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The legal paradox of child's habitual residence: How to uniformly understand a factual concept?

In legal theory there have been several attempts at proposing a definition and explain for this legal institute. The main significance of this legal institute is that is a modern one and is not burdened by several definitions. It is accepted that the determination of habitual residence is a matter of facts, rather than legal definitions.[2] In fact, one of the main reasons why this institute has its "glory" over domicile is that there is a need to avoid confusion, which has arisen due to an unclear understanding of the circumstances, which primarily contribute to the establishment or loss of domicile.[3] As one commentary explains, *"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 as between different legal systems*."[4]

On the other hand there is a certain paradox, in all of the cases in which there is a need to determine the habitual residence (especially in common law countries), as they tend to define the subject as well as create a list of factors, or circumstances, which will quantify to amount to the creation or loss of habitual residence in a certain territory.[5] These circumstances, together with the absence of definitions in the Hague Conventions, create space for a different understanding of habitual residence before the courts of different legal systems. It is up to the law of the forum to determine, in each factual situation, whether the parents or child/children have habitual residence. The vast number of judicial decisions allows for the proper understanding, and the correct determination of habitual residence.

Legal theory and practice, jointly, take the same approach. For example, according to *Cheshire, North u Fawcett* there is no certain definition, and in support of such contention they refer to the court decision rendered by Lord Scarman in the case *Barnet London Borough Council, ex p Shah*[6], which argues that there is no difference in the principle between the traditional concept of ordinary residence and the

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[2] The reporter of the 1980 Hague Abduction Convention, didn't refer to this concept since it was 'well established concept in the Hague Conference' and it is 'a question of pure fact'. See Perez-Vera report, Actes et Documents de la Quatorzieme Session, October 1980, Vol III par. 66, pg.445 (Perez Vera Report)

[3] Schuz Rhona, Habitual Residence of Children under the Hague Child Abduction Convention – theory and practice, 13 Child & Fam.L.Q. 2001, pg. 2 (Schuz, Habitual Residence of Children),

[4] J.H.C. Morris, Dicey and Morris on the Conflict of Laws (10th ed. 1980) pg.144

[5] Schuz, Rhona, Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context. Journal of Transnational Law and Policy, Vol. 11-1 pg. 4-5

[6] Shah v. Barnet London Borough [1983] 2 AC 309 at 342

more contemporary concept of habitual residence, with both referring to "*a person's abode in a particular place or country which he has adopted voluntary and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."*[7]

A similar approach was taken in an ECJ case, *Swaddling v. Adjudication Officer,*[8] where the Court stated that the Member State in which the person resides is "*the State in which the persons concerned habitually reside and where the habitual center of their interests is to be found".*[9] In that context, due consideration should be given, in particular, to the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.[10]

In another statement given by Lord Slynn, in an opinion of the House of Lords, regarding the case *Nessa v Chief Adjudication Officer,*[11] it was held that there is no actual definition of habitual residence, and that the fact finding approach must be applied. The factors, among others, which have to be taken into account in determining habitual residence are steps like bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, "durable ties" with the country of residence or intended residence.[12]

Perhaps the most influential definition of the term "habitual residence" comes from the English case of In re Bates, No. CA 122-89, High Court of Justice, Family Div l Ct. Royal Courts of Justice, United Kingdom (1989). In this case, at first the court found that "The notion of habitual residence is free from technical rules, which can produce rigidity and inconsistencies as between legal systems . . . the facts and the circumstances of each case should continue to be assessed without resort to presumptions or presuppositions . . . 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." Then it gave the following definition*:"[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. 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, and there may well be many others. 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*."

The US approach is similar to the British. In the understanding of the term habitual residence the US legal system has a more practical

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[7] CheshireJM, Sir Peter North and Fawcett JJ, Private International Law, Oxford University Press, 2008, pg.185
[8] Case C-90/97,[1999], ECR I-1075
[9] Case C-90/97,[1999], ECR I-1099
[10] ibid
[11] [1999] 1 WLR 1937 (HL)
[12] Stone P., The Concept of Habitual Residence in Private International Law, Anglo-American Law Review 2000 pg. 347

approach. The US approach opposes giving the term "habitual residence" a strict definition, and is in favor of instructing the court to interpret the expression "habitual residence" according to "the ordinary and natural meaning of the two words it contains [as] a question of fact to be determined by references to all the circumstances of any particular case."[13]

The term should be interpreted from the child's perspective[14], and in the context of the family and social environment in which his or her life has developed.[15] The main factors that predetermine the habitual residence are based on cultural, educational and social experiences. The place of the habitual residence shouldn't be ordinarily determined by the expectations of either parent or by future plans.[16]

In Feder v. Evans-Feder, (3rd. Cir. 1995) 63 F.3d 217, the court stated its definition of habitual residence as follows:

"[W]e 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 acclimatization and which has a "degree of settled purpose" from the child's perspective. We further believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there."[17]

The European Union avoids proposing a definition of habitual residence in its legal sources. The predominant understanding of habitual residence comes from the Explanatory report concerning Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters prepared by Professor Alegria Borras (OJ C 221, 16.7.1998). This definition is in in compliance with the above mentioned definitions given on numerous occasions by the European Court of Justice. It states that the habitual residence is "*the place where the person had established, on a fixed basis, his permanent or habitual center of interests, with all the relevant facts being taken into account for the purpose of determining such residence".*[18]

National definitions

Several states have adopted a definition of habitual residence in their national Private International Law Acts.

The Swiss Private International law act[19] from 1987 holds a simple definition of habitual residence. The habitual residence of a

[13] Mozes v. Mozes 239 F. 3d at 1071

[14] Friedrich v. Friedrich 983 F.2d 1396, 1401 (6th Cir 1993), 78 F.3d 1060 (6th Cir 1996)

[15] Perez Vera Report, par.11, pg.428

[16] Janakis-Kostun v. Janakis, 6 S.W. #d 843, 847-848 (Ky. App.1999)

[17] Rohna Schuz, Policy considerations in Determining the Habitual Residence, op.cit., pg.5

[18] Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (OJ C 221, 16.7.1998) prepared by Dr ALEGRÍA BORRÁS, pg. C 221/38, paragraph 32.

[19] Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987 – Loi féderale sur le droit international privé (LDIP) du 18 décembre 1987

natural person is the place where that person *"Has his place of habitual residence in the State in which he lives for an extended period of time, even if this time period is limited from the outset"*.[20]

In its Code of Private International Law[21] Belgium has adopted a definition on habitual residence of natural persons. It provides that habitual residence is *"the place where a natural person has established his main residence, even in the absence of registration and independent of a residence or establishment permit; in order to determine this place, the circumstances of personal or professional nature that show durable connections with that place or indicate the will to create such connections are taken into account."*[22]

A similar definition is given in the Bulgarian PIL Code.[23]For the purpose of the Code *"habitual residence of a natural person" shall denote the place where the said person has settled predominantly to live without this being related to a need of registration or authorization of residence or settlement. For determination of this place, special regard must be had to circumstances of personal or professional nature arising from sustained connections of the person with the said place or from the intention of the said person to establish such connections."*[24]

The PIL Act of the Republic of Macedonia[25]adopted a definition for habitual residence, but it is only applicable in the determining of the applicable law in non-contractual obligations. *"For the purposes of this Law the habitual residence for a natural person is the place where the person has established a permanent center of his/her activities, and it is not necessary to be filled any documents associated with registering or obtaining a residence permit from the competent national authorities. In determining the habitual residence, especially should be considered the circumstances of a personal or professional character, arising from permanent connections with the place or intention to make such connections. In every case, the natural person has his/her habitual residence in one country, if he/her stays in that country longer that 6 mounts."*[26]

In its draft of the PIL Code,[27] Montenegro envisaged a definition of habitual residence. *"For the purpose of this law the habitual residence of natural person is the place in which the person has settled predominantly without this being related to a need of registration or authorization of residence or settlement and without taking into account*

[20] Article 20 (1)(b)

[21] Loi du 16 Juillet 2004 portant le Code de droite international prive. Moniteur Belge 27 July 2004 ed 1 57344-57374 (English translation available on line by Clijmans and Torremans http://www.ipr.be/data/B.WbIPR%5BEN%5D.pdf)

[22] Article 4 § 2

[23] Кодекс На Международното Частно Право, Обн. ДВ. бр.42 от 17 Май 2005г., изм. ДВ. бр.59 от 20 Юли 2007г., изм. ДВ. бр.47 от 23 Юни 2009г (English translation http://solicitorbulgaria.com/index.php/bulgarian-private-international-law-code)

[24] Article 48 (7)

[25] "Official Gazette of the Republic of Macedonia" (Службен Весник на РМ) no. 87/2007, 156/2010

[26] Article 12-a

[27] The Draft can be found on the official page of the Government of Montenegro http://www.gov.me/ResourceManager/FileDownload.aspx?rId=92221&rType=2.

if the residence is temporally predetermined. In determining the habitual residence, especially should be considered the circumstances of a personal or professional character, arising from permanent connections with the place or intention to make such connections."[28]

In its draft of the PIL Code,[29] Serbia also envisaged a definition of the habitual residence. *"1. Habitual residence is the place in which the person lives for an extended period of time, with or without the intention to settle there and without this being related to a need of registration or authorization of residence or settlement or obtaining a residence permit.*

2. In determining the habitual residence, as referred in paragraph 1, especially should be considered the circumstances of a personal or professional character, referring to permanent connections with the place or intention to make such connections."[30]

It can be concluded that the favorable aspect of the application of habitual residence as a jurisdictional criteria in family matters, is its adaptability to the needs of a mobile society, a characteristic that is absent in the criteria of domicile or nationality.[31] However, to properly apply it in practice, it needs consistent application in cross-border cases, because its incorrect determination could lead to parallel litigations, and essentially to legal uncertainty.

I.Determination of the "Child's habitual residence"

A. Physical presence of the child

For a person (whether it is an adult or a child) to establish habitual residence in a territory, he/she must be physically present in that territory. This obvious preposition in itself however, hides some disputed questions, such as: does the residence have to be lawful? When is the moment when the residence transforms into habitual residence? Can the residence be interrupted?

It is undisputed that the child (or adult) must reside in a territory to create habitual residence. The first question, especially important to cases of child abduction, is whether the person that resides in a territory does this lawfully? For this question, the assumption is that the child will reside with his parent/parents.[32] The lawfulness of the habitual residence has two positions. The first is the premise that habitual residence is a factual concept[33] and the second, is that the unlawful change of habitual

[28] Article 12

[29] The Draft version can be downloaded from this page http://www.pravnik.rs/najava-zakona/zakon-o-medunarodnom-privatnom-pravu.aspx

[30] Art. 4

[31] North P.M. and Fawcett J.J., Cheshire and North's Private International Law, 12 edn. London, 1992, 166, 167

[32] Although older children can form an own habitual residence. On this see more, Schuz, Habitual Residence of Children, op.cit., pg. 17

[33] Perez Vera par. 66, pg.445

residence cannot lead to an alteration of the jurisdiction, because it will encourage the wrongful removal and retention of children.[34]

There is a certain specific position regarding the determination of habitual residence of children: there must be free will in the creation of habitual residence. This situation was underlined in cases of child abduction. During the drafting of the Child Abduction Convention there was uniformity regarding this question. It was accepted that unlawful removal or retention of a child cannot lead to an alteration of its habitual residence.[35] Any other solution would grant legitimacy to the unlawful act of the abductor and would leave the Convention without effect. This basic premise is supported by one pre-Convention decision in which Lord Denning stated „*I do not see that a child's ordinary residence, so found, can be changed by kidnapping him and taking him from his home, even if one of his parents is the kidnaper*".[36] This was based on the understanding that habitual residence can be obtained only voluntarily and it cannot be a result of an unlawful act.[37] It was rationalized that an individual cannot be forced against his will, to adopt the law of the forum as his personal law.[38]

The position of this premise has shifted towards a more liberal position, that there must be some moment in time that will transform involuntary residence in a certain territory into habitual residence. It wouldn't be logical, for example, not to acquire habitual residence although the person resides in that territory for years.[39] This newer standpoint, by which an involuntary stay in a territory over a longer period of time can be qualified as habitual residence, is backed up in a decision rendered by Lord Justice Clerck Ross in the case Cameron v. Cameron, [40]where it was originally concluded that *"Even though Robison Crusoe had no opportunity to escape, we are inclined to think that he had his habitual residence on the desert island. Likewise, in recent years, Nelson Mandela and other political detainees on Robben Island in South Africa, who were on the island for prolonged periods, in our opinion had their habitual residence there although they were detained or imprisoned".*[41]

To acquire habitual residence, a person must reside there for an appreciable period of time.[42] However, that does not mean permanent residence in that territory. Temporary absence, such as vacation, educational activities, or a try by the spouses for reconciliation wouldn't lead to loss of habitual residence in a territory.[43] On the other hand, the migrant loses his habitual residence from the moment he leaves the country for a period of time (sometimes of longer nature), if he did not

[34] Perez Vera, par.11, pg.428
[35] ibid.
[36] Re P. (G.E.)(An Infant) [1965] Ch.586 (cited by Beaumont Paul, McElvay Peter, The Hague Convention on International Child Abduction; Oxford University Press 1999 pg.94)
[37] Beaumont, McElvay,op.cit., pg.94
[38] loc.cit
[39] loc.cit
[40] 1996 SC 17 pg.20
[41] See also Beaumont, McElvay,op.cit., pg.95
[42] Stone P., The concept of Habitual residence , op.cit., pg. 350
[43] Cheshire and others.2008, op.cit., pg.186

intend to return.[44] The essence of the habitual residence concept is that the person creates significant ties with that country and acquires the right to settle his legal matters in that country, in accordance with that legal system.[45]

B. Appreciable period of time

As it was stated above, the basic doctrine of habitual residence is that it is a matter of facts, and not of legal terms. This assumption leads to a larger space of subjectivity by the courts in the determination of habitual residence. This is particularly fertile ground for different interpretation; basically because one of the main criteria for the determination of habitual residence is the intent of the person to stay in a territory. To correct such a position, very important criteria, that makes the intent more "real" is the time period that a person resides in the territory. It is logical to conclude that the longer the person resides in a territory, the greater the significance of ties it creates with that state and with its legal system.

In the cases of the determination of the child's habitual residence, the factual connections with the territory have greater importance than the time period of residence, but at the same time habitual residence is no longer a simple factual concept. With the complexity of the individual's everyday connections with the environment, its application varies depending on the legal context in which it is utilized, and on the degree of connections regarded as desirable. For the concept to retain its factual emphasis, a period of actual residence before habitual residence is established, should be required. This is especially important in relation to children.[46]

What is important for the court is the ties that the child is in the process of building in the new social environment (language, culture, age, etc.) These ties become more persistent, more fundamental with the presence of the child in a territory over an appreciable period of time. There is a great difference, however, between states with respect to the time period that is considered sufficient to create habitual residence in a territory. The judicial practice of the USA, Australia and New Zealand accepts that **six months** or more is enough to determine a habitual

[44] Stone P., The concept of Habitual residence , op.cit., pg.350

[45] Lord Brandon has discussed the distinction between abandoning a prior habitual residence and acquiring a new one:[T]here is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. C v S (minor: abduction: illegitimate child), [1990] 2 All E.R. at 965.

[46] Lamont, Ruth, Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Family Law, Journal of Private International Law 2007, pg.268

residence in a territory.[47] In Scotland, although there is a difference in the determination of the habitual residence of the child[48], Lord Justice Clerk Ross made an interesting conclusion, stating that "There is no minimum period which is necessary in order to establish the acquisition of a new habitual residence…"[49]. In this case, taking into consideration the circumstances (school, participation in local events, registered medical care etc.), **three months** was accepted as sufficient[50]. In England this period is shorter - in one case this period was two months[51] - although judicial practice argues that a shorter period of time could suffice to create habitual residence.[52]

Regarding the determination of the child's habitual residence two things have to be kept in mind. First is the the *"habituality"* of the residence. For a child to create a tie with a state and its legal system, this connection must be a real and active one.[53] The activeness must be determined by the factual situations which arose out of the life that the child is living in that state. The other alternative is to make the habitual residence more technical and similar to the domicile. Only a precise determination of "real" connections with a state, distinguishes habitual residence from that of a domicile. Secondly, even if the "*habituality"* can be shortened for adults who are capable of making independent decisions, this wouldn't be appropriate for children because they cannot. Children have to adapt to the surroundings.

C. Intention for residence

Manifested intention for longer residence in a place is one that is not of a temporary nature. This intent, however, should be accompanied with some evidence. Lack of evidence for the intent of a person to reside in a territory will allow subjectivity to enter a delicate situation (as parental responsibility and the child abduction cases represent). Some material proof of ones intent to reside a longer period of time in a territory will mean an objective manifestation of his actions. As for example, in a Scottish case the intent for a longer residence in a territory was the consent to move their children with their father in France.[54] In another case, the fact that the father had taken an application for permanent residence in Australia and applied for a work permit, as well

[47] Beaumont, McElvay,op.cit. pg. 106
[48] See Dickson v. Dickson 1990 SCLR 692 at 730; Moran v. Moran 1997 SLT 541 at 543, Cameron v. Cameron 1996 SC 17 and Singh v. Singh 1998 SLT 1084
[49] Cameron v. Cameron 1996 SC 17 at 24
[50] Beaumont, McElvay,op.cit. pg. 107
[51] V v. B.(A Minor)(Abduction) [1991] 1 FLR 266
[52] Re F [1992] 1 FLR 548 (CA) in this case habitual residence was determined after three months but nevertheless LJ Butler-Sloss determined that even a month would suffice.
[53] Beaumont, McElvay,op.cit. pg. 108
[54] Cameron v. Cameron 1996 SC 17

as the fact that they had packed all of their belongings was enough evidence for manifested intent for a longer residence in Australia.[55]

For the domicile, *animus simper vivendi* is required, or the intention of the person to reside there indefinitely - as for habitual residence, such requirement is unnecessary.[56] The "intent" in habitual residence is much weaker than the one at domicile. There is no need for the person to prove that he/she wants to reside there permanently or indefinitely.[57] It is possible that the person's intent is to reside there for a limited period of time, such as for employment for a period of 6 months, one year or for example army service abroad. As it was stated by Lord Scarman "The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is [sic] 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. And there may well be many others. 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."[58] However, the intention must stand out as it is stated in one case: *„A settled purpose is not something to be searched for under a microscope. If it is there it will stand out clearly as a matter of general impression."*[59]

So whose intention should the judges consider when determining the habitual residence of the child? Should the courts in determining the habitual residence have a more parent-centered or child-centered approach? There is no uniformity regarding this question. There are three different standpoints regarding this question. The first is the child centered approach, the second is the parent-centered approach and the last is the combined child's connection / parental intention approach in determining the intent.

Child centered approach

The first approach focuses on the child and its connections with the environment. It has been accepted in the jurisprudence of the United States Court of Appeals 6th Circuit[60], Canada in the Province of Quebec[61], Germany[62], New Zealand[63] and Switzerland.[64] It was primarily

[55] Re.F.(Minors)(Child Abduction) [1992] 1 FLR 548

[56] Varadi T., Bordaš B.,Knezević G., i Pavić V., Međunarodno privatno pravo, Beograd, 2007, p.274

[57] As can be seen from the national definitions, most of them distinguish the habitual residence from the administrative procedures for obtaining residence permit

[58] Shah, [1983] 1 All E.R. at 235

[59] Re.B.(Minors)(Child Abduction) (No2) [1993] 1 FLR 993 at 998

[60] 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)

[61] (Droit de la famille 3713, Cour d'appel de Montréal, 8 septembre 2000, No 500-09-010031-003)

[62] 2 UF 115/02; 2 BvR 1206/98, Bundesverfassungsgericht (Federal Constitutional Court of Germany), 29 October 1998

[63] S.K. v. K.P. [2005] 3 NZLR 590

established in the *Friedrich v. Friedrich* case which was the first United States Court of Appeals case to consider the meaning of "habitual residence" under the Hague Convention. This case provided for five principles, which the court should weigh when determining "habitual residence". First, habitual residence should not be determined through the "technical" rules governing legal residence or common law domicile. Instead, courts should look closely at "[t]he facts and circumstances of each case (quoting In Re Bates, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989)). Second, 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. Third, this inquiry should focus exclusively on the child's past experience, future plans of the parents being irrelevant. Fourth, a person can have only one habitual residence. Finally, child's habitual residence is not determined by the nationality of the child's primary care-giver. Only *"a change in geography and the passage of time"* may combine to establish a new habitual residence.[65]

This case was the basis for further developments of the child centered approach, which was further developed as a reaction towards the parent-centered approach in determining the child's habitual residence.[66] It was based on the assumptions that the Hague Convention is intended to prevent a case where "the child is taken out of the family and social environment in which its life has developed"[67] and parental reservations of the parent about the intent to stay in a different country[68] "…turns the Hague Convention on its head".[69] Second, the consideration of the subjective intentions of the parents, empowers a future abductor to lay the foundation for abduction, by expressing reservations over an upcoming move. This is also inconsistent with the Convention's goal of "deter[ring] parents from crossing borders in search of a more sympathetic court."[70] With this, the abducting parent is given an advantage, and further complicates the return of the abducted child and it is opposite to the objectives of The Hague Convention to "secure the prompt return of children wrongfully removed"[71]. Finally, the intent of the Child Abduction Convention is to protect the child's best interest and this should be interpreted in light of the "general principle . . . that 'children must no longer be regarded as parents' property, but must be recognised [sic] as individuals with their own rights and needs."[72] This general principle is best given effect by a holding which honors the child's perception of where home is, rather than one which subordinates the child's experience to their parents' subjective desires.[73]

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[64] 5P.367/2005/ast, Bundesgericht, II. Zivilabteilung (Tribunal Fédéral, 2ème Chambre Civile)
[65] Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993), III A
[66] Robert v. Tesson, 507 F.3d 981 (6th Cir. 2007)
[67] Perez Vera Report, par.12, pg.428
[68] Ruiz v. Tenorio, 392 F.3d 1247, 1253 (11th Cir. 2004)
[69] Robert v. Tesson, 507 F.3d 981, pg.9
[70] Friedrich II, 78 F.3d at 1064
[71] Article 1 of the Hague Abduction Convention
[72] Perez Vera Report, par.19, pg.430
[73] Robert v. Tesson, 507 F.3d 981, pg.9

The court, in determining the child's habitual residence, can assert that a child acquires a new habitual residence when focusing exclusively on the child's experience "…it is present in a new country long enough to allow acclimatization, and that presence has a degree of settled purpose."[74] To have the whole picture the Friedrich principles should be applied, but also the factual circumstances which the court must consider in determining whether or not a child's stay in a new country meets the tests of "acclimatization" and "settled purpose." These tests as in the case Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006) can be "academic activities", "social engagements," "participation in sports programs and excursions," and "meaningful connections with the people and places".[75]All these circumstances focus on the child, not the parent's future plans or intentions. Also, focusing on the child's experience, and not the parents' subjective desires, best serves the main objectives of the Hague Abduction Convention and the protection of the best interest of the child, which in the process of determining the parental responsibilities between the parents is often forgotten.

Parent-centered approach

This approach was highly influenced by the United States Court of Appeals 9th Circuit case Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). This case starts from the premise that a person can have only one habitual residence[76], and that "…the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind."[77]In this case the Court reached a conclusion that "where children have not attained an age and degree of maturity at which it is appropriate to take account of their views the relevant settled intention is that of the person or persons entitled to fix their place of residence."[78] The Court also left the possibility that "…given enough time and positive experience, a child's life may become so firmly embedded in the new country as to make it habitually resident even though there be lingering parental intentions to the contrary."[79]However, in the cases where both parents have the right to fix the child's place of residence and where they are not in agreement on that question, there is a lack of the type of settled intention, which enables habitual residence to be changed quickly. Accordingly it will take a considerable period of time for a child to acquire a new habitual residence after a wrongful removal.[80]

With this approach, the main goal is to discourage the abductions by tying the change of the habitual residence with the intent of both parents. The function of a court applying the Convention is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the

[74] ibid. pg.12
[75] Karkkainen v. Kovalchuk, 445 F.3d at 293-294
[76] Although it recognizes that there may be rare exceptions in split habitual residence between two territories as in Johnson v. Johnson, 493 S.E.2d 668, 669 (Va. Ct. App. 1997)
[77] Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001) IV A
[78] ibid. IV B
[79] ibid.IV C
[80] ibid.

primary locus of the child's life.[81] The court reached a conclusion that "Children can be remarkably adaptable and form intense attachments even in short periods of time--yet this does not necessarily mean that the child expects or intends those relationships to be long-lived. It is quite possible to participate in all the activities of daily life while still retaining awareness that one has another life to go back to. In such instances one may be "acclimatized" in the sense of being well-adjusted in one's present environment, yet not regard that environment as one's habitual residence."[8283]

The approach taken in the Mozes case is criticized, because it can lead to radical situations. For example in Ruiz v. Tenorio, 392 F.3d 1247, 1253 (11th Cir. 2004) the habitual residence was retained in the USA, although a time period of 32 mounts had elapsed,[84] visiting the United States only twice. A number of objective facts pointed towards acclimatization in Mexico: the family had moved there, they brought nearly all of their possessions with them to Mexico, the father had undertaken employment, a new house was being built for them and the sojourn was of considerable length, the children had enrolled in Mexican school and played with Mexican friends. The Court based its decision on the intent of the parents, saying that the parents "never had a shared intention to abandon the prior United States habitual residence and to make Mexico the habitual residence of their children". The Court also considered the following facts: the mother retained an American bank account, credit card, had mail forwarded to the United States, transferred her nursing license to Florida, and the father briefly searched for an American job on the internet. In the end three years of living in a Mexican home and attending a Mexican school were outweighed by the subjective intentions of the children's parents.

Combined child's connection / parental intention approach

This approach is a compromise between the intent of the parent and of the child, and combines them both. First, it determines the child's habitual residence on the basis of the place where he or she has been physically present for an amount of time sufficient for acclimatization and in which he/she has shown a "degree of settled purpose" from the

[81] ibid.
[82] ibid
[83] In another Case Holder v. Holder, 392 F.3d 1009 (9th Cir 2004) reaching a similar conclusion the Court had stated: "…we emphasize that cultural attachments are not the *sine qua non*e of a habitual residence determination: Attending Oktoberfest does not make one a habitual resident of Germany. Conversely, a child whose parents intended to resettle in the United States and who spends a decade living in San Francisco's Chinatown would undeniably be habitually resident in the United States even if she had never watched a baseball game or had a slice of apple pie. Indeed, if cultural ties were held paramount, then countless expatriate children around the globe would already have satisfied a significant component of the requirements for becoming habitual residents of the United States based on an affinity for McDonalds, Mickey Mouse, and Michael Jordan. Therefore, our conclusion that the H. children were not habitual residents of Germany is not driven by the fact that they did not, to quote J., "wear liederhosen."
[84] In another case Tsarbopoulos v. Tsarbopoulos, 176 F. Supp.2d 1045 (E.D. Wash. 2001) the time period was 27 months spent in Greece

child's perspective. Second in the determination whether any particular place satisfies this standard -,during the analysis the focus is on the child and child's circumstances in that place, but also on the parents' presence, having in mind the shared intentions regarding their child's presence there.[85] 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.[86]

Although the primary question is the child's whereabouts during a certain period of time[87], the main focus is the settled purpose from a child's perspective. Settled intention from a child's perspective means that this approach considers a child's contacts and experience in its surroundings, focusing on whether she "develop[ed] a certain routine and acquire[d] a sense of environmental normalcy" by "form[ing] meaningful connections with the people and places [she] encountered" in a country prior to the retention date.[88] In most of the cases the children are well acclimatized in their surroundings, attending preschool and enrolling in kindergarten[89], enrolling in school, preparatory academic work or photography classes[90]

The view of the parents is significant because "the child's knowledge of these intentions is likely to color its attitude to the contacts it is making".[91] This relates to the "settled intent from a child's perspective" because it is a significant part of forming a perspective of their habitual residence. This means that in situations, including the family's change in geography along with their personal possessions and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits from the State[92], or buying a house and renovation work, seeking of employment, and plans for immediate and long term schooling[93] reasonably assures the children that this will be their habitual residence for some period.

The proportion of the child aspect and the parent aspect in these cases is very hard to propose, because the inquiry into a child's habitual residence is a fact-intensive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case.[94] However, some distinction is drawn between the situation of very young children, where particular weight was placed on parental

[85] Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995),
[86] See 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)
[87] Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003)
[88] ibid.
[89] Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995)
[90] Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006) pg.25
[91] ibid
[92] Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003)
[93] Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995)
[94] Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006) pg.17

intention[95], and that of older children where the impact of parental intention was more limited.[96]

II.Conclusion

The habitual residence of a child as jurisdictional criteria gives great space for subjectivity to Courts in determining the place which the child has adapted to on voluntary or involuntary bases. The child was positioned by its parents to create social, cultural, lingual, and educational bonds with an environment and in that environment he/she feels familiar with. Jurisdiction is based on this criterion because habitual residence ties the child to the place where he/she feels at home, and that legal system is most closely connected to the child itself. However close this connection is, it must be properly determined. Due to the fact that habitual residence is a factual concept, which is determined in each case individually, it is very important for the court to take in mind all of the facts, and not to approach it selectively. This is especially important regarding the intent of the children. The focus must be positioned on the child, but not neglecting the fact that the child is more or less connected to the parents, depending on his/her level of maturity. To an extent, the child receives the understanding of the meaning of its home from its parents. Their behavior influences the speed at which a child adapts to a new environment.

The work of the Hague Conference of Private International Law regarding this question is the most influential and it gives opportunity to consult the large number of Hague cases. With its 30 years of application of the Child Abduction Convention, the Hague Conference established a solid basis for a proper interpretation of habitual residence. The INDICAT base of cases is the fundamental basis for the uniform application of the Hague Abduction Convention. This doesn't mean that the determination of habitual residence shifts from a factual concept determined on a case-by-case basis, towards a more rigid concept - this simply means that the courts must have some solid structure, some guidelines that can ease their task.

[95] Baxter v. Baxter 423 F.3d 363 (3rd Cir. 2005) [INCADAT cite: HC/E/USf 808]
[96] Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006)

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The legal paradox of child's habitual residence: How to uniformly understand a factual concept?

ABSTRACT

The child's habitual residence is becoming one of the most important jurisdictional criteria in the area of private international family law. However, even after one hundred years of its first use, in the substantive law of the Hague Convention on Guardianship of 1902, two outstanding issues remain. The criterion is still considered a factual concept, and, as a consequence, most of the legal sources that deal with private international law have not provided its definition.

The article analyses the practice of the Hague Conference of Private International Law, and tries to give insight into the thirty years of implementation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, and the problems that have emerged from it. This shall help in creating a uniform application of this jurisdictional criterion, and a uniform understanding of the concept of habitual residence. The article also gives comparative insight into the recent emergence of definitions of the habitual residence in the national codifications of private international law.

Keywords:
child's habitual residence, jurisdiction, private international law, family law, 1996 Hague Child Protection Convention, 1980 Hague Child Abduction Convention