No. 18-935

In the Supreme Court of the United States

MICHELLE MONASKY,
Petitioner,

v.

DOMENICO TAGLIERI,
Respondent.

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

BRIEF OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. What standard of review applies to an appeal where a lower court has applied the habitual residence test to its factual findings?

2. Where an application for return under the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter: the Abduction Convention) is timely filed within twelve months of the date of unlawful removal or retention, should the court consider the acclimatization of the child in his or her new surroundings in determining if a change in habitual residence has occurred.

3. Whether, in applying the habitual residence test, the shared intent of the parents can be satisfied by objective indicia or is proof of a subjective agreement between the parents required?

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INTEREST OF THE IAFL[1]

The IAFL 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 is a worldwide association of practicing lawyers, currently numbering over 810 Fellows in 57 countries, each of whom is recognized by the bench and bar in his or her country as an experienced and skilled family law practitioner with specific expertise in international matters.

IAFL Fellows have made presentations in the United States and other countries in relation to legal reforms concerning family law related matters. It has sent representatives to participate in relevant international conferences, including the seven Special Commissions on the Implementation of The Hague Convention on the Civil Aspects of International Child Abduction held every four years in The Hague. IAFL Fellows have also written and lectured widely on the Abduction Convention and related topics, such as the relocation of children across state borders.

The IAFL filed an amicus curiae brief in *Lozano v. Montoya*, 572 U.S. ___, 134 S. Ct. 1224 (2014) and in *Cahue v. Martinez,* 137 S. Ct. 1329 (2016). It has also filed a brief in the U.S. Court of Appeals for the

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[1] Pursuant to Supreme Court Rule 37.6 counsel for the *amicus* certify that no counsel for a party authored any part of this brief and no person or entity other than counsel for the *amicus* have made a monetary contribution to the preparation or submission of this brief. Petitioner has filed Blanket Consent. Respondent has consented to the filing of this brief.

Eleventh Circuit, *Calixto v. Lesmes,* 909 F.3d 1079 (2018). Additionally, briefs have been filed by the organization in the Supreme Court of the United Kingdom, *In the Matter of AR, (Children) (Scotland)* UKSC 2015/0048, *In the Matter of NY*, (A Child) UKSC 2019/0145 and the Supreme Court (Cour de Cassation) of 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 is an effective means for both deterring child abductions and enabling the prompt return of children unlawfully removed from their habitual residence, will be severely undermined if the judgment of the Sixth Circuit is overturned. Many child abduction cases are brought to court in signatory States by IAFL Fellows. The IAFL has a significant professional and policy interest in preserving the deterrent effect of the Abduction Convention, ensuring the prompt return of wrongfully removed or retained children to their habitual residence and promoting a uniform interpretation of the Abduction Convention.

The IAFL is acting pro bono in submitting this brief.

STATEMENT OF FACTS

The International Academy of Family Lawyers (IAFL) adopts the facts as they are stated in the Respondent's 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 which country is the appropriate forum to determine the child's best interests.

Given that the purpose of the Abduction Convention is to prevent the unilateral removal of a minor by one of his or her guardians, shared parental intent has become a primary focus in determining habitual residence. "No less importantly, it may be accepted that the general rule is that neither parent can unilaterally change that place of habitual residence." (*LK v. Director-General, Department of Community Services*, 2009 HCA 9, par. 34, High Court of Australia, March 11, 2009).

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 District Courts and Courts of Appeal 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. This test looks back in time, not forward. The minority have applied a test that emphasizes the perspective of the child, in particular, his or her acclimatization to the new surroundings. The attempt to evaluate the child's integration into the new

surroundings is another way of implanting a best interests test into what is intended under the Abduction Convention to be a purely jurisdictional question.

The Abduction Convention draws a clear distinction between petitions that are filed within twelve months of the unlawful removal or retention and those that are filed subsequent to that period. The purpose of this distinction is to prevent a situation where the return of the child to his or her habitual residence might be as traumatic as the original abduction. As with any cut off point, one could make an argument that there is a certain arbitrariness to it. However, the Convention is clear that in cases where the petition for return is filed within twelve months, the court must order the return, unless one of the narrow defenses can be proven.

The two-pronged test as adopted by the Sixth Circuit ignores that distinction. It places the primary emphasis on the acclimatization of the child. It views parental intent as a back-up inquiry for children too young or disabled to become acclimatized. The Abduction Convention does not provide for an evaluation of the child's acclimatization to the new surroundings in cases where the Convention is filed within the twelve-month period. If it is determined that there was no shared parental intent to change the child's habitual residence, that should conclude the court's analysis of habitual residence in a case of unlawful removal. Whether or not the child has acclimated to the new surroundings is not an issue under such circumstances. There are two distinct reasons why the child's acclimatization should not be

an element in determining habitual residence in such cases.

The first reason is the nature of the proceedings. A petition under the Convention is a summary proceeding, which under Article 11 is envisioned to be concluded within six weeks. An investigation of a child's acclimatization to the new surroundings requires reports of psychologists or social workers who examine the child's development in the new state, including performance in school, making of new friends, acquisition of language skills and other factors that could determine acclimatization. Such an examination is another way of stating that a best interests test is to be performed, which is contrary to the Convention goal of a prompt return.

The second reason relates to deterrence. In order for a parent contemplating the removal of a child to recognize whether such an act would be unlawful, there needs to be criteria that are recognizable at the time the removal is contemplated. While there may be a factual dispute as to whether or not consent was given, it is at least an issue that can be analyzed before making a move. The possible acclimatization of a child is highly speculative and can only be determined after the removal has already occurred. A parent who believes that their child will quickly acclimate may believe that their otherwise unlawful removal will become legitimized.

Finally, the Abduction Convention strives for uniformity in its implementation. By assessing the acclimatization of a child in determining habitual residence, courts may be reaching opposite decisions on

identical fact patterns, the difference in the outcome being determined by how well one child makes new friends or learns a new language as opposed to another child.

The Abduction Convention makes no mention of shared parental intent and certainly does not establish a standard of proof. Proof of such shared intent is not limited to any particular evidentiary requirement. As in most matters regarding child rearing, parents do not generally draw up written agreements to summarize their decisions.

There is no prior court judgment that supports the Appellant's claim that there must be a subjective agreement in order to determine shared parental consent. On the contrary, in courts where the issue was raised, there is uniformity in holding that both actions as well as declarations should be considered. It is within the discretion of the court to determine the weight given to the evidence but there is no decision which interprets shared intent to mean a "subjective agreement".

ARGUMENT

The Standard of Review:

The IAFL does not take a position on the standard of review. As an international body of lawyers, its focus is on issues that have international implications. It therefore refrains from opining on matters of procedure in the various jurisdictions of its members.

Determination of Habitual Residence:

The appropriate test for determining habitual residence has become increasingly blurred as courts have begun to reformulate the unambiguous language and expand the clear limitations set out in the Abduction Convention. Article 12 requires the judicial or administrative authority to order the return of the child forthwith if a period of less than one year has elapsed from the date of the wrongful removal and the date of the commencement of proceedings.

Article 12 provides that only where the proceedings have been commenced after the expiration of one year, the judicial or administrative authority can take into account whether the child is now settled in its new environment. Implanting the acclimatization test into the determination of habitual residence is making an end run around the clear provisions of Article 12. The one-year period until commencement of proceedings for wrongful removal will have no significance if the acclimatization test is simply relocated from the defense side of the ledger to the petitioner's side. A petition that is timely filed in an unlawful removal case should not require a best interests test, which is implicit in determining acclimatization.

Shared parental intent is necessary in order to change the habitual residence of a minor child where proceedings are commenced within one year of the unlawful removal.

All Circuits consider parental intent as a component of habitual residence. The distinction between the various Federal Circuits lies in the weight given to parental intent as opposed to other factors, such as the physical location of the child.

The two-pronged test adopted by the Sixth Circuit in this matter is contrary to the clear provisions of Article 12. The drafters considered the issue of the passage of time between the unlawful act and the commencement of proceedings. They concluded that the judicial authority is only to consider whether the child is settled in its new environment where proceedings are commenced after the passage of one year. By considering the acclimatization of the child as part of the determination of habitual residence, the Sixth Circuit is circumventing the provisions of Article 12.

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 duration 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 *Mozes* case dealt with an unlawful retention rather than an unlawful removal as in the case at hand. The time factor between the two sets of circumstances may be of great significance. In an unlawful removal matter where the petition is timely filed, the period between the unlawful act and the petition is less than one year. In a matter of unlawful retention, that might not be the case. The unlawful retention may have occurred two or three years after the initial move. This situation often occurs where families temporarily relocate for job related, health or academic reasons. Thus, a four year old child may have spent three of his or her years in a jurisdiction other than the one in which the family had initially lived. In such instances, the habitual residence test does need to weigh the child's acclimatization along with parental intent.

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 children's adjustment to their new environment, with no rigid formula on how to balance the two.

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

By giving significant weight to the acclimatization of the child to the new environment, the Abduction Convention will lose its deterrent capacity. The proceedings in a petition for return will divert from a determination of jurisdiction to an analysis more appropriate to a custody proceeding. The outcome will no longer be determined by the actions of the parents, 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. 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. It would result in courts applying a best interests test, contrary to the purpose of the Abduction Convention. It creates the need for psychological evaluations and testimony of school officials, family friends and others involved in the social network of the child. Abduction Convention proceedings strive to be completed within six weeks (see Article 11 of the Convention). By conducting an investigation into the acclimatization of the child, proceedings are unlikely to be concluded with the degree of expedition required by Article 11.

In addition, while return proceedings are being conducted, the child will be placed in additional conflict between the parents, the petitioner trying to prevent the child from adapting, even temporarily, to the new surroundings, with the respondent pushing in the opposite direction.

The continuum between parental intent and the child's acclimatization to new surroundings is also impacted by the age of the child. The impact of relocation on a 13 or 14-year old is significantly different from that of a 3 or 4-year old. The ability of a 3-year old to adapt to his or her new surroundings will likely be of less significance compared to that of a 13-year old. The young age of the child in the present case makes such an inquiry superfluous.

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 for a specific, limited 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 a new habitual residence being acquired in a relatively short period of time. In the second situation, a new habitual residence will not be acquired providing that at the completion of the agreed upon period the petition is filled within one year. The third situation is the problematic one. The court stated that in the absence of a settled parental intent, courts should be slow to infer from acclimatization that an earlier habitual residence has been abandoned. As the *Mozes* court ruled in a case of unlawful retention, the twelve-month period of Article 12 could not be applied in an entirely rigid fashion. The present matter is one of unlawful removal in which the petition was timely filed. Thus, there is no issue involving acclimatization. Article 12b should be applied as it appears in the Abduction Convention.

The Ninth Circuit reaffirmed the *Mozes* precedent in the case of *In re ALC*, 2015 WL 1742347 (9th Cir. 2015). The court there held that the first task is to examine shared parental intent. When that does not resolve the dispute, then the new jurisdiction may be considered the child's habitual residence when there are there are objective facts pointing unequivocally to a change in the child's attachments to the prior habitual residence in favor of the new one. Ordering a return would then be tantamount to removing the child the child from the environment in which its life had

developed. It would be, in effect, more traumatic than the initial abduction.

The First Circuit followed the *Mozes* approach in the case of *Mauvais v. Herisse*, 772 F.3d 6 (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 First Circuit case of *Mendez v. May*, 778 F.3d 337 (1st Cir. 2015), held that it is the last shared parental intent which is determinative, even if a change in geography had not yet taken place. It held that a change in geography is only one factor to consider and not a prerequisite to a change in habitual residence.

The Second Circuit also follows the *Mozes* analysis. The Second Circuit has held that to determine habitual residence, courts should first look to the shared intent of "those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared"*, Gitter v. Gitter*, 396 F.3d 124, 134 (2d. Cir. 2005). The parent's intent must be mutual; the unilateral action of one parent to move a child to another country does not alter the child's habitual residence. *Id* at 135. The Second Circuit has instructed that the "courts should begin an analysis of a child's

habitual residence by considering the relevant intentions," specifically "the intent of a person or persons tasked with fixing a child's place of residence". *Id*. at 131. When a child's parents disagree on the child's place of habitual residence, the court must determine the intentions of the parents as of the last time their intentions were shared." *Id*. at 133. "The overall assessment of habitual residence is 'not formulaic' but instead 'is a fact-intensive determination that necessarily varies with the circumstances of each case,'" *Guzzo v. Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013), citing *Whiting v. Krasner*, 391 F.3d 540, 546 (3d Cir. 2004). When examining the shared intent required to shift a child's habitual residence to a new country, courts look to see whether there is an indication that the parties abandoned the prior habitual residence. See *Guzzo*, 719 F.3d at 111, (District Court did not err in finding that the parents never shared an intent for their child to abandon his prior habitual residence in the United States).

In the second prong of the *Gitter* inquiry, courts consider whether "the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings and that his habitual residence has consequently shifted." *Gitter*, 396 F.3d at 133. In such cases, the child's acclimatization may override the intent of the parents. *Id*. at 134. Following the guidance of the *Mozes* approach, the *Gitter* court echoed that "courts should be 'slow to infer' that the child's acclimatization trumps the parents' shared intent." *Id*. at 134 (internal citations omitted). It is important to note that in *Gitter*, the petition for return was not filed within one year after the unlawful

retention. Thus, the court was not mandated to order the return but could consider whether the child was settled in its new environment.

The Second Circuit sets a high bar to establish acclimatization and has held that courts should only deny repatriation due to acclimatization in extreme circumstances, such as where a "child's degree of acclimatization is 'so complete that serious harm … can be expected to result from compelling his or her return to the family's intended residence'", *Mota v. Castillo*, 692 F.3d 108, 116 (2d. Cir. 2102), quoting *Gitter*, 396 F.3d at 134. "Only in relatively rare circumstances will the child's acclimatization to a new location be so complete that serious harm to the child can be expected to result from compelling [her] return to the family's intended residence." *Daunis v. Daunis*, 222 Fed Appx. 32, 34 (2d Cir. 2007).

As a hypothetical example of an acclimatized child, the *Gitter* court discussed the "severe harm" that a child who was born in one country but then had spent fifteen years abroad would suffer if returned to her country of birth. *Gitter*, 396 F.3d at 134. While a child's acclimatization may reach a level of completeness such that a removal from the new location would cause serious harm, such acclimatization is rarely on display. See, e.g. *Heydt-Benjamin v. Heydt-Benjamin*, 404 F. App'x 527, 529 (2d Cir. 2010).

Although the test is two-pronged, analyzing the intention of the persons entitled to fix a child's place of residence is the most important aspect of this analysis, particularly when a child is young, because he or she is unlikely to suffer significantly from a change in his

[or her] environment. *See Guzzo* 719 F.3d at 108 n.7, noting that "[w]hen a child is younger, with less sense of surrounding environment, courts place more emphasis on the intentions of the parents". In *Mota*, 692 F.3d 108, the Second Circuit concluded that the child, who had been in the United States for two years (from the time she was three and a half years old), had not acclimatized to the United States and her return to Mexico would not "expose her to the severe harm one associates with a child's deprivation of [her] acclimatized life". *Id.* At 109-11,116 (internal quotations and citations omitted).

In *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 200 (E.D.N.Y.) *aff'd*, 401 F. App'x 567 (2d Cir. 2010), the court declined to find that the children, whose habitual residence was England, were acclimatized to the U.S. The court's analysis stated that, even though they were "comfortable" and "stable" in New York and had "been enjoying attending school and living with their father and other family members here for nearly two years, the boys are well-acquainted with grandparents, cousins, and other extended family members who live in England." Summarizing its findings, the court found that the children were " imminently capable of adjusting (and readjusting) to life on either side of the pond."

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 shared parental intent is lacking or cannot be determined, the court must then

decide if the petitioner has agreed to taking up a new habitual residence.

Another Fourth Circuit case, *Velasquez v. Funes de Velasquez*, 102 F.Supp 3d 796 (E.D. VA 2015) involved the third scenario identified in the *Mozes* decision. The parties' 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. The court 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 courts of the Third and Eighth Circuits have taken an approach which balances parental intent with the child's acclimatization. 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 parent's shared, present intentions regarding the child's presence there. See *Delvoye v. Lee*, 339 F.3d 330 (3d Cir. 2003), *Didon v. Castillo*, 838 F.3d 313 (3d Cir. 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 intent is more limited.

The Sixth Circuit takes an approach that puts greater emphasis on the child's circumstances than parental intent. 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. It found that a child can have only one habitual residence and that 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 case of *Panteleris v. Panteleris*, WL 468197 (6th Cir. 2015), rejected the *Mozes* analysis, reaffirmed the *Friedrich I* precedent and further elaborated on it. The court established five principles to determine habitual residence:

1) Not to use technical rules but to 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 child'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 parent's intentions at the time of the move to Israel. Assessing these facts led the court to conclude 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 acclimatization 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 primary emphasis

on parental intent, particularly the First Circuit, even the courts that place more emphasis on the child's circumstances still weigh parental intent to varying degrees. The courts all agree that the unilateral decision of one parent is not sufficient to change the habitual residence of a child. The analysis of the Ninth Circuit and the courts that adopt its approach places the emphasis on mutual parental consent and should be the analysis that is followed.

The majority in the *en banc* Court of Appeals decision in this matter states that to identify a child's habitual residence," The primary approach looks to the place in which the child has become 'acclimatized.' The second approach, a back-up inquiry for children too young or too disabled to become acclimatized, looks to 'shared parental intent.'" Pet. App.7a.

There are two problems with this analysis. First, it makes no distinction between an unlawful removal and an unlawful retention. Determining acclimatization in an unlawful removal petition filed within twelve months is contrary to the clear wording of Article 12. The Supreme Court of Canada put it succinctly in the case of *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (S.C.C.),: "By stating that before one year has elapsed the rule is that the child must be returned forthwith, Art. 12 makes it clear that the ordinary effects of settling in, therefore, do not warrant refusal to surrender." (par. 83). The ruling in *Thomson* remains case law in Canada. "However, decisions of this court and the Supreme Court of Canada hold that evidence of settling in is not relevant if the application is brought within one year of the wrongful removal or

retention". *Balev v. Baggott*, 2016 ONCA 680, Court of Appeal for Ontario (2016), reversed on other grounds, 2018 SCC 16, Supreme Court of Canada, 2018.

The second difficulty with this approach is that it prevents parents from determining their family's habitual residence. A parent considering a temporary relocation of his or her family for a defined period would need to take into account the adaptability of their child in the event of marital difficulties. Attorneys asked to advise a client who is considering taking a sabbatical abroad or accepting a diplomatic position in another country, would then be remiss if they did not advise them of the possible change of their child's habitual residence, despite a written agreement between the parents to the contrary. Clearly, it is not the intent of the Abduction Convention to inhibit families from temporarily residing abroad.

Proof of Shared Intent – By Subjective Agreement Only or Objective Indicia?

There is no basis to support Petitioner's contention that a subjective agreement is required to establish shared parental intent. A subjective agreement is one way of proving parental intent but not the only one. The case of *Mendez v. May*, 778 F.3d 337 (1st Cir. 2015) is representative of the approach to the issue of establishing parental intent. There an Argentinian father and a U.S. mother had a child in 2007 while living in Argentina. The mother obtained employment in the U.S. in 2013 and the parties began discussion regarding the relocation of the minor to the U.S.

When the mother removed the child to the U.S., the father petitioned for his return claiming that there was no shared intent. The District Court of Massachusetts ruled in favor of the father. The First Circuit reversed, finding that the child's habitual residence changed upon proof of the parent's joint shared intent. The court reached its conclusion based upon evidence that the absence of a written agreement between the parties allowing the child to change his habitual residence was not required and that the settled intent of the parties could be proven by other evidence.

The case of *Maxwell v. Maxwell*, 588 F.3d 245, 252 (4th Cir. 2009), makes clear that shared parental intent is not limited to a particular form of proof. "In cases where there is a dispute regarding a child's habitual residence, the representations of the parties cannot be accepted at face value, and courts must determine habitual residence from all available evidence. Federal Courts have considered the following factors as evidence of parental intent: parental employment in the new country of residence; the purchase of a home in the new country and the sale of a home in the former country; marital stability; the retention of close ties to the former country; the storage and shipment of family possessions; the citizenship status of the parents and children; and the stability of the home environment in the new country of residence."

The Explanatory Report of the official reporter of the Abduction Convention, Prof. Elisa Perez-Vera, (the Perez-Vera Report), states as follows regarding the issue of habitual residence; " We shall not dwell at this

point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile" (par. 66 of the Report). Prof. Perez-Vera does not in any way state or imply that habitual residence can only be proven by a subjective agreement. A question of pure fact can be proven by any relevant evidence. It is up to each court to determine the weight given to the evidence submitted. There is no basis in the Convention to restrict that evidence to a subjective agreement.

CONCLUSION

Absent a court order, relocation of minor child to a foreign country requires the consent of both parents. Determination of habitual residence must be divided into two categories. The first category is where there has been an unlawful removal. In such cases, if the return petition is filed within one year of the date of the unlawful removal, the acclimatization of the child is not a consideration. Unless the respondent can prove one of the defenses, the court is obligated under the Abduction Convention to order the child's prompt return to the country of habitual residence.

The second category is where there has been an unlawful retention. Generally, acclimatization should also not be considered where the petition for return was filed within one year. However, in cases where the temporary stay abroad was for an agreed period of substantial length, courts may consider, along with parental intent, whether the child's habitual residence has switched to the new state due to his or her acclimatization.

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 of acclimatization. In any constellation of circumstances, parental intent must be the primary consideration. In cases where the child is very young, such as in the present matter, the child's habitual residence is that of the parents. A child of eight weeks cannot acclimate to any surroundings.

Parental intent may be proven in the same was as any other fact in dispute. There is no requirement of a subjective agreement, nor is the court limited to a particular kind of evidence. Parental intent must be determined by all available evidence. A subjective agreement is relevant, but not a requirement to prove parental intent. For the above reasons, the petition should be denied.

Respectfully submitted,

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