

Comment,  
**HABITUALLY PROBLEMATIC: THE  
HAGUE CONVENTION AND THE MANY  
DEFINITIONS OF HABITUAL RESIDENCE  
IN THE UNITED STATES**

## **I. Introduction**

The Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”) is a multilateral treaty developed by the Hague Conference on Private International Law. Its purpose is “to secure the prompt return of children wrongfully removed to or retained in any [member country]; and to ensure that rights of custody and of access under the law of one [member country] are effectively respected in the other [member countries].”<sup>1</sup> The Convention provides that children impermissibly removed from their country of “habitual residence” be returned to that country absent some extraordinary circumstances. The Convention does not specifically define “habitual residence”<sup>2</sup> which has led to differing interpretations by the federal courts. This comment will describe the different approaches adopted by various circuit courts of appeal. Part II provides some background regarding the Convention and the significance of “habitual residence.” Part III describes the various definitions adopted by the courts and will additionally center on problems associated with a focus on parental intent when the parents are unmarried. Part IV discusses the implications of a split among the circuit courts of appeal. Part V will examine proposals for creating a new standard for defining habitual residence that takes into account the approaches currently used.

## **II. A Brief History of the Hague Convention**

The Hague Convention was adopted in 1980 “to protect children internationally from the harmful effects of their wrongful

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<sup>1</sup> Hague Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (hereinafter Hague Convention), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> (last visited on Mar. 23, 2017).

<sup>2</sup> See generally *id.*

removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.”<sup>3</sup> The signatory countries drafted the Hague Convention as a response to the problem of estranged parents wrongfully taking children across international borders from one signatory nation to another, and it provides for the children’s return to the appropriate forum.<sup>4</sup> A key element of an action under the Hague Convention is the determination of the child’s country of habitual residence; if there is not country designation, a remedy is not available under the Hague Convention.<sup>5</sup> As a result, how habitual residence is defined can play a prominent role in a Hague Convention case; however, the Hague Convention does not define “habitual residence.”<sup>6</sup>

This lack of a definition for habitual residence has led to many difficulties in the U.S. federal appellate courts—most notably a split in how individual circuits define and interpret “habitual residence.” “Courts in the United States differ regarding the degree to which habitual residence should be determined from the perspective of the child versus the perspective of the parents.”<sup>7</sup> As a result, there exists a stark divide between the federal circuit courts that emphasize parental intent in determining “habitual residence” and those that focus on the child’s acclimatization.<sup>8</sup> The U.S. Supreme Court has not ruled on the issue of habitual residence for the purposes of the Hague Convention, resulting in no precedent to bind the individual state courts and the

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<sup>3</sup> Hague Convention, *supra* note 1, at pmbl.

<sup>4</sup> See *Redmond v. Redmond*, 724 F.3d 729, 737 (7th Cir. 2013) (A signatory state contracts to “commit to have in place judicial and administrative remedies for the return of children taken from the State of their habitual residence to another signatory State in violation of the left-behind parent’s custody rights under the law of the State of the child’s habitual residence.”).

<sup>5</sup> Jeff Atkinson, *The Meaning of “Habitual Residence” Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 OKLA. L. REV. 647, 648 (2011).

<sup>6</sup> *Id.* See also *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995) (The Hague Convention on the Civil Aspects of International Child Abduction does not provide a definition for habitual residence; case law analyzing the term is now developing.).

<sup>7</sup> Atkinson, *supra* note 5, at 650.

<sup>8</sup> Tai Vivatvaraphol, Comment, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3327 (2009).

thirteen federal circuit courts.<sup>9</sup> Because of the confusion and often inconsistent application of the concept of habitual residence among the various courts, the Supreme Court needs to grant certiorari and define “habitual residence” to give a uniform standard for all U.S. courts to follow.

### III. Defining Habitual Residence

#### A. *Focusing on the Child: The Approach of the Third, Sixth, and Eighth Circuits*

A discussion and analysis of habitual residence begins with how much weight courts assign to parental intent—or in the case of the Third, Sixth, and Eighth Circuits, how little weight courts will assign to parental intent. These circuits focus more heavily on child acclimatization to the new environment.<sup>10</sup> This concept of habitual residence is the most important threshold determination in Hague child abduction proceedings.<sup>11</sup> First, the main objective is that a child must be immediately returned to the country of habitual residence, and second, and perhaps most importantly to this comment, it is the law of the child’s habitual residence that will decide whether one parent’s custody rights have been breached through a wrongful removal or retention.<sup>12</sup> Because of the divide among the courts regarding habitual residence, the thirteen federal circuits have been left to formulate their own standard. As a result, the Third, Sixth, and Eighth Circuits focus on the objective signs of a child’s acclimatization.<sup>13</sup>

*Friedrich v. Friedrich* was “[t]he first major case in the United States to consider the issue of habitual residence for the

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<sup>9</sup> Brief of the International Academy of Family Lawyers as Amicus Curiae in Support of Petitioner, *Cahue v. Martinez* (No. 16-582), 2017 WL 117875 (U.S.), at 5.

<sup>10</sup> See, e.g., *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010); *Feder*, 63 F.3d at 224; *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

<sup>11</sup> Michael R. Walsh & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 32 (2006).

<sup>12</sup> Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1063 (2005).

<sup>13</sup> Aimee Weiner, 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, 455 (2015).

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purpose of Child Abduction Convention proceedings.”<sup>14</sup> In *Friedrich*, the child, Thomas, was born in Germany, to a German father and an American mother serving in the U.S. Army in Germany.<sup>15</sup> The parents separated when the child was only nineteen months old. After an apparent heated exchange, Mrs. Friedrich left Germany with the child, without Mr. Friedrich’s consent or knowledge.<sup>16</sup> Mr. Friedrich subsequently filed a Hague Convention action in the United States seeking the return of the child.<sup>17</sup>

Noting that “little case law exists”<sup>18</sup> to provide insight into the Hague Convention, the Sixth Circuit held that courts must arrive at the determination of habitual residence by focusing on the child’s past experiences, not the parents or their intent.<sup>19</sup> Resulting from this logic, the child’s habitual residence can only be altered by a change in geography and the “passage of time, not by changes in parental affection and responsibility.”<sup>20</sup> The resulting outcome is the court removed any parental intent from the determination, stating that it was “concerned solely with the child’s habitual residence and rejected the parents’ plans as irrelevant.”<sup>21</sup> The court further explained that the child’s home prior to the removal is instrumental in determining permanent residence, and that the court must look back in time at the child’s experiences, not anticipate what the future holds for the child.<sup>22</sup> The strict interpretation of habitual residence used by the Sixth Circuit, where the court seemingly disregards all parental intent, is loosened somewhat by the Eighth and Third Circuits. However, parental intent will still be secondary to the child’s acclimatization.

In *Barzilay v. Barzilay*, the Eighth Circuit in 2010 was forced to address habitual residence.<sup>23</sup> Mr. and Mrs. Barzilay were Israeli citizens who married in Israel in 1994 and had three chil-

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<sup>14</sup> *Friedrich*, 983 F.2d 1396; Vivatvaraphol, *supra* note 8, at 3343.

<sup>15</sup> *Friedrich*, 983 F.2d at 1398.

<sup>16</sup> *Id.* at 1399.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1400.

<sup>19</sup> *Id.* at 1401.

<sup>20</sup> *Id.* at 1402.

<sup>21</sup> *Id.* at 1401.

<sup>22</sup> *Id.*

<sup>23</sup> 600 F.3d 912, 916 (8th Cir. 2010).

dren.<sup>24</sup> The oldest child, an Israeli citizen, was born in Israel, while the other two children, holding dual American and Israeli citizenship, were born in Missouri.<sup>25</sup> In 2001, Mr. and Mrs. Barzilay obtained American work visas and moved from the Netherlands, where they had lived for nearly two years, to Missouri, where the children then resided from 2001 until the commencement of the relevant court proceedings in 2006.<sup>26</sup> The oldest child once lived in Israel in her younger years; however, the younger two children had never lived in Israel.<sup>27</sup> Because the children had lived in Missouri for nearly five years prior to the filing of the wrongful retention, the district court found that the children's habitual residence was in the United States.<sup>28</sup>

The *Barzilay* court stated the "settled purpose of a family's move to a new country is a central element of the habitual residence inquiry."<sup>29</sup> Further, the court determined that the move to a new country must be viewed through the eyes of the child or children, and judged primarily through the children's acclimatization in the new country.<sup>30</sup> Only after acclimatization of the children will the court consider the parental intent.<sup>31</sup> "A determination of habitual residence under the Hague convention is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child."<sup>32</sup> Thus, the acclimatization of the child(ren) is central to the Eighth Circuit's approach to defining habitual residence. An Amicus Brief in *Cahue v. Martinez* takes the same stance as the *Barzilay* court and explains the Eighth Circuit's approach as:

a two-pronged test that takes into account parental intent and the child's perspective, with an emphasis on the child's perspective . . . [and] the relevant factors in determining habitual residence in the Eighth Circuit are the settled purpose of the move to the new country from the child's perspective, parental intent, a change in geography,

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<sup>24</sup> *Id.* at 914.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 914-15.

<sup>28</sup> *Id.* at 917-18.

<sup>29</sup> *Id.* at 918 (quoting *Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003)); Amicus Brief in Support of Petitioner in *Cahue*, *supra* note 9, at 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 920.

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the passage of time and the acclimation of the child to the new country.<sup>33</sup>

In 1995, the Third Circuit was tasked with determining a standard for habitual residence in *Feder v. Evan-Feder*.<sup>34</sup> In *Feder*, two Americans gave birth to a child in Germany in 1990.<sup>35</sup> The family then moved to Pennsylvania later that year, and finally to Australia in 1994.<sup>36</sup> Shortly after the move, Mrs. Feder, determined to leave Mr. Feder, took the child to Pennsylvania under the guise of “visiting her parents”; however, she never returned with the child to Australia.<sup>37</sup> Shortly thereafter, Mr. Feder filed a petition, and demanded the child’s return to Australia.<sup>38</sup>

Guided by the Convention and the Sixth Circuit holding in *Friedrich*, the Third Circuit held in *Feder*, “that a child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective.”<sup>39</sup> The Third Circuit noted that habitual residence inquiries must focus on the child and look back in time, disregarding either parent’s future intentions.<sup>40</sup> The court further articulated that a determination of whether a place satisfies this standard shall focus on the child’s acclimatization to that specific locale.<sup>41</sup> Taking the factors from the child’s perspective—the child was so young, was enrolled in preschool and kindergarten for the following year, and had already lived in Australia for six months of her short life (an amount of time the court deemed to be considerable)—the Third Circuit determined that the child’s habitual residence was Australia.<sup>42</sup>

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<sup>33</sup> Amicus Brief in Support of Petitioner in Cahue, *supra* note 9, at 11.

<sup>34</sup> 63 F.3d 217, 221-22 (3d Cir. 1995).

<sup>35</sup> *Id.* at 218.

<sup>36</sup> *Id.* at 219.

<sup>37</sup> *Id.* at 219-20.

<sup>38</sup> *Id.* at 220.

<sup>39</sup> *Id.* at 224.

<sup>40</sup> *Id.* at 222 (quoting *Friedrich v. Friedrich* (Friedrich I), 983 F.2d 1396, 1401-02 (6th Cir. 1993)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 224.

## B. Parental Intent: Second and Ninth Circuits' Approach

### 1. Focusing on Parental Intent

While the Third, Sixth, and Eighth Circuits focus primarily on the child's acclimatization with parental intent as a distant concern, the Second and Ninth Circuits stress the importance of focusing on the parents' perspectives.<sup>43</sup> "These circuits apply a standard that solely examines the shared intentions of the parents when determining which country is the child's habitual residence."<sup>44</sup> Despite being a drastic turn from the other circuits, this approach makes sense regarding a child's mindset—particularly the mindset of younger children—because the cases discussed herein demonstrate that focusing on shared parental intent is inevitable given that most children "lack the wherewithal to decide where they want to reside."<sup>45</sup>

The Ninth Circuit in *Mozes v. Mozes* decided that the principal focus of a court's analysis should be shared parental intentions.<sup>46</sup> In *Mozes*, the parents married in Israel in 1982 and subsequently had four children.<sup>47</sup> The family remained in Israel until 1997, when the mother moved to Los Angeles with the four children.<sup>48</sup> The father remained in Israel, but he visited the family in the United States over the next year until the mother filed for a dissolution of marriage, asking for custody of the children.<sup>49</sup> The father then brought an action under the Hague Child Abduction Convention for the return of the children to Israel.<sup>50</sup>

Like the other circuits, the Ninth Circuit was faced with a "habitual residence" problem and concluded that "being habitually resident in a place must mean that a person is settled, but deemed the concept of settled purpose . . . insufficient to determine a child's habitual residence."<sup>51</sup> The Ninth Circuit further opined that an intention to abandon current residence must be

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<sup>43</sup> Weiner, *supra* note 13, at 466.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001).

<sup>47</sup> *Id.* at 1069.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Vivatvaraphol, *supra* note 8, at 3347.

present for a person to acquire a new habitual residence.<sup>52</sup> The court then turned to the question of whose intent must be observed regarding residence, eventually settling that the shared parental intent is to be paramount to the intent of the child(ren) because “[c]hildren, particularly the ones whose return may be ordered under the Convention, normally lack the material and psychological wherewithal to decide where they will reside.”<sup>53</sup>

Using the new metric of “shared parental intent,” the court found that there was no agreed upon parental intent to abandon Israel as the habitual residence and ordered the children be returned to Israel.<sup>54</sup> The court further determined that due to the mere fifteen months spent in the United States compared to the years lived in Israel, the children were not settled in Los Angeles for the purposes of habitual residence.<sup>55</sup> To support this logic, the court paralleled the children’s stay in Los Angeles to summer camp<sup>56</sup> or a year spent studying abroad.<sup>57</sup> The children are away from home and most certainly have their belongings, but they are not making the summer camp or the country of the year’s study their new domicile.<sup>58</sup> However, the court was willing to consider the children’s perspective if they had stayed for a significant period of time. “Had the move been for a substantially longer period, the court might have given less weight to parental intent and given more emphasis to the child’s adjustment to his or her new surroundings.”<sup>59</sup> In this manner the Ninth Circuit made clear that parental intent is paramount, although children’s intent would be a factor in limited circumstances.

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<sup>52</sup> *Mozes*, 239 F.3d at 1075.

<sup>53</sup> *Id.* at 1076.

<sup>54</sup> *Id.* at 1084-85.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1074 (recognizing that a child who goes to summer camp arrives with a “settled purpose,” but no person could contend that the camp is the child’s habitual residence, or that the child is habitually settled (quoting *Shah v. Barnet London Borough Council and other appeals*, [1983] 1 All E.R. 226, 233 (Eng.H.L.))).

<sup>57</sup> *Id.* at 1074 (observing that time spent studying abroad is a mere “temporary absence of long duration” (quoting *Adderson v. Adderson*, 51 Alta.L.R. (2d) 193, 198 (Alberta C.A.1987))).

<sup>58</sup> *Id.* at 1083

<sup>59</sup> Amicus Brief in Support of Petitioner in *Cahue*, *supra* note 9, at 6.



In *Gitter v. Gitter*, the Second Circuit, using the Ninth Circuit as its guide, chose to limit the focus on the child's acclimatization and placed its emphasis on parental intent when determining habitual residence.<sup>60</sup> Unlike the Ninth Circuit, the Second Circuit gave more deference to the child's acclimatization, acknowledging "that because the Hague Convention focused on the habitual residence of the child, it would appear logical to focus on the child's intention."<sup>61</sup> In this manner the Second Circuit developed something resembling a two-pronged test, the key component being shared parental intent, and secondarily the child's acclimatization to the new environment.

In *Gitter*, Mrs. Gitter and Mr. Gitter gave birth to a son.<sup>62</sup> Shortly after Eden's birth, Mr. Gitter suggested the family move to Israel, citing such reasons as the move would save money and provide a better family system for Eden.<sup>63</sup> Mrs. Gitter did not want to relocate permanently to Israel; despite this fact, the family moved to Israel in 2001.<sup>64</sup> Prior to the move, the Gitters sold their cars, placed most of their belongings in storage in the United States, and closed their U.S. bank accounts.<sup>65</sup> In February 2002, Mrs. Gitter returned to the United States with Eden to visit her sister. Eventually Mrs. Gitter decided to remain with Eden permanently in the United States.<sup>66</sup> Soon thereafter, Mr. Gitter filed a petition for the return of Eden to Israel under the Hague Convention.<sup>67</sup>

When examining the facts, the Second Circuit looked at whether Mr. and Mrs. Gitter shared the intent that Israel would remain Eden's habitual residence.<sup>68</sup> The court determined that that the joint agreement of Mr. and Mrs. Gitter was to move to

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<sup>60</sup> 396 F.3d 124, 132 (2d Cir. 2005) (focusing on the "intent of 'the person or persons entitled to fix the place of the child's residence'" (citing *Mozes*, 239 F.3d at 1076 (quoting E.M. Clive, *The Concept of Habitual Residence*, 1997 J.U.R.I.D. REV. 137, 144))).

<sup>61</sup> *Weiner*, *supra* note 13, at 470.

<sup>62</sup> *Gitter*, 396 F.3d at 128.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 129.

<sup>68</sup> *Id.* at 135.

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Israel on a “conditional basis” only.<sup>69</sup> The court noted that while there were indicators tending to suggest their stay in Israel might be of “indefinite duration,” the weight of the evidence proved at most that Mr. Gitter did not have any intention of returning to New York.<sup>70</sup> This is not enough evidence to prove that Mr. Gitter intended for Israel to become Eden’s new habitual residence, and that “Mrs. Gitter only intended to move to Israel conditionally.”<sup>71</sup> As a result, the court concluded that Mr. and Mrs. Gitter lacked the parental intent to make Israel the new habitual residence for Eden.<sup>72</sup>

After a parental intent analysis, the Second Circuit deviated from the Ninth Circuit and applied another prong to the test for habitual residence: the consideration of the child’s acclimatization to the new environment.<sup>73</sup> The Second Circuit explained: “[t]he shared intent of the parents is not dispositive of a child’s habitual residence. A court must additionally examine the evidence to determine if it unequivocally points to the child having acclimatized and thus acquired Israel as his habitual residence.”<sup>74</sup> Additionally, the Second Circuit expressed the need for other courts to observe the parents’ intentions at the last time they were shared.<sup>75</sup> The court appeared to stop here at its habitual residence analysis. “In a perfunctory application of its standard to the facts of the case, the Second Circuit determined simply that there was no settled mutual intent to abandon the United States in favor of Israel as Eden’s habitual residence.”<sup>76</sup> Despite the court’s lack of depth in its analysis,<sup>77</sup> the Second Circuit established a fairly balanced, two-pronged approach to habitual

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<sup>69</sup> *Id.* (quoting *Gitter*, 2003 WL 22775375, at 4).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 133.

<sup>76</sup> Vivatvaraphol, *supra* note 8, at 3352.

<sup>77</sup> *Gitter*, 396 F.3d at 135–36 (The court refused to express any opinion on whether the circumstances in which Eden lived in Israel supported a finding that his residence changed from the United States to Israel, or whether his parents’ shared intent that his habitual residence be in the United States should control.).

residence determination that places parental intent first, and then looks to acclimatization second.

2. *Problems Associated with the Parental Approach: The Seventh Circuit's Decision Involving the Unmarried Father*

As with the other circuits, the Seventh Circuit has decided cases concerning habitual residence and focuses on the parental intent.<sup>78</sup> The Seventh Circuit, however, faces a unique problem that gives rise to the need for Supreme Court review of the lack of due process afforded to a specific group of fathers.<sup>79</sup> In *Martinez v. Cahue*, the Seventh Circuit held that in determining habitual residence, the intent and shared intent of an unmarried father who was not subject to any court orders concerning the child cannot be considered in determining habitual residence.<sup>80</sup> As a result, only the intent of the unmarried mother is relevant, which entitles such mother to “fix” habitual residence under the Hague Convention.<sup>81</sup> “Thus, when considering parental intent, only the intent of a parent with rights of custody as defined by the State (country) of the left behind parent will be taken into account.”<sup>82</sup> This presents an enormous problem (discussed below), because some States recognize the rights of the unmarried fathers as equal to those of married father’s, while other States do not.<sup>83</sup>

The petitioner in *Cahue* resided in Illinois, which does not recognize the rights of unmarried fathers who are not under court orders, “even where paternity was legally acknowledged and not in question.”<sup>84</sup> Thus, the only way in which the petitioner was able to have his rights recognized by the Seventh Circuit was to obtain a court order recognizing his rights—without doing so, his intent is not taken into account when determining habitual residence.<sup>85</sup> This is a glaring and profoundly unacceptable violation of constitutional rights. “The Supreme Court has held that

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<sup>78</sup> *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013).

<sup>79</sup> Amicus Brief in Support of Petitioner in *Cahue*, *supra* note 9, at 13.

<sup>80</sup> 826 F.3d 983, 992 (7th Cir. 2016).

<sup>81</sup> *Id.* at 990.

<sup>82</sup> Amicus Brief in Support of Petitioner in *Cahue*, *supra* note 9, at 3.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 4.

<sup>85</sup> *Id.*

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the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions as to care, custody, and control of their children.”<sup>86</sup> Furthermore, the Due Process Clause also protects the right of a parent to maintain a relationship with his or her child.<sup>87</sup>

By entirely disregarding the legal father’s intent and failing to conduct a shared parental intent analysis, the Seventh Circuit has deprived non-married fathers of their interest in continuous personal contact with their children . . . Such an approach fails to take into account the entirety of the circumstances of the case and the Constitutionally guaranteed substantial protection afforded to the father under the Due Process Clause.<sup>88</sup>

Additionally, the Seventh Circuit’s decision unconstitutionally creates a classification discriminating between married fathers and unmarried fathers that carries no societal justification.<sup>89</sup> According to Illinois law, an unmarried father, even though his paternity has been established, must take additional action compared to a married father to have his intent used in his minor child’s habitual residence determination.<sup>90</sup> “No public interest is served by this arbitrary discrimination between categories of fathers. This result of this erroneous interpretation is that the minor child may be deprived of a personal relationship with his or her father based on a marriage certificate rather than the actual circumstances of the case.”<sup>91</sup> The Seventh Circuit’s approach to habitual residence, in which a certain class of fathers (those who are unwed without court orders of custody) is deprived of their constitutionally guaranteed due process rights to be a part of their minor child’s life, is inherently flawed. This approach, when combined with the various approaches used by other circuits leads to disparate treatment among fathers. For these reasons, and others included below, the Supreme Court needs to define habitual residence.

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<sup>86</sup> Petitioner’s Brief for Writ of Certiorari in *Cahue v. Martinez* 2016 WL 6441227 (U.S.), 8-9 (citing *Troxell v. Granville*, 530 U.S. 57 (2000)).

<sup>87</sup> *United States v. Myers*, 426 F.3d 117, 125 (2d Cir. 2005).

<sup>88</sup> Amicus Brief in Support of Petitioner in *Cahue*, *supra* note 9, at 14.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

#### IV. The Implications of a Split Between the Circuits

It is of the utmost importance to child abduction cases, both domestic and foreign, that the Supreme Court resolve the split in the circuits and provide a uniform standard. “An international convention [such as the Hague Convention], expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all Contracting States.”<sup>92</sup> Litigants who are parents desperately seeking custody of their children are in extreme danger of a lack of consistency due to “[t]he grave differences in the circuit courts’ reasoning.”<sup>93</sup> This lack of consistency leads to complicated enforcement processes as well as decreased certainty of the outcome of these abduction cases, which is detrimental to the children involved.<sup>94</sup> A fixed standard is necessary to both set consistent and constitutional guidelines as well as to shape behavior.<sup>95</sup>

Furthermore, the federal circuits, as discussed above, are riddled with examples of inconsistencies among themselves. The Second and Ninth Circuits hold that courts should focus on the parents’ shared intent first and foremost. The Third and Sixth Circuits hold that a child’s habitual residence is the place where he or she has become acclimatized. The Sixth Circuit focuses almost exclusively on child acclimatization, while the Eighth Circuit has a dual pronged approach, focusing first on parental intent, with the child’s acclimatization a distant second.<sup>96</sup> Additionally the Seventh Circuit deprives a specific class of fathers of their due process rights.<sup>97</sup> These inconsistencies further strengthen the necessity for a uniform interpretation.<sup>98</sup> The only

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<sup>92</sup> Lord Browne-Wilkinson, *Re H (Abduction: Acquiescence)* [1998] AC 72; Amicus Brief in Support of Petitioner in *Cahue*, *supra* note 9, at 15.

<sup>93</sup> *Weiner*, *supra* note 13, at 471.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See. e.g.*, *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995); *Friedrich*, 983 F.2d at 1401.

<sup>97</sup> *Martinez v. Cahue*, 826 F.3d 983, 986 (7th Cir. 2016).

<sup>98</sup> *Weiner*, *supra* note 13, at 471.

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certainty that parties to these abduction cases are granted is inconsistency.

Further, this varied approach among the federal circuits results in a lack of uniformity; the result of this unevenness is the child's future home and habitual residence determination is a product of whichever jurisdiction or circuit the child helplessly finds the case being adjudicated. "It is vitally important . . . to resolve the existing split and provide a uniform standard. Clarity and uniformity is particularly essential when dealing with jurisdictional and international disputes."<sup>99</sup> In short, the key cause of the lack of uniformity is the same reason as the lack of consistency—the varied approaches by the circuits, which also leads to the Seventh Circuit debacle. Consequently, "custody rights of the father are those rights most often subject to interpretation."<sup>100</sup> Additionally, the problems of lack of consistency, lack of uniformity, and violation of unmarried fathers' constitutional rights "can create a situation whereby two cases of abduction with identical fact patterns can result in contrary decisions, the outcome depending solely on the different laws of the state of habitual residence."<sup>101</sup>

### V. Possible New Standards

Despite the lack of a unifying definition of "habitual residence" among the federal circuits, a clear consensus exists among practitioners and legal scholars regarding the need for the Supreme Court to provide a definition for all courts to follow. As a result, numerous proposed definitions for habitual residence have been offered, with the explanation that "clarity and uniformity is particularly essential when dealing with jurisdictional and international disputes."<sup>102</sup> As discussed above, the circuits view habitual residence differently. The Third, Sixth, and Eighth Circuits focus on child acclimatization,<sup>103</sup> while the Second and Ninth Circuits focus on parental intent.<sup>104</sup>

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<sup>99</sup> *Id.* at 470-71

<sup>100</sup> Amicus Brief in Support of Petitioner in Cahue, *supra* note 9, at 16.

<sup>101</sup> *Id.*

<sup>102</sup> Weiner, *supra* note 13, at 470-71.

<sup>103</sup> See, e.g., *Friedrich*, 983 F.2d at 1401; *Barzilay*, 600 F.3d at 918; *Feder*, 63 F.3d at 224.

<sup>104</sup> See, e.g., *Gitter*, 396 F.3d at 133; *Mozes*, 239 F.3d at 1076.

One author proposes a “hybrid subjective and objective standard [concentrating] on which country a reasonable person in the [child’s particular] situation would view as [his or her] country of habitual residence.”<sup>105</sup> This is similar to the Sixth Circuit’s approach in *Friedrich*, although the author stresses that the *only* approach to be used would be that of the child’s perspective.<sup>106</sup> The subjective component of the habitual residence test will take into account the child’s maturity, age, and mental capacity, while the objective component will “allow a court to consider a child’s perspective” as a reasonable person would in a similar situation.<sup>107</sup> As an example, a child who has only ever lived in France would view France as his or her habitual residence, despite the fact that his or her parents intended for the United States to eventually be the child’s permanent residence.<sup>108</sup> “It is imperative that courts focus on what the child actually experienced, rather than what the parents intended for the child . . . because the Hague Convention aims to protect the best interests of the child.”<sup>109</sup>

While agreeing that a uniform standard is necessary to achieve the desired outcome of the Hague Convention, one comment proposes that the “Sixth Circuit’s objective approach best effectuates the convention’s intent.”<sup>110</sup> Because the Sixth Circuit focuses on the acclimatization of the child, this analysis is analogous to the “best interests” inquiry of traditional child custody proceedings.<sup>111</sup> This is a metric to which all federal circuits and state courts are accustomed and is also consistent with the intent of the Hague Convention.<sup>112</sup>

Additionally, courts should disregard the shared parental intent given that the “very nature of Child Abduction Convention proceedings presumes that the parents disagree as to where their child’s habitual residence ought to be.”<sup>113</sup> Consequently, focusing on the intent of either or both of the parents is an exercise in

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<sup>105</sup> Weiner, *supra* note 13, at 472.

<sup>106</sup> *Id.* at 471.

<sup>107</sup> *Id.* at 472.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Vivatvaraphol, *supra* note 8, at 3328.

<sup>111</sup> *Id.* at 3363.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

futility.<sup>114</sup> Rather, the focus must be the objective evidence of a child's acclimatization, consisting of such factors as the child's primary language, the school of enrollment, the relationships formed by the child in the particular nation, and the "quality and duration of the child's stay in a particular country."<sup>115</sup> Only then if there is little to no evidence sufficient to provide objective insight from the child's perspective, the courts should then, and only then, turn to parental intent, using such elements as permanence of occupation as guidance.<sup>116</sup> Focusing on the child's acclimatization has garnered support, for another comment posits that acclimation and "objective factual indications" of the place a child considers to be home must be part of any determination of habitual residence.<sup>117</sup>

This comment proposes adoption of the Ninth Circuit approach of primary focus on parental intent with a sliding scale of importance placed upon the wishes of the child(ren) as he or she grows closer to the age of majority, with the final factor being the length of time in the new jurisdiction. This approach is mirrored in an Amici Brief to the Supreme Court regarding *Martinez v. Cahue*,<sup>118</sup> wherein Edwin Freeman, Counsel for Amici writes "[t]he definition of habitual residence must be a synthesis of joint parental intent combined with physical relocation. The length of time in a new jurisdiction as well as the age of the minor child are . . . to be considered."<sup>119</sup> This synthesized approach is the most balanced and fair of the approaches. The intent of parents, who are often in the best position to determine the permanent residence of the child, is weighed heavily, although not as the only factor. Furthermore, courts should place more emphasis on the opinion of older minor children when determining their habitual residence, resulting in a child feeling that he or she had a choice

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 3365.

<sup>116</sup> *Id.* at 3363.

<sup>117</sup> Stephen I. Winter, Comment, *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, 356–57 (2010).

<sup>118</sup> See, e.g., *Cahue*, 826 F.3d 983; Amicus Brief in Support of Petitioner in *Cahue*, *supra* note 9, at 23.

<sup>119</sup> *Id.*



in his or her new life.<sup>120</sup> Finally, since the length of time the child has resided in a jurisdiction would be considered, much of the guesswork of whether the child has acclimated to the new environment will be removed, because a history of how well the child has adjusted to the new school, any possible language barriers, and friendships and other relationships will all be taken into consideration. All of these are strong indicators of a child's adjustment to the new residence, which when taken with the intent of the parents and the age of the child, provides the most accurate, comprehensive, and fair metric the Supreme Court can use to determine the appropriate habitual residence for a child under the Hague Convention.

## VI. Conclusion

The different ways in which the various U.S. courts interpret habitual residence for Hague Convention Cases is a problem that affects every member of the family involved in such a dispute. Furthermore, the differences in interpretations can lead to jurisdictional shopping, inconsistent verdicts, and even due process violations for unwed fathers. Despite the extensive case law regarding habitual residence under the Hague Convention, the only court in the United States that can still fix this messy situation is the Supreme Court. If families and the children involved in these cases have any hope of fair and just outcomes in their cases, the Supreme Court must provide a unifying definition of "habitual residence" to cure the split among the circuits and state courts.

Tristan Medlin

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<sup>120</sup> See, e.g., Joy S. Rosenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y.C. L. REV. 127, 138 (2007) (explaining that children must have a voice in all custodial proceedings); Mark L. Scroggins, *Key Issues and Challenges in Family Law*, 2014 WL 5465754, at 8. ("As the children get older they are going to have some say in which parent they would like to live with, and while their opinion is not definitive by any stretch of the imagination, it is definitely something that a court will rely on in determining what is in the child's best interest.").

