No. 12-820

In the Supreme Court of the United States

MANUEL JOSE LOZANO,
Petitioner,

v.

DIANA LUCIA MONTOYA ALVAREZ,
Respondent.

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

BRIEF OF *REUNITE* INTERNATIONAL CHILD ABDUCTION CENTRE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

Reunite International Child Abduction Centre ("*Reunite*") is the leading charity in the United Kingdom ("the UK") specialising in advice, assistance, mediation, and research in relation to international parental child abduction and the movement of children across borders. It is funded, principally, by the UK Ministry of Justice and the UK Foreign and Commonwealth Office. *Reunite* undertakes a number of roles. In particular, *Reunite*:

(a) provides advice and assistance to those individuals who have had their child abducted, or who have abducted a child, and in relation to relocation and international contact issues;

(b) provides advice and assistance to parents and information, education, to interested persons, national and local authorities and agencies about international parental child abduction, including to help the prevention and discouragement of the international abduction of children;

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[1] *Amicus Curiae* hereby certifies pursuant to Sup. Ct. R. 37.6 that this Brief was not authored in whole or in part by counsel for a party, nor did any person or entity other than *Amicus*, its members, or its counsel make a monetary contribution to fund the preparation or submission of this Brief. Counsel of record for the parties to this action have consented to the filing of this Brief.

(c) seeks, nationally and internationally, to raise awareness and understanding of international parental abduction generally and of the law concerned with it;[2]

(d) cooperates and works closely with the UK Ministry of Justice and Foreign and Commonwealth Office, seeking to bring about satisfactory outcomes to child abduction cases;

(e) undertakes and publishes research concerned with the international movement of children; and

(f) provides a mediation service for parents involved in international disputes relating to their children.

In addition, *Reunite* is the only non-governmental body that is included as part of the government delegation from England and Wales which attends the Hague Conference Special Commission meetings on the practical operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the 1980 Hague Convention").

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[2] Principally, the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000.

Reunite has intervened – providing written and sometimes also oral submissions – in many important international children's cases including in this Court in *Abbott v Abbott*, 130 S. Ct. 1983 (2010), in the European Court of Human Rights, and in the Supreme Court of the UK.[3]

Reunite is not advancing or seeking to advance a particular case, cause or outcome in these proceedings. In submitting this brief, *Reunite* seeks to offer assistance and information to the Court with particular reference to the current position in English law and, where appropriate, international law with regard to the issue before the Court, namely whether equitable tolling should apply to the one year period that triggers the availability of the settlement exception pursuant to Article 12 of the 1980 Hague Convention.

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[3] See, for example (before the European Court of Human Rights) the Grand Chamber hearing of *X v Latvia (Application no. 27853/09),* which it is anticipated will be the seminal EU case on the 1980 Hague Convention, (judgment is currently awaited), and *Ignaccolo-Zenide v. Romania*, no. 31679/96, 25 January 2000; and (before the United States Supreme Court) *Abbott v Abbott*, 130 S. Ct. 1983 (2010); and (before the United Kingdom Supreme Court) *In the matter of A (Children)* (AP) UKSC 2013/0106, in which judgment is awaited, *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 FLR 442, *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *In re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice and another Intervening)* [2009] UKSC 10, [2010] 1 AC 319.

Reunite's interest in the instant case relates to concerns about: (a) the effect on children subject to proceedings pursuant to the 1980 Hague Convention if a rule were to be imposed upon consideration of the "settlement" exception which had the effect of fettering the court's enquiry into that particular exception as a result of parental action; and (b) the concurrent possibility that were such a rule to be imposed, children who might be in every sense "settled" within the meaning of Article 12 would lose the benefit of a proper enquiry into the nature and quality of that settlement, and accordingly be returned where it would be contrary to their welfare to be so returned, or alternatively returned without proper consideration of the mechanism of that return, because the element of their settlement had been ignored.

SUMMARY OF ARGUMENT

1. *Reunite's* objective is to assist the Court in considering the general approach taken to the examination and subsequent determination of the Article 12 "settlement" exception in international child abduction cases brought pursuant to the 1980 Hague Convention. In particular, and at the heart of its submission, *Reunite* suggests that:

(a) the 1980 Hague Convention is focussed upon, and designed to facilitate, the protection of children who are subjected to a wrongful cross-border removal or retention;

(b) in order to address that aim, the 1980 Hague Convention establishes a presumption that the prompt return of the abducted child to the

country of his or her habitual residence will be in that child's best interests; that presumption is *qualified,* and can be overcome by the operation of specific, carefully defined (and necessarily restrictive) exceptions, some of which directly consider aspects of the welfare of the child in the context of the operation of the 1980 Hague Convention. *Reunite* would submit that the Article 12 "settlement" exception places considerable emphasis upon the position and particularly the welfare of the individual child;

(c) the 1980 Hague Convention operates with the express aim of facilitating, by the subject child's summary return, a prompt and effective in-depth enquiry into issues of that child's welfare, conducted not in the State to which he or she has been abducted or retained, but by the courts of the child's habitual residence. The 1980 Hague Convention does, however, recognise that in certain circumstances that aim cannot be achieved, with the result that alternatives must be considered. That will particularly be so where the Article 12 exception is established, as is apparent from the wording of that Article;

(d) integral to that aim is an implied acceptance that any signatory State to which a return is to be ordered can properly conduct an appropriate welfare enquiry, so that the State asked to order the return can be sure that the child's interests will be properly examined in the country of habitual residence, and effectively safeguarded; and

(e) as a result of those aims it is recognised that in appropriate circumstances the aims and policy of the 1980 Hague Convention cannot be achieved. In particular, where a child has spent an extended period of time (in 1980 Hague Convention terms over one year) outside the country of their habitual residence, the benefit of a welfare enquiry in that country may be outweighed by the disruption of summarily determining that the child should be removed from the country to which they were removed, but in which they are now "settled." Where that situation arises (and upon the establishment of certain facts, including that the child is in fact "settled") the court's obligation to return is not absolute though the court may nonetheless order the child's return in the exercise of its discretion.

Against that background, *Reunite* notes, importantly, that neither the terms of the 1980 Hague Convention nor the supporting *Explanatory Report* of Professor Perez-Vera ("the Explanatory Report") expressly provides for or supports the principle of equitable tolling within the terms of Article 12.

2. Notwithstanding the clear structure and wording of the 1980 Hague Convention itself and the supporting *Explanatory Report, Reunite* does note that the 1980 Hague Convention is intended to operate as a summary remedy, with the further intention of protecting children from the harmful effects of international child abduction whilst providing a mechanism by which they can be swiftly returned to the jurisdiction of their habitual residence to allow a prompt welfare enquiry to be conducted there. Accordingly, adopting a purposive

interpretation, and accepting that the 1980 Hague Convention must be so interpreted to allow it to respond flexibly to the changing circumstances of families and particularly of children over time, it is possible to argue that the imposition of a concept such as equitable tolling may benefit the process and strengthen the operation of the 1980 Hague Convention worldwide.

3. Thus adopting equitable tolling in circumstances where a child has been concealed may:

(a) increase the deterrent value of the 1980 Hague Convention, as parents who abduct will know that they will not ultimately benefit from concealing their children from the left behind parent and/or the authorities;

(b) expedite the 1980 Hague Convention enquiry, by avoiding the need to engage in a determination of whether or not a child is in fact "settled" pursuant to Article 12 where that child has been concealed; and

(c) prevent the 1980 Hague Convention enquiry from being derailed by consideration of subjective matters such as the settlement of a child in a particular environment, leaving such issues for the court of habitual residence to determine within welfare based proceedings, as the 1980 Hague Convention intends.

4. Such an approach would also ensure that parents whose children have been concealed during the course of parental child abduction are not disadvantaged by

having to surmount an additional exception that has arisen only as a result of what may well be the abducting parent's duplicitous behaviour. In that regard, it is a well-established principle that an abducting parent should not be permitted to benefit from a set of factual circumstances that they, through their wrongful actions, have engineered (see, for example, *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403). The use of equitable tolling would prevent such a benefit being derived from an undoubtedly harmful act.

5. Conversely, however, any argument that a left behind parent is treated inequitably is countered by, first, the possibility that a child who has been concealed not in fact being found by a court to be "settled" within the terms of Article 12, or alternatively, and, second, the availability of a residual discretion to order the return of a child even if that child is found to be settled within the terms of Article 12.

6. A parent seeking a child's return in such circumstances is therefore *not* deprived of an effective remedy by which to obtain the child's return. The 1980 Hague Convention thus provides for the possibility of a child's return notwithstanding the passage of one year between removal or retention and the commencement of proceedings in the following circumstances:

(a) upon the court being presented with the application for return finding that the child in question is not "settled in its new environment,"

in which case the court "shall also order the return of the child"; [4]

(b) upon a finding that the child is so "settled," but with the court nevertheless exercising its discretion to order the child's return; or

(c) upon the court exercising a general power (and relying upon domestic remedies available) pursuant to Article 18 of the 1980 Hague Convention to "order the return of the child at any time."

7. All of the above determinations by which a return may be ordered require the court to undertake an enquiry appropriate to the situation of the child concerned, considering:

(a) the nature and extent of the child's settlement;

(b) the circumstances under which that settlement has arisen, if indeed the child is settled;

(c) the potential disruption to that child if, notwithstanding any finding of settlement, the child's return is pursued; and

(d) In the event that the court is persuaded that a "settled" child should be returned in the exercise of the court's discretion, what mechanisms and other assurances must be put in place to ameliorate the potential disruption inherent in

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[4] Article 12 of the 1980 Hague Convention.

such a return so that the child's interests are at all stages safeguarded.

8. Were equitable tolling to be imposed the important investigations summarised above may not be undertaken, because the child's settlement would not have to be considered. No other exception may be available, as a result of which the court would be compelled to order the child's return "forthwith" and without substantial consideration of further safeguards.

9. Reunite recognises that there is a balance to be drawn between the stated objectives of the 1980 Hague Convention: on the one hand of speedily and unsentimentally resolving individual cases involving the international abduction of children; but on the other, properly considering and to the extent necessary properly addressing the interests of the individual child who is the subject of a particular set of such proceedings. In addressing that fine balance, there will inevitably come a point where the interests of the child concerned will outweigh the interests of natural justice to the left behind parent.

10. Whilst *Reunite* recognises and wholeheartedly supports the summary nature of the 1980 Hague Convention, where proceedings have been commenced over one year following the child's removal the "summary" aspect of the 1980 Hague Convention is necessarily compromised and the prevailing factors for consideration are altered when compared to a case that might properly be described as one of "hot pursuit." On a plain reading and without the imposition of principles such as equitable tolling, the 1980 Hague Convention

may be said to be sufficiently flexible to accommodate the wide range of circumstances of children in individual cases. By applying the 1980 Hague Convention in this manner, the interests of children are protected as are the overriding principles of the 1980 Hague Convention, tailored appropriately to the circumstances of each case.

11. *Reunite* would therefore respectfully suggest to this Court that to interpret the 1980 Hague Convention to include equitable tolling may not be the most effective, or the fairest, route by which to determine those 1980 Hague Convention cases in which settlement is raised. It will be suggested below that other approaches more consistent with the drafting of, and the explanatory materials to, the 1980 Hague Convention are available to address the particular difficulties that arise in "settlement" cases, and that the adoption of such approaches would be likely to achieve similar goals and be similarly effective to the imposition of equitable tolling.

ARGUMENT

I. The nature and purpose of the 1980 Hague Convention in an international context

A. The focus on the best interests of the child

The 1980 Hague Convention is an enormously successful international convention that seeks to combat and remedy international child abduction. It was conceived "to protect children internationally from the harmful effects of their wrongful removal or

retention and to establish procedures to ensure their prompt return to the State of their habitual residence." (1980 Hague Convention, Preamble). It seeks "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States" (1980 Hague Convention, arts. 1(a), (b)). As the *Explanatory Report* said: "The Convention…places at the head of its objectives the restoration of the status quo, by means of the 'prompt return of children wrongfully removed to or retained in any Contracting State.'" *Explanatory Report* at ¶ 16.

The 1980 Hague Convention has at its heart the interests not of adults, but of children: "the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests" *Explanatory Report* at ¶ 24; *see also In re E (Children) (Abduction*: *Custody Appeal* [2011] UKSC 27, [2012] 1 AC 144 at ¶¶ 15 and 18). The 1980 Hague Convention provides for a limited number of exceptions to the duty to secure the prompt return of children to the state of their habitual residence. These are contained within three Articles: Article 12 (settlement); Article 13 ((i) consent; (ii) acquiescence; (iii) grave risk of harm; (iv) child's objections); and Article 20 (protection of fundamental rights and freedoms). These exceptions are expressed in terms that require them to be applied restrictively, for "a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to

the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." *Explanatory Report* at ¶ 34. Indeed, setting out the point in plain language, the *Explanatory Report* states at paragraph 19: "the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal" or retention. *See Explanatory Report* at ¶¶ 19, 121; see also 1980 Hague Convention at ¶¶ 16, 19.

It is thus the courts of the child's habitual residence which should conduct the in-depth welfare examination appropriate to making the substantive decisions about the child's long term welfare, but that presumption (and the policy that underpins it) is, of course, subject to the limited exceptions within the 1980 Hague Convention itself.

B. Evaluation of the child's best interests: the 1980 Hague Convention approach

Necessarily, and integrally to the aim of the 1980 Hague Convention to achieve the speedy return of abducted children for properly constituted welfare-interest hearings in their countries of habitual residence, the approach taken to consideration of the subject child's best interests in the State to which that child has been abducted, and in the 1980 Hague Convention proceedings themselves, is modified.

Article 16 of the Hague Convention 1980 precludes the authorities of the requested State from deciding "on the merits of rights of custody until it has been

determined that the child is not to be returned under this Convention." A decision not to return a child (pursuant to the provisions of the 1980 Hague Convention) may then (and only then) lead to the assumption of a substantive welfare jurisdiction by the State to which the child has been abducted. However, the child's connection with his country of habitual residence is reinforced in European States subject to Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 by which at Articles 11(6) – 11(8) the jurisdiction of the courts of the child's habitual residence is retained in some circumstances even after the refusal of a summary return, for the purposes of undertaking a prompt welfare enquiry informed (but not determined) by the reasons for the refusal of a Hague return. Significantly for these purposes, however, that connection is *only* so reinforced where an Article 13 exception is established. Where the Article 12 "settlement" exception is made out and a decision is made not to return the child, the country that has refused the 1980 Hague Convention application may then properly proceed to undertake a substantive welfare enquiry.

Therefore the task of undertaking a full assessment of the child's interests is reserved for the courts of the child's habitual residence, leaving the courts of the State to which the child has been removed or retained to consider only whether the child should, or should not, be returned pursuant to the 1980 Hague Convention, upon an examination limited to the application of the relevant Articles of the 1980 Hague

Convention to the facts of each individual case. That may involve consideration of *aspects* of the child's welfare, but the enquiry into those aspects is necessarily limited by the exceptions that it may be said apply to the case. That having been established, it has long been recognised in English jurisprudence that the "settlement" exception, of all of the exceptions, may involve the broadest and most wide-ranging welfare enquiry, notwithstanding that any such enquiry is nonetheless undertaken within the context of the 1980 Hague Convention and pursuant to its abiding principles.

All of the aforementioned propositions, however, operate in the context of international family law as a whole, of which the 1980 Hague Convention is a significant part. With that in mind, it is significant to recount that the 1980 Hague Convention operates in conjunction with, among other instruments concerning children and families (for example, but not specifically relevant to this case, the European Convention on Human Rights), the 1989 United Nations Convention on the Rights of the Child. Pursuant to Article 3.1 of the 1989 United Nations Convention on the Rights of the Child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The interrelationship between the 1980 Hague Convention and the 1989 United Nations Convention on the Rights of the Child was considered by the UK Supreme Court in *In re E (Children) (Abduction*: *Custody Appeal)* (*supra*) in which it was held that:

> [T]he guarantees in Art 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Hague Convention; but that is not the same as a full-blown examination of the child's future. *See In re E* at ¶ 26.

C. The "autonomous" interpretation of the 1980 Hague Convention

That the 1980 Hague Convention operates on the basis of its own autonomous law and interpretation has been made clear both within the *Explanatory Report* and by subsequent authority arising from a number of signatory States. The *Explanatory Report* clearly explains the autonomous nature of the 1980 Hague Convention, particularly in relation to the key concepts of "rights of custody" and "habitual residence" which underpin its operation pursuant to Articles 3, 4 and 5. *Explanatory Report* at ¶¶ 38 and 39. In England and Wales there is now advanced jurisprudence in relation to both such concepts which seek to identify and define the autonomous interpretation of each. *See In re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619 (in relation to rights of custody); *see also DL v EL* [2013] EWCA Civ 865 (in relation to habitual residence).

Specifically in relation to the concept of "rights of custody", this Court has recently held that this important 1980 Hague Convention concept must be interpreted autonomously, and that in the search for its autonomous meaning the views of other signatory States are of relevance. *See Abbott*, 130 S. Ct. at 1993-95. Further, in reaching its conclusion in *Abbott v. Abbott* (*supra*) this Court held that The International Child Abduction Remedies Act (ICARA) directs that "uniform international interpretation" of the Convention is part of its framework. *Id*; *see also,* 52 U.S.C. §11601(b)(3)(B).

Reunite would respectfully suggest that the search for, and subsequent implementation of, autonomous 1980 Hague Convention concepts across signatory States should be an important priority for all jurisdictions. Such uniformity, if achieved, presents a number of significant advantages, including:

(a) increased comity between signatory States, as each is aware of the approach that another will take towards a particular decision making process;

(b) more robust and effective decision making in 1980 Hague Convention proceedings, as the meaning of key concepts will be clear and universally recognised therefore minimising arguments over shades of meaning that may delay resolution of the proceedings to the detriment of the child or children concerned;

(c) the effective pursuit of the aims of the 1980 Hague Convention, as if applied uniformly

> across the signatory States the said Convention will offer no safe havens, with an abduction to any State being capable of remedy on the basis of the uniform interpretation and application of the Convention itself.

Whilst it may previously have been more difficult to obtain information about how other signatory States interpret certain concepts within the 1980 Hague Convention, there are now a wide range of resources available that allow the courts of signatory States to obtain information about the operation of the 1980 Hague Convention in other jurisdictions. In particular decided cases are available in a variety of on-line databases, including free of charge by way of the Hague Conference resource, INCADAT, and the *Explanatory Report*, Guides to Good Practice and various statistical reviews (among other documents) are available from the HCCH website. *Reunite* would respectfully suggest that if the courts of the various signatory States were able to access the aforementioned materials and seek to derive the autonomous meaning of the various Convention concepts from those rather than from domestic rules, procedure and authority, it would be possible for a uniform, global jurisprudence to, in due course, be developed.

The uniform interpretation and application of the 1980 Hague Convention cannot be achieved if signatory States apply jurisdiction specific rules and interpretations, particularly where such interpretations are derived from concepts of rules unique to the jurisdiction in question. It may be said that equitable tolling is an example of such a jurisdiction specific rule, particularly in its application

to the Article 12 "settlement" exception, as there is no obvious authority for the imposition of such a principle upon a plain reading of the 1980 Hague Convention or of the *Explanatory Report* that supports it.

Just as the need for autonomous interpretation and uniform application is applicable to the 1980 Hague Convention, so it is to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Hague Convention"). *See* 35 I.L.M. 1391. Pursuant to Article 7 of the 1996 Hague Convention, the 1996 Hague Convention makes provision for the passage of jurisdiction between signatory States in the context of a wrongful removal or retention. One of the conditions precedent for the transfer of jurisdiction from one signatory State to another is that the child has become "settled in his or her new environment." In the event that it is determined to be appropriate to apply equitable tolling to the twelve month period applicable to the "settlement" exception within Article 12 of the 1980 Hague Convention, the question may be raised as to whether that principle would be similarly applied to Article 7 of the 1996 Hague Convention.

If it were to be similarly applicable to both conventions, there is a risk that additional complexity will be incorporated into the settlement enquiry in each context, with the result that both: (a) the jurisdictional enquiry held pursuant to the 1996 Hague Convention will be expanded and, perhaps, overcomplicated; and (b) a domestic rule or condition will be applied across two conventions, both of which are intended to be

applied uniformly and in accordance with their own autonomous interpretations and rules.

II. The English courts have considered and rejected the concept of equitable tolling in Article 12 "settlement" cases

A. The English Court of Appeal decision in *Cannon v Cannon*

In *Cannon v Cannon* [2005] 1 FLR 169 the English Court of Appeal considered the case of a child who had been removed by the mother from the USA to Ireland and then, having been returned from Ireland pursuant to the 1980 Hague Convention, from the USA to England. In England the mother and child lived under false names, as a result of which the mother was able to conceal the child's whereabouts for a period of years. The one year period specified in Article 12 therefore passed. At first instance the Judge found that the child was "settled" and, moreover, that there was no discretion to order the child's return. The Court of Appeal considered an appeal on the grounds that the Judge had not considered all of the necessary aspects of settlement (having considered only whether the child was physically settled) and that the Judge had been wrong to hold that where settlement was established there was no discretion to return the child. The court also entertained and determined an argument that a period of concealment should be disregarded in calculating whether the twelve month time limit had been exceeded. Within that determination, the court specifically considered the United States doctrine of equitable tolling, which was described as "a doctrine commonly but not universally adopted in the USA for

determination of issues arising under Art 12(2)." *See Cannon*, 1 FLR 169 at ¶ 8. The judgment of the Court of Appeal considered the United States jurisprudence further at paragraphs 28 and 29.

In determining the particular issue of the application of the United States concept of equitable tolling to settlement cases pursuant to Article 12, the English Court of Appeal held that:

> [50] There must be at least three categories of case in which the passage of more than 12 months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence, on the part of the left-behind parent. In that category of case the court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances, including the extent of the Plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.
>
> [51] In other cases concealment or subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Art 12(2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the 12

> month mark has been exceeded. That seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Hague Convention outcome.
>
> [52] In his skeleton argument for the hearing below Mr Nicholls offered this conclusion:
>
> > "Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return'
>
> [53] I would support that conclusion. A broad and purposive construction of what amounts to 'settled in its new environment' will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay…

Id. at ¶¶ 50-53.

Reunite respectfully submits that the factual approach endorsed by the Court of Appeal in *Cannon v Cannon* (supra) accurately reflects the language of Article 12, the approach to Article 12 endorsed by the Explanatory Report of Professor Perez-Vera and, most importantly, is consistent with the aims of the 1980 Hague Convention as described above. To adopt an inflexible rule by which a court is required to disregard what might be extensive periods of time of a child's life as a result of the actions (whether wrongdoing or

otherwise) of that child's parents is to ignore the reality of that child's life and the factual *substrata* that underpins the child's experience during that particular period of time. It is entirely foreseeable that notwithstanding a parent's actions in hiding a child (whether that concealment is conducted by simply failing to inform the parent seeking the child's return of that child's whereabouts, or by more cynical means such as the adoption of alternative or false names) the child themselves may, as a matter of fact, have settled physically, emotionally and psychologically so as to result in a factual finding of settlement for the purposes of Article 12. At the very least a factual examination seeking to determine whether or not settlement has occurred will be justified and proportionate.

Should the prospect of settlement be ultimately disregarded due to the actions of a parent (as may be the case were the concept of equitable tolling applied), the child faces the prospect of being removed from the environment in which they have become settled without a proper examination of the nature and quality of that settlement, and accordingly in a manner that may be against that child's interests contrary to the stated intentions of the 1980 Hague Convention.

As such the application of a principle of equitable tolling may serve to deflect the 1980 Hague Convention enquiry from the child, and that child's position in his or her "new environment," and to focus it instead on the actions of that child's parent, with the prospect that the child's interests will then be subservient to, or at least considered only after, an examination of the parent's actions. Again, *Reunite* would respectfully

suggest that it may be that such an approach is not necessarily in accordance with the stated aims of the 1980 Hague Convention, and as such its adoption may not be necessary in order to advance those aims.

The task that would face a court in assessing the nature and quality of any alleged settlement (on the basis that the abducting parent, to satisfy the Article 12 test, must demonstrate that the subject child is physically, emotionally and psychologically settled in their "new environment") is likely to encompass consideration of the impact on that child of his or her concealment by the abducting parent. If that concealment has had an unsettling effect, Article 12 will not be met and no defence will be established. It has been suggested within English authority that in cases where there has been demonstrable concealment the burden of establishing emotional and psychological settlement would be much increased. *See Cannon,* 1 FLR 169 at ¶ 61. The practical effect of this approach is that an attempt to rely on "settlement" may well be undermined by reason of the abducting parent's concealment, making the exception unavailable, without recourse to "tolling."

In other cases (of which the *Cannon v Cannon (supra)* is an example of a relatively rare set of factual circumstances, at least on a review of English authority) settlement may be established notwithstanding the pernicious acts of the abducting parent. In those circumstances as the possibility of an order for return is retained by the residual discretion of the court the left behind parent does not in fact suffer inequitable treatment. A remedy remains available.

Thus the combination of a multi-faceted enquiry into whether or not as a matter of fact a child is "settled" and the possibility of a discretionary return notwithstanding any such settlement provide sufficient protection for left behind parents whilst striking an appropriate balance between offering such protection, and the interests of the subject child. Such an approach therefore achieves the same end as the imposition of equitable tolling, without the possibility of the child's position being obscured by technical arguments.

B. Other notable decisions: The UK House of Lords decision in *In re M (Abduction: Rights of Custody)*.

In the case of *In re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288 the UK House of Lords considered the Article 12 "settlement" exception in the context of an application for return made pursuant to the 1980 Hague Convention by a left behind father over two years following the wrongful removal. By the time of the hearing the children were aged thirteen and ten years old. At first instance the Judge found that the children were settled, but decided, in exercising his residual discretion, to return the children to Zimbabwe. On appeal, the English Court of Appeal upheld the first instance decision.

On further appeal, the UK House of Lords considered the question of whether or not there was discretion to return children pursuant to the 1980 Hague Convention where the settlement exception was established. Upon the majority finding that there was indeed such a discretion, (Lord Rodger having given a dissenting judgment on that point), Baroness Hale gave

guidance on the exercise of discretion both generally and in the specific context of cases in which settlement was established.

Upon considering settlement alongside the Article 13 exceptions, Baroness Hale accepted the submission that Article 12 amounted to a "child-centric" defence that required examination from the child's perspective, to an extent irrespective of the moral blameworthiness of one or both parents. *See In re M (Abduction: Rights of Custody)*[2007] UKHL 55 at ¶ 52. Within such an enquiry, the court therefore had to consider the child's position, and particularly their integration within the new environment into which the wrongful act had placed them, regardless of the actions taken by the parent who had brought them to that new environment but accepting that a child may be unsettled (or not have become settled) as a result of those actions.

Against the background of those two factors, which demonstrate that, notwithstanding the fact of settlement (considered from an appropriately child-centric perspective), the court may in the exercise of its discretion order a return, Baroness Hale considered how such discretion may be exercised. The following points arising from the judgment are, perhaps, of particular importance:

(a) in all 1980 Hague Convention cases there will be matters arising from the 1980 Hague Convention itself that are of importance to the discretionary exercise, including comity between contracting States, mutual respect of judicial processes between contracting States and the

deterrence of child abduction worldwide. *Id.* at ¶ 42;

(b) there are, however, counterbalancing factors that will have greater or lesser importance depending upon the exception that is established and the particular circumstances of the case before the court. In that sense the court's discretion is at large and the court must consider "the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare" *Id.* at ¶ 43;

(c) in settlement cases, the major objective of the 1980 Hague Convention cannot be achieved as the case is no longer one of "hot pursuit" and accordingly the objective of securing a swift return to the country of habitual residence cannot be met. Notably, Baroness Hale held that: "It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute" *Id.* at ¶ 47;

(d) Baroness Hale concluded: "All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying

> international child abduction. Further elaboration with additional tests and checklists is not required." *Id.* at ¶ 48.

The judgment of Baroness Hale in *In re M (Abduction: Rights of Custody) (supra)* may be cited as justification for a less stringent approach in regard to the settlement exception than may be taken to those exceptions arising pursuant to Article 13, where (in respect to the latter cases) there is likely to be less of a passage of time between the removal and commencement of proceedings and a commensurately lower impact on the child of being returned to the country from which they were removed over twelve months prior thereto. Of course, it is recognised that not all cases can be determined on that basis, and that as such when determining an application for return (and particularly the exercise of discretion where, for example, the settlement exception has been established) the court will consider the factual *substrata* and the circumstances of the child and family in reaching a decision.

Reunite would suggest, however, that the approach identified within *In re M (Abduction: Rights of Custody)* (*supra*) does allow for the flexibility of decision making required to fully consider and properly determine such applications in the interests of the individual child subject to the proceedings, by allowing the court to fully consider that child's circumstances before making a decision as to whether to order return or not. There may be a risk inherent in the adoption of a relatively inflexible concept such as equitable tolling, as if imposed the enquiry into the particular circumstances

of the child may be circumvented or otherwise avoided through a focus on the parental act.

The debate before this Court could be said to have, at its core, the balance inherent in the 1980 Hague Convention between preventing (and where it is too late to prevent, remedying) international child abduction on the one hand, and ensuring in an individual case the protection and promotion of the best interests of children on the other. It may be that equitable tolling helps by having an overt deterrent effect, by ensuring that proceedings are determined expeditiously and by respecting the primacy of the jurisdiction of the country of habitual residence, which would be left to determine any welfare dispute as between the child's parents. There may, however, critically, be an adverse effect on the protection of children's best interests in individual cases, as the fuller enquiry that might otherwise be conducted into the child's position when considering the settlement exception would be avoided.

Following the approach identified within *In re M (Abduction: Rights of Custody) (supra)* may, in appropriate circumstances (but perhaps particularly where settlement has been raised as a defence) require a broader enquiry than might otherwise be the case, if only to establish whether or not the child is, in fact, settled.[5] Such an enquiry would then allow the court to exercise its discretion upon consideration of all of the

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[5] Further, see the decision of the UK Supreme Court in *In re E (Children) (Abduction*: *Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 at para [26].

relevant factors and to take a decision as to whether or not to order a return cognisant of those factors. In the relatively small number of "settlement" cases that arise it may not overly hinder the operation of the 1980 Hague Convention to permit a wider enquiry in that way.

III. The approach to Article 12 in other jurisdictions (and, in particular, in Australia)

The Australian courts had until 1998 adopted a two limbed test to the consideration of settlement, in that the abducting parent had to establish that the child had established *both* physical *and* emotional settlement in their new environment. *See Graziano v Daniels* (1991) FLC 92-212. In two cases in 1998 and 1999 that approach was disapproved.

Firstly, in *Director General, Department of Community Services v M. and C. and the Child Representative* (1998) FLR 92-829, (1998) 24 Fam LR 178 it was held that "settled" as it appeared in Regulation 16 of the Family Law (Child Abduction Convention) Regulations, which implemented the 1980 Hague Convention in Australian law, should be given its ordinary meaning. In that case the child, who had lived in the "new environment" for three years, had suffered emotional difficulties and required abuse counselling; however the court held that such problems did not necessarily impede settlement, as a person could be settled and still experience severe problems.

Secondly, in *Townsend and Director-General, Department of Families, Youth and Community* (1999) 24 Fam LR 495, it was held that to require that there was to be both a physical element, and an emotional constituent of settlement was to place an unnecessary gloss on the wording of the 1980 Hague Convention. As such the approach in *M. and C.* (supra) was approved, on the basis that a narrow approach to the question of "settlement" properly reflected the ordinary meaning of the term.

It is respectfully suggested that focussing a factual enquiry into whether or not a child is physically settled as a single factor, with no focus upon the child's emotional and psychological situation, would have the effect of overly narrowing the enquiry to just one of a number of elements consistent with settling into an environment. It may be that a child could demonstrate all of the hallmarks of physical settlement (for example attending school, church, playing with friends) whilst still being deeply unsettled emotionally and/or psychologically by the circumstances in which they find themselves. This may particularly be so if they are, by way of example, living under a false name or deprived of contact with the left behind parent with whom they had previously had a good relationship.

Reunite would be concerned about the prospect of settlement being established on an overly narrow set of criteria. To consider only physical settlement may be to ignore a number of aspects of a child's life that are of profound importance both to the question of settlement and generally, which may be of relevance to the establishment of the exception and the question of the exercise of discretion. Put simply, *Reunite* would

respectfully suggest that to apply too narrow a test to the settlement exception may serve to hinder the proper operation of the 1980 Hague Convention. The multi-faceted approach to settlement adopted by the English authorities may serve to guard against any such possibility, without the need for the application of additional rules or tests.

Reunite notes that on the authorities available within the Hague Conference INCADAT database it is apparent that equitable tolling (or any equivalent concept) has only been argued for successfully in cases before the courts of the United States. In contrast, of the jurisdictions from which authorities are available within the INCADAT database, attempts to introduce equitable tolling have failed in England (*Cannon v Cannon*), New Zealand (*H.J. v Secretary for Justice* [2006] NZFLR 1005 as upheld in *Secretary for Justice (New Zealand Central Authority) v H.J.* [2007] 2 NZLR 289), and Hong Kong (*A.C. v P.C.* [2004] HKMP 1238).

Whilst a degree of domestic individualism and diversity is inevitable among the very numerous States party to the 1980 Hague Convention, there are obvious strong advantages in terms of predictability and utility in ensuring that on major points of principle there is a public commonality of approach. Indeed, this Court in its determination of the appeal in *Abbott v Abbott* placed the United States firmly with the majority of the Hague community on the issue of "rights of custody". *See Abbott*, 130 S. Ct. 1983.

CONCLUSION

On *Reunite's* analysis, the adoption of a principle of equitable tolling of the twelve month period necessary in order to establish settlement in cases where there has been an active concealment of the child would be a departure from the practice adopted in the majority of other signatory States.

Whilst the 1980 Hague Convention is intended to be applied consistently across signatory States on the basis of an autonomous interpretation of its key concepts and provisions, *Reunite* does accept that some different States do apply the 1980 Hague Convention in different ways and upon different interpretations of certain concepts. Nonetheless, it is respectfully suggested that it is plainly advantageous to the success of the 1980 Hague Convention as a world-wide instrument that where possible there should be a world-wide consistency of interpretation. Equitable tolling if adopted by the United States would appear not to be consistent with the approach to "settlement" adopted by England, New Zealand and Hong Kong, in all of which States the concept has been argued for and rejected. The INCADAT database reveals no authority for the proposition of equitable tolling save for cases decided by the courts of the United States.

That having been said, *Reunite* recognises that there are arguments in favour of the establishment of equitable tolling. *Reunite* notes that those arguments are largely centred around the equitable treatment of the left behind parent as redress for and protection against a wrongful act (or series of wrongful acts) committed by the abductor.

These may be balanced – and outweighed, on the English authorities – if as a consequence of this approach to righting the adult wrong, the individual child's situation risks being overlooked or not given sufficient emphasis. The 1980 Hague Convention was designed (and operates effectively) to safeguard the interests not of the parents, but of the children at the heart of the dispute between those parents.

To fetter by establishing equitable tolling a recourse to an appropriate enquiry into the situation of a child who is the victim of concealment may be to establish a process in which that child's position is not at the forefront, which may, in turn, be contrary to the nature and spirit of the 1980 Hague Convention. If the approach in the English authorities set out above is followed, it may permit a safeguarding against attempts to deploy the settlement exception where there has been concealment, which is at the same time balanced by a safeguarding of child protection, without recourse to equitable tolling.

Respectfully submitted,

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