http://www.incadat.com/ ref.: HC/E/USf 221
[27/10/1999; United States District Court for the Northern District of Florida, Tallahassee; First Instance]
Villata v. Massie, No. 4:99cv 312-RH (N.D. Fla. Oct. 27, 1999)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

October 27, 1999

Before: Hinkle D.J.

IN RE: The Application of G.M.V. (Petitioner) and G.M. (Respondent)

This is an action seeking to compel the return of a nine-year-old child from his father in the United States to his mother in Chile under the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980 ("the Hague Convention"). Under the Hague Convention, to which both the United States and Chile are parties, issues of custody and visitation are properly determined in the country of the child's "habitual residence." Children taken to a different country ordinarily must be returned, on proper request, to the country of habitual residence. Following trial to the court, I conclude that the habitual residence of the child at issue is Chile, and I order the child returned to the mother, without prejudice to the father's right to seek an award of custody or visitation from the appropriate authorities in Chile.

Introduction

The controlling issue is whether the child's "habitual residence" is Chile or the United States. If the habitual residence is the United States, the child is properly here, and any decision regarding custody and visitation properly should be made by the courts of the State of Florida. If the habitual residence is Chile, any decision regarding custody and visitation properly should be made by the appropriate tribunal in Chile. The issue in this court thus is not who should have custody of the child, but which country's authorities should make that decision. The child's parents were married in the United States on September 9, 1989. The child was born in the United States on June 12, 1990. The family lived together in the United states until November 6, 1993, when the mother took the child to Chile without the father's knowledge or consent. The child was three years old.

The father professed his love for and intent to reunite with the mother in Chile, wound up most of his (and their) affairs in the United States, moved to Chile on approximately August 10, 1994, and, together with the mother, established a business there. The mother and father cohabited for six months in Chile, until February 1995, when they separated. On July 10, 1995, the father moved back to the United States, without the child. The father returned to Chile on September 9, 1996, and lived there until December 6, 1998, when the father brought the child out of Chile and into the United States, without the mother's knowledge or consent. The child was eight years old.

In sum, at the time of his removal, the child had lived in Chile for the most recent five of the eight years he had been alive.

I conclude that the family adopted a common plan (or "settled purpose" as it is sometimes described in the applicable case law) to establish a family residence in Chile in 1994 and early 1995, that the child's habitual residence, beginning in 1994 and continuing until December 6, 1998, was Chile, and that under the Hague Convention, the child therefore should be returned to Chile, for such determination of custody and visitation as the authorities in Chile may deem proper.

Proceedings

On August 11, 1999, petitioner G.M.V. [FN1] filed her petition in this court seeking the return of her son, G., pursuant to the Hague Convention and the federal statute implementing it, 42 U.S.C. s. 11601 et seq. Ms. M. named as the sole respondent her estranged husband (the child's father), G.M. Ms. M. sought a temporary restraining order and preliminary injunction. The parties reached agreement on a custody arrangement pending final ruling on the merits. Trial was conducted expeditiously, as required by the Hague Convention. [FN2] This order constitutes the court's findings of fact and conclusions of law.

Facts

Ms. M. is a native of Chile. In approximately 1976, at the age of 20, she moved to the United States. On July 3, 1986, in Miami, she became a naturalized United States citizen, performing all necessary steps to do so, including taking the prescribed oath. [FN3] By operation of Chilean law, Ms. M.'s acceptance of citizenship in the United States apparently terminated her Chilean citizenship. [FN4]

At some later point, apparently in 1987 or 1988, Ms. M. returned to Chile to be with her family. Mr. M., a citizen of the United States from birth who had known Ms. M. prior to her return to Chile, persuaded her to come back to the United States and to marry him. On September 9, 1989, in Miami, Ms. M. and Mr. M. were married. As of that time, Ms. M. had lived in the United States for at least 11 of the prior 13 years, the vast majority of her adult life. Ms. M. and Mr. M. were citizens of the United States. The parties established their marital home in Florida.

On June 12, 1990, just over nine months after the marriage, Ms. M. delivered a son, G., who came to be called "G." The family, including Ms. M.'s two children from a prior marriage, lived together in Florida until October 29, 1993, when there was a substantial incident. While the testimony on precisely what happened is unreliable, it is at least clear that Mr. M. engaged in behavior that reasonably could have been deemed threatening; his own later accounts acknowledge this. [FN5] Ms. M. says Mr. M. was drunk, had a gun, and was threatening to kill himself. No one was physically injured.

Shortly after the October 29 incident, Mr. M. went to Dallas, where his mother lived, to deal with family matters. [FN6] On November 1, Ms. M. bought tickets on a November 6 flight to Santiago, Chile, for herself and the children, including three-year-old G. She left on that flight, with the children, without telling Mr. M. that she was leaving. [FN7] She entered Chile on her Chilean passport asserting she was a Chilean national. She called Mr. M. in Dallas from Santiago, telling him she had gone to Chile. She took up temporary residence at her sister's farm near the city of Chillan. In official Chilean documents, she listed herself as single, and she listed G. as having been born out of wedlock; she gave no indication that she was in fact married or that G.'s father was her husband. Nor did she disclose that she was a naturalized citizen of the United States.

Mr. M. traveled to Chile on November 25, 1993, and stayed there until December 2, 1993. He visited Ms. M. and G., but he stayed in a hotel in the city, not at the farm.

Upon his return to the United States, Mr. M. began writing a series of letters to Ms. M. that detailed his feelings for her and his hopes and plans for the family. On December 8, 1993, Mr. M. wrote that his hope was for a reconciliation, with the marriage eventually working. See Pl. Ex. 1. He indicated he would start by seeing her as if they were "dating," as he said she had suggested. He said he would visit her every couple of months; he apparently meant in Chile.

In a letter written on December 12, 1993, Mr. M. again referred to the "dating" plan and said his first choice was "you and love." Mr. M. also made clear that his plan was for Ms. M. to remain in Chile with the children, including G., not return to the United States:

> **Now there are some practical considerations we should think about. Chile is growing economically and I very much want you and the kids to take part in that growth. It's an old axiom in business that it's better to have your own business than to work for anyone else. As Chile grows you grow. It also goes to the future too. You will be able to use your skills, your connections, your location to optimum advantage. *It's something you could build and leave to the children to run later.* It would also free you to be with the children and at their ages I think we agree that's important. You would work out of your apartment and be a commissioned buyer for Ocean Treasure. You would contract with growers for their crops. Ocean Treasure has contacts with grocery chains here and has been selling produce here, the problem has been securing the produce there, that would be your job . . . .**

Pl. Ex. 3. When Mr. M. talked of a business in Chile that eventually could be left to the (then very young) children, he clearly was speaking of permanent (or at least very long term) residence in Chile.

On December 22, 1993, Mr. M. again traveled to Chile. He stayed with Ms. M. and the children in an apartment she had rented. He gave Ms. M. a substantial diamond ring for Christmas. He returned to the United States on January 6, 1994. On that same day, perhaps from the plane, he wrote another letter to Ms. M., making clear he did not want a divorce. Pl. Ex. 8.

On January 13, 1994, Mr. M. wrote another letter to Ms. M. addressing plans for a business she could operate in Chile. Pl. Ex. 6. On January 26, 1994, immediately before his next trip to Chile, Mr. M. wrote Ms. M. a letter professing his love for her, saying he wanted to be with her "more than life itself," and saying he believed he would get her answer on the forthcoming visit. Pl. Ex. 7. The tenor of the letter made clear he wanted to reconcile and that whether that happened would be up to her.

Mr. M. traveled to Chile again on January 27, 1994, and again stayed with Ms. M. and the children at their apartment, until his return to the United States on February 4, 1994.

On February 14, 1994, Mr. M. wrote another letter to Ms. M. (Pl. Ex. 9). He listed what he described as "very good opportunities" for new businesses that were "unfolding for us," all apparently in Chile. He said he had told an adviser, "we're going to try to make it work in Chile." He said he recognized that "we need the money" being generated from continuing to operate the preexisting business in Florida, but he said staying to operate the business was hard because he "would rather be there building a future and being with you." He described their plans as "a big step." He said he was sending pictures of the contents of their house in Florida so that Ms. M. could mark what she wanted "us" to keep. The tenor of the letter clearly set forth an intent to wrap up affairs in Florida and move to Chile to start a life there.

Later in February or perhaps in March 1994, Mr. M. wrote another letter to Ms. M. setting out a schedule of his further planned trips to Chile. (Pl. Ex. 10). There were trips of approximately 10 days each planned for April, May and June, and finally a trip planned for July 23, 1994, with "no return." That apparently was the date Mr. M. proposed to move to Chile.

Later in March 1994, Mr. M. wrote Ms. M. that her former husband knew Mr. M. was "moving down there." (Pl. Ex. 11). Mr. M. said he planned to apply next week for residency. It was clear Mr. M. intended to move to Chile.

On April 1, 1994, Mr. M. went to Chile and stayed with Ms. M. and the children until April 10, 1994, exactly in accordance with the schedule he had proposed earlier.

On April 14, 1994, Mr. M. wrote Ms. M. that he intended to start the next week trying to sell their Florida house. He said the furniture had been taken the prior day, April 13, for shipment to Chile, and would arrive there at the end of the month.

Mr. M. made additional trips to Chile and stayed from April 29 through May 9, 1994, and from June 10 through June 24, 1994.

On August 10, 1994, Mr. M. moved to Chile. He and Ms. M. lived together as husband and wife, with the children, in an attempt to reconcile fully. They established a firearm importation and sales business, titled in her name, in which they both performed various duties. Mr. M. had the knowledge of firearms, marketing and importation necessary to operate the business; he carried the laboring oar. Mr. M. was active in the business at least by August 1, 1994. (Pl. Ex. 19, 21).

On November 5, 1994, Mr. M. and Ms. M. wrote an impatient letter to their Florida realtor complaining of his failure to find a buyer for their Florida home. (Pl. Ex. 20). On November 9, 1994, they executed a power of attorney, apparently in order to facilitate sale of the Florida home, that listed both Mr. M. and Ms. M. as being "domiciled" in Chile. (Pl. Ex. 15). As of that time, they were living in Chile as husband and wife, operating a business there, pursuing a common and settled purpose. Chile had become their habitual residence. [FN8]

In February 1995, the marriage again foundered. Mr. M. moved out of the marital home, at Ms. M.'s insistence. Shortly thereafter Mr. M. wrote another letter to Ms. M., this time much different in tone from the letters he had written before the reconciliation. Mr. M. said he had no interest in attempting to continue as a couple. Taken at face value, the letter made clear the marriage was over, as indeed it was. Mr. M. also indicated, however, that he intended to stay in Chile nonetheless, in order to pursue the firearms business and expand it to include a firing range, in the hope of having a business G. could grow into if he wanted. Mr. M. also said he wanted to stay in Chile to be near G.

On February 20, 1995, Mr. M. traveled to the United States, his first time back since moving to Chile on August 10, 1994. He stayed in the United States only until March 8, 1995, when he returned to Chile. He remained active in the firearms business in Chile at least until May 23, 1995, and probably for a short time thereafter. (See P. Ex. 21).

On July 10, 1995, Mr. M. moved back to the United States. On that same day, he obtained a United States passport for G., but he made no effort to remove G. from Chile. In August 1995, Mr. M. filed for divorce in Miami, but he had not been a resident of Florida for six months prior to the filing of the petition, as required by Florida law, and the petition ultimately was dismissed. [FN9] Mr. M. returned to Chile to visit from November 4, 1995, until December 1, 1995, but otherwise resided in the United States until September 9, 1996. Meanwhile, Ms. M. and the children remained in Chile. They were settled there.

On September 9, 1996, Mr. M. again moved to Chile. He lived there for more than two years, making only three short visits to the United States. [FN10] He sought and obtained from a Chilean court in February 1997 an order granting him visitation rights with G. Ms. M. sought and obtained an order for child support. Mr. M. exercised his visitation rights and paid his child support.

On December 6, 1998, Mr. M. left Chile with G. and came to the United States. He did not tell Ms. M. he was leaving. He called her upon his arrival in the United States. As is uncontested, she did not consent to his departure from Chile.

Mr. M. says he brought G. out of Chile at least in part because he had been advised that Ms. M. and G. were about to be removed from the county by Chilean officials as a result of their lack of any legal right to be there. Mr. M. says Ms. M. had lost her Chilean citizenship by becoming a United States citizen years earlier. He said the removal process would have been disruptive to G. and that, by bringing G. out surreptitiously, he avoided that disruption. I find, however, that Mr. M. removed G. in order to gain custody he otherwise was unlikely to gain; he sought to avoid the continued control of Chilean law and Chilean authorities.

Mr. M. and G. have lived in Tallahassee, Florida, since their return from Chile in December 1998. Mr. M. has instituted a proceeding in state court in Tallahassee seeking dissolution of the marriage and an award of custody of G. The state court has entered an ex parte order awarding Mr. M. temporary custody. The matter remains pending.[FN11]

On July 28, 1999, Ms. M.'s Chilean citizenship apparently was reinstated. [FN12] On August 11, 1999, Ms. M. filed this petition.

Discussion

The Hague Convention is an agreement between participating nations addressing precisely the circumstances of the case at bar: disputes over child custody and visitation implicating more than one nation. The Hague Convention adopts the concept of "habitual residence" as its guiding principle. In effect, issues of child custody are to be determined under the law or by the courts or other appropriate authorities of the nation of a child's habitual residence, with other nations deferring to such determinations.

The Hague Convention accomplishes this result by means of Articles 12 and 3. Article 12 requires that a child who has been wrongfully removed from the nation of his or her habitual residence, or wrongfully retained in any other nation, be returned to the nation of habitual residence, unless it has been more than a year since the wrongful removal or retention and the child has become settled in his or her new environment.[FN13] Article 3 defines wrongful removal or retention as removal or retention in breach of rights of custody established in the nation of habitual residence, either as a matter of law or through judicial or administrative decision. [FN14]

In the case at bar, G.'s initial habitual residence was the United States, where he was born and lived with both parents until age three. On November 6, 1993, Ms. M. took G. to Chile without Mr. M.'s knowledge or consent. Although Ms. M. and Mr. M. had discussed relocating to Chile at some point, they had made no decision to do so at that time. Ms. M.'s removal of G. from the United States was wrongful.

That does not, however, end the matter. Mr. M. soon decided to move to Chile. Mr. M. and Ms. M. decided to make Chile the family home. For six months, Mr. M. and Ms. M. lived together as husband and wife, with G. and Ms. M.'s two other children. Mr. M. and Ms. M. pursued plans to develop a life-long business in Chile that could be left to the children. In short,

they had a joint, fixed, settled plan and purpose to live in Chile. It was not until 15 months after Ms. M. took G. to Chile that the reconciliation failed. By then, Chile, not the United States, was G.'s habitual residence; he was settled in his Chilean environment. And even then, it was more than three more years before Mr. M. moved back to the United States. By that time G. long been settled in Chile and had been there for more than five of his eight years of life. [FN15]

That a child can become settled in a new environment, even after a wrongful removal from his or her prior home, is confirmed by the Hague Convention itself. Article 12 provides that a child who has been wrongfully removed from his or her habitual residence must be returned on petition filed within a year of the wrongful removal. When more than a year has elapsed, however, the child must be returned only if he or she has not become "settled in [his or her] new environment." Hague Convention, Article 12. One year after G.'s wrongful removal to Chile, he was living with his mother and father in a settled Chilean environment as part of the parties' joint plan to make that their permanent home. He was settled in his new environment. Chile had become his habitual residence. [FN16]

This is so notwithstanding Mr. M.'s assertions regarding Ms. M.'s and G.'s citizenship and the alleged illegality of their presence in Chile. Mr. M. says Ms. M. lost her Chilean citizenship when she became a naturalized United States citizen in 1986. Mr. M. says that G. is a citizen only of the United States, having been born in 1990 in the United States to parents who, at that time, were citizens only of the United States. Mr. M. says Ms. M. illegally entered Chile in 1993 on her Chilean passport, which he says was invalid because she was no longer a Chilean citizen. Mr. M. says he was told that Chilean authorities were about to remove Ms. M. and G. from Chile in 1998 shortly before Mr. M. brought G. out of the country.

Mr. M. has raised substantial questions about the status of Ms. M.'s Chilean citizenship as of November 1993, her right to enter Chile at that time on a Chilean passport, and G.'s citizenship then and now. Those are not, however, questions that affect the outcome of this case. Under the Hague Convention, the controlling issue is habitual residence, not citizenship. To be sure, it would be difficult for a child to become an habitual resident of a nation in which he or she could live only surreptitiously, but that is not what happened here. In 1994 and 1995 when G.'s habitual residence became Chile, the family was living in Chile openly and without issue. Although Mr. M. later apparently asserted to Chilean authorities that Ms. M. and G. had no right to be there, Chilean authorities never agreed. [FN17] As apparently is uncontested, Chile now recognizes Ms. M. as a Chilean citizen and recognizes her right and G.'s right to be there. Whether Ms. M. and G. are entitled to Chilean citizenship is a question for the authorities in Chile, not for this court in an action under the Hague Convention; it is enough for purposes of this case that G.'s habitual residence as defined in the Hague Convention is Chile, regardless of his citizenship.

Mr. M. removed G. from Chile and brought him to the United States on December 6, 1998. At the time of the removal, as a matter of Chilean law without the necessity for any court order, Ms. M. was entitled to custody of G., subject to Mr. M.'s right of access. Chile's courts had recognized this, expressly affording Mr. M. access rights on specific terms, and expressly ordering him to pay child support. Mr. M.'s removal of G. from Chile thus was "wrongful" within the meaning of Article 3 of the Hague Convention.

Ms. M. filed this petition less than a year after G.'s removal from Chile. Under Article 12 of the Hague Convention, therefore, Ms. M. is entitled to an order requiring that G. be returned.

Travel Expenses and Attorney's Fees

Finally, Ms. M. seeks an award of expenses, including both travel expenses and attorney's fees. Article 26 of the Hague Convention provides:

> **Upon ordering the return of a child . . . under this Convention, the judicial or administrative authorities *may, where appropriate*, direct the person who removed or retained the child . . . to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.**

(Emphasis added). The implementing federal statute provides:

> **Any court ordering the return of a child pursuant to [the Hague Convention and implementing statute] *shall* order the respondent to pay necessary expenses incurred by or on behalf of the petitioner including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, *unless the respondent establishes that such order would be clearly inappropriate.***

42 U.S.C. s. 11607(b)(3) (emphasis added).

As these provisions make clear, a petitioner who successfully secures the return of his or her child ordinarily qualifies for an award of expenses and attorney's fees. This is not, however, an ordinary case. Ms. M. wrongfully removed G. from the United States in 1993. Neither her conduct from that point forward (which included a number of misrepresentations on official Chilean documents) nor her testimony in this court (which was less than a model of candor) are the stuff of which successful applications for expenses and attorney's fees ordinarily are made. Still, she had to come to the United States to secure the return of her son, to which she was entitled under the Hague Convention.

The parties have not briefed or argued the issue of entitlement to an award of expenses or attorney's fees. I make no determination of the issue at this time but will instead allow the parties to present the issue in accordance with the Local Rule addressing motions for attorney's fees. I treat the issue as one of costs and attorney's fees and will not delay the entry of judgment. I note that ability to pay is a factor that has been considered by courts addressing this issue. See, e.g., Rydder v. Rydder, 49 F.3d 369, 373-74 (8th Cir. 1995).

Conclusion

Because G.'s habitual residence is Chile,

IT IS ORDERED:

1. The clerk shall enter judgment providing, "The petition of G.M.V. for return of her child G. to Chile is GRANTED, and the child is ordered returned to Chile."

2. Respondent G.M.V. shall take no action to interfere with the return of the child to Chile in accordance with this ruling, provided, however, that Mr. M. may seek relief from this court, the United States Court of Appeals for the Eleventh Circuit, the United States Supreme Court, the Central Authorities of the United States or Chile, or any Chilean courts or authorities, as Mr. M. may deem appropriate.

3. A stay of this order and the judgment to be entered under paragraph 1 above is hereby entered. Unless extended by this court or by the United States Court of Appeals for the Eleventh Circuit or by the United States Supreme Court, the stay will expire of its own force, without further order or notice, at 1:00 p.m. on Monday, November 1, 1999.

4. While the stay provided by paragraph 3 or any other stay of this order and the judgment to be entered under paragraph 1 above remains in effect, neither petitioner G.V.; nor respondent G.M., nor any person acting in concert with either of them, shall remove the minor child from Leon County, Florida. Any such removal of the child from Leon County, Florida. Any such removal of the child from Leon County, Florida, while a stay remains in effect, will constitute contempt of court punishable by appropriate sanctions, which may include imprisonment. The United States Marshal's Service is authorized, without further order, to take all steps that may be necessary to investigate any possible or threatened violation of this provision and to enforce compliance with this provision.

5. Immediately upon expiration of any stay of the judgment and this order, Robert A. McNeely, attorney for Mr. M., shall deliver to Tann Hunt, as attorney for Ms. M., the passports of Ms. M. and the child in Mr. McNeely's possession pursuant to paragraph 2 of the preliminary injunction entered August 20, 1999. Mr. McNeely shall continue to hold under lock any passport of Mr. M. in Mr. McNeely's possession pursuant to paragraph 2 of the preliminary injunction entered August 20, 1999, until Ms. Hunt confirms to Mr. McNeely thatthe child has left the United States en route to Chile (which Ms. Hunt shall do promptly after the child's departure); at that time Mr. McNeely is authorized to return any passport of Mr. M. to him.

6. Paragraphs 4 and 5 of the preliminary injunction entered August 20, 1999 (document 11), dealing with custody and visitation of the child pending resolution of this litigation, are hereby vacated, effective immediately, without regard to any stay of this order or the judgment to be entered pursuant to paragraph 1 above. The child shall be delivered into Ms. M.'s care subject to such provisions on custody and visitation as have been or may be established by Chilean law or the appropriate authorities in Chile.

7. Any motion for an award of expenses or attorney's fees shall be filed within the time, and shall be governed by the procedures, established by Local Rule 54.1.

SO ORDERED this 27th day of October, 1999.

/s/ Robert L. Hinkle
United States District Judge

FOOTNOTES

1. Petitioner so lists her name in her petition. Various exhibits list her last name as M., V. or M. She testified at trial she prefers to be called by her maiden name, M. She will be referred to in this opinion as "Ms. M." in accordance with her expressed preference.

2. Indeed, at one point during the expedited trial, Ms. M. requested that the trial be adjourned and delayed to allow the parties more time to prepare and present their respective positions. Mr. M. joined the request. The court delayed the trial as requested.

3. Ms. M. initially testified she did not take the oath. Later, however, she acknowledged that she at least executed the written oath, and that by her prior testimony she meant only that she had not taken the oral oath. Executing the written oath has the same legal effect as taking the oral oath; it thus does not matter whether Ms. M. did or did not take the oral oath. To the extent she claims it does matter, I do not credit her assertion that she did not take the oral oath.

4. This was the testimony of Chilean ambassador Carlos Dudcci, who was called as a witness by Ms. M. By stipulation of the parties, Mr. Dudcci testified by telephone. Mr. Dudcci said there were exceptions if a Chilean citizen had to become a citizen of another country as a requirement of his or her position, or in order to exercise his or her civil rights, or to secure equal employment opportunities. Ms. M. has cited in this court no basis for any assertion that these exceptions applied to her circumstances in the United States. This does not mean, however, that Chile would not conclude the exceptions were applicable; it is for the Chilean government, not this court, to determine who does and does not qualify for Chilean citizenship.

5. *See, e.g.,* Pl. Ex. 4, 8.

6. Mr. M. says his mother was ill and he went to assist her. Ms. M. says the issues were financial.

7. Ms. M. claims she went to Chile at that time with Mr. M.'s prior knowledge and consent and indeed as part of a mutually-agreed plan to move to Chile. There is some support for the claim the parties had made plans to move to Chile. In a letter to Mr. M. dated June 24, 1993 - - more than five months earlier - - a friend of Mr. M. referred to Mr. M.'s "future plans for relocating in Chile" and suggested the friend knew of "a couple of projects for you worth looking into." Pl. Ex. 42. Mr. M. long had had business dealings in Chile. I find that Mr. M. and Ms. M. had at least considered the possibility of moving to Chile. I also find, however, that Ms. M. left on November 6, 1993, in response to the October 29 incident, without telling Mr. M. she was going and without his consent. Mr. M.'s testimony is more credible than Ms. M.'s on this, and the overall circumstances and testimony of other witnesses are consistent with his version, not hers.

8. In November or December 1994, Mr. M. also became the coach of the Chilean national rifle team.

9. Ms. M. entered a special appearance and moved to dismiss based in part on Mr. M.'s failure to meet the six months requirement. No action was taken for more than a year, leading to dismissal for lack of prosecution under the Florida rule that makes such a dismissal proper when no activity has occurred for a year. *See* Fla. Fam. L.R.P. 12.420.

10. All together, the visits were for less than a month.

11. This court has jurisdiction of this proceeding under the federal statute implementing the Hague Convention. *See* 42 U.S.C. §11603(a). Under the law of the circuit, the court should proceed to exercise that jurisdiction notwithstanding the pendency of a state court proceeding in which custody is an issue. *See Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998).

12. Mr. M. contends this is what Defendant's Exhibit 48 establishes. The exhibit apparently includes a Chilean birth certificate with updated nationality information that perhaps so indicates. The exhibit also includes a handwritten translation into English. In any event, both sides apparently agree that Chile now recognizes Ms. M. as a citizen of Chile. Ms. M. contends this means Chile now recognizes her as always having been a chilean citizen; Mr. M. disagrees. Similarly, Ms. M. contends G. is a dual citizen of both chile and the United States, while Mr. M. apparently contends that when G. was born both Mr. M. and Ms. M. were citizens only of the United States, making G. a citizen only of the United States.

13. Article 12 provides:

> **Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.**

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

14. Article 3 provides:

> **The removal or the retention of a child is to be considered wrongful where - -**
>
> > **(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and**
> >
> > **(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.**

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

15. Mr. M. did not move to and remain in Chile as a result of duress. He was married, his marriage was in trouble, and he chose to try to save it. It is true, as he says, that the Hague Convention had not been adopted by Chile at that time, and he may or may not have been able to get G. out of Chile and back to the United States had he promptly tried to do so. But he did not promptly try to do so. He decided, instead, to move to Chile. *See, e.g., Walton v. Walton*, 925 F.Supp. 453 (S.D. Miss. 1996) (finding habitual residence in Australia despite American mother's assertion that she had not wanted to move to Australia).

16. In a frequently cited case, the Third Circuit explained that a child's habitual residence "is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." *Feder v. Evans-Feder*, 63 F.3d 217, 223-24 (3rd Cir. 1995) (citing *In re Bates*, No. CA 122.89 at 10, High court of Justice, Fam. Div'n Ct. Royal Court of Justice, United Kingdom (1989)). The Third Circuit went on to conclude that an inquiry into habitual residence must focus on the child and include an analysis of the child's circumstances in that place as well as his parents' present, shared intentions regarding the child's presence there. *Id.* In the case at bar, chile had become the habitual residence whether viewed from the perspective of the child, either or both parents, or all of them together.

17. I do not credit Mr. M.'s assertion that Chilean authorities were about to remove Ms. M. and G. from Chile.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]