FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-523

NIVA PENIDO COSTA CRUZ DE CARVALHO, Former Wife,

Appellant,

v.

LEONARDO DE CARVALHO PEREIRA, Former Husband,

Appellee.

On appeal from the Circuit Court for Clay County.
John I. Guy, Judge.

November 16, 2020

BILBREY, J.

Niva Penido Costa Cruz de Carvalho (the Mother) appeals the trial court's order granting the petition of Leonardo de Carvalho Pereira (the Father) for return of their two children to Brazil under the Hague Convention due to their wrongful retention in the United States by the Mother. For the reasons below, we affirm the trial court's order.

The Hague Convention is a short-form name for the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11, 1343 U.N.T.S. 89. *See also* Hague Conference on Private International

Law, https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf (last visited Oct. 26, 2020). The Hague Convention is an international treaty to which the United States is a signatory, as is the Federative Republic of Brazil. *See* United States Department of State, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/International-Parental-Child-Abduction-Country-Information/Brazil.html (last visited Oct. 26, 2020).

The Hague Convention is implemented in the United States by federal law at 22 U.S.C. §§ 9001 through 9009 (International Child Abduction Remedies Act, ICARA). State courts and United States district courts have concurrent jurisdiction to adjudicate actions brought under the Hague Convention. 22 U.S.C. § 9003(a).

"The Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must 'order the return of the child forthwith,' unless certain exceptions apply." *Abbott v. Abbott*, 560 U.S. 1, 9 (2010) (quoting Hague Convention, art. 12). This return remedy is meant to advance the Convention's "core premise that 'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made in the child's country of 'habitual residence.'" *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) (quoting Hague Convention, Preamble). "The Convention's return requirement is a 'provisional' remedy that fixes the forum for custody proceedings." *Id*.

The Convention is intended to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States" by providing a return to the status quo and "to deter parents from crossing borders in search of a more sympathetic court." *Wigley v. Hares*, 82 So. 3d 932, 935–36 (Fla. 4th DCA 2011); *Ruiz v. Tenorio*, 392 F.3d 1247, 1250 (11th Cir. 2004). As stated in *Strout v. Campbell*, 864 So. 2d 1275, 1277 (Fla. 5th DCA 2004), "[t]he Convention seeks to deter parental abductions by eliminating the primary motivation for abductions, which is to obtain an advantage in custody proceedings by commencing them in another country." While this case does not involve abduction or "removal" of the children, wrongful retention

by one parent to defeat the other parent's custody rights in the habitual country of residence is subject to the same anti-forum shopping remedy provided by the Convention. *See* Hague Convention, art. 3.

To establish a case for wrongful retention under the Hague Convention in this case, the Father was required to prove by a preponderance of the evidence that: 1) the children were habitual residents of Brazil at the time they were retained by the Mother in the United States; 2) the retention of the children by the Mother was in violation of the Father's custody rights under Brazilian law; and 3) the Father had been exercising those custody rights at the time of the retention. *See* Hague Convention, art. 3; *Ruiz*, 392 F.3d at 1251. The final two elements of the Father's claim were stipulated by the parties and were thus not in dispute. The parties stipulated that the Father "had custody rights with respect to the children under Brazilian law" and that the Brazilian divorce decree "denied the Mother's request for 'unilateral' custody." The parties also agreed that before April 2016, the Father was regularly exercising custody. Accordingly, the trial court found the only issues for it to decide were whether Brazil was the habitual residence of the children when the Mother retained them in the United States "in breach" of the Father's custody rights under Brazilian law, and whether the Mother had established the affirmative defense to the return remedy that the children were "well established" in the United States so that return would be to their detriment.

In reviewing a trial court's determination of facts in a claim brought under the Hague Convention, an appellate court applies a "clear error" standard of review, while legal determinations by the trial court are subject to de novo review. *Wigley*, 82 So. 3d at 940. As recently stated by the Supreme Court, "[t]he habitual-residence determination thus presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinding court." *Monasky*, 140 S. Ct. at 730. Determination of the child's "habitual residence depends on the totality of the circumstances specific to the case." *Monasky*, 140 S. Ct. at 723. Here, the Mother fails to show clear error in the trial court's determination that Brazil was the children's "habitual residence" at the time she wrongfully retained

them in the United States. *See* Hague Convention, art. 3. The Mother also does not show clear error in the trial court's finding a lack of proof of the "settled" exception to the return provision. *See* Hague Convention, art. 12.

As mentioned, the parents stipulated to most of the circumstances of this case. The Mother and the Father were married in Brazil in 2010, and Child 1 was born in Brazil in 2012. The Mother became pregnant with Child 2 in 2015. In January 2016, the parents, Child 1, and an older child from the Mother's previous marriage traveled to the United States for two agreed-upon purposes: first, for Child 2 to be born in the United States and thus acquire citizenship; and second, for the Father to advance his cardiology career by participating in a medical fellowship at an American hospital. The family rented a home from January 29, 2016 to March 24, 2016, and on March 2, 2016, Child 2 was born in Florida, according to plan.

Unfortunately, by the time Child 2 was born, the Father's cardiology fellowship had fallen through. The Father returned alone to Brazil on March 10, 2016, to reestablish his previous employment and the family's living situation. The Father did so by reopening the parties' home, re-hiring staff, and arranging for the resumption of the older children's schooling in Brazil. The Father purchased plane tickets for the family to rejoin him in Brazil, but the Mother refused to return to Brazil and remained in the United States with both children.

The trial court found that the Mother wrongfully retained the children as of April 5, 2016, when she notified the Father that she wanted to dissolve their marriage and she intended to remain in the United States with the children. Based on the evidence presented at the final hearing, the trial court found that neither parent intended to permanently relocate the family residence from Brazil to the United States until April 2016 when the Mother informed the Father of her plans. In addition, based on the Father's testimony at the final hearing, the trial court found that the Father began seeking assistance from Brazilian authorities for the return of his children in June 2016, although without success due to the improper forum and location of the children in the

United States.[1] Through Brazilian counsel with power of attorney, the Mother filed for divorce in Brazilian court in July 2016.

The Father filed a petition to domesticate and enforce a foreign judgment in the Circuit Court, Ninth Judicial Circuit, in Orange County, Florida in June 2017. But while the Mother and the Father each filed orders from Brazilian courts in the Florida case, none of the Brazilian orders were final foreign judgments determining custody or access rights (such as visitation) for the Florida court to domesticate. Neither parent filed the Brazilian final order of divorce, which they agreed was entered in July 2017, and they agreed maintained equal custody rights for the parents. And none of the Brazilian orders submitted by the parties were rulings on the merits of a Hague Convention petition or on the children's "habitual residence" for purposes of the return remedy under the Convention. *See* § 61.525, Fla. Stat. (2017) ("Enforcement under the Hague Convention").[2]

The Father's Florida action to domesticate a foreign judgment was transferred from the Ninth Circuit to the Fourth Judicial Circuit in Clay County, Florida, in March 2019 due to the Mother's

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[1] The Brazilian court orders filed in the record indicate that the Father requested return of the children in various proceedings, but the Brazilian courts consistently declined to rule on the Father's requests for return under the Hague Convention. The Brazilian courts recognized that a Hague Convention petition is cognizable only in a court with jurisdiction in the country where the child is located. *See* 22 U.S.C. § 9003(b); *Wigley*, 82 So. 3d at 936.

[2] We therefore reject the Mother's contention that res judicata applies to bar the Father's claim that the children are habitual residents of Brazil. The Brazilian proceedings were not an adjudication of a Hague Convention claim. Without an "identity in the thing sued for" and an "identity of the cause of action," res judicata does not apply. *Pearce v. Sandler*, 219 So. 3d 961, 966 (Fla. 3d DCA 2017) (citation omitted).

relocation with the children and her new husband.[3] Following the transfer, the Father filed, on November 4, 2019, his verified petition seeking return of the children under the Hague Convention. *See* 22 U.S.C. § 9003(b) (petition filed in court with jurisdiction where child is located at time petition is filed). At the time he filed his petition, the Father's only access to his children since March 2016 had been by telephone.[4] The parties stipulated that the Father had seen his children in person for less than ten hours since April 2016.

"Habitual residence" is not defined by the Hague Convention or ICARA. *Avendano v. Smith*, 806 F. Supp. 2d 1149, 1164 (D.N.M. 2011). But a child's location or domicile is not the same as a child's "habitual residence" as contemplated by the Hague Convention. *Kijowska v. Haines*, 463 F.3d 583, 586–87 (7th Cir. 2006). The Supreme Court has rejected any "categorical requirements for establishing a child's habitual residence" and disapproved of any "bright-line rule" which would result in "a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected." *Monasky*, 140 S. Ct. at 728.

In the order on appeal, the trial court found that the Father had established "by a preponderance of the evidence that Brazil was the habitual residence of Child 1 and Child 2 at the time of the wrongful retention . . . even though Child 2 was born in the United States and has never lived in Brazil." The court based this finding on the shared intent of the parents until April 2016 to visit the United States only temporarily for the birth of Child 2 and for the Father's completion of the training and experience of a medical fellowship before returning to Brazil.

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[3] The Mother remarried in 2017 and now lives in Torrance, California with her children and current husband.

[4] The Fourth Circuit court entered a temporary time-sharing order requiring a daily video conference between the Father and the children. The court recognized that Brazilian courts had not yet addressed a parenting plan or time-sharing plan because of the location of the children in the United States.

The Mother fails to show clear error in the trial court's finding Brazil to be the habitual residence of these children as of April 2016. "Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations." *Monasky*, 140 S. Ct. at 727. In cases involving infants born in a country during a temporary visit by the parents, the Supreme Court has noted that an "infant's 'mere physical presence,' we agree, is not a dispositive indicator of an infant's habitual residence." *Id.* at 729.[5] In such cases, "a wide range of facts other than an actual agreement, including facts indicating that the parents have made their home in a particular place, can enable a trier to determine whether an infant's residence in that place has the quality of being 'habitual.'" *Id.*; *see also Uzoh v. Uzoh*, No. 11-CV-09124, 2012 WL 1565345 (N.D. Ill. May 2, 2012) (shared actions and intent of parents before child's birth in United States

[5] Our dissenting colleague relies on *In re A.L.C.*, 607 F. App'x 658 (9th Cir. 2015), for his contention that Child 2's habitual residence was the United States or in absence of that Child 2 had no habitual residence. *In re A.L.C.* in turn relies on *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), which was explicitly abrogated in *Monasky* due to the application of a de novo standard of review in *Mozes* rather than the correct clear error standard. *Monasky*, 140 S. Ct. at 730. *Pope v. Lunday*, 2019 WL 7116115, at *4 (W.D. Okla. Dec. 23, 2019), *appeal pending*, No. 20-6003 (10th Cir. Jan. 6, 2020), also cited in the dissent, relies on *In re A.L.C.* While there may be circumstances under the totality of a case where a newborn has no habitual residence based on a prenatal disagreement among the parents, here the trial court had evidence supporting its holding that Child 2's habitual residence was Brazil and but for the wrongful retention by the Mother the child would have been returned to Brazil as an infant. Even if *In re A.L.C.* or *Pope* remains good law and would have us hold otherwise, they are at best persuasive authority, while *Monasky* is binding on us. *See State Farm Mut. Auto. Ins. Co. v. Edge Family Chiropractic, P.A.*, 41 So. 3d 293 (Fla. 1st DCA 2010).

showed that the U.K., not the United States, was the infant's "habitual residence").[6]

Accordingly, even though Child 2 in this case has never been to Brazil, and Child 1 has not been in Brazil for the previous four years, the trial court's determination that Brazil was these children's "habitual residence" as of the April 2016 wrongful retention for purposes of the Father's Hague Convention petition was not clear error. *See Kijowska*, 463 F.3d at 587 (holding that since a parent cannot create a habitual residence by wrongful retention of the child, "[t]he length of the child's residence in the country of one of the parents cannot be decisive").

The trial court described the "substantial" evidence the Father submitted to prove that until April 2016 both parents had intended the trip to the U.S. to be temporary and that the family would return to Brazil to resume their permanent residence, the Father's career, and the education of the children. While another court might have weighed the evidence and determined the credibility of the witnesses differently, the trial court's evaluation of the facts determining these children's habitual residence as of April 2016 did not constitute clear error.

The Mother also challenges the trial court's rejection of her affirmative defense to mandatory return, that Father's petition

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[6] The facts concerning Child 2's birth in the United States are remarkably similar to those concerning a child at issue in *Uzoh*, 2012 WL 1565345, cited in the trial court's detailed order. There a United Kingdom-based family, with a physician father and pregnant mother, traveled to the United States so that the mother could give birth and the child acquire citizenship. *Id.* at *1. The marital relationship deteriorated after the child was born, and the mother refused to return the child to the U.K. *Id.* at *2. The trial court in *Uzoh* held that the child's birth in the United States, standing alone, did not make the United States the child's habitual residence. *Id.* at *5. Rather, "the shared actions and intent of the parents before" the child was born showed that the U.K. was the child's habitual residence. *Id*. The trial court here found similar facts as to the intentions of the parents before the wrongful retention, and that finding is well-supported by the evidence.

under the Hague Convention was filed more than a year after any purported wrongful retention and that the children were "well-settled" in the United States. *See* Hague Convention, art. 12; *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 5 (2014) (noting that if the child is settled in a new environment other than the child's habitual residence, the return remedy is discretionary if a petition for return of a child under the Hague Convention is filed more than one year after the removal or retention). A child is settled "within the meaning of ICARA and the Convention when a preponderance of the evidence shows that the child has significant connections to their new home that indicate that the child has developed a stable, permanent, and nontransitory life in their new country to such a degree that return would be to the child's detriment." *Fernandez v. Bailey*, 909 F.3d 353, 361 (11th Cir. 2018). Temporary disruption of the child's life is not a sufficient detriment in this context, and "the 'settled' inquiry requires courts to carefully consider the totality of the circumstances." *Id.*

The trial court's finding that, despite the passage of time, these young children were not settled to such a degree that return would be detrimental was not an abuse of discretion. The court discussed the evidence presented about the children's lives in their various residences in the United States, their relatives in both the United States and Brazil, and lack of ties to the community due to their young ages. The possibility that we could have "gone the other way had it been our call" does not constitute a clear error of judgment by the trial court. *Id.* at 363; *see also Wigley*, 82 So. 3d at 945.

We emphasize that the trial court's determination that Brazil is the habitual residence of these children for purposes of the Father's petition under the Hague Convention is not a determination of the ultimate custody, parental responsibility, or time-sharing between the parents. As stated by the Supreme Court, the return remedy under the Convention only "fixes the forum for custody proceedings." *Monasky*, 140 S. Ct. at 723. A trial court "considering an ICARA petition cannot decide the underlying custody dispute, but only has jurisdiction to decide the merits of the wrongful removal [or retention] claim." *Hanley v. Roy*, 485 F.3d 641, 650 (11th Cir. 2007) (citations omitted); *see also Palencia v. Perez*, 921 F.3d 1333, 1338 (11th Cir. 2019) (holding

that the Hague Convention & ICARA "empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.") (quoting 22 U.S.C. § 9001(b)(4)).

Because the Mother fails to show clear error in the trial court's order granting the return of the children to Brazil under the Hague Convention for proceedings by a Brazilian court to determine custody and access rights to these children under Brazilian law, the order on appeal is

AFFIRMED.

RAY, C.J., concurs; JAY, J., concurs, in part, and dissents, in part with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

JAY, J., concurring, in part, and dissenting, in part.

I dissent from the decision to affirm as to Child 2. Child 2 is a United States citizen. He was born in the United States. He has always lived in the United States. He has never lived in nor visited Brazil. Brazil is not his "habitual residence." He was not "wrongfully" retained by his mother in the United States, and there is no legal basis—under the Hague Convention—to "return" him to Brazil.

Pope is instructive. In *Pope*, the father filed a petition invoking the provisions of ICARA and seeking an order requiring that his estranged wife return their newborn twins to Brazil, claiming that the newborns were being "wrongfully retained in the United States[.]" 2019 WL 7116115 at *1. The father's petition was premised on the Hague Convention to the extent that he alleged that the children had resided "'in utero'" in Brazil prior to the wife's

traveling to Oklahoma and that Brazil was the newborns' habitual residence. *Id.* However, it was undisputed that the children were born in the United States, had always lived in the United States, and had never visited Brazil. *Id.*

In denying the father's petition, the court recognized that the Convention's text "establishes . . . relief only to a petitioning parent whose child has *some* place of habitual residence[.]" *Id.* at *3 (emphasis in original). To that end, "[o]nly removals or retentions . . . away from the place of *habitual* residence are 'wrongful[.]'" *Id.* at *4 (emphasis in original). Thus, while the object of the Convention is to facilitate the expedited return of children who have been wrongfully retained in a country that is not their country of habitual residence, "*a child can hardly be 'returned' to a place the child has never been*." *Id.* at *3 (emphasis added). The logic of that observation is inescapable. *See also Didon v. Castillo*, 838 F.3d 313, 324 (3d Cir. 2016) (citation omitted) ("In our view, it would disregard the ordinary meaning of the term 'residence' to find that a child is habitually resident in a country in which she has not 'lived.'"); *Barzilay v. Barzilay*, 600 F.3d 912, 921 (8th Cir. 2010) ("It is difficult to imagine a jurisdictional link more artificial than an agreement between parents stating that their child habitually resides in a country where it has never lived.").

Accordingly, "by limiting its application to cases involving retention of a child away from the child's place of *habitual* residence, and by framing the relevant question as what was the child's place of habitual residence immediately before the wrongful retention, the Convention's text indicates that it does not apply to all child-custody disputes with an international element." *Pope* at *4 (emphasis in original).

Perhaps more directly on point is the Ninth Circuit's opinion in *A.L.C.* In that case, the mother appealed the order of the district court sending her two children—A.L.C. and E.R.S.C.—back to Sweden. The Ninth Circuit affirmed as to A.L.C. because the facts demonstrated that A.L.C. "acclimatized to Sweden and that country became the primary locus of his life." 607 F. App'x. at 661 (citation omitted). In February 2013, A.L.C. traveled with his pregnant mother to Los Angeles where E.R.S.C. was born some six months later.

As to E.R.S.C., the Ninth Circuit reversed the district court's decision to return the child to Sweden, ruling that the court "clearly erred in finding E.R.S.C. could be a habitual resident of a nation in which she never resided." *Id.* at 662. Conferring upon the expression "habitual residence" its "ordinary and natural meaning," the Ninth Circuit "recognize[d] the obvious truth that 'habitual residence cannot be acquired without physical presence.'" *Id.* (citation omitted). E.R.S.C. had never been to Sweden. But here came the twist. Neither was the Ninth Circuit willing to find that E.R.S.C.'s nine months as an infant in Los Angeles translated into her being a habitual resident of the United States. Instead, it ruled that when the father filed his Convention petition, E.R.S.C. *did not have* a habitual residence. *Id.* at 663. Consequently, there being no habitual residence away from which the child could have been improperly retained, "E.R.S.C.'s retention by her mother in the United States was not wrongful under the Convention and the district court erred in ordering E.R.S.C.'s return to Sweden." *Id.*

In the final analysis, "[b]ecause locating a child's home is a fact-driven inquiry, courts must be 'sensitive to the unique circumstances of the case and informed by common sense.'" *Monasky*, 140 S. Ct. at 727 (citation omitted). "Common sense suggests that some cases will be straightforward[.]" *Id.* In my considered opinion, given the straightforward facts of this case, common sense informs that Child 2 is a habitual resident of the United States. But even if not, even assuming that Child 2 had no habitual residence at the time of his retention, the Mother's actions were not wrongful—because only a retention away from the child's country of habitual residence is improper. Accordingly, I would reverse the trial court's decision ordering Child 2's "return" to Brazil.

Cindy L. Lasky, Jacksonville, for Appellant.

Francis M. Boyer and Jessica D. Livingston of Boyer Law Firm, P.L., Jacksonville, for Appellee.