

## **DETERMINATION OF A CHILD'S HABITUAL RESIDENCE IN INTERNATIONAL CHILD ABDUCTION CASES: CHARTING THE WAY TOWARDS HARMONIZATION**

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### **ABSTRACT**

The 1980 Child Abduction Convention is aimed at addressing the increasingly disturbing problem of trans-border parental child abduction, its key mechanism being to promptly return an abducted child to his or her country of 'habitual residence.' In essence, habitual residence is established as the chosen personal connecting factor in international child abduction cases. However, in view of the failure of the Convention to define the term, it has become the responsibility of the courts around the world to improvise their own standards for the determination. The objectives of this article are to assess the deplorable situation of fragmented approaches and standards used by the courts in determining the habitual residence of a child and to explore the recent developments in judicial pronouncements in order to be able to demonstrate the changing trend in the jurisprudence of the courts. To achieve these objectives, the article appraises the decisions of the courts in the United States of America, Canada, the European Union, the United Kingdom and other common law countries. The article concludes that the changing trend is clearly discernible and a number of courts of States parties are increasingly applying a hybrid or combined approach rather than various subjective and one-sided approaches. Thus, moving towards the achievement of harmonization in the determination of a child's habitual residence, the underlying principle of the Convention.

**Keywords:** parental child abduction, Hague Abduction Convention, habitual residence, harmonization.

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## **PENENTUAN KEDIAMAN HABITUAL BAGI KANAK-KANAK DI BAWAH UNDANG-UNDANG ANTARABANGSA DALAM KES PENCULIKAN: KE ARAH HARMONISASI**

### **ABSTRAK**

Konvensyen Penculikan Kanak-Kanak 1980 yang bertujuan untuk mengatasi masalah penculikan kanak-kanak merentas sempadan ialah mekanisma utama untuk memulangkan kakan-kanak yang diculik kembali ke 'kediaman habitual' mereka. Pada asasnya, kediaman habitual digunakan sebagai kayu pengukur bagi menentukan di mana kanak-kanak tersebut harus ditempatkan dalam kes penculikan kanak-kanak yang melibatkan ibubapa mereka sendiri. Walaubagaimanapun, oleh kerana Konvensyen tersebut tidak memperhalusi makna terma tersebut, maka ianya menjadi tanggungjawab mahkamah-mahkamah di setiap negara yang terlibat untuk menterjemah apa yang dimaksudkan dan menentukan piawaiannya sendiri. Makalah ini akan menilai situasi yang agak rumit dengan adanya pelbagai pendekatan yang digunakan oleh mahkamah-mahkamah bagi menentukan kediaman habitual seorang kanak-kanak yang menjadi mangsa penculikan merentas sempadan yang melibatkan ibu atau bapa mereka sendiri. Makalah ini juga turut meneroka perkembangan penghakiman dari beberapa negara terpilih bagi menunjukkan terdapat perubahan dalam penghakiman-penghakiman tersebut. Bagi memenuhi tujuan ini, makalah ini membuat penilaian terhadap keputusan mahkamah-mahkamah dari negara Amerika Syarikat, Kanada, Kesatuan Eropah, United Kingdom dan beberapa negara lain yang mengamalkan sistem perundangan "common law". Makalah ini merumuskan bahawa terdapat perubahan ketara dalam penggunaan sistem hibrid dan didapati bahawa semakin banyak negara yang mengaplikasi sistem tersebut daripada mengaplikasi pelbagai pendekatan yang subjektif dan sepihak, ke arah pengharmonian dalam penentuan tempat tinggal habitual kanak-kanak, berdasarkan Konvensyen tersebut.

**Kata kunci:** penculikan kanak-kanak oleh ibubapa, Konvensyen Hague Mengenai Penculikan, kediaman habitual, harmonisasi.

## INTRODUCTION

The Hague Abduction Convention<sup>1</sup> creates the so-called “automatic return mechanism” for the abducted children to be promptly sent back to their country of ‘*habitual residence*.’ What is the rationale behind this? It is the basic philosophy of the Convention that the courts of the country where the child is habitually resident is the most appropriate forum to determine the issue of custodial rights and appraise the “*best interests of the child*”.<sup>2</sup>

The Convention’s selection of ‘habitual residence’ as the most appropriate personal connecting factor is not only a choice of the law but also a choice of the forum.<sup>3</sup> In a trans-border child abduction case, the court will first of all make sure whether the child has been wrongfully removed from his country of habitual residence. If the answer is yes, the court will order for the return of the child.<sup>4</sup>

The disturbing problem, nevertheless, is that there is no definition of habitual residence in the Convention.<sup>5</sup> There is no

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<sup>1</sup> The Hague Convention on the Civil Aspects of International Child Abduction, adopted at The Hague on October 25, 1980, and entered into force on December 1, 1983; hereinafter referred to as the “Hague Abduction Convention.” 101 countries are parties to the Hague Abduction Convention; accessed 24 September 2020: <https://assets.hcch.net/docs/62b28229-4cec-4a93-a7d0241b9ef3507e.pdf>.

<sup>2</sup> Abdul Ghafur Hamid @ Khin Maung Sein, Nora Abdul Hak, Najibah Mohd Zin and Hidayati Mohamed Jani, “The Applicability of the 1980 Hague Abduction Convention in Muslim Countries: Particular Reference to the Malaysian Position, *Arab Law Quarterly*, 32:2 (2017) 99-128.

<sup>3</sup> See Beaumont and McElevay, *The Hague Convention on International Child Abduction*, (Oxford: Oxford University Press, 1999), 45-46.

<sup>4</sup> Michael R. Walsh and Susan W. Savard, “International Child Abduction and the Hague Convention,” *Barry L. Rev.* 6 (2006): 29-59, at 33.

<sup>5</sup> What is provided for in the Convention is only its objective in Article 1 as “to secure the prompt return of children wrongfully removed to or retained in any Contracting State,” and its underlying principle in Article 3 as “the removal or the retention of a child is to be considered wrongful where ... it is in breach of rights of custody ... under the law of *the State in which the child was habitually resident* immediately before the removal or retention.” [Emphasis added.]

guidance found in the commentary as well.<sup>6</sup> It appears that the courts do have a considerable degree of flexibility in this matter. This situation has created the rise of a number of approaches and standards in the determination of habitual residence of a child. In particular, some courts treat the habitual residence of the child as being in some way dependent on that of the parents or the exercise of parental rights, whilst others take the view that as what it is looking for is the habitual residence of the child, the inquiry must be child centred, based on objective evidence rather than subjective ones such as parental intention. The court precedents are so fragmented that the situation is considered as almost hopeless to achieve unification or harmonization of private international law, which is the main purpose of the Hague Conference on Private International Law (HCCH)<sup>7</sup> and the aim of adopting the Hague conventions.

The primary objective of the present work, is therefore, to explore the recent developments in judicial pronouncements that demonstrate the changing trend in the jurisprudence of the courts of States parties to the Convention, paving the way for harmonization. After the introductory remarks, section 2 of the article briefly touches on what habitual residence is and section 3 examines the 3 differing approaches in the determination of a child's habitual residence. The remaining sections evaluate the changing trend in the judicial practice in the US, Canada, the UK and the European Union, and other jurisdictions, followed by a conclusion with findings and recommendations.

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<sup>6</sup> Elisa Pérez-Vera, *Explanatory Report on the 1980 HCCH Child Abduction Convention*, 1980 (hereinafter Perez-Vera Report); See also James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, (Federal Judicial Centre, 2<sup>nd</sup>. ed., 2015).

<sup>7</sup> “The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.” Article 1 of the Statute of the Hague Conference on Private International Law, adopted on 31 October 1951 and entered into force on 15 July 1955. Accessed 28 September 2020, available at <https://assets.hcch.net/docs/d7d051ae-6dd1-4881-a3b5-f7dbcaad02ea.pdf>.

## DEFINING HABITUAL RESIDENCE OF A CHILD

Criticisms are abundant on the failure of the drafters to define the concept of habitual residence. It is understood that, "the omission is deliberate and designed to prevent the concept becoming too rigid and technical, so that it can be applied by judges of all legal systems as a factual test".<sup>8</sup> Be that as it may, Article 31 of the Vienna Convention on the Law of Treaties 1969 provides that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty..."<sup>9</sup> What is the natural and ordinary meaning of the term 'habitual residence'? *Black's Law Dictionary* defines *residence* as "the place where a child lives," and *habitual* as "more than transitory, implying customary, usual, or the nature of a habit."<sup>10</sup>

'Habitual residence' is a relatively new personal connecting factor, when compared to 'domicile' and 'nationality'. The UK courts are the pioneers in defining the term judicially.<sup>11</sup> The most influential of all the attempted definitions to date, however, is that of the House of Lords' in the case of *Shah v Barnet London Borough Council*.<sup>12</sup> It is ironic that the judicial definition which has been widely adopted in Convention cases originated from a decision of the House of Lords concerning the meaning of the phrase 'ordinary residence' in a domestic statute. The House of Lords' obiter dictum equating 'habitual residence' with 'ordinary residence' seems to have been universally adopted by English courts.<sup>13</sup> In the *Shah Case*, Lord Scarman ruled that, "...a man's abode in a particular place or country which he had *adopted voluntarily* and *for settled purposes* as part of

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<sup>8</sup> See, *Dicey and Morris on the Conflict of Laws* (London: Sweet & Maxwell, 13th edn, 1999), at 21.

<sup>9</sup> Article 31, The Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969; entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

<sup>10</sup> *Black's Law Dictionary*, (Thomson: West, 8<sup>th</sup> ed, 2004), 729, 1335.

<sup>11</sup> Jonathan Hill and Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws*, (Oxford: Oxford University Press, 5<sup>th</sup> ed., 2016), 342-43.

<sup>12</sup> *Shah v Barnet London Borough Council*<sup>12</sup> [1983] 2 AC 309 HL.

<sup>13</sup> Rhona Schuz, "Habitual Residence of Children under the Hague Child Abduction Convention - Theory and Practice," *Child & Family Law Quarterly* 13(1) (2001): 1-24, at 4-5.

the regular order of his life for the time being, whether of short or long duration.”<sup>14</sup>

In *re Bates*,<sup>15</sup> the UK High Court of Justice stated:

All that the law requires is that there is a 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. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode.... All that is necessary is that the purpose of living where one does have a sufficient degree of continuity to be properly described as settled.

In the House of Lords decision of *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, Lord Brandon held that “residence for ‘an appreciable period of time’ and a ‘settled intention’ to reside on a long-term basis are needed for acquisition of a habitual residence”.<sup>16</sup>

In substance, the term habitual residence, if applied to the case of a child, “refers to that place where a child has lived for a sufficient period of time for the child to have become settled”.<sup>17</sup>

### **THREE DIFFERING APPROACHES: FRAGMENTATION IN THE DETERMINATION OF HABITUAL RESIDENCE**

Case-law in different jurisdictions demonstrates a number of different approaches. The three main approaches are:

- (i) the parental intention approach;

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<sup>14</sup> *Ibid.*, at 343.

<sup>15</sup> *Re Bates*, No. CA 122-89, High Court of Justice, Family Division, Royal Courts of Justice, United Kingdom (1989).

<sup>16</sup> *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562.

<sup>17</sup> James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, (Federal Judicial Centre, 2<sup>nd</sup>. ed., 2015) Executive Summary, xiii.

- (ii) the child-centred approach; and
- (iii) the hybrid approach (also known as the combined approach).

### **The parental intention approach**

The parental intention approach determines the habitual residence of a child on the basis of the intention of the parents who possess the right to determine where the child lives.<sup>18</sup> This approach was highly influenced by the United States Court of Appeals 9th Circuit case *Mozes v. Mozes*. Many of the common law countries, where the traditional definition of habitual residence under the House of Lords' *Shah* ruling dominates, follow this idea of shared parental intention. This approach also dominated the Canadian jurisprudence until recently.<sup>19</sup>

### **The child- centred approach**

This approach primarily looks at “the child’s *acclimatization* in a given country” to determine its habitual residence, largely rejecting the intentions of the parents. It is backward-focused, looking back to the child’s connections with the state, rather than looking forward to the parental intentions.<sup>20</sup> The main jurisdictions that adhere to this

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<sup>18</sup> See *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), at pp. 1076-79; *Gitter v. Gitter*, 396 F.3d 124 (2nd Cir.

2005), at pp. 131-33; *R. v. Barnet London Borough Council, Ex parte Nilish Shah*, [1983] 2 A.C. 309, at p. 343. See also Schuz, *Habitual Residence of Children*, at p. 187, footnote 87.

<sup>19</sup> See, for example, *Chan v. Chow*, 2001 BCCA 276, 90 B.C.L.R. (3d) 222, at paras. 30-34; *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (Ont. C.A.), at para. 8; *A.E.S. v. A.M.W.*, 2013 ABCA 133, 544 A.R. 246, at para. 20; *Rifkin v. Peled-Rifkin*, 2017 NBCA 3, 89 R.F.L. (7th) 194, at para. 2; *S.K. v. J.Z.*, 2017 SKQB 136, at paras. 44-47 (CanLII); *Monteiro v. Locke* (2014), 354 Nfld. & P.E.I.R. 132 (Prov. Ct.), at paras. 13-22.

<sup>20</sup> *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), at p. 1401; see also *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir. 1995), at p. 224.

approach include the United States Court of Appeals 6th Circuit,<sup>21</sup> Canada in the Province of Quebec,<sup>22</sup> Germany,<sup>23</sup> and New Zealand.<sup>24</sup>

The approach was established in the United States Court of Appeal 6th Circuit case of *Friedrich v. Friedrich*. The main principles laid down in this case among others are:

- (i) that habitual residence should not be determined through the ‘technical’ rules but rather courts should look closely at the facts and circumstances of each case;
- (ii) that because the Hague Convention is concerned with the habitual residence of the child, the court should *consider only the child’s experience in determining habitual residence*; and
- (iii) that this inquiry should *focus exclusively on the child’s past experience, future plans of the parents being irrelevant*.<sup>25</sup>

To meet the tests of “acclimatization” and “settled purpose”, the factual circumstances that the court is required to consider include “academic activities”, “social engagements”, “participation in sports programs and excursions”, and “meaningful connections with the people and places”.<sup>26</sup>

Of all the Canadian jurisdictions, only courts in Quebec followed the child-centred approach,<sup>27</sup> but it was until 2017, when it changed its position to embrace the hybrid approach.<sup>28</sup>

<sup>21</sup> *Friedrich v. Friedrich*, 983 F.2d 1396, (6th Cir. 1993); *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007) and *Villalta v. Massie, No. 4: 99cv312-RH* (N. D. Fla. Oct. 27, 1999).

<sup>22</sup> *Droit de la famille* 3713, Cour d’appel de Montréal, 8 septembre 2000, No 500-09-010031-003.

<sup>23</sup> 2 UF 115/02; 2 BvR 1206/98, Bundesverfassungsgericht (Federal Constitutional Court of Germany), 29 October 1998.

<sup>24</sup> *S. K. v. K. P.* [2005] 3 NZLR 590.

<sup>25</sup> *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), III A. [Emphasis added].

<sup>26</sup> *Karkkainen v. Kovalchuk*, 445 F.3d at 293–294.

<sup>27</sup> See *Droit de la famille — 2454*, [1996] R.J.Q. 2509 (C.A.).

<sup>28</sup> See *Droit de la famille — 17622*, 2017 QCCA 529, at paras. 20, 27 and 29-30 (CanLII).



## Hybrid approach

The United States 3rd Circuit strongly supports the hybrid approach and in *Feder v. Evans-Feder* it stated that “The hybrid approach, instead of focusing primarily on either parental intention or the child’s acclimatization, looks to all relevant considerations arising from the facts of the case. This approach is a compromise between the intent of the parent and of the child and combines them both”.<sup>29</sup>

According to *Karkkainen v. Kovalchuk*, “This approach tries to have a more realistic methodology, focusing on the settled purpose from a child perspective, but still taking into account the intent of the parents. In these cases, however, the highlight is given to the child”.<sup>30</sup>

To apply the hybrid approach, the judge considers all relevant links of the child to a particular country. Considerations include, “the duration, regularity, conditions and reasons for the [child’s] stay in the territory of [a] Member State and the child’s nationality”.<sup>31</sup> “No single factor dominates the analysis; rather, the judge should consider the entirety of the circumstances”.<sup>32</sup>

Relevant considerations will depend on the age of the child concerned; where the child is an infant, “the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of”.<sup>33</sup> The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children.<sup>34</sup> However, the Court of Justice of the European Union, “cautioned against over-reliance on parental intention”.<sup>35</sup> To conclude with, the hybrid approach is “fact-bound, practical, and unencumbered with rigid rules, formulas, or

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<sup>29</sup> *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995) [Emphasis added].

<sup>30</sup> *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003); *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3rd Cir. 2006).

<sup>31</sup> *Mercredit v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, at para. 56.

<sup>32</sup> See *Droit de la famille — 17622*, at para. 30.

<sup>33</sup> *O.L. v. P.Q.* (2017), C-111/17 (C.J.E.U.), at para. 45.

<sup>34</sup> See *Mercredit*, at paras. 55-56; *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60, [2014] A.C. 1, at para. 54; *L.K.*, at paras. 20 and 26-27.

<sup>35</sup> *O.L. v. P.Q.* (2017), para. 46.

presumptions”.<sup>36</sup> It requires the judge to look to the entirety of the child’s situation.

## **THE CHANGING TREND IN THE DECISIONS OF THE UNITED STATES COURTS**

As a federal State, the United States has a number of Circuit Courts of Appeals with differing approaches in so far as the determination of a child’s habitual residence is concerned.<sup>37</sup>

### **Ninth circuit: Focus on shared parental intent**

The following is the ruling of Ninth Circuit in *Mozes v. Mozes*, “Courts should principally focus on subjective evidence of ‘shared intentions of the parents’— provided there has also been a change in geography”.<sup>38</sup> It means that parental intent is of the utmost importance in Ninth Circuit jurisprudence. However, the court in *Mozes* noted that,

There are some objective factors that should be considered in a determination of habitual residency: both an actual change in geography and the passage of a significant period of time. Without a demonstration of settled intent on the part of the parents, however, this objective evidence is considered irrelevant by Ninth Circuit jurisprudence.<sup>39</sup>

### **Sixth circuit: Child-centred approach - objective evidence**

The United States Sixth Circuit Court of Appeals have applied the ‘child-centred approach.’ In *Friedrich v. Friedrich*, the Sixth Circuit held that “a child’s habitual residence should (1) focus on the child’s perspective as opposed to the parents’; and (2) examine past experiences as opposed to future intentions”.<sup>40</sup> In *Robert v. Tesson*,

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<sup>36</sup> *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013), at p. 746.

<sup>37</sup> See, for example, *Cohen v. Cohen*, 858 F.3d 1150, 1154 (8th Cir. 2017); *Mozes v. Mozes*, 239 F.3d 1067, 1084 (9th Cir. 2001); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401–02 (11th Cir. 1991).

<sup>38</sup> *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) at 1079, 1080.

<sup>39</sup> *Ibid.* at 1078.

<sup>40</sup> *Friedrich v. Friedrich*, 983 F.2d at 1401–02.

the Sixth Circuit again held that, “a child’s habitual residence is the place where the child has been present long enough to allow the child to have been acclimatized, and to have established a degree of settled purpose from the child’s perspective”.<sup>41</sup> According to the Sixth Circuit, “a parental-focused inquiry would prioritize the desires of the abductor over the needs of the child, thus running counter to the Convention’s stated goal of preventing children from being removed from their natural homes”.<sup>42</sup>

### **Majority of the circuits: Hybrid approach**

The majority of Circuits Courts of Appeals strike a balance between objective and subjective evidence to determine a child’s habitual residence. The Eighth Circuit in *Silverman v Silverman* held that, “the settled purpose of a move should be examined both from the shared intent of the parents as well as the children’s perspective”.<sup>43</sup> The Third Circuit in *Feder v. Evans-Feder* held that, “the determination of habitual residence should balance evidence of the child’s acclimatization with shared parental intention.”<sup>44</sup> The Second Circuit held in *Gitter v. Gitter* that “a habitual residency analysis should consider two factors: (1) subjective intent of the parents; and (2) objective evidence of habitual residency”.<sup>45</sup>

We can see very clearly a split and a fragmentation of judicial practice even among various states of the United States. However, it is note-worthy that the Seventh Circuit in *Redmond v Redmond* discussed at length the nature of the Circuit split on the issue of habitual residence in these words:

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<sup>41</sup> *Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) at 993. In this case, it was held that “the children were habitual residents of the United States at the time of their removal. The court noted that the children had attended American schools, become close with their American relatives, and gone on various trips within the United States.” *Ibid.* at 996.

<sup>42</sup> *Ibid.* at 991–92. This rationale was in accord with the official commentary on the Convention, which notes that “children should be recognized as individuals with personal needs.” Pérez-Vera, at 431.

<sup>43</sup> *Silverman v. Silverman*, 338 F.3d 886, 898 (8th Cir. 2003).

<sup>44</sup> *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995), at 224.

<sup>45</sup> *Gitter v. Gitter*, 396 F.3d 124, 132–33 (2d Cir. 2005).

In substance, all circuits—ours included—consider both parental intent and the child’s acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts. We emphasized that the inquiry is ‘not . . . rigid’ and ‘does not require courts to ignore reality.’ The concept of ‘last shared parental intent’ is not a fixed doctrinal requirement, and we think it unwise to set in stone the relative weights of parental intent and the child’s acclimatization. The habitual-residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.<sup>46</sup>

### ***Monasky v. Taglieri***:<sup>47</sup> **The most recent landmark decision of the US Supreme Court**

In this landmark decision, the United States Supreme Court resolved a circuit split on the issue of habitual residence. The facts of the case are that after about one year after their marriage in the United States, the father and mother moved to Milan, Italy for career purposes. However, in Italy their relationship deteriorated. Meanwhile, the mother became pregnant. Shortly thereafter, the father obtained a new job. Although the mother considered returning to the United States, she and the father made preparations to take care of the child in Italy. The couple acquired a larger apartment in Milan, inquired about childcare, and made purchases for the needs of their child in Italy.

After the child was born in February 2015, the mother asked for a divorce and expressed her plan to return to the United States. Due to the insistence of the father, the mother agreed to join the father in Italy. However, in April 2015, an argument broke out again and the mother and the child moved to a safe house. The mother lodged a police report claiming that the father abused her to the extent that she feared for her life. Two weeks after that, the mother and child were relocated to the United States to live with the mother’s parents.

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<sup>46</sup> *Redmond v. Redmond*, 724 F.3d 729, (7th Cir. 2013), at 745-746. [Emphasis added].

<sup>47</sup> *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020).

The father initiated a proceeding before the Italian court to terminate the mother's parental rights and obtained an order in his favour. On the basis of that, he commenced proceedings under the 1980 Hague Convention in the United States for the return of the child. The Ohio district court "ordered for return of the child to Italy and found that the child was too young to become acclimatized and relied on the parents' shared intent to live in Italy". The court also "noted that the mother had no definite plans to raise the child in the United States". On appeal, the Sixth Circuit Court of Appeal affirmed the district court's return order. The decision followed *Ahmed v. Ahmed*,<sup>48</sup> a recent precedent of the Sixth Circuit, which ruled that "an infant's habitual residence depended upon shared parental intent".

The Supreme Court first of all enunciated the current split position of the American jurisprudence in respect of determining habitual residence:

We granted certiorari to clarify the standard for habitual residence, in view of differences in emphasis among the Courts of Appeals. Compare, for example, the Sixth Circuit's holding in *Taglieri v. Monasky*<sup>49</sup> (child's acclimatization as the primary approach), the Ninth Circuit's approach in *Mozes v. Mozes*<sup>50</sup> (placing greater weight on the shared intentions of the parents), and the Seventh Circuit's approach in *Redmond v. Redmond*<sup>51</sup> (rejecting rigid rules, formulas, or presumptions).<sup>52</sup>

To remedy this position, the Court specifically ruled that:

A child's habitual residence depends on the *totality* of the circumstances specific to the case... Because locating a child's home is a fact-driven inquiry, courts must be sensitive to the unique circumstances of the case and informed by common sense. For older children capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimatization will be highly

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<sup>48</sup> *Ahmed v. Ahmed*, 867 F.3d 682 (6th Cir. 2017).

<sup>49</sup> *Taglieri v. Monasky*, 876 F.3d 868 (6th Cir. 2018).

<sup>50</sup> *Mozes v. Mozes*, 239 F.3d 1067, 1073–81 (9th Cir. 2001).

<sup>51</sup> *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013).

<sup>52</sup> *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), at 723.

relevant. Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations. No single fact, however, is dispositive across all cases.<sup>53</sup>

In view of the above landmark decision, the current US position appears to be leading towards the harmonization of opposing approaches in the various Circuits, the guiding principle being the consideration of the totality of the circumstances specific to the case in determining a child's habitual residence.

## **THE RECENT RULING OF THE CANADIAN SUPREME COURT**

The parental intention approach was the one dominating Canadian jurisprudence for the determination of a child's habitual residence. On the other hand, Quebec courts applied the child-centred approach until 2017 when they embrace the hybrid approach. There was a split among the Canadian courts on this matter. Like in the US, the Supreme Court of Canada had to step in for the purpose of harmonization of the rulings of the Canadian courts in relation to the determination of habitual residence.

In the recent Canadian Supreme Court case of *Office of the Children's Lawyer v Balev*,<sup>54</sup> the parents, one year after their marriage in the United States, moved to Germany. They acquired German permanent resident, had two children there, and later separated. Due to the effect of the separation of the parents, the children did poorly in school. The parents negotiated and decided that the mother would take them to Canada for 16 months to see if things improved. However, although the 16 months had elapsed, the mother did not return the children to Germany. The father applied to the court for the return of the children and eventually they were returned to Germany. The mother afterwards obtained an order from the German court for

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<sup>53</sup> *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), at 726-27. [Emphasis added.]

<sup>54</sup> *Office of the Children's Lawyer v Balev* [2018] 1 SCR 398 [Supreme Court of Canada] [Emphasis added].

the sole custody of the children and together with the children returned to Canada. Finally, the father brought an action in the US for the return of the children to Germany.

The following is the ruling of the Supreme Court of Canada:

Currently, the parental intention approach dominates Canadian jurisprudence.... The hybrid approach, however, holds that instead of focusing primarily on either parental intention or the child's acclimatization, the judge determining habitual residence must look to all relevant considerations arising from the facts of the case. The judge considers all relevant links and circumstances.... Considerations include the duration, regularity, conditions, and reasons for the child's stay in a member state and the child's nationality. No single factor dominates the analysis. The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children.... The hybrid approach is fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.<sup>55</sup>

It is not a coincidence that the recent Canadian Supreme Court ruling is very much the same as the recent US Supreme Court ruling in *Monasky v. Taglieri* stated earlier. Although the Canadian Court uses the traditional term hybrid approach, it is not just balancing of the two factors of child's and parents' intention, but to look to all relevant considerations arising from the facts of the case. It is indeed enormously contributing to harmonization.

## **THE PRACTICE OF THE EUROPEAN UNION (CIVIL LAW) COURTS**

Unlike the common law courts, the approach applied by the Court of Justice of the European Union (CJEU) from the very beginning has been a combined method (the European name for hybrid approach). This approach "looks at all the circumstances of the case in order to see where the child's centre of interests is but recognizes as one factor in doing so the relevance of the intention of those holding parental

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<sup>55</sup> Ibid., at 402.

responsibility for the purpose of ascertaining where the child is habitually resident.”<sup>56</sup>

The CJEU has to consider the habitual residence of a child under the Brussels IIa Regulation.<sup>57</sup> In *Re A* the European Court stated that it was not prepared to apply shared parental intention as they felt “it was not suitable for determining the habitual residence of the child and thus they moved towards the *combined method*.”<sup>58</sup> In this case CJEU held that:

The parental intention to settle with the child in a new State if manifested by some tangible evidence (like purchasing or leasing a residence there or applying for social housing there) should only be seen as a piece of evidence indicative of where the child is habitually resident. That evidence should be weighed by the court alongside all the circumstances of the case to see which residence of the child reflects *some degree of integration in a social and family environment*.<sup>59</sup>

In *Mercredit*, CJEU has laid down the ‘*integration test*’ in these terms:

... [t]he place which reflects some degree of *integration by the child in a social and family environment*. In particular, duration, regularity, conditions and reasons for the stay on the territory of the Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State should all be taken into consideration obviously appropriate to the child’s age.<sup>60</sup>

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<sup>56</sup> R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Oxford: Hart Publishing, 2013) 192.

<sup>57</sup> EU Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, 2003.

<sup>58</sup> Case C-523/07, *Re A* [2009] ECR I- 02805 [36].

<sup>59</sup> *Ibid* [38, 40] [Emphasis added].

<sup>60</sup> Case C-497/10 PPU *Barbara Mercredit v Richard Chaffe* [2010] ECR I-4309 [65].



Again, in *Mercedit*, CJEU stressed that, “The relationships to be considered vary according to the child’s age. If the child was very young and was dependent on the custodial parent(s) then the court needed to consider the social and family relationships of the parent(s) with the lawful custody in order to determine the habitual residence of the child”.<sup>61</sup>

To conclude with, since CJEU applies the combined approach supplemented by the integration test, it is clearly in favour of harmonization.

## THE CHANGING TREND IN THE PRACTICE OF THE UNITED KINGDOM AND OTHER COMMON LAW COURTS

### The UK courts

Although *R v Barnet London Borough Council, Ex p Nilish Shah* defines ‘ordinary residence’ only and not ‘habitual resident,’ later English judicial pronouncements equated the two concepts. Thus, it had been established by the English courts that ‘settled purpose’ or ‘settled intention’ is the basic requirement of habitual residence.<sup>62</sup> Prior to CJEU precedents, the UK courts, therefore, initially applied the ‘shared parental intention approach’ for determining habitual residence. However, the recent developments on the meaning of habitual residence in child abduction cases from the UK Supreme Court demonstrate a move from the parental intention model towards the combined model.<sup>63</sup>

In the recent case of *In the matter of A (Children)*,<sup>64</sup> the UK Supreme court ruled that:

The test adopted by the European Court is preferable to that earlier adopted by the English Courts, being focused on the situation of the child, with the purposes and

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<sup>61</sup> Ibid. [53][55].

<sup>62</sup> *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309.

<sup>63</sup> Paul Beaumont and Jayne Holliday, “Recent Developments on the Meaning of Habitual Residence in Alleged Child Abduction Cases,” in Mirela Zupan (ed.): *Private International Law in the Jurisprudence of European Courts – Family at Focus* (Faculty of Law J. J. Strossmayer University of Osijek, 2015).

<sup>64</sup> *In the matter of A (Children)* [2013] UKSC 60.

intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, ex p Shah* should be abandoned when deciding the habitual residence of a child.<sup>65</sup>

The concept of habitual residence of the child in the UK has developed over the past thirty years from parental intention approach to a combined approach, which is more child centric and fact-based. By following the jurisprudence of the CJEU, the UK Supreme Court has made a genuine attempt to provide a uniform interpretation of the 1980 Abduction Convention. According to Schuz, “this will hopefully have the effect of creating a more uniform approach to the definition of habitual residence amongst all Contracting States to the Hague Abduction Convention.”<sup>66</sup>

### **The New Zealand courts**

In *Punter v Secretary for Justice*,<sup>67</sup> the Court of Appeal of New Zealand held that the inquiry into habitual residence is “a broad factual inquiry” and went on to say that:

Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, settled purpose (and with young children the settled purpose of the parents) is important but not necessarily decisive. It should not in itself override what the

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<sup>65</sup> Ibid, [54 (v)].

<sup>66</sup> See R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Oxford: Hart Publishing, 2013), 186, stressing that “The parental intention model has been followed by the UK and Commonwealth countries therefore it is possible that Commonwealth courts will follow the UK Supreme Court decision and adopt a more mixed model.”

<sup>67</sup> *Punter v Secretary for Justice* [2007] 1 NZLR 40 at 61-62 [88] [New Zealand].

underlying reality of the connection between the child and the particular state.

### The Australian courts

In *LK v. Director-General, Dept. of Community Services*,<sup>68</sup> the most recent Hague Convention decision in the High Court of Australia and the leading Australian precedent relating to the interpretation of habitual residence in this context, has confirmed that the “habitual residence is a question *to be decided with reference to a wide variety of circumstances*”.<sup>69</sup> These can include, but are not limited to: “the parents’ shared intentions; the actual and intended length of stay in a state; the purpose of the stay; the strength of ties to that state, and any other state; and the degree of assimilation of the child in the state, which includes living and schooling arrangements, as well as cultural, social and economic integration”.<sup>70</sup>

Accordingly, the High Court of Australia undertook a factual inquiry into a number of factors including both the intention of the parents and the integration of the children into Australian society through schooling and extra-curricular activities.<sup>71</sup>

### The Hong Kong courts

The previous practice of the Hong Kong courts is reflected in the case of *BLW v. BWL*,<sup>72</sup> which mainly applied the shared parental intention in accord with the traditional practice of other common law countries. However, in the recent case of *LCYP v JEK (Children: habitual Residence)*,<sup>73</sup> the Court of Appeal of Hong Kong has moved out of

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<sup>68</sup> *LK v. Director-General, Dept. of Community Services*, [2009] 237 C L R 582 (HC of Australia).

<sup>69</sup> *Ibid*, 598 para 35. [Emphasis added].

<sup>70</sup> *Ibid*.

<sup>71</sup> Patricia Easteal AM, Joshua Favaloro and Fanny Thornton, “Hague Convention on the Civil Aspects of International Child Abduction: The consideration of habitual residence in Australian courts,” *Fam L Rev*, 6 (2016): 194, at 199.

<sup>72</sup> *BLW v BLW 2* [2007] HKLRD 3, para. 31.

<sup>73</sup> *LCYP v JEK (Children: habitual Residence)* [2015] HKCA 407; [2015] 4 HKLRD 798 [Hong Kong Court of Appeal].

the shadow of the traditional constraint, stating that impetus for change first came from the recent decisions of the Court of Justice of the European Union ('CJEU')<sup>74</sup> and recently adopted in the United Kingdom by a series of Supreme Court judgments.<sup>75</sup> Referring to these precedents, the Court of Appeal of Hong Kong ruled that:

Habitual residence is a question of fact...The factual question is: has the residence of a particular person in a particular place acquired the necessary degree of stability to become habitual? It is not a matter of intention: one does not acquire a habitual residence merely by intending to do so; nor does one fail to acquire one merely by not intending to do so. ...The concept corresponds to the place which reflects some degree of *integration* by the child in a social and family environment...The question is the quality of the child's residence, in which all sorts of factors may be relevant. Some of these are objective: how long is he there, what are his living conditions while there, is he at school or at work, and so on? But subjective factors are also relevant: what is the reason for his being there, and what is his perception about being there?<sup>76</sup>

The recent decision of the Hong Kong Court of Appeal makes its position in accord with the stand of the overwhelming majority of States parties to the Convention, paving the way for harmonization in the determination of a child's habitual residence under the Hague Abduction Convention.

## CONCLUSION

The Hague Abduction Convention is the brain-child of the Hague Conference on Private International Law (HCCH), whose main

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<sup>74</sup> See, for example, *Mercredit v Chaffé* (Case C-497/10PPU) [2012] Fam 22.

<sup>75</sup> See, for example, *In re L (A Child) (Custody: Habitual Residence)* (Reunite International Child Abduction Centre intervening) [2014] AC 1017; *In re LC (Children)* (Reunite International Child Abduction Centre intervening) [2014] AC 1038.

<sup>76</sup> *LCYP v JEK* (Children: habitual Residence) [2015] HKCA 407; [2015] 4 HKLRD 798, para. 7.7.

purpose is “to work for the progressive unification of the rules of private international law”.<sup>77</sup> Unification or harmonization is the aim of all the private international law conventions initiated by HCCH. Fragmentation or split in the judicial pronouncements on the determination of habitual residence in States parties to the Convention is a serious disservice to the achievement of the main aim of the Convention.

Nevertheless, the recent judicial practice in the European Union (civil law countries), the United States, Canada, the United Kingdom and other common law countries, such as Australia, New Zealand and Hong Kong clearly demonstrates the fact that the majority of the States parties to the Hague Abduction Convention increasingly determines habitual residence on the basis of the hybrid or combined approach, leading towards unification or harmonization in the way the courts look at the key concept of the Convention. It is ardently hoped that this will contribute to the achievement of the Convention's aim of establishing a uniform and efficient mechanism for international child abduction disputes resolution.

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<sup>77</sup> Article 1, Statute of the Hague Conference on Private International Law, adopted on 31 October 1951 and entered into force on 15 July 1955.