International Journal of Law, Policy and The Family, 2026, **40**, ebag018
https://doi.org/10.1093/lawfam/ebag018
Article

OXFORD

Habitual problems in applying the concept of habitual residence of children

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Abstract

Conceived as a simple factual test that will readily identify the jurisdiction best placed to determine disputes concerning children, habitual residence has not proved easy to apply. This article considers the meaning of habitual residence in international instruments concerning children, drawing upon the jurisprudence developed in different jurisdictions. It maintains that the concept of habitual residence of children does not vary according to the instrument involved nor is it a purely factual concept. It considers the relevance of parental intention, explores whether some physical presence is a prerequisite for establishing habitual residence, whether a child can have more than one concurrent habitual residence, and the relevance of the child's age. This article ends with a discussion of the appropriateness of the concept and what, if anything, can be done to clarify its application.

Keywords habitual residence, children, integration test, hybrid test, parental intention, physical presence, child's age

Introduction

The international community has settled upon habitual residence as *the* appropriate connecting factor for determining jurisdiction in cross-border cases concerning children. The Hague Conference pioneered its use as a connecting factor in its 1902 Convention on Guardianship and has used the concept in subsequent Conventions, including the 1980 Abduction Convention, the 1993 Intercountry Adoption Convention, and the 1996 Child Protection Convention. It was, and remains, the principal connecting factor in all three versions of the EU's Brussels II Regulation, and under the Family Law Act 1986, when, absent matrimonial proceedings, determining priority of jurisdiction within the UK.

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The perceived advantage of habitual residence over the traditional connecting factors of nationality and domicile is that it is a straightforward factual concept providing the best means of identifying the jurisdiction with which the child has a real connection and is therefore best placed to determine disputes concerning his/her upbringing. It is not an artificial construct like nationality. It is thought to be less arcane than domicile, which is a legal construct based upon birth, status, and ultimately, intention. As the English and Scottish Law Commissions said:[1] ' … habitual residence points better than the tests of nationality and domicile to the forum with which the child and, in the majority of cases, the other persons concerned have the closest long-term connections'.

Habitual residence has nonetheless proved challenging. As Moylan LJ opined in *Re F (A Child) (Habitual Residence)*,[2] for an issue of fact, it has received a 'surprising degree of attention from the Court of Appeal and the Supreme Court'. The UK, while more exercised than most, is not alone in grappling with the concept.

Although the Explanatory Report on the 1961 Hague Convention on the Protection of Minors[3] foresaw difficulties in interpreting such a 'vague' concept, subsequent explanatory reports say little. The Explanatory Report on the 1980 Abduction Convention (the Pérez-Vera Report) simply says habitual residence is 'a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile'.[4] The Explanatory Report to the 1996 Child Protection Convention (the Lagarde Report)[5] noted that the drafting Commission accepted that temporary absence 'for reasons of vacation, of school attendance, or the exercise of access rights, for example' did not in principle modify the child's habitual residence. The *Practice Guide* to the 2001 Brussels II Regulation[6] adds that, despite the usual meaning of 'habitual', it might be possible for a child to 'acquire habitual residence in a Member State the very day of arrival, depending on the factual elements of the concrete case'. Beyond these few observations, the international instruments and associated guidance leave habitual residence undefined.

Drawing upon the jurisprudence developed in various jurisdictions, this article explores issues and difficulties concerning the meaning of a child's 'habitual residence'. We focus on three key matters: the relevance of parental intention, issues of presence, and the relevance of the child's age. We end by discussing the appropriateness of the concept and what, if anything, can be done to clarify its application.

[1] *Custody of Children–Jurisdiction and Enforcement Within the United Kingdom* (Law Com No 138, Scot Law Com No 91, HMSO, 1984) at 4.15. See also the analysis by S. Gössl and R. Lamont 'Connecting Factors' in P. Beaumont and J. Holliday (eds) *A Guide to Global Private International Law* (Hart, Oxford & Portland, Oregon, 2022)) Ch 4.

[2] [2025] EWCA Civ 911, at [48].

[3] W de Steiger, *Explanatory Report on the 1961 Hague Protection of Minors Convention* (The Hague, HccH, 1960), at 13–14.

[4] Pérez-Vera, 'Explanatory Report', in Permanent Bureau of the Hague Conference on Private International Law (ed), Actes et documents de la Quatorzième session 6 au 25 octobre 1980, (1982), vol 3, 426 at 445 [66].

[5] Published as an offprint of the Eighteenth Session (1996), tome II, Protection of children, at para. [40]. There is more extensive discussion in the *Practical Handbook on the operation of the 1996 Hague Child Protection Convention* (HccH, 2014) from 13.83.

[6] *Practice Guide for the Application of the new Brussels II Regulation* (EU Commission, 2005). There is more extensive discussion in the *Practice Guide for the application of the Brussels IIb Regulation* (European Commission, 2022) at 60 with reference to CJEU case law.

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Does the meaning of a child's 'habitual residence' vary according to the international instrument involved?

There have been suggestions that, because 'habitual residence' plays different roles under different international instruments, its definition under those instruments may also differ. Most commonly, habitual residence governs jurisdiction and consequential recognition and enforcement of orders.[7] Under the Abduction Convention, however, 'habitual residence' is integral to the definition of wrongful removal or retention. Before a wrongful removal or retention can be established, it must be shown that the child has been removed from or retained out of the State of his/her habitual residence.[8] As a consequence, the *Practical Handbook* on the 1996 Convention suggests that 'there may be different considerations to be taken into account' when determining the habitual residence of a child under the 1996 Convention and the Abduction Convention.[9] What these different considerations might be is not articulated.

Interpreting 'habitual residence' differently according to the instrument involved is not unprecedented. In *Proceedings brought by A*,[10] the European Court of Justice (ECJ) held that the 'centre of interest' test, which had previously been developed in other areas of Community law,[11] could not be directly transposed to the context of what was then Brussels II Revised (Brussels IIa).[12] In *Marinos v Marinos*,[13] it was said to be well established that 'habitual residence' has an autonomous meaning for the purposes of what was then Brussels IIa and that its meaning in Community law may differ from its meaning in domestic law and from its meaning in Hague Convention jurisprudence. This recognition that the concept might simultaneously and legitimately mean different things under Community, Hague and domestic jurisprudence[14] does not, however, sit easily with the idea that habitual residence is a question of fact, nor with Baroness Hale's comment in *A v A (Children: Habitual Residence) (Reunite Child International Abduction Centre intervening)*[15] that it is 'highly desirable that the same test be adopted' under Brussels II, the Hague Abduction Convention, and the UK's Family Law Act 1986.

[7] This is so under the 1996 Child Protection Convention and the Brussels IIb Regulation (Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and international child abduction (recast)), while for the 1993 Intercountry Adoption Convention to apply, the child and prospective adoptive parents must be habitually resident in different Contracting States (Art. 2).

[8] In *Re C and another (Children) (International Centre for Family Law, Policy and Practice intervening)* [2018] UKSC 8, the UK Supreme Court rejected the argument that rather than defining 'wrongfulness' Art. 3 refers to habitual residence only to identify the proper law to determine whether a given act is 'wrongful'.

[9] Above (n 5), at para 13.84.

[10] C-523/07; EU: C: 2009: 225, at para. 36.

[11] On which, see e.g. R. Lamont, 'Habitual Residence and Brussels II*bis*: Developing Concepts for European Private International Law' (2007) 3 *Journal of Private International Law* 261. The centre of interests test continues to be used, even under Brussels IIb, when determining the habitual residence of *adults*, see e.g. *IB v FA*, C-289/20, EU:C:2021:955, and *MPA*, C-501/20, EU:C:2022:619.

[12] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Council Regulation (EC) No 1347/2000.

[13] [2007] EWHC 2047 (Fam) at [17]–[18].

[14] Ibid, per Munby J at [18], and *L-K v K (No 2)* [2006] EWHC 3280 (Fam), at [35], per Singer J.

[15] [2013] UKSC 60, at [35].

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Notwithstanding *A v A*,[16] is there a case for a child's habitual residence having a distinct meaning under the 1980 Abduction Convention? One argument concerns the application of Article 12, by which, where proceedings are brought more than a year after the wrongful removal or retention, the court may refuse to return the child on the basis that the child is 'settled in its new environment'. In retention cases,[17] the child will have been present in the new country for a time *before* his/her presence there could become 'wrongful' in the terms of the Convention, and where he/she is found to be habitually resident there before the end of the initial consensual arrangement, there will be no 'wrongful' retention within the terms of the Convention. Given this possibility, the dissenting judgment in the Canadian Supreme Court decision, *Office of the Children's Lawyer v Balev*, maintained that *'evidence of settling in should not play any role in the analysis of habitual residence*'[18] on the basis that matters relating to the degree of settlement of the child ought only to be considered under Article 12. The implication of this proposition is that there is a Convention-specific approach to establishing habitual residence. However, to say that Article 12 requires a distinctive approach to establishing habitual residence is neither justified by its terms nor the intended effect of the Convention. Article 12 is concerned with the position following the wrongful removal or retention. The question of where the child was habitually resident immediately *before* the removal or retention is a different question from that posed by Article 12, and is to be answered as at a different point in time.

What else might justify a distinctive interpretation of 'habitual residence' under the 1980 Convention? It has been suggested in abduction cases that courts should do what they can to avoid a finding that a child does not have a habitual residence for the purposes of the Convention.[19] But that is not an argument for saying the notion of habitual residence should be different under the 1980 Convention, although it may be a reason for courts to more readily find it established. Another distinctive feature of abduction proceedings is their summary nature. Proceedings under the 1980 Convention, 'have to be conducted extremely quickly and this may mean dealing with habitual residence in quite a summary fashion'.[20] This need for expedition has played a part in developments regarding the approach to be taken to establishing habitual residence of children,[21] but does not in itself justify attaching a distinctive meaning to habitual residence in the 1980 Convention.

In our view, there is no compelling argument that a child's 'habitual residence' has a distinctive meaning under the 1980 Convention, and the premise of this article is that the concept is the same regardless of the international instrument involved.

[16] Which was applied in relation to the 1996 Convention in *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659.

[17] Typically, where the left-behind parent consents to a visit of a particular length, but the child is not returned at the end of that visit.

[18] 2018 SCC 16, at [120] et seq.

[19] See Butler Sloss LJ's comment in *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548, at [555]–[556], that a court 'should not strain to find a lack of habitual residence where, on a broad canvas, the child has settled in a particular country' since without such a habitual residence the child cannot be protected under the Convention. See also *Re B (A Child) (Reunite International Child Abduction Centre intervening)* [2016] UKSC 4, at [30] in which Lord Wilson, having commented 'it is not in the interests of children routinely to be left without a habitual residence', continued: 'In that event the machinery of international instruments designed to achieve an orderly resolution of issues relating to them does not operate as primarily intended. Indeed, if they are unilaterally removed from a state in which they are not habitually resident, those aggrieved by their removal can have no recourse to the 1980 Convention.'

[20] *Re J (A Child) (Finland) (Habitual Residence)* [2017] EWCA Civ 80, per Black LJ at [64].

[21] The expeditious nature of abduction proceedings was adverted to by the CJEU in *OL v PQ*, C-111/17 PPU, EC:C:2017:436, at paras 57–59 and cited as a reason for not applying a parental intention approach.

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Is habitual residence really a question of pure fact?

'Habitual residence' is commonly said to be a question of fact in contrast to the legal concepts of domicile and nationality. The Pérez-Vera report expressly describes the concept as 'pure fact'.[22] One attraction of categorizing the concept as factual rather than legal is the notion that as a 'non-technical' question of fact[23] a person's habitual residence can be established relatively easily simply by looking at the facts of the case. Arguably the better analysis is that espoused by the UK and US Supreme Courts, that habitual residence is a mixed question of fact and law, the concept being a matter of law to be established by an examination of the facts.[24] The distinction between law and fact in this context, however, is not clear-cut – Carruthers considers it a 'chameleon' distinction.[25]

The basic problem is that while the test itself is a legal issue, in deciding what that test is, regard must be had to the need to preserve its factual base and in particular, to avoid what has been described as the juridification of the concept,[26] whether by accident or design, by formulating rules or principles which dictate the process by which, or the manner in which, a child's habitual residence is to be established. As Baroness Hale said in *A v A*[27]: 'The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce.'

However, while the UK Supreme Court (UKSC) has abandoned the propositions[28] that habitual residence cannot be changed unilaterally and that habitual residence of the child is always the same as the parents,[29] which clearly smack of legality, as discussed later, there remain issues concerning presence that continue to superimpose legal rules on the meaning of habitual residence.

The fundamental meaning of a child's 'habitual residence' Shifting positions on focus and the relevance of parental intention

In 2001, Schuz[30] categorized the then approaches (mainly evidenced in abduction cases) to the determination of a child's habitual residence as: the 'dependency model' (where the child's habitual residence depends upon the habitual residence of the parents); the 'parental rights model' (under which the child's habitual residence is determined by the

[22] Above (n 4), at para. 66. See also the discussion in J. Carruthers, 'Discerning the Meaning of 'Habitual Residence of the Child' in UK Courts: A Case for the Oracle of Delphi' (2019/2020) 21 *Yearbook of Private International Law* 1.

[23] See E. Clive, 'The concept of habitual residence' (1997) 3 *Juridical Review* 137.

[24] In the UK, see *Re B* (n 19), at para [54], per Baroness Hale and Lord Toulson. Or, as Lord Sumption put it in *Re B* at para [64], 'the test for what constitutes habitual residence is a question of law, but whether that test is satisfied is a question of fact'. In the USA, see *Monasky v Taglieri* 140 S Ct 719 (2020), at p. 15, per Justice Ginsburg and at p. 1 per Justice Alito.

[25] Carruthers (n 22), at p. 8.

[26] As discussed by Carruthers at p. 9, who echoes comments made by R Schuz, 'Habitual Residence of Children under the Hague Child Abduction Convention: Theory and Practice' [2001] *Child and Family Law Quarterly* 1 at 4.

[27] Above (n 15), at paras [54 (vii)].

[28] Previously espoused by the House of Lords in *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 AC 562.

[29] See respectively *Re R (Children)* [2015] UKSC 35, and *Re LC (Children) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1. See also *Re B* (n 19), at para. [31], per Lord Wilson.

[30] Schuz (n 26).

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parent who has the right to decide where the child lives and if both parents have this right neither may unilaterally change it); and the 'child-centred' or 'independent model' (where the child's habitual residence depends on the child's links with the country in question). She argued that the proper approach should be to apply the independent model taking into account, where appropriate, parental intention. She later called this 'the hybrid model'.[31]

Leaving aside for the moment how to label the approaches, as we now discuss, the prevailing approach is to focus on the child's position, with parental intention being one of many relevant factors feeding into the question of where a child is habitually resident. But this is not to say that the relevance of parental intention does not continue to be problematic.

The EU position

In *Proceedings brought by A*,[32] the ECJ rejected the centrality of parental intention in establishing the habitual residence of children espoused in what is commonly called the 'centre of interest' test, in favour of one that focuses on the child's integration in a social and family environment. In *A*, the Court ruled that for the purpose of jurisdiction of the Regulation, 'habitual residence':[33]

> must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a 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 must be taken into consideration.

Subsequent Court of Justice of the European Union (CJEU) decisions adopted this 'integration approach'. In *HR*,[34] the child in question was born in Brussels, had dual Belgian and Polish nationality, and had always lived in Brussels. When the child was 18 months old, the mother sought a court order in Poland to establish the child's place of residence as her home in Poland. The Polish court sought a preliminary ruling on whether it could properly find the child to be habitually resident in Poland on the basis of integration into the social and family environment by reason of: speaking Polish, having been christened in Poland, her mother's Polish nationality, that she was in day-to-day care of her Polish mother, and that she had spent time in Poland during her mother's parental leave and during holidays. Alternatively, should Belgium be considered the child's place of habitual residence on the basis that the mother was employed there and that was where the child had her home and maintained contact with her father and his family?

The CJEU ruled that for Regulation purposes a child's place of habitual residence is the 'place which, in practice, is the centre of that child's life'.[35] Although this seems

[31] R. Schuz, *The Hague Child Abduction Convention – A Critical Analysis* (Hart, Oxford and Portland Oregon, 2013) 192 et seq. See also, by the same author, 'Disparity and the Quest for Uniformity in Implementing the Hague Abduction Convention '(2014) 9 *Journal of Comparative Law* 1, and 'Habitual Residence: Review of Developments and Proposed Guidelines' (2023) 12 *Contemporary Issues in Law* 62, which reviews later developments.

[32] Above (n 10), at para. 36. For an extended analysis of the EU position, see N. Lowe, C. Honorati and M. Hellner, *Brussels II-ter - Cross-Border Marriage Dissolution, Parental Responsibility Disputes and Child Abduction in the EU* (Intersentia, Cambridge, Antwerp and Chicago, 2024) at 4.8 et seq.

[33] At para. 44.

[34] C-512/17, EU:C:2018:513.

[35] At para. 42.

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reminiscent of the 'centre of interest' test, it was clearly not intended to rein back on the test established by *A*; rather, the Court was concerned with how 'integration' might be established. In that respect, the facts (when taken together) that the Court considered decisive were: that the child had lived with her parents from birth until their separation in a specific place; that the parent who, in practice, had custody of the child since the couple's separation continued to stay in that place with the child and was employed there under an employment contract of indefinite duration; and that the child had regular contact there with her other parent, who was still resident in that place. But other facts the Court considered not to be decisive, namely, periods of leave or holiday spent by the child with a parent in the parent's country of origin, the origins and cultural ties of the parent with practical custody of the child, that parent's family ties in their country of origin, and the intention to settle there with the child.

Although it was outside its remit to say so, it can be assumed that the Court considered the child to be habitually resident in Belgium. With regard to the issue of intention, the Court stressed that the wishes of a parent to settle with the child in that parent's Member State of origin in the future cannot, in itself, establish that the child's place of habitual residence is in that State.[36] But this does not mean that parental intention is irrelevant. As the CJEU said in *OL v PQ*,[37] while the intention of parents cannot, as a general rule, by itself be crucial to the determination of a child's habitual residence,[38] it can constitute an indicator capable of complementing a body of other consistent evidence.

The UK position

The integration approach was adopted by UKSC in *A v A*[39] where Baroness Hale rejected the *Shah* test[40] for establishing a child's habitual residence by reference to the parents' 'abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration'. Baroness Hale preferred the 'European' approach because it focused more squarely on the situation of the child and gave less weight to the intentions of the parents, the latter being 'merely one of the relevant factors'. In line with the ECJ, her Ladyship considered that a child would have a habitual residence in 'the place which reflects some degree of integration by the child in a social and family environment', which depends on numerous factors, including the reasons for the stay in the country in question.[41]

Subsequent UKSC decisions have explored further both the meaning of 'integration' and the relevance of parental intention. With regard to the former, Lord Wilson observed in *Re B*[42] that habitual residence does not require the child's full integration in the environment of the new State, but only a degree of integration. The critical issue, as Lord Reed observed in *Re R (Children)*,[43] is the 'stability of the residence' which is dependent neither on being present for a particular time, nor on an intention on the part of one or both parents to

[36] At para. 65.
[37] Above (n 21), at [47].
[38] In that case it was held that parental intention cannot trump the child's lack of physical presence, see further below.
[39] Above (n 15).
[40] *R v Barnet London Borough Council, ex p Shah* [1983] 2 AC 309.
[41] *A v A* at [54]. Lord Hughes dissented in part, but agreed with this summary, see [81].
[42] *Above* (n 19), at [39].
[43] Above (n 29), at [16].

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reside indefinitely in the country concerned. Nevertheless, as Baroness Hale said in *Re L*,[44] parental intent does play a part in establishing or changing the habitual residence of a child, not as a legal concept, but as to the reasons for a child leaving one country and going to stay in another, which have to be factored in, with all the other relevant factors, in deciding whether the move has a sufficient degree of stability to amount to a change of habitual residence.

These latter considerations come into play particularly in cases where it is argued that a child's habitual residence has changed. In that context, in *Re B*,[45] Lord Wilson used the analogy of the see-saw; as ties to one place weaken, and ties to another strengthen, eventually the child's habitual residence will change. But helpful though that analogy may be, it can lead judges to fall into the trap of solely focusing on whether the child has acquired a new habitual residence. As Moylan LJ said in *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention),* 'to demonstrate "some degree of integration" is not a substitute for the required global analysis'.

An instructive case is *Re F (A Child) (Habitual Residence)*,[46] which concerned a seven-year-old child, F, who, until she was brought to England for an agreed stay of just over three months, had lived all her life in Colombia. The girl was held to have been wrongfully retained when, after five months in England, the father unilaterally decided that his daughter should stay there. The question was, at that point, where was the child habitually resident? The first instance judge held that the girl was habitually resident in England. On appeal, that judgment was held to have been flawed because its focus was on F's 'degree of integration' in England without regard to her connections with Colombia. Further, the judge had considered that the mother needed to demonstrate why F had *not* gained a habitual residence in England rather than considering where F was habitually resident. The judge did not, therefore, conduct a balanced assessment of F's connections with Colombia and with England. Had she done so, the Court of Appeal had no doubt that the judge would inevitably have concluded that F was habitually resident in Colombia. In Moylan LJ's view, the depth and strength of F's connections with Colombia would have required strong countervailing factors to justify the conclusion that F had become habitually resident in England by the retention date. In his view, it was of critical importance that F came to England for a temporary stay. On this basis, the court held the child to be habitually resident in Colombia at the time of retention.

Moylan LJ emphasized that the 'determination of habitual residence is not a formulaic exercise because it requires a broad consideration of the child's and the family's circumstances and because different factors will be present in different cases with the same factor being more significant in one case than another.'[47] Accordingly, as the CJEU commented in *HR*,[48] 'guidance provided in the context of one case may be transposed to another case only with caution'. Nevertheless, subject to those caveats, Moylan LJ set out[49] a non-exclusive list of elements drawn from the cases, including the duration, regularity,

[44] *Re L (A Child) (Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, at [23].
[45] Above (n 19).
[46] Above (n 2). See also *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, Cf *Re G-E (Children) (Hague Convention 1980; Repudiatory Retention and Habitual Residence*) [2019] EWCA Civ 283, where the first instance judge was held to have applied the right balance.
[47] At [58].
[48] Above (n 34), at [54].
[49] Above (n 2), at [58].

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conditions and reasons for the child's stay in the state concerned, parental intention, the stability of residence and the degree of integration of the child into a social and family environment in the country in question, and noting that the relevant factors will reflect the age of the child.

The Australian position

In *LK v Director-General, Department of Community Services*,[50] the High Court of Australia rejected the notion that parental intention is critical in determining the habitual residence of children. It was observed[51] that a wide variety of circumstances might bear upon where a person is said to reside and whether that residence may be described as habitual. The Court considered that the adoption of 'habitual residence' rather than 'domicile' in the Abduction Convention meant that intention ought not have decisive importance.[52] In its view, 'considerations relevant to deciding where a person is habitually resident are not necessarily confined to physical presence, and intention is not to be given controlling weight'.[53]

The Court stressed that the parents' intentions were not the only relevant factor[54] and considered that it would be inappropriate to identify a 'set list of criteria' that bear upon a child's habitual residence, or to attempt to impose a 'hierarchy of importance' on the matters that might bear upon the question.[55]

The Canadian position

In Canada, where there had previously been a strong focus on parental intention,[56] the Canadian Supreme Court in *Office of the Children's Lawyer v Balev*[57] adopted what it called the 'hybrid approach' [ie Schuz's classification] to establishing the habitual residence of children. The children in the case were aged nine and twelve years at the time of the alleged wrongful retention under the Abduction Convention. They had initially been present in Canada with their father's agreement, but remained after the end of the agreed period. Drawing on the CJEU's view in *OL v PQ*,[58] the majority in *Balev* said that parental intention 'cannot as a general rule by itself be crucial to the determination of the habitual residence of a child', but that it 'constitutes an "indicator" capable of complementing a body of other consistent evidence'.[59] The court contrasted its preferred 'hybrid' approach with a 'child-centred' approach, which would focus solely on the child's 'acclimatization in a given

[50] [2009] HCA 9, on which see further N. Lowe and M. Nicholls, *The 1996 Hague Convention on the Protection of Children* (2nd edn, LexisNexis, London, 2025) at 3.81 et seq.

[51] Ibid, at para. 23. The court held it to be wrong to treat the fact that the parents had not agreed and singular purpose at the time of the departure from Israel as decisive. Other relevant factors included the mother having established connections with Australia consistent with her and her children having their lives there: had registered the children as Australian citizens, enrolled the older children in school and another in preschool, enrolled the children in clubs, and signed them up for music lessons.

[52] Para. 24.

[53] Para. 28.

[54] Para. 48.

[55] Para. 31.

[56] See e.g. *Korutowska-Wooff v Wooff* (2004) 242 DLR (4th) 385 (Ontario Court of Appeal), *Wentzell-Ellis v Ellis*, 2010 ONCA 347 (Ontario Court of Appeal), *Maharaj v Maharajh*, 2011 ONSC 525 (Ontario Superior Court of Justice).

[57] 2018 SCC 16.

[58] Above (n 21), discussed below.

[59] At para. 47.

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country'.[60] The crucial feature of the hybrid approach for the majority in *Balev* was that no single factor should determine the child's habitual residence. Rather, the whole picture should be considered with a focus on the actual situation of the child.[61]

The US position

The US Supreme Court considered the test for habitual residence in *Monasky v Taglieri*.[62] The Court saw this case, which concerned the habitual residence of a two-month-old child, as an opportunity to clarify the standard for habitual residence – an important question of federal and international law. US courts had previously adopted differing approaches, with some relying primarily on parental intention to establish a child's habitual residence,[63] and others focusing first on 'acclimatization' of the child and turning to parental intention only where children were too young or otherwise prevented from becoming 'acclimatized'.[64] The Supreme Court approved this latter approach. It rejected the mother's argument that before the child could be found to be habitually resident in a particular State, there needed to be an express agreement to that effect between the parents. The Court agreed that physical presence is not a conclusive indicator of habitual residence of an infant, but noted that a wide range of factors other than parental agreement can quite adequately determine whether the residence is 'habitual'.[65]

Before *Monasky*, the Federal Courts of Appeals had shared a common understanding that 'the place where a child is at home at the time of removal or retention ranks as the child's habitual residence'.[66] In the Supreme Court's view, locating a child's home is a fact-driven enquiry in which the courts have to be sensitive to the unique circumstances of the case and informed by common sense. Justice Ginsburg explained,

> For older children capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimatization will be highly 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.[67]

The Court observed that holding habitual residence to be a fact-driven concept to be determined in light of all the circumstances and without any 'categorical requirements', was in line with the negotiation and drafting history of the Convention and with international jurisprudence.[68] The Court thought, however, that where the child concerned was too young

[60] Para. 41.
[61] Paras 42–47.
[62] Above (n 24), on which, see e.g. A. Estin, 'The Contribution of the United States Supreme Court to International Family Law' in J. Carruthers and B. Wilson (eds), *Research Handbook on International Family Law* (Edward Elgar, Cheltenham and Northampton MA, 2024) ch. 18.
[63] See e.g. *Gitter v Gitter* (2005) 396 F.3d 124 (2nd Cir.) at p 134, and see *Mozes v Mozes* (2001), 239 F.3d (US COA, 9th Cir.) 1067 at 1081.
[64] E.g. *Ahmed v Ahmed* 867 F.3d 682 (6th Cir. 2017).
[65] Above (n 24), at p. 12. But for a critique of this approach, see Schuz (n 26), at 53. Note also her analysis of the Israeli position which pays more attention to parental intention than in the jurisdictions analysed above.
[66] Ibid, at p. 8 quoting *Karkkainen v Kovalchuk*, 445 F. 3d 280, 291 (CA3 2006).
[67] At p. 9.
[68] At pp. 10–12. Note Justice Thomas's keenness to stress that since the case concerned the habitual residence of an infant too young to acclimatize, the judgment should be confined to that context.

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to 'acclimatize', it was the court's role to identify the place where the parents intended the child to live.

Overview

A clear driver among the senior courts is a desire to achieve a degree of consistency of approach. Baroness Hale in the UKSC was explicit on this point, while the majorities in *Balev* and *Monasky* each in part expressly justified their preferred approach on the basis that it was supported by the principle of harmonization.[69] Another driver for the shift in emphasis is the belief that the integrated or hybrid approaches are the best 'fit' with the Hague Abduction Convention. It has been argued that these tests deter parents from trying to manipulate the Abduction Convention by attempting to create artificial links with a State, and are less likely than the alternatives to result in large volumes of conflicting evidence, particularly as to intention, or as to the child's connection to a particular country.[70]

The articulations of the tests in the leading cases are not, however, identical. In the EU and UK, the focus is on the integration of the child in a social and family environment, with parental intention relegated to being one of many relevant factors.[71] In Canada, in contrast, the test has no specific focus – all factors are to be considered, with the implication that parental intention and the child's integration may have equal weighting. In the USA, similarly, there is no particular focus on the integration of the child; the child's habitual residence is to be determined on the basis of all the circumstances of the case. At first glance it seems there may be divergence between the 'integration' test adopted in the EU and the UK and the approaches adopted in Canada and the USA, but the Canadian court makes extensive reference to the EU decisions and the court's more detailed explanation of its 'hybrid' approach seems practically indistinguishable from the 'integration' test, which itself directs the court to take account of all the circumstances of the case.[72] The US decision, *Monasky*, similarly references the 'integration test' case law.[73]

In our view, despite differences in emphasis and articulation, which, in any event, may be reflective of a particular case, the various courts are effectively espousing the same approach.

Issues of presence

When does presence become 'habitual'?

Issues concerning presence have generally concerned children moving to a new jurisdiction (as opposed to being born there), and in that context, while there is no doubt that *mere* presence does not establish habitual residence, it is less clear when it becomes habitual.[74] In *Mercredi v Chaffe*,[75] the CJEU kept open the possibility that a child might become habitually resident in a State after only a few days. It observed that the 'duration of a stay can serve only as an indicator in the assessment of the permanence of the residence' and that all the circumstances of the case must be taken into account in making that assessment.

[69] *Balev* at [48], [56]–[57] and *Monasky* at p. 10.
[70] *Balev* at [60], and *OL v. PQ*, above (n 21), at paras 56 and 59.
[71] Though Moylan LJ's reference to the 'critical' importance of the temporary nature of the stay in *Re F (A Child)(Habitual Residence)* above (n 2), at [64]), which could only be ascertained from the intention of the parents, gave us pause for thought on this point.
[72] *Balev* at paras [43]–[47].
[73] Above (n 24), at pp. 7–8.
[74] On this, see Clive (n 23), at 139.
[75] C-497/10 PPU, EU:C:2010:829.

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The Court considered that the duration of the stay was one of the 'first' factors to be considered, along with the regularity, conditions, and reasons for the stay and for the parents' move to that State. It added:

> to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. … the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.[76]

The English courts have accepted that these references to 'permanence' were being used to contrast an indefinite or stable presence with a more 'temporary' presence.[77] In *Re R*,[78] in which Lord Reed observed that it is the 'stability of the residence that is important, not whether it is of a permanent character', it was held that 12 months' residence in Scotland pursuant to the parents' agreement that the mother and children should live there during the mother's maternity leave established the children's habitual residence in Scotland. Earlier, Lord Slynn observed in *Nessa v Chief Adjudication Officer*[79] that the 'requisite period is not a fixed period. It may be longer where there are doubts'. Alternatively, where there are no doubts, it may be short. In *Re F (A Minor) (Child Abduction)*,[80] for example, the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country.

The Brussels IIb *Practice Guide* comments that habitual residence could be acquired 'on, or not long after, the day of arrival'.[81] While no case involving a move to a new jurisdiction has gone this far, case law has clearly rejected the idea that a fixed minimum period of residence is required. However, context is everything and in *Wirral MBC v AZM*,[82] a day-old child born in England was held to be habitually resident there.

As brevity of residence is no necessary bar, so longevity is no guarantee of a finding of habitual residence. In *Re F*,[83] for example, a seven-month stay in England was not enough to transfer the child's habitual residence in Colombia.

Is physical presence a prerequisite?

Whether some physical presence is a prerequisite to establishing habitual residence was one of the matters considered by the UKSC in *A v A,*[84] where the mother, who was

[76] Ibid, at para. 51.

[77] Following Sir Peter Singer's analysis, comparing the French and English texts of the judgment in *Mercredi*, in *DL v EL (Hague Abduction Convention: Effect of Reversal of Return Order on Appeal* [2013] EWHC 49 (Fam), at [74]ff, accepted by the UKSC in *A v A* (n 15), at para. [51], per Baroness Hale and at [80 vii], per Lord Hughes.

[78] Above (n 29).

[79] [1999] 2 FLR 1116 at 1121, HL.

[80] Above (n 19).

[81] EU, 2022, at para. 3.2.3.3 (p. 68). Similarly, in *A v A* (n 15) at [44] Baroness Hale said: 'I would not accept that it is impossible to become habitually resident in a single day', superseding, surely, Lord Brandon's dicta in *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 AC 562, at 578, that '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.'

[82] [2025] EWHC 3366 (Fam), discussed below.

[83] Above (n 2).

[84] Above (n 15).

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habitually resident in England, had been kept in Pakistan against her will and gave birth there. The question was whether there was jurisdiction to ward the baby who, though a British subject through his father, had never been outside Pakistan. The majority thought that some physical presence was probably a necessary prerequisite to establishing habitual residence. Baroness Hale cast doubt on the notion that a child could be 'integrated into the social environment of a country where he has never been', or can acquire a habitual residence 'without ever having set foot in a country'.[85] She noted, however, that a rule that some (even fleeting) physical presence is an essential prerequisite could 'appear artificial'.[86] She could not therefore be confident that the need for some physical presence was *acte claire* for the purpose of EU law, by which the UK was then bound. In fact, the UKSC found an alternative means of grounding jurisdiction so that the issue of habitual residence was left unresolved.

Subsequently, the CJEU ruled[87] that for Regulation purposes, some physical presence *is* a pre-requisite. While the CJEU standpoint is clear that some physical presence is required, as Poole J said in *Re CB (Habitual Residence: Child Born and Present Abroad)*,[88] following the UK's withdrawal from the EU, the ruling did not bind UK courts. The judge nevertheless accepted that the authorities, such as they are,[89] lay down a clear rule that a child cannot be habitually resident in a country in which they have never been present and 'in the absence of any appellate authority to the contrary', applied that rule. In so doing, however, he noted that if 'habitual residence is an issue of fact, then it is not generally suitable for the application of immutable rules'.[90]

In so observing, Poole J echoed Lord Hughes' dissenting comments in *A v A* that the proposition that there must always have been some physical presence amounted to a rule of law and was at odds with the factual nature of habitual residence.[91] In *A v A*, Lord Hughes thought that the crucial argument was that the child was integrated into a social and family environment which had its habitual residence in England.[92] The child's habitual residence was therefore also in England, and it did not matter that he had never been present there. By using the analogies to a child born to a mother on holiday or otherwise travelling overseas, Lord Hughes likened the child's absence in this case to the sort of temporary absence which would normally have no impact on habitual residence. We return to this issue in our closing remarks. Suffice to say here that we think there is merit in Lord Hughes' standpoint.

Two concurrent habitual residences?

In *Re L (Recognition of Foreign Order),*[93] Munby LJ considered the proposition that a child cannot have two concurrent habitual residences as one of good law which had never been

[85] Ibid, at para. [55].
[86] Ibid, at [44].
[87] In *UD v XB* C-393/18, EU:C:2018:835, the facts of which, were strikingly similar to *A v A*.
[88] [2025] EWHC 1712.
[89] Including *Re J & H (Jurisdiction: 1996 Hague Convention: residual domestic jurisdiction: parental responsibility jurisdiction)* [2024] EWHC 1395 (Fam) at [28(xi)], per Williams J.
[90] [2025] EWHC 1712, at [23].
[91] Above (n 15) at paras [83]–[84] and [90]–[92].
[92] Note also Justice Ginsburg's comment in *Monasky* (n 24), at p. 9, that where an infant has lived in a country only because a caregiving parent had been coerced into remaining there, 'that circumstance should figure in the calculus'.
[93] [2012] EWCA Civ 1157 at [67]. The parents made an agreement (ratified by a Portuguese court) for the child to divide his time between the mother in England and the father in Portugal on a 2-monthly

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doubted. *Re L* was concerned with whether the court had jurisdiction under Brussels IIa, and it is generally accepted that the same position obtains under Brussels IIb.[94] Although there is no authority on whether, for the purposes of the 1996 Convention, a child can have more than one concurrent habitual residence, it seems likely that it is not possible.[95] This position makes complete sense in the context of instruments designed to avoid conflicts of jurisdiction.

With regard to the 1980 Convention, the issue was central to the decision in *Re V (Abduction: Habitual Residence)*.[96] There, it was held that because the family had two established homes, in London, and in Corfu, the children could be regarded as being habitually resident in both places, but not concurrently. In Douglas Brown J's view, because concurrent habitual residence is not a concept that fits in with the aims of the Convention, their habitual residences should be regarded as sequential, that is, while in London they were habitually resident in England and when in Corfu they were habitually resident in Greece. The father's return application therefore failed, notwithstanding the mother's concealment of her intention not to return to Greece, because the retention could not be said to be wrongful within the meaning of Article 3, as the children remained in the State of their habitual residence.

Schuz considers the notion that dual habitual residence is incompatible with the 1980 Convention to be unconvincing.[97] She argues that where the family genuinely lives in more than one country, finding that the child is habitually resident in only one of them is inconsistent with the factual nature of the test. Furthermore, one might argue that, given the mother's actions in disrupting the children's normal living arrangements had all the attributes of a 'wrongful retention', the decision in *Re V* that the 1980 Convention afforded no remedy does not seem right. But was Douglas Brown J's analysis unjustified? Holding that a child can have sequential but not concurrent habitual residences may be a pragmatic solution but, given that Convention proceedings do not determine the merits of any dispute but only the forum, which in turn, is predicated upon the premise that the best court to hear the dispute is that of the State of the child's habitual residence, it does not do violence to the Convention.[98]

While no doubt the 1980 Convention could operate with a child having concurrent habitual residences, it is doubtful that the 1996 Convention and Brussels IIb could. Consequently, as we believe that the concept of a child's habitual residence should be the same regardless of the instrument involved, we support the *Re V* analysis, albeit that holding that a child cannot have concurrent habitual residences smacks of a proposition of law.

rotational basis, but during the first stay in England the mother sought a residence order. The court dismissed the mother's application and granted the father's cross-application for recognition and enforcement of the Portuguese order, on the basis that the child remained habitually resident in Portugal.

[94] See Lowe, Honorati and Hellner (n 32), at 4.29.

[95] At any rate, this is the view taken by Lowe and Nicholls (n 51) at 3.63.

[96] [1995] 2 FLR 992.

[97] A position also espoused by the Canadian decision, *SS-C v GC* [2003] RDF 845. See Schuz (n 31), at 179–180.

[98] We do not support the position taken in a German lower court on facts akin to *Re V* that the child had no habitual residence, see case referred to in H. Setright and others, *International Issues in Family Law: The 1996 Hague Convention on the Protection of Children and Brussels IIa* (Jordan Publishing, Bristol, 2015) at 3.65.

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Issues concerning the child's age

Newborn children

Establishing the habitual residence of newborn children is problematic. Can babies really be independently 'integrated' and, if not, does that mean that they cannot have a habitual residence? In *Mercredi v Chaffe*,[99] which involved a two-month-old child, the CJEU said it was necessary to assess the *caring parent's* integration in her social and family environment. In *OL v PQ*,[100] the CJEU reiterated that the environment of an infant is a family environment and that he/she necessarily shares the social and family environment of the person with whom she lives and by whom she is looked after. It ruled that where a child is taken care of by her mother in a Member State different to that where the father lives, the factors to be taken into account in determining the child's habitual residence include, the duration, regularity, conditions and reasons for the mother's stay in her current location, the mother's geographic and family origins, and the family and social connections which the mother and child have with that Member State.[101] But it also observed that while parental intention to settle permanently with the child in a Member State can be taken into account and is an indicator among other evidence, the intention of the parents 'cannot as a general rule by itself be crucial to the determination of the habitual residence of a child'.[102] In *OL*, the parents agreed that the mother should give birth in Athens, where she could have the support of her family, but would then return with the child to the marital home in Italy. After the birth, the father returned to Italy, but the mother subsequently decided, unilaterally, to remain in Greece, with the child. The father sought the child's return under the Abduction Convention, and the Greek court sought a ruling on the appropriate interpretation of 'habitual residence' in these circumstances. The CJEU ruled that to find the child to be habitually resident in Italy in these circumstances would be to establish a rule that an infant's habitual residence must be that of her parents, and that such an approach would 'transcend' the concept of 'habitual residence' within the Regulation, and would undermine the effectiveness of the return procedure and legal certainty.[103] Here the alleged wrongdoing of the mother was insufficient to justify the removal of the child from the State in which she had been born, and lawfully and continuously lived, to a State with which she was unfamiliar.

The High Court of Australia took a similar stance in *LK*, in which it stressed the importance of not elevating the observation that a child looks to others for care and housing 'to some principle of law like the (former) law of dependent domicile of a married woman'. On the other hand, the court also said:

> The younger the child, the less sensible it is to speak of the place of habitual residence of the child as distinct from the place of habitual residence of the person or persons upon whom the child is immediately dependent for care and housing.[104]

This issue was raised in its starkest form in *Wirral MBC v AZM*, which concerned a one-day-old baby. Holding the baby to be habitually resident in England, Poole J noted that since

[99] Above (n 76).
[100] Above (n 21).
[101] At para. 45.
[102] At para. 47.
[103] At paras. 50 and 56.
[104] Above (n 51), at para. 27.

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the child had never been present anywhere else, on the current authorities, it was not possible to find her to be habitually resident in either the State of her mother's nationality or residence. Nor were the usual factors on which integration depends of any use – it was not possible to consider language, schooling, connections to friends, stability, or duration of stay.[105] In the end, the child's place of birth, the fact that the mother planned the birth to be in England, the mother's recent residence in England, and her family ties there proved to be the decisive factors upon which the judge rejected the argument that the child had no habitual residence and found her to be habitually resident in the UK.[106] On the notion of integration into a family and social environment, the judge observed that '[i]ntegration of the degree sufficient to establish the habitual residence of an older child was not present, but integration of the degree sufficient to establish habitual residence of a one day old child was present.'[107]

This may be a sensible pragmatic decision, but it does expose the artificiality of applying the habitual residence test to newborns. While it does not undermine the clearly established position that there is no 'rule' that a young child's habitual residence will always be that of her parents, who may in any event themselves have different habitual residences, it does illustrate the undeniable reality that a very young child can only meaningfully be said to be integrated with her close carer or carers.

Older children

Re LC,[108] the UKSC held that the state of mind of an intelligent 12-year-old should have been considered in determining her habitual residence. The majority confined its decision to adolescents or those having the maturity of an adolescent, while the minority felt that courts should consider the state of mind of children generally and avoid creating a rule that the perceptions of younger children are irrelevant.[109] The decision was to bring the child's perception of the situation, her state of mind, as distinct from her 'wishes', 'views', or 'intentions' to bear on the question of habitual residence. Baroness Hale pointed out that the state of mind of the child would not be the only subjective factor to be considered, others which are routinely listed, include, for example, the reasons for the move.[110] This approach must be right in principle, particularly if one takes children's rights as conferred by the United Nations Convention on the Rights of the Child (UNCRC) into account. *Balev* was also concerned with older children, but the Canadian Supreme Court did not consider the relevance of the child's state of mind in establishing habitual residence in that case. It noted, as set out in *Mercredi*,[111] that the relevant considerations may vary according to the age of the child, but went no further, and expressly rejected the adoption of a wholly 'child-centred' approach. But we think a nuanced, different approach for older children *is* required, having regard in particular to their perceptions and state of mind.

[105] Above (n 83), at [21].
[106] Ibid, at [25].
[107] Ibid, at [26].
[108] Above (n 29); on which see H. Blackburn, 'Habitual Residence – *Re LC*' [2014] *International Family Law* 8 and D. Williams, 'The Supreme Court Trilogy: A New Habitual Residence Arises!' [2014] *International Family Law* 84.
[109] See Lord Wilson at para. [43], with whom Lords Toulson and Hodge agreed and Baroness Hale at para. [58], with whom Lord Sumption agreed.
[110] Para. [60].
[111] Above (n 76), at para. 53.

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Continuing challenges

Conceived as a simple factual test that will readily identify the jurisdiction best placed to determine disputes concerning children, habitual residence has not proved easy to apply, nor is it a purely factual test. It has been well described as a 'technical concept'.[112] It is a mixture of law and fact, albeit predominantly one of fact. Although in the past the courts have been open to the charge of juridifying the concept, the UK courts in particular have stripped away former rules which dictate the process by which a child's habitual residence is established, for example, that a child's habitual residence is always that of the parents, and that it cannot be changed unilaterally by one of them.[113] Nevertheless, not all legal requirements have been eliminated, as is evidenced by the requirement for there to be some physical presence and the bar on having concurrent residences.

In *A v A*, the UKSC refocused the test for habitual residence to align with the 'integration' test adopted by the European court. The UKSC preferred the European approach because its focus was on the child's situation, with the intentions and purposes of the child's parents becoming 'merely one of the relevant factors'.[114] In *Balev*, the Canadian Supreme Court favoured their 'hybrid approach' as neither having a primary focus on parental intention nor on the integration of the child, but rather requiring a consideration of all relevant factors. The US Supreme Court in *Monasky* found that the habitual residence of children depends on the totality of the circumstances, with no categorical requirements or individually determinative factors, while similar approaches had already been adopted in senior courts in New Zealand and Australia.[115]

Globally, there has been a move away from applying an adult-focussed test, in which parental intention is decisive, to a child-focused one which demands a global analysis of the child's actual situation. How this child-focused approach is best described can be debated. In practice, however, there seems to be little essential difference between the 'integration' test as developed in the EU and broadly followed in the UK, and the Canadian court's 'hybrid test'. The labels are in themselves of little consequence. It is the overall focus that matters, and here there seems to be broad agreement across the jurisdictions analysed above that the focus should be on the child. While that must be right in principle,[116] that is not to say that parental intention is irrelevant, rather it is part of the overall enquiry both as to the child's situation and their perspective, and in certain circumstances can still be important. In our view, what is important is for the courts to consider the intentions of the parents *from the point of view of the child and as they impact upon the child.* So, for example, in *Re F*, the child would have been aware of and understood that the planned trip to the UK was to be temporary. The temporary nature of the trip certainly reflects parental intention, but also the child's own expectations and experience.

[112] Per Baroness Hale in *Re J (A Child) (Custody Rights: Jurisdiction)* [2006] 1 AC 80, at [33].

[113] See e.g. Baroness Hale in *A v A* (n 15), at paras [37], [54].

[114] Above (n 15), at [54], per Baroness Hale.

[115] See *Punter v Secretary for Justice* [2007] 1 NZLR 40 and *LK v Director-General, Department of Community Services* (n 51).

[116] Though not all agree – in *Balev* the dissenting judges considered the 'hybrid approach' to be unprincipled and too open-ended, and strongly felt that the focus should remain on parental intention, while in *Monasky* parental intention remained more prominent in the list of relevant factors than in either the CJEU or UKSC judgments. See also e.g. S. Bookman, 'The New Canadian Test for Habitual Residence in the Hague Convention' [2018] *International Family Law* 222, where it is argued that the hybrid approach over-empowers judges by broadening their discretion and will result in uncertainty for litigants for years to come.

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Our initial intention in writing this article was to focus on the difficulties of establishing the habitual residence of very young children, particularly newborn babies. However, while babies present the greatest difficulty, it became clear, as our foregoing analysis demonstrates, that there remain problems in determining a child's habitual residence no matter what the child's age. To some extent, the nature of the challenges changes with the age of the child concerned. The less obvious the answer as to where the child is habitually resident, the more technical the concept becomes as courts seek to identify how best to arrive at an appropriate determination. Given the difficulties, it is tempting to question whether habitual residence is a good connecting factor in children's cases after all. The problem is what could replace it. The notion of 'home' might be mooted as an alternative, but surely that would just raise the same issues. Even if it were possible to think of a better alternative, there is no realistic prospect of changes being made to the international instruments governing cross-border disputes concerning children.

Given that habitual residence will continue to be the connecting factor, can anything more be done to clarify its application? As we have seen, there have been judicial attempts to provide meaningful guidance. In that regard, we commend the CJEU's approach in *HR*[117] in providing guidance both on what were and were not decisive factors, at any rate, in that particular case. Useful overall guidance on the approach taken in England and Wales is also given in *Re F*.[118] But guidance can only go so far. As Black LJ said in *Re J (A Child) (Finland) (Habitual Residence)*,[119] there is no 'prescribed route … to approach the making of a finding of fact about habitual residence', rather 'the scope of the enquiry depends entirely on the particular facts of the case'. Moreover, there is a balance to be struck between avoiding unhelpful 'glosses' on the concept and providing helpful guidance on how it might be established in a difficult case. Guidance from case law is also limited in reach, being binding only in the relevant jurisdiction. A general definition of habitual residence has been made by the Council of Europe, but it is little used and adult-focused.[120] Nevertheless, while recognizing the limits of guidance, it could be, suitably amended to focus on children and to take into account the established jurisprudence, a template for the Hague Conference on Private International Law to develop a *Good Practice Guidance* to provide a global steer on the broad approach to be taken in establishing the habitual residence of children.

As the CJEU commented in *Mercredi v Chaffe*, the social and family environment of the child 'comprises various factors which vary according to the age of the child'.[121] In our view, there is a need to more explicitly recognize not only that the factors to be considered might be different, but that the test itself may need to be applied differently according to the child's age. With regard to babies or newborn children, the concept of habituality is nothing short of fictional.[122] Babies cannot be said to be 'habitually' resident anywhere in their own right for at least a period following birth. There is therefore a choice between looking to their physical presence alone to establish habitual residence, or to their

[117] Above (n 34).

[118] Above (n 2) and outlined above, at pp. 14–15.

[119] [2017] EWCA Civ 80, at [62].

[120] Standardization of the Legal Concepts of 'domicile' and of 'residence': Resolution (72) 1 and Annex Adopted by the Committee of Ministers of the Council of Europe on 18 January 1972 at the 206th meeting of the Ministers' Deputies.

[121] *Mercredi* (n 76) at para. 53. The court in that case distinguished between infants, school age children, and those who had left school. It did not expand on how the factors to be considered might differ between them.

[122] See also R Cabeze, 'The Habitual Residence of Newborn Babies' [2015] *International Family Law* 328.

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integration with a carer or family unit, or holding that they have no habitual residence. The first option can be dismissed – it is clear that physical presence alone is not the test for habitual residence. Taking the view that babies have no habitual residence until independently integrated into society produces undesirable results. It would mean that the Abduction Convention could not apply and would have significant implications in relation to jurisdiction and the ability to make orders under the 1996 Child Protection Convention and Brussels IIb. It is clearly preferable to look at babies' integration with their primary carer. This avoids the problems attendant with the conclusion that babies have no habitual residence. But if that is the case, why is there an additional need to establish a factum of residence? Is there any more artificiality in holding the day-old child in *Wirral MBC v AZM*[123] to have a habitual residence in the UK than there would have been to hold the same about the child in *A v A*[124] whose birth and presence outside the jurisdiction were due to her mother being held overseas against her will? The generally accepted answer is that, because the test is a factual one, it cannot be possible for a child to have her habitual residence in a country to which she has never, as a matter of fact, been. In this respect, we find convincing Lord Hughes's reasoning in *A v A*[125] that in these cases, the only relevant issue is the baby's integration with the carers and the latter's habitual residence. This approach not only avoids the 'gloss' that there must always have been some physical presence, but also provides a pragmatic solution to the innate problem that the concept of 'habitual' residence must in truth be a fiction in relation to babies.[126]

At the other end of the age spectrum are older children for whom a more, or exclusively, child-centred approach seems appropriate. For these children, the test must focus on the child's own ties with the country in question (such as strong and important friendship groups, involvement in schools, colleges, sports teams, and community activities), the child's state of mind at the relevant time, and, arguably, given their relevance to the state of mind, the child's intentions about the matter.[127] More challenging are those children who are neither too young to have started to make links which could indicate integration with the community (making friends, attending institutions like school) nor so mature that an exclusively child-centred approach might reasonably be considered appropriate. In practice, it is this age group with which the courts will most commonly have to deal, at least under the Abduction Convention (according to the 2021 Statistical Study of the application of the Hague Abduction Convention, for example, 48 per cent of the children involved in return applications were aged between three and seven years).[128] For this group, the broad integration approach is appropriate but the weight to be given to the child's state of mind remains a challenge, as does the importance of parental intention. On the latter, we suggest that a more appropriate approach is to recognize that the parental position *is* relevant to the child's position but as something to be looked at through the eyes of the child.

[123] Above (n 83).
[124] Above (n 15).
[125] Discussed above.
[126] As discussed by Clive (n 23), at p. 146.
[127] It is interesting to speculate at what point and how the child-centred approach might mutate into the adult 'centre of interest' test (in which intention plays a significant role see e.g. *IB v FA*, (n 11), and *MPA* (n 11)).
[128] See N. Lowe and V. Stephens, 'A Statistical Analysis of Applications Made in 2021 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction', Preliminary Documents No 19A (Revised, 2024), <http://www.hcch.net/index_en.php?act=progress.listing&cat=7> accessed 9 April 2026. Only 2% were under 1 and 8% between 13 and 15.

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One possible way forward would be more overt recognition that the child's age is of critical importance to the weight to be given to different factors relevant to the determination of habitual residence. Such recognition might help to clarify thinking about how to apply the habitual residence test. We recognize, however, that there remain difficult challenges. It cannot be gainsaid that because establishing habitual residence is fact-specific, the concept can be and will remain problematic and unpredictable. In other words, notwithstanding the courts' now more principled focus on the child's situation, some children's extreme youth and their obvious close reliance on carers, and challenges around ascertaining and weighing older children's state of mind, can all mean there will continue to be habitual problems in applying the habitual residence test for children.

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International Journal of Law, Policy and The Family, 2026, 40, 1–20
https://doi.org/10.1093/lawfam/ebag018
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