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IN THE
COURT OF APPEALS OF INDIANA

Maria L. Cole,
Appellant-Respondent,

v.

Peter G. Cole,
Appellee-Petitioner.

April 28, 2022

Court of Appeals Case No. 21A-MI-2415

Appeal from the St. Joseph Circuit Court

The Honorable William L. Wilson, Magistrate

Trial Court Cause No. 71C01-2107-MI-356

Mathias, Judge.

[1] Maria L. Cole ("Mother") appeals the trial court's determination that her minor children, J.M.C. and L.R.C. ("the Children"), have their "habitual residency" in the Federal Republic of Germany under the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), implemented in the United States by the International Child Abduction

Remedies Act, 22 U.S.C. §§ 9001-9011 ("ICARA").[1] We hold that the trial court erred when it determined that the Children have their habitual residency in Germany and not in the United States. Accordingly, we reverse the trial court's judgment.

Facts and Procedural History

[2] The facts before the trial court were based only on a paper record.[2] According to the parties' submissions, Peter G. Cole ("Father") is a citizen of the United Kingdom. Mother is a citizen of the United States. In 2016, they were married. Mother gave birth to J.M.C. in August 2017, and she gave birth to L.R.C. in January 2019. The Children are both citizens of the United States. From 2017 to December 2020, the family lived together in an apartment in Germany.

[3] According to Father, in 2019 and 2020, he and Mother "had a number of conversations about a trip to the United States and even the possibility of moving there." Appellant's App. Vol. 2 p. 198. Father "agreed" with Mother that the family would take an indefinite, "'extended' vacation" to the United States "to get a better idea about whether an actual move to the United States

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[1] The United States and Germany are both parties to the Hague Convention. Appellant's App. Vol. 2 p. 39. Further, there is no dispute that the St. Joseph Circuit Court had subject matter jurisdiction over this cause and personal jurisdiction over Mother, Father, and the Children for the purposes of determining the Children's place of habitual residency. *See Chafin v. Chafin*, 568 U.S. 165, 169 (2013).

[2] As the Supreme Court of the United States has stated, "whether at the [trial] or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible . . . ." *Id.* at 179. Indeed, the United States Department of State filed a letter with the St. Joseph Circuit Court advising the court that the Department "may inquire about delays in proceedings where judicial authorities have not reached a decision within six weeks of the initiation of the proceedings." Appellant's App. Vol. 2 p. 40 n.4.

was something that might work." *Id.* Mother and Father agreed that they would live with Mother's mother in South Bend, Indiana, at least when they initially came to the United States.

[4] Thus, in the summer of 2019, Father began the application process for a United States Permanent Resident Card. In October 2019, Father emailed the United States Consulate General's office in Frankfurt, Germany, with questions he had while filling out the application. In his email, Father stated that the family was "planning to move all together to Indiana in the USA as soon as we can, which is where [Mother's] family lives." *Id.* at 91. He asked if his German "pension entitlement" would "transfer." *Id.* He also asked if he needed a sponsor for his application since his "wife and our children are in Germany with me and we all will be moving back when I'm allowed to do so[.]" *Id.*

[5] In late October 2020, Father obtained his Permanent Resident Card. Mother and Father then began to implement their agreement to move in with Mother's parents in South Bend. Specifically, about one week after receiving his Permanent Resident Card, Father terminated the lease for the family's apartment in Germany. Between October and December, Mother and Father liquidated numerous assets and arranged to have a significant portion, if not all, of their remaining personal property shipped from Germany to South Bend. In late November, Mother and Father further agreed to transfer more than $94,000, the entirety of their financial savings less $20,000 in cash, to an account in Mother's name at a bank in South Bend. *Id.* at 59, 198.

[6] In mid-December, the family moved to South Bend. In a supplemental customs declaration, Mother stated that the family's reason for entry into the United States was "[m]oving back." Appellant's App. Vol. 4 p. 186. In late December, Mother and Father deposited the $20,000 in cash into the South Bend account. Appellant's App. Vol. 2 p. 97. That same day, Father purchased a 2020 Chevrolet Tahoe for $43,388.38 in cash. *Id.* at 100. And, about one week later, Father spent more than $3,000 on a new king-sized bed frame and mattress. *Id.* at 107.

[7] Prior to leaving Germany, Mother and Father purchased eight weeks' worth of travel health insurance to cover any medical needs the family might have upon initially coming into the United States. Still, Mother and Father registered with the German government a new apartment in Monheim am Rhein, Germany, as their home address, and "[a]ll four members" of the family continued to have valid, and, later, renewed, health insurance when in Germany. *Id.* at 198. In the United States, however, Mother and Father held out Mother's parent's address in South Bend as their home address. *Id.* at 59. As Mother explained, "[t]his allowed us time to obtain jobs and purchase or lease a home without a rent or mortgage payment." *Id.*

[8] After moving to the United States, Father encountered difficulties with obtaining a Social Security card and, relatedly, employment. In January 2021, the local Social Security office "asked [Father] to mail his passport and [Permanent Resident Card] to verify his identity since physical offices were

closed." *Id.* at 60. Father "refused to send his passport, causing the process to stall" and rendering him unable "to seek employment." *Id.*

[9] Near the end of January, Father stated that he wanted to return the family to Germany. Mother disagreed and asked him "to give this relocation a real chance." *Id.* Father believed that he and Mother had agreed that the family's indefinite "vacation" to the United States would end if "either one of us wished to return to Germany," in which case Father thought "the family would do that." *Id.* at 198. Mother did not share Father's understanding of their agreement.

[10] In mid-February, Father returned to Germany. According to Father, his February return to Germany "was planned before" the family left for the United States in December because Father knew he would have to attend to "legal matters that required [his] return." *Id.* at 198-99. While Father was in Germany in February and March, the Children remained with Mother in South Bend, and Mother and Father continued to discuss, and disagree, on whether to return the family to Germany. *Id.* at 199.

[11] Father returned to the United States in early April. He rented his own apartment in South Bend. *Id.* at 112. He then resumed his attempts to obtain a new Social Security card and employment in the United States. *Id.* However, his attempts continued to be unsuccessful, and in late May, after Father had "stayed . . . for as long as [he could] financially afford to," he returned to Germany. *Id.* at 61, 199.

[12] Meanwhile, Mother obtained employment in South Bend teaching third grade. J.M.C. is enrolled in full-day preschool where Mother teaches, and L.R.C. attends daycare near where Mother teaches. In June 2021, Father petitioned for divorce in a German court and Mother petitioned for dissolution of the marriage in an Indiana court.

[13] On July 15, 2021, more than seven months after the Children had moved to South Bend, Father filed his complaint and petition for the return of the Children to Germany under the Hague Convention and ICARA in the St. Joseph Circuit Court, which petition Father later amended. After receiving the parties' evidentiary submissions, the trial court concluded that the Children's place of "habitual residence" was Germany and that Mother had wrongfully retained the Children in the United States. *Id.* at 10. In reaching its conclusion, the trial court relied significantly on Father's return to Germany in February 2021, and the court found that a determination of the Children's habitual residence was "not so much" concerned "with the intent of the parties." *Id.* at 12, 15.

[14] The trial court stayed its judgment pending appeal, and this appeal ensued.

Standard of Review

[15] Although the trial court entered findings of fact and conclusions thereon, the court's judgment is based entirely on a paper record. "We review *de novo* a trial court's ruling" where "the facts before the court are disputed and the trial court rules on a paper record." *Pilkington v. Pilkington*, 71 N.E.3d 865, 868 (Ind. Ct.

App.), *adopted*, 80 N.E.3d 886, 888 (Ind. 2017). "Under such circumstances[,] a court of review is in as good a position as the trial court to determine" the facts. *Id.*

[16] Further, Father has not filed an Appellee's Brief in response to Mother's arguments on appeal. Accordingly, "the trial court's judgment will be reversed" if Mother establishes "*prima facie* error." *In re Paternity of B.Y.*, 159 N.E.3d 575, 578 (Ind. 2020). "*Prima facie* error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006) (citation omitted).

Discussion and Decision

[17] Under the Hague Convention, "a child wrongfully removed from her country of 'habitual residence' ordinarily must be returned to that country." *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020). The Hague Convention, as implemented in the United States through ICARA, seeks to address "the problem of international child abductions during domestic disputes," and it operates on the "core premise that the interests of children in matters relating to their custody are best served when custody decisions are made in the child's country of habitual residence." *Id.* (cleaned up).

[18] The Supreme Court of the United States recently clarified the standard to be used in determining a child's place of habitual residence:

> The Hague Convention does not define the term "habitual residence." A child "resides" where she lives. *See* Black's Law

> Dictionary 1176 (5th ed. 1979). *Her residence in a particular country can be deemed "habitual," however, only when her residence there is more than transitory*. "Habitual" implies "[c]ustomary, usual, of the nature of a habit." *Id.*, at 640. The Hague Convention's text alone does not definitively tell us what makes a child's residence sufficiently enduring to be deemed "habitual." It surely does not say that habitual residence depends on an actual agreement between a child's parents. But the term "habitual" does suggest a fact-sensitive inquiry, not a categorical one.
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> Because locating a child's home is a fact-driven inquiry, courts must be "sensitive to the unique circumstances of the case and informed by common sense." *Redmond[v. Redmond]*, 724 F.3d [729,] 744[(7th Cir. 2013)]. For older children capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimatization will be highly relevant. Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, *the intentions and circumstances of caregiving parents are relevant considerations*. No single fact, however, is dispositive across all cases. Common sense suggests that some cases will be straightforward: Where a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence. But suppose, for instance, that an infant lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus. *See Karkkainen[v. Kovalchuk]*, 445 F.3d [280,] 291[(3d Cir. 2006)] ("The inquiry into a child's habitual residence is a fact-intensive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case.").

Id. at 726-27 (emphases added; footnote omitted). The Court added:

> Facts courts have considered [in determining a child's habitual residence] include: "a change in geography combined with the passage of an appreciable period of time," "age of the child," "immigration status of child and parent," "academic activities," "social engagements," "participation in sports programs and excursions," "meaningful connections with the people and places in the child's new country," "language proficiency," and "location of personal belongings."

Id. at 727 n.3 (quoting Federal Judicial Center, J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 67-68 (2d ed. 2015)). The Court further noted the likely importance of "facts indicating that the parents have made their home in a particular place." *Id.* at 729.

[19] We conclude that the parties' evidentiary submissions demonstrate that, by the time of Father's July 15, 2021, petition under the Hague Convention and ICARA, the Children's place of habitual residence was South Bend. The Children moved to South Bend in December 2020 by agreement of both Mother and Father. While Mother and Father may have not seen eye-to-eye with respect to the circumstances under which the family might return to Germany, the facts are clear that Mother and Father both saw the family's move to the United States as indefinite and at least possibly permanent. After discussing the possibility of moving permanently to the United States with Mother in 2019, Father engaged in a more-than-one-year-long process of obtaining a Permanent Resident Card to live in the United States with his citizen-wife and Children. Within about one week of obtaining his Permanent Resident Card, Father

terminated the lease to the family's apartment in Germany; he agreed to liquidate a substantial portion of the family's assets; he agreed to ship, at significant cost, the vast majority of the family's remaining personal property from Germany to the United States; and he agreed to deposit the entirety of the family's financial assets into an account in South Bend. And, shortly after arriving in the United States, Father purchased a vehicle for more than $43,000 in cash and spent more than $3,000 on a new bed frame and mattress. These are not actions one typically takes when he sees his or his family's residence in a location as transitory.

[20] Likewise, while Father might have believed the family would return to Germany upon the sudden wish of either parent despite the substantial investments the family had made in moving to the United States, Mother and Father had no definite plan to ever return the family to Germany when they left for the United States. While they may have kept an apartment in Germany and German benefits, they actively held themselves out as residents of South Bend. Father admitted that his return to Germany in February 2021 had been planned well before the family left Germany in December 2020. He admitted that, while in Germany in February and March 2021, he and Mother continued to discuss whether to move the family back to Germany. He admitted that he returned to the United States in April 2021, obtained an apartment, and resumed his attempts to obtain a Social Security card and employment in the United States. These circumstances reflect that the parties intended to make the United States

their home when they moved in December 2020, and only afterward did Father change his mind about it.

[21] Additional undisputed facts support the conclusion that the Children's place of habitual residence is South Bend. The Children lived in South Bend, with their Mother and their maternal grandmother, for more than seven months before Father filed his petition under the Hague Convention and ICARA. Mother is now employed in South Bend, teaching third grade. J.M.C. is currently four years old and goes to preschool where Mother teaches. L.R.C. is currently three years old and goes to daycare near Mother's school. And most of the family's personal belongings are in South Bend with Mother and the Children.

[22] In its order, the trial court minimized the intent of the parties in moving to the United States in December 2020 and unduly emphasized Father's wishes in January and February 2021. The trial court failed to consider Father's undisputed evidence that his return to Germany at that time had been long-planned; that Father returned to the United States in April 2021 and resumed his attempts to obtain a Social Security card and employment; and that the Children had been in the United States, as intended by both parties, for more than seven months at the time of Father's filing and with no definite end-date in mind by the parties when they moved the Children here.

[23] Accordingly, we conclude that Mother has demonstrated *prima facie* error in the trial court's judgment. We hold that the parties' evidentiary submissions

establish that the Children's place of habitual residence is South Bend, Indiana, and not Germany. We therefore reverse the trial court's judgment.

[24] Reversed.

Brown, J., and Molter, J., concur.