No. 14-632

IN THE
SUPREME COURT OF THE UNITED STATES

ELAINE MARY MURPHY, PETITIONER,

v.

WILLIAM MILLIGAN SLOAN, RESPONDENT.

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

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM MILLIGAN SLOAN
27 Woodbine Drive
Mill Valley, CA 94941
williamsloan@yahoo.com
(415) 690-6747

Respondent Appearing In Pro Per

QUESTION PRESENTED

Following an evidentiary hearing, the taking of live testimony, the provision of detailed findings including assessments of credibility by the District Court, and affirmance of that decision by the Court of Appeal, should this Court reverse all of those proceedings in favor of imposing a new legal test for determining "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"), contrary to the intent of the drafters of the convention who regarded the determination as "a question of pure fact" to be decided on a case-by-case basis?

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The Hague Convention on the Civil Aspects of International Child Abduction has been reproduced in the Petitioner's Appendix (App. 41a).

INTRODUCTION

"It is never an easy nor a joyous task to resolve a dispute between parents . . . nor is the outcome ever fully satisfactory." *In re B. Del C.S.B.*, 559 F.3d 999, 1001 (9th Cir. 2009). In this case, the District Court conducted an evidentiary hearing that involved the submission of declarations, depositions and evidence, as well as live sworn testimony with cross-examination. At the conclusion of the proceedings, the District Court issued extensive findings of fact, including determinations as to credibility, and found that the parties' daughter, E.S., was and remains a habitual resident of the United States. In that decision, the District Court considered a variety of factors, including time spent in varying countries, family circumstances, schooling, accommodations, travel, medical care, friendships, divorce proceedings and forms, draft settlement agreements, and the subject raised in the Petition, parental intent. The District Court also evaluated the acclimatization of E.S. as part of that inquiry. The decision of the District Court was then appealed by Petitioner, and the Court of Appeal was presented with the same arguments, evidence, and court findings. The same conclusion was reached, namely that E.S. was and remains a habitual resident of the United States. Now, the Petition asks this Court to adopt a new legal test that would take all of the same factual findings and evidence and somehow reach a different conclusion. As will be explained, the Petition does

not raise an important federal question and has not established a conflict in the circuits that would commend this Court's attention. The Petition should be denied.

STATEMENT OF THE CASE

It is unfortunate that this case, where the District Court rendered a thorough decision, with extensive findings and based firmly on existing law, continues in the courts. The Rules of the Supreme Court of the United States indicate that a "brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Supreme Court Rule 15.2. The Statement of the Case presented in the Petition for Certiorari does not accurately reflect the factual findings made by the District Court, and mischaracterizes the record below.

In this case, a contested evidentiary hearing with live testimony occurred in the United States District Court over the sensitive issues surrounding the habitual residence of the parties' daughter. To resolve this matter, Judge Jon S. Tigar decided on October 16, 2013 as follows:

> The Court has considered each of the declarations submitted by [Petitioner and Respondent], including the sworn declarations they submitted in support of and opposition to [Petitioner'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.[1]
>
> 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.

(Pet. App. 19a-20a).

The Petition does not address the District Court's finding that Petitioner "never acquired the settled intent to reside in Ireland, either with or without E.S." (Pet. App. 29a-30a.) The District Court further determined that at the time of the alleged wrongful retention, "neither [Petitioner] nor E.S. had a home in Ireland. [Petitioner] and E.S. did not have a fixed address there," and the Court further found that "[Petitioner] did not reacquire a fixed address in Ireland until September 9, 2013, after she had already initiated these proceedings." (Pet. App. 27a.)

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[1] For the purposes of appeal and seeking certiorari, Mr. Morley has converted his role from expert witness to counsel of record. At the District Court level, his declarations were offered to the Court requesting evidentiary consideration, and he was deposed.

Petitioner also neglects to inform this Court that the District Court made multiple assessments against Petitioner's credibility in its written decision. The record shows that for the period of time that E.S. was away from the United States, she was in multiple accommodations, E.S. was removed from school and taken by Petitioner to other countries, E.S. was prevented by Petitioner from staying in relatives' homes in Ireland to finish school, and E.S. had no fixed address in Ireland when Petitioner commenced these proceedings.

Petitioner argues that this Court should disregard the extensive evidentiary proceedings that took place, including the factual findings and credibility determinations made by the District Court, and instead create a new legal test that would somehow result in a conclusion that a child that was born in the United States, has always maintained a home in the United States, has family, friends, and her pet in the United States, has a doctor and dentist in the United States, has a United States passport since birth, and has spent the majority of her life in the United States, is not a habitual resident of the United States.

REASON PETITION SHOULD BE DENIED

There are no compelling reasons for review on a writ of certiorari in this case. The court of appeal below has not entered a decision in conflict with the decisions of other courts of appeals, nor has it decided an important question of federal law that should be settled by this Court. Rather, this is a case where the Petitioner disputes the factual findings, along with credibility determinations, made by the court below. Yet it is well-established that "[f]indings of fact, whether based on oral or

other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52. In an effort to present a compelling reason for review, the Petition has attempted to recast this case as one that somehow turns on an alleged split in the circuit courts, along with a "global consensus," that simply do not exist. Under any test, the factual findings made by the court below would lead to the same result. As explained further below, the Petition should be denied.

A. Habitual Residence Is a Fact-Intensive Inquiry to Be Decided on a Case-by-Case Basis

The notion of habitual residence is, and always has been, "a well-established concept in the Hague Conference, which regards it as a question of pure fact." Explanatory Report on the 1980 Hague Child Abduction Convention, Elisa Perez-Vera, p. 445, para. 66 (1982). The Perez-Vera Report "is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." *Shalit v. Coppe*, 182 F.3d 1124, 1127-28 (9th Cir. 1999).

Notably, Counsel for Petitioner has observed in his own scholarly publication that "[m]any experts agreed that the use of a strict definition for habitual residence would go against the spirit of the Convention, noting that habitual residence was, above all, a question of fact to be decided on a case-by-case basis. . . . Putting a brave face on a serious

matter, the experts declared that it had been wise of the drafters of the Convention not to define the concept and that it was the role of judges to exercise their discretion on this matter." Jeremy Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers* §3.04 (2013, ABA).

Irrespective of the circuit, or even the country in which a determination of habitual residence is made, nothing supersedes the Hague Convention's recognition that habitual residence is first and foremost a question of fact. "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or presuppositions." In re Bates, No. CA 122.89, 1989 WL 1683783 (UK), High Court of Justice, Family Division Court, Royal Court of Justice (1989).

B. The Petition's Characterization of the Divergence in U.S. Case Law Is Exaggerated

The Petition characterizes the Unites States as having "divergent approaches" to determine habitual residence. However, Petitioner has glossed over the general agreement among virtually every circuit that the parents' intent will be considered in this fact-intensive inquiry. While the Petition culls out the Third, Sixth and Eighth Circuits as diverging from the "majority," none of those circuits would yield a different result based on the factual findings made in this case. As the Third Circuit has explained "[t]he inquiry focuses on the child, but also must consider the parents' present, shared

intentions regarding their child's presence [in a particular location]. . . . A case such as this, where the petitioning parent had consented to let the child stay abroad for an undetermined period of time, is especially fact-intensive. *Mozes v. Mozes*, 239 F.3d 1067, 1077-78 (9th Cir. 2001)." *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 271-72 (3rd Cir. 2007). The Third Circuit further elaborated, relying again on *Mozes,* "[a]dditionally, a child's prior habitual residence must be effectively abandoned by the shared intent of the parents for her to acquire a new habitual residence. *See Mozes*, 239 F.3d at 1082." *Id.* at 272; *see also Karkkainen v. Kovalchuk, 445 F.3d 280, 292* (3rd Cir. 2006) ("As the Court of Appeals for the Ninth Circuit noted, the intentions of a child's parents may affect the length of time necessary for a child to become habitually resident or otherwise influence a child's ability to acclimatize. *Mozes*, 239 F.3d at 1079-80.") Far from any cognizable circuit split with *Mozes* and its progeny, the Third Circuit has relied on shared parental intent and *Mozes* in its recent decisions.

The Eighth Circuit also considers parental intent and has relied on *Mozes*. *See*, *e.g.*, *Barzilay v. Barzilay*, 536 F.3d 844, 851-52 (8th Cir. 2008) ("The determination of a child's habitual residence . . . requires the analysis of many factors, including 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. *See Silverman II*, 338 F.3d at 897-98; *Mozes*, 239 F.3d at 1071-81.") Notably, all of the factors set forth in the Eighth Circuit's decision in *Barzilay* were considered in this case in the

proceedings below—nothing suggests that the law in the Eighth Circuit would lead to a different result.

Even the Sixth Circuit, which has called the utility of parental intent into question, has nonetheless emphasized the factual nature of the inquiry, resisting formulaic tests and observing "[t]he intent is for the concept [habitual residence] to remain fluid and fact based, without becoming rigid." *Prevot v. Prevot (In re Prevot)*, 59 F.3d 556, 560 (6th Cir. 1995) (internal quotations omitted). Moreover, the Sixth Circuit still evaluates acclimatization, which was also considered here in the District Court evidentiary proceedings. *See, e.g., Robert v. Tesson*, 507 F. 3d 981, 993 (6th Circuit 2007).

In the end, none of the case law undermines the core proposition that the determination of habitual residence is a highly fact-intensive inquiry, as contemplated by the drafters of the Hague Convention. Here, the District Court's detailed evidentiary hearing took into consideration all factors relevant to habitual residence. All of the documents, drafts and arguments described in the Petition were presented to the District Court, and the court nonetheless concluded that E.S.'s habitual residence remained in the United States. The District Court found that Petitioner was not habitually resident in Ireland given, among other things, the failure to establish a permanent residence there, the lack of a driver's license, the frequent travels away from there, the lack of any secured living accommodation in Ireland at the time of filing the Hague petition, the application to school programs in other countries, the failure to obtain any employment there, and the storage of belongings

in the United States for the entire time there. No change in the law would commend any different result in this case.

C. The Petition's Allegation of an International Consensus Is Overstated

Piecing together cases in different areas of the world (that do not all stand for the same proposition), Petitioner suggests that there might be an "international consensus" for a new test to determine habitual residence. In *Proceedings brought by A (Case C-523/07)* [2010] Fam. 42, relied on in the petition, the European Court of Justice did not eviscerate the parent's shared intent as a factor for consideration, but rather confirmed it remains "an indication of the child's habitual residence." *Id.* at para. 36. The court went on to explain, "all the circumstances of the individual case must be taken into account where there is a change of place. An indication that the habitual residence has shifted may in particular be the corresponding common intention of the parents to settle permanently with the child in another State." *Id.* at para. 44.

With respect to the law in the United Kingdom, the petition overstates the current jurisprudence on the issue. Rather, in the recent decision *In Re L*, Baroness Hale specifically relied on *Mozes* for explaining how parental intent should be taken into consideration, referring back to the decision in *Re A*, and stating,

> Both Lord Hughes and I also questioned whether it was necessary to maintain the rule, hitherto firmly established in English law, that (where both parents have equal status in relation to the child)

> one parent could not unilaterally change the habitual residence of a child [citations]. As the US Court of Appeals for the Ninth Circuit pointed out in *In re the application of Mozes*, 239 F 3d 1067 (9th Cir 2001), at 1081, such a bright line rule certainly furthers the policy of discouraging child abductions, but if not carefully qualified it is capable of leading to absurd results (referring to EM Clive, "The Concept of Habitual Residence" [1997] Juridical Review 137, at 145). The court continued:
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> > 'Habitual residence is intended to be a description of a factual state of affairs, and a child can lose its [sic] habitual attachment to a place even without a parent's consent. Even when there is no settled intent on the part of the parents to abandon the child's prior habitual residence, courts should find a change in habitual residence if 'the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place' [referring to the Scottish case of *Zenel v Haddow* 1993 SLT 975].'"

In Re L (A Child) (Custody: Habitual Residence) [2013] UKSC 75, 3.W.L.R. 1597 at para. 22.[2] Thus,

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[2] The petition has conflated the prior rule in the United Kingdom (which was that habitual residence could not be unilaterally changed under effectively any circumstances) with

(Footnote continued on following page)

even the United Kingdom's decisional law is currently relying on *Mozes* as a guidepost for the jurisprudence on habitual residence and the role of parental intent.

With respect to another of the United Kingdom decisions cited in the petition, *Mercredi v. Chaffe*, Petitioner suggests that this case should lead to the abandonment of decades of case law in an attempt to diminish the role that parental intent continues to play in the determination of habitual residence. However, as the *Mercredi* court explained:

> [I]n order to determine where a child is habitually resident, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent. In that context, the Court has stated that the ***intention*** *of the person with parental responsibility* to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, *may constitute an indicator of the transfer of the habitual residence* (see A, paragraph 40). . . . Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned *has it in mind* to establish there the permanent or habitual

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Mozes. As explained, the recent decisions in the United Kingdom, if anything, embrace the approach taken in this case.

> centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and *that assessment must be carried out in the light of all the circumstances of fact specific to the individual case*."

Mercredi v. Chaffee (Case C-497/10 PPU) [2012] Fam. 42 at paras. 49-51 [emphases added]. Notably here, the District Court expressly found that Petitioner did not have the intent to settle in Ireland, with or without E.S.

The reference to other jurisdictions such as Ireland are not persuasive. The decision in Ireland cited in the petition does not support Petitioner's claims, as the court there specifically focused on the question of a joint settled intention, stating "the learned High Court judge had before him sufficient evidence upon which he could properly conclude that, while the parties intended to come to Ireland, it was only to 'give it a go' even for up to one year if matters developed, that evidence did not go so far as to suggest that they had a joint settled purpose in doing so." *S v. S* [2009] IESC 77.

In the decision from Australia cited in the petition, the court observed, "examination of a person's intentions will usually be relevant to a consideration of where that person habitually resides. Sometimes, intention will be very important in answering that question." *LK v. Director-General, Department of Community Services* [2009] HCA 9 at para. 28. As for New Zealand, the Petition itself concedes that *Mozes* has influenced the

jurisprudence there. (Pet. 26.) Even the decision from Canada reaffirms that "the determination of a child's habitual residence is usually regarded simply as a question of fact to be decided by reference to all the circumstances of any particular case." *A.H. v. H.S.*, 2013 QCCA 1196. Finally, with respect to Israel, the publication cited actually states, "whilst many dicta can be found supporting the independent approach in subsequent US, Australian and Israeli case law, in many of them heavy emphasis is still placed on the parents' intentions." R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis*, p. 191 (2013). The purported "international consensus" is overstated, and does not commend the radical step of overruling decades of case law in almost every circuit in this country.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Certiorari be DENIED.

Respectfully submitted,

WILLIAM MILLIGAN SLOAN
27 Woodbine Drive
Mill Valley, CA 94941
williamsloan@yahoo.com
(415) 690-6747

Respondent Appearing In Pro Per

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