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IN THE INDIANA COURT OFAPPEALS
CAUSE NO. 21A-MI-02415

COLE, MARIA L.,	**)**
Appellant,	**) Appeal from the St. Joseph Circuit Court**
	)
vs.	**) Trial Ct Cause No. 71C01-2107-MI-000356**
	)
COLE, PETER G.,	**) Hon. William I. Wilson, Magistrate**
Appellee.	**)**

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

I. Nature of the Case.

The nature of this case relates to the Appellant's, Maria L. Cole (hereafter, "Mother"), appeal of the trial court's Memorandum Opinion and Order ("Final Order"), finding, in relevant part, that the habitual residence of the parties' children was Germany, and directing the parties' children be returned to Germany. Appellant's App. Vol. II, pp. 8-19.

II. Course of Proceedings.

On or about July 15, 2021, Appellee, Peter G. Cole (hereafter "Father"), filed his Verified Complaint and Petition for Return of Children. Appellant's App. Vol. II, pp. 2. That, on or about July 28, 2021, Mother filed her Notice of Intent to Respond to Father's Verified Complaint and Petition for Return of Children. Appellant's App. Vol. II, pp. 3. On or about August 6, 2021, Mother filed her Verified Response to Father's Verified Complaint and petition for Return of Children, as well as her Verified Brief in Support of Response to Father's Verified Complaint and Petition for Return of Children. Appellant's App. Vol. II, pp. 3-4. Moreover, on or about August 6, 2021, Mother filed her Request for Special Findings of Fact and Conclusions of Law. Appellant's App. Vol. II, pp. 4.

On or about August 6, 2021, the trial court held a status hearing. Appellant's App. Vol. II, pp. 4. Following this status hearing, the trial court, issued its Order Following Status Hearing and Regarding Temporary Custody and Parenting Time. Appellant's App. Vol. II, pp. 4. On or about August 25, 2021, the trial court issued its Trial or Evidentiary Hearing Scheduling Order, thereby setting an evidentiary hearing for October 13 and 14, 2021. Appellant's App. Vol. II, pp. 179-181.

On or about September 17, 2021, the trial court issued a Memorandum and Order Modifying Plan for Resolution of Proceeding. Appellant's App. Vol. II, pp. 182-186. The trial court's Memorandum and Order Modifying Plan for Resolution of Proceeding vacated the October 13 and 14, 2021 evidentiary hearings and instead, directed the Parties to submit any and all affidavits, sworn declarations, or other exhibits supporting their positions. Appellant's App. Vol. II, pp. 182-186. Furthermore, the trial court directed the Parties to submit proposed findings of fact and conclusions of law. Appellant's App. Vol. II, pp. 182-186.

On or about October 14, 2021 both Mother and Father submitted their proposed findings of fact and conclusions of law, as well as numerous exhibits and affidavits in support of their respective positions. Appellant's App. Vol. II, pp. 6-7.

III. Disposition of the Issue.

The trial court, on or about October 18, 2021, issued its Final Order. Appellant's App. Vol. II, pp. 7. The trial court's final order directed that the parties' children be returned to Germany upon determining that Germany was the habitual residence of the parties' children. Appellant's App. Vol. II, pp. 8-19.

STATEMENT OF THE FACTS

Father is a citizen of the United Kingdom, as well as a resident of Germany. Appellant's App. Vol. II, pp. 10. Mother is an American citizen. Appellant's App. Vol. II, pp. 10. Mother and Father (collectively, the "Parties") were married in November of 2016. Appellant's App. Vol. II, pp. 10. During the marriage, the Parties had two (2) children, namely, J.C., who was four (4) at the time of the Final Order, and L.C. (collectively, "Minor Children"), who was two (2) at the time of the Final Order. Appellant's App. Vol. II, pp. 10.

From 2017 until November of 2020, the Parties lived in Germany. Appellant's App. Vol. II, pp. 10. On December 13, 2020, the Parties and Minor Children flew to the United States, specifically, South Bend, where Mother's family was located. Appellant's App. Vol. II, pp. 10-19.

Prior to the December 13, 2020 flight, the Parties took several actions that would be consistent with actions taken by individuals who are intending to move to a new residence. Appellant's App. Vol. II, pp. 10-19. In particular, the Parties terminated their lease to the apartment they shared in Germany. Appellant's App. Vol. II, pp. 10-19. Moreover, Father went through an extensive process to obtain a residency visa for the United States. Appellant's App. Vol. II, pp. 10-19. Additionally, the Parties sold or donated many household items, and shipped the remainder of their personal property via an 1,800 pound crate by ship to the United States, with said shipping at a significant cost. Appellant's App. Vol. II, pp. 10-19; Maria Cole Sworn Statement, 10/7/2021, pp. 16-20.

Once the Parties and Minor Children arrived in South Bend following the December 13, 2021 flight, the Parties thereby took several actions that would be consistent with actions taken by individuals who just relocated to a new residence. Appellant's App. Vol. II, pp. 10-19. Specifically, the Parties purchased a Chevrolet Tahoe. Appellant's App. Vol. II, pp. 10-19; Appellant's App.

Vol. IV, pp. 619-622. Additionally, the Parties purchased a new mattress, bedding, and other furnishings. Appellant's App. Vol. II, pp. 10-19.

At some point the Parties had a disagreement and Father wanted to return back to Germany. Appellant's App. Vol. II, pp. 8-19. Mother, on the other hand, wanted the Parties to remain in South Bend, as the Parties had intended. Appellant's App. Vol. II, pp. 8-19. Father, on or about July 15, 2021, filed his Verified Complaint and Petition for Return of Children. Appellant's App. Vol. II, pp. 2. Father's petition specifically sought the return of the Minor Children to Germany under the Hague Convention. Appellant's App. Vol. II, pp. 8. Conversely, Mother asserted that the Minor Children's habitual residence was now in the United States, and therefore Mother could not have wrongfully removed the Minor Children. Appellant's App. Vol. II, pp. 10-19.

The Parties subsequently submitted several detailed filings, affidavits, and exhibits in support of their respective positions. Appellant's App. Vol. II, pp. 6-7. The trial court, on or about October 18, 2021, issued its Final Order. Appellant's App. Vol. II, pp. 8-19. The trial court concluded, in relevant part, that the Minor Children were habitual residents of Germany at the time of the alleged wrongful retention in the United States, and directed the Minor Children be returned to Germany. Appellant's App. Vol. II, pp. 8-19.

Mother timely filed her Notice of Appeal on or about November 1, 2021. Appellant's App. Vol. V, pp. 820. After filing her Notice of Appeal, Mother filed a Motion to Stay with the trial court, which was granted on or about November 17, 2021. Appellant's App. Vol. V, pp. 810-819. Additional facts are provided in briefing as necessary.

SUMMARY OF THE ARGUMENT

In this present matter, the trial court clearly erred in concluding that the Minor Children were habitual residents of Germany at the time of the alleged wrongful retention and directing the Minor Children be returned to Germany.

Prior holdings have recognized that, in Hague Convention cases, the determination of a child's habitual residence is significant because wrongful removal can occur only if the child has been taken away from his or her habitual residence. The United States Supreme Court has recently recognized that there are no categorical requirements for establishing a child's habitual residence. Instead, Courts have understood the inquiry to be a practical, flexible, factual one that accounts for all available relevant evidence and considers the individual circumstances of each case.

Importantly, it has been recognized that in cases where families which jointly take all the steps associated with abandoning habitual residence in one country to take it up in another; courts would generally be unwilling to let one parent's reservations about the move stand in the way of finding a shared and settled purpose.

Here, the trial court's findings and record evidence undoubtedly revealed that the Parties had abandoned their "habitual residence" in Germany when the Parties flew to the United States with the settled purpose of making the United States their permanent home. As such, the Minor Children's "habitual residence" is the United States, which prevents any finding of "wrongful removal or retention." Thus, the trial court's conclusion to the contrary is clearly erroneous.

ARGUMENT

I. The Trial Court's Conclusion that the Minor Children's Habitual Residence was in Germany was Clearly Erroneous.

A. Standard of Review.

"The trial court in this case entered special findings of fact and conclusions thereon pursuant to Trial Rule 52(A)." *Coulibaly v. Stevance*, 85 N.E.3d 911, 915 (Ind. Ct. App. 2017). Therefore, this Court's "review of such findings and conclusions is two-tiered." Id. "First, [this Court] consider[s] whether the evidence supports the findings, and second, whether the findings support the judgment." *Id*. "The Trial court's findings and conclusions will be set aside only if they are clearly erroneous – that is, where a review of the record leaves [this Court] with a firm conviction that a mistake has been made." *Id*. at 916.

B. Controlling Law.

"The Hague Convention was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Redmond v. Redmond*, 724 F.3d 729, 736 (7th Cir. 2013). It has been held that "the Convention's main purpose is to 'secure the prompt return of children wrongfully removed to or retained in' another signatory State." *Id*.

Importantly, "[t]he convention is aimed at parties to custody battles who remove the child from the child's domicile to a country whose courts the removing parent thinks more likely to side with that parent." *Kijowska v. Haines*, 463 F.3d 583, 586 (7th Cir. 2006). In order to "prevent this unsavory form of forum shopping, the convention requires that the determination of whether the removal of the child was wrongful be made under the law of the country in which the child has his or her 'habitual residence.'" *Id*. The International Child Abduction Remedies Act "entitles a person

whose child has been wrongfully removed to the United States, usually by a parent, to petition a federal court to order the child returned." *Id*.

The 7th Circuit has provided the following guidance to court's hearing Hague Convention cases:

> "a Hague Convention case asks the following questions in this order: (1) When did the removal or retention of the child occur? (2) In what State was the child habitually resident immediately prior to the removal or retention? (3) Was the removal or retention in breach of the custody rights of the petitioning parent under the law of the State of the child's habitual residence? and (4) Was the petitioning parent exercising those rights at the time of the unlawful removal or retention?" *Redmond v. Redmond*, 724 F.3d 729, 736 (7th Cir. 2013).

Furthermore, "[t]he determination of a child's habitual residence is significant because wrongful removal can occur only if the child has been taken away from his or her habitual residence." *Redmond v. Redmond*, 724 F.3d 729, 742 (7th Cir. 2013). That is:

> "[a] petitioner cannot invoke the protection of the Hague Convention unless the child to whom the petition relates is 'habitually resident' in a State signatory to the Convention and has been removed to or retained in a different State. The petitioner must then show that the removal or retention is 'wrongful.'" *Id.*

Therefore, "[t]he pivotal question under the Convention is generally that of habitual residence." *Martinez v. Cahue*, 826 F.3d 983, 989 (7th Cir. 2016).

The United States Supreme Court has explained that "[t]he Convention's explanatory report states that the Hague Conference regarded habitual residence as 'a question of pure fact, differing in that respect from domicile." *Monasky v. Taglieri*, 140 S. Ct. 719, 727 (2020). Additionally, "[a] child's habitual residence 'depends on numerous factors ... with the purposes and intentions of the parents being merely one of the relevant factors.... The essentially factual and individual nature of the inquiry should not be glossed with legal concepts.'" *Id.* Ultimately, "[t]here are no categorical requirements for establishing a child's habitual residence." *Id*. at 728.

While the "Convention does not define 'habitual residence,' . . . [Courts] have understood the inquiry to be a 'practical, flexible, factual' one that 'accounts for all available relevant evidence and considers the individual circumstances of each case.'" *Martinez v. Cahue*, 826 F.3d 983, 989 (7th Cir. 2016).

C. Analysis.

In this present matter, the trial court committed clear error when it determined that the Minor Children were "habitual residents of the Federal Republic of Germany at the time of the wrongful retention in the United States." Appellant's App. Vol. II, pp. 8-19. The reason for this clear error is that the evidence presented undoubtedly revealed that the Parties had abandoned their "habitual residence" in Germany when the Parties flew to the United States with the settled purpose of making the United States their permanent home.

To expand, the trial court found the following undisputed facts based upon the evidence presented:

- In October of 2020, Father requested and obtained a residency visa from the United States Consulate located in Frankfurt, Germany.
- In November of 2020, Father also took steps to terminate the lease on the apartment the parties shared in Germany; he was informed by the landlord the lease would terminate on January 31, 2021.
- On December 13, 2020, the Parties traveled to the United States (specifically, South Bend, Indiana).
- After arriving, the Parties deposited funds and obtained a loan with Communitywide Federal Credit Union in South Bend.
- The Parties also purchased a used Chevrolet Tahoe from a local car dealer.
- The Parties also went through many of the common steps people take when they move to a new location: purchasing a mattress, bedding, and other furnishings. Appellant's App. Vol. II, pp. 10.

Thus, the undisputed facts, according to the trial court, were that first, two (2) months prior to leaving for the United State, Father, in October of 2020, obtained a residency visa. Appellant's App. Vol. II, pp. 10. The only logical inference from this fact is that the Parties intended to remain in the United States for the foreseeable future, as opposed to a "visit" or "trip" since a residency visa would not be necessary for a visit. Appellant's App. Vol. II, pp. 10. Second, the Parties "terminated" the lease to their apartment in Germany. Appellant's App. Vol. II, pp. 10. Again, the only logical inference from this fact is that the Parties intended to permanently relocate to the United States, as individuals who are merely taking a trip or extended visit somewhere do not terminate the leases to their residence.

Third, the Parties deposited funds and obtained a loan with Communitywide Federal Credit Union in South Bend. Appellant's App. Vol. II, pp. 10. While this fact in and of itself may not be unusual for individuals taking oversea trips; the fact that the Parties transferred nearly all of their money to the United States makes it highly unusual for a mere "trip." Appellant's App. Vol. III, pp. 340-342. Fourth, the Parties purchased a Chevrolet Tahoe from a local car dealer in South Bend, Indiana upon arrival. Appellant's App. Vol. II, pp. 10. The only reasonable inference from this fact is that the Parties intended on remaining in the United States, as individuals merely traveling abroad do not buy expensive vehicles.

Finally, the trial court found that it was undisputed the Parties' "went through many of the common steps people take when they move to a new location: purchasing a mattress, bedding, and other furnishings." Appellant's App. Vol. II, pp. 10. Clearly these actions by the Parties were consistent with actions takin by individuals who move to a new location, as the trial court correctly found. Appellant's App. Vol. II, pp. 10.

Not only did the trial court's findings make it clear that the Parties intended to permanently relocate to the United States, but the record evidence further supports the conclusion. In particular, Father went through an extensive process with the U.S. Consulate in Germany to obtain a spousal resident visa so he could live and work in the United States on an indefinite basis, such process was started in the Spring of 2020, said visa being issued in October 2020. Appellant's App. Vol. III, pp. 301-303. Moreover, not only did the Parties terminate the lease on their apartment in Germany, but between October 2020 and December 13, 2020, the Parties sold or donated many household items. Appellant's App. Vol. III, pp. 302-306. Additionally, the Parties shipped the remainder of their worldly possessions via an 1,800 pound crate by ship to the United States, with said shipping at a significant cost. Appellant's App. Vol. III, pp. 302-306.

Finally, Father worked on getting his Social Security card when he arrived in the United States so he could provide this to any employer who would hire him as required by law. Appellant's App. Vol. III, pp. 365-370. The trial court even stated that "Mother clearly believes the evidence shows the parties intended to move to the United States and never return to Germany. Obtaining a residency visa, shipping an 1,800-pound crate of personal property to the States, and buying a car here **are all strong indicators of intent to remain at least for a longer period of time**." Appellant's App. Vol. II, pp. 11 (emphasis added). Thus, it is clear that, based on the trial court's findings and the record evidence, that the Parties had abandoned Germany to move to and establish a permanent residence in the United States.

Nevertheless, despite the trial court's own findings, as well as the copious record evidence demonstrating the Parties' intention of abandoning Germany, the trial court erroneous concluded that the Minor Children's "habitual residence" remained in Germany. Appellant's App. Vol. II, pp. 8-19.

The trial court's decision is apparently based upon the following finding made by the trial court: "Father points to the limited-time travel health insurance and the fact that the German health insurance coverage (for in-country needs) remains in full force and effect." Appellant's App. Vol. II, pp. 11. Even accepting this fact as true, however, it is not sufficient to support the trial court's determination that the Minor Children's "habitual residence" remained in Germany. The Parties took a multitude of steps and took several actions that undoubtedly demonstrate the Parties intent to permanently relocate to the United States.

In particular, the trial court's findings and the record evidence clearly demonstrate that the Parties intended to permanently relocate to the United States with the "settled purpose" of starting a new life with new employment opportunities and the ability to purchase a home. *see Koch v. Koch*, 450 F.3d 703, 713 (7th Cir. 2006) ("families which jointly take all the steps associated with abandoning habitual residence in one country to take it up in another; in such a case, courts would generally be unwilling to let one parent's reservations about the move stand in the way of finding a shared and settled purpose.").

The case of *Harsacky v. Harsacky*, 930 S.W.2d 410 (1996) provides the appropriate frame-work for this current matter. Specifically, in this case, the Harsackys lived in Finland in June of 1992, and remained there until April of 1995. *Id.* at 411. While in Finland, the Harsackys purchased a home, which they retained when they moved to the United States in April 1995. *Id.* Mr. Harsacky was not employed during the entire time they lived in Finland; and the Harsackys lived off their assets and government social benefits. *Id.* at 412. The parties ultimately discussed moving to Texas, a place Mr. Harsacky had connections, so Mr. Harsacky could likely obtain employment. *Id.* at 412. There was dispute, as in the present case with the Coles, whether the move to the United

States in the spring of 1995 was a permanent move, a vacation or a stay of indefinite duration. *Id.* at 412.

The *Harsacky* Court found the "settled purpose" of the move was for Mr. Harsacky to find work; and this move was for an indefinite period of time. *Id.* at 415. The Harsackys arrived in Houston, Texas on April 20, 1995. *Id.* at 412. They contacted realtors about purchasing a home and rented several apartments in 1995. *Id.* at 412. Not long after their arrival, Mr. Harsacky purchased two automobiles, a Mercedes and a Chevrolet Suburban. *Id.* at 412. Mr. Harsacky had resumes prepared for his job search. *Id.* at 412.

Less than two months after their arrival, on May 27, 1995 Mr. Harsacky filed a domestic violence petition against Mrs. Harsacky. *Id.* at 412. On August 24, 1995, Mrs. Harsacky filed her motion to have the court order the return the children to their "habitual residence" in Finland under the Hague Convention. *Id.* at 412. In addressing whether Finland was the children's "habitual residence" in conjunction with the trial court analyzing whether the children were wrongfully removed or retained in the United States, the court found it must determine whether the parents intended or agreed that the jurisdiction (the United States) would be home to the children, if only for an indefinite period. *Id.* at 414.

The *Harsacky* Court found that it was the intention of both Harsackys to bring their family to the United States for no less than an indefinite period of time for the "settled purpose" of Mr. Harsacky finding employment. *Id.* Given the facts surrounding this case, the *Harsacky* Court rejected Mrs. Harsacky's claim the parties were on vacation. *Id.*

Specifically, the *Harsacky* Court found the intent of their trip to the United States in April 1995 was to remain for more than merely a vacation. *Id.* The Harsackys were in the United States on an indefinite basis so Mr. Harsacky could seek and find employment. *Id.* at 412. In reaching

this conclusion, the Court relied on several key facts, such as the court found it implausible that the Harsackys would sell many of their possessions in Finland, and then ship the balance of their belongings, at great expense, to the United States if they intended to remain for only a few months. *Id.* at 414.

In summary, the *Harsacky* Court found that the Harsackys had the "settled purpose" of bringing their family to the United States on an indefinite basis in the hope that Mr. Harsacky could find employment. *Id.* at 414. Specifically, the *Harsacky* court held:

> "Based on the foregoing, this Court finds and concludes as a matter of law that she has failed to carry that burden of proof. This Court is of the opinion that there was no wrongful abduction or retention of the children from their habitual residence. Both parents agreed to bring their children to this county to make a new home on no less than an indefinite basis. ***Thus, it cannot be said that Mr. Harsacky abducted or wrongfully retained the children in this country. . .*** [as the United State is their country of habitual residence]." *Harsacky v. Harsacky,* 930 S.W.2d 410, 415 (1996). (emphasis added).

The same is true in this present matter. The Parties relocated to the United States on December 13, 2020 with the "settled purpose" of starting a new life, a part of which was providing Mr. Cole with a business environment where he would be able to obtain a job. The Parties actions leading up to the move clearly establish this, as was the case in *Harsacky*, except the Parties in this matter had no home to return to in Germany. Appellant's App. Vol. III, pp. 479. Mr. Cole obtained a spousal resident visa to be able to work in the United States, and when he was laid off from his job in May 2020 in Germany, he relayed to Maria he would wait until they moved to the United States to look for a job. Appellant's App. Vol. III, pp. 446.

Even more, like *Harsacky,* the parties sold or gave away most of their worldly possession, shipping the remainder to the United States at considerable expense, mostly Father's items, such as his desk and an expensive sofa. Appellant's App. Vol. III, pp. 302-306. The Parties transferred all their money to the United States to Mother's account at CommunityWide. Appellant's App.

Vol. III, pp. 340-342. The Parties terminated their lease and forfeited their deposit because they did not give proper notice because they immediately wanted to move to United States as soon as Father obtained his spousal resident visa. Appellant's App. Vol. III, pp. 330-340. Father purchased a new SUV for the family. Appellant's App. Vol. II, pp. 10. Finally, Father purchased a new mattress and bedding for the family. Appellant's App. Vol. II, pp. 10.

In summary, the trial court's conclusion that the Minor Child's "habitual residence" was in Germany is not supported by the findings nor the record evidence. Instead, the trial court's findings and the record evidence undoubtedly demonstrate the Parties had abandoned their "habitual residence" in Germany when the Parties flew to the United States with the "settled purpose" of making the United States their permanent home. This Court should reverse and remand with instructions that the Minor Children's habitual residence is the United States and direct the trial court deny issuing a return order to Germany.

CONCLUSION

For the reasons stated herein, this Court should reverse and remand with instructions that the Minor Children's habitual residence is the United States, direct the trial court deny issuing a return order to Germany, and for all other relief just and proper in the premises.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I, Alexander N. Moseley, verify that this Appellant's Brief contains no more than 14,000 words, including footnotes, as prescribed by Ind. App. Rule 44(E), notwithstanding those items excluded from page length limits under Ind. App. Rule 44(C), as determined by the word counting function of Microsoft Word 2010

/s/ Alexander N. Moseley
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CERTIFICATE OF SERVICE

I certify that on this 3rd day of January 2022, a true and accurate copy of the foregoing was served upon the following via the Court's Electronic Filing System:

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