No. 16-582

In the Supreme Court of the United States

PETER VALDEZ CAHUE,
Petitioner,

v.

JADED MAHELET RUVALCABA MARTINEZ,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF

The International Academy of Family Lawyers moves for leave to file an amici curiae brief in support of petitioner, pursuant to Supreme Court Rule 37.2(b). Amici are filing this motion because respondents have not consented to filing this brief.

Amici's brief may assist the Court in determining whether to grant certiorari to review the issues presented in this case. Amici are a professional international association of lawyers whose expertise focuses on family law issues. Matters relating to the international application of Conventions focusing on children, in particular the Hague Child Abduction Convention, are of special interest to the IAFL. Amici have been represented at all six of the Special Commissions of the Hague Conference on Private International Law that deliberate on the Abduction Convention's implementation. Amici filed an amici curiae brief in *Lozano v. Montoya*, 134 S. Ct. 1224 (2014), which also concerned the implementation of the Abduction Convention.

Given the importance of uniformity between the contracting States in implementing the Abduction Convention, the international perspective which amici brings can be helpful in determining the issues in this case. The Abduction Convention deliberately did not provide a definition of habitual residence in order to prevent the application of a rigid formula. This has created different definitions of habitual residence, both internationally and within the member states as seen in the use of the term by the courts of the individual Federal Judicial Circuits. In addition to the definition of habitual residence, there is conflict in the definition

of custody rights when one of the legally acknowledged parents is an unmarried father. Certain jurisdictions, such as Illinois in the present matter, require some judicial act of recognition before taking into account the parental intent of an unmarried father, while other jurisdictions do not require any legal act. Although an unmarried father who is legally acknowledged as a parent and has actively raised the child is responsible for the child's welfare and support, in some jurisdictions that father is not recognized by a court adjudicating an Abduction Convention matter. Parental intent, which is a crucial factor in determining the habitual residence of a minor, is solely determined by the mother in those states. This creates an unconstitutional category of fathers whose due process rights are violated. Amici's brief attempts to compare the definition of habitual residence in the jurisdiction of the member states as well as the varying approaches of the states in regard to the parental rights of unmarried fathers. It offers an analysis which can lead to uniformity in the definition and application of the crucial elements of the Abduction Convention.

Amici therefore request the Court to grant this motion for leave to file this brief amici curiae.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. What are the factors in determining habitual residence as that term is used by The Hague Convention on the Civil Aspects of International Child Abduction ("The Abduction Convention")?

II. In determining habitual residence under The Abduction Convention, does the refusal to consider the intent of an unmarried father whose paternity is acknowledged and not in dispute, violate the Due Process Clause of the United States Constitution?

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The International Academy of Family Lawyers (IAFL) adopts the facts as they are stated in the Petitioner's brief.

INTEREST OF THE IAFL[1]

The IAFL (formerly the International Academy of Matrimonial Lawyers, whose name was changed in 2015) was formed in 1986 to improve the practice of law and the administration of justice in the area of divorce and family law throughout the world. The IAFL currently has 745 "Fellows" in 55 countries, each of whom is recognized by the bench and bar in his or her country as an experienced and skilled family law practitioner.[2] It is a worldwide association of practicing lawyers who are experienced and skilled family law specialists in their respective countries.

IAFL Fellows have made presentations in the US and in other Fellows' States in relation to legal reforms. The IAFL has sent its representatives to participate in relevant international conferences, often as non-governmental experts, including the six Special Commissions on the Hague Convention on the Civil Aspects of International Child Abduction. Its Fellows have also written and lectured widely on the

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[1] Pursuant to Supreme Court Rule 37.6 counsel for the amici certify that no counsel for a party authored any part of this brief and no person or entity other than counsel for the amici has made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this Brief. Respondent has not consented.

[2] The IAFL website, www.iafl.org, contains, among other items, a listing of the Fellows.

Convention and related topics, such as proceedings to obtain court approved relocation of children to another country.

The IAFL filed an amicus curiae brief in *Lozano v. Montoya*, 572 U.S. ____, 134 S. Ct. 1224 (2014). The Academy has also filed amicus briefs in cases concerning the interpretation of the Abduction Convention in the Supreme Courts of the United Kingdom, *In the Matter of AR*, (Children) (Scotland) UKSC 2105/0048 and *France, Bowie v. Gaslain* (No.T 15-26664)

The IAFL's interest in the instant case relates to its concern that implementation of the Convention, which has significantly reduced the harmful effects of international child abduction, will be severely undermined if the judgment of the Seventh Circuit in this matter is not overturned. Many Convention cases are brought to court in the signatory States by IAFL Fellows. The IAFL, therefore, has a significant professional and policy interest in preserving the deterrent effect of the Convention and ensuring the prompt return of wrongfully removed or retained children to their habitual residence.

The IAFL is acting pro bono in submitting this brief.

SUMMARY OF ARGUMENT

The purpose of the Abduction Convention is to return a minor child who has been wrongfully removed or retained to his or her country of habitual residence as swiftly as possible. It is an instrument to determine jurisdiction, not custody. The Abduction Convention therefore does not apply a best interests test but rather determines the correct forum to apply that test.

The term habitual residence was deliberately not defined by the drafters of the Abduction Convention in order to avoid the application of rigid formulas to an issue which is fact driven. The Federal Circuits have developed different approaches to determine habitual residence. A majority of the Circuits focus on joint parental intent in conjunction with a physical presence of the minor in the new jurisdiction. The minority have applied a test that emphasizes the perspective of the child, particularly his or her acclimation to the new surroundings. It looks back in time, not forward. The geographical change, coupled with the passage of time, can alter habitual residence, even where one of the parents had no intent to make a change.

A parent or institution may initiate proceedings under the Abduction Convention if they have rights of custody (Par. 3 of the Convention). Those rights are determined by State law. Thus, when considering parental intent, only the intent of a parent with rights of custody as defined by the State of the left behind parent will be taken into account. Some States recognize unmarried fathers as having the same rights of custody as married fathers, while other States require the unmarried father to take legal steps in order for their rights to be recognized. This creates two

categories of fathers, resulting in unlawful discrimination against the unmarried fathers.

In addition, this discrimination undermines uniformity in the application of the Abduction Convention. Identical fact patterns regarding the non-consensual removal of a child between the same two countries can result in completely opposite outcomes.

The petitioner is a resident of Illinois, a state which does not automatically recognize the parental rights of an unmarried father, even where paternity was legally acknowledged and not in question. Without obtaining a court order recognizing his rights, the petitioner's intent in determining habitual residence is not taken into account.

The IAFL believes that the correct approach in determining habitual residence is that adopted by the majority of Circuits, holding that joint parental intent is required. The failure to recognize the petitioner's parental rights is therefore a denial of due process and equal protection under the Fourteenth Amendment of the United States Constitution.

In addition, it is argued that Abduction Convention case law has developed an autonomous definition of parental rights. That definition should be the applicable one. Its adoption will promote uniformity among the member states and prevent discrimination against a class of fathers whose categorization results in a denial of due process.

ARGUMENT

I. Shared parental intent is necessary in order to change the habitual residence of a minor child in proceedings under the Abduction Convention.

The United States Supreme Court has yet to rule on the issue of habitual residence in the context of the Hague Abduction Convention. The thirteen Federal Circuit Courts and the fifty State Courts therefore have no precedent which binds them all.

The distinction in the analysis of habitual residence lies in the weight given to parental intent as opposed to the physical location of the child. The First, Second, Fourth and Seventh Circuits follow the analysis of the Ninth Circuit's judgment in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001). The *Mozes* court held that the analysis is fact intensive and therefore there are no rigid rules to apply. It ruled that there must be a shared parental intent to abandon the existing habitual residence before a new one can be acquired. Therefore the length of the move must be examined in the context of the parties' agreement as to the purpose of the move. The relocation need not be permanent. It can be for any number of reasons: business, study, health or just the desire to explore other ways of life. However, there must be a settled purpose to the move and the move must actually take place.

The interrelationship between parental intent and the child's adaption to new surroundings exists on a continuum. The weight given to each factor will depend on the circumstances of the case. The shorter the time in the new jurisdiction, the more weight given to

parental intent. In *Mozes*, the children had spent 15 months in the US while the father remained in Israel. There was no agreed upon intent to abandon Israel as the habitual residence. The court found that the children's habitual residence did not change, regardless of how much they adjusted to their new surroundings. Had the move been for a substantially longer period, the court might have given less weight to parental intent and given more emphasis to the child's adjustment to his or her new surroundings. *Mozes* stands for an integration of parental intent and the child's adjustment to its new environment, with no rigid formula to on how balance the two.

Focusing on parental intent attains an important Abduction Convention objective: the prevention of a unilateral change of the child's habitual residence. One of the essential motivating factors in adopting the Abduction Convention is to prevent the unlawful removal of children from one country to another. Changing a child's habitual residence without consent of both parents, in situations where the left-behind parent was exercising his or her custodial rights, or without court approval, is an act that seriously harms both the child and parent. It severely interferes with and often totally prevents the continuance of the parent-child relationship. Parental intent must therefore always be an important and essential criteria when determining if the change of habitual residence was unlawful under the Hague Convention.

In addition, by placing primary evidence on the acclimation of the child to the new environment, the Abduction Convention will lose its deterrent capacity. The proceedings will shift from determining

jurisdiction, which is at the heart of the Abduction Convention, to an analysis more appropriate to a custody proceeding. The outcome will no longer be determined by the actions of the parent, whether lawful or unlawful, but by the nature of the child. A child who has the ability to easily adapt to new surroundings will have been found to have acquired a new habitual residence, while a child who struggles to make new friends, learn a new language or adjust to a foreign school system will be considered not to have acquired a new habitual residence. This would result in federal courts applying a "best interests" test as it would in a conventional custody case. That would be contrary to the essence of an Abduction Convention proceeding, whose purpose is to determine international jurisdiction, not custody. The purpose of the Abduction Convention is not served by the outcome of a proceeding under its framework being determined primarily by a child's ability to make the switch from American football to European soccer.

The continuum between parental intent and the child's adaptation to new surroundings is also impacted by the age of the child. The impact of relocation on a 13 or 14 child is significantly different from that of a 3 or 4 year old. The ability of a 4 year old to adapt to their new surroundings may be of far less significance compared to that of a 14 year old.

The *Mozes* court divided the question of habitual residence into three different scenarios; 1) Where the family unit has manifested a settled purpose to change habitual residence, despite the qualms of one of the parents, 2) Where the translocation from an established habitual residence was clearly intended to

be of a specific, delimited period, 3) In between cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. The first situation will result in habitual residence being acquired in a relatively short period of time. In the second situation, habitual residence will not be acquired even after an extended stay, although once the delimited period has passed the length of the can determine the change in habitual residence. The third situation is the problematic one. The court stated that in the absence of settled parental intent, courts should be slow to infer from acclimatization that an earlier habitual residence has been abandoned.

The Ninth Circuit recently reaffirmed the *Mozes* precedent in the case of *In re ALC*, 2015 WL 1742347 (9th Cir. 2015). The court held that the first task is to examine shared parental intent. When that does not resolve the dispute, then the new jurisdiction will be considered the habitual residence when objective facts point unequivocally to the child's relative attachments to the two countries changing to the point where requiring a return would be tantamount to removing the child from the environment in which its life has developed. The court held that where a child is born under the cloud of disagreement between the parents over its habitual residence, a child of tender age remains without an habitual residence.

The First Circuit followed the *Mozes* approach in the case of *Mauvis v. Herisse*, 2014 WL 5659412 (1st Cir. 2014) an abduction from Haiti to Massachusetts. The court stated that the analysis of habitual residence is a two-part approach. The first question is whether there was a shared parental intent or settled purpose

to abandon the prior habitual residence and acquire a new one. The court then stated that as a secondary factor, it would ascertain whether the acclimatization of the child to the new residence is relevant. It reiterated that a new habitual residence cannot be acquired without abandoning the prior one.

The Fourth Circuit adopted the *Mozes* analysis in *Maxwell v. Maxwell*, 588 F.3d 245 (4th Cir. 2009). The court held that habitual residence is determined by a two-part formula. First it attempts to determine the shared parental intent. Where a shared parental intent is lacking or cannot be determined, the court must decide if petitioner has agreed to taking up a new habitual residence.

The recent Fourth Circuit case of *Velasquez v. Funes de Velasquez*, 2015 WL 1565142 (E.D. Va 2015) involved the third position stated in the *Mozes* decision. The move from El Salvador to the US was an open ended one. There was no clear parental intent to abandon the habitual residence in El Salvador. The court affirmed the two-part approach of *Mozes*. It examined whether there was an actual change of geography coupled with an appreciable passage of time. It found that returning the children to El Salvador would not be tantamount to returning them home and therefore denied the appeal of the father for a return order.

The Sixth Circuit takes an approach that is more child focused. In the case of *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) (*Friedrich I*), the court held that the habitual residence of the child is its customary residence prior to the removal. It looks back in time, not forward. It is the child's habitual residence, not the

parents', which is determinative. A child can have only one habitual residence. There must be a change in geography to alter habitual residence. That change in geography must occur prior to the removal in question. The geographical change, coupled with the passage of time, can alter habitual residence.

A recent First Circuit case, *Mendez v. May*, 2015 WL 627215 (1st Cir. 2015), rejected the proposition that a change of geography is a prerequisite to a change in habitual residence. It held that it is only one factor and not a prerequisite. It is the last shared parental intent which is determinative, even if the change in geography had yet to take place.

The courts of the Third and Eighth Circuits have taken a child centered approach in conjunction with equal weight given to the parents' present shared intentions. The Third Circuit case of *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995) established the definition of habitual residence for that Circuit. It held that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective. A determination of whether any particular place satisfies this standard must focus on the child. It consists of an analysis of the child's circumstances in that place and the parents' shared, present intentions regarding the child's presence there. *See Delvoye v. Lee*, 329 F.3d 330 (3d Cir. 2003), *Didon v. Castillo*, 15-3350, 2016 WL 5349733 (3d Cir. Sept. 26, 2016).

The Third Circuit case of *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006) made a distinction as to the age of the children regarding parental intent. In the

case of very young children, particular weight is placed on parental intent. In the case of older children, the impact of parental intention is more limited.

The recent case of *Panteleris v. Panteleris*, WL 468197 (6th Cir. 2015) rejected the *Mozes* analysis and reaffirmed the *Friedrich I* precedent and further elaborated. It established 5 principles to determine habitual residence:

1) Not to use technical rules but examine the facts,
2) Consider only the child's experiences,
3) Focus on the child's past,
4) A person can have only one habitual residence,
5) Only a change in geography and a passage of time can combine to establish a new habitual residence.

The Eighth Circuit also applies a two-pronged test that takes into account parental intent and the child's perspective, with an emphasis on the child's perspective. In the case of *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003) the court was called upon to determine whether the habitual residence of children born and raised in Minnesota had been changed to Israel after ten months. It held that the court must examine habitual residence from the children's perspective, including the family's change in geography along with personal possessions and pets, the passage of time, the selling of their prior residence, enrollment in school, obtaining benefits granted to new immigrants and to some degree, the parents' intentions at the time of the move to Israel. Assessing these facts

led to the conclusion that the children's habitual residence had been changed to Israel.

The relevant factors in determining habitual residence in the Eighth Circuit are the settled purpose of the move to the new country from the child's perspective, parental intent, a change in geography, the passage of time and the acclimation of the child to the new country. *See Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010), *Stern v. Stern*, 639 F.3d 449 (8th Cir. 2011), *Sorenson v. Sorenson*, 559 F.3d 871 (8th Cir. 2009).

All of the US Federal Courts take into account parental intentions to some degree. While the courts that follow the Ninth Circuit place significant emphasis on parental intent, particularly the First Circuit, even the courts that are more child focused still weigh parental intent to some degree. The courts all agree that the definition is fact intensive and no fixed formula should be applied. Yet it is clear that the unilateral decision of one parent is not sufficient to change the habitual residence of a child. The analysis of the Ninth Circuit requires mutual parental consent and should be the analysis that is followed.

II. The intent of an unmarried father whose paternity is acknowledged and undisputed must be taken into account when analyzing the habitual residence of a minor for purposes of the Hague Abduction Convention.

The Seventh Circuit found that the Petitioner, the legally recognized father who had been actively involved in the child's upbringing, lacked custody rights under Illinois law and therefore did not have to take into account his intent when analyzing the habitual residence of the minor in question. Petitioner argues that his intent must be taken into account in order to determine the habitual residence of the minor.

The Seventh Circuit's approach violates due process and equal protection under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions as to care, custody and control of their children. *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). "It is well established that a parent's interest in maintaining a relationship with his or her child is protected by the Due Process Clause of the Fourteenth Amendment." *United States v. Myers*, 426 F.3d 117, 125 (2d Cir. 2005). When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child his interest in personal contact with his child acquires substantial protection under the Due Process clause." *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 2993, 77 L. Ed. 2d 614 (1983).

By entirely disregarding the legal father's intent and failing to conduct a shared parental intent analysis, the Seventh Circuit has deprived non-married fathers of their interest in continuous personal contact with their children without due process of law. Such an approach fails to take into account the entirety of the circumstances of the case and the Constitutionally guaranteed substantial protection afforded to the father under the Due Process Clause.

This approach also fails to take into account the right of the child to maintain a personal relationship with his or her father, "… a child has a constitutionally protected liberty interest under the Fourteenth Amendment in the 'companionship and society' of her father." *Hayes v. County of San Diego*, 638 F.3d 688, 693 (9th Cir. 2011) opinion withdrawn, 658 F.3d 867 (9th Cir. 2011), certified question answered, 57 Cal. 4th 622, 305 P.3d 252 (2013). Considering only the mother's intent to determine habitual residence denies due process to the father as well as the child as protected by the Fourteenth Amendment.

The Seventh Circuits decision also represents an unconstitutional classification which discriminates between married fathers and unmarried fathers with no compelling societal justification. A married father has the same right to determine the habitual residence of his minor child as the mother. However, an unmarried father, even though his paternity has been legally acknowledged and is not in dispute, does not have the same right. The unmarried father, according to the Seventh Circuit's application of Illinois law, must take additional legal action, not required by a married father, in order that his intent be considered

when determining the minor's habitual residence. No public interest is served by this arbitrary discrimination between categories of fathers. This result of this erroneous interpretation is that the minor child may be deprived of a personal relationship with his or her father based on a marriage certificate rather than the actual circumstances of the case.

Petitioner further argues that there should be a uniform interpretation of custody rights under the Hague Convention.

Custody Rights: Defined by the State, Construed by The Hague Convention on Child Abduction

"An international convention, expressed in different languages and intended to apply to a wide range of differing legal systems cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all Contracting States". (Lord Browne-Wilkinson, Re H (Abduction: Acquiescence) [1998] AC 72.) The principle of uniformity in applying Abduction Convention principles is an accepted one. Courts that have weighed in on the issue have all stated the importance of uniform definitions in order to avoid both uncertainty and asymmetry in applying the Convention.

The United States Abduction Convention implementing legislation, The International Child Abduction Remedies Act, (ICARA) directs that "uniform international interpretation" of the Convention is part of its framework, *see* 42 U.S.C. § 11601(b)(3)(B). The Guide to Good Practice, which is compiled by the delegates to the Special Commissions of the Hague Conference convened every four years and

updated from time to time, emphasizes an autonomous definition of the Abduction Convention terms. Part III of the Guide, under Implementing Measures, states that an international approach is necessary for consistent interpretation and application.

Case law and legal scholars have supported the approach taken by the Guide to Good Practice. Interpreting rights of custody solely according to state law can not only lead to inconsistent interpretation, but create totally unacceptable outcomes which are contrary to the objectives of the Abduction Convention. Prof. Linda Silberman, who has written extensively on the Abduction Convention, has stated "If Convention cases became subject to varying national approaches and perspectives, neither of the core objectives of the treaty would be attainable." (Law and Contemporary Problems, Vol. 57: No.3, Summer 1994, p.258.)

Custody rights as defined by the various signatory states can vary significantly. Custody rights of the fathers are those most often subject to interpretation. Some jurisdictions, such as Illinois, require unmarried fathers to take specific legal action in order to have their custodial rights recognized. Failure to do so leaves the father without custodial rights, even if de facto he is an active parenting partner, including financially supporting the child. This can create a situation whereby two cases of abduction with identical fact patterns can result in contrary decisions, the outcome depending solely on the different laws of the state of habitual residence.

Custody Rights and Ne Exeat Orders

The significance of a ne exeat order has exemplified how courts of the member states have given different meaning to the same term as it pertains to the right of custody. In an attempt to clarify the definition of custody rights, the Abduction Convention states in Article 5(a) that the right of custody includes the right to determine the child's residence. That has not prevented extensive litigation in the contracting states as to whether the issuance of a ne exeat order alone, absent any other basis in law or by agreement, falls within that definition.

The conflicting interpretations of the significance of a ne exeat order in the various U.S. federal courts eventually led to the U.S. Supreme Court's grant of certiorari in the case of *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983 (2010). Until then, the majority of U. S. Federal Circuits had adopted the restrictive interpretation as defined in *Croll*, which held that the issuance of a ne exeat order did not constitute a right of custody in favor of the requesting parent. (see *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003) and *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008). The exception was the Eleventh Circuit which applied the accepted interpretation in the majority of Abduction Convention jurisdictions, (*see Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004).

The majority opinion of the Supreme Court overturned the judgment of the Court of Appeals and held that the accepted interpretation of custody rights includes the right to prevent the removal of a child from the jurisdiction. Any other interpretation would

render the Abduction Convention meaningless. The court stated that it was not relevant that traditional notions of custody referred to physical custody. The emphasis needs to be placed on the Abduction Convention's understanding of the term. Doing so would promote international consistency and prevent arbitrary results. *Abbott* boldly stated that "The definition of 'rights of custody' is an issue of treaty interpretation and does not depend on the domestic law of the country of habitual residence." *Id*. at 1991. That perhaps was the clearest declaration of a unique autonomous Abduction Convention definition of custody rights to be applied by any court called upon to determine a petition for return in a Convention proceeding.

It is now accepted case law in the majority of jurisdictions that the definition of custody rights for purposes of implementing the Abduction Convention includes the right to prevent the removal of the child from the jurisdiction of his or her habitual residence.

Autonomous Nature of the Child Abduction Convention

As the definition of custody has evolved in state courts, there has developed an autonomous Hague Convention definition of custody rights which places the emphasis on the right to determine the child's place of residence. The synthesis between custody rights as defined by the state and the autonomous Abduction Convention definition has been addressed in a number of cases. A two step approach has been developed which takes into account the law of the habitual residence as stated in Article 3 while applying a common Abduction Convention definition of those rights.

In the 2004 case of *Re P* (Abduction Consent) [2004] EWCA Civ 971, LJ Ward held that the Hague Convention requires the court to give the expression "rights of custody" and autonomous interpretation. He further stated that the task of the court is to establish the rights of the parents under the law of the State of habitual residence and then to consider whether those rights are rights of custody for Hague Convention purposes.

The case of *Re P* gave the courts the legal basis for developing a uniform definition of custody rights that would be conducive to the Abduction Convention's goals without the need to amend it, a difficult and arduous task, which has not happened since its adoption in 1980. It made it clear that the state definition of custody rights was not simply to be applied, as is, to a petition for return under the Abduction Convention.

A year later, in another Court of Appeal of England case, LJ Thorpe expanded on *Re P* and took its development to the next level. Justice Thorpe recognized that the Abduction Convention is a living instrument. He was also aware that revision of its text "is simply impracticable…". He cited the provisions of the Vienna Convention on the Law of Treaties, which also came into force in 1980, permitting a construction that reflects "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31(3)(b). He held that social developments must be incorporated by evolutions in interpretation and construction in order for a treaty to remain relevant (*Hunter v. Murrow (Abduction: Rights of Custody*) [2005] EWCA Civ 976).

In interpreting the meaning of an Article of the Abduction Convention, Justice Thorpe held that the answer is to be found in the international jurisprudence of the Contracting States. He goes as far to say that it is not sufficient to argue the case law of the jurisdiction in which the case is litigated. He holds that it is incumbent upon an attorney arguing a Hague Convention case to not only cite English case law but also to refer to the international jurisprudence of the Abduction Convention as applied by the signatory states. The court even makes reference to the case law data base of the Hague Conference, the INCADAT website, in order to encourage attorneys to refer to international case law.

Having established that there is an autonomous Abduction Convention definition of custody rights, we are still faced with the question of which case law is controlling. Are the courts hearing a Hague Abduction petition to review the international judgments and attempt to determine the controlling case law? Perhaps it is the Abduction Convention case law of the jurisdiction in which the proceedings take place that should prevail. Justice Thorpe, relying on the case of *Re H (Abduction: Acquiescence)*[1997] 1 FLR 872, held that it is the English perception of the autonomous law of the Hague Convention which should be applied.

The Abduction Convention is essentially a treaty which determines jurisdiction. As such, one of its primary purposes is to discourage forum shopping. If the Abduction Convention produces contradictory outcomes due to the application of conflicting definitions of its terms, then forum shopping will not be discouraged. On the contrary, it may encourage some

parents to remove their child to a jurisdiction that has a more favorable legal interpretation. A goal of the Abduction Convention is to discourage unlawful removals. The more clarity there is regarding what constitutes an unlawful removal, the better the chance of deterring a potential abduction.

The clearest expression of the synthesis of state definition of custody rights and a determination of whether those rights constitute a right of custody under the Abduction Convention can be found in a judgment of the U. S. Court of Appeals for the Second Circuit (*Ozaltin v. Ozaltin,* 708 F.2d 355 (2d Cir. 2013). The case involved a Turkish couple whose two daughters were taken by the mother to the United States without the father's permission.

The father promptly filed an application for return with the Turkish Central Authority. The mother then obtained an ex parte order of protection in the Turkish Family Court. The mother subsequently filed for divorce in Turkey and was awarded temporary child support.

This prompted the father to file in the Turkish Court for temporary custody, or in the alternative, an order requiring that the children be brought to Turkey and visitation rights be granted. The request for temporary custody was denied but visitation in New York was granted, as well as the right to take the children for a visit to Turkey during the summer. The children were belatedly returned to the mother in the U.S. and the father was again granted visitation with them in New York. A second application by the father for temporary custody was rejected by the Turkish Family Court. The father then filed his petition in the

U.S. Federal Court. The mother opposed the petition, claiming, among other arguments, that the father did not have custody rights under Turkish Law.

The District Court heard opposing expert testimony from two witnesses regarding the nature of the father's custody rights under Turkish Law. The District Court found that the removal was in violation of the father's rights of custody and ordered the return of the two children, *In re S.E.O.*, 873 F. Supp. 2d 536 (S.D.N.Y. 2012). The mother appealed, claiming that the removal was lawful under Turkish law. She cited in particular the order of the Turkish Court requiring the father to return the children's passports to her after the summer visit so that she could return to the U.S. The Federal Court of Appeals rejected the appeal. Citing the *Abbott* case, the court held that "the definition of 'rights of custody' under the Convention is an issue of treaty interpretation and does not depend on the domestic custody law of the country of habitual residence". The court went on to explain that it is domestic law that supplies the "substance of parental rights, but the relevant provisions of the Hague Convention determine whether those rights are considered 'rights of custody' under the Convention". The court gave us a two step formula for analyzing custody rights under the Abduction Convention. The first step is to examine state law to ascertain the substance of the parental rights held by the petitioner. The second step is to determine whether those rights meet the definition of custody rights under the Abduction Convention's guidelines.

CONCLUSION

The definition of habitual residence must be a synthesis of joint parental intent combined with physical relocation. The length of time in the new jurisdiction as well as the age of the minor child are factors to be considered in the analysis.

Discrimination between married and unmarried fathers whose paternity is legally acknowledged is a violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Excluding the intent of the unmarried father in determining habitual residence is harmful to the Constitutionally protected rights of both father and child.

There is a growing body of Abduction Convention case law which is developing an autonomous Convention definition of custody rights. In order to attain uniformity in application of the Abduction Convention and to prevent unjust results between Abduction Convention member states in cases involving identical fact patterns, the courts should apply a uniform definition of father's rights, recognizing the parental intent of unmarried fathers.

Respectfully submitted,

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