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[24/04/2004; Superior Court of California, Placer County (USA);First Instance]
F v A, 21 April 2004, transcript, Superior Court of California, Placer County

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF PLACER

IN RE THE APPLICATION OF FERRARIS, Petitioner

CASE NO SSP 0295

ORDER ON APPLICATION FOR RETURN

INTRODUCTION

Petitioner, V.F., has filed an application with this court for the return of his son, C., now aged 5 years, to Italy. The application is brought under the authority of the Hague Convention on the Civil Aspects of International Child Abduction [FN1] (hereinafter referred to as "the Convention").

On November 10, 2003, Petitioner V.F. made application to the Italian Ministry of Justice as the Central Authority for handling Hague Convention cases for the return of C. That application made its way through official channels to the United States Central Authority, the U.S. State Department, and then to the National Center for Missing and Exploited Children (hereinafter NCMEC). NCMEC is a non-governmental organization which has contracted with the U.S. State Department to discharge the duties of the Central Authority under the Convention for "incoming" cases to the United States. This court was informed on November 19, 2003 of the existence of the application. As a consequence, the court, ex parte, entered a stay pursuant To Article 16 [FN2] of the Convention of two cases pending before this court which were filed by the Respondent herein, C.'s mother, Ms. P.A. [FN3]

On November 26, 2003, this court continued the stay on the custody actions pending a decision on the Petitioner's application. The court ordered that the application itself be filed with this court as the moving papers [FN4]. The court ordered the passports of Respondent, Ms. A., and the child C., to be deposited with the clerk of the court. The court further ordered that C. was not to be removed from the State of California by any person without an order of the court, and the court indicated that counsel would be appointed to represent Mr. F. in the event that he did not retain an attorney to represent himself.

On December 4, 2003, Petitioner and Respondent, through counsel, participated in a case management hearing conducted by telephone conference call. The court adopted a schedule for submission of declarations by both parties. Briefing was to have been completed by January 23, 2004. Pursuant to the agreement of both counsel, the court extended the dates for briefing, which called for all documents to be filed by January 30, 2004. A further case management hearing was set for February 2, 2004. That hearing was later continued to February 10, 2004 [FN5].

On February 10, 2004 the matter came on for oral argument to the court. Petitioner, V.F. was present and represented by William M. Hilton, Esq. The Respondent P.A. was present

and was represented by Charlotte Keeley, Esq. Evidence and argument was presented to the court and the matter submitted. On February 24, 2004, the court issued it's written tentative decision. Thereafter, Mr. F. requested a hearing on the tentative decision. Due to the travel schedule of Mr. F. and the illness of his counsel, the court continued the matter to April 13, 2004 for final argument.

On April 13, 2004, the matter came on before the court for final argument. Mr. F. was present and was represented by William M. Hilton, Esq. The Respondent P.A. was present, and represented herself pro se. Additional evidence was tendered to the court, some of which was accepted, some of which was rejected. The parties made their arguments to the court and the matter was submitted. The following constitutes the final decision of this court.

II. FACTS

Ms. P.A. is a United States Citizen, born in California. Mr. F. is an Italian citizen, born in Switzerland. These parties never married nor did they ever cohabit as a family. Ms. A. is a computer scientist who owns her own consulting business. She was previously employed by *, the State of California, and the United States Department of Justice. In 1993 she was hired by ** Software. With ** her responsibilities were to provide assistance and training to countries in Europe and South America. In 1995 she started her own company, The * Project, and began consulting services to companies in the United States, Belgium and Italy.

Mr. F. is an Italian citizen, who has lived throughout the time periods relevant to this case, in Agrano, Commune of Verbania, Italy. His primary residence is in Agrano, where he has lived with his mother P., and his adult sister, L. Mr. F. is a language instructor in Milan.

Ms. A. was in Italy in March 1998 pursuant to a work assignment. She enrolled in a language school in Milan, "Il Centro" [FN6] to learn Italian. There, she met Mr. F. A friendship developed between the two, based upon a common appreciation of different languages and cultures. Ms. A. indicated to Mr. F. that she wanted to become a mother, and had considered adoption and artificial insemination. Mr. F. offered to assist Ms. A. to become pregnant. Ms. A.'s expectation was that after the birth of the child she would remain good friends with Mr. F., but that they would not be a family. This arrangement was communicated to Mr. F.

After her assignment in Italy was complete, Ms. A. returned to the United States, where she discovered that the plan to impregnate her was successful. She was pregnant by Mr. F. Ms. A. investigated the alternatives available for birthing in the United States and in Italy, and found that the latter offered her care, infant and breastfeeding instruction, and after-care which was more comprehensive than that offered in the United States. Ms. A. returned to Italy some months before the birth of C., and ultimately selected an apartment at *, Milan, the choice of location resting on the proximity of her Italian obstetrician.

Before C.'s birth, Ms. A. informed V. and his family that it was her intention to continue her work as a computer scientist throughout Europe and the United States until C. reached school age. When he reached school age, Ms. A. indicated that it was her intention to return to the United States and keep her business travel to a minimum. Since C.'s birth, Ms. A. has been the sole financial support of C., and has been the only person in charge of his day care and his pre-school education [FN7].

C. was born on April 18, 1999 in Monza, Italy. Over the next four and one half years, the parties openly welcomed the extended families of each other. Some of Mr. Fs.' family members came to California to visit Ms. A. and the child, and Ms. A. visited with the F. family in Italy at their homes. The pattern of frequent changes of residence was consistent

with Ms. A.'s forecast for C.'s preschool years. She and C. lived where her work took her, always on a short term basis. Exhibit A, appended hereto, is a graphic representation of the time Ms. A. and C. spent in various locations. The following narrative discusses the time allocated to the various loci.

After his birth, Ms. A. and C. remained in Italy until June 28, 1999, when the mother and child returned to the United States. Mr. F. came to California with Ms. A. and C., but returned to Italy after approximately six weeks. In Between September 16 and November 3, 1999, Ms. A. traveled with C. throughout Europe to Switzerland, Austria, Germany, France, Spain, Belgium, Luxembourg, The Netherlands, and Italy.

From November 1999 to mid 2001, Ms. A.'s "home base" was in Belgium. At the beginning of November, 1999, Ms. A. began an assignment with the * Bank in Brussels, Belgium. She and C. lived at the * Apartments in Leuven, Belgium. During this period of time, Ms. A. obtained permission to travel to Italy for C.'s booster shots on December 20, 1999, and she and C. spent Christmas with the F. family in Italy.

For approximately one month, Ms. A. accepted a work assignment for * Europe in Comerio, Italy. For this assignment, she and C. lived in hotels in Varese and Gavirate, Italy. On March 11, 2000, Ms. A. and C. returned to the United States until March 30, 2000. Beginning on April 1, and until June 17, 2000, Mother extended her work assignment for Whirlpool and she and C. lived in Gavirate, Italy.

In June, 2000 Ms. A. and C. returned to California for a period of approximately two months, after which they returned to Europe, traveling in various countries.

In November, 2000, Ms. A.'s work led to a project in Belgium with the * Bank. She and C. lived in Leuven, Belgium for approximately 3 ½ months, after which they traveled in Europe for an additional two weeks. On March 21, 2001, Ms. A. and C. returned to California for approximately one month. C. was entered into * Day Care in Oakland, which was a licensed day care facility. During this period mother worked on an assignment in San Francisco.

Ms. A. and C. returned to Europe on April 25, 2001, and after a brief vacation returned to Leuven, Belgium, where mother had obtained another assignment with Pharynx. Here, C. attended * Kinder Centrum in Leuven. They remained in Belgium for approximately 3 months.

After completing the assignment in Belgium, Ms. A. and C. returned to California for approximately 4 ½ months. Just before Christmas 2001, Ms. A. and C. returned to Europe, vacationing in various countries, including Italy. Ms. A. accepted additional work for * as well as other projects in Milan for * and * Europe. She made Italy her home base for this consulting period, remaining there for approximately 5 months. After these assignments, Ms. A. traveled in Europe, visiting various countries, including Italy. This vacation lasted approximately 10 weeks. At the conclusion of this period of travels, Ms. A. and C. returned to California for about 2 months.

Ms. A. and C. returned to Italy for four months beginning in December 2002, working various projects including * Consult, and the Ministry of Justice. They lived in Rome on the Via Della Cafferelleta. Ms. A. arranged for childcare at a local preschool.

In April, 2003, Ms. A. and C. returned to California, where she continued her consulting services to companies at conferences and in San Francisco. C. was again enrolled in * Day Care for part of this period of time.

Ms. A. and C. returned for the last time to Rome, where she continued with projects for * and other companies. At the end of this stay, knowing that she planned to take another assignment in Belgium, and then return to the United States for more substantial periods of time, Ms. A. allowed C. to visit with his grandmother, P., for an "extended" period of time, approximately one week at the beginning of September. C. was returned to his mother by Mr. F. on September 9, 2003. Three days later, P.F. phoned to ask if C. could visit for another week. Ms. A. agreed, and V. returned to Milan, where Ms. A. was staying, to pick up C. He was to return C. on September 16, 2003, but he failed to do so, and informed Ms. A. of that position that he was not going to return the child to Ms. A.

Ms. A. sought advice at the U.S. Embassy, and the Italian Central Authority. Ms. A.'s attempts to persuade Mr. F. and his family to return C. were met with refusals. Coincidentally, Ms. A. developed a medical problem which required immediate intervention. She obtained outpatient surgery in Milan, after which she was driven by a companion to the F. residence.

On September 23, 2003 Ms. A. notified the F. family of her impending visit to Agrano. She and her companion arrived at the F. residence in the evening. The parties go to great lengths to describe the emotional events which followed that evening, which ultimately resulted in Ms. A. leaving the F. household with C. In brief, although the reception Ms. A. received initially was gracious, it became apparent that the F. family members had positioned themselves to keep C. in Italy. C. had been enrolled in daycare in Agrano, and Mr. F. indicated that Ms. A. could come to visit her son "whenever she wanted". P.F. told Ms. A. that she (Ms. A.) "had had C. four years and could do whatever [Ms. A.] wanted, and no-one ever said anything – 'now it's our turn' ". After a brief period of being physically detained, Ms. A. and C. made their escape from the F. household. Acting on the advise of Italian officials, Ms. A. was advised to return to the United States and obtain documents indicating her right to custody. She and C. left Italy for the United States on September 29, 2003. Despite her intentions to go to Belgium in January, 2004 for her next work assignment, she and C. have remained in the United States since that time [FN8].

Both parties provide some documentary evidence of their respective positions, consisting of travel arrangements, leases, medical records, declarations of witnesses, preschool records, residence permits, passports, and other evidences of presence in one place or another at various times. In support of her claim that the United States is the child's habitual residence, Ms. A. points to the following: That her business is based in California, where she has her banking relationships, pays her taxes, and has her office manager and bookkeeper. Ms. A. has also arranged for medical care for C. in California. She indicates that upon her California pediatrician's advice, C.'s child inoculations were all provided in Italy, at the same clinic. This is to avoid inoculating the child with vaccinations and booster shots at differing locations, because of the lack of similarity of the inoculation "batches". In fact, mother traveled from Belgium to Italy on at least one occasion specifically to have C. vaccinated at the same clinic. That she arranged solely for C.'s preschool and daycare at the various places where he business took her, at * Day Care Center in Oakland, in Northern Italy, at Pasticciopoli, and in Rome at Villa Lazzaroni. She indicates that it has always been her intention to use the United States as her base for working internationally, and that upon C. reaching age 5, that she would cut her international travel to a minimum.

Mr. F.' evidence posits that Ms. A. has been in Italy twice the number of days that she has been in the United States. Mr. F.'s documentation in support of the various declarations in his behalf tend to largely corroborate Ms. A.'s version of the facts. He provides vaccination records which correspond mostly to the times Ms. A. agrees that she and C. were in Italy. As noted previously, Ms. A. points out that she made special trips into Italy for the purpose of

arranging for the inoculations to be administered by the same clinic. Mr. F. also provides Ms. A.'s medical card data, showing her entitlement to receive health care in 2000 and 2001. He also provides his family unit registrations. C.'s medical card, showing an entitlement to receive medical care is also provided. He provides evidence that Ms. A. had one of her personal autos shipped to Europe [FN9], and a lease agreement covering a period of 12 months of an apartment in Verbania, school certificates showing attendance in Verbania, Omegna, and Rome.

He provides evidence of registration of C. as a resident of Italy, his family unit consisting of Ms. A., Mr. F. and himself, and the declarations of family members, friends, and townspeople in Northern Italy who attest to C.'s presence in Agrano more or less continuously for substantial periods of time. Mr. F.' position is that Ms. A. and C. and he were a "family" and that Ms. A. intended to stay in Italy for a indefinite period of time, and that C. had become "settled" in Italy. At oral argument in April, 2004, he emphasized that Ms. A. had filed the appropriate documents to become a legal resident in Italy, which he argued were irrefutable evidence of Ms. A.'s intention to reside in Italy on a more or less permanent basis.

The declaration of Mr. F. provides his perspective concerning the time periods which C. and his mother were present in Italy and in California. Other than a single reference to joining Ms. A. and C. in Belgium, however, he omits any reference to the various trips taken by the mother and child. He essentially fails to acknowledge that Ms. A. was a "resident" of Belgium on the same basis that she was a "resident" of Italy. Where it is undisputed that Ms. A. and C. were in the United States, he concedes their presence. All other time, however, he allocates to presence in Italy. The evidence clearly shows that this is not the case. Partly because of this revisionist and skeletalization of the facts, the court has accepted Ms. A.'s version of her residential arrangements where her version conflicts with that of Mr. F. and there is no other evidence which can clearly substantiate the facts in question.

III. DISCUSSION

A Hague Convention case is not a custody case. It is an action which provides a unique remedy – the physical return of a child to his or her habitual residence – in order to accomplish two purposes: the deterrence of international abduction, and the prompt return of a child to the status quo ante, that is, to return the child to the situation which existed before the abduction took place [FN10].

The Convention was approved for adoption by the Hague Conference on Private International Law on October 25, 1980 [FN11]. The United States was a member of the Hague Conference and voted to approve the Convention for adoption. The Convention was ratified by Congress in 1986, but did not come into force with other nations until the implementing legislation was enacted by Congress in 1988. The implementing legislation is referred to as ICARA (International Child Abduction Remedies Act) and is found at 42 U.S.C. 11601 et. seq. ICARA sets forth the procedures applicable to handling Hague Convention cases in the United States. Pursuant to ICARA, both State and Federal courts have original concurrent jurisdiction to hear Hague Convention cases [FN12]. Currently, there are over 70 countries signatory to the Convention, and it is in force between the United States and 51 other countries [FN13]. The Convention came into force between Italy and the United States on May 1, 1995 [FN14].

The Convention provides for a return of a child under sixteen years of age who has been (1) wrongfully removed or retained (2) from her or her habitual residence (3) in violation of the custody rights of a person or institution [FN15]. A wrongful removal or retention requires a

showing that rights of custody have been breached according the law of the child's habitual residence, and that those rights were actually being exercised, or would be exercised but for the wrongful removal or retention [FN16]. Typically, the Convention deals with situations where one parent has removed or retained a child from his or her habitual residence across an international frontier, in violation of the left-behind parent's rights of custody. The concept of "wrongfulness" does not imply or require any mens rea, or intent. If a violation of the left-behind parent's rights has occurred, wrongfulness has been established. See Thompson v. Thompson [1994] (3 R.C.S. 551(Canada)), 34 I.L. M. 1159, 1172 (1995) [FN17] [where it was held that mother's knowledge of non-removal order was not essential to a showing of wrongfulness: "Nothing in the nature of mens rea is required; the Convention is not aimed at attaching blame to the parties. It is simply intended to prevent the abduction of children from one country to another in the interest of children."].

In order to determine whether a wrongful removal has occurred, it is necessary to establish whether the country from which the child has been removed or retained is the child's habitual residence [FN18]. The term "habitual residence" is not defined in the Convention, although it has been part of the lexicon of many European nations for years [FN19]. One of the best ways to describe "habitual residence" is to consider what it is not. It is not domicile, because the concept of domicile contains within it a notion of nationality, or heritage, which the Convention eschews [FN20]. It is not the same as the "home state" concept utilized by the UCCJA or the UCCJEA, since this concept utilizes a static time interval to determine whether a court may exercise jurisdiction over a child custody matter.

What can be said about coming to some understanding of the term "habitual residence" is that it is a fact-intensive mixed question of law and of fact [FN21]. Despite nearly 20 years of U.S. case law on the subject, the definition which finds broad acceptance by U.S. courts comes from a U. K. case, In re Bates, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989):

"[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." Id. at p. 10.

The intent with which a place is occupied by a family, or by a parent with a child, may play a role in determining whether that place qualifies as the child's habitual residence. Certainly, where a mother and father maintain a joint and shared intent that they are going to settle in a place for an indeterminate time, or for a substantial period of time, a habitual residence will inevitably result. Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995) [FN22]. The issue becomes more problematic when the parent's intent as to a future residence is either not shared by the other parent, or is not communicated at all. In Friedrich v. Friedrich (Friedrich I), 983 F.2d 1396 (6th Cir. 1993), when the parties separated, mother left the family residence in Germany after having lived there for 18 months. She returned, without the knowledge or consent of the father, to the United States with the child, citing her intention to eventually return to live permanently in the United States. The Friedrich court noted that "To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intention…." Id. 983 F.2d 1401.

The touchstone U.S. case for examining the role of parental intent has become Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001. In Mozes, both mother and father were Israeli citizens, and the family, with four children ranging in age fro 7 to 16 years, had spent their entire lives in Israel. In 1997 mother expressed the desire to come to Los Angeles so that the children could attend school, learn English, and be exposed to the American culture. With father's consent, the mother and children departed for an agreed-upon stay, the duration of which was to have been fifteen months in the United States. The parties had no agreed understanding as to what would occur with the family beyond that. Upon arrival, mother leased a home in Beverly Hills, purchased vehicles, and entered the children in school. Father financed the trip, and visited the family occasionally. One year after the mother and children moved to California, mother filed suit in Los Angeles for dissolution of the marriage and requested the court to award her custody of the children. Father immediately filed an application for return of the children to Israel under the Convention. The district court found that the children's habitual residence was in California, not Israel and denied father's petition for return. The 9th Circuit reversed, with Judge Kozinsky delivering the court's opinion.

First, Mozes posits that one cannot acquire a new habitual residence unless there is first an intention to abandon the older one. Mozes, supra,1075-1076. When the intent issue becomes significant, the court cites to the following language: "in those cases where intention or purpose is relevant -for example, where it is necessary to decide whether an absence is intended to be temporary and shorttermthe 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." [Footnote 24 - E.M. Clive, The Concept of Habitual Residence, 1997 Jurid.Rev. 137, note 7, at 144.]

Mozes finds three possible scenarios where parental intention plays a role in determining habitual residence. The first is where the intent of both parents is in concordance to move to a new habitual residence. Here, the intent element is clear, even though one of the parents has misgivings (communicated or uncommunicated) about the relocation. Feder v. Evans-Feder, supra, 63 F.3d 217. Second, there are situations where it is clear that a child's relocation from a habitual residence was obviously intended for a specific period of time. Here, courts have typically found an absence of the requisite intent to acquire a new residence [FN23]. Third, cases which are conceptually more difficult are those which involve a situation where there was an initial shared intent to allow the child to remain away from the habitual residence for an undetermined period of time. Here, Mozes finds that an inference may arise that the parties agreed to an abandonment of the previous habitual residence. The time factor becomes more important in the latter case, because the time period involved with the relocation must be for an appreciable period, that is, one in which the facts demonstrate that the child has become settled or "acclimatized" in the new place. Mozes concludes the discussion on this topic with the holding that: "we conclude 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.´ Id. at p. 1079.

In this case it is abundantly clear that a shared or mutual intent between Ms. A. and Mr. F. as to C.'s residence never existed. Thus, while the factual scenarios in Mozes are relevant as a background tapestry of the law regarding parental intent, none of those scenarios demonstrate a clear connection to the factual situation which exists in this case. The evidence shows that Ms. A. was the only person determining C.'s residence and the course of his travels with her. This was apparent both before his birth and for his entire life. There is no evidence to demonstrate that Mr. F. contributed to the decisions affecting where C. lived, nor is there evidence that he voiced any apparent objection to where C. lived and traveled, until September, 2003. He did not contribute to C.'s financial support, nor did he become

involved with the child's medical care. The evidence demonstrates that decisions regarding every phase of C.'s life since his birth – health care, education, language, travel, and place of residence – were exercised solely by Ms. A.

In essence, by his actions and his inaction, Mr. F. conferred upon Ms. A. the de facto (if not de jure) right to determine C.'s habitual residence. What reinforces this conclusion is the fact that Mr. F. and Ms. A. never intended to, nor did they actually live together as a family. Certainly, there were periods where Mr. F. joined Ms. A. at her various residences in Italy, Belgium and the United States. Ms. A. also spent time with Mr. F. and his family. These contacts were meant to facilitate Mr. F.' contact with the child, and the contact with P.F. and L. Despite this amiable arrangement, from the beginning of Ms. A.'s plan to have a child, it was apparent that she intended the family unit to be herself and her child, and that she would conceive, give birth to, and raise the child as a single mother. In fact, her career not only permitted, but seemed to require this type of flexibility. All of the working assignments which Ms. A. describes are of short duration, and her base of operations remained in the United States. As such it appears that Ms. A.'s intent alone, is relevant to fixing C.'s habitual residence. To the extent of the broad statements that "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" (Mozes, supra), it is Ms. A.'s intent which must be considered determinative.

The foregoing analysis was challenged by Petitioner at final argument, on the basis that it impermissibly considered issues of "best interests" of the child, or that the analysis indicated that the court was allowing considerations of who was the best parent. The argument misses the point of the discussion. It is highly relevant to consider what the actual facts were concerning which parent exercised what authority over the child as that bears upon whether or not there was a shared intent as to what the habitual residence might be. The best indication of whether there was a mutual, pre-existing, or shared intent, or an absence of such an intent is what actually occurred with regard to the child and what the parents actions were (not what their hidden intent might have been) [FN24].

The determination of a child's habitual residence is a fact-intensive inquiry. As such it is necessary to consider a broad range of facts which are relevant to the issues in dispute. Having done so, however, the court draws no conclusions from any of the evidence presented by the parties as to which parent is the "better parent" or which parent is entitled to custody. These latter issues must not seep into judicial anaysis in Hague Convention proceedings.

Mr. F. argues that the enrollment of the child in preschool some days before Ms. A. departed with C. in September 2003 is evidence of C.'s settlement in Italy. (See Footnote 7, supra). Moreover, Mr. F. argues that C. was with him three full months before September 23, 2003, and that this length of time should establish the fact that his last period of time in Italy qualifies as his habitual residence. This, coupled with the allegation that the child was forcibly removed from his presence, is a strained interpretation of the actual facts concerning C.'s presence in the F. household. First, the fact that the child was enrolled in day care by Mr. F. approximately one week before his mother retrieved him is an indication that the period of time C. was with his father was best represented by Ms. A.'s account of the facts. Secondly, even assuming that Mr. F.' account is correct, that the child was with him for three months before he was to leave for the United States, this period of time, in and of itself, would be insufficient to make Italy the child's habitual residence because Ms. A. had already determined that she and C. were leaving Italy. It is manifestly clear and documented that Ms. A.'s intent was to return to the United States with C. for approximately three to four months, and then proceed on to Belgium to complete a contract

for *. This was to be her last international contract which required her to remain in Europe for such a period of time which would be inconsistent with C.'s attendance at school in the United States. It is only father's prevention of her leaving Italy which ultimately dissuaded her from temporarily living in Belgium before her eventual return to a more permanent relocation in California.

It is clear that in September, 2003, C. was being detained from his mother, and that the use of coercion was being exercised by the F. family. A child who is compelled to remain or return to a certain locale cannot be said to have established a voluntary habitual residence. See Ponath v. Ponath, 829 F.Supp. 363 (D. Utah 1993). As a postscript to this discussion, comment needs to be made about the absence of consideration of the child's intent. It is rarely helpful to focus to any extent upon the presence or absence of arguments regarding a child's intent to select a habitual residence. Infants and small children merely accompany their parents to wherever the choice of abode may be. This should not be confused with the issue of "settlement" however, which can be a determination which focuses upon the facts and circumstances surrounding the child [FN25].

In the case before us, Mr. F. attempts to support his position that Italy is C.'s habitual residence by counting the number of days the child was in Italy versus the United States. Habitual residence can rarely be determined by the mere calculation of the periods of time that a child has spent in various locations. A longer stay in one location may not necessarily compel the conclusion that the place has qualified as the child's habitual residence. For example, in Harsacky v. Harsacky, 930 S.W.2d 410 (Ky. App. 1996), two children born in the United States but the entire family returned to mother's country of origin, Finland, to live for almost three years. The family then returned to the United States for what was intended to be a permanent stay. One month later, however, the parties separated. Despite the fact that the children had only been in the United States for approximately one month prior to litigation commencing, the court found that the children's habitual residence had changed from Finland to the United States.

Cases which have dealt with parents who maintain a highly mobile pattern of habitation offer little help in the present context. Zuker v. Andrews, 2 F.Supp.2d 134 (D. Mass. 1998), deals with an unmarried mother and father, who nevertheless had an intact family relationship. The court analyzed the pattern of the child's habitual residence as it shifted with the residences of his mother and father. The pattern of residences was as follows:

Period: United States / Argentina

June 1993 – March 1994: 10 months / -

April 1994: - / 1 month

April – November 1994: 6 months / -

November 1994 – May 1995: - / 7 months

May – November 1995: 6 months / -

November 1995 – June 1996: - / 8 months

June 1996 – February 1997: 10 months / -

As shown by the foregoing table, the parents alternated residences between the United States, the mother's country of origin, and Argentina, the father's country of origin. The

father and consented to the mother's return to the United States with the child at various times. The court in Zuker determined that beginning in November, 1994, the habitual residence of the child was the place in which the child actually lived.

"[For the periods noted] [the child] was a habitual resident of the country in which he was actually situated. This is certainly true from the point of view of [the child]. It is also true from the point of view of the shared intentions of the parents. Both parents intended that [mother] and [the child] would live in Argentina while [father] finished the CD, both parents agreed to [mother] and [the child] returning to the United States for six months in 1995, and both parents agreed to [mother's] return with [the child] to Argentina in November, 1995. While I find that the expectation of both parents differed as to how long they and [the child] would stay in Argentina in on each occasion, each of the trips back and forth was essentially the product of an agreement between the parents, at least to the extent that the trips would take place. In fact, [mother's] return to the United States in June, 1996 with [the child] was agreed to between the parents, but there was no agreement at that time on the length of stay in the United States." Id., 2 F.Supp. 2d at 138.

The court then found, based on its prior analysis, that the United States was the habitual residence of the child immediately before the alleged wrongful retention. Zuker lends no assistance in this case, because in the former situation, the parents were agreed as to what the child's travels would be. Here, there does not appear to be any evidence at all that there was such a mutual intent. The evidence shows that the mother's expressed intent was the intent which governed the relationship between Mr. F. and Ms. A., and that he fully acquiesced to her plans until September, 2003.

The unique facts of this case lend to the possible conclusion that on September 23, 2003, C. actually had no habitual residence. Cases in which courts have found that children have no habitual residence tend to fall outside the typical factual patterns which are regularly encountered in cases arising under the Convention. The recent case of Delvoye v. Lee, 329 F.3d 330 (3rd Cir. 2003) cert. den. 72 U.S.L.W. 3281 (U.S., Oct. 20, 2003) shares common ground with the instant case. In Delvoye, Father was a resident of Belgium and Mother a resident of New York. Father spent about one quarter of his time in New York, and in August 2000, Mother moved into Father's New York apartment. In November 2000, mother traveled to Belgium on a three-month tourist visa, to have the child. Mother intended to stay only 3 months in Belgium to have the baby. She lived out of her suitcases. By the time the baby was born in May, 2001, the parties relationship had deteriorated, and father consented to mother and the child returning to New York. Father visited mother and child over the next two months, attempting to reconcile. While reconciliation efforts failed, father petitioned for return of the Child to Belgium. The petition was denied at the trial level, and the 3rd Circuit affirmed.

The court tackled the difficult question as to how to determine the habitual residence of a child where there was no intact relationship upon which to create a habitual residence. The court noted that:

"Where a matrimonial home exists, i.e., where both parents share a settled intent to reside, determining the habitual residence of an infant presents no particular problem, it simply calls for application of the analysis under the Convention with which courts have become familiar. Where the parents' relationship has broken down, however, as in this case, the character of the problem changes. Of course, the mere fact that conflict has developed between the parents does not ipso facto disestablish a child's habitual residence, once it has come into existence. But where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence." Id. at p. 333.

As to the lack of a shared intention to form a habitual residence, the court held that:

“Because petitioner and respondent lacked the ‘shared intentions regarding their child's presence [in Belgium],’ Feder, 63 F.3d at 224, Baby S did not become an habitual resident there. Even if petitioner intended that he become an habitual resident, respondent evidenced no such intention. Addressing the status of a newborn child, one Scottish commentator said:

[A] newborn child born in the country where his ... parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his ... mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability.

Dr. E.M. Clive, "The Concept of Habitual Residence," The Juridical Review part 3, 138, 146 (1997).” Id. at p. 334.

In W and B v H [2002] 1 FLR 1008 (United Kingdom – Family Division - 2002) [FN26], a British surrogate mother contracted with a California mother and father to carry and birth a child. The surrogate mother was implanted with an egg from an anonymous donor, and the egg was inseminated by W. When the surrogate mother returned to England, she discovered that she was carrying twins. At this point, a breakdown occurred between the surrogate mother and the parents in California. Upon the birth of the twins in England, the surrogate refused to turn the children over to the California couple. The California couple filed a Hague Convention petition for the return of the children to California. In refusing the petition for return, the English court held that the children were not, and never had been habitually resident in California. This was despite the fact that a California court had entered custody orders granting the California couple sole legal and physical custody of the twins. The English court further held that the children were not habitually resident in England either, having no biological connection with the surrogate mother, and having been the subject of US legal proceedings. The children had not acquired a habitual residence.

The court relied upon a series of UK cases which analyzed the theories relating to the acquisition of a habitual residence or the loss of it. The court considered whether the twins were habitually resident in any country. In dealing with this issue, the court rejected a static rule which woodenly aligned the child’s habitual residence with the intent of the person who had the responsibility for care of the child. The court concluded that:

“[23] Whilst I would not assert that as a matter of fact no child can have an habitual residence where he has never been and whilst certainly I cast no doubt on that factual conclusion in B v H (Habitual Residence: Wardship) [2002] 1 FLR 388, I remain hesitant. It seems to me that Charles J's propositions cited above, if taken out of the context of his particular case, run the very risk against which the Court of Appeal have repeatedly warned namely confusing a legal and a factual proposition. If Charles J is asserting as a matter of law that a baby takes the habitual residence of his parents then that is to confuse domicile with habitual residence and I would have respectfully to disagree. If what he asserts is a proposition of fact, then, by definition, it cannot be good for all cases. Each one must stand alone.

“[24] In this case these children were born in England to a woman with whom they have no biological connection. During their brief lives they have lived in England whilst English and Californian proceedings are on foot to determine their future. And for as long as they live in England with no order in existence, H is in law their mother here and no one else holds parental responsibility. On the other hand their only biological connection is in California. It was there that they were intended to be born and it was there that they were intended to live

and be brought up. It was in California that H first sought the assistance of the courts and placed herself and her children subject to that court's jurisdiction. As Mr. Hilton expressed it, from a lawyer's point of view this case is California through and through.

"[25] I have found this point extremely difficult and I have weighed and pondered all these issues with anxious care. In the end I have come to the conclusion that these children, whatever the legal connections may be, simply are not habitually resident in California nor have ever been. In my view to say that they are so resident involves a degree of artificiality inconsistent with a proposition of fact. They are not in California and have never been so. H (as all agree) is lawfully resident in England, the Californian court accepting that it could not restrain her movements. They are and always have been with her. By the same token I am equally unwilling to find that they are habitually resident in England. Although they are with H who in English law is their mother, they have no biological connection with her. They have always been intended to be American children and their future in that regard remains wholly undecided. On the singular facts of this case I have come to the conclusion that at the moment these children have no place of habitual residence, and I so find." Id.

This court is mindful of the difference between domicile and habitual residence. The fact that Ms. A. always intended to return to the United States to establish a more permanent residence is not a fact upon which this court relies. That was an expression of her concept of domicile, and it is not relevant to these proceedings. Her "plan" for C., however, is relevant. As distinguished from domicile, her plan which she actually carried out [FN27], was to travel with the child throughout Europe until C. was of school age, and at that time reduce her international travel to a minimum. Mr. F. points to no evidence which controverts the fact that Ms. A.'s plan was agreed upon by the parties. Other cases finding explicitly or implicitly that a child may have no habitual residence are Robertson v. Robertson (1997) 1998 SLT 468, 1997 GWD 21-1000 [FN28] Inner House of the Court of Session (Second Division) (Scotland); Dickson v. Dickson 1990 SCLR 692 [FN29], 1990, Inner House of the Court of Session (Scotland). It appears as a general rule that cases which have reached the conclusion that a child did not have a habitual residence at the time of removal or retention, seem to focus on the lack of concordance between the intent of the parent or parents entitled to fix the habitual residence and the place where the children are located.

One case which rejected the invitation to find no habitual residence was In Cooper v. Casey, (1995) FLC 92-575 from the full Court of the Family Court of Australia [FN30]. The parties spent most of their time together between 1989 and 1994 in the United States. There were frequent trips to Australia, the longer of which lasted two to five months, although there were shorter sojourns as well. In 1993 mother moved from the United States to France without father's permission, returned to the United States for several months and thereafter relocated the children to Australia. The trial court rejected the mother's argument that the children had no habitual residence, and was affirmed by the full Family Court on appeal.

The issue whether the children in the Cooper case had no habitual residence was rejected by the court on the facts of the case. The court expressed a reluctance to find that children had no habitual residence, as the consequence of that finding would inhibit the protections provided by the Hague Convention. A graphic representation of the time the family spent in the United States (blue), Australia (red) and France (yellow) is as follows:

[THE CHART IS NOT AVAILABLE IN THIS FORMAT]

The court, quoting at length from a UK case, In Re F, held as follows:

"It may be commented in relation to the above passage, that the period with which we are presently dealing is a much longer one than that in Re F (A Minor) (Child Abduction) (1992)

1 FLR 548 and it may also be commented that, although evidence was given that the wife and children were planning to return to France, the evidence suggested that that was for a limited period only, for the summer holidays. In those circumstances, it seems difficult to argue that the period that had elapsed following their return to France did not amount to a "settled purpose" within the meaning of the term as used in the above passage.

"In Re F, supra, Butler-Sloss LJ delivering the principal judgment of the Court of Appeal, pointed to conflicting evidence which could conceivably have justified a finding that the children in question had abandoned their principal place of residence of the United Kingdom and not acquired one in Australia and said, at pages 555-6:

" 'The judge was entitled to make the finding that the family did intend to emigrate from the UK and settle in Australia. With that settled intention, a month can be, as I believe to be in this case, an appreciable period of time. Looking realistically at the position of A, by the time he left Sydney on 10 July 1991, he had been resident in Australia for the substantial period of nearly three months. Mr. Setright, wearing two hats, on behalf of the mother and of the Lord Chancellor as the central authority, reminds us that it is important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing. Paraphrasing his argument, we should not strain to find a lack of habitual residence, where on a broad canvas, the child has settled in a particular country.' "

"As was pointed out during the course of argument in the present case, the making of a finding that a child has no habitual residence could easily operate to defeat the purpose of the Convention and leave children open to the possibility of repeated abductions by both parents. In regard to the issue of habitual residence: see also the remarks of Sir Stephen Brown, P. in V v B (A Minor) (Abduction) 1991 FLR 266, particularly at 271-2. For the reasons stated by Ellis J it seems clear that on any view these children acquired an habitual residence in the United States of America on their return from France in 1994, if indeed they ever lost it prior to that date."

The reluctance of the Cooper court to find that a child has no habitual residence, is understandable given the intensity of the child's association with the United States. In retrospect, Cooper tends to fall into the category of cases which might be described as showing a more typical fact pattern than not.

The petitioner in a case for return of a child under the Convention bears the burden of proving the wrongfulness of the removal or retention of the child [FN31]. In the instant case, Mr. F. has failed in this burden. The facts as found by the court show a pattern of travel consistent with Ms. A. fulfilling her contracts in three countries nearly simultaneously. It appears that the base of her operation changed between Rome, Brussels, Milan and California. It was Ms. A.'s clear purpose to travel, and expose C. to different cultures, languages, and experiences. There is no discernable purpose shown to remain in any one place for purposes other than those relating to work. From the time of the child's birth until the present day, there never was a joint intent on the part of both Mr. F. and Ms. A. to establish a family residence or a permanent abode. This was not in the nature of their relationship. It is therefore manifest that Italy is not C.'s habitual residence, nor was it ever intended to be so.

Mr. F. argues that this case shows that the activities of all of the parties were "Italy centered", and for this reason, Italy should be chosen as the child's habitual residence. Even if the court accepts that there was substantial time spent in Italy, presence alone in a country is not sufficient to confer habitual residence. It must be accompanied with an element of

intent which approximates a "settled purpose" (In Re Bates, supra.) This intent can be express, or it can be inferred from conduct. Here, the court does not draw an inference of settled purpose from the facts.

It is not necessary to the denial of Mr. F.' application under the Convention to determine that Italy is not the child's habitual residence because some other country is the child's habitual residence. In contrast to the dynamic situation the court in Delvoye v. Lee, supra, confronted, this case does not involve having to make a choice as to the child's habitual residence. The facts of this case do not require the court to specifically identify the child's habitual residence, since there is no controversy which is ripe for decision other than the question whether Italy is the child's habitual residence. It is enough to say that Italy is not that place.

Having found that Italy is not C.'s habitual residence, the court need not speculate as to whether the contacts with the United States, coupled with Ms. A.'s intentions and actions, are sufficient to establish habitual residency here. The danger, of course, is if the child is abducted from the United States, there is no formal court declaration which identifies the child's habitual residence, which makes the maintenance of a Hague application problematic. It is not likely, however, that the unsettled nature of the child's habitual residence will last for long. C. has just celebrated his 5th birthday, and the formal process of education will begin. The two cases which are pending before this court concerning custody and parentage will ultimately determine the nature of the child's contacts with his parents and the locale in which he will live. California has jurisdiction under its own laws to deal with the issue of custody of C., and the court will ultimately make custody orders.

The parties have tendered evidence and opinions concerning the issue whether under the Convention Mr. F. possesses rights of custody which are entitled to enforcement [FN32]. Because of the holding of this court regarding the issue of habitual residence, it is unnecessary to consider or decide the issue of Mr. F.' rights of custody under the Convention. At final oral argument on this case, Mr. F. posited that he had enforceable custody rights under Italian law. The court makes no conclusions regarding this issue as the burden regarding his rights is not entirely borne out by the evidence. It is not essential to the determination of this case to address this question of custody rights, since the court's decision not to return is based upon the finding that Italy is not C.'s habitual residence. That being the case, the issue of rights of custody as the same pertains to this proceeding, is moot.

IV. CONCLUSION

For the foregoing reasons, Mr. F.' application for the return of C. to Italy is hereby DENIED. The stay on case numbers SDR 22033 and SDR 22035 is hereby vacated, and those cases may proceed in due course. The clerk of the court is directed to return the passports of Ms. A. and C. to their respective owners.

Dated: April 21, 2004

JAMES D. GARBOLINO

SUPERIOR COURT JUDGE

FOOTNOTES

[1] Hague Convention on the Civil Aspects of International Child Abduction, Senate Treaty Doc. 11 99th Cong., 1st Sess. 9 (1980) reprinted in 19 I.L.M. 1501(1981).

[2] "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 the receipt of the notice. Convention, Article 16.

[3] Case NO. SDR 22033, an application under the Uniform Parentage Act to establish parental relationship; and No. SDR 22035, an action for the Exclusive Custody of a Minor Child.

[4] No particular procedure is required for a party to make application to a court for the return of a child under the Convention. Text & Legal Analysis, 51 Fed. Reg. 10494, 10507. Consequently, this court ordered the filing of the application without the necessity of a formal document requesting relief. A Petition for return of a child made through the Central Authorities is an administrative document, however because of the detailed nature of the information which the petition requires, it may reflect all of the information necessary to adjudicate the application. (See Text & Legal Analysis, 51 Fed. Reg. 10494, 10508). Since Convention cases must be handled in an expeditious fashion, the court has dispensed with any formal requirement that the application must specifically relate to a specific procedure authorized by statute such as habeas corpus, or issuance of a writ in lieu of a writ of habeas corpus. This procedure might not be suitable in every case, but the Respondent was already before the court in two separate cases, and she and her counsel appeared voluntarily to contest the application. The application provides sufficient notice of the nature of the relief sought. As such, the requisites of due process (notice of the proceedings, the right to appear and defend, an opportunity to be heard, and the right to counsel) have been met in this case. Additionally, counsel for each party has agreed to this process of lodging the initial application for return as the moving document in this case.

[5] Mr. F. made an informal application for permission to visit with C. while he was in California. Recognizing that such a request might involve consideration of "best interests" arguments, the court referred the issue of access ("visitation" under California law) to the Presiding Judge, who, after referring the matter for recommendation by Family Court Services, made certain orders for visitation to take place. Before doing so, however, this court held that it had jurisdiction to make orders regarding access during the pendency of the Petition for return of the child pursuant to Article 21 of the Convention. Li v. Hue 296 F.Supp.2d 1009 (USDC Minn. 2003).

[6] Centro di Lingua e Cultura Italiana Per Stranieri.

[7] It appears that Mr. F. was responsible for a single period of signing C. up for day care, this being approximately one week before he and the members of his family detained C., and refused to allow him to return to his mother's care. This enrollment is too close in proximity to C.'s detention to be simply coincidental with the F. family's refusal to return the child to his mother. It appears contrived.

[8] Pursuant to this court's order in November, 2003, the court ordered that C. could not be removed from California pending resolution of the Hague Convention petition.

[9] Ms. A. counters that this is one of her automobiles, and that she also made arrangements to have the car shipped to Belgium, primarily because of the high cost of renting automobiles in Europe.

[10] Preamble to the Convention, Senate Treaty Doc. 11, 99th Cong., 1st. Sess. 9.

[11] Elisa Perez-Vera, Explanatory Report in 3 Actes et documents de la Quatorzieme session (1982), fn. 1 (hereinafter Perez-Vera Report). Madame Perez-Vera (now Justice Perez-Vera) was the official reporter to the Hague Conference for this Convention. Her report is recognized as the official history and commentary on the Convention). Pub. Notice 957, 51 Reg. 10494, 10503.

[12] 42 U.S.C. 11603 "(a) Jurisdiction of courts. The courts of the States and the United Sates district courts shall have concurrent original jurisdiction of actions arising under the Convention."

[13] For a list of countries which are bound by the convention by acceptance, ratification or accession, see Hague Conference - Status sheet Convention # 28 (http://www.hcch.net/e/status/abdshte.html)

[14] Italy and the United States were both "member states" of the Hague Conference on Private International Law at the time of the approval of the Convention for adoption by other countries. As members, the treaty automatically enters into force between the member states which have already ratified the treaty and those who subsequently ratify it. The United States ratified and implemented the treaty on July 1, 1988. Upon the ratification by Italy on May 1, 1995, the treaty entered into force between these countries on the latter date.

[15] Convention, Articles 1 and 3.

[16] "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 laws of the State in which the child was habitually resident immediately before the removal of 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 subparagraph 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." Convention, Article 3.

[17] The Hague Convention is an international instrument, which produces a vast body of international case law. It is appropriate to consider the decisional law of sister states who are party to the Convention for guidance. Air France v. Saks, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). The decisions which are cited herein are available on the official research website of the Hague Conference on Private International Law, which is called INCADAT. It can be accessed at http://82.161.226.26/index.cfm. For access to full text and search capabilities, a password must be applied for, which is free of charge.

[18] In order for the Convention to apply, the child must have been "habitually resident in a Contracting State immediately before any breach of custody or access rights." Essentially, if the child was not removed from a country which was the child's habitual residence, there is

no right of return to that country. Convention, Article 31; Text & Legal Analysis, 51 Fed.Reg.10494, 10504 (1986).

[19] "We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile." Perez-Vera Report, ¶66.

[20] Friedrich v. Friedrich, 983 F.2d 1396, 1401-1402 (6th Cir. 1993) (Friedrich I). See also Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001), "Clearly, the Hague Conference wished to avoid linking the determination of which country should exercise jurisdiction over a custody dispute to the idiosyncratic legal definitions of domicile and nationality of the forum where the child happens to have been removed." Id. at 1071

[21] Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995). Accord, Silverman v. Silverman 338 F.3d 886 (8th Cir. 2003); Mozes v. Mozes, 239 F.3d 1067, 1073 (9th Cir. 2001).

[22] Although Feder is often cited for the proposition that a court should place weight upon the facts and circumstances surrounding the child as opposed to parental intent, it is a case where intent was relevant, even though the mother in that case had a quick change of heart regarding the selection of the child's new habitual residence. Cf. Gitter v. Gitter 2003 WL 22775375 (USDC EDNY 2003).

[23] In re Application of Morris, 55 F.Supp.2d (D.C. Colo. 1999) [relocation to Switzerland for 10 months for a teaching sabbatical]; Kanth v. Kanth, 79 F.Supp.2d 1317, 1319 (D.Utah 1999); [Teaching positions of 9 months each in duration]; But where the period of time becomes longer, courts seem reluctant to enforce the "temporary" nature of the relocation, and tend to find that the children have become settled. See Shalit v. Coppe, 182 F.3d 1124 (9th Cir. 1999) [three year period in Israel]; Toren v. Toren 191 F.3d 23 (1st Cir. 1999) [two years, but petition filed prematurely] cf. Ron v. Levi 279 A.2d 860, 719 N.Y.S.2d 365 (2001) [18 months is not temporary].

[24] The federal circuits are not in agreement as to the standard for review after a trial court's determination of habitual residence. See, e.g. Feder v. EvansFeder, 63 F.3d 217, 222 n. 9 (3d Cir.1995); Mozes, supra, citing United States v. McConney, 728 F.2d 1195, 1202 (9th Cir.1984) (en banc) (quoting Commissioner v. Duberstein, 363 U.S. 278, 289, 80 S.Ct. 1190, 4 L.Ed.2d 1218 (1960)), abrogated on other grounds, Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). Nevertheless, a determination of habitual must, perforce, depend upon the court's analysis of how the parties acted vis-à-vis the child and each other. It is from an analysis of those facts that the court must determine whether those facts are relevant to an intention, either joint or unilateral which bears on the issue of Habitual residence.

[25] "There is general agreement on a theoretical level that because of the factual basis of the concept there is no place for habitual residence of dependence. However, in practice it is often not possible to make a distinction between the habitual residence of a child and that of its custodian. Where a child is very young it would, under ordinary circumstances, be very difficult for him ... to have the capability or intention to acquire a separate habitual residence. Paul Beaumont & Peter McEleavy, The Hague Convention on International Child Abduction 91 (1999). An English court has said: 'The habitual residence of the child is where it last had a settled home which was in essence where the matrimonial home was.' Dickson v. Dickson, 1990 SCLR 692. And an Australian court has stated: 'A young child cannot acquire habitual residence in isolation from those who care for him. While 'A' lived with both parents, he shared their common habitual residence or lack of it.' Re F (1991) 1 F.L.R. 548,

551.". Delvoye v. Lee, 329 F.3d 330 (3rd Cir. 2003) Cert. Den. Delvoye v. Lee, 72 U.S.L.W. 3281 (U.S., Oct. 20, 2003).

[26] Full text can be viewed at http://www.hcch.net/incadat/fullcase/0470.htm.

[27] Ms. A. noted that although the regulations of the EU do not require passport controls between countries, she frequently stopped at borders to have C.'s passport stamped, as a souvenir of his travels. This was born out by an examination of the actual passport.

[28] This case may be found on INCADAT.

[29] This case may be found on INCADAT at http://82.161.226.26/index.cfm?fuseaction=convtext.showFull&code=73&lng=1.

[30] INCADAT location: http://www.hcch.net/incadat/fullcase/0104.htm.

[31] §42 U.S.C. 11603(e)(1)(A); Pesin v. Osorio Rodrigues 77 F.Supp.2d 1277 (S.D. Fla. 1999); Blondin v. Dubois 189 F.3d 240 (2nd Cir. 1999).

[32] This issue is one which has created significant disagreement between courts, Central Authority officials, and academics. See, e.g. Furnes v. Reeves ---F.3d.--- 2004 WL 434626 (11th Cir. 2004); Croll v. Croll, 229 F.3d 133 (2d Cir.2000); Fawcett v. McRoberts, 326 Fed.3rd 491 (4th Cir. 2003), cert. den. 124 Sup.Ct. 805; 229 Fed.3rd 133 (2nd Cir. (NY) 2000), cert. den. 122 Sup.Ct. 342; Silberman, L., "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues," New York University Journal of International Law and Politics, Fall 2000, 33 N.Y.U. J. Intn't. Law & Policy 221.

EXHIBIT A: Is not available in this format.

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