No. 24-390

IN THE

Supreme Court of the United States

ANTHONY PATTERSON,

Petitioner,

v.

ASLI BAZ,

Respondent.

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

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

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QUESTION PRESENTED

Whether an agreement between the parties as to jurisdiction to determine custody and the habitual residence of a child creates a rebuttable presumption of habitual residence in that particular country.

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INTEREST OF *AMICUS CURIAE*[1]

The International Academy of Family Lawyers (IAFL) was formed in 1986 to improve the practice of law and the administration of justice in the areas of family law and divorce worldwide. It is an international non-profit association that is legally incorporated in the United States of America. Currently, IAFL has more than 1,020 Fellows from 76 countries, all of whom are recognized by the courts and bar associations of their respective countries as experts and experienced litigators in family law.

IAFL members have made presentations in Europe, North America, Australia and Asia related to legal reforms. IAFL has sent representatives to major international conferences, often as non-governmental experts (NGOs), and has observer status for the Special Commissions on the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as the Abduction Convention), to all of which it has sent representatives to. In addition, IAFL members have written extensively and lectured extensively on the Abduction Convention and other related topics, such as cross-border relocation of children.

The IAFL website (www.iafl.com) contains, among other things, a list of its partners.

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1. Counsel for the amicus certify that no counsel for a party authored any part of this brief and no person or entity other than counsel for the amicus have made a monetary contribution to the preparation or submission of this brief. The parties have received timely notice of the intent to file this brief.

IAFL has filed *amicus curiae* briefs with the U.S. Supreme Court in the cases of *Cahue v. Martinez*, 137 S. Ct. 1329 (2016); *Lozano v. Montoya*, 134 S. Ct. 1224 (2014) and *Monasky v. Taglieri*, No. 18-935 (2019). They have also done so before the Supreme Court of the United Kingdom in the cases *In the Matter of AR*, (Children) (Scotland) UKSC 2015/0048; *In the Matter of NY*, (A Child) UKSC 2019/0145, and before the Court of Cassation of France, in *Bowie v. Gaslain* (No. T 15-26.664). Other *amicus curiae* filings have also been made to lower courts in various other jurisdictions.

IAFL members, who are experienced attorneys practicing in countries around the world, have summarized the relevant law in their jurisdiction for the purposes of this filing as an Amicus.

SUMMARY OF ARGUMENT

A court ratified parental agreement regarding a minor's habitual residence should be considered an affirmative defense against a consent claim under Article 13(a) of the Hague Abduction Convention. Alternatively, such court ratified agreements should be afforded considerable weight. Failure to do so will discourage parents from reaching child custody agreements.

State court orders ratifying such custody agreements should be afforded full recognition by Federal courts. As Federal courts do not have jurisdiction over custody matters, all court ratified custody agreements are state court orders. Failure to recognize them as binding on Federal Courts would effectively render such orders meaningless in Hague Convention matters heard in

Federal courts. Such an outcome would undermine the International Child Abduction Remedies Act, which provides that Hague Convention cases may be heard in either State of Federal courts, (22 U.S.C. § 9003(a)).

ARGUMENT

The purpose of the Hague Abduction Convention is to return a minor child who has been wrongfully removed or retained to his or her country of habitual residence as swiftly as possible. It is an instrument to determine jurisdiction, not custody. The Hague Abduction Convention therefore does not apply a best interests test but rather determines which country is the appropriate forum to determine the child's best interests.

The term habitual residence was deliberately not defined by the drafters of the Abduction Convention in order to avoid the application of a rigid formula to an issue which is fact driven (See: Explanatory Report by Prof. Elisa Perez-Vera, par. 66, Actes et Documents de la Quartorzieme session, Tome III, Child Abduction, Hague Conference on Private International Law, 1982).

While all of the eleven United States Federal Circuit Courts consider parental intent as an element in determining habitual residence, there is a distinction between them regarding the weight given to parental intent as opposed to other factors, prompting the United States Supreme Court to consider the issue.

The 1st, 2nd, 4th, 5th, 7th and 11th United States Circuit Courts historically followed the analysis of the 9th Circuit's judgment in *Mozes v. Mozes*, 239 F.3d 1067(9th

Cir. 2001). The Mozes court held that the analysis is fact intensive and therefore there are no rigid rules to apply. It ruled that there must be a shared parental intent to abandon the existing habitual residence before a new one can be acquired. Therefore, the length of the move must be examined in the context of the parties' agreement as to the purpose of the move. The relocation need not be permanent. It can be for any number of reasons: business, study, health or just the desire to explore other ways of life. However, there must be a settled purpose to the move and the move must actually take place.

The interrelationship between parental intent and the child's adaption to new surroundings exists on a continuum. The weight given to each factor will depend on the circumstances of the case. The shorter the time in the new jurisdiction, the more weight given to parental intent. In *Mozes*, the children had spent 15 months in the U.S. while the father remained in Israel. There was no agreed upon intent to abandon Israel as the habitual residence. The court found that the children's habitual residence did not change, regardless of how much they adjusted to their new surroundings. Had the move been for a substantially longer period, the court might have given less weight to parental intent and given more emphasis to the child's adjustment to his or her new surroundings. Mozes stands for an integration of parental intent and the child's adjustment to its new environment, with no rigid formula to on how balance the two. Where parental intent can be determined, the child's adjustment to the new environment is a less significant factor.

Focusing on parental intent attains an important Abduction Convention objective: the prevention of a

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

In addition, by placing primary evidence on the acclimation of the child to the new environment, the Abduction Convention will lose its deterrent capacity. The proceedings will shift from determining jurisdiction, which is at the heart of the Abduction Convention, to an analysis more appropriate to a custody proceeding. The outcome will no longer be determined by the actions of the parent, whether lawful or unlawful, but by the nature of the child. A child who has the ability to easily adapt to new surroundings will have been found to have acquired a new habitual residence, while a child who struggles to make new friends, learn a new language or adjust to a foreign school system will be considered not to have acquired a new habitual residence. This would result in courts applying a "best interests" test as it would in a conventional custody case. That would be contrary to the essence of an Abduction Convention proceeding, whose purpose is to determine international jurisdiction, not custody. The purpose of the Abduction Convention is not served by the outcome of a proceeding under its

framework being determined primarily by a child's ability to make the switch from American football to European soccer or vice-versa.

The continuum between parental intent and the child's adaptation to new surroundings is also impacted by the age of the child. The impact of relocation on a 13 or 14 child is significantly different from that of a 3 or 4 year old. The ability of a 4 year old to adapt to their new surroundings may be of far less significance compared to that of a 14 year old. The younger the child, the more significant the role parental intent plays in determining the habitual residence of the minor.

The Mozes court divided the question of habitual residence into three different scenarios; 1) Where the family unit has manifested a settled purpose to change habitual residence, despite the qualms of one of the parents, 2) Where the translocation from an established habitual residence was clearly intended to be of a specific, delimited period, 3) In between cases where the petitioning parent had earlier consented to let the child stay abroad for some period of ambiguous duration. The first situation will result in habitual residence being acquired in a relatively short period of time. In the second situation, habitual residence will not be acquired even after an extended stay, although once the delimited period has passed the length of the stay can determine the change in habitual residence. The third situation is the problematic one. The court stated that in the absence of settled parental intent, courts should be slow to infer from acclimatization that an earlier habitual residence has been abandoned.

All of the United States Federal Courts take into account parental intentions to some degree. While the courts that have historically followed the 9th Circuit, including the 11th Circuit, place significant emphasis on parental intent, even the courts that are more child focused still weigh parental intent to some degree. The courts all agree that the definition is fact intensive and no fixed formula should be applied. Yet it is clear that the unilateral decision of one parent is not sufficient to change the habitual residence of a child. The underlying principle of The Hague Abduction Convention is that a minor's habitual residence should not be changed by the unilateral acts of one parent where both have rights of custody.

The United States Supreme Court addressed the issue of defining habitual residence in *Monasky v. Taglieri*, 589 U.S. 68 (2020), 140 S. Ct. 719. The matter involved a U.S. mother who married an Italian father in the United States and relocated to Italy two years later. There were no definitive plans to return to the U.S. The couple lived in Italy for about a year when the mother became pregnant. Their marriage deteriorated and the mother, who claimed that she was abused by the father, looked into returning to the U.S. However, the couple also made plans for the birth of their daughter in Italy, where she was born in February, 2015.

At the end of March, 2015, the mother sought shelter in a safe house. She told the police that she feared for her life. In April, the mother left Italy with the two month old child and returned to the United States, without the father's knowledge or court permission. The father filed a timely petition for the child's return under the Abduction Convention.

The District Court of the Sixth Circuit which tried the case found that the shared intent of the parents was for their daughter to live in Italy. The child's habitual residence was therefore in Italy and the court ordered her return. The Court of Appeals for the Sixth District upheld the decision.

The mother argued in the Supreme Court that an "actual agreement" between the parents was required to prove parental intent. The Supreme Court rejected that argument, stating that such "requirement would undermine the Convention's aim to stop unilateral decisions to remove children across international borders". The court held that habitual residence is a fact-driven inquiry. As children, especially those too young to acclimate on their own, depend on their parents, the intentions and circumstances of the caregiving parents are relevant considerations. No single fact, however, is dispositive of all cases.

As to the weight to be given to parental intent, Monasky has not clearly ruled as to which Federal Circuit Courts have adopted the correct approach. It did make clear that there is no formality requirement to prove that the parties had reached an agreement as to the habitual residence of the minor.

However, the Supreme Court did not answer the question about those circumstances in which an "actual agreement" was in fact reached regarding the issues of habitual residence. The absence of such an agreement was not dispositive, it found, but whether the presence of such an agreement should be given significant, if not determinative weight, was never addressed.

In a case which considered parental agreement, the U.S. Court of Appeals for the Ninth Circuit reaffirmed that in determining the child's habitual residence, we "look to the last shared, settled intent of the parents." *Murphy v. Sloan*, No. 13-17339, August 25, 2014, (cert. denied, 547 U.S. 1136) citing *Valenzuela v. Michel*, 736 F.3d 1173, 1177 (9th Cir. 2013). In the current matter, the parties' agreement ratified by the Illinois state court, called the Illinois Allocation Agreement, included agreement that the child's habitual residence for Hague Convention purposes would remain in Illinois.

The Court of Appeals held that the parent's agreement regarding habitual residence does not bind the court. It is the role of the court to determine the extent to which parental intent is determinative in setting habitual residence. The court, in determining an abduction claim, is not similar to a third party who has an interest that may be impacted by an agreement to which he is not a party. The court has no interest that can be adversely affected by the agreement of the parties. The court's task is to weigh the agreement, whose terms are not disputed, as part of the totality of the circumstances. By holding that the court is not bound by the agreement of the parties, it is minimizing the proper weight which the agreement should be accorded and will only lead to more conflict in these complex cases.

In *Larbie v. Larbie*, a final Decree of Divorce issued by a Texas Court was determined to constitute consent to that court's jurisdiction. The court stated "Crucially, consent for a particular tribunal to make a final custody determination – which may be established by entry of a temporary custody order – suffices to establish an

affirmative defense under the Convention." 690 F.3d 295, 308 (5th Cir. 2012), (cert. denied 586 U.S. 1192)

CONCLUSION

A state court ratified agreement regarding habitual residence should be afforded a rebuttable presumption as to a child's habitual residence. Alternatively, such decisions should be accorded significant weight in determining habitual residence.

For the above reasons, the IAFL believes that the majority opinion of the Seventh Circuit Court of Appeals is in error and certiorari should be granted.

Respectfully submitted,

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