

The notion of 'habitual residence' within the meaning of the 2000 Hague Convention

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First, a detour by a recent French / European case law



- Versailles' Court of appeal, 21 January 2019, n° 18/00561,
- Cour de cassation, 18 November 2020, n° 19-15.438,
- European Court of Justice, 7 April 2022, n° C-645/20,

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The absence of any definition and guidance

- No definition in the Convention or in the Explanatory report.
- Explanatory Report by Paul Lagarde: “No definition was given of habitual residence, which despite the important legal consequences attaching to it, should remain a factual concept”.
- No guidance or criteria in the Convention or in the explanatory report to help determine it (see § 23 of UE Regulation n° 650/2012 Successions for a different approach).

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The 2000 Hague Convention’s “specific aims”

- The ECJ insists that the notion be interpreted in light of the relevant Convention/Regulation’s specific aims (see for instance ECJ, 12 May 2022, n° C-644/20).
- What are the 2000 Hague Convention’s specific aims:
 - Explanatory Report:
 - Necessity to address the lengthening of the human lifespan accompanied by a corresponding increase in the illnesses attaching to old age.
 - Necessity to facilitate notarial practice of the management or the sale of goods belonging to these persons or the handling of inheritances coming to them.
 - The Convention’s preamble: “ Affirming that the interests of the adult and respect for his or her dignity and autonomy are to be primary consideration”.

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Factual elements to consider when a change of residence occurs

1. Did that person express his intent before losing its capacity to express it? If so, are they relevant or up-to-date when the change occurs?
2. What are the living conditions of the incapacitated adult once his residence has been moved?
3. Does the incapacitated adult, although unable to express intent, seems content with the change?
4. Is there already a court order in force that ensures the adult's protection?
5. Is the change being made "lawfully" or "wrongfully"?
6. Does there seems to be an agreement amongst the adult's relatives and the responsible authorities?

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First case: Re MN [2010] EWHC 1926 (Fam)

22. "It follows that in my judgment the question of authority to remove is the key in this and case in to English the question of habitual residence. Habitual residence is an undefined term authorities it is regarded as a question of fact to be determined in the individual circumstances of the case. It is well recognised in English law that the removal of a child from one jurisdiction to another by one parent without the consent of the other is wrongful and is not effective to change habitual residence – see e.g., RE PK [2009] 2 FLR 1051 (CA). It seems to me that the wrongful removal (in this case without authority under the Directive whether because Part 3 is not engaged, or the decision was not made in good faith) of an incapacitated adult should have the same consequence and should leave the courts of the country from which she was taken free to take protective measures. Thus, in this case were the removal 'wrongful', I would hold that MN was habitually resident in California at the date of Judge Cain's orders.

23. If, however the removal were a proper and lawful exercise of authority under the been different considerations arise. The position in April 2010 was that MN had providing living with her niece in England and Wales on the basis that the niece was content her with a permanent home. There is no evidence other than that MN is and well cared for there and indeed may lose or even have lost any clear most recollection of living on her own in California. In those circumstances it seems to me probable that MN will have become habitually resident in England and Wales and this court will be required to accept and exercise a full welfare jurisdiction under the Act pursuant to paragraph 7(l)(a) of Schedule 3. Hence my view that authority to remove is the key consideration".

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Second case: Re PO; JO v GO & Ors [2013] EWHC 3932

18. "In the case of an adult who lacks the capacity to decide where to live, habitual residence can in principle be lost and another habitual residence acquired without the need for any court order or other formal process, such as the appointment of an attorney or deputy"

21. "In other words, the principle of *perpetuation fori* has no application in this context. Accordingly, the relevant date for determining PO's habitual residence is the date of the hearing, July 2013, and not the date when JO made her application, November 2012".

23. "PO is settled in her care home in Scotland and, seemingly, expressing her contentment at being there [...] PO is not now expressing a desire to return either to her own home or to Worcestershire".

27. "The fact is that PO has been in Scotland for some time (15 months) and that she is settled in her care home".

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A second detour by French law

When dealing with a French person, how to know if there is a protective measure in force ?

- No national database in place.
- The solution: the person's birth certificate
 - If client or spouse/parent of the client, have a look at the integral copy of the person's birth certificate (*copie intégrale d'acte de naissance*)
 - If other, have a look at the extract without filiation of the person's birth certificate (*extrait d'acte de naissance sans filiation*).

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