

No. 71414-7-I  
King County Superior Court No. 13-3-00237-3 SEA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Marriage of:

SALVADOR AGUILAR HURTADO,  
Appellant

and

JENNIFER ROOT,  
Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Suzanne Parisien, Judge

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APPELLANT'S REPLY BRIEF

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**I.**  
**STATEMENT OF THE CASE**

Ms. Root's statement of the case is based almost entirely on her testimony and point of view. She spends over seventeen (17) pages describing her version of events leading up to her filing for dissolution and up to trial even though majority of what she submits is disputed, not relevant, and fails to directly address the specific matters of law raised by Mr. Aguilar Hurtado. Ms. Root excludes from her statement the times that she abandoned Nikki, left her with Mr. Aguilar Hurtado while partying in Cabo San Lucas, and further, Nikki's poor physical and mental state when she was returned to Mexico in May 2013. Ms. Root further admits she illegally took Nikki across an international border. Mr. Aguilar Hurtado's claims, however, are based primarily on undisputed evidence and law. He has challenged the final orders only to the extent that they were not supported by the law and substantial evidence in the record.

**II.**  
**ARGUMENT**

A.     **THERE WAS GOOD CAUSE FOR THE TRIAL COURT TO GRANT A CONTINUANCE**

Ms. Root argues that there was no good cause for a continuance of the trial date but provides no specifics as to how she would have been prejudiced by a continuance. There is no dispute that Mr. Aguilar Hurtado

was unprepared for trial and was only able to retain an attorney licensed in Washington State on the eve of trial. Good cause for a continuance is shown when a party's attorney needs time to prepare the case.

Nor has Ms. Root discussed how a continuance would have prejudiced her. Temporary orders were in place and the minor child was residing with her and would have continued to do so pending the new trial date.

The central issue at trial was the primary residential placement of a minor child. Ms. Root concedes that the nature and extent of the property she disclosed at trial was not an area of great contention (though there remains the issue of Ms. Root's failure to disclose the prenuptial agreement and her ownership interest in Seven R Corporation). Given the high stakes at trial, and further, the restrictive nature of Ms. Root's proposed permanent parenting plan to which Mr. Aguilar Hurtado had no notice, the trial court should have granted a continuance to allow Mr. Aguilar Hurtado's counsel to fully prepare for trial. The trial court's failure to do so was abuse of discretion.

The proper standard in determining whether a trial court has abused its discretion is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purpose of the trial court's discretion. The primary consideration in the trial court's decision on Mr. Aguilar Hurtado's motion for a continuance should have been

justice. Mr. Aguilar Hurtado should not have been penalized for his inability to retain counsel in Washington earlier in the case, given his stated inability to do so. The task of finding and retaining an attorney from a foreign country is not an easy one, with many attorneys unwilling to risk the possibility of not receiving payment for their services from a foreign client. The Court should have viewed the motion for a continuance in the context of Mr. Aguilar Hurtado's new legal representation but did not do so. Instead, the Court remarked that it was concerned that Mr. Aguilar Hurtado would not remain represented by counsel if a trial continuance was granted. I RP 9.

Courts have taken a liberal view toward granting continuances in divorce cases, particularly where the continuance requests is the first one sought. *Chamberlin v. Chamberlin*, 44 Wash.2d 689, 270 P.2d 464 (1954). Mr. Aguilar Hurtado was faced with the difficult task of litigating this case from Mexico in a language not native to him, and limited funds with which to retain an attorney in a foreign country.

Finally, the Trial Court's later denial of Mr. Aguilar Hurtado's Motion to Vacate flowed from the Court's initial denial of Mr. Aguilar Hurtado's Motion for Continuance. The Court provided no reasoning whatsoever for its refusal to vacate the final orders. Had the Court granted a continuance, Mr. Aguilar Hurtado would have had the opportunity to

prepare and present his case at a full trial on the merits. It is difficult to see how justice was served in this case.

#### B. MR. AGUILAR HURTADO DID NOT WAIVE SUBJECT MATTER JURISDICTION

This dispute involves a statute, namely the UCCJEA that restricts, in some instances, a court's exercise of its subject matter jurisdiction. Challenges to a court's subject matter jurisdiction are reviewed de novo *Cole v. Harveyland, LLC*, 163 Wash.App. 199, 205, 258 P.3d 70 (2011) and can be raised for the first time at any point in a proceeding, even on appeal. *Id.* at 205-206. The absence of subject matter jurisdiction is a defense that can never be waived. Judgments entered by Courts acting without subject matter jurisdiction must be vacated even if neither party objected to the Court's exercise of subject matter jurisdiction and even if the controversy was settled years prior. *Cole*, 163 Wash.App. at 205, 258 P.3d 70; *Shoop v. Kittitas County*, 108 Wash.App. 388, 397-98, 30 P.3d 529 (2001), *aff'd on other grounds*, 149 Wash.2d 29, 65 P.3d 1194 (2003).

Whether Washington courts have subject matter jurisdiction is a question of law that is reviewed de novo. *In re Marriage of Kastanas*, 78 Wash.App. 193, 197, 896 P.2d 726 (1995). Interpretation of a statutory scheme and application of that scheme also present questions of law that are reviewed de novo. *In re Parentage of J.M.K.*, 155 Wash.2d 374, 386-

87, 119 P.3d 840 (2005). The UCCJEA does in fact limit subject matter jurisdiction. *In re Ruff*, 168 Wash. App. 109, 275 P.3d 1175 (2012).

The UCCJEA's procedural requirements are jurisdictional and Mr. Aguilar Hurtado's alleged consent could not have given Washington jurisdiction. Not only is jurisdiction not something that can be consented to generally, but nowhere in the UCCJEA is there a provision for the parties to waive the jurisdiction of one state in favor of another by their conduct or their agreement. Indeed, the comments to the UCCJEA and the court's interpretation of those comments in *A.C.* imply and suggest exactly the opposite. *In re Custody of A.C.*, 165 Wash.2d 568, 200 P.3d 689 (2009). Based on the foregoing, Washington did not have subject matter jurisdiction to enter a final parenting plan in this case, and thus the final parenting plan should be vacated.

#### C. THE CHILD'S HOME STATE UNDER UCCJEA WAS BAJA CALIFORNIA SUR, MEXICO.

The UCCJEA's procedural requirements control the court's exercise of its subject matter jurisdiction. *In re Ruff*, 168 Wash. App. 109, 275 P.3d 1175 (2012). A party asserting jurisdiction has burden of establishing its existence. *In re Marriage of Hall*, 25 Wash.App. 530, 607 P.2d 898 (1980). For purposes of determining which state should exercise jurisdiction over child custody proceedings, the court should first

determine whether a home state exists, and then determine whether significant connections and substantial evidence exist in either state, and finally determine whether the state is an inconvenient forum. 28 U.S.C.A. § 1738A(b)(4), (c)(2)(A)(i, ii), (c)(2)(B)(ii)(I, II); RCW 26.27.070, 26.27.180–26.27.190.

At no time did the Washington Courts confer with the Mexican Courts to determine what the child’s home state was pursuant to RCW 26.27.231(4). Washington could not have acquired jurisdiction from Mexico because Mexico did not decline to exercise its jurisdiction and Washington failed to properly exercise emergency jurisdiction. Ms. Root concedes that the child was not present in Washington State for at least (6) consecutive months prior to the filing of the Summons and Petition for Dissolution.

Washington was not Nikki’s home state because her home state was Baja California Sur, Mexico, the state and country she was born in and lived her entire life prior to Ms. Root’s removing her to Washington State. Further, Mr. Aguilar Hurtado filed a competing action in Mexico within six (6) months of being served the Summons & Petition for Dissolution in Washington. If Mexico was a “sister state”, it would have been the home state.

Ms. Root claims that while the child was not present in Washington for six (6) consecutive months prior to filing of the Summons and Petition, any absences from Washington were only temporary and thus the time between absences from Washington should be included when determining whether Washington had jurisdiction under RCW 26.27.201(1)(a).

The UCCJEA does not formally define ‘temporary absence.’ The intent of the parties is a factor in considering whether an absence is temporary. *In re Marriage of Payne*, 79 Wash. App. 43, 899 P.2d 1318 (1995).

In this case, there was no intent by Mr. Aguilar Hurtado to make Washington Nikki’s new home state simply because he agreed to Ms. Root taking Nikki to Washington State to visit her family. Just the opposite is true. Mr. Aguilar Hurtado filed a competing action in Mexico which is a clear demonstration of his lack of intent in making Washington the child’s home state. There is no evidence to prove Ms. Root’s assertion that the parties decided in November 2011 that Ms. Root would share residences in both Washington in Mexico. During this time, the marital relationship was breaking down and Ms. Root was in the process of deciding whether she wanted to remain married, or would seek dissolution.

While Ms. Root may be able to demonstrate that she has significant connections to Washington State, she cannot do the same for Nikki. Under RCW 26.27.201(1)(b), the “significant connections” analysis applies “only if the child has no home state or the home state has declined jurisdiction on the ground that Washington is the more appropriate forum.” *In re Marriage of Hamilton*, 120 Wash.App. 147, 157, 84 P.3d 259 (2004). Ms. Root fails to show why the court should even reach the “significant connections” analysis absent a specific determination as to what Nikki’s home state was. During the period of time where there were two (2) competing actions in Washington and Baja California Sur, Mexico, Ms. Root took no steps to have the courts confer regarding jurisdiction.

Assuming the Court properly reached the “significant connections” analysis, Ms. Root further fails to demonstrate what substantial evidence was available in Washington concerning Nikki’s care, protection, training, and personal relationships which would justify a Court’s conclusion that there was substantial evidence in Washington regarding Nikki. In fact, the only 3<sup>rd</sup> party Ms. Root refers to is her grandmother, Joyce, who did not testify at trial and her ½ sister Lily, an infant (who was not born until 7/4/2014). In contrast, Mr. Aguilar Hurtado could demonstrate Nikki’s close connections to his extended family, her friends, and her school in Mexico.

The effect of unclean hands on a jurisdictional determination was addressed in *In re Marriage of Ieronimakis*, 66 Wn.App. 83, 831 P.2d 172 (1992). In *Ieronimakis*, both the children were born in Greece. *Ieronimakis*, 66 Wn.App. at 85. Without the husband's knowledge, the wife took the children to Seattle, where her parents lived. *Ieronimakis*, 66 Wn.App. at 85. She told the husband that she did not intend to return. *Ieronimakis*, 66 Wn.App. at 85. Within a week, she filed a petition for dissolution of marriage seeking a parenting plan with the children residing primarily with her. *Ieronimakis*, 66 Wn.App. at 85. Six days later, the husband commenced a child custody proceeding in Greece. *Ieronimakis*, 66 Wn.App. at 86.

The Greek court issued a permanent order granting custody to the father. *Ieronimakis*, 66 Wn.App. at 86. Subsequent to the Greek order, the Washington court commissioner communicated with the Greek court and was satisfied that the Greek system 'provides equal rights for women and that child custody decisions are based on the best interests of the child.' *Ieronimakis*, 66 Wn.App. at 87. The mother sought revision of the commissioner's order and also appealed the Greek order in Greece. *Ieronimakis*, 66 Wn.App. at 87. While the revision was pending, the Greek court ruled in the mother's favor on appeal and awarded her custody of the children. *Ieronimakis*, 66 Wn.App. at 87. The superior court then granted

the mother's motion for revision and exercised initial child custody jurisdiction in the 'best interests of the children.' *Ieronimakis*, 66 Wn.App. at 88. On remand, a commissioner granted the mother's parenting plan, and the father appealed. *Ieronimakis*, 66 Wn.App. at 84, 89.

The *Ieronimakis* court reversed the trial court's order, and held that the trial court should not have exercised jurisdiction. *Ieronimakis*, 66 Wn.App. at 90–91. The court cited former RCW 26.27.230 (RCW 26.27.230 has since be repealed and recodified as RCW 26.27 .201), which requires the recognition and enforcement of custody decrees 'of other nations if reasonable notice and opportunity to be heard were given to all affected persons.' *Ieronimakis*, 66 Wn.App. at 91. The court held that the mother could not benefit from taking the children from the home state and keeping them away long enough to circumvent the provisions of the relevant jurisdictional statutes:

The UCCJA, which was in place at the time *Ieronimakis* was decided, allowed the court to look at "significant connections" with Washington *even if another state was the home state of the child*, as the court in *Ieronimakis* determined that Greece was.

In contrast, under the present statute, RCW 26.27.201(1)(b), the court looks at "significant connections" with Washington *only if the child has*

*no home state or the home state has declined jurisdiction* on the ground that Washington is the more appropriate forum. Here, Nikki still had a home state because she had not resided in Washington for six months by the time Ms. Root commenced this action and Mr. Aguilar Hurtado did not wait more than six months after Nikki left to file his action for custody in Mexico.

To allow Washington courts to assert jurisdiction because Ms. Root generated significant contacts with the state is in effect telling any abducting parent that if you can stay away from the home state long enough to generate new considerations and new evidence, that is a sufficient reason for the new state to assert a right to adjudicate the issue. Such a holding circumvents the intent of the jurisdiction laws.

*Ieronimakis*, 66 Wn.App. at 92. The court further held that there had been no showing that the Greek court would not protect the children's best interests; in fact, there was proof to the contrary. *Ieronimakis*, 66 Wn.App. at 92. Courts in Washington have recognized decrees and orders from Mexico and there is no indication why this Court would not have done so. *Tostado v. Tostado*, 137 Wash.App. 136, 151 P.3d 1060 (2007).

B. PARENTS MAY NOT WAIVE THE COURT'S OBLIGATION TO DETERMINE A CHILD'S HABITUAL RESIDENCE UNDER THE HAGUE CONVENTION

Ms. Root is correct in pointing out that Mr. Aguilar Hurtado has cited no authority for the assertion that the parties may not waive the Court's obligation to determine a child's habitual residence where the parents clearly disagree where a child's habitual residence is, and there is no shared mutual intent to change a child's habitual residence. This is a case of first impression in Washington.

Courts from other Hague Convention Signatories have touched on this issue but no cases have been found that directly address this issue from US Courts.

Over the past year, the Supreme Court of the United Kingdom has considered the concept of habitual residence in three (3) cases: *Re A (Children)* [2013] UKSC 60; *Re L (a Child; Custody; Habitual Residence)* [2013] UKSC 75 and *Re LC (Children)* [2014] UKSC 1. These decisions have settled the test for a child's habitual residence and in particular they confirm that habitual residence is a factual question to be determined by the specific circumstances of the children and their parents in each case.

Recently in the case of *Re H (Jurisdiction)* [2014] EWCA Civ 1101<sup>1</sup> the Court of Appeal considered again the parameters of the concept

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<sup>1</sup> As a courtesy, a true and correct copy of the opinion in *Re H (Jurisdiction)* is attached to this reply brief because it is not readily available on the U.S. editions of Westlaw or LexisNexis

of habitual residence. In particular the case required it to decide whether in light of the trilogy of cases determined by the Supreme Court there continues to be a rule in English law that a parent cannot unilaterally change the habitual residence of a child.

Mr. Aguilar Hurtado and Ms. Root clearly did not agree on Nikki's habitual residence, nor did they agree that there was a shared intent to change Nikki's habitual residence from Baja California Sur, Mexico to Washington State. Finally, it could not be inferred that the parties intended to abandon the previous habitual residence. If a factual inquiry into habitual residence is required where the parents disagree as to a child's habitual residence, then the habitual residence analysis cannot be waived by the parents absent a demonstration that there was an unequivocal settled mutual intention to abandon Mexico under the guidance provided in *Mozes v. Mozes*, 239 F.3d 1067 (2001).

A "waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. *Birkeland v. Corbett*, 51 Wash.2d 554, 320 P.2d 635 (1958). The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them. *Bowman v. Webster*, 1954, 44 Wash.2d 667, 269 P.2d 960. In this matter, it is clear

that Mr. Aguilar Hurtado was not aware of the right he was potentially relinquishing under the Hague Convention, namely Nikki's habitual residence. Nor can his conduct after the temporary parenting plan was entered be construed as an inference of the relinquishment of such a right. Ms. Root alleges that Mr. Aguilar Hurtado wrongfully withheld Nikki under the Hague Convention in Mexico after the temporary parenting plan was entered and relies on the provisions of the temporary parenting plan in support of her assertion. This conduct by Mr. Aguilar Hurtado was entirely inconsistent with a party who knowingly and willingly relinquished such a right. If the Court had made an independent inquiry into Nikki's habitual residence, it would have concluded that her habitual residence was Mexico and any claim of wrongful retention would have been eliminated. See *Munoz v. Ramirez*, 923 F.Supp.2d 931 (2013).

When Mr. Aguilar Hurtado signed the agreed temporary parenting plan, he was under the impression that this would be the only way he could see the parties' daughter. He was not aware or informed that his signature on the temporary parenting plan was intended to change Nikki's habitual residence as well. As a matter of public policy, the Court should not allow such an act to circumvent the operation of international conventions to which the United States is a signatory or federal and state statutes.

The only possible effective “waiver” of habitual residence under *Mozes* would be if both parties agreed that there was a shared mutual intent to change the child’s habitual residence. In this case, there was never an agreement to do so.

It is well established that a contract that contravenes public policy is void. *Macintosh v. Renton*, 2 Wash.Terr. 121, 129, 3 P. 830 (1882). Prenuptial agreements generally cannot affect the rights of the parties' children. *In re Marriage of Littlefield*, 133 Wash.2d 39, 58, 940 P.2d 1362 (1997); *In re Marriage of Thier*, 67 Wash.App. 940, 944, 841 P.2d 794 (1992), review denied, 121 Wash.2d 1021, 854 P.2d 41 (1993). Although the court may consider the terms of an agreement purporting to affect the children's rights, the court is not bound by them. *Littlefield*, 133 Wash.2d at 58, 940 P.2d 1362. Public policy is generally determined by the Legislature and established through statutory provisions. Stated another way, it is not the function of the judiciary to determine public policy; that function rests exclusively with the legislative branch of government. *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 95 Wash.2d 373, 378, 622 P.2d 1234 (1980) (citing *Barkwill v. Englen*, 57 Wash.2d 545, 548, 358 P.2d 317 (1961)); see *Cary v. Allstate Ins. Co.*, 130 Wash.2d 335, 340, 922 P.2d 1335 (1996). The proper starting point for determining public policy is applicable legislation. *Id.*

In RCW 26.09.002, our Legislature stated: “In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities.”

This public policy is evident in *Thier* and *Littlefield*. In *Thier*, the court was asked to enforce the custody provisions of a separation agreement. The court declined and cited the language of RCW 26.09.070(3), which provides in relevant part:

If either or both of the parties to a separation contract shall ... at a subsequent time petition the court for dissolution of their marriage, ... the contract, except for those terms providing for a parenting plan for the children, shall be binding upon the court unless it finds ... that the separation contract was unfair at the time of its execution. *Thier*, 67 Wash.App. at 944, 841 P.2d 794. This statute and *Thier* reflect Washington's policy of generally allowing parents to enter into binding contracts regarding their rights and their property, but generally prohibiting marital agreements that divest the court of its authority and discretion over issues affecting the rights and welfare of their children. This legal principle was affirmed in *Littlefield* when our Supreme Court, citing RCW 26.09.070(3) and *Thier*, refused to enforce the provisions of a

prenuptial agreement relevant to the parties' dispute over geographic restrictions. *Littlefield*, 133 Wash.2d at 57–58, 940 P.2d 1362.

It is clear that, as a matter of public policy, Courts in Washington will disregard prenuptial agreements that include provisions related to the residential placement of children. This Court has the opportunity to extend such policy, consistent with the legislative intent of RCW 26.09.002 and the Hague Convention, to the waiver by the parties of the determination of habitual residence of a minor child absent a shared mutual intent, because determination of the habitual residence of a minor child will undoubtedly affect the primary residential placement of that child at trial.

B. MR. AGUILAR HURTADO WAS AT NO TIME PRIOR TO DECEMBER 19<sup>TH</sup>, 2013 REPRESENTED BY AN ATTORNEY IN THIS CASE

A review of the docket in this case reveals that at no time prior to December 19<sup>th</sup>, 2013 was Mr. Aguilar Hurtado represented by attorney in this case. Ms. Root relies on communications and representations made by Ms. Nossaman-Petitt, an attorney who appears to be licensed only in the State of Nebraska for her argument that Mr. Aguilar Hurtado was represented by an attorney. At no time did Ms. Nossaman-Petitt file a Notice of Appearance or take any steps to get admitted in Washington pro hac vice. Nor is there any other evidence to support Ms. Root's claim that Ms. Nossaman-Petitt was Mr. Aguilar Hurtado's attorney.

RCW 2.44.010 address the authority an attorney and counsel has in binding his or her clients. The statute only applies where there is in fact an attorney-client relationship. *Grossman v. Will*, 10 Wash. App. 141, 516 P.2d 1063 (1973). In fact, in her own responsive brief, Ms. Root refers to Ms. Nossaman-Petitt as Mr. Aguilar Hurtado's attorney/friend. It is quite clear that there was no attorney-client relationship formed and thus Ms. Nossman-Petitt had no implied or actual authority to make any agreements on behalf of Mr. Aguilar Hurtado.

Additionally, Ms. Root provides no evidence to show that Mr. Aguilar Hurtado granted Ms. Nossman-Petitt any special rights to surrender his substantial rights. See *Graves v. P.J. Taggares Co.*, 94 Wash. 2d 298, 616 P.2d 1223 (1980). The email address Ms. Nossman-Petitt indicated should be used to send the parenting act information was not the actual email address used to communicate with Mr. Aguilar Hurtado. Instead the email address [chavaah@hotmail.com](mailto:chavaah@hotmail.com) was used so even if there was an agreement to exchange pleadings via email (a point not conceded), that agreement was violated when Ms. Root's attorney used a different email address.

Nevertheless, Mr. Aguilar Hurtado never agreed to exchange pleadings by email or accept service by email. Any agreement Ms. Nossman-Petitt may have made with Ms. Root's attorney regarding

exchange of documents by email was void as she was never Mr. Aguilar Hurtado's attorney and had no authority to make such agreements on Mr. Aguilar Hurtado's behalf. Therefore, any argument presented by Ms. Root regarding Mr. Aguilar Hurtado's alleged legal representation and any alleged agreements stemming from such alleged representation are not persuasive. Ms. Root was still bound by the civil and local rules regarding service and those rules were clearly not followed.

C. MS. ROOT DID NOT COMPLY WITH RCW 26.09.181 BY FOLLOWING JUDGE O'DONNELL'S PRETRIAL CONFERENCE ORDER

It is undisputed that Ms. Root's Petition for Dissolution of Marriage indicated that she would file and serve a proposed permanent parenting plan at a later date, pursuant to RCW 26.09.181. It is also clear from a review of the docket that she never did so.

While it is true that Judge O'Donnell ordered Ms. Root to prepare and submit proposed orders, including a proposed parenting plan, the day before trial, nothing in his order indicated that doing so would serve to comply with RCW 26.09.181, nor did Judge O'Donnell's order suspend RCW 26.09.181. The parties did not discuss or agree to extend the deadlines described in RCW 26.09.181

Ms. Root's attempt to equate preparation and submission of a proposed order to the Court one day before trial as compliance with RCW

26.09.181 is nonsensical for two major reasons. 1) Proposed orders are not filed with the clerk of the court unless a statute authorizes/requires otherwise. RCW 26.09.181 is clear. A proposed permanent parenting plan must be filed *and served* upon the other party either within thirty (30) days after filing and service by either party of a notice for trial (which is not applicable in King County) or within 180 days after commencement of the action. The purpose of RCW 26.09.181 is to provide actual notice to the other party of parenting arrangements a parent will be seeking at trial.

Further, Ms. Root relies on RCW 26.09.181(5) in suggesting that she was excused from complying with the statute because Mr. Aguilar Hurtado could have moved for a default and did not do so. While RCW 26.09.181 provides a remedy to a party who has complied with the statute, nowhere in the statute does it state that default is the *exclusive* remedy.

In short, Mr. Aguilar Hurtado had no implied or actual notice of the Proposed Permanent Parenting Plan that Ms. Root was seeking until the morning of trial when courtesy copies were provided to Mr. Aguilar Hurtado's counsel. The Proposed Permanent Parenting Plan differed substantially from the Temporary Parenting Plan and was entered as drafted by the Court. Therefore, the Final Parenting Plan should be vacated.

D. THE TRIAL COURT WAS IMPROPERLY INFLUENCED BY THE TEMPORARY PARENTING PLAN

It is clear from the record that the trial court did not make an independent inquiry into Nikki's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction, whether the Court had jurisdiction to enter a final parenting plan under the UCCJEA, and instead relied on the temporary parenting plan's provisions regarding jurisdiction in contravention of RCW 26.09.191(5).

The Family Law Deskbook's chapter on the Parenting Act explains:

“The temporary parenting plan is to be based upon a look at the preceding 12 months to determine the relationship of the children with each parent subject, of course, to the other limitations. In the permanent parenting plan, the court is to evaluate the ability of each parent to perform the parenting functions for each child prospectively. Drawing any presumption from the temporary plan is inappropriate.”

This concept is further discussed and confirmed in *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Here, the final parenting plan entered by the Court was substantially more restrictive than the agreed temporary parenting plan and further, included restrictions based upon interlocutory orders entered pending trial that stemmed from the temporary parenting plan. Therefore, the final parenting plan should be vacated and a new trial ordered so that both parties can fully present their case.

remand with the following directions: for the trial court to hold a new trial on the merits and make a formal inquiry as to the child's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction prior to her removal from Mexico and without reliance on the provisions of the temporary parenting plan.

DATED this 15<sup>th</sup> day of September, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Ordell", written in a cursive style. The signature is positioned above a horizontal line.

Roni E. Ordell, WSBA # 42690  
Attorney for Salvador Aguilar Hurtado

**CERTIFICATE OF SERVICE**

I, Roni E. Ordell, hereby declare under penalties of perjury of under the laws of the State of Washington, that on the date listed below, I served by Legal Messenger, one copy of the foregoing brief on the following:

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September 15<sup>th</sup>, 2014  
Date



\_\_\_\_\_  
Roni E. Ordell, WSBA # 42690  
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Neutral Citation Number: [2014] EWCA Civ 1101

Case No: B4/2013/2973

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION**  
**MR JUSTICE PETER JACKSON**

**FD13P00219**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29/07/2014

**Before :**

**LORD JUSTICE RICHARDS**  
**LADY JUSTICE BLACK**  
and  
**LORD JUSTICE VOS**

-----  
**Between :**

**RE H (JURISDICTION)**  
  
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**Mr David Williams QC & Ms Gina Allwood (instructed by MSB solicitors) for the Appellant**  
**Respondent not present**  
**Ms Deirdre Fottrell, Ms Eleri Jones & Mr Mike Hinchliffe (instructed by Cafcass Legal) for the**  
**Childrens Guardian**  
**Mr James Roberts & Ms Jennifer Perrins (instructed by Dawson Cornwell) appeared on behalf of**  
**the Intervener 'Reunite'**

Hearing date : 24<sup>th</sup> June 2014  
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**Approved Judgment**

**Lady Justice Black:**

1. The appellant in this appeal is the father of two young children who are presently in Bangladesh with their mother. His case is that they have been wrongfully retained there by her and that there is evidence to suggest that they are at risk of significant harm. There have been proceedings in Bangladesh relating to the children but they have not resolved the situation to the father's satisfaction and he sought to bring the matter before the English court by making an application under the inherent jurisdiction of the High Court, issued on 4 February 2013. The order he sought was for the return of the children to this country.
2. Mr Justice Peter Jackson dismissed the father's application on 24 September 2013 on the basis that the courts of England and Wales had no jurisdiction to entertain it. His judgment can be found on [bailli.org](http://bailli.org).
3. The father and mother both originate from Bangladesh. The father came to this country some years ago and obtained British citizenship. He and the mother were married in Bangladesh in 2005 and the mother then came to live here, where the children were born in 2007 and 2008. Both children are British citizens.
4. In May 2008, the parents and children travelled to Bangladesh when one child was 14 months old and the other 6 weeks old. The father returned here alone in August 2008.
5. Since then, he has made three extensive visits to Bangladesh between 2009 and 2012, spending two years there in all. He last saw the children in November 2012. Peter Jackson J recorded in his judgment that he frequently speaks to the children on the telephone since returning here.
6. There seems to be a dispute as to whether the mother's continued presence in Bangladesh is the result of her refusal to return to England with the children (which is the father's case) or of the father abandoning her there (which may be the mother's case). I say that it "may" be the mother's case because the mother has not participated in these proceedings at all so far so one can only surmise what she has to say about things.
7. Before Peter Jackson J, the father asserted that the English court had jurisdiction on the basis either that the children were habitually resident here when the proceedings were issued or that they are British citizens.
8. Peter Jackson J did not consider that the children were habitually resident here. He noted the young age of the children when they left the United Kingdom and the length of time they had since spent in Bangladesh. He said that even if the father was right that they had been unlawfully retained in Bangladesh by the mother, they had long since ceased to be habitually resident here.
9. He accepted that, on the basis of In the matter of A (Children) [2013] UKSC 60 [2013] 3 WLR 761 (hereafter referred to as Re A), the children's British citizenship provided a theoretical basis on which the court could exercise jurisdiction but on the facts of this case he considered that it would be inappropriate to do so, the courts of Bangladesh having long since been seised of the matter and providing a forum where the father could present his case and any issue over the welfare of the children could

be resolved. He was not impressed with the father's argument that an order from the English court might assist him in the Bangladeshi proceedings, "particularly" he said "as the father has apparently not taken any active legal steps to enforce the 2011 custody order locally".

10. He observed that even if the father *had* been able to establish that the children continued to be habitually resident here, he would have been unwilling for the same reason to intervene "on the basis of such limited information....when the court in Bangladesh is already engaged and where the relief sought (the peremptory return of the children to this country) has such potential consequences for them".

*Joinder of the children as parties and the intervention of Reunite*

11. When I granted permission to appeal, I joined the children as parties to the appeal. I explained why this was in the judgment I then gave. It is very unusual for new parties to be joined in this way at the appeal stage but I considered that in view of the mother's failure to participate, it was in the children's best interests that they were represented separately. CAF/CASS interpreted this as an invitation to adopt the role of advocate to the court which was not what I had intended.
12. Where both parents participate in litigation concerning their children, the court can be sure to receive at least two points of view as to what is in the children's best interests and, if there is any legal argument that can legitimately be advanced in support of the rival contentions, it will be presented. Where, as here, there is only one active party to the litigation, the case (factual and legal) is inevitably presented in accordance with that party's view of the children's interests, which may or may not be the only perspective. In the absence of any argument from the mother to counter the father's presentation, there was therefore a risk in this case that what was actually in the children's best interests would not emerge and that the arguments, legal and factual, that would further those interests may be overlooked. It was for that reason that I decided, as I said in my earlier judgment, that in their interests they should be represented separately in the appeal.
13. This does not presage the frequent joinder of children as parties at the appeal stage, nor is it intended to send a message that whenever only one of the parents appears in proceedings, whether at first instance or on appeal, the children should be joined. My decision was a decision taken on the particular facts of this case.
14. CAF/CASS invited us to give guidance as to the correct approach to the joinder of children as parties at the appeal stage but I do not intend to take up this invitation. The question is not entirely straightforward and it may merit further examination should a case arise in which it requires to be decided. Here, however, as there is nothing for us actually to determine in this respect, attention should be focussed on the other important issues which arise directly. CAF/CASS did not contest their involvement in the proceedings and have provided assistance, for which I am grateful. On the facts of this case, there was a role for them not only in presenting the legal arguments in the way that would best serve these children but also in making submissions as to their welfare interests in connection with the question of whether the English court should exercise its jurisdiction over them and if so, how.

15. Considering that the legal issues in this case potentially had wide implications in international child abduction cases, Reunite sought to intervene to present submissions and was given permission to do so. We have therefore had the assistance of their written and oral assistance too.

*The issues arising*

16. The appellant advanced four grounds of appeal which I do not quote directly here but which revolved around the following questions:
  - i) Ground 1: Is there still a 'rule' (hereafter "the 'rule'") that where two parents have parental responsibility for a child, neither can unilaterally change the child's habitual residence?
  - ii) Ground 2: How does Article 10 of the Council Regulation (EC) No. 2201/2003 (hereafter "Brussels IIR") operate where a child has been wrongfully removed from a Member State where he was habitually resident to a non-Member State or wrongfully retained in these circumstances?
  - iii) Ground 3: Was Peter Jackson J wrong to decline to exercise the *parens patriae* jurisdiction?
  - iv) Ground 4: Was the judge wrong to conclude that had he exercised his jurisdiction, he would not have made the orders that the father sought?
17. Subsidiary arguments arose in the course of exploration of these themes as will become evident as this judgment proceeds.
18. There was a measure of agreement between the parties but not complete unanimity. As things evolved, the *parens patriae* issue lost significance and it was the first two grounds of appeal that were important in determining the question of jurisdiction. As to ground 1, only the appellant argued for the continued existence of the 'rule' and even he was possibly not a very enthusiastic supporter of it. There was otherwise general acceptance that it had been overtaken by the development of the law on habitual residence in recent Supreme Court decisions. As to ground 2, there was agreement that Article 10 of Brussels IIR applied notwithstanding that the children are now in Bangladesh but there was debate as to how it should be interpreted where a non-Member State was involved. As to whether the English court should exercise such jurisdiction as it had, the appellant naturally said that it should, or alternatively that the question of whether jurisdiction should be exercised should be remitted to the Family Division for determination. I think that CAFCASS took the position that the matter could be determined by us and, in so far as their submissions were in support of any specific course of action as opposed to taking the form of a general review of the relevant factors, my impression was that they tended towards jurisdiction being declined.

*Ground 1: the "rule"*

19. For a long time, the approach of English law has been that where both parents have parental responsibility, one of them cannot unilaterally change the child's habitual residence. Early expressions of this approach can be found in Re P (GE) [1965] Ch

569 and, particularly, in the decision of the Court of Appeal in Re J (A Minor)(Abduction: Custody Rights) [1990] 2 AC 562 @ 572C.

20. The Supreme Court has had occasion to consider the concept of habitual residence in three cases in the last twelve months: Re A (see above), In re L (A Child: Custody: Habitual Residence) [2013] UKSC 75 and In re LC (Children) [2014] UKSC 1.
21. The judgments in Re A dominated the debate before us. They provide a considerable amount of material on jurisdiction and habitual residence and we found ourselves being taken back to them many times during the hearing.
22. The principal legal question in Re A was whether a child who was born in Pakistan and had never been to England and Wales could be habitually resident here. The Supreme Court concluded that jurisdiction was governed by Brussels IIR and that it was not *acte clair* whether the Regulation required some physical presence as a prerequisite of habitual residence. However, they took the view that the outcome of the case did not turn on that question because, even if the child was not habitually resident here and therefore jurisdiction did not exist under Article 8, it would do so by virtue of Article 14 which deals with residual jurisdiction where no court of a Member State has jurisdiction pursuant to Articles 8 to 13. Under Article 14, jurisdiction would be determined by the laws of England and Wales so could be exercised on the basis of nationality. The court remitted the matter to the High Court for the judge to decide whether to exercise such jurisdiction.
23. Counsel for the father, Mr Williams QC (who did not appear below, although his junior Ms Allwood did, then led by Mr de Mello) pointed out that nowhere in Re A or in the other two recent Supreme Court cases had that court expressly overruled the 'rule' and that in none of them was its continued existence directly in point. He submitted that it would require a clear statement at appellate level in a case where the point did arise to overturn the 'rule'. In his submission, Peter Jackson J should therefore have applied it here and it would have led to the conclusion that the children remained habitually resident in this country and this court had jurisdiction in relation to them.
24. To an extent, Mr Williams' submissions on this point were bound up with his submissions on Article 10. I think it is fair to say that if he could persuade us that Article 10 conferred jurisdiction on the court in circumstances such as the present ones, he was content not to press for the continued existence of the 'rule'. This was because Article 10 would cater for the policy consideration which influenced the 'rule', that is the protection of children from abduction.
25. Reunite and CAFCASS were more uncompromising in their approach to the 'rule'. Reunite submitted that it was incompatible with the three recent decisions of the Supreme Court and had been expressly or impliedly overruled. CAFCASS submitted that in the light of the decisions it cannot now be considered to be good law.
26. To my mind, the three recent Supreme Court decisions represent a new departure for habitual residence and it is appropriate to reconsider the continued existence of the 'rule' in the light of them. In so doing, it is worth remembering that no authority has been found in which the 'rule' is articulated as part of the ratio; it has simply been taken for granted for many years.

27. At §54 of her judgment in Re A, Baroness Hale (with the agreement of three members of the court) set out 8 propositions about habitual residence with the intent of, as she said, “[d]rawing the threads together”. Amongst them is the message which is now loud and clear that habitual residence is a question of fact and that “[t]he essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce” (see also §20 of her judgment in Re L). This is the context in which what she said about the ‘rule’ at §§39 and 40 should be read. At §39 she said:

“39. ....the English courts have been tempted to overlay the factual concept of habitual residence with legal constructs. The most important of these is the ‘rule’ that where two parents have parental responsibility for a child, one cannot change the child’s habitual residence unilaterally....

28. She explained that the existence of the rule had not been put in issue by the father in Re A so the question was not before them, but she commented:

40. ....It is worth noting that the "rule" has not been universally adopted: see, for example, *Mozes v Mozes* 239 F 3<sup>rd</sup> 1067 (9th Circuit 2001); *SK v KP* [2005] 3 NZLR 590. Nor is there a hint of it in the European jurisprudence. It would not inevitably be a charter for abduction. Both the 1986 Act and the Regulation contain provisions designed to retain jurisdiction in the country where a child was formerly habitually resident for at least a year after his wrongful removal or retention: see 1986 Act, s 41 (albeit that it has been held that this does not apply as between the United Kingdom and other countries: *Re S (A Child: Abduction)* [2002] EWCA Civ 1941, [2003] 1 FLR 1008) and Regulation, article 10..... As Lord Hughes points out, article 10 provides a good reason why the courts of England and Wales retain jurisdiction over the three older children in any event. The Hague Child Abduction Convention is concerned with wrongful removal or retention of a child from the country where he was habitually resident *immediately before* that wrongful removal or retention: see article 3. As Lord Hughes also points out, the "rule" is more relevant in retention than removal cases, but the answer may lie in treating the unilateral change of habitual residence as the act of wrongful retention, even if it takes place before the child was due to be returned. The matter may therefore require fuller consideration in another case, but it is not necessary for us to express a concluded view.”

29. Lord Hughes adopted Baroness Hale’s summary at §54 of her judgment (§81) and agreed with most of her reasoning. He too was at pains to return habitual residence to a question of fact. He expressed the view that what have been treated in some quarters as propositions of law emanating from Lord Brandon’s speech in Re J (supra) are much better regarded as “helpful generalisations of fact” (§73, and see also the endorsement of this in §21 of Re L). He then alluded in §76 to the ‘rule’ which he described as “a proposition closer than those above to a rule of law” (§76), identifying

its origins in the view that children should normally be returned summarily to the State of their habitual residence so that “the necessary, and often finely balanced, merits decisions” can be made about them there and the need to ensure that the unilateral actions of one parent do not undermine this by achieving a change of habitual residence by wrongful removal or, particularly, retention. He observed that “[t]o hold that parent B’s unilateral actions cannot bring about a change of habitual residence is one route to ensuring that the 1980 Convention is not made ineffective in such a case” (§76). He agreed with Baroness Hale that concluded answers about the ‘rule’ must await another day (§78) but did set out some thoughts on the subject, including a consideration of Article 10 of Brussels IIR which he noted was designed for such a case. I do not think he was yet wholly reassured that it would turn out to be the complete answer although he set out a possible way of resolving matters that may maintain the effectiveness of the 1980 Hague Convention, as follows:

“It may well be that the correct view is that unilateral acts designed to make permanent the child’s stay in State B are properly to be regarded as acts of wrongful retention, notwithstanding that the scheduled end of the child’s visit has not yet arrived. Such a conclusion is not, to my mind, in any way precluded by the decision of the House of Lords in *Re H (Minors) (Abduction: Custody Rights)* [1991] 2 AC 476, which holds no more than that a specific act of retention must be identified, and it is consistent with the decision of Wall J in *In re S* (supra). The significance of the point here is simply twofold. First, Brussels II Revised is, notwithstanding that in the event of conflict it prevails over the 1980 Hague Convention (see Article 60), clearly meant to co-exist consistently with that Convention remaining effective – see for example Articles 10 and 11 – and it ought to be construed wherever possible with that very important objective in mind; in particular the concept of habitual residence needs to be construed similarly in each of the two instruments. Second, providing this approach is adopted, it is unlikely that even in this situation it is necessary to formulate a rule of law that a child’s habitual residence cannot unilaterally be changed by one parent where two parents both have parental responsibility.” (§78)

30. Overall, what to my mind emerges from Lord Hughes’ judgment, as from Baroness Hale’s, is a general disinclination to encumber the factual concept of habitual residence with supplementary rules and in particular to perpetuate the ‘rule’ with which we are concerned here, provided that an approach can be found which prevents a parent undermining the Hague Convention and the jurisdiction provisions of Brussels IIR. The solution that both Lord Hughes (at §78) and Baroness Hale (at §40) had in mind, and seemed to think tenable, involved treating the act of wrongful retention of the child as occurring at an earlier stage than might sometimes be assumed, that is to say as soon as the parent engages in unilateral acts designed to make permanent the child’s stay in the new country rather than only when the end of the child’s scheduled stay there arrives. This would prevent a parent from establishing

a habitual residence in the country to which he has abducted the child before the act of wrongful retention occurs.

31. In Re L, the court was no less hesitant about the continuation of the ‘rule’. Giving the only judgment, Baroness Hale referred back to Re A, saying:

“22. Both Lord Hughes and I also questioned whether it was necessary to maintain the rule, hitherto firmly established in English law, that (where both parents have equal status in relation to the child) one parent could not unilaterally change the habitual residence of a child (see *In re S (Minors) (Child Abduction: Wrongful Retention)* [1994] Fam 70, approved by the Court of Appeal in *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887). As the US Court of Appeals for the Ninth Circuit pointed out in *In re the application of Mozes*, 239 F 3d 1067 (9<sup>th</sup> Cir 2001), at 1081, such a bright line rule certainly furthers the policy of discouraging child abductions, but if not carefully qualified it is capable of leading to absurd results (referring to EM Clive, “The Concept of Habitual Residence” [1997] *Juridical Review* 137, at 145). The court continued:

‘Habitual residence is intended to be a description of a factual state of affairs, and a child can lose its [sic] habitual attachment to a place even without a parent’s consent. Even when there is no settled intent on the part of the parents to abandon the child’s prior habitual residence, courts should find a change in habitual residence if ‘the objective facts point unequivocally to a person’s ordinary or habitual residence being in a particular place’ [referring to the Scottish case of *Zenel v Haddow* 1993 SLT 975].’

23. Nevertheless, it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child’s leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence.”

32. Re L also shows a continuing reluctance on the part of the court to permit legal glosses to be placed on the factual concept of habitual residence. The gloss that counsel for the father in Re L sought unsuccessfully to place on it was that where, as there, the child is permitted to live in a foreign country pursuant to an order which is under appeal, the child does not acquire the habitual residence of the parent with whom he is living until the appeal is determined.
33. Quite apart from the route contemplated by the Supreme Court in Re A to avoid the continuing need for the ‘rule’, it was submitted to us that a parent’s ability to change their child’s habitual residence unilaterally will be limited by the inclusion of the

purposes and intentions of the parents as one of the relevant factors in the factual determination of where a child is habitually resident (see Baroness Hale at §54(ii) of Re A and also at §23 of Re L). I accept that submission. Furthermore, as Baroness Hale said at §26 of Re L, the fact that the child's residence is precarious (as it may well be where one parent has acted unilaterally) may prevent it from acquiring the necessary quality of stability for habitual residence. However, the fact that one parent neither wanted nor sanctioned the move will not inevitably prevent the child from becoming habitually resident somewhere. If that were the case, the 'rule' would be alive and well, albeit dressed up in the new clothes of parental intention as one of the factors in the court's determination.

34. Given the Supreme Court's clear emphasis that habitual residence is essentially a factual question and its distaste for subsidiary rules about it, and given that the parents' purpose and intention in any event play a part in the factual enquiry, I would now consign the 'rule', whether it was truly a binding rule or whether it was just a well-established method of approaching cases, to history in favour of a factual enquiry tailored to the circumstances of the individual case.
35. It follows that the appellant's submission that Peter Jackson J was constrained by the 'rule' to find that the children had remained habitually resident in this country right up to his issue of proceedings here fails. The judge's enquiry into habitual residence had to be much more broadly based. That is how he approached the matter. He said:

“I do not consider that these children were habitually resident in this jurisdiction on 4 February 2013, regardless of the circumstances in which they remained in Bangladesh in August 2008. Taking account of all factors and applying the test adopted by the European Court, on no sensible analysis could this country be regarded as ‘the place which reflects some degree of integration by the child in a social and family environment’. The children left the United Kingdom at the age of about 14 months and 6 weeks old, and by the time the proceedings were issued, they had spent nearly 5 years in Bangladesh. Even if (taking the father's case at its highest) they have been unlawfully retained in that country by the mother, they have as a matter of fact long since ceased to be habitually resident in this country.”

36. I would not interfere with the judge's conclusion, there expressed. I will say a little more about the facts when I consider other grounds of appeal but what he said captures the very essence of the matter.
37. As Peter Jackson J concluded, the High Court could not therefore exercise its jurisdiction on the basis of habitual residence.

*Ground 2: Article 10*

38. That was not, in fact, the end of the matter as far as jurisdiction was concerned. The appellant's counsel presented Peter Jackson J with the alternative of the *parens patriae* jurisdiction but they did not submit to him, as has been submitted to us, that there was

jurisdiction based upon Article 10 of Brussels IIR. For the reasons I am about to set out, I consider that such jurisdiction does indeed exist.

39. There may be a natural inclination to think of Brussels IIR only where a matter is entirely concerned with European Union countries. We know from In re I (A Child)(Contact Application: Jurisdiction) [2009] UKSC 10 that it is not in fact limited in this way. The child there was habitually resident in Pakistan but the Supreme Court held that Article 12 of Brussels IIR still applied.
40. In Re A, the order sought by the mother was (as it was here) an order for the return of the children to England. The Supreme Court held that such an order was an order relating to parental responsibility within Article 1 of Brussels IIR and therefore within the scope of the Regulation and went on to hold that “the jurisdiction provisions of the Regulation do indeed apply regardless of whether there is an alternative jurisdiction in a non-member state” (§33).
41. I will quote in full §30 of Re A which is the core of the reasoning for this decision:

*“Does the Regulation apply where there is a rival jurisdiction in a non-Member State?”*

30. The Regulation deals with jurisdiction, recognition and enforcement in matrimonial and parental responsibility matters. Chapter III, dealing with recognition and enforcement, expressly deals with the recognition in one Member State of judgments given in another Member State: see article 21.1. But there is nothing in the various attributions of jurisdiction in Chapter II to limit these to cases in which the rival jurisdiction is another Member State. Article 3 merely asserts that in matters relating to divorce, legal separation or marriage annulment “jurisdiction shall lie with the courts of the Member State” in relation to which the various bases of jurisdiction listed there apply. Article 8 similarly asserts that the courts of a Member State “shall have jurisdiction in matters of parental responsibility . . .” Furthermore, article 12.4 deals with a case where the parties have accepted the jurisdiction of a Member State but the child is habitually resident in a non-Member State, thus clearly asserting jurisdiction as against the third country in question. Hence in Re I (A Child) (Contact Application: Jurisdiction), this Court held that article 12 did apply in a case where the child was habitually resident in Pakistan. There is no reason to distinguish article 12 from the other bases of jurisdiction in the Regulation.”

42. Both Baroness Hale and Lord Hughes expressly referred to Article 10 in Re A. To put their comments in context, it is necessary to know that the older three children were also wrongly retained in Pakistan as well as the youngest child with whom the Supreme Court was directly concerned. With that in mind, I think one can discern from the passages I am about to set out that neither of them questioned that Article 10 applies where the issue arising relates to a removal/retention of a child to/in a country outside the European Union.

43. What Lord Hughes said in his minority judgment was:

“93. There can be no doubt about the jurisdiction of the English court in relation to the elder siblings. This is not because of any rule of law which prevents one of two parents from unilaterally altering the habitual residence of a child. It is because as the 1980 Hague Convention requires, in the case of abduction, whether removal or, as here, retention, the acid test is habitual residence immediately before the event. They were resident in England. They went to Pakistan only for a three week holiday. There they have been wrongfully retained. *For the same reason, Article 10 of Brussels II revised maintains the jurisdiction of the English court.*” (my emphasis)

44. Baroness Hale picked this up in her judgment as follows:

“40.....As Lord Hughes points out, Article 10 provides a good reason why the courts of England and Wales retain jurisdiction over the three older children in any event.”

45. In the circumstances, it was no surprise to find the parties in agreement that, in principle, Article 10 applies even where the child concerned is presently in a country which is not a Member State. However, CAFCASS was troubled by how Article 10 would work in that situation. To explain why, I need to set out the provisions of the Article, which I will do in full even though the detail may not matter for these purposes.

#### **Article 10**

##### *Jurisdiction in cases of child abduction*

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the

competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

46. It will be seen that Article 10 has two main components. It first ensures that in case of wrongful removal or retention, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention retain their jurisdiction for a period. Secondly it makes provision for that retained jurisdiction to come to an end (hereafter “the ending of jurisdiction provisions”). What troubled CAF/CASS was that it would, in their view, be unsatisfactory, where the child has been taken to live somewhere outside the European Union, to have a retained jurisdiction without any provisions to bring it to an end. If the wording of Article 10 were to be given its natural meaning, this is what the position would be, because the requirements for the ending of jurisdiction include that the child has acquired a habitual residence in “another Member State”.
47. Ms Fottrell for CAF/CASS therefore contended for a broad purposive interpretation that would ensure that the ending of jurisdiction provisions were effective even if the child had moved to a non-Member State. In her submission, this would appropriately reflect the scheme of the Article which is to make provision both for retention of jurisdiction and for loss or transfer of jurisdiction. To achieve this, where the Article says that the jurisdiction is retained “until the child has acquired a habitual residence in another Member State”, it would have to be read simply as “until the child has acquired a habitual residence in another State”.
48. We have to bear in mind that, as Recital (12) of the Regulation says, the grounds of jurisdiction in matters of parental responsibility are shaped in the light of the best interests of the child, in particular on the criterion of proximity. One manifestation of this is the general jurisdiction provision in Article 8 which concentrates on the child’s place of habitual residence. Interpreting Article 10 as Ms Fottrell invites us to do might be seen as serving this objective, because it would tend to fix jurisdiction in the country where the child was now living.
49. But there are other factors in play as well in cases of wrongful removal/retention. For example, Recital (17) endorses the importance of the Member State where the child was habitually resident prior to the wrongful removal or retention and speaks of the need to obtain the return of the child there without delay.

50. Furthermore, it can be seen elsewhere in the Regulation that there are situations in which it is deemed that it is in the child's best interests for a Member State to have jurisdiction rather than the matter being entrusted to the courts of a third State, see Article 12 and in particular Article 12(4) relating to children with their habitual residence in a State which is neither a Member State nor a contracting State to the 1996 Hague Convention (on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children).
51. It is not plain therefore that policy considerations do, in fact, clearly dictate that Article 10 should be interpreted so as to bring an end to the retained jurisdiction even when it is in a non-Member State that the children are now living and not a Member State.
52. I would, in any event, find it very difficult to read the language of Article 10 in the way that CAFCASS proposed. The Regulation as a whole differentiates clearly between Member States and other States. I am not aware of anywhere else in it where "Member State" should obviously be read as "any State" and it is clear that in the majority of it, it would play havoc with the sense if that reading were to be adopted. It would have been entirely possible for those drafting the Regulation, conscious as they inevitably and patently were of the Member State/non-Member State divide, to have widened the wording of Article 10 so that it had the effect for which CAFCASS argued, but they did not. I would not do by a purposive interpretation what they did not do expressly.
53. In those circumstances, working, as the judge did, upon the basis that the father's case as to wrongful retention is accepted, jurisdiction is retained in the courts of England and Wales by virtue of Article 10 and has not been lost, because the children have not yet acquired a habitual residence in another Member State. To decide that there is jurisdiction is not, of course, the same as deciding that jurisdiction will be exercised. That is separate question, to which I will return.

#### *Parens patriae jurisdiction*

54. As, in my view, jurisdiction exists under Article 10, there is no room for the *parens patriae* jurisdiction and I do not intend to burden this judgment with further examination of the arguments that were advanced in relation to when it should be exercised if it does arise.

#### *The exercise of the Article 10 jurisdiction*

55. Under this heading, I include two aspects of the exercise of the Article 10 jurisdiction. The first concerns whether the court should proceed to exercise that jurisdiction or not. The second concerns what would be the appropriate order for the court to make, if it did exercise it.
56. It may be material to observe at this juncture that we are now a considerable distance from the way in which the case was presented to the judge below. Article 10 was not even mentioned to him and it may perhaps be thought to have been indulgent of this court to entertain argument about it. Be that as it may, it is now apparent that it is the foundation of the jurisdiction of the courts of this country to hear this case. By the

same token, as the mother did not participate before the judge and the children were not joined as parties at first instance, no application was made to him for him to stay the proceedings in favour of the Bangladeshi courts or simply to decline to exercise jurisdiction. That was something that he considered of his own motion. To it I now turn.

57. Mr Williams' skeleton made only a fairly brief reference to the issue of whether there was power to decline to exercise the Article 10 jurisdiction on *forum conveniens* grounds. The other parties barely dealt with it at all. We are therefore not in a good position to determine an issue which is of some significance and of which Baroness Hale remarked at §33 of Re A, having referred to Owusu v Jackson Case C-281/02) [2005] QB 801, JKN v JCN (Divorce: Forum) [2011] 1 FLR 826 and AB v CB (Divorce and Maintenance: Discretion to Stay) [2013] 2 FLR 29 (which she understood to be under appeal):

“It would therefore be unwise of us to express a view on the position in children's cases, which might well require us to make a reference to the Court of Justice.”

58. The appeal in AB v CB has since been heard and determined and is reported as Mittal v Mittal [2013] EWCA Civ 1255. The Court of Appeal held, distinguishing Owusu v Jackson, that there was power to stay matrimonial proceedings here on the ground that India was the more appropriate forum. Mittal hardly featured in the argument before us. Whilst it involved consideration of Brussels IIR, Mittal was not a case about children but about divorce proceedings. It required consideration of the interplay between Article 19 of the Regulation and paragraph 9 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973. It does not therefore tell us what the position is in children proceedings.

59. Given the potential importance of the question as to whether a court can decline to exercise the jurisdiction that it has under Brussels IIR in matters of parental responsibility, I would prefer not to determine it without full argument. Fortunately, it is, in my view, unnecessary to do so because there is another answer to this case. It is that the outcome of an exercise of the jurisdiction on the facts of this case would be the dismissal of the proceedings in any event. This is not to be confused with a refusal of jurisdiction. As Baroness Hale said at §40 of Re I:

“There are many conclusions which the court hearing this case might reach. Among them is an order that it would be better for the child to make no order at all: section 1(5) of the Children Act 1989. But this is not a refusal of jurisdiction (cf Owusu v Jackson (Case C-281/02) [2005] QB 801). It is a positive conclusion, reached after the court has exercised its jurisdiction to hear and determine the case, that in all the circumstances it will be better for the child to make no further order about his future.”

60. There is no doubt that a court entertaining proceedings in relation to a child can bring those proceedings to a speedy end, see for example what Munby LJ (as he then was) said in Re C (Children)(Residence Order: Application Being Dismissed at Fact-

Finding Stage) [2012] EWCA Civ 1489 of the powers of a judge in proceedings concerning children:

“§14 .....In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may ...decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence.

§15 The judge in such a situation will always be concerned to ask himself: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise. If there is or may be solid advantage to the children in doing so, then the inquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercise of his discretion so to decide and to determine that the proceedings should go no further.”

61. As can be seen from my judgment giving permission to appeal, I thought then that it may turn out that the outcome of the hearing before Peter Jackson J was right and that it would not be appropriate to make orders here in relation to two children who have not been resident in this country for five years and in relation to whom the Bangladeshi courts are already involved. The judge did not in terms consider the question of *how* to exercise his jurisdiction as opposed to *whether* to exercise it although, on the facts of this case the two issues are very closely allied and what he said was material to both. We are not, therefore, in the position of reviewing the judge’s decision as to the disposal of the case but of deciding on the material available to us first, whether the welfare decision about the children should be remitted to the Family Division for consideration or determined by this court and secondly, if we are in a position to make the welfare decision ourselves, what it should be.
62. Peter Jackson J dealt with the case on the basis of the written material and submissions only. We are in no worse position than he was, therefore, and in some respects we have more information because the bundle of material that is now available includes material concerning the proceedings in Bangladesh which was not available at the time of the hearing before him. We were invited to take note of this and have done so but it is disappointing that it was not the subject of an application for permission to adduce fresh evidence which would have enabled us to identify the material easily for what it was and to consider whether or not to receive it (CPR Rule 52.11(2)).
63. The children’s welfare is the paramount consideration in a determination of what, if any, orders to make in relation to them. Mr Williams submitted that it could not be said to be in their best interests to make no order where there were concerns about

their welfare in Bangladesh and the court process there was becalmed. He argued that an order for the return here of the children was not the only option open to the court and other courses of action should have been considered. In particular, he argued that Peter Jackson J should have sought further information about the children; by extension, his argument would be that so should we.

64. I would first make a general point. Even in family litigation, even (or perhaps especially) in international family litigation, there is an obligation on the parties to gather and present their own evidence to the court. There are occasions when the court's help needs to be sought, for example a location order may be needed so as to find the child or an order may be required to obtain disclosure of material that is in the possession of another party who will not produce it. There are also occasions when permission is required from the court to obtain and adduce evidence. Expert evidence is a notable example of this, see Part 25 Family Procedure Rules 2010, and now section 13(1) Children and Families Act 2014 which provides that a "person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings". But subject to these matters, parties cannot expect the family courts to bridge the gaps in their preparation for them or to take things as read which should have been established, nor can they expect the judge to take over completely and direct what steps are to be taken to assemble information that is needed to address jurisdictional and welfare questions. Having said that, Mr Williams is of course correct that the courts of this country do attempt, in appropriate cases, to use whatever means are at their disposal to obtain information from abroad about children in order to ensure that their welfare is safeguarded.
65. The father's application to Peter Jackson J was for an order for the return of the children to this country so that the court here could "determine what steps to take" (§13 d of the skeleton argument at C3 of the appeal bundle) and also for care and control of the children (§16). The main elements of his case were that the children were being kept in Bangladesh by the mother against his will and he was concerned about her mental state and about her care of the children which he said was inadequate in many ways. He made two statements in support of his case in which he set out his account of events and to which he exhibited various documents, including letters from a doctor and a dentist who have treated the children and criticise the care they have been receiving, and a statement from the mother's uncle who also makes critical comments about the mother's care of the children.
66. The story that emerges is far from clear and the documentation appears to contain allegations and counter-allegations making it very difficult to know precisely what has occurred. Although the father's account was that the mother refused to return to England with him, there is available a copy of a statement that she made to a magistrate in Sylhet (C75) which suggests the opposite. It is asserted in that statement that the father returned to London in August 2008 with the mother's passport after saying to her that he was going to Dhaka and that she was "tortured" by her brother-in-law who, if I have understood correctly, was intent on getting the children returned to the father in the UK.
67. A significant feature of this case is the amount of time that has elapsed since the father returned to the UK without the rest of the family in August 2008 and the proportion of that time that he has spent in Bangladesh, seeing the children regularly and, on his account, acting as their main carer although they were living with the

mother. He was there between March and November 2009, from November 2010 to November 2011 and from May 2012 to November 2012. Given the ages of the children when they went to Bangladesh and the nearly 6 years they have now spent there, they will remember nothing of their lives in this country. What they have known is a life in Bangladesh with prolonged visits from their father, up to 18 months ago, since when they have kept in touch on the telephone.

68. The father attempted to explain why it was only in February 2013 that he brought proceedings in this country. His account was that when he was first unable to get the children back, he consulted solicitors here in 2009 but they were unable to assist him which was why he returned to Bangladesh to try to secure their return. He said that he first filed a case there in April 2009 but that was discharged in October 2009. In January 2011, he applied for custody of the children and restitution of conjugal rights which was granted on 7 July 2011 but the order was not complied with. He said that he then took action to enforce it, which action is ongoing.
69. It appears from the new documentation that has been placed before us, that in November 2012, the mother belatedly filed an appeal against the July 2011 order. She explained the delay in proceeding with the appeal as being because she hoped to get back to the father's family, an assertion which runs completely counter to the father's account. In her documentation, there is reference to the father having filed an appeal himself which was dismissed in April 2012 after trial (see D20 §4). I am not sure that we have any information at all about that. It is not, however, inconceivable that the father would have been dissatisfied with the July 2011 order, which this appeal may have concerned. In translation, it reads:

“Order is given for residing [the mother] with [the father] and maintaining of free relation as husband – wife looking after those minor children under custody of [the father] and for talking to each other and taking care of them. And [another family member] is restricted not to make prevention [the mother] and taking care to her minor children and coming to the house of [the father].” (sic)

It can be seen that it appears to contemplate the parties living together with the children rather than the children being entrusted to the care of the father which appears to be what he seeks.

70. No English court would be readily inclined to intervene, in circumstances such as those that appear to exist here, in relation to children who are living abroad, and particularly not where the order sought is for the return of the children after such a very long time to a country and life of which they have no recollection.
71. The father has asserted that an order of the English court will assist in securing the return of the children here and produced a letter from his lawyers in Bangladesh (C91). The letter requests the father to pursue an order here “so that we can use that order(s) to persuade the matter in Bangladesh Court”, saying that such an order “will carry a high persuasive value in the Bangladesh Court to get the justice for your children and return back to their birth country in England” but there is no explanation offered as to what, if any, difficulty there is with the Bangladeshi proceedings and precisely how an English order would help, and no elucidation of the workings of the

July 2011 order which appears to contemplate the family living together rather than the children being in the sole care of the father. The father asserted in his statement that the order would also have the benefit of securing assistance from the Foreign and Commonwealth Office in Bangladesh and the British High Commission.

72. My view is that the father's wardship proceedings should be dismissed forthwith with no substantive order being made. I bear in mind Mr Williams' submission that it is incumbent on the court to seek further information from Bangladesh about the welfare of the children by some means. It can be hard to obtain information about the situation of children abroad and the documentation that we already have reveals that that is very likely to be the case here. Furthermore, even if a means could be found to investigate the children's circumstances further in situ, there would inevitably remain a tangled web of assertions going this way and that. It is unlikely that the mother would be keen to participate in a hearing here that would allow reliable findings of fact to be made and I am not persuaded that it would be possible for the English court to obtain a sufficiently dependable picture for it even to contemplate ordering a return of the children to this country in the care of the father. It is one thing to order the return of children who have *recently* been taken wrongfully from the country in which they are living to another country; in such a situation the court may sometimes proceed upon fairly limited information. It is quite another to order a return after they have been living abroad for a period of nearly six years, particularly when that represents virtually their whole lives. In those circumstances, the potential for harm to the children from a misguided order is such that the court will want to be on particularly secure ground before acting.
73. In short, to use the language of Re C (see §59 above), I can see no solid reason in the interests of the children to continue the proceedings further and I consider that the appropriate outcome is that they should end with no order made. It would not help the children if the court were to make an immediate return order without the information required to determine reliably whether that would be conducive to their welfare. Neither would it be in their best interests, in my view, to divert the focus from whatever is being done locally in Bangladesh to resolve the disputes about their care by protracting the English proceedings in an attempt to investigate the situation there so as to provide the English court with more information. In any event, it seems to me so unlikely that an English court would make a return order on the facts of this case, even after further investigation, that it would be futile to remit the case to the Family Division for further hearings.
74. I would therefore dismiss the father's appeal. That will result in his proceedings remaining dismissed, albeit that my reasoning for that result is not the same as Peter Jackson J's.

**Lord Justice Vos:**

75. I agree.

**Lord Justice Richards:**

76. I also agree:

Judgment Approved by the court for handing down.

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