

No. 14-632

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IN THE

Supreme Court of the United States

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ELAINE MARY MURPHY,

*Petitioner,*

—v.—

WILLIAM MILLIGAN SLOAN,

*Respondent.*

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

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**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF OF PETITIONER

Petitioner asserts that the law of habitual residence is relatively settled and does not require clarification by the Supreme Court. That claim is absolutely incorrect.

The consensus is that a sharp split exists among the circuits and between the majority U.S. view and the majority foreign view, on the weight assigned to parental intention when trial and appellate courts determine a child's habitual residence under the Convention.

*See e.g.* A.L. Estin, *The Hague Abduction Convention and The United States Supreme Court*, 48 Family Law Quarterly 235, 247 (2014):

“The Convention question that has seen the **most** appellate litigation and petitions for certiorari concerns the definition of habitual residence under the Abduction Convention. This 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.” (footnote omitted; emphasis added).

See also, the American Society of International Law, *Benchbook on International Law* (2014), p. III.B-21 ([http://www.asil.org/sites/default/files/benchbook/ASIL\\_Benchbook\\_Complete.pdf](http://www.asil.org/sites/default/files/benchbook/ASIL_Benchbook_Complete.pdf)):

**“Federal Courts’ Different Approaches to Habitual residence Question.**

In the United States, most federal courts have agreed that determination of a child’s habitual residence before the challenged removal or retention entails a fact-intensive inquiry. See *Nicolson v. Pappalardo*, 605 F.3d 100, 104 & n.2 (1st Cir. 2010) (citing cases)). Looking to the interpretive sources and methodology discussed *supra* § III.B.3.d, **U.S. Courts of Appeals have divided on how to structure this inquiry.**

- Several circuits have emphasized parental intent. This approach asks, first, whether the parents shared an intention to abandon the previous habitual residence; and second, whether the change in location has lasted long enough for the child to have become acclimatized. See *Nicolson v. Pappalardo*, 605 F.3d 100, 104-05 (1st Cir. 2010); *Koch v. Koch*, 450 F.3d 703, 715 (7th Cir. 2006); *Gitter v. Gitter*, 396 F.3d 124, 132-34 (2d Cir. 2005); *Ruiz v. Tenorio*, 392 F.3d 1247, 1253 (11th Cir. 2004); *Mozes v. Mozes*, 239 F.3d 1067, 1975-78 (9th Cir. 2001).

- Other circuits have placed focus on the degree of settlement, in a determination that takes into greater account the child’s experience and perspectives. See *Stern v. Stern*, 639 F.3d 449, 451-53 (8th Cir. 2011); *Robert v. Tesson*, 507 F.3d 981, 988-945 (6th Cir. 2007); *Karkkainen v. Kovalchuck*, 445 F.3d 280, 292-98 (3d Cir. 2006).”

(emphasis added)

In *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012), *cert den.* 133 S.Ct. 1455 (2013), the Fifth Circuit stated:

**“Courts use varying approaches to determine a child’s habitual residence, each placing different emphasis on the weight given to the parents’ intentions.** At one end of the spectrum are those jurisdictions holding that a child’s habitual residence cannot be changed without the clear agreement or acquiescence of the nonpossessory parent. See *Mozes*, 239 F.3d at 1080-81 (discussing foreign authorities, including *Re S and another (minors)*, [1994] 1 All E.R. 237, 249 (Eng. Fam. Div.)). The Sixth Circuit takes the opposite approach, placing paramount importance on the “child’s experience,” as established by the child’s “acclimatization” and “degree of settled purpose,” to the exclusion of the parents’ “subjective intent.” See *Robert v. Tesson*, 507 F.3d 981, 989-95 (6th Cir. 2007).” (emphasis added)

*Larbie* illustrates the issue well because that case came before courts in the United States and in the United Kingdom. In the United States, the Fifth Circuit ruled that the child was habitually resident in the United States. In the United Kingdom, the U.K. Supreme Court ruled that the child was habitually resident in England, although the relevant dates as of which habitual residence was being determined were different. *In re L (A Child) (Habitual Residence)* [2013] UKSC 75.

The UK Supreme Court applied the test of habitual residence that the Court of Justice of the European Union had previously adopted in *Mercredi v Chaffe (Case C-497/10 PPU)* [2012] Fam 22. Under that test, habitual residence is treated as a question of fact, taking into account all of the relevant circumstances, and “corresponds to the place which reflects some degree of integration by the child in a social and family environment.” Parental intent, the Supreme Court said, is relevant but only one of the factors to be considered. The Court concluded that the facts weighed strongly in favor of a finding that the child had established a habitual residence in the UK, and that the High Court judge “was entitled to hold that [KL] had become habitually resident in England and Wales by 29 August 2012.” The UK Supreme Court stated respectfully, at Paragraphs 26 and 27 of its judgment, that “looked at from the point of view of the child” the English trial judge was entitled to hold that the child had become habitually resident in England even though the American courts might well come to a different conclusion.

The Hague Conference on Private International Law, which promulgated the Hague Convention, has established the International Child Abduction Database, known as “INCADAT,” which is a highly respected source of leading decisions and analysis concerning the Convention. INCADAT states that:

“The interpretation of the central concept of habitual residence (Preamble, Art. 3, Art. 4) has proved increasingly problematic in recent years with divergent interpretations emerging in different jurisdictions. There is a lack of uniformity as to whether in determining habitual residence the emphasis should be exclusively on the child, with regard paid to the intentions of the child’s care givers, or primarily on the intentions of the care givers. At least partly as a result, habitual residence may appear a very flexible connecting factor in some Contracting States yet much more rigid and reflective of long term residence in others...

**United States** Federal Appellate case law may be taken as an example of the full range of interpretations which exist with regard to habitual residence.”

<http://www.incadat.com/index.cfm?act=search.detail&cid=1237&lng=1&sl=2#>

Respondent takes out of context a statement in the treatise on the Convention written by co-counsel for the Petitioner. The treatise, Jeremy D. Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family*

*Lawyers*, § 3.08 (2012, American Bar Association), makes it clear that:

“Disagreement among the circuits on the interpretation of habitual residence is in derogation of the Congressional call for a “uniform international interpretation of the Convention.” If the various parts of the United States cannot agree on one interpretation, how can the United States expect other countries to do so?

Worse still, such inconsistencies may encourage forum shopping within the United States. Given the dramatic differences in the way that this key term is interpreted, it would make perfect sense for a parent who is considering taking a child from a country that might or might not be deemed to be the habitual residence of the child to take legal advice before choosing exactly where in the United States to live. The difference between how the law is interpreted, for example, on either side of the Hudson River may be completely decisive, with New York looking primarily at last shared parental intention and New Jersey looking far more at the actual “conditions on the ground.”

It is unfortunate that the Supreme Court has not resolved the issue.”

## CONCLUSION

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

Respectfully submitted,

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