THE MYTH OF HABITUAL RESIDENCE: WHY AMERICAN COURTS SHOULD ADOPT THE *DELVOYE* STANDARD FOR HABITUAL RESIDENCE UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

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INTRODUCTION

The phrase "international child abduction" paints an image of a forceful abduction by unknown assailants. Despite this image, the Hague Convention on the Civil Aspect of International Child Abduction ("HCCAICA") was not drafted to address concerns about violent kidnapping by strangers.[2] Rather, HCCAICA was drafted in part to address the problem of international parental child abduction. HCCAICA, drafted by the Hague Conference on Private International Law ("Hague Conference"), was implemented in the United States by the International Child Abduction Remedies Act of 1988 ("ICARA").

International parental child abduction is the unilateral removal or retention of children by parents in violation of the other parent's custody rights. The strength of parents' rights comes from the ability to sue violators of custody or access rights. Under HCCAICA, those who infringe upon a parent's rights do so by either wrongful removal or wrongful retention. The ability to forestall wrongful removal and wrongful retention is a very important part of the bundle of rights bestowed upon parents by HCCAICA.

HCCAICA is the primary legal remedy for parents of children under the age of sixteen in a case of international parental child abduction.[3] The purposes of HCCAICA are locating abducted children, securing their eventual return to custodial parents and creating remedies for international child custody disputes and reducing international parental child abduction. Under the procedures of HCCAICA, these aims are achieved by mandating

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[2] Mozes v. Mozes, 239 F.3d 1067, 1069-70 (9th Cir. 2001).

[3] *See* Marisa Leto, Note, *Whose Best Interest? Child Abduction Under the Hague Convention*, 3 CHI. J. INT'L L. 247 (2002).

the prompt return of all wrongfully removed children to their habitual residence for the purpose of deciding an eventual custody dispute.[4] The state of the child's habitual residence is the forum for an eventual custody decision and HCCAICA governs which state is the state of the child's habitual residence. For this and other reasons, the state of the child's habitual residence is the threshold inquiry in a HCCAICA case. The choices for the state of the child's habitual residence are the state where the child is present at the onset of the HCCAICA proceedings and the state where the child was present prior to the abduction or retention.

The state of the child's habitual residence is the forum for an eventual custody decision-making the question of which state is the state of the child's habitual residence an important inquiry. Moreover, habitual residence is the threshold inquiry in a HCCAICA case because of a myriad of facets of a HCCAICA case controlled by the state of the child's habitual residence. A HCCAICA case is brought in the court of the physical location of the child at the time of HCCAICA proceedings. If the child is located in the state of the child's habitual residence at the onset of a HCCAICA case, then the child remains in that state and there is no further inquiry. If the child is not located in the state of the child's habitual residence, then the court looks to the substantive law of the state of habitual residence to determine whether the child was wrongfully removed or retained. If the child is wrongfully removed or wrongfully retained, then the child is returned to the state of the child's habitual residence for an eventual custody dispute. The venue of an eventual custody dispute is the state of the child's habitual residence. For the duration of an eventual custody dispute, the child resides in the state of the child's habitual residence. These factors make the state of the child's habitual residence the threshold inquiry in a HCCAICA case.

Even though the question of which state is the child's habitual residence is such an important inquiry, there is no universal standard for determining this issue. Under HCCAICA, the task of crafting a standard for determining the state of the child's habitual residence falls to the member states of HCCAICA. In America, the Supreme Court has not addressed this issue and American courts have faltered in attempts to define a comprehensive standard for determining the state of the child's habitual residence for abducted children under HCCAICA. By emphasizing different factors, the United States Judiciary has created a great deal of uncertainty around the controlling standard for habitual residence.[5] Moreover, some

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[4] *See generally* Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89, TREATY DOC. No. 11, art. 1 (1st Sess.) [hereinafter HCCAICA Convention].

[5] Unfortunately, the doctrine of habitual residence under HCCAICA has also confused much of the scholarship. For example, one source states that "[h]abitual residence is a question of fact." Susan Reach Winters & Thomas D. Baldwin, N.J. PRACTICE SERIES § 22.19 (1999). This is incorrect because habitual residence is a "mixed question of fact and law." Delvoye v. Lee, 329 F.3d 330, 332 (3d Cir. 2003) (*Delvoye II*); *see also* Feder v. Evans-Feder, 63 F.3d 217, 222 n.9 (3rd

courts have created standards that abrogate the purposes of HCCAICA. These varying standards cause several problems, which a uniform standard would resolve. A uniform standard for habitual residence would enable the uniform interpretation of HCCAICA in all contracting states, allow America to meet its obligations as a contracting state, prevent forum shopping, comply with parents' established mutual intentions, determine habitual residence for all children regardless of age and deter parental kidnapping. Therefore, courts should, at the first available opportunity, clarify their jurisprudence on the issue of habitual residence and adopt a uniform standard for determining the state of the child's habitual residence to promote the goals of HCCAICA.

American courts should adopt the Third Circuit's *Delvoye* standard for determining a child's habitual residence under HCCAICA as the uniform standard. The *Delvoye* standard evaluates a variety of elements to determine the habitual residence of a child depending on the age of the child. Under the *Delvoye* standard, the threshold question is the child's age and maturity. The age and maturity of the child determines the elements evaluated to establish the state of the child's habitual residence.

In many international parental child abduction cases, the child is a neonate or an infant. A neonate is a newborn child, while an infant is older than a neonate. A child is a neonate from birth to around six months and an infant from around six months until four years. The court determines the classification of the child's age and maturity on a case-by-case basis. Prior to the standard for determining the state of the child's habitual residence used by the Third Circuit in *Delvoye v. Lee*, it was often impossible to accurately determine a neonate's habitual residence.[6]

Under the *Delvoye* standard, the age and maturity of the child determines the elements evaluated to establish the state of the child's habitual residence. In the case of the neonate, the sole element that a court using the *Delvoye* standard evaluates to determine the neonate's habitual residence is the mutual intent of the parents to make a place the state of the neonate's habitual residence. The *Delvoye* standard does not require that the neonate be physically present in the state of habitual residence prior to the removal or retention.

In the infant stage, a court using the *Delvoye* standard to determine the child's habitual residence evaluates three elements to determine the infant's habitual residence. The three elements are the states in which the infant was physically present prior to the removal or retention, the length of time spent by the infant in those states and the mutual intent of the parents to make a place the state of the infant's habitual residence.

Cir. 1995) (*Feder II*); *Mozes*, 239 F.3d at 1073.

[6] 329 F.3d 330 (3d Cir. 2003).

For children older than neonates and infants, a court using the *Delvoye* standard to determine the child's habitual residence evaluates four elements to determine the older child's habitual residence. The four elements are the states in which the older child was physically present prior to the removal or retention, the length of time spent by the older child in those states, the child's intent to remain in those states and the actions of the child prior to the removal or retention relating to their intent. In this way, the age and maturity of the child determines the elements evaluated to establish the state of the child's habitual residence under the *Delvoye* standard.

This Note suggests a standard for habitual residence that addresses America's obligations as a contracting state under HCCAICA. This standard will prevent forum shopping, promote parents' mutual intentions, treat children appropriately depending on their age and deter international parental child abduction. This Note proposes using the *Delvoye* standard, an age dependent standard that evaluates a variety of elements to determine the habitual residence of a child. Under the *Delvoye* standard, the probative value of the element of physical presence is evaluated on a case-by-case basis. As the child grows older, physical presence becomes a more important factor. For a neonate physical presence in the state of habitual residence prior to the removal or retention is not required. American courts should embrace this standard when next facing the issue of habitual residence. Part I of this Note gives an overview of the Hague Convention on the Civil Aspects of International Child Abduction. This includes the importance of habitual residence under HCCAICA, the role of a child's age in determining a child's state of habitual residence and a discussion of the role of wrongful removal and retention in a HCCAICA case. Part II analyzes the Sixth Circuit's *Friedrich* standard, various courts' settled purpose standard and the Third Circuit's *Delvoye* standard for habitual residence under HCCAICA. Part III proposes the Third Circuit's *Delvoye* standard as a uniform standard for habitual residence.

I. BACKGROUND OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Prior to the enactment of HCCAICA, it was difficult to locate abducted children and secure a child's eventual return to their custodial parent.[7] The main problem was the lack of enforcement of foreign custody orders.[8] This created incentives for parental abduction for the purpose of forum shopping.[9] One incentive for forum shopping was that a new forum could

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[7] *See* Lynda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. INT'L L. & COM. REG. 137, 142 (1994).

[8] *See id.* at 142-43.

[9] *See id.* at 143 (citing Barbara U. Scherwin, *The Hague Convention on International Child Abduction: A Practical Application*, 10 LOY. L.A. INT'L & COMP. L. REV. 163, 168 (1988)).

find a different outcome without enforcing a prior judgment.[10] Another incentive for forum shopping was the various standards for custody jurisdiction including: "(a) the child's physical presence; (b) the child's domicile; (c) the physical presence and/or domicile of one or both parents; or (d) the continuing rights or jurisdiction in a court rendering an initial decree."[11] For these reasons it remained difficult to locate abducted children and secure their eventual return to their custodial parent.

In order to reduce the frequency of international parental child abduction, the Hague Conference drafted the final act of HCCAICA.[12] One purpose of HCCAICA is to create remedies for international parental child abduction.[13] Prior to HCCAICA, the problem of parental child abduction was only dealt with nationally, not internationally.[14] There were few

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[10] *See id.*

[11] *See id.* (internal citation omitted).

[12] *See* Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99 (1980). The Hague Conference completed the final act of HCCAICA on Oct. 25, 1980. *Id.*

There are certain undertakings individual nations are unable to execute without assistance from other countries. In this spirit, the Hague Conference brings countries together for a unified purpose. The Hague Conference is an intergovernmental organization. *See Frequently Asked Questions Regarding the Hague Conference and the Hague Conventions* § 6 (Oct. 4, 2002), *at* http://www.hcch.net/e/faq/faq.html#06 [hereinafter Hague Conference, FAQ]. This goal of unifying rules of private international law can be found in the Statute of the Hague Conference on Private International Law ("Hague Statute"), drafted during the seventh session of the Hague Conference held at the Hague from Oct. 9-31, 1951. *See* Statute of the Hague Conference on Private International Law (July 15, 1955), *at* http://www.hcch.net/e/conventions/text01e.html [hereinafter Hague Statute]. The Hague Statute sets out to define the purpose, procedures and policies of the Hague Conference, the drafting body of the various Hague Conventions. *See generally id.* The United States became admitted to the Hague Conference by accepting the Hague Statute on Oct. 15, 1964. The Hague Statute states that "[t]he purpose of The Hague Conference shall be to work for the progressive unification of the rules of private international law." *Id.* at art. 1. The Hague Conference achieves this goal by negotiating and drafting various treaties, collectively called Hague Conventions. *See* Hague Conference, FAQ, *supra* note 12, at § 6.

The modern Hague Conference essentially began on March 1, 1954 with the passage of Convention du Premier Mars 1954 Relative à la Procédure Civile– (Convention of 1 March 1954 on Civil Procedure), *available at* http://www.hcch.net/e/conventions/menu02e.html (last visited Apr. 24, 2003) [hereinafter Hague Civil Procedure Convention]. The Hague Conference composes Hague Conventions for a variety of international purposes. Hague Conference serve a variety of international functions:

> Some of the Hague Conventions deal with the determination of the applicable law, some with the conflict of jurisdictions, some with the recognition and enforcement of foreign judgments and some with administrative and judicial co-operation between authorities, and some combine one or more of these aspects of private international law.

Hague Conference, FAQ, *supra* note 12, at § 6. One such convention is HCCAICA, which serves as the primary means for enforcing international custody rights. HCCAICA Convention, *supra* note 4; *see also* Leto, *supra* note 3, at 247 ("The primary legal remedy for parents of children abducted to foreign nations is the Hague Convention on the Civil Aspects of International Child Abduction . . . .").

[13] *See* Lisa Nakdai, Note, *It's 10 P.M., Do You Know Where Your Children Are? The Hague Convention on the Civil Aspects of International Child Abduction*, 40 FAM. CT. REV. 251, 253 (2002).

[14] *See id.* at 253; *see also* Herring, *supra* note 7, at 142.

remedies to international parental child abduction.[15] Although there were few remedies, the problem of international parental child abduction remained a pressing concern. Speaking to this concern, the Kings County Supreme Court noted that, "[o]ne of the hardest problems concerns the removal of a child from the jurisdiction by one parent without the consent of the other parent."[16] This Note addresses custodial parents who seek to promote the welfare of children, secure the return of abducted children and deter parental child abduction. HCCAICA was enacted to meet these goals.[17]

Deterring parental child abduction is promoted by ensuring that one party does not gain an advantage over the other party in their eventual custody dispute.[18] HCCAICA prevents one party from gaining an advantage by preserving the status quo.[19] Preserving the status quo deters parental child abduction by mandating the return of the child to the state of the child's habitual residence.[20]

The United States became a contracting state to HCCAICA on December 23, 1981. The United States became a contracting state or party to HCCAICA through ratification.[21] Ratification legally obligates the ratifying state to apply the provisions of HCCAICA.[22] Barring a few exceptions, ratification powers are exclusively reserved for member states.[23]

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15 *See* Nakdai, *supra* note 13, at 253.

16 Sheikh v. Cahill, 546 N.Y.S.2d 517, 518 (N.Y. Sup. Ct. 1989).

17 HCCAICA Convention states that"[t]he object of the present convention [is] to secure the prompt return of children wrongfully removed . . . ." HCCAICA Convention, *supra* note 4, at art. 1. *See also* 51 Fed. Reg. 10,498 (1986); Schroeder v. Vigil-Escalera Perez, 664 N.E.2d 627 (Ohio Com. Pl. 1995). Thus far, the Hague Convention on the Civil Aspect of International Child Abduction has been successful in expediting the return of abducted children while also deterring parental kidnapping. *See* Nakdai, *supra* note 13, at 255.

18 *See* Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993).

19 *See id.* at 1400 (noting "the general rule governing the Hague Convention on the Civil Aspect of International Child Abduction . . . is to preserve the status quo").

20 *See id.*

21 States can be bound by HCCAICA in two ways besides ratification. The first method is signing HCCAICA. Signing HCCAICA expresses a state's intention to become a party to HCCAICA. *See* Hague Conference, FAQ, *supra* note 12, at § 12. A signature does not obligate a state to take any further action, ratification is necessary. *See id.* The United States has signed, but not ratified two Hague Conventions. One is The Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition. *See* Hague Conference On Private International Law Homepage, *Full Status Report Convention # 30, at* http://hcch.net/e/status/stat30e.html#us (last visited Jan. 30, 2004). The other is The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. *See* Hague Conference On Private International Law Homepage, *Full Status Report Convention # 33, at* http://hcch.net/e/status/stat33e.html#us (last visited Jan. 30, 2004).

The second way a state can be bound by HCCAICA without ratification is to accede to a convention. *See* Hague Conference, FAQ, *supra* note 12, at §12. Acceding only binds the states that accept the accession. "[The] Convention . . . enter[s] into force between acceding State[s] and State[s] that have declared acceptance [of the acceding State]." HCCAICA Convention, *supra* note 4, at art. 38(4).

22 Hague Conference, FAQ, *supra* note 12, at § 12.

23 *Id.* at § 12. The United States has ratified four Hague Conventions including the Hague Convention on the Civil Aspect of International Child Abduction. Others include, the Judicial Procedure: Abolishing Requirement of Legalization for Foreign Public Document Convention

HCCAICA was implemented in the United States by the International Child Abduction Remedies Act of 1988.[24] ICARA provides concurrent state and federal original jurisdiction for actions arising under HCCAICA.[25] For this reason, any decisions related to ICARA should be decided in light of the overarching policies of HCCAICA.

A. *The Importance of Habitual Residence Under the Hague Convention on the Civil Aspects of International Child Abduction*

The Threshold question in a HCCAICA inquiry is the determination of the child's state of habitual residence. International parental child abduction occurs when one parent unilaterally removes or retains a child in violation of the other parent's custody rights. The court in a HCCAICA case decides which court will decide an eventual custody dispute.[26] The merits of the custody dispute are not decided in a HCCAICA case.[27] It is during an eventual custody proceeding that parents present a case to become the custodial parent.[28] The merits of the custody dispute will ultimately be decided in the state of the child's habitual residence.[29]

Habitual residence is an important question in an international child abduction case because it is the state controlling the substantive law of wrongful removal and retention during the HCCAICA proceedings,[30] the venue of an eventual custody dispute and the child's location for the duration of an eventual custody dispute. In addition, if the child is located in the state of the child's habitual residence at the onset of a HCCAICA case the removing parent retains the child.[31] If the child is not located in the

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adopted at the Hague on October 5, 1961, 33 U.S.T. 883, 1981 WL 375769 (U.S. Treaty), T.I.A.S. No. 10,072 (Oct. 15, 1981), the Service Abroad of Judicial and Extrajudicial Documents Convention adopted at the Hague on November 15, 1965, 20 U.S.T. 361, 1969 WL 97765 (U.S. Treaty), T.I.A.S. No. 6638 (Feb. 10, 1969) and the Taking of Evidence Abroad Convention adopted at the Eleventh Session of the Hague Conference on Private International Law October 26, 1968, 23 U.S.T. 2555, 1972 WL 122493 (U.S. Treaty), T.I.A.S. No. 7444 (Oct. 7, 1972).

[24] 42 U.S.C. § § 11601-11610.

[25] *See id.* § 11603(a) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.").

[26] *See* HCCAICA Convention, *supra* note 4, at arts. 1, 16; *see also Friedrich*, 983 F.2d at 1402.

[27] *See id.*

[28] *See Friedrich*, 983 F.2d at 1403.

[29] *See* HCCAICA Convention, *supra* note 4, at arts. 1, 16; *see also Friedrich*, 983 F.2d at 1403.

[30] The HCCAICA Convention states:

> The removal or the retention of a child is to be considered wrongful where – (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention.

HCCAICA Convention, *supra* note 4, at art. 3.

[31] The location of the child at the onset of the HCCAICA inquiry is not automatically deemed the state of the child's habitual residence. The parent with physical custody of the child at the onset of the HCCAICA inquiry retains custody of the child until the questions of habitual residence and wrongful removal or retention have been resolved. The parent seeking the return of the child must have access rights to commence a HCCAICA case. 42 U.S.C. §

state of the child's habitual residence at the onset of the HCCAICA inquiry, then the court determines whether the child has been wrongfully removed. If wrongful removal is established by the non-removing party, the removing party may rely on four exceptions to HCCAICA to retain the child.[32]

The Hague Conference first used the term "habitual residence" in a 1954 convention dealing with civil procedure.[33] Since that time, the Hague Conference has repeatedly used the term "habitual residence" in various conventions.[34] However, the Hague Conference has yet to define the term in any of its conventions.[35] Since HCCAICA is silent as to the definition of habitual residence, each contracting state is free to interpret the term. American courts have determined habitual residence on a case-by-case basis with reference to the facts of each case.[36]

B. *The Relationship Between the Child's Age and the Habitual Residence Inquiry*

In addressing the threshold question of habitual residence, courts look to the age of the child. Under a uniform standard, courts will use the age of the child to determine what elements are evaluated in the habitual residence inquiry. There are three main age groups for children under sixteen: neonates, infants, and older children.[37] Different elements are used to

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11603(e)(1)(B) (stating "in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights").

[32] The burden of proof on the removing parent for the first two exceptions is clear and convincing evidence. *Id.* at § 11603(e)(2)(A). The burden of proof on the removing parent for the second two exceptions is a preponderance of the evidence. *Id.* at § 11603(e)(2)(B). Only the relevant exceptions need be proven by the removing parent. The four exceptions are: 1) grave risk that the return of the children would expose them to physical or psychological harm, HCCAICA Convention, *supra* note 4, at art. 13(b), 2) the violation of fundamental principles of the requesting state relating to the protection of human rights and fundamental freedoms, *id.* at art. 20, 3) delay of more than one year after the children have become settled in a new environment, *id.* at art. 12, or 4) consent by the petitioner to the removal or retention. *See id.* at art. 13(a).

The court must determine whether there was consent at the time of the alleged wrongful removal. The removing parent must plead consent. The court must determine whether the petitioner consented to the removal. This is a question of fact determined on a case-by-case basis. If there is consent, then the state of habitual residence is irrelevant. The child stays with the removing parent because the non-removing parent consented to the removal. *See* HCCAICA Convention, *supra* note 4, at art. 13(a). If there is no consent then the child must be promptly returned to the state of habitual residence. *See id.* at art. 1. Mutual parental intent is not an exception to HCCAICA, rather it is part of the habitual residence inquiry. The court must determine whether both parents mutually intended to make a state the child's state of habitual residence. Mutual parental intent is a necessary predicate to using the settled purpose standard for habitual residence.

[33] *See* Hague Civil Procedure Convention, *supra* note 12, at arts. 21, 32.

[34] *See, e.g.*, 1961 Hague Convention called the Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, at art. 1 (Oct. 5, 1961), *available at* http://www.hcch.net/e/conventions/text10e.html.

[35] *See Friedrich*, 983 F.2d 1396, 1400-01 ("Little case law exists on [The Hague Convention on the Civil Aspect of International Child Abduction] in general; no United States cases provides guidance on the construction of 'habitual residence'"); *see also Mozes*, 239 F.3d at 1071.

[36] Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993).

[37] For purposes of this Note a neonate is a newborn child as determined by a court. In

determine habitual residence for neonates, infants and older children.[38] In general, the court can use the following elements to determine the habitual residence of the child: the states where the child has been physically present prior to the removal or retention, the length of time the child was present in those states, the intent of the child to remain in those states, the past actions of the child relating to the child's intent and the mutual intent of the child's parents.

The age of the child helps determine the elements evaluated by a court in a habitual residence inquiry. This is because neonates and infants have no ascertainable intentions regarding habitual residence.[39] "[Y]oung children . . . generally are unable to articulate reasons such as business opportunities to habitually reside in a particular place."[40] A child would be hard pressed to communicate the rationale for moving to a particular location.[41] The sensitivity of the habitual residence inquiry becomes particularly acute when neonates are involved. A "neonate simply has not been present anywhere long enough to have an acclimatization apart from his parents."[42] Acclimatization is the process of forming the intent to remain in a particular locale, through which the child establishes connections and

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Delvoye v. Lee, 224 F. Supp. 2d 843, 846 (D.N.J. 2002), *aff'd*, 329 F.3d 330 (3d Cir. 2003) [hereinafter *Delvoye I*], the court deemed a two-month old child a neonate. In *Schroeder*, a five-month old child was found to be a neonate. *See* 664 N.E.2d at 632. The court in *Feder v. Evans-Feder*, determined that a child of four years old is an infant. *See* 866 F. Supp. 860, 862 (E.D.Pa. 1994), *vacated by*, Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995) [hereinafter *Feder I*].

The medical definition of neonate is the first twenty-eight days after birth. *See* David A. Suski, *Frozen Blood, Neonates,and FDA: The Regulation of Placental-Umbilical Cord Blood*, 84 VA. L. REV. 715, n.1 (1998) ("A neonate is [a newborn] infant during the first 7 to 28 days after birth." (citing CHURCHILL'S ILLUSTRATED MEDICAL DICTIONARY 1237 (1st ed. 1989)). The habitual residence standard is meant to be fluid and fact based. *See Levesque*, 816 F. Supp. at 666. The question of whether a child is a neonate under HCCAICA should be a question of fact, and not be based on the strict and technical age parameters of the medical definition of a neonate.

For purposes of this Note, an infant is a very young child that is older than a neonate. Again, it is for the court to determine on a case-by-case basis whether a child is a neonate or an infant. *See In re* Application of Ponath, 829 F. Supp. 363, 367 (D. Utah 1993) (holding that a child over the age of one was an infant). *But see Friedrich*, 983 F.2d at 1399 (holding a child of around two years of age too old to be an infant).

The reason for a distinction between neonates and infants is that the definition of neonate only applies to newborns, whereas, the definition of infant can be applied to a newborn or an older child. The term infant carries two definitions "a newborn baby" and "a minor." BLACK'S LAW DICTIONARY 624 (7th ed. 1999). Further complicating matters, some courts have used the terms neonate, newborn and infant interchangeably. *See Schroeder*, 664 N.E.2d at 632.

[38] *See Schroeder*, 664 N.E.2d at 633. Despite the limitations of the requirements that a child have physical presence over a period of time to establish habitual residence, the *Schroeder* court established that determining habitual residence for neonates should be treated differently from cases involving infants and older children. *See id.*

[39] In *Feder*, Evan was born in Germany on July 3, 1990. The *Feder* court held that even a child of over four years old depends on its parents for making decisions regarding its past, present and future condition. *See Feder I*, 866 F. Supp. at 868. In *Sheikh*, the court held that a nine-year-old child is not of an age and degree of maturity to make the child's intent dispositive. *Sheikh*, 546 N.Y.S.2d at 521-22.

[40] *See* Armiliato v. Zaric-Armiliato, 169 F. Supp. 2d 230, 237 (S.D.N.Y. 2001).

[41] *See id.* at 237.

[42] *Delvoye I*, 224 F. Supp. 2d at 848.

community ties.[43]

Different elements are evaluated in a habitual residence inquiry to compensate for a child's inability to articulate a preference. One such factor is mutual parental intent. Parents might have a more ascertainable purpose for moving to a particular locale. Therefore, the court should look to the mutual intent of the parents when determining habitual residence for neonates and infants.[44]

Mutual parental intent is an important factor well into a child's development. Prior to a child's birth, the mother is free to move around without committing parental child abduction. The state of the child's birth is not necessarily the state of the child's habitual residence, so the court must evaluate the facts of the case to determine the child's habitual residence. At this stage, the child is a neonate. Various standards have emerged to attempt to incorporate age into the habitual residence inquiry. These standards each present elements that should be included in a uniform standard for habitual residence under HCCAICA.

C. *The Relationship Between Wrongful Removal and Retention Under the Hague Convention on the Civil Aspects of International Child Abduction and the Habitual Residence Inquiry*

The threshold question addressed by the court is their habitual residence. If the court finds that the child is not located in the state of the child's habitual residence at the onset of the HCCAICA case, then the court must determine whether the child has been wrongfully removed or retained. International parental child abduction occurs when one parent violates the rights of custody of the other parent. Parental rights of custody arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."[45] Under HCCAICA, the non-removing parent must prove by a preponderance of the evidence that the child has been wrongfully removed or retained from state of the child's habitual residence.[46] Wrongful removal and wrongful

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[43] *See Feder II*, 63 F.3d at 224.

[44] *See id.* at 225.

[45] HCCAICA Convention, *supra* note 4, at art. 3(2).

[46] 42 U.S.C. § 11603(e)(1)(A) ("A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention."). § 11603(b) states that:

> Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

Id.; *see also* HCCAICA Convention, *supra* note 4, at art. 3(1)(a)-(b).

retention are questions of the law of the state of the child's habitual residence.[47] In general, removal or retention of a child is wrongful under HCCAICA where:

> [I]t 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 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.[48]

The goals of HCCAICA, including, locating abducted children, securing their eventual return to custodial parents, creating remedies for international child custody disputes and reducing international child abduction, are served by protecting children from the harmful effects of wrongful removal and retention.[49]

II. THE EVOLVING STANDARD FOR HABITUAL RESIDENCE

A. *The* Friedrich *Standard*

Since the United States became a contracting state to HCCAICA, courts have been challenged to craft a uniform standard for habitual residence. These standards each present elements that should be included in a uniform standard for habitual residence under HCCAICA. The *Friedrich* standard for habitual residence was created by the Sixth Circuit. The elements evaluated by the *Friedrich* standard in determining habitual residence are thee states in which the child was physically present prior to the removal or retention, the length of time spent in those states, the child's intent to remain in those states and the past actions of the child relating to that intent.

Prior to the *Friedrich* standard, the earliest cases in the United States under HCCAICA considered each case on a fact-by-fact basis and did not craft a standard for habitual residence. These courts looked only at the elements of the states where the child had physical presence and the length of time the child spent in those states to determine habitual residence.[50] The court in *Sheikh v. Cahill*, with little other factual inquiry, held the United Kingdom was the state of the child's habitual residence because the child had lived in London for over two and a half years.[51] Nadeem was first taken by his mother to London in July 1986 without the knowledge of his father.[52]

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47 HCCAICA Convention, *supra* note 4, at art. 3(1)(a)-(b).

48 *Id.*

49 *Id.* at arts. 1, 16.

50 *See Sheikh*, 546 N.Y.S.2d at 517.

51 *See id.* at 520.

52 *See id.* at 519.

Nadeem remained in London for two and a half years until he was nine years old.[53] *Sheikh* and other early HCCAICA cases were considered on a fact-by-fact basis and did not explicitly craft a uniform standard for habitual residence.[54]

In *Friedrich v. Friedrich*, the Sixth Circuit Court of Appeals was the first American court to create a standard for habitual residence under HCCAICA.[55] The issue in *Friedrich* was whether the United States or Germany was the state of Thomas' habitual residence. The court held that Germany was the state of Thomas' habitual residence.[56] On December 29, 1989, Thomas was born in Bad Aiblin, Germany.[57] Thomas' father was a German national and his mother was an American citizen and a member of the United States Army.[58] In May of 1991, Mrs. Friedrich took Thomas for a ten-day visit to the United States, and then returned to the family apartment in Germany with Thomas.[59] On July 27, 1991, the Friedrichs had a heated argument and Mr. Friedrich ordered Mrs. Friedrich to leave their apartment.[60] She left with Thomas.[61] On August 1, 1991, Mrs. Friedrich, without Mr. Friedrich's permission, consent, or knowledge, took Thomas to the United States and filed for divorce and filed for custody of Thomas in Ohio.[62] At this time, Thomas was over two and a half years old.[63] Given the

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53 *Id.* at 520.

54 Although little case law defining habitual residence existed in the United States in 1993, the United Kingdom had almost a two-year head start over the United States in deciding cases arising under HCCAICA. The United Kingdom became a party to HCCAICA on Aug. 1, 1986, whereas the United States ratified HCCAICA on Apr. 29, 1988. *See* Hague Conference On Private International Law, *Full Status Report Convention Number Twenty Eight, available at* http://www.hcch.net/e/status/stat28e.html (last visited Jan. 29, 2004). The United Kingdom became a member of the Hague Conference on July 15, 1955. *See* Hague Conference On Private International Law, *Full Status Report Number One*, § 3, *available at* http://www.hcch.net/e/members/signrat_uk.html (last visited Jan. 29, 2004). British courts have proven to be a fruitful source of clarification on the standard for habitual residence. *See generally In Re* Bates, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989). This case proved influential to the *Friedrich* court and American courts in general. In construing *In re Bates*, the *Friedrich* court articulated that "there is no real distinction between ordinary residence and habitual residence." *Friedrich*, 983 F.2d at 1401 (construing *Bates*, No. CA 122.89, at 10). Other cases are similarly reasoned. *See, e.g.*, Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (noting that "it should be understood as the child's 'ordinary residence' at the relevant time of discovering 'habitual residence'").

55 983 F.2d 1396 (6th Cir. 1993). At the time of the *Friedrich* decision, "no United States case [had] provided guidance on the construction of 'habitual residence.'" *Id.* at 1401.

56 *See Friedrich*, 983 F.2d at 1401-02 ("This is a simple case. Thomas was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore, we hold that Thomas was a habitual resident of Germany at the time of his removal.").

57 *See id.* at 1398.

58 *See id.*

59 *See id.* at 1399.

60 *See id.*

61 *See id.*

62 *Friedrich*, 983 F.2d at 1399.

63 *See id.*

young age of the child, and the court's impressions of the child's ability to form intentions, the *Friedrich* court created a standard to determine the habitual residence for the child.[64]

The *Friedrich* court relied heavily on the fact that Thomas had resided exclusively in Germany.[65] Germany was Thomas' habitual residence. This finding discourages parental child abduction because habitual residence can be altered only by a "change in geography and the passage of time."[66] These are two of the elements evaluated by the *Friedrich* standard in determining a child's habitual residence. The other two elements are the intent of the child to remain in the states in which the child has been physically present prior to the removal or retention and the actions of the child relating to that intent.

The age of the child in *Friedrich* afforded the child the opportunity to become attached to the place of physical presence. Under the *Friedrich* standard, the court, on a case-by-case basis, determines whether enough time has passed for the child to acclimate to the environment. For both of these elements, the court only looks at the child's actions prior to the alleged wrongful removal.[67] Looking only at the child's prior actions is another deterrent to parental child abduction. The facts must indicate habitual residence prior to the removal, so the parent cannot establish habitual residence through the act of removal. Under the *Friedrich* standard, the parent's intentions regarding the child are irrelevant to a habitual residence inquiry.[68] The *Friedrich* court warned that focusing on the parents' future intentions would render HCCAICA "meaningless."[69] Many American courts have adopted the *Friedrich* standard.[70]

B. *The Settled Purpose Standard*

The settled purpose standard, which was developed by many courts over a period of time, expanded the *Friedrich* standard for habitual residence

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64 *See* HCCAICA Convention, *supra* note 4, at art. 4 (stating that "[t]he Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years").

65 *See Friedrich*, 983 F.2d at 1401. In *Friedrich*, after Mr. Friedrich forced Thomas and his mother to leave the Friedrich family residence, the boy and his mother stayed at a United States military base for three days. *See id.* The court held that a United States "military base is not a sovereign territory of the U.S." *Id.*

66 *Id.* at 1402.

67 *See id.* at 1400.

68 *See id.* at 1401.

69 *Friedrich*, 983 F.2d at 1402.

70 *See, e.g., Rydder*, 49 F.3d 369, 373; Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 847-48 (Ky. Ct. App. 1999) (noting that "[t]here are alternative approaches to determining a child's habitual residence, however, this Court has previously decided that a determination of habitual residence 'must focus on the child, not the parents, and examine past experience, not future intentions'") (internal citations omitted).

to include the mutual intent of the parents when the child's own intent proves inadequate.[71] The parents' mutual intent must be manifest prior to the removal of the child.[72] The elements evaluated by the settled purpose standard in determining a child's habitual residence include the parents' mutual intent for a state to be the child's habitual residence, the child's intent for a state to be the child's habitual residence, the states in which the child was physically present prior to the removal or retention and the length of time the child spent in those states.

Eight months after the creation of the *Friedrich* standard, the District Court for the District of Utah questioned the *Friedrich* standard's finding that the parents' intentions regarding the child's state of habitual residence are irrelevant to a habitual residence inquiry.[73] The case was *In re Ponath.*[74] Richard, the child, was born on July 21, 1991 in Utah[75] and spent the first five months of his life in Utah.[76] On November 6, 1991, Richard moved to Germany with his parents, where he spent the next eleven months of his life.[77] The *Ponath* court found that beginning in approximately February 1992 both Richard and his mother were detained in Germany through verbal, emotional and physical abuse.[78] On September 7, 1992, Richard and his mother returned to Utah. Since Richard's father did not consent to Richard's removal, he petitioned the district court in Utah under HCCAICA for the return of the child to Germany.[79] Richard was two years old, younger than the child in *Friedrich*, when the alleged act of wrongful removal occurred, yet the *Ponath* court deemed Richard to be an infant.[80]

The determination that Richard was an infant led the court to evaluate the intentions of the parents. The *Ponath* court noted that because Richard was an infant, the court could not ignore the "desires and actions" of the parents when determining the child's habitual residence.[81] The court reasoned that Richard's habitual residence should be based on his parents' mutual intent and that intent should be voluntary.[82] In *Ponath*, the mother did not have the voluntary intent to establish Germany as her child's habitual

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71 *See Ponath*, 829 F. Supp. at 367.

72 *Feder II*, 63 F.3d at 225.

73 *Ponath*, 829 F. Supp. at 363.

74 *Id.*

75 The child was born to a German father and American mother in July 1991. *See id.* at 364.

76 *See id.*

77 *See id.*

78 *Id.*

79 *Ponath*, 829 F. Supp. at 367.

80 *See id.*

81 *See id.* (holding that "[a]lthough it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored by the court in making that determination when the child was at the time of removal or retention an infant").

82 *See id.* at 364.

residence because she was coerced into staying there.[83] Therefore, the physical presence of the child in Germany was neither voluntary nor mutually decided by the parents. For these reasons, Utah remained the child's habitual residence, despite the fact that the child had not lived in Utah for eleven months.[84]

The *Ponath* court adopted the physical presence and passage of time requirements of *Friedrich.* However, the *Ponath* court rejected the requirement that only the child's intentions should be evaluated in determining habitual residence. Under the *Friedrich* standard, the *Ponath* court would have found the child's habitual residence to be Germany. Remarkably, even though the child in *Ponath* lived in Germany twice as long as in Utah, the *Ponath* court nonetheless held that the child's father failed to establish by a preponderance of the evidence that Germany was the Richard's habitual residence.[85] The *Ponath* court reached this result by expanding the standard for habitual residence to include the intent of the child's parents. One reason for this is that the intent of the parents in *Ponath* was achieved through coercion. This was an important factor, which led the court to evaluate the basis for the parental intent. The settled purpose standard expands the habitual residence inquiry to include the intent of the parents.[86] This standard also recognizes that young children often lack the ability to form an intent regarding habitual residence, so the court should look towards the intent of the parents.

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[83] *Ponath*, 829 F. Supp. at 367.

[84] The *Ponath* court held that child's stay in Germany could have altered his habitual residence from Utah to Germany. The *Ponath* court noted:

> [W]hat began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United States with the minor child and petitioner's willful obstruction of that purpose.

Id. at 367-68. In *Ponath*, the absence of the mother's voluntary intent prevented the child's habitual residence from changing. The court observed "coercion . . . by means of verbal, emotional and physical abuse removed any element of choice and settled purpose which earlier may have been present in the family's decision to visit Germany." *Id.* at 368.

[85] *See id.* at 367.

[86] The "settled purpose" in the settled purpose standard needs to come from the parent and not the child. *Mozes*, 239 F.3d at 1081; Harsacky v. Harsacky, 930 S.W.2d 410, 415 (Ky. Ct. App. 1996) ("[W]e fully agree with the trial court that a determination of habitual residence "must focus on the child, not the parents.") (quoting *Friedrich*, 983 F.2d at 1401).

A child may have a "settled purpose" to reside at summer camp for a limited period, yet summer camp, with a predetermined beginning, middle and end, is not the child's habitual residence. *See Mozes*, 239 F.3d at 1074. What seems settled to a child is not necessarily habitual residence to a court. For this reason the court needs to look to the intent of the parents. The settled purpose standard therefore recommends that mutual intent of the parents be used to clarify the habitual residence of the child. *See Armiliato*, 169 F. Supp. 2d at 237 ("Although the 'settled purpose' of a small child like Alessandra is elusive, the principle is informed by the subjective intent of those entitled to fix the child's residence.") (internal citations omitted); *Feder II*, 63 F.3d at 224 ("[A] determination of [habitual residence] must . . . consist of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."). The *Ponath* court's solution to the deficit of *Friedrich* standard was to adopt the settled purpose standard.

The settled purpose standard evaluates, "whether the parent had a fixed intent for the child to remain in the area in question."[87] Additionally, changing the child's habitual residence requires mutual parental intent.[88] The mutual parental intent must be for the child to settle indefinitely.[89] Under the settled purpose standard, the court evaluates whether "a sufficient amount of time for acclimatization . . . from the child's perspective" has been established.[90] If this occurs, the parents are said to have the "settled purpose" to make the place of physical presence the child's habitual residence.[91] The court will analyze the degree of the child's acclimatization, so the amount of time spent in a given place by the child is not determinative.[92] The court is looking for information relating to the child's acclimatization, not information relating to the parents' motives or future intentions.[93] Any unilateral change in intent by one parent will not change the habitual residence.[94] The mutuality requirement deters parental kidnapping. The shared intent of the parents manifests itself through the "conduct and stated intention of the parents."[95] A parent cannot change a child's existing habitual residence by wrongfully removing the child.[96] The court determines shared intent on a case-by-case basis.[97]

The settled purpose standard expanded the *Friedrich* standard to include the mutual intentions of the parents in determining the habitual residence for children under the age of sixteen. Even under the settled purpose standard, physical presence and the passage of time are required to establish habitual residence.[98] Today, courts either use the *Friedrich* standard or the settled purpose standard to determine habitual residence.[99]

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87 *Feder II*, 63 F.3d at 224.

88 *See id.*

89 Wanninger v. Wanninger, 850 F. Supp. 78 (D. Mass. 1994).

90 *Feder II*, 63 F.3d at 224.

91 *See Feder I*, 866 F. Supp. at 868.

92 *See In re* McKenzie, 168 F. Supp. 2d 47 (E.D.N.Y. 2001).

93 *See Friedrich*, 983 F.2d at 1396.

94 *See In re* Morris, 55 F. Supp. 2d 1156 (D. Colo. 1999) ("[A] sabbatical type situation where the family intends to be in a foreign country for a defined period of less than one year and for a specific purpose, one parent's unilaterally changed intent not to return is insufficient to shift the child's habitual residence from that country.").

95 *Feder II*, 63 F.3d at 225.

96 Miller v. Miller, 240 F.3d 392 (4th Cir. 2001).

97 *See* Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001) ("[V]erbal and physical abuse of one spouse by the other is one of several factors in the Court's determination of the existence of 'shared intent' to make a place the family's 'habitual residence.'") (internal citation omitted).

98 *Mozes*, 239 F.3d at 1080 (noting "whatever the parents' intent, habitual residence cannot be acquired without physical presence").

99 For other courts' interpretations of the *Friedrich* standard, see *Rydder*, 49 F.3d at 369, 373; *Janakakis-Kostun*, 6 S.W.3d at 847-48.

C. *The Settled Purpose Standard Reexamined*

The settled purpose standard is better for determining the habitual residence for infants than the *Friedrich* standard, but it is far from perfect. The settled purpose standard is still problematic in determining the habitual residence for neonates. The problematic elements are the requirement that a child have physical presence over a period of time to establish habitual residence. The problem with these elements is illustrated in *Schroeder v. Vigil-Escalera Perez*, a state HCCAICA case from Ohio involving neonates.[100]

Gabriela in *Schroeder* was born on February 23, 1994, in Mexico.[101] On August 12, 1994, Gabriela's parents mutually agreed to move with her to Spain.[102] On November 12, 1994, Gabriela's parents mutually agreed that Gabriela should move with her mother to Ohio.[103] Gabriela was only five months old when this move occurred.[104] Gabriela had never lived in the United States prior to this date. On May 16, 1995, Gabriela's father filed suit under HCCAICA asserting that Gabriela had been wrongfully retained in Ohio.[105] The question before the court was whether Ohio or Spain was Gabriela's habitual residence.

The court in *Schroeder* adopted the settled purpose standard to determine habitual residence. The question before the court in *Schroeder* was whether Spain or Ohio as Gabriela's state of habitual residence.

The court held that Ohio was Gabriela's habitual residence.[106] This was the right conclusion, but this conclusion was reached for the wrong reasons. Gabriela's parents established a mutual intent to make Ohio Gabriela's habitual residence prior to August 12, 1994. Even so, the court held that Gabriela was not a habitual resident of Ohio prior to August 12, 1994.[107] The court held that Ohio was Gabriela's state of habitual residence by calling August 12, 1994 the date of "removal" and May 16, 1995 (the date of the Gabriela's father's filing) the date of "wrongful retention."[108] During the gap in time between the date of Gabriela's mother's removal and the date of Gabriela's father's filing, Ohio became Gabriela's habitual residence.

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[100] 664 N.E.2d 627 (Ohio Com. Pl. 1995). A later Ohio case, Lucas v. Green, 1999 WL 961499 (Ohio Ct. App. 1999), distinguishes the holdings in *Schroeder* related to service of process and child support obligations, but the *Lucas* court did not question the standard used by the *Schroeder* court to determine habitual residence.

[101] *See Schroeder*, 664 N.E.2d at 627. Some courts, including *Schroeder*, use the term neonate, newborn and infant interchangeably. *Id.* at 632; *see also Delvoye II*, 329 F.3d at 333.

[102] *See Schroeder*, 664 N.E.2d at 630.

[103] *Id.*

[104] *See id.*

[105] *See id.* at 629.

[106] *See id.* at 633.

[107] The *Schroeder* court finds that it is not possible for the United States to be Gabriella's habitual residence, because prior to Nov. 12, 1994 "[h]er first five months of life had been spent in Mexico, and the next three months of her life had been in Spain." *Id.* at 631.

[108] *Schroeder*, 664 N.E.2d at 633.

Physical presence and the passage of time are requirements of the settled purpose standard for habitual residence.

Determining that Gabriela's father's filing on May 16, 1995 was the date of wrongful retention is problematic. This finding ignores many situations where a father wants (and has a right to) the return of the child, but has yet to take an affirmative action to claim that right. There is no duty for the custodial parent to file a suit under HCCAICA. Even if there was a duty, this inquiry is not relevant for determining habitual residence using the settled purpose standard.

The Ohio court's reasoning fails to deter international parental child abduction, an important HCCAICA purpose. Using May 16, 1995 as the date of wrongful removal fails to deter parental child abduction. Until the non-removing parent manifests a "clear" custodial battle, the court will find that wrongful removal has not yet occurred.[109] This enables the court to satisfy the length of time spent by a child in a state element of the settled purpose test and allows for unilateral change in habitual residence.

The *Schroeder* court was not trying to undermine the purposes of HCCAICA. Rather, the court was trying to achieve a fair result in light of the physical presence and passage of time requirements of the settled purpose standard. The *Schroeder* court was constrained to find contacts with the state of habitual residence.[110] In *Schroeder*, the court did not need to be constrained to find contacts with Ohio because the court had already established that Gabriela's parents had the mutual intent to move Gabriela to Ohio.[111]

One issue raised by the court was Gabriela's father's consent to her removal to Ohio. Consent is one of the four exceptions to the HCCAICA requirement of prompt return of the child to the state of habitual residence.[112] Before consent can be raised, Gabriela's father had to establish wrongful removal or retention.[113] The court does not evaluate the exceptions to HCCAICA until after the party alleging wrongful removal has

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109 *Id.*

110 *See id.*

111 The court reveals that "it was intended that Gabriela remain with her mother in the United States for an indefinite period of time." *Id.* at 632. The court further stated that "no definite time for the child's return was set or discussed, and that it was the mutual intent of the parties that the child be with the mother in Ohio for an indefinite amount of time." *Id.* at 633.

112 *See id.* at 632. The burden of proof is on the custodial parent to establish that by a preponderance of the evidence the non-custodial parent consented to the alleged wrongful removal. *See Schroeder*, 664 N.E.2d at 633. HCCAICA Convention states:

> [T]he . . . [s]tate is not bound to order the return of the child if the person, institution or other body which opposes [the child's] return establishes that . . . the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention

HCCAICA Convention, *supra* note 4, at ch. 1, art. 13(a).

113 *See Delvoye I*, 224 F. Supp. 2d at 847.

convinced the court that there is a wrongful removal. The court first evaluates the merits of the case-in-chief, and then the court looks to see if there is a consent exception to the HCCAICA rule of prompt return of the child to the state of habitual residence.[114] The *Schroeder* court found that Gabriela's father "vacillated in his desire to have the plaintiff [and child] return to Spain. It is clear the defendant acquiesced and agreed that the plaintiff and child could remain in the United States."[115] In *Schroeder*, there was no wrongful removal, so the court did not need to address the father's consent.[116]

The *Schroeder* court probably reached the result it did because Gabriela's father consented to her removal to Ohio.[117] In *Schroeder*, the burden of proof was on Gabriela's mother to prove that her father consented to her removal to Ohio by a preponderance of the evidence.[118] The consent exception to HCCAICA is different from a habitual residence standard. When pleading consent, the removal is "wrongful" since it violates the custodial rights of the custodial parent, but the custodial parent agrees to forgo custodial rights in favor of some consideration.

The Eighth Circuit in *Nunez-Escudero v. Tice-Menley* struggled to determine habitual residence for a neonate using the settled purpose standard.[119] The question before the court was whether Mexico or Minnesota was the child's state of habitual residence.[120] By applying the settled purpose standard, the *Nunez-Escudero* court was bound by the requirements that the child have physical presence in a state for a requisite length of time prior to the retention or abduction to establish habitual residence. These elements were lacking, so the court was forced to remand the case for the purpose of deciding the question of whether Mexico or Minnesota was the child's habitual residence.[121] The district court did not find the threshold question of whether Mexico or Minnesota was the child's habitual residence or whether the child was wrongfully removed from

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114 HCCAICA Convention, *supra* note 4, at art. 13(a).

115 *Schroeder*, 664 N.E.2d at 632.

116 *See id.* at 633.

117 *See id.* at 630. At some point after November 1994, the father told the mother that she could have custody of the child in exchange for visitation rights to begin when Gabriella was old enough to travel. *Id.* at 630. The burden of proof on the party relying on an exception to HCCAICA is a preponderance of the evidence. This is true for all exceptions except those set forth in Article 13(b) and 20 of HCCAICA Convention. Articles 13(b) and 20 do not permit the child to be returned to the state of habitual residence, if the return would result in either grave physical or psychological harm to the child or an infringement on the fundamental principles of human rights and freedoms of the state of habitual residence. *See* HCCAICA Convention, *supra* note 4, at arts. 13(b), 20.

118 *See* 42 U.S.C. § 11603(e)(2)(B).

119 58 F.3d 374 (8th Cir. 1995).

120 The *Nunez-Escudero* court did not note the name or gender of the child in the written opinion.

121 *See id.*

Mexico. Rather the district court held that the removing parent established the grave risk of harm exception to HCCAICA.[122]

The child in *Nunez-Escudero* was born on July 28, 1993 in Mexico to a Mexican father and American mother.[123] The child's presence in Mexico was not based on the parents' mutual intent. Fifty-five days after the child's birth, on September 21, 1993, the child's mother took the child to her parents in Minnesota.[124] Unlike *Schroeder*, the child in *Nunez-Escudero* was not removed to Minnesota with the child's parents' mutual intent.[125]

In *Nunez-Escudero*, the mother argued that she did not intend to remain in Mexico.[126] If true, this illustrates the lack of mutual intent to make Mexico the child's habitual residence. In addition, the mother argued that she was coerced into living in Mexico and that neither she nor the child had a "voluntary habitual residence in Mexico."[127] This is crucial, because settled purpose must be voluntary.[128] Despite these facts, the *Nunez-Escudero* court relied on the physical presence requirements of the settled purpose standard for habitual residence, even in the case of a neonate.[129] The court reasoned that to hold differently would create an incentive for the mother to kidnap.[130]

According to the *Nunez-Escudero* court, abandoning the physical presence requirement for habitual residence is the equivalent of holding that the mother's residence is the child's habitual residence.[131] Creating such a rule "would be inconsistent with [HCCAICA], for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is wherever the mother happens to be."[132] However, given

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122 *Id.* at 376.

123 *Id.* at 375.

124 *Id.*

125 *See id.* at 379.

126 *Nunez-Escudero*, 58 F.3d at 378.

127 *Id.*

128 *See Ponath*, 829 F. Supp at 368. The mother also asserted that the child is dependent on the mother for the determination of the child's habitual residence. *See Nunez-Escudero*, 58 F.3d at 378. This reasoning is flawed. If this rule were adopted under HCCAICA, it would certainly undermine the policy of not encouraging kidnapping. Mothers would have no fear of absconding with infant children because courts would deem the child dependent on the mother to choose the child's habitual residence. The general rule is that mutual settled purpose is required to define habitual residence for a child, and a unilateral decision won't do. *See Mozes*, 239 F.3d at 1069-70; *see also Feder II*, 63 F.3d at 224; *Morris*, 55 F. Supp. 2d at 1156. In addition, the mother asserted that her child, being less than eight weeks old, is incapable of determining habitual residence. However, there is no exception to HCCAICA stating that a neonate is incapable of forming an intent as a matter of law.

129 *See Nunez-Escudero*, 58 F.3d at 379.

130 *Id.*

131 *Id.*

132 *Id.; see also Friedrich*, 983 F.2d at 1402. The *Friedrich* court noted:

> If we were to determine that by removing [the child] from his habitual residence without [the father's] knowledge or consent [the mother] "altered" [the child's] habitual residence, we would render [The Hague Convention on the Civil Aspect

that the mother alleged that she was coerced into remaining in Mexico,[133] the court would reward the father's coercion by declaring Mexico the child's habitual residence. By avoiding the question of where these two parents intended to raise their child, the court created a unique situation where the child's parents never mutually intended the child's habitual residence to be in any state.

Schroeder and *Nunez-Escudero* show how the physical presence and passage of time requirements constrain the court. A good hypothetical that further illustrates the problem with the settled purpose standard as applied to neonates is the case of the pregnant mother who was vacationing in Israel.[134] The mother is a United States citizen and the father is an Israeli. While in Israel, the mother gives birth to the child. At the time of the trip both parents mutually intend for this trip to be a vacation and that the child should reside in the United States. After the birth however, the father changes his mind and the mother removes the child to the United States. This is similar to the facts of *Schroeder* and *Nunez-Escudero* in that the child has no connection with the United States prior to birth. This hypothetical, like *Schroeder* and *Nunez-Escudero,* differs from *Friedrich* and *Ponath* "where the child is assumed to have an habitual residence initially and the controversy is over a change of that residence."[135] Using the settled purpose standard, the court deciding the pregnant mother vacationing in Israel case should hold that Israel is the state of habitual residence because under the settled purpose standard a child cannot have a habitual residence in a place where the child has never been.[136] However, the mutual intent of the parents would indicate whether the child is on vacation or whether the parents are establishing a new habitual residence for the child.[137] Even so, the settled purpose standard is constrained by the fact that the child has only lived in one country. This flaw in the settled purpose standard would apply even if that country had no relationship to the state the parents mutually intended to serve as the child's home.

D. *The* Delvoye *Standard*

The *Delvoye* standard is an age dependent standard that evaluates a variety of elements to determine the habitual residence of a child depending

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> of International Child Abduction] meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence.

Id.

133 *See Nunez-Escudero*, 58 F.3d at 378.

134 Telephone Interview with Erez Liebermann, Associate, Paul, Weiss, Rifkind, Wharton, & Garrison LLP (Nov. 21, 2002).

135 *Delvoye II*, 329 F.3d at 333.

136 *Mozes*, 239 F.3d at 1080.

137 *See Delvoye I*, 224 F. Supp. 2d at 851.

on their age and maturity. In the case of the neonate, the *Delvoye* standard does not always require that the neonate be physically present in the state of habitual residence prior to the removal or retention. At this stage, the element evaluated by the *Delvoye* standard for habitual residence to determine the neonate's habitual residence is the mutual intent of the parents.[138] In the infant stage, the elements to be evaluated by the *Delvoye* standard are the states in which the child was physically present prior to the removal or retention, the length of time the child spent in those states and the mutual intent of the parents regarding the state of habitual residence. For children older than neonates and infants, the elements evaluated by the *Delvoye* standard are the states in which the child was physically present prior to the removal or retention, the length of time the child spent in those states, the child's intent to remain in those states and the past actions of the child relating to that intent.

In May of 2003, the Third Circuit Court of Appeals in *Delvoye v. Lee,* eschewed the physical presence and passage of time requirements of prior habitual residence standards.[139] The *Delvoye* court crafted a new standard that examines only the mutual intent of the parents to determine the state of habitual residence for a neonate.[140] The question before the court in *Delvoye v. Lee* was whether Belgium or the United States was the state of Sebastian's habitual residence. The court found that the United States was Sebastian's habitual residence.[141]

In November of 2000, while pregnant, Ms. Lee moved from the United States to Belgium.[142] Her travel to Belgium was temporary.[143] On May 14, 2001, Sebastian was born in Belgium to Ms. Lee and Mr. Delvoye.[144] Seventy days later on July 23, 2001, Ms. Lee returned to the United States with Sebastian.[145] The *Delvoye* court determined that Sebastian was a neonate.[146] The *Delvoye* court found that the parents of Sebastian mutually intended for the United States to be Sebastian's habitual residence.[147]

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138 *Delvoye II,* 329 F.3d at 334.

139 329 F.3d 330 (3d Cir. 2003).

140 *Id.* at 333.

141 *Id.* at 334.

142 *See Delvoye I,* 224 F. Supp. 2d at 845.

143 *See id.* at 845.

144 *See id.*

145 *See id.* at 846.

146 *See id.* at 848.

147 *See id.* at 850. It is important to note that the Third Circuit held that Mr. Delvoye failed to meet the burden of proof in proving that Belgium was Sebastian's state of habitual residence. *See Delvoye II,* 329 F.3d at 332. This is not the same as saying that the Ms. Lee proved that the United States was Sebastian's habitual residence. The court held that Mr. Delvoye failed to meet the burden of proof because he failed to prove mutual intent to make Belgium Sebastian's state of habitual residence. *Id.* at 334. Shared intent is necessary because "a two-month old [neonate], who is still nursing, has not been present long enough to have an acclimatization apart from his parents." *Id.* at 333.

The lower court made five factual findings not challenged on appeal: the findings were that Ms. Lee temporarily moved to Belgium because of the low cost of medical care there.[148] Both parents intended for Ms. Lee and Sebastian to remain in Belgium for a short period of time. Ms. Lee was in Belgium on a three-month tourist visa and no effort was made to extend the visa.[149] She left her belongings in the United States when she sojourned to Belgium; most notably she left behind her non-maternity clothes.[150] The entire time that Ms. Lee stayed in Belgium she lived out of a suitcase and never unpacked.[151] Based on these findings, the Third Circuit affirmed that Mr. Delvoye failed to prove that Belgium was Sebastian's habitual residence.[152]

The case of *Feder v. Evans-Feder* was decided in the Third Circuit and was binding on the *Delvoye* Court.[153] The question in *Feder* was whether the period of less than six months spent in Australia altered Evan's habitual residence from the United States to Australia. The Third Circuit Court of Appeals in *Feder*, using the settled purpose standard, determined that the parents mutually intended to change Evan's habitual residence from the United States to Australia.[154]

When Evan was about four years old the Feders moved to Australia.[155] Evan and his mother joined the father in Australia on January 8, 1994.[156] Eventually, Mrs. Feder decided to move back the United States and left Australia with Evan on June 29, 1994.[157] Mr. Feder believed his wife and child were only taking a vacation; therefore, the move from Australia to the United States was not made with mutual parental intent.[158]

Mrs. Feder removed the child under false pretenses. She "told [Mr. Feder] that she wanted to take Evan to visit his grandparents in the United States. She did not believe that Mr. Feder would let them leave the country otherwise."[159] This duplicity is relevant because Australia was deemed Evan's habitual residence. If the United States had been deemed the habitual residence then it did not matter whether Evan was "wrongfully" removed from Australia.

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148 *See id.* at 851.

149 *See id.* at 845.

150 *See id.*

151 *See Delvoye I*, 224 F. Supp. 2d at 845.

152 *Delvoye II*, 329 F.3d at 334.

153 63 F.3d 217, 222 n.9 (3rd Cir. 1995).

154 *Id.* at 224 (noting "[t]hat Mrs. Feder did not intend to remain in Australia permanently . . . does not void the couple's settled purpose to live as a family in a place where Mr. Feder had found work").

155 *Feder I*, 866 F. Supp. at 863.

156 *See id.*

157 *Id.* at 864.

158 *Id.*

159 *Id.*

The *Feder* court used the elements of physical presence and passage of time to evaluate habitual residence. Unlike Sebastian in *Delvoye*, Evan had been physically present in both the country of his birth and the country to which he was moved. Specifically, Evan had been present in both the United States and Australia prior to the removal by his mother to the United States. In *Delvoye*, Sebastian had only been physically present in Belgium, the country of his birth prior to the removal by his mother to the United States. In *Delvoye*, the court rejected a bright line rule that the child's country of birth is automatically the child's habitual residence.[160] In *Delvoye*, Judge Hochberg noted:

> This Court rejects any bright line rule that a child born in a country is automatically a habitual resident of that country, regardless of all other evidence to the contrary. That is not the analysis mandated by this Circuit in *Feder*. Surely, if a couple lives in the United States and gives birth to a child during a summer visit to a vacation home in the Swiss Alps, the habitual residence of the child is not Switzerland.[161]

Similarly, the *Delvoye* court rejected using the residence of the mother to determine the child's habitual residence.[162]

The *Delvoye* court recognized the problems that faced the *Nunez-Escudero* in determining habitual residence for a neonate. *Nunez-Escudero* decided in the Eighth Circuit is persuasive although not binding on the Third Circuit deciding *Delvoye*. The *Delvoye* court noted "where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence."[163] The *Delvoye* court distinguished *Nunez-Escudero* since the parents in *Delvoye* mutually intended to only temporarily keep the child in Belgium.[164] In *Nunez-Escudero* the parents had lived in Mexico for almost a year prior to the child's birth (although this may have been due to coercion).[165] In *Nunez-Escudero*, like *Delvoye*, the child had not been present in the United States prior to his birth. Unlike *Delvoye*, the *Nunez-Escudero* court was not able to determine the habitual residence question because the *Nunez-Escudero* court was bound by the physical presence requirement of the settled purpose standard. For these reasons, a case involving a neonate should not be bound by the physical presence requirement of the *Friedrich* and settled purpose standards.

In *Delvoye*, the mutual intent of the parents for the United States to be Sebastian's habitual residence was established prior their stay in Belgium, and therefore, any subsequent change by one parent is a unilateral change.

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160 *See Delvoye I*, 224 F. Supp. 2d at 851.

161 *Id.*

162 *Delvoye II*, 329 F.3d at 333.

163 *Id.*

164 *See Delvoye I*, 224 F. Supp. 2d at 850.

165 *See Nunez-Escudero*, 58 F.3d at 375.

The Delvoye court held that even if Mr. Delvoye had intended for Belgium to be Sebastian's state of habitual residence, there was no evidence of this intent prior the removal of Sebastian from Belgium to the United States.[166] A neonate is not old enough to acclimate to the environment, so the mutual intent of the parents should control the child's habitual residence.[167]

One party cannot unilaterally change the parents' mutual intent as it relates to the child's habitual residence.[168] For the court to hold otherwise would create an incentive for parental child abduction. Also, mutual parental intent is essential in establishing habitual residence; otherwise the *Delvoye* court would be rewarding Ms. Lee's removal of Sebastian thereby creating an incentive for parental child abduction. The *Delvoye* standard enables the court to reach a fair result while deterring both parents from kidnapping. The *Delvoye* court achieved this by separating the habitual residence inquiry into two periods. The first period includes the events prior to child's removal. The second period includes events after the removal. The parents must manifest a mutual intent prior to the removal.[169] This intent will show whether the child is located in the child's habitual residence or whether the child being wrongfully held.

In the case of a neonate, the *Delvoye* standard expands existing standards of habitual residence by debunking the physical presence and passage of time requirements. Rather, the *Delvoye* standard considers these elements, but does not make them determinative for finding habitual residence for a neonate. The drafters of HCCAICA intended for the standard for habitual residence to remain "fluid and fact based, without becoming rigid ."[170] Therefore, prior habitual residence standards are not determinative. The habitual residence standard needs to be flexible in order to thrive and be interpreted by many nations.[171]

III. THE IMPORTANCE OF A UNIFORM STANDARD FOR HABITUAL RESIDENCE

Uniformly interpreting HCCAICA in all contracting states removes the incentive for parents to cross international borders in search of more sympathetic courts.[172] A uniform interpretation of HCCAICA would remedy the problem of international parental child abduction. As a ratifying country under the Convention, the United States is required to interpret HCCAICA

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166 *See Delvoye II*, 329 F.3d at 334.

167 *See id.* at 333.

168 *See Feder II*, 63 F.3d at 225.

169 *Delvoye II*, 329 F.3d at 334.

170 *Levesque*, 816 F. Supp. at 666.

171 *Id.*

172 *See* 42 U.S.C. § 11601(b)(3)(B); *see also Friedrich*, 983 F.2d at 1400; Nakdai, *supra* note 13, at 253 ("International kidnapping occurs for the same reason as national kidnapping- if a parent is unhappy with a custody order, he or she leaves the country with the hopes of getting a favorable decree elsewhere.").

consistently with other contracting states.[173] A uniform standard for evaluating habitual residence is essential to uniformly interpreting HCCAICA within the context of American jurisprudence.

A new interpretation of habitual residence, where physical presence is not a requirement for habitual residence, is necessary in order to enable the uniform interpretation of HCCAICA in all contracting states, allow America to meet its obligations as a contracting state, prevent forum shopping, comply with parents' established mutual intentions and deter parental kidnapping. Therefore, courts should, at the first available opportunity, clarify their jurisprudence on the issue of habitual residence and adopt a uniform standard to promote the goals of HCCAICA. In a uniform standard for habitual residence, the physical presence requirement should not be determinative. This will enable the uniform standard to meet the objectives of HCCAICA,[174] and effectuate the established mutual intentions of the parents regarding the place where the parents intended the child to live.

There are five main principles that any new standard for habitual residence must reconcile. First, habitual residence should be examined in light of the best interests of the child.[175] Second, the court should determine habitual residence on a case-by-case basis and avoid allowing the term "habitual residence" to become a highly rigid and technical term.[176] Third, the habitual residence of the child must demonstrate facts and events that occurred prior to the alleged act of wrongful removal.[177] Fourth, the burden of proof is on the non-removing parent to prove by a preponderance of the evidence that the child was in the their habitual residence at the time of the removal.[178] Lastly, if the intent of the parents is to be included, that intent must be mutual.[179]

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[173] Hague Statute, *supra* note 12, at art. 1.

[174] The term of art "habitual residence" is integral to stated aims of the Hague Convention on the Civil Aspect of International Child Abduction. HCCAICA's goals are spelled out in its preamble, as is the role habitual residence will play in its purpose:

> The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring 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, have resolved to conclude a Convention to this effect.

HCCAICA Convention, *supra* note 4, at pmbl.

[175] "[T]he interests of children are of paramount importance in matters relating to their custody." HCCAICA Convention, *supra* note 4, at pmbl.

[176] *Levesque*, 816 F. Supp. at 666.

[177] The *Friedrich* court declared "[t]he court must look back in time, not forward" when establishing habitual residence. *Friedrich*, 983 F.2d at 1401. To hold otherwise would allow one party to establish habitual residence through an act of wrongful removal and would encourage parental child abduction.

[178] *See id.* at 1400.

[179] *See Feder II*, 63 F.3d at 225.

Traditionally, American courts are leery of a uniform standard for habitual residence for fear that the standard will be too rigidly applied:

> It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions.[180]

A uniform standard for determining habitual residence for neonates, however, is not a detailed and restrictive rule. In fact, it is designed to capture a complete viewing of the facts and circumstances of each case.

A. *Why the* Friedrich *and Settled Purpose Standards Fail as Uniform Standards for Habitual Residence*

The *Friedrich* and settled purpose standards both fail as uniform standards for determining habitual residence under HCCAICA. The *Friedrich* standard for habitual residence, created by the Sixth Circuit, looks to physical presence, the passage of time, the child's intent and the past actions of the child to determine their habitual residence. The *Friedrich* standard fails as a uniform standard because a habitual residence inquiry is age-dependent and the *Friedrich* standard is problematic when applied to neonates and infants.

The problem with the *Friedrich* standard as applied to neonates is the inclusion of the physical presence requirement as a mandatory element. The policies that justify a physical presence requirement for a habitual residence standard: behavioral patterns, interpersonal connections, and community ties are not factors for a neonate. Therefore, physical presence is not a proper factor to be used when evaluating the habitual residence of a neonate.

The problem with the *Friedrich* standard as applied to neonates, infants and young children in general is that it fails to include mutual parental intent in the evaluation of habitual residence.[181] Mutual parental intent is needed to determine the child's habitual residence during early stages of

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[180] *Rydder*, 49 F.3d at 373; *see also Friedrich*, 983 F.2d at 1401 (internal citation omitted).

[181] There is ambiguity in the record as to whether mutual intent ever manifested in *Friedrich*. The evidence that Germany is the habitual residence includes the fact that Thomas lived exclusively in Germany except for a few short vacations in the United States prior to his alleged wrongful removal. *See Friedrich*, 983 F.2d at 1401. The evidence that the parents mutually intended the child's habitual residence to be the United States is the child's American citizenship. *See id.* United States documentation listed the child's permanent residence as Ironton, Ohio, and the mother's intent to return to the United States with Thomas when she was discharged from the military. *See id.* The problem with this evidence is neither side illustrates mutual intent. The *Friedrich* court ultimately concludes "[a]though these ties may be strong enough to establish legal residence in the United States, they do not establish habitual residence." *Id.*

development, because neonates, infants and young children are too young to acclimate to their environments. The *Friedrich* court did not encounter the acclimation issue because the *Friedrich* court determined that the child at issue was sufficiently acclimated to his environment.[182]

In addition, some children, like the child in the pregnant mother vacationing in Israel hypothetical and the child in Delvoye, have only lived in the country of their birth. Meanwhile, the country of the child's birth was not mutually intended by the parents to be the state of the child's habitual residence. The *Friedrich* standard does not provide for these children because it requires that the child be present in the state of habitual residence prior to the abduction or retention and the *Friedrich* standard does not evaluate the intent of the parents. For these reasons, the *Friedrich* standard fails as a uniform standard.

The settled purpose standard also fails as a uniform standard for habitual residence under HCCAICA. The District Court of Utah in *Ponath* and other courts applying the settled purpose standard expanded the habitual residence standard to include the "desires and actions" of the parents.[183] The settled purpose standard infuses mutual parental intent into the habitual residence inquiry when the child's own intent proves inadequate. The settled purpose standard is age dependent. The only caveat is that the parents' intentions must be mutual and all evidence of intent must manifest prior to the removal of the child.[184]

The settled purpose standard accommodates the particular needs of infants who have not acclimated to their environments. Courts using the settled purpose standard, like courts using the *Friedrich* standard, look for physical presence and the intent of the child. Depending on the maturity of the child and their ability to form an intent regarding habitual residence, the settled purpose standard allows the court to consider physical presence, the passage of time and the mutual intent of the parents. There is no strict standard for this age determination. The court balances all of the facts on a case-by-case basis to determine whether to substitute the mutual intent of the parents for that of the child. The settled purpose standard works for infants, but it is not helpful for finding the habitual residence for neonates.[185] This judicially crafted definition of habitual residence is inadequate in evaluating the habitual residence for neonates because it is constrained by the physical presence requirement. The *Delvoye* standard is needed in order to determine the habitual residence for neonates under HCCAICA.[186]

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182 *See id.* at 1401.

183 *See Ponath*, 829 F. Supp. at 367.

184 *Feder II*, 63 F.3d at 225.

185 *See Armiliato*, 169 F. Supp. 2d at 237 ("The 'settled purpose' principal is difficult to apply to young children . . . .").

186 *Delvoye II*, 329 F.3d at 333.

B. *Why American Courts Should Adopt the* Delvoye *Standard For Habitual Residence*

The Third Circuit in *Delvoye* found that the settled purpose standard is not appropriate to determine the habitual residence for neonates.[187] To accommodate neonates who have not formed the intent to acclimate to their environments, the Third Circuit found that it is not required that a child be physically present in the state of habitual residence prior to the abduction. *Delvoye*, for the first time, lifted the veil off the myth of habitual residence and proposed that physical presence is not a prerequisite for habitual residence for neonates.[188]

At one end of the age spectrum is the neonate from birth to six months. In the case of the neonate, physical presence may not even be necessary to determine habitual residence of the child. Here, courts should use the broad *Delvoye* standard for habitual residence that evaluates the mutual intent of the parents to determine the neonate's habitual residence.[189] The mutual intent of the parents must be manifest prior to the removal of the child.[190] This standard is needed for neonates because they are unable to have preferences and establish ties and connections to the environment.[191]

The next phase in the inquiry is the infant stage from six months to four years. The court should determine whether the child is an infant or a neonate on a case-by-case basis. Here, the flexible *Delvoye* standard incorporates the requirements of the settled purpose standard. In the infant stage, the elements to be evaluated for determining an infant's habitual residence are physical presence, the passage of time and the mutual intent of the parents. Again, the mutual intent of the parents must be established before the child's removal.[192] As the child grows older, the child's ties to the place of physical residence grow stronger and it becomes more likely that the place of physical residence is in fact the child's habitual residence.

Finally, for children older than neonates and infants, the *Delvoye* standard incorporates the elements of the stricter *Friedrich* standard. For an older child, the *Delvoye* standard evaluates the elements of physical presence, the passage of time, the child's intent and the past actions of the child to determine the older child's habitual residence. At this stage, looking to intent of the child is a reasonable requirement for a habitual residence standard.[193] An older child will be able to articulate intentions. Also, as the

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187 *See id.*

188 *See id.*

189 *See id.* at 334.

190 *See id.*

191 *See id.* at 333.

192 *See Feder II*, 63 F.3d at 225.

193 In this spirit, the *Feder* court noted:

child grows the probative value of parental intent weakens. The court will determine on a case-by-case basis whether the child is old enough to acclimate to the environment and form intentions regarding habitual residence. Using a strict physical presence requirement for an older child will lead to fair results.

The *Delvoye* standard makes age rather than physical presence the threshold question in a HCCAICA case. Once the child's maturity is ascertained based on the facts of the case, the court is better able to determine which elements should be evaluated to determine their habitual residence in a given case. By making the habitual residence standard age dependent, the *Delvoye* standard promotes certainty in courts as to the controlling standard for habitual residence. Certainty is good because it will deter parental child abduction. If all courts apply a uniform standard then the incentive to forum shop is removed. Moreover, using an age specific standard for habitual residence will better uphold the purposes of HCCAICA and achieve fairer results.[194] The purposes of HCCAICA are locating

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> 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 . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

Id.

[194] A uniform standard would have avoided the problem the *Schroeder* court encountered in determining when wrongful removal occurred. The *Schroeder* court asserted that it is sometimes difficult in cases arising under HCCAICA to determine the date of wrongful removal. *See* Schroeder v. Vigil-Escalera Perez, 664 N.E.2d 627, 632 (Ohio Ct. Com. Pl. 1995). The date of wrongful removal is an essential inquiry, because even if a court is willing to evaluate parental intentions, these intentions must manifest themselves prior to the alleged wrongful removal. The *Schroeder* court used the standard set forth in Slagenweit v. Slagenweit, 841 F. Supp. 264 (N.D. Iowa 1993) to determine the date of wrongful removal. In *Slagenweit*, the court needed to determine the date of wrongful removal in order to establish whether the statute of limitation to bring a HCCAICA case had passed. The court in used the date the custody battle began as the date of wrongful removal. *See Slagenweit*, 841 F. Supp. at 270. According to the *Slagenweit* court this occurs when "the noncustodial parent . . . clearly communicates [a] desire to regain custody and asserts [a] parental right" to have the child returned. *Id.*

The *Schroeder* court determined that custody became an issue on May 16, 1995, when the father filed his motion to dismiss. The court held that date as the beginning of the custody dispute and the date from which to commence the period of alleged wrongful retention, because prior to the motion to dismiss the father had not sought the return of Gabriella. *See Schroeder*, 664 N.E.2d at 632.

As noted above the *Schroeder* court adopted this standard for determining the date of wrongful removal in order to create contacts with the state of habitual residence. However, an age specific standard would determine the probative value of physical presence and help solve the *Schroeder* problem in two ways. First, by removing the physical presence requirement for the neonate in *Schroeder*, the court could use the date of the removal, as the date of alleged wrongful removal. Using this date would prevent parental kidnapping because habitual residence is only established if mutual parental intent manifests prior to this date. *See Feder II*, 63 F.3d at 224. In addition, the incentive to shift the date of wrongful removal is removed. By holding that the alleged wrongful removal began on May 16, 1995, the court created an eighty-day period window from Nov. 12 until Feb. 1, 1994 in which Gabriella lived in the United States. *See Schroeder*, 664 N.E.2d at 632. The court observes there was "a substantial passage of time from

abducted children, securing their eventual return to custodial parents, creating remedies for international child custody disputes and reducing international child abduction.

CONCLUSION

Habitual residence should not be a myth, a gossamer apparition crafted from wispy facts and circumstances; rather, habitual residence should be a tool, used by the court to realize the goals of the Hague Convention on the Civil Aspect of International Child Abduction. The goals of HCCAICA are locating abducted children, securing their eventual return to custodial parents, creating remedies for international child custody disputes and reducing international child abduction. A neonate does not possess the mental faculties necessary to acclimate or form an intent to remain in a given location indefinitely. For this reason, the strict requirement of looking only toward the child preferred by the *Friedrich* standard and its progeny should be rejected in favor of looking toward mutual parental intent. A court needs to evaluate the mutual intentions of the parents to find the habitual residence for a neonate.[195] In the case of a neonate, however, even the settled purpose standard is constrained by the myth that physical presence is required to establish habitual residence. Courts should go one step further and recognize that in the case of a neonate, the mutual intentions of the parents may implicate a state for habitual residence other than one where the child had been physically present prior to his or her removal or retention. A child should not be trapped by a standard that relies on an arbitrary requirement that the child be physically present in the state of the child's habitual residence prior to the removal or retention. A child, especially a neonate, has only lived for a short time. The child may never have had an opportunity to set foot in the child's own habitual residence. A neonate's habitual residence is not based on any voluntary choice made by the child, rather the mutual intent of the child's parents determine the child's habitual residence. In many cases this decision predates the birth of the neonate. Courts should look past the myth of habitual residence and adopt a standard that allows for the declaration of a habitual residence in a state in which the child has not yet been physically present. Courts should do this because the parents agreed to make the state the child's habitual residence. This is in keeping with the goals of HCCAICA. The manifest mutual intentions of the parents should determine the best interest of the

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the removal on November 12, 1994 to the beginning of the alleged wrongful retention in May 1995." *Id.* at 633. The court notes this passage of time and change in geography to bring the facts of the case in line with the settled purpose standard. Under the uniform standard this would not be necessary because physical presence is not a requirement for neonates. Therefore, the court will not need to engage in chronological sleight of hand in order to establish contacts with the state of the custodial parent.

[195] *Feder II*, 63 F.3d at 225.

child, not the court. Parental kidnapping is not encouraged when the parents form a pact and mutually intend to raise the child in a particular state. To hold otherwise creates a perverse incentive for parents of neonates with contacts only to that parent's state to renege on mutual plans. The *Delvoye* standard meets the goals of HCCAICA, evaluates the mutual intentions of the parents to find the habitual residence for a neonate and allows for the possibility that a child's habitual residence can be in a state in which the child has not yet been physically present. For these reasons, American courts should adopt the *Delvoye* standard as the uniform standard for determining the habitual residence for children under HCCAICA.