

A HOUSE IS NOT (NECESSARILY) A HOME:
A DISCUSSION OF THE COMMON LAW
APPROACH TO HABITUAL RESIDENCE

ERIN GALLAGHER

INTRODUCTION	463	R
I. OVERVIEW OF THE CHILD ABDUCTION CONVENTION	465	R
II. CANADA	469	R
A. <i>The Case Law</i>	469	R
B. <i>The Efficiency of the Lack of a Defined Standard</i>	475	R
III. THE UNITED STATES	476	R
A. <i>Parental Intent – the Mozes Approach</i>	477	R
B. <i>Balancing Intent with Acclimatization – the Feder Approach</i>	481	R
C. <i>Focus Solely on the Child – the Friedrich Approach</i>	483	R
D. <i>Reconciling the Apparent Three-Way Split</i>	485	R
IV. THE UNITED KINGDOM	488	R
A. <i>Creation of the CJEU Test</i>	490	R
B. <i>The U.K. Adopts the CJEU Mercredi Test</i>	492	R
C. <i>Adaptation of the CJEU Mercredi Test to Convention Cases</i>	494	R
D. <i>Analysis of the New British Approach</i>	495	R
V. THE LACK OF A DEFINITION ALLOWS FOR MULTIPLICITY	497	R
CONCLUSION	499	R

INTRODUCTION

Every year, thousands of children are subject to proceedings under the Hague Convention on the Civil Aspects of International Child Abduction (“Child Abduction Convention” or “Convention”).¹ These proceedings arise when a parent² al-

1. In the most recent survey published by the Hague Conference on Private International Law (“HCCH” or “Hague Conference”) 2,321 applications were made under the Convention in 2008, affecting 3,182 children. Of those, 1,961 applications were for return of the child(ren) (involving 2,705 children) and 360 applications were for access (involving 477 children). This

legedly “abducts”³ a child by taking him or her to a country other than that of his or her “habitual residence.” Thus, in order to determine if the child was abducted, every court faced with a Convention case must determine the child’s “habitual residence.” However, this term is not defined anywhere in the Convention, which has “created complicated issues of interpretation for judges,”⁴ leading to different standards among Contracting States. This Note addresses jurisprudence surrounding this clause in three common law countries: Canada, the United States, and the United Kingdom.⁵

Section I provides a basic overview of the Convention’s purpose and procedures with a particular focus on the “habitual residence” clause. Section II then details the limited case law in Canada surrounding this definition in Convention cases. Section III turns to the United States and gives an overview of the three-way circuit split in the U.S. Courts of Appeals.

was an increase of 45% and 40% respectively from the previous survey of 2003 data. Hague Conference on Private International Law [HCCH], *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I – Global Report*, HCCH Prelim. Doc. No. 8 A, ¶¶ 10–23 (Nov. 2011) available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> [hereinafter *2008 Statistical Analysis*]. As this number increases each survey year (though likely in part due to additional States joining the Convention), it is likely that this number has only increased since 2008.

2. In this paper, “parent(s),” “primary carer(s),” and “custodian(s)” are interchangeable terms. Different terms are used by different courts, but it should be recognized that parents are not the only individuals who have custody rights of children. Notably, the Convention does not cover stranger kidnapping; the individual must have some relation to the child.

3. The term “abduct” is not used anywhere in the Convention other than in the title. In the introduction, “abducts” is used in place of “wrongfully removes or retains,” the operating terms in the Convention.

4. LINDA J. SILBERMAN, CO-OPERATIVE EFFORTS IN PRIVATE INTERNATIONAL LAW ON BEHALF OF CHILDREN: THE HAGUE CHILDREN’S CONVENTIONS 346 (2008).

5. Canada is included because it was one of the original signatories to the Convention. See *Status Table*, HCCH, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Oct. 10, 2014). It is also an example of a State in the earlier stages of its habitual residence jurisprudence, still relying on the British jurisprudence recently overturned. See *infra* Sections II & IV. The United States and the United Kingdom, who receive by far the majority of applications for return, were selected as examples of States with extremely developed jurisprudences. See *2008 Statistical Analysis*, *supra* note 1, at 10.

Section IV analyzes the three recent U.K. Supreme Court decisions regarding habitual residence that responded to the two recent Court of Justice for the European Union (“CJEU”) decisions interpreting the clause. Finally, Section V proposes that the drafters were correct not to define habitual residence and that the seemingly different approaches are not actually irreconcilable.

I. OVERVIEW OF THE CHILD ABDUCTION CONVENTION

The Child Abduction Convention was concluded on October 25, 1980 and entered into force on December 1, 1983.⁶ Over thirty years later, it has ninety-two Contracting States⁷ and is considered the most successful of The Hague Conference on Private International Law’s (“Hague Conference”) family law conventions.⁸ The Convention is meant to be both remedial as well as preventative. Its stated purpose is to “protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.”⁹ Thus, the Convention aspires to: (1) reverse the abduction by having the child returned, thus mitigating the psychological trauma to the child; (2) allow the State of habitual residence to make a decision about custody and visitation (which it has determined is the most appropriate place to do so); and (3) deter future abductions because parties will know that wrongfully removing a child will not provide a more sympathetic forum.¹⁰ However, the Convention is only a provisional remedy;

6. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Child Abduction Convention]; *Status Table, supra* note 5.

7. *Status Table, supra* note 5. Iraq is the most recent country to accede to the Convention, which happened as recently as March 21, 2014. Press Release, HCCH, Singapore Becomes 76th HCCH Member (Apr. 9, 2014), *available at* http://www.hcch.net/index_en.php?act=events.details&year=2014&varevent=356.

8. RHONA SHUZ, *THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 1* (2013).

9. Child Abduction Convention, *supra* note 6, at pmb1.

10. Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1054 (2005) [hereinafter Silberman, *In Search of a Global Jurisprudence*].

it is *not* meant to address the merits of the actual custody of the child(ren).¹¹

As a preliminary matter, the Convention only applies if the child was habitually resident in a Contracting State immediately before the allegedly wrongful removal or retention.¹² A removal or retention is considered wrongful under the Convention if:

- (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.¹³

This requires a court to make two initial determinations. First, was there a breach of rights of custody under the laws of the State where the child was habitually resident? And second, were those rights actually being exercised at the time of removal or retention? If both of those questions are answered in the affirmative, a child must be promptly returned to the State of his or her habitual residence unless one of the exceptions applies.¹⁴

There are arguably five exceptions to mandating the return of the child that has been wrongfully removed or retained in a Contracting State. First, if the “left-behind” parent¹⁵ does not commence proceedings for return of the child within one year from the date of the wrongful removal or retention, a court is not required to order the return of the child if he or

11. Child Abduction Convention, *supra* note 6, art. 19; Silberman, *In Search of a Global Jurisprudence*, *supra* note 10, at 1054. For further reading on the Convention, see generally SCHUZ, *supra* note 8; PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* (1999); SILBERMAN, *supra* note 4.

12. Child Abduction Convention, *supra* note 6, art. 4. Additionally, the Convention ceases to apply when a child turns sixteen. *Id.*

13. *Id.* art. 3 (emphasis added).

14. *Id.* art. 12.

15. The left-behind parent terminology is used for the person making the application for return of the child.

she is now settled in the new environment.¹⁶ Second, if the left-behind parent either consented to or subsequently acquiesced to the removal or retention, a court does not have to order the return of the child.¹⁷ Third, a court is not bound to order the return of the child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”¹⁸ Fourth, if the court finds that the child is mature enough and objects to being returned, it can take into account his or her views and refuse to order return.¹⁹ Finally, the requested State may refuse to return the child if it would not be permitted by its principles relating to the protection of human rights and fundamental freedoms.²⁰

Within these mechanics of the Convention, determining a child’s habitual residence is easily the most important threshold determination in any Hague Convention proceeding.²¹ Habitual residence is important both because the law of the child’s State of habitual residence is used to determine if the removal or retention was wrongful and, if it was wrongful, the child must be returned to his or her State of habitual residence.²² Thus, every court encountering a Convention case

16. Child Abduction Convention, *supra* note 6, art. 12. Courts are still encouraged to return the child in these circumstances. Under this article’s phrasing one must meet a seemingly high bar in showing that the child is settled in its new environment: “[e]ven where the proceedings have been commenced after the expiration of the period of one year . . . shall also order the return of the child, unless . . .” *Id.* See also *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014) (addressing the issues surrounding this exception to return).

17. Child Abduction Convention, *supra* note 6, art. 13. This article also notes that if the left-behind parent was not actually exercising the custody rights, the court does not have to order return. However, if that parent was not exercising his or her rights, then the removal or retention was not wrongful as this determination is part of the initial inquiry into the removal. Thus, it should not count as its own exception. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* art. 20.

21. See *Asvesta v. Petroutsas*, 580 F.3d 1000, 1017 (9th Cir. 2009) (noting that habitual residence “is perhaps the most important inquiry under the Convention”).

22. Tai Vivatvaraphol, Note, *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).

must make a determination of the child's habitual residence at the outset.

Although habitual residence is a very important component of the Convention, following a long-established tradition of the Hague Conference, the drafters did not offer a definition.²³ The Pérez-Vera Explanatory Report ("Pérez-Vera Report") on the Convention states that habitual residence is "a well established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile."²⁴ It was chosen precisely for its flexibility to deal with modern society in addition to being a phrase that was acceptable to both common and civil law legal systems.²⁵ However, there is no further description of the clause, nor any guidance to courts as to what exactly it means or how to apply it. This has led to varying interpretations across the Contracting States and a lack of consensus in whether the term should be more fully defined.²⁶

The courts studied herein attempt to find a balance between the last shared intent of those with custody rights ("parental intent") and the objective facts surrounding the child's presence in the State. This tension in the application of habitual residence parallels the Convention's desire to deter unilateral removal while returning the child to the forum with the most facts to make the best custody determination. Turning now to the three countries chosen for this Note, I address each of their jurisprudences on the term "habitual residence" in turn.

23. Eliza Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, 426, 451 (Permanent Bureau trans., 1982) [hereinafter *Pérez-Vera Report*], available at http://www.hcch.net/index_en.php?act=publications.details&pid=2779 ("The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it.").

24. *Id.* at 445.

25. Beaumont, *supra* note 11, at 89; SHUZ, *supra* note 8, at 176.

26. In 2010, the Conference disseminated a questionnaire to the Convention's Contracting States to determine if there should be a protocol to the Convention. Out of the States that responded, there was a split between those that believed habitual residence should be more clearly defined through a protocol and those that did not want to add a definition. *Responses to the Questionnaire of Nov. 2010*, HCCH, http://www.hcch.net/index_en.php?act=publications.details&pid=5291&dtid=33 (last visited Apr. 8, 2014).

II. CANADA

Canada was the first common law jurisdiction to sign on to the Convention and thus an important country with which to begin this analysis.²⁷ However, of the three countries studied, it has the least detailed jurisprudence regarding the term “habitual residence.”²⁸ The Supreme Court of Canada has not proffered an opinion on the determination of a child’s habitual residence in a Hague Convention (or in any other) context and only two provinces’ Courts of Appeal have addressed the definition. However, the Canadian government does attempt to provide some guidance. According to the Canadian Department of Justice, a child is habitually resident where he or she last lived with both parents in a family setting as long as the family actually adopted the residence.²⁹ These basic concepts come from the original British jurisprudence surrounding the term, but provide little more guidance than the undefined term itself.³⁰

A. *The Case Law*

Only two provinces’ Courts of Appeal have “defined” a child’s habitual residence in Convention cases, and both consider the same factors.³¹ The first decision that fully addressed

27. Canada, France, Greece, and Switzerland were the first four Contracting States. *Status Table*, *supra* note 5.

28. The Canadian jurisprudence considered in this paper does not include that of Quebec as the Civil Code of Quebec governs family law in Quebec. *Civil Code*, JUSTICE QUÉBEC, <http://www.justice.gouv.qc.ca/english/sujets/glossaire/code-civil-a.htm> (last visited Apr. 7, 2014).

29. *What Does the Term “Habitual Residence” Mean?*, DEPT. OF JUSTICE, http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/rhro_cl/p2.html (last visited Apr. 10, 2014).

30. *See, e.g.*, *Chan v. Chow*, 2001 BCCA 276 (Can.); *Korutowska-Wooff v. Wooff*, (2004) 242 D.L.R. 4th 385, ¶ 8 (Can. Ont. C.A.); *Jackson v. Graczyk*, 2007 ONCA 388, ¶ 37 (Can.). However, the British test for habitual residence has completely changed within the past year and no longer follows the approach that will be detailed in the Canadian section. *See infra*, Section IV.

31. In my most recent search using the Canadian Legal Information Institute website, I searched “child abduction AND ‘habitual residence’” in Appeal Courts. Besides British Columbia and Ontario, only Alberta, Nova Scotia, Newfoundland & Labrador, and Manitoba drew results. However, these cases only cited the Convention and did not provide any analysis of the phrase as applied to Convention cases. CANLII, <http://www.canlii.org/en/> (last visited Apr. 10, 2014).

the term, *Chan v. Chow*,³² comes from the Court of Appeal for British Columbia. In this case, the parents were married in Canada and had a child there.³³ After several breakups and attempts at reconciliation while moving around the world, the couple permanently separated while living as a family in Hong Kong.³⁴ However, a few months later, the father took the child back to Canada without the mother's knowledge or consent and the mother applied for the child's return to Hong Kong under the Convention.³⁵ The chambers judge decided that the child was not habitually resident in Hong Kong because the child's permit to remain in Hong Kong and the mother's immigration status were set to expire.³⁶ The Court of Appeal overruled this judgment and found that Hong Kong was the child's habitual residence because the nine months the child spent there was an *appreciable amount of time* and the parents had a *settled intention* to make it the child's home prior to the final separation.³⁷

In coming to this conclusion, the court analyzed British jurisprudence and borrowed the definition from the 1990 House of Lords decision in *In Re J*:

The first point is that the expression "habitually resident" as used in Article 3 of the Convention is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be *understood according to the ordinary and natural meaning of the two words it contains*. The second point is that the question whether a person is or is not habitually resident in a specified country is a *question of fact to be decided by reference to all the circumstances of any particular case*. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resi-

32. *Chan*, 2001 BCCA 276.

33. *Id.* ¶ 3.

34. *Id.* ¶¶ 3–12. At this point the couple had already been divorced in Canada for a year, but made one final attempt to reconcile in Hong Kong. They had joint custody of the child. *Id.* ¶¶ 7–12.

35. *Id.* ¶¶ 14–15.

36. *Id.* ¶ 23.

37. *Id.* ¶¶ 44–47.

dent in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An *appreciable period of time and a settled intention* will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.³⁸

From this statement, the court determined that the inquiry into a child's habitual residence in Convention cases should be guided by three principles:

- 1) The question is a question of fact to be decided by reference to all the circumstances of the case.
- 2) An 'habitual residence' is established by residing in a place for an appreciable period of time, with a 'settled intention.'
- 3) A child's 'habitual residence' is tied to the habitual residence of his or her custodian(s).³⁹

Additionally, this court adopted the *R v. Barnet London Borough Council, ex p Shah* ("Shah") meaning of "settled intention or 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. This 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*

38. In re J., [1990] 2 A.C. 562, 578 (H.L.), *aff'd sub nom C. v. S.*, [1990] 2 All E.R. 961 (H.L.) (appeal taken from Eng.).

39. *Chan*, 2001 BCCA 276, ¶ 32.

*living where one does has a sufficient degree of continuity to be properly described as settled.*⁴⁰

Expanding on this definition, several years later, in *Korutowska-Wooff v. Wooff*, the Ontario Court of Appeal determined that “a ‘settled intention’ or ‘purpose’ is an intent to stay in a place whether temporarily or for a particular purpose such as employment, family, etc.”⁴¹ Thus, the guiding principles grew to four:

- 1) [T]he question of habitual residence is a question of fact to be decided based on all of the circumstances;
- 2) [T]he habitual residence is the place where the person resides for an appreciable period of time with a “settled intention”;
- 3) [A] “settled intention” or “purpose” is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.; [and]
- 4) [A] a child’s habitual residence is tied to that of the child’s custodian(s).⁴²

The British Columbia Supreme Court attempted to parse out the “appreciable period of time” and “settled intention” factors in a 2008 case, *Fasiang v. Fasiangova*.⁴³ The court explored Canadian, British, and American case law.⁴⁴ In this case, the parents were married in Slovakia, where their son was born in October 2002.⁴⁵ They resided in Slovakia with the child until January 2004 and then moved between Canada and Slovakia, residing in Canada from June 2005 through May 2008.⁴⁶ In May 2008, the mother took the child back to

40. R v. Barnet London Borough Council, *ex parte Shah*, [1983] 2 A.C. 309, 344 (H.L.) (hereinafter *Shah*) (emphasis added).

41. *Korutowska-Wooff v. Wooff*, [2004] CanLII 548, ¶ 8 (Can.). Though not expressly adopted by the British Columbia Court of Appeal, British Columbia lower courts have used this four-point test. See, e.g., *Mathews v. Mathews*, [2007] BCSC 1825, ¶ 12 (Can.); *Fasiang v. Fasiangova*, [2008] BCSC 1339, ¶ 62 (Can.).

42. *Mathews*, [2007] BCSC ¶ 12.

43. *Fasiang*, [2008] BCSC ¶ 62.

44. *Id.*

45. *Id.* ¶¶ 12–13.

46. *Id.* ¶¶ 14–17.

Slovakia.⁴⁷ One week after she arrived, the mother filed for divorce in Slovakia, but later that month returned to Canada.⁴⁸ Two days later, the father went to Slovakia and petitioned Canada for return of the child to Slovakia.⁴⁹ The court determined that the child was habitually resident in Slovakia due to the actions of the mother invoking the Slovakian court's jurisdiction and the alleged agreement between the parents that they were planning to take the child back to live in Slovakia permanently.⁵⁰

Turning first to the term "appreciable period of time," the court commented on a few standards from the case law. First, the court noted that it is not a fixed period and could be as short as a day.⁵¹ Additionally, what constitutes an appreciable period of time is different if the party is resuming habitual residence in a location rather than establishing residence in a location for the first time.⁵² While neither of these standards significantly expands on the ordinary meaning of "appreciable period of time," the court listed other factors to consider: "bringing personal possession to the new country; taking the necessary steps to establish residence before travelling to the new country; having a right of abode in the new country; seeking to bring family members to the new country; and having 'durable ties' to the new country."⁵³

The array of case law the court cited for "settled intention" includes a non-exhaustive list of factors pulled from *Petnehazi v. Kresz*:⁵⁴

1. Both parties have relocated to the new state;
2. The custodial parent is employed in the new state;
3. The custodial parent had taken steps to satisfy the immigration requirements of the new state;
4. The children were enrolled in school in the new state;

47. *Id.* ¶ 18.

48. *Id.* ¶¶ 22–25.

49. *Id.* ¶¶ 25–26.

50. *Id.* ¶¶ 66, 97–101.

51. *Id.* ¶¶ 70–71 (citing *Nessa v. Chief Adjudication Officer*, [1999] 1 W.L.R. 1937, 1943 (H.L.) (appeal taken from Eng.) and *deHaan v. Gracia*, [2004] ABQB 74 ¶ 4.6 (Can.))

52. *Id.* ¶ 74 (citing *Nessa*, [1999] 1 W.L.R. 1943).

53. *Id.* ¶ 73 (citing *Nessa*, [1999] 1 W.L.R. 1942).

54. *Petnehazi v. Kresz*, [1999] B.C.J. 1238 (Can.).

5. The parents had purchased one-way tickets to the new state; and
6. Accommodation has been arranged in the new state.⁵⁵

However, according to the court, the parties' settled intention "will stand out clearly as a matter of general impression."⁵⁶ Further, the court announced several somewhat more concrete rules for determining settled intention. First, settled intent is determined just prior to the physical move.⁵⁷ Second, if both parents share the intention to change the child's residence, that intent controls the child's location.⁵⁸ Third, one parent cannot unilaterally decide to change the child's habitual residence.⁵⁹ Finally, settled intention to change a child's habitual residence alone is not enough; the child must actually move, and an appreciable amount of time must pass.⁶⁰

These guiding factors could indicate that Canadian courts only look to the parents' intentions and objective facts surrounding a parent's presence in a location. Focusing solely on parental intent can cause problems, as detailed in the following section on U.S. jurisprudence.⁶¹ Further, not looking to the child's circumstances at all can be detrimental to the child if he or she has significantly acclimated to a particular location. For example, in *Fasiang*, the child mostly spoke English, had spent the past three years in Canada, and went to school there.⁶² The court's decision that the child was habitually resident in Slovakia because it appeared that the parents had agreed to it and the child stayed there for two weeks did not take into account the significant ties the child had to Canada. However, some Canadian courts do consider objective facts related to the child's presence, such as having a regular pediatrician or attending school in a certain location.⁶³ Thus, it does

55. *Fasiang*, [2008] BCSC ¶ 63 (citing *Petnehazi*, [1999] B.C.J. ¶ 36).

56. *Id.* ¶ 61 (citing *Chan*, [2001] BCCA ¶ 34).

57. *Id.* ¶ 64 (citing *deHaan*, [2004] ABQB ¶ 32).

58. *Id.* ¶ 65 (citing *Priora v. Priora*, [2003] ABQB 576 ¶ 21 (Can.)).

59. *Id.* ¶ 66 (citing *Priora*, [2003] ABQB ¶ 19).

60. *Id.* ¶ 68 (citing *Mozes v. Mozes*, 239 F. 3d 1067 (9th Cir. 2001), cited in *Priora*, [2003] ABQB ¶ 25). Ironically, this last rule loops back to the "appreciable period of time" standard.

61. See *infra* Section III.A.

62. *Fasiang*, [2008] BCSC ¶ 50.

63. See, e.g., *Rey v. Getta*, [2013] BCCA 369, ¶ 23 (Can.).

not appear that the jurisprudence is exclusively parental-focused and they may take the child's acclimatization into account.⁶⁴

B. *The Efficiency of the Lack of a Defined Standard*

The most recent British Columbia Court of Appeal case deciding a child's habitual residence under the Convention only devotes one paragraph to the definition of habitual residence. It is the place where children "resided for 'an appreciable period of time' under the 'settled intention or purpose' of their parents. [. . .] A settled intention simply requires that 'the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.'"⁶⁵ This lack of a concrete definition for habitual residence, or even more fully developed jurisprudence about what a settled intention means, makes it difficult to predict what Canadian courts will find when presented with a case of conflicting arguments about a child's habitual residence, denying notice to parents who find themselves in these situations.

However, as long as Canadian courts actually do take the child's situation into account when making a determination of his or her habitual residence, the lack of a fully defined standard is not necessarily a problem. While it is true that a more vague definition gives lower courts less guidance as to how to determine a child's habitual residence (and less notice to parents), it does mean that the standard is more flexible and allows courts to focus on the given facts of a case. As the inquiry is meant to be fact-based, a flexible standard may actually comport most closely with the ideals of the Convention. Nonetheless, the apparent hard rule that a child's habitual residence is that of his or her parents will not hold up in more complicated situations.⁶⁶ Thus, the difficulty with the current Canadian jurisprudence is that it combines an extremely flexible standard with unfortunately rigid rules.

64. *See, e.g.*, A.E.S. v. A.M.W., [2012] ABQB 753, ¶ 91 (Can.); Christodoulou v. Christodoulou, 2009 CarswellOnt 6275, ¶¶ 121–23 (Can. Ont. S. C. J.).

65. *Rez*, [2013] BCCA ¶ 32.

66. *See infra* note 154 and accompanying text. Additionally, a hard rule that one parent cannot unilaterally change the child's habitual residence also may be problematic in certain situations.

In general, it does not appear that the case law in Canada is fully developed. This is likely because there are fewer applications for return in Canada than in the United States and the United Kingdom.⁶⁷ Nonetheless, Canada was one of the original signatories to the Convention and remains an integral part of the work on the Convention, so its application of the phrase is important. Further, as Canadian courts appear to rely heavily on international jurisprudence in determining the definition of habitual residence, it will be interesting to see how they react to the new definition of habitual residence articulated in the United Kingdom.⁶⁸

III. THE UNITED STATES

Though the United States was one of the original countries that voted to adopt the Abduction Convention, it did not officially become a signatory until December 23, 1981.⁶⁹ Additionally, since the Convention was not self-executing in the United States, it was not until Congress enacted the International Child Abduction Remedies Act (“ICARA”) on April 29, 1988 that the Convention actually became effective as a matter of domestic law.⁷⁰ However, according to the most recent analysis by the Hague Conference, the United States both makes the most applications for return and receives the most incoming return applications.⁷¹ Despite the United States’ prominent position in the field of international child abduction, the U.S. Supreme Court has only ruled on three Convention cases and has not yet addressed the meaning of “habitual residence” in the Convention.⁷²

67. In 2008, Canada only received forty-nine applications compared to the United States’ 283 and United Kingdom’s 200. *2008 Statistical Analysis*, *supra* note 1, at 10.

68. *See infra* Section IV.

69. *Status Table*, *supra* note 5; *Pérez-Vera Report*, *supra* note 23, at 426 n.1.

70. International Child Abduction Remedies Act, 42 U.S.C. §§11601-11611 (2012). Though not identical, ICARA uses much of the same terminology as the Convention, and courts must still look to the substantive terms of the Convention for guidance and interpretation. *See Vivatvaraphol*, *supra* note 22, at 3340.

71. *2008 Statistical Analysis*, *supra* note 1, at 10, 13.

72. The three cases are: *Abbott v. Abbott*, 560 U.S. 1 (2010) (holding that a *ne exeat* clause in a Chilean custody order was a right of custody as defined by the Convention); *Chafin v. Chafin*, 133 S. Ct. 1017 (2013) (holding that the return of a child to a foreign country pursuant to a court order

The lack of a U.S. Supreme Court ruling on the subject has led to a three-way split between the U.S. Circuit Courts of Appeals, with nearly every Circuit offering an opinion on how to determine a child's habitual residence in Convention cases.⁷³ The first, and most popular approach, outlined in *Mozes v. Mozes*,⁷⁴ focuses on the settled parental intent to reside in a particular country while taking into account objective facts that point to the child's acclimatization in a particular location.⁷⁵ A second approach, discussed in *Feder v. Evans-Feder*,⁷⁶ gives a bit more weight to the child's acclimatization to his or her environment, but still balances the child's acclimatization against shared parental intention.⁷⁷ The final approach, which has only been adopted in the Sixth Circuit, focuses solely on the child and the objective factual circumstances surrounding the child's past experiences, ignoring any future intentions of the parents.⁷⁸

A. Parental Intent – the *Mozes* Approach

The First, Second, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits all subscribe to some close variation of the *Mozes* approach.⁷⁹ These Circuits apply a two-prong analysis. First,

does not render an appeal of the order moot); and *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014) (holding that the one-year filing requirement in Article 12 of the Convention may not be equitably tolled even if the abducting parent conceals the child's whereabouts). For a more detailed discussion of the U.S. Supreme Court's jurisprudence, see generally Linda J. Silberman, *United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence*, 9 J. COMP. L. 49 (2014) [hereinafter Silberman, *U.S.*]. Multiple cases have petitioned for certiorari, looking for a united "habitual residence" test, but the Supreme Court has denied the applications. See, e.g., *Headifen v. Harker*, 549 F. App'x 300 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1951 (2014), *reh'g denied*, 134 S. Ct. 2835 (2014); *Heydt-Benjamin v. Heydt-Benjamin*, 404 F. App'x 527 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3068 (2011).

73. Only the Tenth Circuit has not expressly adopted one of the subsequent tests.

74. 239 F.3d 1067 (9th Cir. 2001).

75. *Id.* at 1073–79, 1081.

76. 63 F.3d 217 (3d Cir. 1995).

77. *Id.* at 224.

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

79. See, e.g., *Nicolson v. Pappalardo*, 605 F.3d 100, 104 (1st Cir. 2010); *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005); *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Larbie v. Larbie*, 690 F.3d 295, 311 (5th Cir.

courts must “determine the *intentions of the parents*⁸⁰ as of the last time that their intentions were shared”⁸¹ with respect to the child’s residence. Though this usually controls the determination of habitual residence, parental intent alone cannot change a child’s habitual residence.⁸² The second prong is that there must be “an *actual change in geography* coupled with the passage of an *appreciable period of time*, one sufficient for *acclimatization by the child*[] to the new environment.”⁸³

However, once this presumption in favor of shared parental intention is determined, it is difficult to rebut.⁸⁴ In the absence of a shared parental intent, courts in these Circuits are “slow to infer” that a child’s habitual residence has changed from contacts with the new location alone.⁸⁵ Thus, in order for a child to be habitually resident in a new location either (1) in opposition to the last shared parental intent or (2) in the face of no shared parental intent, the objective facts must “unequivocally point[] to the conclusion that the child has acclimatized to the new location.”⁸⁶ The court must be confident that “requiring return to the original forum would now be tantamount to taking the child ‘out of the family and social environment in which its life has developed.’”⁸⁷ On its face, this appears to be a very high bar. However, as the Ninth Circuit recently acknowledged, “[s]hared parental intent is not always dispositive” and courts must still look at the objective facts surrounding the child’s presence.⁸⁸

The Circuits that adhere to this approach provide compelling reasons in support of their focus on parental intent, claiming that first, it is the parents who generally make the decisions regarding a child’s location. As “[c]hildren . . . normally lack the material and psychological wherewithal to de-

2012); Koch v. Koch, 450 F.3d 703, 715 (7th Cir. 2006); Ruiz v. Tenorio, 392 F.3d 1247, 1252-53 (11th Cir. 2004).

80. If only one parent is entitled to fix the child’s habitual residence, only that parent’s intent will be relevant to a determination under this prong.

81. *Gitter*, 396 F.3d at 133. (emphasis added).

82. *Id.* (emphasis added).

83. *Maxwell*, 588 F.3d at 251.

84. *Gitter*, 396 F.3d at 134.

85. *Mozes*, 239 F.3d at 1079.

86. *Gitter*, 396 F.3d at 134.

87. *Id.* (quoting *Mozes*, 239 F.3d at 1081).

88. *Murphy v. Sloan*, 764 F.3d 1144, 1152 (9th Cir. 2014).

cide where they will reside,”⁸⁹ focusing on those entitled to fix the child’s residence will both be easier and likely provide more accurate results. Additionally, focusing on intent provides contour to the objective factual circumstances and allows the court to tell whether a child’s presence is meant to be temporary or permanent.⁹⁰ As the *Mozes* court detailed, an approach that focuses on the child’s objective behavior can lead to different outcomes depending on the time frame chosen.⁹¹ Further, simply observing whether the child has adapted to a new country is extremely difficult as children (particularly young children) can adapt and form attachments very quickly, potentially “open[ing] children to harmful manipulation when one parent seeks to foster residential attachments during what was intended to be a temporary visit.”⁹² This presumption of shared intent may actually be the best way to do just what the Convention intended – deter unilateral removal of children and ensure that the abducting parent will have an uphill battle to prove that the child has unequivocally acclimated to the new environment.⁹³ Finally, the courts claim that the approach is not incompatible with international jurisprudence as international courts “look to many factors in determining a child’s habitual residence *including* parental intent.”⁹⁴

However, the *Mozes* court was primarily focused on young children who cannot make their own decisions regarding their location. As a child matures, he or she may be more able to form sincere attachments, and removing a child from a location where he or she has those types of attachments may actually harm the child in contravention of the spirit of the Convention.⁹⁵ Further, in some instances, parental intent may be

89. *Mozes*, 239 F.3d at 1076.

90. *Gitter*, 396 F.3d at 132.

91. The court provided the example of a child who goes to sleepaway camp for two months. If observed only in those two months, he or she could arguably have a “settled purpose” to live there continuously “for a limited period.” *Mozes*, 239 F.3d at 1074.

92. *Id.* at 1079.

93. *Id.* See also SILBERMAN, *supra* note 4, at 350.

94. *Murphy v. Sloan*, 764 F.3d 1144 (9th Cir. 2014) (emphasis added).

95. Children may even develop their own opinions about where they want to live, something the U.K. courts now take into account. See *infra* Section III.E.

more easily manipulated than a child's acclimatization.⁹⁶ In some Circuits, the court merely requires one parent to express concerns about a move to a new country. For example, in *Ruiz v. Tenorio*,⁹⁷ a family left the United States to live in Mexico and lived there together for nearly three years, visiting the United States only twice.⁹⁸ They brought nearly all their possessions with them, the children attended school there, the father worked full-time, and they began construction on a house in Mexico.⁹⁹ Nearly three years after the move, the mother took the children to Florida and the father filed for return under the Convention.¹⁰⁰ The Eleventh Circuit held the children to be habitually resident in the United States because the parties "never had a shared intention to abandon prior United States habitual residence and to make Mexico the habitual residence of their children," since the mother expressed some reservations about the move and retained certain attachments to the United States.¹⁰¹ This case is an example of how courts can inappropriately interpret the *Mozes* approach by completely ignoring the objective facts that support attachment to a new forum. It also points to an additional issue with focusing too much on parental intent, the increasing amount of time that a child may actually live in a country before becoming habitually resident.¹⁰²

96. "Not only do the parents almost always disagree as to the child's habitual residence . . . but they often disavow prior expressions of intent and accuse one another of fabricating and misconstruing testimony." Petition for Writ of Certiorari at 24, *Heydt-Benjamin v. Heydt-Benjamin*, 2011 WL 1540439 (U.S.).

97. 392 F.3d 1247 (11th Cir. 2004).

98. *Id.* at 1249–50.

99. *Id.* at 1249–50, 1255.

100. *Id.* at 1250.

101. *Id.* at 1254. *See also* *Chafin v. Chafin* 742 F.3d 934 (11th Cir. 2013) (affirming the court's reasoning in *Ruiz*).

102. In *Ruiz*, the children lived in Mexico for two years and ten months and in the recent case *Headifen v. Harker*, 549 F. App'x 300 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1951, 188 L. Ed. 2d 963 (U.S. 2014), *reh'g denied*, 134 S. Ct. 2835 (U.S. 2014), the children lived in New Zealand for three years and four months. *See* Petition for Writ of Certiorari at 25–26, *Headifen v. Harker*, 2014 WL 1090044 (U.S.).

B. *Balancing Intent with Acclimatization – the Feder Approach*

The Third and Eighth Circuits follow the approach set forth in *Feder v. Evans-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.”¹⁰³ The analysis consists of a comparison of the objective facts surrounding the child’s presence in the location and the current, shared intentions of those entitled to fix the child’s residence regarding that child’s presence.¹⁰⁴

The approach was further detailed in *Karkkainen v. Kovalchuk*, which created a balancing test including:

- (1) the child’s conduct, contacts with, and experiences in the location;
- (2) the parental intent and how it has affected or influenced the child’s ability to acclimatize; and
- (3) the parents’ present shared intentions.¹⁰⁵

Additionally, the Third Circuit has acknowledged that the age of the child should influence how much weight is placed on parental intent. With an older child, parental intent is less impactful, but with very young children, the parents’ shared intent is of paramount importance.¹⁰⁶ However, in these Circuits, “shared parental intent remains relevant to habitual residence in *all* cases under the Hague Convention.”¹⁰⁷

One of the most persuasive points of this approach is that it takes into account the child’s age and maturity to determine how to balance the other factors. It uses the *Mozes* approach if the child is a neonate or an infant, but decreases the deference given to parental intent when the child is old enough to

103. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995); *see also* *Delvoye v. Lee*, 329 F.3d 330, 332 (3d Cir. 2003); *Whiting v. Krassner*, 391 F.3d 540, 547 (3d Cir. 2004); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 289 (3d Cir. 2006). The Eighth Circuit case, *Barzilay v. Barzilay*, 600 F.3d 912, 920 (8th Cir. 2010), uses the same type of language.

104. *See Feder*, 63 F.3d at 224.

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

106. *Whiting*, 391 F.3d at 550 (citing *Feder*, 63 F.3d at 223 and *Delvoye*, 329 F.3d at 333–34); *see also Karkkainen*, 445 F.3d at 296. The court noted that with young children, putting the emphasis on the parental intent would further the Convention objective of deterring child abduction similar to the *Mozes* justification. *Whiting*, 391 F.3d at 551

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

have his or her own intent or form true attachments.¹⁰⁸ Further, parents cannot then simply “agree” to a child’s habitual residence if there are not enough objective facts to support that intent. For example, in *Barzilay v. Barzilay*, an Israeli couple moved to the United States with their five-year old child.¹⁰⁹ They had two more children in the United States and lived there for four years until the marriage broke down.¹¹⁰ In the U.S. divorce decree, the couple was granted joint custody, and there was a “repatriation agreement” that if one party returned to live in Israel, the other party would take steps to move back to Israel so the family could reside in the same country.¹¹¹ The father subsequently moved back to Israel. During a visit by the mother and children, the father pressured the mother into agreeing to a judgment by an Israeli court that the mother and children would repatriate to Israel within three years and that if she failed to do so, it would be regarded as kidnapping under the Convention.¹¹² The mother returned to the United States with the children, and the father filed a petition for return of the children to Israel.¹¹³

In the case before the Eighth Circuit, the father tried to rely on the repatriation agreement and consent judgment as parental intent that the children’s habitual residence was Israel.¹¹⁴ The court refused to accept this argument, stating that allowing parents to contractually determine a child’s habitual residence was at odds with the Convention, and parties could not create “artificial jurisdictional links” to subvert the Convention’s factual consideration of habitual residence.¹¹⁵ In this circumstance, a strict *Mozes* approach could potentially find that the “visit” to Israel was enough to confirm the parties’ intent to make the children habitually resident in Israel. The court instead weighed the parental intent against the objective

108. Stephen E. Schwartz, Note, *The Myth of Habitual Residence: Why American Courts Should Adopt the Delvoeye Standard for Habitual Residence Under the Convention on the Civil Aspects of International Child Abduction*, 10 *CARDOZO WOMEN’S L.J.* 691, 693 (2004).

109. *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010).

110. *Id.* at 914–15.

111. *Id.* at 915.

112. *Id.*

113. *Id.*

114. *Id.* at 916.

115. *Id.* at 920–21.

facts surrounding the child's presence in Israel to come to a conclusion regarding the child's habitual residence.

Unfortunately, the *Mozes* concern about gamesmanship by the parents trying to artificially form attachments could be realized if courts place too much weight on a child's acclimatization. The *Feder* approach attempts to mitigate this by only taking acclimatization into account when the child is old enough to have some sort of intent or form attachments separate from his or her parents. However, attempting to draw a line to determine the respective weight given to parental intent and the child's acclimatization seems quite difficult. When does a child change from an infant to a child, and when does that child have the ability to form attachments? If definite lines were drawn, it could easily become too rigid of a standard, as one child who is five years old may be less able to form attachments than another. This could detract from the fact-based inquiry heralded by the Convention. Even if there were no hard lines and the court's balancing remained dependent on the individual child, it would be one more point of contention in the proceedings. Finally, a balancing test is inherently more difficult than the rebuttable presumption in *Mozes* or even the child-focused approach in *Friedrich* outlined below.¹¹⁶ As determining a child's habitual residence is the threshold question in all Convention cases, the more difficult it is to determine, the more drawn out this supposedly quick provisional measure can become. The preamble, Article 1, Article 7, Article 11, and Article 12 of the Convention all emphasize that these proceedings are meant to be quick decisions so that the appropriate jurisdiction can decide on custody matters.¹¹⁷ As the inquiry becomes more detailed, it becomes less likely that it meets the Convention's ideal of a quick resolution.

C. Focus Solely on the Child – the Friedrich Approach

The first U.S. Court of Appeals case to address the definition of habitual residence was *Friedrich v. Friedrich*.¹¹⁸ Though

116. See *infra* Section III.C.

117. Child Abduction Convention, *supra* note 6, at pmb1, arts. 1, 7, 11, 12.

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

cited in many cases afterwards,¹¹⁹ only the Sixth Circuit has maintained the child-focused inquiry advocated by the *Friedrich* court. Courts in this Circuit “focus on the child, not the parents, and examine past experience, not future intentions.”¹²⁰ This Circuit has expressly disavowed the *Mozes* parental intent approach and confirmed that in its jurisdiction, the objective facts surrounding the child are the most appropriate evidence to determine habitual residence.¹²¹ However, the Circuit refined its analysis and adopted part of the *Feder* approach such that a child’s habitual residence is the “nation where, at the time of [his or her] removal, the child has been present long enough to allow *acclimatization*, and where this presence has a ‘degree of *settled purpose* from the child’s perspective.’”¹²²

Thus, to determine habitual residence in the Sixth Circuit, there is no inquiry into parental intent. The approach is experience-driven, looking at objective connections a child has with countries where he or she was physically present prior to removal or retention.¹²³ While the Sixth Circuit is expressly child-centric in the cases it has considered, the court did leave open the possibility that with extremely young or developmentally disabled children, parental intent may be taken into consideration.¹²⁴

Part of the attractiveness of the child-centered approach is that the Convention is meant to protect children and “interests of children are of paramount importance in matters related to their custody.”¹²⁵ As the court in *Robert v. Tesson* points out, the Pérez-Vera Report states that “children must no longer be regarded as parents’ property, but must be recognized as individuals with their own rights and needs.”¹²⁶ Thus, focusing on the child’s actual connections with a country may

119. See, e.g., *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Mozes v. Mozes*, 239 F. 3d 1067, 1078 (9th Cir. 2001); *Gitter v. Gitter*, 396 F.3d 124, 134, 131 (2d Cir. 2005).

120. *Friedrich*, 983 F.2d at 1401.

121. *Robert v. Tesson*, 507 F.3d 981, 991-92 (6th Cir. 2007).

122. *Id.* at 993 (quoting *Feder*, 63 F.3d at 224) (emphasis added).

123. See *McKie v. Jude*, Civil Action No. 10-103-DLB, 2011 WL 53058 at *8 (E.D.Ky. Jan. 7, 2011).

124. *Robert*, 507 F.3d at 992 n.4.

125. Child Abduction Convention, *supra* note 6, at pmbl.

126. *Robert*, 507 F.3d at 992. The Pérez-Vera Report was an explanatory report published with the Convention. See *Pérez-Vera Report*, *supra* note 23.

be what best serves the child. Additionally, this is the most fact-driven inquiry. Parents can say and do whatever they want, but the observational facts about the child will hold. Thus, this approach completely prevents a *Ruiz*-type situation.

However, the *Friedrich* approach goes too far by taking parental intent out of the equation altogether. Courts have to determine if a parent acted unilaterally in taking a child out of his or her habitual residence to determine if the removal was wrongful. To do so, it is helpful, and in some cases necessary, to know what the parents jointly intended.¹²⁷ Additionally, parental intentions regarding their child's habitual residence can actually influence what the child considers to be his or her home.¹²⁸ Though the proponents of an objective, child-centered approach argue that the facts relating to the child's experience "can be easily demonstrated,"¹²⁹ as the *Mozes* court noted, parents can manipulate their child's attachments by placing them in school or having them join activities. A deeper inquiry into the nature of the attachments would be necessary to determine if they are true or not. Finally, the abducting parent likely has the most information about the child's attachments to the new location, as he or she is presumably in possession of the child. This can put the left-behind parent at a severe disadvantage.

D. *Reconciling the Apparent Three-Way Split*

Though there appear to be three divergent tests in U.S. law for determining a child's habitual residence under the Convention, upon closer look, the inquiries are not that different. Putting aside the Sixth Circuit's apparent dismissal of pa-

127. *Karkkainen v. Kovalchuk*, 445 F.3d 280, 296 (3d Cir. 2006) ("Were a court to exclude shared parental intent entirely from the habitual residence inquiry, and instead focus solely on a child's contacts and experiences, it would fail to consider whether a parent is acting unilaterally to alter what was jointly intended or agreed upon. Factoring shared parental intent into habitual residence therefore serves one of the primary goals of the Hague Convention.").

128. *Mozes v. Mozes*, 239 F.3d 1067, 1079–80 (9th Cir. 2001) ("[T]he child's knowledge of these intentions is likely to color its attitude to the contacts it is making.").

129. *Petition for Writ of Certiorari, Heydt-Benjamin v. Heydt-Benjamin* at 25, (No. 10-1303), 2011 WL 1540439 (U.S.).

rental intention altogether,¹³⁰ in essence, the two other approaches ask the same questions and look to the same evidence. The only real differences between the *Mozes* and *Feder* approaches appear to be: (1) which question is asked first; and (2) how much weight is placed on each part of the analysis.¹³¹ Since habitual residence is supposed to be a question of fact, the weight that is placed on each prong should not be predetermined. It should instead be decided on a case-by-case basis. Additionally, the appropriate question to ask first is the shared parental intent question as it is also necessary to determine if there was even a wrongful removal. Thus, the two approaches could and should merge.

As previously detailed, *Mozes* courts place much more weight on parental intent to the extent that it is almost a rebuttable presumption, while *Feder* courts place the emphasis on objective facts. However, both approaches give courts discretion to place as much weight as is necessary on each prong, as each framework is meant to be flexible and fact-specific.¹³² The point is to stay away from restrictive, technical rules and focus on the unique circumstances of each case.¹³³ Thus, the distinction between the two may be somewhat artificial.

130. Though it appears to dismiss parental intent, as noted previously, the Sixth Circuit has left the door open to the use of parental intent in the case of very young children, which is arguably where it is most important. *Supra* Section III.C. Further, even to determine if the removal is wrongful, the parents' intent must be considered. Thus, as the Sixth Circuit's jurisprudence is simply less developed (and less popular) than the other two approaches, I only compare the *Mozes* and *Feder* approaches in this section.

131. In the most recent petition for certiorari on the subject, the petitioner characterized the circuit split as a question of whether parental intent should take priority over the consideration of a child's place in his or her environment. Petition for Writ of Certiorari at 10, *Headifen v. Harker*, 2014 WL 1090044 (U.S.). This is consistent with my phrasing of the differences; they are focusing more on what should take priority than the ordering of the questions.

132. See, e.g., *Redmond v. Redmond*, 724 F.3d 729, 744 (7th Cir. 2013); *Whiting v. Krassner*, 391 F.3d 540, 546 (3d Cir. 2004); *Robert v. Tesson*, 507 F.3d 981, 989 (6th Cir. 2007); *Guzzo v. Cristofano*, 719 F.3d 100, 106, 108 (2d Cir. 2013); *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004).

133. See, e.g., *Redmond*, 724 F.3d at 742–43 (citing cases from many different circuits that quote the English case *Re Bates* [1989], No. CA 122/89 (High Ct. of Justice, Fam. Div. Eng.) emphasizing the factual nature of the inquiry).

The recent Seventh Circuit case, *Redmond v. Redmond*, explores both tests and comes to the conclusion that they are not so different.¹³⁴ In this case, the couple met in Ireland while the American mother was attending college in Ireland and lived together there for eleven months, but never married.¹³⁵ During their time together, the mother became pregnant, and the couple agreed that the baby would be born in America, but raised in Ireland.¹³⁶ The child was born in Illinois, and the couple returned to Ireland with the child eleven days later.¹³⁷ However, the relationship deteriorated, and the mother moved back to Illinois against the father's wishes less than eight months later.¹³⁸ At this point, the father could not file for return under the Convention because unmarried fathers are not legally recognized as parents in Ireland. Thus, after three and a half years of fighting to establish paternity in Ireland, Irish courts finally gave him guardianship and joint custody, ordering that the child live in Ireland.¹³⁹ The mother had come to Ireland with the child to participate in these final proceedings and promised that she would return after going back to Illinois to make preparations for their official move to Ireland.¹⁴⁰ However, she did not intend to keep this promise. Eight months after her return to Illinois, the father filed a return petition under the Convention.¹⁴¹

The District Court adopted a narrow view of the *Mozes* approach and found that the last shared parental intent was to raise the child in Ireland even though the child had spent most of his life in the United States.¹⁴² The Court of Appeals reversed this decision and criticized the District Court's strict application of parental intent in the face of many objective facts of the child's acclimatization to the United States.¹⁴³ The court further acknowledged that "the court's focus must re-

134. *Id.* at 746 ("In substance, all circuits – ours included – consider *both* parental intent *and* the child's acclimatization, differing only in their emphasis.").

135. *Id.* at 731.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 731–32.

143. *Id.* at 743–44.

main on ‘the *child*’s habitual residence.’”¹⁴⁴ It noted that shared parental intent is not a fixed doctrinal requirement and “it [is] unwise to set in stone the relative weights of parental intent and the child’s acclimatization.”¹⁴⁵

This critique is exactly why the best approach for U.S. courts going forward is to merge the *Mozes* and *Feder* approaches. As detailed above, both the parents’ intent and the child’s acclimatization are important in the determination of a child’s habitual residence. The *Mozes* approach may set the parental intent bar too high, and the *Feder* approach may set it too low. However, since both approaches acknowledge that it is a fact-based inquiry, there is no reason to set the relative weights of intent versus acclimatization prior to considering each case’s individual facts. Finally, since courts need to determine parental intent in order to determine if the removal was wrongful, the inquiry should begin with this, as the *Mozes* test advocates. It is hopeful that more Circuits will follow the Seventh Circuit’s lead in this area and merge the two approaches. However, ideally the U.S. Supreme Court will address the issue to create a uniform test for U.S. Convention jurisprudence, ending the confusion.¹⁴⁶

IV. THE UNITED KINGDOM

The United Kingdom, the last country in this case study, had a long history of defining “habitual residence,” which was suddenly and drastically modified in the last year. The concept of “habitual residence” in the United Kingdom was originally derived from that of “ordinary residence,” namely, “a particular place or country which [an individual] has *adopted voluntarily* and for the settled purposes as part of the regular order of his life for the time being, whether of short or of long dura-

144. *Id.* at 746 (quoting *Holder v. Holder*, 392 F.3d 1009, 1016 (9th Cir. 2004)).

145. *Id.*

146. Even two recent cases in circuits that have adopted the *Mozes* approach had different interpretations. Compare *Redmond v. Redmond*, 724 F.3d 729, 744 (7th Cir. 2013) (advocating for a more modified and merged approach to habitual residence) with *Murphy v. Sloan*, 764 F.3d 1144 (9th Cir. 2014) (sticking to a more strict interpretation of the parental intent approach). A Supreme Court determination of habitual residence would help to resolve the confusion.

tion.”¹⁴⁷ In order to be habitually resident, an individual must have a “*settled purpose*,” that he or she intends to stay, though it may only be for a limited period of time.¹⁴⁸ Expanding on this original concept, in 1990, the House of Lords found that there is a significant difference between ceasing to be habitually resident in one State and gaining a new habitual residence. In order to become habitually resident in a new State, “[a]n *appreciable period of time* and a *settled intention* will be necessary to enable him or her to become so.”¹⁴⁹

Though most British courts made a point to state that habitual residence is a question of fact rather than law,¹⁵⁰ several decisions enunciated what could be considered legal rules rather than allowing each court to make a decision based on the unique facts. For example, a young child that is in the sole lawful custody of one parent will necessarily have the same habitual residence as that parent.¹⁵¹ Additionally, if a couple has joint custody, a child’s habitual residence cannot change by the unilateral action of one parent.¹⁵² Another case announced a rule that if no individual had rights of custody with respect to a child who is removed from a jurisdiction, the child will not lose his or her existing habitual residence.¹⁵³ However, as increasingly complicated cases arose, these strict ideas of habitual residence could not keep pace with the more intricate factual circumstances.¹⁵⁴

147. R v. Barnet London Borough Council, *ex parate* Shah, [1983] 2 A.C. 309, 344 (H.L.) (appeal taken from Eng.).

148. *Id.*; see also Al Habtoor v. Fotheringham, [2001] EWCA (Civ) 186, [37] (U.K.).

149. In re J., [1990] 2 A.C. 562, 578 (H.L.) (appeal taken from Eng.), *aff’d sub nom*, C. v. S., [1990] 2 All E.R. 961 (H.L.) (appeal taken from Eng.) (emphasis added); see also *infra* Section II (discussing the British cases adopted by the Canadian courts). However, unlike the Canadian courts, British courts did expressly consider factors affecting the children. See, e.g., In re. D [2006] UKHL 51 (appeal taken from Eng.); E.T. v. L.B.T. [2010] EWHC 3177 (U.K. Fam.).

150. In re J., [1990] 2 A.C. 562; *Nessa v. Chief Adjudication Officer* [1999] 1 W.L.R. 1937, 1942 (H.L.) (appeal taken from Eng.); In re S., [2002] EWCA (Civ) 1941 (U.K.).

151. In re J., [1990] 2 A.C. 562.

152. In re B., [1993] 1 F.L.R. 993, 995 (Fam.) (U.K.).

153. In re S., [1998] A.C. 750 (H.L.) (appeal taken from Eng.).

154. See, e.g., *W. and B. v. H.*, [2002] 1 F.L.R. 1008 (Fam.) (U.K.) (holding that children born to an English surrogate who retained them in England, though she had an American surrogacy contract with Californian parents,

Thus, in a trio of recent cases, *In Re A* [2013] UKSC 60 (“A v. A”), *In Re KL* [2013] UKSC 75 (“KL”), and *In Re LC* [2014] UKSC 1 (“LC”), the U.K. Supreme Court completely abandoned the prior jurisprudence regarding a child’s habitual residence in order to merge with the test provided by the CJEU interpreting Article 8(1) of the Brussels II Regulation (EC) No 2201/2003 (“Brussels IIA” or “Regulation”). In order to fully understand this new test, this Note discusses each case individually, starting with the two CJEU cases.

A. *Creation of the CJEU Test*

The two CJEU cases interpreting “habitual residence” are not Child Abduction Convention cases. However, they both interpret Article 8(1) of Brussels IIA, which states, “The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is *habitually resident* in that Member State at the time the court is seised.”¹⁵⁵ Since the Regulation also governs the application of the Child Abduction Convention in European Union Member States and uses habitual residence throughout, the CJEU interpretation of the phrase affects all members of the European Union.¹⁵⁶

In 2009, the CJEU decided Case C-532/07 (“A”). The Court held that:

[T]he concept of “habitual residence” under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and so-

had no habitual residence); *B v. H*, [2002] 1 F.L.R 388 (Fam.) (U.K.) (holding that a child born in Bangladesh to a mother who traveled to Bangladesh while pregnant and was forcibly retained there was habitually resident in England despite never having been physically present in that State).

155. Council Regulation 2201/2003, art. 8(1), Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, 2003 O.J. (L 338) [hereinafter *Brussels II Regulation*].

156. *Id.* arts. 10, 11.

cial relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.¹⁵⁷

Thus, a determination of habitual residence is a fact-based inquiry with approximately nine factors: (1) duration of residence, (2) regularity of residence, (3) conditions surrounding the child's presence, (4) reasons for the child's presence, (5) the child's nationality, (6) school attendance, (7) linguistic knowledge, (8) family relationships, and (9) social relationships. Notably, this case did not expressly include parental intent in its holding, but did state that parents' intent, as manifested by tangible steps, may constitute an indicator of the transfer of habitual residence.¹⁵⁸

Just over a year later, the Court reaffirmed and explained the test for a child's habitual residence enunciated in the case *Mercredi v. Chaffe*.¹⁵⁹ In doing so, it further developed what courts should look to with respect to the primary carer(s) of the child(ren). As mentioned in *A*, the tangible steps the primary carers take to settle in another State can be important to the analysis.¹⁶⁰ However, *Mercredi* added two additional lines of reasoning with respect to parental intent. First, the primary carer must also have "it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character."¹⁶¹ Thus, it is the *permanence* of the residence that is being assessed with relation to the carer's intention. The actual duration is not a dispositive factor if the carer does or does not have the intention to settle in the new State.

Additionally, the Court developed a second line of inquiry to the parental intent consideration with reference to the child's age. The factors comprising the social and family environment of the child vary according to age. With very young children or infants, their environment is "essentially a family environment which is determined by the reference person(s)

157. Case C-523/07, *A*, 2009 E.C.R. I-2805, ¶ 44 (emphasis added).

158. *Id.* ¶ 40.

159. Case C-497/10 PPU, *Mercredi v. Chaffe*, 2010 E.C.R. I-14358, ¶ 47.

160. *Id.* ¶ 50.

161. *Id.* ¶ 51.

with whom the child lives.”¹⁶² Thus, if the child’s age requires it, courts should also look to the carer’s “geographic and family origins and the family and social connection which the [carer] and child have with that Member State.”¹⁶³ Accordingly, this case could be seen to add four more factors to the list: (10) intention of the primary carer(s) with respect to permanence of settlement, (11) primary carer’s geographic and family origins, (12) primary carer’s family connections, and (13) primary carer’s social connections.¹⁶⁴

B. *The U.K. Adopts the CJEU Mercredi Test*

The first U.K. Supreme Court case that analyzed this new test, *A.v. A*, also did not fall under the Child Abduction Convention.¹⁶⁵ However, it expressly overruled the *Shah* “settled purposes” test and adopted *Mercredi* for determining a child’s habitual residence. Though the jurisdiction in this case depended on Article 8 of the Brussels IIA Regulation, the Court held that the CJEU *Mercredi* test should be used for the regulation and Child Abduction Convention cases.¹⁶⁶

In this case, a married couple habitually resident in England had three children born there.¹⁶⁷ In 2009, the mother took the children to Pakistan after leaving the marital home in 2008 due to allegations of abuse.¹⁶⁸ While there, she was coerced into reconciling with the father under the impression that they would return as a family to England, even though she was forced to give up her own as well as the children’s passports.¹⁶⁹ The mother then became pregnant in 2010, and the couple’s fourth child was born in Pakistan.¹⁷⁰ The mother eventually found her way back to England without the children and made a wardship application to the English Courts

162. *Id.* ¶ 54.

163. *Id.* ¶ 56.

164. Several of these factors can be considered subsets of other factors. See *infra* Section IV.D.

165. *In re A*, [2013] UKSC 60 (U.K.). The case dealt with a dispute between the U.K. and Pakistan who is not a party to the Convention thus it could not be resolved using the Convention framework.

166. *Id.* ¶ 35.

167. *Id.* ¶ 2.

168. *Id.* ¶ 4.

169. *Id.* ¶ 5.

170. *Id.* ¶ 6.

for return of the children.¹⁷¹ On appeal to the U.K. Supreme Court, the only question was whether the fourth child born in Pakistan could be considered habitually resident in England, despite never having been physically present in the jurisdiction.¹⁷²

The essential legal holdings of the Court pertaining to habitual residence are threefold:

- (1) Habitual residence is a question of fact, there is no automatic rule that a child shares the habitual residence of its parents;
- (2) The CJEU *Mercredi* test is the correct test to determine habitual residence for both the Brussels IIA Regulation and cases under the Child Abduction Convention cases; and
- (3) As enunciated in *Mercredi*, when determining the social and family environment of an infant or young child, it is necessary to assess the integration of the primary carer(s) in the social and family environment of the country concerned.¹⁷³

This new, explicitly child-centered approach¹⁷⁴ for determining habitual residence did not resolve the central issue in this case, whether physical presence in the country was required in order to obtain habitual residence.¹⁷⁵ The court was instead able to hold on other grounds that England and Wales could have jurisdiction over the child.¹⁷⁶ In refusing to include a physical presence requirement in its holding (and stating that it would refer the question to the CJEU), the court expressed concern about having a physical presence requirement for habitual residence as a rule of law.¹⁷⁷ This decision highlights the beginning of the new British trend of moving away from any potentially strict legal rule surrounding the determination of a child's habitual residence.

171. *Id.* ¶¶ 6–7.

172. *Id.* ¶ 1. The other potential basis for jurisdiction was the child's nationality, which is what the Court based its ruling on.

173. *Id.* ¶ 54.

174. *Id.* ¶ 48.

175. *Id.* ¶¶ 55–58.

176. The British courts could accept jurisdiction of the child based on his nationality and allegiance to the country. *Id.* ¶ 67.

177. *Id.* ¶¶ 55–58, 90–92.

C. *Adaptation of the CJEU Mercredi Test to Convention Cases*

The U.K. Supreme Court has since addressed habitual residence in two cases falling under the Convention. *KL* was the first such case, and it officially adopted the CJEU *Mercredi* test for habitual residence. The importance of this case to this Note is its reaffirmation of the findings of *A v. A*, and the application of those findings to a case falling under the Convention.¹⁷⁸ In addition to adopting the *A v. A./Mercredi* test to Convention cases in the United Kingdom, the case further developed two important points. First, British courts are to look at the factors from the point of view of the child, cementing the new child-centered approach in British jurisprudence.¹⁷⁹ Second, primary carer intent does play a part in establishing or changing a child's habitual residence. Courts should first consider intent in relation to why the child is in the location.¹⁸⁰ That should be followed up with an inquiry into whether that intent helps determine if there is a sufficient degree of stability for the child to be habitually resident in that location.¹⁸¹ The U.K. Supreme Court emphasized that this is not a legal concept, but one of the relevant factors in determining the child's habitual residence.¹⁸²

The most recent U.K. Supreme Court case, *LC*, decided in January 2014, seemed officially to sever the determination of a child's habitual residence from that of his or her primary carer.¹⁸³ The basic facts are as follows: four children—aged thirteen, ten, eight, and four—were born to a Spanish mother and British father in England.¹⁸⁴ They lived there until a breakdown in the parents' relationship when the mother took them to Spain.¹⁸⁵ They stayed there for four months, but on their Christmas visit to their father in England, the eldest hid their passports and refused to go back to Spain.¹⁸⁶ The mother

178. The facts of the case are quite complex, involving a "re-abduction" and both U.S. and U.K. courts. For a more in-depth discussion of the case, see Silberman, *U.S.*, *supra* note 72, at 57–59.

179. In re *KL*, [2013] UKSC 75 [26]–[27] (U.K.).

180. *Id.* ¶ 23.

181. *Id.*

182. *Id.*

183. In re *LC*, [2014] UKSC 1.

184. *Id.* ¶ 3.

185. *Id.* ¶ 4.

186. *Id.* ¶¶ 4, 27.

applied for return of the children under the Convention, and the primary question upon appeal to the U.K. Supreme Court was whether the children's state of mind was a factor in the habitual residence test.¹⁸⁷

On these facts, the Court acknowledged that it is highly unusual for a child who lives with his or her primary carer not to acquire that person's habitual residence.¹⁸⁸ However, the test for habitual residence, which requires "some degree of integration," provides for the possibility of exceptions to that general assumption.¹⁸⁹ Thus, the child's state of mind is now an additional factor (or perhaps a sub-factor in the social/family environment prongs) in Child Abduction Convention cases in the United Kingdom. Whether the child feels him or herself to be integrated into a social family environment in a particular State is now relevant to a determination of habitual residence.

This new British approach appears to be a child-centric approach to habitual residence. However, like the main U.S. approaches, there is still an inquiry into the intent of those entitled to fix the child's habitual residence. *KL* and *LC* do not go as far into the *Friedrich* approach as might be implied at first glance. *KL* expressly acknowledges the need to consider parental intent, and *LC* notes that it is highly unusual not to adopt one's parent's habitual residence.

D. *Analysis of the New British Approach*

With the new British jurisprudence that relies on the CJEU "definition" of habitual residence, there are now many factors to consider:

1. The duration of the child's residence;
2. The regularity of the child's residence;
3. The reasons for the child's presence in the location;
 - a. The primary carer's intent surrounding these reasons;
4. The conditions surrounding the child's presence in the location;

187. *Id.* ¶¶ 1, 5.

188. *Id.* ¶ 37.

189. *Id.*

- a. The intention of the primary carer regarding the stability of the location;
5. The child's nationality;
6. The child's school attendance;
7. The child's linguistic knowledge;
8. The child's family relationships;
9. The child's social relationships;
10. If the child is mature enough, the child's state of mind regarding his or her presence in the location; and
11. If the child is very young:
 - a. The intention of the primary carer with respect to permanence of settlement;
 - b. The primary carer's geographic and family origins;
 - c. The primary carer's family connections; and
 - d. The primary carer's social connections.

Though the determination of habitual residence is supposed to be fact-based, these are a lot of factors for any court to weigh in what is supposed to be a threshold consideration for a provisional remedy. While the reasoning of the courts are very thorough, and they are trying to do what is in the best interest of the child, it is possible (and likely) that this list of factors will only become longer. For example, prior to *LC*, the child's state of mind was not a consideration in the habitual residence determination; it was only relevant to an Article 13 exception. Now it must be examined in the threshold determination if the court deems him or her to be mature enough to have an intent regarding his or her habitual residence. One could easily imagine that another "exceptional" case could come before the court, adding another factor to the list.

It may seem that the best option for the Hague Conference would be to follow this approach and create a non-exhaustive list of factors in order to guide courts while still allowing for flexibility within the standards. This solution considers both the child(ren)'s and the parents' intent as well as the objective facts surrounding the presences of all parties in the location. It takes into account the child's age and adjusts the standard accordingly. Finally, due to the CJEU rulings and the fact that this approach must be used for the entire European Union, if there is a goal to develop a universal standard for habitual residence, this highly detailed approach may be

the best way to do so. However, as outlined above, there are weaknesses to this approach and upon careful consideration and reconsideration; the Hague Conference continuously declines to provide any sort of definition or guidelines.

V. THE LACK OF A DEFINITION ALLOWS FOR MULTIPLICITY

In 2007, the Hague Conference published a Report of the Special Commission that convened in the fall of 2006.¹⁹⁰ As the report detailed, the participants considered the term “habitual residence” during the meeting.¹⁹¹ The Permanent Bureau noted that there is a divergence in the case law concerning the weight that should be attached to parental intent.¹⁹² Participants acknowledged that it would be helpful to provide judges with guidelines for interpretation to address this concern.¹⁹³ However, experts pointed to the fact that the term was intentionally left undefined so that it could accommodate the diversity of legal systems among Member States, and a strict definition would go against the spirit of the Convention.¹⁹⁴ The experts further pointed to the same types of factors that are utilized in Canada, the United States, and the United Kingdom – schooling, duration, integration, and common intent of the parents.¹⁹⁵ The Chair agreed with the experts and decided that it was wise of the Convention drafters not to define the concept.¹⁹⁶ I am inclined to agree with her.

As the case studies of Canada, the United States, and the United Kingdom demonstrate, there are too many potential situations in Convention cases, and it is impossible to address them all in a single “definition” or even general guidelines of habitual residence. Modern problems that were not conceived of by the drafters are now increasingly addressed in the Con-

190. Hague Convention on Private International Law, October 30–November 9, 2006, *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implication of the 1996 Hague Protection of Children Convention*, (Mar. 2007), available at http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf [hereinafter *2006 Report*].

191. *Id.* ¶¶ 156–60.

192. *Id.* ¶ 156.

193. *Id.* ¶ 157.

194. *Id.* ¶¶ 157, 159.

195. *Id.* ¶ 159.

196. *Id.* ¶ 160.

vention framework, and more unforeseen circumstances could easily arise.¹⁹⁷ If the drafters had created some legalistic definition of habitual residence, courts might have a much easier time making these determinations, but there would likely be more children whose circumstances are atypical and thus would be harmed by a decision regarding their habitual residence. Refusing to define habitual residence allows courts to do their best to take all the facts into consideration in order to do what is best for the child and create standards that best fit their differing legal systems.

Some experts still want more clarity. In her new book, Rhona Schuz advocates for a Combined/Hybrid Model of habitual residence, arguing that the Hague Conference should produce a Guide to Good Practice recommending adoption of this approach.¹⁹⁸ Her analysis recognizes that courts should look to a child's connection with the forum, but that those connections cannot be assessed in a vacuum and there must be some inquiry into the intentions of the parents.¹⁹⁹ Citing a case from Israel, she notes that the weight given to the different factors should vary depending on the unique facts of each case.²⁰⁰ However, it appears that common law jurisprudence has already taken this into consideration, and as argued above, even general guidelines may not be appropriate.

In fact, these "different" standards for habitual residence are not so drastically different. They do, however, exemplify the tension between deterring unilateral abduction and returning the child to the State best situated to make a custody determination. Despite the fact that Canada's jurisprudence is not fully developed and it may not place enough emphasis on the child's attachment to a location, its courts do seem to make a sincere effort to consider objective facts in conjunction with parental intent when making a habitual residence determination. As detailed above, the United States' Circuit split is not actually such a deep divide; the courts are simply trying to deal with the tension by preemptively placing weight on the parental intent prong versus the child acclimatization prong. Finally, though the United Kingdom approach has become

197. See, e.g., *supra* note 154 and accompanying text.

198. SHUZ, *supra* note 8, at 221.

199. *Id.* at 192, 220.

200. *Id.* at 192.

the most detailed, all of the U.K. factors could be classified as an inquiry into the child's attachment or parental intent with some overlap in the middle.

It is in the nature of common law to develop as circumstances change. As more complex situations arise regarding a child's habitual residence, the law needs to be able to adapt to new and unforeseen circumstances. Both the most popular U.S. approaches and the new U.K. approach appear to be able to do just that. The Canadian approach may be slightly lagging, but its focus on international jurisprudence may ultimately allow it to catch up to the United States and United Kingdom. All of the approaches have their advantages and disadvantages. There is no magic formula for habitual residence, nor will any of the approaches completely remove uncertainty, as determinations will ultimately depend on each new set of facts. However, it is important to always keep in mind that the "interests of children are of paramount importance in matters related to their custody."²⁰¹

CONCLUSION

As the world becomes increasingly interconnected, it is improbable that international parental child abduction will become a thing of the past. Thus, the Convention will likely remain an important combatant in the fight against wrongful removals and retentions. Further, each Convention case will have to determine the child's habitual residence. While an international standard could be administratively simple, it is not necessary and likely not ideal. As long as a country applies a flexible, fact-based approach considering parental intent and child attachment to a particular location, it will keep with the ideals and goals of the Convention.

201. Child Abduction Convention, *supra* note 6, at pmbl.

