RECENT DEVELOPMENTS

THERE'S NO PLACE LIKE HOME. DETERMINING HABITUAL RESIDENCE: *FEDER V. EVANS-FEDER*

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Children are often used "as pawns in the adult game of divorce."[1] Some parents take a child away to another state in an effort to side step a custody decree. In other cases, the parent removes the child from the United States. This happens to about 1,000 U.S. children each year.[2] Prior to 1980, parents trying to bring back their children had little help. With the passage of the Hague Convention[3] and the International Child Abduction Remedies Act (ICARA)[4] parents were given statutory authority to assist them in forcing a non-custodial parent to bring a child home. Even so, the cost of travelling to recover a child can be financially and emotionally draining,[5] and as this article will demonstrate the courts are not consistent in determining where the child should reside. This paper examines one court's determination of habitual residence under the Hague Convention and ICARA and the potential effects of the court's rationale.

I. FACTUAL BACKGROUND

Edward M. Feder and Melissa Ann Evans-Feder are United States citizens who met in Germany in 1987.[6] Mr. Feder was employed by Citibank and

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* J.D. 1997.

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

[2] Evelyn T. Powers, *Parents of Abducted Children Get Help*, USA TODAY, Oct. 25, 1996, at 6A.

[3] Hague Convention on the Civil Aspects of International Child Abduction, held at the Hague, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501 (1980) [hereinafter Hague Convention].

[4] 42 U.S.C. §§ 11601-11610 (1995).

[5] Powers, *supra* note 2, at 6A. Recently, the Justice Department's Office of Victims of Crime has expanded its programs to pay travel costs of parents who prove that they cannot afford to travel to another country to recover their children. The program also increases services to parents whose children have been taken across international borders. *Id.*

[6] Feder v. Evans-Feder, 63 F.3d 217, 218 (3d Cir. 1995).

Mrs. Feder was an opera singer. Their only child, Charles Evan Feder ("Evan"), was born in Germany on July 3, 1990.[7] In October, 1990, the family moved to Jenkintown, Pennsylvania because Mr. Feder had been offered a job with CIGNA in Philadelphia. CIGNA terminated Mr. Feder's employment in June, 1993 and he soon found employment with the Commonwealth Bank of Australia.[8] Mrs. Feder was reluctant to move, but agreed to take a two week trip to Australia that August. While there, the Feders toured Sydney, spoke to Americans who had moved to Australia, and met with a real estate agent and a relocation consultant regarding housing and schools. In addition, Mrs. Feder spoke with the Australia Opera about possible employment.[9]

Mr. Feder accepted the job with the Commonwealth Bank of Australia on September 16, 1993.[10] Mrs. Feder was still reluctant to move particularly because of her husband's unstable work history.[11] She was unsure of how long they would stay in Australia and did not want to relocate now that they had a child.[12] However, she agreed to the move in an attempt to keep the family together and to salvage her marriage. In addition, she did not feel that she could support herself and Evan if she chose to initiate divorce proceedings.[13]

Mr. Feder moved to Australia in late October, 1993, leaving Mrs. Feder and Evan in Pennsylvania. In November, 1993, Mr. Feder bought a 50 percent interest in a house in St. Ives, New South Wales in his and Mrs. Feder's name.[14] Reluctantly, Mrs. Feder moved with Evan to Australia in early January, 1994.[15]

During the first four and a half months that the Feders were reunited, the family lived in a hotel and then an apartment until renovations to the St. Ives

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Feder v. Evans-Feder, 866 F. Supp. 860, 863 (E.D. Pa. 1994).

[11] During the past twenty years, Mr. Feder had worked for four different employers in ten different cities in seven different countries on four different continents. *Id.*

[12] The marriage had deteriorated during Mr. Feder's employment with CIGNA and remained troubled during his recent unemployment. *Feder*, 866 F. Supp. at 863. These problems led Mrs. Feder to consult a domestic relations attorney in October, 1993.

[13] *Feder*, 63 F.3d at 219.

[14] The Commonwealth Bank purchased the other 50 percent interest and financed the Feders' interest in the house. *Id.*

[15] *Id.*

house were completed.[16] Both Mr. and Mrs. Feder took steps to acclimate themselves to their new environment. Mr. Feder changed his driver's license registration and applied for residency. Mrs. Feder did neither, but she did obtain employment with the Australia Opera,[17] enroll Evan in nursery school, and put his name on a waiting list for a private school when he reached the fifth grade. Evan was not an Australian citizen at that time, but Mrs. Feder represented the contrary on the application. In addition, the entire family obtained Australian Medicare cards, giving them access to Australia's health care system.[18]

During the Spring of 1994, Mrs. Feder expressed to Mr. Feder her unhappiness in the marriage and her wish to return to the United States. Mr. Feder asked her to stay, saying that the stress on the marriage would dissipate once they were more settled in Australia and moved into their new house.[19] Mrs. Feder agreed to stay for both personal and practical reasons. The family moved into the St. Ives house in May, 1994, but the marriage did not improve. Mrs. Feder decided that she wanted to divorce Mr. Feder and return to the United States with Evan. Instead of revealing her true intentions to Mr. Feder, Mrs. Feder told him that she wanted to take Evan to visit his grandparents in Pennsylvania.[20] Mr. Feder agreed and purchased plane tickets for his wife and son departing Australia on June 29, 1994 and returning on August 2, 1994.[21]

In July, 1994, Mr. Feder traveled to the U.S. on business and arranged to meet his family at their house in Pennsylvania which had still not sold. He went to the house on July 20, 1994 and was served with a complaint stating that Mrs. Feder was seeking a divorce, property distribution, custody of Evan, and financial support.[22] Soon after, Mr. Feder returned to Australia and Mrs. Feder and Evan moved back into the Pennsylvania house.

On September 28, 1994, Mr. Feder filed a petition in the United States District Court for the Eastern District of Pennsylvania alleging that Mrs. Feder had wrongfully retained Evan in violation of the Hague Convention

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[16] *Id.*

[17] Mrs. Feder accepted a role for one performance in February, 1995. Rehearsals were scheduled to begin in December, 1994. *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 219-20.

[21] *Id.* at 220.

[22] *Id.*

on the Civil Aspects of International Child Abduction and ICARA.[23] His petition also requested that Evan be returned to him in accord with ICARA. The District Court held that Evan's habitual residence was the United States and that Mrs. Feder had not wrongfully retained him there.[24] Consequently, Evan was allowed to remain in the United States with his mother.

On appeal, the United States Court of Appeals for the Third Circuit vacated the District Court's decision, holding that Evan's habitual residence was Australia and that Mrs. Feder had wrongfully retained him in the United States.[25] The court remanded the case for a determination as to whether an exception to the Convention applied which would allow Evan to remain in the United States.[26]

In making its determination, the court departed from the traditional view that "habitual residence" is a finding of fact.[27] Instead, the court stated that habitual residence is a conclusion of law or at least a mixed question of law and fact.[28] By changing the nature of the determination of habitual residence, the court decided an issue of first impression regarding the appropriate standard of review for the determination of habitual residence.

II. LEGISLATIVE BACKGROUND

A. General Overview of the Hague Convention and the International Child Abduction Remedies Act

The 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention)[29] addresses the problems of child abduction and the efforts of parents to remove their children to foreign

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[23] *Id.*

[24] *Id.*

[25] *Id.* at 218.

[26] *See infra* text accompanying notes 44-47.

[27] *See infra* Section B of the legislative background.

[28] *Feder*, 63 F.3d at 222 n.9.

[29] The full text of the Convention can be found at 51 Fed. Reg. 10494 (1986). The following 43 countries, including the U.S., have ratified the Convention: Argentina, Australia, Austria, Bahamas, Belize, Bosnia-Herzegovina, Burkina Faso, Canada, Chile, Colombia, Croatia, Cyprus, Denmark, Ecuador, Finland, France, Germany, Great Britain, Greece, Honduras, Hungary, Ireland, Israel, Italy, Luxembourg, Macedonia, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, Spain, St. Kitts/Nevis, Sweden, Switzerland, Zimbabwe. Powers, *supra* note 2, at 6A.

countries in an attempt to obtain an advantage in custody disputes. The preamble to the Convention states its goal of protecting "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 [parental] access."[30]

Article 1(a) of the Convention states its primary objective is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State."[31] The Convention is not, however, designed to settle custody disputes.[32] It merely restores the status-quo by returning a child to the country of its "habitual residence" so the custody dispute can be resolved in that country.[33] The Convention prevents either parent from gaining an advantage by removing the child to a country with a more favorable or sympathetic judicial system.[34]

The United States ratified the Convention and became a signatory on April 29, 1988.[35] Congress passed ICARA (PL 100-300, 102 Stat 437, codified at 42 U.S.C.S. §§ 11601 et seq.) on the same day.[36] ICARA expresses concern for children who are subject to international abduction in the context of custody disputes.[37] It explicitly states that its purpose is to implement the procedures set forth in the Convention.[38]

The Convention applies when a child has been wrongfully removed to or retained in any Contracting (signatory) state.[39] Under ICARA, a petitioner

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[30] Hague Convention, *supra* note 3, preamble.

[31] Hague Convention, *supra* note 3, at art. 1(a).

[32] "[A] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." *Id.* at art. 19.

[33] A primary purpose of the Convention "is to restore the status quo ante and to deter parents from crossing international boundaries in search of a more sympathetic court." Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995).

[34] Scott M. Smith, Annotation, *Construction and Application of International Child Abduction Remedies Act*, 125 A.L.R. FED. 217, 228 (1994).

[35] *Id.*

[36] 42 U.S.C.S. § 11601.

[37] 42 U.S.C.S. § 11601(a).

[38] 42 U.S.C.S. § 11601(b)(1).

[39] Under Article 3 of the Convention, wrongful removal or retention occurs 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* (emphasis added); and
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> (b) at the time of removal or retention those rights were actually

must prove by a preponderance of the evidence that the child was removed from his or her "habitual residence" and that the removal or retention occurred while the petitioner's custody rights were being exercised.[40]

Because the Convention does not define "habitual residence," courts have generally construed the term based on the facts of each individual case.[41] However, the Convention does define "rights of custody" as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[42]

Once a court determines that a child has been wrongfully removed or retained, the court orders the child to be placed in the custody of the prevailing party.[43] However, the Convention acknowledges two exceptions to the mandate of returning the child to the prevailing party. Article 13(b) states that a court is not bound to order the return of a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm."[44] Under ICARA, this must be proven by clear and convincing evidence.[45] Article 13(a) states that a court is not bound to order the return of a child if the person having the care of the child "had consented to or subsequently acquiesced in the removal or retention."[46] ICARA requires this to be proven by a preponderance of the evidence.[47]

B. Interpretation of "Habitual Residence" by United States Courts

Habitual residence is not defined by the Hague Convention. The most often cited explanation for this comes from *Re Bates*[48] where the court stated:

> exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague Convention, *supra* note 3, at art. 3.

[40] 42 U.S.C.S. § 11603(e)(1)(A).

[41] *See generally* Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993); Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995); Levesque v. Levesque, 816 F. Supp. 662 (Kan. 1993).

[42] Hague Convention, *supra* note 3, at art. 5.

[43] Hague Convention, *supra* note 3, at art. 12. Usually the child is returned to the state deemed as the child's habitual residence. However, if the prevailing party has moved from the child's habitual residence, the child is returned to the prevailing party regardless of where the party now resides. 51 Fed. Reg. at 10511.

[44] Hague Convention, *supra* note 3, at art. 13.

[45] 42 U.S.C.S. § 11603(e)(2)(A).

[46] Hague Convention, *supra* note 3, at art. 13.

[47] 42 U.S.C.S. § 11603(e)(2)(B).

[48] Re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989).

> No definition of "habitual residence" has ever been included in a Hague Convention. This has been a matter of deliberate policy, the aim being to leave the notion free from technical rules, which can produce rigidity and inconsistencies between legal systems. . . . It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence.[49]

Many United States cases have followed the reasoning of *Re Bates*. In *Friedrich v. Friedrich*,[50] the court held that the child's habitual residence was Germany and ordered the mother to return the child after she took him to the United States without the father's knowledge. The child, Thomas, had been born and raised in Germany. Mrs. Friedrich was an American citizen employed by the United States Army; Mr. Friedrich was a German citizen. After a heated argument, Mrs. Friedrich and Thomas moved to on-base visiting quarters. She eventually took the child to the United States without telling the father.[51] The District Court held that Thomas's habitual residence was altered from Germany to the United States when Mr. Friedrich put Thomas's belongings in the hall.[52] The court also held that Mr. Friedrich terminated his custody rights when he banished Mrs. Friedrich and Thomas from the apartment.[53]

The United States Court of Appeals for the Sixth Circuit reversed the District Court and held that the child's habitual residence at the time of the wrongful removal was Germany.[54] The case was remanded to determine whether Mr. Friedrich was exercising his custodial rights at the time of the wrongful removal. The court interpreted *Re Bates* as saying "there is no real distinction between ordinary residence and habitual residence."[55] The court further stated:

> On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in

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[49] *Id.*
[50] 983 F.3d 1396 (6th Cir. 1993).
[51] *Id.* at 1399.
[52] *Id.* at 1398.
[53] *Id.* at 1401.
[54] *Id.*
[55] *Id.*

> time, not forward. . . . Any future plans that Mrs. Friedrich had for Thomas to reside in the United States are irrelevant to our inquiry. . . . Thomas's habitual residence can be "altered" only by a change in geography and the passage of time, not by changes in parental affection and responsibility.[56]

The events following the argument were changes in Mr. Friedrich's parental affection and responsibility toward Thomas—they did not alter Thomas's habitual residence.

In *Rydder v. Rydder*,[57] the court also followed *Re Bates*. Both Mrs. Rydder, an American citizen, and Mr. Rydder, a Danish citizen, were registered residents of Sweden at the time of their marriage. Both of their children were born in Stockholm, and Mr. and Mrs. Rydder exercised joint custody. The family moved to Poland, after which Mr. and Mrs. Rydder experienced marital difficulties. Without the prior knowledge of or consent from Mr. Rydder, Mrs. Rydder took the children to Iowa and notified her husband that she intended to file for divorce in the United States.[58]

The District Court correctly held that the childrens' habitual residence was Poland.[59] On review, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's finding stating "although the Hague Convention does not define 'habitual residence,' a frequently-cited British case, with which we agree, concluded that there is no real distinction between habitual and ordinary residence."[60] The court went on to quote *Re Bates*: "It is greatly hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence. . . . The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions."[61]

The court in *Levesque v. Levesque*[62] also treated habitual residence as a factual determination. There, Mrs. Levesque and her daughter, Vallery, had

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[56] *Id.* at 1401-02. To allow a parent to change a child's habitual residence by removing or retaining the child without the knowledge of the other parent would undermine the purpose of the Convention. "It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence." *Id.* at 1402.

[57] 49 F.3d 369 (8th Cir. 1995).

[58] *Id.* at 372.

[59] *Id.*

[60] *Id.* at 373.

[61] *Id.*

[62] 816 F. Supp. 662, 666 (Kan. 1993).

lived in Germany for approximately two years and then returned to the United States, where Mr. Levesque had been residing. Mrs. Levesque and Vallery took a five week trip to Germany in 1992, and in June of that year, they went back to Germany with Mr. Levesque's permission. Mr. Levesque arrived in Germany in July of 1992 to visit Vallery. Claiming that Mrs. Levesque had told him that he could never see his daughter again, Mr. Levesque took Vallery back to the United States and filed divorce proceedings.[63]

The District Court ordered Vallery's return to her mother, holding that Vallery's habitual residence was Germany and that Mr. Levesque had wrongfully removed her from Germany.[64] The court stressed the importance of keeping habitual residence a finding of fact. "As noted by the *Bates* court, no Hague Convention has ever defined 'habitual residence,' although the term is frequently used in such conventions. The intent is for the concept to remain fluid and fact based, without becoming rigid."[65] The court also emphasized the need for a demonstrated degree of settled purpose, noting that one is not required to show an intent to stay indefinitely. One's purpose "while settled may be for a limited period."[66]

While most U.S. cases treat habitual residence as a finding of fact, other courts have treated habitual residence as a conclusion of law. An example is *In re Ponath*.[67] Mr. and Mrs. Ponath met and married in Utah and had one child, Richard. In November, 1991, the family traveled to Germany to visit Mr. Ponath's family. Two weeks after they arrived in Germany, Mr. Ponath obtained employment there. After three months, Mrs. Ponath expressed her desire to return with Richard to the United States; however, Mr. Ponath prevented her from leaving by means of verbal, emotional and physical abuse.[68] Several months later, with Mr. Ponath's permission, Mrs. Ponath and Richard returned to the United States. After Mrs. Ponath filed for divorce in Utah, Mr. Ponath filed an action claiming that his wife had wrongfully removed the child and requesting Richard's return to Germany.[69]

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[63] *Id.* at 663.
[64] *Id.* at 662.
[65] *Id.* at 666.
[66] *Id.*
[67] 829 F. Supp. 363, 367 (Utah 1993).
[68] *Id.* at 366.
[69] *Id.* at 367.

The District Court found as a matter of law that the child's habitual residence was Utah and that Mrs. Ponath and Richard were not habitually resident in Germany due to the coerced and abusive circumstances.[70] The court also found that because Mr. Ponath had given permission for his wife and child to leave Germany there was no wrongful removal.[71]

The court acknowledged the need for habitual residence to remain a fluid concept, but placed a limit on its determination when it held that "the concept of habitual residence must, in the court's opinion, entail some element of voluntariness and purposeful design."[72] The court likened the element of voluntariness to the concept of settled purpose and stated that "coerced residence is not habitual residence within the meaning of the Hague Convention."[73] While the court determined the child's habitual residence by analyzing the facts of the case, it held that its finding was a conclusion of law.

C. Standard of Review for Determining Habitual Residence

Neither the Hague Convention nor ICARA specifies a standard of review for determinations of habitual residence, and nothing in the legislative or negotiating history of ICARA reveals the proper standard of review.[74] To date, three appellate cases have reviewed ICARA petitions that were disposed of after an evidentiary hearing,[75] but none of them discuss an appropriate standard of review.[76]

Some insight can be taken from the report by the official Hague Conference Reporter for the Convention. According to the U.S. Department of State, the report is recognized "as the official history and commentary on the Convention."[77] The report states that " 'habitual 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 the

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[70] *Id.*

[71] *Id.* at 368.

[72] *Id.*

[73] *Id.*

[74] *Feder*, 63 F.3d at 228.

[75] See *Prevot v. Prevot* (In re Prevot), 59 F.3d 556 (6th Cir. 1995); *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993).

[76] *Feder*, 63 F.3d at 226.

[77] 51 Fed. Reg. at 10503.

domicile."[78] This report, in conjunction with the general treatment of the term by a majority of U.S. courts, suggests that the determination of habitual residence is purely factual.

If habitual residence is a finding of fact, then a reviewing court must let the lower court's determination stand in the absence of clear error.[79] The clearly erroneous standard is justified because the trier has the advantage of hearing and observing witness testimony. The trier of fact is in the best position to make the determination of habitual residence and its determination should be relied upon.[80]

III. ANALYSIS

A. *Habitual Residence Should Remain a Finding of Fact*

Habitual residence is not defined in the Hague Convention. As stated in *Re Bates* the absence of a definition was deliberate.[81] The concept was intended to remain fluid and unrestrained by technical rules so that determinations could be made on a case by case basis.[82] While the legislative history of the Convention and ICARA shed no light on the proper definition of habitual residence, the report by the official Hague Conference Reporter for the Convention indicates that habitual residence was intended to be a purely factual concept.[83] In addition, most U.S. courts have treated habitual residence as a finding of fact.[84] Even in *In re Ponath*, where the court stated its finding of habitual residence as a conclusion of law, the court made its determination solely based on the specific facts of the case.[85]

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[78] Elisa Perez-Vera, "Report of the Special Commission," Conference de La Haye de droit international prive: Actes et documents de la Quatorzieme session, Vol. III, Child Abduction, P 60 at 189, *cited in Feder*, 63 F.3d at 228.

[79] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake had been committed. . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Friedrich*, 983 F.2d at 1403.

[80] "The clearly erroneous standard is particularly strong since the judge had the opportunity to observe the demeanor of the witnesses." United States v. Sutton, 850 F.2d 1083, 1086 (5th Cir. 1988).

[81] *See supra* note 49.

[82] *See supra* note 41 and accompanying text.

[83] *See supra* note 49.

[84] *See Friedrich*, 983 F.2d 1396; *Rydder*, 49 F.3d 369; *Levesque*, 816 F. Supp. 662.

[85] 829 F. Supp. at 363.

Despite the strong precedent for determining habitual residence as a finding of fact, the *Feder* court chose its own interpretation. "We believe that the determination of habitual residence is not purely factual, but requires the application of a legal standard, which defines the concept of habitual residence, to historical and narrative facts. It is therefore, a conclusion of law or at least a mixed question of law and fact."[86] The court's cited authority for this determination was *Universal Minerals, Inc. v. C.A. Hughes & Co.*[87] Reliance on this case is misplaced because the Court in *Feder* wrongly characterized habitual residence as an ultimate fact, "a legal concept with a factual component,"[88] rather than a basic or inferred fact.[89] Under the language of the Convention, wrongful removal or retention is properly characterized as an ultimate fact and therefore a conclusion of law. Habitual residence is merely a basic or inferred fact[90] used in the determination of wrongful removal or retention. Habitual residence is generally equivalent to one's ordinary residence and is likely stipulated at trial. Thus, it qualifies as a basic fact under *Universal Minerals*.[91]

B. Appropriate Standard of Review

Based on its new determination of habitual residence, the *Feder* court concluded that the appropriate standard of review was mixed, "accepting the

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[86] Feder, 63 F.3d at 222 n.9.

[87] 669 F.2d 98, 102-03 (3d Cir. 1981).

[88] *Id.* at 102.

[89] *Universal Minerals* distinguished three types of fact—basic facts, inferred facts, and ultimate facts.

> Basic facts are the historical and narrative events elicited from the evidence presented at trial, admitted by stipulation, or not denied, where required, in responsive pleadings. Inferred factual conclusions are drawn from basic facts and are permitted only when, and to the extent that, logic and human experience indicate a probability that certain consequences can and do follow from the basic facts.

669 F.2d 98, 101-02. An ultimate fact, however, "is usually expressed in the language of a standard enunciated by case law or by statute." *Id.* at 102. Examples of ultimate facts include the existence of negligent conduct, reasonable rates, and collective bargains. *Id.*

[90] If not a basic fact, then habitual residence is best characterized as an inferred fact—a conclusion drawn from the basic fact of ordinary residence. *See supra* note 78.

[91] "Basic facts are the historical and narrative events elicited from the evidence presented at trial, admitted by stipulation, or not denied, where required, in responsive pleadings." *Universal Minerals*, 669 F.2d at 102.

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."[92] The Court cited *Universal Minerals, Inc. v. C.A. Hughes & Co.* as its authority for this standard of review.[93] Reliance on the case is erroneous because the *Universal Minerals* standard applies only to ultimate facts.[94] Assuming that habitual residence is not a conclusion of law, but a "historical or narrative fact," the appropriate review under *Universal Minerals* is clear error. Wrongful retention, an ultimate fact, is subject to plenary[95] review.

Assuming that the *Feder* court erred in characterizing habitual residence as a conclusion of law, it also applied the incorrect standard of review. Thus, the reviewing court cannot vacate the lower court's finding of habitual residence unless the court comes to a "definite and firm conviction that a mistake has been committed."[96]

C. The Appellate Court Could Have Overruled the District Court By Finding Clear Error

If habitual residence is a finding of fact, the court must show clear error to overrule the District Court's judgment. Clear error is demonstrated by relying on the limited legislative history of the Convention and previous cases as applied to the specific facts of *Feder*.

In *Friedrich* and *Rydder* the courts interpreted *Re Bates* to mean that "there is no real distinction between ordinary residence and habitual residence."[97] Based on this interpretation, Evan's habitual residence at the time his mother took him back to the United States was his "ordinary residence"—the place where he had been living with both of his parents and attending school for the previous six months. Without question, Evan's ordinary residence and thus his habitual residence was Australia. Therefore, the District Court's finding that Evan's habitual residence was the United States was clearly erroneous and the Appellate Court was correct in overruling the finding.

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[92] Feder, 63 F.3d at 222 n.9.

[93] *Id.*

[94] *Universal Minerals*, 669 F.2d at 102.

[95] "Full, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990).

[96] *Feder*, 63 F.3d at 229.

[97] *See Friedrich*, 983 F.2d at 1401 and *Rydder*, 49 F.3d at 373.

The majority of courts also look for a sufficient degree of settled purpose in determining habitual residence.[98] *Re Bates* is often cited for its statements on settled purpose. "There must be a degree of settled purpose. . . . That is not to say that the propositus intends to stay where he is indefinitely. Indeed, his purpose, while settled may be for a limited period."[99]

The degree of settled purpose affects the determination of the child's habitual residence which in turn affects the determination of wrongful removal or retention. To allow the future intentions of one parent to influence the settled purpose of the child is arguably clear error because this bias impacts the ultimate determination of wrongful removal or retention. For example, in *Friedrich*, the court emphasized the importance of looking back in time, not forward.[100] The future plans and intentions of the mother to have the child reside with her were held irrelevant to the inquiry of settled purpose and habitual residence at the time of the wrongful removal.[101]

In *Feder*, the District Court focused solely on the mother's lesser degree of settled purpose and ignored Mr. Feder's intent to remain in Australia.[102] By allowing the mother's settled purpose to represent the child, the District Court committed clear error. The focus is the child's habitual residence, not one parent's future intentions for the child's residence.

Considering the entire family, it is clear that Evan's habitual residence was Australia. Mr. Feder demonstrated a settled purpose by changing his driver's license and applying for citizenship. Although Mrs. Feder did not endorse the move to Australia, she went there willingly and took affirmative steps to adjust to her new home. Considering the collective acts of his parents, Evan's habitual residence was Australia prior to his removal to the United States. By looking only at the settled purpose of Mrs. Feder, the District Court committed clear error.

The District Court further erred by analogizing this case to *In re Ponath* where the mother and child were prevented from leaving the father by means of verbal, emotional and physical abuse.[103] The *Ponath* court stated that habitual residence must "entail some element of voluntariness and purposeful

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[98] *See Slagenweit v. Slagenweit*, 841 F. Supp. 264 (N.D. Iowa 1993); *Levesque*, 816 F. Supp. 662; *In re Ponath*, 829 F. Supp. 363.

[99] *Cited in Feder*, 63 F.3d at 223.

[100] 983 F.2d at 1401.

[101] *Id.*

[102] 866 F. Supp. at 869.

[103] "The Ponath decision is more persuasive . . . and is closer to the facts of this case." *Feder*, 866 F. Supp. at 868.

design. Indeed this notion has been characterized in other cases in terms of 'settled purpose.' "[104] Based on this statement, the *Feder* court held that Evan's habitual residence was the United States and therefore Mrs. Feder did not wrongfully retain him there.

The court misapplied *Ponath* in two ways. First, the facts of *Ponath* are distinguishable. Mrs. Feder was not forced to move to Australia by verbal, emotional or physical abuse. While she was hesitant about the move, the facts do not indicate that Mrs. Feder was coerced in the same way as Mrs. Ponath. Additionally, the move to Australia was required by Mr. Feder's employment. The family did not commit to stay for a definite time, but they did intend to live in Australia as long as Mr. Feder was working there. Their purpose for going to Australia was significantly different from *Ponath* where the family went to Germany with the intent to visit relatives.

Second, the District Court looked only at Mrs. Feder's lack of settled purpose in determining Evan's settled purpose. Relying on the *Ponath* definition of habitual residence, the court argued that Mrs. Feder did not move to Australia voluntarily and thus had no settled purpose there.[105] This proved, in the court's opinion, that Evan's habitual residence had never been Australia even though the family had lived there for six months. Mrs. Feder was not voluntarily in Australia, thus her lack of settled purpose demonstrated a similar lack of purpose regarding Evan and his habitual residence remained the United States.

The court erred in its application of the *Ponath* definition of habitual residence by reading the "element of voluntariness" requirement too narrowly. As in *Ponath*, evidence that one was forced to live somewhere by means of verbal, emotional and physical abuse clearly demonstrates a lack of voluntariness and thus a lack of settled purpose.[106] However, evidence that one would prefer to live elsewhere does not clearly demonstrate a lack of voluntariness.

Mrs. Feder preferred not to move, but did consent to the move. She was not forced against her will. Although she was concerned about her inability to support herself if she were to begin divorce proceedings, Mrs. Feder, unlike Mrs. Ponath, had family nearby on whom she likely could have relied if necessary. More importantly, Mrs. Feder was not forced to move to Australia by means of verbal, emotional or physical abuse. While Mrs.

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[104] 829 F. Supp. at 367.
[105] *Feder*, 866 F. Supp. at 868.
[106] 829 F. Supp. at 367.

Feder would have preferred to remain in the United States, she demonstrated the requisite level of voluntariness by moving to Australia in an attempt to salvage her marriage and keep the family together.[107]

The court construed Mrs. Feder's settled purpose too narrowly under *Ponath*[108] and completely disregarded evidence of Mr. Feder's settled purpose. By doing so the District Court committed clear error and that error permitted the Court of Appeals to overturn the factual finding of Evan's habitual residence made by the District Court. The Appeals Court had ample justification to hold that the District Court's determination of habitual residence was clearly erroneous.

D. Consequences of the Case

In *Feder v. Evans-Feder*, the court held that habitual residence is not a purely factual determination, but a conclusion of law or at least a mixed question of fact and law.[109] Thus the proper standard of review is not clear error but a mixed standard. The historical facts stand in the absence of clear error but a court's interpretation of legal precepts and its application of those precepts to the facts is subject to plenary review.[110] This new definition of habitual residence and corresponding standard of review weakens the integrity of the Convention and ICARA because it allows a reviewing court to step in whenever it is compelled to change an undesirable result.

The purpose of the Convention is to prevent children from being transferred between their parents and across international waters during custody disputes.[111] The *Feder* decision allows reviewing courts to act in

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[107] Additional evidence of Mrs. Feder's settled purpose comes from her successful efforts to obtain employment with the Australia Opera. *Feder*, 63 F.3d at 219.

[108] The better view for considering voluntariness is a sliding scale: completely against one's will (as in *Ponath*) to completely willing. While Mrs. Feder was hesitant about moving, she was not forced to go against her will. She could have stayed in Pennsylvania where she was near relatives. Unlike Mrs. Ponath, Mrs. Feder had options. Her husband was not forcing her to move and she had the resources to stay behind if she had wanted. Thus, Mrs. Feder's situation lies closer on the continuum to the completely willing pole. She demonstrated the requisite level of voluntariness to have a settled purpose in Australia even if she did not intend to stay there indefinitely.

[109] 63 F.3d at 222 n.9.

[110] *Id.*

[111] *See supra* text accompanying notes 30-34.

conflict with that purpose by permitting them to overturn a lower court's finding of habitual residence by meeting a standard weaker than clear error. Instead of a child remaining at his or her habitual residence while a custody dispute is being settled, the child may be transferred between parents as the case moves through the courts. Thus, the finding of habitual residence is best left as a factual finding that can only be overturned when the finding is clearly erroneous.

In *Feder*, the Appeals Court could have found the District Court's finding of habitual residence to be clearly erroneous, but instead it overturned the District Court by creating a new definition and standard of review. Regardless of the rationale, Evan was ordered to return to Australia until the custody dispute was settled. Although the Convention's purpose was not fulfilled in Evan's situation, the result is justified because the Appeals Court could have demonstrated that the District Court committed clear error. However, in many cases clear error will not be demonstrable and the lower court's determination of habitual residence must stand. Otherwise, custody of the child will be transferred between the parents as each court changes the determination of the child's habitual residence. This result is contrary to the goals of the Convention.[112]

CONCLUSION

Habitual residence has traditionally been a purely factual concept, and its proper standard of review is clear error. By treating habitual residence as a finding of fact, the integrity of the Hague Convention and ICARA is maintained. A reviewing court can only overturn a finding of habitual residence if the finding is clearly erroneous. This protects the child from the effects of having his or her custody alternate between parents while the courts battle over the child's habitual residence.

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[112] The Convention has two main goals that often conflict—preventing parents from gaining an advantage in a custody dispute and protecting children from the harmful effects of their wrongful removal or retention. *See supra* text accompanying notes 30-38. It is easy to imagine a situation where one of these goals must be sacrificed for the other. For example, an Appeals Court may feel that the lower court's determination of habitual residence is wrong but may be unable to demonstrate clear error. The child is protected, but the parent who prevailed in the lower court has gained an unfair advantage in the custody dispute. Conversely, one could argue that the result in *Feder* did not protect Evan but did prevent his mother from gaining an unfair advantage in the custody dispute.

In *Feder v. Evans-Feder*, the court departed from the traditional view that habitual residence is a finding of fact. Changing the determination of habitual residence to a conclusion of law or at least a mixed question of fact and law necessarily changed the proper standard of review. Now, a reviewing court must accept the lower court's historical or narrative facts unless they are clearly erroneous, but may exercise plenary review "of the court's choice of and interpretation of legal precepts and its application of those precepts to the facts."[113]

This new standard allows a court to overturn a determination of habitual residence whenever it appears to the court that the determination was incorrect. Unlike the clearly erroneous standard, plenary review gives the court greater judicial discretion. It is this discretion that the Hague Convention attempted to avoid by not defining habitual residence and by indicating that the concept should remain fact-based and free from technical rules and constraints.

The majority opinion in *Feder* was correct in holding that Evan's habitual residence was Australia, but its rationale was incorrect. Instead of changing the standard of review of habitual residence, the court should have found the District Court's determination clearly erroneous. That holding would comport with the purpose of the Hague Convention and the International Child Abduction Remedies Act. Unfortunately, the court's rationale conflicts with those purposes and may create the types of situations that the Convention sought to remedy. However, the court did create a potentially useful definition of "habitual residence"[114] which focuses on residence from the child's perspective and the parents' present, shared intentions regarding that residence. Proper application of the definition by the lower courts may lead to the right result at the outset. Thus, the decision may uphold the goals of the Hague Convention and the International Child Abduction Remedies Act.

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[113] *Feder*, 63 F.3d. at 222 n.9.

[114] "We believe that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimization and which has a 'degree of settled purpose' from the child's perspective." *Feder*, 63 F.3d at 224.