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“HOME SWEET HOME”: DEFINING A CHILD’S RESIDENCE TO ESTABLISH ORIGINAL JURISDICTION IN CASES INVOLVING FAMILY ABDUCTION

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I. INTRODUCTION

The sudden disappearance of a child is commonly coupled with thoughts of the child being lured away by a stranger. Unfortunately, society does not recognize that the abductor is often the child’s parent. Family abduction, as such an event is referred to, is considered to be a serious crime rather than a child custody issue.¹ The National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children (NISMART) has defined family abduction as “the taking or keeping of a child by a family member in violation of a custody order, a decree, or other legitimate custodial rights, where the taking or keeping involved some element of concealment, flight, or intent to deprive a lawful custodian indefinitely of custodial privileges.”²

Family abduction generally occurs after a divorce has been filed, remarriage has occurred, or one spouse plans a geographic move without the other spouse’s consent.³ In 1999, approximately 203,900 children were victims of family abduction.⁴ Fifty-three percent of such victims

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¹Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice, *The Crime of Family Abduction: A Child’s and Parent’s Perspective* 3 (1st ed. 2010).

²Heather Hammer et al., *National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children, Children Abducted by Family Members: National Estimates and Characteristics* 2 (2002).

³Dorothy S. Huntington, *Parental Kidnapping: A New Form of Child Abuse* 8 (1984).

⁴Hammer et al., *supra* note 3, at 2.

were taken by the child's father, while twenty-five percent were taken by the child's mother.⁵ Even more significant, eighty-two percent of parental abductors had the intent to permanently affect custody.⁶

Family abduction, from the child's viewpoint, is considered to be a severe form of child abuse.⁷ Often in these troubled situations the child is used as a pawn in the hostile custody battle between separated spouses.⁸ Sam F., a family abduction victim, narrated, "[t]hey [the parental abductor] stop treating their child as a person, and instead, treat their child as a piece of property."⁹ Consequently, children in these situations become more like "hostages" and have difficulty understanding that he or she was removed from a parent who truly loves and desires to discover the child's location.¹⁰ Parents may also use the child either as an attempt for reconciliation or as an attempt to discredit the non-abducting parent by subjecting the child to lies about that parent.¹¹ As a result, a sense of guilt is created in the mind of the child who begins to feel that the family separation and abduction are his or her fault.¹²

Family abduction may also cause the child to lose a sense of self, which includes knowing one's family history and beginnings.¹³ Liss, another family abduction victim, described, "[f]amily abduction is about your family being eradicated from the face of the earth."¹⁴ Long-term effects of family abduction on the child include a sense of vulnerability and distrust, which can be detrimental to the child.¹⁵ Child victims of family abduction may also suffer from reactive attachment disorder, generalized anxiety disorder, and posttraumatic stress disorder as adults.¹⁶

When family abduction occurs, the abducting parent frequently moves the child beyond the jurisdiction of the law governing the child custody proceeding. This may be either a domestic or international move, and usually occurs in order to obtain a more favorable forum in which to

⁵Hammer et al., *supra* note 2, at 2.

⁶*Id.* at 8.

⁷Huntington, *supra* note 3, at 6.

⁸*Id.* at 6-9.

⁹Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *supra* note 1, at 4.

¹⁰*Id.* at 4.

¹¹Huntington, *supra* note 3, at 4, 9.

¹²Nancy Faulkner, Parental Child Abduction is Child Abuse 11 (1999).

¹³*Id.* at 16.

¹⁴Office of Juvenile Justice and Delinquency Prevention, *supra* note 1, at 14.

¹⁵Huntington, *supra* note 3, at 16.

¹⁶Faulkner, *supra* note 12, at 1.

file the proceeding.¹⁷ To confront the increasing occurrence of family abduction, the United States and the international community have developed approaches to address the problem as related to establishing original jurisdiction in child custody proceedings. The domestic approach implemented the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).¹⁸ The international approach implemented the Hague Convention on the Civil Aspects of International Child Abduction (Convention).¹⁹

Each approach has implemented a law based on the primary goal of preserving the child's well-being where the child is most familiar. In order to achieve the preservation goal, each approach uses a different term to describe the location where the child is most familiar. The UCCJEA refers to this location as the child's home state.²⁰ The Convention refers to this location as the child's habitual residence.²¹ However, the UCCJEA provides a definition of home state to establish original jurisdiction in domestic child custody proceedings.²² Conversely, the international approach has failed to define the meaning of habitual residence.²³ Failure to define this critical term to establish original jurisdiction in international child custody proceedings harbors an unpredictable interpretation and application of the Convention. Due to the importance of the interests at stake, each approach should be analyzed to determine whether a defined term of residence to establish original jurisdiction in child custody proceedings more adequately addresses the needs of child victims of family abduction.

In this Article, Part II will discuss the domestic approach under the UCCJEA and the stringent standard enacted in Section 201(a) for the exercise of original jurisdiction in a domestic child custody proceeding. Part II will also examine case law to demonstrate how courts determine the child's home state under the UCCJEA. Part III of this Article will discuss the international approach under the Convention and the guarantee of Article 3 for the exercise of original jurisdiction to be

¹⁷*Id.* at 3.

¹⁸Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Child Custody Jurisdiction and Enforcement Act (1997).

¹⁹Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980.

²⁰Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 23.

²¹Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at preamble.

²²Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 23.

²³Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at preamble (mentioning the term "habitual residence," but failing to define the term or state what qualifies as "habitual residence").

granted to the country of the child's habitual residence in an international child custody proceeding. Part III will also examine case law to demonstrate how courts in the United States determine the child's habitual residence under the Convention. Part IV of this Article will compare and contrast the UCCJEA and the Convention to consider which approach is more effective in granting original jurisdiction in child custody proceedings. Finally, a determination will be made as to whether the Convention would become more effective if the child's habitual residence were to be defined.

II. THE DOMESTIC APPROACH: THE UCCJEA

The National Conference of Commissioners on Uniform State Laws (NCCUSL) first addressed the problem of interstate family abduction by promulgating the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968.²⁴ Subsequently, the UCCJA was adopted by all fifty states as part of the effort to deter interstate family abductions.²⁵ The fundamental goal of the UCCJA was to eliminate interstate competition by permitting only one state to exercise jurisdiction in a child custody proceeding.²⁶ The federal government also addressed the problem of family abduction in 1980 by enacting the Parental Kidnapping Prevention Act (PKPA)²⁷ to promote interstate cooperation by requiring full faith and credit to be given to judgments in child custody proceedings in each state.²⁸ However, as the American Bar Association's Center on Children and the Law observed, inconsistent interpretation of the UCCJA and difficulties with the technical application of the PKPA resulted in the loss of nationwide uniformity in child custody proceedings.²⁹ Accordingly, states were unable to achieve the independent goals of either the UCCJA or the PKPA laws without violating a provision of the other law.³⁰

The issues surrounding the UCCJA and PLKA led the NCCUSL to draft the UCCJEA in 1997.³¹ The American Bar Association (ABA)

²⁴Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18.

²⁵*Id.*

²⁶David A. Blumberg, *The Uniform Child Custody Jurisdiction and Enforcement Act: A Focused Introduction*, THE LAW OFFICES OF DAVID A. BLUMBERG: UCCJEA RESOURCES: ARTICLES & PRESENTATIONS, <http://www.uccjea.net/resources/documents/lecture-outline.pdf> (last updated July 8, 2012).

²⁷Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1980).

²⁸Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 1.

²⁹*Id.* at 2.

³⁰*Id.* at 1.

³¹*Id.*

approved the UCCJEA in 1998.³² Alaska was the first state to adopt the UCCJEA in September 1998.³³ As of July 2012, forty-nine states, as well as the District of Columbia, Guam, and the U.S. Virgin Islands, have adopted the UCCJEA.³⁴ Massachusetts, the sole state to not have adopted the UCCJEA, has a bill pending in the state legislature proposing its enactment.³⁵

The NCCUSL's principal objective in drafting the UCCJEA was to create a clear, yet stringent standard for the exercise of original jurisdiction in interstate child custody proceedings.³⁶ In particular, the UCCJEA was primarily drafted to protect the child victim from being harmed as a result of interstate family abduction.³⁷ Furthermore, the UCCJEA is designed to encourage child custody determinations to be made in the state that can most adequately determine the best interest of the child, as well as to prevent the re-litigation of child custody issues and interstate jurisdictional competition.³⁸

A. Section 201(a) of the UCCJEA

Section 201(a) of the UCCJEA provides four exclusive jurisdictional bases for a state court to establish original jurisdiction in a child custody proceeding.³⁹ First, and most important, a state court can make an initial determination in a child custody proceeding if it is the home state of a child under Section 201(a)(1).⁴⁰ A state qualifies as a child's home state if it is the child's home state on the date the initial child custody proceeding is filed.⁴¹ A child's absence from the state within six months prior to filing does not disqualify the state as the child's home state as long as a parent, or person acting as a parent, continues to live in the state.⁴² This "temporary absence" provision is designed to preserve a state's home state status during the period required for another state to become the child's new home state by

³² *Id.*

³³ THE LAW OFFICES OF DAVID A. BLUMBERG: UCCJEA ADOPTION TABLE, <http://www.uccjea.net/resources/adoptions.shtml> (last visited Oct. 18, 2012); *See* ALASKA STAT. §§ 25.30.300-.910 (1998).

³⁴ THE LAW OFFICES OF DAVID A. BLUMBERG: UCCJEA ADOPTION TABLE, <http://www.uccjea.net/resources/adoptions.shtml> (last visited Oct. 18, 2012).

³⁵ Blumberg, *supra* note 26.

³⁶ Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 1.

³⁷ *Id.* at 7.

³⁸ *Id.* at 1.

³⁹ *Id.* at 24.

⁴⁰ *Id.* at 23.

⁴¹ *Id.*

⁴² Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 23.

allowing the state to exercise original jurisdiction if, at any time during the six months preceding the filing of the child custody proceeding, the state qualified as the child's home state.⁴³ Hence, the court must determine whether the child lived with a parent, or person acting as a parent, in a particular state for at least six consecutive months at any time before the child custody proceeding was filed.⁴⁴

Second, under Section 201(a)(2), a state court can exercise original jurisdiction if another state court does not qualify under Section 201(a)(1) or if a home state court declines to exercise such jurisdiction in a child custody proceeding.⁴⁵ However, there are two elements that must also be shown for a state court to exercise original jurisdiction under Section 201(a)(2).⁴⁶ The first element is for the child and at least one of the child's parents to have a significant connection with the state beyond mere physical presence.⁴⁷ This element is consistent with an underlying policy of Section 201 that physical presence is neither necessary nor sufficient to enable a state court to make a child custody determination.⁴⁸ The second element is for substantial evidence to be available in the state sought to be determined as the child's home state regarding "the child's care, protection, training, and personal relationships" within that state.⁴⁹

Third, under Section 201(a)(3), a state court can exercise original jurisdiction in a child custody proceeding as the more appropriate forum for the proceeding if another state court declines to exercise jurisdiction under sections 201(a)(1) and 201(a)(2).⁵⁰ In addition, each state legislature has directed the courts to respect the decision of another state court that has properly asserted jurisdiction according to Section 201.⁵¹ Fourth, under Section 201(a)(4), a state court can exercise original jurisdiction in a child custody proceeding if there is no court of any other state that could exercise jurisdiction under Section 201(a)(1), Section 201(a)(2), or Section 201(a)(3).⁵²

⁴³*See, e.g.*, *Sarpel v. Elfanli*, 65 So. 3d 1080, 1084 (Fla. Dist. Ct. App. 2011); *R.M. v. J.S.*, 20 A.3d 496, 503–504 (Pa. Super. Ct. 2011); *Prizzia v. Prizzia*, 707 S.E.2d 461, 466–67 (Va. Ct. App. 2011).

⁴⁴*Prizzia*, 707 S.E.2d at 461.

⁴⁵Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 23.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.* at 26.

⁴⁹*Id.* at 23.

⁵⁰*Id.*

⁵¹*Waltenburg v. Waltenburg*, 270 S.W.3d 308, 314–15 (Tex. App. 2008).

⁵²Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 24.

B. "Home State" Determination

Courts have recognized its chief objective "is to give effect to the purpose of the [A]ct as intended by the Legislature."⁵³ The intent of the UCCJEA in creating a stringent standard to establish original jurisdiction in a child custody proceeding is prioritization of the child's home state, which is determined based upon circumstances at the time the suit is filed. In making this determination, the location of the child and the child's parents are a crucial element.⁵⁴ Therefore, to achieve the intent of Section 201, courts must literally interpret the UCCJEA by the words' plain and ordinary meaning.⁵⁵

Several state courts have held the UCCJEA's language to be clear and unambiguous by defining the child's home state as the place the child has "lived with a parent" for six consecutive months prior to the filing of a child custody proceeding.⁵⁶ For example, in a child custody proceeding filed by the child's mother on April 8, 2010, in Pennsylvania, the child was in Pennsylvania uninterrupted from August 22, 2009, until March 5, 2010.⁵⁷ As a result, the Superior Court of Pennsylvania upheld the determination of Pennsylvania as the child's home state because the child was in Pennsylvania for six consecutive months prior to the commencement of the proceeding by the child's mother.⁵⁸ Therefore, Pennsylvania was granted original jurisdiction to determine the merits of the child custody proceeding.⁵⁹

Despite this clear and unambiguous interpretation of the child's home state, other state courts have inquired whether the term "lived with a parent" should be objectively or subjectively interpreted. The Supreme Court of Texas addressed this issue and determined a subjective intent test would frustrate the purpose of the UCCJEA.⁶⁰ The court found the word "lived" was used by the state legislature to avoid such a complicated inquiry into the mind of the child or the child's parents.⁶¹ Therefore, the court held that an objective inquiry of the facts in

⁵³*Sidell v. Sidell*, 18 A.3d 499, 504 (R.I. 2011) (quoting *Webster v. Perrotta*, 774 A.2d 68, 75 (R.I. 2001)); *See also R.M. v. J.S.*, 20 A.3d 496, 502 (Pa. Super. Ct. 2011); *Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2005).

⁵⁴Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 19, at 24; *See also In re Marriage of Marsalis*, 338 S.W.3d 131, 135 (Tex. 2011).

⁵⁵*See, e.g., B.B. v. A.B.*, 916 N.Y.S.2d 920, 924 (2011); *Sidell*, 18 A.3d at 505; *Powell*, 165 S.W.3d at 326.

⁵⁶*See, e.g., R.M.*, 20 A.3d at 505; *Powell*, 165 S.W.3d at 326.

⁵⁷*R.M.*, 20 A.3d at 498–99.

⁵⁸*R.M.*, 20 A.3d at 504.

⁵⁹*Id.*

⁶⁰*Powell v. Stover*, 165 S.W.3d 322, 325–26 (Tex. 2005).

⁶¹*Id.*

determining original jurisdiction in a child custody proceeding creates jurisdictional certainty without mitigating the significance of the facts of each individual case.⁶² Based on the objective intent test, the court held the mother's intent to stay in Tennessee with the child for a temporary period of time was insufficient to establish Texas as the child's home state.⁶³ Thus, the court granted Tennessee original jurisdiction as the child's home state in the child custody proceeding because of the child's presence in the state for more than ten months prior to the filing of the proceeding.⁶⁴ The Court of Appeals of Virginia has also implemented the objective intent test in child custody proceedings when determining original jurisdiction. Specifically, the court found a mother's future intent to live in Hungary did not disqualify Virginia as the children's home state when the children had lived in Virginia for over two-and-a-half years prior to the filing of the proceeding.⁶⁵ As a result, Virginia was granted original jurisdiction to determine the merits of the child custody proceeding.⁶⁶

Several state courts have also interpreted the "temporary absence" provision as a protection of both parents, not just the parent who no longer lives in the home state.⁶⁷ Accordingly, the court's inquiry must focus on the individual—whether the child, parent, or person acting as a parent—who remains in the home state.⁶⁸ This provision was analyzed in a child custody proceeding in which each parent initiated a proceeding—the mother in her native Hungary, where she remained with the children, and the father in Virginia.⁶⁹ The Court of Appeals of Virginia found the trial court failed to follow requirements of the UCCJEA's "temporary absence" provision by deferring original jurisdiction of the child custody proceeding to the Hungarian court.⁷⁰ The court held that the children's visit to Hungary should have been deemed a temporary absence because the children had not been in the country for at least six months to establish Hungary as the children's home state.⁷¹ Therefore, Virginia remained the children's home state as it had been in the six months prior

⁶²*Id.* at 327–28.

⁶³*Id.* at 326.

⁶⁴*Id.* at 322, 328.

⁶⁵*Prizzia v. Prizzia*, 707 S.E.2d 461, 468 n.6 (Va. Ct. App. 2011).

⁶⁶*Id.* at 467–68.

⁶⁷*Powell v. Stover*, 165 S.W.3d 322, 325–26 (Tex. 2005).

⁶⁸Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 24–25.

⁶⁹*Prizzia*, 707 S.E.2d at 465.

⁷⁰*Id.*

⁷¹*Id.* at 468.

to the father's commencement of the child custody proceeding and was granted original jurisdiction.⁷²

Nonetheless, the UCCJEA is not clear in defining all terms relating to the establishment of original jurisdiction in a child custody proceeding. The UCCJEA fails to define the term "significant connection," which is used when the most appropriate forum must be determined because home state jurisdiction is not established under Section 201(a)(1). Similar to the inquiry of the "temporary absence" provision, a court must focus on the individual remaining in the state sought to be determined as the child's home state. For example, the inquiry in a child custody proceeding filed in the Supreme Court of Montana focused on the father's connection to Montana when the mother removed the child to Kentucky.⁷³ The court found that the father's permanent residence, the presence of the child's extended family, and the child's extensive time spent within the state visiting under the father's custody rights qualified as "significant connections" to Montana.⁷⁴ Therefore, the court determined Montana was the child's home state and granted the State original jurisdiction to determine the merits of the child custody proceeding.⁷⁵

The UCCJEA also fails to define what qualifies as "substantial evidence ... regarding the child's care, protection, training, and personal relationships" within the state for a state to establish original jurisdiction in a child custody proceeding.⁷⁶ Thus, a court must analyze the facts of the individual case to determine if such "substantial evidence" exists to support the establishment of a particular state as the child's home state.⁷⁷ An important consideration in this determination is whether the "care, protection, training, or personal relationships" in a state have deeply impacted the children.⁷⁸ For example, the Court of Appeals of Texas addressed the "substantial evidence" question in a child custody proceeding in which the children had frequently visited Texas, where the children's paternal grandparents also lived.⁷⁹ After living in Texas for four months, the children's mother removed them to Louisiana.⁸⁰ The court found the evidence within Texas failed to demonstrate a significant

⁷²*Id.* at 467–68.

⁷³*In re Marriage of Lloyd*, 255 P.3d 166, 171 (Mont. 2011).

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 23.

⁷⁷*In re Marriage of Marsalis*, 338 S.W.3d 131, 136 (Tex. 2011)

⁷⁸*Id.* at 137.

⁷⁹*Id.*

⁸⁰*Id.*

effect on the children's lives to establish Texas as the children's home state.⁸¹ Hence, Texas could not exercise original jurisdiction in the child custody proceeding based on the "substantial evidence" provision.⁸² The Court of Appeals of Louisiana has also answered the "substantial evidence" question.⁸³ The court found the child's attendance in school and continuous care in Louisiana in the six consecutive months prior to the filing of the child custody proceeding was substantial evidence to grant Louisiana home state jurisdiction in the child custody proceeding.⁸⁴

In determining which state can exercise original jurisdiction in interstate child custody proceedings, the UCCJEA has chosen to define the child's home state. While the UCCJEA has chosen to define this term, the Convention has failed to define the child's habitual residence. This lack of a definition has led to a different, yet similar, approach in determining which country can exercise original jurisdiction in international child custody proceedings. However, an analysis must be performed to determine whether the Convention's lack of a defined term has a negative impact on the children that the Convention is intended to protect.

III. THE INTERNATIONAL APPROACH: HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

In 1980, the Hague Convention on the Civil Aspects of International Child Abduction (Convention) was adopted to address the problem of international family abduction as it relates to child custody proceedings.⁸⁵ A central goal of the Convention is to ensure that the custody rights of one ratifying country are competently honored in other ratifying countries.⁸⁶ Accordingly, the court in which the action is brought must determine the child custody proceeding in accordance with the terms of the Hague Convention.⁸⁷

One of the most common situations that arise under the Convention is when one parent attempts to acquire an advantage in a child custody

⁸¹*In re Marriage of Marsalis*, 338 S.W.3d at 137.

⁸²*Id.* at 137–38 (however, because no other state court could exercise jurisdiction in the case, Texas was permitted to exercise original jurisdiction in the proceeding.).

⁸³*In re A.U.M.*, 62 So. 3d 185, 188 (La. Ct. App. 2011).

⁸⁴*Id.*

⁸⁵Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19.

⁸⁶Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at art. 1(b).

⁸⁷International Child Abduction Remedies Act, 42 U.S.C. § 11603(d) (1988).

proceeding by moving with the child across international borders.⁸⁸ Ordinarily, the abducting parent seeks exclusive care of the child to earn sympathy from the court in the new jurisdiction.⁸⁹ The Convention attempts to deter such parental behavior by seeking the prompt return of a wrongfully removed child to the ratifying country.⁹⁰ This results in a “rapid remedy” to restore the family environment to the state that it was prior to the abduction, which protects the non-abducting parent’s custody rights.⁹¹ The “rapid remedy” also essentially eliminates the parent abductor’s motivation to gain a legal advantage because judicial relief will be deprived in the less appropriate jurisdictional forum, which is usually the forum where the child is removed.⁹²

Despite the Convention’s focus on the actions of the parent, the Convention principally seeks to protect the abducted children from their lives being further altered.⁹³ The Preamble reflects this goal by expressing that the Convention is designed “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.”⁹⁴ As a result, situations where the child has been removed from the family and social environment in which the child’s life has developed are sought to be corrected.⁹⁵ Ultimately, this goal can be achieved if the child is viewed as having individual rights and is no longer viewed as property of the child’s parents.⁹⁶

⁸⁸Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993) (finding that “there is a central core of matters at which the Hague Convention was aimed: situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent’s native country, or country of preferred residence.”).

⁸⁹Beaumont & McEleavy, *The Hague Convention on International Child Abduction* 1 (1999).

⁹⁰Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at art. 1(a).

⁹¹Shealy v. Shealy, 205 F.3d 1117, 1121 (10th Cir. 2002) (citing Karin Wolfe, *A Tale of Two States: Successes and Failure of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U.J. OF INT’L L. & POL. 285, 299 (2000)).

⁹²Elisa Perez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* 429 ¶ 16 (1982).

⁹³*Id.* at 448 ¶ 72.

⁹⁴Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at preamble.

⁹⁵Perez-Vera, *supra* note 92, at 428 ¶12.

⁹⁶*Id.* at 431 ¶ 24.

Since its adoption, more than fifty countries have ratified the Convention.⁹⁷ The United States ratified the Convention, which has a legal status of a treaty, in 1988.⁹⁸ As a signatory, the United States implemented the Convention by federal statute under the International Child Abduction Remedies Act (ICARA).⁹⁹

A. Article 3 of the Convention

Article 3 of the Convention requires that the determination of whether a child's removal was wrongful be made under the laws of the State in which the child has his or her habitual residence.¹⁰⁰ Under the Convention, a parent's rights of custody include, "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."¹⁰¹ The removal of a child is considered wrongful when the non-abducting parent's custody rights—when exercised or would have been exercised if not for the child's removal—are breached under the law of the State of the child's habitual residence immediately preceding the child's removal.¹⁰² As a result, the non-abducting parent cannot invoke the Convention unless the abducted child is a habitual resident of the signatory country.¹⁰³

Accordingly, application of the Convention depends on the determination of the child's habitual residence when the child custody proceeding is initially filed.¹⁰⁴ Such place is generally where the child is most familiar and is within the forum where a court can best serve the child's interests.¹⁰⁵ Under the Convention, a child can only have one habitual residence, which must be determined at the time immediately prior to the child's abduction.¹⁰⁶ Furthermore, the child's place of birth is not automatically the child's habitual residence.¹⁰⁷ Once the child's

⁹⁷Blumberg, *supra* note 26.

⁹⁸*Id.*

⁹⁹International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.* (1988).

¹⁰⁰Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at art. 3.

¹⁰¹*Id.* at art. 5(a).

¹⁰²Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at art. 3(a)–(b).

¹⁰³*Gitter v. Gitter*, 396 F.3d 124, 130 (2d Cir. 2005).

¹⁰⁴*Koch v. Koch*, 450 F.3d 703, 709 (7th Cir. 2006).

¹⁰⁵*Abbott v. Abbott*, 130 S. Ct. 1983, 1995 (2010).

¹⁰⁶*Silverman v. Silverman*, 338 F.3d 886, 897–98 (8th Cir. 2003); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

¹⁰⁷*Holder v. Holder*, 392 F.3d 1009, 1020 (9th Cir. 2007) (“Nonetheless, if a child is born where the parents have their habitual residence, the child normally should be regarded as a habitual residence of that country.” (citations omitted)).

habitual residence is identified, the Convention guarantees a court in that country original jurisdiction in the child custody proceeding and the dispute must then be resolved under the laws of that country.¹⁰⁸ The Convention then requires the child to be returned to the child's habitual residence if the non-abducting parent files a valid petition within one year of the wrongful removal.¹⁰⁹

B. Habitual Residence Determination

The determination of the child's habitual residence immediately before the wrongful removal is the most difficult issue for a court to decide when applying Article 3 in a child custody proceeding.¹¹⁰ This difficulty primarily arises due to the Convention's lack of definition of the term habitual residence.¹¹¹ The Supreme Court has also failed to define the meaning of habitual residence under the Convention when applied in child custody proceedings initiated in the United States.¹¹² In addition, Congress has encouraged uniform international interpretation of the Convention's terms to provide stability for the child, which it believes is part of the Convention's framework.¹¹³ Hence, courts are encouraged to prevent the wrongful removal of the child from "the family and social environment in which its life has developed" by preserving the child's habitual residence.¹¹⁴

Judge M. Margaret McKeown of the Ninth Circuit has suggested that habitual residence may have been intentionally left undefined to assist courts in creating formalistic determinations in child custody proceedings without the term becoming rigid.¹¹⁵ Further, courts have also hoped restrictive rules for determining the meaning of habitual residence will not be implemented so "[t]he facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions."¹¹⁶ Nevertheless, the federal courts of appeals in the

¹⁰⁸*Friedrich*, 983 F.2d at 1403.

¹⁰⁹Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 19, at art. 12.

¹¹⁰*Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001).

¹¹¹*Feder v. Evans-Feder*, 63 F.3d 217, 228 (3d Cir. 1995) (Sarokin, J., dissenting).

¹¹²*Robert v. Tesson*, 507 F.3d 981, 988 (6th Cir. 2007).

¹¹³*Abbott v. Abbott*, 130 S.Ct. 1983, 1993 (2010).

¹¹⁴*Mozes*, 239 F.3d at 1081 (quoting Elisa Perez-Vera, 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 1069 ¶ 11 (1982)).

¹¹⁵*Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2001); *Feder v. Evans-Feder*, 63 F.3d 217, 228 (3d Cir. 1995) (Sarokin, J., dissenting).

¹¹⁶*Friedrich v. Friedrich*, 983 F.3d 1396, 1401 (6th Cir. 1993) (citing DICEY & MORRIS, *THE CONFLICT OF LAWS* 166 (11th ed. 1987)).

United States have developed a general guideline to determine a child's habitual residence in a child custody proceeding. The everyday non-legal meaning of habitual residence is to be used for interpretation in reference to the circumstances of each case.¹¹⁷ Application of the legal meaning of habitual residence would promote forum shopping by allowing the abducting parent to seek a forum that defines the term in that parent's favor, which contravenes a chief objective of the Convention.¹¹⁸

The guideline developed by the federal court of appeals includes a two-prong analysis to determine a child's habitual residence to establish original jurisdiction in a child custody proceeding. The first prong is a subjective inquiry of the intent to abandon the child's previous habitual residence, which includes a settled purpose to establish a new habitual residence.¹¹⁹ The intent to abandon can be formed after the child has been removed from the previous habitual residence, can exist even only if he or she in the new environment for a limited period of time, and can be implied from actions surrounding the child's removal.¹²⁰ However, the intent to abandon must be a past intent.¹²¹ Consequently, a future intent to return to the child's previous habitual residence does not preserve that country as the child's habitual residence.¹²²

The inquiry of the intent to abandon the child's previous habitual residence is where a lack of definition of habitual residence has led to the most confusion amongst courts when applying Article 3 of the Convention. The majority view is to "focus on the intent of the child's parents or others who may fix the child's residence," because "[c]hildren . . . normally lack the material and psychological wherewithal to decide where they will reside."¹²³ Accordingly, parental intent serves for that of

¹¹⁷See, e.g., *Holder*, 392 F.3d at 1016; *Kijowska v. Haines*, 463 F.3d 583, 586 (7th Cir. 2006); *Whiting v. Krassner*, 391 F.3d 540, 546 (3d Cir. 2004); *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001); *Friedrich*, 983 F.2d at 1401.

¹¹⁸See, e.g., *Holder*, 392 F.3d at 1013; *Kijowska*, 463 F.3d at 586; *Shealy v. Shealy*, 295 F.3d 1117, 1121 (10th Cir. 2002); *Mozes*, 239 F.3d at 1071; *Friedrich*, 983 F.2d at 1400.

¹¹⁹See, e.g., *Gitter v. Gitter*, 396 F.3d 124, 132 (2d Cir. 2005); *Whiting*, 391 F.3d at 549; *Mozes*, 239 F.3d at 1075.

¹²⁰See, e.g., *Koch v. Koch*, 450 F.3d 703, 714–15 (7th Cir. 2006); *Gitter*, 396 F.3d at 132; *Whiting*, 391 F.3d at 549 n.6; *Ruiz v. Tenorio*, 392 F.3d 1247, 1252–53 (11th Cir. 2004); *Mozes*, 239 F.3d at 1075.

¹²¹See, e.g., *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007); *Koch*, 450 F.3d at 714–15; *Friedrich*, 983 F.2d at 1401.

¹²²*Norinder v. Fuentes*, 657 F.3d 526, 534 (7th Cir. 2011).

¹²³*Gitter*, 396 F.3d 130 at 132 (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001)); See also *Whiting*, 391 F.3d at 548.

a child who has not yet reached the maturity to make a competent decision as to where to establish a permanent residence.¹²⁴

Because separated parents often disagree as to where the child should reside, under the majority view, a court must determine the parent's last place of mutual intent for the child's habitual residence based on all available evidence.¹²⁵ To make such a determination, a court must analyze factors that include:

[P]arental employment in the new country of residence; the purchase of a home in the new country and the sale of a home in the former country; marital stability; the retention of close ties to the former country; the storage and shipment of family possessions; the citizenship status of the parents and children; and the stability of the home environment in the new country of residence.¹²⁶

A contractual determination of the child's habitual residence is not included as a factor because it would violate the goal of the Convention by creating a false jurisdictional link that removes the child from its familiar environment.¹²⁷ The Court of Appeals for the Fourth Circuit took these factors into consideration in determining the habitual residence of quadruplets in a child custody proceeding initiated by the children's father in Australia.¹²⁸ The court based its determination on the evidence which demonstrated the children's mother left personal possessions in North Carolina, traveled with tourist visas and reserved round-trip tickets for herself and the children, kept American health and car insurance, and sought to return to the United States after five weeks in Australia.¹²⁹ Therefore, the United States, not Australia, was determined to be the children's habitual residence and was granted original jurisdiction to determine the merits of the child custody proceeding.¹³⁰

Still, a mutual intent to abandon the child's previous habitual residence may not exist. When there is no such mutual intent, a court should find a change in the child's habitual residence only when "the

¹²⁴Holder v. Holder, 392 F.3d 1009, 1016–17 (9th Cir. 2007).

¹²⁵See, e.g., Holder, 392 F.3d at 1017; Karkkainen v. Kovalchuck, 445 F.3d 280, 292 (3d Cir. 2006); Kijowska v. Haines, 463 F.3d 583, 587 (7th Cir. 2006); Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005); Ruiz, 392 F.3d at 1252–54; Friedrich, 983 F.2d at 1402.

¹²⁶Maxwell v. Maxwell, 588 F.3d 245, 252 (4th Cir. 2009) (citations omitted).

¹²⁷Barzilay v. Barzilay, 600 F.3d 912, 920–21 (8th Cir. 2010).

¹²⁸Maxwell, 588 F.3d at 252.

¹²⁹Id. at 253.

¹³⁰Maxwell, 588 F.3d at 254.

objective facts point *unequivocally* to a person's ordinary or habitual residence being in a particular place" and not based solely on the child's contacts in the new environment.¹³¹ Thus, a change in the child's habitual residence will occur either when the child does not have a habitual residence or when the child's presence is meant for a limited period because it is accepted that the child will soon lose connections to the previous habitual residence.¹³² The Court of Appeals for the Ninth Circuit was faced with this situation in a child custody proceeding filed in the United States by the children's mother.¹³³ During the time agreed upon for the children to complete a year of school in the United States and then return to Israel, the children learned English and made American friends.¹³⁴ The court found this evidence did not unequivocally point to a change in the children's habitual residence from Israel to the United States at the time the child custody proceeding was filed.¹³⁵ Therefore, Israel, not the United States, could exercise original jurisdiction to determine the merits of the proceeding.¹³⁶

The minority view regarding the analysis of the intent to abandon the child's previous habitual residence is to conduct a subjective inquiry from the child's perspective.¹³⁷ This view is premised on the belief that the inquiry of the parents' subjective intent would allow a parent to legally abduct a child by conveying an objection to an upcoming geographic move.¹³⁸ Thus, one parent's express disagreement during a geographic move is insufficient to eliminate the intent to abandon the child's previous habitual residence.¹³⁹ For example, the Court of Appeals for the Third Circuit found a mother's lack of intent to permanently remain in Australia and return to the United States if the marriage did not improve neither disqualified Australia, where the father had found work, as the child's habitual residence nor prevented Australia from exercising

¹³¹*Mozes v. Mozes*, 239 F.3d 1067, 1081 (9th Cir. 2001) (quoting *Zenel v. Haddow*, 1993 S.L.T. 975, 979 (Scot. 1st Div.)) (emphasis added).

¹³²*Id.* at 1082.

¹³³*Id.* at 1083.

¹³⁴*Id.* at 1082–83.

¹³⁵*Id.*

¹³⁶*Id.*

¹³⁷*Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007); *See also Friedrich v. Freidrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

¹³⁸*Robert*, 507 F.3d at 992.

¹³⁹*See, e.g., Silverman v. Silverman*, 338 F.3d 886, 899 (8th Cir. 2003); *Mozes v. Mozes*, 239 F.3d 1067, 1076–77 (9th Cir. 2001); *Feder v. Evans–Feder*, 63 F.3d 217, 220, 224 (3d Cir. 1995).

original jurisdiction to determine the merits of the child custody proceeding.¹⁴⁰

Similar to the factors considered by a court in determining parental intent, factors to determine a child's intent to abandon a previous habitual residence include:

[T]he family's change in geography along with their personal possessions and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits only available to . . . immigrants, the children's enrollment in school, and, to some degree, both parents' intentions at the time of the move.¹⁴¹

The Court of Appeals for the Third Circuit analyzed these factors in a child custody proceeding between the father, who lived in the United States, and the mother, who lived in Finland.¹⁴² The court found evidence that the child, who is believed to possess the sole authority to decide where to reside, had expressed a desire to remain in the United States after a summer vacation with her father.¹⁴³ The child also brought a majority of her personal possessions to the United States and began attending an American school.¹⁴⁴ Therefore, the court held that the child had abandoned Finland as her habitual residence with a settled purpose to establish United States as her new habitual residence.¹⁴⁵ Accordingly, the United States was granted the authority to establish original jurisdiction to the child custody proceeding.¹⁴⁶

The second prong of the analysis to determine a child's habitual residence is whether the child has sufficiently acclimatized to the new place of habitual residence to establish a change in the child's habitual residence.¹⁴⁷ A change in habitual residence is established if the evidence demonstrates the child would be harmed by the removal from the new environment, even if the child were to return to the previous environment.¹⁴⁸ This prong is based on achieving the Convention's goal

¹⁴⁰Feder, 63 F.3d at 224.

¹⁴¹Silverman, 338 F.3d at 897-98.

¹⁴²Karkkainen v. Kovalchuck, 445 F.3d 280, 285 (3d Cir. 2006).

¹⁴³*Id.*

¹⁴⁴*Id.* at 293-94.

¹⁴⁵Karkkainen, 445 F.3d at 296.

¹⁴⁶*Id.* at 298.

¹⁴⁷Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005).

¹⁴⁸*Id.* at 134.

of deterring family abduction by maintaining the child's sense of normalcy before the abduction occurred.¹⁴⁹

Yet again, both the Convention and the Supreme Court have failed to define the term "acclimatization" in the determination of a child's habitual residence. As a result, courts must analyze several factors to determine whether the child has adapted to the new environment, which include: (1) the child's enrollment in school; (2) the child's participation in social activities, such as sports; (3) the child's length of stay in the previous and new environments; (4) the child's meaningful connections in the new environment; (5) the child's age; and (6) an actual change in geography prior to the abduction.¹⁵⁰ The child's cultural ties—as Judge M. Margaret McKeown of the Ninth Circuit explained—are not considered because "then countless expatriate children around the globe would already have satisfied a significant component of the requirements for becoming habitual residents of the United States based on an affinity for McDonald's, Mickey Mouse, and Michael Jordan."¹⁵¹

The Court of Appeals for the Sixth Circuit analyzed these factors in a child custody proceeding to determine the habitual residence of twins removed by their mother from France to the United States.¹⁵² The court found the evidence demonstrated the twins' socialization in the United States—by attending school and building relationships with their American relatives—during their ten-month stay outweighed stay outweighed the twins' three-week visit to France.¹⁵³ Thus, the twins' time in France was held to be a vacation from the twins' habitual residence in the United States.¹⁵⁴ Therefore, the United States was granted original jurisdiction to determine the merits of the child custody proceeding.¹⁵⁵ The Court of Appeals for the Sixth Circuit also analyzed these factors to determine the habitual residence of a child removed from Germany to the United States by the child's mother, without the father's knowledge.¹⁵⁶ The child was born in Germany, where he remained

¹⁴⁹Whiting v. Krassner, 391 F.3d 540, 550 (3d Cir. 2004).

¹⁵⁰See, e.g., Maxwell v. Maxwell, 588 F.3d 245, 254 (4th Cir. 2009); Robert v. Tesson, 507 F.3d 981, 993 (6th Cir. 2007); Holder v. Holder, 392 F.3d 1009, 1013 (9th Cir. 2004); Ruiz v. Tenorio, 392 F.3d 1247, 1255 (11th Cir. 2004); Mozes v.; Mozes, 239 F.3d 1067, 1078 (9th Cir. 2001); Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993).

¹⁵¹Holder, 392 F.3d at 1021.

¹⁵²Robert, 507 F.3d at 987.

¹⁵³*Id.* at 997–98.

¹⁵⁴*Id.* at 997.

¹⁵⁵*Id.* at 998.

¹⁵⁶Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).

permanently until his removal to the United States.¹⁵⁷ The court held the child's three-day stay on a United States military base did not qualify as a change in geography; thus, Germany was the child's habitual residence.¹⁵⁸ Accordingly, only Germany could exercise original jurisdiction in the child custody proceeding.¹⁵⁹

Courts have also not established a time period required to satisfy the child's acclimatization to the new environment. In a dissenting opinion, Judge Sarokin for the Third Circuit argued that the time period is less than one year because of the Convention's provision preventing a child's return when the proceeding is filed after the child has been in the new environment for more than one year.¹⁶⁰ Generally, such a short period of time will only be sufficient if the child moves with both parents because of the child's extraordinary adaptability and ability to make connections while remaining aware of an already established environment.¹⁶¹

But when the geographic move is intended by one parent to prevent acclimatization to the new environment, even a lengthy period of time may not be sufficient.¹⁶² The Court of Appeals for the Ninth Circuit analyzed the time factor in a child custody proceeding where the children were removed from the United States to Greece.¹⁶³ During the four months spent in Greece, where the children had previously only spent three or four short vacations, the children lived in three different homes and spoke little Greek.¹⁶⁴ The court considered this evidence of the children's irregular home environment during the four-month time period as insufficient to establish "deep-rooted ties" to Greece.¹⁶⁵ Therefore, Greece was not established as the children's habitual residence and the United States maintained the authority to assert original jurisdiction to determine the merits of the child custody proceeding.¹⁶⁶

In determining a child's habitual residence to establish original jurisdiction in a child custody proceeding, a court usually gives each prong of the analysis equal weight. The exception is when the child custody proceeding involves a child of a young age, who is viewed as

¹⁵⁷*Id.* at 1401.

¹⁵⁸*Id.* at 1401-02.

¹⁵⁹*Id.* at 1402.

¹⁶⁰*Feder v. Evans-Feder*, 63 F.3d 217, 230 (3d Cir. 1995) (Sarokin, J., dissenting).

¹⁶¹*Mozes v. Mozes*, 239 F.3d 1067, 1078-80 (9th Cir. 2001).

¹⁶²*Id.* at 1078.

¹⁶³*Papakosmas v. Papakosmas*, 483 F.3d 617, 620-21 (9th Cir. 2007).

¹⁶⁴*Id.* at 626-28.

¹⁶⁵*Id.* at 627.

¹⁶⁶*Id.* at 628.

lacking the capability to acclimatize to the new environment independent of the child's parent; thus, the parents' mutual intent as to the child's habitual residence outweighs the child's acclimatization.¹⁶⁷ The rationale behind this exception is to prevent the child from being manipulated by one parent seeking to alter the child's habitual residence at the earliest possible age, especially if the visit was only intended to be temporary.¹⁶⁸ For instance, the Court of Appeals for the Third Circuit, in determining Canada as the one-year-old child's habitual residence, held that the parents' shared intentions for the child to live in Canada for two years was more important in the determination than the child's acclimatization.¹⁶⁹ Moreover, in cases involving older children, the child's acclimatization to the new environment can overcome the absence of the intent to abandon the child's habitual residence. The Court of Appeals for the Ninth Circuit, in determining Germany as the seven-year-old child's habitual residence, held that the eight months the child spent in Germany was sufficient for acclimatization to German life.¹⁷⁰ Hence, the child's acclimatization to Germany overcame the parent's lack of mutual intent to abandon the United States as the child's habitual residence.¹⁷¹

IV. THE "BEST APPROACH": THE UCCJEA'S DEFINED HOME STATE V. THE CONVENTION'S UNDEFINED HABITUAL RESIDENCE

The United States, in drafting the UCCJEA to address domestic family abduction, and the signatory countries, in drafting the Convention to address international family abduction, both centered the establishment of original jurisdiction in child custody proceedings on either the child's home state or the child's habitual residence. Each approach aims to achieve the same three fundamental goals: (1) the prevention of the abducting parent to engage in forum shopping as an attempt to gain a more sympathetic forum; (2) the litigation of the same child custody proceeding in more than one jurisdiction; and (3) the encouragement of respect for courts that have properly asserted jurisdiction over the child custody proceeding. Both approaches primarily seek the return of the wrongfully removed child to his or her

¹⁶⁷Holder v. Holder, 392 F.3d 1009, 1020–21 (9th Cir. 2004); *See also* Whiting v. Krassner, 391 F.3d 540, 550–51 (3d Cir. 2004).

¹⁶⁸Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005) (citing *Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001); *Whiting*, 391 F.3d at 551).

¹⁶⁹Whiting, 391 F.3d at 549–51.

¹⁷⁰Holder, 392 F.3d at 1020.

¹⁷¹*Id.*

most familiar environment, which may be determined by the child's significant connections to the state or country or substantial evidence located within the state or country. Under the Convention, the most familiar environment may also be determined by the child's acclimatization to the state or country. Often, this state or country selected as the child's most familiar environment is deemed to be the most appropriate forum to make a determination in a child custody proceeding in order to provide the child with a sense of stability and normalcy. Furthermore, each approach seeks uniform interpretation of the drafters' intent of home state or habitual residence based on the plain and ordinary meaning of the words used in the text.

Both the UCCJEA and the Convention analyze similar factors to determine the location where the child is most familiar based on the time of the abduction and filing of the child custody proceeding. These factors include school attendance, location of extended family, and length of stay in the state or country. The UCCJEA and the Convention both require a majority of the evidence that demonstrates the impact of the environment on the child's development to be located within either the state or country that is sought to establish original jurisdiction in the child custody proceeding. If all of the evidence is within one state or country, this allows for a quick determination of the child's home state or habitual residence to be made because all information required is readily available within one jurisdiction. Thus, this requirement ensures that the most appropriate forum, which can make a determination in the child's best interest, is granted original jurisdiction in the child custody proceeding. Moreover, courts under each approach have the opportunity to decline jurisdiction if another location is found to be the more appropriate forum.

There are two key differences between the UCCJEA—which defines home state—and the Convention—which does not define habitual residence—which have a significant impact on the determination of the child's residence in the child custody proceeding. The first difference is the UCCJEA expressly includes a “temporary absence” provision in defining the child's home state to preserve a state's ability to establish original jurisdiction in a child custody proceeding.¹⁷² In the case previously mentioned under the UCCJEA from the Virginia Court of Appeals, the “temporary absence” provision preserved Virginia as the children's home state and, therefore, Virginia was granted original

¹⁷²Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 18, at 8.

jurisdiction to determine the merits of the child custody proceeding.¹⁷³ If the UCCJEA had not expressly included this provision, it may have been possible for a court to find Hungary to be the children's home state because the children had not been in Virginia for six consecutive months prior to the filing of the child custody proceeding. As a result, the mother in this case would have gained an advantage because Hungary is her native country and, therefore, one of the goals of the UCCJEA would have been violated. In addition, the children's best interests would not have been protected if such a determination had been made because the most appropriate forum, which in this case was Virginia, would not have had jurisdiction to make a determination on the merits of the child custody proceeding.

Contrary to the UCCJEA, the Convention's failure to define habitual residence results in the lack of a "temporary absence" provision. Such a provision would have been beneficial in the case previously mentioned under the Convention from the Court of Appeals for the Sixth Circuit.¹⁷⁴ Based on the court's holding that the twins' three-week visit to France did not result in a change of the United States as the twins' habitual residence, it appears the conclusion would have been the same if determined under a "temporary absence" provision. However, if a "temporary absence" provision were included within the Convention's definition of habitual residence, the court would have been able to make the determination more quickly without going into such an in-depth analysis of the twins' time in France. The twins would have benefited from a more rapid determination of their habitual residence by allowing them to return to the United States as early as possible, and not remain in France while the determination was made.

The inclusion of a "temporary absence" provision within the Convention's definition of habitual residence would also encourage a potential parental abductor to behave in a more principled manner. Besides the hopeful deterrence of the family abduction in the first instance, such a provision could help prevent the parent from making an argument that would be expressly prohibited if a "temporary absence" provision applied. The parent would be unable to argue that the child has acclimatized to the new environment, especially if the child has been in the new country for a short period of time, because the parent is or should be aware that a short absence from the child's familiar environment does not abandon that country as the child's habitual

¹⁷³Prizzia v. Prizzia, 707 S.E.2d 461, 467 (Va. Ct. App. 2011).

¹⁷⁴Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007).

residence. The result would be consistent with the Convention's goal to prevent the abducting parent from participating in forum shopping to gain a legal advantage in the child custody proceeding by establishing jurisdiction in a more sympathetic forum for that parent.

The second difference is that the UCCJEA's definition of home state limits a court's inquiry to an objective standard. For example, in the case previously mentioned under the UCCJEA from the Supreme Court of Texas, the court only used an objective standard to analyze the facts to determine that Tennessee, as the child's home state, could establish original jurisdiction to determine the merits of the child custody proceeding.¹⁷⁵ If the UCCJEA's definition of home state had not limited the court's inquiry to an objective standard, the mother's intent of remaining in Tennessee would have been considered in the court's determination of the child's home state. Such a determination would most likely have resulted in the original jurisdiction of the child custody proceeding being established in Texas. As a result, Tennessee, where the child had lived for almost ten months prior to the filing of the child custody proceeding, would have been denied the opportunity to determine the merits of the child custody proceeding. Thus, the best interests of the child would have been deprived of the most appropriate forum, which in this case was Tennessee, to establish original jurisdiction in the child custody proceeding.

Conversely, the Convention's lack of definition of habitual residence permits an inquiry of the child's habitual residence under a subjective standard. For example, in the case previously mentioned under the Convention from the Court of Appeals for the Fourth Circuit, the court subjectively analyzed the mother's intent to determine the quadruplets' habitual residence was the United States.¹⁷⁶ If the Convention had defined habitual residence to limit the court's inquiry to an objective standard, facts such as the mother's purchase of round-trip tickets and retention of American insurance would not have been considered in determining the quadruplets' habitual residence. Yet, there is a strong possibility the court may still have found the United States to be the quadruplet's habitual residence because it is where almost all of the quadruplets' young lives were spent. Hence, the most appropriate forum to make a determination in the child custody proceeding in the child's best interest still would have been granted original jurisdiction. However, the court could have avoided the intense inquiry into the

¹⁷⁵Powell v. Stover, 165 S.W.3d 322, 326 (Tex. 2005).

¹⁷⁶Maxwell v. Maxwell, 588 F.3d 245, 252-53 (4th Cir. 2009).

mother's intention while the quadruplets remained in Australia and the quickest possible return to the United States would not have been delayed.

The current interpretation of the Convention reveals a contradiction of whether an objective or a subjective standard is preferred to determine a child's habitual residence. A subjective standard is permitted for the intent to abandon the child's previous habitual residence; but, an objective standard is used to determine if the facts unequivocally show a child's residence is a particular country. The issue with the subjective standard is that it becomes a complicated inquiry of the child's mind, the parent's mind, or both, when determining the child's residence. Such a standard will almost certainly lead to differing results because the inquiry predominantly becomes a fact-intensive analysis based disproportionately on circumstantial evidence and not necessarily based on the most appropriate forum to serve the child's best interest. The objective inquiry approach, as used in UCCJEA based cases, still allows the facts and circumstances of each individual case to remain the center of the determination of the child's residence while providing a sense of jurisdictional certainty. Because greater importance is placed on avoiding disruption to the child's environment unless required by law under the Convention, children who are victims of family abduction would benefit from a definition of habitual residence that eliminates the subjective approach.

A change in the text of the Convention—to define the child's habitual residence—would benefit the children who are victims of family abduction. Although the current interpretation appears to achieve the fundamental goals of the Convention, a definition of habitual residence can accelerate the establishment of original jurisdiction in the most appropriate forum in child custody proceedings while creating uniformity of judicial interpretation and application of the Convention. Such a definition would also preserve the child's familial values when the family environment in which the child is most familiar, prior to the family abduction, is restored in a prompt manner. The Convention could benefit from using the UCCJEA's definition of "home state" as a guide to define "habitual residence" while retaining construction of the term most appropriately for family abduction within the international community. For instance, signatories of the Convention would be able to protect themselves as a wrongfully removed child's habitual residence by adopting a similar "temporary absence" provision. Thus, the country would remain the child's habitual residence during the time required for another signatory country to become the child's habitual residence. Additionally, because removing a child across international borders may

have a greater negative impact on the child, the international approach may consider adopting a longer period of time than six months, as used in the UCCJEA, to establish a habitual residence prior to the commencement of the child custody proceeding. There may be a concern that different signatory countries could apply different cultural meanings while interpreting the definition of habitual residence, which would prevent jurisdictional uniformity. However, this can be avoided, and jurisdictional uniformity achieved, if the definition of habitual residence adopts the United States' approach of excluding cultural ties.

A definition of habitual residence would also create a more stringent standard in establishing original jurisdiction in child custody proceedings in cases involving international family abduction. The current fear expressed by courts in the United States that habitual residence would become too rigid if defined has resulted in almost too much judicial discretion to use any factor or approach deemed appropriate under the circumstances to determine the child's habitual residence. As a result, even different federal courts within the United States have used unpredictable and inconsistent formulations to determine a child's habitual residence to establish original jurisdiction in a child custody proceeding. A definition of habitual residence would result in a uniform standard and jurisdictional certainty, especially if the definition was drafted as clearly and unambiguously as possible. Furthermore, courts would retain flexibility without being required to meet precise standards if, as under the UCCJEA, the definition of habitual residence permits courts to decline jurisdiction if the abducting parent is found to have manipulated the law by participating in forum shopping or if another court is held to be a more appropriate forum to determine the merits of the child custody proceeding.

V. CONCLUSION

There are benefits and disadvantages to defining habitual residence in the text of the Convention. When the fundamental goals of the Convention are considered, most importantly the prompt return of a child wrongfully removed, children who are victims of family abduction would benefit from having habitual residence defined. A definition would prevent the child's prolonged stay where the child has been wrongfully removed by allowing the determination of the child's habitual residence to be made in a swifter manner than if the term is left undefined. Although judicial confusion in interpretation and application of the Convention may not be completely eliminated, courts will benefit from a defined term because it will result in uniform jurisdictional certainty within the United States. This jurisdictional certainty can also

be achieved worldwide if the United States' view that a child's cultural ties are not to be considered in determining a habitual residence is followed. The courts' current complicated analysis, including the two-pronged test that requires sub-inquiries to determine a child's habitual residence, would be eliminated if the term were to be defined. Most importantly, a definition will help ensure that the most appropriate forum can establish original jurisdiction and determine the merits of the child custody proceeding in the child's best interest.