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Michelle Morgan Kelly

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TAKING LIBERTIES: THE THIRD CIRCUIT DEFINES "HABITUAL RESIDENCE" UNDER THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

I. Introduction

Perhaps nothing frightens a parent more than the thought that his or her child may be kidnapped.\(^1\) Increasingly, the perpetrator of this devastating act is the child's other parent.\(^2\) As society becomes increasingly mobile, more parent-kidnappers are absconding with their children to places with legal systems that seem totally inaccessible to the abandoned parents: foreign countries.\(^3\)

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2. Susan L. Barone, International Parental Child Abduction: A Global Dilemma with Limited Relief—Can Something More Be Done?, 8 N.Y. INT'L L. REV. 95, 96 (1995) (attributing increase in "non-custodial . . . kidnappings" to globalization and international marriages); Robin Jo Frank, Note, American and International Responses to International Child Abductions, 16 N.Y.U. J. INT'L L. & POL. 415, 416 n.6 (1984) (stating that "[t]here are an estimated 25,000 to 100,000 outright child snatchings annually in the United States" and 400,000 annually "[i]f retention of children after visitation is included"); Martha Shirk, Snatched: Kidnappings by Parents on Increase, ST. LOUIS POST-DISPATCH, Nov. 26, 1995, at 1A ("The Justice Department says up to 75,000 American children a year 'suffer significant harm'—mental or physical—as a result of being abducted by a parent."); see also BOBBI LAWRENCE & OLIVIA TAYLOR-YOUNG, THE CHILD SNATCHERS 3-102 (1983) (detailing ordeal of woman whose abducted their son).

3. Adair Dyer, The Hague Child Abduction Convention—Past, Present and Future, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES Panel I, at 1, 1 (1993); Julia A. Todd, The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?, 2 IND. J. GLOBAL LEGAL STUD. 553, 553 (1995); The recent swell in the number of international parental child abductions is probably the result of an elevation in the number of transnational marriages, possibly due to an increase in long-range tourism. Todd, supra, at 553. Such marriages may also be due to the increase of immigration into the United States. Frank, supra note 2, at 416 n.5 (citing Mobility of the Population of the United States: March 1970 to March 1975, in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, series P-20 No. 285 (6PO Series P-20, 1975)). Yet another possible source of transnational marriages are the many Americans living on military bases in foreign countries. Id. at 417. In summary, "[A]s Americans find it easier to meet and marry foreigners, divorce takes its toll and increasing numbers of children are kidnapped to other countries by estranged parents."

(1069)
The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) provides a powerful response to the international child snatching epidemic.° Signed on behalf of the United States


The statistics surrounding the phenomenon of international parental child abduction are staggering. See Tom Harper, The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-Abduction, 9 EMBRY INT’L L. REV. 257, 258 (1995) (“Between 1973 and 1993, the State Department received 4,563 reports of American children being abducted to foreign countries.”) (citation omitted); Child Custody Unit Helps Parents Keep Track, U.S. DEP’T OF STATE DISPATCH, Jan. 21, 1991 (“Since the Department began keeping statistics in 1978, more than 3,000 international parental child abduction cases have been reported to the office, including about 300 in 1990. More than 700 cases are active worldwide.”).

Michael Granberry, Prisoners of Trans-Border Custody Wars, L.A. TIMES, July 21, 1994, at A3 (“Figures from the State Department show that 441 children were taken unlawfully from homes in the United States in 1993 to the 32 countries that honor the Hague Convention . . . .”).

Certainly, the emotional impact on the child who is abducted internationally can be significant. Geoffrey L. Greif, Impact on Children of International Abduction, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES Panel VII, at 1, 2-4 (1993) (drawing conclusions from survey of 371 “searching parents”). Over half of the parents surveyed described a decline in their child’s level of functioning, and approximately 66% of the children were eventually seen for psychological counseling. Id. at 4. Some children were snatched in a violent manner, while others were trained to be secretive or told that their other parent was dead. Id. at 5; see also LAWRENCE & TAYLOR-YOUNG, supra note 2, at 165-66 (describing emotional impact of abduction on child).

4. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501 (1980) [hereinafter Hague Convention]. The countries which have ratified the Hague Convention include Argentina, Australia, Austria, Canada, Denmark, France, Germany, Greece, Ireland, Israel, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, the United States of America and Yugoslavia. Carol S. Bruch, International Child Abduction Cases: Experience Under the 1980 Hague Convention, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES Panel IV-B, at 1, 1 n.4 (1993). The Hague Convention has been acceded to by an additional 10 countries. Id. at 1. “An accession is effective only between the acceding country and those contracting states that have accepted the accession.” Id. at 1 n.5 (citing Hague Convention, supra, art. 38). Unfortunately, unless both the “home” state and the foreign state have ratified the Hague Convention, the searching parent has no remedy under the Hague Convention. Barone, supra note 2, at 100; Todd, supra note 3, at 560. “Thus, there are still many ‘Haven-States’ where abductors can take children and where the custodial parent will be forced to litigate a custody determination in a foreign country, assuming the child can be located.” Id. Another option is criminal prosecution in the United States under state law. Many U.S. states, however, require the violation of an existing custody or visitation order to prosecute, and nearly half allow protection of the child as a valid defense. Patricia Ann Kelly, Criminal Prosecution of Parental Abduction: Law & Policy, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES Panel VI, at 1, 3-4 (1993).

“Child snatching” is a term of art which refers to the situation where one parent breaches the other parent’s custody rights. Frank, supra note 2, at 415 (cit-
by President Reagan in 1981 and implemented in 1988 through the International Child Abduction Remedies Act (ICARA), the Hague Convention seeks "to hasten the return of children wrongfully abducted and to deter such abductions in the future."

The Hague Convention requires that a child "wrongfully removed" be returned to the country of the child's "habitual residence." This prevents


Prior to the enactment of ICARA, parents whose children had been abducted internationally sought relief through the Uniform Child Custody Jurisdiction Act, 9 U.L.A. 115 (1988) [hereinafter UCCJA], which was primarily designed for obtaining jurisdiction within the United States and "avoid[ing] jurisdictional competition and conflict with courts of other states." UCCJA § 1(a)(1). Once a court obtains jurisdiction under the UCCJA in either the "home state" or a state having significant contacts with the child or family, and a decree is entered, a court of another state can modify the existing decree only if the connections with the first forum end or the first forum declines modification. UCCJA §§ 3(a)(1)-(4), 12, 13. The Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (codified as amended at 28 U.S.C. § 1738A (1999)), 42 U.S.C. §§ 653-655, 663 (1982), and 18 U.S.C. § 1073 (1982)) [hereinafter PKPA], was enacted to supplement the UCCJA. The PKPA, unlike the UCCJA, "prohibits multiple states from simultaneously exercising jurisdiction over a child custody case." Harper, supra note 3, at 257 (citing 28 U.S.C. § 1738A(g) (1993)). For a more in-depth discussion of the UCCJA and the PKPA, see generally Richard E. Crouch, Interstate Custody Litigation: A Guide to Use and Court Interpretation of the Uniform Child Custody Jurisdiction Act (1981); Brigitte M. Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, 14 FAM. L.Q. 203 (1981); Russell M. Coombs, Interstate Child Custody: Jurisdiction, Recognition and Enforcement, 66 MINN. L. REV. 711 (1982); Frank, supra note 2, at 427-35.

Although use of the UCCJA extends into the international forum, there are many problems surrounding its implementation internationally. Herring, supra note 1, at 145. It provides no remedy where the child is taken from the United States by a noncustodial parent. Id. at 145-46. Rather, it only applies where there is an existing custody order in one forum and "the abducting parent tries to legitimize his or her custody in another forum." Id.

"[U]nlike the . . . UCCJA, and the PKPA, the Hague Convention does not require the existence of an enforceable custody order for it to operate." Id. at 146-47 (citations omitted).

7. Todd, supra note 3, at 554; see Hague Convention, supra note 4, art. 1 (listing Convention's objectives).

8. Hague Convention, supra note 4, at art. 1. Article 3 of the Hague Convention describes the removal or retention of a child as "wrongful" where:

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
the abducting parent from benefitting in any way from the wrongful act\(^9\) and returns the child to the status quo.\(^{10}\) The Hague Convention does not address the merits of the underlying custody claim; this is left to the courts in the country of the child's habitual residence.\(^{11}\)

Notably, neither the Hague Convention nor the accompanying legal analysis define habitual residence.\(^{12}\) The official commentary to the Hague Convention reveals that the authors likely omitted a definition on purpose, stating that "the term is understood as a purely factual concept."\(^{13}\) Thus, courts have begun to explore and develop the meaning of this term.\(^{14}\) The interpretation of the term is critical because the habitual

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b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular 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.

\(\textit{Id.}\) art. 3 (emphasis added). The Legal Analysis that accompanies the Hague Convention defines "wrongful removal" as the taking of a child from the person who was actually exercising custody of the child. The Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (1986).


10. Herring, \textit{supra} note 1, at 146.


14. For a discussion of various cases that have interpreted "habitual residence," see infra notes 46-73 and accompanying text.

"[T]here are no rules of treaty interpretation which are mandated by the Constitution itself, or are legitimately derived directly from constitutional allocations of authority." David J. Bederman, \textit{Revivalist Canons and Treaty Interpretation}, 41 UCLA L. Rev. 953, 957 (1994) (footnote omitted). The Statute of the International Court of Justice, however, provides some guidance for interpreting international treaties and suggests a hierarchy of precedent. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060. Specifically, Article 38 directs the judiciary to apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;
residence of the child dictates the destination to which the child will return, and consequently may significantly impact the subsequent custody battle.  

Recently, the United States Court of Appeals for the Third Circuit reviewed the determination of an abducted child's habitual residence and established the standard of review as a mixed question of law and fact in *Feder v. Evans-Feder*. This Note discusses the early stages in the evolution of federal and state law, and Third Circuit jurisprudence in particular, regarding the interpretation of habitual residence under the Hague Convention and the appropriate standard of review. Part II traces the evolution of the federal and state courts' interpretations of habitual residence and identifies the lack of an established standard of review. Part III then focuses on the treatment of these issues in the recent *Feder* decision. Part IV analyzes and critiques the reasoning utilized by the Third Circuit in this decision and concludes that the court inappropriately chose to de-

d... *judicial decisions* and the teachings of the most highly qualified publicists of the various nations, as *subsidiary* means for the determination of rules of law.

*Id.* at 1060 (emphasis added). One commentator has stated that attempts to find a set of principles used by American courts to interpret treaties will be "fraught with peril" because the analyses are substantially result-driven. Bederman, *supra*, at 956. Bederman goes on to discuss some of the more common canons of construction utilized by American courts, including interpretation of the text, liberal and good faith construction, and effectuating the intent of the parties. Bederman, *supra*, at 964-72.

15. See Linda Whobrey Rohman et al., *The Best Interests of the Child in Custody Disputes, in Psychology and Child Custody Determinations* 59, 77 (Lois A. Weithorn ed., 1987). Most American jurisdictions consider continuity and stability as one of the main factors in determining who should have custody. *Id.* Rohman notes:

Commonly, a court's inquiry may focus upon one or more of three general factors: the need for stability, usually considered in terms of how long a child has lived in a particular stable, satisfactory environment and the desirability of maintaining continuity; the child's adjustment to home, school, and community; and the permanence, as a family unit, of the existing or proposed custodial home.


16. 63 F.3d 217, 222 n.9 (3d Cir. 1995).

17. For an analysis of the various international, federal and state cases that have interpreted "habitual residence" under the Hague Convention, see *infra* notes 46-73 and accompanying text.

18. For a thorough discussion of the court's reasoning in *Feder*, see *infra* notes 74-88 and accompanying text. For a discussion of the dissent's reasoning in *Feder*, see *infra* notes 89-102 and accompanying text.
fine habitual residence. Finally, Part V considers the potential impact of Feder on other parents seeking the return of their abducted children.

II. THE FACTS OF FEDER V. EVANS-FEDER

Mr. and Mrs. Feder, both American citizens, met in Germany in 1987. Mrs. Feder gave birth to their only child, Evan, on July 3, 1990. In October 1990, the family moved to Jenkintown, Pennsylvania where Mr. Feder accepted a management position with a major Philadelphia bank. The bank eliminated Mr. Feder’s position almost three years later, and he began looking into other employment opportunities, including one with a bank in Australia. The couple visited Australia in the summer of 1993 and looked into real estate, schools and possible employment opportunities for Mrs. Feder, an opera singer.

Mr. Feder accepted a bank manager position with an Australian bank in September 1993. Apparently, Mrs. Feder was very reluctant to move to Australia because of the couple’s deteriorating marriage. Nonetheless, she agreed to the move and the couple listed the Jenkintown house for sale. Mr. Feder left for Australia and began looking for a house, while Mrs. Feder “remained behind with Evan to oversee the sale of their house in Jenkintown.”

19. For a critique of the Feder decision, see infra notes 103-09 and accompanying text.
20. For a consideration of the potential impact of the Feder decision, see infra notes 101-15 and accompanying text.
21. Feder, 63 F.3d at 218. At the time, Mr. Feder was employed in Germany at GbBank and Mrs. Feder was working there as an opera singer. Id.
22. Id.
23. Id. The position was with Cigna. Id.
24. Id. The facts do not reveal why Cigna terminated Mr. Feder’s employment in June 1993. Mr. Feder inquired into job opportunities with the Commonwealth Bank of Australia. Id.
25. Id. While in Australia, the couple toured Sidney, where Commonwealth Bank was located, and Mrs. Feder spoke to the Australia Opera about employment opportunities. Id. “Although Mr. Feder greeted the possibility of living and working in Australia with enthusiasm, Mrs. Feder approached it with considerable hesitation.” Id.
26. Id. at 219. The position that Mr. Feder accepted was that of General Manager of the Personal Banking Department. Id. at 218-19.
27. Id. at 219. “[I]n October 1993, she consulted with a domestic relations attorney regarding her options, including a divorce. Nevertheless, for both emotional and pragmatic reasons, Mrs. Feder decided in favor of keeping the family together and agreed to go to Australia, intending to work toward salvaging her marriage.” Id.
28. Id. The Feder also sold various household items that they would not need in Australia. Id.
29. Id. In the meantime, Mr. Feder looked at houses in the Sydney area and sent pictures and videos to Mrs. Feder for her approval. Id. In November of 1993, Mr. Feder bought a 50% interest in a house as a surprise birthday present for Mrs. Feder. Id. Mr. Feder’s employer, Commonwealth Bank, purchased the other 50%. Id. at 219 n.2.
In January 1994, although the house had not yet been sold, Mrs. Feder and Evan joined Mr. Feder in Australia and arranged to have all of the family's furniture shipped there. They lived in a hotel and an apartment for four and one-half months while renovations were being made on their new home. Evan attended nursery school, and Mrs. Feder enrolled Evan in a kindergarten that would begin the following year. Mrs. Feder also completed an application for him to attend private school when he reached the fifth grade, on which she falsely stated that Evan was an Australian citizen.

Mrs. Feder accepted a role in an opera scheduled for February 1995, with rehearsals to begin in December 1994. Mr. Feder changed his driver's license and completed paperwork for the whole family to obtain permanent residency, and the entire family obtained Australian Medicare cards. Mrs. Feder, however, "did not surrender her Pennsylvania license nor submit to the physical examination or sign the papers required of those seeking permanent residency status." The Feders moved into their new home in May 1994, even though the marital relationship continued to deteriorate. "Ultimately, Mrs. Feder decided to leave her husband and return to the United States with Evan." Telling Mr. Feder that she wanted to visit her parents with Evan, she left for Pennsylvania in July. Later that month, Mr. Feder was served with a divorce complaint while in Pennsylvania on business, and Mrs.

30. Id. at 219. "Mrs. Feder was ambivalent about the move; while she hoped her marriage would be saved, she was not committed to remaining in Australia." Id.
31. Id. Mrs. Feder supervised the extensive remodelling of the home. Id.
32. Id. Kindergarten was to begin in February 1995. Id.
33. Id. Evan was neither an Australian citizen nor a permanent resident of Australia at the time of this application, even though "Mrs. Feder represented to the contrary . . . ." Id.
34. Id. This was done "[i]n an effort to acclimate herself to Australia." Id.
35. Id.
36. Id.
37. Id. The court summarized the Feder's marital situation at this point as follows:
   [The couple] discussed [Mrs. Feder's] unhappiness in the marriage as well as her desire to return to the United States. Mr. Feder attributed the couple's difficulties to the stress of his new job and requested that Mrs. Feder stay in Australia, anticipating that their problems would subside once the family moved into their new home. Once again, for both personal and practical reasons, Mrs. Feder agreed.
   The family moved into the St. Ives home in May, 1994; the Feders' relationship, however, did not improve.
   Id.
38. Id.
39. Id. at 220. Mrs. Feder believed that Mr. Feder would not agree if he knew her true intentions. Id. at 219. Thus, unaware that Mrs. Feder was planning a permanent departure, Mr. Feder bought Evan and Mrs. Feder two round-trip tickets to the United States, departing on June 29 and returning on August 2 to Australia. Id. at 220.
Feder moved back into the still unsold house in Jenkintown soon thereafter.40

Mr. Feder sought relief in the Australian Family Court in September 1994, under the Hague Convention.41 The court found that the Federers all habitually resided in Australia and that Mrs. Feder had wrongfully removed Evan from Australia under the Hague Convention.42 Mr. Feder then filed a petition pursuant to the Hague Convention in the United States District Court for the Eastern District of Pennsylvania, requesting Evan’s return.43 The court found in favor of Mrs. Feder, stating that Evan’s habitual residence had never changed from the United States to Australia “and that his mother ha[d] not wrongfully retained him [in the United States].”44 Mr. Feder appealed the District Court’s decision to the Third Circuit.45

III. Background

A. International Precedent

American courts have approached the issue of habitual residence under the Hague Convention by relying not on an American decision, but rather on the British Family Court decision Re Bates.46 Bates involved two-

40. Id. Mr. Feder had arranged to stop by the unsold Jenkintown house on July 20th to see his wife and son. Id. When he arrived, “he was served with a complaint that Mrs. Feder had filed in the Court of Common Pleas of Montgomery County, Pennsylvania on July 14, 1994, seeking a divorce, property distribution, custody of Evan and financial support.” Id. Mr. Feder returned to Australia. Id.

41. Id. Mr. Feder sought relief under the Article 3 “wrongful removal” provision of the Hague Convention. Id.; see Hague Convention, supra note 4, art. 3. For the complete wording of the provision, see supra note 8.

42. Feder, 63 F.3d at 220. Although the record of the Australian Family Court indicated that Mrs. Feder did receive notice of this proceeding, she did not attend. Id. at 220 n.3.

43. Id. at 220. Mr. Feder filed this petition on September 28, 1994, also under Article 3 of the Hague Convention. Id.; see Hague Convention, supra note 4, art. 3. For the complete wording of this provision, see supra note 8.

44. Feder v. Evans-Feder, 866 F. Supp. 860, 868 (E.D. Pa. 1994). The district court stated that even though “Mr. Feder may have considered and even established Australia as his habitual residence by June of 1994 . . . Mrs. Feder assuredly did not,” because “she never developed a settled purpose to remain [there].” Id.

45. Feder, 63 F.3d at 217.

46. No. CA 122/89 (Fam. 1989) (U.K.). For a discussion of the issue of precedent in the international forum, see supra note 14. For American decisions relying on Bates, see Feder, 63 F.3d at 222-24 (reversing district court’s decision and returning child from mother in United States to father in Australia); Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (affirming district court’s decision to return children to father in Poland from United States); Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993) (reversing district court and returning child from United States to father in Germany); Slagenweit v. Slagenweit, 841 F. Supp. 264, 268-69 (N.D. Iowa 1993) (allowing child to remain in Iowa with father as originally agreed by both parties); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993) (returning child to mother in Germany after father’s wrongful removal to United States); In re Ponath, 829 F. Supp. 363 (D. Utah 1993) (permitting child to
year-old Tatjana, her father, who was an internationally famous musician and citizen of England and her mother, who was a citizen of the United States.\(^{47}\) Although the mother often participated in the father’s worldwide touring, the family’s home base was in London.\(^{48}\) In early 1989, on the eve of an impending concert tour, it was decided that Tatjana and her mother would stay at a friend’s apartment in New York during the tour.\(^{49}\) Several weeks into the tour, during a telephone conversation from the Far East, the father ordered Tatjana’s nanny to take Tatjana to England; the nanny obeyed.\(^{50}\) Nonetheless, the court held that because Tatjana’s life in New York had acquired a “sufficient degree of continuity to enable it properly to be described as settled[,]” it was Tatjana’s habitual residence under the Hague Convention.\(^{51}\)

The court in Bates stated that the concept of habitual residence should remain fluid, largely factual and free of any technical rules or presumptions.\(^{52}\) Therefore, the court in Bates set forth this overarching principle for determining a child’s habitual residence:

[T]here must be a degree of settled purpose. . . . That is not to say that the propitious intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.\(^{53}\)

The court added that in a case such as this where the child is very young, the court could appropriately consider the “conduct and the overtly stated intentions and agreements of the parents” just prior to the abduction.\(^{54}\) Therefore, the court’s holding framed habitual residence as an issue of fact rather than an issue of law.\(^{55}\)

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remain with mother in Utah after father consented to child’s move from Germany).

\(^{47}\) Bates, No. CA 122/89, at 9.

\(^{48}\) Id. The father owned a home there. Id.

\(^{49}\) Id. The tour was to begin in the United States, continue to the Far East and end in London. Id. The family moved into the New York apartment and the mother arranged for speech therapy sessions in New York for Tatjana, whose speech skills were deficient. Id. After accompanying the father on a few engagements in the United States and British Columbia, Tatjana, her mother and the nanny returned to the New York apartment. Id. The father, apparently, wanted Tatjana and the nanny to return to the home in London instead. Id.

\(^{50}\) Id. at 5. During the telephone conversation, the nanny described a heated argument with Tatjana’s mother. Id.

\(^{51}\) Id. at 10-11. “New York had . . . become the city in which the mother wanted to stay and in which the father had reluctantly agreed to allow her to stay with Tatjana, at least until the band returned to London in April 1989.” Id. at 10.

\(^{52}\) Id. at 9.

\(^{53}\) Id. at 10.

\(^{54}\) Id. The court stated that to do otherwise “would be unrealistic.” Id.

\(^{55}\) Id. at 9. Indeed, the court stated:
In the United States, aside from the Third Circuit, only the Sixth and Eighth Circuits have reviewed determinations of habitual residence under the Hague Convention. \(^{56}\) None of these courts, however, have set forth an explicit standard of review for habitual residence.

The Sixth Circuit first addressed this issue in *Friedrich v. Friedrich*. \(^{57}\) Mr. and Mrs. Friedrich had raised their son, Thomas, in Germany, but when Mr. Friedrich threw Mrs. Friedrich and Thomas out of their apartment, Mrs. Friedrich took Thomas to the United States. \(^{58}\) The district court found that when Mr. Friedrich forced Mrs. Friedrich and Thomas to leave, Thomas’s habitual residence was “altered from Germany to the United States.” \(^{59}\) Reversing that decision, the court of appeals emphasized that “[t]o determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.” \(^{60}\) The court also noted the *Bates* court’s “word of caution” to allow the concept of habitual residence to remain fact-based rather than make it a rigid, technical rule. \(^{61}\)

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.

*Id.* (citing *DICEY AND MORRIS ON THE CONFLICT OF LAWS* 167 (Lawrence Collins et al. eds., 11th ed. 1987)).

56. See Prevoit v. Prevoit, 59 F.3d 556, 558 (6th Cir. 1995) (reversing lower court decision, which had found habitual residence in France with father, by disentitling father from access to courts due to fugitive felon status); Ryder v. Ryder, 49 F.3d 369, 370 (8th Cir. 1995) (affirming that residence registration card is of little consequence in determining habitual residence); Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993) (reversing and relying on *Bates*’s perception of habitual residence as purely factual concept).

57. 983 F.2d 1396 (6th Cir. 1992).

58. *Id.* Mrs. Frederich was an American citizen and member of the United States Army, stationed in Germany. *Id.* at 1998. Mr. Friedrich was a German citizen. *Id.* The Frederich’s only child, Thomas, was born in Germany and lived there with both of his parents during 1990 and early 1991. *Id.* The Frederich’s marriage was a stormy one involving frequent separations. *Id.* at 1999. When Thomas was approximately one and one-half years old, the Frederich’s had an argument and “Mr. Friedrich ordered Mrs. Friedrich to leave the apartment with Thomas and put most of their belongings in the hallway, including some of Thomas’s toys.” *Id.* After staying at the army barracks for several days, Mrs. Friedrich left with Thomas for the United States. *Id.*

59. *Id.* at 1401.

60. *Id.* In reversing the district court’s decision, the court of appeals held that Thomas was a habitual resident of Germany at the time of his removal. *Id.* at 1402. This case has been heralded as a “triumph of the policy considerations behind the Convention” because of its “strict application of [the Hague Convention’s] provisions.” Dorosin, *supra* note 12, at 756.

61. *Friedrich*, 983 F.2d at 1401.
The Sixth Circuit subsequently provided a twist on Friedrich in Prevot v. Prevot. In Prevot, the father, a fugitive felon living in France, sought to have his children returned to him from the United States. The court did not reach the issue of the district court's decision regarding the children's habitual residence. Instead, it denied Mr. Prevot access to the federal trial court because of his fugitive felon status and reversed with instructions to dismiss.

The Eighth Circuit decided a case similar to Feder in Rydder v. Rydder. In Rydder, an American wife and Danish husband were registered residents of Sweden, where both of their children were born. Due to Mr. Rydder's job transfer, the family moved to Poland, where they intended to stay for two years. Marital problems developed, and Mrs. Rydder eventually took the children to the United States.

The Eighth Circuit affirmed the district court's order to return the children to Poland. Relying on Bates, the court held that “the district court’s treatment of the children’s Swedish residence registration as a legal fiction of little consequence to the determination of their habitual residence was entirely appropriate.”

62. 59 F.3d 556 (6th Cir. 1995).
63. Id. at 558. Mrs. Prevot was an American citizen, and Mr. Prevot was a French citizen who had lived in America for nearly 20 years. Id. Early in their marriage, Mr. Prevot was charged with the second-degree felony of theft of property with a value in excess of $20,000. Id. He pled guilty and was sentenced to 10 years probation with a condition that he make monthly restitution payments. Id. Feeling “caged in” by his probation requirements, Mr. Prevot decided to move himself, his wife and their two children to France. Id. at 559. Because the probation officer had taken his passport, Mr. Prevot drove his family to Canada to obtain a new passport; shortly thereafter, they left for France. Id.

In France, the couple began arguing. Id. There were conflicting allegations that Mr. Prevot had physically abused his wife, that Mrs. Prevot drank excessively and that the living conditions in their trailer were unsatisfactory. Id. Although Mr. Prevot had taken his wife's and children's passports, Mrs. Prevot obtained new ones from the American consulate and eventually returned to the United States without her husband's knowledge. Id. at 560. Mr. Prevot brought suit under the Hague Convention and participated in the hearings by long distance telephone. Id.

64. Id.
65. Id. at 561-67. Although the district court found that the children were habitual residents of France, the court of appeals reversed with instructions to dismiss the case because of Mr. Prevot's fugitive felon status. Id. at 567.
66. 49 F.3d 369 (8th Cir. 1995).
67. Id. at 371-72. “The parties . . . consistently exercised joint custody of the children. Mrs. Rydder . . . acted as their primary caretaker, while Mr. Rydder worked full-time to provide for the family's financial needs.” Id. at 372.
68. Id. Mr. Rydder's contract was later extended by one year. Id.
69. Id. Mrs. Rydder had taken the children to the United States once before, staying at her parents' home in Iowa for two months without her husband's prior knowledge or consent. Id. Although she returned to Poland voluntarily, she allegedly “became ‘fearful’ with respect to her husband's behavior.” Id.
70. Id. at 374.
71. Id. at 373.
In addition to these appellate level reviews, several federal district courts and state courts have considered the issue of habitual residence. Some have assessed the matter as one of law, others as one of fact. It is against this somewhat hazy legal background that the Third Circuit considered the *Feder* case.

IV. THE COURT’S REASONING IN *FEDER v. EVANS-FEDER*

A. The Majority Opinion

The Third Circuit began by stating the Hague Convention goal of restoring the “‘factual’ status quo” and noting that both Australia and the United States are signatory nations. The court went on to define “wrongful detention” under the Hague Convention and described some of the exceptions to the general rule of returning the child. The court also noted its jurisdiction under the Hague Convention.

In addressing the issue of habitual residence, the court first noted that the Hague Convention provides no definition. The court stated, however, that it did not believe that the determination was purely factual, but rather a mixed question of law and fact. Therefore, the court said it would apply “a mixed standard of review, accepting the district court’s historical or narrative facts unless they are clearly erroneous, but exercising plenary review of the court’s choice of and interpretation of legal precepts and its application of those precepts to the facts.”

Relying on the standards set forth in *Bates* and *Friedrich*, the court then essentially defined habitual residence as “the place where he or she


75. *Id.*. These include serious risk of physical or psychological harm to the child upon return. See Hague Convention, *supra* note 4, art. 13(b).

76. *Feder*, 63 F.3d at 222.

77. *Id.*

78. *Id.* at n.9.

79. *Id.* (citation omitted).
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."\textsuperscript{80} Applying this definition to the facts, the court held that the child's habitual residence was Australia.\textsuperscript{81} The court went on to list the Feders' actions in Australia that lent a sense of permanency to their lives there.\textsuperscript{82} The court stated that Mrs. Feder's personal intentions to the contrary "[did] not void the couple's settled purpose to live as a family [in Australia]."\textsuperscript{83}

Next, the court analyzed whether Mrs. Feder's retention of the child was wrongful under Article Three of the Hague Convention.\textsuperscript{84} Because Australia was the place of habitual residence, the court applied Australian law and determined that the Feders had been exercising joint custody at the time of the abduction.\textsuperscript{85} Therefore, Mrs. Feder retained the child wrongfully under the Hague Convention.\textsuperscript{86}

Finally, the court of appeals vacated the district court's denial of Mr. Feder's petition to have his son returned to him.\textsuperscript{87} The case was remanded, however, to address the possible exception to return raised by Mrs. Feder, who asserted that Evan's return would present a great risk of psychological or physical harm.\textsuperscript{88}

\textbf{B. The Dissenting Opinion}

Recognizing the significant impact that the child's return would have on the eventual custody determination, Judge Sarokin in dissent would have disturbed findings of habitual residency "with great hesitancy" and

\textsuperscript{80} Id. at 224. The latter language was borrowed from Bates. Id. The court added that the shared, present intentions of the parents must also be analyzed. Id.\textsuperscript{81} Id.

\textsuperscript{82} Id. These included the facts that Evan was in Australia for almost six months, "a significant period of time for a four-year old child," that he attended preschool, "one of the most central activities in a child's life," that he was enrolled in kindergarten and long-term schooling, and that Mr. and Mrs. Feder bought and renovated a house and pursued employment opportunities. Id.

\textsuperscript{83} Id. Additionally, the court rejected the district court's reliance on \textit{In re Ponath}, 829 F. Supp. 363 (D. Utah 1983). \textit{Feder}, 63 F.3d at 224. The court distinguished \textit{Ponath} because in that case, the American mother and child went on a voluntary visit to see the father's family in Germany and were coerced through physical and emotional abuse to remain. Id. Only later did they finally escape to the United States. \textit{Id.} The \textit{Feder} court stated: "Such is clearly not the case here." \textit{Id.} at 225.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 225-26. The relevant Australian law is \textit{The Family Law Act of 1975} §§ 63 (E)(1)-(2), (F)(1) (1975) (Austl.).

\textsuperscript{86} \textit{Feder}, 63 F.3d at 225-26.

\textsuperscript{87} Id.

\textsuperscript{88} Id. at 226-27. Mrs. Feder asserted that returning her son to Australia would expose him to a grave risk of physical or psychological harm, an exception under Article 13(b) of the Hague Convention. \textit{Id.}
only when "clearly mandate[d]." Judge Sarokin noted that none of the three appellate decisions dealing with habitual residency under the Hague Convention have explicitly articulated a standard of review. He also noted that several district and state courts have dealt with the issue differently, "some making findings of fact and others conclusions of law regarding a child's habitual residence." 

Judge Sarokin then acknowledged that neither the Hague Convention nor ICARA provide a definition for the term "habitual residence." He found evidence in the official history and commentary that the term was to be understood as "a purely factual concept . . . ." He also noted that the Sixth and Eighth Circuits have generally approved the fact-based nature of the term asserted by the British court in Bates. Furthermore, Judge Sarokin interpreted the Prevot court's characterization of the exercise of custody as a "finding" to mean that the Sixth Circuit also viewed habitual residence as factual. The Judge also looked to the "preponderance of the evidence" language in ICARA as a signal that the issue was one of fact, rather than law. Finally, Judge Sarokin stated that the majority had confused a mixed question of law and fact with what was actually an

89. Id. at 227 (Sarokin, J., dissenting). "Where a child resides and develops ties awaiting a final decision on custody invariably affects that decision." Id. (Sarokin, J., dissenting).

90. Id. (Sarokin, J. dissenting) (citing In re Prevot, 59 F.3d 556 (6th Cir. 1995), cert. denied, 116 S. Ct. 1048 (1996); Ryder v. Ryder, 49 F.3d 360 (8th Cir. 1995); Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993)). For a discussion of the facts of these cases and their holdings, see supra notes 56-73 and accompanying text.


92. Id. at 228 (Sarokin, J., dissenting).


94. Id. (Sarokin, J., dissenting). "'[H]abitual residence' . . . is, in fact, a familiar notion of the Hague Conference, where it is understood as a purely factual concept, to be differentiated especially from that of 'domicile.'" Id. (quoting Perez-Vera, supra note 92, at 189).

95. Id. at 229 (Sarokin, J., dissenting).

96. Id. (Sarokin, J., dissenting) (citing 42 U.S.C. § 11603 (e)(1) (1994)). ICARA states: "(1) 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 . . . ." ICARA, 42 U.S.C. § 11603(e)(1).
ultimate fact requiring review for clear error. Judge Sarokin concluded that "the determination of a child's habitual residence is best described as a factual finding," which should be reviewed for clear error and left undisturbed absent a "firm conviction that a mistake had been committed."

The district court's analysis did not persuade Judge Sarokin that the district court had committed a clear error in holding that Evan's habitual residence had never changed from the United States to Australia. He was confident that the district court adequately "weigh[ed] . . . those facts which indicate[d] a settled purpose to reside in one location or another, as well as those which suggest[ed] close ties to a particular community." Judge Sarokin asserted that although it was impossible to determine the settled purpose of this young child, the facts supported the conclusion that his settled purpose was "more closely aligned here to that of the mother." He also indicated that a court should consider the best interests of the child at this stage, as well as later, and that "[s]uch tugging and shuttling can only be detrimental."

V. Critical Analysis

By establishing the standard of review for habitual residence under the Hague Convention as a mixed question of law and fact, the Third Circuit has done a disservice to the Hague Convention. The absence of a definition for habitual residence in the Hague Convention itself, as well as the explanation in the official history and commentary, reveal the intention that the concept remains a factual one, free from rigid legal constructions or definitions. In American courts, reliance on the British holding Bates provides further evidence of a factual interpretation of the

97. Feder, 63 F.3d at 229 (Sarokin, J., dissenting) (citing Pullman-Standard, Div. of Pullman, Inc. v. Swint, 456 U.S. 273, 287 (1982)). Judge Sarokin listed several issues that have been considered "ultimate facts." Id. (Sarokin, J., dissenting) (citations omitted). "[T]o the extent our circuit once reviewed ultimate facts in part for legal mistake, 'we were wrong.'" Id. (Sarokin, J., dissenting) (quoting Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 908 n.11 (3d Cir. 1991)).

98. Id. (Sarokin, J., dissenting) (citation omitted).

99. Id. at 230 (Sarokin, J., dissenting).

100. Id. (Sarokin, J., dissenting).

101. Id. (Sarokin, J., dissenting).

102. Id. at 231 (Sarokin, J., dissenting). Indeed, some commentators have argued that separating a child from the primary caretaker, regardless of the reason, creates the risk of significant psychological harm. Carolyn Legette, International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception, 25 Tex. Int'l L.J. 287 (1990); see also Rohman et al., supra note 15, at 72 (stating that children "would fare better in the custody of their primary caretaker during the crisis of parental divorce").

103. Explanatory Report, supra note 9, at 445 (characterizing habitual residence as "well-established concept . . . of pure fact" (footnote omitted)); Silberman, supra note 5, at 225 (noting that absence of definition in Convention comports with purely factual interpretation); Todd, supra note 3, at 558 ("The determination of habitual residence is necessarily fact specific and, thus, the term must remain fluid.").
term in the international forum.\textsuperscript{104} After recognizing the fact-based interpretations conducted by the \textit{Bates} and \textit{Freidrich} courts, the Third Circuit disregarded the reasoning behind the analyses of those two courts and created a "definition" for habitual residence.\textsuperscript{105} This definition then allowed the majority to utilize its "mixed question of law and fact" approach to make a plenary review of the district court's analysis.\textsuperscript{106} If the standard had remained factual, as the other circuit courts indicated it should, such a reversal would have only been possible if there had been clear error.\textsuperscript{107}

As noted by the dissent in \textit{Feder}, allowing a plenary review of the district court's decision on habitual residence undermined the term's identity as a factual issue.\textsuperscript{108} Given the significant impact that the determination of habitual residence will have on the child and the eventual custody determination, such a plenary review is ill-advised and contrary to the apparent intentions of the Hague Convention.\textsuperscript{109}

\begin{footnotes}

\item[105] \textit{Feder}, 63 F.3d at 217, 222-24.

\item[106] \textit{Id.} at 224. "Where the district court's finding involves a mixed question of law and fact, [the] standard and scope of review 'takes on greater scrutiny, approaching de novo review as the issue moves from one of strictly fact to one of strictly law.'" United States v. Belletiere, 971 F.2d 961, 964 (3d Cir. 1992) (quoting United States v. Murillo, 933 F.2d 195, 198 (3d Cir. 1991)). When there is a mixed question of law and fact, "the reviewing court should separate the issue into its respective parts, applying the clearly erroneous test to the factual component, the plenary standard to the legal." RAM Constr. Co., Inc. v. American States Ins. Co., 749 F.2d 1049, 1053 (3d Cir. 1984).

\item[107] Numerous Third Circuit cases have applied the mixed question of law and fact standard. See, \textit{e.g.}, Chemetron Corp. v. Jones, 72 F.3d 341 (3d Cir. 1995) (bankruptcy); United States v. Bogusz, 49 F.3d 82 (3d Cir. 1994) (sentencing guidelines); U&W Indus. Supply v. Martin Marietta Alumina, Inc., 34 F.3d 180 (3d Cir. 1994) (contract interpretation); Curcio v. John Hancock Mut. Life Ins. Co., 33 F.3d 226 (3d Cir. 1994) (equitable estoppel).

\item[108] \textit{Feder}, 63 F.3d at 227-29 (Sarokin, J., dissenting).

\item[109] \textit{Id.} (Sarokin, J., dissenting); see also Todd, supra note 3, at 553 (recognizing "psychological hardship to children, who are taken from their customary environment and subjected to a new parental situation, a new culture, and perhaps a new language" (citing Monica Copertino, \textit{Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Its Efficacy}, 6 \textit{Conn. J. Int'l L.} 715 (1991))).
\end{footnotes}
VI. IMPACT AND CONCLUSION

Feder v. Evans-Feder significantly impacts the practitioner of family law because it establishes a standard of review in the American legal system for "habitual residence" under the Hague Convention.\textsuperscript{110} By establishing this standard as one of a mixed question of law and fact, Feder allows the plenary review of a district court's application of the facts to the newfound "settled purpose" definition of habitual residence.\textsuperscript{111} This definition will be the new standard in the Third Circuit. Practitioners should, therefore, tailor their arguments to this definition as closely as possible.

Additionally, such plenary review may likely result in more frequent reversals of district court decisions regarding the return of the child. Practically speaking, this will mean yet another uprooting for the child involved, with the issue of ultimate custody still looming in the distance.\textsuperscript{112} Third Circuit practitioners should prepare their clients accordingly on appeal.

It is unclear whether other jurisdictions will incorporate the Third Circuit's new definition into their analysis of habitual residence. Although the Sixth and Eighth Circuits speak of habitual residence as a purely factual concept, their willingness to review the district courts' interpretations in such a liberal fashion conflicts with the clear error standard appropriate to findings of fact.\textsuperscript{113} Of the various federal district courts and state courts that have considered the issue, some have viewed habitual residence as a matter of law, others as a matter of fact.\textsuperscript{114} Hopefully, the United States Supreme Court will resolve this apparent conflict between the circuits in the near future to avoid inconsistent approaches that undermine the profound value of the Hague Convention.\textsuperscript{115}

\textit{Michelle Morgan Kelly}

\textsuperscript{110} Feder, 63 F.3d at 222 n.9, 224.
\textsuperscript{111} Id. at 224-25. For the specific wording of the definition established by the Feder court, see supra note 80 and accompanying text.
\textsuperscript{113} Fed. R. Civ. P. 52(a). For the text of this rule, see supra note 107.
\textsuperscript{114} For a discussion of these cases, see supra notes 56-73 and accompanying text.