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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

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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

JEFF ATKINSON*

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I. Importance of “Habitual Residence” in Hague Convention Cases

The Hague Convention on the Civil Aspects of International Child Abduction¹ provides for the prompt return of children who have been

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1. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670 (entered into force Dec. 1, 1983) [hereinafter CCAICA]; *see also* Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494 (Mar. 26, 1986). Drafting of the Hague Convention on the Civil Aspects of International Child Abduction was concluded at the Hague in the Netherlands on October 25, 1980. *See id.* The United States Senate ratified the Convention in October 1986. The text of the Convention and related materials are available online. *See Full Text: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.text&cid=24 (last visited June 24, 2011). The U.S. State Department’s website also contains material regarding International Parental Child Abduction. *See International Parental Child Abduction*, TRAVEL.STATE.GOV., http://travel.state.gov/abduction/abduction_580.html (last visited June 24,

wrongfully taken from their state of habitual residence or wrongfully retained outside their state of habitual residence.² Thus, a key element of an action under the Hague Convention is ascertainment of the child's state (country) of habitual residence. If a state from which a child is taken not found to be the child's habitual residence, the return remedy of the Convention is not available.³

Under the International Child Abduction Remedies Act (ICARA), the burden of proof for proving the child's state of habitual residence is preponderance of the evidence.⁴

The meaning of "habitual residence" also is important for another Family Law Convention – the Hague Convention on the Protection of Children – which determines which country has jurisdiction to determine a child's custody or protect a child's property.⁵ The United States ratified the convention in 2010.⁶

II. Lack of Fixed Definition of "Habitual Residence"

The Hague Abduction Convention does not define "habitual residence." The term is commonly used in international conventions covering a variety of subjects, and the drafters of the conventions deliberately avoided seeking

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2. See *CCAICA*, *supra* note 1, at art. 3 ("The removal or the retention of a child is to be considered wrongful where – (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."); *CCAICA*, *supra* note 1, at art. 12 ("Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.").

3. See *Holder v. Holder*, 392 F.3d 1009, 1014-15 (9th Cir. 2004).

4. See 42 U.S.C. §§ 11603(e)(1) (2006) ("A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence – (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention . . ."); *Robert v. Tesson*, 507 F.3d 981, 994-95 (6th Cir. 2007); *Humphrey v. Humphrey*, 434 F.3d 243, 246 (4th Cir. 2006).

5. See Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 2204 U.N.T.S. 39130, available at <http://hcch.e-vision.nl/upload/conventions/txt34en.pdf>.

6. Press Release, U.S. Sec'y of State, U.S. Signature of the Child Protection Convention (Oct. 22, 2010), <http://www.state.gov/secretary/rm/2010/10/149860.htm>.

to impose a precise, fixed definition. A 1989 Hague Convention case from the United Kingdom, *In Re Bates*,⁷ frequently cited in the United States,⁸ stated: "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions."⁹

Courts in the United States also have noted that the Convention does not provide a definition of "habitual residence."¹⁰ The Ninth Circuit Court of Appeals said the decision to not include a definition of "habitual residence" in the Convention "has helped courts avoid formalistic determinations but also has caused considerable confusion as to how courts should interpret 'habitual residence.'"¹¹

III. Need for "Settled Purpose;" General Description of "Habitual Residence"

In *In re Bates*, the court described "habitual residence" as follows:

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

7. No. CA 122.89, 1989 WL 1683783 (UK), High Court of Justice, Family Division Court, Royal Court of Justice (1989).

8. See generally *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001); *Feder v. Evans-Feder*, 63 F.3d 217, 222-24 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

9. *In re Bates*, 1989 WL 1683783, at *13 (quoting 1 DICEY & MORRIS ON THE CONFLICT OF LAWS 166 (Lawrence Collins et al. Eds., 11th ed. 1987)).

10. See, e.g., *Nicolson v. Pappalardo*, 605 F.3d 100, 103-04 (1st Cir. 2010); *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005); *Silverman v. Silverman*, 338 F.3d 886, 897 (8th Cir. 2003), cert. denied, 540 U.S. 1107 (2004); *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001); see also Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 20 (1994) ("The Convention does not provide a definition of habitual residence, but identifying the State of habitual residence is critical.").

11. *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004).

a sufficient degree of continuity to be properly described as settled.¹²

It is generally agreed a person can have only one habitual residence at a time,¹³ although as the Ninth Circuit has noted, “The exception would be the rare situation where someone consistently splits time more or less evenly between two locations, so as to retain alternating habitual residences in each.”¹⁴ Determination of habitual residence “is a fact-specific inquiry that should be made on a case-by-case basis. Moreover, . . . a parent cannot create a new habitual residence by wrongfully removing and sequestering a child.”¹⁵ The issue of “settled intention” does not depend on express declarations alone.¹⁶ “Settled intention” can be “manifest from one’s actions; indeed, one’s actions may belie any declaration that no abandonment was intended.”¹⁷

IV. Perspective of Child vs. Perspective of Parents

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.

The Sixth Circuit Court of Appeals in *Friedrich v. Friedrich* held: “To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.”¹⁸ The court in *Friedrich* described the instant action as “a simple case.”¹⁹ The child was born in Germany.²⁰ The mother was a U.S. citizen, serving in the U.S. Army in Germany.²¹ The father was a German citizen, employed on the military base as a club manager and bartender.²² When their child was 19 months old, the parents separated, and the mother left Germany for the United States with the child.²³ Mrs. Friedrich departed Germany without

12. *In re Bates*, 1989 WL 1683783, at *13.

13. *See Mozes*, 239 F.3d at 1075 n.17; *Friedrich*, 983 F.2d at 1401.

14. *See Mozes*, 239 F.3d at 1075 n.17.

15. *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001).

16. *See Mozes*, 239 F.3d at 1075.

17. *Id.*; *see also Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005) (“In making this determination [of habitual residence] the court should look, as always in determining intent, at actions as well as declarations.”).

18. 983 F.2d at 1401.

19. *See id.* at 1402.

20. *See id.*

21. *See id.* at 1398

22. *See id.*

23. *See id.* at 1399.

Mr. Friedrich's consent or knowledge.²⁴ Mr. Friedrich filed a Hague Convention action in the U.S. seeking return the child.²⁵ The Sixth Circuit Court of Appeals held that the child was a habitual resident of Germany at the time of his removal.²⁶ "[The child] had resided exclusively in Germany. Any future plans that Mrs. Friedrich had for [the child] to reside in the United States are irrelevant to our inquiry."²⁷ Thus, the custody dispute regarding the child should be heard in Germany – the child's state of habitual residence – unless a defense to return of the child can be proved.²⁸ The case was remanded to the trial court.²⁹

Another case in which the Sixth Circuit focused on the perspective of the children rather than the parents is *Robert v. Tesson*.³⁰ *Robert* involved twin six-year-old boys who had moved multiple times with their parents between the United States and France, although the boys had spent more time in the United States than in France.³¹ In the one-year period before litigation commenced, the children spent ten months in the U.S., and three weeks in France before the mother left again to the U.S. with the children, leaving the father a note about mother's and children's departure.³² During the ten-month stay in the U.S., the boys attended kindergarten in the Denver area, vacationed with the mother's family in Yellowstone National Park, and visited their maternal grandmother in Baton Rouge.³³ The Sixth Circuit cited with approval the magistrate judge's finding that "the children became 'more and more socialized in the United States.'"³⁴ The court said: "a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective."³⁵ The court also said: "The twins' final trip to France lasted only three short weeks. In that time, they had few experiences that would have acclimatized them to their new surroundings, or which would indicate a settled purpose to remain in France."³⁶

24. *See id.*

25. *See id.*

26. *See id.* at 1402.

27. *See id.* at 1401.

28. *See id.* at 1403.

29. *Id.*

30. 507 F.3d 981, 993 (6th Cir. 2007).

31. *See id.* at 984-86.

32. *See id.* at 987, 997.

33. *See id.* at 986.

34. *Id.* at 996.

35. *Id.* at 998 (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)).

36. *Id.*

Other courts have placed more emphasis on the intentions of the parents than on than the perspectives of the child. In a Second Circuit case, *Gitter v. Gitter*,³⁷ the court held:

[I]n determining a child's habitual residence, a court should apply the following standard: First, the court should inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent.³⁸

In *Gitter*, the father wanted to move from the United States to Israel.³⁹ The mother was reluctant to do so, but agreed to move to Israel on a trial basis when the child was three months old.⁴⁰ After eleven months in Israel, the mother returned to the United States with the child, and the mother expressed a desire to remain in the United States.⁴¹ The father, with the aid of a family friend "eventually convinced [the mother] to return to Israel by promising her that if she were still unhappy in six months, she could return to the United States."⁴² Approximately five months later, the mother and child traveled to the United States, purportedly on vacation, and did not

37. 396 F.3d 124 (2d Cir. 2005).

38. *Id.* at 134. Other circuit courts have focused on parental intent. See Maxwell v. Maxwell, 588 F.3d 245, 251 (4th Cir. 2009); Ruiz v. Tenorio, 392 F.3d 1247, 1252-54 (11th Cir. 2004)(per curiam); Mozes v. Mozes, 239 F.3d 1067, 1076-78 (9th Cir. 2001); see also Nicolson v. Pappalardo, 605 F.3d 100, 103-04 (1st Cir. 2010) ("the majority of federal circuits . . . have adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence"). *But cf.* Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995) ("we believe 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. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.")

39. See *Gitter*, 396 F.3d at 128.

40. See *id.*

41. See *id.* at 128-29.

42. *Id.* at 129.

return to Israel.⁴³ The father filed an action in New York federal court seeking return of the child under the Hague Convention.⁴⁴

In explaining why the court should give primary focus to the intent of the parents, the court said: “[c]hildren . . . normally lack the material and psychological wherewithal to decide where they will reside.’ Thus, it is more useful to focus on the intent of the child’s parents or others who may fix the child’s residence. . . . Informed by these holdings, we will presume that a child’s habitual residence is consistent with the intentions of those entitled to fix the child’s residence at the time those intentions were mutually shared.”⁴⁵

The Second Circuit seemed to agree with the trial court’s finding “that there was no ‘settled mutual intent to make Israel [the child’s] permanent home.’”⁴⁶ The case was nonetheless remanded for application of the proper legal standard, including examination of “the evidence to determine if it unequivocally points to the child having acclimatized and thus acquired Israel as his habitual residence.”⁴⁷

Similarly, in *Ruiz v. Tenorio*, the 11th Circuit focused more on the intent of the parents than the perspective of the children.⁴⁸ In *Ruiz*, the father was a citizen of Mexico; the mother was a citizen of the U.S.; and the children were approximately ages five and ten when the litigation began.⁴⁹ After having spent seven years in United States, the family moved to Mexico for what the father and mother agreed was “a trial period and that if it did not work out, the family would move back.”⁵⁰ The family spent more than two years and ten months in Mexico, and the children were enrolled in school there.⁵¹ The mother took the children to the U.S. and told the father they would not be returning.⁵² The father convinced the mother to return to Mexico and give the marriage another try.⁵³ She did so, but the reconciliation attempt lasted only a few months, and the mother then left for

43. *See id.*

44. *See id.*

45. *Id.* at 132-33 (quoting *Mozes v. Mozes*, 239 F.3d 1061, 1076 (9th Cir. 2001)) (alteration in original) (footnotes omitted).

46. *Id.* at 135 (quoting *Gitter v. Gitter*, No. 03-CV-3374, 2003 WL 22775375, at *4 (E.D. N.Y. Nov. 20, 2003)).

47. *Id.* at 135-36.

48. *See* 392 F.3d 1247, 1253-54 (11th Cir. 2004) (per curiam).

49. *See id.* at 1249-50.

50. *Id.* at 1249.

51. *See id.* at 1249-50, 1255.

52. *See id.* at 1250.

53. *See id.*

the U.S. with the children without telling the father.⁵⁴ The father filed a wrongful removal action under the Hague Convention in the U.S.⁵⁵ The District Court and the Court of Appeals found that the U.S. – and not Mexico – was the children’s state of habitual residence.⁵⁶ Although the court appeals “acknowledge[d] that this is a relatively close case,”⁵⁷ the court said “there was never a settled mutual intention on the part of the parents” to abandon the U.S. as the state of habitual residence and establish a new state of habitual residence in Mexico.⁵⁸

Had *Ruiz* been decided by the Sixth Circuit Court of Appeals, the result would have been different. In criticizing the decision in *Ruiz*, the Sixth Circuit said: “A child who lives in Mexico, attends Mexican school, and makes Mexican friends for three years builds an attachment to Mexico that would lead any child to call that country ‘home.’”⁵⁹ Thus, the Sixth Circuit would have found that Mexico was the state of habitual residence of the Ruiz children.

V. Factors Considered When Determining “Habitual Residence”

Courts consider a variety of factors when determining a child’s habitual residence. The factors can be divided into two broad categories: factors regarding intent and factors regarding acclimatization of the child to the country of residence.⁶⁰ A single factor usually is not determinative, and courts often need to weigh conflicting factors. This section will list the factors that have been considered by courts and provide brief commentary about each.

A. Factors Related to Parental Intent

- *Parental employment* – The employment of one or both parents in a country to which the parents recently moved can be evidence of establishing a new habitual residence. Conversely, leaving one’s employment in a country can be evidence of leaving a prior state of habitual residence.⁶¹

54. *See id.*

55. *See id.*

56. *See id.*

57. *Id.* at 1256.

58. *Id.*

59. *Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007).

60. A list containing some of these factors was provided in *Maxwell v. Maxwell*. *See* 588 F.3d 245, 252-54 (4th Cir. 2009).

61. *See, e.g., Feder v. Evans-Feder*, 63 F.3d 217, 218-19, 224 (3d Cir. 1995) (husband terminated from job at U.S. bank and accepted job at Australian bank; wife, although she had misgivings about marriage, moved to Australia and accepted a role in an upcoming performance

- *Purchase of home* – Purchase of a home also is evidence of establishing habitual residence.⁶² Purchase of a home is more likely to be a basis for such a finding than short-term stays with relatives or in a rental apartment.⁶³

- *Moving of belongings* – The movement of family belonging can establish intent to establish a new habitual residence.⁶⁴ However, shipping some belongings while keeping other belongings in the state from which one moved can be evidence of not intending to change habitual residence.⁶⁵

- *Location of bank accounts* – A parent's decision to maintain bank accounts in a country where the parent had lived, despite spending time in a new country, is evidence of the parent's tie to the original country.⁶⁶

- *Obtaining driver's license and professional licenses* – Obtaining a driver's license or professional license in a new country (or attempting to obtain such licenses) is evidence of intent establish a new habitual residence.⁶⁷

- *Marital instability* – If the family is moving at a time of marital instability, that can be viewed as supporting evidence that at least one of the parents did not intend to live at the new location indefinitely, and thus there was not intent to establish a new habitual residence.⁶⁸ This is particularly true if the parties agreed the move was for a "trial period."⁶⁹

of an opera company).

62. See, e.g., *Feder*, 63 F.3d at 224 (couple purchased and renovated home in Australia).

63. See e.g., *Papakosmas v. Papakosmas*, 483 F.3d 617, 627 (9th Cir. 2007) (not finding Greece to be the habitual residence when, among other factors, the family initially stayed with relatives and then in a rental apartment).

64. See, e.g., *Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003) ("The [trial] court should have determined the degree of settled purpose from the children's perspective, including the family's change in geography along with their personal possessions and pets . . ."); *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 381, 385-86 (D. N.J. 2005) (shipping furniture including children's beds and other belongings from Argentina to U.S. was evidence of U.S. becoming habitual residence).

65. See *Maxwell v. Maxwell*, 588 F.3d 245, 253 (4th Cir. 2009).

66. See, e.g., *Ruiz v. Tenorio*, 392 F.3d 1247, 1255 (11th Cir. 2004) (per curiam) (the mother's maintaining bank accounts and credit cards in the U.S. was cited as evidence that "the family was in limbo during its stay in Mexico" and thus supported a finding that the U.S. remained the habitual residence of the children).

67. See *Silvestri*, 403 F. Supp. 2d at 381 (father's "repeated efforts to obtain a [driver's] license, as well as the other facts surrounding his move to the United States, belie [his] assertion that he immediately objected to and opposed establishing roots in the United States"). In *Ruiz v. Tenorio*, midway during the family's period living in Mexico, the mother traveled to Florida and obtained a nursing license, which was viewed as evidence that she did not intend Mexico to become the habitual residence of herself or the children. See 392 F.3d at 1250, 1254.

68. See *Ruiz*, 392 F.3d at 1255.

69. See, e.g., *id.* at 1249, 1254; see also *Gitter v. Gitter*, 396 F.3d 124, 128-29, 135 (2d Cir.

● *Citizenship; immigration status; type of visa* – If a parent and child come to a country on a tourist visa and do not seek more permanent residency status, that can lead to a finding that habitual residence in the prior country from which the parent and child came was not abandoned.⁷⁰ A court has observed, however, “While an unlawful or precarious immigration status does not preclude one from becoming a habitual resident under the Convention, it prevents one from doing so rapidly.”⁷¹

B. Factors Related to Acclimatization of the Child

Discussing acclimatization, the Ninth Circuit Court of Appeals said: “[T]he inquiry is, more generally, whether the children’s lives have become firmly rooted in their new surroundings. Simply put, would returning the children to [the country from which they have been taken] be tantamount to sending them home?”⁷² Factors considered by courts in determining acclimatization include:

● *School enrollment* – Enrollment in school can be a key factor in showing that the child has acclimated to a new residence.⁷³

● *Participation in social activities* – A child’s socialization with children at school or outside of school in a new environment increases the likelihood the child will be found to have acclimated to the new environment.⁷⁴ Conversely, when the evidence shows the child has not adapted to a new environment, the new environment will be less likely to be found to be the child’s habitual residence.⁷⁵

2005).

70. *See, e.g., Ruiz*, 392 F.3d at 1255 (finding there was not shared intent to abandon residence in the United States when the mother “and the children went to Mexico on tourist visas, and there is no evidence that either [the mother or father] sought to acquire permanent legal status or Mexican citizenship for [the mother] and the children”); *Mozes v. Mozes*, 239 F.3d 1067, 1082 (9th Cir. 2001) (suggesting the habitual residence of the children may be Israel rather than the United States when the mother “and the children left for the United States with a temporary visa, casting considerable doubt on whether they would be allowed to remain here indefinitely even if they wished to”).

71. *Mozes*, 239 F.3d at 1082 n.45.

72. *Holder v. Holder*, 392 F.3d 1009, 1019 (9th Cir. 2004).

73. *See, e.g., Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) (citing a four-year-old’s attendance in preschool and enrollment in kindergarten for the following year during the family’s nearly six-month stay in Australia as evidence that Australia had become the child’s habitual residence); *Silvestri v. Oliva*, 403 F. Supp. 2d 378, 386 (D. N.J. 2005) (citing withdrawal of children from school in Argentina and enrollment in a U.S. school as evidence of U.S. becoming the children’s habitual residence).

74. *See Silvestri*, 403 F. Supp. 2d at 382, 386-87 (the court found the “children have made friends in school as well as friends they see after school” after they moved to the U.S.).

75. In *Papakosmas v. Papakosmas*, the court of appeals court found Greece not to be the habitual residence when “the district court noted that the evidence showed that the couple’s son

● *Length of stay in the country* – The longer a child (and family) stay in a country, the more likely the child will be found to have acclimated the country. Since there is not a precise definition of “habitual residence” under the Convention, the length of time is not fixed. Children have been found to have acclimated and, thus to have established a new country of habitual residence, in as little as two and one-half months.⁷⁶ However, in one case, the children’s stay in a new country of more than two years and ten months was found not to have established a new habitual residence.⁷⁷

● *Child’s age* – An older child is more likely to have experiences that would result in a finding of acclimatization, including ties to school and socialization.⁷⁸ Regarding very young children, the Ninth Circuit observed: “if a child is born where the parents have their habitual residence, the child normally should be regarded as a habitual resident of that country. . . . Once this initial habitual residence has been established, we recognize that it is practically impossible for a newborn child, who is entirely dependent on its parents, to acclimatize independent of the immediate home environment of the parents.”⁷⁹

was not adapting well to his new environment, and often had headaches and crying fits.” 483 F.3d 617, 626 (9th Cir. 2007). The court also said: “[W]e note that although the passage of time itself is not dispositive on the issue of acclimatization, it is instructive that the children spent nearly all of their lives in the United States, spoke little Greek, and had visited the country only three or four times for two to three weeks at a time. With the irregular set-up of their household in Greece, four months was an insufficient time for the children to ‘develop[] deep-rooted ties to the family’s new location.’” *Id.* at 627 (alteration in original) (quoting *Holder*, 392 F.3d at 1021).

76. In *Silvestri v. Oliva*, the children arrived in the U.S. from Argentina on March 22, 2003; the court found the father insisted that the children return to Argentina in early June 2003, and the mother refused. *See* 403 F. Supp. 2d at 384-86. Ultimately, the court determined that the habitual residence was the United States. *Id.* In *Feder v. Evans-Feder*, the child “moved, with his mother and father, from Pennsylvania to Australia where he was to live for at the very least the foreseeable future, and stayed in Australia for close to six months, a significant period of time for a four-year old child.” *See* 63 F.3d 217, 224 (3d Cir. 1995).

77. *Ruiz v. Tenorio*, 392 F.3d 1247, 1250, 1259 (11th Cir. 2004) (per curiam).

78. *See supra* notes 74-76 and accompanying text.

79. *Holder*, 392 F.3d at 1020-21 (footnote omitted) (citation omitted). Regarding the impact of the age of a very young child on determining habitual residence, the Sixth Circuit (which focuses initially on the intent of the parents) said:

While we recognize that a very young or developmentally disabled child may lack cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose, this case does not present us with such a child. We therefore express no opinion on whether the habitual residence of a child who lacks cognizance of his or her surroundings should be determined by considering the subjective intentions of his or her parents.

Robert v. Tesson, 507 F.3d 981, 992 n.4 (6th Cir. 2009) (citation omitted).

VI. Comparison of “Habitual Residence” and Jurisdictional Principles of the UCCJEA

The rules governing child custody jurisdiction in the United States are contained in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been adopted in all states except Massachusetts.⁸⁰

The rules of the UCCJEA are more precise than the rules of habitual residence. While “habitual residence,” as the term has been construed by courts, relies on subjective concepts such as “intent,” “shared intent,” and “acclimatization,” the UCCJEA uses the term “lives” and sets specific time periods. Under the UCCJEA, the power to make an initial custody determination is given to the child’s “home state” if one exists.⁸¹

“Home State” means the State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.⁸²

Once a state has made a child custody determination, that state “has exclusive, continuing jurisdiction over the determination” until the child, the child’s parent (or the person acting as parent) have all left the state, or those persons no longer have a “significant connection” with the state.⁸³

80. See *Legislative Fact Sheet - Child Custody Jurisdiction and Enforcement Act*, UNIFORM LAWS COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (last visited Sept. 29, 2011); see also *UCCJEA Adoptions*, UNIFORM LAWS COMMISSION, <http://www.uniformlaws.org/Shared/docs/UCCJEAadoptions.pdf> (last visited Sept. 29, 2011). The UCCJEA was approved by the National Conference of Commissioners on Uniform State Laws (now called the Uniform Law Commission) in 1997. See Nat’l Conference of Comm’rs of Unif. State Laws, *Uniform Child Custody Jurisdiction & Enforcement Act*, U. PENNSYLVANIA L. SCH., <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.pdf> (last visited June 24, 2011). The jurisdictional principles of the UCCJEA are similar to those of the federal Parental Kidnapping Prevention Act. See 28 U.S.C. § 1738A (2006). Professor Robert Spector of the University of Oklahoma College of Law served as Reporter for the Act. Jeff Atkinson of DePaul University College of Law (author of this paper) served as the ABA Advisor for the Act.

81. See Unif. Child Custody Jurisdiction & Enforcement Act § 201(a), 9 U.L.A. 133 (1999 & Supp. 2010).

82. *Id.* § 102(7), 9 U.L.A. 102.

83. *Id.* § 202(a), 9 U.L.A. 134. The full text of section 202 is:

(a) Except as otherwise provided in Section 204, a court of this State which has

There is some ambiguity regarding the UCCJEA’s terms of “temporary absence” and “significant connection,” but the level of ambiguity and uncertainty is much less than has arisen in construing “habitual residence.”

The UCCJEA’s use of the term “lived” in the definition of “home state” focusses on the child’s physical presence rather than intent of the parents.⁸⁴ As the Supreme Court of Texas observed:

[T]he Legislature used the word “lived” “precisely to avoid complicating the determination of a child’s home state with inquiries into the states of mind of the child or the child’s adult caretakers.” . . . The UCCJEA was thus intended to give prominence to objective factors. We believe that the UCCJEA should be construed in such a way as to strengthen rather than undermine the certainty that prioritizing home-state jurisdiction was intended to promote, and thus decline to apply a test to determine where a child “lived” based on the parties’ subjective intent.⁸⁵

Habitual residence as applied through the Hague Convention on the Protection of Children⁸⁶ also places a different burden than the UCCJEA

made a child-custody determination consistent with Section 201 or 203 has exclusive, continuing jurisdiction over the determination until:

(1) a court of this State determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child’s care, protection, training, and personal relationships; or

(2) a court of this State or a court of another State determines that the child, the child’s parents, and any person acting as a parent do not presently reside in this State.

(b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 201.

Id.

84. *See* Unif. Child Custody Jurisdiction & Enforcement Act § 202(7), 9 U.L.A. 658.

85. *Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2005) (quoting *Escobar v. Reisinger*, 2003-NMCA-047, ¶ 16, 133 N.M. 487, 64 P.3d 514. In *Powell*, the court found that Tennessee – and not Texas – was the child’s home state after the child moved from Texas and had lived in Tennessee for eleven months. *See id.* at 328. The court did not accept the mother’s argument that the stay in Texas was only “temporary” and that she intended to return to Texas. *See id.*

86. *See* Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children *supra* note 5.

regarding travel to the forum in actions to modify a custody determination. UCCJEA places the burden of travel to the forum on the party who has changed the status quo by moving away from the forum that made the initial (or prior) custody determination. If a parent moved with the child from the child's former home state, that parent will need to return to the state that issued the prior order to litigate future custody disputes (unless the court that issued the earlier order finds that it is not a convenient forum).⁸⁷ The Hague Convention on the Protection of Children, on the other hand, directs that litigation concerning a child's custody (or property) take place in the state of the child's habitual residence.⁸⁸ Thus, in an action to modify custody of a child, a parent who stayed in the state where an earlier custody determination was made will have to travel to the child's new state of habitual residence to litigate custody or rights of access.⁸⁹

Since the United States has ratified the Hague Convention on the Protection of Children, U.S. courts will use habitual residence to determine which country has jurisdiction over international custody disputes. The Uniform Law Commission has formed a drafting committee to amend the UCCJEA to apply habitual residence to international disputes. The drafting committee held its first meeting in September 2011. The drafting process generally takes two to three years. It is anticipated that the UCCJEA's existing rules regarding home state jurisdiction and exclusive, continuing jurisdiction will continue to apply to custody disputes involving different states within the United States.

VII. Conclusion

Globalization has many facets. In addition to economic and business integration, globalization encompasses international links within families

87. See Unif. Child Custody Jurisdiction & Enforcement Act § 207, 9 U.L.A. 141 (1999) (the "Inconvenient Forum" provision). In order for the state that issued the prior order to have exclusive, continuing jurisdiction, the child, a parent, or a person acting as parent must continue to reside in the state. See *id.* § 202(a), 9 U.L.A. 134-35. (Supp. 2010).

88. Article 5 of the Hague Convention on the Protection of Minors provides:

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

(2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.

See Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *supra* note 5, art. 5(2).

89. See *id.*

and the legal system that govern them. The Hague conventions pertaining to protection of children and international child abduction provide uniform rules for the countries that have adopted the conventions.

Uniformity of law and cooperation between countries are of growing importance as an increasing number of families have ties to more than one country and have disputes that need orderly resolution. The determination of "habitual residence" – a key concept in both conventions – helps resolve the disputes. The legal issues, however, are not always easy to resolve or predictable in outcome given the ambiguity in the term "habitual residence." In the United States, some ambiguities may be resolved if the Supreme Court grants a Hague case to determine the order of consideration and weight that should be given the child's perspective and the parents' intentions.

Both the child's perspective and the parents' intention are important factors. The weight given those factors can vary from case to case, and the importance of the child's perspective will depend on the child's age and level of maturity. The older and more mature a child is, the more weight that should be given the child's perspective when determining the child's habitual residence. Courts should avoid an artificially formalistic determination such as applied in the Second Circuit in *Gitter v. Gitter*, which gave strong presumptive weight to the parents' "shared intent."⁹⁰ The strength of a parent's intent – and the degree to which intent is shared – also can vary from case to case. When determining habitual residence, court should weigh multiple factors without being locked into a preset formula of which factor should be considered first or which factor carries the most weight. The use of multiple factors without pre-assigned weight would be consistent with the conventions' approach not to have a precise definition of "habitual residence" and to avoid of automatic presumptions.⁹¹

By adopting the Hague Convention on the Protection of Children, the U.S. has given up some of the precision and predictability of its own law for determining jurisdiction over international child custody disputes. Nonetheless, the benefits of a uniform international system and increased cooperation between countries should outweigh the reduction of precision and predictability.

90. 396 F.3d 124, 134 (2d Cir. 2005). For discussion of *Gitter*, see *supra* notes 37 - 47 and accompanying text.

91. See *supra* notes 7-11 and accompanying text.