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COURT OF QUEEN'S BENCH OF MANITOBA (FAMILY DIVISION)

B E T W E E N:

XOCHILTH MARIA PENA GADEA,	)	Appearances:
	)	
Applicant,	)	Candray Mehkary
	)	for the Central Authority for the
	)	Province of Manitoba on behalf of the
	)	Applicant
- and -	)	
	)	Michael Stangarone
ISAAC HENRY RATH,	)	for the Respondent
	)	
Respondent.	)	
	)	JUDGMENT DELIVERED:
	)	January 18, 2022

HATCH A.C.J.

I. INTRODUCTION

[1] This case considers the interpretation of the Hague *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("Hague *Convention*") in respect to its purposes, its procedures, and the application of the "settled in" and "consent or acquiescence" exceptions to the return of wrongfully removed or retained children to their habitual residences.

[2] The mother requests the return of the parties' child to Costa Rica, pursuant to the provisions of the Hague *Convention*. She argues that the father wrongfully removed the child in April 2020 or alternatively, 17 months later on September 1, 2021, which dates trigger different exceptions to the return of children under the Hague *Convention*.

[3] The father denies that the removal or retention of the child was wrongful on the basis that the child was not habitually resident in Costa Rica on either of the alleged dates. If the removal or retention was in fact wrongful, the father relies on the exceptions set out in Articles 12 and 13 of the Hague *Convention*, which give the Court discretion to decline to grant the return order. He asserts that because the Return Application was filed more than a year from the alleged wrongful removal date of April 2020, the exception under Article 12 applies, as the child has settled into her life in Canada. The father further submits that the mother implicitly or explicitly consented to or subsequently acquiesced in the removal and retention of the child, triggering the Article 13 exception.

II. ISSUES

[4] The issues are:

i. Was the child wrongfully removed or retained from Costa Rica by the father?

ii. Was the child habitually resident in Costa Rica at the time of the removal or retention?

iii. Has the child settled into her environment in the Province of Manitoba, Canada, since March 3, 2020?

iv. Did the mother consent to or subsequently acquiesce in the father's removal or retention of the child?

v. Whether the Court should exercise its discretion to decline to grant the return order if any of the exceptions exist.

III. THE HAGUE CONVENTION

[5] Costa Rica is a Central American country, with coastlines on the Caribbean and Pacific Oceans. Canada and Costa Rica are contracting states under the Hague *Convention*.

[6] Pursuant to s. 17 of *The Child Custody Enforcement Act*, C.C.S.M. c C360, the Hague *Convention* is in force in Manitoba and the Department of Justice is the designated Central Authority for Manitoba in respect thereto.

[7] The goals "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to ... their habitual residence" are found in the preamble of the Hague *Convention.*

[8] The objects of the Hague *Convention* are articulated in Article 1 as follows:

> *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.

IV. PROCEDURAL PROTOCOL

[9] The child was removed from Costa Rica by her father on March 3, 2020, and taken to Manitoba, Canada, where she has been residing ever since. The mother submits that the wrongful removal by the father took place in either April 2020 or on September 1, 2021.

[10] The Manitoba Department of Justice, Family Law Section, appointed by the Department of Justice as the Central Authority in Manitoba, filed the Requisition and Notice on October 15, 2021, and the Notice of Application on October 20, 2021.

[11] Pursuant to the "Procedural Protocol" for the handling of Return Applications under the Hague *Convention*, established by our Court, I pronounced an Interim Order on November 8, 2021, by consent, which fixed timelines for the filing of materials by the parties and scheduled the hearing date of December 14, 2021. The father was ordered to deliver the passports of himself and the child to the Court for safekeeping pending a final determination of the matter, and to provide his contact particulars to the Central Authority for the Province of Manitoba. The order contained a non-removal clause from the Province of Manitoba.

V. THE LAW

[12] It is a well-established principle that return applications under the Hague *Convention* are not to be treated as custody hearings where the sole test is the child's best interests. See ***Thomson v. Thomson***, [1994] 3 S.C.R. 551 (S.C.C.), at p. 578.

[13] Article 12 of the Hague *Convention* requires that if I find that the child has been wrongfully removed or retained, I must order her return, unless the return application is commenced one year or more from the date of wrongful removal or retention, and I determine that the child is settled in her new environment.

[14] Article 12 states:

> 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 of 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.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[15] Other exceptions to the duty to order the child's return in circumstances of wrongful removal or retention are articulated in Article 13 as follows:

> *a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> *b)* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[16] The onus is on the person opposing the return order to prove, on a balance of probabilities, that an exception exists.

WRONGFUL REMOVAL OR RETENTION

[17] According to Article 3 of the Hague *Convention*:

> 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 sub-paragraph *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.

[18] Article 5(a) of the Hague *Convention* defines "rights of custody" as follows:

> For the purposes of this Convention –
>
> *a)* "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

[19] Section 9.1(b) of Costa Rica's country profile filed at the Hague Conference Permanent Bureau provides that rights of custody are attributed by operation of law to the child's parents. The parties have equal rights of custody to the child. In this case, no court orders or agreements modifying or terminating either parent's custody rights exist.

[20] In accordance with the Hague *Convention*, jurisdiction for custody and access issues is based upon habitual residence.

[21] For the Hague *Convention* to apply, the child (under 16) must be "habitually resident in a Contracting State immediately before any breach of custody or access rights" pursuant to Article 4.

HABITUAL RESIDENCE

[22] In the ***Office of the Children's Lawyer v. Balev***, 2018 SCC 16 (***Balev***), the Supreme Court of Canada introduced a "hybrid approach" when determining habitual residence that combines parental intention and the child's specific circumstances. The hybrid model requires the Court to consider the nucleus of the child's life immediately preceding the removal or retention, together with other factors such as the length, conditions and purposes for the child's move. All relevant circumstances in the specific

case are to be considered and are important in the habitual residence analysis. No longer is the focus "primarily or exclusively on either parental intention or the child's acclimatization" (***Balev*** at para. 42).

[23] Chief Justice McLachlin, writing for the majoring in ***Balev***, provides a concise description of the hybrid habitual residence model at paras. 43 - 44:

> On the hybrid approach to habitual residence, the application judge determines **the focal point of the child's life** — "the family and social environment in which its life has developed" **— immediately prior to the removal or retention**.... The judge considers **all relevant links and circumstances** — the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.
>
> Considerations include "**the duration, regularity, conditions and reasons for the [child's] stay** ... and the **child's nationality**.... **No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances.... Relevant considerations may vary according to the age of the child** concerned; where the child is an infant, "**the environment of a young child is essentially a family environment, determined by** the reference person(s) with whom the child lives, by **whom the child is in fact looked after and taken care of**"....
>
> (emphasis added)

[24] The habitual residence analysis directed by ***Balev*** places the focus on the facts of the specific case and the child's own circumstances, rather than legal tests at para. 47:

> The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions".... It requires the application judge to look to the entirety of the child's situation. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation "to overlay the factual concept of habitual residence with legal constructs" must be resisted.

VI. THE FACTS

[25] The child, who is three years of age, was born in Costa Rica and is a dual citizen of both Costa Rica and Canada. The parties applied for the child's Canadian Citizenship Certificate immediately upon her birth.

[26] The mother, born in Nicaragua, is a permanent resident of Costa Rica where she has been living since 2010. She works as a part-time healthcare worker. Her two older children, S. and E., ages 16 and 9 respectively, reside with her.

[27] The father was born and raised in Manitoba and is a Canadian citizen. He is self-employed in the construction industry as a carpenter and drywall installer, and works from April to October each year, his busy season. His principal residence is in Rorketon, Manitoba, with the child. His parents reside in Winnipeg and assist him with caring for the child.

[28] The parties met in Tamarindo, Costa Rica, where the father was vacationing in 2016, and they began their relationship in February 2017. In February 2018, the mother learned she was pregnant and the couple discussed whether the father should move to Costa Rica or whether he should sponsor the mother and her two eldest children in immigrating to Canada.

[29] After the child was born in October 2018, the parties agreed that the father would sponsor the mother and her two older children for permanent resident status in Canada. The paternal grandmother and her husband visited the parties and the three children in February 2019 in Costa Rica and the paternal grandmother, a former employee of

Immigration Canada and Revenue Canada, agreed to assist the parties in preparing and filing the permanent resident documents for the mother.

[30] In September of 2019, the mother sent birth certificates for herself and the three children to the paternal grandmother to have translated from Spanish to English and notarized. The paternal grandmother assisted the mother in obtaining a Costa Rica permanent resident card for her and her oldest child, which was a prerequisite for the permanent resident application.

[31] In October 2019, the paternal grandmother began working with the mother to collect and have translated other documents required for the mother's application.

[32] The father stayed with the mother in Costa Rica for several weeks when the child was born in October 2018 and for five months between approximately December 2018 and April 2019. In November 2019, when his seasonal work concluded in Manitoba, the father again returned to Costa Rica and lived with the mother. When the mother travelled to Switzerland in February 2020 for family business, the father cared for the three children.

[33] In January 2020, the parties decided that instead of proceeding with the mother's permanent resident application, they would apply for a visitor visa for the mother. This would allow the mother to travel to Canada sooner, for approximately 11 weeks. The parties had agreed they would submit the documents for the father to sponsor the mother and her two older children while the mother was in Canada on a visitor visa.

[34] At the parties' request, the paternal grandmother obtained and organized the mother's Visitor Visa Application and supporting documents for the parties to sign and

gave them to the father's brother and his wife to take to the couple in Costa Rica in January 2020 when they visited.

[35] The parties signed the Visitor Visa Application documents on March 2, 2020, together with a form appointing the paternal grandmother as their representative with Immigration, Refugees and Citizenship Canada.

[36] On March 3, 2020, the father and the child travelled to Canada and the father brought the mother's signed Visitor Visa Application with him. The Application was filed with the Government of Canada on March 6, 2020.

[37] On March 14, 2020, the mother's Visitor Visa Application was denied. The parties then refocused their efforts on obtaining documents required for the permanent resident sponsorship process.

[38] The mother obtained a Consent Form on May 19, 2020 signed by S.'s father, who resides in the United States, consenting to S. immigrating to Canada with the mother. E.'s father, who also lives in the United States, refused to agree to the mother's request to relocate E. to Canada. The mother commenced court proceedings in Costa Rica several months earlier to obtain a custody order of E. for her application.

[39] Although the mother alleges that in July 2020, her romantic relationship with the father ended, the messages exchanged between the parties suggest otherwise. Further, the father continued to support the mother's permanent resident application and to provide financial assistance to her until July 10, 2021.

[40] The permanent resident application with supporting documents was filed on June 8, 2020. The Government of Canada started processing the application 12 months

later on June 21, 2021, and sent the mother medical instructions on June 28, 2021. The mother provided the medical results for her application on July 14, 2021.

[41] In August or September 2021, the parties agreed to separate. The father says that the mother advised him at that time that she no longer wished to relocate to Canada and the permanent resident application was withdrawn.

[42] The mother signed the Request for Return of the child in accordance with the provisions of the Hague *Convention* on September 20, 2021, which was received by the Central Authority for the Province of Manitoba, on October 5, 2021.

VII. WAS THE CHILD HABITUALLY RESIDENT IN COSTA RICA?

[43] In ***Ludwig v. Ludwig***, 2019 ONCA 680 (CanLII), Tulloch J.A., on behalf of the Ontario Court of Appeal, articulated at para. 23 a two-step analysis to be followed when assessing habitual residence:

> ...[T]he first step is to determine when the alleged wrongful removal or retention took place, and the second step is to determine in which state the children were habitually resident immediately prior to that removal or retention.

[44] With respect to step one, the mother contends that the date of wrongful removal or retention was April 2020 or, alternatively, on September 1, 2021. If I find that the child was wrongfully removed on September 1, 2021, I must order that the child be returned to the mother, unless the father establishes that the mother had consented to or subsequently acquiesced in the child's removal to Canada, pursuant to the Article 13(a) exception.

[45] If I find that the child was wrongfully removed in April 2020, I also have to consider under Article 12 whether the child is now settled in her new environment because the Return Application was filed more than one year since the date of wrongful retention.

[46] The second step of the ***Ludwig*** analysis is to determine where the child was habitually resident immediately prior to the date of the alleged wrongful removal or retention, which is referred to as the "focal point of the child's life" in ***Balev***.

[47] In making that determination, ***Balev*** replaces the parental intention approach and the alternative child-centred approach with a hybrid test that is fact-specific. The new test focuses the lens on all relevant circumstances of the individual child and the parents.

CHILD'S HABITUAL RESIDENCE IN APRIL 2020

[48] The mother argues that the removal or retention of the child in April 2020 was wrongful, as the child was habitually resident in Costa Rica immediately prior to her removal and she has rights of custody. She submits that the parties verbally agreed that the father was to take the child to Canada in March 2020 for only one month and that she did not consent to the child's move being of a permanent nature or her retention in Canada beyond April 2020. According to the mother, the father acted unilaterally and decided that the child would live in Canada without her authorization. The mother's evidence is that the COVID-19 pandemic (the pandemic) caused the child to remain in Canada beyond the timeframe agreed to during the time when her visitor visa was not approved. She contends that the plan of the one-month trip had to pivot due to the pandemic and that there was never an agreement to relocate the child to Canada with her to join at a later date.

[49] The father adamantly denies the mother's assertion that the child would be in Canada for only one month in March. He argues that he and the mother agreed that the mother, her two elder children and the child would relocate and live in Canada. According to the father, the parties started the permanent resident sponsorship application process for the mother and her two children several months before he took the child to Canada. He asserts that neither the pandemic nor the denial of the mother's visitor visa changed the agreement reached by the parties to relocate the child to Canada. He says that the mother's joint intention to relocate to Canada remained steadfast throughout.

[50] I do not accept the mother's evidence that the child was only to travel to Canada for one month in March 2020 and return in April 2020 for five reasons.

[51] First, there is no independent evidence that suggests that the child was only to be away for one month.

[52] Second, nowhere in the mother's own evidence does she provide an expected date of return for the child. The consent document that she signed for the child to travel to Canada indicates no return date. The father and the child flew on the father's one-way ticket from Costa Rica to Canada on March 3, 2020. The mother accompanied them to the airport and kissed them good-bye. The mother's own message sent via Facebook Messenger to the father that day indicates that she would be travelling to Canada, not that the child would be returning to Costa Rica:

> I love my baby, I hope to see you soon. Good trip. I love you. I'm sad.
> **You bring me to the baby soon...**
>
> (emphasis added)

[53] Third, the father's work schedule and travel history confirm that he works from April to November each year. He would not have had the ability to return the child to Costa Rica in April 2020.

[54] Fourth, the mother deposes that the purpose of the one-month trip was for the child to visit the father's parents in particular who were "anxious" to "meet" the child. However, the father's parents had already met the child in Costa Rica in February 2019, as confirmed by the evidence of the father and his parents.

[55] Fifth, the mother's allegation that the child was only to visit Canada for one month in March 2020 is also inconsistent with the travel dates that she listed in her Visitor Visa Application. In her letter dated February 27, 2019, for her Visitor Visa Application, the mother requested to visit Canada from April 21, 2020 to July 7, 2020, to be with the child, the father and his family. She stated that she was "limiting" her application to an 11-week planned visit because she had two children ages 15 and 8 (at that time) who would remain in Costa Rica in her sister's care and that she may need to return sooner to see her ill mother who lives in Nicaragua. It is not reasonable to conclude that the mother would visit Canada from April 21, 2020 to July 7, 2020, if the plan was for the child to be returned to Costa Rica in April 2020.

[56] Nor do I accept the mother's contention that the pandemic detained the child in Canada in April 2020, and required the mother to start the permanent resident application process. This is contrary to the extensive documentary evidence filed in these proceedings.

[57] As early as September 2019, the mother was forwarding documents to the paternal grandmother to assist her with the plan for her and her children to immigrate to Canada. The mother's own messages to the father sent via Facebook Messenger in September 2019 confirm the joint plan of the parties to relocate the child to Canada:

Sept. 2019	There is no work I think if the bb goes to Canada it will be better
Sept. 29, 2019	Let's go to Canada I don't want Costa Rica anymore

[58] Similarly, the mother's own evidence in April 2020 indicates that she was content to have the child reside in Canada and pursue her permanent resident application. Her letter dated April 18, 2020, to Immigration, Refugees and Immigration Canada, explains that she and the father are living apart "because of immigration barriers" and that they have "a healthy, wholesome relationship built on trust and support". She notes that her visitor visa would have permitted her to visit with the child and the father for a 12-week period during his work in Canada. Nowhere does she indicate that the child was living in Canada either temporarily or because of the pandemic. She writes:

> ...Due to the extreme time limits I have encountered in obtaining documents for myself, my daughter [E.] and my son [S.], and now the COVID 19 pandemic, I have yet to obtain all the necessary Canadian documents for the permanent residence application.
>
> ...As a temporary solution, I applied for a visitor visa for approximately a 12 week period, but was denied. **This visitor visa would have allowed me to be with Isaac and baby for at least part of his seasonal work in Canada.**
>
> ....
>
> **My application for permanent residence status would enable us to live together in Canada year round. Please help us to reunite on a permanent basis in Canada.**
>
> (emphasis added)

[59] Further, even after Costa Rica opened up to travellers in August 2020, as admitted by the mother, she chose not to file a Hague *Convention* return application. In my view, this was because the parties had agreed that the child's home was Manitoba.

[60] In addition to her submission that the child was only to visit Canada for one month and that the pandemic caused the child to remain longer, the mother also asserts that the child's removal was wrongful because the child had spent most of her life in Costa Rica and that country was the child's habitual residence.

[61] The case law is clear that the amount of time that the child resides in the particular country is only one factor to consider. See ***Korutowska-Wooff v. Wooff***, 2004 CanLII 5548 (ON CA); ***Csoke v. Fustos***, 2013 ONSC 2417 (CanLII); and ***A.E.S. v A.M.W.,*** 2012 ABQB 753 (CanLII). The amount of time necessary to establish habitual residence can be as brief as one day, depending upon the circumstances of the case. See ***Gavriel v. Tal-Gavriel***, 2015 ONSC 4181 (CanLII) at para. 55; and ***Fasiang v. Fasiangova***, 2008 BCSC 1339 (CanLII) at paras. 71 and 85.

[62] I appreciate that as of April 2020, the child had only been in Canada for one month with the father, and had previously resided for 17 months in Costa Rica. However, the father had lived with the mother and child for approximately 10 or 11 months of the 17 months in Costa Rica, and they had both cared for the child. The child was only 18 months old in April 2020. As noted in ***Balev***, a young child's environment is a family environment, consisting of the child's caregivers.

[63] In April 2020, the child, a Canadian citizen, was residing in Canada with the father, one of her primary caregivers, and having regular FaceTime contact with the mother. Her family environment remained intact in reference to her main caregivers.

[64] The intentions of the parents and their circumstances are particularly important in the case of a young child. See ***Balev*** *at* para. 45.

[65] I find that the culmination of the evidence in the present case confirms the parties' joint intentions to relocate the child to Canada. Their respective communications indicate that they believed that the child and the family would have a better life in Canada. I find that the parties agreed to move the child's habitual residence from Costa Rica to Manitoba on March 3, 2020.

[66] I find that the father acted on the joint agreement of the parties when he brought the child to Canada and that there was no wrongful removal or retention of the child by the father. The father and the child travelled on a one-way ticket, with all the necessary documents and possessions for the child to make her home in Canada. He obtained Manitoba Health coverage for her on March 19, 2020.

[67] I find that the child was habitually resident in Canada in April 2020 and that the Hague *Convention* does not apply to this child.

THE "SETTLED IN" EXCEPTION

[68] Had I found that the child was habitually resident in Costa Rica in April 2020, the father's removal and retention of the child would have been wrongful within the meaning of the Hague *Convention* given the resultant breach of the mother's joint rights of custody under Article 3. In that event, I am satisfied that the father has proven that an exception

under Article 12 applies to permit the child to remain in Canada pending future custody proceedings.

[69] Article 12 gives the Court discretion not to order that a child be returned where the return application is brought one year or more from the date of wrongful removal or retention, and the child is settled in the new environment. Factors to take into account when considering whether the settled in exception applies include the length of time that the child has been in the new environment, the interests of the child not being uprooted again, the objective of secure and prompt return, whether the status quo can be returned and general deterrence.

[70] In ***Kubera v. Kubera***, 2010 BCCA 118 (CanLII), Levene J., on behalf of the British Columbia Court of Appeal, succinctly explains the purpose of the settled in exception set out in Article 12 at para. 38:

> This exception is a recognition that the **interests of a child in not having his or her life disrupted once he or she has settled down in a new environment may**, in a certain case, **override the otherwise compelling need to protect all children from abduction**.... After one year, the immediate return envisaged by the *Convention* is no longer possible. Those policies that are presumed to justify mandatory repatriation in all cases prior to the expiry of the one year period will, with the passage of time, tend to weaken. Those that require consideration of the welfare and interests of the particular child tend to strengthen. The result is that the further one gets from the objective of swift repatriation, the greater the likelihood that ordering the child's return will only "accentuate the harm caused by the wrongful relocation"....
>
> (emphasis added)

[71] According to ***Kubera***, the Court is to balance "the objectives" of the Hague *Convention*, "weighing in favour of or against return", with the "interests" of the child in

not being uprooted from their new environment in the particular facts of each case (at para. 66):

> ...[T]he factual inquiry seeks to determine the actual circumstances of the child in terms of the disruptive effect of ordering his or her return. The exception reflects a compromise between an indefinite extension of the obligation to return the child, and a recognition that the justifications for that obligation do not persist indefinitely. Beyond one year, the interests of a particular child in not being uprooted may begin to outweigh the generalized objectives of the *Convention* summarized in *J.E.A.* (at para. 68). The objective of securing prompt return has been seriously undercut; restoring the status quo may be impossible; it can no longer be presumed that the country of origin is the best forum to determine the issue of custody; and, finally, general deterrence, while much less prone to the passage of time, must also eventually yield to the welfare interests of the particular child....
>
> (emphasis in original)

[72] As noted in ***Ludwig*** at para. 37, the child's circumstances in the country they are residing in at the time of the hearing is the focus of the settled in exception analysis:

> **Under the "settled in" exception, the court must assess the children's connection to the country they are in at the time of the hearing of the application**, not immediately before the date of wrongful removal or retention: *Balev*, at para. 67. This difference in timing can be significant. **The "settled in" exception thus accounts for the possibility that a child will develop closer ties to the jurisdiction in which the child has been wrongfully removed or retained in the period of time that follows the date of the wrongful removal or retention: *Balev*, at para. 67**....
>
> (emphasis added)

[73] The mother asks that the Court consider the Hague *Convention's* deterrent objectives. She argues that the father should not benefit from either the pandemic, which was a circumstance that was beyond her control, or his poor behaviour in breaching her trust. She asserts that resumption of the status quo that existed prior to the wrongful retention is possible in that the child can return to the same residence with her mother

and two older siblings in Costa Rica and that the child would not be affected as she does not have significant attachments outside of her paternal family ties in Canada.

[74] Firstly, I note that this is not a case as in ***Kubera***, where one parent misled the other parent for the purpose of relocating the child. On the contrary, the evidence in the case at bar demonstrates that the parties had a joint plan to relocate the child to Canada, a plan that was not initiated or affected by the pandemic.

[75] Further, I accept the father's evidence that the child has "settled in" to her life in Manitoba. The child, a citizen of Canada, has resided in Manitoba for 21 months, more than half of her life. She has been seeing a doctor in Manitoba since August 17, 2020, she has had a Social Insurance Number since May 26, 2021, she has attended pre-school since November 9, 2021, and she has formed close bonds with her paternal relatives, which include her grandparents, aunts, uncles and cousins, as well as friends in the neighborhood and classmates. She is an active three-year-old involved in a number of age-appropriate activities. She has settled into her life in Canada.

[76] I agree with the father that the child should not be uprooted from her life in Manitoba and returned to Costa Rica, a place where she has not lived since she was an infant and where she does not speak the language. Such a move would cause her to lose her Manitoba roots and the Canadian sense of identity that she has acquired.

[77] The mother has delayed the commencement of the return proceedings until 17 months after the alleged wrongful retention date and during this time the child has embraced and thrived in her life in Manitoba. In my view, it would be traumatic for the child to have her life disrupted and to require her to live in a country that she no longer

has familiarity with, whether that relates to language, food, environment or physical location.

[78] I find on the evidence that the child is now settled into her new environment as provided for by Article 12. Had I found that the child was habitually resident in Costa Rica as at April 2020, I would have chosen to exercise my discretion not to return the child to Costa Rica, given the disruptive effect a return order would have on her.

CHILD'S HABITUAL RESIDENCE ON SEPTEMBER 1, 2021

[79] Having found that there was no wrongful removal or retention of the child in April 2020, I must consider the mother's alternative position, that the date of wrongful retention is September 1, 2021.

[80] According to the mother, if there was an agreement between the parties for the child to live in Canada, it was conditional upon her residing in Canada. The mother does not dispute that a move to Canada was considered by the parties, and in fact, applied for by virtue of the application for permanent residency. She asserts that the messages exchanged between the parties indicate their mutual intention for the family to be residing together, but do not specify that the child will be in Canada regardless of the outcome of the immigration process. The mother argues that in September 2021 she became firmly aware of the father's intention not to return the child to Costa Rica when the parties acknowledged that their relationship was over, the father withdrew the mother's residency sponsorship and the reunification plan for the family formally ended.

[81] The father denies that the child's move to Manitoba was conditional. The evidence of the father is that the child had been living in Manitoba since March 3, 2020, based on

the couple's joint plan that Manitoba would be her permanent home. He states that when the mother resiled from their joint plan to come to Canada with E. and S. and be a family, they separated, and he withdrew the sponsorship application. At that point, the Canadian government had not reached a decision respecting her application and the parties were no longer in a relationship looking to make a family together in Canada, which was the basis of the sponsorship.

[82] Alternatively, he submits that any conditions attached to the move do not prevent the child's habitual residence from being Manitoba in the 18 months she resided there between March 3, 2020 and September 1, 2021.

[83] The new residence can be found to be the child's habitual residence, notwithstanding one parent's stipulation that his or her move was conditional. All of the surrounding circumstances need to be considered. See ***Schroeder v. McCormack***, 2016 ONSC 5775 (CanLII) at para. 19; ***Csoke*** at paras. 290 and 307; ***Wirta v. Wirta***, 2016 ONSC 3835 at para. 52; and ***Gavriel*** at paras. 40-41.

[84] In the present case, the evidence indicates that the joint plan of the parties was for the child to move to Manitoba and for the mother and her other children to join the father and the child. I find that the parties' decision to make the child's residence Manitoba was not conditional on the mother relocating to Canada. Although the parties planned for the mother to come to Canada, they knew that it would be the decision of the Government of Canada whether or not she and her eldest two children would be granted permanent residency, and that that decision was beyond anyone's control. The

messages exchanged by the parties reveal that they were hopeful that the mother would be permitted to immigrate to Canada.

[85] I am satisfied from the evidence that the mother changed her mind in August or September 2021 and decided that she no longer wanted a relationship with the father or to immigrate to Canada where the father and child lived.

[86] I find that a change in habitual residence is not contingent on a family reunification or immigration status.

[87] Notwithstanding the mother's decision not to relocate to Canada, she continued to be of the view that the child should reside in Canada, as confirmed by the following message that she sent the father via Facebook Messenger on September 3, 2021:

> **It's good that they are well I'm glad I don't think I can live in Canada I think it's not a good place for me, what do you think? Besides, I don't have a job, Marie, you can go to school and stay with me on vacation.**
>
> (emphasis added)

[88] I have already addressed the mother's alternate argument that the pandemic is an important consideration in this case surrounding why the child has remained in Canada since March 2020. As noted above, I am not persuaded by that position as the mother could have filed a return application in August 2020 once travel was allowed. Instead she was content to continue to pursue her application for permanent resident status for herself and her two older children.

[89] Further, the mother contends that the child has remained in Canada since March 2020 because of the father's reassurances to her to trust him in supporting her relationship with the child and the immigration process. The mother blames the father for the delay in the immigration process, which he had no control over. The mother's

contention flies in the face of the documentary evidence which confirms that the father acted in a bona fide manner in supporting the mother's applications for a visitor visa and permanent residency. The evidence indicates that the father was genuine in his efforts throughout to support the mother's desire to have her and her two oldest children reside in Canada, and that at no time was the father attempting to manipulate the mother.

[90] Lastly, the mother alleges that the child remained in Canada during this lengthy time because the father withheld financial support as a means of controlling her behavior. This allegation is also not supported by the documentary evidence which confirms that the father voluntarily sent monies on a regular basis to the mother between June 6, 2019 and July 10, 2021, to assist her. In addition to the father's record of payments to the mother, the mother's own letter dated February 27, 2019, for her Visitor Visa Application acknowledges that the father has been supporting her family through wire transfers and visits. Her letter states that she was an authorized user on the father's primary account, was given an RBC Royal Bank Visa with a credit limit of $5,000 and that she and the child were named as beneficiaries on the father's life insurance policy.

[91] Whether it was pursuing a custody order for her daughter E. through court proceedings for her permanent resident application or travelling to Switzerland, as she had in September 2019 and February 2020 for family business, the mother was in control of her actions and decisions.

[92] Throughout these proceedings, I have preferred the evidence of the father as it is more credible than the evidence of the mother.

[93] I find that the child was habitually resident in Canada as at September 1, 2021.

THE CONSENT OR ACQUIESCENCE EXCEPTION

[94] Had I found on the evidence that the child was habitually resident in Costa Rica in either April 2020 or as at September 1, 2021, I am satisfied that the father has established that the mother consented to, or subsequently acquiesced in, the removal or retention of the child. This triggers the exception set out in Article 13(a) of the Hague *Convention* which gives me discretion to not order that the child be returned to Costa Rica. I would have exercised my discretion to permit the child to remain in Canada in accordance with this exception in the circumstances of this case.

[95] In ***Katsigiannis v. Kottick-Katsigiannis***, 2001 CanLII 24075 (ON CA), Osborne A.C.J.O. (as he then was), on behalf of the Ontario Court of Appeal, reviewed a number of authorities and concluded at paras. 47 and 49, that the words "consent" and "acquiescence" should be given their ordinary meaning and that the evidence to establish their presence must be "clear and cogent":

> ..."To consent" is to agree to something, such as the removal of children from their habitual residence. "To acquiesce" is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent.
>
> ... [T]o trigger the application of the Article 13(a) defence there must be clear and cogent evidence of unequivocal consent or acquiescence.

[96] The mother's own conduct and communications demonstrate that she consented to and/or acquiesced in the child remaining in Canada in April 2020 and on September 1, 2021.

[97] In respect to the April 2020 date, the mother's consent to the child remaining in Canada is found in her messages to the father on March 30 and 31, 2021:

March 30, 2021 **She can also visit life in Canada is better than Costa Rica for her**

I want the baby to have all the best and you are a good father

March 31, 2021 **You know that I would never leave you without Marie, you are the best father and you take good care of her and you need to be with Marie but I am a mother and I also want to see her.**

(emphasis added)

[98] Similarly, on October 28, 2021, the mother sent the father the following message via Facebook Messenger:

> The only letter is fine because **now this little girl can go to school in Canada and when she is older we can decide together where she will live and which school it will be, if in Canada or Costa Rica for her, which is the best for both of us..and what to take off when visiting Costa Rica** What do you say will be in Canada for school while she is little and when she is older we will decide which is the best for her and both of us that is you and me and my two other children.
>
> (emphasis added)

[99] Evidence of acquiescence or subjective consent may be found from actions, inactions, words or silence of the wronged parent to a child's removal or retention. See ***Katsigiannis*** at paras. 41 and 48.

[100] The mother's willingness to participate in the immigration process is evidence of a joint contention that the child's travel to Canada was to be permanent and the mother was to join at a later date. Her messages sent to the father from April 2020 to September 2021 reference her moving to Manitoba to join the father and the child, her abandoning her residence in Costa Rica, her desire to sell certain possessions, and plans she had

when she arrived in Manitoba, including finding a job and purchasing a home. For example, in March 2021, the mother writes:

> March 11, 2021 — I want to go to Canada and work and see Marie maybe life there is better than in Tamarindo and if I work I will earn money to buy a house
>
> March 15, 2021 — She has been in Canada for long time and I keep waiting for the papers and I think I will never have them

[101] The mother's actions and statements reveal a "consistent attitude of acquiescence over a significant period of time". In ***Katsigiannas***, the Ontario Court of Appeal cited with approval the following statement from ***Freidrich v. Friedrich***, 78 F. 3d 1060 (6th Cir. 1996), the 6th Circuit Court of Appeals, at para. 44:

> ...[W]e believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.

[102] Delay in filing a return application is a factor to consider when assessing whether the wronged parent acquiesced in the child's retention. See ***Muense v. Muense***, 2020 MBQB 105 (CanLII).

[103] In the present case, the mother did not file the Return Application until 17 months from the alleged wrongful retention date of April 2020. I find that she was content for the child to remain in Manitoba as long as the parties' relationship was intact and her own permanent resident sponsorship application was pending. It was the mother who decided unilaterally that she no longer wanted the parties' relationship or the sponsorship application to continue. After her decision to terminate both, she then decided to seek the return of the child by filing a Request to Return.

[104] The mother's change of heart about moving to Manitoba does not alter the fact that the parties agreed to change the child's habitual residence to Manitoba and does not alter the fact that the mother consented to and/or acquiesced to the child being habitually resident there. See ***Unger v. Unger***, 2017 ONCA 270 (CanLII), at paras. 6-7 and 10.

[105] In my view, the mother's own communications and ongoing participation in the sponsorship process along with her delay, constitute consent to and/or acquiescence in the child remaining in Manitoba with the father in April 2020 and on September 1, 2021, within the meaning of Article 13(a). I would have exercised my discretion not to return the child to Costa Rica based on the evidence in this case.

VIII. CONCLUSION

[106] I dismiss the mother's application for the return of the child to Costa Rica.

[107] I direct that the Manager of the Court of Queen's Bench of Manitoba Registry release the passports of the father and the child to the father.

Helen Pitcher A.C.J.