No. 17-15364-GG

In the United States Court of Appeals
for the Eleventh Circuit

JOHAN SEBASTIAN ALZAT CALIXTO,
Plaintiff-Appellant

v.

HADYLLE YUSUF LESMES,
Defendant-Appellee

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF *AMICUS CURIAE* IAFL IN SUPPORT OF REVERSAL

TIM AMOS
TIMOTHY SCOTT
GERALD L. NISSENBAUM
DANA PRESCOTT
ISABELLE REIN-LESCASTEREYRES
CHARLOTTE BUTRUILLE-CARDEW
IAN KENNEDY
ANNE-MARIE HUTCHINSON
ALICE MEIER-BOURDEAU
INTERNATIONAL ACADEMY OF
FAMILY LAWYERS
81 Main Street, Suite 405
White Plains, New York 10601

EDWIN FREEDMAN
LAW OFFICES OF EDWIN FREEDMAN
58 Harakevet Street
Tel Aviv 6777016
Israel
00-972-3-6966611
edwin@edfreedman.com

Counsel for Amicus Curiae

No. 17-15364
Johan Calixto v. Hadylle Lesmes

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, IAFL, pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1(a)(2), 26.1-2(a), and 26.1-3, certify that the following is a complete list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and all other identifiable legal entities related to any party:

Amos, Tim (IAFL)

Ballante, Nicole L., Counsel for Appellee

Butruille-Cardew, Charlotte (IAFL)

Calixto, Johan Sebastian Alzat, Appellant

Covington, Hon. Virginia M. Hernandez, U.S. District Court Judge, Middle District of Fla.

Edwin Freedman, Counsel for Amicus Curiae

Gillett, Carmen, R., Counsel for Appellant

Gillett, Carmen R., Law Office of, Counsel for Appellant

Hourihan, Shanna, Counsel for Appellant

Hutchinson, Anne-Marie (IAFL)

International Academy of Family Lawyers (IAFL)

Kennedy, Ian (IAFL)

Krak, Kathleen M., Counsel for Appellee

Law Offices of Edwin Freedman, Counsel for Amicus Curiae

Lesmes, Hadylle Yusuf, Appellee

M.A.Y., Minor Child Subject of Order Granting Hague Petition

Meier-Bourdeau, Alice (IAFL)

Nissenbaum, Gerald L. (IAFL)

Prescott, Dana (IAFL)

Rein-Lescastereyres, Isabelle (IAFL)

Scott, Timothy (IAFL)

Shutts & Bowen, LLP, Counsel for Appellee

Sneed, Hon. Julie S., U.S. District Court Magistrate Judge

s/ Edwin Freedman
Edwin Freedman
Law Offices of Edwin Freedman

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C1

TABLE OF AUTHORITIES ii

INTEREST OF THE IAFL 1

STATEMENT OF THE ISSUES 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Shared parental intent is necessary in order to change the habitual residence of a minor child in proceedings under the Abduction Convention 5

II. Conditional Consent is Terminated When the Precondition is Not Fulfilled 17

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases

Ahmed v. Ahmed,
867 F.3d 682 (7th Cir. 2017) 11

Barzilay v. Barzilay,
600 F.3d 912 (8th Cir. 2010) 13

Berezowsky v. Ojeda,
765 F.3d 456 (2014) 10

Boehm v. Boehm,
2011 WL 863066 (M.D. Fla. 2011) 15, 20

Bowie v. Gaslain,
(No.T 15-26.664) 2

Delgado v. Osuna,
837 F.3d 571 (2016) 10

Delvoye v. Lee,
329 F.3d 330 (3d Cir. 2003) 12

Didon v. Castillo,
No. 15-3350, 2016 WL 5349733 (3d Cir. Sept. 26, 2016) 12

Feder v. Evans-Feder,
63 F.3d 217 (3d Cir. 1995) 11

Friedrich v. Friedrich,
983 F.2d 1396 (6th Cir.1993) 10, 12

In re ALC,
2015 WL 1742347 (9th Cir. 2015) 8

In the Matter of AR, (Children) (Scotland)
UKSC 2105/0048 2

Karkkainen v. Kovalchuk,
445 F.3d 280 (3d Cir. 2006) 12

Larbie v. Larbie,
690 F.3d 295 (2012) 10

Lozano v. Montoya,
572 U.S. ____, 134 S. Ct. 1224 (2014) 2

Mauvis v. Herisse,
2014 WL 5659412 (1st Cir. 2014) 9

Maxwell v. Maxwell,
588 F.3d 245 (4th Cir. 2009) 9

Mendez v. May,
2015 WL 627215 (1st Cir. 2015) 11

**Mozes v. Mozes*,
239 F.3d 1067 (9th Cir. 2001) 5, 6, 8, 9, 10, 12, 14, 19

Panteleris v. Panteleris,
2015 WL 468197 (6th Cir. April, 2015) 12

Ruiz v. Tenorio,
392 F.3d 1247 (11th Cir. 2004) 13, 14, 15, 19

Silverman v. Silverman,
338 F.3d 886 (8th Cir. 2003) 12

Sorenson v. Sorenson,
559 F.3d 871 (8th Cir. 2009) 13

Stern v. Stern,
639 F.3d 449 (8th Cir. 2011) 13

Velasquez v. Funes de Velasquez,
2015 WL 1565142 (E.D. Va 2015) 10

Other Authorities

Explanatory Report by Prof. Elisa Perez-Vera, par. 66, Actes et Documents de la Quartorzieme session, Tome III, Child Abduction, Hague Conference on Private International Law, 1982 5

* Citations upon which Appellants primarily rely are marked with asterisks.

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 seven Special Commissions on the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: the Abduction Convention). Its Fellows have also written and lectured widely on the

[1] 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.

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

Abduction 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*, 134 S. Ct. 1224 (2014), 572 U.S. ____ (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 15-26.664) The IAFL's interest in the instant case relates to its concern that implementation of the Abduction Convention, which has significantly reduced the harmful effects of international child abduction, will be severely undermined if the judgment of the Eleventh Circuit in this matter is not overturned. Many Abduction 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 Abduction 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.

STATEMENT OF THE ISSUES

Does one parent's written consent for a minor to travel abroad for a limited period, with the possibility of extending that period upon certain conditions being met, constitute consent to change the habitual residence of the minor where the conditions were not met by the expiration of the year?

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. Evaluating the child's acclimation to the new surroundings should not be used as an indirect method of applying a best interests test.

In extreme situations, 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. This occurs in cases where the left behind parent fails to take action, even after the passage of years. However, where the action for return is filed within one year from the date of unlawful removal or retention, the

Abduction Convention dictates that the court shall return the child forthwith without considering whether the child is settled in its new environment.

Where one parent has given their conditional consent to change the child's habitual residence, consent is only finalized when the condition is met. Failure to meet said condition negates the consent to change habitual residence. Thus, where consent is subject to one of the parties obtaining residency status, failure to obtain that status results in failure to obtain consent.

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 underlying principle of the Abduction Convention is that the habitual residence of a child should not be changed by the unilateral act of one parent.

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 Abduction Convention. The term habitual residence was deliberately not defined by the drafters of the Abduction Convention in order to avoid the application of a rigid formula to an issue which is fact driven.[3] While all of the eleven Federal Circuit Courts consider parental intent as an element in determining habitual residence, there is a distinction between them regarding the weight given to parental intent as opposed to other factors.

The First, Second, Fourth, Fifth, Seventh and Eleventh 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

[3] See: Explanatory Report by Prof. Elisa Perez-Vera, par. 66, Actes et Documents de la Quartorzieme session, Tome III, Child Abduction, Hague Conference on Private International Law, 1982.

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. Where parental intent can be determined, the child's adjustment to the new environment is a less significant factor.

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 Abduction 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 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 or vice-versa.

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 younger the child, the more significant the role parental intent plays in determining the habitual residence of the minor.

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 stay 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 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 Fifth Circuit has taken the approach of the majority that begins with the shared intent of the parents. Absent shared intent, the prior habitual residence should only be supplanted where the objective facts unequivocally point to that conclusion. Context, rather than specific periods of time spent in one location or another, is key in determining a change of habitual residence. (See *Delgado v. Osuna*, 837 F.3d 571 (2016), *Larbie v. Larbie*, 690 F.3d 295 (2012), *Berezowsky v. Ojeda*, 765 F.3d 456, 467 (2014))

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.

The Sixth Circuit has summarized the test to determine habitual residence as follows: 1)Where the child has resided exclusively in a single country, that is the habitual residence, 2)Where the child has alternated between two or more countries, the acclimatization test is applied, 3) Where the first two standards do not produce a clear determination, then shared parental intent is determined. (See *Ahmed v. Ahmed*, 867 F.3d 682 (6th Cir. 2017))

A 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*, No. 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. This distinction also appears in the analysis of all of the other circuits.

The case of *Panteleris v. Panteleris*, WL 468197 (6th Cir. April, 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).

The Eleventh Circuit has adopted the approach of the First, Second, Fourth, Fifth, Seventh and Ninth Circuits. The case of first impression concerning habitual residence in the Eleventh Circuit is *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004). Petitioner – Appellant Juan Tenorio Ruiz is a Mexican who met Defendant – Appellee Melissa Green Tenario, a United States citizen and resident of Minnesota, while she was an exchange student in Mexico. After becoming pregnant, Melissa returned to Minnesota where she gave birth in 1992. The couple married in the United States and settled in Minnesota. A second son was born in Minnesota in 1998. After seven years in the United States, the couple moved to Mexico in the hope of improving their

marriage. The couple spent two years and ten months in Mexico, during which time they both retained their ties to the United States; Melissa opened a US bank account, she converted her Minnesota nursing license to a Florida nursing license and Juan actively sought employment in the United States, to name a few examples. In May, 2003, Melissa took the children to Florida without informing Juan and refused to return.

In its discussion of habitual residence, the court held that "the opinion of Judge Kozinski in *Mozes* is not only the most comprehensive discussion of the issue, but also sets out the most appropriate approach." The court then proceeded to summarize the approach of *Mozes* "and adopt it as our own". (p. 1252). The court cites the *Mozes*' definition of the most difficult of the various situations, whereby the parents had agreed to let the child stay abroad for some period of ambiguous duration. Only where the duration of the stay was uncertain or where the parental intent was contradictory should the acclimatization of the child be considered. The court states that *Mozes* was critical of some cases which placed too much emphasis on facts like the child doing well in school and making friends. It cited the *Mozes* conclusion on this point, stating that "… in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned." "The court concluded that it made sense to 'regard the intentions of the parents as affecting the length of time necessary for a child to become

habitually resident, because the child's knowledge of these intentions is likely to color its attitude toward the contacts it is making." *Id*. at 1254.

The court upheld the District Court's decision to reject the petition, finding that the facts supported the conclusion that Melissa's intent with respect to the move to Mexico was clearly conditional. Although the parties had spent a significant amount of time in Mexico, during which the children went to local schools and had social engagements, the court found that there was no settled intent to abandon their habitual residence in the United States. Thus the acclimatization of the children, in cases where there is no joint parental intent to abandon the first habitual residence, is not a factor to be given significant weight.

In the case of *Boehm v. Boehm*, 2011 WL 863066 (M.D. Fla. 2011), the court held that "the first question is whether the parents shared a settled intention to abandon the former country of residence.", citing *Ruiz* and *Mozes*. There can be a change in habitual residence of a child when the parents have a settled purpose in moving even for a limited period of time. However, the court goes on to state that "courts have generally refused to find a change in habitual residence because one parent intended to move to the new country of residence on a conditional or trial basis." In *Boehm*, Petitioner mother was a German citizen and the Respondent father had dual United States and Austrian citizenship. Their minor daughter was born in Germany in 2006 and has both U.S. and German citizenship. From the age of five weeks the child resided with

her parents in Florida until November, 2009, when the Petitioner took her to Germany. The parties had business and family in Germany but there was no evidence to support the Petitioner's claim that they agreed to move there.

The parties had marital difficulties but were unable to resolve their differences. Petitioner admitted that she had been involved with another man in Germany and the parties discussed separation. They had planned to travel to Germany in December of 2009. Petitioner requested permission to move up the date to November in order to attend an art show there and Respondent agreed that she could go with their daughter a month early. Respondent joined the family in Germany in December. The parties agreed that the Respondent would take the child on a ski trip to Austria. Respondent left with the child to Austria but from there proceeded to return to the United States.

Petitioner claimed that the parties had agreed that the move to Germany was permanent. Respondent argued that it was solely for the purpose of a trial separation and he had not consented to the permanent relocation of the minor. The court found that the Petitioner had not proven that the move to Germany was permanent. Respondent had not given his consent to relocation of the minor but rather agreed that she could travel for a limited time while the parties tried to sort out the future of their marriage. The court found that there was a lack of shared intent to change the habitual residence of the minor to Germany. Although the court did not wish to encourage "self-help" as exhibited by the

Respondent's unilateral actions, it denied the petition, holding that there was no unlawful removal as Germany was not the child's habitual residence.

All of the United States Federal Courts take into account parental intentions to some degree. While the courts that follow the Ninth Circuit, including the Eleventh Circuit, place significant emphasis on parental intent, 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 underlying principle of The Hague Abduction Convention is that a minor's habitual residence should not be changed by the unilateral acts of one parent where both have rights of custody. The analysis of the Ninth Circuit requiring parental consent, adopted by the majority of the other Circuits, should be the analysis that is followed.

II. Conditional Consent is Terminated When the Precondition is Not Fulfilled

The increasing mobility of families has had an impact on the way courts have interpreted habitual residence. There are a growing number of instances in which couples temporarily change their living arrangements in order to accommodate the work, education or health needs of one or both parents. These instances can be divided into three categories. The first is where the parties clearly abandon their current residence and relocate abroad. The second

category is where the parties do not clearly abandon their prior residence and relocate abroad for a trial period of indeterminate time. The third category is those families who do not abandon their prior habitual residence and relocate for a specific period of time, for example a member of a diplomatic corps stationed abroad. A subset of the third category is where the move abroad is not only for a specific time, but also conditional upon fulfilling an agreed upon condition. Of the three categories, only the second one should require a determination which may need to consider the acclimatization of the minor child.

The case at hand fits into the subset of the third category. The Petitioner gave his consent to Respondent to reside with the child in the United States for one year. The consent form signed by the Petitioner makes clear that the consent expires after one year. The Petitioner agreed that the period would be extended if he were able to secure a residency visa in the United States. Petitioner did not agree that the child could relocate to the United States on a permanent basis if he were unable to reside with him.

It appears that some courts have transformed the settled purpose test as applied to the parents' intentions into a test of whether the child is well settled in his or her new environment. Article Twelve of the Abduction Convention provides that the courts shall order the return of an abducted child if the petition for return is filed within one year of the date of unlawful removal or retention. Only if the petition is filed more than one year after the unlawful event can the

court consider the acclimatization of the child. Thus, the ability of the child to adapt to the new surroundings is not a factor when determining petitions filed within the one year time period.

It was not the purpose of the Abduction Convention drafters to create a barrier to families who wish to temporarily spend time abroad. As pointed out in *Mozes*, there are a number of reasons for a temporary relocation; business, education, health or simply a desire to explore new possibilities. International businesses often send employees to their foreign branches for a limited period. Professors are often employed by foreign educational institutions to expand their research. Judges may use their sabbaticals to teach in foreign law faculties. If the Abduction Convention is interpreted in a way that inhibits families from spending limited periods abroad, then it is has not only failed to address the problem of child abduction, it has created a potential crisis for families faced with temporary relocation situations.

The courts in *Mozes* and *Ruiz* take into account the possibility that in cases where there is no shared parental intent to prior habitual residence of the child, the period of time in the new state becomes more significant. If the court can "say with confidence that the child's relative attachments to the two countries have changed to the point where requiring a return to the original forum would now be tantamount to taking the child out of the family and social environment in which its life has developed" (*Mozes* at 1081), then it may find that there has been a change in habitual residence. Such cases do not occur

where the consent to reside abroad has a clear expiration date, such as in the case at hand.

CONCLUSION

All of the Circuits require that there be a "settled purpose" to relocate in order to establish habitual residence in the requested state. The plain meaning of the term indicates that both parents have agreed as to the reasons for relocating. There can be no settled purpose where one parent does not agree to the underlying premise on which the change of habitual residence is based. In the present case, Petitioner, by signing the limited consent form, declared that he does not agree to non-conditional relocation of the child to the United States. Lacking a settled purpose, there cannot be a change in habitual residence.

Petitioner did not consent to the unconditional abandonment of the minor child's habitual residence in Colombia. By limiting his agreement to remain in the United States for only one year, Petitioner made it clear that there was no settled intent for the child to permanently reside in a country other than the Petitioner's country of residence. Petitioner's consent to extend the one year period was conditional upon him obtaining a United States residency visa. When that condition was not met, his consent to the child's residence in the United States terminated on the date delineated in the travel consent form.

As the court stated in *Boehm*, *Id*., consent to travel for a limited period of time does not constitute a shared intent to abandon the prior state as the habitual residence of the child. The burden to prove that there was shared parental

consent to change the habitual residence of the child is on the Respondent mother. The travel consent document signed by the Petitioner clearly limits the time of residence abroad to one year. Respondent presented no evidence which contradicts that document.

Respectfully submitted,

s/ Edwin Freedman
Edwin Freedman
Law Offices of Edwin Freedman
58 Harakevet Street
Tel Aviv 6777016
Israel
00-972-3-6966611
edwin@edfreedman.com

Tim Amos
Timothy Scott
Gerald L. Nissenbaum
Dana Prescott
Isabelle Rein-Lescastereyres
Charlotte Butruille-Cardew
Ian Kennedy
Anne-Marie Hutchinson
Alice Meier-Bourdeau
International Academy of Family Lawyers
81 Main Street, Suite 405
White Plains, New York 10601

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certificate that this brief complies with the length limitations set forth in Rule 32(a)(7)(B)(i) and 29(d) because it contains 5,161 words, as counted by Microsoft Word, excluding the items that may be excluded under Rule 32(a)(7)(B)(iii).

s/ Edwin Freedman
Edwin Freedman
Law Offices of Edwin Freedman

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certificate that on February 6, 2018, I filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Edwin Freedman
Edwin Freedman
Law Offices of Edwin Freedman