TEXAS LAWYER

EXPERT OPINION

What constitutes a ‘habitual residence’?

Elisa Reiter and Daniel Pollack | **May 5, 2022**

M.Y.C.S. (the mother) and C.M.S. (the father) married in 2015, following a brief courtship. Life was complicated for this family. The father was employed as an Israeli diplomat. His 12-year-old daughter by a prior relationship made an outcry to her counselor that he had allegedly spanked her with a belt. This outcry occurred while M.Y.C.S. was pregnant with twins—the pregnancy being achieved through technology using donor eggs and father’s sperm. Following the outcry, the father returned to Israel in February 2016. After his return to Israel, he advised M.Y.C.S. that he had done a background check on her, no longer believed she was Jewish, and declared that under Jewish law, they were no longer

married. M.Y.C.S., by then 32 weeks pregnant, traveled to Israel on a three-month tourist visa. C.M.S. rejected her, even denying her access to his home. In light of the fact that she did not have a residence, she tried to return to the United States, but the airline would not allow her to travel due to her advanced state of pregnancy. The twins were therefore born in Israel on June 20, 2016, around two weeks after the mother arrived. The father was not present for the birth of the children, nor did he support the twins or their mother. In fact, he insisted on a paternity test.

On Nov. 8, 2017, the parties signed an agreement for a Jewish divorce. That document mandated that the children be educated and reside in Israel. The document was written in Hebrew. Around three months later, the father sought and was granted "stay of exit" orders from the Israeli Court. M.Y.C.S. left Israel with the twins in April 2018. She had been ordered to do so by the Israeli government, as her visa had expired. She later claimed she received no notice of the "stay of exit." She obtained passports for the twins through the U.S. Embassy, marking the requisite form by indicating there were no court orders impacting the twins' custody. Meanwhile, back in Israel, the father filed a police report in May 2018 after learning that the mother left Israel with the twins. C.M.S. represented that he worked with the State Department, the Middle Eastern Affairs Department and a private investigator to locate the mother and their twins. However, he failed to mention that he had a copy of mother's Texas driver's license, listing her residence in Wood County, Texas, where she resided with her parents.

In August 2020, two years after the mother left Israel with the twins, the father filed a petition for the return of the children, citing the Hague

Convention and the International Abduction Remedies Act. The mother filed an answer, including a general denial, and raising affirmative defenses that:

1. The children are well settled in their new environment.

2. There is a grave risk that the children will be exposed to physical or psychological harm or otherwise placed in an intolerable situation should they be returned to Israel.

3. The father consented to alleged wrongful removal of the children under Article 13(a) of the Hague Convention.

4. The return of the children should not be permitted by the fundamental principle of the requested State relating to the protection of human rights and fundamental freedoms under Article 20 of the Hague Convention.

Soon after the answer was filed, the mother's attorney filed a motion for withdrawal. The case was scheduled for trial Jan. 6, 2021. The mother's new counsel filed an appearance on Dec. 31, 2020, requesting a continuance, which was granted, abating trial from Jan. 6, 2021, until Jan. 21, 2021. The mother's new attorney then made a verbal motion for withdrawal, which the court granted. Trial was abated one day, until Jan. 22, 2021. The mother's motion for continuance was denied on Jan. 21, 2021, and she appeared pro se at trial. On Jan. 25, 2022, the 402nd Judicial Court of Wood County, Texas, entered orders granting father's petition for return of the twins to Israel, awarding him $7,500 in legal fees and $14,409.51 in expenses. The trial court denied the mother's

motion for new trial on April 30, 2021. Appeal of the trial court judgment followed.

In summary, the twins were born in Israel to a mother via in vitro fertilization. The mother, a U.S. citizen, was asked to leave the country after her visa expired. She argues that the trial court erred in its application of the Hague Convention by failing to look at the "totality of the circumstances," a standard of review adopted by the U.S. Supreme Court in *Monasky v. Taglieri*, 589 U.S. ___, 140 S.Ct. 719, 723, 206 L.Ed. 9 (2020).

The Hague Convention was drafted with certain goals in mind, including the need "to address the problem of international abductions during domestic disputes." The Hague Convention seeks to provide remedies to contracting states. If a parent removes a child from the child's "habitual residence" and takes the child to another country, acting in breach of the other parent's rights, the parent from whom the child was removed may seek relief pursuant to the Hague Convention by filing a petition for relief where the child has been removed or is being retained, notwithstanding the petitioning parent's rights under orders issued elsewhere. The Hague Convention allows the responding parent to raise affirmative defenses and exceptions, which if established by the answering parent, may lead to denial of the petitioning parent's requested relief. The International Child Abduction Remedies Act (ICARA) was enacted by the United States to help prevent international child abduction, with the stated intent that, "Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention." 42 USC §§ 11601-11610. The trial court should consider whether or not one year or more elapsed since the alleged wrongful removal of the child, and further, whether it

can be shown that the child is "now settled in its new environment." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014).

The Twelfth Court of Appeals, in *In the Interest of A.Y.S. and A.H.S., Children* (No. 12-21-00074-CV, Tex. App. 2022), looks beyond the initial inquiry of the twins' habitual residence to whether the children were at home in Israel. As part of that analysis, the appellate court looks to the *Monasky* opinion regarding how to determine habitual residence. For instance, if a child's presence in a country was coerced, that fact should be taken into consideration. Where an infant is involved, "mere physical presence" is not conclusive proof of habitual residence.

The appellate court concludes that it was incumbent upon the trial court to "look to the totality of the circumstances before the removal to determine the children's habitual residence." The appellate court acknowledges that the mother signed the Israeli custody agreement, but finds that, standing alone, the document does not establish the twins' habitual residence. The appellate court expands the pertinent facts to include that:

a. The parties met in the U.S., were married in the U.S., and the children were conceived via in vitro fertilization in the U.S. b. The father went to Israel without the mother, whom he knew was pregnant with twins. c. The father denounced the marriage as invalid soon after his return to Israel, and further, filed for divorce, well aware that mother would not qualify for Israeli citizenship under the law of return, urging her not to follow him to Israel. d. Though the mother was 32 weeks pregnant on her arrival in Israel, the father failed to allow her to reside with him, nor did he provide her with shelter. e. The mother lacked a permanent

residence in Israel, nor could she get a job in Israel. f. The mother tried to return to the U.S. two weeks after her arrival in Israel, but was denied passage by the airline due to the advanced state of her pregnancy. g. The mother gave birth in Israel despite efforts to obtain a doctor's letter allowing her to return to the U.S. h. The father was not part of the twins' birth, nor did he meet them until they were more than 1 year old, after results were in for the paternity testing he demanded. i. The mother's native language was not Hebrew, nor was she fluent in Hebrew. j. The text of the Israeli custody agreement mandated that the father's access to the twins be supervised by Dr. Daniel Gottlieb, and further, that "mother shall have custody of the daughters." k. When mother left Israel, the twins—who she continued to breastfeed—were under 2 years of age.

The court therefore finds that, reviewing the totality of the circumstances, the Wood County trial court erred "in concluding that the children's habitual residence is Israel." It adds: "the children are habitually resident in the United States." Based on that conclusion, the mother's challenge to the award of fees, costs and expenses was also sustained. Accordingly, the Twelfth Court of Appeals reverses and renders the Wood County District Court, denying the father's petition for return of the twins, striking all pending motions, as moot.

Habitual residence must be gleaned from a review of the totality of the circumstances, including affirmative defenses. Justice Ruth Bader Ginsburg wrote in the *Monasky* case:

"Is an actual agreement between the parents on where to raise their child categorically necessary to establish an infant's habitual residence?

We hold that the determination of habitual residence does not turn on the existence of an actual agreement."

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