# IN THE

# Supreme Court of the United States

ELAINE MARY MURPHY,

Petitioner,

—v.—

WILLIAM MILLIGAN SLOAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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# **QUESTION PRESENTED**

"Determination of 'habitual residence' is 'perhaps the most important inquiry under the [Hague] Convention.' Asvesta v. Petroutsas, 580 F.3d 1000, 1017 (9th Cir. 2009)." Murphy v. Sloan, 764 F.3d 1144, 1150. The U.S. Supreme Court has never interpreted the term.

The question presented is: Should the majority of United States courts continue to interpret the term "habitual residence" in the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention") in a manner that directly conflicts with the global consensus outside the United States, the views of the Third, Sixth and Eighth Circuits, and the plain meaning of the term?

The courts in almost all other treaty member countries, including the United Kingdom, all of continental Europe, Australia, Canada, New Zealand, South Africa and Israel, and three U.S. Circuit Courts of Appeals, in varying degrees, interpret "habitual residence" consistently with the plain meaning of the term. In sharp contrast, most U.S. Circuit Courts of Appeals, including the Ninth Circuit in the case at bar, interpret "habitual residence" by considering primarily the intention of the parents. These courts have also created and applied highly technical rules such as that a new habitual residence cannot exist without clear proof that a previous habitual residence has been abandoned; that a child cannot have more than one habitual residence; and that a child's "acclimatization" to a new environment cannot trump the last shared parental intent except in

extreme situations. The seminal U.S. case, *Mozes* v. *Mozes*, 239 F.3d 1067 (9th Cir. 2001), developed from and relied primarily on the decision of the U.K. House of Lords in *Shah* v. *Barnet London Borough Council*, [1983] 1 All E.R. 226 (Eng. H.L.), but the *Shah* case has been expressly overruled by recent decisions of the U.K. Supreme Court. The majority United States interpretation is now unique, nonconforming, in violation of the Convention, and in violation of the "need for uniform international interpretation of the Convention" called for by Congress in the International Child Abduction Remedies Act. There is an urgent need for Supreme Court review.

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Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010)
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#### JURISDICTION

The judgment of the court of appeals was entered on August 25, 2014. (App. 17a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

# TREATY AND STATUTE PROVISIONS

The Hague Convention on the Civil Aspects of International Child Abduction (App. 41a) and the International Child Abduction Remedies Act (App. 61a) are reproduced in the Appendix.

#### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 764 F.3d 1144 and reproduced at Petition Appendix ("Pet. App.").

# STATEMENT OF THE CASE

#### I. BACKGROUND FACTS AND ISSUES

In 2000, Petitioner, Elaine Murphy, an Irish citizen born and raised in Ireland, married Respondent, William Sloan, a U.S. citizen. They lived together in California, where their daughter, E.S., was born on June 13, 2005. They always contemplated moving to Ireland, gave E.S. a uniquely Irish name with a uniquely Irish accent and christened her in Ireland.

In November 2009 Sloan told Murphy that their marriage was over. He encouraged her to move with E.S. to Ireland. In May 2010 they abandoned previous plans for E.S. to attend elementary

school in California and agreed that Murphy and E.S. would relocate to Kinsale, a small town in County Cork, Ireland where Murphy's family was based. Sloan asserts that E.S.'s and Murphy's relocation to Ireland was initially on a trial basis for one year. Together they registered her in school in Kinsale. Murphy and E.S. relocated to Kinsale in August 2010. In October 2010 Sloan brought suit in California for divorce and custody but did not pursue the case.

E.S. lived in Kinsale with Murphy for the next three years, with Sloan's complete agreement. She went to the same Irish school throughout. She spent many breaks from school with Sloan, either in Ireland, or in the United States. Her school reports establish that E.S. thrived in Ireland. She made close friends there, participated in many extracurricular activities and was fully settled there. Kinsale, Ireland was her home.

In February 2013 Sloan revived the California divorce case that he had filed in October 2010 but he did not seek E.S.'s return to California or otherwise seek to change the status quo. On February 16, 2013 Sloan and Murphy signed under oath and exchanged matching Income and Expense Declarations in that case. In his Declaration Sloan confirmed that he saw E.S. for 30% of the time but only during school vacations and that he was "agreeing to school vacations ... with me." Likewise and simultaneously, Murphy confirmed that she lived with E.S. in Kinsale, Ireland; that E.S. spent 70% of her time with Murphy in Ireland; that the remaining time with Sloan was only during school vacations; and that she was "agreeing to school vacations ... with father."

Sloan testified that the 70-30 Ireland-California arrangement "was our agreed parenting schedule."

Sloan submitted to Murphy, also on February 16, 2013, a separate proposed Marital Settlement Agreement which provided that E.S. would "reside in Ireland with Elaine during the school year and in California with Bill during summer and holidays."

In 2013 Sloan informed Murphy that he was considering buying a house in Kinsale near E.S.'s school and buying a membership in a golf club there so that he could play golf when visiting E.S.

In April 2013 Murphy visited the Maldives with E.S., where Murphy's boyfriend owned an interest in a resort, and they stayed there until May 7, 2013. During the visit, Sloan wanted E.S. to return forthwith to school in Ireland and was angry that Murphy had taken E.S. out of school and had not returned to Ireland. He sent many emails demanding that Murphy return E.S. to school in Ireland. Thus, on May 1, 2013 he stated, "Please let me know what you are doing to get [E.S.] back to school and when your flight is scheduled. I am really distressed by all of this—it is not fair to [E.S.] to keep her out of school without a plan to get her back in." On May 2, 2013 he said, "I have asked you repeatedly to let me know when you are planning to get back to Ireland for school.... If I don't hear from you, I may need to contact the school."

Sloan then helped Murphy find a new place to live in Ireland. He sent a second email to Murphy on May 2, 2013, entitled "Accommodations", with links to four properties in Kinsale, stating,

"These all say available now, furnished, and should be walking distance to school—first one is best/not so sure about last two." The emails confirmed that he had researched the properties and had based his analysis in part on their proximity to E.S.'s school in Ireland. Murphy returned to Kinsale with E.S. on May 7, 2013 and rented a house there, paid for by Sloan, for 4 months with a right of extension for a further 8 months. E.S. was registered for school in Ireland for the next year.

On June 5, 2013 Sloan told Murphy that he was taking E.S. to California "for her summer," as in all prior years. He arrived in Ireland on June 12, 2013 to visit E.S. for her birthday. On June 14, 2013 Murphy and Sloan went together to speak to E.S.'s teacher. Sloan indicated that E.S. was returning to school after the summer break, as he and Murphy had agreed. On June 16, 2013 Sloan took E.S. to California for the child's annual summer vacation. He took summer but not winter clothes for E.S.

On June 28, 2013 Sloan sent a lengthy and carefully-crafted email to Murphy, announcing that he had decided to end the so-called trial period for E.S. to be in Ireland, and would keep her in California. He blamed his decision primarily on Murphy having taken E.S. to the Maldives at the end of the school year. He made it abundantly clear that this was his unilateral decision, and that this had *not* been agreed to by Murphy:

Murphy promptly protested, retained counsel, submitted a demand in the state court divorce case for the return of E.S. to Ireland and then initiated the pending action under the Hague Convention.

#### II. DECISION OF THE DISTRICT COURT

To prevail on a Hague Convention claim, a petitioner must prove that: (1) the child was habitually resident in one State and was removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner's custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention. Hague Convention, Art. 3.

The only element of the case contested at trial was habitual residence. Sloan conceded that Murphy had a right of custody over E.S. under Irish law and was exercising such rights at the date of the allegedly wrongful retention. Sloan did not contend at the trial that Murphy had consented to the retention of E.S. in California after the summer vacation. If E.S. was habitually resident in Ireland at the time of her retention the Petitioner would have won the case. Instead the trial court found that she was habitually resident in California, after three years of living in Ireland.

The interpretation of "habitual residence" in the Ninth Circuit is governed by *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) and its progeny. The trial court relied on that case, and on the Eleventh Circuit decision in *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004), to conclude that because E.S. retained substantial connections with California while in Ireland, her original habitual residence in the United States was never abandoned either by parental intent or acclimatization to Ireland, where she lived and thrived for three years.

Under these authorities, the habitual residence of a child is governed by the last shared intent of the parents on that issue, and even if a child moves to a new country the habitual residence will not change unless the left-behind parent proves that there was a mutual and affirmative intention of both parents to abandon the original habitual residence. The only exception to that rule is in what the Second Circuit, in the seminal decision of Gitter v. Gitter, 396 F.3d 124, 131 (2d Cir. 2005), referred to as the "relatively rare circumstance" that a child's acclimatization to a new location is proven to "be so complete that serious harm to the child can be expected to result from compelling his return to the family's intended residence." As a result, courts "should be 'slow to infer' that the child's acclimatization trumps the parents' shared intent."

#### III. DECISION OF THE NINTH CIRCUIT

The Ninth Circuit began by asserting that, "Determination of 'habitual residence' is "perhaps the most important inquiry under the Convention." It stated that, "To determine a child's habitual residence, we 'look for the last shared, settled intent of the parents'" and that "the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration." A limited exception might apply if requiring return to the original forum would now be tantamount to taking the child out of the family and social life in which its life has developed.

The Court noted that, "Murphy urges us to adopt a habitual residence standard that would focus on the subjective experiences of the child, contending that *Mozes* is out of step with our sister circuits and international consensus." It then stated that, "We decline to accept Murphy's formulation. For one, nearly every circuit has adopted our view of the proper standard for habitual residence, which takes into account the shared, settled intent of the parents and then asks whether there has been sufficient acclimatization of the child to trump this intent. Id. at 1076-79; see, e.g., Darín v. Olivero-Huffman, 746 F.3d 1, 11 (1st Cir. 2014); Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005); Karkkainen v. Kovalchuk, 445 F.3d 280, 292 (3d Cir. 2006); Maxwell v. Maxwell, 588 F.3d 245, 253-54 (4th Cir. 2009); Larbie v. Larbie, 690 F.3d 295, 310-11 (5th Cir. 2012); Koch v. Koch, 450 F.3d 703, 717-18 (7th Cir. 2006); Ruiz v. Tenorio, 392 F.3d 1247, 1252-54 (11th Cir. 2004) (per curiam). But see Robert v. Tesson, 507 F.3d 981, 991 (6th Cir. 2007) (focusing "solely on the past experiences of the child, not the intentions of the parents")."

It then stated that, "We are not persuaded that there has been a worldwide sea change since *Mozes*—let alone a new worldwide consensus—that would warrant a suggestion to reconsider our decision. Nor, of course, are we free to ignore binding circuit precedent." Specifically, in a footnote the Court asserted that, "even the newest British cases emphasize that parental intent plays a role in determining a child's habitual residence, alongside other considerations. See, e.g., *In re KL* [2013] UKSC 75 at ¶ 23 (noting that "it is clear

that parental intent does play a part in establishing or changing the habitual residence of a child")." (In fact, as stated below, the statement that there has been "no worldwide sea change" in the interpretation of habitual residence is entirely erroneous. Moreover, English cases hold, in conformity with the rest of the world outside the United States, that intent is just one of the factors to be considered but is not controlling).

The Ninth Circuit then held that the issue of settled intention to abandon a prior habitual residence is a question of fact as to which it would give appropriate deference to the district court. It reviewed the facts and adopted the lower court conclusions that "the parties never had a 'shared settled intent' that E.S.'s habitual residence would be Ireland," and that "E.S. never abandoned her habitual residence in the United States," based on the retention of connections to California. It stated that "this case falls in the alternative category identified in *Mozes*: one in which the 'circumstances are such that, even though the exact length of the [child's] stay was left open to negotiation, the court is able to find no settled mutual intent from which abandonment can be inferred."

The Ninth Circuit ignored the critical evidence in the form of the parties' Income and Expense Declarations in the father's California divorce case—in which they had agreed that the child lived in Ireland and spent summers in California. The district court had ignored those sworn Declarations also. Instead, the Ninth Circuit merely referred to a draft settlement agreement in which those arrangements were to be confirmed for the future and stated, correctly that it was merely a settlement document.

With respect to whether the child was sufficiently acclimatized to Ireland as to make it improper to rely solely on the last shared parental intention, the Court ruled that not only must the evidence of such acclimation be exceptional and unequivocal but that when a child retains significant contacts with the prior place of residency there can *never* be acclimatization to a new residency sufficient to overcome the failure to show that the parents had agreed to abandon the prior habitual residency.

# REASONS FOR GRANTING THE WRIT

The Supreme Court has never interpreted the term "habitual residence", which is the key term of the Hague Convention. Once the date of the wrongful act has been set, a finding of the child's habitual residence is the first issue that must be decided in every case that is brought pursuant to the Convention. *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259 (3d Cir. 2007).

There is a gulf—that has widened dramatically in the past few years—between the majority U.S. interpretation of that term on the one hand versus, on the other hand, the diametrically opposed interpretation of the United Kingdom, continental Europe, most of the rest of the world and a minority of U.S. Circuits.

Moreover, the U.S. majority interpretation is clouded with uncertainty because, given the lack of any interpretation from "on top," many "variations on the theme" have spawned.

The results of the Supreme Court's failure to act include the following:

- (i) There is great uncertainty throughout the United States concerning the correct interpretation of the term habitual residence.
- (ii) Recent Circuit Courts of Appeals decisions on point have not resolved or ameliorated the continuing split among the Circuits and resulting confusion.
- (iii) The United States is isolated and entirely out of the international mainstream, in the unusual interpretation of the Convention's key term by a majority of its circuits.
- (iv) The United States is in breach of its treaty obligation under the Hague Convention to promote a consistent interpretation of the Convention and to afford "considerable weight" to the opinions of our sister signatories in interpreting any treaty. *Abbott v. Abbott*, 130 S.Ct. 1983, 1993 (2010).
- (v) The United States courts are contravening the instructions of Congress, which directed in the International Child Abduction Remedies Act ("ICARA") that there should be a "uniform international interpretation of the Convention." See ICARA, 42 U.S.C. § 11601(b)(3)(B); Abbott, supra at 1993 (2010) ("The principle [of affording considerable to sister signatory interpretations] applies with special force here, for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework. See § 11601(b)(3)(B))."

- (vi) There has been an explosion of litigation concerning the interpretation of habitual residence in Hague cases in the United States.
- (vii) There has been a surge in appeals to circuit courts on the issue of habitual residence.
- (viii) Hague cases have become far more expensive to litigate than would be the case if the meaning of the term habitual residence had been clarified.
- (ix) Hague Convention cases take far longer than would be the case if the term habitual residence were clear. By delaying the resolution of Hague Convention cases, the United States is in derogation of its treaty obligation—clearly recognized by this Court in Chafin v. Chafin, 133 S. Ct. 1017, 1027-1028 (2013)—to resolve such cases expeditiously. (See Hague Convention, Article 2: "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available"; Hague Convention, Article 11: "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State ... shall have the right to request a statement of the reasons for the delay.").
- (x) Likewise, as a result in significant part of the confusion and difficulties in applying the term "habitual residence," the judicial authori-

ties in the United States are often in derogation of the Congressional mandate that Hague Convention cases should be concluded promptly. The just-enacted Sean and David Goldman International Child Abduction Prevention and Return Act of 2014 requires the U.S. State Department to scrutinize more diligently the performance of other countries in returning abducted children expeditiously and to employ enhanced methods to cause non-complying countries to improve their performance, Congress also recognizes that "people in glass houses should not throw stones." Accordingly, the new law expressly states that it is, "the sense of Congress that the United States should set a strong example for other Convention countries in the timely location and prompt resolution of cases involving children abducted abroad and brought to the United States." Sec. 2(b) of ICAPRA.

(xi) The pending case exemplifies the problems that arise in this regard. The child was taken from Ireland to the United States for the summer, 2013. Her mother filed her petition on September 3, 2013. The only significant issue in the case is that of habitual residence. The mother diligently prosecuted the case and asked for expedited determination of the appeal, but the Ninth Circuit did not rule until August 2014 and the child is now missing a second year of school in Ireland. While the United States expects other countries to meet a target of only six weeks, including appeals, our conflicting and confused interpretations of habitual residence cause our own courts to miss the target by an embarrassingly excessive extent.

Habitual residence is not defined in the Convention but its meaning is critical in any Hague case. The Convention requires the authorities of a Contracting State to promptly return a child who "has been wrongfully removed or retained" away from the country where the child was "habitually resident." Hague Convention art. 12.

Article 3 provides that a removal is wrongful when it occurs "in breach of rights of custody attributed to a person ... either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention." [emphasis supplied].

Article 4 provides: "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights."

"The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests." Hague International Child Abduction Convention; Text and Legal Analysis (State Legal Analysis), 51 Fed. Reg. 10494, 10505 (1986)

The U.S. majority interpretation of habitual residence was established primarily by the Ninth Circuit in the *Mozes* case, which applied the thenprevailing (but since overturned) international approach. *Mozes* has spawned a morass of case law which has overlaid the plain meaning of "habitual residence" with a tangled web of rules, presumptions, conditions, maxims and guidelines

that makes any trial of a Hague habitual residence case uncertain, expensive and confusing.

The rest of the world follows a different approach.

In ICARA, Congress recognized "the need for uniform international interpretation of the Convention" but did not attempt to define the term. 42 U.S.C. § 11601(b)(3)(B). "The drafters intended that the Convention be interpreted uniformly across jurisdictions in order to avoid forum shopping." Valenzuela v. Michel, 736 F.3d 1173, 1176 (9th Cir. 2013).

This Court has well recognized that it is important that the Convention be interpreted uniformly around the world. In *Abbott v. Abbott*, 560 U.S. 1, 12, 130 S.Ct. 1983 (U.S., 2010) this Court based its decision that a *ne exeat* right is a "right of custody" under the Hague Convention in significant part because, "[A] review of the international case law confirms broad acceptance of the rule that ne exeat rights are rights of custody...." It stated (560 U.S. at 16) that,

"In interpreting any treaty, "[t]he 'opinions of our sister signatories' ... are 'entitled to considerable weight.' "El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) (quoting Air France v. Saks, 470 U.S. 392, 404, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985)). The principle applies with special force here, for Congress has directed that "uniform international interpretation of the Convention" is part of the Convention's framework. See § 11601(b)(3)(B)."

In *Abbott*, the international authorities were somewhat divided on the issue of *ne exeat* rights. Nonetheless, this Court was persuaded that, while the Supreme Court of Canada had reached an arguably contrary view, and French courts were divided, a review of the international law confirmed that courts and other legal authorities in England, Israel, Austria, South Africa, Germany, Australia, and Scotland had accepted the rule that *ne exeat* rights are rights of custody within the Convention's meaning, and that scholars agreed that there was an emerging international consensus on the matter.

Similarly, in *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014), this Court rejected the adoption by some U.S. circuits of the American doctrine of equitable tolling in Hague Conventions cases, since foreign courts had not adopted the doctrine and it is important that the treaty be interpreted uniformly.

A global consensus on the correct interpretation of the term is now firmly in place, with the notable exception of the U.S. majority view.

# The U.S. Approaches

Courts in the United States have developed three primary and divergent approaches to determine the habitual residence of a child in a Hague case. However, the approaches are not fixed and conclusive, except in those circuits in which they have been clearly and expressly set forth.

The first approach focuses primarily on parental intention, with a subsidiary look at acclimatization. Seven courts of appeals—the First, Second,

Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits—have adopted this approach, although there are variations between the circuits. Nicolson v. Pappalardo, 605 F.3d 100 (1st Cir. 2010); Gitter v. Gitter, 396 F.3d 124 (2d Cir. 2005); Hofmann v. Sender, 716 F.3d 282 (2d Cir. 2013); Guzzo v. Cristofano, 719 F.3d 100 (2d Cir. 2013); Maxwell v. Maxwell, 588 F.3d 245 (4th Cir. 2009); Larbie v. Larbie, 690 F.3d 295 (5th Cir. 2012); Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013); Koch v. Koch, 450 F.3d 703 (7th Cir. 2006); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001); Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004).

The parents' "last shared intent" regarding their child's habitual residence is presumed to be controlling, although the presumption can be rebutted in exceptional cases if the child has sufficiently acclimatized to its new surroundings as to render a return order unfair or seriously damaging.

Courts taking this approach will decide that a child has acquired a new habitual residence only if it is established that the parents had a shared and settled purpose to do so, unless there is strong proof of the child's acclimatization. The inquiry focuses on the parents' state of mind. This may be revealed by considering, for example, whether or not they intended their and the child's move to a new place to be permanent or merely temporary, how long they intended to stay in the new country and whether they had any plans to return to a previous residence. It is possible using this approach to find that a child remained habitually resident in a prior country of residence despite having resided for some years in a new country,

even attending school and assimilating into the new community. *See e.g. Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004).

These circuits apply a heavy presumption that a child's habitual residence should be determined by 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 (2d Cir. 2005).

This presumption may be overcome only if "the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent." Indeed the First Circuit in *Mauvais v. Herisse*, — F.3d —, 2014 WL 5659412 (1st Cir. Nov. 5, 2014), stated that the rule was that,

"Relatedly, evidence of acclimatization is generally insufficient 'to establish a child's habitual residence in a new country when contrary parental intent exists."

The second approach is the "child-centered approach." It is followed in the 6th Circuit. Here the courts look exclusively at the child's objective circumstances and past experiences. Relevant inquiries include whether or not the child is attending school, the child's participation in other cultural activities such as sports teams and religious organizations, and the child's overall level of acclimatization and integration into the community. The inquiry does not consider parental intent, which is deemed to be entirely irrelevant in determining the child's habitual residence. See e.g. Robert v. Tesson,

507 F.3d 981 (6th Cir. 2007); Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993); Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007).

The 6th Circuit insists that the *Mozes* rule is inconsistent with the Convention's goal of deterring parents from crossing borders in search of a more sympathetic court, because by considering the subjective intentions of the parents it empowered a future abductor to lay the foundation for an abduction by expressing reservations over an upcoming move. It has ruled that a child-centered approach to habitual residence was in accordance with the recommendation in the Perez-Vera Report, that children should be regarded as individuals and not merely as their parents' property. *Robert v. Tesson, supra.* 

The third approach—which is followed by the 3rd and 8th Circuits—requires a mixed inquiry into both the child's circumstances and the shared intentions of the child's parents. How much weight should be given to each factor is unclear. Sometimes evidence of shared parental intent to abandon an old habitual residence and acquire a new one will trump any evidence of acclimatization from the child's perspective. In other cases, sufficient evidence of acclimatization will defeat any evidence of shared intent. In jurisdictions following this approach, notably the 3rd Circuit, the inquiry may shift from case to case so that arguments based on both parental intentions and the child's circumstances should be presented.

The 3rd Circuit has held that a child's habitual residence is the place where the child has been physically present for an amount of time sufficient for acclimatization and which has a degree of set-

tled purpose from the child's perspective. The inquiry should focus on the child, but it also must consider the parents' present, shared intentions regarding their child's presence in a particular location. *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259 (3d Cir. 2007); *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006); *Whiting v. Krassner*, 391 F.3d 540 (3d Cir. 2004).

The 8th Circuit similarly looks to the child's objective circumstances to determine his habitual residence while also allowing consideration of parental intent as one factor. In that circuit, the factors relevant to the determination of habitual residence include "the settled purpose of the move to the new country from the child's perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country." Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003). Silverman has been followed in Sorenson v. Sorenson, 559 F.3d 871 (8th Cir. 2009) and Barzilay v. Barzilay, 600 F.3d 912 (8th Cir. 2010).

The significance of the issue is addressed by Ann Lacquer Estin, *The Hague Abduction Convention And The United States Supreme Court*, 48 Family Law Quarterly 235, 247 (2014).

"The ... definition of habitual residence under the Abduction Convention ... has been a subject of ongoing debate among the federal courts of appeal and in other Convention countries as well. It presents a treaty construction problem that often determines whether a left-behind parent can establish a prima facie case under the Convention. The split of authority in the

United States regarding habitual residence has developed over more than a decade. In contrast to the relatively clean legal questions presented for decision in the Court's previous Hague Abduction cases, the definition of habitual residence has been an unwieldy, highly fact-dependent problem that cannot readily be answered from the text and drafting history of the Convention."

# The International Consensus

A review of the international case law confirms that the approach adopted by the District Court is distinctly out of line with the clear international consensus that a child who has lived and gone to school in one country for an extended period with the consent of both parents is habitually resident in that country in the absence of extremely unusual circumstances.

# i. The European Union

The 28 sovereign countries of the European Union (EU) apply a common set of rules governing jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, including custody, access and child abduction. Habitual residence is the primary connecting factor used in these harmonized rules, and has twice been interpreted by the Court of Justice of the European Union (CJEU). This guidance is binds all EU Member States, including Ireland.

In *Proceedings brought by A* (Case C-523/07) [2010] Fam. 42,<sup>1</sup> the CJEU ruled that the term

Also available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0523:EN:HTML

"must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case." Advocate General Kokott referred to this approach as designating the child's "actual centre of interests." Id. at Para. 28.

The CJEU reaffirmed this factually oriented approach, in which parental intention is only one of the factors that may be relevant, in *Mercredi v Chaffe (Case C-497/10 PPU)* [2012] Fam 22.<sup>2</sup> The Court clarified that the age of a child is relevant to the way in which habitual residence is to be ascertained. It specified that as "a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of." *Id.* at Para. 54.

Applying these principles to the case at bar, after three years at school and at her mother's home in Ireland with the consent of both parents,

Also available at http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0497&lang1=en&type=NOT&ancre=

Ireland is clearly the place which "reflects some degree of integration by the child in a social and family environment" taking into account "the place and conditions of attendance at school" and other specified factors, including her Irish nationality and her linguistic ability in the Gaelic language. This necessitates the conclusion that all EU Member State courts would rule that E.S. was habitually resident in Ireland when she was kept in California after her summer vacation.

# ii. The United Kingdom

In *Mozes*, the Ninth Circuit cited English case law extensively on the interpretation of habitual residence, particularly including the test derived from *Shah v. Barnet London Borough Council*, [1983] 1 All E.R. 226, 233 (Eng.H.L.) and the judgment in *C v S (minor: abduction: illegitimate child)*, [1990] 2 All E.R. at 965. However, that entire line of English cases has now been overturned.

The Supreme Court of the United Kingdom has rendered three recent judgments concerning the determination of the habitual residence of children: A v A (Children: Habitual Residence) [2013] UKSC 60, [2013] 3 W.L.R. 761; In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 75, [2013] 3 W.L.R. 1597 and Re LC (Children) (International Abduction: Child's Objections to Return) [2014] UKSC 1, [2014] 2 W.L.R. 124. In each judgment the Court concluded that the test adopted by the CJEU is preferable to the parental intention test adopted earlier by the English courts in Shah and many subsequent

cases. The Court has expressly instructed U.K. courts to focus on the situation of the child, with the purposes and intentions of the parents being merely relevant factors. Consequently the U.K. Supreme Court has ruled that the English case law on the habitual residence of a child cited by the *Mozes* court should be abandoned. In so doing, in order to promote international uniformity, the U.K court jettisoned thirty years of well-established English law which contradicted the consensus that the non-Anglo-American world had adopted.

The key principles in Baroness Hale's judgment in  $A \ v \ A$  include the following (see paragraph 54 of the judgment):

- (i) Habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.
- (ii) It was the purpose of the Family Law Act 1986, which brought the Hague Convention into English law, to adopt a concept which was the same as that adopted in the Hague Convention and European Conventions.
- (iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.
- (iv) The test adopted by the European Court is preferable to that earlier adopted by the English courts. The European Court's test is

focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The prior long-standing English test derived should be abandoned when deciding the habitual residence of a child.

- (v) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.
- (vi) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts, presumptions or rules which would produce a different result from that which the factual inquiry would produce.

In Re LC (Children) (International Abduction: Child's Objections to Return), [2014] UKSC 1 at para. 31, Lord Wilson noted that the CJEU interpretation of the habitual residence of children actually reflected the intentions of the drafters of the Convention. Referring to the Pérez-Vera Explanatory Report on the Convention, (para. 11), he stated that it was "satisfactory that, 30 years after the Convention was adopted, in a case (Proceedings brought by A, cited above) unrelated to the [1980 Hague] Convention, the CJEU should have formulated a test for habitual residence, which now falls to be applied as fully to Convention proceedings as to other proceedings, in terms so intriguingly close to what its signatories had in mind."

#### iii. Ireland

The courts of Ireland will follow the interpretative guidance of the CJEU, but it should be noted that in this jurisdiction also there has been an unwillingness to follow the principle that an existing habitual residence must be abandoned before a new one can be acquired:  $S \ v \ S \ [2009] \ IESC \ 77, [2010] \ 1 \ IR \ 370.$ 

#### iv. Australia

The Australian courts would reach a similar conclusion as to the habitual residence of E.S. The Australian position is set forth in the landmark ruling of the High Court of Australia in LK v Director-General, Department of Community Services [2009] HCA 9. The case concerned Israeliborn children who moved to Australia with their Australian-born mother, with the father's consent, on condition that they would return to Israel if the father decided he wanted to live with the family. The mother and children settled into a family home in Australia, the children went to school there, the mother obtained government benefits and the older children took up sports and music lessons, but after just two months the father demanded the children's return. The High Court ruled that the children were not habitually resident in Australia. The High Court affirmed, at para. 28, that in determining habitual residence intention was not to be given controlling weight. It refused to embrace the principle of abandonment, at para. 33: "Absence of a final decision positively rejecting the possibility of returning to Israel in the foreseeable future is not necessarily inconsistent with ceasing to reside there habitually."

#### v. New Zealand

The New Zealand courts have given detailed consideration to United States case law on habitual residence. The New Zealand Court of Appeal has described its approach as taking "a middle course between *Mozes* and the child-centred approach in Feder v Evans-Feder." Punter v Secretary for Justice [2007] 1 NZLR 40 at para 104. All relevant facts are weighed, with the settled purpose of the parents as one significant factor, but not as important as it was seen to be by the Mozes Court. In addition, unlike in Mozes, the concentration is on parental purpose as to the quality and length of residence in the new state, rather than as to abandonment of the previous habitual residence: S.K. v. K.P. [2005] 3 NZLR 590, [INCADAT cite: HC/E/NZ 816].

# vi. Canada

The Canadian courts have expressly rejected primary reliance on the intention of the parents. Instead they hold that "the place of habitual residence of a child will be determined by focusing on the reality of the child, not that of the parents." *A.H. v. H.S.*, 2013 QCCA 1196.

In Droit de la famille 3713, Cour d'appel de Montréal, 8 septembre 2000, No 500-09-010031-003 [INCADAT cite: HC/E/CA 651], the Cour d'appel de Montréal held that the determination of the habitual residence of a child was a purely factual issue to be decided in the light of the circumstances of the case with regard to the reality of the child's life, rather than that of his parents. The actual period of residence must have endured for a continuous and not insignificant period of

time; the child must have a real and active link to the place, but there is no minimum period of residence which is specified.

In A.H. v. H.S., 2013 QCCA 1196, the Quebec Court of Appeal expressly disapproved of the Second Circuit cases of *Mota v. Castillo*, 629 F.3d 108 (2012) and Hofmann v. Sender, 716 F.3d 282 (2d Cir. 2013), which had focused on parental intention. In *Hofmann*, the parents had taken two children from Canada to the U.S. where they had lived for 18 months before the father sought their return to Canada. The Second Circuit affirmed a determination that the habitual residence never shifted to the U.S. because there was an inferred and unsatisfied condition that they were moving as a family unit only. Once the children were returned to Canada under the Hague Convention the Quebec courts—in A.H. v. H.S.—sent them back to the United States. The Quebec Court of Appeal said that, "had the initial matter in this case been decided according to the law applied in Quebec or, say, in Michigan, the children would very likely have stayed where they had been since August 2011."

The Ontario Court of Appeal in *Korutowska-Wooff v. Wooff*, [2004] O.J. No. 3256, ruled that, "Habitual residence is the place where the person resides for an appreciable period of time with a 'settled intention' and that "[a] 'settled intention' or 'purpose' is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc." That formulation has been upheld consistently thereafter. Thus, in *Juma v. Juma*, 2012 ONSC 4135, a 6-year old Canadian child who had lived in Canada

with her Canadian parents went with her parents to live in Florida for at least a year. After just six months the mother took the child back to Canada. The Ontario court held that the child was habitually resident in Florida because six months was "an appreciable period of time" and she was attending school in Florida.

#### vii. Israel

In *Gabbai v. Gabbai*, (CA 7260/93) the President of the Supreme Court of Israel, Judge Barak stated that, "Habitual residence is not a technical term. It is not domicile nor residence. It expresses a continuing reality of life. It reflects the place where the child usually lives before the abduction. The point of view is that of the child and place where he lives. The examination focuses on the day to day life of the child and not on plans for the future." See R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis*, p. 191 (2013).

#### Conclusion as to International Authorities

There is a clear international consensus outside the United States that in the determination of the habitual residence of a child parental intention should not be given controlling weight, and that an existing habitual residence does not have to be abandoned before a new one is acquired. There is also consensus that once a child has resided and gone to school for an appreciable period of time in a new country on an indefinite basis, the child is habitually resident in the new country.

#### **Application to the Present Case**

Applying these principles to the case at bar, after three years at school and at her mother's home in Ireland with the consent of both parents, Ireland is clearly the place which "reflects some degree of integration by the child in a social and family environment" taking into account "the place and conditions of attendance at school" and other specified factors, including her Irish nationality and her linguistic ability in the Gaelic language. This necessitates the conclusion that the rest of the world would rule that E.S. was habitually resident in Ireland when she was kept in California after her summer vacation.

#### CONCLUSION

Outside the United States, and in the Third, Sixth and Eighth Circuits, the courts would have little or no difficulty in ruling that E.S. was habitually resident in Ireland, They would not be restrained by the obligation to find that the petitioner had overcome the burden of proving that both she and the father intended to abandon the child's habitual residence in California. They would not be precluded from finding that a child cannot have more than one habitual residence. They would have looked to the plain meaning of the term and the meaning and purpose of the Hague Convention. One parent acting alone and without the agreement of another parent who has rights of custody should not be permitted to unilaterally take or keep a child away from a place where he or she has been living with some degree of settled purpose. The Ninth Circuit's dismissal

of the petitioner's case violates the Convention and unnecessarily weakens the Convention and the position of the United States that our treaty partners should enforce the Convention diligently and effectively.

Petitioner requests that this Court determine that she met her burden of proving that E.S. was wrongfully retained away from her habitual residence in Ireland without the consent of her mother, and that she should be immediately returned to Ireland.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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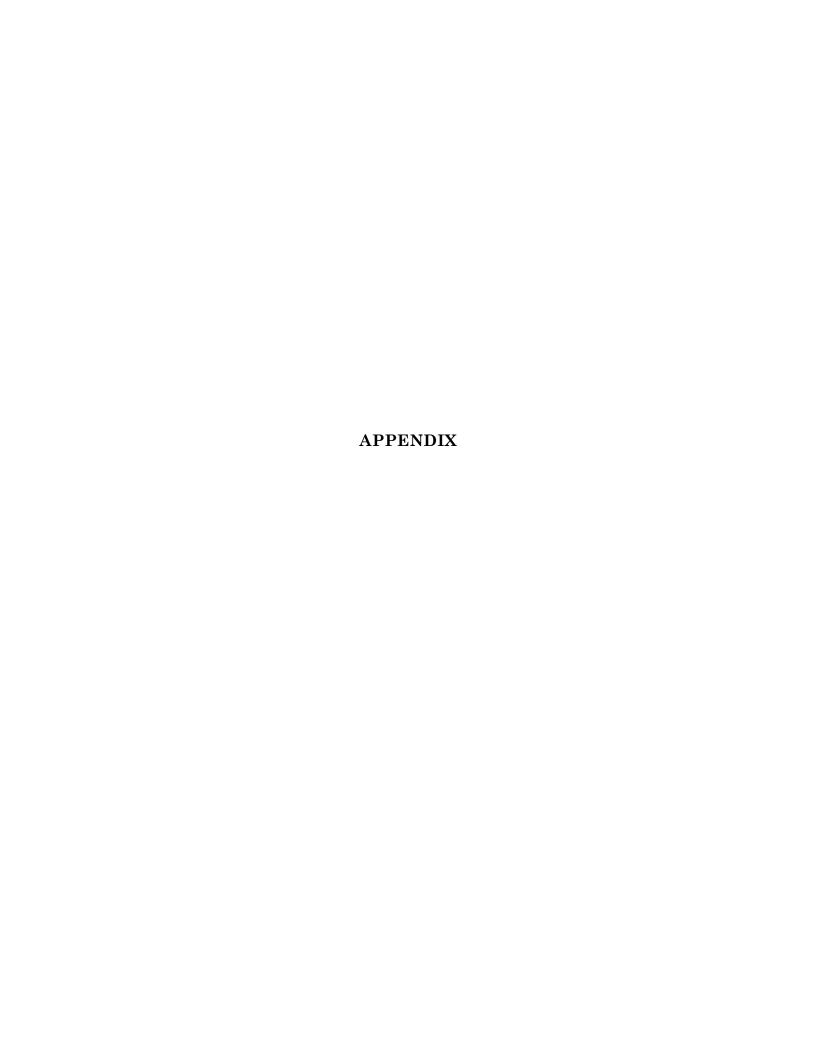
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Dated: November 21, 2014



#### FOR PUBLICATION

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

F I L E D Aug. 25, 2014

MOLLY C. DWYER, CLERK US. COURT OF APPEALS

No. 13-17339 D.C. No. 3:13-cv-04069-JST

ELAINE MARY MURPHY, Plaintiff-Appellant,

—v.—

WILLIAM MILLIGAN SLOAN,

 $Defendant \hbox{-} Appellee.$ 

**OPINION** 

Appeal from the United States District Court for the Northern District of California Jon S. Tigar, District Judge, Presiding

Argued and Submitted August 13, 2014 San Francisco, California

Before: KOZINSKI, Chief Judge, and MCKEOWN and CLIFTON, Circuit Judges.

Opinion by Judge McKEOWN, Circuit Judge:

In this case we consider the significance of a "trial period" of residence on a child's "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction.¹ Elaine Murphy seeks the return of her child, E.S., to Ireland. We affirm the judgment of the district court that E.S. was a habitual resident of the United States, where she presently resides with her father, William Sloan.

## $\bm{Background}^2$

Sloan, a citizen of the United States, and Murphy, a citizen of Ireland, were married in California in 2000. They lived together in Mill Valley, in California, and had a daughter, E.S., in 2005.

Oct. 25, 1980, 19 I.L.M. 1501, as implemented by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq. (hereinafter "the Hague Convention" or "the Convention").

<sup>&</sup>lt;sup>2</sup> This background summary is based on the district court's factual findings.

In October 2009, Sloan told Murphy that he felt their marriage was at an end, and moved to a different bedroom in their house.

In January 2010, Murphy and Sloan enrolled E.S. in a private California preschool for the next fall. But these plans changed in the spring of 2010, after Murphy proposed moving to Ireland so that she could get a master's degree in fine arts from University College Cork and so that E.S. "could experience going to school" there. Murphy and Sloan discussed the move to Ireland as a "trial period," and Sloan wrote to both the private preschool and the public school district to inform them of E.S.'s move and the temporary nature of the plan. ("This was very last minute, but we decided to try living in Ireland for a year[.]").

In early 2010, Sloan had purchased a second home in Mill Valley so that E.S. could live easily with both parents. Sloan and Murphy agreed to store Murphy's belongings there during Murphy's time in Ireland, and to rent, rather than sell, this home during her absence so that she would have a place to live when she returned. Murphy moved with E.S. to Ireland in August, and Sloan paid the rent on that home as well. Sloan filed for divorce in October 2010, and served Murphy shortly thereafter.

Over the next three years, E.S. attended school in Ireland, but returned to the United States each February, April, summer, Halloween and Thanksgiving to spend time with her father and his extended family. Sloan visited Ireland each December to spend Christmas with E.S. and Murphy. Throughout E.S.'s time in Ireland, she

continued to receive her medical and dental care in California rather than in Ireland.

In the spring of 2013, Murphy applied to graduate school in England. Over the previous two years, she had expressed interest in applying to schools in New Haven, New York, Providence and, as recently as October 2012, in California.

In April 2013, without Sloan's knowledge or consent, Murphy took E.S. out of school before the term had ended to visit her boyfriend in the Maldives. She did not respond to Sloan's inquiries for five days. On May 1, Sloan wrote to Murphy asking when E.S. would return to Ireland to resume school, and stated, "If you do not tell me when you are going to get back to Ireland, I am going to start looking into getting her into school here in California for the remainder of the year, and I will come pick her up if I have to." Sloan wrote to Murphy twice the following day, still attempting to find out when she planned to return to Ireland and sending her links to furnished rental units near E.S.'s school. Murphy's only response was to ask Sloan to review the draft of a paper she had written for graduate school. She did not return with E.S. to Ireland until May 7, 2013, by which time E.S. had missed nineteen days of school.

Sloan arrived in Ireland on June 12, 2013, planning to celebrate E.S.'s birthday on June 13,

<sup>&</sup>lt;sup>3</sup> Murphy has a boyfriend named Ahmed Abbas. The two became friends at some point in 2009, and their relationship later developed into a romantic one before Murphy moved to Ireland in 2010. Abbas, a businessman, lives in Sri Lanka and spends considerable time in the Maldives and provides Murphy with financial support.

depart on June 16, and return to Ireland on June 26 to bring E.S. back to California for the summer. On the day of Sloan's arrival, Murphy informed him that her landlord had terminated her lease, and that she was planning to leave again for Asia with E.S.

Sloan, concerned about E.S.'s absences from school, objected strenuously and begged Murphy to allow E.S. to finish her last two weeks of school in Ireland, offering to pay for a hotel. When Murphy refused to consider this option, and because Sloan's work commitments prevented him from remaining in Ireland until E.S.'s semester was complete two weeks later, Sloan took E.S. with him to the United States when he left Ireland on June 16. Murphy did not object, and told Sloan she was applying to graduate programs in England and the United States. The next day, Murphy flew to the Maldives, and spent much of the summer there and in Sri Lanka with her boyfriend.

Murphy and Sloan agree that on June 21, 2013, Sloan told Murphy that he did not intend to return E.S. to Ireland, to which Murphy responded that if E.S. was going to live in the United States, Murphy would move next to him in Mill Valley. Murphy took no action to compel E.S.'s return to Ireland for nearly three months, until September 2013, when she filed the action that led to the present appeal.

E.S. began third grade in Mill Valley in August 2013. In October 2013, the Marin County Superior Court entered a judgment dissolving the marriage, but left pending the state court action for pur-

poses of issuing further orders regarding child custody, child support and spousal support.

Murphy brought suit under the Hague Convention to compel E.S.'s return to Ireland, contending that Ireland was E.S.'s "habitual residence." The district court denied Murphy's petition after considering Murphy and Sloan's sworn declarations, testimony and documents presented at an evidentiary hearing and depositions of Murphy's boyfriend and an expert witness. It determined with a "high degree of conviction" that "Murphy and Sloan never had the shared, settled intent to shift E.S.'s habitual residence from the United States to Ireland," and found that the spring of 2010 was the last time that Sloan and Murphy had a shared, settled intent, which was that E.S. reside in California. The court concluded that "E.S. was, at the time of the alleged wrongful retention, and now remains, a habitual resident of the United States."

#### **DISCUSSION**

## I. The Hague Convention Framework for Habitual Residence

The Hague Convention, which was drafted in response to concerns about "unilateral removal or retention of children by parents, guardians or close family members," seeks to prevent forum shopping in custody battles. *Mozes v. Mozes*, 239 F.3d 1067, 1070–72 (9th Cir. 2001) (internal quotation marks omitted). Under Article 3 of the Convention,

The removal or the retention of a child is to be considered wrongful where—

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Convention, art. 3, 19 I.L.M. at 1501 (emphasis added). "[W]hen a child who was habitually residing in one signatory state is wrongfully removed to, or retained in, another, Article 12 provides that the latter state 'shall order the return of the child forthwith." *Mozes*, 239 F.3d at 1070 (quoting Convention, art. 12, 19 I.L.M. at 1502). The United States and Ireland are both signatories to the Convention.

Determination of "habitual residence" is "perhaps the most important inquiry under the Convention." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1017 (9th Cir. 2009). In giving practical application to this term, we are bound by the language of the Convention, along with our decision in *Mozes*, which sets forth the governing framework.

To determine a child's habitual residence, we "look for the last shared, settled intent of the parents." *Valenzuela v. Michel*, 736 F.3d 1173, 1177 (9th Cir. 2013). Where a child has a "well-estab-

lished habitual residence, simple consent to [her] presence in another forum is not usually enough to shift" the habitual residence to the new forum. *Mozes*, 239 F.3d at 1081. "Rather, the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration." *Id*.

The parents' intent is not the only factor to consider. As we explained in *Mozes*, the question is "whether we can say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child out of the family and social life in which its life has developed." *Id.* (internal quotation marks omitted).

Murphy urges us to adopt a habitual residence standard that would focus on the subjective experiences of the child, contending that *Mozes* is out of step with our sister circuits and international consensus. We decline to accept Murphy's formulation. For one, nearly every circuit has adopted our view of the proper standard for habitual residence, which takes into account the shared, settled intent of the parents and then asks whether there has been sufficient acclimatization of the child to trump this intent. Id. at 1076–79; see, e.g., Darín v. Olivero-Huffman, 746 F.3d 1, 11 (1st Cir. 2014); Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005); Karkkainen v. Kovalchuk, 445 F.3d 280, 292 (3d Cir. 2006); Maxwell v. Maxwell, 588 F.3d 245, 253-54 (4th Cir. 2009); Larbie v. Larbie, 690 F.3d 295, 310–11 (5th Cir. 2012); Koch v. Koch, 450 F.3d 703, 717–18 (7th Cir. 2006); Ruiz v. Tenorio, 392 F.3d 1247, 1252–54 (11th Cir. 2004) (per curiam). But see Robert v. Tesson, 507 F.3d 981, 991 (6th Cir. 2007) (focusing "solely on the past experiences of the child, not the intentions of the parents").

For another, we do not view *Mozes* as incompatible with international consensus. Murphy argues that in foreign courts, parental intent is "only one of the factors that may be relevant" to the habitual residence inquiry. She points to decisions of courts in Australia, Canada, the European Union, Ireland, New Zealand and the United Kingdom, contending that some of these countries place a greater emphasis on a child's surroundings or "actual centre of interests" in determining habitual residence than we do. Although the language of the Convention is universal, we recognize that courts around the world may have somewhat varied approaches to balancing the factors relevant to the determination of a child's habitual residence, including parental intent and the child's circumstances. But even counsel for Murphy acknowledges that courts in Britain, the European Union and New Zealand, among others, look to many factors in determining a child's habitual residence, including parental intent. In this regard, our decision in *Mozes*—by which we are bound—is not inconsistent with recent decisions of international courts.4 We are not persuaded that there

We note, for example, that although counsel for Murphy emphasizes a recent change in British law, post-dating *Mozes*, even the newest British cases emphasize that parental intent plays a role in determining a child's habitual

has been a worldwide sea change since *Mozes*—let alone a new worldwide consensus—that would warrant a suggestion to reconsider our decision. Nor, of course, are we free to ignore binding circuit precedent.

#### II. Shared, Settled Intent

Because the issue of "settled intention to abandon a prior habitual residence is a question of fact as to which we defer to the district court," *Mozes*, 239 F.3d at 1075–76, we begin with the court's findings.<sup>5</sup> In conducting our review, we give "appropriate deference to the district court's findings of fact and credibility determinations." *Papakosmas v. Papakosmas*, 483 F.3d 617, 623 (9th Cir. 2007).

It is undisputed that before she left for Ireland, E.S.'s habitual residence was the United States. In concluding that "the parties never had a 'shared settled intent' that E.S.'s habitual residence would be Ireland," and that "E.S. never abandoned her habitual residence in the United States," the district court made a number of fac-

residence, alongside other considerations. *See, e.g.*, *In re KL* [2013] UKSC 75 at ¶23 (noting that "it is clear that parental intent does play a part in establishing or changing the habitual residence of a child").

<sup>5</sup> Although the official report of the Convention describes habitual residence as a "question of pure fact," "this has not been understood to mean that [the determination] is left entirely within the unreviewed discretion of the trial court." *Mozes*, 239 F.3d at 1071, 1073. Instead, we review "essentially factual questions for clear error and the ultimate issue of habitual residence de novo." *Valenzuela*, 736 F.3d at 1176 (internal quotation marks omitted).

tual findings. These include the finding that the last "shared, settled intent regarding E.S.'s habitual residence" was in the spring of 2010 (United States); that "Murphy's move to Ireland with E.S. was intended as a 'trial period,' and that E.S. never abandoned her habitual residence in the United States"; that E.S. retains strong ties to community and family in California and elsewhere in the United States; that Murphy had no fixed residence in Ireland as of the date of the wrongful retention; that many of Murphy's and E.S.'s possessions remained in California; and that E.S. was continuing to spend part of the year in California with Sloan. The district court further noted that E.S. retained both U.S. and Irish citizenship; that Murphy has a California driver's license, but not an Irish one; and that Murphy had no permanent home or longer-term lease or means of support in Ireland, and no longer had any attachment to Ireland in terms of work or schooling after she completed her master's degree in October 2013.

To be sure, in cases in which parents "have shared a settled mutual intent that [a] stay [abroad] last indefinitely," "we can reasonably infer a mutual abandonment of the child's prior habitual residence." *Mozes*, 239 F.3d at 1077.6 But

Mozes notes that where a parent who "agrees to . . . an arrangement without any clear limitations" whereby a "child goes to live with a parent in that parent's native land," the parent "may well be held to have accepted th[e] eventuality" that the child "will soon begin to lose its habitual ties to any prior residence." 239 F.3d at 1082. The scenario in Mozes, however, describes a situation in which the parents agree to an arrangement "on an open-ended basis," or have a "settled intent in favor of indefinite residence." Id.

this is not such a case. Rather, this case falls in the alternative category identified in *Mozes*: one in which the "circumstances are such that, even though the exact length of the [child's] stay was left open to negotiation, the court is able to find no settled mutual intent from which abandonment can be inferred." *Id.*; see id. at 1077–78 (noting that "[c]learly, this is one of those questions of 'historical and narrative facts' in which the findings of the district court are entitled to great deference"). Indeed, there was never any discussion, let alone agreement, that the stay abroad would be indefinite. As the district court expressly found, the move to Ireland was "intended as a 'trial period," not as a permanent relocation.

The facts do not evince a shared, settled intent to abandon the United States as E.S.'s residence. Instead, they point to the opposite conclusion. Sloan never intended that the stay in Ireland be anything but a "trial period." Murphy, moreover, did not have a settled intent to remain in Ireland, either alone or with E.S., as in the last two years she had applied or had considered applying to graduate schools outside of Ireland, including in the United States, and had not enrolled E.S. in school in Ireland for the fall of 2013. When Sloan

As noted above, the present case falls into a different category: arrangements whose exact length are left open but where there is no settled intent. Notably, Sloan never "accepted th[e] eventuality" that E.S. would lose her ties to him or to his country. See id.

We cite the uncertainty of Murphy's plans—which included the possibility of returning to the United States—not to penalize her for weighing her options, but as evidence that there was no settled intent on her part, let alone an

took E.S. back to California and told Murphy that E.S. would be enrolling in school in Mill Valley, Murphy did not object, and instead stated "th[at] she was applying to graduate programs." Murphy told Sloan on June 21, 2013 that if E.S. was moving back to the United States, she would move next to him in Mill Valley.8

The district court's factual findings are not clearly erroneous, nor do we disagree with its conclusion that E.S. never abandoned her habitual residence in the United States.

#### III. Acclimatization

Shared parental intent is not always dispositive. Certain circumstances related to a child's residence and socialization in another country—a process called "acclimatization"—may change the calculus. To infer abandonment of a habitual residence by acclimatization, the "objective facts [must] point *unequivocally* to [the child's] ordinary

intent shared with Sloan, to change E.S.'s habitual residence.

Murphy argues that Sloan's proposed draft marital settlement proves that Sloan had conceded that E.S.'s habitual residence would be Ireland. To begin, the specifics of the settlement *proposals* can hardly be characterized as evidence of anything. The initial draft of the proposal, noting that E.S. would spend part of her time in Ireland, was replaced by a subsequent draft that omitted the country of Murphy's future residence. At best, the draft documents speak to possible future residence, not the last shared, settled intent of the parents. These documents simply show that the parties were continuing to use courts in California to arrange their affairs, including child custody.

or habitual residence being in [the new country]." *Mozes*, 239 F.3d at 1081 (emphasis added) (internal quotation marks omitted).

We have cautioned that "courts should be slow to infer from . . . contacts [with the new country] that an earlier habitual residence has been abandoned," *id.* at 1079, both because the inquiry is fraught with difficulty, 10 and because readily inferring abandonment would circumvent the purposes of the Convention.

Determinations regarding acclimatization are highly fact-bound, and there is no bright line as to the temporal limits for such adjustment. Nor should "acclimatization . . . be confused with acculturation." *Papakosmas*, 483 F.3d at 627. We

<sup>&</sup>lt;sup>9</sup> At oral argument, Murphy's counsel argued that imposing an "unequivocal" standard is at odds with the Convention. This position was not advanced in the district court or in the briefs on appeal, and is thus deemed waived. *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009).

See Mozes, 239 F.3d at 1079 (noting that the acclimatization inquiry is "so vague as to allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life [in the new country]," and that "[e]ven if deliberate manipulation [of a child or a child's residence by a parent] were not a danger, divining from a child's observed contacts in a new country whether it has come to reside there habitually would be an enterprise fraught with difficulty. Children can be remarkably adaptable and form intense attachments even in short periods of time—yet this does not necessarily mean that the child expects or intends those relationships to be long-lived. It is quite possible to participate in all the activities of daily life while still retaining awareness that one has another life to go back to.")

agree with the district court that the facts here do not point "unequivocally" to the conclusion that Ireland had become E.S.'s habitual residence. Although E.S. developed strong ties to Ireland through school, extracurricular activities, and contacts with Murphy's family, she also maintained broad and deep "family, cultural, and developmental ties to the United States," spent Halloween, Thanksgiving, Easter and summers in the United States while living in Ireland, "maintain[ed] a relationship with Sloan's extended family," "maintain[ed] a community in Mill Valley" and "receive[d] her dental and medical care in California" while living overseas. The district court characterized her ties to the United States as "robust."

In light of these substantial ties to the United States and our traditional caution about inferring abandonment, E.S.'s time in Ireland, though significant, did not "unequivocally" establish that she had abandoned the United States as her habitual residence. In short, we agree with the district court's finding that E.S.'s attachments to Ireland "did not shift the locus of [E.S.'s] development[,] and . . . any acclimatization did not overcome the absence of a shared settled intention by the parents to abandon the United States as a habitual residence."

Where, as here, a child retains strong ties to the parent in the former country, it "makes 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." *Mozes*, 239 F.3d at 1079–80 (footnotes omitted).

## COUNSEL

Thomas W. Wolfrum (argued), Walnut Creek, California; Jeremy D. Morley, New York, New York, for Plaintiff-Appellant.

William M. Sloan (argued), Mill Valley, California, In Pro Per.

## UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

FILED

Oct. 28, 2013

### RICHARD W. WIEKING CLERK, U.S. DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

Case No. 13-CV-04069 JST

ELAINE MARY MURPHY,

Petitioner,

\_\_v.\_\_

WILLIAM MILLIGAN SLOAN,

Respondent.

#### **JUDGMENT**

This action came on for hearing before the Court, the testimony and witnesses having been presented, the issues having been duly heard, and the Court having issued its Order Denying Petition For Return Pursuant To The Hague Convention On The Civil Aspects of International Child Abduction on October 16, 2013,

It is ORDERED and ADJUDGED that the Verified Petition and Complaint, along with all claims therein, filed by Petitioner Elaine Mary Murphy is denied, and that judgment is entered in favor of Respondent William Milligan Sloan.

Dated: Oct. 25, 2013

<u>/s/ Jon S. Tigar</u>
The Honorable Jon S. Tigar
United States District Judge

# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

Case No.13-CV-04069-JST

ELAINE MARY MURPHY,

Petitioner,

-v.-

WILLIAM MILLIGAN SLOAN,

Respondent.

### ORDER DENYING PETITION FOR RETURN PURSUANT TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Re: ECF No. 1

Before the Court is the petition filed by Elaine Murphy ("Murphy") for the return of her daughter E.S. to Ireland pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 ("Convention"), as implemented by the International Child Abduction Remedies Act ("ICARA"), codified at 42 U.S.C. § 11601, et seq. ECF No. 1.

The Court has considered each of the declarations submitted by Murphy and Respondent

William Sloan ("Sloan"), including the sworn declarations they submitted in support of and opposition to Murphy's request for a preliminary injunction; the Verified Petition; and the Response to the Petition. The Court also received testimony and documentary evidence at an evidentiary hearing held October 7, 2013; the direct testimony of the parties was introduced via additional sworn declarations, and the parties were cross-examined. The Court also admitted and considered the depositions of percipient witness Ahmed Abbas and expert witness Jeremy Morley. The Court also considered the parties' trial briefs.

Having considered the evidence carefully, the Court now finds that E.S. was, at the time of the alleged wrongful retention, and now remains, a habitual resident of the United States, and denies the petition.

#### I. FACTS

At all times relevant to this proceeding, Sloan has resided in Mill Valley, Marin County, California. Sloan and Murphy were married in the year 2000 in California, where they were then living. Murphy is a citizen of Ireland; Sloan is a citizen of the United States.

E.S. was born in 2005, during the marriage, also in California. She attended preschool in Marin County.

In approximately October of 2009, Sloan advised Murphy that he felt their marriage was at an end, and he moved to a different bedroom in their house.

Initially, the parties continued to plan for E.S. to continue residing in Mill Valley. In January 2010, they enrolled E.S. to begin kindergarten in a private school called Greenwood School. Their decision to enroll her there was a joint one. In February 2010, Sloan purchased a smaller house, also in Mill Valley but closer to downtown Mill Valley and the Greenwood School, so that E.S. could live in one home with him and the other home with Murphy. He made this purchase with Sloan's knowledge and consent.

In March 2010, Murphy proposed moving with E.S. to Ireland so E.S. "could experience going to school in Ireland," and so Murphy could obtain a master's degree in fine arts from University College Cork. Murphy and Sloan discussed the move to Ireland as a "trial period." Consistent with this characterization, Sloan sent an e-mail to the Greenwood School, letting them know that E.S. would be moving to Ireland, but that she would return to the United States (and Greenwood) if the "Irish rain becomes unbearable." Sloan also sent an e-mail on September 2, 2010 to the student registration office at the Mill Valley School District, the public school district which E.S. was entitled to attend, in which he stated, "This was very last minute, but we decided to try living in Ireland for a year (Elaine is from there), so [E.S.] has started Kindergarten there." The couple agreed to rent out the second Mill Valley home so Murphy would have accommodations when she returned to California, and so she

<sup>&</sup>lt;sup>1</sup> Murphy now claims that she always intended to live in Ireland permanently with E.S.; if so, she did not share that intention with Sloan.

could store her belongings in the second home, which she did. The items she stored included clothing, bedding, linens, pillows, curtains, pots, pans, cookware, cups, plates, art supplies, books, and artwork.

In August 2010, Murphy moved to Kinsale, Ireland with E.S. The parents enrolled E.S. in Summercove School there. Beginning in October 2010, Murphy and E.S. lived in a rental home in Kinsale, Ireland called "Rathgale." Sloan paid the rent.

Sloan filed for divorce in Marin County Superior Court on October 25, 2010, and served Murphy shortly thereafter.

Murphy has a boyfriend named Ahmed Abbas. Abbas and Murphy became friends sometime in 2009, and the relationship developed into a romantic one at some point between 2009 and when Petitioner moved to Ireland in 2010. Abbas lives in Sri Lanka and spends a significant amount of time in the Maldives, where he is a part owner of the Full Moon Sheraton luxury resort. Abbas is generous to Murphy, and gives her money whenever she asks for it. Although he characterizes these transfers as loans, Abbas does not keep track of how much money he gives her or inquire as to its use. Particularly in light of Abbas' testimony that he offered to purchase a house and put the title in Murphy's name, infra, the Court finds that Abbas' testimony that the money he gives Murphy is intended as a loan is not credible; that the money is intended as a gift; and that Murphy depends for support either on Sloan, who lives in the United States, or on Abbas, who lives in Sri Lanka and the Maldives.

E.S. attended school in Ireland for the 2010, 2011, and 2012 scholastic years. In addition to her regular academic school, she also attended a dance academy. E.S. speaks Gaelic as well as English. In each of those years (up to and including Spring 2013), E.S. returned to the United States for vacations in February, April, summer, Halloween, and Thanksgiving.<sup>2</sup> The majority of those visits were spent in Mill Valley, but some of them were spent on the East Coast with Sloan's extended family. At Christmas, E.S. would remain in Ireland, and Sloan visited her and Murphy there.

In March 2013, Murphy applied to graduate school at Oxford University, which is located in Oxford, England. Murphy also considered applying to graduate programs in California "as recently as October 2012," when she visited the San Francisco Art Institute and California College of the Arts with Sloan. In the last two years, Murphy has expressed interest in applying to fine art degree programs at Yale University, NYU, UCLA, and Rhode Island School of Design, three of which are located on the East Coast of the United States, and one of which is located in Southern California.

In April 2013, Rathgale became uninhabitable. That fact is undisputed; Murphy further contends that she was unable to find any other lodgings for herself and E.S. in Kinsale, and so she left the country, as described more fully below. The Court finds that there were other accommodations available in and around Kinsale. Nonetheless, on April 18, 2013, Petitioner left for the Maldives with

<sup>&</sup>lt;sup>2</sup> In one year, E.S. spent the spring vacation skiing with her father in Switzerland.

E.S., where Abbas was located, without previously informing Sloan or obtaining his consent. Sloan attempted to contact Murphy in a number of ways, including through her family in Ireland. Murphy did not respond until April 23, 2013, to tell Respondent that E.S. was "totally fine."

On May 1, 2013, after Murphy had taken E.S. to the Maldives for thirteen days without Sloan's knowledge or consent, Sloan wrote Murphy an email asking when E.S. would return to Ireland to resume school. He stated: "If you do not tell me when you are going to get back to Ireland, I am going to start looking into getting her into school here in California for the remainder of the year, and I will come pick her up if I have to."

On May 2, 2013, Sloan wrote to Murphy twice, still attempting to find out when she planned to return to Ireland. In his second e-mail, he sent Murphy some links to a number of rental units in Ireland that were available furnished and within walking distance to E.S.'s school. Murphy's only response was to ask Sloan to review the draft of a paper she had written for her graduate school.

Murphy testified that while Sloan was sending e-mail messages expressing anxiety and concern over E.S.'s absence from school and Murphy's lack of a plan for returning to Ireland, he was simultaneously having phone conversations with Murphy

<sup>&</sup>lt;sup>3</sup> The parties introduced a great deal of evidence regarding this trip. Because most of it was not necessary to the Court's decision, it is not summarized here. The Court emphasizes that the purpose of this proceeding is not to determine custody, but only E.S.'s habitual residence and whether there has been a wrongful retention.

in which he told her—contrary to the e-mail communications—that "everything was fine." This testimony was not credible.

During this time, E.S. was missing school in Ireland. Petitioner did not return until May 7, 2013.

When Murphy returned to Ireland, she rented a home called The Boathouse on a week-to-week basis. She stayed there with E.S. during portions of May and June, 2013. Murphy knew when she rented the house that her tenancy was subject to cancellation at the end of any given week.

On June 12, 2013, Sloan arrived in Ireland. His plan was to celebrate E.S.'s birthday on June 13, depart Ireland on June 16, then return to Ireland on June 26 to take E.S. back to California with him for the summer. On June 12—the day Sloan arrived — Murphy received a telephone call from her landlord stating that Murphy could no longer stay at The Boathouse and would have to leave. Having nowhere else to stay in Kinsale, Murphy told Sloan that she would again leave for Asia with E.S. Sloan objected strenuously to E.S. not being able to finish the school year in Ireland, and pleaded with Murphy to stay in Kinsale at least until E.S. could finish the school year—either to stay with her relatives, of whom she has more than one, or in a hotel, which Sloan would pay for. Sloan also suggested that, if Murphy was unwilling to stay in Kinsale herself, that she at least permit E.S. to stay in Kinsale with relatives to finish school. Murphy refused to consider any of these alternatives. Because of Murphy's prior trip to the Maldives, and the fact that E.S. had already

been absent from her school a total of nineteen days, Sloan was concerned that this additional, unplanned absence at the end of the school year would be harmful to E.S.

Because Murphy refused to keep E.S. in school, and because his prior work commitments prevented him from remaining in Ireland until E.S.'s semester was scheduled to end approximately two weeks later, Sloan took E.S. with him to the United States when he left on June 16. Sloan told Murphy that he had purchased a one-way ticket for E.S. and that she would thereafter be attending school in Mill Valley.<sup>4</sup> Murphy did not object. She responded by indicating the she was applying to graduate programs at Oxford University and in the United States. The next day, she left Ireland to visit Abbas in the Maldives, and she spent much of the summer either there or in Sri Lanka.

While the parties dispute what conversations took place in Ireland in June 2013, they agree that on June 21, 2013, Sloan told Murphy that he did not intend to return E.S. to Ireland. Murphy told Sloan that, if E.S. was going to live in the United States, she would move next to him in Mill Valley, and that he should buy a house next door to his own.

Murphy's actions in June 2013 demonstrate a lack of attachment to Ireland and a lack of settled intent to remain in Kinsale or in Ireland.

<sup>&</sup>lt;sup>4</sup> In her testimony, Murphy acknowledged that she agreed to allow Sloan to take E.S. back to the United States. She denies that he told her he would enroll her in school in Mill Valley. As set forth above, the Court credits Sloan's version of events.

Murphy took no action to compel E.S.'s return to Ireland until September 3, 2013, when she filed this action. Even though there was already a pending Marin County Superior Court dissolution action, she neither sought an emergency custody order from that court nor filed a Hague Convention action in this one. In point of fact, at the moment of the June 12 and June 21 conversations, neither Murphy nor E.S. had a home in Ireland. Murphy and E.S. did not have a fixed address there, and E.S. was not enrolled in school for the following year. Murphy did not reacquire a fixed address in Ireland until September 9, 2013, after she had already initiated these proceedings and more than two weeks after the beginning of the school year at E.S.'s former school in Ireland. Murphy had no plan to pursue a particular occupational or academic endeavor after completing her master's degree. On October 4, 2013, she received her Master's Degree. She no longer has any attachment to Ireland in terms of work or schooling. She has not been gainfully employed in Ireland at any time relevant to this proceeding. She had no means of support within Ireland.

On August 29, 2013, E.S. began third grade at Strawberry Point School in Mill Valley. E.S.'s primary care physician and dentist are located in the Bay Area. E.S. has never gone to the doctor for check-ups, or gone to the dentist, in Ireland.

On September 3, 2013, Murphy filed this action.

On October 4, 2013, the Marin County Superior Court entered a judgment of dissolution, and the parties are no longer married. The state court dissolution action is still pending, however, for the purposes of making further orders regarding child custody, child support, and spousal support.

The reason that Murphy has not purchased a more permanent home in Ireland, or entered into a longer-term lease, is not a lack of resources. Abbas has offered to purchase her a house with his funds, but putting her name on the title. Murphy testified that she "hasn't really discussed with" Abbas his purchasing a house for her. The Court believes Abbas' testimony, does not believe Murphy's testimony that she "hadn't really discussed" the subject with Abbas (her testimony at

- Q. Is there some reason that you have not bought Elaine a house in Ireland, since she wants to live there permanently and she's had all of these terrible struggles maintaining a house there?
- A. We have not come across the right house, I should say, you know. Because you have to come across the right property to buy, you know, but we always have the idea of buying a place.
- Q. Has she asked you to buy her a house in Ireland?
- A. Not that she asked. I suggested that I should buy her a house, you know.
- Q. And she would be the owner of it?
- A. Definitely.
- Q. So you would buy it, but she would be the owner and she would live there. Is that right?
- A. Yes.
- Q. Do you have -
- A. It will not be on my name.
- Q. I'm sorry?
- A. It will not be on my name; it will be on her name.
- Q. Okay. And who would make the mortgage payments?
- A. I would make the mortgage payments.

<sup>&</sup>lt;sup>5</sup> Abbas' testimony at deposition was as follows:

trial) or that she could not recall whether she had discussed it (her testimony at deposition), and believes that Murphy knew when she testified that her answers were not factually accurate. The Court has taken that fact into account in assessing Murphy's credibility.

At the time of the allegedly wrongful retention, Murphy had not enrolled E.S. in school for the following year, and Murphy was not allowing E.S. to complete school in Ireland for the 2012-13 school year.

Murphy has a California driver's license, but not an Irish one.

Both Abbas and Murphy testified that they do not communicate by e-mail and that they communicate only by telephone. Murphy was ordered by stipulation to produce a variety of e-mails between her and Abbas, but she did not look for any such e-mails on the ground that none could exist. However, an e-mail from Abbas to Murphy was produced in the case (by Sloan) and attached as an exhibit to Abbas' deposition. From the content of the e-mail, it appears to be a response to an e-mail Murphy sent to Abbas. While it is possible that this e-mail exchange is the only relevant e-mail exchange between Murphy and Abbas, the Court finds that it is more likely that there were other relevant e-mail messages and that Murphy intentionally failed to search for them as she was obligated to do. The Court considered this failure in evaluating Murphy's credibility.

Sloan never acquired the settled intent that E.S. reside permanently in Ireland. Murphy never

acquired the settled intent to reside in Ireland, either with or without E.S.

The Spring of 2010 was the last time that Sloan and Murphy had a shared, settled intent regarding E.S.'s habitual residence. That intent was that she reside in California, in the United States.

#### II. JURISDICTION

This Court has jurisdiction over actions brought under the Hague Convention through ICARA. See 42 U.S.C. § 11601 et. seq.

#### III. CONCLUSIONS OF LAW

The Hague Convention on the Civil Aspects of International Child Abduction "was adopted in 1980 in response to the problem of international child abductions during domestic disputes [and] . . . seeks to secure the prompt return of children wrongfully removed to or retained in any Contracting State[.]" Abbott v. Abbott, 560 U.S. 1, 130 S.Ct. 1983, 1989 (2010) (internal quotation marks omitted). "The Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must order the return of the child forthwith, unless certain exceptions apply." Id. (citation and internal quotation marks omitted).

"[T]he Hague Convention analysis is *not* a determination of custody rights." *Shalit v. Coppe*, 182 F.3d 1124, 1128 (9th Cir. 1999). "The Convention . . . empower[s] courts in the United States to determine only rights under the Convention and

not the merits of any underlying child custody claims." 42 U.S.C. § 11601(b)(4). See also *Cuellar v. Joyce*, 596 F.3d 505, 508 (9th Cir. 2010) ("A court that receives a petition under the Hague Convention may not resolve the question of who, as between the parents, is best suited to have custody of the child. With a few narrow exceptions, the court must return the abducted child to [his or her] country of habitual residence so that the courts of *that* country can determine custody.").

A petitioner seeking return of a child under the Convention must prove by a preponderance of the evidence that the child "was wrongfully removed or retained" within the meaning of the Convention. 42 U.S.C. § 11603(e)(1)(A). A "wrongful removal or retention" involves a breach of the non-removing parent's "rights of custody," which includes the right to care for the child and determine his or her place of residence. The right at issue must (1) arise under "the law of the state in which the child was habitually resident immediately before the removal and retention"; (2) have been "actually exercised" at the time of the removal or retention; and (3) relate to a child under the age of sixteen. If the foregoing elements are proven, the court must "order the return of the child forthwith." Abbott, 130 S.Ct. at 1991.

In determining whether a wrongful removal or retention has occurred, courts in the Ninth Circuit must answer four questions: "(1) When did the removal or retention at issue take place? (2) Immediately prior to the removal or retention, in which state was the child habitually resident? (3) Did the removal or retention breach the rights of

custody attributed to the petitioner under the law of the habitual residence? And (4) Was the petitioner exercising those rights at the time of the removal or retention?" *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001).

The most important inquiry under the Convention is the state of the child's habitual residence. Asvesta v. Petroutsas, 580 F.3d 1000, 1017 (9th Cir. 2009). Determination of "habitual residence" is described by the Hague Conference as a question of "pure fact." Mozes, 239 F.3d at 1071. The Hague Conference left the term undefined by design, in order to "leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems." Id. (quoting J.H.C. Morris, Dicey and Morris on the Conflict of Laws 144 (10th ed. 1980)).

Although the term "habitual residence" is intentionally left undefined in the Convention, we have developed an analytical framework to provide "intelligibility and consistency" in the determination of a child's habitual residence. Thus, in determining whether a child has acquired a new habitual residence, we first ask whether there is a settled intention to abandon a prior habitual residence. In this inquiry, the intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence. Here, as in most cases, those persons are the parents.

Papakosmas v. Papakosmas, 483 F.3d 617, 622 (9th Cir. 2007) (citations and quotations omitted).

Thus, in determining the child's habitual residence, the Court first seeks to determine the joint settled intention of the parents. Mozes at 1075 ("[T]he first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind.").

"Thus, in determining whether a child has acquired a new habitual residence, we first ask whether there is a settled intention to abandon a prior habitual residence." Papakosmas, 483 F.3d at 622 (citing Mozes, 239 F.3d at 1075). "[T]he agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence." Mozes, 239 F.3d at 1081. The cases "demonstrate the importance of a shared parental intent in deciding the issue of habitual residence of a child lacking the capacity to form his or her own intentions concerning residency." Whiting v. Krassner, 391 F.3d 540, 548 (3d Cir. 2004).

#### A. Shared Settled Intent

Consistent with the foregoing, the Court has examined the facts for evidence of shared settled intent on the part of E.S.'s parents regarding her residence. "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." *Maxwell v. Maxwell*, 588 F.3d 245, 252 (4th Cir. 2009) (citing cases) (footnotes omitted).

Applying these factors, the Court finds that the parties never had a "shared settled intent" that E.S.'s habitual residence would be Ireland. Rather, the Court finds that Murphy's move to Ireland with E.S. was intended as a "trial period," and that E.S. never abandoned her habitual residence in the United States. E.S. has retained many close ties to the United States, both to her community in Mill Valley, California and to Sloan's extended family in the United States. E.S. has Irish citizenship, but she has never renounced her United States citizenship. Even though Murphy had the means to purchase a home in Ireland, or even to establish a long-term leasehold, she had no fixed residence in Ireland as of the date of the wrongful retention. She does, on the other hand, have a home waiting for her in the United States that was purchased with her knowledge and consent. She does not have a marital relationship to anyone in Ireland; while she has a long-term boyfriend, he lives in Sri Lanka and the Maldives (where she spends a significant amount of time, both with and without E.S.). While Murphy denigrates the value or importance of the possessions she has stored in California, the fact remains that she has many possessions stored there. More importantly, so does E.S., whose possessions are not in storage, but inside the house where she lives part of the year with Sloan. These facts in the aggregate compel the Court to conclude with a high degree of conviction that Murphy and Sloan never had the shared, settled intent to shift E.S.'s habitual residence from the United States to Ireland.

The fact that E.S. had lived for much of each of two-and-a-half years in Ireland at the time of Sloan's alleged retention does not necessarily mean that her habitual residence had changed. In the case of Re A (Wardship: Jurisdiction), 1 F.L.R. 767, 773 (Eng. Fam. Div. 1995), a case cited by the Mozes court, the child lived in England for the first two years of her life, then Pakistan for four years, then England for two years, after which the parents agreed that child should attend school in Pakistan for two years while living with the father's relatives. After approximately one year of the alleged agreement, the mother sought return of the child to England. Although the child by that point had spent more than half her life in Pakistan, the court held that the parties' agreement was "temporary and conditional," and not sufficient to change the child's habitual residence.

Similarly, in *Mozes*, the court found that the children had not abandoned their habitual residence in Israel even though the father lived with the children in the United States for a "very full year" in which the children "were enrolled and participating full time in schools and social, cultural, and religious activities. They had successfully completed a year of school in the United States, quickly learned English, made new friends, and were accustomed to and thriving in their new life in Beverly Hills." *Id*. Unlike the case at bar, in which E.S. returned to the United

States frequently throughout the year, in *Mozes* there was no evidence that the children frequently returned to Israel. Nonetheless, the Ninth Circuit considered the children's year in the United States akin to an "academic year abroad." "[T]he ordinary expectation—shared by both parents and children—is that, upon completion of the year, the students will resume residence in their home countries. If this were not the expectation, one would find few parents willing to let their children have these valuable experiences." *Id.* at 1083. The same can be said here.

# B. Acclimatization

Murphy correctly argues that the parents' shared intent is not always dispositive, because there are circumstances in which the length of time a child resides in a new country by itself can be sufficient to change the child's habitual residence, in a process called "acclimatization."

The Ninth Circuit has explained that acclimatization occurs only in a limited set of circumstances. First, "[w]hen a child has no clearly established habitual residence elsewhere, it may become habitually resident even in a place where it was intended to live only for a limited time." *Mozes*, 239 F.3d at 1082 (footnote omitted). Second, a child's residence may change by the passage of time "if the child's prior habitual residence has been effectively abandoned by the shared intent of the parents." *Id.* In the absence of either of these circumstances, however, "a prior habitual residence should be deemed supplanted *only where* "the objective facts point unequivocally" to this

conclusion." *Id.* (emphasis added). To satisfy this test, the Court must be able to "say with confidence that the child's relative attachments to the two countries have changed to the point where requiring 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." *Id.* at 1081 (citing Elisa Perez-Vera, Explanatory Report ¶ 11, in 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982)).

The first two sets of circumstances that might support acclimatization clearly are not present here, and neither party argues that they are.

Turning to the third category, the Court finds that Murphy has not met her high burden of demonstrating that "the objective facts point unequivocally to [E.S.]'s habitual residence being in" Ireland. Murphy points to E.S.'s enrollment in an Irish school, her development of friends in Kinsale, her celebration of holidays with E.S.'s family, her participation in a dance academy, and her learning the Gaelic language as evidence of her acclimatization. There is no question that E.S. has developed ties and relationships in Kinsale. The Ninth Circuit has "caution[ed, however,] that acclimatization should not be confused with acculturation; the question more generally is whether [Ireland] had supplanted California as the locus of [E.S.]'s development." Papakosmas, 483 F.3d at 627 (citing Holder v. Holder, 392 F.3d 1009, 1019 (9th Cir. 2004)). Here, E.S. maintains substantial family, cultural, and developmental ties to the

United States. She celebrates Halloween, Thanksgiving, and Easter in the United States. She maintains a relationship with Sloan's extended family. She maintains a community in Mill Valley, where she spends each summer. She receives her dental and medical care in California as well. Considering the totality of the evidence, and while the Court does not minimize the attachments E.S has developed to Kinsale, the Court find that these attachments "did not shift the locus of [E.S.'s] development and that any acclimatization did not overcome the absence of a shared settled intention by the parents to abandon the United States as a habitual residence." *Id*.

This case resembles Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004), in many significant respects. In that case, the parents originally lived in Minnesota, then moved to Mexico with their two minor children, who at the time were then seven and two years of age. The move was intended as a "trial period," and it was stated that the parties would move back to Minnesota. Id. at 1249. The family stayed in Mexico for two years and ten months; during that time, the mother returned to the United States to visit twice with the children, and once by herself. On one trip, the mother opened a bank account in Florida; on the second, she obtained a nursing license there. *Id*. at 1250. After approximately two years, the couple separated but the mother remained in Mexico with the children. Some months later, however, she took the children to the United States and told the father that she would not return them to Mexico. Id.

Applying the test set forth in *Mozes*, the Eleventh Circuit affirmed the district court's finding that there had been no shared settled intent to shift the children's habitual residence to Mexico, and also found that the children had not become acclimatized. The *Ruiz* court's conclusions apply equally here:

It is true that the children in the instant case remained in Mexico for a considerable period of time and that there was some evidence of their acclimatization; for example, they went to school, had social engagements, and took lessons. However, we agree with the *Mozes* court 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." We also agree with the *Mozes* court that "when there is no settled intent on the part of the parents to abandon the child's prior habitual residence," courts should be hesitant to find a change in habitual residence unless objective facts point unequivocally to a change or the court can "say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount" to changing the child's family and social environment in which its life has developed.

Ruiz, 392 F.3d at 1255 (citations omitted). Here, E.S. maintained ties to the United States that were much more robust than those of the children

in *Ruiz*. The Court finds that E.S.'s habitual residence in the United States was never "abandoned," and that Murphy therefore has not shown that E.S. has acclimatized to Ireland.

# CONCLUSION

For the foregoing reasons, the Court concludes that Sloan's retention of E.S. was not wrongful, and Murphy's petition is DENIED. The preliminary injunction entered September 12, 2013, is DISSOLVED. The clerk is ordered to return E.S.'s passports to Respondent. Respondent is ordered to submit a form of judgment to the Court within 10 days of this order.

# IT IS SO ORDERED.

Dated: October 16, 2013

/s/ Jon S. Tigar
Jon S. Tigar
United States District Judge

Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 ("Hague Child Abduction Convention").

# CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring 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, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions —

# CHAPTER I — SCOPE OF THE CONVENTION

## Article 1

The objects of the present Convention are –

- 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 the other Contracting States.

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

#### Article 3

The removal or the retention of a child is to be considered wrongful where –

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph *a*) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

#### Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

For the purposes of this Convention –

- a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

# CHAPTER II — CENTRAL AUTHORITIES

#### Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

#### Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

- *a)* to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

## CHAPTER III — RETURN OF CHILDREN

#### Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child:
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

#### Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

# Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

#### Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that —

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

# Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

## Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

#### Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

# Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

# Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

#### Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

## CHAPTER IV — RIGHTS OF ACCESS

#### Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

## CHAPTER V — GENERAL PROVISIONS

#### Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

#### Article 23

No legalisation or similar formality may be required in the context of this Convention.

#### Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

#### Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

#### Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

# Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

## Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

## Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

#### Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

#### Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions.

Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

## Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

#### Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

# CHAPTER VI — FINAL CLAUSES

#### Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

#### Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

#### Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

# Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any

declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

#### Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

#### Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -

- (1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
- (2) for any territory or territorial unit to which the Convention has been extended in conformity

with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

#### Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

#### Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following –

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 37;
- (2) the accessions referred to in Article 38;

- (3) the date on which the Convention enters into force in accordance with Article 43;
- (4) the extensions referred to in Article 39;
- (5) the declarations referred to in Articles 38 and 40;
- (6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
- (7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

# International Child Abduction Remedies Act (I.C.A.R.A.) 42 U.S.C. §§ 11601-11611.

# § 11601. Findings and declarations

# (a) Findings

The Congress makes the following findings:

- (1) The international abduction or wrongful retention of children is harmful to their wellbeing.
- (2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
- (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
- (4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.

The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

# (b) Declarations

The Congress makes the following declarations:

- (1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.
- (2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.
- (3) In enacting this chapter the Congress recognizes—
  - (A) the international character of the Convention; and
  - **(B)** the need for uniform international interpretation of the Convention.
- (4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

# § 11602. Definitions

For the purposes of this chapter—

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

- (2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;
- (3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of this title;
- (4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;
- (5) the term "person" includes any individual, institution, or other legal entity or body;
- (6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;
- (7) the term "rights of access" means visitation rights;
- (8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and
- (9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 11606 (a) of this title.

# § 11603. Judicial remedies

# (a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

# (b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

# (c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

# (d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

# (e) Burdens of proof

- (1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence—
  - (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
  - (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

- (2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—
  - (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
  - (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

# (f) Application of Convention

For purposes of any action brought under this chapter—

- (1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;
- (2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used

in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

# (g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court

ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

# (h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

# § 11604. Provisional remedies

# (a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603 (b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

# (b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603 (b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

# § 11605. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 11603 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

# § 11606. United States Central Authority

# (a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

# (b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

# (c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

# (d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act [42 U.S.C. 301 et seq.], obtain information from the Parent Locator Service.

# (e) Grant authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

# (f) Limited liability of private entities acting under the direction of the United States Central Authority

# (1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter, including any director, officer, employee, or agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

# (2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, offi-

cer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

# (3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

# § 11607. Costs and fees

# (a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

#### (b) Costs incurred in civil actions

- (1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).
- (2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 11603 of this title shall be

borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

# § 11608. Collection, maintenance, and dissemination of information

# (a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

# (b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

# (c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of title 13; shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies.

In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

# (d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

# (e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

# § 11608a. Office of Children's Issues

# (a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term continuity in the management and policy matters of the Office and has a strong background in consular affairs.

# (b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

# (c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

# (d) Reports to parents

# (1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas.

Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

# (2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if—

- (A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or
- **(B)** the parent seeking assistance requests that such reports not be provided.

# § 11609. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies.

This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of title 5 for employees of agencies.

# § 11610. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.

# § 11611. Report on compliance with the Hague Convention on International Child Abduction

# (a) In general

Beginning 6 months after October 21, 1998, and every 12 months thereafter, the Secretary of State shall submit a report to the appropriate congressional committees on the compliance with the provisions of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, by the signatory countries of the Convention. Each such report shall include the following information:

- (1) The number of applications for the return of children submitted by applicants in the United States to the Central Authority for the United States that remain unresolved more than 18 months after the date of filing.
- (2) A list of the countries to which children in unresolved applications described in paragraph (1) are alleged to have been abducted, are being wrongfully retained in violation of United States court orders, or which have failed to comply with any of their obligations under such convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States.

- (3) A list of the countries that have demonstrated a pattern of noncompliance with the obligations of the Convention with respect to applications for the return of children, access to children, or both, submitted by applicants in the United States to the Central Authority for the United States.
- (4) Detailed information on each unresolved case described in paragraph (1) and on actions taken by the Department of State to resolve each such case, including the specific actions taken by the United States chief of mission in the country to which the child is alleged to have been abducted.
- (5) Information on efforts by the Department of State to encourage other countries to become signatories of the Convention.
- (6) A list of the countries that are parties to the Convention in which, during the reporting period, parents who have been left-behind in the United States have not been able to secure prompt enforcement of a final return or access order under a Hague proceeding, of a United States custody, access, or visitation order, or of an access or visitation order by authorities in the country concerned, due to the absence of a prompt and effective method for enforcement of civil court orders, the absence of a doctrine of comity, or other factors.
- (7) A description of the efforts of the Secretary of State to encourage the parties to the Convention to facilitate the work of nongovernmental organizations within their countries that assist parents seeking the return of children under the Convention.

# (b) Definition

In this section, the term "Central Authority for the United States" has the meaning given the term in Article 6 of the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980.