No. 24-

IN THE

Supreme Court of the United States

ANNE CATHERINE RICHARD,

Petitioner,

v.

ERIC JOHN HORACIUS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit's habitual-residence analysis conflicts with this Court's totality-of-the-circumstances standard under *Monasky v. Taglieri*, by finding that a child's significant residence and social ties in the United States can be effectively disregarded by a presumption that a short-term visit cannot evolve into a new habitual residence. *Monasky v. Taglieri,* 589 U.S. 78 (2020).

II. Whether the Eleventh Circuit erred by failing to apply a consistent, child-centered standard to the "well-settled" affirmative defense, and whether a trial court has virtually unbounded "equitable discretion" to order a child's return even after finding that the child is well-settled

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Anne Catherine Richard, Petitioner

Eric John Horacius, Respondent

LIST OF PROCEEDINGS

U.S. COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
Case No. #24-10801
ERIC HORACIUS V. ANNE RICHARD
Opinion affirming decision of District Court issued on July 30, 2024.
Order denying rehearing on October 7, 2024.

U.S. DISTRICT COURT SOUTHERN DISTRICT
OF FLORIDA
Case No. 0:23-cv-62149KMM
ERIC HORACIUS V. ANNE RICHARD
Order granting Petition to Return Minor Child to Canada issued on March 7, 2024.
Judgment on March 14, 2024.

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INTERNATIONAL TREATIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Anne Catherine Richard, respectfully requests that a Writ of Certiorari be issued to review the decisions from the lower courts ordering A.H. to be relocated to Canada under the Hague Convention.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on July 30, 2024, and is reproduced in the Appendix ("App.") at [App. 1a]. The district court's Findings of Fact and Conclusions of Law, granting the Petition for Return of Minor Child under the Hague Convention, was issued on January 4, 2024 is reproduced at App. 21a. Both opinions are unpublished.

BASIS FOR JURISDICTION IN THIS CASE

The Eleventh Circuit entered judgment on September 30, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner timely filed this Petition for a Writ of Certiorari within 90 days of the entry of judgment by the court of appeals, pursuant to Supreme Court Rule 13.1.[1]

INTERNATIONAL LAW PROVISIONS INVOLVED

This case arises under the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") concluded on October 25, 1980, and

1. A motion for extension of time to file this Petition for Writ of Certiorari was granted, extending the filing date until February 19, 2025.

The Hague Convention provisions central to this petition include:

1. **Article 3(a) & (b)** (defining "wrongful removal or retention" and "rights of custody");

2. **Article 12** (the one-year period and the "well-settled" exception);

3. **Article 18** (granting discretion to order the return of the child at any time).

Relevant excerpts of the Hague Convention are set forth at [App. 42a].

STATUTORY PROVISIONS INVOLVED

The Hague Convention is implemented in the United States by the International Child Abduction Remedies Act 22 U.S.C. §§ 9001–9011. ("ICARA")

STATEMENT OF THE CASE

Petitioner, Anne Catherine Richard, and Respondent, Eric John Horacius, were married in Canada in 2018, where they initially resided. *Dist. Ct. Op.* 2. Their daughter, A.H., was born in Quebec in March 2020 and spent the first nine months of her life there. *Id.* at 2–3. In December 2020, the family traveled to the Dominican Republic to visit Petitioner's ailing father, who was residing there. *Id.* at 3. Rather than returning to Canada, the family traveled directly to Florida in February 2021 on one-way tickets. *Id.*; *11th Cir. Op.* 6.

Upon arriving in Florida, the family moved into Petitioner's sister's home in Miramar, Florida, along with other relatives. A.H. lived with her mother, father, and extended family, including cousins. *Id.*

Shortly after arriving, Respondent and Petitioner jointly agreed to terminate the lease for their condominium in Canada. This decision allowed them to save money and made it easier to remain in Florida during the pending immigration process. *Id.*

While in Florida, Respondent obtained multiple documents indicative of residency, including: (i) a Florida driver's license, (ii) a Florida notary commission[2], (iii) a concealed weapons permit, and (iv) Florida voter registration—all listing the Miramar address. *11th Cir. Op.* at 3. Respondent also obtained a Florida phone number and met with real estate agents about purchasing property in Florida. *Id.* at 5. Respondent has since claimed that any property purchased would have been for investment purposes. *Id.*

Respondent initiated sponsorship paperwork for Petitioner and A.H. to secure permanent residency in the United States. *Id.* at 3.

A.H. attended daycare in Florida, where she interacted with peers daily. She participated in playdates with her cousins and other children from the community and attended church regularly with her family. *Id.* at 6. A.H. developed strong relationships with her Florida-

2. The application for the notary commission included a sworn statement that Florida was the applicant's legal residence.

based relatives. She had no similar connections in Canada, having left as an infant.

A.H. received routine medical care from Florida-based pediatricians, and by 2023, Florida was the only home A.H. remembered. *Id.*

While Respondent later claimed that the family's stay in Florida was intended to be temporary, Petitioner presented evidence, including immigration sponsorship efforts and decisions like ending the Canadian lease, that demonstrated a shared intent to remain in Florida. *Dist. Ct. Op.* at 2-4.

In January 2022, Respondent left Florida and returned to Canada after withdrawing his sponsorship of Petitioner's immigration application, citing financial strain. *Id.* at 4. Shortly thereafter, Petitioner filed for divorce in Florida. *Id.* at 5.

By the time of the trial, A.H. had spent almost three years in Florida, representing three-fourths of her entire life. She had no meaningful ties to Canada, had never attended daycare or school there, and had no friends or social network in Canada. *Id.* at 14.

The district court entered a final judgment on March 14, 2024, granting the Petition for Return of Minor Child to Canada.

Respondent appealed. On September 30, 2024, a panel of the Eleventh Circuit affirmed in a per curiam opinion. Although it recognized *Monasky*'s "totality-of-the-circumstances" standard, the Eleventh Circuit focused on

the parents' lack of "shared settled intention" to remain in the United States. *11th Cir. Op.* at 7. It concluded that "Richard has not shown clear error in the district court's conclusion that A.H.'s habitual residence was Canada." (*Id.* at 13–14.) The Eleventh Circuit further held that the district court did not abuse its discretion in rejecting the "well-settled" defense and in ordering the child's return even if that defense had been proven. (*Id.* at 15.)

As the Eleventh Circuit's approach, as well as the district court's reliance on parental intent over clear evidence of the child's acclimatization in Florida, conflicts with this Court's directives in *Monasky* and is at odds with other circuits' fact-intensive analysis, Petitioner now seeks this Court's review.

REASONS TO GRANT THIS PETITION

This case presents important questions under the Hague Convention, as implemented by ICARA, regarding how courts should determine a child's "habitual residence" and whether (and how) to apply the Convention's "well-settled" defense when the child has lived in the United States for a substantial period. Respondent, the father of A.H., seeks Supreme Court review because the Eleventh Circuit's decision (1) endorses an analysis of habitual residence that heavily emphasizes parental intent over the child's day-to-day realities, which departs from this Court's totality-of-the-circumstances directive in *Monasky*; and (2) allows a district court to override a "well-settled" finding almost by default, thus undermining uniform interpretation of the Hague Convention across federal courts.

I. The Eleventh Circuit's Decision Contributes to Disuniformity Among the Circuits in Habitual-Residence Analyses under the Hague Convention.

The Hague Convention provides a mechanism for addressing wrongful international removals and retentions of children, yet lower courts have taken varying approaches to determining a child's "habitual residence." This Court clarified in *Monasky* that no rigid rule applies; instead, courts must employ a flexible, totality-of-the-circumstances standard. *See Monasky v. Taglieri*, 589 U.S. 78 (2020). Despite that instruction, the Eleventh Circuit's approach here effectively revives a focus on parental intent that can overshadow evidence of a child's day-to-day life and acclimatization in the new country.

An examination of the lower court proceedings illustrates why. In affirming the district court, the Eleventh Circuit relied heavily on the father's original testimony that Florida was supposed to be a "temporary" stay and the continued storage of family belongings in Canada. The district court used these factors to conclude there was no "shared settled intention" to remain in Florida. In so doing, the Eleventh Circuit essentially discounted abundant evidence of the child's three-year residence in Florida, including the child's daycare attendance, friendships with cousins, routine medical care, and deep social ties. These facts, while acknowledged, were given little weight. The district court went so far as to conclude that the mother's "wrongful retention" could not "suffice to create a new habitual residence," thereby minimizing the question of whether a prolonged stay in Florida had, in practice, become the child's true home. On appeal, the Eleventh Circuit upheld this parental-

intent-centric analysis under a deferential "clear error" standard, effectively reinforcing that perspective.

By contrast, other circuits more evenly balance parental intent and the child's circumstances on the ground. For instance, the Second Circuit in *Gitter v. Gitter*, adopted a two-step analysis that first considers "settled parental intent" but then expressly requires examining the child's acclimatization if parental intent is uncertain or contested. *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005). This framework ensures that courts look beyond a parent's stated plans to the practical reality of the child's home environment. The Eleventh Circuit's affirmance here, however, substantially diminished the second prong, i.e., the child's own experience, by casting the initial "temporary" plan as dispositive.

Likewise, in *Barzilay v. Barzilay* the Eighth Circuit stressed that merely traveling abroad based on a parent's intent does not necessarily defeat the child's actual, fact-based ties to the forum. *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010). The court there underscored that determining habitual residence should account for whether the child has become rooted in the new location, thus calling for a more child-centered inquiry.

The Fourth Circuit's decision in *Maxwell v. Maxwell* further illustrates a thorough, factor-by-factor examination of the child's environment. *Maxwell v. Maxwell*, 588 F.3d 245 (4th Cir. 2009). In *Maxwell*, the court weighed aspects such as the child's schooling, social networks, healthcare, and general stability, all of which collectively informed a careful determination of the child's habitual residence.

Taken together, these approaches in *Gitter*, *Barzilay*, and *Maxwell* highlight that a child's real-world experience must be given strong consideration when determining habitual residence. This is an emphasis that the Eleventh Circuit has diluted in its decision below, leading to an outcome that stands in tension with other circuits' more child-centered inquiries, and thereby contributing to disuniformity in how federal courts apply the Hague Convention's core concepts.

II. The Eleventh Circuit's Near-Plenary Discretion to Override the "Well-Settled" Defense Conflicts with the More Nuanced Treatment in Other Circuits

The Eleventh Circuit's approach below permits trial courts to downplay or override the "well-settled" defense with little or no explanation, despite the Hague Convention's Article 12 expressly contemplating denial of return if a child is "well-settled" after one year. By treating the defense as merely optional, regardless of how developed the child's roots in the new environment may be, the Eleventh Circuit effectively dilutes a key safeguard designed to protect children who have become significantly integrated in their new settings.

In the decision below, the Eleventh Circuit chose not to address the District Court's well-settled analysis, noting that even if the District Court had found A.H. to be well-settled, it would have ruled in the same manner, ordering her return. App. C at App. 15a. While it is true that a court has equitable discretion to accept the well-settled defense, it was most certainly not intended to be so flippantly disregarded. In doing so, the Eleventh Circuit ignored the totality-of-the-circumstances approach favored by this

court, and failed to look at the factors utilized by other circuits, namely:

> (1) the age of the child; (2) the stability of the child's residence in the new environment; (3) whether the child attends school or daycare consistently; (4) whether the child attends church [or participates in other community or extracurricular school activities] regularly; (5) the respondent's employment and financial stability; (6) whether the child has friends and relatives in the new area; and (7) the immigration status of the child and the respondent.

Lozano v. Alvarez, 697 F.3d 41 (2d Cir. 2012).

If the Eleventh Circuit had taken those factors under consideration, given the facts involved in this case, it would have been unable to maintain the argument that the District Court's weight of the factors did not involve clear error.

The Second Circuit's discussion in *Lozano v. Alvarez*, underscores how critical it is for courts to methodically parse the "well-settled" factor rather than reflexively ordering return once a wrongful retention is found. In *Lozano*, the Second Circuit stressed that even if a retention is "wrongful," a court must still evaluate, with concrete evidence, the extent of the child's acclimatization to the new environment. This step protects against the risk of uprooting a child who has established meaningful social, educational, and familial bonds. *Lozano,* 697 F.3d 41.

In the face of the more searching review provided by the Second Circuit in *Lozano*, verified by this Court's affirmation, the Eleventh Circuit's deflation of the well-settled argument fosters confusion and inconsistent outcomes. The Eleventh Circuit's far more cursory treatment of the well-settled defense here departs significantly from the spirit of *Lozano*. Regardless of the merits or demerits of the Eleventh Circuit's reasoning, the fact is that the gap between its method and the careful, evidence-based inquiries demanded in other circuits illustrates that a crucial treaty of international law is being applied unevenly. The resulting patchwork of standards undermines the Convention's goal of uniform, child-focused resolutions to international abduction disputes.

III. The Need for a Uniform Interpretation of the Hague Convention Is Paramount.

The United States' ratification of the Hague Convention, and Congress's implementation of a corresponding statute (ICARA), both reflect a national commitment to uniform rules governing international child abduction. This Court has repeatedly recognized the paramount importance of ensuring the consistent application of international treaties to prevent the seeking of friendly jurisdictions to seek desired results. See, e.g., *Abbott v. Abbott*, 560 U.S. 1, 12 (2010). Yet the Eleventh Circuit's decision, by underscoring parental intent even at the expense of the child's demonstrable connections, departs from the more balanced methodology favored by other circuits. These discrepancies will inevitably lead to divergent outcomes and erode the treaty's central objectives: providing predictable, child-centered remedies and preventing forum-shopping by parents.

IV. This Case Presents an Ideal Opportunity to Resolve Post-*Monasky* Inconsistencies Amongst the Circuits in the Habitual Residence Determination.

In *Monasky*, the Court clarified the "fact-driven inquiry" behind habitual residence determinations but did not eliminate all ambiguity about the weight accorded to parental intent, as opposed to the child's own acclimatization. Because this dispute directly challenges how a child's extensive ties to the location should factor into both the "habitual residence" inquiry and the "well-settled" defense, it offers the Court a useful opportunity to unify the federal approach to the Hague Convention and ICARA. The Eleventh Circuit's refusal to credit the child's extended stay in Florida as dispositive of a new habitual residence, coupled with its disregard for the well-settled defense, carries significant implications for children across the Nation.

Given the importance of uniformity in interpreting international treaties and the practical high stakes consequences for families and children, the Court should grant certiorari to clarify whether the Eleventh Circuit's approach aligns with *Monasky* and other post-*Monasky* decisions. Absent this Court's guidance, the risk of disuniform applications, and the difficulty for international families seeking predictable, rule-based outcomes, will persist.

This case clearly presents two recurring issues under the Hague Convention: (1) how courts should balance parental intent against a child's real-world acclimatization in determining habitual residence, and (2) how a court should apply and weigh the "well-settled"

exception when a petition is filed more than one year after the alleged wrongful retention. The Eleventh Circuit's affirmance below highlights a problematic reliance on one parent's perspective at the expense of a thorough child-centered inquiry. Absent this Court's intervention, such inconsistencies will persist, resulting in unpredictable outcomes for children and parents across the United States.

Accordingly, this Court should grant certiorari to address and resolve these ongoing tensions among the circuits, ensuring uniformity in applying the Hague Convention's protections.

CONCLUSION

For all the reasons set forth above, this case presents important questions of federal law and treaty interpretation that have profound consequences for children, parents, and international comity under the Hague Convention. The Eleventh Circuit's ruling not only diverges from the nuanced approaches of sister circuits, it also undermines the Convention's central purpose of ensuring that courts utilize a uniform and child-centered analysis of wrongful retention and the well-settled defense. Left unaddressed, these inconsistencies will result in ongoing confusion for families and courts nationwide, as well as erode confidence in the United States' commitment to applying its international obligations in a predictable, principled manner.

Accordingly, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-10801

ERIC JOHN HORACIUS,

Plaintiff-Appellee,

versus

ANNE CATHERINE RICHARD,

Defendant-Appellant.

July 30, 2024, Filed

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-62149-KMM

Opinion of the Court

Before NEWSOM, LUCK, and ABUDU, Circuit Judges.

PER CURIAM:

Anne Catherine Richard appeals an order of the district court, entered after a bench trial, granting

Appendix A

Eric John Horacius's petition for the return of Richard's and Horacius's minor child, A.H.,[1] to Canada under the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001-9011. After careful review of the record, and with the benefit of oral argument, we affirm the district court's order.

I. FACTUAL BACKGROUND

Richard and Horacius were married in Canada in 2018. Horacius is a dual citizen of the United States and Canada. Richard, who is originally from Haiti, and A.H. are Canadian citizens. At the time of A.H.'s birth, in March 2020, Richard and Horacius lived together in Quebec.

Around December 2020, when A.H. was nine months old, Richard and Horacius took A.H. to the Dominican Republic to visit Richard's parents. The parties left the Dominican Republic in February 2021 and traveled directly to Florida. From February 2021 until the alleged wrongful retention began in March 2022, A.H. lived with Richard and Horacius at the home of Richard's sister in Miramar, Florida, "by mutual agreement of the parties." A.H. has biological brothers, grandparents, and extended family in both Canada and Florida.

While living with Richard and A.H. in Florida, Horacius: (1) obtained a Florida driver's license using

1. We refer to the minor child throughout this opinion using her initials for the sake of privacy.

Richard's sister's Miramar address; (2) applied for and received a notary commission in Florida using the Miramar address; (3) obtained a Florida concealed weapons permit using the Miramar address; and (4) registered to vote in Florida and maintained active voter status there at the time of trial. Horacius also filed affidavits of support with United States immigration authorities for Richard and A.H. to become permanent United States residents, and he listed the Miramar address as his residence on the affidavits.

In January 2022, after A.H. had been living in Florida for nearly a year, Horacius left and returned to Canada alone. The following month, in February 2022, Richard filed a divorce petition against Horacius in Florida state court. Horacius then purchased and sent airline tickets for Richard and A.H. to return to Canada around March 2022, but Richard refused to return.

II. PROCEDURAL HISTORY

Richard's refusal to return with A.H. to Canada, in March 2022, marked the point at which the alleged wrongful retention began. Horacius filed his ICARA petition in November 2023. By the time of trial, in January 2024, A.H. had been living in Florida for nearly three years. In his petition, Horacius alleged that Richard was wrongfully retaining A.H. in Florida despite his requests that A.H. be returned to Canada. He contended that A.H.'s "habitual residence" was Canada and that Richard's retention of A.H. in Florida violated rights of custody afforded him by Canadian law.

Richard answered the petition and admitted that she refused to return A.H. to Canada and that Horacius had custody rights that he had been exercising at all relevant times. However, Richard denied that A.H. was a habitual resident of Canada and asserted, instead, that the United States had become A.H.'s habitual residence after A.H. relocated there by mutual agreement of both parents in February 2021. Richard further asserted that, even if Horacius could establish a *prima facie* case of wrongful retention under ICARA, his petition still should be denied based on her affirmative defense that A.H. had become well-settled in Florida.

A. Factual Issues for Trial

Although the parties stipulated to several facts alleged in Horacius's petition, the remaining issues to be litigated at trial included whether: (1) Horacius intended his, Richard's, and A.H.'s entry into the United States to be temporary or permanent; (2) Richard's conduct, beginning in March 2022, amounted to a wrongful retention of A.H. that violated Horacius's custody rights under Canadian law; (3) A.H. had been a "habitual resident" of the United States or Canada immediately prior to the wrongful retention in March 2022; and (4) A.H. had become well-settled in her new environment such that the court should deny the petition for her return even if Horacius established a *prima facie* case of wrongful retention.

Regarding the first disputed fact, Horacius testified that Richard repeatedly assured him that the trip to Florida would be temporary, and he only agreed to travel

there so that Richard's family could meet A.H. As evidence that the family planned to return to Canada, Horacius noted that immediately after A.H.'s birth, she had been placed on a waiting list to attend daycare in Canada and the family's belongings had been kept in a storage unit in Canada while they were in Florida. He asserted that because Richard and A.H.'s applications for permanent-resident status were submitted while they were in the United States, they could not return to Canada during the pendency of their applications without the applications being cancelled. However, if Richard and A.H. returned to Canada and submitted the applications to become permanent residents of the United States from Canada, there would not have been any travel restrictions.

Upon further questioning about whether he intended to remain in Florida permanently, Horacius conceded that he had met with realtors in Florida to discuss purchasing a home there, but he maintained that any home he purchased would have been an investment property that he rented out while living in Canada rather than a permanent residence in the United States. He also acknowledged that he had obtained a Florida phone number while living in Florida and that he and Richard had ended their lease for their condominium in Canada while they lived in Florida. Nevertheless, he maintained that he never intended to live in Florida permanently.

In contrast, Richard testified that before the alleged wrongful retention began, she and Horacius had already decided to move to Florida with A.H. "full time." She stated that Horacius did not begin expressing reluctance

about living in Florida until around the time that he moved back to Canada. She denied ever telling Horacius that she and A.H. planned to return to Canada, and she highlighted that the family had purchased one-way airline tickets to Florida that did not include a return flight to Canada.

When questioned about Horacius's custody rights over A.H., Richard agreed that Horacius had "parental rights as it relates to A.H.," and that he "should be involved in major decisions involving A.H." She also conceded that she had made "major decisions such as schooling and medical treatment for A.H. without first speaking" to Horacius.

Additional testimony established that A.H. had not been back to Canada since she left at nine months old, she did not have any friends in Canada, and she never attended daycare or school there. However, while living in Florida, A.H. had developed a "social network" that included her cousins, schoolmates, and other children who played on her brother's soccer team. A.H. frequently had "play dates" with other children in Florida, she attended a church and daycare in Florida, and her pediatrician's office was in Florida. According to Richard, A.H. had never asked about Canada and considered Florida to be her home.

B. The District Court's Decision

The district court ultimately granted Horacius's petition in an order containing its "findings of fact and conclusions of law." The court first determined that Horacius had established a *prima facie* case of wrongful retention by showing that: (1) A.H. had been kept

outside her country of habitual residence such that a "retention" had occurred; and (2) the retention violated Horacius's rights of custody under Canadian law, making it "wrongful." After noting that habitual residence is determined at the point in time immediately before the retention—*i.e.*, when Richard refused to return A.H. to Canada in March 2022—the court found that "[t]he relevant objective facts" satisfied Horacius's "burden of establishing Canada as A.H.'s habitual residence . . . ." The court reasoned that Richard and Horacius "did not have a shared settled intention to change A.H.'s habitual residence from Canada to the United States," A.H. had been born in Canada, the family's belongings remained in Canada while they were in Florida, and Richard and A.H. had only temporary immigration status in the United States. The court concluded that the fact that A.H. had "lived in the United States for longer than she ever lived in Canada d[id] not disturb th[e] analysis" because Richard's retention of A.H. in Florida could not "suffice to create a new habitual residence . . . ."

Turning to the wrongfulness of the retention, the court determined that Richard violated Horacius's rights of custody under Canadian law by retaining A.H. in the United States without Horacius's consent. After citing Article 4, Section 599 of the Civil Code of Québec,[2] the court noted that neither party disputed that Horacius had custody rights, including rights related to supervision and schooling of A.H. The court reasoned that Horacius

2. That provision states that "[t]he father and mother have the rights and duties of custody, supervision and education of their children." Civil Code of Qué-bec, 1991, c 64, art 599 (Can.).

had been exercising his custody rights when the retention began and that he "continued to exercise his rights . . . even after [Richard] unilaterally decided to keep A.H. in the United States and refused to return to Canada with her." The court concluded that Richard's "retention of A.H. in the United States breached [Horacius]'s custody rights, which he was exercising at the time of A.H.'s retention."

Having determined that Horacius established a *prima facie* case of wrongful retention, the court then turned to Richard's affirmative defense that A.H. had become well-settled in Florida. The court reasoned that although A.H. had spent most of her life in Florida, she was "only about four years old and did not participate in significant extracurricular activities in her community besides attending daycare for a few hours per day." The court also noted that, depending on the outcome of the pending immigration proceedings, Richard could be forced to return to Canada.[3] The court concluded that "[i]n light of A.H.'s young age, the fact that she has family in Canada, and" because Richard would "return to Canada if her immigration application is rejected," Richard "ha[d] not established that A.H. is well-settled in the United States . . . ." Alternatively, the court determined that even if Richard had met her burden, it would nevertheless exercise its "equitable discretion under the Hague Convention and order A.H.'s return to Canada."

3. Following the bench trial, Richard filed a motion to reopen evidence for purposes of submitting documentation showing that United States immigration officials had granted A.H. authorization to remain in the United States until at least 2029. The court denied the motion to reopen, and that ruling is not being challenged on appeal.

The district court subsequently entered final judgment in Horacius's favor, and Richard timely appealed.

III. STANDARDS OF REVIEW

Generally, we review questions of law *de novo* and questions of fact for clear error. *Monasky v. Taglieri*, 589 U.S. 68, 83, 140 S. Ct. 719, 206 L. Ed. 2d 9 (2020). "A child's habitual residence presents . . . a 'mixed question' of law and fact—albeit barely so." *Id.* at 84 (quoting *U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 386 (2018), 138 S. Ct. 960, 200 L. Ed. 2d 218). Because this mixed question is primarily factual, "[o]nce the trial court correctly identifies the governing totality-of-the-circumstances standard," its conclusion about the child's habitual residence is "judged on appeal by a clear-error review standard deferential to the factfinding court." *Id.*

When we review for clear error, we are deferential to the district court's view of the evidence. *Bellitto v. Snipes*, 935 F.3d 1192, 1197 (11th Cir. 2019). "A factual finding is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)). Accordingly, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S at 574.

In addition, "[w]hen findings are based on determinations regarding the credibility of witnesses," we must give "even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575.

ICARA requires that children who are wrongfully retained should "be promptly returned unless one of the narrow exceptions set forth in the [Hague] Convention applies." 22 U.S.C. § 9001(a)(4). One of the Hague Convention's "narrow exceptions" to return provides that a court does not have to order a child's return if the child has become "settled" in the new country such that return would not be in the child's best interests. *Fernandez v. Bailey*, 909 F.3d 353, 358-60 (11th Cir. 2018). However, our precedent instructs that a court may order a child's return even if that exception to return is met. *Id.* at 363. We review that equitable determination—"to return or not to return a child"—for an abuse of discretion. *Id.* The abuse of discretion standard of review is also deferential, and "there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call." *Rasbury v. IRS (In re Rasbury)*, 24 F.3d 159, 168 (11th Cir. 1994). That is because "the abuse of discretion standard allows 'a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.'" *Id.* (quoting *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989)).

IV. DISCUSSION

On appeal, Richard argues that the district court erred in: (1) concluding that A.H.'s habitual residence was Canada; (2) determining that she had violated Horacius's rights of custody under Canadian law; and (3) rejecting her defense based on A.H.'s well-settled status in the United States. For the reasons stated below, we affirm the district court's factual findings and its exercise of discretion to return A.H. to Canada.

A. Habitual Residence

A petitioner under ICARA must prove, "by a preponderance of the evidence, that the child was wrongfully removed or retained." *Calixto v. Lesmes*, 909 F.3d 1079, 1083 (11th Cir. 2018). Courts first look to whether a petitioner has made a *prima facie* showing that the child's retention is "wrongful" by demonstrating: (1) "the child was a habitual resident of another country at the time of the retention"; (2) "the retention breached his or her custody rights under the law of that other country"; and (3) "he or she had actually been exercising those custody rights at the time of retention." *Id.* at 1084.

Although neither the Hague Convention nor ICARA defines the term "habitual residence," our precedent interpreting the phrase has looked to whether a child has lived in the place with "a sufficient degree of continuity to be properly described as *settled*." *Id.* (emphasis in original) (quoting *Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004)). When analyzing whether a child's habitual

residence has changed from one country to another, we have "held that '[t]he first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind.'" *Id.* (quoting *Ruiz*, 392 F.3d at 1252). "The 'unilateral intent of a single parent,'" is not enough, standing alone, "to change a child's habitual residence." *Id.* (quoting *Redmond v. Redmond*, 724 F.3d 729, 745 (7th Cir. 2013)). Instead, "a court must . . . determine whether the parents or guardians . . . shared an intent to change the child's habitual residence." *Id.*

Richard's first argument is that the district court erred in concluding that A.H.'s habitual residence was Canada. She argues that A.H. spent significantly more time in the United States than Canada, and she points to several facts in the record that support a conclusion that she and Horacius shared an intent to live in the United States. She notes that she and Horacius had obtained an early termination of the lease of their condominium in Canada; that Horacius obtained a Florida driver's license and Florida notary public commission using their address in Florida; and that Horacius sought to buy a home in Florida.

We begin our analysis by reiterating that the district court found Richard not to be credible regarding the parties' intention to relocate to the United States, and we must afford that finding significant deference. *Anderson*, 470 U.S at 575. The district court also correctly identified the applicable "totality-of-the-circumstances standard," so our review of its conclusion about A.H.'s habitual residence is only for clear error. *Monasky*, 589 U.S. at 84.

While our review of the record evidence shows that it is a close call whether A.H.'s habitual residence was Canada, rather than the United States, we do not have a "definite and firm conviction that a mistake has been committed." *Bellitto*, 935 F.3d at 1197. Instead, the record contains sufficient evidence to support the district court's conclusion that Canada was A.H.'s habitual residence. Among this evidence is the fact that Richard stated that the family's stay would be temporary to obtain a B-2 visa when she entered the United States. In addition, Horacius's and Richard's belongings remained in a storage unit in Canada during their stay in Florida. Although Richard applied for American citizenship during her time in Florida, that application does not weigh heavily in her favor, as citizenship and residence are not coterminous. For instance, Horacius is a citizen of both Canada and the United States, but is only a resident of Canada.

Given the facts we have highlighted and the district court's credibility determination, we cannot say that the district court's view of the evidence was an impermissible one. *Anderson*, 470 U.S at 574-75; *Bellitto*, 935 F.3d at 1197. Therefore, Richard has not shown clear error in the district court's conclusion that A.H.'s habitual residence was Canada. *Anderson*, 470 U.S at 574.

B. Breach of Custody Rights

The second and third prongs of Horacius's *prima facie* case required him to show that A.H.'s "retention breached his . . . custody rights under the law of" Canada and that "he . . . had actually been exercising those custody rights at the time of retention." *Calixto*, 909 F.3d at 1084.

Richard does not dispute that Horacius had custody rights relating to A.H. under Canadian law, nor does she argue that he was not exercising those rights when the retention of A.H. began. She only disputes that her retention of A.H. breached Horacius's custody rights. However, she conceded at trial that Horacius "should be involved in major decisions involving A.H." and that she had made "major decisions such as schooling and medical treatment for A.H. without first speaking" to him. Richard's counsel also conceded at oral argument that Horacius was attempting to exercise his rights of custody both before and after he left Florida, including by insisting that A.H. return to Canada. We conclude that these concessions, when considered with the facts described above and our review of Canadian law, show that the district court's finding that A.H.'s retention violated Horacius's custody rights was, again, a "permissible view[] of the evidence." *Anderson*, 470 U.S at 574.

Because Richard has not shown clear error in this respect either, we affirm the district court's findings that A.H.'s retention breached Horacius's "custody rights under the law of Canada" and that Horacius "had actually been exercising those custody rights at the time of [A.H.'s] retention." *Calixto*, 909 F.3d at 1084. Horacius, therefore, established the second and third elements of his *prima facie* case. *Id.*

C. Richard's Affirmative Defense

Finally, the district court found that Richard had not shown that A.H. was well-settled in the United States.

Furthermore, even if she had, the district court ruled that it would exercise its discretion to order A.H.'s return. *See Fernandez*, 909 F.3d at 363. Because the latter ruling is dispositive, we do not address Richard's well-settled affirmative defense. *See Fla. Wildlife Fed'n Inc. v. United States Army Corps of Eng'rs*, 859 F.3d 1306, 1316 ("We may affirm the district court's ruling on any basis the record supports.").

Richard's briefing on appeal does not challenge the district court's alternative conclusion that it would exercise its discretion and order A.H. returned to Canada notwithstanding Richard's well-settled defense. Thus, we conclude that any challenge to the district court's ruling on that front is forfeited. However, even if we were to consider the issue, the district court did not make a "clear error of judgment" in ordering A.H.'s return. *Rasbury*, 24 F.3d at 168. On this record, the district court's decision was within its "range of choice" and we cannot conclude that it abused its discretion. *Id.; Fernandez*, 909 F.3d at 363.

V. CONCLUSION

For the foregoing reasons, we affirm the district court's decision and judgment.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JULY 30, 2024

IN THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 24-10801

ERIC JOHN HORACIUS,

Plaintiff-Appellee,

versus

ANNE CATHERINE RICHARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-62149-KMM

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: July 30, 2024

For the Court: DAVID J. SMITH, Clerk of Court

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MARCH 14, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:23-cv-62149-KMM

ERIC JOHN HORACIUS,

Petitioner,

v.

ANNE CATHERINE RICHARD,

Respondent.

FINAL JUDGMENT

THIS CAUSE came before the Court upon the Court's March 7, 2024 Order granting Petitioner Eric John Horacius's Verified Petition for Return of Minor Child to Canada. (ECF No. 59). Pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby ORDERED AND ADJUDGED that Final Judgment is entered in favor of Petitioner Eric John Horacius and against Respondent Anne Catherine Richard.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of March, 2024.

Appendix C

/s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED OCTOBER 7, 2024

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

October 7, 2024, Filed

No. 24-10801

ERIC JOHN HORACIUS,

Plaintiff-Appellee,

versus

ANNE CATHERINE RICHARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-62149-KMM

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before NEWSOM, LUCK, and ABUDU, Circuit Judges.

Appendix D

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

APPENDIX E — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MARCH 7, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:23-cv-62149-KMM

ERIC JOHN HORACIUS,

Petitioner,

v.

ANNE CATHERINE RICHARD,

Respondent.

Filed March 7, 2024

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court following a bench trial held on January 16, 2024 through January 17, 2024. (ECF Nos. 41, 42); Transcripts of Bench Trial (ECF Nos. 52-1, 52-2).[1] On November 10, 2023, Petitioner Eric John Horacius ("Petitioner") filed a Verified Petition for Return of Minor Child to Canada. ("Pet.") (ECF No. 1). Therein, Petitioner seeks the return of his minor child,

1. References to the Bench Trial Transcripts are noted as "Day __ Trial Tr."

A.H.,[2] to Canada pursuant to the Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 (the "Hague Convention"), and the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001–9011. Petitioner contends that A.H.'s mother, Anne Catherine Richard ("Respondent"), brought A.H. from Canada to the United States under false pretenses and has wrongfully retained the child therein in violation of Petitioner's custody rights. Pet. ¶ 3.

On December 11, 2023, Respondent filed her Answer and Affirmative Defenses. ("Answer") (ECF No. 19). At the bench trial, Petitioner and Respondent each testified on their own behalf. *See generally* Day One Trial Tr.; Day Two Trial Tr. Following the bench trial, the Parties submitted post-trial proposed findings of fact and conclusions of law. *See generally* Petitioner's Proposed Findings of Fact and Conclusions of Law ("Pet'r's Proposed Findings") (ECF No. 54); Respondent's Proposed Findings of Fact and Conclusions of Law ("Resp't's Proposed Findings") (ECF No. 53).

Having reviewed the pleadings, examined the evidence, observed the witnesses, and considered the arguments of counsel as well as the remainder of the record, the Court now enters its Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil

2. Pursuant to Federal Rule of Civil Procedure 5.2(a), the minor child's initials are used in lieu of her full name and only her year of birth is stated. *See* Fed. R. Civ. P. 5.2(a)

Procedure 52(a).[3] For the reasons set forth below, the Petition is GRANTED.

I. FINDINGS OF FACT[4]

A. A.H.'s Family Background

A.H. was born in Canada in 2020. Day One Trial Tr. 23:5–12. Due to a medical condition with her chin, A.H. required medical treatment shortly after her birth to address breastfeeding and breathing issues. *Id.* 25:23–25, 26:1–2. A.H.'s father, Petitioner, resides in Canada and is both a Canadian and United States citizen. *Id.* 18:20, 38:14. A.H.'s mother, Respondent, is a Canadian citizen. *Id.* 20:18. Petitioner and Respondent began their relationship in 2016 and were married in Canada in 2018. *Id.* 22:2–4. Petitioner has two other children and Respondent has one other child from previous marriages. Pet'r's Proposed Findings at 2.

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3. To the extent that any finding of fact is more aptly characterized as a conclusion of law, or any conclusion of law is more aptly characterized as a finding of fact, the Court adopts it as such.

4. At trial, the Parties painted different pictures of their relationship and the events that transpired. To the extent that the disputed testimony is relevant to the Court's inquiry under the Hague Convention, the Court resolves the credibility issues between Petitioner and Respondent as to each specific issue.

B. A.H.'s Journey from Canada to the United States

On December 15, 2020, when A.H. was nine months old, A.H. and her parents left Canada on a trip to the Dominican Republic. Day One Trial Tr. 195:6–15; Day Two Trial Tr. 61:3–4. Respondent had informed Petitioner that she wanted the family to visit her parents because her father was gravely ill. Day One Trial Tr. 28:10–16. A.H. and her parents did not return to Canada from the Dominican Republic. Respondent testified that while they were in the Dominican Republic, she and Petitioner both decided to permanently move to Florida with A.H. and A.H.'s stepbrother, Respondent's son from a previous relationship. *Id.* 195:6–9. Petitioner testified that the family had always intended to return to Canada from the Dominican Republic, but Respondent convinced him to extend their vacation and go to Florida to spend more time with Respondent's family. *Id.* 29:18–25, 30:1–13. On February 15, 2021, the family traveled from the Dominican Republic to Florida with just a few pieces of luggage. *Id.* 30:9, 194:3–6. Upon arrival to the United States, Petitioner and Respondent represented to the U.S. Customs agent that the purpose of their trip was to visit family members. *Id.* 31:6–9. Respondent, A.H., and A.H.'s stepbrother were granted B2 visas and were allowed to enter the United States for six months. *Id.* 31:12; Pet'r's Ex. 4.

In Florida, Petitioner, Respondent, A.H., and A.H.'s stepbrother moved in with Respondent's relatives in Respondent's sister's rented house in Miramar, Florida. Day One Trial Tr. 33:3–10. After a new owner bought

the condominium that they had been renting in Canada, Petitioner and Respondent negotiated an early termination on their joint lease, which allowed them to save money and afford living in Florida. *Id.* 48:18–25. Following the lease termination, Respondent began renting a storage unit in Canada in March 2021 to store the family's belongings. *Id.* 219:17–23. She testified that she continues to pay for the storage unit and has not moved any belongings to Florida. *Id.* 220:1–14.

Petitioner also began the paperwork to sponsor Respondent's application to secure U.S. citizenship, in the hope that they could submit the application before Respondent's visa expired on August 15, 2021. *Id.* 35:17–23. Petitioner testified that every time he asked Respondent to help him with the paperwork, she found ways to delay the process by saying the application was not a priority and suggesting that they do something else instead of the paperwork. *Id.* 35:4–13. Respondent's application was ultimately received by Immigration Services on October 28, 2021. *Id.* 35: 21–23.

On January 16, 2022, Petitioner discussed the immigration application with Respondent and suggested that they cancel his sponsorship application, return to Canada, and resubmit the application there. *Id.* 50:15–22. He felt that this was the best option because while the application was being processed, Respondent and A.H. were not allowed to leave the United States and they had already overstayed their visas at that point. *Id.* 51:1–5. During this conversation, Respondent told Petitioner that the application was in its final stages, but that if the

application was not processed by February or March 2022, they would cancel it and return to Canada. *Id.* 138:16–19.

On January 28, 2022, Petitioner told Respondent that he had withdrawn his sponsorship application due to the financial burden of the application process and the expenses of living in Florida. *Id.* 57:17–23. Respondent proceeded to kick Petitioner out of her sister's house. *Id.* 57:4–8. Petitioner returned to Canada without being given a chance to say goodbye to A.H. *Id.* 57:22–25, 58:1.

C. Respondent Files for Divorce and Continues Immigration Proceedings On Her Own

Respondent filed for divorce on February 7, 2022. Resp't's Ex. 20. On February 11, 2022, Petitioner sent airplane tickets for Respondent, A.H., and A.H.'s stepbrother to return to Canada on March 1, 2022. Day One Trial Tr. 59:1–4. At that point, Petitioner had not yet received Respondent's divorce petition and despite their fight, he believed that the plan was still for the family to return to Canada and restart immigration proceedings from there, as previously discussed with Respondent. *Id.* At trial, Respondent admitted that the divorce petition contained incorrect allegations—for example, Respondent requested sole parental responsibility of A.H. because Petitioner had not had any recent contact with A.H.; he had, in fact, been with A.H. until he left Respondent's sister's house on January 28. *Id.* 223:21–23. Petitioner received the divorce petition on February 14, 2022. *Id.* 59:7–9. While the couple proceeded with the divorce, Petitioner was in Canada and attempted to maintain

contact with A.H. in Florida. *Id.* 62:2–4 ("I had requested not only to see A.H., but to have implemented a daily video call on a daily basis. But, it never worked out. The mother didn't allow it.").

During this time, Respondent attempted to find other legal avenues to remain in the United States. At trial, she testified that without Petitioner's sponsorship, she knew it was only a matter of time before her immigration application was rejected. *Id.* 231:1–4. Thus, she found an immigration lawyer, who advised her to apply for permanent residency status under the Violence Against Women's Act (VAWA). *Id.* 236:6–8. Respondent filed the application for permanent residency status under VAWA in April 2022. *See generally* Pet.'r's Ex. 36. This application is still pending. Respondent testified that if her application is ultimately denied and she is ordered to leave the United States, she would return to Canada. Day Two Trial Tr. 58: 6–17.

In support of her application, Respondent wrote and submitted a letter explaining why she should be granted permanent residency status. During trial, it became clear that Respondent's VAWA immigration application and supporting letter contained multiple false allegations, or at least, there are significant inconsistencies between the application and Respondent's trial testimony. For example, Respondent wrote that Petitioner had never sent her money, when in fact Respondent sent money every month to support her and A.H. Day One Trial Tr. 241:21–25, 242:1–6. Respondent's application also contained allegations of sexual violence. Indeed, her application

and supporting documentation contain allegations that Petitioner raped her on September 5, 2021. *Id.* 258:23–24. These allegations, like those about whether Petitioner supported her and A.H. financially, also contradicted her trial testimony. Despite raising sexual assault allegations in her application, she testified that she texted Petitioner on September 20, 2021, fifteen days after the alleged rape, "You are perfectly aware that we haven't had sex for almost two years now." *Id.* 259:1–13. The Court will not opine on the merits of Respondent's pending immigration application but finds that the inconsistencies in Respondent's testimony strike a serious blow to her credibility.

D. State Court Proceedings

Once Petitioner realized that Respondent did not intend to return to Canada with A.H. or A.H.'s stepbrother, Petitioner contacted the Canadian Central Authority and submitted an application under the Hague Convention for the return of A.H. on December 2, 2022. *Id.* 72:9– 19. The Canadian authorities subsequently transmitted the application to the U.S. State Department. Pet. ¶ 51. On April 20, 2023, the U.S. State Department advised the Chief Judge of the Seventeenth Circuit Court of Florida of Petitioner's application and informed the Chief Judge that a Petition for Return might be filed. *Id.* ¶ 53. The state court mistook this notice to mean that a Petition for Return had actually been filed. *Id.* Consequently, the state court assigned a judge to resolve the Hague Convention Petition for Return, even though no Petition for Return had been filed at that point. *Id.* The state court judge held

a bench trial and ultimately denied Petitioner's purported Petition for Return on June 29, 2023. *Id.* ¶ 55. To appeal the state court decision, Petitioner found new legal representation. *Id.* ¶ 56. When preparing for the appeal, Petitioner's new counsel realized that Petitioner had never properly filed a Petition for Return in the first place, so Petitioner filed a motion seeking to vacate the state court's June 29 order as void for lack of subject matter jurisdiction. *Id.* ¶¶ 57–59. Ultimately, on September 26, 2023, the state court order was vacated. *See* Pet'r's Ex. 26. Petitioner then proceeded to file the instant Petition before this Court. *See generally* Pet.

II. CONCLUSIONS OF LAW

A. The Hague Convention and ICARA

"To address 'the problem of international child abductions during domestic disputes,' in 1980 the Hague Conference on Private International Law adopted the [Hague Convention]." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4 (2014) (quoting *Abbott v. Abbott*, 560 U.S. 1, 8 (2010)). Subsequently, Congress "implemented the Convention's terms through the International Child Abduction Remedies Act of 1988 ("ICARA"), 22 U.S.C. §§ 9001–9011." *Gomez v. Fuenmayor*, 812 F.3d 1005, 1010 (11th Cir. 2016) (citation omitted). The Hague Convention is designed "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." *Hanley v. Roy*, 485 F.3d

641, 644 (11th Cir. 2007) (quoting Hague Convention, pmbl.) (internal quotation marks omitted).

"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." § 9001(a)(4); *see also Abbott*, 560 U.S. at 22 ("Return is not required if the abducting parent can establish that a Convention exception applies."). However, "[e]ven if an exception is established, the Court has discretion to order the return of a child if return would further the aims of the Hague Convention." *Marquez v. Castillo*, 72 F. Supp. 3d 1280, 1284 (M.D. Fla. 2014) (citation omitted). Certainly, any affirmative defenses or "exceptions," are to be construed narrowly. *See Ermini v. Vittori*, 758 F.3d 153, 161 (2d Cir. 2014) (citation omitted); *see also Gomez*, 812 F.3d at 1011 ("As the Convention's official commentary has noted, narrow interpretations of the exceptions are necessary to prevent them from swallowing the rule and rendering the Convention 'a dead letter.'") (citation omitted). Ultimately, ICARA's limited scope of inquiry mandates that courts must not "become mired in inquiries of who is the better parent or who occupies the nicer home." *Pacheco Mendoza v. Moreno Pascual*, No. CV 615-40, 2016 WL 320951, at *1 (S.D. Ga. Jan. 26, 2016); *see also Ruiz v. Tenorio*, 392 F.3d 1247, 1250 (11th Cir. 2004) ("The court's inquiry is limited to the merits of the abduction claim and not the merits of the underlying custody battle.") (citation omitted).

B. Discussion

As a threshold matter, the Parties dispute whether Petitioner met his burden of presenting a *prima facie* case of wrongful retention under the Convention. The Court first discusses Petitioner's *prima facie* case, and next turns to Respondent's affirmative defense that A.H. is well-settled in the United States.

i. Petitioner Has Presented a Prima Facie Case of Wrongful Retention

Petitioner argues that he has proven his *prima facie* case for Respondent's wrongful retention of A.H. Pet'r's Proposed Findings at 19–25. To do so, he must prove by a preponderance of the evidence that (1) A.H. has been kept outside her country of habitual residence to establish that a "retention" has occurred; and (2) the retention violates the "rights of custody" afforded Petitioner under the laws of A.H.'s pre-retention country of habitual residence, Hague Convention art. 3(a), which rights Petitioner was "actually exercis[ing]" at the time of the retention or "would have been so exercis[ing] but for the removal or retention." *Id.* art. 3(b); *see also Pielage v. McConnell*, 516 F.3d 1282, 1288–89 (11th Cir. 2008). Respondent argues that Petitioner failed to prove a *prima facie* case of wrongful retention because Petitioner never lost his custody rights over A.H. Resp't's Proposed Findings at 22.

a. A.H.'s Habitual Residence Was Canada

The habitual residence is determined at the point in time "immediately before the removal or retention."

Hague Convention art. 3(a). Petitioner argues that Canada was A.H.'s habitual residence at the time of A.H.'s wrongful retention by Respondent on March 1, 2022, when Respondent refused to return to Canada with A.H. on the flight that Petitioner purchased for them. Pet'r's Proposed Findings at 19. Respondent argues that Canada was not A.H.'s habitual residence because (1) Petitioner and Respondent "actively took steps to establish the United States as the . . . child's habitual residence"; and (2) based on a totality of the circumstances from A.H.'s perspective, her habitual residence is the United States. Resp't's Proposed Findings at 6–18.

Neither the Hague Convention nor ICARA specifically defines habitual residence. *Calixto v. Lesmes*, 909 F.3d 1079, 1084 (11th Cir. 2018). When analyzing whether a child's habitual residence has changed from one country to another, the Eleventh Circuit has held that "the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind." *Id.* (quoting *Ruiz*, 392 F.3d at 1252) (internal quotation marks omitted). "Although the settled intention of the parents is a crucial factor, it cannot alone transform the habitual residence." *Id.* (quoting *Ruiz*, 392 F.3d at 1253) (internal quotation marks omitted). "There must also be an actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized." *Id.* (citation and internal quotation marks omitted). Where the parents do not have a shared settled intention, "[t]he evidence required to show acclimatization becomes greater." *Id.* (citing *Chafin v. Chafin*, 742 F.3d 934, 938 (11th Cir. 2013)).

Here, the parents did not have a shared settled intention to change A.H.'s habitual residence from Canada to the United States. Both parents clearly had a shared intent to come to the United States for some period of time, but now disagree as to the permanency of the move. At minimum, there was an agreement to stay for the duration of Respondent's initial immigration application in the United States, until Petitioner withdrew his sponsorship of Respondent's application in January 2022. The Court does not find Respondent's testimony regarding their agreement to reside permanently in the United States to be credible. Respondent testified that she and Petitioner had already decided to move permanently to the United States before arriving in Florida but told immigration officers they were only there to visit family. Day Two Trial Tr. 27:20–25, 27:1–3. In Florida, Respondent told Petitioner that they would go back to Canada once the immigration application was processed. As discussed *supra*, not only did Respondent delay filing the application in the first instance but when Petitioner later withdrew his sponsorship, Respondent almost immediately filed for divorce and found a lawyer to file another immigration application. Day One Trial Tr. 45:2–5, 220:24–25, 221:1–2. The record in this case demonstrates Respondent's desire to take whatever action necessary to remain in the United States instead of returning to Canada.

Accordingly, the Court finds that Petitioner established that Canada was A.H.'s habitual residence from her birth until immediately prior to the alleged wrongful retention in the United States. The relevant objective facts support Petitioner's burden of establishing Canada as A.H.'s

habitual residence by a preponderance of the evidence. A.H. was born in Canada and only left Canada on a temporary trip to the Dominican Republic. Respondent never moved the family's belongings from the storage unit in Canada and presently continues to pay for storage. Respondent's and A.H.'s immigration status in the United States was temporary. The fact that at this point, A.H. has lived in the United States for longer than she ever lived in Canada does not disturb this analysis. *See De Carvalho v. Carvalho Pereira*, 308 So. 3d 1078, 1085 (Fla. Dist. Ct. App. 2020) (citing *Kijowska v. Haines*, 463 F.3d 583, 587 (7th Cir. 2006)) (holding that since a parent cannot create a habitual residence by wrongful retention of the child, "[t]he length of the child's residence in the country of one of the parents cannot be decisive"). Respondent's retention of A.H. in Florida does not suffice to create a new habitual residence therein.

b. Respondent's Conduct Constituted a Wrongful Retention of A.H. Because It Violated Petitioner's Rights of Custody

Next, Petitioner must establish that there has been a retention within the meaning of the Hague Convention. *Pielage*, 516 F.3d at 1287. Retention "is meant to cover the circumstances where a child has been prevented from returning to [her] usual family and social environment." *Id.* at 1288. It was Petitioner's understanding that the trip to the Dominican Republic and the subsequent trip to Florida were temporary trips. He purchased airplane tickets for Respondent, A.H., and A.H.'s stepbrother

because he thought that they would return to Canada on March 1, 2022. Respondent may have changed her mind and wanted A.H. to reside permanently in the United States, but Petitioner always considered Canada to be A.H.'s habitual residence. At no point did Petitioner consent to the arrangement where A.H. would remain permanently in Florida. Thus, the Court finds that Respondent retained A.H. in the United States without the consent of Petitioner on or about March 1, 2022.

"Article 3 of the Hague Convention provides that the removal or retention of a child is wrongful where it violates the custody rights of another person that were actually being exercised at the time of the removal or retention. . . ." *Lops v. Lops*, 140 F.3d 927, 935 (11th Cir. 1998). "The intention of the [Hague] Convention is 'to protect *all* the ways in which custody of children can be exercised, and the Convention favors a flexible interpretation of the terms used, which allows the greatest number of cases to be brought into consideration.'" *Gatica v. Martinez*, No. 10-21750-CIV, 2010 WL 6744790, at *4 (S.D. Fla. Oct. 13, 2010), *report and recommendation adopted*, 2011 WL 2110291 (S.D. Fla. May 25, 2011) (quoting *Furnes v. Reeves*, 362 F.3d 702, 716 n.12 (11th Cir. 2004), *abrogated on other grounds by Lozano v. Montoya Alvarez*, 572 U.S. 1 (2014)). A parent "need only have one right of custody" to bring an action pursuant to the Hague Convention and ICARA. *Furnes*, 362 F.3d at 714.

Petitioner argues that he was exercising his custody rights under Canadian law, pursuant to Article Four, Section 599 of the Civil Code of Quebec, at the time of

A.H.'s retention. Pet. ¶ 5; Pet'r's Proposed Findings at 22–23. Respondent does not dispute that Petitioner had custody rights but argues that those rights were never breached because Petitioner has been an active participant in custody proceedings pending in Florida state court. Resp't's Proposed Findings at 19–20. The Court is not convinced that Petitioner's active participation in state court custody proceedings indicates that none of his custody rights, as defined by the Hague Convention, were violated. Under the Hague Convention, rights of custody include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Hague Convention art. 5(a). The Court finds that at the time of Respondent's retention of A.H. in the United States, Petitioner was exercising his rights of custody within the meaning of the Hague Convention: Petitioner lived with A.H. in Respondent's relative's house until he was forcibly removed in January 2022, he supported A.H. and Respondent financially, and he attempted to stay in regular contact either through in-person visits or phone calls after he returned to Canada. Petitioner continued to exercise his rights of custody even after Respondent unilaterally decided to keep A.H. in the United States and refused to return to Canada with her. Indeed, "if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child." *De La Riva v. Soto*, 183 F. Supp. 3d 1182, 1197 (M.D. Fla. 2016) (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996)). Here, the Court finds no evidence showing Petitioner ever abandoned A.H.

Accordingly, the Court finds that Petitioner met his burden of showing that Respondent's retention of A.H. in the United States breached Petitioner's custody rights, which he was exercising at the time of A.H.'s retention.

ii. Respondent Has Not Shown that A.H. Is Well-Settled in the United States

Having found that A.H. was wrongfully retained in the United States, the Court must grant the Petition unless Respondent has satisfied her burden of establishing an affirmative defense under the Hague Convention. In her Answer and at trial, Respondent asserted the affirmative defense that A.H. is well-settled in Miami. *See* Answer at 14–16. As discussed in more detail below, the Court finds that Respondent has not established, by a preponderance of the evidence, that A.H. is well-settled in the United States.

"The Convention treats petitions filed in the first year differently from those filed more than one year after a child is removed: if the petition is filed within one year of the abduction, the signatory country where the child is located 'shall order the return of the child forthwith'; but when a parent petitions for return more than a year after a child has been removed, the signatory country 'shall also order the return of the child, unless it is demonstrated that the child is *now settled* in its new environment.'" *Fernandez v. Bailey*, 909 F.3d 353, 359 (11th Cir. 2018) (quoting Hague Convention art. 12). The Eleventh Circuit has instructed that "a child is settled within the meaning of ICARA and the Convention when

a preponderance of the evidence shows that the child has significant connections to their new home that indicate that the child has developed a stable, permanent, and nontransitory life in their new country to such a degree that return would be to the child's detriment." *Id.* at 361 (citing *Hernandez v. Garcia Pena*, 820 F.3d 782, 787 (5th Cir. 2016); *Lozano v. Alvarez*, 697 F.3d 41, 56 (2d Cir. 2012), *aff'd sub nom Lozano v Montoya Alvarez*, 572 U.S. 1 (2014)). "[T]he 'settled' inquiry requires courts to carefully consider the totality of the circumstances." *Id.* Courts may consider a number of factors in analyzing the well-settled exception, including the child's living environment, parental involvement, measures taken to conceal a child's whereabouts, the child's age, the child and parent's immigration status, residential stability, the child's attendance at school or church, the parent's employment and financial stability, the presence of friends or relatives in the area, and the extent to which the child maintains ties with the country of habitual residence. *See Taylor v. Taylor*, No. 10-61287, 2011 WL 13175008, at *7 (S.D. Fla. Dec. 13, 2011).

As an initial matter, Petitioner did not properly seek relief under the Hague Convention until bringing the instant Petition before this Court on November 10, 2023, nearly twenty months after A.H.'s wrongful retention in the United States began. *See* (ECF No. 1). And, as the United States Supreme Court held in *Lozano*, equitable tolling does not apply to extend time limitations under the Hague Convention. *Lozano*, 572 U.S. 1, 18 (2014). Accordingly, Respondent properly raises the affirmative defense that A.H. is well-settled in the United States.

Appendix E

Respondent argues that A.H. is well-settled after residing in Miami for most of her life, based on the following: (1) she attends daycare and church in Florida; (2) she has many family members in Florida; (3) Respondent is the process of applying for permanent resident status, so A.H. is not under threat of removal; and (4) Respondent has support from her family and stable employment as a paralegal in Florida. Answer at 15–16. Respondent further argues that A.H. has no friends in Canada, has no physical connections with Canada, and might be detrimentally affected if she were to be uprooted from her life in Florida and required to return to Canada. Resp't's Proposed Findings at 26. Petitioner argues that A.H. is not well-settled because (1) A.H. is only a toddler, so she does not participate in significant extracurricular activities in her community; and (2) Respondent's "questionable immigration status further undercuts any stability they may presently enjoy in the United States." Pet'r's Proposed Findings at 27–28.

In evaluating the factors relevant to the well-settled defense, the Court finds that Respondent has failed to show by a preponderance of the evidence that A.H. is well-settled in Florida. Although A.H. has spent most of her life in Florida at this point, A.H. is only about four years old and does not participate in significant extracurricular activities in her community besides attending daycare for a few hours per day. Importantly, Respondent and A.H.'s future in the United States is unclear, as Respondent's stay in the United States may come to an abrupt end depending on the outcome of her pending immigration application pursuant to VAWA. While the Court will not attempt to predict the outcome of Respondent's

immigration proceedings, Respondent's inconsistency-laden testimony did very little to convince the Court of her credibility. *See In re Ahumada Cabrera*, 323 F. Supp. 2d 1303, 1314 (S.D. Fla. 2004) (noting that the "uncertain immigration status of a parent . . . is a factor suggesting that a child is not settled").

In light of A.H.'s young age, the fact that she has family in Canada, and Respondent's testimony that she would return to Canada if her immigration application is rejected, the Court finds that Respondent has not established that A.H. is well-settled in the United States by a preponderance of the evidence. Even if Respondent could show that A.H. is well-settled in the United States, the Court would still exercise its "equitable discretion under the Hague Convention" and order A.H.'s return to Canada. *Lozano*, 572 U.S. at 18 (Alito, J., concurring); *see also* Hague Convention art. 18 (explaining that a court may "order the return of the child at any time"); *Romanov v. Soto*, No. 3:21-CV-779-MMH-MCR, 2022 WL 356205, at *11 (M.D. Fla. Feb. 7, 2022) (noting that a court should not create incentive for delaying Hague Convention proceedings and reward the ongoing wrongful retention of a child).

III. CONCLUSION

UPON CONSIDERATION of the foregoing, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Petition (ECF No. 1) is GRANTED. It is FURTHER ORDERED that:

1. A.H. shall be returned to Canada in accordance with this Judgment, accompanied by her father, Eric John Horacius, within 10 days of this Order.

2. To the United States Marshal's Service and all other federal, state, and local law enforcement officers: The Petitioner, Eric John Horacius, has the authority and the lawful custody to remove A.H. from the United States of America in order to return her to Canada. The United States Marshal's Service may disclose A.H.'s full name and other identifying information to other federal, state, and local law enforcement officers in order to effectuate this Order.

3. Respondent is ordered to cooperate with Petitioner in returning A.H. to Canada and may accompany A.H. at Respondent's discretion.

4. Pursuant to 22 U.S.C. § 9007(b)(3), Petitioner is entitled to file a motion for attorneys' fees and costs. The Court retains jurisdiction to determine the amount of attorneys' fees and costs Petitioner is entitled to.

The Clerk of Court is INSTRUCTED to CLOSE this case. All pending motions, if any, are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 7th day of March, 2024.

/s/
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

APPENDIX F — CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, CONCLUDED OCTOBER 25, 1980

HCCH

28. CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

(Concluded 25 October 1980)

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions—

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1. This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Child Abduction Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

Appendix F

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are—

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State;

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 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where—

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the 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 so 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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention—

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

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CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures—

a) to discover the whereabouts of a child who has been wrongfully removed or retained;

b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d) to exchange, where desirable, information relating to the social background of the child;

e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;

g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

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CHAPTER III—RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by—

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

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.

Article 12

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 judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

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Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

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Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

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.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

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CHAPTER IV—RIGHTS OF ACCESS

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

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Article 23

No legalisation or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

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Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, 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.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is

otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

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Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

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Article 34

This Convention shall take priority in matters within its scope over the *Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors*, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

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CHAPTER VI—FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the

Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

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Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force—

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period.

It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following—

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.