



**The Meaning of Ordinary  
Residence and Habitual  
Residence in the Common  
Law Provinces in a  
Family Law Context**

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**The Meaning of Ordinary Residence and  
Habitual Residence in the Common Law Provinces  
in a Family Law Context**

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## **PREFACE**

At the time of his untimely death on October 4, 2005, Professor McLeod had not had the opportunity to finalize the last-minute changes that he had envisioned. Nevertheless, we felt it was important to publish the version we had, given its quality and the thoroughness of his research.





## OVERVIEW

At common law, the primary connection between an individual and a place was domicile. “Residence” was used at a conflict of laws level primarily as one of a number of contacts to ascertain the place with which an individual had a real and substantial connection. “Habitual residence” was not used as a connecting factor at common law. However, habitual residence was a major point of contact between a person and a place in Continental European civilian systems of law and particularly popular with the Hague Conference on Private International law.

When Canada started to participate in international conventions through the Hague Conferences, it also adopted habitual residence as a major connecting factor in preference to the historic common law personal law concept of “domicile” or even simple residency probably because the majority of countries involved had a civil law history and the Conventions were drafted with reference to “habitual residence”. Most provinces that have adopted Hague Conventions have accepted “habitual residence” in preference to “domicile” or “ordinary residence” not only in the implementation legislation but also in other family law statutes to resolve international or interprovincial jurisdiction and choice of law issues. Manitoba reinterpreted the concept of “domicile” in terms of “habitual residence” for provincial purposes in *The Domicile and Habitual Residence Act*<sup>1</sup>.

The *Children’s Law Reform Act*<sup>2</sup> in Ontario uses “habitual residence” as the primary source of jurisdiction regardless whether the case involves contact with another province or another country as do other provinces that have adopted the Uniform Custody Legislation upon which the *Children’s Law Reform Act* is based<sup>3</sup>. The *Divorce Act*<sup>4</sup> continues to determine jurisdiction on the basis of “ordinary residence”. Unfortunately, the lines between domicile, habitual residence, residence, and the commonly employed common law concept of ordinary residence have never been clearly defined. Indeed, the *Divorce Act* uses the concept of “ordinary residence” in sections 3-5 to establish jurisdiction in the English version of the Act and the French equivalent of “habitual residence” in the French language version. While this suggests the concepts are the same, this may not be the case or at least was not historically the case. Although “ordinary residence” did not form part of Quebec law, the Quebec courts interpreted habitual residence in the divorce context the same as the common law courts interpreted ordinary residence primarily as a result of relying on cases from the common law provinces interpreting “ordinary residence” in the same context. There is also some indication that common law courts have begun to integrate the two concepts in a more general context.

In a children’s law context, presence, residence and domicile were all used historically to establish jurisdiction to decide custody and access. Current provincial custody legislation incorporates residence, ordinary residence, and habitual residence as well as “real and substantial connection” to various degrees. Jurisdiction in child protection cases was statutory in nature focusing primarily on the presence or residence of the child in the jurisdiction under the various

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<sup>1</sup> RSM 1987 c. D 96.

<sup>2</sup> RSO 1990 c. C-12 s. 22.

<sup>3</sup> E.g. *Children’s Law Act* 1997 SS 1997 c. C-8.2 s. 15.

<sup>4</sup> RSC 1985 c. D- 3 ss. 3, 4, & 5.

provincial child protection statutes and has remained primarily “residence” or “presence” oriented to the present time.

Child support was also a creation of statute but few statutes expressly addressed jurisdiction to make a child support order or the law that a court should apply to decide support, assuming it had jurisdiction. Since child support orders were *in personam* orders, they were only enforceable against a payor if made in the place where the payor resided unless he or she attorned to another jurisdiction, usually being the place where the custodial parent and child resided. Because of the problems enforcing child support orders (as well as spousal support orders) at an inter provincial and international level, most jurisdictions implemented reciprocal enforcement legislation whereby a support order was only enforceable outside the place where the order was made if the payor was resident in the granting jurisdiction. If the parents lived in different jurisdictions, an applicant could commence proceedings in the province/country where the payor resided or obtain a provisional order in his or her place of residence which order was ineffective until confirmed by a court in the payor’s place of residence. This procedure was streamlined in the *Interjurisdictional Support Orders Act*, which was implemented at a provincial level in Canadian common law provinces.

Historically, common law courts interpreted the concept of domicile to refer to a person’s “permanent home”<sup>5</sup>, requiring not only presence within the jurisdiction but also an intention to remain there forever. While this provides a useful working definition of domicile of choice, it does not adequately explain domicile of origin or dependency. Moreover, legislators sometimes used the term domicile in a special sense in a statute providing a different definition for the purposes of the statute to reflect the statutory objectives and policies.

Domicile was a term of art and a question of law not fact. Because of the importance attached to the concept historically, a person had to have a domicile at all points in his or her life and could not have any more than one. The rules governing the concept of domicile were highly technical and sometimes bore little relation to the place where a person lived. The rules governing a child’s domicile of dependency in particular were highly formalized yet surprisingly contentious. In the end, many provinces passed legislation to simplify a child’s domicile, which did not necessarily reflect the traditional rules: see e.g. *Family Law Act*<sup>6</sup> s. 67 (domicile of minor child reflecting domicile of parent(s) with whom child is habitually resident).

The common law courts used the various forms of “residence” to describe the place where a person’s life was centered. There was no exclusivity associated with “residence” or even with “ordinary residence” but a person could only have one “actual residence” from time to time. When the legislators introduced habitual residence into the common law jurisdictions, the courts originally interpreted it as more than simple residence or ordinary residence but less than domicile unless the legislation incorporated a special definition. More recently, the English courts in particular appear to have merged the concepts of ordinary and habitual residence, suggesting that they are different ways of describing the same concept. While it is unclear whether Canadian courts have gone this far, it appears that there is no appreciable difference between a child’s “ordinary” and “habitual” residence in most custody cases.

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<sup>5</sup> *Whicker v. Hume* (1858) 7 H.L. Cas. 124 at p. 160.

<sup>6</sup> RSO 1990 c. F-3.

In recent years, legislators have shown a tendency to shift most family law issues that previously were domicile based to one or other of the forms of residence. Since the focus of this project is restricted to the interpretation and use of the various forms of “residence” in the common law provinces, I will not deal with “domicile” except by way of comparison in defining the various forms of residence.

At the present time, a child’s “ordinary” and “habitual” residence each revolves around the place where the child last lived with both parents in a family setting. While Canadian courts acknowledge that a custodial parent has the right to make decisions on behalf of a child, including where the child will reside<sup>7</sup>, courts in the common law provinces have refused to allow a custodial parent to unilaterally change a child’s ordinary or habitual residence<sup>8</sup> or even to move away with a child if the move would affect the child’s relationship with his or her other parent in a material fashion<sup>9</sup>. Substantial case law has developed around when a parent consents or acquiesces in the other parent’s decision to move with the child<sup>10</sup> and when a parent should be allowed to move away with a child over the other parent’s objections<sup>11</sup>. Obviously, a parent cannot change a child’s ordinary or habitual residence without changing where the child resides on a day to day basis since residence, unlike domicile, is primarily a matter of fact reflecting the reality of a child’s life, not a matter of law<sup>12</sup>. Whether a unilateral removal by a custodial parent from the place of a child’s habitual residence is sufficient to change the child’s habitual residence will depend on the law of that place. For example, in *Re J. (A Minor) (Abduction: Custody Rights)*<sup>13</sup> the custodial mother could change the child’s habitual residence unilaterally because the father had no parental rights without a court order. Similarly, if the right to custody in the child’s habitual residence gave a unilateral right to change the child’s residence in the absence of an order or agreement, then the custodial parent will be able to change the child’s habitual residence. This would be a matter of proof of foreign law.

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<sup>7</sup> See *Gordon v. Goertz* (1996) 19 RFL (4<sup>th</sup>) 177 (SCC).

<sup>8</sup> C.f. *Brooks v. Brooks* (1998) 39 RFL (4<sup>th</sup>) 187 (OCA).

<sup>9</sup> E.g. *Woodhouse v. Woodhouse* (1996) 20 RFL (4<sup>th</sup>) 337 (OCA).

<sup>10</sup> *Bedard v. Bedard* 2004 CarswellSask 494 (SCA)(trial judge finding acquiescence to move in father’s actions; Court of Appeal disagreeing and concluding no clear acquiescence); *Hunter v. Hunter* 2005 SKQB 93 (SQB) (acquiescence or implied consent to move by father).

<sup>11</sup> See as to case law on point McLeod and Mamo Annual Review of Family Law 2004 (Carswell) pp. 72-83.

<sup>12</sup> *Macrae v. Macrae* [1949] P. 397 at 403; *Lewis v. Lewis* [1956] 1 WLR 200; *Cullen v. Cullen* (1969) 9 DLR (3d) 610 (NSTD); *Nowlan v. Nowlan* (1971) 2 RFL 67 (NSTD).

<sup>13</sup> [1990] 2 AC 562 (HL).



# RESIDENCE, HABITUAL RESIDENCE, AND ORDINARY RESIDENCE IN THE CANADIAN COMMON LAW PROVINCES

## 1. What does the term “residence” mean?

Part of the problem in assessing “residence” in the common law provinces is that (i) it usually is modified by terms such as “ordinary”, “actual”, or “habitual” each of which alters the basic meaning of the word “residence”, (ii) the meaning of the word may be affected by whether it is employed as a choice of law or jurisdiction concept, and (iii) the term may be used alone or as part of a grouping of significant contacts approach.

The common law courts developed the concept of “residence”, “and ordinary residence” in children’s law and spousal support. Parliament incorporated “ordinary residence” as a general jurisdiction factor in the *Divorce Act*, 1968 and added the concept of “actual residence” but only as a basis for jurisdiction to grant a divorce. Because of the problems associated with “actual residence” as a jurisdictional consideration in the *Divorce Act*<sup>14</sup>, Parliament abandoned the concept in the *Divorce Act*, 1985 and used instead “ordinary residence” or more precisely where a person was “ordinarily resident”. Although the French language version of the Act replaces “ordinarily resident” with “habitually resident”, the dichotomy does not seem to have affected the way the term is interpreted in the common law provinces or Quebec<sup>15</sup>.

A person resides in that province, state, or country about which his or her life is centred. In family law cases the reference was more often to “ordinary residence” than residence *simpliciter*. In the common law provinces, the courts initially adopted the definition of ordinary residence that had developed under the *Income Tax Act*<sup>16</sup>. “Residence” in contrast to “presence” involves a settled and enduring connection between a person and a place.<sup>17</sup> Residence is treated primarily as a factual conclusion and not, like domicile, an idea of law.<sup>18</sup>

“Residence”, unlike “domicile” is not an exclusive concept so that a person may be resident in more than one jurisdiction at the same time.<sup>19</sup> At its simplest level, residence implies that a person is living in a jurisdiction: eating, sleeping, and working in that place. A person may “reside” in a place even if he or she is not physically present there from time to time<sup>20</sup>. The term

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<sup>14</sup> See *Hardy v. Hardy* (1969) 7 DLR (3d) 307 (OHC); *Marsellus v. Marsellus* (1970) 13 DLR (3d) 383 (BCSC); *Norton v. Norton* (1970) 14 DLR (3d) 639 (NSSC); *Cuzner v. Cuzner* (1971) 15 RFL (3d) 511 (NSSC)—concept implying physical presence and some degree of habitude. See also Mendes da Costa “Some Comments on the *Divorce Act*” (1968) 46 Can. Bar Rev. 252—need for regular physical presence.

<sup>15</sup> See *Droit de la famille—360*, 1987 CarswellQue 927 (Que.SC) (court relying on common law cases interpreting “ordinarily resident” to interpret “réside habituellement”).

<sup>16</sup> E.g. *Thomson v. MNR* [1946] 2 DTC 812 @ p. 817; *Levene v. Inland Revenue Commrs* [1928] A.C. 217 (HL).

<sup>17</sup> *Helman v. Brown* (1969) 2 DLR (3d) 715, 718-719 (BCSC); *Blackwell v. England* (1857) 120 ER 202, 204.

<sup>18</sup> *Re Walker and Walker* (1970) 3 OR 771 (HCJ).

<sup>19</sup> See *Hernadi and Minister of Health* (1986) 34 DLR (4<sup>th</sup>) 145 (BCCA); *Adderson v. Adderson* (1987) 36 DLR (4<sup>th</sup>) 631 (ACA).

<sup>20</sup> Mendes da Costa “some Comments on the *Divorce Act* (1968) 46 Can. Bar Rev. 252 at 272. See also *Stransky v. Sgransky* [1954] 2 All ER 536; *Hopkins v. Hopkins* [1950] 2 All ER 1035—no need for physical presence during periods of “residence” or “ordinary residence”.

“residence” excludes tourists and casual visitors to a place<sup>21</sup> although the legality or compulsory nature of a person’s presence in a place should not affect where he or she is resident as a matter of law.

In *Re Koo*<sup>22</sup>, Reid J. held that a person with an established home of his own in a place does not cease to be resident there when he leaves it for a temporary purpose whether on business or vacation or even to pursue a course of student. Although the decision dealt with whether a person had fulfilled the residence requirement of the *Citizenship Act*<sup>23</sup>, Reid J. reviewed many of the same cases that are raised in family law cases and reached the conclusion that the test whether a person is resident in a place is whether that place is where the person regularly, normally or customarily lives—the place where he or she has centralized his existence. While Reid J. purported to be determining the person’s residence, his analysis seems more in keeping with the test for “ordinary residence” and highlights the blurred lines between the various forms of residence in the common law provinces.

## **2. What does the term “habitual residence” mean?**

### **(a) at common law**

The term habitual residence was not a concept regularly used in the common law jurisdictions as a matter of judge made law. Its incorporation appears to come from continental European countries primarily through the Hague Conventions and Uniform Legislation Conferences. Its presence as a term of law in the common law provinces is legislative in nature.

In *Adderson v. Adderson*<sup>24</sup>, Laycraft C.J.A. stated: “The term “habitual residence” seems to have come into Canadian law from the Hague Conventions adopted by the Hague Conference on Private International Law”. Laycraft C.J.A. opined that the term was introduced, at least in part, “to avoid the rigid and arbitrary rules which have come to surround the concept of “domicile”. While “domicile” is concerned with whether there is a future intention to live elsewhere, “habitual residence” involves only a present intention of residence. There is a weaker animus.

Although duration of residence is only one factor to be considered in deciding if a person is habitually resident in a place, it is unlikely that habitual residence can be acquired based upon a very brief period of residence, regardless of the person’s intention since habitual residence implies a significant period of presence together with an intention to live in a place.<sup>25</sup> The English Court of Appeal<sup>26</sup> recently has emphasized that habitual residence is primarily a question of fact to be decided by reference to the circumstances of each particular case.

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<sup>21</sup> C.f. *Re Koo* [1993] 1 FTD 286—residence to be distinguished from “stay” or “visit”.

<sup>22</sup> *Ibid.*

<sup>23</sup> RSC 1985 c. C-29, s. 5(1)(c).

<sup>24</sup> (1987) 36 DLR (4<sup>th</sup>) 631 (ACA). See also Collins, Dicey and Morris on the Conflict of Laws 13<sup>th</sup> ed. (2000) p. 149.

<sup>25</sup> *Re J. (A Minor) (Abduction)* [1990] 2 AC 562; *M. v. M. (Abduction: England and Scotland)* [1997] 2 FLR 263 (CA); *Re A. (Abduction: Habitual Residence)* [1998] 1 FLR 497.

<sup>26</sup> *Re M. (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495 (CA).

In *Re S. (A Minor) (Custody: Habitual Residence)*<sup>27</sup>, the English House of Lords had to decide a two year old child's habitual residence to determine custody jurisdiction under the *Family Law Act* as well as whether the child had been wrongfully removed/retained from its habitual residence under the Hague Convention. The parents were never married so that under the applicable law at the time the father had no parental rights in respect of the child. It was common ground that prior to the mother's death, the child's habitual residence was that of his mother. The mother had lived in England with the father from 1990—1995 when she obtained a "custody" order. The mother and child stayed with the maternal grandmother in Ireland from 3-16 August 1995 on holiday. Thereafter, the mother stayed in England until 4 September when she traveled to Ireland with the intention of returning to England in January 1996. She went to England alone for a week in November 1995 and returned to England with the child on 16 January 1996 where she remained until she died on 10 March 1996. The grandmother returned the child to Ireland and obtained a "custody" order. The father meanwhile obtained a "custody" order in England and applied for the return of the child under the Hague Convention, which depended on whether the child was habitually resident in England at the time of the father's custody order. Everyone agreed that the mother was habitually resident in England at the time of her death. The issue was the child's habitual residence at the time of the mother's death. Lord Slynn held that if the mother had lost her habitual residence in England when she went to Ireland (which was not discussed), she became habitually resident in England when she returned in January or at least by the time she died. That meant the child was habitually resident in England when his mother died and the issue then became whether the child was still habitually resident in England two days later when the judge awarded the father custody since the child had left England. The Court of Appeal had held that the death of the custodial mother did not immediately strip the child of his habitual residence acquired from her, while he remained in England. Nor did the fact the child was removed to another place by a non parent who did not have custodial rights change the child's habitual residence. However, the longer the child remained with the *de facto* caregiver without challenge, the more likely the child would acquire the habitual residence of those who continued to care for him. As an aside, this is consistent with the generally held view in the common law provinces that an infant's habitual residence is acquired from his or her custodial parents acting within their legal rights since the infant is too young to form any intention as to his or her future residence. The conclusion is also consistent with the proposition that one parent cannot unilaterally change a child's habitual residence without a court order or the consent/acquiescence of the other parent with parental responsibility as well as emphasizing that "intention" is a central consideration in determining habitual residence in common law jurisdictions. It does however raise the prospect of a mature minor having authority to decide his or her habitual residence, which appears inconsistent with basic custody law in the common law provinces as explained in *Gordon v. Goertz*<sup>28</sup>. Lord Slynn also pointed out that if the mother had moved to Ireland with the intention of remaining there indefinitely, she could have established a habitual residence there in short time, as would the child since there was no one else with parental responsibilities in the case. That the child may have been an Irish national did not affect his habitual residence in the circumstances. As a result, the English court had jurisdiction to decide custody and once it did so, the child's habitual residence became tied to the father's, which was also England. The House of Lords accepted that the child's habitual residence not only gave the English court jurisdiction to decide custody under the *Family Law Act*, it also

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<sup>27</sup> [1998] AC 750 (HL).

<sup>28</sup> (1996) 19 RFL (4<sup>th</sup>) 177 (SCC).

provided the basis to conclude that the child was being wrongfully retained in Ireland outside its habitual residence (England) from a person entitled to custody rights (the father) within the meaning of the Convention and should be returned to England. That is, the court applied the same meaning to habitual residence under the Convention as it applied to determine jurisdiction under domestic custody law.

Lord Slynn also quoted with approval Lord Brandon's comments on "habitual residence" from *In Re H. (Minors)(Abduction: Custody Rights)*<sup>29</sup> to the effect that habitual residence is not defined in the Convention and should be given its natural and ordinary meaning, not treated as a term of art. Whether a person is habitually resident in a place is a question of fact not law. A person may cease to be habitually resident in a place in a single day if he or she leaves with a settled intention not to return but probably cannot become habitually resident in another place in a single day. Presence over an appreciable period of time and a settled intention to remain indefinitely are necessary to establish habitual residence. Finally, where a very young child is in the sole lawful custody of one parent, the child's habitual residence will necessarily be the same as the parent's. In my opinion, the same principles apply in the common law provinces of Canada, subject to the caveat, which may not be apparent from Lord Brandon's comments, that because of the way relocation (mobility) law has evolved in the common law provinces, a custodial parent does not have a unilateral right to change the child's habitual residence without a court order or the consent/acquiescence of any other person entitled to exercise parental responsibility, in the absence of proof that the right to custody being exercised by the removing parent according to the child's then habitual residence carries with it a right to change the child's residence.

In *Re J. (A Minor) (Abduction: Custody Rights)*<sup>30</sup> the English Court of Appeal had held that a custodial parent could change a child's habitual residence by changing her own habitual residence if no one else was entitled to exercise parental authority (as was the case here where an unmarried father had no rights as in *Re S.*) but that the same conclusion would not follow where both parents were in law entitled to exercise parental authority even if one had been awarded "custody". The House of Lords dismissed the father's appeal noting that the mother had not wrongfully removed the child under the Convention since no one other than the mother had parental or custody rights. One of the mother's legal custody rights was to decide where the child would reside. Again, I would suggest that common law courts in Canada would not allow a custodial parent to unilaterally change a child's habitual residence if another person was entitled to exercise parental authority over the child unless the relevant law included a right to change the child's residence without consent/acquiescence.

**(b) in common law provincial and territorial legislation that defines the concept.**

Some statutes such as the *Children's Law Reform Act*<sup>31</sup> define "habitual residence" for the purposes of the Act. Other statutes such as the *Family Law Act*<sup>32</sup> incorporate the concept but do not provide a statutory definition. In those statutes where the concept is not defined it usually is

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<sup>29</sup> [1991] 2 AC 476 (HL) at p. 578.

<sup>30</sup> [1990] 2 AC 562 (HL).

<sup>31</sup> RSO 1990 c. C-12 s. 22(2) (custody jurisdiction based on habitual residence). See also *Children's Law Act* SS 1997 s. 15(2) (jurisdiction in custody proceedings).

<sup>32</sup> RSO 1990 c. 15 (property distribution governed by last common habitual residence).



interpreted to mean something close to the person’s domicile of choice—the place where the person’s life is centred and where he or she intends to live indefinitely. In spite of occasional suggestions to the contrary, most courts in the common law provinces interpreted “habitual residence” to include a concept of exclusivity in the sense that a person can only have one habitual residence at a time. The word “habitual” implies a more enduring and permanent connection between a person and a place than simple residence.<sup>33</sup>

In *Cruse v. Chittum*<sup>34</sup>, Lane J. adopted the submission of counsel that while the focus of “habitual residence” is on the nature and quality of the residence, regular physical presence seems to be implied as well. Many authors and commentators adopted a similar definition and placed “habitual residence” between “residence” and “domicile” on a spectrum of connections between a person and a place<sup>35</sup>. Although evidence of intention is not as important in deciding habitual residence as it is in establishing domicile, it may be a relevant consideration in deciding the quality and nature of a person’s presence/residence in a place. In *Adderson v. Adderson*<sup>36</sup>, Laycraft C.J.A. considered other formulations of the definitions and adopted a similar interpretation whereby “habitual residence” referred to the quality of the residence more than the duration, though duration was a consideration, and that it required an intention between that required for domicile and residence, importing more durable ties than residence.

However, there are recent indications that perhaps there is no real difference between “habitual residence” and “ordinary residence” or at least far less than many lawyers and judges earlier thought. North and Fawcett<sup>37</sup> reviewed case law from about the mid ‘80s onwards and concluded that “habitual residence” should now be equated with “ordinary residence”. Collins in the Twelfth edition of Dicey and Morris<sup>38</sup> also suggested that Lane J.’s decision in *Cruse v. Chittum* that habitual residence was “something more than” ordinary residence may no longer be good law based in large part on *Re E. (Child Abduction)*<sup>39</sup>.

Whether “habitual residence” now means the same as “ordinary residence” in the Canadian common law provinces depends on whether the definitional shift referred to by the above authors is confined to the legislation under which the cases referred to were decided. The current English thinking seems to be that the two concepts are essentially the same for family law purposes. In a related vein, the wording of the English and French versions of the definition of “residence” in the Quebec Civil Code Art. 77 seems to treat the two concepts as interchangeable. The short answer may be that in the absence of any legislative definition of the term “habitual residence” common law courts will adopt a purposive construction of the concept to reflect the context

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<sup>33</sup> *Cruse v. Chittum* [1974] 2 All E.R. 940 (QB)(“habitual” a reference more to the quality than duration of residence).

<sup>34</sup> *Ibid.* see also *Adderson v. Adderson* (1987) 36 DLR (4<sup>th</sup>) 631 (ACA) where Laycraft C.J.A. accepted Lane J.’s comments.

<sup>35</sup> E.g. Dicey and Morris, *The Conflict of Laws*, 10<sup>th</sup> ed. (1980) pp. 144-5; Cheshire and North *Private International Law*, 10<sup>th</sup> ed. (1979) p.187; McLeod *Conflict of Laws* (1983) p. 180; Graveson, *Conflict of Laws*, 7<sup>th</sup> ed. P. 194, Castel, *Canadian Conflict of Laws*, 4<sup>th</sup> ed. P. 110.

<sup>36</sup> *Supra* footnote 14.

<sup>37</sup> Cheshire and North’s *Private International Law*, 12<sup>th</sup> ed. (1992).

<sup>38</sup> L. Collins, *AV Dicey and JHC Morris, Dicey and Morris on the Conflict of Laws*, 12<sup>th</sup> ed. (1993).

<sup>39</sup> [1991] FCR 632 (reversed on the facts [1992] 1 FCR 541 (FCA).)

within which the phrase is used<sup>40</sup> but will be inclined to equate “habitual residence” with “ordinary residence” and vice versa in family law cases, particularly custody or access where both concepts are used primarily as jurisdiction thresholds intended to discourage child napping and force custody/access issues to be litigated in the place where the child’s family life was centered.

In Manitoba there may be problems equating habitual residence with ordinary residence since *The Domicile and Habitual Residence Act*<sup>41</sup>, treats habitual residence and domicile as identical concepts and everyone agrees that domicile is different from ordinary residence at various levels. By contrast, the English and Scottish Law Commissions<sup>42</sup> recommended that habitual residence not replace domicile as a general connecting factor because of the undeveloped state of habitual residence as a legal concept in common law jurisdictions. Unfortunately, I was unable to locate any Manitoba cases that provided insight into how to reconcile domicile, habitual residence, and ordinary residence having regard to the legislation.

If “habitual residence” and “ordinary residence” are interchangeable terms, it would mean that at least in principle a person could be without any habitual residence<sup>43</sup> (subject to statutory provisions to the contrary) and that a person could be habitually resident in two or more places<sup>44</sup> (which would seem to undermine the generally accepted view about the exclusivity of habitual residence). However, this could depend on the context within which the concept was employed.<sup>45</sup>

Regardless of the relationship between habitual and ordinary residence, there seems general acceptance of the reality that there is no practical difference between a young child’s “ordinary” and “habitual” residence<sup>46</sup>.

Notwithstanding general acceptance that “habitual residence” is primarily a matter of fact not law, common law courts seem to determine a child’s habitual residence by reference to family lifestyle prior to separation and not simply where the child lives at the time the child’s habitual residence becomes an issue.<sup>47</sup>

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<sup>40</sup> C.f. *Haig v. Canada; Haig v. Canada* (Chief Electoral Officer) [1993] 2 SCR 995 per Cory J—interpretation of residence as it pertained to right to vote.

<sup>41</sup> CCSM c. D96.

<sup>42</sup> *The Law of Domicile* (Law Com. 168) paras 3.5-3.8.

<sup>43</sup> C.f. *Hack v. Hack* (1976) 6 Fam. Law 177; *Re J. (A Minor) (Abduction)* [1990] 2 AC 562; *W. and B. v. H. (Child Abduction: Surrogacy)* [2002] 1 FLR 1008 (HC)—(in exceptional case even child could have no habitual residence).

<sup>44</sup> *Commissioner, Western Australia Police v. Dorman* (1997) FLC 92-766. Having said this, most courts reject the idea that a child can have more than one habitual residence at a time for custody purposes but can have revolving residences if the parents share custody on a more or less equal parenting basis: *Re A. (Abduction: Habitual Residence)* [1998] 1 FLR 497 (HC).

<sup>45</sup> E.g. *Cameron v. Cameron* 1996 S.C. 17 where the court made clear that the *Hague Convention on the Civil Aspects of International Child Abduction* was dependant on the principle that a child could only have one habitual residence at a time.

<sup>46</sup> See *Re S.* [1998] AC 750; *Re J.* [1990] 2 AC 562; *Hunter v. Hunter* 2005 SKQB 93 (SQB); *Bedard v. Bedard* 2004 SKCA 101 (SCA); *Brooks v. Brooks* (1998) RFL (4<sup>th</sup>) (OCA).

<sup>47</sup> See *Krisko v. Krisko, infra*.

In *Krisko v. Krisko*<sup>48</sup> the court held that two children who were Canadian Citizens were not habitually resident in Ontario for the purposes of establishing jurisdiction under s. 22 of the *Children's Law Reform Act* where they lived with their parents in Dubai indefinitely, even though the parents intended at some time to return to Ontario. While it is doubtful that the parents' domicile of choice shifted from Ontario to Dubai, the nature and duration of their residence in Dubai was sufficient to make them habitually resident there. The children were also ordinarily resident in Dubai on any reasonable definition of the phrase for the same reasons.

In *Chan v. Chow* 2001 BCCA 276 (BCCA), the British Columbia Court of Appeal addressed the concept of a child's "habitual residence" under ss. 44(2)(3) of the *Family Relations Act*<sup>49</sup> and the Hague Convention and in particular whether the definition of "habitual residence" in ss. 44(2)(3) of the Act<sup>50</sup> applied under the Convention. Proudfoot J.A. pointed out that there was conflicting authority on the point at the Superior Court level<sup>51</sup> and held that the definition in the *Family Relations Act* did not apply under the Convention primarily because the Act and the Convention serve different purposes<sup>52</sup>. With respect, Proudfoot J.A.'s comments on the difficulties of applying the statutory definition to the Convention are not convincing. More importantly, she seemed to base her conclusion, at least in part, on La Forest J.'s comments in *Thomson v. Thomson*<sup>53</sup> that the provisions of the Convention and Manitoba's *Child Custody Enforcement Act*<sup>54</sup> operated independently of one another. Contrary to the impression created by Proudfoot J.A.'s statements, when considered in full context La Forest J.'s comments seem to confirm that the Convention and the Act had similar objectives—requiring custody to be determined in the place where the child's life was centred. Moreover, it is difficult to see how a court could decide that the child was habitually resident in a province to decide custody but not habitually resident there to order the child's return in violation of a local order made on the basis the child was habitually resident in the province.<sup>55</sup> Finally, the definition of habitual residence in the Act (as in the Uniform Legislation) simply mirrors the definition developed by the common courts generally. In dealing with the statutory definition in ss. 44(2)(3) FRA, Proudfoot J.A. held that the Act made a significant distinction between parental and non-parental care. In ss. 44(2)(a) and (b), a child merely has to "reside" with one or both parents to be deemed to be

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<sup>48</sup> 27 Jan. 2000, doc. Simcoe 4216/99 (OGD) appeal dismissed (2000) 137 OAC 7 (CA). See also *Baker v. Arthurs* (1994) 124 Nfld & PEIR 69 (Nfld. CA): children habitually resident in Ontario for deciding jurisdiction under Newfoundland *Children's Law Reform Act* where lived with parents and parents intended to live there indefinitely before separation.

<sup>49</sup> RSBC 1996 c. 128.

<sup>50</sup> Which incorporate the provisions of the Uniform Custody Legislation adopted in many common law provinces.

<sup>51</sup> E.g. *Petnehazi v. Kresz* [1999] BCJ No. 1238 (SC) and *Hewstan v. Hewstan* 2001 BCSC 368.

<sup>52</sup> Contrast *Medhurst v. Markle* (1995) 26 O.R. (3d) 178 (OGD) (judge rejecting view different interpretations of habitual residence applied under local custody legislation and Hague Convention).

<sup>53</sup> [1994] 3 SCR 551, at page 603.

<sup>54</sup> RSM 1987 c. 360.

<sup>55</sup> Contrast *Re S.* [1998] AC 750 (HL) where the House of Lords decided the child was habitually resident in England under local custody legislation and then ordered the return of the child under the Convention because the child was wrongfully detained in Ireland from its place of habitual residence.

habitually resident in a place, whereas if the child is with a non-parent, he or she needs to reside with that person on a “permanent basis for a substantial period of time”.<sup>56</sup>

In *Bedard v. Bedard*<sup>57</sup> the Saskatchewan Court of Appeal held that a father had not acquiesced in the mother’s unilateral removal of children from British Columbia to Saskatchewan where the family had resided prior to separation. The children were habitually resident in British Columbia and the mother could not unilaterally change the children’s habitual residence by moving them away without a court order or the father’s consent/acquiescence. The husband had acted promptly to get an order for custody in B.C. but did not try to enforce the order in Saskatchewan for an extended time while he tried to negotiate with the mother. The Court of Appeal disagreed with the trial judge’s assessment of the evidence and held that there was no “clear and cogent evidence of unequivocal consent or acquiescence” in the removal. As a result, the Saskatchewan courts had no jurisdiction to decide custody under ss. 15(1)(2) of the *Children’s Law Act* in light of the pending proceedings in British Columbia where the children were habitually resident. The analysis under the Act reflected the same definition that courts in the common law provinces apply under the Convention to decide a child’s “habitual residence”.

In *Hunter v. Hunter* 2005 SKQB 93 (SQB), Wright J. also addressed the meaning of a child’s “habitual residence” under s. 15 of the *Children’s Law Act*<sup>58</sup> following the mother’s removal of the child from British Columbia to Saskatchewan. Wright J. distinguished *Bedard v. Bedard* and held that the father in this case had acquiesced in the mother’s removal of the child even if he had not originally agreed to the removal. The father did not manifest any objection to the child residing in Saskatchewan and commenced no proceeding there or in B.C. and had even acknowledged the child was living with the mother in an inter spousal agreement. The father’s acquiescence was sufficient to allow the mother to change the child’s habitual residence to Saskatchewan.

In *Dale v. Dale*<sup>59</sup>, Belch J. refused to assume jurisdiction to decide custody of two children who had been brought by their mother with the father’s consent from Pennsylvania to Ontario to attend school for a limited time up until the end of school in June 2003. The father extended his consent to 31 August 2003 and then to 31 December 2003. In November 2003 the mother advised the father she intended to stay in Ontario with the children. Belch J. held that the children had been habitually resident in Pennsylvania pursuant to s. 22(2) CLRA before their move to Ontario, the mother could not unilaterally change the children’s habitual residence and the father had never agreed to more than a temporary stay in Ontario. He went on to hold that the children should be returned to Pennsylvania under the Convention, on the assumption that since the children were habitually resident in Pennsylvania under the CLRA there were also habitually resident there under the Convention.

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<sup>56</sup> See Lord Slynn’s comments in *Re S. (Custody: Habitual Residence)* [1998] AC 750 (HL) to a similar effect in proceedings under the Convention where the child was removed by his grandmother from England to Ireland.

<sup>57</sup> 2004 SKCA 101 (SCA).

<sup>58</sup> Which incorporated the Uniform Legislation as in British Columbia and in Ontario.

<sup>59</sup> 22 Nov. 2004 doc 667/03 (OSCJ).

### (c) The Hague Convention on the Civil Aspects of International Child Abduction

Collins<sup>60</sup> points out that habitual residence has long been a favourite expression of the Hague Conference on Private International Law but no definition of the term has ever been included in a Hague Convention. The case law in the common law provinces has been consistent under the Hague Convention on International Aspects of International Child Abduction that a child is habitually resident in the place where the child last lived with both parents in a family setting<sup>61</sup>. The case law requires that the family actually have adopted a residence in a place for it to be the child's habitual residence. A brief sojourn or temporary presence in a place is insufficient to establish a habitual residence in that place.

The courts in the common law provinces routinely have maintained that one parent cannot unilaterally change a child's habitual residence by moving away with the child. Although the right to "custody" includes a right to decide where a child will live<sup>62</sup> and the SCC went so far as to suggest that a custodial parent may be able to unilaterally change a child's habitual residence even in the face of a non removal clause,<sup>63</sup> Canadian courts do not appear willing to read a unilateral right to do so into a custody order unless the order expressly so provides<sup>64</sup> or unless the law under which the parent exercises custody allowed him or her to unilaterally change the child's residence<sup>65</sup>.

Certainly, one joint parent does not have authority to change a child's habitual residence without a court order to that effect or the consent/ acquiescence of the other joint parent<sup>66</sup> since the right to joint custody usually carries with it a right to participate in major parenting decisions, including where the child will reside<sup>67</sup>. Notwithstanding the La Forest J.'s comments in *Thomson v. Thomson*<sup>68</sup> to the contrary most courts seem to accept that a parent who has been granted custody but with the proviso that the child not be removed from the jurisdiction will not be allowed to unilaterally change the child's habitual residence by moving with the child<sup>69</sup> in spite of the SCC's suggestion that this might be possible after a final custody order.<sup>70</sup> The parents can agree to a change in the child's habitual residence or one parent can acquiesce in such a

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<sup>60</sup> *Dicey and Morris on the Conflict of Laws*, ed. Collins 13<sup>th</sup> ed (2000) at pa. 149.

<sup>61</sup> See *R.(B) v. C.* (LRS) 2001 CarswellBC 1161 (BCCA) (court reviewing concepts of habitual residence and wrongful removal).

<sup>62</sup> *Gordon v. Goertz* (1996) 19 RFL (4<sup>th</sup>) 177 (SCC).

<sup>63</sup> *Thomson v. Thomson* (1994) 3 SCR 551 (SCC).

<sup>64</sup> See cases discussed in McLeod and Mamo, *Annual Review of Family Law 2004* (Carswell) pp. 23-24.

<sup>65</sup> E.g. *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 (HL).

<sup>66</sup> *C. (DM) v. W. (DL)* (2001) 15 RFL (5<sup>th</sup>) 35 (BCCA)(mother with joint custody ordered to return child).

<sup>67</sup> Clearly if the local court is dealing with a court order from another country, it would be a question of foreign law whether the shared parenting arrangement carried a right to participate in deciding where the child would live but a local court would not assume a right to unilaterally change residence.

<sup>68</sup> *Supra* footnote 57.

<sup>69</sup> *Thorne v. Dryden-Hall* (1997) 28 RFL (4<sup>th</sup>) 297 (BCCA).

<sup>70</sup> See *Thomson v. Thomson*, *supra* where the court suggested there was a difference between such a restriction in an interim and a final order.

change by the other parent<sup>71</sup>. However, courts are reluctant to find an agreement to change or acquiescence in a change in the absence of clear evidence that was intended<sup>72</sup>.

In *Williams v. Elliott*<sup>73</sup>, Steinberg J. pointed out how difficult it may be to determine a child's habitual residence with a highly mobile family. His solution came close to using a real and substantial connection case to decide close cases.

In *Chan v. Chow*<sup>74</sup>, the BCCA dealt with a similar problem but in a more traditional fashion. The parties married in Alberta in 1993, their child was born in 1994, and they separated in 1995. In January 1996 the mother was granted interim custody by *ex parte* order and took the child to Australia without informing the father. She later took the child to Hong Kong. In the meantime, the father was granted interim custody. He also moved to Hong Kong to attempt reconciliation. In April 1997, the parties were divorced in Alberta and awarded joint custody. In July 1998 the parties made a further attempt at reconciliation in Ontario. The family moved to British Columbia in August 1998 and to Hong Kong in June 1999. The parents separated permanently while living in Hong Kong and the child spent about equal time with each parent. In March 2000, the father returned to British Columbia with the child but without the mother's knowledge or consent. The mother applied for the child's return to Hong Kong under the Convention. The chambers judge noted that the child's permit to remain in Hong Kong and the mother's immigration status in Canada were about to expire and then held that the Convention did not apply since the child was not habitually resident in Hong Kong immediately before the father brought her to British Columbia. The Court of Appeal disagreed and held that the child had been habitually resident in Hong Kong immediately before the removal. She had been there for nine months, which was an appreciable period of time, the parents clearly had a settled intention to make Hong Kong their home before their final separation, which meant they were habitually resident there, and the child's habitual residence was tied to her parents' habitual residence. Since the parents shared joint custody, neither had a right to unilaterally change the child's residence as a matter of law. However, that was not an end to the case since the child's return posed the risk of an intolerable situation since she would have to move again when her permit to remain in Hong Kong expired and the mother had demonstrated an unstable lifestyle. Accordingly, the Court declined to order the return of the child under the Convention and referred the matter for trial in the province. The Court's reasons confirm that the fact a person's immigration status is uncertain does not mean that he or she cannot establish habitual residence in a place although it may be a factor bearing on whether he or she reasonably intends to remain in the place indefinitely.

While it is not a Canadian case, Kozinski C.J.'s comments in *Mozes v. Mozes*<sup>75</sup> contain some instructive comments on the meaning of habitual residence in other common law jurisdictions. Although the appeal is from a California decision and California has a civilian heritage, it is clear

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<sup>71</sup> Contrast the results on the facts in *Bedard v. Bedard* 2004 SKCA 101 (SCA) and *Hunter v. Hunter* 2005 SKQB 93 (SQB) applying same legal analysis.

<sup>72</sup> See *Brooks v. Brooks* (1998) 39 RFL (4<sup>th</sup>) 187 (OCA) (court erring assuming jurisdiction where child removed from Manitoba to Ontario); *Bedard v. Bedard*, *supra* (no clear and compelling evidence of agreement or acquiescence).

<sup>73</sup> (2001) 21 RFL (5<sup>th</sup>) 247 (OSCJ).

<sup>74</sup> 2001 BCCA 276 (BCCA).

<sup>75</sup> United States Court of Appeals for the Ninth Circuit, 9 January 2001.

that the Court of Appeal was applying common law concepts<sup>76</sup>. The mother had brought the children from Israel to California with the father's consent for a limited time (about 15 months) and purpose (primarily education). However, a year after they arrived, the mother applied for divorce and custody in California and the father sought the children's return to Israel under the Convention. The father appealed the District Court's denial of his petition. Kozinski J. emphasized that the Convention was intended to prevent and address unilateral removal of children from their place of habitual residence that interfered with a person's custody rights. The issue turned on whether the children were still habitually resident in Israel or whether their habitual residence had changed to California given the nature and duration of their presence there. Kozinski C.J. disagreed with the suggestion the words "habitual residence" had a simple and obvious meaning. While he tried to downplay the technical aspects of the phrase, he acknowledged that the meaning of the words was a question of law, being a matter of statutory interpretation, even though the meaning was essentially a matter of fact making the term a mixed question of fact and law. Kozinski C.J. confirmed the English law holding that there was no real distinction between ordinary residence under British law and habitual residence under the Convention and also confirmed the difference between habitual residence and domicile involved the nature of the requisite intention to establish each. Kozinski C.J. was very clear that habitual residence involved proof of a settled intention to reside in a place indefinitely. He also pointed out that many courts have held that a person can only have one habitual residence at a time under the Convention. The exception would be the rare situation where someone splits time more or less evenly between two locations. Kozinski C.J.'s case law review included reference to a Quebec case—*Y.D. v. J.B (Droit de la famille—2454)*<sup>77</sup> where the court appeared to focus simply on the objective facts but observed that the court "nevertheless made what we would call a finding of settled purpose, remarking that 'the members of this family were neither visitors nor tourists in California'". This suggests that "intention" may be more relevant in fact and substance than appears to be the case in law and form under Quebec law. Kozinski C.J. also agreed that when it came to children, the intention or purpose which has to be taken into account to determine habitual residence was that of the person or persons entitled to decide the child's residence. Problems arise when the persons entitled to fix the child's residence no longer agree. Kozinski C.J. rejected the suggestion that a child remained habitually resident in the last place the family lived together unless a court ordered or the parents agreed otherwise as well as the suggestion that as a general rule a parent could unilaterally change the child's residence as a matter of objective facts just by living somewhere else with the child. Instead, he adopted the more widely accepted view that as a general rule after separation, neither parent can unilaterally change a child's residence but instead requires a court order, consent, or acquiescence to the change. The latter may arise by simple knowing inaction to a change. He also confirmed that an intention to live somewhere will not result in habitual residence there unless the person is actually physically present there.

In *Mozes v. Mozes*, Kozinski C.J. opined that the courts would be undermining the integrity of the Convention if they allowed a child's habitual residence to be changed too easily. In the absence of consent/acquiescence or court order, a parent should only be allowed to change a child's habitual residence by moving with the child if the child resided there for a considerable

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<sup>76</sup> In part III of his reasons Kozinski C.J. relies on English cases and texts.

<sup>77</sup> [1996] RDF 512 (Que.SC) (children living continuously with both parents and attending school in California for three years).

time with no objection by the other parent or the applicable law allowed the parent to unilaterally change the child's residence as an incident of his or her custody rights. Although Kozinski C.J. appeared to accept the possibility of unilateral change if the duration of the change was sufficiently long, this appears to be no more than recognition that acquiescence can be inferred by inaction. Kozinski C.J. then remitted the matter for determination on the proper legal principles. In this case, the parents had agreed that the children would be in California for a limited time and purpose. There was no agreement or acquiescence to any indefinite stay and no consent to changing the children's habitual residence. That the father immediately took steps to arrange the children's return negated any change or finding that he had acquiesced in the change so it seemed unlikely that the court could find the children's habitual residence had changed.

In *de Haan v. Gracia*<sup>78</sup>, the parties commenced cohabitation in France in 1994, had two children, and were married there in 1999. The mother and both children were Canadian citizens. The parents separated and commenced divorce proceedings in France in 2002 but later reconciled and decided to move to Alberta, Canada. The mother and children went on ahead and the father arrived a few months later. The father decided he wanted to return to France but the mother refused to accompany him or allow him to take the children. Power J. dismissed the father's application for a return order under the Hague Convention, noting that the father had consented to the family, including the children, moving to Alberta. Based on the parties' words and conduct, Power J. was satisfied that they had a settled intention to abandon their prior habitual residence in France and to establish one in Alberta. Accordingly, the children were habitually resident in Alberta and there was no basis to order their return since the application was commenced after the change in habitual residence. The only troubling aspect of the case was when Power J. held that the children's habitual residence changed almost immediately upon their arrival in Alberta. With respect, this seems more domicile oriented than habitually resident where most courts insist on some extended physical presence before an habitual residence is established. At least in Power J.'s opinion, there is no rule of law requiring extended residence in a place to establish a habitual residence there if the intention to live there indefinitely is clear enough. With respect, this conclusion should be approached with some caution given the weight of authority in favour of requiring a more extended physical presence in a place.

In *Chan v. Chow*<sup>79</sup> the British Columbia Court of Appeal held that the definition of "habitually resident" in the custody jurisdiction section of the *Family Relations Act* did not apply to determine a child's habitual residence under the Convention and then appeared to do just that. By contrast in *Dale v. Dale*<sup>80</sup>, Belch J. applied the same definition in s. 22(2) CLRA to decide a child's habitual residence under the Convention but without expressly commenting on the propriety of doing so. Unless the definition in the local custody legislation contains a definition that is clearly different from the usual meaning of habitual residence under the Convention, it is likely that courts will do the same as Belch J. did in *Dale* notwithstanding Proudfoot J.A.'s

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<sup>78</sup> 2004 ABQB 74 (AQB). See also *Proia v. Proia* 2003 ABQB 576 (AQB) where Rooke J. held that the parents and children became habitually resident in Alberta after they sold their home in France and moved to Alberta and signed a residential lease. That the parents separated a short time later and the father returned to France did not change the children's habitual residence. Again the court seemed satisfied that the parents and children acquired a habitual residence in Alberta upon their arrival given the parents' decision to relocate.

<sup>79</sup> 2001 BCCA 276 (BCCA).

<sup>80</sup> 22 Nov. 2004 doc 667/03 (OSCJ).



comments to the contrary in *Chan v. Chow* since the Convention and Uniform Custody legislation have similar objectives.

In *Medhurst v. Markle* (1995) 26 O.R. (3d) 178 (OGD), the trial judge found that the parents moved from Canada to Germany to live indefinitely rather than as tourists or for vacation. As a result, the parents became habitually resident in Germany as was their daughter who was born in Germany in December 1994. That the mother may have had the father's permission to bring the child to Canada in February 2005 to visit the father's mother did not entitle her to change the child's habitual residence when she decided to separate from the father and remain in Canada. The father appealed. In the course of the appeal, Jenkins J. noted that the trial judge had used the definition of "habitually resident" in s. 22(2) CLRA to decide the child's habitual residence under the Convention. Jenkins J. rejected the father's argument that this was improper since principles of public international law not domestic law governed the interpretations of treaties incorporated into domestic law<sup>81</sup>. Jenkins J. held that since the Convention had been incorporated into the CLRA it was part of Ontario custody law and the same definition applied under the Convention as applied under s. 22(2) CLRA, noting that the SCC appeared to recognize this in *Thomson v. Thomson*.

**(d) the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibilities and Measures for the Protection of Children**

There is no reason to suspect that common law courts will adopt a different interpretation of "habitual residence" under this Convention than the Convention on International Child Abduction, especially given the large body of case law that has developed under the latter Convention. The Convention on Parental Responsibilities is not so different in fundamental policy objectives as to force the courts into a contextually different approach. Even if the BCCA was correct in *Chan v. Chow* that habitual residence had a different meaning under the Convention than under domestic custody law, this Convention, like the *Convention on Civil Aspects of International Child Abduction*, is also an international treaty with similar basic objectives. On balance, it is likely that most courts would adopt Jenkins J.'s reasoning in *Medhurst* in preference to the BCCA's in *Chan* since both the domestic legislation and Convention are aimed at restricting custody cases to the place where a child's life is centered to discourage child napping and reduce multiplicity of proceedings.

Most common law courts have limited their attention to cases from Canada and occasionally England or the Commonwealth in deciding a child's "habitual residence" under the Hague Convention and presumably will do so under the Jurisdiction Convention, if it is implemented.

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<sup>81</sup> This was the same argument, albeit in more formal form, that the BCCA accepted as a matter of law in *Chan v. Chow*, *supra*.

### **3. (a) Does the interpretation which has been given to the term “habitual residence” under the Hague conventions differ from that under the common law and P/T legislation?**

Except to the extent the legislation expressly incorporates a different definition or the context requires a different approach to carry out the legislative policy objectives there is no reason to expect fundamentally different interpretations. One caveat to this may be that while the relocation law that has applied in the common law provinces does not acknowledge a parent’s right to unilaterally change a child’s residence even if that parent exercises sole custody, this may not be case where custody rights are established according to a Contracting State outside the common law provinces. In such cases, whether the parent exercising a right of custody from such place has the right to unilaterally change the child’s residence is an incident of the foreign law.

While there appears to be a fundamental difference of opinion on whether domestic definitions should be transported into the Convention as noted by Proudfoot J.A. in *Chan v. Chow*<sup>82</sup> and Jenkins J. in *Medhurst v. Markle*<sup>83</sup> as I previously indicated, most judges do not even advert to the dilemma and simply transpose the definition from the Uniform Legislation into the Convention and those that do probably would prefer Jenkins J.’s decision over Proudfoot J.A.’s. The matter seems almost moot since the definition in the Uniform Legislation reflects the case law that had developed under the Convention and other Hague Conventions as noted by various text writers.

In Manitoba the Legislature amended the law by enacting *The Domicile and Habitual Residence Act* whereby both terms have the same meaning in law. Under the Act, the common law of domicile is abolished and domicile and habitual residence are treated as the same thing. The domicile and habitual residence of each person is in the state and a subdivision thereof in which the person’s principle home is situated and in which that person intends to reside. Unless a contrary intention is shown, a person is presumed to reside indefinitely in the state and subdivision where that person’s principle home is situated. The statute essentially re-defines domicile for adults of full capacity in terms of habitual residence as the term is interpreted in the common law provinces and institutes a statutory presumption of intention. However, a person may only have one domicile or habitual residence at any time and cannot abandon a domicile or habitual residence until he or she has acquired another (contrary to the common law doctrine of reverter). Although the domicile of dependency is abolished, special rules apply for mentally incompetent persons and for children who continue to have domiciles and habitual residences that are different and distinct. While a child’s domicile reflects the parents’ as a matter of law, a child’s habitual residence depends on where the child normally and usually resides, which reflects Quebec law. Having said this, since children usually live with their parents, the distinction will be more imagined than real in most cases.

In *Fareed v. Latif*<sup>84</sup>, a wife petitioned for divorce and claimed a division of family property under *The Marital Property Act*. The husband applied for a stay of proceedings or dismissal on the ground the Manitoba court lacked jurisdiction. Mercier J. held that the husband’s principle

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<sup>82</sup> 2001 BCCA 276 (BCCA).

<sup>83</sup> (1995) 26 OR (3d) 178 (OGD).

<sup>84</sup> (1991) 31 RFL (3d) 354 (MQB).

home and hence his domicile and habitual residence were in Egypt while the wife's were in Manitoba. Accordingly the courts had jurisdiction to decide support if they chose to do so although there could be enforcement problems. *The Marital Property Act* applied if the parties' last common habitual residence was in Manitoba. Mercier J. held that the parties' last common habitual residence was a matter of fact that he could not decide on the conflicted affidavits and left the matter to the trial judge. In deciding whether the Manitoba court had jurisdiction to deal with divorce under the *Divorce Act*, Mercier J. applied the same case law referred to above with no indication that *The Domicile and Habitual Residence Act* had any effect on habitual residence.

In *L. (TI) v. F. (JL)*<sup>85</sup>, an issue arose whether a Manitoba court had jurisdiction to hear an adoption. The adoptive parents who were both born in Manitoba and had resided in the province all their lives wanted to adopt a child who was born in North Dakota. The birth mother had agreed to place the child with the adoptive parents and three days after the child was born did so. The application was dismissed because the child had not resided in Manitoba as required under the local adoption legislation. Although the child was domiciled and habitually resident in North Dakota under *The Domicile and Habitual Residence Act* s. 4 because his birth parents resided there and he was born there, domicile and habitual residence were irrelevant under the adoption legislation. All that was required was that the child reside in Manitoba prior to the adoption, which he did after the mother placed him there. That the birth father had not agreed or did not even know was irrelevant to simple residence.

On the other hand, in *Moggey v. Lawler*<sup>86</sup>, Clearwater J. seemed to equate ordinary residence with habitual residence contrary to what appeared to be the clear words of the Act. The parents cohabited in North Dakota without marrying for two and half years until their child was 14 months old. The parents signed an agreement giving the father custody and the mother access. Six months after separation, the mother married and moved with the child to Manitoba. The mother claimed custody in Manitoba and the husband claimed in North Dakota. Although the mother and child were American citizens, the mother had applied for permanent resident status in Canada for both of them. Clearwater J. held that Manitoba had jurisdiction to decide custody of children who are ordinarily resident in Manitoba and then noted that under *The Domicile and Habitual Residence Act* no one can have more than one domicile or habitual residence. However, the court should only exercise that jurisdiction if it had a real and substantial connection with the subject matter of the litigation. Clearwater J. held that regardless of the terms of the parties' agreement or that the father had been a major caregiver for extended periods of time until he was called up on active service, the child had been under the mother's care for the majority of her life with the knowledge and concurrence of the father for an extended time. The child was not surreptitiously removed from North Dakota and had a real and substantial connection with Manitoba in fact, given the time she had lived there. Clearwater J. seemed content to base ordinary residence on the facts of the case without regard to who was entitled to *de jure* custody. This reflects what I understand to be the dominant position in Quebec to decide habitual residence but not necessarily the position in the common law provinces with respect to ordinary residence and/or habitual residence.

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<sup>85</sup> (2001) 16 RFL (5<sup>th</sup>) 173 (MCA).

<sup>86</sup> 2004 MBQB 198 (MQB).

### **3. (b) Critical differences between Quebec and the common law provinces**

While it appears that Quebec courts and the courts in the common law provinces decide cases under the Convention and the *Divorce Act* in similar ways, there appear to be a number of differences as a matter of principle in how the courts approach the various jurisdictional factors. Four points of distinction stand out and are worth comment.

#### **(i) Do habitual residence and ordinary residence mean the same thing?**

Since the concept of ordinary residence does not form part of Quebec family law, it appears that when the issue has arisen, the Quebec courts have interpreted them as meaning the same thing, which is emphasized by the fact that the English language version of the *Divorce Act* makes ordinary residence the main jurisdictional consideration while the French language version uses habitual residence (*réside habituellement*). Quebec courts routinely decided jurisdiction under ss. 3, 4, & 5 of the *Divorce Act* according to habitual residence but used the early cases from the common law provinces that purported to decide the issue on the basis of ordinary residence. On the other hand, if civil lawyers were asked whether the traditional definition of “ordinary residence” meant the same as their definition of “habitual residence” they would probably answer in the negative. Clearly, it is unacceptable to have the same jurisdiction section meaning something different in Quebec than in the rest of the country.

It is even more difficult to answer this question in the common law provinces. The concept of “habitual residence” is a civil law concept not a common law concept and when it was incorporated into the law of the common law provinces it was given a spot somewhere between “ordinary residence” and “domicile”. While habitual residence was less technical and legally driven than domicile, and, like “ordinary residence”, primarily a question of fact, it involved a more significant and enduring intention than ordinary residence. Over the years, the two concepts have drifted together in the way the common law courts apply them. Although the English courts and academics seem to accept that the two concepts now mean the same thing, they may be more closely aligned with Continental Europe than Canada on this issue in the sense that I am not convinced there would be anything like unanimity on the point here. In particular, many Canadian common lawyers and judges would have problems with the idea that the same intention is needed for both, that a person can have only one ordinary residence or more than one habitual residence as a matter of law. Having said this, I suspect that judges and lawyers would usually reach the same conclusion if asked to identify a person’s habitual residence and ordinary residence on a set of facts in most cases.

#### **(ii) Is intention relevant to habitual residence?**

The Quebec courts and common law courts clearly disagree on this as a matter of principle. Professor Goldstein<sup>87</sup> is of the view that Quebec law denies that “intention” has any role to play in deciding a person’s habitual residence except as an incidental consideration in unusual cases such as to distinguish between permanent presence or limited term presence or sojourns. Common lawyers are equally emphatic that intention is a critical consideration in deciding a

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<sup>87</sup> LL.D., Professeur titulaire, Faculty of Law, University of Montréal.

person's habitual residence in the sense that a person does not acquire a habitual residence in a place unless he or she intends to reside there indefinitely.

**(iii) Should a child's habitual residence revolve around the child's connections to a place and his or her intention (assuming it is relevant) or is a child's habitual residence dependant on his or her parents or other custodial person?**

Traditionally common law courts have related a child's habitual and ordinary residence to that of the parents. The fact that young children do not have any reliable intention and live where their parents require them to live probably explains the linkage as set out in s. 22(2) of the *Children's Law Reform Act* in Ontario. The law is less clear with older children but the common law rule still seems to be that so long as the parents decide where the child will live the child's habitual and ordinary residence depend on the parents' or in unusual cases on the ordinary/habitual residence of a non parent exercising custody by court order. In this latter case, I would suggest that a court may decline to change a child's habitual residence with the adult's if it is not in the child's best interest to do so, by analogy to the case law that developed around the domicile of dependence of a mental incompetent, although I admit I have no authoritative case law on point.

Since "intention" is legally irrelevant under Quebec law, a child's habitual residence is usually regarded simply as a question of fact to be decided by reference to all the circumstances of a case not tied to the parents' or custodial person's actions and intentions.<sup>88</sup> This would seem to be a fundamental difference between the way a child's habitual residence is decided in common law provinces and Quebec and probably reflects the way common law courts decided a child's ordinary residence.

In Manitoba<sup>89</sup>, a child's habitual residence is the state and subdivision thereof where the child normally and usually resides. This appears to conform to the Quebec law on point both by focusing on the child's day to day living arrangements rather than the parents' and by focusing on the objective reality of the child's living arrangements rather than the parents' or the child's intentions.

**(iv) Does the definition of "habitual residence" in the Uniform Custody legislation enacted in many provinces reflect the definition used under the Convention?**

Notwithstanding the BCCA's suggestion in *Chan v. Chow* that this is not the case, most common law courts apply the same definition albeit usually without discussion. Since this definition contains strong intention overtones and makes the child's habitual residence dependant on his or her parents or other custodian as a matter of law, I would be surprised if Quebec courts would accept this definition of a child's habitual residence under the Convention or anywhere else for that matter.

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<sup>88</sup> C.f. *Droit de la Famille—3713* [2000] QJ Np. 2967 (QCA) discussed by Prof. Goldstein.

<sup>89</sup> *The Domicile and Habitual Residence Act*, s. 9(2). The only case I could find expressly referring to s. 9(2) of the Act was *L. (TI) v. F. (JL)* (2001) 16 RFL (5<sup>th</sup>) 173 (MCA) where the Court accepted that the test applied under provincial legislation but provided no further insight.

## 4. What does the term ordinary residence mean in the context of

### (a) the common law

“Ordinary residence” is not a phrase capable of precise definition.<sup>90</sup> At its simplest level, ordinary residence connotes something more than mere temporary presence in a place. It refers to the place in which a person’s lifestyle is centered and to which the person regularly returns if his or her presence is not continuous.<sup>91</sup>

The courts started to resort to “ordinary residence” in custody cases following the Privy Council decision in *McKee v. McKee*<sup>92</sup> to structure their discretion whether to assume jurisdiction in cases where a child was unilaterally removed by one parent to the place where that parent now sought custody. The combination of the Privy Council’s decisions that a local court was not bound by a foreign custody order and could assume jurisdiction based on simple presence within the jurisdiction raised the spectre of widespread child napping as well as the embarrassing prospect of two courts assuming jurisdiction and making contradictory orders on the same facts. In response, a practice developed without any legislative basis whereby Canadian courts would decline jurisdiction under provincial custody legislation if the child was not ordinarily resident in the province<sup>93</sup>. When custody legislation was reformed to include jurisdiction requirements some courts adopted “ordinary residence” as the starting point. While some other courts decided jurisdiction based on real and substantial connection, few courts were content to simply assume jurisdiction based on presence, regardless of how the child’s presence in the jurisdiction was established.

Most common law courts understand ordinary residence to mean the place where a person resides in the ordinary course of his or her day to day life. If the inquiry is directed towards a person’s real home as many courts have suggested<sup>94</sup> a person usually will have only one place of ordinary residence<sup>95</sup> notwithstanding the family courts’ early reliance on cases decided in an income tax context where the courts held that an individual can have more than one residence<sup>96</sup>.

While an adult’s ordinary residence depends on physical presence in a place for an extended and regular basis as well as an intention to live there on a more or less regular basis<sup>97</sup>, a minor child’s ordinary residence is the place where he or she last lived with his or her parents in a family setting and the child’s ordinary residence changes with the parents’ ordinary residence. If the parents separate, in principle, the child’s ordinary residence should remain that of the parent

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<sup>90</sup> See *Re Gutierrez; Ex parte Gutierrez* (1879) 11 Ch. D. 298 (CA); *Re Hacquard; Ex parte Hacquard* (1889) 24 QBD 71 (CA); *Re Akt. Robersfors & Societe anonyme des Papeteries de l’Aa* [1910] 2 KB 727.

<sup>91</sup> *Hardy v. Hardy* (1969) 7 DLR (3d) 307 (OHC); *Girardin v. Giardin* (1974) 42 DLR (3d) 294 (SQB).  
*Nielsen v. Nielsen* (1971) 16 DLR (3d) 33 (OHC).

<sup>92</sup> [1951] 2 DLR 657 (PC). See also *Lussier v. Lussier* (1977) 3 RFL (2d) 335 (ODC).

<sup>93</sup> E.g. *Firestone v. Firestone*, (1978) 7 RFL (2d) 93 (ODC); *Harnish v. Harnish* (1977) 4 RFL (2d) 105 (SQB).

<sup>94</sup> E.g. *Hardy v. Hardy* [1969] 2 OR 875 (HCJ); *Marsellus v. Marsellus* (1970) 13 DLR (3d) 383 (BCSC);

*Davies v. Davies* (1980) 29 NBR (2d) 207 (QB); *Stransky v. Stransky* [1954] P. 428 at p. 437.

<sup>95</sup> See *Hopkins v. Hopkins* [1951] P. 116 at 122 where Picher J. opined that a person could not be ordinarily resident in two places at one time.

<sup>96</sup> E.g. *Nowlan v. Nowlan* (1971) 2 RFL 67 (NSTD); *Marsellus v. Marsellus* (1970) 13 DLR (3d) 383 (BCSC).

<sup>97</sup> See *Girardin v. Girardin et al* (1974) 2 WWR 180 (SQB); *Penner v. Penner* (1986) 39 Man. R. (2d) 237 (QB).

exercising custody<sup>98</sup>. However, as indicated, courts will not allow one parent to unilaterally change a child's ordinary residence<sup>99</sup>.

In *Re P.*<sup>100</sup>, Lord Denning MR stated:

“The Crown protects every child who has his home here and will protect him in respect of his home. It will not permit anyone to kidnap the child and spirit it out of the realm. Not even its father or mother can be allowed to do so without consent of the other. The kidnapper cannot escape the jurisdiction of the court by such a stratagem. If, as in this case, it is the father who flies away with the child, the mother is not bound to follow him to a foreign clime. She can bring her proceedings against him in England.” As a result courts uniformly accepted that one parent could not unilaterally change a child's ordinary residence from what it had been while the family was cohabiting as a unit after separation without a court order approving the move, or the consent/acquiescence of the other parent.

Unlike actual residence, ordinary residence does not require continued physical presence in a place during the currency of the period of ordinary residency. That a person has a fixed place of residence in a jurisdiction is an important consideration but not a requirement of law to establish and maintain ordinary residence in a place.<sup>101</sup> A person does not lose his or her ordinary residence in a place by leaving for a temporary purpose.<sup>102</sup> However, a person will lose his or her ordinary residence in a place if he or she travels to another place to live and work indefinitely even if he or she intends ultimately to return to the prior home.<sup>103</sup>

**(b) any provincial/territorial legislation that uses the term**

Parliament incorporated ordinary residence as one of the main jurisdictional contacts in the *Divorce Act*, 1968 and continued it in the 1985 version. Interestingly, the 1968 French version used the words “a ordinairement résidé” which were changed to “réside habituellement” in the 1985 version. “Ordinary residence” is also used in a variety of provincial and other federal statutes, including the *Criminal Code*, and the *Interjurisdictional Support Orders Acts*. Increasingly, custody statutes incorporate “habitual residence” in preference to “ordinary residence” which probably reflects the influence of the Hague Conventions on the various issues. While there are contextual differences that may result in slight differences particularly in the

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<sup>98</sup> *Re Chester* (1975) 62 DLR (3d) 367 (BCSC); *Re Landry and Lavers* (1985) 17 DLR (4<sup>th</sup>) 190 (OCA).

<sup>99</sup> *Nielsen v. Nielsen* (1970) 16 DLR (3d) 33, 37-39(OHCJ); *Re Ritchie and Ritchie* (1974) 5 OR (2d) 520 (CA); *Re Firestone and Firestone* (1978) 90 DLR (3d) 742 (ODC); *Harnish v. Harnish* (1977) 4 RFL (2d) 105 (SQB).

<sup>100</sup> [1965] Ch. 568 at 585-86 (CA). Lord Denning's view of the law was accepted in *Re Walker and Walker* [1970] 3 OR 771 at 774-75; *Nielsen v. Nielsen* [1971] 1 OR 541 at 546; *Harnish v. Harnish supra*; and *Manning v. Warford* (1979) 9 RFL (2d) 153.

<sup>101</sup> *Doucet v. Doucet* (1974) 47 DLR (3d) 22 (OCC); *Hardy v. Hardy supra*; *Nowlan v. Nowlan, supra*; *Bryn v. Mackin* (1983) 32 RFL (2d) 207 (QSC).

<sup>102</sup> *Hardy v. Hardy, supra*; *Wood v. Wood*, (1969) 2 DLR (3d) 527 (MQB); *Doucet v. Doucet* (1974) 47 DLR (3d) 22 (OCC).

<sup>103</sup> *Krisko v. Krisko supra*; *Marsellus v. Marsellus, supra*; *Zoldester v. Zoldester* (1974) 42 DLR(3d) 316 (bcsc); *Graves v. Graves* (1973) 36 DLR (3d) 637 (NSTD). Contrast *Nowlan v. Nowlan supra* where the intention to return was more concrete.

provisions of various provincial rules of civil procedure, which are limited to intra provincial jurisdiction, on balance most courts have applied a similar analysis to that described above in interpreting the concept in a family law context.

The *Income Tax Act* cases seem to accept that a person may have more than one ordinary residence.<sup>104</sup> A similar interpretation is possible under the federal *Garnishment, Attachment and Pension Diversion Act* given the remedial nature of the legislation and the objective of facilitating enforcement of family law orders.

Recently, some courts appear to have gravitated to a view whereby it is assumed that a person may only have one ordinary residence at a time in the ordinary course<sup>105</sup> but most have stopped short of holding that a person may not have more than one place of ordinary residence as a matter of law. However, there is case law to the effect that an intention to settle in a place will not effect a change of ordinary residence without a physical presence in that place.<sup>106</sup> While the reason for a person's presence in a place is a relevant consideration, a person can be ordinarily resident in a place even if his or her presence in the jurisdiction is illegal.<sup>107</sup>

## **5. Are the terms “ordinary residence” and “reside habituellement” used interchangeably in English and French versions of provincial legislation that is drafted in both official languages and if so have the interpretations differed?**

I have checked for legislation in Ontario, Manitoba, and New Brunswick for statutes in a family context using the phrase “ordinary residence” or “ordinarily resident” and have been unable to find any cases that adopt a different interpretation than that discussed above, with the possible exception of one Manitoba case<sup>108</sup>.

In Manitoba, the English language version of *The Inter-jurisdictional Support Orders Act* SM 2001 c. 33 ss. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 25, 26, 27, 28, 29, 30, 31, 32 refer to the place where a party is “ordinarily resident”. The French language version refers to “reside habituellement”. I have not found any cases that applied a different test under the Act than previously indicated although I suspect there should be in light of *The Domicile and Habitual Residence Act* definition of “habitual residence”. However, while the reasons are somewhat difficult to follow, it appears that Clearwater J. equated ordinary residence with habitual residence under *The Domicile and Habitual Residence Act* in deciding custody jurisdiction under *The Family Maintenance Act*. Unfortunately, the comments were made in passing with no explanation or analysis.

In New Brunswick, the *Family Services Act* SNB 1980 c. F-2.2 s. 51, and the *Interjurisdictional Support Orders Act* SNB 2002 c. I-12.05 ss. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 23, 24, 25, 26, 27, 28, 29 refer to “ordinarily resident” in the English language versions. The French

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<sup>104</sup> E.g. *Thomson v. MNR* [1946] SCR 209; *Schujhan v. MNR* [1962] Ex. CR 328.

<sup>105</sup> E.g. *Stransky v. Stransky*, *supra*; *Hopkins v. Hopkins*, *supra*.

<sup>106</sup> *MacPherson v. MacPherson* (1976) 28 RFL 106 (OCA); *Trotter v. Trotter* (1992) 40 RFL (3d) 68 (OGD).

<sup>107</sup> *Wood v. Wood* (1987) 4 RFL M(2d) 182 (PEITD); *Jablonowski v. Jablonowski* (1972) 8 RFL 36 (OSC).

<sup>108</sup> *Moggey v. Lawler* 2004 MBQB 198 (MQB).



language version of the *Family Services Act* uses “reside ordinairement” while the French language version of the *Interjurisdictional Support Orders Act* uses “résident habituellement”. This is probably no more than a reflection of the history of the legislation. The ISO, which is interjurisdictional and “convention like” in scope, uses the more inter-jurisdictional concept of habitual residence in the French version while the former Act being purely domestic merely translates the English language concept of ordinary residence directly into French.

In Ontario, the *Change of Name Act* RSO 1990 c. C7 s. 4, 5 and the *Marriage Act* RSO 1990 c. M.3 (as amended) s. 16 use the words “ordinarily resident” in the English language versions and “reside ordinairement” in the French language versions. Again, since both are purely domestic legislation, the use of a French translation for the traditional common law concept of “ordinary residence” is understandable. However, in implementing the *Interjurisdictional Support Orders Act*, which is more “international” and convention like, the Legislature used “ordinarily resident” and “réside habituellement”.

**6. Sections 3, 4, and 5 of the *Divorce Act* use the concept “ordinary residence” in the English language version and “réside habituellement” in the French. How has the term “ordinary residence” been interpreted under the English version and does this differ in any significant way from the interpretation of “réside habituellement” in the French?**

The interpretation of “ordinary residence” in the *Divorce Act* reflects the way the term has been interpreted at common law and in cases under provincial legislation. The courts have made a conscious effort to maintain a consistent interpretation of the phrase across the law. While some contextual differences arise in taxation, election, and criminal legislation, the interpretation in family law cases has been remarkably similar, especially with respect to minor children. Many if not most of the cases referred to in discussion of the meaning of “ordinary residence” in the previous sections arise under the *Divorce Act* or rely on early *Divorce Act* cases. This is not surprising since the *Divorce Act* was one of the first statutes to make wide scale use of the phrase in a family law context.

The concept of “ordinary residence”/ “ordinarily resident” in a divorce context may be summarized:

1. A spouse is ordinarily resident in a province if his or her life is centered in that province. Whether this is the case is a question of fact, not law.<sup>109</sup>
2. A spouse may be ordinarily resident in a province even if he or she leaves the province and lives elsewhere for a temporary purpose.<sup>110</sup>
3. However, a person is not ordinarily resident in a province if he or she is away indefinitely, even if he or she has an intention to return at some time while away.<sup>111</sup>

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<sup>109</sup> *Hardy v. Hardy*, *supra*; *Wood v. Wood*, *supra*; *Marsellus v. Marsellus*, *supra*.

<sup>110</sup> See *Marsellus v. Marsellus* (1970) 2 RFL 53 (BCSC); *Byrn v. Mackin* (1983) 32 RFL (2d) 207 (QSC).

<sup>111</sup> *Krisko v. Krisko*, *supra*; *Milles v. Butt* (1990) 82 Nfld. & PEIR 42 (Nfld UFC).

4. Conversely, the arrival of a person in a new locale with the intention of making a home in that place for an indefinite period of time makes the person ordinarily resident in the place even if the person harboured an intention to return to the first place in the future.<sup>112</sup>
5. A spouse may be ordinarily resident in a province within the meaning of ss. 3, 4, & 5 of the *Divorce Act* even if his or her presence in the province is illegal.<sup>113</sup>

In *Molson v. Molson*<sup>114</sup>, Fraser J. held that a wife had severed her residential ties with Quebec when she left with the intention of establishing a home in Alberta and established an ordinary residence in Alberta from the day she arrived. While most courts accept that a person can sever his or her ordinary residence with a place by leaving with the intention of remaining away indefinitely, they point out that a person usually cannot acquire an ordinary residence in a day but needs some more extended stay in the place to turn their “residence” in the new place into “ordinary” residence. Fraser J. distinguished between the meaning of “ordinary residence” to decide jurisdiction to grant a divorce from “ordinary residence” for other purposes where the objectives of the exercise may be different. While his comments make sense and reflect a contextual and purposive approach to statutory interpretation, the reality seems to be that most courts have adopted the same basic definition of ordinary residence/ordinarily resident under the *Divorce Act* as at common law and under other statutes unless it was clear from the other legislation that the words were being used in a special sense.

In a related vein, judges in many of the early cases decided under the *Divorce Act* relied on the definition of the concept used in cases under the *Income Tax Act*. In *Hintz v. Hintz*<sup>115</sup>, Epstein J. observed that numerous cases have dealt with the interpretation of the phrase “ordinarily resident”, one of the earliest being *Thomson v. Minister of National Revenue*<sup>116</sup> dealing with the meaning of the phrase in the *Income War Tax Act* that adopted a more restrictive meaning than for “residence” and involved both physical presence in a place for an extended time and an intention to reside there in the sense that the person’s customary mode of life was centered in that place as contrasted with special or occasional or casual residence. This definition was adopted under the *Divorce Act* in cases like *Hardy v. Hardy*<sup>117</sup>, *MacPherson v. MacPherson*<sup>118</sup>, *Wrixon v. Wrixon*<sup>119</sup>, and *MacLean v. MacLean*<sup>120</sup>.

In *Lietz v. Lietz*<sup>121</sup>, Riordan J. held that the concept of ordinary residence focused on the place where a person’s life was centred. Although there is no inherent exclusivity associated with “ordinary residence” in most cases a person’s life will be centered in one place. In the circumstances, Riordan J. was not satisfied that either spouse had been ordinarily resident in

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<sup>112</sup> *MacPherson v. MacPherson* (1976) 28 RFL 106 (OCA).

<sup>113</sup> See *Wood v. Wood* (1987) 4 RFL 2d) 182 (PEITD); *Jablonowski v. Jablonowski* (1972) 8 RFL 36 (OSCJ).

<sup>114</sup> 1998 ABQB 476 (AQB).

<sup>115</sup> [1996] O.J. No. 2601 (OGD).

<sup>116</sup> [1946] SCR 209.

<sup>117</sup> [1969] 2 OR 875 (HC).

<sup>118</sup> (1976) 28 RFL 106 (OCA).

<sup>119</sup> (1982) 30 RFL (2d) 107 (AQB).

<sup>120</sup> [1990] BCJ No. 50 (BCSC).

<sup>121</sup> (1990) 30 RFL (3d) 293 (NBQB).

New Brunswick for one year immediately before the commencement of divorce proceedings to establish jurisdiction under s. 3 of the *Divorce Act*.

In *Alexiou v. Alexiou*<sup>122</sup>, the parties were married in Greece and lived there most of their lives. The parties' children were born in Greece. The parties and children maintained employment and personal ties to Greece during the time the husband worked in Alberta on a temporary basis. Nash J. held that the parties continued to be ordinarily resident in Greece and had not established ordinary residence in Alberta so that the Alberta courts had no jurisdiction to entertain divorce proceedings. Nash J.'s comments could be reproduced in any discussion of the parties' habitual residence.

From my basic research, the courts appear to adopt the same definition when using the French language version and on the rare occasions it is necessary to refer to case law, the judges use the same basic cases referred to above. In *Droit de la famille—360*<sup>123</sup> Tourigny J. appeared to determine jurisdiction under s. 3 of the *Divorce Act* using the same definition for “réside habituellement” as courts in the common law provinces had used for “ordinary residence”.

## **7. What if any are the differences between the concepts “habitual residence” and “ordinary residence”?**

This is not as easy a task as it was in the past. Historically, the main differences between “ordinary” and “habitual” residence seemed to be that:

- (i) habitual residence was a more enduring connection between a person and a place;<sup>124</sup>
- (ii) habitual residence was an exclusive concept whereas a person could have more than one ordinary residence<sup>125</sup>;
- (iii) most courts and commentators considered habitual residence to fall somewhere between domicile and ordinary residence. It was a more enduring connection than ordinary residence but somewhat less than domicile.

As indicated, the English courts and commentators appear to accept that the concepts of ordinary residence and habitual residence mean the same thing at the present time. It is difficult to tell if ordinary residence has moved into habitual residence or vice versa. More likely if this change has occurred, both concepts have moved slightly from their original positioning.

If asked, most lawyers and judges in Canadian common law provinces probably would maintain that there is a difference between habitual residence and ordinary residence, placing both between domicile and residence with habitual residence closer to domicile

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<sup>122</sup> [1996] AJ No. 696 (AQB).

<sup>123</sup> 1987 CarswellQue 927 (Que. SC).

<sup>124</sup> See *Cruse v. Chittum* [1974] 2 All ER 940 (QB).

<sup>125</sup> This follows from adopting the test used under the *Income Tax Act* in cases like *Thomson v. MNR* [1946] SCR 209 in cases such as *Hardy v. Hardy* [1969] 2 OR 875 and *Marsellus v. Marsellus* (1970) 13 DLR 383 (BCSC).

as more intention driven than ordinary residence. The main practical differences between habitual residence and domicile being that it takes longer physical presence to acquire a domicile of choice in a place than habitual residence but less intention. While a person must intend to remain in a place “forever” to establish domicile, only an intention to remain indefinitely is needed to establish habitual residence. At a different level of abstraction, domicile is more legally driven and has far more cumbersome rules associated with domicile of origin and dependency in particular.

However, it is quite arguable that there is little or no difference between the two concepts at the present time<sup>126</sup>. Both are factual in nature. Neither requires proof of a long term future intention. Most importantly, recent case law seems to accept that in an exceptional case a person may have neither an ordinary or habitual residence and/or more than one of either<sup>127</sup>. With some hesitation, it is suggested we have reached the point where the terms are interchangeable—both are something less than domicile<sup>128</sup> but beyond mere presence. Certainly in children’s law, the common law courts interpret both in a similar manner. A child’s habitual or ordinary residence depends on the pattern of family life prior to family breakdown and neither parent can unilaterally change the child’s habitual/ordinary residence. However, cases that seem to suggest a person can establish ordinary residence as soon as he or she arrives in a place if there is a sufficiently strong intention to reside there indefinitely seem difficult to reconcile with traditional notions of habitual residence.

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<sup>126</sup> Clearwater J. seemed to treat the terms as interchangeable in *Moggey v. Lawler* 2004 MBQB 198 (MQB).

<sup>127</sup> For example in *Hunter v. Hunter* 2005 SKQB 93 (SQB) Wright J. found the child habitually resident under provincial legislation and the spouse ordinarily resident in the province under the *Divorce Act* as if the parent’s habitual and ordinary residence were one and the same.

<sup>128</sup> Except in Manitoba where *The Domicile and Habitual Residence Act* RSM 1987 c. D 96 treats the two terms as the same with a new statutory definition that is slightly different than the definition for either that developed in the case law.