STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Ken-24-400

MICHELE H.P. XAMPLAS

Plaintiff/Respondent-Appellee

v.

PETER XAMPLAS

Defendant/Petitioner-Appellant

APPEAL FROM THE DISTRICT COURT

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

I. SUMMARY OF THE CASE

Peter Xamplas,[1] the father of the minor child, [redacted] ("T[redacted]" DOB: [redacted]2020, filed a Petition against the mother, Michele Xamplas, for the return of their minor child to T[redacted]'s habitual residence in Greece [App. 49].[2] In accordance with the Court's Order at the telephonic conference [App. 6, 27], Peter filed for an order of immediate return of the child under The Hague Convention on the Civil Aspects of Child Abduction [hereinafter "Hague" or "Convention"],[3] [App. 40, 49], as well as for dismissal of the divorce complaint, filed by Michele in April of 2024 [App. 29], for lack of subject matter and personal jurisdiction [App. 13-14].[4] The case may be summarized from the record, as follows:

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[1] For purposes of a divorce complaint, the nomenclature in Maine is plaintiff and defendant, and for a Hague Convention petition it is petitioner and respondent. Fur purposes of this brief, the Hague Petitioner and divorce Defendant will be "Peter", and the Respondent and divorce Plaintiff will be "Michele."

[2] References to the transcript will be "TrI" for trial date May 31st and "TrII" for trial date June 21st, with the Appendix "App."

[3] Federal and state courts have concurrent jurisdiction under the Convention. *See* Eric Lesh, *Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases should be heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 173 (2011) ("Significantly, ICARA grants original concurrent jurisdiction of Hague Convention cases to both federal and state courts. This means that a LBP [Left Behind Parent] seeking return of a child that has been abducted to the United States has the choice of initiating an action in either a state or federal court.").

[4] The trial court reserved decision on these motions [*See* App. 28 n. 8]; *see Monteith v. Monteith*, 2021 ME 40, 255 A.3d 1030, 1037 ("Subject matter jurisdiction 'refers to the power of a particular court to hear the type of case that is then before it.' In contrast, a court's claim-processing rules, such as notice, pleading, and arbitration requirements, dictate how a court is to consider a case

1. As the trial court found, T[redacted] is a child under the age of 16 whose "habitual residence" was Greece at the time of her wrongful removal and restraint [*See* App. 18-19].

2. Greece and the United States are signatories to the Hague Convention. *See* U.S. Hague Convention Treaty Partners (state.gov).[5]

3. This case concerns a petition for "return" of a child under The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention" or "the Convention"), Oct. 25, 1980, 1343 U.N.T.S. 89 and its implementing statute in the United States, the International Child Abduction Remedies Act 22 U.S.C. § 9001 et seq. ("ICARA").

4. The Convention is a multilateral treaty intended to provide an expeditious[6] protocol for the return of a child unilaterally removed or retained by a parent from one Convention member country to another Convention member under Article 3. As such, the Convention's focus is not the underlying merits of a custody dispute but whether a child should be returned to their habitual residence for custody proceedings under that country's domestic law. *See e.g. Alcala v. Hernandez*, 826 F.3d 161, 169 (4th Cir. 2016) ("The Convention is based on the principle that the best

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over which it has jurisdiction. Whereas claim-processing rules and lack of personal jurisdiction may be waived, lack of subject matter jurisdiction cannot be waived and may be raised at any time.") (citations omitted); *Seekins v. Hamm*, 2015 ME 157**,** 129 A.3d 940, 941 ("discussing jurisdictional prerequisites under the Uniform Child Custody Jurisdiction and Enforcement Act.").

[5] *See Seymour v. Seymour*, 2021 ME 60, 263 A.3d 1079, 1083 (Discussing the application and forms of judicial notice and concluding that, "When a court takes judicial notice of information available on a website, it may do so for either of two purposes: solely to take notice that the information appears on the website or for the truth of the matter asserted on the website.'").

[6] Delays in the US has been subject to criticism. *See* Andrew A. Zashin, et al., *The United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Conve*ntion, 28 J. AM. ACAD. MATRIM. LAW. 249, 263 (2015) ("The United States is a refuge state for child abductors; in the United States, the abductor almost always wins. That sentence may surprise some readers. After all, in the United States, we believe that we are a progressive, enlightened society and a leader in the world concerning human rights. We believe we have a superior form of government in our democracy. We believe that we are at the forefront of forward-thinking law and policy-essentially, that we do things better than other nations. The James Baker quote above reminds us of that. The reality is very different. The evidence, both empirical and statistical, tells another story.").

interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. The return remedy, in effect, 'lays venue for the ultimate custody determination in the child's country of habitual residence rather than the country to which the child is abducted.'") (citations omitted).[7]

5. Under art. 8 of the Convention, "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." HCCH, CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, at HCCH | #28 - Full text (last visited December 10, 2024).

6. Under ICARA, "the petitioner bears the initial burden of proving by a preponderance of the evidence that the child was wrongfully removed," but once the petitioner meets his initial burden, the respondent may oppose the child's return by proving one of [the] five affirmative defenses" as listed under 22 U.S.C. §9003(e)(2)(A) and (B) §9003(e)(2):

> In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—
>
> (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
>
> (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

5. Congress specifically required that these affirmative defenses be narrowly construed to effectuate the purposes of the Convention. Moreover, because of the very important policy objectives of the Convention and ICARA, courts retain discretion to order the child's return "even where a defense applies, the court has the discretion to order the child's return." *See Monzon v. De La Roca*, 910 F.3d 92, 97 (3d Cir. 2018) (discussing the Convention and ICARA) (citations and footnotes omitted).

[7] *See* Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 4, 5 (2004) (emphasis added).

6. Following a two-day trial, the trial court (Mitchell, J),[8] found that Greece was the habitual residence, the removal was wrongful, and there was wrongful restraint by Michele [App. 18-19].[9]

7. When the court determined a child had been wrongfully removed, Article 12 of the Convention provides that the child is to be returned "forthwith," if the proceedings have been "commenced" in the "judicial or administrative authority of the Contracting State" and "less than one year before the date of wrongful removal."

8. Michelle commenced a divorce on July 17,2023 in Maine having waited six months from her arrival for a visit with family in Maine [App. 4, 29, Tr.II, p. 80-81, 88-89]. Peter commenced a petition for return in Greece through the Central Authority on July of 2023 and a request to the Central Authority in the US in September of 2023, and a petition in the Maine District Court for return in April of 2024.

9. If a petitioner fails to commence the proceedings before the one-year deadline, s/he is no longer entitled to automatic return. Instead, a rebuttable presumption arises whereby the child's return is subject to certain affirmative defenses, including demonstration that "the child is now settled in its new environment" under Article 12.

10. The operative question then became whether the burden of proof shifted to Peter when he commenced his petition in Greece with the Central Authority who then engaged the United States Central Authority well-within one year of the wrongful removal and restraint and which, despite the narrower language of ICARA, complied with the Hague as a treaty adopted between nation-states.

[8] Following the first proceedings, District Court Judge Mitchell was nominated and confirmed as a Justice of the Superior Court but continued to assign himself as allowed by the rules.

[9] The trial court initially declined to re-visit its Order in the divorce dated February 28, 2023, but then did so in the context of the Hague proceedings as, quite properly, these are distinct proceedings and the treaty has its own definition of civil wrongful removal and retention [*See* Tr.I, p. 6, 16; App.3; "objection is broader" Tr.I, p. 35].

For the reasons below, the Court's Order dated August 24, 2024, should be vacated, and the matter remanded for return of T[redacted] to Greece for a determination of her best interests and as her habitual residence under the Hague Convention treaty.

I. STANDARD OF REVIEW

The standard of review is sufficiently well-summarized in *da Silva v. de Aredes*, 953 F.3d 67, 72-73 (1st Cir. 2020):

> As presented to us, the question of whether the district court erred in concluding de Aredes had not met her burden of proof as to any of her defenses is a mixed question of law and fact. Under the reasoning of the Supreme Court in *Monasky v. Taglieri*, —— U.S. ——, 140 S. Ct. 719, 730, 206 L.Ed.2d 9 (2020), we review the question for clear error. "[T]he appropriate standard of appellate review for a mixed question 'depends ... on whether answering it entails primarily legal or factual work.'" *Id.* (quoting *U.S. Bank N.A. v. Vill. at Lakeridge*, LLC, —— U.S. ——, 138 S. Ct. 960, 967, 200 L.Ed.2d 218 (2018)). Like the "habitual residence" determination at issue in *Monasky*, the "grave risk" and "now settled" defenses require the court to identify a broad standard and then answer the factual questions of whether return would expose the abducted child to grave risk of harm or whether the abducted child is "now settled." *See, e.g., Yaman v. Yaman*, 730 F.3d 1, 9 (1st Cir. 2013) (stating the district court applied a "totality of the circumstances test" to find a child "now settled"); *Alcala v. Hernandez*, 826 F.3d 161, 170-71 (4th Cir. 2016) (holding that the totality of the circumstances test applies to the now settled analysis).
>
> Review for clear error also accords with the goals of the Convention. As *Monasky* holds, "[t]o avoid delaying the custody proceeding, the Convention instructs contracting states to 'use the most expeditious procedures available' to return the child to her habitual residence." 140 S. Ct. at 724 (quoting Art. 2, T.I.A.S. No. 11,670). Review for clear error "speeds up appeals and thus serves the Convention's premium on expedition." Id. at 730. Under clear error review, any plausible finding as to a witness's credibility "can virtually never be clear error." *Díaz-Alarcón v. Flández-Marcel*, 944 F.3d 303, 312 (1st Cir. 2019) (quoting

> *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). The Hague Convention "establishes a strong presumption favoring return of a wrongfully removed child." *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir. 2002). The affirmative defenses to this presumption are construed narrowly. Id. at 14. While we review de novo legal issues, which include "the district court's interpretation of the Hague Convention," *Yaman,730* F.3d at 10, we see no legal issues here.

Accord Horacius v. Richard, No. 24-10801, 2024 WL 3580772, *3 (11th Cir. July 30, 2024) (unreported); *Tereshchenko v. Karimi*, 102 F.4th 111, 124 (2d Cir. 2024) ("In cases arising under the Convention and ICARA, we review a district court's factual findings for clear error and its legal conclusions de novo").

II. FACTUAL AND PROCEDURAL SUMMARY

The trial court's findings and conclusions (Mitchell, J.) are summarized here, with specific references to the record when required.

Peter's Petition for Return of Child under the 1980 Hague Convention came before the Court over the course of a two-day hearing on May 31, 2024, and June 21, 2024 [App. 14]. Michele filed for divorce in Maine on July 17, 2023 [App. 13]. The Court originally scheduled an uncontested divorce hearing for December 1, 2023. Peter was in Greece and did not attend for reasons explained on the record [App. 13]. As with subject matter and personal jurisdiction, Service of Process under international or Maine law concerning divorce remained (and remains) an unresolved issue.

Following the December 1st hearing, the Court issued a procedural order dated December 20, 2023, which noted that the case did not appear to involve an uncontested divorce, Michele was asking the Court to determine parental rights and responsibilities and to divide their property, including their real estate in Greece, and there was reason to believe those matters would be contested [App. 13]. The Court scheduled a further hearing to address the issue of personal jurisdiction over Peter.

The next hearing occurred on February 28, 2024. Michele appeared, represented by Attorney Davis. Peter appeared via Zoom, with Attorney Sotiropoulos, a Greek attorney, who could not represent him in Maine but nonetheless appeared to assist Peter and the Court [App. 13].[10] The Court heard arguments from the parties and received their testimony and issued an order that same day in which it found (1) specific personal jurisdiction over Peter likely existed, and (2) Peter likely had waived any objections to jurisdiction by his participation in the case [App. 13]. The Court also heard testimony from the parties on whether Michele's actions amounted to the abduction of the parties' child as defined by the Convention. The Court found, at that time, that Michele's refusal to return to Greece with Peter in

[10] In international cases, child custody, support, or discovery cases, for example, courts may extend comity to counsel from other countries to assist with legal issues or to facilitate the procedural aspects of the case.

January 2023 and her decision to keep her daughter was not abduction for purposes of divorce [App. 13]. Although the Court declined to revisit that ruling at the outset of the Convention return hearing, after hearing the evidence and the legal arguments of counsel, found that Michelle had wrongfully removed and retained T[redacted] in violation of the Convention [App. 17-19].

The Court held a pretrial/status conference on April 9, 2024. Attorney Prescott attended, having entered a limited appearance on behalf of Peter, and the parties agreed to file legal memoranda regarding the jurisdictional and service issues in the case [App. 14]. As noted, the Petition was filed in the District Court on April 19, 2024 [App. 4; 40, 49]. On May 6, 2024, Attorney Scheffee entered a limited appearance on behalf of Michele [App. 6-7]. Both parties filed briefs on the jurisdictional issues. The Court specially assigned the case for single-judge case management and trial in a manner that was respectful and sensitive to this family matter [TrI., p.55]. The findings are drawn from the record and decision of the trial court.

A. <u>Historical Factual Findings</u>

The parties met while vacationing in Bali, Indonesia, and were married in Australia on June 16, 2018. They have one child together who was born in Australia on October 22, 2020. Peter, Michele, and T[redacted] lived

together in Sydney, Australia, until they moved to Greece on December 7, 2021. They purchased a home in Greece in April 2022. As of the date of hearing, T[redacted] had lived in three countries in her 3.5 years of life: Australia (13 months), Greece (11 months), and the United States (18 months) [App. 14, n.3; Tr.II, p. 102].

Peter is a Greek citizen and, therefore, did not need a visa to move to Greece. He also holds an Australian passport. Michele is a U.S. Citizen and holds a U.S. passport, and T[redacted] holds an Australian passport. Michele and T[redacted] both were issued Greek visas. The parties decided to spend Christmas 2022 in Maine to visit Michele's family. They purchased round trip tickets and planned to stay in Maine for six or seven weeks. They did not sell any furniture or property in preparation for their time in Maine. They arrived in Maine on November 25, 2022, and stayed with Michele's father. Their return tickets were scheduled for January 5, 2023. On January 4, 2023, Peter could not find T[redacted]'s passport when it was time to pack for their return to Greece. When he approached Michele about it, she said she was not coming back with him to Greece, and she intended to keep T[redacted] with her in Maine. The parties have different perspectives on the details of what happened next, but the result was that Peter returned to Greece on January 5, 2023, without Michele or Ti[redacted]

The Court found that both parties "testified credibly" that Michele clearly stated her intention to remain in Maine on January 4, 2023; that Michele was providing a lot of information and giving updates on T[redacted] via email, Facebook messenger, and FaceTime from January 2023 through the present; that Peter told Michele he "would not just sit back and take this;" and finally, Michele and T[redacted] did not get on the flight with Peter to return to Greece on January 5, 2023, nor at any point afterwards [App. 15]. From those findings, the Court found that Peter knew, or should have known, that Michele intended to remain in Maine with T[redacted] as of January 4, 2023.

Michele claimed that Peter had sole access to the parties' financial assets, and in June 2023, Michele asked for funds to find an apartment. As a result of this conversation, the Court found that Peter engaged the services of Attorney Sotiropoulos and began the process of filing a petition for the return of T[redacted] under the 1980 Hague Convention [*See* App. 15-16; 120 (Def. Ex. 18a; TrI, p. 41; App. 130 (Def. Ex. 18b; TrI, p. 41; App. 174, Def. Ex. 18c; TrI, p. 41].

According to Michele, T[redacted] has been diagnosed with autism and is currently receiving multiple services in Maine[11] and underwent several

[11] The diagnosis, and the extent of any disabilities that arose only after the wrongful removal and restraint to Maine, is disputed but the finding of the court was limited in the context of the well-settled" and not a child custody or best interests finding.

assessments and was diagnosed with autism in November 2023. Peter participated in several of the assessments via Zoom, and Michele updated him with reports and information as the process went along. T[redacted] ultimately was accepted into the CDS program and receives speech services. She also is enrolled in a specialized autism program in Bangor called Heartleaf. She receives seven hours of therapy every day. She works one-on-one with therapists who assist with her speech and behavior development [App 17].

In its decision, the Court found that it had subject-matter jurisdiction, and the venue was proper under the Convention [App. 16-17]. The Court then framed the "Question Presented" as, "Whether the Child Shall be Returned to Greece" pursuant to the 1980 Hague Convention and ICARA [App. 17]. The Court stated, properly, that it is not undertaking a best interest analysis for Ti[redacted] Therefore, the Court found that both parents were subject to the Hague and limited itself to the ultimate question of whether the return of T[redacted] is required by considering (1) whether there has been a wrongful removal or retention of her by Michele that would provide a basis for return, and (2) if so, whether any of the Hague Convention defenses or exceptions to the return requirement apply [App. 17].

B. <u>Michele's Wrongful Removal and Retention</u>

The Court first noted that under the Convention, to establish a *prima facie* case for return of a child, Peter must prove, by a preponderance of the evidence, four specific elements. Turning to those elements, the Court then found, as follows:

> 1. **Wrongful retention:** T[redacted] was retained in Maine by Michele beginning on January 4, 2023, which was the point in time at which Peter knew or should have known Michele intended to remain in Maine with Ti[redacted] Michele's retention of T[redacted] was wrongful insofar as it was in breach of Peter's custody rights under Greek law [App. 18].
>
> 2. **Habitual residence:** The parties were living as a family in Greece prior to their trip to Maine for the holidays in November 2022, and T[redacted]'s habitual residence was Greece at the time of the wrongful retention [App. 18].
>
> 3. **Left-behind parent's custody rights:** The parties were married at the time of the retention (and are still married as of the date of this Order). Peter credibly testified that he would spend time with T[redacted] in the mornings and evenings when he was not at work and that he lived in a home in Greece with Michele and T[redacted] as a family. The Court finds that (i) Peter had custody rights pursuant to the laws of Greece, and (ii) Peter was exercising those custody rights at the time of the wrongful retention. As a result, Michele's decision to keep T[redacted] in Maine was in breach of Peter's custody rights [App. 18-19].
>
> 4. **Child is under the age of sixteen:** T[redacted] was born October 22, 2020. She was two years old at the d.me of the retention, and 3.5 years old at the time of the hearing [App. 19].

Based on the facts before the Court, the Court explicitly found that Peter had "made out a prima facie case for the return of T[redacted] under the Hague Convention" [App. 19].

C. Peter Sustained his Burden of Initiating Return within One Year of the Wrongful Removal and Retention and Michelle Failed to Meet her Burden that T[redacted] was Well-Settled under Article 12.

Once Peter established a prima facie case for return, Michele may assert any of six exceptions/affirmative defenses set forth in the Hague Convention [App. 19]. As the Court noted, the only defense raised at trial by Michele was the so-called "settled child" defense which the court then considered [App. 19]. Under this art. 12 defense, if a petitioner has not initiated judicial proceedings within one year from a child's wrongful removal or retention, and the respondent shows the child is well-settled in her new environment, a court has discretion to decline to order the child's return. Michele, as the respondent, bears the burden of establishing this defense by a preponderance of the evidence. The Court found that she had done so [App. 20]. Peter asserts that this was both a clear abuse of discretion and an error of law.

First, the Court concluded more than one year passed after the wrongful retention without Peter initiating "judicial" proceedings because, the Court reasoned, ICARA "gives clear guidance on this point" and "[a]ny person seeking to initiate judicial proceedings under the Convention for the return of a child ... may

do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the Home the petition is filed." 22 U.S.C. § 9003(b). Furthermore, under ICARA, the Court asserted, "[T]he term 'commencement of proceedings[,]' as used in article 12 of the Convention, means the filing of a petition in accordance with subsection (b) of this section." § 9003(f)(3) [App. 20].

From the trial court's perspective, a party must initiate *judicial* proceedings by filing a petition in a court of *competent jurisdiction*. The Court concluded that Peter had not filed his petition in a Maine court until April 19, 2024, and that Michele's wrongful retention of T[redacted] began on January 4, 2023. Thus, the Court found, "472 days, or one year, three months, and 16 days, passed from the retention until the time Peter filed his petition" [App. 20]. Therefore, the Court concluded, the first requirement of this affirmative defense was met by Michele [App. 20]. The Court essentially rejects the filing for Return with the Greece and US Central Authorities under the Hague as insufficient to constitute a *judicial or administrative* action under the Hague (or ICARA for that matter) [*See* App. 162-173 (Def. Ex. 18c); App. 120-121 (Def. Ex. 18a); TrI, pp. 21-22; TrI, pp. 44-45].

Second, the Court considered whether T[redacted] had become well-settled in Maine and should, therefore, not be returned to Greece. As the Court noted, and other

courts have held based on fact-intensive analyses, The Hague Convention and ICARA are silent as to what specific factors a court should weigh in making the "well-settled" determination but elected to follow the lead of others that have adopted a "totality of circumstances" approach. This called upon the Court to consider "any relevant circumstance that demonstrates security, stability, or permanence — or lack thereof— in a child's new environment." As the Court framed that analysis, this is a "holistic inquiry" in which looks to whether T[redacted] has "significant connections demonstrating a secure, stable, and permanent life in her new environment." Viewing the totality of T[redacted]'s circumstances and detailing the Courts findings within this conceptual framework, the Court found that T[redacted] is well-settled in her current environment [App. 20-21].

The Court then concluded that T[redacted]'s young age was the most significant factor weighing against a determination that she is well-settled in Maine. Although she has been in the U.S. for 18 months of her short life, she is young, and courts have found that young children are less likely to be "well-settled" in their new environments [App. 22]. Additionally, given T[redacted]'s age, she does not yet participate in community or extracurricular school activities, such as team sports, youth groups, or school clubs [App. 22]. However, the Court does not find these considerations to be determinative when balanced against the supporting factors discussed above. In sum, "weighing the evidence in its totality, the Court finds T[redacted] is well-settled in

Maine for the purposes of applying the settled child defense" [App. 22-23]. The Court then exercised its discretion by finding that T[redacted] should not be returned to Greece:

> This is not an easy decision. The policies underlying the Hague Convention prefer that authorities in a child's place of habitual residence should make custody decisions and that parents should be discouraged from engaging in self-help measures in this area. The United States is a signatory to that Convention, which Court takes very seriously. The Court also understands the importance and value to a child of having a strong bond with her father. However, the Court also believes returning T[redacted] to Greece simply would be too disruptive for her at this Home — both in terms of interrupting the services she is receiving for her autism and interfering with well-settled aspects of her life here. To remove her now from the place where she has important supports to a country whose language she does not speak would strike the wrong balance, notwithstanding the countervailing considerations noted above [App. 23].

For the reasons set forth below, the Court committed a clear abuse of discretion and error of law in its application of the Convention and art. 8 and 12 by declining to order the return of T[redacted] to her habitual residence following Michele's wrongful removal and retention.

III. LEGAL ARGUMENT

PETITIONER PROPERLY COMMENCED A PROCEEDING IN ACCORDANCE WITH THE HAGUE CONVENTION WITHIN ONE YEAR OF WRONGFUL RETENTION SUCH THAT THE BURDEN OF PROOF TO PREVENT RETURN TO GREECE WAS ON RESPONDENT AND, THEREFORE, THE TRIAL COURT ERRED.…….....

A. The Hague Convention and ICARA

The Hague Conference on Private International Law (HCCH) currently has 91 Members: 90 States and 1 Regional Economic Integration Organization, of which the United States and Greece are signatories *See* HCCH CONVENTIONS: SIGNATURES, RATIFICATIONS, APPROVALS AND ACCESSIONS (November, 2024), at ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf (visited December 10, 2024); THE U.S. HAGUE CONVENTION TREATY PARTNERS, 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, at U.S. Hague Convention Treaty Partners (visited December 10, 2024). The Office of Children's Issues at the Department of States operates as the Central Authority for the United States. *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, at https://www.hcch.net/en/states/authorities/details3/?aid=133 (visited December 10, 2024). Each member nation to the Convention is required to maintain a Central Authority to administer applications and assist left-behind parents to enforce their right to have their children returned. *See* THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, ART.6, OCT. 25, 1980, T.I.A.S. NO. 11,670, 1343 U.N.T.S. 49. The application to the Central Authority is distinct, however, from filing a claim in a federal or state court in the United States.

The available current data from the HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, GLOBAL REPORT – STATISTICAL STUDY OF APPLICATIONS

MADE IN 2021 UNDER THE 1980 CHILD ABDUCTION CONVENTION, at Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention (visited December 10, 2024), reveals that, "At least 2,771 children were involved in the 2,180 return applications, making an average of 1.3 children per application. A large majority of applications (74%) involved a single child. The average age of a child involved in a return application was 6.7 years." *Id*. at ¶ 16. The researchers carefully noted that when considering this global estimate of the number of applications, these estimated figures only relate to applications under the 1980 Child Abduction Convention routed through Central Authorities and not to child abduction overall, abductions within State boundaries, abductions even as between Contracting States, applications made directly to the national courts without the knowledge or involvement of Central Authorities, or abductions involving States that are not party to the 1980 Convention. *Id*. at ¶ 4.

Following a review of the trend in rates of return and cases requiring judicial decision making in Hague Convention cases, the authors made these findings, with a limitation for the COVID-19 pandemic, relevant to what has occurred in this case and nationally in the United States to the left-behind parent:

> In 2021, return applications were generally resolved more slowly, compared with the 2015 Study. The overall average time taken to reach a final outcome from the receipt of the application by the Central Authority was 207 days compared with 164 days in 2015 and 188 days in 2008. The average time taken to reach a decision of judicial return was 196 days (compared with 158 days in 2015, 166 days in 2008, 125 days in 2003 and 107 in 1999) and a

> judicial refusal took an average of 268 days (compared with 245 days in 2015, 286 days in 2008, 233 days in 2003 and 147 days in 1999). For return applications resulting in a voluntary return the average time taken was 129 days, compared with 108 days in 2015, 121 days in 2008, 98 days in 2003 and 84 days in 1999.

Id. at ¶ 20.

It is in the public interest to reduce the number of abducted or wrongfully removed children to the United States and not encourage the United States to be a safety net for such conduct. The Convention was specifically established decades ago to "address the problem of international child abductions during domestic disputes." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4 (2014) (internal quotation marks omitted). The United States system for child custody is an "adversarial system of adjudication," *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020), and the intentional design of the Convention is for courts with jurisdiction in a nation state obligated by treaty to enforce the return of children once findings of habitual residence and wrongful retention and removal are made.

There are, however, distinctions in the language of the Convention worth noting. "Abduction" as used in the Convention title is not intended in a criminal sense but is shorthand for the phrase "wrongful removal or retention" which appears throughout the text, beginning with the preambular language and Article 1. Generally speaking, "wrongful removal" refers to the taking of a child from the person who was exercising custody of the child, and "wrongful retention" refers to

the act of keeping the child without the consent of the person who was exercising custody. The "archetype of this conduct "is the refusal by the noncustodial parent to return a child at the end of an authorized visitation period. *See* THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION LEGAL ANALYSIS (N.D.), (51 FEDERAL REGISTER 10494), at p. 5, at Legal_Analysis_of_the_Convention.pdf (visited December 10, 2024). The term "abductor" as used in this analysis refers to the person alleged to have wrongfully removed or retained a child. *Id.*

Petitions brought under the Convention are not meant to resolve international child-custody disputes but proceeds on the "premise" that "custody decisions [should ordinarily be] made in the child's country of 'habitual residence.'" *Monasky v. Taglieri*, 589 U.S. 68, 72 (2020). To further that objective, parents may petition under the Convention for the prompt return of a child wrongfully removed or retained away from the country in which she habitually resides. *Id*. As the United States Supreme Court explained, the Convention's "return" requirement "is a 'provisional' remedy that fixes the forum for custody proceedings." *Id*. Thus, "[u]pon the child's return, the custody adjudication will proceed in that forum." *Id*.

B. Central Authorities and the One-Year Period

Congress enacted ICARA to implement the Convention. Under ICARA, Congress granted state and federal district courts concurrent jurisdiction over

petitions seeking the return of a child under the Convention, 22 U.S.C. 9003(a), and gave "person[s] seeking to initiate judicial proceedings under the Convention" the private right to "commenc[e] a civil action" in courts with jurisdiction. 22 U.S.C. 9003(b). Congress stated that the court would decide a petition in accordance with the convention. 22 U.S.C. 9003(d). And Congress prescribed burdens of proof—for example, a petitioner must show, "by a preponderance of the evidence," "that the child has been wrongfully removed or retained within the meaning of the Convention." 22 U.S.C. 9003(e). Congress also made clear that Convention remedies were not exclusive but "in addition to remedies available under other laws or international agreements." 22 U.S.C. 9003(h). Finally, and of critical importance to this analysis of discretion and legal interpretation to these facts, The Hague Convention "establishes a strong presumption favoring return of a wrongfully removed child" and the affirmative defenses to this presumption are to be "construed narrowly." *Danaipour v. McLarey*, 286 F.3d 1, 13-14 (1st Cir. 2002).

Congress instructed that a Hague Convention petition is a "civil action," 22 U.S.C. 9003(b), and that a Hague Convention petitioner bears the burden of proof on the element of wrongful removal, and thus habitual residence, 22 U.S.C. 9003(e). *See Monasky v. Taglieri*, 589 U.S. 68, 72 (2020) ("the Convention ordinarily requires the prompt return of a child wrongfully removed or retained away from the country in which she habitually resides."). In this case, the trial court found that

Greece was the habitual residence and that the retention and removal were wrongful. The operative question then became whether the burden of proof shifted to Peter when he commenced his petition in Greece with the Central Authority who then engaged the United States Department within one year of the wrongful removal or if an action had to be filed in the Maine state or federal courts (which have concurrent jurisdiction under the Convention).

The operations of Central Authorities vary significantly from signatories to the Convention. For instance, the United States Central Authority (called the Office of Children's Issues) has very limited powers compared to others globally. It has no direct judicial function and lacks authority to secure a child's return pursuant to the Convention. In the US, the exclusive burden of the left-behind parent is to hire and seek counsel and commence a Hague court case in the state or federal courts (which have concurrent jurisdiction in many instances). After the court application is submitted, the Central Authority can then offer limited assistance such a letter to the other parent advising voluntary return. The problem, as in this case, is that if the left-behind parent, whether by the emotional and tactical advantages of the abducting parent, a lack of financial resources, or following their own countries laws that delays a child's return, may jeopardize that return to the habitual residence of the child altogether.

Misunderstanding the role of a Central Authority may have a detrimental impact on that return as it shifts the burdens of proof from the abducting parent to the left behind parent at trial. There is a body of US law, acknowledged in this brief and at trial, which holds that the one-year period commences on notice of the abduction and that a parent who initiates a Hague action through their Central Authority in Greece and which is properly transmitted to the United States Central Authority, may not constitute a commencement of an action unless that left-behind parent files in the state where the child is residing within one year. This is not the language of the Convention, which was intended, across socio-economic and national boundaries, to allow a parent to seek return of a child within the one-year period for an a*dministrative or judicial proceeding* under Article 12.[12]

The Convention is a treaty passed by Congress. *See Lozano v. Montoya Alvarez*, 572 U.S. 1, 5 (2014) ("The Hague Convention, of course, is a treaty, not a federal statute. For treaties, which are primarily "'compact[s] between independent nations,'" our "duty [i]s to ascertain the intent of the parties" by looking to the

[12]The narrowness of the exceptions under the Convention has an historical basis given privileged nations disrespecting the race, cultures, and indigenous peoples of other nations and the weaponization of poverty to prevent return to a habitual residence. *See e.g. Galaviz v. Reyes*, 95 F.4th 246, 274-75 (5th Cir. 2024) ("While we are sympathetic to the sensitive issues presented, '[a] court that receives a petition under the Hague Convention may not resolve the question of who, as between the parents, is best suited to have custody of the child." In the present case, we leave the question of custody to the Mexican courts.'") (footnotes omitted).

document's text and context.") (citations omitted). ICARA is the enabling statute that has been utilized to neuter the effectiveness and legal status of Central Authorities internationally by adding a requirement of state action in the state once a child is abducted and wrongfully retained (and found) in the United States. *Cf. McGirt v. Oklahoma*, 591 U.S. ___ (2020), p. 18 (Discussing Creek Nation *treaty* and implications for criminal prosecutions and jurisdiction, reasoning that, "When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us."). Because the trial court erred as a matter of law in calculating the period under Article 12, and that error of law shifted the burden of proof to the left behind parent, the order should be vacated and remanded.

C. <u>The Burden of Proof under Article 12 was Improperly Shifted to Petitioner</u>.

"The Hague Convention is a multilateral treaty designed to address the problem of international child abductions during domestic disputes." *Nergaard-Colon v. Neergaard*, 752 F.3d 526, 529-530 (1st Cir. 2014), citing *Abbott v. Abbott*, 560 U.S. 1, 8 (2010). Over one hundred countries—including both the United States and Greece - signed the Hague Convention on the Civil Aspects of International Child Abduction. Those countries "desir[e] 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." HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION PMBL., Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89. "Broadly speaking, the Convention aims to deter parents from abducting their children to a country whose courts might side with them in a custody battle." *Díaz-Alarcón v. Flández-Marcel*, 944 F.3d 303, 305 (1st Cir. 2019). The Convention does so by providing for "the prompt return of children wrongfully removed to or retained in any Contracting State." *Id.* (internal quotation marks and citation omitted). *See* Convention, art. 1(a); 22 U.S.C. § 9001(a)(4).

The Convention "generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the United States." *Chafin v. Chafin*, 568 U.S. 165, 168 (2013). The trial court found that the child was wrongfully retained in Maine by Michele beginning on January 4, 2023, that the child's habitual residence was Greece at the time of the wrongful retention, and that Peter had custody pursuant to the laws of Greece and Peter was exercising those custody rights at the time of the wrongful retention. (Order August 15, 2024, Section D, pages 7-8, ¶¶ 1-3).

Once Peter made out a prima face case for return, Michele may assert any of six exceptions/affirmative defenses set forth in the Hague Convention. 22 U.S.C. §

9003(e). To establish the well-settled child exception, the respondent must prove by a preponderance of the evidence that (1) more than one year elapsed between the child's removal and the petitioner's commencement of judicial or administrative proceedings, and (2) the child "is now settled in its new environment." Hague Convention, art. 12; 22 U.S.C. § 9003(e)(2)(B). In other words:

> If the petitioner can satisfy these three elements, and "*commenced judicial or administrative proceedings within one year of the date of wrongful removal*," the Court must order the return of the child unless the respondent can establish the existence of one of the exceptions or defenses enumerated by the Convention. *Mendez*, 778 F.3d at 343. Because "[t]he Convention establishes a strong presumption favoring return of a wrongfully removed child," "[e]xceptions to the general rule of expedient return ... are to be construed narrowly." *Danaipour*, 286 F.3d at 13–14 (citations omitted). Respondent has the burden of establishing, by a preponderance of the evidence, that the child is well-settled in his new environment, *see* Hague Convention, art. 12; 22 U.S.C. § 9003(e)(2)(B), or by clear and convincing evidence, that returning the child to the country of habitual residence would pose a "grave risk" to the child's safety, *see* Hague Convention, art. 13b; 22 U.S.C. § 9003(e)(2)(A). Even if one or both of these exceptions are satisfied, the Court still has discretion to order the return of the child. *Danaipour*, 286 F.3d at 14.

da Costa v. de Lima, No. 22-cv-10543-ADB, 2023 WL 4049378, **15-16 (D. Mass. June 6, 2023) (emphasis added), *affirmed da Costa v. de Lima*, 94 F.4th 174 (1st Cir. 2024). Peter recogizes the authorites cited in that decsion concerning what constitutes commenctement for purposes of the one year time frame. *Id*. at **20-21.

In this case, the trial court found that T[redacted] was retained in Maine by Michele beginning January 4, 2023. Peter filed a Petition for Return with the Central

Authority in Greece on September 25, 2023 [App. 120-121 (Def. Ex. 18a)] and filed a Petition for the Return of the Minor Child to Greece in Maine on April 19, 2024 [App. 40, 49]. Michele's *intent to remove (abduct under ICARA) and restrain* did not become *objectively* known, on this record, until she filed her divorce complaint in Maine on or about July17, 2023 [App. 29] and was then sent to Peter later than that (leaving aside the question of service of process) under Maine law.

Thus, the question presented is whether Peter initiated proceedings for the return of the child within one year of T[redacted]'s wrongful retention. It is Peter's contention that he commenced an administrative proceeding within one year of T[redacted]'s wrongful retention by filling with the Central Authority in Greece in accordance with the Convention and Greek law. Until the filing of the divorce complaint (which she intentionally waited six months to do), Michele had not committed no explicit act to restrain T[redacted] once in Maine under the Convention or ICARA. Therefore, the trial court erred in shifting the burden of proof to Peter and declining to order T[redacted]'s return to her habitual residence in Greece.

In *Zaoral v. Meza*, No. H-20-1700, 2020 WL 5036521, *15 (S.D. Tex. Aug. 26, 2020), the trial court found that filing with the Central Authority satisfied the requirement of filing a proceeding within one year of wrongful retention:

> E.R.G. was wrongfully retained in the United States when she did not return to Venezuela as scheduled on August 14, 2018. PX 02 at ZAORAL 012; July 28, 2020; Joint Pretrial Order, Parties' Admissions of Fact (ECF 53-01), at ¶¶ 32, 33. On November 11, 2018, Petitioner

> submitted a Hague Convention Application to the Venezuelan Central Authority seeking the return of E.R.G. to Venezuela. PX 16; Joint Pretrial Order, Parties' Admissions of Fact (ECF 53-01), at ¶ 36. Petitioner's Hague Convention Application was transmitted from the Venezuelan Central Authority to the United States Department of State, Office of Children's Issues on December 26, 2018. PX 16 at ZAORAL 193. *Because Petitioner commenced proceedings before the Central Authority of the United States — the administrative authority where E.R.G. was located -- to secure the return of E.R.G. well before "a period of less than one year [had] elapsed from the date of wrongful ... retention," the well-settled defense is not available to Respondent.*

(Emphasis added.) *Accord In re A.V.P.G.*, 251 S.W.3d 117 (Tex. App. Corpus Christi 2008) (for purposes of the one-year filing deadline under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, the filing of a petition for return with the Central Authority within one year of the wrongful removal may be sufficient to satisfy Article 12). *See generally* Jill M. Marks, ANNOTATION, CONSTRUCTION AND APPLICATION OF PROVISION OF HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION SPECIFYING ONE-YEAR PERIOD FOR PARENT TO FILE FOR RETURN OF CHILD WRONGFULLY REMOVED FROM OR RETAINED OUTSIDE COUNTRY OF HABITUAL RESIDENCE, AS IMPLEMENTED IN INTERNATIONAL CHILD ABDUCTION REMEDIES ACT, 42 U.S.C.A. § 11603(B), (F)(3), 79 A.L.R. Fed. 2d 481, § 11 (2013 and Supps.).

Here, Peter initiated his case within the one-year period prescribed by ICARA by filing with the Central Authority and pursuing his remedies in Greece. He did not sit on his rights, and promptly sought applied to the Central Authority. He should

not be penalized in any way, including by allowing Michele to establish her affirmative defense, when he sought return. *See Falk v. Sinclair*, 692 F.Supp.2d 147 (D. Maine 2010) (mother, a German citizen residing in Germany, did not acquiesce in father's retention of their child in Maine in any manner contrary to the terms of a custody agreement, thus defeating father's "acquiescence" affirmative defense; upon being apprised that he intended not to return the child to Germany on her scheduled flight, the mother immediately protested and insisted that the child be returned, she promptly sought legal assistance and filed a request with the German Central Authority for the child's return). Pursuant to Article 12 of the Hague Convention, when a child has been wrongfully removed, she must be returned to her home country if a court where the child is located receives a petition for his return within one year of the wrongful removal. *Cf. Lozano v. Montoya Alvarez*, 572 U.S. 1, 5 (2014) (Supreme Court held that the 1-year period was not subject to equitable tolling when the abducting parent conceals the child's location from the parent).

Because Peter commenced the Hague Convention proceedings within one year, the court erred by failing to order immediate return. "The Convention establishes a strong presumption favoring return of a wrongfully removed child." *Danaipour v. McLarey*, 286 F.3d 1, 13 (1st Cir.2002). "Children who are wrongfully removed or retained within the meaning of the Hague Convention are to be returned promptly unless one of the narrow exceptions applies." *Kufner v. Kufner*, 519 F.3d

33, 38 (1st Cir. 2008). Because Peter established wrongful removal and retention, it was Michele's burden to establish her affirmative defense. The trial court did not, however, place that burden on Michele. Order, page 9.

As noted above, the respondent must prove the elements of the well-settled defense by a preponderance of the evidence, and the court has discretionary power to determine whether the defense justifies return. *See* 22 U.S.C. § 9003(e)(2)(B); *In re Filipczak*, 838 F.Supp.2d 174, 181 (S.D.N.Y.2011) ("[I]f more than one year has passed, a demonstration that the child is now settled in its new environment may be a sufficient ground for refusing to order repatriation, but it does not compel the result.") (internal quotation marks omitted). Courts have interpreted the evidentiary standard by employing a State Department Legal Analysis issued in conjunction with the adaptation of the Convention, which concluded that "nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof." HAGUE INT'L CHILD ABDUCTION CONVENTION; TEXT & LEGAL ANALYSIS, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986) ("State Dep't Analysis"); *see also Lozano v. Alvarez*, 697 F.3d 41, 56 (2d Cir.2012) (adopting State Department standard), aff'd in part, 572 U.S. 1 (2014); *In re B. Del C.S.B.*, 559 F.3d 999, 1003 (9th Cir. 2009) (same).

These cases are fact intensive, and holdings vary widely which is rather predictable given the volume of courts with jurisdiction to act under the Convention

and the US's unique system of vertical federalism between federal and state courts.[13] The child's age of 2 matters more here as there is nothing that connects her from her wrongful removal and retention to Maine in any psychological or emotional manner that is permanent or immutable. There may be a connection to the parent who abducted but that does not prevent her return to Greece which is her habitual residence under the Hague and where there are courts of lawful jurisdiction able to determine her best interests.

D. This Toddler is not "Well-Settled" nor did Petitioner Acquiesce to Her Wrongful Removal and Retention from her Habitual Residence in Greece.

Although the trial court did not adopt Michele argument for "acquiesce," the argument permeated the hearings such that it is addressed on appeal [Tr.I, p. 7]. The Convention is an international treaty that adopted in 1980 in response to the problem of international child abductions during domestic disputes. By signing the treaty, the Senate and the President pledged that the United States would maintain judicial and administrative remedies for the return of children taken from the State of

[13] *See* Lesh, *supra* n. 3, at 173 (2011) ("The United States represents the largest share of the Hague Convention caseload and is among the slowest to resolve cases. When implementing the Hague Convention in the United States, Congress passed the International Child Abduction Remedies Act (ICARA), which grants concurrent federal and state court jurisdiction over these cases. This vast jurisdictional grant allows more than 31,500 judges to hear international child abduction petitions, promoting delay, inconsistent interpretation, and unresolved cases that have harmful effects on parent and child victims and frustrate the intent of the Hague Convention").

their habitual residence to another signatory State in violation of the left-behind parent's custody rights.

Thus, Article 1 of the Convention has two primary objectives: (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. *See* Robert G. Spector, *Proceedings under the Hague Child Abduction Convention: 2018-2019*, 53 FAM. L.Q. 313 (2020). A retention is more difficult to prove and may result in a trap if only a judicial action where the child was taken is so narrowly held as meeting the one-year defense under art. 12 for the LBP. *See* Olivia Claire Dobard, Comment, *The Supreme Court Addresses International Child Abduction under the Hague Convention*, 32 J. AM. ACAD. MATRIMONIAL LAW. 435, 441 (2020) ("When considering a wrongful removal, the date of the kidnapping will likely be evident because a parent can prove when the child was removed from the country. On the other hand, when considering wrongful retention, a parent might find it more difficult to establish a timeline, because the facts may be less clear on when the stay of the child became wrongful.").

In *Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010), for example, a Maine federal district court concluded that S.G.N.'s habitual residence was Australia, that Nicolson had possessed and retained joint custody rights, and that he had not

consented or acquiesced to Pappalardo's permanent retention of S.G.N. in the United States through the state court proceedings or otherwise. The case, however, unlike the case at bar, turned on the effect of a consent protection from abuse order in Maine as evidence of acquiescence. The Court then rejected Pappalardo's "thesis" that she "never shared Nicolson's intent for S.G.N. to reside habitually in Australia because the couple's marital relationship broke down and Pappalardo formed the intent to leave with S.G.N. before the child was born." *Id* at 104. The district court found that while their marriage was "fraught with difficulties from the beginning" and "[t]here were numerous conversations about the viability of the marriage, both before and after S.G.N. was born," "[t]hey lived together as a married couple . . . from the time of their marriage until March 29, 2009" and "shared responsibilities for S.G.N." until that time, when she was over three months old. *Id*.

The Court of Appeals then analyzed Pappalardo's acquiescence claim as resting on the PFA consent order entered after the wrongful retention. Nowhere was it claimed that Nicolson expressly agreed that the child could move permanently to the United States. His behavior, the court noted, is at least as consistent with that of a man who wanted to continue the marriage, as did Peter, and, therefore, to avoid forcing a final choice on his wife. The outcome, therefore, turned finally on an issue the First Circuit viewed as distinguishable from other cases and not directly answering the question whether Nicolson acquiesced to Pappalardo's retention of

S.G.N. in the United States by agreeing--through his attorney--to the Maine state court's entry of an Interim PFA order. The consent PFA order provided only for temporary custody but, if it were read as agreeing to let the Maine courts determine final custody, the Court concluded that "we would think that this was an acquiescence or, alternatively, a waiver of Hague Convention rights." *Id*. at 107.

The federal district court cited cases that treated acquiescence as a purely subjective intent inquiry, but, as the Appeals Court wrote, "surely Nicolson had no subjective intent in the state court proceeding to have S.G.N. remain in the United States or to confer final authority to decide her custody on an American court. *After all, he was privately seeking Hague Convention relief through the Australian Central Authority at the very time he participated in the state court proceeding, and he began his federal district court case shortly afterwards*." *Id*. (emphasis added). In fact, "American case law seems to recognize the need for exceptions to the subjective intent standard and some American cases (in dictum) and a United Kingdom case (as a direct holding) strongly support our view that a clear-cut formal consent order would be sufficient for acquiescence." *Id*.

As already explained, the policy of the Convention is return to the child's habitual residence such that the "burden is Pappalardo's to prove a defense, and the exceptions are to be narrowly construed." *Id*. In that instance, even a temporary consent order in a state PFA proceeding in Maine is not the unequivocal

"acquiescence" or waiver that it might first appear; at best, the order is, on the point in question, “a cryptic collection of printed and handwritten phrases that yields no single answer as to who is to decide on permanent custody.” *Id*. In sum, the Court held that it did not have a "clear[] and unequivocal[]" expression of an agreement by Nicolson to have final custody determined in a Maine court,” nor "a convincing written renunciation of rights" to that effect. *Id*. at 108 (citations omitted).

In Peter and T[redacted]’s case, as parent and child, there is no evidence of any consent to removal or retention as defined by the Convention. The trial court’s conclusion of “well-settled” was grounded in shifting the burden of proof from Michele to Peter and calculating the one-year period from removal and not from the filing of the divorce or Peter’s filing with the Greek Central Authority, transmission to the US Central Authority, or the filing of his petition in Maine, such that the Order denying return dated August 24, 2024, should be vacated.

V. CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Order of the District Court be vacated, and the matter remanded, together with such other and further relief as the Court deems just.

DATED at Saco, Maine this 16th day of December, 2024.

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CERTIFICATE OF SERVICE

I, Dana E. Prescott, Esq. hereby certify that I caused two (2) copies of this Brief of Appellant to be served on Appellee's counsel by depositing in first class mail on this the 16th day of December, 2024 and a native .pdf served electronically.

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