No. 71130-0
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

IN RE: PETITION FOR RETURN OF CHILDREN UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

ELIKA KOHEN,

Petitioner / APPELLEE v.

MARIE-CATHERINE SMITH,

Respondent.

BRIEF OF RESPONDENT

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A. INTRODUCTION

The Appellant, Elika Kohen, and the Respondent, Marie-Catherine Smith, have two children together, Anya-Marie, age 4, and Lydia-Maayan, age 2). On Nov. 13, 2013, the Trial Court ordered the Children's return to Canada, under the Hague Convention on the Civil Aspects of International Child Abduction. Mr. Kohen appeals that order. Ms. Smith respectfully requests the Court dismiss Mr. Kohen's appeal and award attorney's fees and costs to her.

B. ASSIGNMENTS OF ERRORS

Assignments of Error

Ms. Smith assigns no error to the trial court's decision.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred by ordering return of the children to their habitual residence Canada pursuant to the Hague Convention on the Civil Aspects on International Child Abduction.

2. Whether the trial court erred in reserving an award of attorney's fees to Ms. Smith for the Canadian court based upon the Hague Convention.

C. STATEMENT OF THE CASE

1. Background.

Mr. Kohen and Ms. Smith were married on February 1, 2010 in Odgensberg, New York. At the time of the marriage, the parties lived in Ottawa, Canada, with Mr. Kohen's then 7-year-old son from a previous marriage, Hezekiah. The parties have two daughters of the marriage, Anya-Marie Kohen, DOB September 12, 2010, and Lydia-Maayan Kohen, DOB March 15, 2013. Anya was born in Seattle, Washington and Lydia-Maayan was born in Ottawa, Ontario, Canada. Mr. Kohen is an unemployed, retired veteran. Ms. Smith is currently unemployed. CP 147-153.

In August 2010, the parties moved to Seattle because Mr. Kohen told Ms. Smith that he had a good job opportunity. Mr. Kohen moved to Seattle in July 2010 while Ms. Smith stayed in Canada with his son. Ms. Smith was pregnant with Anya at the time. When Ms. Smith arrived in Seattle, she learned that Mr. Kohen did not have a job. At the end of August, Mr. Kohen started working for Boeing as a solution architect. The parties' daughter, Anya, was born on September 12. Mr. Kohen was terminated from Boeing in November 2010. *Id.*

In January 2011, Mr. Kohen enrolled in North Seattle Community College to study architecture. He was able to attend school through his VA

benefits, but he did not finish his course and dropped out. Because he dropped out, the parties had to repay the cost to Veteran's Affairs. Ms. Smith was unable to work in the U.S. because she did not have a green card. *Id.*

From June 2011 to February 2012, the parties lived off of the sales of personal property and Mr. Kohen's veteran's benefits of approximately $716/month. Ms. Smith was pregnant with the parties' second child. Ms. Smith moved back to Canada knowing that the parties' financial situation was not improving. The parties agreed that Ms. Smith would file Canadian immigration paperwork for Mr. Kohen and his son to live and work in Canada. Ms. Smith's mother paid for the plane tickets for Ms. Smith and Mr. Kohen's son, Hezekiah, to return to Canada. *Id.*

Ms. Smith arrived in Canada on February 5, 2013 with Anya and Hezekiah. They moved into Ms. Smith's parents' home in Bristol, Quebec. Mr. Kohen lived with a friend in Seattle for a few weeks, then found a job in New Jersey. Ms. Smith had the parties' second child, Lydia-Maayan, on March 15, 2012 in Ottawa, Canada. Mr. Kohen was not present for her birth. Mr. Kohen visited the day after the birth, stayed for a week, then returned to New Jersey. Thereafter, Mr. Kohen came and went for two weeks at a time. *Id.*

In July 2012, Mr. Kohen quit his job in New Jersey and returned to

Canada, having decided that the family should live together in Montreal. In October 2012, Ms. Smith started working at Starbucks and within a month was promoted to supervisor. Mr. Kohen stayed home with the children. He did not enroll Hezekiah in school. Mr. Kohen did not have permission to work or attend school in Canada. In February 2013, Ms. Smith applied for visitor's visas for Mr. Kohen and Hezekiah. The applications were pending and a few months later they learned that they did not submit proper fees. Mr. Kohen was allowed to stay in Canada by immigration services. Also in February 2013, Mr. Kohen filed his U.S. income tax return with the IRS for 2012 and received a refund of approximately $10,000. He then thought it was a good time for the family to immigrate to the U.S. He convinced Ms. Smith to let him go with the children and that it was important not to separate the three children. *Id.*

2. Mr. Kohen Abducted and Wrongfully Retained the Children.

Mr. Kohen left Canada on July 2, 2013 for Seattle, with Ms. Smith's consent as he was scheduled to return on October 2, 2013. Mr. Kohen failed to return to Canada with the children, thus wrongfully removing them from their home in Canada. *Id.*

In August 2013, Mr. Kohen suggested Ms. Smith file for separation. He alleged that Ms. Smith should not see her children because

of "psychological problems." On September 12, 2013, Mr. Kohen denied Ms. Smith access to speak with Anya and Hezekiah on their birthdays. On September 15, 2013, Mr. Kohen informed Ms. Smith that he would not return to Canada with the children and would remain with them in Seattle. Had Ms. Smith known Mr. Kohen would do that, she would have never consented to his departure from Canada with the children. *Id.*

Ms. Smith filed an application with the U.S. State Department for return of the children. The children were located in Snohomish County, Washington. Ms. Smith did not see her children for three months after they were abducted. Mr. Kohen refused to return the children. *Id.*

Mr. Kohen filed a Petition for Legal Separation in Snohomish County, Washington, falsely stating that the state of Washington had jurisdiction over the children, indicating "the children have no home state elsewhere." The children's home was (and is) in Canada, and has been since February 2012. *Id.*

3. The children were properly returned to Canada pursuant to the court order.

Ms. Smith requested the court order the children be returned safely to her in Canada in the shortest time possible, pursuant to the Hague Convention. Ms. Smith requested the court order Mr. Kohen pay for all expenses incurred regarding return of the children, including their airfare

and attorney's fees and costs. The court granted Ms. Smith's request and ordered the children be returned within 72 hours. The children were returned on November 14, 2013 and have been residing with Ms. Smith since.

4. Procedural History

Mr. Kohen filed a Petition for Legal Separation on September 27, 2013. Ms. Smith filed a Petition for Return of the Children pursuant to the Hague Convention on November 1, 2013. CP 195-200. The parties stipulated to stay Mr. Kohen's action for Legal Separation and an Order to Stay was entered on November 13, 2013. CP 293-295. The trial court ordered the children be returned pursuant to the Hague Convention on November 13, 2013. Mr. Kohen filed this appeal on November 13, 2013. CP 275-280.

D. SUMMARY OF ARGUMENT

The Hague Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 ("the Convention"), and the International Child Abduction Remedies Act ("ICARA"), 42 U. S. C. 11601 et seq., came into effect in the United States on 1 July 1988 set forth the following objects of the Convention:

> Article 1 (a): To secure the prompt return of children wrongfully removed from or retained in any Contracting State; and

> Article 1 (b): To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

This Court has jurisdiction pursuant to 42 U. S. C. 11603.

The Hague Convention is a treaty, and thus on par with the United States Constitution, superseding state law.

> The objects of the Convention are (a) to secure the prompt return of children wrongfully removed from or retained in any Contracting State (Article 1 (a)); and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States (Article 1 (b)).

The Convention is enforced in the United States via ICARA. Original jurisdiction is concurrent in both state and federal courts. 42 USC 11601, Sec. 4 (a).

A person seeking to initiate judicial proceedings for the return of a child may file a civil action in the appropriate court in the jurisdiction where the child is located. In this case, the children were located in Snohomish County, Washington at the time the Petition for Return of Children was filed.

Mr. Kohen has not shown that the trial court erred in ordering the children be returned to their habitual residence, Canada. Ms. Smith showed that she did not agree to the retention of the children in the U.S.

and that, but for Mr. Kohen's retention of the children in the U.S., she would have exercised her rights of custody.

E. ARGUMENT

1. Ms. Smith demonstrated to the trial court that her custody rights were breached.

Mr. Kohen's argument that Ms. Smith failed to show that her rights of custody were breached is without merit. At the time the children were retained in the U.S., Ms. Smith was the children's mother, residing in Canada, the habitual residence of the children. The trial court record substantiates this fact. Further, contrary to Mr. Kohen's assertions, Ms. Smith never directed him to retain the children in the U.S. Again, there is no factual evidence to support this claim.

Mr. Kohen also argues that the Hague Convention does not preclude parents from acting together to change their habitual residence. This argument is irrelevant to the issue before this court, which is whether the trial court erred in ordering the return of the children to their habitual residence, Canada. Mr. Kohen provided no evidence to the trial court that he and Ms. Smith were working together to change their habitual residence *or* that of the children.

Mr. Kohen further argues that because Ms. Smith did not even attempt to show how her rights of custody were breached under

Canadian law, she did not fulfill ALL necessary burdens of proof required by law. This argument also fails for the reasons stated above.

Mr. Kohen did not show that Ms. Smith failed to demonstrate that her custody rights were breached. The trial court record supports Ms. Smith's Petition for Return of Children and the court's order to return the children.

2. The trial court did not err in finding that Mr. Kohen wrongfully removed the children from Canada.

Mr. Kohen argues that "the allegation of wrongful removal is absurd." While Mr. Kohen is entitled to his opinion, he cites no legal or factual basis to support this opinion.

The Convention states as follows:

> Article 3
> The removal or the retention of a child is to be considered wrongful where -
> (a) It is in breach of rights and custody attributed to a person . . . under the
> law of the State in which the child was habitually resident immediately before the removal or retention; and
> (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention.
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.

In this case, Ms. Smith and Mr. Kohen were residing together

with the children at the time of the wrongful removal, and Ms. Smith was exercising her rights of custody. Ms. Smith agreed for Mr. Kohen to take the children to the U.S. in July and to return in October 2013. But for the wrongful removal from their habitual residence of Canada, Ms. Smith would have exercised her custody rights.

Article 12 of the Convention states:

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

The record clearly shows that Ms. Smith filed an application for the return of the children through the U.S. State Department on October 3, 2013, just one day after the abduction (Mr. Kohen was to return to Canada with the children on October 2, 2013). The language of the Convention is mandatory: the authority (in this case, the Snohomish County Superior Court), *shall* order the return of the child *forthwith.*

ICARA provides that "Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. 42 USC 11601 Sec. 2 (4). See also *Perez v. Garcia*, 148 Wn. App. 131, 198 P. 3d 539 (Wash. App. Div. 2 2009).

There are six defenses to an action of wrongful removal or retention of a child under the Convention, none of which apply to this case. Those defenses are set forth in the Articles 12, 13, and 20. These defenses are as follows: (1) more than one year has passed since the wrongful removal or retention, and the child bas become settled in his or her new environment; (2) consent or acquiescence by the left-behind parent; (3) the person seeking the return was not actually exercising his or her rights of custody at the time of the removal or retention; (4) the return of the child would expose him or her to a grave risk of harm; (5) the wishes of a mature child; or (6) a return of the child would violate the requested state's fundamental principles relating to the protection of human rights and fundamental freedoms. The first three defenses do not apply. At least one court has stated that the latter two defenses apply only in "extraordinary cases." *Friedrich v. Friedrich* (Friedrich I) 983 F.2d 1396, 1403 (6th Cir. 1993).

ICARA, rather than the Convention, established the burdens of proof required to establish a defense. See 42 U.S.C. §11601 et seq. In particular:

> "a respondent opposing the return of a child has the burden of establishing - (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and (B) by a preponderance of the evidence that any other exception set forth in article 12 or

13 of the Convention applies."

It is important to note that two factors limit the application of defenses to the return of a child. First, the defenses are to be construed narrowly, to avoid undermining the purposes of the Convention. In *Ryder v. Ryder,* the court noted:

> "[It was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly construing the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof. ...[The wording of each exception represents a compromise to accommodate the different legal systems and tenets of family law in effect in the countries negotiating the Convention, the basic purpose of each case being to provide for and exception that is narrowly construed." *Ryder v. Ryder*, 49 F.3d 369 (8th Cir. 1995).

The second important factor is that even if a defense is established, the defense is not conclusive. The court still retains the discretion to order the return of the child even if a defense has been proven:

> "Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order maildatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies." Text and Legal Analysis, 51 Fed. Reg. 10494, 10510 (1986); *Friedrich v. Friedrich* (Friedrich II) 78 F.3d 1060, 1067 (6th Cir. 1996).

If a defense is raised, the Convention allows the court to consider evidence of the child's social background while living in the habitual

residence. See Article 13, paragraph 5. Since the person wrongfully removing the child has easy access to evidence relating to the defenses, the Convention allows the left-behind parent to balance this evidence by submitting background information which bears on the child's life before his or her removal from the habitual residence.

a. One Year Rule. Does not apply.

b. Acquiescence or Consent. Does not apply. Ms. Smith did not acquiesce or consent to the children's removal from Canada.

c. Exercise of Parental Rights. Ms. Smith was exercising her parental rights prior to the abduction.

d. Grave Risk of Harm. The "grave risk of harm" alleged was that Ms. Smith has mental health issues. The trial court did not err in finding that the accusation was not credible. There was no substantiating evidence for the accusation: no medical records or treatment records. It is apparent that Mr. Kohen used this defense to attempt to justify his abduction of the children, after the fact, by filing a restraining order in the Snohomish County Legal Separation action.

The defense of '"grave risk of harm" must be proven by clear and convincing evidence, and still, refusal to return the child is discretionary

with the court. In dealing with the defense of "grave risk," courts in the United States have been restrictive when defining the situations in which the defense might apply. For example, in the case of *In re Coffield*, 96 Ohio App. 3d 52, 644 N.E.2d 662 (1994), the court stated that the defense of "grave risk" must relate to "the environment in which the child will reside upon returning to the home country." In other words, the court considered "environment" to mean the general environment in the country, not the specific home in which the child would reside (that issue being generally left to the domestic courts of the home country, which could then make decisions about custody).

Similarly, in *Currier v. Currier*, 845 F. Supp. 916 (D.N.H. 1994), the court rejected the proposal that a "grave risk" defense was established by evidence that the child's mother was emotionally unable to handle the rigors of raising two infants, and that her estrangement from her own family magnified her alleged unsuitability as a parent. In another case, *Tahan v. Duquette*, 259 N.J.Super. 328, 613 A.2d 486 (App. 1992), the court held that the defense of "grave risk" required the court to evaluate the "surroundings to which [the children] are to be sent and the basic personal qualities of those located there."

Specific dangers to the children must also be considered, provided that those specific dangers are limited to those which could not be

ameliorated by the courts of the child's habitual residence. The Friedrich II court rejected the defense that a return to the child's habitual residence would be "traumatic and difficult" for the child, based on the opinion of a psychologist who testified about the psychological damage that might occur if the child were separated from his mother, and experience anger against both parents. Rejecting this theory as a defense, the court stated:

> "Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of him in cases of serious abuse or neglect, or extraordinary emotional dependence, when the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." *Friedrich v. Friedrich* (Friedrich II), 78 F.3d 1060 (6th Cir. 1996).

In *Frier v. Frier*, 969 F.Supp. 436 (E.D. Mich. 1996), the court denied a grave risk defense raised on the basis that Israel was a war zone. In that case, the parents had lived in Israel for nearly their whole relationship. Their child had spent all his life in Israel, except for vacations to the United States with his mother (both parents were dual citizens). The abducting mother argued that the frequent skirmishes and bombings, increase of military presence, and constant fear of random violence in the

country should allow her to assert the defense of grave risk. The court stated:

> "The Court would agree that at this time Israel is experiencing some unrest and that this unrest may be in relative proximity to the family's residence. However, the Court does not find sufficient evidence in this record for Israel to be the "zone of war" contemplated by the Sixth Circuit of the Hague Convention. No schools are closed, businesses are open, and Petitioner was able to leave the country. It appears that the fighting is limited to certain areas and does not directly involve the city where the child resides." Id., 969 F.Supp. at 443.

See also, *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003), cert. denied, 124 S.Ct. 1062 (U.S. 2004), holding the same, particularly since the removing parent had voluntarily lived in Israel for several years with the child, under the same conditions.

In a Massachusetts case, the court found that the existence of domestic violence did not support a 13b defense as it related to the children. While there was some slight evidence that the children may have been mistreated, the court saw this as amounting to corporal punishment for disciplinary purposes. While rejecting the defense, the court stated:

> "There are no allegations in this case, much less clear and convincing evidence, that the children are threatened with the degree of harm visited upon the children in Steffen F. and Turner. The evidence demonstrates that John is intemperate and often unkind to his children and that he spanks and slaps them for minor childish infractions, and of course, there is the constant exposure to verbal and physical conflict within the home. As regrettable, and indeed as

> reprehensible as this state of affairs may be, it does not furnish grounds to deny the petition. [Citations omitted] Whatever damage long-term exposure to such a poisonous atmosphere may cause, the evidence does not reveal an immediate, serious threat to the children's physical safety that cannot be dealt with by the proper Irish authorities. [citations omitted]." *In re the Application of Walsh*, 31 F. Supp. 2d 200 (D.C. Mass. 1998).

A case in which return was refused on the basis of the grave risk defense is *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456 (D.C. Md.1999), a case requesting return to Venezuela, in which the court found a detailed history of physical abuse against a child, along with domestic violence against the child's mother. The child abuse included being struck with a belt on the legs, back, and buttocks, being beaten with fists, kicked, and emotionally demeaned on a daily basis, and the violence against the mother included being beaten at least twice a month, being struck with a closed fist, strangling, stomping, and breaking her nose. It was noted by the court that her pleas to the Venezuelan authorities had not resulted in any assistance, because the police would not become involved in "domestic disputes."

Yet even in cases of grave abuse such as just described, the courts still retain the discretion to order the return, and may include safeguards such as allowing the child to return in the custody of the abducting parent or a third party, to ensure the child's safety. *See* the Report of the Second

Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction 33 I.L.M. 225 (1994) at 241.

Mr. Kohen alleged that the children would suffer harm if returned to Ms. Smith in Canada. The harm suffered by abducted children must also be considered. The majority of courts recognize that children suffer psychological harm from being abducted. Again citing Friedrich II:

> "Mrs. Friedrich advocated a wide interpretation of the grave risk of harm exception that would reward her for violating the Convention. A removing parent must not be allowed to abduct a child and then - when brought to court - complain that the child has grown used to the surroundings to which they were abducted. [fn. 9 - Under the logic of the Convention, it is the abduction that causes the pangs of subsequent return. The disruption of the usual sense of attachment that arises during most long stays in a single place with a single parent should not be a "grave" risk of harm for the purposes of the Convention.]" *Friedrich v. Friedrich* (Friedrich II), 78 F.3d 1060 at 1068 (6th Cir. 1996).

In this case, Mr. Kohen should not be rewarded for violating the Convention by removing the children from their habitual residence and then arguing that returning them would be harmful to them. As set forth in *Friedrich*, it is the abduction that causes harm.

1. The Wishes of a Child. This defense was not alleged and does not apply.

2. Human Rights and Fundamental Freedoms. This defense

was not alleged and does not apply.

3. The court did not err in determining the children's habitual residence was in Canada.

"Habitual residence" is not defined by either the Convention or ICARA. Courts in the United States sometimes find it helpful to compare the "habitual residence" concept to the "home state" concept of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). The UCCJEA, codified in Washington as RCW 26.27 *et seq.* provides that jurisdiction over children should be exclusively in their home state, barring certain circumstances. While not precisely equivalent to home state, habitual residence is generally considered to be the "home" of the children, as seen from their point of view, and, to some degree, the point of view of the parents, acting mutually, and must be determined at the point in time "immediately before the removal or retention" (Article 3 (a)). Habitual residence is important because custody rights of the children are determined by the country of the children's habitual residence.

In a well-recognized Convention case, *Feder v. Evans-Feder,* 63 F.3d 217, at 223-24 (3d Cir. 1995), the Third Circuit concluded that:

> "[a] child's habitual residence is the place where he . . . has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. We further

> believe that a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' presently shared intentions regarding their child's presence there."

One of the most frequently quoted definitions of the term "habitual residence" is from the British case of *In re Bates,* No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989):

> "There must be a degree of settled purpose. The purpose may be on 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."

As of the date of the abduction, the parties had been residing with the children in Canada, where they had resided since February 2012. Neither parent had filed an action for custody or divorce as of the time of the abduction of the children. Mr. Kohen asserts that a Power of Attorney executed by Ms. Smith authorized him to "move" the children's habitual residence to the U.S. The Power of Attorney does not provide permission to move the children. There can be no doubt that this family was "settled"

within the meaning of the *Bates* case.

A well-known case from the Sixth District distinguishes the concept of habitual residence from domicile as follows:

> "...[H]abitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions...A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal....[A child's] habitual residence can be 'altered' only be a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal; here, the removal precipitated the change in geography. If we were to determine that by removing Thomas from his habitual residence without Mr. Friedrich's knowledge or consent Mrs. Friedrich 'altered' Thomas' habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence." *Friedrich v. Friedrich*, 983 F.2d 1396, 1401-1402 (6th Cir. 1993) (Friedrich I).

In *In re the Matter of David B. and Helen 0.*, 164 Misc. 2d 566, 625 N.Y.S.2d 436 (1995), the court distinguished habitual residence and domicile, stating:

> "Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home....Although the term habitual residence may appear to be a hybrid of the terms domicile and residence, and although all three may, depending on context, contain factual variables in common, the terms are capable of distinction...[T] term habitual residence is intended to be conceptually more similar to that of residence than to domicile." Id., 625 N.Y.S.2d at 440.

Mr. Kohen's assertion that the trial court erred in determining the children's habitual residence was in Canada is not grounded in law or fact. Mr. Kohen further argues that because there are issues of fact as to the location of the habitual residence, the court erred in making such a determination. Mr. Kohen provides no legal authority to support this argument. The trial court did not err in this determination.

4. The court did not err in ruling that custody is not an issue in this case.

It is of vital importance to recognize that in a Hague Convention case, the court shall not consider custody issues. Article 16 states:

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

This is a civil case, and not a domestic relations or custody case. The proper forum for the custody case, if any, is in the children's habitual residence. As stated above, as of the date of the filing of this action, no divorce or custody action had been commenced in Canada. Pursuant to the UCCJEA, Washington did not have jurisdiction over the children when Ms. Smith filed her Petition for Return of the Children. No custody action

should have been commenced in Washington. Yet, Mr. Kohen filed a petition for legal separation and filed a restraining order on September 27, 2013, and the children had not lived in Washington for six months as of that time. It cannot be overstated that this action has nothing to do with custody of the children. It is a treaty relating to the return of children who have been wrongfully removed from their habitual residence, and a means to have the children returned. In a like manner, under Article 19, the return of the children under Article 12 "shall not be taken to be a determination on the merits of any custody issue."

5. The court did not err in reserving an award of attorney's fees and costs for Canadian courts.

The Convention provides, at Article 26, that "upon ordering the return of a child . . . the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child . . . to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child." ICARA also provides for Mr. Kohen to pay these costs, under 42 USC 11607 Sec. 8 (b) (3).

6. The Court of Appeals shall act expeditiously in proceedings for return of the children.

Article 11 of the Convention provides:

> "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be."
>
> In addition, the U.S. Supreme Court has instructed, "[a]t both the district and appellate court level, courts should take steps to decide these cases as expeditiously as possible.

Chafin v. Chafin, 133 S.Ct. 1017, 1020 (2013).

Litigation in this case has been ongoing for nearly a year. Ms. Smith respectfully requests expeditious proceedings in this matter.

F. CONCLUSION

The trial court correctly ordered the children be returned to Canada, their habitual residence, pursuant to the Hague Convention. This court should affirm that decision.

RESPECTFULLY SUBMITTED this 17th day of September, 2014.

THE LAW OFFICE OF STACY D. HEARD, PLLC

By: _____

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