



**The Concepts of Habitual
Residence and Ordinary
Residence in Light of
Quebec Civil Law,
the 1985 *Divorce Act* and
the Hague Conventions
of 1980 and 1996**

**Family, Children and Youth Section
Research Report
September 2006**



**The Concepts of Habitual Residence and Ordinary
Residence in Light of Quebec Civil Law,
the *Divorce Act* and
the Hague Conventions of 1980 and 1996**

Prepared by:
Gérald Goldstein
LL.D., Full Professor
Faculty of Law, Univ. de Montréal

Presented to:
Family, Children and Youth Section
Department of Justice Canada

*The views expressed in this report are those of the author and
do not necessarily represent the views of the Department of Justice Canada.*

Aussi disponible en français

This paper was written in French under the title, *Les notions de résidence habituelle et de résidence ordinaire à la lueur du droit civil québécois, de la Loi sur le divorce et des Conventions de La Haye de 1980 et de 1996.*

This translation was commissioned by the Department of Justice Canada.

This report may be reproduced, in part or in whole, and by any means, without charge or further permission from the Department of Justice Canada, provided that due diligence is exercised in ensuring the accuracy of the materials reproduced; that the Department of Justice Canada is identified as the source department; and that the reproduction is not represented as an official version of the original report.

TABLE OF CONTENTS

OVERVIEW	1
PART I: HABITUAL RESIDENCE IN QUEBEC LAW AND UNDER THE 1980 AND 1996 HAGUE CONVENTIONS	3
Question 1: Meaning of “residence” in Quebec civil law.....	4
1.A Traditional definition of residence.....	4
1.B Meaning under <i>Civil Code</i> : <i>stable</i> and therefore <i>ordinary</i> residence	4
Question 2: Meaning of the concept of habitual residence in Quebec civil law and under the 1980 and 1996 Hague Conventions	6
2.A Meaning of the concept of “habitual residence” in Quebec civil law.....	6
2.B Meaning of the concept of “habitual residence” under the 1980 Hague Convention on International Child Abduction	15
2.C Meaning of the concept of “habitual residence” under the 1996 Hague Convention on Child Protection	34
Question 3: Differences of interpretation of the concept of “habitual residence” in Quebec civil law and under the 1980 and 1996 Hague Conventions	36
3.A General rules of interpretation of habitual residence	36
3.B Specific rules on habitual residence	37
PART II: HABITUAL RESIDENCE AND ORDINARY RESIDENCE IN QUEBEC LAW AND UNDER THE <i>DIVORCE ACT</i>.....	49
Question 4: Existence and meaning of the concept of ordinary residence in Quebec civil law ...	50
4.A Absence of specific meaning	50
4.B The terms “ordinary residence” and “habitual residence” are understood as one concept	50
Question 5: Is there a difference of interpretation in Quebec case law between the French version (“résidence habituelle”) and the English version (“ordinary residence”) of article 77 of the <i>Civil Code</i> ?	51
Question 6: Is there a difference of interpretation in Quebec case law between the French version (“résidence habituelle”) and the English version (“ordinary residence”) of sections 3, 4 and 5 of the <i>Divorce Act</i> ?	52
Question 7: Is there a difference in Quebec law between “résidence habituelle” and “résidence ordinaire” or “ordinary residence”?	54

OVERVIEW

The first part of this report is devoted to the concept of habitual residence in Quebec civil law and the 1980 Hague Convention on International Child Abduction and 1996 Hague Convention on the Protection of Minors. The second deals with the concepts of habitual residence and ordinary residence under Quebec civil law and the *Divorce Act*.

PART I: HABITUAL RESIDENCE IN QUEBEC LAW AND UNDER THE 1980 AND 1996 HAGUE CONVENTIONS

We will answer the following questions:

- Q. 1** What is the meaning of the concept of “residence” in Quebec civil law?
- Q. 2** What is the meaning of the concept of “habitual residence”
 - A. in Quebec civil law?
 - B. under the 1980 Hague Convention on Child Abduction?
 - C. under the 1996 Hague Convention on the Protection of Minors?
- Q. 3** Does the interpretation (in the case law) given to the concept of “habitual residence” under the Hague Conventions differ from the one given under Quebec civil law?

Question 1: Meaning of “residence” in Quebec civil law

This expression is defined as the act of a person ordinarily residing in a place (see Deleury and Goubau, n. 185, page 235).

1.A Traditional definition of residence

In Quebec law, residence has traditionally been defined abstractly, *legally*, as [TRANSLATION] “the *place* where a person resides” (*Dictionnaire de droit privé*). In *material terms* “residence” is also (in principle) the building in which a person resides. Accordingly, the concept of “family residence” materialized in articles 401 *et seq.* *Civil Code*, i.e. the dwelling of a married couple.

On this point, Sénécal J. stated in the Superior Court in 1996, in *Droit de la famille — 2617*:¹

[TRANSLATION]

Unlike the concept of domicile, the concept of residence is in principle a strict question of fact that does not involve intention. A person resides where he or she *in fact* lives. It is of little importance whether the person has been settled at that location for a temporary, definite or indefinite period.

However, some decisions rendered before the adoption of the new *Civil Code* (C.C.Q.)² had already refined this definition, particularly in municipal law, by adding a condition of *permanence*.³ The idea was that persons who were occasionally present should not be subject to local law. The laws in question did not indicate, however, whether the residence should be permanent or habitual for the law to apply. The courts have therefore complemented the law in accordance with its purpose.⁴

1.B Meaning under *Civil Code*: *stable* and therefore *ordinary* residence

As a result of article 77 C.C.Q.’s definition of residence as “the place where [a person] *ordinarily* resides”, Quebec civil law in principle regards “residence” as equivalent to “*habitual* residence”, unless otherwise defined in a specific statute. Accordingly, the civil law in principle currently only attaches legal consequences to habitual residence, *not to brief and occasional residence*. Residence, which implies stability, is to be distinguished from simple *habitation*, which refers to a brief or occasional stay.⁵ This idea, linking residence and permanence or stability of the stay, has been expressly adopted in article 77 C.C.Q.

¹ J.E. 97-539, [1997] R.J.Q. 1011, [1997] R.D.F. 374.

² See recently *Brizard v. Boivin*, AZ-50221510, J.E. 2004-640, S.C. Trois-Rivières, February 12, 2004, No. 400-17-000623-039. See also:

³ See *Cloutier v. La municipalité du Lac Simon*, [1969] R.L. 519; *Ovide Provost v. Roméo Lefort et La corporation municipale du village de St-Chrysostome*, [1980] S.C. 1013.

⁴ [1922] 32 K.B. 229.

⁵ E. Deleury and D. Goubau, *Droit des personnes physiques*, Y. Blais, 1994, n. 262, p. 226.

Quebec law recognizes that a person may have several habitual residences. In analyzing change of domicile (article 76 C.C.Q.), the Code considers that we should use the principal residence (without specifying). Analysts have considered that we should refer to the place a person [TRANSLATION] “ordinarily frequents”, that is, the place he or she [TRANSLATION] “most often occupies”.⁶ In this sense, habitual residence is very similar to *ordinary* residence. We should certainly consider that the assessment of the *principal* residence objectively depends **quantitatively** on the **length of the stay**.⁷

Quebec law expressly recognizes that a person may have no habitual residence (article 78(2) C.C.Q.: “A person who has no residence is deemed to be domiciled at the place where he lives”).

Finally, as this rule also illustrates, Quebec law distinguishes between residence and mere presence (the place where a person is).

⁶ Deleury and Goubau, *ibid.*, n. 280, p. 233

⁷ However, if in exceptional cases such a calculation could not adjudicate between the residences, qualitative factors could then be taken into account, such as the use of the premises (management of business, only for vacation and so on). However, we would then be drawing close to the concept of “principal establishment”, which is an essential aspect of domicile.

Question 2: Meaning of the concept of habitual residence in Quebec civil law and under the 1980 and 1996 Hague Conventions

2.A Meaning of the concept of “habitual residence” in Quebec civil law

In *Droit de la famille — 2617*⁸ the Superior Court defined the concept as follows:

[TRANSLATION]

It has been held that a person’s *habitual* residence is the place where he or she regularly, normally, customarily lives . . . “Habitual residence” requires more durable ties than mere residence . . . Habitual residence is therefore not just where a person is passing through.

Similarly, in *S.F. v. C.L.*,⁹ the Superior Court said in 2003:

[TRANSLATION]

26. Residing means “having one’s residence at a particular place, living there habitually” [*Dictionnaire Le Petit Larousse*, 2003, pp. 884 and 498], while the word “habitually” means “almost constantly, generally” [*Dictionnaire Le Petit Larousse*, 2003, p. 498].

In *L.L.A. v. J.P.A.*,¹⁰ in 2004, in a divorce proceeding, the Superior Court also said:¹¹

[TRANSLATION]

Habitual residence is the place where a person lives on a daily and habitual basis.

While in theory the concept of habitual residence seems quite clear, in practice serious problems arise in cases where the situation at issue is related to a **change in residence**, which is often the case in situations of international child abduction. The problem arises from the fact that the required period of time of the residence is open to question.¹² It is aggravated by the short period of residence generally relied on when the proceeding for the child’s return is initiated.¹³ The tests used to determine when the new residence becomes a habitual one are not clear and precise enough to remove all doubt. To what extent should the parents’ intention of returning to the place of origin be taken into account? How much time should pass before the new residence becomes habitual? Can this happen instantly? In fact, no rule has been codified in Quebec law to

⁸ *Supra*, note 1.

⁹ [2003] J.Q. n. 10672.

¹⁰ [2004] J.Q. n. 8586 (S.C.).

¹¹ In this regard, the Court referred to the following precedents: *Anema v. Anema* (1977), 27 R.F.L. 156 (Man. Q.B.); *Hardy v. Hardy*, 2 R.F.L. 50, [1969] 2 O.R. 875, 7 D.L.R. (3d) 307 (H.C.); *Thomson v. M.N.R.*, [1946] S.C.R. 209, at 231-232; *Byrn v. Mackin* (1983), 32 R.F.L. (2d) 207 (Que. S.C.); *Jutras v. Société Radio-Canada*, [1998] R.L. 294 (S.C.); *Da Silva v. Jodoin*, [1993] R.D.J. 334 (C.A.); *Droit de la famille — 2279* [1995] R.D.F. 695 (S.C.), *Droit de la famille — 2054*, [1997] R.J.Q. 1124 (S.C.).

¹² E.M. Clive, “The Concept of Habitual Residence”, [1997] *Juridical Review* 137, 142.

¹³ P. Rogerson, “Habitual Residence: The New Domicile?”, (2000) 49 *I.C.L.Q.* 86, 101.

determine when the change of residence takes place (unlike change of domicile under article 76 C.C.Q.).

However, in *Droit de la famille — 3713 (D.M.D. v. E.V.)*,¹⁴ the Court of Appeal summed up as follows the principal rules relating to the habitual residence of a child, in a situation of international abduction. This case, together with *Droit de la famille — 2454*,¹⁵ are regarded as the key authorities on the subject:

WHEREAS the concept is to be understood according to the ordinary and natural meaning of the words;

WHEREAS the determination of a child’s habitual residence is usually regarded simply as a question of fact to be decided by reference to all the circumstances of any particular case (*Droit de la famille — 2454*, [1996] R.J.Q. 2509);

WHEREAS the place of habitual residence of a child will be determined by focusing on the reality of the child, not that of the parents;

WHEREAS an appreciable period of time—one of a duration necessary for the child to develop ties and to show signs of integration into his new environment—should elapse before a new habitual residence might be acquired;

WHEREAS the child should have a real and active connection with the place of his residence;

WHEREAS to be habitual the residence must have achieved a certain degree of continuity;

WHEREAS there is no minimum period necessary in order to establish the acquisition of a new habitual residence.

We may summarize as follows these rules, which are largely drawn from *Droit de la famille — 2454*.

Rule 1—The concept of “habitual residence” is to be understood in the ordinary and natural meaning of the words

This rule is largely theoretical.¹⁶ Accordingly, the Court of Appeal found it necessary to add the following rules.

¹⁴ [2000] Q.J. No. 2967.

¹⁵ [1996] R.J.Q. 2509.

¹⁶ As Lord Scarman quite properly said, as adopted by Judge Kozinski in *Mozes v. Mozes*, HC/E/USf 301: “Though the meaning of ordinary words is a question of fact, the meaning to be attributed to enacted words is a question of law, being a matter of statutory interpretation. So . . . a question of law arises as to the meaning of [habitual residence], even though it arises only at a preliminary stage in the process of determining a question of fact”.

Rule 2—The determination of a child’s habitual residence is usually regarded simply as a question of *fact* to be decided by reference to *all the circumstances*

This is a question of fact (understood in the sense of material, concrete facts), not of law.

In this sense, in *L.Y.P. v. M.E.*,¹⁷ in 2004, the Superior Court said, relying on a New Zealand decision¹⁸ rendered in a child abduction case, that habitual residence in a place does not necessarily have to be legal from the standpoint of immigration law: the condition will be met if a person resides in a country for a certain time, even if the person is only tolerated there because his or her legal status has not been determined definitively.

The underlying idea is to facilitate the judge’s task (especially in child abduction cases which require more expedient proceedings). In principle, it is a matter of proving material *facts* and not, like in domicile matters, a matter of verifying whether legislative provisions have been observed or determining the intention of a person.¹⁹

However, as one writer remarks, this may be overly optimistic²⁰ because the notion of facts is not specific: What facts should be taken into account? Rules must therefore be developed which will determine how, in practice, residence should be identified.²¹

Certain *primary* facts are easily identified and usable, such as lasting presence of a person in a place, which has already occurred, or the existence of ties to a place (friends, family, sitter, toys, tax returns, driver’s licence, furniture).²²

Certain other primary facts are difficult to assess. Their meaning can be deduced from the *circumstances*. Thus, in *M.-P.L. v. M.I.B.L.*,²³ the Superior Court said at n. 64:

¹⁷ [2004] J.Q. n. 13967 (S.C.).

¹⁸ *H. v. H.*, [1995] 12 FRNZ 498, pp. 1 and 2, cited at n. 48 of the Quebec decision.

¹⁹ The intention of individuals is relevant when there is a change of domicile. Case law dating from before the new *Civil Code* recognized that there was no difference between the concepts of domicile in common law and in Quebec law (*Wadsworth v. McCord*, (1886) 12 S.C.R. 466, at 478). It was recognized that the change required proof of intention not to return to the former domicile, and that “the *animus manendi* necessary to change the domicile of origin to a new domicile means a fixed and settled purpose” to abandon the former domicile (*Trottier v. Rajotte*, [1940] S.C.R. 203). In *Trottier v. Rajotte* the Supreme Court also said: “A domicile of origin is not lost by the fact of the domiciled person having left the country in which he was so domiciled with the intention of never returning. It is essential that he shall have acquired a new domicile, that is to say, that he shall in fact have taken up residence in some other country with the fixed, settled determination of making it his principal place of residence, not for some particular purpose, but indefinitely”. This idea is now expressed in article 76 C.C.Q. Accordingly, in this analytical framework, if the intention concerns residence, it is not used for determining the residence, but is added to it to modify domicile. This interrelationship in the analysis of change of domicile may lead to confusion and suggest that the question of intention is a component or even condition of residence, whereas it is only external to residence.

²⁰ J.G. Collier, *Conflict of Laws*, 3rd edition, Cambridge Un. Press, 2001, p. 55.

²¹ Thus, the question of determining habitual residence is a question of fact, but from the standpoint of appellate courts it nevertheless requires the application of rules, which may eventually lead to a review of lower court decisions.

²² Thus, see as a good example *N.K. v. R.V.*, [2004] R.D.F. 572 (S.C.), AZ-50254383, J.E. 2004-1360 (divorce).

²³ [2002] R.D.F. 982 (S.C.).

[TRANSLATION]

At the time M. left for Quebec, Canada, his place of residence and domicile were in Surinam, where his parents then resided, although temporarily, i.e. during the term of the father's contract with C.

In the circumstances, the four-year term of the work contract of the father, who had taken his family to Surinam with him, though temporary i.e. not for the indefinite future was enough for them to be habitually resident in that country and for the child, age three, also to be considered resident there just before her abduction to Barbados, and then Quebec, even though she had actually spent barely three months there (but 19 months before in Barbados, for the term of a previous work contract).

In addition to primary facts which can easily be determined, the court may “examine the situation in more general terms, going beyond the purely factual situation”, that is, examine other circumstances which make it possible to determine *inter alia* the importance of these facts, or which can even perfect the analysis.²⁴

The concept of fact also includes the *material* acts of the person concerned. The importance of the material acts is often not clearly understood also in terms of the *circumstances*, in particular the *intentions* of the parties involved. For example, the purchase of a house as such refers more to a future *intention* to go on residing in a particular place, as does leaving without leaving any property behind.

Accordingly, the *intention* of a person or parent may be regarded as a *fact*, though immaterial, secondary, subjective which should still be taken into account in understanding the primary facts, such as the importance of the length of a stay.²⁵

If, on the contrary, the concept of fact is limited to material and apparent events, the intention of the persons concerned may still be included *in the circumstances* (not limited to material circumstances), which should be taken into account in assessing the scope of the facts, according to the Court of Appeal.

First, it is worthwhile to point out that the Court has stated that residence is usually a question of fact, without definitively excluding any consideration of a person's intention, and second, *that all circumstances* have to be taken into account.

²⁴ In *S.E. v. T.R.* [2003] J.Q. n. 11746, the Superior Court in 2003 said, after citing the leading cases in this area: [TRANSLATION] Even considering the situation in more general terms, going beyond the purely factual situation, the conclusion remains the same. The letter of July 15, 2003. . . states that the father was hired on June 14, 2001. The mother then claimed that the two-year assignment ended on June 14, 2003 and that the employment contract had accordingly expired when she left France on June 27, 2003. The family residence was then once again in Quebec. The Court does not agree with this interpretation, since it does not reflect reality. Further, as of today, the father is still working in Paris for S. Additionally, the out-of-court testimony of A. D. clearly indicates that the two-year period is a bare minimum. When the employment contract was signed in June 2001, neither S. nor the father discussed or even considered his returning to Quebec after only two years”.

²⁵ This indicates that courts of appeal will be called upon to determine whether the rules relating to the concepts of habitual residence have been correctly applied (cf. *Mozes v. Mozes*).

In this sense, in *C.E.S.*,²⁶ Grenier J. more appropriately distinguished the [TRANSLATION] “objective method” (not taking intention into account) and the [TRANSLATION] “subjective method” (taking into account intention as well as the significant facts, or the circumstances surrounding them) to determine habitual residence.

See also *Rees v. Convergia, Convergia Networks Inc.*,²⁷ a case where the Court had to determine whether an employee was resident in Quebec, when he was working there and lived there in a rented apartment:

27. Not only did he not manifest an intention of establishing a residence in Quebec but by his actions and statements Plaintiff’s intentions clearly indicated the contrary. He did everything to remain within the legal jurisdiction of the United States or one of its individual states. Indeed, one can conclude that he went out of his way to maintain his residence within such jurisdiction such that he remained habitually resident in Iowa. The temporary stops used by him for purposes of his employment in various places from time to time can only be deemed temporary accommodations or “pieds à terre”.

However, to the contrary, we may refer to Chamberland J.A.’s views on a child’s residence in *Droit de la famille — 3451* in the Court of Appeal, regarding article 77 C.C.Q.

[TRANSLATION]

The choice of this concept of “habitual residence” is deliberate. It avoids any discussion of either parent’s intention to establish domicile at one place rather than another. It introduces subjective and specific considerations into determining the domicile of a minor child of a couple no longer living together. Those considerations are more easily measurable by the Court than attempting to determine the parties’ intentions.

In that case, Chamberland J.A. reversed a decision of a lower court in circumstances quite similar to those in *Re J.* (a child born a year before in Ontario abducted by the mother, who took him back to Quebec) on the following grounds:

[TRANSLATION]

Accordingly, in my opinion the trial judge incorrectly relied on the respondent’s intention “to remain in Quebec” as a basis for concluding that the Superior Court had jurisdiction to rule on the custody of W. Applying the “habitual residence” test, the trial judge should have concluded that at the time he heard the dispute between the parties, in early February 1999, the “habitual residence” of W. . . was in Toronto, Ontario. He was born there and had lived there with his two parents from his birth until January 28, 1999 [the date of the abduction] . . . He had his own room, equipped with children’s furniture and accessories, in the house rented by his parents in Toronto. All of these factors objective, concrete factors and independent of the intentions of either parent should have led the trial judge to find that the habitual residence of W. was in Toronto, where his father was still living.

²⁶ *C.E.S. v. E.V.*, [2002] R.D.F. 874 (S.C.), J.E. 2002-1904.

²⁷ S.C. Montréal 500-17-017494-033, 2004-03-11, AZ-50225541, J.E. 2004-975, D.T.E. 2004T-500, at n. 27.

Accordingly, we can infer that in the circumstances of *Re J. Chamberland* J.A. would certainly not have said that the child's habitual residence was no longer in Australia and would not have attached any weight to the mother's intention, unlike the decision by the House of Lords, but consistent with the traditional view of the concept of habitual residence in civil law.²⁸

This rule, which disregards the parents' intention, has been affirmed several times to ensure that parents do not manipulate their own residence in order to alter their children's residence.²⁹

In Quebec law, a person's intention to reside in a place therefore cannot alter the circumstances or the primary facts pointing clearly to some other place.

Rule 3—The child's habitual residence will be determined by focusing on *the reality of the child*, not that of the parents

In *Droit de la famille — 2454*, Chamberland J.A. stated this rule:³⁰

²⁸ The judge went on: [TRANSLATION] "As the case is one of illegal removal, I think it would be entirely inappropriate to take facts subsequent to that removal into account to determine the child's place of "habitual residence". The unlawful removal of a child cannot be the basis for a legal change in its domicile. The contrary view would only encourage parents who were dissatisfied with a jurisdiction to take the law into their own hands and change jurisdictions in the hope conscious or unconscious that the courts there would be more sympathetic to their case. The *Hague Convention on the Civil Aspects of International Child Abduction* is intended to discourage this type of conduct; article 3142 C.C.Q., and as a consequence article 80(2) C.C.Q., are to the same effect and also allow the judicial authorities of Quebec to discourage such conduct, even in cases in which the *Act respecting the civil aspects of international and interprovincial child abduction* does not apply". This is a very clear statement of an essential reason for not taking the parents' intention into account in determining the child's habitual residence: the purpose is to discourage fraud on the courts and on the law, in the end.

²⁹ See also: *A.I. v. R.M.C.*, [2004] J.Q. n. 7484 (S.C. Montréal, July 2, 2004) at n. 21: [TRANSLATION] "It is important to bear in mind that the parents' intention will be of no importance in determining the habitual residence of B., as this question refers essentially to the facts". Similarly, in *Droit de la famille — 264*, [1997] A.Q. n. 1224 (S.C.), the Superior Court, at n. 63, referring to the comments of Chamberland J.A. in *Y.D. v. J.B.*, [1996] A.Q. n. 2916 (C.A.), refused to take into account a proposed agreement whereby the parents would return to Quebec, while in fact the child who had been abducted had since birth always lived in Martinique (France). In the circumstances, the existence of the agreement was not certain, as the wife's intention was not clearly expressed. This clearly demonstrates the problems regarding the use of intention in making a rapid determination of a child's habitual residence. See also *Droit de la famille — 2675*, AZ-97026241, B.E. 97BE-583, S.C. April 22, 1997, n. 200-04-003138 979, citing the same case: [TRANSLATION] "Under the case law, this concept is a question of fact involving the child's reality, not the intention of the parents". Again, in *S.F. v. C.L.*, [2003] J.Q. n. 10672, the Superior Court said in 2003: [TRANSLATION] "The purely factual test employs objective and concrete factors, independent of the intentions of either parent. Only the child's reality is relevant: moreover, one must look to the past, before the dispute arose, to determine it since it is and cannot be 'in the process of becoming' ". On that point, we may also refer in this regard to what was said, although in *obiter*, by Dalphond J. (as he then was) in the Superior Court in 1999 in *Droit de la famille — 3597* (*S.G. v. R.S.*), AZ-00026276, B.E. 2000BE-573, [2000] R.L. 183: [TRANSLATION] "Unlike the concept of domicile, which involves intention (see article 76 C.C.Q.), the concept of residence is purely factual . . . the fact that the father may intend to return to Montréal as soon as he can find employment comparable to what he currently has in Hanover in no way alters the fact that he is currently residing, habitually, in New Hampshire. He has been working in that American state for over two years; he earns his income there and has his apartment there where most of his clothing and furniture are located. Moreover, he pays his taxes in the United States and has ceased filing returns in Canada and Quebec".

³⁰ *Supra*, note 15.

[TRANSLATION]

Only the children's reality should be taken into account in determining the place of their "habitual residence"; in this regard, the Court should look only at the children's experience, because the wishes, desires or intentions of their parents do not count in deciding on the place of their "habitual residence" at the time of their removal.

Accordingly, in *Droit de la famille — 3713 (D.M.D. v. E.V.)*,³¹ the fact that the children's stay in England was initiated by some sort of agreement between the parents, with a resolutive condition, should not have been taken into account.

Similarly, in *H.H.N. v. O.X.Ng.*,³² when the mother left Bangkok with her children to go back to her family in Montreal, the Superior Court examined the situation of the parents and determined that they only had a temporary residence in Bangkok, where they were supposed to stay for two years as long as the father's work contract lasted. Then, referring to *Droit de la famille — 2454*, the Court concentrated on the specific reality of the children as follows:

[TRANSLATION]

[86] Seen from the children's standpoint, this is what confirmed the temporary aspect of their stay: they were only in Thailand as dependents of a father whose visa, work permit and work contract were temporary; in Thailand they lived first in a hotel for expatriates, and then in a compound for expatriates; C attended an English school although his mother tongue was French; this school was a school for expatriates; the children did not speak Thai; at his age Ch in any case did not speak yet; the children had no connection to the Thai population and culture; and the children had some friends, but most of their connections were with family in Montreal.

Similarly, in *R.A. v. B.As.*,³³ the Superior Court stated:

[TRANSLATION]

[30] When the respondent joined Mr. A. in Florida in September 2001 with the children, they moved to the house he rented for the family. The children had their own room, as did their half-sister J. The father looked after them when he returned from work, took them to the playground or to restaurants from time to time, prepared their breakfasts and played with them. [31] Ms. As. remained at home with the children and on December 3, 2001, she enrolled Al. in dance and swimming courses at the YMCA and also enrolled the family . . . [33] In our opinion, the children's lives since late September 2001 indicated that their habitual residence was in Florida and that they had unlawfully been removed to Quebec in February 2002 without their father's consent.

³¹ *Supra*, note 14.

³² [2002] R.D.F. 604 (S.C.), AZ-50129220, J.E. 2002-1248.

³³ [2002] R.D.F. 429 (S.C.).

Finally, in 2003 the Superior Court said in *S.S.-C. v. G.C.*:³⁴

[54] Connecticut is where the children have lived since March of 2001; this is where they have attended school, made friends and enjoyed their daily activities. It may be that one of the parents had other plans for the future but, for E..., C... and F..., A, Connecticut, was their habitual residence. [55] Focusing on the children's reality, the Court comes to the conclusion that their habitual residence on June 29 was Connecticut.

Rule 4—To be habitual, the residence must have achieved a certain degree of *continuity*

This rule relates to the temporal aspect of residence. For this, there must be evidence of some *settled existence*: the situation must be sufficiently settled. The very purpose of the legislation on child abduction is to avoid unsettling the child, which is not in the child's best interests. That is why he should be taken back to the place of his habitual residence, thereby responding to this need for stability, which is necessary for healthy development.

Accordingly, in *J.T. v. L.-A.B.*, [2002] R.D.F. 50 (S.C.), a case which involved determining where the children were habitually resident when they were taken by their mother to Montreal, when the family was moving from California to New Hampshire, the Superior Court considered that they had not begun to integrate in Massachusetts, as they had only stayed in a hotel for two days.

Nevertheless, the continuity does not have to be absolute: there can be temporary or occasional absences.

However, in terms of legal logic this requirement seems redundant, insofar as interpreting residence itself as a *stable stay*, without requiring that the term "habitual" be added (see question 1). Nevertheless, these are practices developed under the former *Civil Code*, in which residence was not equated to habitual residence.

However, in the decision by the Court of Appeal in *Droit de la famille — 3451*, Chamberland J.A. correctly viewed this as [TRANSLATION] "the affirmation of a desire to make the *Civil Code* vocabulary correspond to the international law vocabulary", in particular that of the 1980 Hague Convention. The Minister of Justice's comments are in this vein.³⁵

Rule 5—Although no *minimum period of time* is required to acquire new habitual residence, there must be a *sufficient period of time* for the child to develop ties and to show signs of integration into his new environment

This rule, which consists of two propositions, also affects the temporal aspect of residence. The second proposition is quite clear, and we can put forward that the existence of the new habitual residence requires evidence of integration with regard to the child himself (psychological reports

³⁴ [2003] R.D.F. 845 (S.C.).

³⁵ Under article 77 C.C.Q., it is stated that : [TRANSLATION] "The definition introduced by this article incorporates into the Civil Code a very current concept. . . in private international law, that of habitual residence": *Comments of Minister of Justice*, t. 1, Publications du Québec, 1993, p. 62.

and so on). For example, enrolment in a school, a factor that is external to the child, will be insufficient.

However, the first proposition is ambiguous. First, we might ask whether this implies that new residence can be acquired in a single day. The answer is probably that it can, in theory, but provided that it could be established, which would in practice generally require a certain period of time, according to the second proposition. There is therefore a contradiction between theory and practice.

However, the second interpretation of this rule may actually be that there is no predetermined, *fixed period*³⁶ (unlike the requirement of one year in divorce matters or the five-year period in the 1985 Hague Convention on Succession).

In *Droit de la famille — 3713*, the Court of Appeal held that a period of three months was sufficient to establish new residence in England, though the children in question had previously lived in Quebec for seven years. On the other hand, in *H.H.N. v. O.X.Ng.*,³⁷ it was held that five months in Bangkok was insufficient to change the habitual residence of children who had previously resided in Ontario.

This therefore means that *no firm rule* can be used here and that *everything depends on the circumstances* (the parents being in a new place, climate, length of a work contract of the parent on whom the children are dependent and so on) and on the child (depending on his or her personality and age, the child will integrate quickly or slowly).

We must then ask whether, in these circumstances, when dealing with facts that are difficult to interpret, the *intention* of the persons involved can replace the period of time in order to clarify the scope of the primary fact: the geographical change in the place of residence. Most Quebec precedents do not appear to accept this, but there are some minority judgments to the contrary.

In *R.A. v. B.As.*,³⁸ the Superior Court considered, in circumstances involving quite rapid and repeated removals, that five months' residence in Florida was sufficient to consider that the children in question had their habitual residence there. It is clear, in this rather difficult case, that if the parents' intention had been used as a relevant factor, no determination could have been made since their intentions were contradictory.

Rule 6—The child should have a *real and active connection* with his place of residence

Quebec law thereby distinguishes residence and mere presence (the place where a person is), since mere presence does not establish any *real connection unless it is associated with temporal stability*. Article 76 (2) C.C.Q. also implicitly states that **habitual residence is not mere presence**.

³⁶ E.M. Clive, "The Concept of Habitual Residence", [1997] *Juridical Review* 137, 143, note 31: "That may just be a loose and inaccurate way of saying that no fixed minimum period is required", with reference to the Scots case *Cameron v. Cameron*, [1996] S.L.T. 313, which seems to be the origin of this rule in the mind of the Quebec Court of Appeal.

³⁷ *Supra*, note 32.

³⁸ [2002] R.D.F. 429 (S.C.), AZ-50122487, J.E. 2002-911.

Thus, in *J.T. v. L.-A.B.*,³⁹ the Superior Court said concerning children who had stayed in Massachusetts for two days in transit on the way back from California:

It is apparent that they had not been in Cambridge an appreciable amount of time, that they had no real and active connection with Cambridge.

It can also be argued, somewhat paradoxically, that this rule perhaps means that **the loss of habitual residence may be immediate** insofar as, just after a move, the child has no further *real* connection with the former location, even if he still has an intellectual connection with it.

It is also conceivable that this rule is derived from the rules already stated, or illustrates them. Thus, the connection will be *real* if it is *continuous* (rule 3) or affects the reality of the children themselves (rule 2). Similarly, the connection with the child will be *active* if it affects the child's own reality (rule 2) and if it is assessed over a sufficient period of time for the child to develop ties and show signs of integration into the new environment (rule 4).

2.B The meaning of the concept of “habitual residence” under the 1980 Hague Convention on International Child Abduction

This concept is not defined in the Convention. It originates in other Hague Conventions (concept adopted in the 1900 session), and is found in particular in a 1954 Hague Convention, where it is also not defined. Accordingly, the interpretation of these Conventions in the case law gives its meaning to habitual residence.⁴⁰

³⁹ [2002] R.D.F. 50 (S.C.). This rule was also applied, without much comment, in *A.I. v. R.M.C.*, [2004] J.Q. n. 7484 (July 2, 2004, Montréal S.C.) at n. 25.

⁴⁰ Our study looked at 137 judgments in the INCADAT under Article 3 of the 1980 *Hague Convention*. We assume that this sample was sufficiently representative of the trends noted. However, from a quick search that we made, the INCADAT bank seems to contain at least 278 judgments on the concept of habitual residence.

Though certain rules are generally accepted by all States applying the Convention, there are considerable differences in the way a number of rules have been interpreted, despite good intentions to maintain uniform interpretation to avoid problems relating to domicile.⁴¹

With these divergent positions in mind, the “factors” relating to habitual residence were stated as follows in *C. v. T.*:⁴²

(a) Question of Fact: It is settled law that the habitual residence of a person in a specific country is a “question of fact to be decided by reference to all the circumstances of any particular case”. Per Lord Brandon of Oakbrook in *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 3 WLR 492 (House of Lords) at 504, paragraphs (c)-(d) and *H. v. H.*, [1995] 13 FRNZ 498, at 501, *per* Greig J.

(b) Natural and Ordinary Meaning (settled and voluntary): Greig J. in *H. v. H.* at page 501 stated: . . . “that the construction of the phrase ‘habitual residence’ has no particular legal magic. It is to be construed in the ordinary meaning of the words. The essence of ‘habitual’ is customary, constant, continual. The opposite of that is casual, temporary or transient.”

(c) Continuity: There is required a degree of continuity to enable habitual residence to be described as settled. Refer Sir Stephen Brown P. in *V. v. B. (A minor) (Abduction)* [1991] 1 FLR 266 at 271.

(d) Intention: Lord Brandon of Oakbrook in *Re J.* above at page 504 paragraph (e) held that a person may cease to be habitually resident in one country in a single day if that person leaves it with a settled intention not to return but to take up long term residence in another country instead. Lord Brandon however continued that such a person cannot become habitually resident in the second country in a single day. He continued “. . . an

⁴¹ This is not surprising if we consider what a judge recently admitted, in *Re R. (Abduction: Habitual Residence)*, [2003] EWHC 1968, [2004] 1 FLR 216, [24/07/2003; High Court (England and Wales); First Instance] HC/E/UKe 580, quite frankly (at paragraph 57): “The domestic system of law by reference to which for this purpose I have to determine the question of habitual residence, is the domestic law of England. It is the domestic law of England, the view which the law of England attaches to the meaning of the words “habitual residence” when they appear in Article 3 of the Hague Convention. It is the law of England as set out in the authorities to which I have referred . . . On the facts as I have found them either the German court applying German law takes the same view or a different view . . . If it takes a different view then the reality, however elegantly the point is put, is that I am being asked to come to a different view from that which the law of England would direct me to come to by being invited to be beguiled by the different view of German lawyers in relation to German law. My duty in these circumstances is to apply the domestic law of England by reference to the authorities I have mentioned, and in the light of those authorities, applying the relevant principles, the conclusion I have come to cannot be affected by evidence of German law. Equally it seems to me it would not be affected even by the decision of the German court to a different effect.” See, however, *Re S. (A Child)*, [2002] EWCA Civ 1941, 27/11/2002; Court of Appeal (England and Wales), HC/E/UKe 490: Questions of habitual residence in relation to Article 3 of the Hague Convention are to be determined by reference to the international jurisprudence, recorded on the Permanent Bureau’s INCADAT website”. See also in the U.S.: *E. Nunez-Escudero, v. S. Tice-Menley*, June 26, 1995, US C.A. 8th Circuit, HC-E-Usf 98.

⁴² [2001] NZFLR 1105 [31/08/2001; Family Court at Taupo (New Zealand); First Instance] HC/E/NZ 413.

appreciable period of time and a settled intention will be necessary to enable him or her to become so.”

(e) Termination and Change of Habitual Residence: It is well accepted. . . that habitual residence can be terminated in one day. Refer *Re J.* above.

The principal rules derived from the international case law are therefore as follows:

Rule 1—Habitual residence must be construed in accordance with the ordinary and natural meaning

The purpose is to avoid a difference of interpretation by the courts that would result from the use of a legal concept such as domicile.

*Re J. (A Minor) (Abduction: Custody Rights); C. v. S. (Minor)*⁴³:

. . . the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains.

The result of this is that by ordinary interpretation “habitual” residence implies a degree of permanence. See *A. v. A.*:⁴⁴

. . . place where the minor carries out his activities, where he has been established with a certain degree of permanence, the centre of his emotional and daily experiences.

See also *J. v. J.*:⁴⁵

. . . consideration of the question of habitual residence under the Convention is primarily a matter of making an overall assessment of circumstances which may be observed objectively such as the length of sojourn, existing social ties, and other... or occupational nature which may indicate a more permanent attachment to one country or the other.

Rule 2—Residence is a question of fact depending on circumstances

This is, in principle, a question of fact, not of law (and therefore is not dependant on the domicile of another person or on the registered place of residence). This rule is generally recognized in the

⁴³ [1990] 2 All E.R. 961, 965 (Eng. H.L.)

⁴⁴ *A. v. A.*, 5 October 2001, Buenos Aires court of first instance, [05/10/2001; Buenos Aires court of first instance (Argentina); First Instance], HC/E/AR 487. See also: *I F 3709/00, Amtsgericht Zeibruecken, 25 January 2001*, [25/01/2001; Amtsgericht Zeibruecken (District Court) (Germany); First Instance], HC/E/AU DE 392: “the parties had been ordered to be stationed there, that they had their own home there and that therefore the centre of all their activities was in Israel”; *R. and R.*, 7 January 1999, Juvenile Court of Rome (Italy), Nr. 2450/98 E, [07/01/1999; Juvenile Court of Rome (Italy); First Instance], HC/E/IT 297: “ ‘habitual residence’ does not indicate the registered residence, but the place where the child usually spends most of his time. This place, center of the child’s life, is without any doubt, England, where L. was born and has grown up”.

⁴⁵ Case No. 7505-1995, 9 May 1996, Supreme Administrative Court of Sweden, [09/05/1996; Supreme Administrative Court of Sweden, Regeringsratten], HC-E-SE 80.

common law countries and in other legal systems.⁴⁶ For common law countries, the authority cited is the House of Lords' decision in *C. v. S. (Minor)*:⁴⁷

. . . a question of fact to be decided by reference to all the circumstances of any case

In this regard, we may also mention the document "Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)", at paragraph 16:

[16] Alternating custody agreements, or 'shuttle agreements', might give rise to problems in determining the habitual residence of the child. The question arises whether such agreements may determine habitual residence in a way that would be binding on courts requested to order the return of the child, *e.g.* by including an additional clause that non-return of the child on the date agreed upon constitutes unlawful retention under the Convention or other kinds of choice of court clauses. Such choice of court clauses do not fall to be recognised under the Convention, however, and parties to such an agreement should not have the power to create a habitual residence that does not match with the factual habitual residence of the child. This is, firstly, because the concept of 'habitual residence' under the Convention is regarded as a purely factual matter and, secondly, because the Convention provides for a very specific remedy applicable in cases of emergency and is not meant to solve parental disputes on the merits of custody rights.

Therefore, the existence of an agreement resulting from a meeting of the minds of the parents should not be binding on the courts if it does not correspond to the factual situation.

However, there are statements in English cases which appear to contradict this rule. In *Re S. (Minors) (Abduction: Wrongful Retention)*⁴⁸ the Court affirmed⁴⁹:

. . . it seems to me plain that where both parents have equal rights of custody no unilateral act by one of them can change the habitual residence of the children, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence and custody.

This suggests that the intention of parents, or even a court order, could possibly change the habitual residence of a child; but this statement may only be a generalization, where the two situations of fact in question eventually do result in such a change, rather than a statement that these two factors may *directly* alter residence in the absence of a change of place.

⁴⁶ See *W. v. O.*, 14 June 1995, Argentine Supreme Court of Justice, 14/06/1995; Argentine Supreme Court of Justice; Superior Appellate Court, HC/E/AR 362; *A. v. A.*, *supra*, note 44; *R. and R.*, *supra*, note 45; *J. v. J.*, Case No. 7505-1995, 9 May 1996, Supreme Administrative Court of Sweden, [09/05/1996; Supreme Administrative Court of Sweden, Regeringsrätten], HC-E-SE 80.

⁴⁷ *Supra*, note 43. See also: *F. v. A.*, 21 April 2004, transcript, Superior Court of California, Placer County, [24/04/2004; Superior Court of California, Placer County (USA); First Instance] HC/E/USs 582: "The determination of a child's habitual residence is a fact-intensive inquiry".

⁴⁸ [1994] Fam. 70, [1994] 1 FLR 82, [1994] Fam. Law 70, [14/07/1993; High Court (England); First Instance] HE-E-Uke 117.

⁴⁹ See also: *D. v. D.*, June 8, 1990, Court of Sessions, HC-E-UKs 73.

Further, some cases directly challenge the notion that the question is purely one of fact. In *Silverman v. Silverman*,⁵⁰ the U.S. Eighth Circuit Court of Appeals held:

It is not a question of pure fact, to be decided without reference to statutory language and established legal precedent . . . it is imperative that parents be able to assess the status of the law on habitual residence and wrongful removal and retention. 239 F.3d at 1072-73. If habitual residence is treated as a purely factual matter, to be decided by an individual judge in individual circumstances unique to each case, parents will never be able to guess, let alone determine, whether they are at risk of losing custody by allowing their children to visit overseas or in allowing them to make international trips with an estranged spouse.

Rule 3—Role of parents’ intention

There are profound differences between the cases regarding the role of intention.⁵¹ One moderate interpretation, undoubtedly recognized by all systems, is that in *exceptional cases* it can be one of the circumstances useful for clarifying especially difficult facts (3-A). A more extreme interpretation which in my opinion is proper to the common law, but which is disputed in some systems (such as in Quebec law) considers that it is a *normal* condition of a change of residence (3-B).

Rule 3-A—The parents’ intention, whether or not specified in a written contract, is one of the *circumstances* to be taken into account to determine whether a stay in a place is temporary (in case of doubt): the *exceptional* subjective approach

Thus see *C. v. C.*:⁵²

(Résumé: where a child has not been present in a particular forum on a long-term basis one should focus on the mutual and expressed intent of the parents when they moved to that place).

Because of the short time spent by the child, and his youth (two years old), it becomes necessary to take the parents’ intention into account to understand the meaning of the stay (whether temporary or not). In such an analysis, the Court is looking not only at the past but at the future as well.

⁵⁰ 338 F.3d 886 (8th Cir. 2003) [05/08/2003; United States Court of Appeals for the Eighth Circuit; Appellate Court] HC/E/USf 530.

⁵¹ As the Court properly noted in *Harsacky v. Harsacky*, 930 S.W. 2d 410 (C.A. Kentucky), HC-E-USs 131: “In keeping with the principle that ‘habitual residence’ must be judged on a case by case basis, it is not surprising that courts have disagreed as to what factors should be controlling . . . There is also some disagreement as to what extent the intentions of the parents as to present or future residence should bear on the determination of a child’s habitual residence under the Convention”.

⁵² 25 May 1992, Tel Aviv District Court (Israel) HC/E/IL 357.

See also *Re A. (Abduction: Habitual Residence)*:⁵³

It is necessary to look not only at the time which it was intended that the child should spend in Greece but also at the purpose of his visit. The time was a maximum of 6 weeks, the purpose was as I have described. It included a purpose akin to holiday contact . . . That contact was, as I have said, to enable not only the father but the father's extended family to see the child.

See also Cass Civ 1ère 16/12/1992:⁵⁴

[TRANSLATION]

The decision mentions that the Xs had planned, before their departure [to France], that the child would go back to Canada with his mother; it adds that Mr. X did not provide evidence of a new "family arrangement" indicating that his wife and their child would move to France to live with him; accordingly the Court of Appeal, addressing the conclusions raised, legally justified its decision.

However, some cases have gone further and considered that the intention of one or more parents was a *necessary* factor in a change of residence.

Rule 3-B—The change of residence requires evidence of a settled intention to abandon the former residence, PLUS a settled purpose to reside at new the location

Essentially, these cases dispute the idea that habitual residence can be determined directly from the facts. In *F. v. A.*,⁵⁵ the Court refused to consider calculating the period of time spent in a place:

Mr. F. attempts to support his position that Italy is C.'s habitual residence by counting the number of days the child was in Italy versus the United States. Habitual residence can rarely be determined by the mere calculation of the periods of time that a child has spent in various locations. A longer stay in one location may not necessarily compel the conclusion that the place has qualified as the child's habitual residence . . . Even if the court accepts that there was substantial time spent in Italy, presence alone in a country is

⁵³ [1998] 1 FLR 497, [13/08/1997; High Court (England); First Instance] HC/E/UKe 176).

⁵⁴ Appeal No. 91-13119, 16/12/1992, Cour de cassation, première chambre civile (France), HC/E/FR 518, Dalloz 1993, p. 570, note J. Massip (retention in France unlawful as child habitually resided in Canada, although father argued that [TRANSLATION] "family's final move to France was made necessary by his own professional requirements, and his wife returned to Canada for reasons of health". See similarly *Ø.L.K.*, 5 April 2002, 16. *afdeling*, B-409-02, HC/E/DK 520 [05/04/2002; Østre Landsret (High Court, Eastern Division, Denmark), second level: the Danish Court of Appeal took an agreement by parents into account and considered that pursuant to that agreement a child's stay in Denmark was only temporary (while the mother was hospitalized) and was not to last more than a year. Thus the child retained its habitual residence in England. Similarly, in *J. v. J.*, *supra* note 46, the Swedish Administrative Supreme Court took the agreement between the parties into account: "In accordance with the agreement cited in the case and confirmed by the court in Virginia, A. is to spend a total of eight years in Sweden until she reaches the age of 18, as compared with four years in the United States. In the light of what has been stated, the Supreme Administrative Court finds that A. was habitually resident in Sweden on 20 August 1995".

⁵⁵ *Supra*, note 47.

not sufficient to confer habitual residence. It must be accompanied with an element of intent which approximates a “settled purpose” (In *Re Bates*, *infra*.)

From this standpoint, it is rather the intention behind the period of time that makes it possible to determine the place of habitual residence. This factor of intent is a state of mind particular to the parents making it possible to determine the existence of a habitual residence.⁵⁶ A relative and subjective concept of time is adopted, recognizing that in principle this time cannot be measured objectively.

The key case favouring a subjective view of time is *R. v. Barnet London Borough Council ex parte Shaw*,⁵⁷ per Lord Scarman:

. . . and there 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.

In *In Re Bates*,⁵⁸ the Court used this test to determine a person’s habitual place of residence, describing it as the “governing principle for ascertaining the elements of habitual residence”.

In *Re J. (A Minor) (Abduction: Custody Rights)*; *C. v. S. (Minor)*,⁵⁹ the House of Lords also stated:⁶⁰

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.

More recently, see *Al Habtoor v. Fotheringham*,⁶¹ where Thorpe L.J. said at page 966, at paragraph 37:

⁵⁶ See *Harsacky v. Harsacky*, *supra*, note 51.

⁵⁷ [1983] 2 A.C. 309, 314; [1983] 1 All E.R. 234.

⁵⁸ No. CA 122-89, High Court of Justice, Fam. Div’n Ct. Royal Court of Justice, United Kingdom (1989); in *F. v. A.*, *supra*, note 47, the Californian Court said regarding this case, using the same quotation, “Despite nearly 20 years of U.S. case law on the subject, the definition which finds broad acceptance by U.S. courts comes from a U. K. case, *In re Bates*”.

⁵⁹ *Supra*, note 43.

⁶⁰ See also *In Re B.* (Fam. Div. H.C.J. October 21, 1997, HK-E-Uke 39): “It is . . . well settled that habitual residence refers to a person’s 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.”

⁶¹ [2001] EWCA Civ. 186, [2001] 1 FLR 951

. . . Mr Overall submits that the judge set the test too high when she concluded ... ‘this family never settled’. Mr Overall submits that the test is not whether the family was settled in Dubai but whether their residence was for a settled purpose, which might be either a purpose of short duration or conditional upon future events.

In *Application of Ponath*, 829 F. Supp. 363 (D. Utah 1993) HC-E-USf 144, the district judge wrote that a person could not be considered to have a habitual residence in Germany if they were being kept there against their will: mere presence in a place for a certain time, with *no intention* to be there, cannot amount to habitual residence. Intention is therefore essential from this point of view.

In the United States, the leading case is the decision in *Mozes v. Mozes*, in which the United States Ninth Circuit Federal Court of Appeals,⁶² *per* Judge Kozinski, explained that the temporal factor necessary to determine whether residence is habitual cannot be objective, since it depends upon the judge’s period of observation: two months, several years, etc. In his view, this is why the subjective intention of the persons must be taken into account. He therefore adopted a subjective approach to time, according to which the more settled the intention, the less time would be required in the new place. The factor of intention replaces the period of time.

Nevertheless, the quantitative dimension is not entirely excluded in this view, as the House of Lords recognized in *In Re J.*, at least in acquiring a new residence, “an appreciable period of time” is also necessary. In *Mozes v. Mozes*, Judge Kozinski also said:

While the decision to alter a child’s habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone. First, it requires an actual change in geography. . . Second. . . it requires the passage of “[a]n appreciable period of time”. *C.v. S. (Minor...)*.

The reverse of this relationship is also true: the longer the stay in a place, the less need there is to consider the qualitative aspect of the settled intention to reside in a place. The qualitative aspect here relates to the strength of the intention. This subjective approach is certainly open to considerable evidentiary problems, leading to uncertainty, which is not desirable in child abduction cases. Additionally, it would appear to be difficult to apply if the two parents have different intentions.

However, the judge sought to limit this uncertainty by proposing certain rules. He tried to classify the situations into three categories: (1) the family as a unit had a settled purpose to change their habitual residence, even if one parent had regrets or greater hesitation, (2) the stay was clearly intended to be temporary, or finally (3) intermediary cases in which a parent agreed that a child would stay abroad for an indeterminate period, with no real consensus, in which case the change of residence should not be recognized. In general, according to Judge Kozinski, when the parents disagree, there is no settled intention for the child’s residence to change quickly.

⁶² (9th Cir. 2001) 239 F.3d 1067; No 98-56505 (U.S. Court of Appeals) (2001), HC/E/USf 301, cited at No. 29 of the Superior Court judgment.

In the United States, we must also refer to the Third Circuit Court of Appeals' judgment in *Feder v. Evans-Feder*:⁶³

Guided by the aims and spirit of the Convention and assisted by the tenets enunciated in *Friedrich v. Friedrich* and *Re Bates*, we believe that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective.

This position is widely held in the common law countries.⁶⁴

⁶³ 63 F.3d 224, (C.A. Third Circuit), August 24, 1995, HC-E-Ufs 83.

⁶⁴ See also *Smith v. Central Auth.*, no. AP/98, High Court, Christchurch, New Zealand (March 2, 1999); *State Central Authority and McCall* (1995) FLC 92-552, [21/12/1994; Family Court of Australia at Melbourne; First Instance] HC/E/AU 279: "Habitual residence is a question of fact; there are two elements—the fact of residence, and the intention to reside habitually. . . C.'s parents, having parental responsibility . . . are the persons who may jointly form the intention of terminating C.'s habitual residence by removing him to another jurisdiction." See also *C. v. C.* (Court of Sessions), Inner House (2nd div.) October 24, 1995, HC-E-Uks 71; *Re J.S.* (Private International Adoption, [2000] 2 FLR 638; [2000] 3 Fam Law 787 [06/07/2000; High Court (England); First Instance Court, HC/E/UK 479. In that peculiar adoption case, it was held that a child who remained in Texas for only two days at the time of her birth and was taken by adoptive parents to England, where she remained for five months, had not acquired a habitual residence but retained her residence in Texas. According to the English court, mere presence did not suffice and there had to be an intention by the person who had custody of the child to make England its habitual residence, which was not the case. The Court said: "A child, certainly a child of the age of J.S., cannot herself form an intention about her residence or indeed anything else, so that the law provides that the habitual residence of a child shall be determined by the parents of the child and failing that by whoever has legal responsibility for the child . . . always it seemed to me the outcome was that the term 'habitual residence of a child' envisages a state of affairs based not only on physical presence but with what one might call a mental element on the part of the parent or here the institution having legal responsibility". See also *D. v. D.*, [19/06/2001; First Division, Inner House of the Court of Session (Scotland); Appellate Court] HE-E-Uks 351. In that case the Scottish Court of Appeal considered that parents had not acquired habitual residence in Switzerland despite having moved to that country, because they had no common intention regarding the stay. See, as well, *Harsacky v. Harsacky*, *supra*, note 51; *In Re A.* (Family Div.), H.C.J. July 31, 1995, HC-E-Uke 38; *Re B.*, *supra* note 60; *Morris v. Morris*, 55 F.Supp.2d. 1156, 1159 (D.Colo. 1999) HC-E-Ufs 306; *Walton v. Walton*, 925 F.Supp. 453, HC-E-Ufs 132; *S. v. S.*, 27 September 1994, transcript, Family Court of Australia (Sydney) [27/09/1994; Family Court of Australia at Sydney; First Instance] HC/E/AU 230; *Artso v. Artso* (1995) FLC 92-566, [20/03/1991; Family Court of Australia at Dandenong; First Instance] HC/E/AU 252; *Laing v. Central Authority* (1996) FLC 92-709, [10/10/1996; Full Court of the Family Court of Australia (Sydney); Appellate Court] HC/E/AU 228.

In *A. v. A. (Child Abduction)*,⁶⁵ the Court stated:

I consider that when, in the latter sentence, Lord Brandon refers to a settled intention being necessary to constitute habitual residence, what he meant was a settled intention to take up long-term residence in the country concerned. That being so, in my judgment, the mere fact of even 8 months' residence in Australia will not have made these children, or any of them, habitually resident there, or indeed made the father or mother habitually resident there.

In that case, the Court unhesitatingly held that *the mere length of the stay was insufficient* without intent. In these cases it is quite clear that the idea of a settled purpose/purposeful design/mental element is an *essential requirement*, not an additional factor, among others, to be used in exceptional cases.

However, in *Re B. (Minors) (Abduction) (No 2)*⁶⁶ Waite J. also distinguished this requirement from the one necessary to establish a new domicile, as follows:

Domicile and habitual residence are essentially different concepts. The acquisition of a domicile of choice requires a combination of residence and intention of permanent or indefinite residence (see Dicey and Morris, *Conflict of Laws* (11 edn), p. 128). A far more wide-ranging inquiry is needed to establish those elements than is appropriate or necessary when the court is dealing with the much simpler concept of habitual residence. That is a concept which depends solely upon showing a settled purpose continued for an appreciable time. It follows, therefore, that the detailed type of inquiry into presumed intention which characterises domicile proceedings is inappropriate when the court is dealing with issues of habitual residence. In the latter case it is normally sufficient for the court to stand back and take a general view. A settled purpose is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression.⁶⁷

In view of this position, other cases, essentially from systems other than the common law, have held that the intention of one parent is not sufficient and that we must rely on objective facts.

⁶⁵ [1993] 2 FLR 225 [27/10/1992; High Court (England); First Instance] HC/E/UKe 161. See also *Re S. (A Minor)*, 20 August 1996, High Court, transcript; *The Independent*, 14 October 1996, [20/08/1996; High Court (England); First Instance] HC/E/UKe 181; *Re O. (A Minor) (Abduction: Habitual Residence)* [1993] 2 FLR 594, [1993] Fam Law 514 21/12/1992; High Court (England); First Instance] HC/E/UKe 159: "She, O, was not of an age at which she could form her own intentions relevant to acquiring habitual residence in any given place. Accordingly, her habitual residence was the same as the habitual residence of the mother, in whose sole and lawful custody she was".

⁶⁶ [1993] 1 FLR 993 at page 989, HC/E/UKe 173.

⁶⁷ To the same effect see *F. v. A.*, *supra*, note 47; *Re A. (Abduction: Habitual Residence)* [1998] 1 FLR 497, 13/08/1997; High Court (England); First Instance] HC/E/UKe 176; *In re C.L. (A minor); J.S. v. C.L.*, [25/08/1998; High Court (Northern Ireland); First Instance] HC/E/UKn 390.

In *C. v. M.*,⁶⁸ the Stockholm Administrative Court of Appeals held that despite the fact that the mother intended to return to Sweden, her daughter had lived in Texas for over two years before the removal and retained her habitual residence there.

Even at common law, however, there are New Zealand cases that do not favour this subjective approach.⁶⁹

Finally, we must refer to *Armiliato v. Zaric-Armiliato*.⁷⁰ In my view, Pauley J. gave a very enlightening summary of the entire intellectual process relied on by the common law judges:

. . . as Judge Kozinski has observed, “the most straightforward way to determine someone’s habitual residence would be to observe his behavior.” *Mozes*, 239 F.3d at 1073. Such a determination would be based strictly on objective criteria such as how long the child resided in a state and whether her life was centered around a particular location. However, merely evaluating objective criteria could skew the results depending on what

⁶⁸ December 18, 1998, Administrative Court of Appeals, 18/12/1998; Administrative Court of Appeals (Stockholm, Sweden)]; HC/E/SE 331. See also *L. v. L.*, 26 June 1994, transcript (Unofficial Translation) Tel Aviv District Court, [26/06/1994; Tel Aviv District Court (Israel); First Instance], HC/E/IL 215: (résumé: Habitual residence refers only to the physical dwelling place of a child and not to an intended future place of residence). See also the Quebec decisions considered below: *Droit de la famille — 2454*, (C.A.); *Droit de la famille — 3451*, (C.A.); *Droit de la famille — 3713 (D.M.D. c. E.V)* (C.A.); *S.S.-C. c. G.C.*, (S.C.); *H.H.N. c. O.X.Ng*, (S.C.).

⁶⁹ Thus, in *Secretary for Justice v. P., ex parte C.* [1995] NZFLR 827, [07/07/1995; District Court of New Zealand at Henderson; First Instance] HC-E-NZ 67, the New Zealand Court, which had to decide where the residence of children brought to that country by their mother was located, when they had come to Australia with their mother to try and re-establish the family with the father, who was living there, held that the primary facts pointed toward residence in Australia, as the result of a stay of some six months in that country, although the mother said she only intended to make a trial in Australia and quickly changed her mind. The Court said: “Much is made in this case by Mr. Keys of the respondent’s actual state of mind and intention. I think that to place undue emphasis on a subjective test such as this has inherent dangers. While doubtless there is some room for an inquiry into intention, I think it preferable for most emphasis in an inquiry to be based on an objective approach. To suggest otherwise would be to invite evidence given with the benefit of hindsight”. Similarly, in *K.H. v. S.H., Wellington*, AP n. 359/94 (H. Court of N.Z.), April 12, 1995 (HC-E-NZ30), the New Zealand High Court held in 1995 that children habitually resided in California before being taken to New Zealand by the mother, although the parents’ status in the United States was only temporary. It also indicated its clear preference for an objective approach, distancing itself to some extent from the subjective approach taken in the leading English cases: “x. I was referred to the judgment of Lord Brandon in *C. v. S. (Minor)*, *supra*, note 43. Reference is there made to settled intention for an appreciable period of time before habitual residence can arise. With respect that seems to re-introduce some of the concepts which provided the complications to the law on domicile and that, I think, is not to be applied if possible . . . In spite of employment difficulties and money problems the mother and father stayed in the United States and did not attempt to leave on any basis at all. I have no doubt, in my mind, that there was a habitual residence, a customary, constant, continual residence”. Finally, in *F. v. A.*, *supra*, note 47, the Court after recalling the fundamental citation in *Ex parte Shaw*, *supra* note 121, added “The intent with which a place is occupied by a family, or by a parent with a child, may play a role in determining whether that place qualifies as the child’s habitual residence. Certainly, where a mother and father maintain a joint and shared intent that they are going to settle in a place for an indeterminate time, or for a substantial period of time, a habitual residence will inevitably result. *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir. 1995) [FN22]”. From this reference to a recent American case, the question of intent can be seen as a simple finding of fact, dealing with a generality, according to which a common intent would unavoidably lead in fact to the establishing of a habitual residence, rather than an absolute requirement of law.

⁷⁰ No. 01 Civ. 0136 (WHP) (S.D.N.Y. May 3, 2001) 03/05/2001; United States District Court for the Southern District of New York; HC/E/USf 385.

period of time one studied. . . . To avoid such pitfalls, the English courts require a “degree of settled purpose” in order to establish habitual residence . . . The “settled purpose” principal is difficult to apply to young children who generally are unable to articulate reasons . . . Although the “settled purpose” of a small child like A. is elusive, the principle is informed by the subjective intent of those entitled to fix the child’s residence . . . Determining intent when the parents disagree about their child’s habitual residence is an Augean chore. In such circumstances, it is necessary to look beyond the subjective intent of the parents to the objective manifestations of that intent. . . . One of the objective manifestations of intent is the relative period of time the parties resided in the alleged habitual residence. . . . Whether the parties resided in the residence on a temporary or conditional basis is also significant. . . . The steps the parents have taken to acclimate their child to her surroundings is another objective manifestation of intent to habitually reside in a locale.

Accordingly, beginning with a purely objective approach, derived from the principle that residence is a question of fact, reason quickly dispenses of it after finding that such an approach is necessarily tainted by subjectivity, in favour of an openly subjective approach, requiring a settled purpose as a condition of law. However, as such an intention cannot be applied directly in the case of a child, it must be identified through the intention the parents had regarding their child. Another problem is then encountered in some cases, that of a divergence between parental intentions. If the subjective approach then results in an impasse, it will be necessary to return to an objective approach using objective facts, such as the length of residence, or efforts to integrate the child into the environment, taken as objective manifestations of intent, to show a common intention.

It is a reversal of the objective analysis of facts that we would have expected and a choice in favour of the subjective analysis of the parents’ intention, an analysis requiring reference to objective factual information to discover whether there was a common intention regarding the child.⁷¹

In the end, all of these mental gymnastics move habitual residence significantly closer to domicile, even if the intention has nothing to do with permanence: as one writer said, the difference between the two concepts is only a question of degree, not of kind.⁷² Apart from its major problems and the resulting unpredictability, this is the reason why the majority of cases in

⁷¹ Reference may also be made to the same effect to the New York Court of Appeals judgment in *Brennan v. Cibault*, 227 A. 2d 965, 643 N.Y.S.2d (N.Y. App. Div. 1996) [31/05/1996; Supreme Court of New York, Appellate Division, Fourth Department; Appellate Court] HC-E-Uss 135.

⁷² *Cohen v. Cohen*, 158 Misc. 2d 1018, 602 N.Y.S.2d 994 (Sup. Ct. 1993) [10/08/1993; Supreme Court of the State of New York, Kings County (United States); First Instance] HC-E-USs 145. In that case, the Court expressly used the rules relating to the *change of domicile* in deciding that children taken to Israel by their father had remained habitually resident in the United States: “Using an analysis borrowed from the cases surrounding the issue of domicile (obviously very analogous to “habitual residence”); the law is well settled that an existing domicile [substitute habitual residence] continues until a new one is acquired [etc]”. However, in *David B. v. Helon O.*, 164 Misc. 2d 566, 625 N.Y.S.2d 436 (Fam. Ct. 1995) HC/E/USs 149 [08/03/1995; Family Court, New York County (United States); First Instance], the Court, in a note, held that the position taken in that case was contrary to the majority of binding opinions.

Quebec civil law have refused to be drawn into this analysis and have been accused of taking a “superficial” approach (Judge Kozinski).

In any event, we understand that the case law regarding this condition is far from clear and it is difficult to identify definite rules from it, but the two trends we identified exist side by side.

Rule 4—The child’s reality or automatic dependence on parents

Some cases emphasize the child’s reality, rather than the parents’ reality. However, the case law is not unanimous on this point. There is a strong trend at common law to link the child’s residence to that of a parent or parents having custody or parental authority. Finally, these two positions could be reconciled.

Rule 4-A—Favouring child’s reality (child-centred model)

In the decision rendered by the Swedish Supreme Administrative Court,⁷³ a child’s integration into the new environment was considered to be a condition for acquiring a new residence. Similarly, in the U.S. case of *Friedrich v. Friedrich*,⁷⁴ the Court said at 1401:

To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions . . . A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The Court must look back in time, not forward.⁷⁵

⁷³ Supreme Administrative Court (Regeringsrätten) (Sweden), decision of 12 September 2001, Case number 7624-2000, (Regeringsrätten), HC/E/SE 447.

⁷⁴ 983 F. 2d 1396 (6th Cir.) (1993).

⁷⁵ See also, using this quotation, *Brennan v. Cibault*, *supra*, note 71; *Schroeder v. Vigil-Escalera Perez*, 76 Ohio Misc. 2d 25, 664 N.E.2d 627 (Ohio Com. Pl. 1995) [09/11/1995; State of Ohio, Court of Common Pleas, Cuyahoga County, Domestic Relations (United States); First Instance] HC/E/USs 154; *A. Zucker v. P. Andrews*, District court, Mass., 10 avril 1998, HC-E-USf 122. See also *Falls v. Downie*, 871 F. Supp. 100 (D. Mass. 1994) [28/12/1994; United States District Court for the District of Massachusetts; First Instance] HC-E-USf 141, in which the Massachusetts Court considered that a child taken to that state by its father with the agreement of its mother, who remained in Germany, had acquired habitual residence there after eight months: “To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions. . . . What is required is that there be a ‘degree of settled purpose.’ . . . In this case, as of August 1994, this twenty-one-month old boy had been living in the United States, with the agreement of his mother, and with the prospect of an indefinite continuance of residence, for eight months. He had become completely accustomed to life in this country with his father and grandparents; he barely knew his mother. It simply defies common sense to suggest under these circumstances that P. was, as of that date, a ‘habitual’ resident of Germany”. See also *Slagenweit v. Slagenweit*, District Court, Iowa, 28 Oct. 1998, HC-E-USf 143; *Paz v. Paz*, 169 F. Supp. 2d 254 (S.D.N.Y. 2001), [29/10/2001; United States District Court for the Southern District of New York; First Instance] HC-E-USf 414, aff. by United States Court of Appeals for the Second Circuit on 17 September 2002: *Paz v. Paz* 47 Fed. Appx. 22; 2002 U.S. App.

See also *Panazatou v. Pantazatos*.⁷⁶

Although there is no question that the parties intended at some future time to permanently reside in the United States, habitual residence cannot be confused with domicile. To determine habitual residence the Court must focus on the child and examine past experience not future intentions. *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (Sixth Circuit 1993). The greater portion of the child’s life was spent in Mykonos as well as the seven months preceding the mother’s departure in September of 1996 without the father’s consent.

Rule 4-B — Automatic dependence on the parents and consideration of their intention (dependency model)

To the contrary, in *Mozes v. Mozes*, the Ninth Circuit U.S. Federal Court of Appeals,⁷⁷ *per* Judge Kozinski, unhesitatingly held:

. . . the broad claim that observing “la réalité que vivent les enfants” [the children’s reality] obviates any need to consider the intent of the parents, Y.D., [1996] R.J.Q. at 2533, is unsound.

Similarly, in *C. v. S. (minor: abduction: illegitimate child)*,⁷⁸ Lord Brandon held:

where a child of J.’s age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.

In *In Re A*.⁷⁹ the judge followed the rules set out in *In Re B (minors: abduction) (No 2)* by Judge Waite, considered as principles at common law:⁸⁰

1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change that without the express or tacit consent of the other or an order of the court.

⁷⁶ No. FA 960713571S (Conn. Super. Ct. Sept. 24, 1997) [24/09/1997; Superior Court of Connecticut, Judicial District of Hartford (United States); First Instance] HC-E-USs 97.

⁷⁷ *Mozes v. Mozes*, *supra*, note 62.

⁷⁸ *Supra*, note 43.

⁷⁹ Family Div., H.C.J. July 31, 1995, HC-E-Uke 38).

⁸⁰ [1993] 1 FLR 993, p. 995. See also *Robertson v. Robertson* 1998 SLT 468, 07/05/1997; Inner House of the Court of Session (Second Division) (Scotland); HC/E/UKs 194: “In the present case, given the very young ages of all the children, the crucial issue was whether or not it had been established that the father by 5 October 1996 had consented to the children’s becoming habitually resident in Germany”; *Re J.S. (Private International Adoption)*, *supra*, note 64: “. . . always it seemed to me the outcome was that the term ‘habitual residence of a child’ envisages a state of affairs based not only on physical presence but with what one might call a mental element on the part of the parent or here the institution having legal responsibility”.

However, certain judges question the meaning of this connection between parents and children. Refusing to see any automatism resulting from the law, they regard it simply as a general finding of fact.⁸¹

Rule 4-C—The settled purpose must be from the child’s perspective

Finally, we should note the intermediate position of the U.S. Third Circuit Court of Appeals in *Feder*,⁸² which expressed this idea as follows:

[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 ... [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.

In *Feder* the Court applied this rule as follows:

E. moved, with his mother and father, from Pennsylvania to Australia where he was to live for at the very least the foreseeable future, and stayed in Australia for close to six months, a significant period of time for a four-year old child. In Australia, E. attended preschool and was enrolled in kindergarten for the upcoming year, participating in one of the most central activities in a child’s life. Although Mr. and Mrs. F. viewed Australia very differently, both agreed to move to that country and live there with one another and their son, and did what parents intent on making a new home for themselves and their child do—they purchased and renovated a house, pursued interests and employment, and arranged for E.’s immediate and long-term schooling. That Mrs. F. did not intend to

⁸¹ Thus, in *W. and B. v. H. (Child Abduction: Surrogacy)* [2002] 1 FLR 1008, [18/02/2002; High Court (England); First Instance] HC/E/UK 470, Hedley J. said, referring to *B. v. H. (Habitual Residence: Wardship)* [2002] 1 FLR 388, in which Charles J. held that the habitual residence of a child at birth was that of its parents: “If Charles J. is asserting as a matter of law that a baby takes the habitual residence of his parents then that is to confuse domicile with habitual residence and I would have respectfully to disagree. If what he asserts is a proposition of fact, then, by definition, it cannot be good for all cases. Each one must stand alone”. In that case of a surrogate mother resident in England, the Court refused to consider that children born in England who had never set foot in California had their habitual residence in California simply because their biological father lived there and he had some rights regarding them.

⁸² *Supra*, note 62.

remain in Australia permanently and believed that she would leave if her marriage did not improve does not void the couple's settled purpose to live as a family in the place where Mr. F. had found work.⁸³

Accordingly, the "intentions regarding the children's presence" are what must be considered and not not regarding other questions involving the parents' situation must be considered.

See also *Toren v. Toren*.⁸⁴

. . . it is clear from the record before the Court that the children's habitual residence was in the United States . . . It was the expectation of both parents that the children would live in the United States for as long as four years. . . . It does not matter that the United States was not intended to be the children's permanent residence, nor that it was intended when they came here that they were to return to Israel in 2000. What may happen in the future ordinarily has little, if any, relevance to whether the children have become so "settled" in their place of residence that it may fairly be described, in the present but by reference to the past, as their "habitual" residence. "The court must look back in time, not forward." Friedrich 983 F.2d at 1401.

Rule 5—The period of time for the loss or acquisition of habitual residence

The cases are also not unanimous regarding the period of time in question.

Rule 5-A—The period of time required to lose residence

The cases appear to accept the idea that a former residence can be lost immediately.

This *a priori* surprising proposition (is it so easy for it to no longer be habitual?) can only be understood if one takes the subjective approach, attaching critical importance to the *future*

⁸³ See also *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) [05/08/2003; United States Court of Appeals for the Eighth Circuit; Appellate Court] HC/E/USf 530. In that case, the Court applied this rule considering that the couple had an intention to settle in Israel, and it was wrong to consider that the hesitations of one of the spouses eliminated the possibility of a "settled purpose: one spouse harbouring reluctance during a move does not eliminate the settled purpose from the children's perspective". Similarly, in *Delvoye v. Lee*, the Court considered that a child born in Belgium had no habitual residence there for the following reason: "The parties never jointly intended to make their permanent home in Belgium, and the birth of a baby during a short stay there to save on medical bills does not change the parties' "degree of settled purpose" regarding their child's habitual residence". Similarly, in *Paz v. Paz*, *supra*, note 75, the Court considered the reality of a child who had been moved several times between several countries and held that a nine-month stay in New Zealand, where she had been at school, did not establish habitual residence, which remained at her mother's place of residence. However, the Court also considered that the mother did not have the intention of making New Zealand the child's habitual residence and so there was no common intention to this effect, which also places this decision in this reconciling trend. See also *Schroeder v. Vigil-Escalera Perez*, 76 Ohio Misc. 2d 25, 664 N.E.2d 627 (Ohio Com. Pl. 1995) [09/11/1995; State of Ohio, Court of Common Pleas, Cuyahoga County, Domestic Relations (United States); First Instance] ref.: HC/E/USs 154.

⁸⁴ 26 F. Supp. 2d 240 (D. Mass. 1998) [21/10/1998; United States District Court for the District of Massachusetts;] ref.: HC/E/USf 225 (reversed on another ground by *Toren v. Toren*, 191 F.3d 23 (1st Cir. 1999), INCADAT: HC/E/USf 584).

intention of the person concerned.⁸⁵ However, it is more difficult to lose residence immediately if it is the past that is examined.

Thus, in *Re J. (A Minor) (Abduction: Custody Rights); C. v. S. (Minor)*,⁸⁶ the House of Lords decided that a child who lived in Australia until her departure for England lost her habitual Australian residence on the very day of departure, since her mother, who took her with her, had left the country “with a settled intention not to return to it”.⁸⁷

However, in *Re S. (A Minor)*,⁸⁸ the House of Lords considered that a child taken to Ireland for two days by his grandparents after living in England had not acquired a habitual residence because the grandparents had no parental authority over the child, and therefore had no right to change his residence against the wishes of the father, who retained that authority. The Court therefore distinguishes situations like the one in *Re J.*, where the removal is carried out by a person with a right over the child, from situations where that is not the case.

We must assume that the reason for this is that one *anticipates* that the person with the right to alter the habitual residence will in fact be able to do so permanently, whereas residence altered by a person not entitled to do so will only be temporary as it will be open to challenge.

Rule 5-B—With respect to the period of time for the acquisition of the new residence, establishing residence requires a certain time in the new place

According to some cases, this has to be “significant” or “appreciable”. The precedent usually cited in common law countries is *Re J. (A Minor) (Abduction: Custody Rights); C. v. S. (Minor)*:⁸⁹

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.

However, we find the same misgivings regarding that period of time. This arises when the court considers that either a factual situation of integration has to be determined (integration will depend on many circumstances, such as the openness of the new location to strangers, welcoming procedures and so on), or that there be an intentional element, which itself depends on the circumstances (why the removal took place and so on). Most of the cases examine what

⁸⁵ E.M. Clive, “The Concept of Habitual Residence”, [1997] *Juridical Review* 137, 142.

⁸⁶ [1990] 2 All E.R. 961, 965 (Eng. H.L.).

⁸⁷ See to the same effect *Al Habtoor v. Fotheringham*, *supra*, note 61. Similarly, in *In Re A.* (Family Div., H.C.J. July 31, 1995, HC-E-Uke 38), the judge held that the family, who lived in England because the father, a soldier, had until then been assigned to that country for five years, had instantaneously lost that residence from the time he was transferred to Iceland, although the children had actually lived in Michigan for three months in transit before going to Iceland.

⁸⁸ [1998] AC 750, [24/07/1997; House of Lords (England); HC/E/Uke 3].

⁸⁹ [1990] 2 All E.R. 961, 965 (Eng. H.L.).

occurred in the past at the time of the removal. Others, however, at common law, also take the future into account (i.e., the future intention of parents, ultimately).

For the cases taking the parents' intention into account, it can be argued that the stronger an intention, the faster the acquisition time will be.⁹⁰

In *S. v. O.D.*,⁹¹ the New Zealand District Court even held that habitual residence could be acquired in Australia *immediately*, in circumstances where the parents' intention was that the child would remain with the father in Australia indefinitely:

It is settled law that the habitual residence of a child of A.'s age will be the habitual residence of the parent who has his care. There can be no question that Mr. S. has been habitually resident in Queensland for some years. It is my view that when A. left New Zealand with his mother's agreement to stay indefinitely with his father his country of habitual residence changed immediately. In my view, such circumstances are properly and necessary [*sic*] distinguishable from the situation where a parent takes a child to a new country (as was the situation in *In re J.*) and in the present circumstances there will be no "appreciable period of time" before the child becomes habitually resident in the country to which he or she is taken.⁹²

There are of course cases that have held the opposite, but the circumstances were different.⁹³

According to certain comments,⁹⁴ there are two trends in this regard, which can be explained if we consider that they reflect situations in which the parents' intention is more or less settled:

⁹⁰ P. Rogerson, "Habitual Residence: The New Domicile?" *supra*, note 13. Thus, in *Secretary for Justice v. D.*, [08/07/1994; District Court of New Zealand at Auckland; First Instance] HC/E/NZ 251, the Court considered that children who had been in Scotland for five months before their forced return to New Zealand organized by their mother had acquired habitual residence in Scotland, in view of the facts and in light of the fact that when their father took them to Scotland from New Zealand there was an agreement between the parents that the move to that country would be permanent.

⁹¹ 14 February 1995, [14/02/1995; District Court of New Zealand at Hamilton; First Instance] HC/E/NZ 250.

⁹² In *C. v. T.* [2001] NZFLR 1105 31/08/2001; Family Court at Taupo (New Zealand); First Instance] HC/E/NZ 413, similarly, the immediate change of habitual residence was recognized on account of an agreement to this effect between parents: "J.'s habitual residence changed immediately when he left Australia to reside with his father indefinitely".

⁹³ *Ø.L.K.*, 5. April 2002, 16. afdeling, B-409-02, HC/E/DK 520 [05/04/2002; Østre Landsret (High Court, Eastern Division, Denmark); Second Level]: a stay in Denmark lasting one year did not suffice to alter the residence of a child who had remained in England with an agreement between the parents to that effect. See also *R. and R.*, 7 January 1999, Juvenile Court of Rome (Italy), Nr. 2450/98 E, [07/01/1999; Juvenile Court of Rome (Italy); First Instance], HC/E/IT 297; *A. v. S.*, 27 June 1996, Venice Juvenile Court (Italy), [24/06/1996; Venice Juvenile Court (Italy); First Instance], HC/E/IT 300 (six months in Italy regarded as insufficient to alter former residence located in California); *Public Attorney v. J.S.*, Case No. 778/2001, [25/09/2001; Tribunal Judicial de Santa Maria da Feira (Portugal); First Instance], HC/E/PT 410; *8Ob121/03g*, *Oberster Gerichtshof (Cour suprême d'Autriche)*, 30/10/2003, HC/E/AT 548 [30/10/2003; Oberster Gerichtshof (Supreme Court of Austria); Supreme Jurisdiction].

⁹⁴ In the Danish case, *Ø.L.K.*, 5. April 2002, 16 Afdeling, B-409-02, HC/E/DK 520.

(a) when the move is for an indefinite, or potentially indefinite, period of time, it is generally held that the child has lost his habitual residence of origin and may even have acquired a new habitual residence (the intention to leave is quite clear);⁹⁵

(b) *contra*, when the move is only intended to be for a limited time, even if lengthy, it has been held that the child retains his former habitual residence throughout the stay abroad (in that case the intention not to settle permanently is stronger than the primary facts).⁹⁶

Rule 6—Continuity of habitual residence

This requirement is found in several cases.⁹⁷ Thus, for example, in *C. v. T.*⁹⁸ the Court said:

There is required a degree of continuity to enable habitual residence to be described as settled. Refer Sir Stephen Brown P. in *V. v. B. (A minor) (Abduction)* [1991] 1 FLR 266 at 271.

Rule 7—Absence or multiplicity of habitual residences

Rule 7-A—Possibility of absence of habitual residence

While the case law generally considers it important for the child to always have a habitual residence, in order to protect him in accordance with the provisions of the 1980 Convention,⁹⁹ there are cases that clearly recognize that a child may have no habitual residence.

Thus, in *W. and B. v. H. (Child Abduction: Surrogacy)*,¹⁰⁰ Hedley J. held that a child who had never been in California could not be habitually resident there, but was also not habitually resident in England, even though his (surrogate) mother, with whom he lived, habitually lived in England. He therefore had no habitual residence.

⁹⁵ *Re H. (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294; [2000] 3 FCR 412 [INCADAT reference: HC/E/UKe 478]; *Cameron v. Cameron* 1996 SC 17, 1996 SLT 306, 1996 SCLR 25 [INCADAT reference: HC/E/UKs 71]; *Moran v. Moran* 1997 SLT 541 [INCADAT reference: HC/E/UKs 74].

⁹⁶ *Callaghan v. Thomas* [2001] NZFLR 1105 [INCADAT reference: HC/E/NZ 413]; *Morris v. Morris, supra*, note 64; *Mozes v. Mozes, supra*, note 62.

⁹⁷ *In Re A.* (Family Div., H.C.J. July 31, 1995, HC-E-Uke 38); in *Armiliato v. Zaric-Armiliato, supra*, note 70, the New York Court, in holding that a girl was not habitually resident in New York, but that this residence was in Genoa, said: “Whether the parties resided in the residence on a temporary or conditional basis is also significant. . . . While A. has traveled around the world and remained abroad for up to two months at a time, she continually returned to Genoa, Italy. Moreover, the purpose of A.’s travel generally was to accompany her father when he performed. Mr. A.’s operatic engagements were temporary and finite”.

⁹⁸ [2001] NZFLR 1105 [31/08/2001; Family Court at Taupo (New Zealand); First Instance] HC/E/NZ 413.

⁹⁹ *Re F. (A Minor) (Child Abduction)* [1992] 1 FLR 548 [INCADAT: HC/E/UKe 40]; *Cooper v. Casey* (1995) FLC 92-575 [INCADAT: HC/E/AU 104].

¹⁰⁰ *Supra*, note 81. See also *D. v. D.*, [19/06/2001; First Division, Inner House of the Court of Session (Scotland); Appellate Court] HE-E-Uks 351, where the court appears to have implicitly admitted that a child could have no habitual residence for a time. See also *Robertson v. Robertson, supra*, note 78; *Delvoye v. Lee*, 329 F.3d 330 (3rd Cir. 2003) [INCADAT: HC/E/USf 529]; *F. v. A., supra*, note 47.

Rule 7-B—Possibility of multiple habitual residences

Similarly, some cases have criticized the possibility of multiple habitual residences, because that would destroy the logic underlying the protection contained in the Convention.¹⁰¹ However, others have theoretically admitted this possibility in exceptional cases.

There are also cases that recognize a rotation of *consecutive* habitual residences, in accordance with the period of time spent by the child with one or other parent pursuant to an agreement between them.¹⁰²

2.C Meaning of the concept of “habitual residence” under the 1996 Hague Convention on the Protection of Children

According to the commentators, while certain trial definitions were proposed during the drafting of this Convention, it was thought preferable not to adopt a definition of habitual residence specific to the Convention.¹⁰³ As a result, the same concept must be applied for the 1996 and 1980 Conventions.¹⁰⁴

However, as this concept will then also be used for applicable legislation, it is essential that only one habitual residence be identified, since multiple contradictory laws would be unacceptable. This is why the Convention endeavours to resolve mobile conflicts resulting from changes of residence and why problems in determining such residence continue to torment judges. The acquisition of a new residence is not defined in the 1996 Convention, but Article 7 admits as an alternative that the authority in the new place will have jurisdiction if the child has lived there for a period of a year after the person with custody has or should have had knowledge of the child’s removal *and* if the child has integrated there.

The Convention does not therefore establish a preference over the rules relating to changes of residence. Prof. Lagarde’s Explanatory Report simply states that this is a *question of fact* (as in Quebec law: see Rule 2) and that *it is possible to lose habitual residence immediately¹⁰⁵ and immediately acquire a new habitual residence.¹⁰⁶ However, the Commission responsible for the draft Convention refused to [TRANSLATION] “quantify the period of time necessary to acquire*

¹⁰¹ See, for example, *Morris v. Morris*, *supra*, note 64.

¹⁰² *In the Matter of V.*, H.C.J. Fam. Div. 28 June 1995, HE-E-Uke 45; *Re A. (Abduction: Habitual Residence)* [1998] 1 FLR 497 [13/08/1997; High Court (England); First Instance] HC/E/UK 176: “It is of course not in doubt that a person, including a child, may have a habitual residence in two different countries at different times of the year. . . . Thus the fact that the child may have been habitually resident in England before being taken to Greece and may have been going to be habitually resident in England after return from Greece would not of itself prevent his being habitually resident in Greece during the intervening period”.

¹⁰³ E.M. Clive, “The Concept of Habitual Residence”, [1997] *Juridical Review* 137, note 2; Explanatory Report on Convention, October 9, 1996, P. Lagarde, p. 552 at No. 40.

¹⁰⁴ Further, this new Convention modernizes the former Convention on the Protection of Children: on October 30, 2003 the Supreme Court of Austria held (8Ob121/03g, Oberster Gerichtshof (Austrian Supreme Court), HC/E/AT 548 [30/10/2003; Oberster Gerichtshof (Supreme Court of Austria—Supreme Jurisdiction)] that the concept of habitual residence in the 1980 Hague Convention is interpreted in the same way as in the [old] Hague Convention on the Protection of Children.

¹⁰⁵ Explanatory Report, pp. 554, n. 44 and 556, n. 47.

¹⁰⁶ *Idem*, p. 552 at n. 41.

a new habitual residence”.¹⁰⁷ The same rule has been stated in Quebec law (see Rule 5). However, in *cases of unlawful removal*, and so of abduction, the year’s residence required under Article 7 will not be sufficient if it is established that the child has not integrated (the same solution would exist in Quebec: see Rule 5); at the same time, in accordance with the Convention, if integration is established, it is also insufficient without a period of a year’s residence (the solution would be different in Quebec, where there is no minimal length of stay: see Rule 5). Further, Article 7 implicitly recognizes that these two tests are not exclusive, since in addition to the acquisition of habitual residence in the new place (“and” in paragraph 1), one or other of these elements must be established.

Similarly, the absence of habitual residence is governed under Article 6 of the Convention, replacing it by mere presence, as does article 78 (2) C.C.Q. with regard to domicile.¹⁰⁸

¹⁰⁷ *Idem*, p. 552 at n. 41.

¹⁰⁸ It should be noted that in Quebec law child protection measures depend in theory not on the law of habitual residence but on that of domicile, which is not always located in the same place as residence, according to a certain interpretation given by the Court of Appeal to article 80 C.C.Q. (which we have criticized). In any case, in Quebec law protection measures often depend nevertheless on the *lex fori*, as in the Convention, but not always, since the competent court is that of the child’s domicile with regard to custody (art. 3142 C.C.Q.) or the domicile of one of the persons concerned (art. 3141 C.C.Q., applicable alternatively in parental authority). Further, as in the Convention, special provisions cover the jurisdiction of the court of the *lex fori* in cases of emergency or to protect the minor or the latter’s property (arts. 3138 and 3140 regarding jurisdiction and 3084 and 3085 C.C.Q. in the event of conflict of laws).

Question 3: Differences of interpretation of the concept of “habitual residence” in Quebec civil law and under the 1980 and 1996 Hague Conventions

We will methodically consider (1) the *general rules of interpretation* of habitual residence in concepts under the Conventions (3.A), and then (2) specific rules developed by the courts on this concept when it originates in the framework of the Hague Convention (3.B).

3.A General rules of interpretation of habitual residence

In *V.W. c. D.S.*,¹⁰⁹ the Supreme Court of Canada described the relationship between Quebec law and conventional law as follows at paragraph 28:

Since the situation in Quebec can be distinguished from that in Manitoba in that the sole purpose of the Act is to give effect to the [1980] Convention even though it does not adopt the integral wording thereof, two independent systems cannot coexist in Quebec. On the contrary, the interdependence of the Convention and the Act is recognized both in the preamble to the Act, which states that “Quebec subscribes to the principles and rules set forth in the Convention”, and in s. 1 thereof, which states the common objects of the Act and Convention. . . In my view, the interdependence of the Convention and the Act accordingly suggests an interpretation of ss. 3 and 4 of the Act that gives full effect to the object of the Convention. . .

Similarly, in *Droit de la famille — 2454*, Chamberland J.A. stated the following regarding habitual residence in the context of an international abduction, at paragraphs 49 and 50:

[TRANSLATION]

Accordingly, it is in the light of the objects and philosophy of that Convention that we should analyse the relevant provisions of the Act and apply them to the circumstances of the case at bar . . . As the Convention is an international treaty, we must be careful not to interpret the concepts contained therein in such a way that it would depart from the interpretation generally recognized by the international community, lest obviously we diminish its effectiveness at the expense, in the long or short term, of those whom it seeks to protect, children. International solidarity on child protection requires a relatively uniform interpretation of the Convention throughout the world.

Accordingly, this approach advocates the interpretation of Quebec law concepts in light of the objectives of the Convention rather than in accordance with the purely civil law conceptions of the Civil Code, *where there is disagreement*.

In the same case, *Droit de la famille — 2454*, Chamberland J.A. referred to several British and American cases which have interpreted the Convention. He himself attempted to determine the value of those cases in terms of [TRANSLATION] “conclusive precedents in the interpretation of the Convention and Act”.

¹⁰⁹ [1996] 2 S.C.R. 108.

Accordingly, in Quebec law, in order to meet the objectives of the Convention, the interpretation of the concept of habitual residence should follow the international trend, rather than adopt an independent interpretation, so as to achieve relative uniformity. From this standpoint certain Quebec judges, at least at the Court of Appeal level, have tried to determine how foreign courts have interpreted this concept. Accordingly, they do not hesitate to cite foreign precedents, even if in practice local precedents are generally used. However, as *Droit de la famille — 2454* is one of the leading cases in this area, the foreign cases cited in it have also become references in Quebec law, as interpreted by our judges, who still exercise critical judgment.

3.B Specific rules on habitual residence

Most of the propositions below (except proposition 8) are clearly affirmed in Quebec law and in the available precedents from other countries. Their interpretation remains quite consistent (propositions 1, 2, 3.1, 5.1, 6 and 7.1). Some, however, subject to quite divergent positions, are not always viewed in the same way in Quebec and elsewhere (propositions 3.2, 4, 5.2, 5.3 and 7.2).

Proposition 1—Habitual residence should be interpreted in accordance with the ordinary and natural meaning

This rule was adopted in Quebec by the Court of Appeal in *Droit de la famille — 3713 (D.M.D. c. E.V.)*¹¹⁰ and in common law countries where *Re J. (A Minor) (Abduction: Custody Rights)*; *C. v. S. (Minor)*¹¹¹ is regarded as a leading case.

In Quebec, the ordinary meaning of the phrase “habitual residence” is as follows: the place where a person generally, ordinarily, permanently resides. The few definitions we have found given in other countries suggest that there is no difference in this regard between the Quebec view and that of other countries.

However, in all systems, it is recognized that this ordinary meaning rule is insufficient; especially when the persons in question travel a great deal or the child’s life has been too short at the time of the case to identify what is “habitual”. It has therefore been necessary to add other rules to deal with these difficult cases.

Proposition 2—Continuity of habitual residence

To be “habitual”, a residence should not be occasional and should have certain continuity. From a logical standpoint, this rule should simply be seen as a component of the definition of “habitual residence” (which should be “permanent”). However, precedents in both Quebec and

¹¹⁰*Supra*, note 14.

¹¹¹ *Supra*, note 43.

other countries sometimes appear to perceive it as an independent rule, dealing with the frequency or quantitative aspect of the connection. In any case, we do not see any difference between the Quebec condition and the one applied in other countries requiring it.¹¹²

Proposition 3—Residence is a question of fact, dependant on the circumstances

Proposition 3.1—Residence is a question of fact

This rule is recognized in Quebec¹¹³ and in other systems.¹¹⁴ All systems recognize (in *L.Y.P. v. M.E.*,¹¹⁵ the Quebec Superior Court relied in 2004 on a New Zealand decision¹¹⁶) that it does not depend directly on a person’s legal situation, especially from an immigration standpoint.

Proposition 3.2—Residence depends on circumstances

There is disagreement regarding the *circumstances* used to determine residence. It is recognized that a Court may “*examine the situation in more general terms, going beyond the purely factual situation*” in the various systems, and that the duration of a work contract can be included in this. An agreement between the parents, especially regarding joint custody, is also part of the circumstances making such a determination possible. There is a consensus that such an agreement can be considered as a *juridical fact*.¹¹⁷

However, there is disagreement as to whether this kind of juridical fact can *directly* determine a child’s habitual residence. The report titled “Report of the Third Special Commission meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997)” objects in paragraph 16 to habitual residence depending on an agreement between parents which does not correspond to the factual situation. However, some passages in decisions from common law countries could be taken to mean the contrary. It is suggested that disagreement between parents, a lack of a tacit or express contract, cannot alter

¹¹² See also *Droit de la famille — 3713 (D.M.D. c. E.V.)*, *supra*, note 14; *C. v. T.* [2001] NZFLR 1105 [31/08/2001; Family Court at Taupo (New Zealand); First Instance] HC/E/NZ 413; *In Re A.* (Family Div., H.C.J. 31 July 1995, HC-E-Uke 38); *Armiliato v. Zaric-Armiliato*, *supra*, note 70.

¹¹³ *Droit de la famille — 2454*, *supra*, note 15.

¹¹⁴ *W. v. O.*, 14 June 1995, 14/06/1995; Argentine Supreme Court of Justice, HC/E/AR 362; *R. and R.*, 7 January 1999, Juvenile Court of Rome (Italy), Nr. 2450/98 E, 07/01/1999, HC/E/IT 297; *J. v. J.*, *supra*, note 46; *C. v. S. (Minor)*, *supra* note 43; *F. v. A.*, *supra*, note 47.

¹¹⁵ [2004] J.Q. n. 13967 (S.C.).

¹¹⁶ *H. v. H.*, [1995] 12 FRNZ 498, pp. 1 and 2, cited at n. 48 of the Quebec judgment.

¹¹⁷ See, thus, *Cass Civ 1ère 16/12/1992* (N° de pourvoi: 91-13119), 16/12/1992; Cour de cassation, première chambre civile (France); HC/E/FR 518, *J. v. J.*, *supra*, note 46.

the situation.¹¹⁸ Quebec law certainly cannot be included with those who would recognize the parents' intention as having such a role. Unless one is referring to general findings according to which it is a fact that by necessity, *in retrospect*, an agreement between parents results *indirectly* in altering the child's habitual residence, while a disagreement between them cannot (which is certainly incorrect in Quebec law).

Proposition 4—Role of parents' intention

There are quite significant disagreements in the case law regarding to the role that should be given to parents' intention, to the extent that Quebec precedents have been directly criticized in the decision regarded as most influential in U.S. case law.

Proposition 4.1—Exceptional subjective approach: settled purpose of parents belongs to circumstances of fact

This judicial trend appears in civil law countries, or others,¹¹⁹ as well as in common law countries.¹²⁰

In Quebec, ambiguously, the Court of Appeal appears to recognize this moderate position according to which *in exceptional cases* this subjective aspect can be taken into account qualitatively as a *circumstance* in difficult cases where the length of the stay in the new location is quantitatively difficult to establish.

In the Court of Appeal, in *Droit de la famille — 2454*, the mother's *intention* to stay in California for only three years *was not relevant* in determining the children's habitual residence, and at paragraph 64 Chamberland J.A. said:

[TRANSLATION]

Only the children's reality should be taken into account in determining the place of their "habitual residence": in this regard, the Court should look only at the children's experience, as the wishes, desires or intentions of their parents do not count in deciding on the place of their "habitual residence" at the time of their removal.

However, paradoxically, in *Droit de la famille — 2454* Chamberland J.A. cited the English decision *In Re Bates*,¹²¹ explaining that the Court in that case suggested the test we have referred

¹¹⁸ Thus, in *Re S. (Minors) (Abduction: Wrongful Retention)* [1994] Fam 70, [1994] 1 FLR 82, [1994] Fam Law 70, [14/07/1993; High Court (England); First Instance] HE-E-Uke 117, the Court said: "it seems to me plain that where both parents have equal rights of custody no unilateral act by one of them can change the habitual residence of the children, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence and custody". See also *D. v. D.*, June 8, 1990, Court of Session, HC-E-UKs 73.

¹¹⁹ *Cass Civ Ière 16/12/1992* (N° de pourvoi: 91-13119), 16/12/1992; (France) HC/E/FR 518; *Ø.L.K.*, 5. April 2002, 16. afdeling, B-409-02, HC/E/DK 520, 05/04/2002; Østre Landsret (High Court, Eastern Division, Denmark; *J. v. J.*, *supra*, note 46; *C. v. C.*, 25 May 1992, Tel Aviv District Court (Israel) HC/E/IL 357.

¹²⁰ *Re A. (Abduction: Habitual Residence)* [1998] 1 FLR 497, [13/08/1997; High Court (England); First Instance] HC/E/UKe 176.

¹²¹ *Supra*, note 58.

to earlier, dealing with the “settled purpose”.¹²² Appearing to apply it, the judge determined that in the circumstances the couple in question had in fact “settled” in California. It can be argued that in this analysis the *purpose*, the aim, of the stay is taken into account to determine **not** whether the residence **exists**, but whether it is **habitual**, and sufficiently continuous to constitute a **settled purpose**.

Further, according to Chamberland J.A. in *obiter*, at paragraph 64:

[TRANSLATION]

The situation could be different if only one of the parents had custody: his or her intentions would then be of greater importance (for example, in *Re J. (A minor)*, 87 L. Soc’y Gazette, Oct. 3, 1990).

Thus, the Court of Appeal went so far as to recognize that the intention of a single custodial parent could be taken into account in deciding the children’s place of residence.

Some decisions by lower courts have clearly moved in the direction of exceptional use of parents’ intent. In *Byrn v. Mackin*,¹²³ the Superior Court in 1983 held that a person residing in Vancouver, where he had a house in which his wife and children lived, had retained his residence there despite spending long periods of time in Montreal to work there and living there in an apartment owned by his employer, because he had not expressed an intention of staying in Montreal permanently.¹²⁴

More recently there was *C.E.S. v. E.V.*,¹²⁵ a child abduction case decided in 2002. Unlike what the Court of Appeal held in *Droit de la famille — 2454*¹²⁶ according to which, so as not to assimilate habitual residence, a factual concept, with that of the domicile of one of the parents, only the children’s reality should be taken into account and the parents’ wishes and intentions would not be relevant factors since the aspect of intent related to domicile would be applied, the Superior Court found that [TRANSLATION] “this viewpoint does appear to have been generally recognized by the international legal community”. In this regard it cited *Moses v. Moses*.¹²⁷ The U.S. Court went on to consider whether it is relevant to look at the parents’ intention or whether instead the child’s intention should be considered, in a case where intentions count, *for example where it is necessary to determine whether absence from a place was to be temporary*.¹²⁸ The

¹²² “The governing principle for ascertaining the elements of habitual residence is contained in the speech of Lord Scarman in *R. v. Barnet London Borough Council ex parte Shah* [1983] 2 A.C. 309, when he says, at page 314: ‘and there 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.’ ”

¹²³ *Byrn v. Mackin*, *supra*, note 11.

¹²⁴ See summary in: *Droit de la famille québécois*, vol. 1, “La demande en divorce”, par. 32-210, p. 3085.

¹²⁵ *Supra*, note 28.

¹²⁶ *Droit de la famille — 2454*, *supra*, note 15.

¹²⁷ *Supra*, note 62.

¹²⁸ *Ibid.*, cited by the Superior Court at No. 30.

Superior Court also referred to a decision by the House of Lords¹²⁹ and the passage written by Lord Scarman already cited by Chamberland J.A. in *Droit de la famille — 2454*.

The Superior Court then concluded:¹³⁰

[TRANSLATION]

It appears from the foregoing cases that interpretation of the concept of habitual residence cannot be done in the abstract. We should avoid adopting a reductionist approach whose effect would be to confuse the concept of “habitual residence” with that of *real or effective residence*. It is all a matter of circumstances. This is precisely why those drafting the Convention did not define the concept of habitual residence, thereby giving the courts more latitude to develop applicable rules. The approach is objective, which does not mean that the subjective approach is not appropriate in some cases or that the intention of the parents is never relevant.

Applying this subjective approach to the case before it, for an order to return the children to North Carolina, the Court determined as follows:¹³¹

[TRANSLATION]

The Court has no hesitation in finding, based on the particular circumstances of this case, that there was a settled purpose within the meaning of international precedents. . . . The parties’ settled purpose was to reside in the United States, because that is where the applicant earned his living and wanted his children to grow up.

Accordingly, the Superior Court admitted, retreating somewhat from the Court of Appeal’s statements in *Droit de la famille — 2454*,¹³² but relying on a U.S. decision and on a decision by the House of Lords, that the two parents’ settled purpose to reside in the United States should be taken into account in determining the children’s habitual residence.¹³³

However, the Quebec courts have clearly refused to take the parents’ intention into account as a *general* condition of change of residence.

¹²⁹ *R. v. Barnet, London Borough Council ex parte Shaw, supra* note 57, at 344, cited by the Superior Court at No. 32.

¹³⁰ [2002] R.D.F. 874 (S.C.) at No. 33.

¹³¹ *Ibid.* at No. 36.

¹³² *Supra*, note 15.

¹³³ See also *Rees v. Convergia, Convergia Networks Inc.*, S.C. Montréal 500-17-017494-033, 2004-03-11, AZ-50225541, J.E. 2004-975, D.T.E. 2004T-500, at n. 27 (jurisdiction of the court in a case regarding a employment contract).

Proposition 4.2—Subjective approach: a change of residence requires the evidence of a settled intention to abandon the former residence, PLUS the evidence of a settled purpose to reside at the new location

The applicable quotation in favour of a subjective approach comes from *R. v. Barnet London Borough Council ex parte Shaw*,¹³⁴ per Lord Scarman:

...and there 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.

This test, a fundamental principle of English law, is also the key position in U.S. law.¹³⁵

However, in *Mozes v. Mozes*, the leading U.S. authority in this area, Kozinski J. held that the question of duration should not be overlooked:

While the decision to alter a child's habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone. First, it requires an actual change in geography. . . . Second . . . it requires the passage of "[a]n appreciable period of time". *C.v. S. (minor...)*, [1990] 2 All E.R. 961, 965 (Eng. H.L.)

Bear in mind that this subjective approach has not received such favourable support in New Zealand.¹³⁶ Further, in *Armiliato v. Zaric-Armiliato*,¹³⁷ Pauley J. noted that the entire reasoning based on the settled purpose of parents (often?) requires reference to facts objectively showing such a purpose in order to prove it. We therefore go back to a largely objective reasoning.¹³⁸

By contrast, it may be noted that in *Droit de la famille — 2454*, the Court of Appeal held that the mother's *intention* to stay in California for only three years *was not relevant* in determining the habitual residence of the children, and Chamberland J.A. said, at paragraph 64 (emphasis added):

¹³⁴ [1983] 2 A.C. 309, 314; [1983] 1 All E.R. 234.

¹³⁵ *F. v. A.*, *supra*, note 47.

¹³⁶ *Secretary for Justice v. P., ex parte C.* [1995] NZFLR 827, [07/07/1995; District Court of New Zealand at Henderson HC-E-NZ 67; *K.H v. S.H., Wellington*, AP n. 359/94 (H. Court of N.Z.), 12 April 1995, HC-E-NZ30.

¹³⁷ *Supra*, note 70.

¹³⁸ See as to this *Brennan v. Cibault, supra*, note 71.

[TRANSLATION]

Only the children’s reality should be taken into account in determining the place of their “habitual residence”: in this regard, the Court should look only at the children’s experience, and the *wishes, desires or intentions of their parents do not count* in deciding on the place of their “habitual residence” at the time of their removal.

Further, to this effect, the judge again cited the U.S. case of *Friedrich v. Friedrich*,¹³⁹ as a guide to follow in determining habitual residence:

To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions. . . A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The Court must look back in time, not forward.

Chamberland J.A. was not prepared to take this route.¹⁴⁰ See also to this effect *A.I. v. R.M.C.*¹⁴¹ at no. 21:

[TRANSLATION]

It should be noted that the parents’ intention will have no significance in determining the habitual residence of B., as this is essentially a question of fact.

This position in Quebec is completely contrary to Kozinski J.’s position in *Mozes v. Mozes*, who expressly describes it as “unsound”, and even “superficial”. In his view, it is adequate for easy and obvious cases. He correctly points out that in such cases all the circumstances are not taken into account. He does not agree that the objective ties developed by the child could suffice *in the absence of “settled parental intent”*, which accordingly becomes a condition of change of habitual residence.

Kozinski J. considered that this approach, focusing on the child’s reality, would be unreliable, especially as the children may readily adapt to a new environment. He considered that the task of the Court is not to determine whether a child is happy where he is, but to prevent parents from

¹³⁹ *Supra*, note 74.

¹⁴⁰ He stated at paragraph 70: [TRANSLATION] “I am not sure that this statement accurately reflects the state of U.S. law on the point: it appears to be an isolated decision which writers have also sought to distinguish, by comparing it to the leading case of *Fredrich v. Friedrich*”.

¹⁴¹ [2004] J.Q. n. 7484 (July 2, 2004, S.C. Montréal). To the same effect, in *Droit de la famille — 3451*, Chamberland J.A. reversed a decision by a lower court in circumstances quite similar to those in *Re J. (Abduction of a child who had lived for a year in Ontario by the mother to take him back to Quebec)*, on the ground that: [TRANSLATION] “in my opinion, therefore, the trial judge wrongly relied on the respondent’s intention “to remain in Quebec” as a basis for concluding that the Superior Court had jurisdiction to rule on the custody of W. Applying the “habitual residence” test, the trial judge should have concluded that at the time he heard the dispute between the parties, in early February 1999, the “habitual residence” of W. was in Toronto, Ontario. He was born there and had lived there with his two parents from his birth until January 28, 1999 [the date of the abduction]. . . He had his own room, equipped with children’s furniture and accessories, in the house that his parents leased in Toronto. All these objective and concrete factors, independent of the intentions of either parent, should have led the trial judge to conclude that the habitual residence of W. was in Toronto, where his father is still living”.

unilaterally altering the *status quo* of the child's situation. He also tried to respond to the argument made by Chamberland J.A., where the parents' intentions differ. As we have seen, he tried to classify situations in several categories, depending on whether or not there is a settled purpose to change the habitual residence.

In short, this is the type of reasoning which Chamberland J.A. would like to avoid, because it involves broad discretion and unpredictability. This approach could be criticized for being as unreliable as the Quebec judge's approach, adding that the very purpose of the Convention is not to punish the person abducting the child but to ensure that the abduction does not harm the child's development, which is usually the case, but which also justifies exceptional integration defences.

Finally, one may believe that this is a philosophical concept recognizing that time can be appreciated subjectively, and so relatively. As P. Rogerson acutely observes:¹⁴²

. . . the conception of what is an "appreciable time" varies depending upon the state of mind of the person in question. Where that person has definitively and obviously made up their mind to live in a particular place for the foreseeable future, the "appreciable time" need only be very short, even a matter of a few days.

If this analysis is accepted, the conflict in approaches comes down to whether a subjective (or relative) concept of time will be recognized. The traditional view only accepts an objective concept of time, which would be the same for everyone, and would not take into account the future intention of the person in question (*i.e.* the parent).

In any case, **the difference with the common law approach, as advocated by Lord Scarman, is that the settled intention or settled purpose to move to a new place is not in Quebec law a condition required for changing habitual residence.** However, in cases where the time spent in the new place is short, this aspect of intention may from time to time be applied in difficult cases.

Proposition 5—The child's reality or automatic dependence on parents

There are three approaches to this question in the case law of countries that have interpreted the concept of habitual residence under the Convention. The Quebec courts have clearly used the first approach and rejected the other two.

Proposition 5.1—The child's habitual residence is determined by considering the reality of the child, not the parents (child-centred model)

This approach is accepted in particular in the United States. The leading case on the point is *Friedrich v. Friedrich*,¹⁴³ where it states at page 1401:

To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.

¹⁴² *Supra*, note 13.

¹⁴³ *Supra*, note 74.

This case has been cited with approval several times.¹⁴⁴ A Swedish case can also be cited to the same effect.¹⁴⁵ In Quebec, in *Droit de la famille — 2454 (Y.D.)*, Chamberland J.A. stated the following:¹⁴⁶

[TRANSLATION]

Only the children’s reality should be taken into account in determining the place of their “habitual residence”: in this regard, the Court should look only at the children’s experience, and the wishes, desires or intentions of their parents do not count in deciding on the place of their “habitual residence” at the time of their removal.

Proposition 5.2—Automatic dependence on parents and consideration of their intention (dependency model)

The leading case on this point is *Mozes v. Mozes*, in which the U.S. Ninth Circuit Federal Court of Appeals (*per* Kozinski J.) held as follows, entirely rejecting the approach taken in Quebec:

. . . the broad claim that observing “la réalité que vivent les enfants” [the children’s reality] obviates any need to consider the intent of the parents, Y.D., [1996] R.J.Q. at 2533, is unsound.

To the contrary, according to this approach which assigns most of the weight to the settled purpose, only the intention of the parents can be taken into account, in view of the age of the child.¹⁴⁷

Proposition 5.3—The settled purpose must be from the child’s perspective

This intermediate and more moderate approach is probably the one gaining the most support in the United States.

The leading case is *Feder v. Evans-Feder*¹⁴⁸, which states the following:

[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 ... [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.

In view of the fact that the parents’ intention continues to play an essential part in this approach, we can submit that it also does not correspond to the approach currently taken in Quebec law.

¹⁴⁴ Including in *Brennan v. Cibault*, *supra*, note 71.

¹⁴⁵ *Supreme Administrative Court (Regeringsrätten) (Sweden), decision of 12 September 2001*, Case number 7624-2000, 12/09/2001; *Supreme Administrative Court of Sweden (Regeringsrätten), HC/E/SE 447*.

¹⁴⁶ See also *Droit de la famille — 3713 (D.M.D. c. E.V.)*, *supra*, note 14.

¹⁴⁷ *C. v. S.*, *supra*, note 43; *In Re B. (minors: abduction) (No 2)* [1993] 1 FLR 993; *Robertson v. Robertson*, *supra*, note 79.

¹⁴⁸ *Supra*, note 63.

Proposition 6—Required period of time to lose and acquire the habitual residence

Proposition 6.1—Required period of time to lose the habitual residence

The cases from common law countries which have interpreted the concept of habitual residence under the Convention recognize that such residence can be lost immediately, in a single day.¹⁴⁹ This is understandable in a system which gives a central role to intention and which requires that there be proof of intention not to return to the former country. Such an intention can materialize immediately.

In Quebec law, the courts have not ruled on this position. This can be explained inasmuch as in Quebec the possibility of multiple habitual residences is recognized: the analysis concentrates on the acquisition of a new residence without considering whether the former one has been lost. However, given the implicit role of intention in the potential for instant loss, and given that this brings residence closer to domicile, it may be that this position would not be readily accepted in Quebec law. At the same time, it is acknowledged that the acquisition of a new residence can take place quite quickly, without requiring any minimum period, which would tend to move in the direction favourable to acceptance of such a position.

Proposition 6.2—Required period of time to acquire a new residence must be “significant” or “appreciable”

This rule is recognized in Quebec law and in common law.¹⁵⁰ In both systems, it is recognized that everything depends on the circumstances establishing that the child has integrated in the new place and there is no *fixed* or predetermined period of time.

Proposition 7—Absence or multiplicity of habitual residence(s)

Proposition 7.1—Absence of habitual residence

Quebec law certainly recognizes the possibility that there is no habitual residence, as stated in article 78 C.C.Q. That is also now recognized in the case law of the common law countries.¹⁵¹

Proposition 7.2—Multiple habitual residences

Quebec law recognizes the possibility of multiple habitual residences, as provided in article 77 C.C.Q. However, in order to comply with the objectives of the Convention to protect children, most decisions in common law countries dispute this,¹⁵² and prefer to recognize the possibility of

¹⁴⁹ *Re J. (A Minor) (Abduction: Custody Rights); C. v. S. (Minor)*, *supra*, note 43; *Al Habtoor v. Fotheringham*, *supra*, note 61.

¹⁵⁰ *Re J. (A Minor) (Abduction: Custody Rights); C. v. S. (Minor)*, *supra*, note 43; see in Quebec: *Droit de la Famille — 3713 (D.M.D. c. E.V.)*, *supra*, note 14.

¹⁵¹ See *W. and B. v. H. (Child Abduction: Surrogacy)*, *supra*, note 81; *Delvoye v. Lee*, *supra*, note 100; *F. v. A.*, *supra*, note 47.

¹⁵² *Morris v. Morris*, *supra*, note 64.

a number of *consecutive* habitual residences, in accordance with the child's period of residence with one parent or the other under an agreement between them.¹⁵³

Proposition 8—Real and active connection between the child and his habitual residence

This condition, whose exact origin is unknown, is clearly stated independently by the Quebec Court of Appeal in *Droit de la famille — 3713 (D.M.D. v. E.V.)*.¹⁵⁴

It does not appear expressly in the case law of other countries that have interpreted the habitual residence concept within the meaning of the 1980 Convention. Nevertheless, it exists implicitly in foreign cases requiring that the focus of the analysis be on the child's reality, not on that of the parents or their intention¹⁵⁵ or condemning the artificiality of a claim by one parent.¹⁵⁶ Accordingly, there is clearly no difference on this point between Quebec case law and the majority of foreign cases.

Conclusion

As some rules are not codified in Quebec, particularly those involving change of habitual residence, we note that on certain points the case law has relied on common law rules. Nevertheless, there are significant differences on this point and there are trends in common law judgments which are not easily accommodated. The possible adoption of the 1996 *Convention on Child Protection* by the Canadian provinces will fuel this debate.

¹⁵³ *In the Matter of V.*, H.C.J. Fam. Div. June 28, 1995, HE-E-Uke 45; *Re A. (Abduction: Habitual Residence)* [1998] 1 FLR 497, 13/08/1997; High Court (England); First Instance, HC/E/UKe 176).

¹⁵⁴ *Supra*, note 14.

¹⁵⁵ *Friedrich v. Friedrich*, *supra*, note 74.

¹⁵⁶ *Falls v. Downie*, 871 F.Supp. 100 (D. Mass. 1994) [28/12/1994; United States District Court for the District of Massachusetts; First Instance] HC-E-USf 141.

PART II: HABITUAL RESIDENCE AND ORDINARY RESIDENCE IN QUEBEC LAW AND UNDER THE *DIVORCE ACT*

We will answer the following questions:

- Q. 4** What is the meaning of the concept of ordinary residence in Quebec civil law? Does this concept exist?
- Q. 5** Does the interpretation given to the concept of habitual residence (French version) in article 77 C.C.Q. differ from the interpretation given to the phrase “ordinary residence” contained in its English version?
- Q. 6** Does the interpretation given to the phrase “ordinary residence” in the English version of sections 3, 4 and 5 of the *Divorce Act* in Quebec differ from the interpretation given to the phrase “résidence habituelle” [habitual residence] found in the French version of the said sections?
- Q. 7** Is there a difference under the law applicable in Quebec between the concepts of “habitual residence” and “ordinary residence”?

Question 4: Existence and meaning of the concept of ordinary residence in Quebec civil law

The concept of ordinary residence exists in Quebec law, but depending on the context either has no specific legal meaning or has the same meaning as “habitual residence”.

4.A Absence of specific meaning

Some cases¹⁵⁷ use the expression (in French) “résidence ordinaire”, without giving it a specific meaning. See, for example, *Droit de la famille — 1473*¹⁵⁸ and *L. v. Vallée*.¹⁵⁹ Some statutes also use the concept of “ordinary residence”.¹⁶⁰

4.B The terms “ordinary residence” and “habitual residence” are understood as one concept

In several statutes, the concept of “ordinary residence” is used as a translation of “résidence habituelle”: see the English version of article 77 C.C.Q.

Article 77. The residence of a person is the place where he ordinarily resides; if a person has more than one residence, his principal residence is considered in establishing his domicile.

In article 68 of the *Code of Civil Procedure*, the phrase is used as a translation of “résidence”.¹⁶¹ In Quebec law, however, “résidence” is itself defined as “résidence habituelle” in article 77 C.C.Q.

¹⁵⁷ With respect to ordinary residence, the search period in the cases extends from 1987 to 2004.

¹⁵⁸ EYB 1991-76025, S.C. Montréal, n. 500-04-000387-910, September 27, 1991.

¹⁵⁹ REJB 1996-29278, C.A. Quebec, September 16, 1996, n. 200-09-000158-946.

¹⁶⁰ See, for example, the *Act respecting Public Inquiry Commissions*, R.S.Q. 1977, c. C-37, s. 10: “Any person on whom any summons has been served, in person or by leaving a copy thereof at his *usual residence*, who fails to appear before the commissioners, at the time and place specified therein, maybe proceeded against by the commissioners in the same manner as if he had failed to obey any subpoena or any process lawfully issued from a court of justice”. See also section 7 of the *Act respecting Automobile Insurance*, R.S.Q. 1977, c. A-25: “Every victim resident in Quebec and his dependants are entitled to compensation under this title, whether the accident occurs in Quebec or outside Quebec. Subject to paragraph 1 of section 195, a person resident in Quebec is a person who lives in Quebec and is ordinarily in Quebec, and has the status of Canadian citizen, permanent resident or person having lawful permission to come into Quebec as a visitor”.

¹⁶¹ “68. Subject to the provisions of this Chapter and the provisions of Book Ten of the Civil Code of Quebec, and notwithstanding any agreement to the contrary, a purely personal action may be instituted; (1) Before the court of the defendant’s real domicile or, in the cases contemplated by article 83 of the Civil Code, before that of his elected domicile. If the defendant has no domicile in Quebec but resides or possesses property therein, he may be sued before the court of his *ordinary residence*, before the court of the place where such property is situated, or before the court of the place where the action is personally served upon him.”

Question 5: Is there a difference of interpretation in Quebec case law between the French version (“résidence habituelle”) and the English version (“ordinary residence”) of article 77 C.C.Q.?

E.M. Clive¹⁶² very properly points out that the ordinary/extraordinary dichotomy does not necessarily correspond to the one between habitual/temporary, since

A residence undertaken for extraordinary reasons could well be or become a habitual residence.

To my knowledge, there are no cases in Quebec law that have interpreted the English version of article 77 C.C.Q. Since in Quebec law ordinary residence and habitual residence are assimilated, there is no reason to think that the English version “ordinary residence” would be interpreted differently from the French one.

¹⁶² [1997] *Juridical Review* 137, 139, note 13.

Question 6: Is there any difference in interpretation in Quebec case law between the French version (“résidence habituelle”) and English version (“ordinary residence”) of sections 3, 4 and 5 of the *Divorce Act*?

The decisions rendered in Quebec do not interpret the French and English versions of sections 3, 4 and 5 of the *Divorce Act* differently.

In *Droit de la famille* — 2279,¹⁶³ dealing with section 3 of the *Divorce Act*, the Superior Court states:

[TRANSLATION]

In his text titled *Droit de la famille québécoise* [Jean-Pierre Senécal, *Droit de la famille québécoise*. vol. 1, Farnham, C.C.H./FM, updated, No. 32-2310] Jean-Pierre Senécal, now a judge of the Superior Court, considers that a person’s habitual residence is the place where the person regularly, normally or ordinarily lives. He refers to the Supreme Court of Canada income tax judgment, *Thompson v. MNR*, [1946] S.C.R. 209, at 231, where the Court held:

A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is “ordinary resident” in the place where in the settled routine of his life he regularly, normally or customarily lives.

From this it follows that the “ordinary” residence is the place where a person regularly, normally or ordinarily lives. The “ordinary residence” is *the place where in the settled routine of his life someone regularly, normally or customarily lives*. The two phrases are seen as identical. Accordingly, the concept of “ordinary residence”, defined as the place where a person habitually lives, corresponds exactly to the definition of “habitual residence”.¹⁶⁴

¹⁶³ AZ-95024060, [1995] R.D.F. 695.

¹⁶⁴ See also *Droit de la famille* — 1657, EYB 1992-75060, S.C. Hull, n. 550-12-014189-921, Sept. 11, 1992, where the Court said: [TRANSLATION] “The [*Divorce*] Act refers to ordinary residence, namely the place where the couple habitually lived. . . he two spouses had their habitual family residence in Gatineau from June 1, 1990 onwards, and lived in a house purchased jointly where they intended to reside permanently”. See to the same effect *N.K. v. R.V.*, [2004] R.D.F. 572 (S.C.), AZ-50254383, J.E. 2004-1360, a divorce case in which the two expressions are used indifferently. See also *Droit de la famille* — 3148, [2000] Q.J. n. 3224 (S.C.); *M.(O) c. K.* (REJB, 2000-19964, S.C., Montréal, August 2 2000, no. 500-12-239317-971), where the Court, in concluding that neither party to a divorce action had an “ordinary residence” in Quebec, said: “There was no permanency whatsoever attached to the living arrangements of the couple while they resided in the Province of Quebec”. We noted above that the idea of permanence is also fundamental to the concept of habitual residence.

Quebec jurisprudence considers that it is [TRANSLATION] “essentially a question of fact” (*S.G. v. R.S.*, at no. 19), which in theory appears to exclude analysis of the parties’ intention.¹⁶⁵ See, however, *Byrn v. Mackin*:¹⁶⁶

In the year proceeding [*sic*] the divorce petition, his stay in Montreal had none of the badges of being ‘ordinarily resident’ here. He was here for work only and with no indication that he intended to stay permanently.

This case is exceptional: it does not represent the usual position of Quebec courts.¹⁶⁷

Incidentally, it may be noted that Quebec courts do not habitually use the test current in common law cases, according to which “résidence habituelle”, “ordinary residence”, is the place where a “real home” has been established.¹⁶⁸ However, this test is not opposed to the concept expressed in Quebec cases and is sometimes used.¹⁶⁹

¹⁶⁵ *S.G. v. R.*, AZ-00026276; B.E. 2000BE-573; [2000] R.L. 183. In the same case, Dalphond J. (as he then was) said: [TRANSLATION] “The fact that the father may intend to return to Montreal as soon as he can find employment comparable to what he currently has in Hanover in no way alters the fact that at present he is habitually resident in New Hampshire”.

¹⁶⁶ *Supra*, note 11.

¹⁶⁷ Nevertheless, reference may also be made to *Droit de la famille — 2617*, *supra*, note 1, where Sénécal J. (as he then was) said in *obiter*: [TRANSLATION] “The concept of habitual residence has already been interpreted under the *Divorce Act*, in which the phrase has existed since 1968 (it was retained in the 1986 Act). It has been held that a person’s *habitual residence* is the place where the person regularly, normally or ordinarily lives (*Hardy v. Hardy*, (1969) 2 O.R. 875 (H.C.). The Alberta Court of Appeal expressed the view in *Adderson v. Adderson*, (1987) 7 R.F.L. (3d) 185, 36 D.L.R. (4th) 631 (C.A. Alb.), that the phrase ‘habitual residence’ is a mid-point between domicile and residence and refers to the nature of the residence. The duration of time spent there is a factor to be considered, as is intention”.

¹⁶⁸ *Hardy v. Hardy*, 2 R.F.L.50, (1969) 2 O.R. 875, 7 D.L.R. (3d) 307 (H.C.); *Marsellus v. Marsellus*, (1970) 2 R.F.L. 53, 75, 13 D.L.R. (3d) 383 (B.C.S.C.); *Anema v. Anema* (1977), 27 R.F.L. 156 (Man. Q.B.).

¹⁶⁹ Thus, in *Massé v. Sykora*, S.C. Montréal, no. 500-12-087337-790, July 6, 1979, C. Benoit J. explained at p. 11: [TRANSLATION] “Temporary absence from the ‘home’ which was established and is maintained in a province suggests continued residence in that province”.

Question 7: Is there a difference in Quebec law between “résidence habituelle” and “résidence ordinaire” or “ordinary residence”?

There is no difference in Quebec law between the concepts of “résidence habituelle” and “résidence ordinaire” or between these concepts and that of ordinary residence. Thus, in *Droit de la famille — 2617*¹⁷⁰ the Superior Court defined the concept as follows:

[TRANSLATION]

It has been held that a person’s *habitual* residence is the place where he regularly, normally or ordinarily lives [citing *Hardy v. Hardy*, [1969] 2 O.R. 875 (H.C.)] “Habitual residence” requires more lasting ties than simple residence. In tax matters, the Supreme Court said in *Thomson v. M.N.R.*, [1946] S.C.R. 209, at 224 and 231:

The expression “*ordinarily resident*” carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the *customary mode of life* of the person concerned, and it is *contrasted with special or occasional or casual residence . . .* The general mode of life is, therefore, relevant to a question of its application. A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is “ordinarily resident” in the place *where in the settled routine of his life he regularly, normally or customarily lives.*

It cannot be said that, in Quebec law:

No particular minimum time has been required to establish ordinary residence in this country [England] so the “appreciable time” requirement is the only possible distinguishing feature between ordinary and habitual residence.¹⁷¹

It should be noted that in Quebec law, according to the great majority of cases, neither habitual residence nor ordinary residence includes a condition of *intention* to remain, permanently or not, in a particular place.

¹⁷⁰ *Supra*, note 1. See also *Droit de la famille — 2279*, AZ-95024060, [1995] R.D.F. 695.

¹⁷¹ P. Rogerson, “Habitual Residence: the New Domicile?” *supra*, note 13.