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HOME SWEET HOME? DETERMINING HABITUAL RESIDENCE WITHIN THE MEANING OF THE HAGUE CONVENTION

Abstract: In becoming a signatory to The Hague Convention on International Child Abduction, the United States agreed to expeditiously return all internationally abducted children to the country of their habitual residence, such that that nation may determine the merits of any underlying custody disputes. The Convention failed, however, to instruct American courts as to how to determine a child's habitual residence. This has resulted in a split among circuits as to whether habitual residence should be determined using objective evidence of the child's perspective, subjective evidence of parental intent, or some combination. In 2017, the Eighth Circuit held in *Cohen v. Cohen* that a child's habitual residence should be determined according to the child's perspective with some, albeit lesser, deference given to parental intent. This Comment argues that American courts should adopt a uniform approach to determining a child's habitual residence by examining objective, child-centered evidence regarding habitual residency.

INTRODUCTION

In the latter part of the twentieth century, the substantial impact of globalization on the world community began to affect international family law-related issues.¹ The weakened international boundaries brought about by increased globalization have led to increased disputes regarding parental child abductions.² In 1980, twenty-three nations attempted to address this problem by creating the Hague Convention on the Civil Aspects of Interna-

¹ See Stephen I. Winter, *Home Is Where the Heart Is: Determining "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction*, 33 WASH. U. J.L. & POL'Y 351, 351–52 (2010) (noting that international parental child abductions began to pose an increasing problem for many nations in the second half of the twentieth century); Martha Winterbottom, *The Nightmare of International Child Abduction: Facing the Legal Labyrinth*, 5 J. INT'L L. & PRAC. 495, 497 (1996) (explaining that the rise in international child abductions can be attributed to many causes, including increases in international marriages, ease of international travel, and divorce rates).

² Winter, *supra* note 1, at 351–52; Winterbottom, *supra* note 1, at 497. See Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Abduction Convention*, in ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 426, 428 (1982) (defining such abductions as the removal of a child, whose custody has been allocated to and lawfully exercised by a natural or legal person, from its habitual environment).

tional Child Abduction (hereinafter “the Convention”).³ In the United States, implementation and enforcement of the Hague Convention was effected through the International Child Abduction Remedies Act (“ICARA”).⁴

Prior to the ratification of the Hague Convention on International Child Abduction, international child abduction proceedings were generally quite a prolonged process.⁵ These inquiries did not always produce predictable outcomes, as they allowed courts wide discretion in their proceedings.⁶ Decisions could therefore be influenced by the cultural values of the society in which the court was located.⁷ Further, because a child taken outside of a country is no longer subject to the jurisdiction of that nation, remaining parents typically had difficulty enforcing custodial rights in their home countries.⁸

In response to these challenges, the drafters of the Convention opted to alter the existing procedures for child abduction cases by creating a summary return mechanism.⁹ Rather than analyze the individualized circum-

³ Winter, *supra* note 1, at 351–52; *see also* Maureen P. Conroy, § 10.2.13 *The International Child Abduction Remedies Act—42 U.S.C. § 11601*, in MASS. CONTINUING LEGAL EDUCATION, A PRACTICAL GUIDE TO DIVORCE IN RHODE ISLAND 10-17–10-19 (Sandra H. Smith & Deborah M. Tate, 2009) (noting that, since the Convention’s enactment, the United States, most European nations, and many other countries have become signatories); Hague Conference on Private International Law, *Status Table: 28 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HHCH (Feb. 13, 2017), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> [<http://perma.cc/Z6VQ-ZPJT>] (demonstrating that, since its drafting, ninety-eight nations have become signatories to the Convention).

⁴ 22 U.S.C. § 9001 (2012); *see* LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE* § 3:6 (2017) (noting that ICARA set up the procedure for implementation and enforcement of the Convention).

⁵ Tai Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3325, 3331 (2009). Courts frequently investigated the best interest of the child, which required an individualized inquiry into the circumstances of each and every case. *Id.*

⁶ *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 2* (1999) (commenting that courts using the best interest of the child standard were able to take “any conceivable measure” in their decisions). In the United States, states differ as to whether the best interest standard is determined by statute, case law, or a combination of the two. Kelly Schwartz, *The Kids Are Not All Right: Using the Best Interest Standard to Prevent Parental Alienation and a Therapeutic Intervention Approach to Provide Relief*, 56 *B.C. L. REV.* 803 (2015).

⁷ *See* Vivatvaraphol, *supra* note 5, at 3332 (explaining that decisions were frequently influenced by the moral or social values of the country in which the proceedings took place); *see also* Pérez-Vera, *supra* note 2, at 431 (commenting on the impossibility of examining the best interests of a child without implicating the moral values of a particular culture).

⁸ *See* Vivatvaraphol, *supra* note 5, at 3332 (explaining that the “left-behind” parent usually had to pursue legal action in the courts of the country in which the child was present).

⁹ *Id.* at 3335. In order to accomplish the goal of protecting children from abduction by eliminating forum-shopping incentives and restoring a child’s pre-abduction status, the Convention allowed courts in the abducted-to country to determine whether or not a wrongful removal oc-

stances to determine a child's best interest, signatory countries have agreed to order the return of children to the country of their habitual residence so that that nation may determine the underlying custody dispute.¹⁰ Because the Convention fails to define the term "habitual residence", a circuit split has developed amongst United States Circuit Courts of Appeals regarding how to properly determine a child's habitual residence.¹¹

Part I of this Comment provides background information on The Hague Convention, as well as relevant Eighth Circuit jurisprudence.¹² Part II lays out and examines various approaches adopted by several circuits that have considered the issue.¹³ Part III argues that the United States should adopt an objective, child-centered approach in keeping with the goals of the Convention and the custom of other signatory nations.¹⁴

I. THE HAGUE CONVENTION AND THE EIGHTH CIRCUIT'S HOLDING IN *COHEN V. COHEN*

Since the adoption of The Hague Convention in 1980, courts both in the United States and abroad have struggled with the treaty's failure to include an explicit definition for the term "habitual residence."¹⁵ Section A of this Part summarizes the goals and legal principles underlying The Hague Convention.¹⁶ Section B outlines the facts and procedural history of *Cohen*

curréd. Barbara E. Lubin, *International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention*, 4 WASH. U. GLOBAL STUD. L. REV. 415, 424 (2005). If there was a wrongful removal, the court will order that the child be returned to the abducted-from country. *Id.* This process is referred to as the summary return mechanism. *Id.*

¹⁰ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501, 1502 [hereinafter *The Convention*]; Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1054 (2005); see also Pérez-Vera, *supra* note 2, at 430 (noting that the Convention is not concerned with the underlying merits of a custody dispute, but rather is based upon the idea that the custody determination should be made in the place where the child was habitually resident).

¹¹ See *Cohen v. Cohen*, 858 F.3d 1150, 1154 (8th Cir. 2017) (holding that habitual residence should be determined by looking at the child's perspective while giving some, albeit lesser, weight to parental intent); *Mozes v. Mozes*, 239 F.3d 1067, 1084 (9th Cir. 2001) (holding that habitual residence should be determined according to the settled intent of the parents so long as there has been an actual change in geography and a sufficient period of time has passed); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993) (holding that habitual residence should be determined according to objective evidence regarding the child's perspective).

¹² See *infra* notes 15–57 and accompanying text.

¹³ See *infra* notes 58–81 and accompanying text.

¹⁴ See *infra* notes 82–105 and accompanying text.

¹⁵ See Ann Laquer Estin, *The Hague Abduction Convention and the United States Supreme Court*, 48 FAM. L.Q. 235, 247 (2014) (noting that the Convention issue resulting in the most appellate litigation and petitions for certiorari, both amongst federal courts of appeal and in other Convention countries, is that of how to determine habitual residence).

¹⁶ See *infra* notes 19–30 and accompanying text.

v. *Cohen*.¹⁷ Section C details other Eighth Circuit jurisprudence related to the question of habitual residence.¹⁸

A. A Brief Examination of the Hague Convention and Its Underlying Policy

The goal of the Hague Convention is to protect children from the harmful effects of their wrongful international removal or retention, and to establish procedures to allow for their timely return to the state of their habitual residence.¹⁹ The Convention aims to restore stable relationships to children wrongfully removed from their homes.²⁰ Despite these stated goals, the Convention is not concerned with determining the merits of an underlying custody dispute.²¹ Rather, the Convention is based upon the principle that the home country of an abducted child should be the jurisdiction to make such a custody determination.²² By mandating that the child's home country make such decisions, the Convention intends to deter parents from transporting children across international borders to gain an advantage in a more sympathetic legal system.²³

Per the Convention, a child is wrongfully removed when she is taken from the place where she is habitually a resident in violation of another's custody rights.²⁴ To establish a prima facie case, a petitioner must show that the child was a habitual resident in one Convention signatory country and then wrongfully removed to or retained in a different Convention signatory

¹⁷ See *infra* notes 31–49 and accompanying text.

¹⁸ See *infra* notes 50–57 and accompanying text.

¹⁹ The Convention, *supra* note 10, at 1501; see Pérez-Vera, *supra* note 2, at 429 (noting that although the Convention has multiple objectives, the most important is that of restoring the status quo via the timely return of children who have been wrongfully removed).

²⁰ See Appendix C—Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10, 503, 10, 504 (Mar. 26, 1986) [hereinafter Legal Analysis of the Hague Convention] (explaining that a fundamental purpose of the Hague Convention is to protect children from wrongful removal by people bent on obtaining their custody because such removals deprive children of stable relationships).

²¹ See *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004) (explaining that the Convention's goal is to determine whether a child should be returned to a country for custody proceedings, as opposed to what the outcome of those proceedings should be); JAMES L. BUCHWALTER, 71 CAUSES OF ACTION SECOND SERIES, *Cause of Action for Return of Child Under International Child Abduction Remedies Act*, Westlaw (database updated Mar. 2018) (describing the possible remedies as follows: (1) a declaration that the child arrived in the United States as a result of a wrongful removal; (2) an order that the child be transported via U.S. Marshals to the federal or state court hearing the case such that the child may be returned from the United States; (3) a temporary restraining order prohibiting the child's removal from the jurisdiction for the length of the abduction case; and (4) a stay pending appeal).

²² Pérez-Vera, *supra* note 2, at 430.

²³ Legal Analysis of the Hague Convention, *supra* note 20, at 509.

²⁴ The Convention, *supra* note 19, at 1501.

country.²⁵ If the child was taken from a country that is subsequently not found to be his or her habitual residence, the petitioner may not seek a remedy under the Convention.²⁶

The Convention demands that courts determine the habitual residence of the child at the point in time immediately prior to the child's removal or retention.²⁷ Within the United States, the standard of proof for determining a child's habitual residence is a preponderance of the evidence.²⁸ Yet the Convention does not expressly define the term "habitual residence."²⁹ The omission of a singular definition was intentional, designed in part to help courts avoid formalistic determinations, but the lack of clarity has resulted in diverging views among United States courts about the proper way to determine a child's habitual residence.³⁰

B. Facts and Procedural History of Cohen v. Cohen

In 2010, Israeli residents and citizens, Ocean (hereinafter "Mother") and Yaccov (hereinafter "Father") Cohen, began discussing the possibility of moving to the United States with their son, O.N.C.³¹ Father's criminal record, however, resulted in a variety of criminal fines, penalties, and restitution charges, which collectively caused a Stay of Exit Order to be placed

²⁵ Buchwalter, *supra* note 21; *see Holder*, 392 F.3d at 1014 (stating that the essence of the issue is whether the children were habitual residents of Germany immediately prior to the alleged wrongful removal and noting that if they were not, the court could not order their removal to Germany). The Convention only govern disputes in which both the country of habitual residence and the removed-to country are signatories. The Convention, *supra* note 10, at 1501–02.

²⁶ Buchwalter, *supra* note 21.

²⁷ The Convention, *supra* note 10, at 1501.

²⁸ 22 U.S.C. § 9003 (2012). In broad terms, a preponderance of the evidence standard requires proof that an issue is more likely true than not. *Preponderance of the evidence*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012). This is the lowest possible burden of proof, and is also used in civil actions. *Id.*

²⁹ *Friedrich*, 983 F.2d at 1400; *see* The Convention, *supra* note 10, at 1501–04 (failing to provide a definition for the term "habitual residence").

³⁰ DICEY AND MORRIS ON THE CONFLICT OF LAWS 144 (J.H.C. Morris ed., 10th ed. 1980); *see Cohen*, 858 F.3d at 1154 (holding that habitual residence should be determined by looking at the child's perspective whilst giving some, albeit lesser, weight to parental intent); *Mozes*, 239 F.3d at 1084 (holding that habitual residence should be determined according to the settled intent of the parents, so long as there has been an actual change in geography and a sufficient period of time has passed); *Friedrich*, 983 F.2d at 1401–02 (holding that habitual residence should be determined according to objective evidence regarding the child's perspective).

³¹ *Cohen v. Cohen*, No. 4:15-CV-01756, 2016 WL 4546980, at *2 (E.D. Mo. Sept. 9, 2016), *aff'd*, 858 F.3d 1150 (5th Cir. 2017). Federal Rules of Civil Procedure require that filings involving the name of a minor include only the child's initials. FED. R. CIV. P. 5.2. Mother and Father married in Israel in 2008. *Cohen*, 2016 WL 4546980, at *2. The following year, Mother gave birth to their son, O.N.C., in Israel. *Id.* The child is a citizen of both Israel and the United States. *Id.*

on his visa.³² Mother and Father therefore developed a plan in which Mother and O.N.C. would move to the United States first.³³

Mother and O.N.C. travelled to Saint Louis, Missouri in December of 2012.³⁴ Over the next two years, Mother and O.N.C. returned to Israel twice.³⁵ During the second visit, a three-week trip in April 2014, it became clear that the marriage was deteriorating.³⁶ Father began to fear that Mother would not return to Israel and hired a lawyer, who drafted an agreement requiring Mother to return with O.N.C. if Father was unable to join them in six months' time.³⁷

Mother filed for divorce in Missouri in July 2014, after returning from Israel.³⁸ Two months later, Father filed a request pursuant to the Hague Convention with the Israeli Ministry of Justice, seeking the return of O.N.C.³⁹ In November 2015, Father filed a complaint in the District Court for the Eastern District of Missouri for issuance of a show cause order under the Hague Convention and asserted that Israel was the child's habitual residence prior to retention, therefore the court must order O.N.C.'s return

³² *Cohen*, 2016 WL 4546980, at *2. Israeli courts may issue a Stay of Exit Order in regard to criminal or civil matters. *Law for Amending and Extending the Validity of Emergency Regulations*, NO LEGAL FRONTIERS (2007), <http://nolegalfrontiers.org/israeli-domestic-legislation/isr19ed2?lang=en> [<http://perma.cc/C6JQ-D8P3>]. Such orders prevent exit from the country and its territories. *Id.* Father has an extensive criminal record in Israel. *Cohen*, 2016 WL 4546980, at *2. In 2010, he served time in prison for assault and using a vehicle without permission. *Id.* Discussion of the family's possible move to the United States began shortly after his release. *Id.*

³³ *Cohen*, 2016 WL 4546980, at *2. Two of Mother's brothers were living in the United States at the time; one brother was engaged in the business of flipping real estate and encouraged Father to join him in this venture. *Id.* The plan was for Mother to enroll O.N.C. in school in the United States and work to help Father pay off his debts. *Id.* When the debts were paid off, Father was to join them. *Id.* Mother later testified the family moved for financial reasons, and that she told her friends the move was permanent. *Id.* Father, however, testified that the family only planned to live in the United States for three to five years to save enough money to buy a house in Israel. *Id.*

³⁴ *Id.* O.N.C. was three years old at the time of the move. *Id.* While in the United States, Mother found employment and enrolled her son in school full time. *Id.* She also bought a car and obtained a Missouri driver's license. *Id.*

³⁵ *Id.* at *3.

³⁶ *Id.*

³⁷ *Id.* Mother later testified that she felt she had no option but to sign the agreement because she feared she would not otherwise be allowed to return to the United States. *Id.* She signed the document after a clause was added requiring Father to stay away from crime. *Id.* Failure to do so would relieve Mother of her obligation to return to Israel. *Id.* Father was arrested again in August of 2014, breaching the agreement. *Id.*

³⁸ *Id.* In March 2015, the Circuit Court of St. Louis, Missouri entered a Judgment of Dissolution of Marriage, granting Mother sole legal and physical custody of O.N.C. with supervised visitation to Father. *Id.* In Missouri, a Judgment of Dissolution of Marriage is the formal end of a marriage and is final upon entrance, subject to a party's right to appeal. Eric Ziegenhorn, *Dissolution of Marriage*, in 6A MO. PRAC., LEGAL FORMS §18:26 (3d ed. 2017).

³⁹ *Cohen*, 2016 WL 4546980, at *3.

to Israel.⁴⁰ Mother argued that the move to the United States resulted in a change in O.N.C.'s habitual residence.⁴¹

The district court held that O.N.C.'s habitual residence was the United States.⁴² In making its determination, the court considered the following factors according to prior Eighth Circuit jurisprudence: the settled purpose of the move from the child's perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country.⁴³ In determining the settled purpose of the move from the child's perspective, the Eighth Circuit held that O.N.C. had experienced a clear change in geography and spent a substantial amount of time in the United States.⁴⁴ The court also considered the perspective of O.N.C.'s parents.⁴⁵ Although there was conflicting testimony regarding whether the relocation was intended to be permanent, the court held that settled purpose need only mean that there be a "sufficient degree of continuity to be properly described as settled."⁴⁶

⁴⁰ *Id.*

⁴¹ *Id.* A show cause order is a court decree demanding that an individual appear at a hearing and offer a reasoned explanation for why a particular order or decree should not be confirmed. MICHAEL J. WALDMAN, §46 ORDERS AND RULES TO SHOW CAUSE; RULES NISI, 56 AM. JUR. 2D MOTIONS, RULES AND ORDERS (2d ed. 2018).

⁴² *Cohen*, 2016 WL 4546980, at *6. Thus, the court held that the underlying custody dispute should be determined by United States courts. *Id.*; see Pérez-Vera, *supra* note 2, at 430 (noting that the Convention does not determine custody rights, but rather relies on the principle that custody should be determined by the nation of the child's habitual residence).

⁴³ *Cohen*, 2016 WL 4546980, at *6; see also *Stern v. Stern*, 639 F.3d 449, 452 (8th Cir. 2011) (holding that the child's habitual residence was the United States whether the court emphasized his perspective or the perspective of his parents because the family's prior home and businesses were abandoned entirely); *Barzilay v. Barzilay*, 600 F.3d 912, 918–19 (8th Cir. 2010) (noting that parental intent in the case was unclear and thus agreeing that the United States was the children's country of habitual residence because they had spent most or all of their lives there). The term "settled purpose" appears frequently in United States jurisprudence regarding the Convention but is rarely defined. See, e.g., *Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003) (using the term without providing any guidance as to what it means). In the Eighth Circuit, where settled purpose is examined from the child's perspective, the term refers to whether the child considered the family's move to be indefinite. See *Barzilay*, 600 F.3d at 919 (holding that the settled purpose of a family's residence in Missouri was to remain there permanently because the children had spent their entire lives there and had always attended school there).

⁴⁴ *Cohen*, 2016 WL 4546980, at *5. The child had spent more than half of his life in Saint Louis, had been educated in Saint Louis, had received speech therapy in Saint Louis, had friends and did activities in Saint Louis, and spoke primarily English. *Id.*

⁴⁵ *Id.* at *6. The court considered the parties' joint application for approval of O.N.C.'s naturalization, Father's interest in the United States construction business, and Mother's securing of employment, combined with both parties' knowledge that Father would not be able to join them immediately. *Id.*

⁴⁶ *Id.* at *5. This was satisfied by the child's enrollment in school, his relationship with his family in the United States, his socialization with friends, etc. *Id.*

Father appealed the decision of the district court.⁴⁷ The Eighth Circuit Court of Appeals affirmed and emphasized that, from the child's perspective, the family had moved to the United States indefinitely.⁴⁸ It further noted that the parents' intent further supported its conclusion that O.N.C.'s country of habitual residence was the United States.⁴⁹

C. The Eighth Circuit's Analysis of Habitual Residence

The *Cohen v. Cohen* decision is in line with the Eighth Circuit's jurisprudence regarding the determination of habitual residence under the Convention.⁵⁰ The Eighth Circuit has repeatedly focused its inquiry on the child's perspective, giving lesser, but nonetheless some, consideration to parental intent.⁵¹

In 2010, the Eighth Circuit also deferred to the child's perspective while determining habitual residence.⁵² In *Barzilay v. Barzilay*, the father

⁴⁷ *Cohen*, 858 F.3d at 1151–52.

⁴⁸ See *id.* at 1154 (considering O.N.C.'s perspective regarding the permanence of the move by detailing his attendance at school, his socialization with friends, his participation in local activities, and his language primarily being English).

⁴⁹ *Id.* The Eighth Circuit's determination of parental intent was supported by evidence that Mother and Father intended to move the child to the United States for at least three to five years, had applied for his citizenship there, and planned for a life there. *Id.* Mother also sent money to Father in order to get him to be able to join her in the United States. *Id.*

⁵⁰ *Id.* (emphasizing the child's perspective while giving some, but lesser, consideration to parental intent); *Barzilay*, 600 F.3d at 918 (determining habitual residence based upon the child's perspective after determining that parental intent was unclear); *Sorenson v. Sorenson*, 559 F.3d 871, 874 (8th Cir. 2009) (determining that evidence of the child's friendships/cultural acclimation were relevant in addition to evidence of parental intent).

⁵¹ See *Cohen*, 858 F.3d at 1154; *Barzilay*, 600 F.3d at 918; *Sorenson*, 559 F.3d at 896; *Silverman*, 338 F.3d at 898–99. In *Silverman*, the father brought action against the mother, alleging she had wrongfully removed their children from Israel to the United States in August 2000. 338 F.3d at 891. The family had moved to Israel from the United States in July 1999. *Id.* at 889. The Court of Appeals held that the children's habitual residence was Israel. *Id.* The court noted that habitual residence must encompass some form of settled purpose. *Id.* at 898. Accordingly, settled purpose must be from the child's perspective, but parental intent should also be taken into account. *Id.* Noting the change in geography, passage of time, abandonment of the former home, and the children's enrollment in school, the Court of Appeals found that from the perspective of the children, the family's habitual residence was Israel. *Id.* at 898–99. The court also held that the district court should have considered both parents' intentions at the time of the move to Israel. *Id.* Similarly, in *Sorenson*, the court examined the issue of habitual residence from the child's perspective. 559 F.3d at 873. The Sorenson family moved to Australia from the United States in June of 2003. *Id.* at 872. In 2007, the father moved back to the United States and filed for his daughter's return. *Id.* Using many of the same factors enumerated in *Silverman*, the court held that the child's habitual residence was Australia because she had experienced a clear change in geography when her parents moved there with most of their possessions, spent a substantial amount of time (three years) there, and had friends and was enrolled in school there. *Id.* at 873–74.

⁵² *Barzilay*, 600 F.3d at 918–19. The Barzilay family moved to the United States from Israel in 2001. *Id.* at 914. The mother and father had three children, the youngest two of whom were born in the United States. *Id.* at 914–15. The mother and father divorced in 2005. *Id.* at 915.

filed a petition in district court pursuant to the ICARA, seeking an order compelling the mother and the couple's children to move to Israel.⁵³ Following the district court's decision to abstain from reaching the merits of the petition, the court of appeals determined that the alleged wrongful retention by the mother must have occurred between when the father moved back to Israel and his filing in the Israeli family court.⁵⁴ The court went on to determine that, from the children's perspective, the settled purpose of the family's residence in Missouri was to live there indefinitely.⁵⁵ The court also considered, to a lesser extent, the intent of the parents.⁵⁶ The couple's abandonment of their prior residences in Israel, coupled with the fact that the children were well acclimatized to life in the United States and had received the totality of their education there, led the court to conclude that the children's habitual residence was the United States.⁵⁷

II. SURVEYING THE VARIED METHODS OF ESTABLISHING A CHILD'S HABITUAL RESIDENCE

Within the United States Circuit Courts of Appeals, there exists a circuit split regarding how to determine a child's habitual residence.⁵⁸ Section A of this Part details the Sixth Circuit's jurisprudence, which examines ob-

⁵³ *Id.* at 916. In the United States, the Hague Convention was implemented and enforced by ICARA. 22 U.S.C. § 9001 (2012). In *Barzilay*, the mother and father's divorce led to the creation of a parenting plan specifying that if either party were to return to their native Israel, the other parent was required to move back with the children as well. 600 F.3d at 915. The father returned to Israel in September of 2005. *Id.* Although the mother refused to commit to a permanent return to the country, she agreed to a summer visit in June of 2006. *Id.* During that visit, the father sought and obtained an order from an Israeli family court prohibiting removal of the children from the country. *Id.* After negotiations between the parties, the mother and father agreed that the mother and children could fly back to the United States if they agreed to return to Israel on a permanent basis by August 1, 2009. *Id.* Failure to do so would be considered kidnapping within the meaning of the Convention. *Id.*

⁵⁴ *Barzilay*, 600 F.3d at 918. The father's move to Israel occurred in September 2005. *Id.* His filing in the Israeli family court took place in the summer of 2006. *Id.*

⁵⁵ *Id.* The court noted that two of the children had lived their whole lives in Missouri and the eldest had resided there for five years. *Id.*

⁵⁶ *See id.* at 918 (providing an analysis of the children's perspective regarding settled purpose and then noting that parental intent was less clear). The mother and father had moved to the United States on temporary work visas, but had abandoned their prior habitual residences in Israel. *Id.*

⁵⁷ *See id.* at 918–19. Thus, the underlying custody dispute would be determined by the American legal system. The Convention, *supra* note 10, at 1501.

⁵⁸ *See* *Cohen v. Cohen*, 858 F.3d 1150, 1154 (8th Cir. 2017) (determining habitual residence by examining the child's perspective while also giving some minor consideration to parental intent); *Mozes v. Mozes*, 239 F.3d 1067, 1084 (9th Cir. 2001) (holding that parental intent determines habitual residence provided the child has experienced a change in geography been an actual change in geography and a sufficient period of time has passed); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401–02 (11th Cir. 1991) (stating that habitual residence is determined from the child's perspective alone).

jective evidence only.⁵⁹ Section B discusses the Ninth Circuit's approach, which considers only parental intent.⁶⁰ Section C reviews those jurisdictions that use a two-pronged test, which analyzes both the intentions of the parents and objective evidence regarding the acclimatization of the child.⁶¹

A. Sixth Circuit: Objective Evidence Only

The United States Sixth Circuit Court of Appeals has held that courts analyzing a child's habitual residence should (1) focus on the child's perspective as opposed to the parents'; and (2) examine past experiences as opposed to future intentions.⁶² In *Friedrich v. Friedrich*, the court held that a child's habitual residence could only be modified by a change in geography and the passage of time.⁶³ Parental intent is not given any consideration by the Sixth Circuit.⁶⁴ The court reasoned that allowing a child's mother to alter his habitual residence through a wrongful removal would defy the purpose of the Convention.⁶⁵

Recently, the Sixth Circuit reiterated its commitment to focusing on the past experiences of the child, rather than the intentions of the child's parents.⁶⁶ In 2007, in *Robert v. Tesson*, the Sixth Circuit again held that a child's habitual residence is the place where the child has been present long

⁵⁹ See *infra* notes 62–68 and accompanying text.

⁶⁰ See *infra* notes 69–74 and accompanying text.

⁶¹ See *infra* notes 75–81 and accompanying text.

⁶² *Friedrich*, 983 F.2d at 1401–02.

⁶³ *Id.* The court explained that habitual residence refers to a child's residence prior to removal, and therefore reasoned that any examination as to habitual residence must focus on past experience as opposed to future intentions. *Id.*

⁶⁴ See *id.* (failing to consider any evidence of parental intent in the analysis). The child in *Friedrich* was born and raised exclusively in Germany prior to his allegedly wrongful removal. *Id.* at 1402. Thus, the court determined his habitual residence to be in Germany. *Id.*

⁶⁵ *Id.* at 1402. The court reasoned that, if a mother's removal of the child without a father's knowledge or consent could alter a child's habitual residence, the Convention would be rendered essentially ineffective. *Id.* Holding otherwise would, under the Sixth Circuit's interpretation, allow abductors to characterize wrongful removals as rightful alterations of habitual residence. *Id.*

⁶⁶ *Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007). Here, the children were born in the United States in 1997. *Id.* at 984. In 1998, The mother and father formed a French company and purchased a plot of land in France. *Id.* They terminated their lease in Texas and put their belongings in storage to eventually ship to France while they lived in various places around the United States. *Id.* The family moved to France in December of 1998 until the mother and father separated in 1999. *Id.* at 984–85. At this point, the children moved back to the United States with their mother. *Id.* at 985. In 2000, the parties ended their separation, and the mother returned to France with the children in September of 2001. *Id.* In 2002, the mother returned to the United States, but both parents agreed that the children would remain in France. *Id.* at 985–86. The mother temporarily returned to France in 2002. *Id.* at 986. She brought the children back to the United States in December of that year, where they were enrolled in school. *Id.* In September of 2003, the mother and the children returned to France yet again. *Id.* The mother and the children returned to the United States in October of 2003. *Id.*

enough to allow the child to have been acclimatized, and to have established a degree of settled purpose from the child's perspective.⁶⁷ According to the Sixth Circuit, a parental-focused inquiry would prioritize the desires of the abductor over the needs of the child, thus running counter to the Convention's stated goal of preventing children from being removed from their natural homes.⁶⁸

B. Ninth Circuit: Focus on Shared Parental Intent

The Ninth Circuit, in contrast to the Sixth Circuit's decision to focus only on objective evidence from the child's perspective, has held that courts should principally focus on subjective evidence of shared parental intent—provided there has also been a change in geography.⁶⁹ In 2001, the Ninth Circuit held in *Mozes v. Mozes* that the principal point of focus in habitual residence inquiries should be the shared intentions of the parents.⁷⁰ The court reached its conclusion after first deducing that the initial step in gaining a new habitual residence is to form a settled intent to abandon the old one.⁷¹ As a result, the Ninth Circuit determined that it is the intent of the parent that should primarily be considered in determining a child's habitual residence.⁷²

Although parental intent is of the utmost importance in Ninth Circuit jurisprudence, the court in *Mozes* noted that there are some objective factors that should be considered in a determination of habitual residency: both an actual change in geography and the passage of a significant period of

⁶⁷ *Id.* at 993. In this case, the court held that the children were habitual residents of the United States at the time of their removal. *Id.* at 995. The court noted that the children had attended American schools, become close with their American relatives, and gone on various trips within the United States. *Id.* at 996.

⁶⁸ *Id.* at 991–92. This rationale was supported by official commentary on the Convention, which notes that children should be recognized as individuals with personal needs. Pérez-Vera, *supra* note 2, at 431.

⁶⁹ Compare *Friedrich*, 983 F.2d at 1401 (determining habitual residence based only upon birth place and country of residence), with *Mozes*, 239 F.3d at 1079 (holding that the alteration of a child's habitual residence results from the settled intentions of the parents, provided a change in geography and a passage of time occurred as well).

⁷⁰ See 239 F.3d at 1080 (reasoning that the intentions of the parents affect the habitual residence inquiry because the child's knowledge of these intentions will determine its attitude toward its residency).

⁷¹ *Id.* at 1070. Although the decision noted that it would be best to consider the child's intent in the habitual residency inquiry, this approach fails to take into account the cognitive abilities of children. *Id.* at 1076. Using the analogy of a child going away to camp, the court explained that failing to abandon a prior habitual residence means that an individual is simply residing temporarily in the new location. *Id.* at 1074.

⁷² See *id.* at 1084 (holding that the district court's determination of habitual residence did not give enough weight to the importance of shared parental intent).

time.⁷³ Without a demonstration of settled intent on the part of the parents, however, this objective evidence is considered irrelevant by Ninth Circuit jurisprudence.⁷⁴

C. *The Two-Pronged Test Adopted by the Majority of the Circuits*

The majority of Circuits use a balancing test of both objective and subjective evidence to determine a child's habitual residence.⁷⁵ Like the Eighth Circuit did in 2003 and 2009 with its decisions in *Silverman v. Silverman* and *Sorenson v. Sorenson*, the Second Circuit held in 2005 in *Gitter v. Gitter* that a habitual residency analysis should consider two factors: (1) subjective intent of the parents; and (2) objective evidence of habitual residency.⁷⁶ Courts should begin by considering whether the child's presence in the country was intended to be temporary or permanent.⁷⁷ Objective evidence should also be used to consider habitual residence, including a change in geography, and some indication of acclimatization.⁷⁸

⁷³ *Id.* at 1078. These factors allow the child to become acclimatized to their environment. *Id.* The Ninth Circuit noted that being habitually resident in a place requires that the child be settled in some sense, but does not require that the family intend to live there until they die. *Id.* at 1074. The court found support for this proposition in the Convention's stated purpose of preventing parents from seeking custody of their children by removing them to another country against the other parent's will. *Id.* at 1079. Allowing courts to solely examine objective evidence of acclimatization would tempt parents to relocate their children to new countries. *Id.*

⁷⁴ *See id.* at 1078–79 (explaining that, without intent to abandon an old residence, any period of time spent elsewhere can constitute a temporary arrangement in the grand scheme of life).

⁷⁵ *See Cohen*, 858 F.3d at 1154 (holding that habitual residence is to be determined based on the child's perspective while giving some deference to parental intent); *Sorenson v. Sorenson*, 559 F.3d 871, 874 (8th Cir. 2009) (holding that evidence of the child's acclimation was relevant, in addition to evidence of parental intent, in determining habitual residence); *Gitter v. Gitter*, 396 F.3d 124, 132–33 (2d Cir. 2005) (determining that parental intent must be examined in order to better understand objective evidence of the child's perspective); *Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003) (holding that the lower court should have examined both the settled purpose of the move from the children's perspective as well as both parents' intentions at the time of the move to Israel); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) (examining both the child's perspective regarding settled purpose of the family's move and the parent's current intentions regarding habitual residence).

⁷⁶ *See Sorenson*, 559 F.3d at 874 (examining both evidence of the child's acclimation and the shared intent of the parents to determine habitual residence); *Gitter*, 396 F.3d at 132–33 (reasoning that parental intent can be used to aid in understanding the child's perspective); *Silverman*, 338 F.3d at 898 (holding that the settled purpose of a move should be examined both from the shared intent of the parents as well as the children's perspective).

⁷⁷ *Gitter*, 396 F.3d at 132. The decision states that because children lack the psychological ability to determine their place of residency, courts should only give weight to the intent of the parents. *Id.*

⁷⁸ *Id.* at 133. As an example of indicia of acclimatization, the court offered an example of a child who spent fifteen years abroad in the same state. *Id.* at 132. The court reasoned that, even if the child's parents intended to eventually return to the original state, the child's habitual residence would still be abroad. *Id.* at 133.

Similarly, the Third Circuit has held that the inquiry should balance evidence of the child's acclimatization with shared parental intents.⁷⁹ In *Feder v. Evans-Feder*, the court held 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 the child considers to have a degree of settled purpose.⁸⁰ Further, the analysis must also consider the parents' current intentions regarding the child's habitual residence.⁸¹

III. THE CASE FOR AN OBJECTIVE, UNIFORM METHOD OF ESTABLISHING HABITUAL RESIDENCE

This Part argues that the Eighth Circuit's holding in *Cohen v. Cohen* is not in keeping with the stated goals of the Convention, and that United States courts should uniformly adopt a child-centered, objective inquiry into a child's habitual residence.⁸² Section A of this Part contends that the Convention's overarching goal of protecting children is best served by such an approach.⁸³ Section B examines the need for uniformity among signatories, and demonstrates that international jurisprudence generally leans toward a child-centered analysis.⁸⁴

A. An Objective Approach Best Serves the Convention's Underlying Goal of Protecting Children in Need

Although the Convention does not explicitly make residency determinations according to the best interest of the child, the treaty was drafted with a primary intent to prevent children from harms which manifest in the wrongful removal from their home countries.⁸⁵ A child-centered inquiry into habitual residency is more closely aligned to this policy than analysis into

⁷⁹ *Feder*, 63 F.3d at 224.

⁸⁰ *Id.* The child lived in Australia for six months and attended school there. *Id.* The court determined that such a time span was significant for a four-year old child. *Id.*

⁸¹ *Id.* Though the mother considered the new country to be a temporary living arrangement, the time the child spent in Australia coupled with the father's intention that the family live there permanently caused the court to determine that Australia was the place of the child's habitual residence. *Id.* The court held that the district court's decision that the United States was the child's habitual residence placed undue emphasis on the fact that he had lived the majority of his years in the United States. *Id.* The child had lived in Australia for the six months immediately preceding his return to the United States. *Id.*

⁸² See *infra* notes 83–106 and accompanying text.

⁸³ See *infra* notes 85–94 and accompanying text.

⁸⁴ See *infra* notes 95–106 and accompanying text.

⁸⁵ The Convention, *supra* note 10, at 1501; see also Pérez-Vera, *supra* note 2, at 431 (noting that the Convention contains no explicit mention of the child's best interest in custody determinations but that readers should understand that the philosophy of the treaty can be defined as the desire to aid children and should be based upon their interests).

parental intent.⁸⁶ A child-centered approach examines objective factors such as length of residency, enrollment in school, language spoken, and relationships formed.⁸⁷ These factors are essential to a determination of habitual residency because they indicate the immediate and tangible impact of residency on the child's psychological state.⁸⁸

Some courts have criticized a child-centered approach, claiming it fails to take into account the cognitive abilities of a child, whose mind is not yet fully developed.⁸⁹ This criticism is misplaced; jurisdictions using the child-centered analysis do not simply ask a child where he or she feels most at home.⁹⁰ Rather, as explained above, they look to factors that do not require any sort of psychological or emotional maturity to comprehend.⁹¹ Evidence

⁸⁶ See *Friedrich v. Friedrich*, 983 F.2d 1396, 1401–02 (6th Cir. 1993) (reasoning that an approach favoring parental intent would allow an abductor to alter a child's habitual residence by way of wrongful removal and therefore render the Convention meaningless); Pérez-Vera, *supra* note 2, at 431 (noting that the Convention is based upon the principle that the best interests of the child are of the highest importance in custody determinations).

⁸⁷ See *Sorenson v. Sorenson*, 559 F.3d 871, 871 (8th Cir. 2009) (noting that three years had passed prior to the child's retention, and that her Australian accent, enrollment in school, and friendships with other Australian children indicated that she had become acclimatized to the country).

⁸⁸ See *Robert v. Tesson*, 507 F.3d 961, 991 (6th Cir. 2007) (determining habitual residence based on the child's perspective and noting that any other approach would run counter to the Convention's goal of preventing children from being removed from the family and social environment they matured in). The alternative parental intent approach emphasizes the emotional needs of the parent over those of the allegedly abducted child, and therefore does not align with the stated policy of the Convention. See *id.* at 992 (noting that the idea that children must not be regarded as their parents' property leads to a holding in which the child's experience is given greater weight than one that subordinates the child's perception to their parent's needs). Research has shown that individuals who moved frequently as children experience lower levels of well-being as adults than those who did not. Shigehiro Oishi & Ulrich Schimmack, *Residential Mobility, Well-Being, and Mortality*, 98 J. OF PERSONALITY & SOC. PSYCHOL. 980, 981–82 (2010). This has been attributed to peer rejection, social withdrawal, and inability to make and maintain lifelong friends. *Id.*

⁸⁹ See *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001) (noting that many children lack the material and psychological wherewithal to determine where they will live). Studies have shown that the parts of the brain that contribute to emotional maturity continue to develop well into adulthood. Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216–17 (2009).

⁹⁰ See, e.g., *Friedrich*, 983 F.2d at 1402 (considering only the birth place and the number of years spent by the child in the nation to determine habitual residence); *Sorenson*, 559 F.3d at 874 (examining only the passage of time and the existence of connections to determine habitual residence).

⁹¹ See *Friedrich*, 983 F.3d at 1402 (considering factors such as birth place as opposed to the mindset of child); *Sampson v. Sampson*, 975 P.2d 1211, 1215, 1218 (1999) (considering only length of residency and parental custody to determine habitual residence). Objective factors consist only of facts, whereas subjective factors typically involve an analysis into personal perspectives or opinions. Compare *Friedrich*, 983 F.3d at 1402 (considering only the change in geography and the passage of time to determine habitual residence), with *Mozes*, 239 F.3d at 1076 (attempting to determine the intentions of the parents).

of adjustment to culture may be introduced using objective factors only, and without having to examine the intricacies of the mind of the child.⁹²

The Convention explicitly states that a signatory country may refuse to return a child to the country of its habitual residence if the child objects to the return and has reached an age or degree of maturity at which the court finds it suitable to consider his or her views.⁹³ Thus, the Convention acknowledges that the child's perspective is relevant in these cases, but should be considered separately from the determination of a habitual residence.⁹⁴

B. An Objective, Child-Centered Approach Is Better Suited to Meet the Need for Uniformity Among Signatories

In order for the Convention to succeed in its goal of protecting children from the harms resulting from their wrongful removal, signatories to the treaty must reciprocate their agreed upon rights and duties.⁹⁵ Congress has declared that this requires a uniform interpretation of the treaty among signatories.⁹⁶ At present, United States courts have failed to consistently interpret the Convention, even internally amongst the circuits.⁹⁷ Uniformly

⁹² See *Sorenson*, 559 F.3d at 874 (noting that the child was enrolled in pre-school in Australia, all of her friends were located in Australia, and that the child even spoke with an Australian accent).

⁹³ The Convention, *supra* note 10, at 1502. American courts have in the past demonstrated such deference to the objections of children. *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001). In *Blondin*, the Second Circuit Court of Appeals held that an eight-year-old child who objected to being returned to France was old and mature enough for her views to be considered in relation to the judgment. *Id.*

⁹⁴ The Convention, *supra* note 10, at 1502. Notably, there are some cases for which this approach may not be entirely applicable. See *In re Bates* (1989) CA 122/89, slip op. (High Ct. of Justice, Family Div., Royal Cts. of Justice), http://www.findthekids.org/cases/Bates_uk.txt [<http://perma.cc/W8T3-7XAR>] (determining the habitual residence of a two-year-old and noting that with a child this young, parental intent should be considered). Extremely young children are less susceptible to emotional trauma caused by transitioning from one culture to another. See Alice Park, *Study: Switching Schools May Give Your Kids Psychotic Symptoms*, TIME (Feb. 20, 2014), <http://time.com/8854/study-switching-schools-may-make-your-kids-psychotic/> (noting that children who are forced to change schools seem to be linked to a greater risk of developing psychosis-like symptoms). Thus, in a case where the court must determine the habitual residence of a child under the age of three, a child-centered analysis may do little to achieve the Convention's goal of preventing psychological harm to the child. The Convention, *supra* note 10, at 1501. A parental-intent focused approach may be more applicable under such circumstances. See *In re Bates*, CA 122/89, slip op. (holding that in the case of a child as young as two, the stated intentions of the parents are more appropriate indicators of habitual residence).

⁹⁵ See Pérez-Vera, *supra* note 2, at 435 (noting that cooperation among authorities is one of the "central components" of the Convention).

⁹⁶ 22 U.S.C. § 9001(b)(3)(B) (2012); *Mozes*, 239 F.3d at 1071.

⁹⁷ See *Cohen v. Cohen*, 858 F.3d 1150, 1154 (8th Cir. 2017) (determining habitual residence based on objective interest of the child's perspective but giving some consideration to parental intent); *Mozes*, 239 F.3d at 1084 (holding that habitual residence is to be determined according to the shared intentions of the parents).

applying a child-centered habitual residence analysis would bring American jurisprudence more in line with other signatory countries.⁹⁸

Although there is not presently a single method of analysis amongst all signatory countries, few other jurisdictions place much emphasis on parental intent.⁹⁹ Generally, other common law countries focus on objective evidence.¹⁰⁰ The highly influential and frequently cited United Kingdom case *In re Bates* held that the only factor to be used in determining habitual residence is whether there is a “sufficient degree of continuity [for the child] to be properly described as settled.”¹⁰¹ Many civil law jurisdictions also use an objective, child-centered method of analysis.¹⁰² Argentinian courts have defined habitual residence as the place that provides the child with stability and permanence.¹⁰³ In Sweden, courts have held that the analysis requires an examination of all objective evidence that would show a permanent attachment to a nation.¹⁰⁴ Finally, Italian courts have found that habitual residence is the place where the child spends most of his or her time.¹⁰⁵ United States courts should adopt a uniform approach to conform with international jurisprudence.¹⁰⁶

CONCLUSION

The Eighth Circuit’s decision in *Cohen v. Cohen* reiterates its commitment to a two-pronged approach in determining habitual residence within the meaning of the Hague Convention. The decision broadens the already existing split among circuits regarding whether to consider the child’s per-

⁹⁸ See *In re Bates*, CA 122/89, slip op. In this case, the child was so young that parental intent had to be taken into account in order to determine settled purpose. *Id.*; Vivatvaraphol, *supra* note 5, at 3354–55 (describing the approach taken by other countries). Both common law and civil-law countries consider child-centered evidence of habitual residence. *Id.* at 3355–58. Whereas common law countries frequently use a two-pronged approach that incorporates both objective and subjective evidence of parental intent, civil law countries have refused to rely on any evidence of parental intent at all. *Id.*

⁹⁹ See Winter, *supra* note 1, at 374–75 (noting that the common approach among English-speaking jurisdictions is to consider both the child’s and parents’ perspectives, with particular weight given to the child’s experience).

¹⁰⁰ Vivatvaraphol, *supra* note 5, at 3355–56.

¹⁰¹ *In re Bates*, CA 122/89, slip op. Among many foreign courts, *In re Bates* is considered a starting point for consideration of habitual residence. BEAUMONT & MCELEAVY, *supra* note 6, at 236. Australian and Scottish courts have made frequent use of English case law in determining habitual residence, and have opted to follow the *In re Bates* standard. *Id.*; see, e.g., De Lewinski, F.B. and Legal Aid Comm’n v. Director General New South Wales Dep’t of Cmty. Servs. Cent. Auth. (1997) FLC 92-737 (Family Ct. of W. Austl.).

¹⁰² Vivatvaraphol, *supra* note 5, at 3354–55. Very few jurisdictions place significant weight on parental intent. Winter, *supra* note 1, at 375.

¹⁰³ Vivatvaraphol, *supra* note 5, at 3358.

¹⁰⁴ *Id.* at 3359.

¹⁰⁵ *Id.* at 3359–60.

¹⁰⁶ See *supra* notes 95–105 and accompanying text.

spective, parental intent, or both. Determining habitual residence based on objective evidence of the child's perspective alone, however, is the method that keeps most in line with the stated goals of the Convention. This method of analysis best prevents the psychological harms to the child that may stem from a wrongful removal from his or her home country and is better suited to meet the need for uniformity in application among signatories.

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