

No. _____

In the
Supreme Court of the United States

CHARLES BLACKLEDGE,

Petitioner,

v.

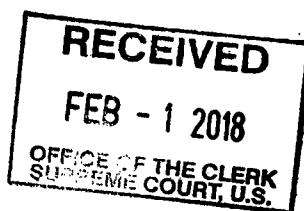
OLGA BLACKLEDGE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS FOR REVIEW

In the Hague Convention on the Civil Aspects of Child Abduction, a presumptive order of return exists for a child who has been removed from his/her habitual residence by a unilateral act of a taking parent (*Lozano v. Alvarez*). Does a similar presumption of a return order, a presumption which has been clearly articulated for children *removed* to the US from their habitual residences, also apply to children who are *retained* in the US in excess of a time-limited consent of a significant duration such as one academic year?

Consider a child leaving his habitual residence in a first country for a significant duration in a second country. When time-limited consent for the child's stay in the second country allows for the child to adjust, acclimatize, and/or settle to the new residence, can the child's acclimatization to the new residence, coupled with a last shared parental intent that the child spends a significant time in the new residence, cause the child's habitual residence to change such that a unilateral decision by the taking parent to retain the child indefinitely in the new residence cannot be wrongful, due to the habitual residence of the child shifting from the previous habitual residence to the residence in the second country? Can such a shift of habitual residence during a period of time-limited consent occur within one year? when the old habitual residence is not abandoned?

When a child is allegedly wrongfully retained in the US, is it necessary to

determine the date of retention in order to determine whether the child's retention is wrongful? In cases in which the consent for removal to the US was limited; and, within a year, the intent of the "taking parent" to indefinitely retain the child is clear and the petition is filed, is the "retention date" when the taking parent's intent to retain the child becomes known, such as the date of the filing of a custody complaint by the taking parent, or must the left-behind parent unequivocally assert, yet again, an unequivocal assertion of rights?

II. PARTIES TO THE PROCEEDINGS

Charles Wesley Blackledge (Petitioner, Father)

Appellant in the Third Circuit

Petitioner in the Western District of Pennsylvania

Respondent in the Allegheny County Court of Common Pleas (Family Court)

Olga Grigorievna Blackledge (Respondent, Mother)

Appellee in the Third Circuit

Respondent in the Western District of Pennsylvania

Plaintiff in the Allegheny County Court of Common Pleas (Family Court)

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Convention on the Civil Aspects of the International Child Abduction. Oct 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, reprinted in 51 Fed. Reg. 10494(1986).

22 U.S.C. §§ 9001-9011, International Child Abduction Remedies Act (ICARA).

1980 Conference de La Haye de droit international prive (Hague Conference on Private International Law), Actes et documents de la Quatorzième session, Tome III Enlèvement d'enfants (Child abduction), pp. 249-250 (1982)

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IV. CITATIONS OF OPINIONS AND ORDERS

Blackledge v. Blackledge, 866 F. 3d 169 - Court of Appeals, 3rd Circuit 2017

Blackledge v. Blackledge, 2:16-cv-1004 Western District of Pennsylvania

Blackledge v. Blackledge, FD-16-7751 Allegheny Court of Common Pleas

V. STATEMENT OF THE BASIS FOR JURISDICTION

The judgement of the Third Circuit Court of Appeals was entered on 9 November 2017. The petition for rehearing was denied on 1 November 2017. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

VI. TREATIES, STATUTES

U.S. Const. art. III, § 2, cl. 1

28 U.S.C. § 1254 (1)

28 U.S.C. § 1291

Hague Convention on the Civil Aspects of International Child Abductions, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, reprinted at 51 Fed. Reg. 10 494 (1986)

..... passim

International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. 97 § 9001-9011,

formerly classified to section 11602 of Title 42. passim

VII. CONCISE STATEMENT OF THE CASE

This petition is in regard to the Third Circuit's affirmation of the denial by the Federal District Court of Western Pennsylvania of Father's petition under the Hague Convention for an order for the return to Germany of the parties' child, JB.¹ The District Court exercised jurisdiction under 22 U.S.C. § 9003(a), which grants district courts original jurisdiction over claims arising under the Convention. The Third Circuit exercised jurisdiction under 28 U.S.C. § 1291.

A. Narrative

The parties' child, JB, was born in 2008 in Kharkiv, Ukraine, while the parties were married. Appendices L and M² (105a-107a) show where JB had resided up until the 5 July 2016 filing of Father's petition under the Hague Convention asking the Federal District Court of Western Pennsylvania to order JB's return to Germany. As seen from the Appendices L and M, the family lived in Europe until 8 August 2011, including 52 days in Munich, Germany before JB ever resided in Pittsburgh. The dates and durations provided in Appendices L and M

¹ Since Mother was the plaintiff in the custody trial, and Father was the plaintiff/petitioner under the Hague Convention, the parties are referred to herein as "Father" and "Mother."

² Appendix M is derived directly from Exhibit F of the Federal trial (appendix L).

were filed with the petition 5 July 2016 and served to Mother, and were undisputed at trial. At the date of filing of Father's petition at the District Court, 5 July 2016:

- JB had spent a majority of his life in Europe, 1930 days;
- JB had spent a *total* of 900 days in Pittsburgh, including the 660 (291+369) days at the Winebiddle (Bloomfield) residence, which was abandoned in 2013 (lines 7 and 12 of Appendices L and M, 105a-107a);
- JB had lived in the Berlin residence for 785 days (including 82 days in the summer 2012 [line 11 of Appendices L and M]; and 703 continuous days from 28 August 2013 until JB's removal of 1 August 2015 to the Squirrel Hill district of Pittsburgh [lines 15 and 25 of Appendices L and M]);
- JB had lived at the Hobart St. (Squirrel Hill) residence in Pittsburgh for a total 340 days, continuously, from 2 August 2015 until the filing of the petition 6 July 2016;
- JB's *continuous* 703 day residence in Berlin (line 15 of Appendices L and M) **immediately before** JB's removal to Pittsburgh by time-limited consent was JB's second longest continuous residence, the only longer one being the abandoned Dublin, Ireland residence (line 3 of Appendices L and M).³

In 2011, Father secured employment in Germany. At about the same time, Mother was accepted to a Ph.D. program at the University of Pittsburgh. In the

³ This is contradicted by the Third Circuit, which found that Pittsburgh had been JB's longest and most stable residence (30a, last line).

summer of 2011, after seven weeks together in Munich, Germany, the family separated. JB resided with Respondent in an apartment in the Bloomfield district of Pittsburgh from 8 August 2011 until 28 August 2013; although in the summer of 2012, the entire family resided in Berlin for 82 days; and in the summer of 2013, the entire family resided in Pittsburgh for 73 days. At the end of the summer 2013, JB's Pittsburgh residence in Bloomfield was abandoned; a few months later the car was sold (162a and 165a) and Mother began residing in Berlin.

On 28 August 2013, JB came to Berlin, attending JFK School Berlin until 1 August 2015, residing continuously at the same residence where Father continues to reside. Mother came to reside in Berlin on 14 January 2014, (line 17 of 105a) having abandoned the Winebiddle residence in the Bloomfield district of Pittsburgh, although toys, books, furniture, and other belongings were left with a friend in Pittsburgh.

In the summer of 2015, Mother had decided to return to Pittsburgh to finish graduate studies. The parties discussed, but did not agree upon, a shuttle custody arrangement,⁴ in which custody of JB would be transferred periodically between the parties.

On 5 May 2015, Mother aided Father in obtaining German visas for the parties and JB, valid until 2018. On 30 April 2015, Father had become

⁴ The parties are in agreement that there was no shuttle custody agreement or arrangement. The Federal District Court was silent on the issue. The 3rd Circuit, however, seems to have found that there was, at some time, shared parental intent for a shuttle custody agreement (31a last paragraph), or "alternating habitual residence." This error and/or abuse of discretion is addressed more in the next section.

permanently employed at the German patent law firm that hired him in 2011, and Father's German visa received on 5 May 2015 is unlimited/open-ended (*unbefristet*), sometimes understood as "permanent."⁵

Father continues to reside in the same Berlin residence, since February 2012 (line 11 of 105a).

The parties obtained a one-year leave of absence for JB at JFK School Berlin. JB therefore had no place at JFK School for the academic year 2015-2016, but had one reserved for him upon his return in 2016. In the summer of 2015, the parties knew that JFK School provides one and only one leave of absence which may be used for only one academic year. The parties co-executed a leave-of-absence request which states, "[JB] will return for to JFK [School Berlin] for the academic year 2016-2017," (104a).

On August 1, 2015, shortly after JB's 7th birthday anniversary, JB left Berlin with Mother to move to Hobart St. in the Squirrel Hill district of Pittsburgh (line 25 105a), and began attending Colfax Elementary for the first time. At the time of JB's removal from the residence in Berlin, the parties shared intent was for his attendance for 1 academic year in Pittsburgh and subsequent return in 2016,⁶ in good time to return to JFK School for the 2016-2017 academic year.

By February 2016, Mother's unilateral opinion that JB should remain in Pittsburgh indefinitely became clear. Father unsuccessfully attempted to persuade

⁵ The facts of this paragraph are undisputed and part of the record, exhibits ZB and ZB2. The visas and JB's passport are part of the record.

⁶ Section IV.B.2 of *Blackledge v. Blackledge*, 866 F. 3d 169 - 3rd Circuit 2017

Mother to uphold the agreement of JB's timely return, including *offering* a shuttle custody arrangement. No *agreement* was reached. However, the Third Circuit determined that the parents' shared intent evidently on 26 May 2016 (after Mother's custody complaint was filed, *vide infra*) was a shuttle custody arrangement (35a-36a; 152a).

On 6 May 2016, Mother filed a complaint for custody in the Allegheny County Court of Common Pleas.

On 19 May 2016, Father, in filing an answer to Mother's complaint, informed the Allegheny County Court of Common Pleas of the parties' agreement for JB's return in good time for the academic year 2016-2017 in Berlin (116a).

The last day of school for the academic year 2015-2016 in Pittsburgh was 13 June 2016 (exhibit U, not in the Appendix).

On 6 July 2016, Father, acting without representation, filed a petition under the Hague Convention asking the Western District of Pennsylvania to order the return of JB. The Federal District Court ordered mediation which was ultimately unsuccessful.

On 15 August 2016, JB was interviewed *in camera* by the Federal District Court. JB recalled, *in camera*, Father telling JB in the summer 2015 that JB would return to Berlin after a year. JB stated a preference to remain in Pittsburgh with Mother. JB did not mention that he would *object* to returning to Berlin (*c.f.* the child's objection exception of Article 13 of the Convention).

A trial was held in the Federal District Court of Western Pennsylvania in Pittsburgh on 16-17 August 2016. Father testified (163a line 16 to 164a line 2) that

in the summer of 2015, the parties discussed but did not agree upon a shuttle custody arrangement. Father testified that the agreement was for JB to spend an academic year in Pittsburgh and return to Berlin for the 2016-2107 academic year, emphasizing that the limit of consent was one academic year in Pittsburgh (158a-159a). Father testified that the parties, in the summer of 2015, discussed a *one*-year shuttle custody arrangement but did not agree upon it; Father testified that the parties did *not* discuss a *two*-year shuttle custody arrangement until the court mandated medication (163a-164a).

At the federal trial, there was no mention at all by Mother whether or not there had been discussion or agreement of any shuttle custody arrangement. Mother testified that the agreement for JB's return was contingent upon her finishing her PhD (166a). Mother admitted that she would not know where she will reside when she finishes her PhD (160a lines 7-8).

The Federal District Court of Western Pennsylvania denied Father's petition 26 August 2016.

The Federal District Court found that there was "no credible evidence of an agreement for a specific duration," (59a). The District Court made no factual finding with regard to whether or not the parties had come to a "shuttle custody agreement," *i.e.* an agreement in which custody of JB was to be transferred between the parties with periodicity, or alternating habitual residence. The District Court stated that "the shared intent... *is far from clear,*" (emphasis added; lines 13-16 Appendix PAGE 55a), but did not comment on the shared parental intent of summer 2015, immediately before JB's removal. The District Court determined the

date of retention to be August 2016, *i.e.* after the filing date of the petition. The District Court found that Mother exhibited a greater degree of credibility than Father (60a).

Father timely filed an appeal to the Third Circuit Court of Appeals. By January 2017, the Appellate Court was briefed by Father and Mother's representative. Subsequently, the Third Circuit suggested *pro bono* representation. Supplemental briefs were filed by Father's *pro bono* attorney on 28 March 2017.

On 5-6 July 2017, while the Third Circuit deliberated,⁷ a custody trial took place in the Allegheny County Court of Common Pleas (Family Court). Father's pre-trial statement again asserted that the agreement was for JB's return for school in 2016 (122a first paragraph). Mother again argued that the agreement was for JB's return to Berlin when she completed her PhD. Mother testified, in harmony with Father's previous testimony in the Federal trial, that there had been no agreement in the summer of 2015 to any shuttle custody arrangement (167a).

On 2 August 2017, the Family Court issued its decision: primary custody during the school year was awarded to Mother with Father receiving primary custody in summers. The Family Court's opinion is that if the parties were more proximate, a shared custody order would be appropriate (69a, first paragraph). The Family Court's Opinion includes the comment, "According to Father, the parties reached an agreement... this 'shuttle custody arrangement' would continue... Mother denies that there was ever such an agreement." However, Father never asserted a shuttle custody agreement. Father queried Mother for her testimony in

⁷ See Article 11 of the Convention

regard to the matter. There is no place on the record of the custody trial where Father asserted that there had been a shuttle custody agreement. On 22 January 2018, Father asked Superior Court of Pennsylvania for a decree indicating that the record of the custody trial does not support that Father argued that there had been a shuttle custody agreement (112a).

The Third Circuit's decision came on 3 August 2017, one day after the Family Court's decision. The Third Circuit corrected the Federal District Court in regard to the factual finding of "no credible evidence for an agreement of a specific duration," and also changed the legal determination of the retention date, finding it to be the date that Father filed the petition, 6 July 2016. However, the Third Circuit affirmed the denial of Father's petition, finding that, as a matter of law, by the date of Mother's retention of JB (6 July 2016, *i.e.* within a year of the removal of 1 August 2015), JB's habitual residence had shifted from Germany to the USA, therefore, although Mother unilaterally decided to retain JB indefinitely, contrary to the agreement, it was not wrongful within the meaning of the Convention.

Father timely petitioned for rehearing, asserting factual and legal errors in the Third Circuit's 3 August 2017 Opinion. Father's petition for rehearing was denied on 1 November 2017.

Father also filed an appeal on 28 August 2017 to Superior Court of Pennsylvania in regard to the custody decision, arguing that the decision should be reversed and/or vacated, citing Article 16.

This petition for a writ follows the above.

B. Comments on the Opinion

Despite the clear fact that the parties intended JB's return to Berlin after an academic year with Respondent as she finishes her graduate studies, and the petition's timely filing, *Blackledge* rewards Respondent's unilateral decision to break the agreement and retain JB indefinitely, away from his family and friends in Berlin, by finding that JB's habitual residence shifted before the retention began, thus there is no way for the retention to be wrongful. Such a determination necessarily provides repose to an abductor (such as one who has concealed her intent) because it forecloses even the possibility of wrongfulness.

The Third Circuit's reasoning in *Blackledge* is simply that Father had already agreed to JB's academic year in Pittsburgh, and this indicates joint parental intent for JB to settle in Pittsburgh; moreover, JB had, not surprisingly, become acclimated to his new residence in Pittsburgh within the consensual academic year before the petition was filed. JB's habitual residence had shifted before the petition was filed and the retention cannot be said to be wrongful.

The Third Circuit acknowledges that, on 2 August 2015, JB did not leave his habitual residence in Berlin to return to the same residence which was abandoned in 2013, but to a new one in Squirrel Hill (165a), where Mother intended to finish graduate school. JB made completely new friends at school over the year 2015-2016. The record supports that JB's nearest extended family in the USA are – without exaggeration – 1000 miles away. In contrast, in Berlin, he has two cousins who each also lived at the Berlin residence and who continue to live in Berlin

presently. His cousin closest-in-age is about 2.5 hours away.

Breach of custody rights

With reference to the Blackledge Opinion's footnote (17a), and the implication that no custody right had been breached, first note that German law provides married couples joint and equal custody rights. German law expressly requires parents to discuss questions of parental care with their children and "seek agreement" or "strive for unanimity" (*streben Einvernehmen an*) § 1626 BGB(2) (115a). German custody rights include the right to care for a child in a residence the parents determine (*Aufenthaltsbestimmungsrecht*, see also Article 5(a) of the Convention). By unilaterally refusing to return JB per the agreement, Mother breaches Father's right to care for JB, particularly in JB's Berlin residence.

Shuttle Custody Agreement??

The *Blackledge* opinion includes, regrettably, many disputable new findings of fact by the Third Circuit, such as that the parties jointly intended for JB to shuttle back and forth the between Berlin and Pittsburgh. The District Court had not made such a finding. It is respectfully submitted that the Third Circuit abused its discretion and/or committed a legal error in making new factual findings that are not supported to the clear and convincing standard.

The Third Circuit bases the determination on emails and a documented

conversation between the parties, but ignores Father's direct denial of such an agreement in testimony. The question then arises, does Father's direct denial of such an agreement lack credibility? The District Court did not find Father to lack credibility, merely that "[Mother] exhibited a greater degree of credibility," (60a). Father's testimony is the only time the topic came up at the federal trial. Father stated that the parties, in the summer 2015, discussed a one-year shuttle custody arrangement and did not agree upon it; Father also stated that the parties did not discuss a two-year shuttle custody arrangement until the court mandated mediation (163a-164a).

Mother's argument has been that the agreement was conditional, *i.e.* that JB would not return to Berlin unless Mother finished graduate school. However, the Third Circuit found, to the clear and convincing standard, that this was definitely not the case, that there was an agreement for JB's return in good time for school in 2016. Therefore, on this point, it is absurd to find Mother more credible than Father.

The cosigned leave of absence request (104a) is the *de facto* agreement; the record supporting that the parties' last intent was that JB return to Germany for the 2016-2017 academic year. There is no support for any fixed joint intent at any time that subsequently JB would return to *Pittsburgh*, or even to the US; and the Third Circuit misreads the record to reach a different conclusion.

The Opinion errs on pp. 24-25, 27, 29, 34: the citations to (JA181, JA178, JA177, JA176, JA171, JA157 (152a); in attached appendix) support that, *before* 26 May 2016, there were discussions of alternating physical *custody*, but not

alternating *residence* in Pittsburgh or even the USA. On 26 May 2016, Mother *disagreed* with any proposal to alternate between Germany and USA (152a). There is therefore no joint intent. Earlier, the parties *discussed* alternating custody in regard to the parties' *physical custody* of JB, but not with respect to the *residence* of JB. Discussions also do not support a finding of joint intent. The discussions also implicitly included the expectation that Mother would relocate upon graduation (160a ll. 7-16). Mother, who is completing graduate studies (161a) lines 4-5, was applying for positions internationally earlier than 11 December 2015 (151a).

VIII. REASONS FOR GRANTING THE WRIT

Many petitions under the Hague Convention that appear before US Courts, which ask for an order for the return of a child to a “requesting country,” are decided upon the mixed legal-factual question of the *habitual residence* of the child. In making such a determination, the Federal Circuits are split in regard to the relative legal significance of (last) shared parental intent and the child's acclimatization. There is also no consensus yet in regard to the legal determination of a date of retention, and its significance, which, according to a widely followed rubric for adjudicating these disputes articulated in *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), is a requisite step in determining whether an allegedly wrongfully retained child should be ordered returned. Unless a year has passed and the child

has become newly settled,⁸ or other exceptions apply,⁹ a wrongfully retained child is to be ordered returned forthwith. JB left Germany for a new residence in Pittsburgh on 1 August 2015, the parties having joint intent for JB's return to Berlin in good time for the academic year 2016-2017, and the petition was filed on 6 July 2016.

Given a child's habitual residence A in a first country, when a taking parent has limited consent for the child's temporary residence B in a second country, and the old habitual residence A in the first country is not abandoned, the habitual residence does not change from A to B, unless the child's relative attachments to the two countries have changed to the point where requiring a return to the habitual residence A would be tantamount to taking the child out of the family and social environment in which its life has developed. When there is no shared settled intent on the part of the parents to abandon a child's prior habitual residence A, a court should find a change in habitual residence to B only if the objective facts point *unequivocally* to the new habitual residence B.¹⁰

In *Blackledge*, JB's habitual residence in Berlin was determined to have been supplanted in less than a year by a new residence in Pittsburgh, where Mother is finishing graduate school, and from where Mother herself expects to relocate upon graduation. Father has been permanently employed in Berlin since 30 April 2015,

⁸ Convention Article 12

⁹ Convention Article 13

¹⁰ *Ruiz v. Tenorio*, 392 F. 3d 1247, 11th Circuit 2004 at 1254, citing *Mozes*. The emphasis on *unequivocally* appears in the original.

i.e. before JB's move 2 August 2015 to Pittsburgh.

"Abduction" is a strong word, chosen by the drafters to indicate the seriousness of the unilateral acts of parents who breach the custody rights of their co-parents; but the term is not intended to indicate a criminal act, only a wrongful one. ICARA and the convention are not only concerned with remedying the immediate wrong by ordering the child's return, but are also expressly intended to deter would-be wrong-doers (see ICARA 22 U.S. Code § 9001(a)(4)). See (94a).

Blackledge is an invitation to would-be wrong-doers that by obtaining time-limited consent to bring their child to the US, and concealing their intent from the left-behind parent, and allowing the child to adjust or "acclimatize"/settle to the new residence, they will find repose. *Blackledge* is also a warning to parents contemplating arranging for their child to spend a significant duration of time in the US. The risk of allowing your child to make or maintain connections to the US is that he/she may not return.

This petition should be granted because parents considering allowing their children to make or maintain connections with another country would like to know if they are putting their children's entire futures at risk. Would-be abductors may also like to know if it might be possible to receive repose in a more attractive climate than Pittsburgh's.

A. The *Blackledge* opinion, the 3rd Circuit, and other “child-centric” federal circuits are in disharmony with the emerging international consensus regarding the determination of wrongful retention within the meaning of the *Hague Convention on the Civil Aspects of International Child Abduction* when children are retained in the US contrary to a time-limited consent.

Internationally, there is increasing recognition (e.g. in the U.K.,¹¹ Denmark,¹² Canada,¹³ and Singapore¹⁴) that when a taking parent has been provided time-limited consent to remove a child from his/her country of habitual residence, a unilateral decision of the taking parent to retain the child beyond the time-limited consent favors a legal determination of wrongfulness. The interpretation of the Convention by sister signatories is given considerable weight,¹⁵ but the decision in *Blackledge* and the reasoning behind it is not in harmony with the abovementioned sister signatories. Notably, the child’s age acclimatization does not outweigh the time-limited consent provided to the taking parent, particularly, for example, for *Balev v. Baggot* (under review by the Canadian Supreme Court).

¹¹ *Re H. (Abduction: Habitual Residence: Consent)* [2000] 2 FLR 294 (United Kingdom) summary available at <https://www.incadat.com/en/case/478>

¹² Ø.L.K, 5. April 2002, 16. afdeling, B-409-02 Østre Landsret (High Court, Eastern Division, Denmark) summary available at <https://www.incadat.com/en/case/520>

¹³ *Balev v. Baggot* 2016 ONCA 680 (Court of Appeal for Ontario, Canada) available <https://www.incadat.com/en/case/1369> . This case is, at the date of filing of this petition, under deliberation at the Canadian Supreme Court

¹⁴ *TUC v. TUD*; SGHCF 12 9 May 2017; Supreme Court of Singapore; available [https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/delivered-judgment---tuc-v-tud-2017-sghcf-12-\(090517\)-pdf.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/delivered-judgment---tuc-v-tud-2017-sghcf-12-(090517)-pdf.pdf)

¹⁵ *Abbott*, 130 S. Ct. at 1993

Thanks to the US circuit split, there *are* US decisions and jurisdictions^{16,17} in alignment with the emerging international consensus.

B. The Federal Circuits are split over the significance of parents' time-limited or conditional consent for a child to stay in the United States in determining the habitual residence of the child. The split is acute for retained children who are old enough to acclimatize.

The split arises especially in cases in which a child old enough to acclimatize to his/her environment has moved to a new residence at some point in time before the allegedly wrongful removal or retention, *i.e.* the child's country of residence has changed, *e.g.* from a first country of residence A to a second country of residence B. For *retention* cases like *Blackledge*, the respondent's act cannot be wrongful if the child's *habitual residence* has shifted to residence B before the legally determined date of retention.^{18,19}

There is no controversy that after some significant duration of residence, a

¹⁶ Darín v. Olivero-Huffman, 746 F. 3d 1 1st Circuit 2014; Walker v. Walker, 701 F. 3d 1110 7th Circuit 2012 [also discusses retention date]

¹⁷ In Mota v. Castillo, 692 F. 3d 108 2nd Circuit 2012, the child's acclimatization to the US over 2 years was insufficient to result in a shift of habitual residence from the USA to Mexico, because the parties' intent was that the child stay in the US indefinitely only if the petitioner was able to join her; petitioner was unable to do so.

¹⁸ Article 3 of the Convention

¹⁹ Note the existence of wrongful *removal* examples in which the child moved from A to B, and the child's removal from B could only be wrongful if there had been a change in habitual residence from A to B before the removal, otherwise the removal would have been *back* to the country of habitual residence. Examples are *Evans v. Evans-Feder* and *Whiting v. Krassner*

child's habitual residence will shift from A to B, due to the child becoming "well-settled" in residence B. When the move from A to B was jointly intended to be indefinite, rather than time-limited or conditional, and especially if the old residence A was abandoned, there is a rapid shift of habitual residence to B. However, the circuit split is acute for cases in which parents intend the child's move from A to B to be of a significant but limited duration and the child is old enough to "acclimatize," because the child's acclimatization and the parents' last joint intent are working, respectively, for and against a change of the child's habitual residence.

The facts of *Blackledge* would have led to a different outcome had Mother retained JB in a parent-centric circuit, such as circuits 1, 2, 7, and 9, and 11. These circuits generally follow *Mozes*, which, emphasizes that a new habitual residence is not acquired unless the old one is abandoned. Furthermore, the *parents' intent*, in making the move from residence A to B, weighs heavily on the determination of whether or not the child's habitual residence shifts. This is often repeated and elaborated upon, for example in *Gitter* at 134, which clarified that it is the *last* shared intent of the parents that is probative. In *Blackledge*, the last shared intent is clearly expressed in (104a) that JB was supposed to return in 2016 to Berlin for school. The 3rd Circuit erred to try to divine from the record any shared intent in the middle of the dispute, such as February 2016 onward.

The 1st Circuit has found that in the absence of shared parental intent that the child will take up the new residence indefinitely or permanently, a district court

should be slow to infer that the earlier habitual residence is abandoned.²⁰ *Mozes* at 1079 stresses that if last shared parental intent is not taken into account, this opens up the child to harmful manipulation by a taking parent seeking unilaterally to foster attachments during what was intended to be a temporary visit.

In a parent-centric circuit, it is appreciated that evidence of a child's settlement or acclimatization, especially that occurring over a consensually limited time span of less than a year, does not point toward a legal conclusion that the child's habitual residence has changed. Thus, the acclimatization of JB to Pittsburgh occurring within the consensual academic year would not support a legal conclusion that JB's unabandoned habitual residence in Berlin has shifted to the Squirrel Hill district of Pittsburgh, in the parent-centric circuits.

Although the legal determination in *Blackledge* is that the parental intent was effectively to change JB's country of habitual residence because the parties had agreed upon JB's academic year in a new residence in Pittsburgh, this is contrary to the usual legal conclusion in interpreting the fact, evident to the clear and convincing standard, that the *Blackledge* parties had agreed upon a time-limited stay in a new residence in Pittsburgh, the time limit being an academic year. *Blackledge* acknowledges the fact that the consent and joint intent of the parents at the time of the removal was time-limited. However, the Opinion is that *because* this joint intent was for JB to attend the academic year 2015-2016 in Pittsburgh, and considering the unsurprising amount of acclimatization of an adaptable child,

²⁰ *Darín v. Olivero-Huffman*, 746 F.3d at 11-12, quoting *Mozes*, 239 F.3d at 1081, also mentioned in *Neergaard-Colón v. Neergaard*, 752 F. 3d 526, 1st Circuit 201 at 533.

JB's habitual residence shifted from Berlin to Squirrel Hill before the petition was filed, 6 July 2106, *i.e.* immediately after the end of the 2015-2016 academic year in Pittsburgh of 13 June 2016. The Opinion is that JB had a settled purpose within the academic year in a new temporary residence in Pittsburgh, adequate to fulfill the conditions of a shift of habitual residence.

Moreover, the Opinion, in alignment with other "child-centric" circuits, is that, in determining habitual residence, shared parental intent only matters in terms of how it might (or does) influence JB's perspective on the move to Pittsburgh. So, in addition to the bifurcation of jurisprudence in regard to the primacy of last shared parental intent²¹ in determining if a child's habitual residence has changed, leading to the circuit split described above, there is a further bifurcation in judicial reasoning which arises in the "child centric" courts. A very young child, too young to form attachments to its community, does not acclimatize, so child-centric courts like the 3rd Circuit have reasoned that parental intent *can* determine habitual residence in those circumstances.

Within the child-centric courts, the determination of a child's habitual residence is therefore even more complicated and difficult to predict. When is a child old enough to acclimate? If a parent allows their child to the US at age 4.5, can the child's return be expected by age 6? Bear in mind that children are undergoing developmental changes, so if the child is not acclimated at the date of filing the petition, he/she may well be by the time the dispute is finally adjudicated.

²¹ *Gitter* recognizes and emphasizes *last* shared parental intent, better qualifying the *dictum* of *Feder v. Evans-Feder*, 63 F. 3d 217, 217 (3rd Cir. 1995).

The child-centric courts' emphasis on the child's perspective is even more difficult to weigh than the last shared intent of the adult parents.

In the present case, the Third Circuit has determined by the clear and convincing standard, that Father's consent was limited to one academic year in Pittsburgh, and JB, unsurprisingly, adapted to his new residence within a year. Yet this is enough, reasons the Third Circuit, for JB to lose his habitual residence in Berlin. In contrast, *Gitter* and others place the bar higher for a child to lose habitual residence. "[A] child can lose its habitual attachment to a place even without a parent's consent. Even when there is no settled intent on the part of the parents to abandon the child's prior habitual residence, courts should find a change in habitual residence if 'the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place.'" The modifier *unequivocally* in this passage has been repeatedly emphasized.²² JB's connections to his extended family have eroded, but his center of life has not unequivocally shifted. JB is essentially living in familial isolation with his Mother in a community in which Mother's main tie is that she intends to finish her PhD there.

²² See also *Murphy v. Sloan*, 764 F.3d 1144, 1152 (9th Cir. 2014), cert. denied, 135 S. Ct. 1183 (2015) (quoting *Mozes*, 239 F.3d at 1081) The emphasis is in the original. See also *Mota v. Castillo*, 692 F. 3d 108, 2nd Circuit 2012

C. The 3rd Circuit abused its discretion and/or committed legal error in exercising its review of the facts of this case; the evidence does not support the 3rd Circuit's factual finding that the parties agreed to a shuttle custody arrangement; quite simply, the *last shared intent* controls.

As respectfully submitted herein, the Third Circuit abused its discretion in determining that the parties had a shuttle custody agreement. The Federal District Court in the trial never addressed this factual question. The parties are in agreement that there was no such agreement for shuttle custody. There is no way to infer, by the clear and convincing standard, such an agreement from the record.

If the Third Circuit, during its deliberations, had believed that a shuttle custody agreement might make a difference to the outcome of this case, it should have remanded to the District Court to develop the record on this point; because the record does not clearly support it.

The cited parts of the record that the Third Circuit found to have supported that there was joint intent for a shuttle custody agreement are emails from February 2016 and a documented conversation in May 2016. It was during these times that the parties were *not* in agreement about custody. The communications between the parties at those times addressed both the past agreement and current (at the moment) proposals. Obviously, no new agreement was reached because Mother desired to indefinitely keep JB in Pittsburgh. Respectfully, the Third Circuit was careless in its interpretation of these communications in trying to find some hint of shared parental intent when there simply was none. The May 2016 conversation is even after Mother filed for custody, so there is no way to suggest there is shared intent then. The last shared intent of the parties, however, with

reference again to *Gitter*, is perfectly clear from the record: JB would return to Berlin in good time for school 2016 (104a).

Apparently the Third Circuit needs some guidance and help that her sister circuit was unable to provide clearly enough, in recognizing that the *last shared intent* of the parents is what matters.

D. The 3rd Circuit's insistence on an overly formulaic determination of habitual residence provides no deterrence to would-be abductors. For cases of time-limited consent of a child's residence for a significant duration away from his/her established habitual residence, habitual residence is *Schrödinger's Cat* for cases of removal from or retention in the child's new residence of agreed time-limited duration.

The framers of the convention intentionally left habitual residence undefined and warned against it becoming a too legalistic term like domicile. The Explanatory Report by Ms. Pérez-Vera is replete with warnings not to allow the determination of habitual residence to become formulaic (see 35a *Blackledge*). Why did the framers leave a central term, essential to the determination of each and every Hague case undefined?

The answer lies in comparison of *Whiting v. Krassner* and *Mozes* and how one can determine that they are each good law. In each case, the child(ren) had moved to a new residence for a time-limited duration. In one case (*Mozes*), the taking parent retained the children beyond the time limit. In the other case, the taking parent removed the child from the temporary residence within the time limit. Each

action was determined to be wrongful, and the children ordered returned. In *Whiting*, the child lost her previous habitual residence so that the court could say she was removed from her new habitual residence; in *Mozes*, the children kept their previous habitual residence so that the court could say that they were being retained from their habitual residence.

If we apply the Third Circuit's rubric of determination of retention date and habitual residence to the facts of *Mozes*, it is difficult to see how the Third Circuit would not find the *Mozes* children acclimatized and therefore habitually resident in the US before the retention, such that the retention could not have been wrongful. *Mozes* and *Whiting* (or *Blackledge*) therefore appear to be irreconcilable, if one sticks to the formula for habitual residence that the Third Circuit is set upon.

However, *Mozes* and *Whiting* can be reconciled because the habitual residence of children who are residing under time-limited consent is a *Schrödinger's Cat*. If a parent unilaterally removes the children from the temporary residence B, then the temporary residence B became the habitual residence; if a parent unilaterally decides to retain past the time-limit, then the old habitual residence A remained the habitual residence. The point is that the unilateral act of the parent who breaches the custody rights of the other in spite of an agreement is wrong. The habitual residence determination is made in order to allow for the determination of wrongfulness, and the legal application of the remedy.

For *Blackledge*, the Third Circuit cited *Whiting v. Krassner* for the explanation of how JB's habitual residence could change although the shared

parental intent was that JB only reside for a limited time in Squirrel Hill 2015-2016. The Opinion finds this case analogous to *Whiting*, because the joint intent of the parents to have their child reside, even temporarily, changed the habitual residence, but *Blackledge* is more similar to *Whiting* in that one parent acted *unilaterally* to break an agreement that the parties had regarding their child's residence. The unilateral act of the taking parent, Mr. Krassner, the removal by deceit, was wrong *a priori*. The habitual residence determination was made to allow for the remedy. The facts of *Blackledge* point unequivocally to a retention, and ICARA and the Treaty make it clear that retentions are to be remedied just as removals are.

E. The Federal Circuits need direction in determining a “retention date” and its significance in determining the wrongfulness of a child’s retention. The 3rd Circuit’s rubric for determining a retention date is impossibly contradictory to the plain language of the Convention and ICARA, and undermines the intent of the Convention to deter abductions.

There is no place in the Treaty and ICARA for any requirement of a petitioner to withdraw consent to meet the burden of showing a wrongful retention. The Treaty and ICARA do not contain superfluous language. The Treaty contains an exception to ordering a return forthwith, which arises when the respondent shows that the petitioner consented to the retention (Article 13(a)). See 87a-88a.

With reference to *Blackledge* (19a), if a petitioner is *required* to show that

he/she “no longer consents” in order for the court to set a retention date, and a retention date is required to prove wrongful retention, then the consent exception of Article 13(a) is superfluous; in other words, there would be no condition in which the consent exception of Article 13(a) would apply to a wrongful retention, because according to the 3rd Circuit, the petitioner is required to have already shown that there is no consent for the retention to exist in the first place.

Note, for example, the case from Singapore uses the date that the retaining parent filed for divorce (point 13 of *TUC v TUD*, Singapore). This is not at all unusual, but is contrary to the Third Circuit’s rubric. In many cases both internationally and within the US, when a taking parent shows an intent to exceed the scope of a time-limited residence, away from an established habitual residence, or to retain indefinitely the child, the question of the wrongfulness of the retention surfaces. It is artificial to burden, as the Third Circuit has, the left-behind parent with unequivocally expressing withdrawal of consent (which was already limited anyway) in order to merely get a retention date, which ignores that the action and intent of the taking party is the root of the wrong, and only creates an opportunity for an abductor to find repose.

- F. The Federal Courts need direction in differentiating a child's preference to remain in the requested country from a child's objection to returning to the requesting country and how the Treaty is intended to take the child's point of view and degree of settlement into account.**

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted 29 January 2018,

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