It Is More Than Custody: The Balance Between Parental Intention and the Child’s Perspective in Hague Convention Cases

“The States signatory to the present Convention [are] firmly convinced that the interests of children are of paramount importance . . . [d]esir[e] to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.”

I. INTRODUCTION

On May 22, 2017, the Supreme Court once again denied a petition for writ of certiorari to determine what “habitual residence” means within the scope of the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention). Petitioner Danilo Pennacchia appealed the district court’s decision finding that his minor child’s habitual residence was the United States. The appeals court agreed with the lower court’s interpretation of habitual residence, focusing on the shared, settled intent of the parents. Pennacchia presented two questions to the Court: what does “habitual residence” mean under the Hague Convention; and what must courts look to when determining a child’s habitual residence in proceedings under the Hague Convention and the International Child Abduction Remedies Act (ICARA).


2. Pennacchia v. Hayes, 137 S. Ct. 2162, 2162 (2017) (denying writ of certiorari); Petition for Writ of Certiorari at i, Pennacchia v. Hayes, 137 S. Ct. 2162 (2017) (No. 16-1119) (asking Court to define “habitual residence”). The district court denied the father’s petition to return his minor child to Italy under the Hague Convention. See Pennacchia v. Hayes, No. 1:16-CV-00173-EJL, 2016 U.S. Dist. LEXIS 99043, at *1-2 (D. Idaho July 28, 2016), aff’d, 666 F. App’x 677 (9th Cir. 2016), cert. denied, 137 S. Ct. 2162 (2017). The mother travelled with the child to the United States, but the father expected them to return within a month. See id. Although the child lived in Italy for several years, the court did not determine the case from the child’s point of view. See id. at *1-2, *8-9. The court concluded that in “the absence of settled parental intent, [it] should be slow to infer from [the child’s] contacts,” and ruled that the child’s habitual residence was the United States. See Pennacchia v. Hayes, 666 F. App’x 677, 680 (2016), cert. denied, 137 S. Ct. 2162 (2017). There are also other cases throughout the years asking the Supreme Court to define the term “habitual residence,” but they were all denied certiorari. See, e.g., Murphy v. Sloan, 135 S. Ct. 1183, 1183 (2015); Headifen v. Harker, 572 U.S. 1089, 1089 (2014); Delvoye v. Lee, 540 U.S. 967, 967 (2003).

3. See Pennacchia, 666 F. App’x at 678-79 (outlining Pennacchia’s argument child established habitual residence in Italy).

4. See id. at 679 (agreeing with district court’s application of correct legal standard). The court followed the precedent of Mozes v. Mozes, placing the primary focus on parental intent. See Pennacchia, 666 F. App’x at 679 (following Mozes precedent); infra Section H.B.3.

5. See Petition for Writ of Certiorari, supra note 2, at i (presenting questions to Court for certiorari).
Conversely, in June 2017, the Eighth Circuit in *Cohen v. Cohen* affirmed the district court’s finding that the child’s habitual residence was the United States based on a different standard. The district court examined the child’s acclimatization to the country and determined habitual residence from the child’s perspective instead of focusing on the parents’ shared intent. This varied interpretation between the Eighth and Ninth Circuits demonstrates the law’s current status within the United States.

Every year, thousands of children are subject to proceedings under the Hague Convention. In 2018, seven hundred and sixteen cases were reported to the U.S. Central Authority, involving 896 children. To state a prima facie case for returning a child, a petitioner must establish by a preponderance of the evidence that the child has been wrongfully removed from the country of his or her habitual residence or wrongfully detained in a country other than that of his or her habitual residence. Thus, these cases turn on the determination of the child’s habitual residence in Hague Convention proceedings.

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6. 858 F.3d 1150 (8th Cir. 2017).
7. See id. at 1154-55 (ruling on child’s habitual residence). The mother brought the child to the United States while paying off the father’s debt in Israel. See id. at 1152. The mother agreed to return to Israel with the child on the condition that the father did not violate the law. See id. There was a dispute as to how long the child would stay in the United States, but considering the child’s point of view, the court decided that the child had acclimatized to the United States, and thus, the United States was the child’s habitual residence. See id. at 1154.  
8. See id. at 1153-54, 1153 n.3 (outlining court’s standard and refusing to apply notably different standard used by Second Circuit).  
11. See U.S. DEP’T. OF STATE, *ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 2018*, at 1, 3 (2018), https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/AnnualReports/2018%20Annual%20Report%20on%20International%20Child%20Abduction%20FINAL1.pdf [https://perma.cc/5LNM-8DEH] (reflecting total number of abductions cases reported to U.S. Central Authority open during 2017). The total number of 896 children is the accumulation of the total number from each country’s data within the report. See generally id.  
Despite the importance of defining a child’s habitual residence, the lack of definitional guidance has caused a split within the United States courts on how to properly determine a child’s habitual residence. This Note examines the circuit split and suggests that a bright line rule is not necessary to achieve the Hague Convention’s goal. However, if the Court adopts one, it should adopt the Eighth Circuit’s interpretation of habitual residence to achieve uniformity.

This Note begins with a discussion of the history of international child abduction. It then details the historical origins of the Hague Convention, its objectives, and its text. This Note also briefly examines the reason behind defining and not defining certain legal terms. Part II then examines ICARA—the statute enacted by Congress to give the Hague Convention domestic effect. Next, this Note details the split among the federal appellate courts on how to determine habitual residence within the United States. Currently, among those who have addressed the issues, the United States Courts of Appeals for the Second, Third, Eighth, Ninth, and Eleventh Circuits all adhere to some consideration of shared parental intent, while the Sixth Circuit strictly reviews the issue under an objective evidence-only standard. A look at how other Hague Convention signatories determine habitual residence highlights the importance of uniformity.

Part III then analyzes the three main models of interpretation in the United States beginning with a case study. Lastly, after focusing on the Hague Convention’s goals, this Note concludes it is necessary to have a uniform standard for habitual residence in the United States, arguing that adopting the Eighth Circuit’s standard best accomplishes the Hague Convention’s objectives.

14. See infra Part II; see also Redmond v. Redmond, 724 F.3d 729, 746 (7th Cir. 2013) (noting imprudent to set relative weights of parental intent and child’s perspective in stone). The court suggested that “[t]he habitual-residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.” See Redmond, 724 F.3d at 746; see also Rhona Schuz, Disparity and the Quest for Uniformity in Implementing the Hague Abduction Convention, 9 J. COMP. L., no. 1, 2014, at 3, 9 (highlighting different models and standards could produce different outcome in same case).
15. See infra Parts II-III.
16. See infra Part III.
17. See infra Section II.A.1.
18. See infra Section II.A.2.
19. See infra Section II.A.3.
20. See infra Section II.A.
21. See infra Section II.B.
22. See infra Section II.B.
23. See infra Section II.C.
24. See infra Section III.A.
25. See infra Parts III-IV.
II. HISTORY

A. Overview of the Hague Convention


International child abduction occurs in any instance where a child is taken across an international frontier without consent or lawful authority.\(^26\) The term, despite its multiple meanings, is not concerned with violent kidnappings by strangers for the purpose of the Hague Convention.\(^27\) Rather, it is “synonymous with the unilateral removal or retention of children by parents, guardians or close family members.”\(^28\) The stereotypical abductor was historically described as a noncustodial father, but this has recently changed in the context of the Hague Convention; mothers are just as likely, if not more likely, to remove or retain children from their family.\(^29\)

The motivation behind abducting a child could “occur for a variety of reasons from the narcissistic to the heroic.”\(^30\) Typically, the abducting parent’s objective is to gain sole custody and control over the child in a new jurisdiction.\(^31\) There is no doubt that the forced relocation will have a detrimental effect on the child.\(^32\) In analyzing this effect, an abduction should not be viewed in isolation, but in the totality of the circumstances surrounding the time when the child was

\(^{26}\) See Anne-Marie Hutchinson et al., International Parental Child Abduction 3 (1998) (defining international child abduction generally).

\(^{27}\) See Paul R. Beaumont & Peter E. McÉleavey, The Hague Convention on International Child Abduction 1 (P.B. Carter ed., 1999) (stating multiple possible meanings of child abduction). Cases within the Hague Convention are unlike cases of “classic kidnapping” where a third party or stranger is the abductor. See id. There are suggestions of possible acts relating to the meaning of child abduction, but most underlying themes are wrongful, and almost invariably harmful to the children involved. See id.


\(^{29}\) See Beaumont & McÉleavey, supra note 27, at 8-10 (detailing statistics on abductor being female instead of male). Explanations for the increase in mothers being the abductors include evolution in domestic custody provisions which recognize both parents as having similar duties and responsibilities in caretaking. See id. at 10.

\(^{30}\) See id. at 11 (quoting Geoffrey L. Greif & Rebecca L. Hegar, International Parental Abduction and Its Implication for Social Work Practice: Great Britain to the United States, 7 CHILD. & SOC’Y 269, 270 (1993)) (outlining possible reasons for abduction). The abducting parent may believe that he or she is acting in the child’s best interest, or may simply be tired of the relationship or the life in a certain country, and wish to return to familiar surroundings with the child. See id. The abduction may also be retaliation for ending the marriage. See id.

\(^{31}\) See id. at 1 (differentiating abductor who seeks material gain); see also Pérez-Vera, supra note 28, at 428 (identifying abductor wanting to establish artificial jurisdictional links).

\(^{32}\) See Beaumont & McÉleavey, supra note 27, at 1 (describing difficulty children face in abduction-by-family situation). A child is likely to feel uprooted from a familiar environment when he or she loses contact with friends and relatives. See id. It may also disrupt the child’s education and general sense of security. See Trevor Buck, International Child Law 131 (2005); see also Pérez-Vera, supra note 28, at 432 (detailing consequence of “childnapping”).
removed or detained. With the added international element in Hague Convention cases, the already emotional conflict over the care and control of the child is exacerbated.

The increase in child abduction stems from a multitude of legal, technical, and social developments in the late twentieth century. International mobility became more prevalent, marriages between couples from different countries increased, and divorce rates began to rise. Advancements in technology have also enabled the abducting parent to move a child thousands of miles away from the left-behind parent in a matter of hours. The confluence of all these developments led to an increase in child custody disputes with international dimensions.

Before the Hague Convention, the recovery of a child was inherently difficult. These difficulties resulted from complications in locating the child, high expenses for international disputes, and ineffective assistance of local and foreign authorities. There was also the issue of undue delay in reaching

33. See BEAUMONT & MCÉLEAVY, supra note 27, at 11-12 (detailing factors impacting child in international child abduction cases). For example, the preexisting relationship with the parent, the environment the child is forced to live in, the length of the removal, and the support available after the removal are all factors that affect the child’s ability to survive post-removal. See id. at 12.

34. See id. at 2 (outlining difficulty added to international cases).

35. See id. (suggesting possible origin of international child abduction).


39. See BEAUMONT & MCÉLEAVY, supra note 27, at 3 (discussing reasons why chances of recovering abducted child prior to Hague Convention limited); Bruch, supra note 38, at 98 (identifying global problems).

40. See BEAUMONT & MCÉLEAVY, supra note 27, at 3 (discussing difficulties of recovering child); see also Bruch, supra note 38, at 98 (pointing to specific problems before creation of Hague Convention); Dana R. Rivers, Comment, The Hague International Child Abduction Convention and The International Child Abduction Remedies Act: Closing Doors to the Parent Abductor, 2 TRANSNAT’L LAW. 589, 591 (1989) (describing increased cost in travel and struggle to overcome obstacles for left-behind parent).

Most Americans who experience the abduction of a child across international frontiers are at a complete loss about what to do and where to turn. There is no office in this country that is equipped to give them the necessary aid and direction. If they travel to the country where they presume the
resolutions in cases because courts were reluctant to take any action without investigating what would be in the abducted child’s best interest. This best interest analysis was applied on an individual basis, prolonging the proceedings and impacting the child as well as the court. The left-behind parent was also forced to pursue a remedy in another country, and this often resulted in situations where different legal systems and laws were applied with embedded cultural or social attitudes that were at odds with home courts.

However, the major concern was not, and is not, the jurisdictional issue; the main concern was, and is, efficiency. The number of children and left-behind parents in the system prove this is a global issue, but it was not until the Hague Conference in the 1970s that countries began to specifically address the matter. Prior attempts to deal with these issues either failed at the drafting stage or in their initial implementation.

2. The Creation of the Hague Convention

The Special Commission for the Child Abduction Convention (the Commission) met for the first time in March 1979. The Commission decided that the issue of international child abduction would be addressed at the Fourteenth Session of the Hague Conference for the purpose of finding a joint


41. *See Beaumont & McEleavey, supra note 27, at 3 (identifying courts’ standard).*

42. *See id. at 29 (noting standard used in private-law proceedings). Time is an important factor in the child’s adjustment; courts may find it difficult to require a child who has adjusted to a new situation for a long period of time to leave and return to another country. See Dyer, supra note 37, at 23-24; see also Pérez-Vera, supra note 28, at 431 (suggesting unclear legal standard and thus difficult to apply). See generally LeAnn Larson LaFave, *Origins and Evolution of the “Best Interests of the Child” Standard*, 34 S.D. L. REV. 459 (1989) (discussing past, present, and future development of “best interest” standard).*

43. *See Pérez-Vera, supra note 28, at 431 (reminding issue of subjective value judgments of abductors’ state court); Hutchinson et al., supra note 26, at 3 (stating difficulty enforcing right in home country).*


45. *See Beaumont & McEleavey, supra note 27, at 3 (noting child abduction issue lacking recognition until late 1970s); supra note 10 and accompanying text (indicating large number of children affected).*

46. *See Beaumont & McEleavey, supra note 27, at 3 (finding previous attempts unsuccessful in resolving issue). There would have been an Article 6 of the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, but the drafters were unable to come to an agreement, while the 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Child and on Restoration of Custody of Children was not helpful in practice. See id. at 3 & n.14.*

47. *See id. at 18 (indicating beginning of Hague Convention and acknowledging international issue).*
resolution to the issue. The Commission agreed on a few items that would be the basis for the Commission’s preliminary draft treaty. These included: establishing a central authority in each member state to facilitate cooperation across borders; providing the left-behind parent the right to apply to the state of refuge for an automatic return of an abducted child within six months of the abduction; and only allowing a return to be declined if an action taken would be gravely prejudicial to the child’s interest. Lastly, the rules would apply separately from the existing custody order, if any. Custody in the context of the Hague Convention refers to the “rights relating to the care of the person of the child and . . . the right to determine the child’s place of residence.” After a few drafts and negotiations during the Fourteenth Session of the Hague Conference, the twenty-three countries present unanimously voted to adopt the Hague Convention. Currently, ninety-eight countries are signatories to the Hague Convention, including the United States.

a. Purpose and Application of the Hague Convention

The Hague Convention’s objective is: “to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.” The drafters intended for this return mechanism to serve a child’s interest and to protect him or her

48. See id. at 17 (setting timeline for finding resolution to global issue). The research of then-First Secretary, Adair Dyer, included analysis of legal issues and also sociological aspects of child abduction worldwide. See id. This report identified the true nature of the problem and was vital in allowing countries to understand the issue before meeting again to plan out the resolution. See id. The work, along with a questionnaire, was then distributed to governments; the responses indicated a near-unanimous rejection of an international tribunal, but overwhelming support for some form of increased cooperation among contracting states. See id. at 18; see also Pérez-Vera, supra note 28, at 435 (noting nature of Hague Convention).

49. See BEAUMONT & MCELEAVY, supra note 27, at 19-20 (describing progress made in Conclusion of Special Commission). These working principles formed the basis for the Commission’s preliminary draft treaty. See id.

50. See id. (noting progress made after Special Commission meeting). The aim of the meeting was to find agreement upon an approach that could become the basis of the future convention. See id. Issues arose while the parties were debating recognition and enforcement of foreign custody decrees. See id. One view believed adoption of a strict recognition rule should be adopted, whereas another approach argued for “allow[ing] courts greater discretion to determine what was in the best interest of the children involved.” See id. The result was that no mention regarding the issue was made in the Conclusion of March 1979. See id. at 19 & nn.29, 30.

51. Id. at 20 (deciding application of rules).

52. See id. (separating Hague Convention’s return mechanism from contracting state’s custody order); see also Hague Convention, supra note 1, art. 5 (providing scope of custody right in Hague Convention).

53. See Pérez-Vera, supra note 28, at 426 & n.1 (listing participating countries that voted to pass Hague Convention); BEAUMONT & MCELEAVY, supra note 27, at 20-22 (detailing drafting process of Convention).


55. Hague Convention, supra note 1, art. 1 (stating objective of Hague Convention).
from the harmful effects associated with wrongful removals or retentions.\textsuperscript{56} Instead of a child’s best interest, the Hague Convention aimed to protect all children collectively.\textsuperscript{57} No longer would the proceedings be a full traditional custody determination, rather there would only be a peremptory examination into whether or not a return order should be made.\textsuperscript{58} The court of the child’s habitual residence—the forum conveniens—could then decide the underlying substantive custody issues.\textsuperscript{59} This allows a child to be returned to the place that he or she is most familiar with and has the greatest connection to, while the authorities in that state are best situated to determine the child’s future.\textsuperscript{60}

\textit{b. Definition in the Hague Convention}

There is no supranational institution or tribunal to provide guidance in resolving controversies under the Hague Convention; thus, the effectiveness of the Hague Convention is left in the hands of the respective signatory nations.\textsuperscript{61} However, the Hague Convention established two definitions for the terms “right of custody” and “rights of access” because an incorrect interpretation would potentially compromise the Hague Convention’s objectives.\textsuperscript{62} Conversely, “habitual residence”—the term used to state a prima facie case and the focus of this Note—is left undefined in the text.\textsuperscript{63}

\textsuperscript{56} See Beaumont & McElavy, supra note 27, at 28-29 (stating drafter’s intention).
\textsuperscript{57} See Pérez-Vera, supra note 28, at 431 (explaining why no explicit reference to “best interest” in Hague Convention); Beaumont & McElavy, supra note 27, at 29 & n.8 (reaffirming interest of children collectively paramount consideration of Hague Convention); see also Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376-78 (8th Cir. 1995) (deciding to exclude evidence relevant to custody or best interest of child).
\textsuperscript{58} See Beaumont & McElavy, supra note 27, at 29-30 (differentiating new approach used in Hague Convention); see also supra notes 38-39 and accompanying text (examining pre-Convention issues that result in new determination besides best interest analysis).
\textsuperscript{59} See Beaumont & McElavy, supra note 27, at 29-30 (explaining return mechanism); Silberman, supra note 13, at 1063 (noting best interest evaluation appropriate in courts of state of habitual residence after child returned).
\textsuperscript{60} See Pérez-Vera, supra note 28, at 430 (noting objective of Hague Convention); Beaumont & McElavy, supra note 27, at 30 (explaining advantage of returning child to habitual residence without substantive hearing on best interest analysis).
\textsuperscript{61} See Beaumont & McElavy, supra note 27, at 30 (indicating result of return mechanism); Silberman, supra note 13, at 1057 (stressing lack of supervision in respective states).
\textsuperscript{62} See Hague Convention, supra note 1, art. 5 (defining two terms within Convention). The issue of custody rights in this context is “a more limited concept than protection of minors.” See Pérez-Vera, supra note 28, at 451-52. In contrast, access rights seem to include other ways of access, like residential access and a right of access across national frontiers. See id. at 452.
\textsuperscript{63} See Beaumont & McElavy, supra note 27, at 88-89 (examining habitual residence issues due to lack of definition); Silberman, supra note 13, at 1064 (opining Convention’s lack of definition source of greatest deficiencies). Habitual residence’s importance is seen in a few places within the Hague Convention. See Silberman, supra note 13, at 1064. Under Article 3, the states of habitual residence are used to determine law in wrongful removal cases. See id. at 1063. Additionally, the need to return the child depends on where he or she is currently located and where the habitual residence is decided to be. See id.; see also Pérez-Vera, supra note 28, at 451 (stating tradition of not defining legal concepts).
Despite the importance habitual residence plays in the Hague Convention, it is a tradition of the Hague Conferences to not define this legal concept to preserve the versatility of its use. Yet habitual residence is clearly distinguished from the concept of domicile. Domicile requires an intent to reside in a country of choice permanently or indefinitely, as well as actual physical presence in that country. On the other hand, intent alone as a basis for habitual residence is a simplification in the context of the Hague Convention. Domicile also embodies elements of future intent, citizenship, and nationality that are not considered under habitual residence. The uncertainty surrounding the length of residence for it to be considered habitual also provides flexibility to this concept. The drafters believed that the ambiguity would allow courts to come to the most appropriate solution in most cases, but the concept has yet to be applied by courts in international child abduction cases.

Despite the Hague Convention’s intentional omission, a large body of case law has developed regarding how a court should determine a child’s habitual residence. As a result of the lack of universal definition and interpretation, courts are conflicted on the proper standard to use. Some courts’ decisions

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64. See Beaumont & McElevy, supra note 27, at 88 (explaining Hague Convention’s new approach to solving issue); see also Pérez-Vera, supra note 28, at 441, 451 (affirming lack of definition deliberate policy of Hague Convention).

65. See Pérez-Vera, supra note 28, at 445 (indicating domicile not consideration under Hague Convention); Beaumont & McElevy, supra note 27, at 89 (differentiating habitual residence from domicile).


67. See Beaumont & McElevy, supra note 27, at 90 (questioning whether intention enough for determination).

68. See Kijowska v. Haines, 463 F.3d 583, 587 (7th Cir. 2006) (suggesting habitual residence independent of domicile); Rydder v. Rydder, 49 F.3d 569, 373 (8th Cir. 1995) (dismissing consideration of children’s resident status because not dealing with habitual residence); Friedrich v. Friedrich, 983 F.2d 1396, 1401-02 (6th Cir. 1993) (emphasizing importance of not confusing habitual residence with domicile).

69. See Beaumont & McElevy, supra note 27, at 89 (noting flexibility of using habitual residence instead of domicile).

70. See id. (alerting possible issue during implementation). In contrast to domicile, habitual residence is not “loaded with national conceptions and prejudice.” See id. at 90 n.11 (quoting LENNART PALSSON, MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAW 78 (Springer 1974)).

71. See Feder v. Evans-Feder, 63 F.3d 217, 222-23 (3d Cir. 1995) (indicating development in case law); see also Rhona Schuz, Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context, 11 J. TRANSNAT’L L. & POL’Y 101, 103 (2001) (discussing intentional limited attention to habitual residence issue). The Special Commission presumes there would be little difficulty in determining habitual residence, and yet there is considerable difficulty in “borderline” cases that involve relocation. See Schuz, supra, at 103; see also infra Section II.B (developing body of case law).

72. See Holder v. Holder, 392 F.3d 1009, 1014-15 (9th Cir. 2004) (noting habitual residence issues when term left undefined). The Ninth Circuit Court of Appeals said the decision to not define “habitual residence” in the Hague Convention “has helped courts avoid formalistic determinations but also has caused considerable confusion as to how courts should interpret ‘habitual residence.’” See id. at 1015; see also Silberman, supra note 13, at 1063 (arguing need and desire for global jurisprudence); Merle H. Weiner, Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 33 COLUM. HUM. RTS. L. REV. 275, 281-94 (2002) (highlighting importance of
have ultimately restrained the discretion of judges in determining habitual residence, thus impeding the Hague Convention drafters’ goals and aspirations.73

3. **ICARA**

The United States is among the original countries that voted to approve the Hague Convention in 1980, but it did not become a signatory until December 23, 1981.74 Congress’s enactment on April 29, 1988 made the Hague Convention effective as a matter of domestic law, separating it from already existing law within the United States.75 ICARA incorporated the Convention and detailed procedures for how the Convention would be implemented in the United States.76 For example, ICARA established the central authority in an existing agency of the federal government, established concurrent jurisdiction between state and federal courts, and specified petitioners’ burden of proof when claiming a child has been wrongfully removed or retained.77 However, U.S. courts must still look directly to the Hague Convention for guidance.78

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73. See Beaumont & McElligott, supra note 27, at 90 (identifying possible disadvantage of not defining habitual residence); see also In the Matter of V.-B [1999] EWCA (Civ) 261, [1999] 2 FLR 192 (Eng.) (citing In the Matter of H [1998] AC (HL) 72, 87 (appeal taken from Eng.)) (noting need for uniformed definition). “An international Convention . . . cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting States.” See In the Matter of V.-B, EWCA (Civ) 261.

74. See 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, supra note 28 (noting list of original signatories and date signed); see also Pérez-Vera, supra note 28, at 426 n.1 (identifying original signatories); Beaumont & McElligott, supra note 27, at 23 (noting Canada, France, Greece, and Switzerland signed on October 25, 1980).


76. See 22 U.S.C §§ 9001–9141 (establishing procedures and implementation of ICARA).

77. See id. §§ 9003-06 (outlining application of Hague Convention in United States). The petitioner has the burden of showing, by a preponderance of the evidence, “that the child has been wrongfully removed or retained.” See id. § 9003(c)(1)(A) (explaining burden of proof standard under ICARA).

B. The American Jurisprudence

One of the major cases in the United States examining habitual residence is *Friedrich v. Friedrich*. At the time the court addressed the issue, there was very little case law on the Hague Convention in the United States and in other countries. By deferring to the United Kingdom’s analysis in *In the Matter of Bates*, the court concluded habitual residence should not be confused with domicile, and held that to determine habitual residence, the court must “focus on the child, not the parents, and examine past experience, not future intentions.”

The Sixth Circuit’s analysis provided the foundation for determining habitual residence in Hague Convention proceedings before U.S. courts, but subsequent court rulings have altered this interpretation, creating the current three-way split.

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79. See 983 F.2d 1396, 1398-99, 1401 (6th Cir. 1993) (holding court must focus on child not parents to determine habitual residence). In 1993, the court dealt with a “simple case” of Thomas David Friedrich. See id. at 1402. Thomas was born in Germany and resided solely in Germany for his entire life. See id. at 1401. His mother, Jeana, was a U.S. citizen, and his father, Emanuel, a German citizen. See id. at 1398. After a heated argument, Jeana left Germany with Thomas for the United States and his father filed an application for the return of the child. See id. at 1399. Both countries were then signatories of the Hague Convention. See id. at 1400. The Sixth Circuit held that Thomas was a habitual resident of Germany. See id. at 1402. The court reasoned that the mother’s focus on her future plans disregarded Thomas’s point of view, and it was erroneous to rely on factors that solely reflected the intention of the mother, when it is the perspective of the child that is significant. See id. at 1401-03.

80. See id. at 1400-01 (stating British cases provide most complete analysis). This case was of first impression, and no U.S. cases provided guidance on the construction of habitual residence. See id. at 1398, 1400-01. The courts looked only at elements of the states where the child had physical presence and the length of time the child spent in those states when determining habitual residence. See Sheikh v. Cahill, 546 N.Y.S.2d 517, 520 (N.Y. Sup. Ct. 1989) (holding United Kingdom child’s habitual residence because child lived in London for over two-and-a-half years).

81. 1989 EWHC (Fam) 122.89 (Eng.).


Conventional wisdom thus recognizes a split between the circuits that follow *Mozes* and those that use a more child-centric approach, but we think the differences are not as great as they might seem. . . . In substance, all circuits—ours included—consider both parental intent and the child’s acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts.

*Id.* Not only is there a split amongst the courts, but there is also a debate among scholars on which standard to adopt. See, e.g., Medlin, supra note 72, at 256 (recommending new standard with primary focus on Ninth Circuit’s parental intent); Stephen E. Schwartz, *Note, The Myth of Habitual Residence: Why American Courts*
1. Focus on Combined Child’s Connection and Parental Intention

As only the second federal court of appeals to address the issue of habitual residence, the Third Circuit relied on the limited case law available—Friedrich and In the Matter of Bates—in deciding Feder v. Evans-Feder. The Third Circuit highlighted important aspects of Friedrich—particularly, the idea that any habitual residence inquiry must focus on the child and look back in time without regard to either parent’s future intention. However, the Third Circuit loosened the strict interpretation used by the Sixth Circuit and relied mainly on In the Matter of Bates’s principle of a “settled purpose.” This settled purpose focuses on the parents’ current shared intention regarding their child’s presence in that country, as well as the child’s experience in his or her country of habitual residence.

Following the standard used by the Third Circuit, the Eighth Circuit provided further guidance, balancing evidence of the child’s acclimatization with shared


84. See Feder v. Evans-Feder, 63 F.3d 217, 222-23 (3d Cir. 1995) (indicating developing case law). Feder involved two American citizens who met in Germany and had a child together. See id. at 218. The family moved several times and stayed in Australia when the mother decided that she wanted to leave the father and return to the United States with their son. See id. at 219-20.

85. See id. at 222 (quoting Friedrich v. Friedrich, 983 F.2d 1396, 1401-02 (6th Cir. 1993)) (establishing standard based on Friedrich’s precedent). In Delvoye, the Third Circuit had to determine residence for a two-month-old baby, and after determining the child was too young to acclimatize to one country, the court then turned to the parent’s intention. Delvoye v. Lee, 329 F.3d 330, 333 (3d Cir. 2003); see also Redmond, 724 F.3d at 743, 746 (noting habitual residence determined from child’s perspective even though eight-month-old child involved). In contrast, the Ninth Circuit notes that a child-centric approach is problematic because young children are not capable of possessing a perspective. See Mozes v. Mozes, 239 F.3d 1067, 1076 (9th Cir. 2001).


87. See Feder, 63 F.3d at 224 (accepting guidance from limited precedents). The lower court dismissed the father’s application and the father appealed. See id. at 220. The court looked at the Feders’ shared intentions regarding the child, and recognized that they agreed to move to Australia as a family with the intent of making a new home for themselves. See id. at 219. The child remained in Australia for almost six months before the removal and the court viewed this as a meaningful amount of time for a four-year-old child. See id. at 224. The fact that the child attended preschool and enrolled in kindergarten in Australia was persuasive evidence to the court as well. See id. Although Mrs. Feder’s intent was not to remain in Australia, her intent alone could not override the objective, factual evidence or prior shared intentions indicative of a settled purpose to stay in Australia. See id. Thus, the child’s habitual residence was Australia. See id. The Scotland court also noted that a child who cannot form an intention of his own has the residence chosen for him by his parents. See Dickson v. Dickson (1990) SCLR 692 (Scot.), https://assets.hcch.net/incadat/fullcase/0073.htm [http://perma.cc/7KD4-2L56] (noting habitual residence has settled intention element). When parents separate, one parent must consent for another to change a child’s habitual residence. See id.
parental intentions. The Eighth Circuit looks to “change in geography[,] . . . passage of time[,] . . . children’s enrollment in school, and, to some degree, both parents’ intentions at the time of the move” as factors when determining degree of settled purpose. Recently, the court has once again emphasized and rejected giving dispositive weight to parent intent—an element secondary to the child’s acclimatization. The Eighth Circuit has previously relied on the reasoning of the Ninth Circuit, but did not adopt the Ninth Circuit’s parental intent standard; instead, it created its own standard, blending aspects of multiple courts. The Eighth Circuit noted that “[t]he child’s perspective should be paramount in construing this convention whose very purpose is to ‘protect children’ by preventing their removal from ‘the family and social environment in which [their

88. See Stern v. Stern, 639 F.3d 449, 452 (8th Cir. 2011) (noting issue of child’s settlement requires review from child’s perspective); Barzilay v. Barzilay, 600 F.3d 912, 918 (8th Cir. 2010) (stating parental intent not dispositive); Sorenson v. Sorenson, 559 F.3d 871, 873-74 (8th Cir. 2009) (citing to Third Circuit’s standard). The Eighth Circuit decided not to focus solely on objective facts by examining the intention of Congress. See Silverman v. Silverman, 338 F.3d 886, 896-97 (8th Cir. 2003).

89. See Silverman, 338 F.3d at 898-99 (providing further guidance in determining habitual residence).

90. Compare Cohen v. Cohen, 858 F.3d 1150, 1153 n.3 (8th Cir. 2017) (rejecting adoption of Second Circuit’s standard), with Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005) (outlining standard use in Second Circuit). Although the Second Circuit gave more deference to the child’s acclimatization and acknowledged that the logical reasoning following the Hague Convention’s focus should be the child’s intention, the first step in its analysis continues to place emphasis on parental intent. See Gitter, 396 F.3d at 132; see also Aimee Weinerf, Comment, Home Is Where the Heart Is: Determining the Standard for Habitual Residence Under the Hague Convention Based on a Child-Centric Approach, 11 SETON HALL CIR. REV. 454, 470 (2015) (explaining Second Circuit’s decision in Gitter). When examining the facts, the court looked at whether Mr. and Mrs. Gitter shared the intent that Israel would remain their son’s habitual residence. See Gitter, 396 F.3d at 135. The court determined the joint agreement to move was only on a conditional basis. See id. The evidence merely suggested Mr. Gitter had no intent to return to New York, but did not prove his intent to have Israel be the son’s new habitual residence. See id. at 135-36.

91. See Silverman, 338 F.3d at 896-97 (agreeing with Mozes court).

If habitual residence is treated as a purely factual matter, to be decided by an individual judge in individual circumstances unique to each case, parents will never be able to guess, let alone determine, whether they are at risk of losing custody by allowing their children to visit overseas or in allowing them to make international trips with an estranged spouse. With such uncertainty, parents experiencing marital difficulties will be less likely to allow children to travel with one parent and less likely to allow children to maintain relationships with families in other countries. Congress must have intended that there be enough consistency in these cases to prevent such a result. Indeed, we find it difficult to believe that American legislators intended to launch American citizens into such uncharted waters.

Id.; see also GARBIOLINO, supra note 78, at 64-68 (comparing settled versus “acclimatization”). The term “settled,” which focuses on the child’s perspective, is relied on in the Third, Sixth, and Eight Circuits; whereas “acclimatization” is significant in the analysis when the primary focus is on parent intent. See GARBIOLINO, supra note 78, at 65-66. Regardless of which standard the court has adopted, almost all consider multiple factors such as “change in geography, the child’s age, the child’s and parent’s immigration status, social engagements, and meaningful connections with the people and places in the child’s new country.” See id. at 67-68.
lives have] developed.” The Eighth Circuit has also held that an infant’s habitual residence does not automatically become that of its mother.

2. Child-Centered Focus

Following Friedrich, in Robert v. Tesson, the Sixth Circuit persisted in its view for a child-centered approach in determining habitual residence, despite other circuits’ diverging standards. The court determined that the evidence, including the twins attending American schools, the relationship established with their relatives in the United States, the amounts of possession brought, and the actual length of stay in France, demonstrated the twins’ habitual residence was the United States at the time they were removed from France by their mother.

In analyzing the case, the court relied heavily on the principles established in Friedrich and criticized other circuits’ inclusion of the parents’ subjective intent as an additional factor for consideration. The court said: “[A] child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child’s perspective.”

92. See Stern, 639 F.3d at 452 (citing to Pérez-Vera, supra note 28) (identifying focus of Hague Convention).


94. 507 F.3d 981 (6th Cir. 2007).

95. See id. at 998 (recognizing Sixth Circuit holding at odds with Ninth Circuit’s decision in Mozes); see also infra Sections II.B.1, 3 (noting difference in Eighth and Ninth Circuit cases). But see, e.g., Larbie v. Larbie, 690 F.3d 295, 311 (5th Cir. 2012) (refusing to follow Sixth Circuit’s exclusively child-centric approach); Gitter, 396 F.3d at 133 (focusing analysis beginning with parental intent); Ruiz v. Tenorio, 392 F.3d 1247, 1252-55 (11th Cir. 2004) (agreeing settled intention of parents “crucial factor” in determining habitual residence).

96. See Robert, 507 F.3d at 996-97 (ruling children not habitual residents of France at time of removal). The application related to twin boys born to a French father and an American mother. See id. at 984-86. The family moved between the United States and France, spending time in both countries. See id. The marriage broke down, and the father commenced an action alleging the mother had wrongfully removed the twins from France. See id. at 987. While nearly every other circuit had to consider the issue of habitual residence as a matter of first impression, the Sixth Circuit had Friedrich as precedent. See id. at 988-89.

97. See id. at 989, 991 (criticizing inconsistency with Friedrich). The Sixth Circuit relied on Friedrich’s five guiding principles. See id. at 989.

First, courts should focus on the facts and circumstances of each case, rather than rely on technical rules; second, courts should refrain from considering anything other than the child’s experiences; third, the inquiry should be limited to the child’s past experience; fourth, a person can have only one habitual residence at any time; and fifth, the nationality of the child’s caregiver is not indicative of the child’s habitual residence.

Vivatvaraphol, supra note 44, at 3353 (citing Friedrich v. Friedrich, 983 F.2d 1396, 1491 (6th Cir. 1993)). The Sixth Circuit also determined that the Ninth Circuit’s standard was inconsistent, and made seemingly easy cases hard, resulting in results that are questionable at best. See id. at 991.

98. See Robert, 507 F.3d at 998 (quoting Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995)) (accepting standard consistent with goal of Hague Convention and focusing solely on child’s perspective).
3. Parental-Intention Focus

The Ninth Circuit heard *Mozes v. Mozes*\(^99\) six years after the Third Circuit addressed the habitual residence issue.\(^100\) The Ninth Circuit is the leading court in applying a standard focused mainly on parental intent.\(^101\) *Mozes* has also influenced other circuit courts to include parental intent in their analyses, diverging from the child-centered analysis.\(^102\) In *Mozes*, the court began by considering the relevance of intent.\(^103\) The court rejected a straightforward approach that simply observes the child, concluding that observation could yield different results based on the observer’s timeframe and further noted it is impossible to determine the duration necessary for adequate observation.\(^104\) Instead, the court concluded that close attention must be paid to subjective intent.\(^105\)

The court then looked to whose intent it must consider, and found that children in general lack the material and psychological ability to decide where they will reside.\(^106\) Thus, it is the intent of the person or persons entitled to fix the child’s place of residence—usually the parents—that must be taken into account.\(^107\) Although focusing on a child’s contacts with a new country is a more straightforward and objective approach, the court found that the Hague Convention was designed to reduce the incentive to seek unilateral custody over

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\(^99\) 239 F.3d 1067 (9th Cir. 2001).

\(^100\) See id. at 1067, 1079 (ruling standard focused on parental intent). The children had lived in both Israel and the United States. See id. at 1069. In 1997, with the consent of the father, the mother took the children to the United States for a fifteen-month stay. See id. In 1998, the mother filed for marital dissolution in Los Angeles and was granted temporary custody. See id. The father then filed for the return of the children under the Hague Convention. See id. The father appealed after the district court ruled the children’s habitual residence was the United States. See id.

\(^101\) See GARBOLINO, supra note 78, at 53-55 (explaining *Mozes* standard and other circuit courts’ adoption of similar standards); Weinerf, supra note 90, at 466 (describing circuit court standard solely examining parents’ shared intention).


\(^103\) See *Mozes*, 239 F.3d at 1072-73 (beginning analysis with intent to habitually reside).

\(^104\) See id. at 1073-74 (contrasting from objective way of determining habitual residence).

\(^105\) See *Mozes* v. *Mozes*, 239 F.3d 1067, 1073-74 (9th Cir. 2001) (creating new standard for analyzing habitual residence). The court looked to the time spent in both countries to see whether the child was settled for the purpose of habitual residence. See id. at 1073-75. The court analogized the child’s fifteen-month stay to summer camp or a year spent studying abroad. See id. The court recognized a child who goes to summer camp arrives with a “settled purpose,” but no person could contend that camp is a child’s habitual residence, or that the child is habitually settled. See id. (quoting Shah v. Barnet London Borough Council [1983] 1 All ER 226, 233 (Eng.).)

\(^106\) See id. at 1073-76 (articulating reason behind new standard).

\(^107\) See id. at 1076 (adopting new standard focused on parental intent for habitual residence analysis).
a child, and any standard that would make it easier to shift habitual residence without the parents’ consent would act contrary to that goal.108

The most recent example on the Ninth Circuit’s model of interpreting habitual residence is *Pennacchia*.109 In this case, the child moved and lived in Italy for two months after she was born, but was brought back to the United States at age five by her mother.110 Her father filed the petition but, ultimately, the court decided that the child’s habitual residence was the United States.111 The court specifically declined to focus on the child’s subjective experience.112 Instead, the court determined the case by focusing on the parents’ testimony, the parents’ living arrangement agreement, and ultimately believing the intentions of the mother, decided that the child’s habitual residence was the United States.113

**C. Interpretation Worldwide**

While the United States struggles to reach a unified definition of habitual residence among the states, other signatory countries of the Hague Convention seem to have clearer standards in determining habitual residence.114 The United Kingdom has one of the earliest cases that considered the issue of habitual residence under the Hague Convention.115 The U.K. courts followed the principle of “settled purpose,” which has been widely accepted.116 In addition,

108. See id. at 1078-79 (justifying standard with goals of Convention). With the newly articulated standard, the court concluded that the lower court had given insufficient weight to the importance of shared parental intent and remanded the case for further inquiries. See id. at 1084.


111. See id. at *28 (deciding habitual residence of child).

112. See *Pennacchia*, 666 F. App’x at 679 (focusing on parents not child).

113. See *Pennachia*, 2016 U.S. Dist. LEXIS 99043, at *14-19 (exemplifying court’s determination based on focusing parental intent).

114. Compare supra Section II.B (breaking down different standards within United States), with infra notes 115-119 and accompanying text (articulating one nationwide standard in determining habitual residence).

115. See *Vivatvaraphol*, supra note 44, at 3355-56 (discussing *In the Matter of Bates*, one of earlier cases, nine years after Hague Convention). The only daughter of an American mother and British father traveled constantly and was left mostly to the care of nannies. See id. In New York, the mother decided to give the nanny a weekend off while the father was on a world tour, but perceiving the mother’s desire to be alone with the child as a threat, the nanny contacted the father about the mother’s instructions and he instructed her to deliver the daughter to London immediately. See id. In response, the mother filed a Hague Convention petition. See id. When deciding the case, Justice Waite recognized that the concept of habitual residence was separated from domicile and that courts should “avoid creating detailed and restrictive rules that would transform it into a technical term of art.” See id. Justice Waite determined that New York was the child’s habitual residence by applying the principle of settled purpose. See id.

the United Kingdom Supreme Court further recognized and adopted the child-centered model. 117

Other countries, like Germany and Switzerland, instead adopted the child-centered, factual approach. 118 Although the standards between countries vary in their approaches in child abduction cases, each country as a whole has a unified standard for their courts to follow. 119 Given the goal of a joint resolution on the child abduction issue, the disadvantages of not having a uniform interpretation, and a desire to deter forum-shopping, the United States should decide on a uniform standard as a country. 120

III. ANALYSIS

After years of case law development, many limits have been set; but unlike other signatories, U.S. courts remain divided regarding the appropriate standard for determining habitual residence. 121 This Note proposes adopting the Eighth Circuit’s standard that focuses on the child’s perspective, but also weighs parental intent as a factor when determining habitual residence. 122

A. Case Study: A Different Outcome Within the United States

Although different standards could produce the same result in different cases, there is still a need for uniformity to preserve the goal of the Hague Convention

117. See Schuz, supra note 82, at 342 (examining child-focused model adopted by UK Supreme Court). The trilogy of cases showcased the court’s view on habitual residence as being a factual determination which reflects the child’s reality, and not the parents’. See id. at 342-43.


119. See id. (comparing multiple interpretations within United States to other countries).


121. See supra text accompanying note 73 (indicating restrictions on judge’s discretion resulting in impediment to Convention’s goal). Compare supra Section II.B (summarizing divergence among courts in United States), with supra Section II.C (demonstrating unified standard within country when interpreting habitual residence).

122. See supra Section II.B.1 (explaining combined model of Eighth Circuit); infra Section III.B (proposing new standard for courts to adopt when addressing habitual residence of child); see also, e.g., Barzilay v. Barzilay, 600 F.3d 912, 918 (8th Cir. 2010) (noting parental intent only part of entire analysis); Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003) (noting different factors considered); Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995) (determining parents’ intention considered in analysis). Compare Medlin, supra note 72, at 256 (advocating for Ninth Circuit’s parental intent), and Vivatvaraphol, supra note 44, at 3365 (advocating for Sixth Circuit’s purely objective approach), with infra Sections III.A-B (demonstrating benefit of adopting Eighth Circuit model).
and avoid situations like *Pennacchia*. When the court decided *Pennacchia*, it was bound by the precedent laid out in *Mozes*. The trial court first looked for the parents’ last shared, settled intent and then asked whether there had been sufficient acclimatization of the child in the new country to trump that intent. The court first determined the parents did not have a shared intention to stay in Italy and found that petitioner’s testimony lacked credibility. Based on that analysis, the child’s habitual residence was therefore the United States—the country that matched the intent of the child’s mother.

On the contrary, when applying the Eighth Circuit’s balancing standard, the outcome would clearly be different. Parental intention would not be the first thing the court examines, instead the court would look at the child’s relationship to the country from the child’s perspective. In *Pennacchia*, the child moved from the United States to Italy when she was two months old, and lived there for close to five years. She attended preschool and developed relationships in Italy. Although the parents disagreed, parental intention is only one of the many factors used in determining habitual residence under the Eighth Circuit’s test. Under this test, there is no determination of which party is more credible,

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123. See Schuz, supra note 14, at 9 (noting different outcomes); supra notes 2-8 and accompanying text (introducing two recent cases in different circuit courts with different standards); supra note 72 and accompanying text (addressing need for uniformity).

124. See supra notes 2-4 and accompanying text (outlining standard used in deciding case); see also *Pennacchia* v. Hayes, No. 1:16-CV-00173-EJL, 2016 U.S. Dist. LEXIS 99043, at *8 (D. Idaho July 28, 2016) (noting adherence to *Mozes* standard), aff’d, 666 F. App’x 677 (9th Cir. 2016), cert. denied, 137 S. Ct. 2162 (2017).

125. See *Pennacchia*, 2016 U.S. Dist. LEXIS 99043, at *8-9 (asserting child’s perspective holds minimal weight in cases under Convention); see also supra Section II.B.3 (explaining standard used in Ninth Circuit).

126. See *Pennacchia*, 2016 U.S. Dist. LEXIS 99043, at *10-12, *15 (citing *Mozes*’s standard used when parties disagree on their intentions).

127. See id. at *14 (holding United States child’s habitual residence).

128. See Schuz, supra note 14, at 9 (noting under Eighth Circuit approach, habitual residence of child might change); see also Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003) (examining move to Israel from the children’s perspectives while mother’s reservations ignored). But see Ruiz v. Tenorio, 392 F.3d 1247, 1259 (11th Cir. 2004) (holding habitual residence still in United States despite extended period of time). The Sixth Circuit, which uses the child-centered approach, expressly stated that it would have decided *Mozes* different. See Robert v. Tesson, 507 F.3d 981, 992 (6th Cir. 2007).

129. See supra notes 88-93 and accompanying text (describing Eighth Circuit’s standard). Compare supra notes 2-4 and accompanying text, with supra notes 6-8 and accompanying text (indicating different standard applied to facts).


In *Cohen v. Cohen*, the Eighth Circuit based its decision on the child’s acclimatization; for example, the child has been in a U.S. school for two years. *Cohen* v. *Cohen*, 858 F.3d 1150, 1154 (8th Cir. 2017). Based solely on that fact, the child in *Pennacchia* would most likely have been seen as acclimated under the Eighth Circuit’s standard. See Schuz, supra note 14, at 9 (indicating outcome changes when applying different standards).


132. See supra note 88 and accompanying text (listing factors affecting determination of habitual residence).
and the court avoids using evidence that the mother’s residence implies an intention to have her child’s habitual residence be the same.133

B. The Combined Standard Should be Adopted

1. Conforming to the Goals of the Hague Convention

The goal of the 1980 Hague Convention was to further the interests of children who were wrongfully removed from the environment and society they were once members of.134 In addition, the determination should not deprive primary caretaker of the opportunity to reestablish care and control of the abducted child.135 According to the Ninth Circuit’s focus on parental intention, a child might have a habitual residence in a country where he or she has not been living for a long time, like the above Pennacchia case study, simply because one or both of his or her parents never intended to abandon their residency in that country.136 This determination would in effect take the child out of the environment that he or she has developed a close connection with.137 Moreover, parental intention focuses on the future intentions rather than past reality and has little relevance to the child’s experience.138

Conversely, without considering parental intent under the Sixth Circuit’s standard, the court would not be able to understand the child’s attitude towards the contacts he or she is making.139 In these circumstances, the Eighth Circuit’s model is the most appropriate because it expressly seeks to determine the child’s level of acclimatization in deciding if the new country can be considered the social and familial environment in which the child’s life has developed.140

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134. See Pérez-Vera, supra note 28, at 429 (outlining Hague Convention objectives); supra notes 55-57 and accompanying text (noting aim of Hague Convention); see also Stern v. Stern, 639 F.3d 449, 452 (8th Cir. 2017) (agreeing to focus of Hague Convention).

135. See Beaumont & McElevy, supra note 27, at 112 (suggesting flexible interpretation given to habitual residence); see also supra notes 65, 69-70 and accompanying text (noting Hague Convention’s intent to have versatile concept of habitual residence).

136. See supra Section II.B.3 (breaking down Ninth Circuit’s analysis); supra notes 110-113, 130-131 and accompanying text (indicating years of living in Italy instead of United States in Pennacchia case study).


138. Compare Mozes v. Mozes, 239 F.3d 1067, 1076 (9th Cir. 2001) (contrasting Ninth Circuit Court’s interpretation), with Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993) (noting court “must . . . examine past experience, not future intentions”). The Ninth Circuit alleges children “lack the material and psychological wherewithal to decided where they will reside.” See Mozes, 239 F.3d at 1076.

139. See supra notes 32-34 and accompanying text (indicating detrimental and complex effects of abduction on child).

140. See supra Section II.B.1 (explaining benefits of Eighth Circuit’s model of determining habitual residence).
noted before, a child should be treated as an independent individual, and the “child’s perspective should be paramount in construing th[e] Convention whose very purpose is to protect children.”\textsuperscript{141}

In creating the concept of habitual residence, the Hague Convention intended to create both flexibility in application and certainty in standards that the terms “domicile” and “nationality” are unable to provide.\textsuperscript{142} The outcome of a case becomes more uncertain when judges are just using their general discretion in deciding which evidence is more credible, as opposed to weighing specific factors in a given case.\textsuperscript{143} The courts’ ability to decide how much weight to give each of these definitive factors also provides parents with a degree of flexibility and transparency.\textsuperscript{144}

2. Issue of Forum Conveniens

Reviewing the case from the child’s perspective also accurately represents the Hague Convention’s intent to decide on the forum conveniens for a further substantive custody hearing, a connection that should be more than an artificial jurisdictional link.\textsuperscript{145} It is therefore unlikely for a country to be the forum conveniens when a child has not lived there for many years.\textsuperscript{146} There is also the concern for embedded subjective values of local courts.\textsuperscript{147} The Eighth Circuit’s standard focusing on the child’s perspective is preferable because it accurately mirrors the closest connection between the country and the child where local court decides the child’s future.\textsuperscript{148} Including parental intention as a factor also boosts the court’s understanding of the child’s life as a whole when making long-term decisions about the child.\textsuperscript{149}

\textsuperscript{141} Stern v. Stern, 639 F.3d 449, 452 (8th Cir. 2011) (emphasizing importance of child’s perspective); supra note 56-57 and accompanying text (acknowledging child focus of Hague Convention); see also Schuz, supra note 82, at 350 (supporting court’s focus on child not parents).

\textsuperscript{142} See supra notes 64-70 and accompanying text (providing new standard specifically for Hague Convention cases); see also Beaumont & McEleavy, supra note 27, at 88-89 (acknowledging benefits of using habitual residence for standard).

\textsuperscript{143} See Mozee, 229 F.3d at 1072-73 (noting identifying state of habitual residence critical); Pennacchia v. Hayes, No. 1:16-CV-00173-EJL, 2016 U.S. Dist. LEXIS 99043, at *10-11 (D. Idaho July 28, 2016) (noting evidence of habitual residence diverging), aff’d, 666 F. App’x 677 (9th Cir. 2016), cert. denied, 137 S. Ct. 2162 (2017); supra note 91 (identifying importance of parents’ ability to predict move’s impact on habitual residence).

\textsuperscript{144} See supra text accompanying note 87 (indicating parental intent only one of many factors).

\textsuperscript{145} See supra notes 30-31 and accompanying text (noting abducting parents to have alternative motives in Convention cases); see also Beaumont & McEleavy, supra note 27, at 112 (suggesting emphasis on parental intention might be problematic); supra note 52 and accompanying text (ruling not examining custody orders).

\textsuperscript{146} See supra note 60 and accompanying text (indicating reason behind seeking determination of habitual residence).

\textsuperscript{147} See supra note 43 and accompanying text (showing difficulty for left-behind parent recovering child).

\textsuperscript{148} See supra notes 32-33 and accompanying text (presenting harmful effect of abduction towards child); see also supra notes 56-57 and accompanying text (indicating drafter’s intention to protect children).

\textsuperscript{149} See supra notes 59-60 and accompanying text (noting forum should remain country child most familiar with).
3. Efficiency Is Key

In almost all cases arising under the Hague Convention, the parents have disagreed as to the place of the child’s habitual residence.\(^{150}\) Spending time understanding the intent of estranged parents would go against the aim of increasing efficiency in these cases.\(^{151}\) Moreover, basing a decision on determining who is more credible allows for the possibility of parties distorting the truth and manipulating facts.\(^{152}\) With this concern, the Sixth Circuit’s independent and objective review seems to be easier and more straightforward, but including parental intent as one factor in the analysis would ultimately allow for more accurate habitual residence determinations while ensuring efficiency.\(^{153}\) This is because the scope is more limited and allows the court to look from the child’s perspective on how he or she understood his or her parents’ intentions instead of a full-blown determination solely focused on parental intent.\(^{154}\) Thus, the Eighth Circuit’s test—focusing on the child’s perspective and looking to parental intent as a nondeterminative factor—results in the best possible outcome in terms of efficacy, as it reduces the need for courts to make credibility determinations, which may be time consuming and unreliable.\(^{155}\)

IV. CONCLUSION

The Hague Convention’s goals include locating abducted children, securing their eventual return to custodial parents, creating remedies for international child custody disputes, and reducing international child abduction. Currently, the different ways U.S. courts interpret habitual residence for Hague Convention purposes affects every member involved in the dispute. While adopting the Eighth Circuit’s standard might result in situations where the abductor is rewarded with the child, the main goal of the Hague Convention is to negate the harmful effects of uprooting a child from his or her social and familial environment, and not justice between the parents. Regardless of which model

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150. See Mozes v. Mozes, 239 F.3d 1067, 1076 (9th Cir. 2001) (recognizing difficulty having agreement between parents especially in child abduction cases).

151. See supra notes 44, 55 and accompanying text (highlighting efficiency key when establishing Hague Convention).

152. See Schuz, supra note 14, at 29 n.231 (hinting probability of parent manipulating facts); see also Pennacchia v. Hayes, No. 1:16-CV-00173-EJL, 2016 U.S. Dist. LEXIS 99043, at *10-12, *15 (D. Idaho July 28, 2016) (exemplifying court’s decision to decide more credible party), aff’d, 666 F. App’x 677 (9th Cir. 2016), cert. denied, 137 S. Ct. 2162 (2017); Vivatvaraphol, supra note 44, at 3363 (noting children potentially manipulated).

153. See Vivatvaraphol, supra note 44, at 3365 (concluding in support of only objective evidence and no subjective determination). Compare supra Section II.B.1 (discussing Third and Eighth Circuit approach), with supra Section II.B.3 (outlining Ninth Circuit parent-intent focus approach).

154. See Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995) (adding parental intent in habitual residence standard); supra notes 55-56 and accompanying text (promoting efficacy top priority of drafters when creating Hague Convention).

the Supreme Court chooses, inherent problems will remain; such as determining habitual residences of new born babies, and the rights of unmarried fathers. Nevertheless, the most urgent concern for the Supreme Court is to recognize the benefits of adopting a uniform interpretation of habitual residence, and provide guidance to U.S. courts so that children are not displaced and further harmed by the institution that was meant to protect them.

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