STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DKT. NO. KEN-24-400

MICHELE H.P. XAMPLAS

Plaintiff-Appellee

v.

PETER XAMPLAS

Defendant-Appellant

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes

STATEMENT OF FACTS

The parties were married on June 16, 2018 in Australia. They have one child together who was born in Australia on October 22, 2020. The parties and their daughter resided in Australia until moving to Greece in December 2001. The Appellant is a Greek citizen, while the Appellee and child were issued Greek visas.

The parties arrived in Maine in November 2022 and stayed with Appellee's father in Bangor. The parties were scheduled to return to Greece on January 5, 2023. On January 4, 2023, Appellee informed the Appellant she and the child would not be returning to Greece but rather would be staying in Maine. The Appellant had time remaining on the visa he was traveling on but still chose to return to Greece.

The Appellee immediately began making arrangements for the child to be enrolled in the appropriate daycare and school. The child was ultimately enrolled in a specialized autism program in Bangor. Appellant was informed and participated in these arrangements via zoom. Appellant was kept up to date with pertinent information pertaining to the long-term plans for the child in Maine by the Appellee via email, Facebook messenger and FaceTime from January 2023 through the date of hearing in this matter.

Appellant failed to take any steps to seek the return of the child to Greece until after the Appellee filed for divorce. The Trial Court concluded that Appellant knew or should have known that the Appellee intended to remain in Maine with the parties'

child on January 4, 2023. The Appellant never filed in any court in the location where the child was; but rather only filed a petition with Central Authority. In said application to Central Authority, Appellant certified that he would " pursue all the legal means, both civil and criminal ones, right after filing the present application." [App 121]. Appellant never took any other action in this matter as required under the Hague Convention.

ARGUMENT

The Trial Court Properly Considered the Affirmative Defense of the Appellee in Denying the Petitioner's Request for the Return of the Child Pursuant to the Hague Convention.

Under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), the return of a child who has been wrongfully removed or retained is mandatory unless one of the enumerated defenses applies. *See* The Hague Convention On The Civil Aspects of International Child Abduction, Art. 3 & Art. 4, Oct. 25, 1980. The trial court correctly found that the "settled child defense" was applicable in this case, thereby justifying the denial of the petitioner's request for the return of the child.

I. Legal Framework for the Settled Child Defense

Article 12 of the Hague Convention provides that, "if the proceeding commences more than a year after wrongful removal, the court shall also order the return of the child unless it is demonstrated that the child is now settled in his new environment." *Petitioner v. Lima (In re Heitor Ferreira DA Costa)*, 2023 W.L.4049378 *citing Hague Convention*, art. 12. ICARA incorporates this defense and vests courts with discretion to deny a petition for return if the defense is established by a preponderance of the evidence. 22 U.S.C. §9003(e)(2)(B). The Hague Convention On The Civil Aspects of International Child Abduction, Art. 3 & Art. 4, Oct. 25, 1980.

The "settled" analysis focuses on whether the child has achieved significant connections to their new environment, considering factors such as: (1) the child's stability in their residence, school, and community; (2) the child's social relationships; (3) the length of time the child has lived in the new environment; and (4) any other relevant evidence demonstrating that return would disrupt the child's well-being. *Id.*

II. The Trial Court's Findings Were Supported by Substantial Evidence

The Trial Court correctly applied the legal standard for the settled child defense and determined that the child in this case was settled in her new environment. The evidence demonstrated:

1. Residential Stability and Duration of the child's residence in Maine: The child's residence has been stable, and she has resided continuously in the same area of Maine. [App. 21] There is no evidence of transience or impermanence.
2. Educational and Social Integration: The child receives intensive services for her autism which includes seven hours of one-on-one therapy every weekday [App 21]. These services have resulted in marked improvement in the child and her overall development. [App 21].
3. Community Ties: The child has significant family support in the area, with very involved extended family. [App 21]. The child's maternal aunt is a registered nurse, lives in close proximity and has children similar in age to the child. [App 21] The child's maternal grandfather is also very involved and supportive of the child. [App 21].
4. Financial Stability: The Appellee is employed and financially stable with prospects for future employment in teaching. [App 22].
5. Emotional Well-Being: The child has been successful in her current daycare and looks forward to attending every day. [App 22] Given the child's young age and the fact that she is mostly non-verbal, this conduct was informative and supports the assertion that the child is attached to her environment. [App

22]. The Trial Court reasonably concluded that the child's best interests were aligned with remaining in her settled environment.

III. The Trial Court Did Not Abuse Its Discretion in Balancing the Prima Facie Case and the Settled Child Defense.

The Trial Court acknowledged that the petitioner established a prima facie case for the return of the child to Greece under the Hague Convention. [App 19]. However, the Trial Court then correctly identified the fact that Appellee was entitled to assert a defense, which she did. Denial of the petition was not an abuse of discretion because it properly evaluated the Appellee's conduct and weighed it against the potential harm and disruption that would be caused to the child by forcing a return to Greece.

1. Assessment of Appellee's Conduct: The Trial Court carefully examined the Appellee's actions, including the reasons for the child's initial removal and the duration of the retention. While the Appellee's conduct was scrutinized, the court recognized that the child's welfare was paramount.
2. Disruption to the Child's Life: The court found that uprooting the child from her stable and established environment in Maine, especially the one-on-one services the child receives every weekday for her severe autism, coupled with the supportive and extended family members involved in the child's

life, would cause significant emotional and developmental harm. This finding was based on substantial evidence, including testimony, as both parties acknowledged the child's needs. [App. 23].

3. Balancing the Interests: The Trial Court perfectly balanced the petitioner's right to seek the return of the child with the Hague Convention's goal of protecting children from harm. The Trial Court's analysis reflected a nuanced consideration of the facts and circumstances, demonstrating that it exercised its discretion thoughtfully and within the bounds of the law.

IV. Petitioner Failed to Comply with Filing Requirements Under 22 U.S.C. § 9003(b)

ICARA, 22 U.S.C. § 9003(f)(3), defines "commencement of proceedings" as "the filing of a petition in accordance with" subsection (b) of 22 U.S.C. § 9003. Section 9003(b), in turn, requires a person seeking to initiate judicial proceedings to "commenc[e] a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action . . . in the place where the child is located at the time the petition is filed." 22 U.S.C. § 9003(b), (f)(3); see Moura v. Cunha, 67 F. Supp. 3d 493, 499 (D. Mass. 2014).

As such, "only the filing of a civil action in a court where the child is located is sufficient to commence Hague Convention proceedings. Filing an application

with the central authority of the country of origin, does not suffice." Monzon v. De La Roca, 910 F.3d 92, 99 (3d Cir. 2018) (proceedings were "commenced" when action was filed in U.S. court where child was located, not when petitioner filed application with Guatemala's Central Authority); Blanc v. Morgan, 721 F. Supp. 2d 749, 762-63 (W.D. Tenn. 2010) (filing action with French court and French administrative authority did not "commence" proceedings within meaning of Article 12); Muhlenkamp v. Blizzard, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) ("The petition must be filed with the court of record, not the Central Authority, to file within the one-year limitation."); see Wojcik v. Wojcik, 959 F. Supp. 413, 418 (E.D. Mich. 1997) (petitioner's application to U.S. Central Authority not sufficient to trigger "commence[ment]" of "judicial or administrative proceedings").

Section 9003(a) of ICARA, entitled "Jurisdiction of the courts," provides that "[t]he courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention." 22 U.S.C. § 9003(a).

Section 9003(b), in turn, provides:

"Any person seeking to initiate judicial proceedings under the convention for the return of a child or effective exercise of rights of access to 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 time the petition is filed." ICARA, 22 U.S.C. § 9003(b).

In the case at bar, the petitioner failed to file in accordance with the statutory requirements. Petitioner never initiated any proceeding in a court of competent jurisdiction where the child is located, despite his knowledge and acknowledgment that he would do so. [App.121] Rather, he filed the petition only with the Central Authority and even did that late, filing 472 days after the date of retention of the child. [App 20, 121] Appellant never filed any action in a court where the child is located. This failure to comply with the statutory requirements for commencing proceedings under ICARA further supports the trial court's decision to deny the petition for return and to consider the Appellee's affirmative defense.

V. Conclusion

The Trial Court's decision was consistent with the Hague Convention's framework and the underlying purpose of ICARA. The findings were supported by substantial evidence demonstrating that the child was settled in their new environment. The denial of the petitioner's request for the return of the child should therefore be affirmed.

DATED: 13TH day of January 2025.

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CERTIFICATE OF SERVICE

I, Jed Davis, Esq., the undersigned attorney for the Appellee, Michele H.P. Xamplas, hereby certify that , on this date, ten (10) copies of the Brief of the Appellee, in the matter of Michele H.P. Xamplas v. Peter Xamplas, Law Court Docket No. KEN-24-400, were sent via courier service to the Clerk of the Law Court, and that two (2) copies of the Brief of the Appellee were mailed via the U.S. Postal Service, First Class Mail, postage prepaid, to Appellant's counsel, Dana E. Prescott, of Prescott Jamieson Murphy Law Group, LLC , P.O. Box 1190, Saco, Maine 04072.

Dated: January 13, 2024

/s/ Jed Davis

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