makes Mexican friends for three years builds an attachment to Mexico that would lead any child to call that country 'home.'" *Robert*, 507 F.3d at 991. "The *Ruiz/Moses* rule . . . would return him to the nation of their abductor simply because that abductor held

contradicts the Convention's intent to prevent a child from being "taken out of the family and social environment in which its life has developed."<sup>160</sup> In *Mikovic*, the court emphasized the mother's conditional intent to remain in the United Kingdom when determining that the couple's child was habitually resident in the United States. However, the child had spent less than a year in the United States before the move, and the mother sold everything when leaving the United States, intending by her own admission to create a family life for the three of them.<sup>161</sup> Furthermore, the child's father was incapable of entering the United States. Removal thus took the child from her home life and social environment, and effectively prevented any significant father-daughter relationship.<sup>162</sup>

Rather than deter a parent from unilaterally altering a child's habitual residence in an attempt to secure a more sympathetic court, *Mozes's* rationale allows an abductor to "lay the foundation for an abduction by expressing reservations over an upcoming move."<sup>163</sup>

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personal reservations about the original move to Mexico. . . . Such a rule turns the Hague Convention on its head." *Id.*

160. Perez-Vera Report, *supra* note 4, at 428–29; *see, e.g., id.* at 428; Koch v. Koch, 416 F. Supp. 2d 645, 651–52 (E.D. Wis. 2006).

161. This is in addition to many other important objective facts likely indicating that the mother did alter her residence, as discussed *supra* in notes 81–89 and accompanying text. One of the most obvious indications that the mother intended to alter her residence lies in her application to Wales's National Health Service and her subsequent acceptance of free medical care at the British taxpayers' expense. *See Mikovic v. Mikovic*, 541 F. Supp. 2d 1264, 1282 (M.D. Fla. 2007). It is the author's opinion that when one moves to another country for any length of time, attempts to gain a long-term visa, affirmatively enrolls herself in a national social services program, and then takes advantage of that assistance, that individual should expect to be forced to utilize that country's judicial system. The fact that she signed an application whose language nearly parallels the phrasing used by the courts to determine habitual residence only strengthens this argument. *See supra* note 85.

162. One might justifiably question the justice in a finding for the abducting parent under such circumstances. The father could not follow the mother and child to the United States due to a deportation proceeding that barred his reentry for at least ten years. *Mikovic*, 541 F. Supp. 2d at 1266. The court's holding, then, effectively assured that the child would grow up without its biological father. Moreover, it deprived the father of any meaningful future relationship with his child, about whom he cared enough to endure the rigors of a Convention proceeding and appeal. Furthermore, the mother knew that her husband was an illegal alien when she married him, and the child's conception occurred *after* the father's deportation. *Id.* at 1266–67. Therefore, the mother not only knew that she ran the risk of being forced to live with her husband in another country if he was eventually expelled, but also knew that they would be unable to live in the United States as a traditional family.

163. *Robert*, 507 F.3d at 992. *See, e.g., Gitter v. Gitter*, 396 F.3d 124, 135 (2d Cir. 2005); *Ruiz v. Tenorio*, 392 F.3d 1247, 1254 (11th Cir. 2004); *Papakosmas v. Papakosmas*, 483 F.3d

When the court is unable to determine the parents' settled mutual intent to abandon their old habitual residence, *Mozes* "places a heavy thumb on the scale against a finding of a new habitual residence."<sup>164</sup> By their nature, Convention cases involve parental disputes over prior, present, and future intentions. Since Convention cases rarely involve scenarios where the parents shared a settled intent of any sort, *Mozes* directs a court to consider objective circumstances while at the same time stating that courts should be hesitant to infer any change in a child's habitual residence as a result of acclimation. Through this rationale, the court sought to prevent the unilateral taking of children by making it more difficult to alter a child's habitual residence by abduction.<sup>165</sup> However, if a future abductor has effectively ensured that there is a lack of settled parental intent to abandon, then the only way a court will find a child habitually resident in his or her new home is if the abandoned parent can overcome the strong inclination against finding that the child has acclimated to his or her new environment. Rather than secure the prompt return of a child wrongfully removed, this analysis "erect[s] . . . barriers to the child's return" that impede re-establishment of the child's status quo.<sup>166</sup>

The *Mozes* approach propagates a legal fiction that may not "require a court to ignore reality" completely, but can result in reduced emphasis on the most obvious indications of residence.<sup>167</sup> As a result, its practical effect has often "made seemingly easy cases hard and reached results that are questionable at best."<sup>168</sup> In *Papakosmas*, the court's emphasis on determining whether the

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617, 626 (9th Cir. 2007).

164. *Robert*, 507 F.3d at 990.

165. The court stated:

The greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try. The question whether a child is in some sense "settled" in its new environment is so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there.

*Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001).

166. *See Robert*, 507 F.3d at 992.

167. *See Robert*, 507 F.3d at 991 (referring specifically to the reasoning used by the Seventh Circuit in *Koch v. Koch*, 450 F.3d 703, 716 (7th Cir. 2006)).

168. *Koch v. Koch*, 416 F. Supp. 2d 645, 651 (2006), *aff'd on other grounds*, 450 F.3d 703 (7th Cir. 2006).

mother had only a conditional intent to remain in Greece drove that court to imbue seemingly inconsequential facts with great indicative meaning.<sup>169</sup> In focusing on these facts, the court overlooked the obvious indications that the children had not acclimated to Greece.<sup>170</sup> In *Holder*, the court emphasized the specific amount of time that the family would spend in Germany while downplaying both the factual circumstances of the move. While the family ultimately spent only eight months in Germany, those were the first eight months of a four-year military assignment.<sup>171</sup> The family took all of its belongings with them and enrolled the older child in school.<sup>172</sup> If anything, it appeared that the family did intend to change the children's habitual residence for those four years, but perhaps the children had not acclimated to their new surroundings during the short period in which they lived there. The *Mozes* framework, however, forces courts to decide based primarily on parental intent. Under these circumstances, that inquiry may be superfluous.<sup>173</sup>

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169. The court, for instance, included the fact that there was not a going away party and that the older child had received ambiguous cards when he left school as indicative of the family's conditional intent. *See Papakosmas v. Papakosmas*, 483 F.3d 617, 624 (9th Cir. 2007).

Additionally, the court found it important that the mother intended to continue ownership of a hotel in the United States. *Id.* This may be helpful, but does not warrant the court's emphasis. In our increasingly globalized world, business ownership in other nations does not require residence in that country.

170. These facts include that the family was only in Greece for four months, never had a permanent residence, the children had no Greek language ability and attended English speaking schools, the eldest child was unhappy, and the mother and children were prevented from leaving Greece after their father took their passports. *Id.* at 626–27. Meanwhile, the father brought his mistress along with him to Greece, and a quarrel between the parents resulted in a knife wound. *Id.* at 620. The children's lack of habitual residence could have been determined based on objective facts of acclimation alone, and therefore the court's analysis of the mother's conditional intent was superfluous.

171. *See Holder v. Holder*, 392 F.3d 1009, 1012 (9th Cir. 2004).

172. The older child could easily consider himself habitually resident in Germany, especially considering that he likely believed he would be there for the entirety of his father's four-year assignment. *Id.* The older child was approximately five years old when the family moved to Germany. *Id.* Therefore, this period would be nearly the equivalent of his entire life thus far. *Id.* Four years is a long time for a five year old. *See supra* note 58.

173. Several other decisions are susceptible to a similar analysis. In *Koch*, the court ultimately held that the children had acclimated to their new environment and were therefore habitually resident in Germany. *See Koch*, 450 F.3d at 717–18. Therefore, the "primary" inquiry into parental intent was likely unnecessary. In *Gitter*, the court spent the majority of its opinion discussing parental intent, but remanded based on the lack of evidence relating to acclimation. *See Gitter v. Gitter*, 396 F.3d 124, 131–36 (2d Cir. 2005). Presumably, it could

The official commentary on the Convention makes it clear that the Convention desires to further the principle that a child is an individual with his own rights and needs, as opposed to simply being his parents' property.<sup>174</sup> Focusing on the parents' desires, intentions, and subjective affections "subordinates the child's experience."<sup>175</sup> Instead, courts should give effect to this aspect of the Convention by honoring the child's perception of where home is, at least so long as the child is old enough to form attachments independent of his caretaker.<sup>176</sup>

Finally, the *Mozes* approach departs from the Convention interpretations adopted in other jurisdictions.<sup>177</sup> Uniform Convention interpretation is essential if the Convention is to prevent parents from crossing borders in search of a more sympathetic court.<sup>178</sup> Moreover, the Convention binds all signatory countries to interpret the Convention uniformly.<sup>179</sup>

### *B. The Friedrich Approach*

*Friedrich's* standard swings too far in the opposite direction from *Mozes* and fails to further the Convention's intentions by refusing to consider parental intent at all.<sup>180</sup> The Convention, in part, seeks to prevent the unilateral alteration of a child's habitual residence.<sup>181</sup> In

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have reached the same decision without engaging in "primary" parental intent inquiry at all. *See id.*

In contrast to these examples, the Seventh Circuit recently engaged in what might be a more efficient analysis. The court first inquired into whether the child's acclimatization evidenced his habitual residence in the United States. *Thompson v. Brown*, No. 05 C 1648, 2007 U.S. Dist. LEXIS 1187, \*20-21 (N.D. Ill. Jan. 3, 2007). The court then continued its analysis in order to examine the parents' intent, but did so only to reinforce their earlier determination. *See id.* at \*25-26.

174. *See Perez-Vera Report*, *supra* note 4, at 431-32.

175. *Robert v. Tesson*, 507 F.3d 981, 992 (6th Cir. 2007).

176. *See Karkkainen v. Kovalchuk*, 445 F.3d 280, 296 (3d Cir. 2006); *see also* cases cited *supra* note 117 and accompanying text.

177. Most countries adopt a more balanced approach and prefer to place a greater emphasis on the child's acclimation. *See supra* Part I.B and accompanying sources cited.

178. *See supra* note 13.

179. *See Convention*, *supra* note 5, art. 1.

180. *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

181. *Jenkins v. Jenkins*, 569 F.3d 549, 560 (6th Cir. 2009); *Karkkainen*, 445 F.3d at 296; *Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001); *Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995).

order to determine whether one parent had acted unilaterally, it is helpful to consider what the parents once jointly intended.<sup>182</sup> Moreover, parents' past and present intentions regarding their child's habitual residence influence that child's views about his home.<sup>183</sup> Additionally, courts and commentators have noted that a habitual residence determination must consider parental intent when very young children are involved, as they are incapable of forming attachments independent of their primary caretaker.<sup>184</sup>

### C. *The Feder and Karkkainen Approach*

The balancing approach typified by the Third Circuit in *Karkkainen* and *Feder* avoids some of the shortcomings inherent in the other analytic frameworks,<sup>185</sup> but also highlights the difficulty inherent in implementing any formulaic approach to determining habitual residence. The balancing approach's strength lies in its commitment to inquire into acclimatization and settled purpose from the perspective of the child.<sup>186</sup> As with other approaches, a court will attempt to determine whether a child turned a country into her home by the time of her removal.<sup>187</sup> To do this, however, it places greater weight on findings relating to the child's contact with his surroundings, the child's meaningful relationships, and whether the child acquired a sense of normalcy.<sup>188</sup> Additionally, the approach identifies specific factors indicative of the child's acclimatization and settled purpose.<sup>189</sup> This focus on the child and specific objective indicators avoids many of the pitfalls of approaching habitual

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182. *Karkkainen*, 445 F.3d at 296.

183. *Id.* at 292. If a child thinks that his or her family lives someplace, or has moved somewhere in order to live there for the indeterminate future, then that child is more likely to consider that his home as well. *See id.*

184. The Third Circuit in particular has paid special attention to this issue. For further discussion, see *supra* note 117.

185. *See* discussion *supra* Parts II.A–B.

186. *Karkkainen*, 445 F.3d at 292.

187. *See, e.g., id.* at 292; *Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (stating the Convention seeks to prevent a child from being “taken out of the family and social environment in which its life has developed”); *Holder v. Holder*, 392 F.3d 1009, 1019 (9th Cir. 2004); *Perez-Vera Report*, *supra* note 4, at 428–29.

188. *Karkkainen*, 445 F.3d at 291–92.

189. *See supra* note 115 and accompanying text.

residence with a primary focus on subjective parental intent, while more closely adhering to the Convention's intentions.<sup>190</sup> Additionally, the balancing approach may more capably prevent unilateral removal than an approach focusing solely on the child, because it does take into account shared parental intent.<sup>191</sup> Moreover, by paying attention to parental intent, the balancing approach allows courts to consider how the child's perception of parental intent may influence the child's acclimation.<sup>192</sup>

However, the balancing approach shares some of the other approaches' problems. It is very difficult to judge when a child is truly capable of calling a place "home."<sup>193</sup> The balancing approach, which attempts to solve this dilemma by utilizing aspects of the other approaches, raises its own difficult questions. A court must determine when the child is old enough to have an independent sense of settled purpose instead of substituting the parents' settled purpose and intent, determine the manner in which parental intent influenced the child's subjective intent, and decide how much weight to give the identified objective factors.<sup>194</sup> Furthermore, if the court set the bar for finding

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190. See discussion *supra* Part II.A.

191. See discussion *supra* Part II.B.

192. See discussion *supra* Part II.B. and note 117.

193. The district court in *Karkkainen* utilized a series of experts in teaching and psychology, as well as the judge's impressions during the hearing. *Karkkainen*, 445 F.3d at 286. The court stated:

The record reflects that Maria is both mature and intelligent for her age. An expert in teaching and training children in the performing arts testified that Maria is "a very focused, gifted, talented and . . . creative child" with particularly strong skills in photography and drawing. An independent child psychologist found that Maria was "uniquely talented and highly intelligent," an impression the District Court echoed after hearing Maria's testimony. Maria could communicate well in Finnish, English, and Russian, and had extensive experience traveling in Europe and the United States for visits with her father. She was, in short, much more experienced and mature than the average eleven year old when she came to the United States on June 6, 2003.

*Id.* One assumes, however, that maturity with respect to other members of her age group is not necessarily indicative of an ability to acclimate independently of one's primary caregiver.

194. Any determination seemingly would depend on the individual facts. Otherwise, courts would face the difficult prospect of objectively allocating weight to factors such as school attendance, participation in athletics, or making friends. Inevitably, a court would consider some facts important and would discard others as inconsequential. For example, in *Karkkainen* the court discounted the fact that there was an unfiled custody agreement between the parents stipulating that Finland was the child's habitual residence, the child was only present in the United States for a single summer, and that the mother bought her daughter a round-trip ticket.



acclimation too low, then this would create an incentive for one parent unilaterally to remove the child “in the hope that the child will quickly acclimatize and not be returned.”<sup>195</sup>

### III. PROPOSAL

Across jurisdictions, most of the various approaches acknowledge that habitual residence and ordinary residence are nearly conceptually equivalent.<sup>196</sup> Moreover, an inquiry into a child’s habitual residence is, to varying degrees, an inquiry into whether a child has made a country his or her “home” before that child’s removal.<sup>197</sup> “Home” is in some ways an elusive concept; it can be difficult to describe without idealizing or equating to past locations or memories, and it can be difficult to create purposefully in a place. Despite this quality, one knows when a place has become home. Perhaps on the simplest level, home is a circumstantial concept. It is where our family and loved ones are and where our passions are located, whether occupational, academic, or otherwise. As the saying goes, home is where the heart is.

The Convention directs courts to locate a child’s home, and in order to comport with the Convention’s intentions, that inquiry must approach habitual residence in light of the child’s perspective and circumstances.<sup>198</sup> Thus, the question becomes, how do you determine where a child’s home is located? The answer begins with the approach taken by the Third Circuit.<sup>199</sup> Fact-based formulaic

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*Id.* at 285–90. Moreover, the court did not appear to consider that the mother did not have plans to come to the United States. *See id.* If she remained in the United States, there would likely be a negative impact on the relationship between the daughter and the parent who raised her.

195. *Id.* at 295–96. The court in *Mozes* also noted this danger. *See supra* note 165.

196. *See, e.g., Mozes v. Mozes*, 239 F.3d 1067, 1071–73 (9th Cir. 2001); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

197. *Karkkainen*, 445 F.3d at 291–93 (“[E]ach test has in common the goal of determining where a child’s home is at the time of removal or retention.”); *cf. Mozes*, 239 F.3d 1067, 1074–80 (“[T]he Convention seeks to prevent harms thought to flow from wrenching or keeping a child from its familiar surroundings.”); *Friedrich*, 983 F.2d at 1400 (discussing the importance of preserving the child’s status quo).

198. *Karkkainen*, 445 F.3d at 291–92; *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995); Perez-Vera Report, *supra* note 4, at 431–32.

199. *Karkkainen* is a recent example of this type of analysis. *See discussion supra* Part I.A.2.

approaches are often difficult to apply across the myriad of fact patterns present in Convention cases.<sup>200</sup> However, some structure in the analysis assists in furthering the Convention's stated goal of uniformity.<sup>201</sup>

The Third Circuit's flexible analytic structure grounds its analysis with the child and looks primarily to whether the child has acclimated to his or her surroundings and formed a settled intent to remain.<sup>202</sup> This comports more closely with the Convention's intent than an inquiry focused on parental intent.<sup>203</sup> Next, courts should consider the parents' settled intent, which comprises a portion of the "acclimation and settled purpose" inquiry because it offers valuable information about how the child perceives his or her circumstances.<sup>204</sup> Furthermore, consideration of shared parental intent helps to ensure that the Convention prevents the use of force and removal to create artificial jurisdiction in a sympathetic judicial forum.<sup>205</sup>

The Third Circuit's approach emphasizes objective indications of acclimation and settled purpose, but courts should elaborate on the identified factors and expand those considered.<sup>206</sup> Objective factors make an imprecise habitual residence determination more concrete. One important factor not explicitly recognized by courts is the accessibility of each parent to the child. An accessibility inquiry would include economic limitations, health complications, and immigration issues that affect the parent-child relationship. A determination of habitual residence can be a lengthy judicial process and is only among the first steps in a Convention dispute.<sup>207</sup> The Convention recognizes that stability in the child's family and social environment is essential to the child's well-being.<sup>208</sup> Oftentimes, the

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200. See *Karkkainen*, 445 F.3d at 291.

201. See *supra* notes 13, 24, 25 and accompanying text.

202. See discussion *supra* Part I.A.2.

203. See sources cited *supra* note 198; discussion *supra* Part II.A.

204. *Karkkainen*, 445 F.3d at 285, 294; see also discussion *supra* Part I.A.2, and note 117.

205. See *supra* note 13.

206. See *supra* note 115 and accompanying text.

207. See, e.g., *Feder v. Feder v. Evans-Feder*, 63 F.3d 217, 227–31 (3d Cir. 1995) (Sarokin, J., dissenting) (noting the child spent more time in the United States waiting for the court's determination of his habitual residence than he originally spent in his habitual residence); see also discussion *supra* note 133.

208. *Karkkainen*, 445 F.3d at 291; Perez-Vera Report, *supra* note 4, at 428, 431–32, 448; see discussion *supra* notes 11, 14.

presence of both parents helps to create this stability.<sup>209</sup> Moreover, it is in the child's best interest to have both parents present in a child's life so long as there is no evidence of abuse or neglect.<sup>210</sup> Additionally, considering parental accessibility furthers the Convention's goal to prevent forum-shopping. The parent left behind may be unable to travel internationally in order to take part in his or her child's life, and therefore a parental accessibility factor acts as a counterweight to a conclusion that the child should remain in his or her new location.<sup>211</sup>

#### CONCLUSION

The Convention seeks to protect children by preventing the unilateral removal of a child from his or her family and social environment. Habitual residence, as a foundational concept, must therefore focus primarily on where that child perceives his or her home to be. Courts must consider parents' shared intent, however, as this intent influences the child's perception of home and allows courts to identify unilateral action. Furthermore, any analysis must provide sufficient structure to facilitate uniform interpretation, but be flexible enough to adapt to the unique facts of each case. The Third Circuit's approach provides a sound foundational model. The addition of further objective factors that assist a court's inquiry would further refine this standard.

International child abduction continues to challenge the world community. However, the Convention provides a strong framework through which member states can attempt to deter and alleviate the upheaval, family strain, and childhood trauma that accompany a child's unilateral removal from his or her home. Because children are necessarily at the heart of each Convention case, courts must continue to place the child at the center of every Convention analysis.

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209. Perez-Vera Report, *supra* note 4, at 431–32.

210. *See supra* note 123.

211. For example, a court might avoid a situation analogous to *Mikovic*. *See* discussion *supra* Parts I.A.1., II.A.