No. _____

In The

Supreme Court of the United States

JEFFREY LEE CHAFIN,

Petitioner,

v.

LYNN HALES CHAFIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL E. MANELY
Counsel of Record
Ga. Bar No.: 468580
THE MANELY FIRM, P.C.
7 Atlanta Street, Suite C
Marietta, Georgia 30060
Phone: (770) 421-0808
tmf@allfamilylaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under the International Child Abduction Remedies Act 42 U.S.C. §§ 11601-11610 (2000) and the Hague Convention on the Civil Aspects of International Child Abduction a parent may file a petition for return of their minor child/custodian to the child's country of habitual residence if it appears that the child has been wrongfully abducted. Once an Order has issued from the District Court returning the child to the petitioning custodian and an appeal has been filed by the respondent the Circuits are spilt as to whether the return of the child to the country of habitual residence renders the appeal moot. The Eleventh Circuit, in *Bekier v. Bekier*, 248 F.3d 1051 (2001), held that such an appeal is clearly moot since the relief sought by petitioner has been granted and the Court had "no authority 'to give opinions on moot questions or abstract propositions . . . which cannot affect the matter in issue in the case before [the Court]'" *Bekier* at 1054. The Court provided that no actual affirmative relief could be provided to the appellant. However, this decision and others like it has come under great scrutiny by other Circuits. Specifically the Fourth Circuit, in *Fawcett v. McRoberts*, 326 F.3d 491 (2003), has held that "[c]ompliance with a trial court's order does not moot an appeal (of a Petition for Return of Custody under the aforementioned Acts) if it remains possible to undo the effects of compliance or if the order will have a continuing impact on future action." *Fawcett* at 494. The Fourth

QUESTION PRESENTED – Continued

Circuit in *Fawcett* held that even after the return of a child in compliance with the lower court's order that "this Court can [affect the matter in issue]." *Id.* To consider the merits of an appeal and potentially reverse the lower court's decision would have a considerable effect. In contrast, the Eleventh Circuit's unfathomable position on this particular matter eliminates the basis and purpose of the appeal process.

Whether an appeal of a District Court's ruling on a Petition for Return of Children pursuant to International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction becomes moot after the child at issue returns to his or her country of habitual residence, as in the Eleventh Circuit's *Bekier* case, leaving the United States Court system lacking any power or jurisdiction to affect any further issue in the matter or should the United States Courts retain power over their own appellate process, as in the Fourth Circuit's *Fawcett* case, and maintain jurisdiction throughout the appellate process giving the concerned party an opportunity for proper redress.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeffrey Lee Chafin, petitions the Court for a Writ of Certiorari to review a final order of the United States Court of Appeals for the Eleventh Circuit (entered February 6, 2012) holding that the underlying District Court's order was to be vacated and the action moot.

OPINIONS BELOW

The opinion/order of the United States Court of Appeals for the Eleventh Circuit is not reported and is included in the Appendix. The underlying final order of the United States District Court for the Northern District of Alabama is not reported and is included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 6, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§ 11601-11610 (2000), in pertinent part:

> To establish procedures to implement the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, and for other purposes.

The Hague Convention on the Civil Aspects of International Child Abduction, in pertinent part:

> Article 1
>
> The objects of the present Convention are –
>
> 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.
>
> Article 8
>
> Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

Article III, Section 2 of the U.S. Constitution, in pertinent part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

STATEMENT OF THE CASE

Petitioner is a Sgt. First Class in the United States Army. Respondent is a Scottish national. The parties were married in Germany, where Sgt. Chafin was stationed, in early 2006. The parties' daughter was born in Germany the following year. Sgt. First Class Chafin was subsequently deployed to Afghanistan for 15 months from 2007 to 2008. Ms. Chafin moved to Scotland with the child while Sgt. Chafin was deployed. When Sgt. Chafin returned to Germany from Afghanistan in 2008, the parties decided to remain separated at that time. Sgt. Chafin was

transferred to Redstone Arsenal in Huntsville, Alabama in the beginning of 2009. Ms. Chafin and the child came to Alabama to help Sgt. Chafin select a house to purchase. The child stayed several more months in Alabama with Sgt. Chafin though Ms. Chafin returned to Scotland. Ms. Chafin again returned to Alabama with the child toward the end of 2009 when the parties decided to resume cohabitation in Alabama.

The parties' relationship remained rocky which, at one point, resulted in Sgt. Chafin filing for divorce in May 2010 in the Circuit Court of Alabama. Sgt. Chafin contends he filed because Ms. Chafin threatened to take the child where Sgt. Chafin would never see her again. Ms. Chafin contends that she had planned to leave with the child on the day she was served with divorce papers, though she had not purchased any airplane tickets whatsoever. At the initial hearing for the divorce, the Alabama Circuit Court determined that the parties had resolved their immediate differences and that there was no need for a hearing. At the conclusion of this hearing, both parties retained full and complete joint legal and physical custody of the minor child.

The parties continued to live together as husband and wife, attending parties, going on vacation, raising their child, and only moved into separate bedrooms in the Autumn of 2010. As the date scheduled for the trial arrived in December 2010, Ms. Chafin hired counsel to represent her in the divorce. While she did not file an Answer or any other responsive pleading,

she did request and received a continuance from the Alabama Circuit Court's December trial calendar.

In her Petition and at trial, Ms. Chafin contended that Sgt. First Class Chafin took the child's two passports which consisted of the child's United States Passport and her Scottish Passport, and kept them from Ms. Chafin. At trial, Ms. Chafin admitted that she had access to the child's United States Passport. Ms. Chafin always retained possession of her own passport.

After the initial hearing in the divorce, Ms. Chafin worked on remodeling the house, inquired about purchasing and training a new dog for the family and began filing appropriate documents with the United States Government to obtain her permanent residency in the United States. The child remained enrolled in school and was fully engaged and immersed in her American community. Ms. Chafin admitted at trial that she had never written to anyone that she intended only to visit the United States, rather, everyone she wrote to, and everyone who testified that she spoke to them about the matter, expressed that Ms. Chafin was unequivocal that she and her child had moved to the United States of America.

Ms. Chafin was also getting into confrontations with the police. She was twice arrested in incidents arising from her extreme state of intoxication. Finally, on December 24, 2010, she was arrested on a domestic violence incident in which she threatened Sgt. First Class Chafin with a knife while she was,

again, quite drunk. Ms. Chafin admits to being inebriated that night, but disagrees that any incident took place. The charges against Ms. Chafin were eventually dropped months later when it became apparent that she would not be returning from Scotland, to which she had been deported.

As a result of Ms. Chafin's incarceration stemming from the domestic violence incident, U.S. Immigration and Customs [ICE] officials determined that she had overstayed her 90 Day Tourist Visa which had expired in August 2010. Though she had arrived in February, Ms. Chafin kept the Visa in compliance by periodically returning to Scotland, alone, for a few days, then returning home to the United States. According to Ms. Chafin when the events occurred, she ceased returning to Scotland because officials of U.S. Citizenship and Immigration Services [USCIS] advised her that under no circumstance should she leave the country or she would have to restart the immigration process. By the time of trial, Ms. Chafin blamed her husband for her not returning to Scotland to renew her tourist visa.

Ms. Chafin did not contend that the child was a Habitual Resident of Scotland or that she was not a resident of the United States until a few days after Ms. Chafin had been deported to Scotland. To the contrary, Ms. Chafin took many efforts to remain in the United States. Even while being detained for more than a month awaiting deportation, Ms. Chafin contended that the child would remain here, in the United States, where Ms. Chafin hoped she could return.

On May 2, 2011, Ms. Chafin instituted her action in United States District Court for the Northern District of Alabama for the return of the child to Scotland. This was done pursuant to The Hague Convention and International Child Abduction Act and the International Child Abduction Remedies Act. A hearing was held on this matter on October 11 and 12, 2011. Despite this evidence supported by every witness and every document (except for portions of Ms. Chafin's testimony), the lower court determined that Scotland was the child's Habitual Residence and permitted Ms. Chafin to take the child to Scotland. Within twenty minutes of the Court issuing its oral ruling from the bench, Sgt. Chafin filed his Motion requesting that the lower court stay the child's relocation to Scotland pending appeal. Within sixteen minutes the lower court denied Sgt. Chafin's Motion. (See Appendix page 13). The lower court "permitted" Ms. Chafin to leave and take the child. The timing and circumstance of Ms. Chafin's departure was of her choosing, designed to unilaterally accomplish her ends in the hope of barring the District Court from providing relief to Sgt. Chafin.

Ms. Chafin made immediate efforts to flee the country within a few hours, permitting Sgt. Chafin to have less than an hour with his daughter, who by then had lived in the United States for nineteen months and with Sgt. Chafin exclusively for almost ten months. On October 13, 2011 the Court issued its written order confirming the return of the child to Scotland. (See Appendix page 3).

Though Ms. Chafin has returned to Scotland, this time with the child, she has not undertaken any steps to initiate any custody proceedings there. Instead, the only action now and ever affecting the custody of this child has been pending in the Circuit Court of Alabama as a divorce action. Sgt. Chafin appealed the order to the Eleventh Circuit Court of Appeals. Notice of Appeal was filed on November 14, 2011. Subsequently, Ms. Chafin through counsel filed a Motion to Dismiss Appeal alleging the underlying action was moot based the child having returned to Scotland. On February 6, 2012 the Court of Appeals issued its one-page order vacating the District Court previous order and dismissing the appeal as moot thereby leaving Sgt. Chafin with no immediate legal recourse. (See Appendix page 1).

REASONS FOR GRANTING THE WRIT

The Circuits are split over whether an appeal from a ruling by the District Court of a Petition for Return of Children pursuant to The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (42 U.S.C. §§ 11601-11610 (2000)) is moot when the child returns to his or her country of habitual residence.

The Eleventh Circuit has relied on *Bekier v. Bekier*, 248 F.3d 1051 (2001) for the proposition that

an appeal of the granting from a ruling by a District Court of a Petition for Return of Children pursuant to The Hague Convention on Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act is moot when the child returns to his or her country of habitual residence. In *Bekier*, the Court held that such an appeal of a district court order directing the return of a child to his father in Israel under The Hague Convention was moot when the child returned home during the pendency of the appeal. The Court did issue a stay if an appeal was filed and the mother posted a $100,000.00 bond. *Id.* at 1053. The mother filed the appeal but failed to post the bond and the child was returned to the father. The Eleventh Circuit held that the father had received the initial relief sought and the Court had "no authority 'to give opinions on moot questions or abstract propositions . . . which cannot affect the matter in issue in the case before [the Court].'" *Id.* at 1054. The Court provided that no actual affirmative relief could be provided the mother and her only hope lay in the Israeli courts. The Court by its own omission became powerless and that no "live" issue remained for which relief could be granted.

In agreement, the Sixth Circuit in *March v. Levine* granted stay of an order to return a child "recognizing that immediate return of the children to Mexico may effectively moot any appeal." 136 F. Supp. 2d 831, 861 (M.D. Tenn.), aff'd, 249 F.3d 462 (6th Cir. 2001).

In contrast to those holdings, the Fourth Circuit in *Fawcett v. McRoberts*, 326 F.3d 491 (2003) concluded that an appeal of a ruling on a Hague Convention petition was not moot even though the child had returned to the country of habitual residence (in this case: Scotland). "Compliance with a trial court's order does not moot an appeal if it remains possible to undo the effects of compliance or if the order will have a continuing impact on future action." *Id.* at 494, quoting 13A Charles Wright, et al., Federal Practice and Procedure § 3533.2 (2d ed. 1984). The Fourth Circuit in *Fawcett* held that even after the return of a child in compliance with the lower court's order that "this Court can [affect the matter in issue]." *Id.* To consider the merits of an appeal and potentially reverse the lower court's decision would have a considerable effect. While the *Bekier* Court may have felt that any order it could have issued may have been difficult to enforce with a child living outside of the United States it is "not clear that a lack of effective methods for enforcing a court order necessarily means that the court's opinion 'cannot affect the matter in issue.'" *Id.* at 496, quoting *Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447 (1992). For example, in a 1995 Second Circuit decision there was little hope of enforcement of a civil judgment against Radovan Karadzic, a fugitive from The Hague International War Crimes Tribunal, however, the Court did not dismiss the plaintiff's claims as moot. *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995). This further clouds the rationale of the *Bekier* court.

The Court further held that

> [t]he overwhelming majority of other courts have also evidenced their agreement with this position by routinely considering the merits of an appeal from an order returning a child to a foreign country, even when compliance with the order has resulted in the child's presence in a foreign country. See, e.g., *Ohlander v. Larson*, 14 F.3d 1531, 1538-39 (10th Cir. 2000) (rejecting mother's arguments that her petition should be dismissed because it "was moot and because [the child] was no longer in Utah" and noting that accepting such arguments "could give parents an undue incentive to flee from Hague Convention proceedings"); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (reviewing merits of an appeal, even after child had been returned to Greece in compliance with trial court order made pursuant to Convention and International Child Abduction Remedies Act; see also, e.g., *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995) (reviewing merits of appeal from district court order that child be returned to foreign country pursuant to Convention and ICARA and in which no stay appears to have been issued); *Dalmasso v. Dalmasso*, 269 Kan. 752, 9 P.3d 551 (Kan. 2000); *Sampson v. Sampson*, 267 Kan. 175, 975 P.2d 1211 (Kan. 1999); *Harkness v. Harkness*, 227 Mich. App. 581, 577 N.W.2d 116 (Mich. Ct. App. 1998).
>
> Indeed, at least two appellate courts have recently granted the precise relief [McRoberts]

> seeks, i.e., reversal of a trial court's order returning a child to a foreign country even after the child has left the United States. See *In re Marriage of Jeffers*, 992 P.2d 686, 689, 692 (Co. Ct. App. 1999) (reversing "the portion of the judgment returning the children to Greece" notwithstanding fact that children had already been returned to Greece in compliance with original order); *Bless v. Bless*, 318 N.J. Super. 90, 723 A.2d 67, 75 (N.J. Super. Ct. 1998) (reversing and remanding to trial court, concluding "that jurisdiction has not been obliterated by [the child's] court-ordered presence in Switzerland"). Obviously these courts too concluded that their decision would "affect the matter in issue."

Id. at 495.

The Fourth Circuit in *Fawcett* was unclear why the *Bekier* court came to the conclusion it did. All the cases cited by *Bekier* in support of the mootness holding involved cases with highly different fact patterns. For example, in *B&B Chemical Co., Inc. v. United States EPA*, 806 F.2d 987, 989 (11th Cir. 1986), a case holding that a challenge to the execution of a warrant to enter property was moot because the warrant had already been executed and there was no way to "un-execute" it. Further the *Bekier* Court cited *University of Texas v. Camenisch*, 451 U.S. 390, 398, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981), where the university had complied with a court order to provide a student with a sign-language interpreter, the University appealed but the student had graduated while the appeal was pending and the services could not be

"un-provided." These Courts were faced with impossibilities which only the reversal of time could remedy.

In the instance of the return of a child from a foreign country pursuant to an appeal of a Hague Convention return order no such impossibility exists. The Court can order this and it can be simply carried out. The *Fawcett* Court held that such orders are issued routinely and are fully in the power of the district court. See, e.g., *Ohlander*, 114 F.3d at 1535; *Goldstein v. Goldstein*, 229 Ga. App. 862, 494 S.E.2d 745, 747 (Ga. Ct. App. 1998); *Hernandez v. Branciforte*, 55 Mass. App. Ct. 212, 770 N.E.2d 41, 45, 49 (Mass. Ct. App. 2002); *Roszkowski v. Roszkowska*, 274 N.J. Super. 620, 644 A.2d 1150, 1160 (N.J. Super. Ct. 1993); *In re Vernor*, 94 S.W.3d 201, 206 (Tex. Ct. App. 2002); *Johnson v. Johnson*, 26 Va. App. 135, 493 S.E.2d 668, 671 (Va. Ct. App. 1997); see also, e.g., *Horlander v. Horlander*, 579 N.E.2d 91, 97 (Ind. Ct. App. 1991) (concluding that court had jurisdiction to issue custody order even though child was in foreign country); *Ivaldi v. Ivaldi*, 147 N.J. 190, 685 A.2d 1319, 1326 (N.J. 1996); *Middleton v. Middleton*, 227 Va. 82, 314 S.E.2d 362, 367 (Va. 1984). *Id.* at 496.

Additionally, the Third Circuit in *Whiting v. Krassner* found the *Fawcett* reasoning persuasive and concluded that an appeal of a return order under the Convention was not moot even after the child's return to [her] country of habitual residence. 391 F.3d 540 (3d Cir. 2004). The Court held that since the return of the child is still being contended under The Hague Convention [in the form of an appeal of the return

order] relief can still be granted and therefore this constitutes a "live" issue for Court. *Id.* at 545.

While the Tenth Circuit has found a Hague Convention appeal to be moot, the rationale for the decision was not that the child had merely returned to the country of habitual residence, it was that the Petitioner in that matter had obtained a new order from the country of habitual residence. In fact the Tenth Circuit declined to address the precise issue of whether a mere return of the child would render the appeal moot. *Navani v. Shahani*, 496 F.3d 1121, 1131-32 (10th Cir. 2007).

It is clear that the Eleventh and Sixth Circuits have taken a direct, opposite and arguably unfounded and unreasonable position from the Third, Fourth, Eighth and perhaps the Tenth Circuits with regard to the issue of mootness of an appeal from a ruling by the District Court of a Petition for Return of Children pursuant to The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act when the child returns to his or her country of habitual residence.

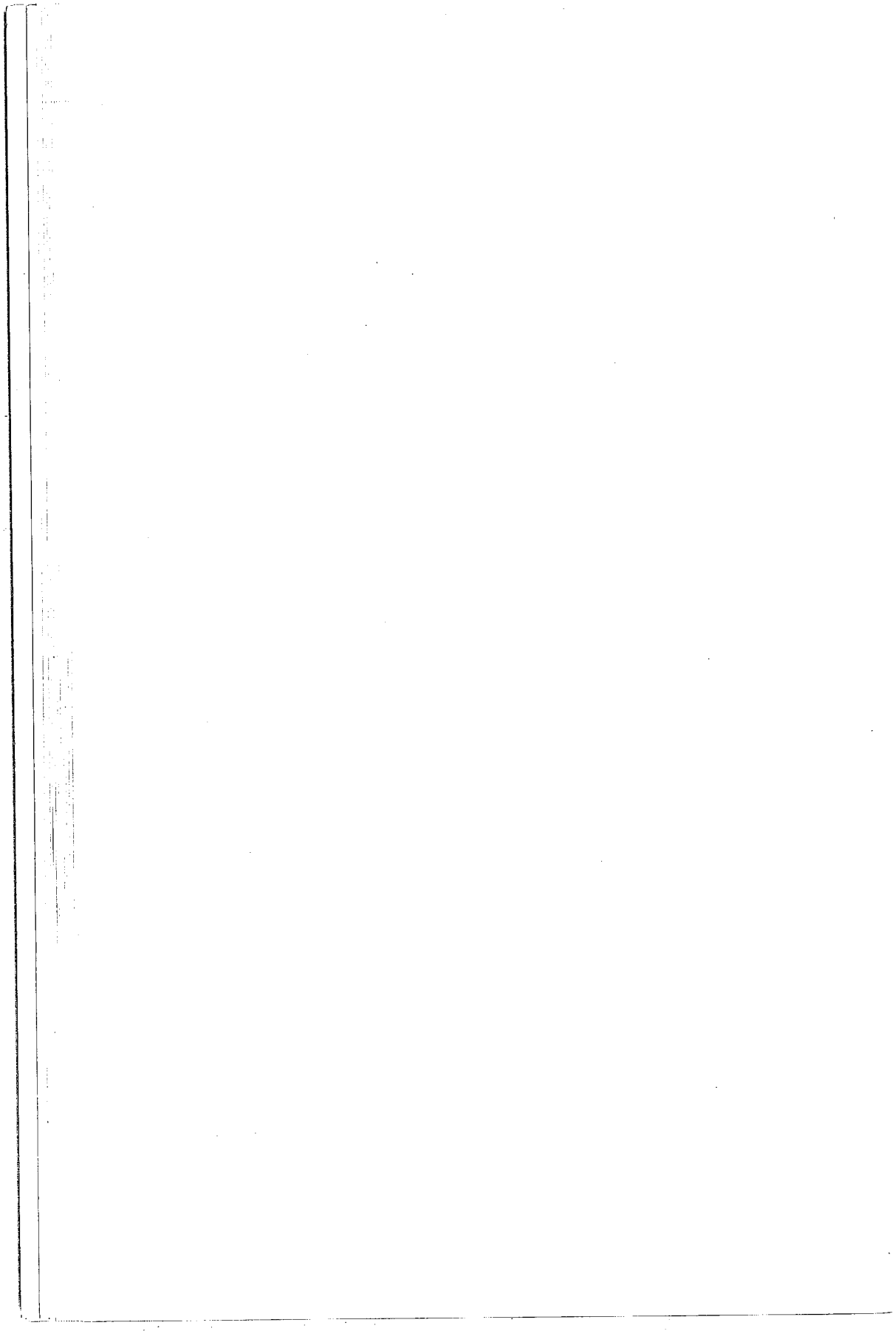
Certiorari is proper to resolve this split.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

MICHAEL E. MANELY
Counsel of Record
Ga. Bar No.: 468580
THE MANELY FIRM, P.C.
7 Atlanta Street, Suite C
Marietta, Georgia 30060
Phone: (770) 421-0808
tmf@allfamilylaw.com



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 11-15355-CC

LYNNE [sic] HALES CHAFIN,

Plaintiff-Appellee,

versus

JEFFREY LEE CHAFIN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed Feb. 6, 2012)

BEFORE: CARNES and HULL, Circuit Judges.

BY THE COURT:

Plaintiff-Appellee Lynne [sic] Hales Chafin ("Lynne [sic]") motion for leave to dismiss Defendant-Appellant Jeffrey Lee Chafin's ("Jeffrey") appeal from the district court's October 13, 2011 order granting Lynne's [sic] petition for return of their daughter, EEC, to Scotland is GRANTED. *Pacific Ins. Co. v. Gen. Dev. Corp.*, 28 F.3d 1093, 1096 (11th Cir. 1994); *Bekier v. Bekier*, 248 F.3d 1051, 1054-56 (11th Cir. 2001). Further, the case is REMANDED with

instructions for the district court to VACATE the October 13, 2011 order and DISMISS the case as moot. *See Bekier,* 248 F.3d at 1056.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
NORTHEASTERN DIVISION**

LYNN HALES CHAFIN,

Plaintiff,

vs.

JEFFREY LEE CHAFIN,

Defendants [sic].

CASE NO.
CV-11-J-1461-NE

ORDER

(Filed Oct. 13, 2011)

This case came on to be heard on the petitioner's verified petition for return of child to Scotland (doc. 1) and the respondent's answer thereto (doc. 14). Petitioner was present in person and through counsel, and respondent was present in person and through counsel, and the court heard testimony and arguments and received exhibits into evidence. Having considered the foregoing, the court makes the following findings of fact and conclusions of law:

When a child who was habitually residing in one signatory state is wrongfully removed to, or retained in, another, Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction ("Convention") provides that the latter state "shall order the return of the child forthwith." *Id.,* art. 12, 19 I.L.M. 1501, 1502. Further, Article 16 provides that "until it has been determined that the child is not to

be returned under this Convention," the judicial or administrative authorities of a signatory state "shall not decide on the merits of rights of custody." Convention, art. 16, 19 I.L.M. at 1503. The United States and the United Kingdom are both signatories to the Convention. See *Hague Conference of Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction,* 33 I.L.M. 225, 225 (1994); and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et. seq.*

To establish wrongful removal or retention of a child under the Convention, the petitioner must show by a preponderance of the evidence that (1) the child was a habitual resident of Scotland immediately before retention in the United States, (2) the retention was in breach of petitioner's custody rights under Scottish law, and (3) petitioner had been exercising her custody rights at the time of retention. *Convention,* art. 3; *Ruiz v. Tenorio,* 392 F.3d 1247, 1251 (11th Cir.2004). If Petitioner meets this burden, the child must be "promptly returned unless one of the narrow exceptions set forth in the Convention applies." *Lops v. Lops,* 140 F.3d 927, 936 (11th Cir.1998). The court's inquiry is limited to the merits of the abduction claim and not the merits of the underlying custody battle. 42 U.S.C. § 11601(b)(4).

Thus, the court considered where the child's habitual residency was at the times relevant to the pending petition. The Ninth Circuit has helpfully set

forth the following four questions: "(1) When did the removal or retention at issue take place? (2) Immediately prior to the removal or retention, in which state was the child habitually resident? (3) Did the removal or retention breach the rights of custody attributed to the petitioner under the law of the habitual residence? (4) Was the petitioner exercising those rights at the time of the removal or retention?" *Mozes v. Mozes,* 239 F.3d 1067, 1070 (9th Cir. 2001).[1]

Habitual Residency:

The petitioner asserted, and the respondent agreed, that the child at issue here had her habitual residence in Scotland until February 14, 2010.[2] The petitioner testified that on that date she and the child traveled to the United States in hopes of salvaging her marriage to the respondent.[3] The respondent argues this was done with the intent to abandon

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[1] The Eleventh Circuit Court of Appeals has stated that the opinion in *Mozes* "is not only the most comprehensive discussion of the issue, but also sets out the most appropriate approach." *Ruiz v. Tenorio,* 392 F.3d 1247, 1252 (11th Cir.2004).

[2] Neither party disputed that the petitioner and respondent, until February 2010, intended the child's habitual residence to be in Scotland. The dispute as to her habitual residence only arose after that date, as further explained herein.

[3] Because a young child . . . does not have a 'settled intent' independent of his or her parents, a court should look to 'the settled purpose and shared intent of the child's parents in choosing a particular habitual residence.'" *Whiting v. Krassner,* 391 F.3d 540, 550 (3d Cir.2004); *see also Ruiz,* 392 F.3d at 1253.

Scotland as the habitual residence in favor of the United States. To determine an intended habitual residence, the court must look to the shared intentions of both parents rather than unilateral intentions of one parent. *See e.g., Feder v. Evans-Feder,* 63 F.3d 217, 224 (3rd Cir.1995).

"Because the Convention tries to prevent one parent from unilaterally determining the country in which the child will live, the habitual residence of the child cannot be shifted without mutual agreement." *In re Ahumada Cabrera,* 323 F.Supp.2d 1303, 1311 (S.D.Fla.2004) (citing *Mozes,* 239 F.3d at 1077). "The first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind." *Ruiz,* 392 F.3d at 1252 (citing *Mozes,* 239 F.3d at 1075). Although the respondent asserted this was the purpose in the petitioner's traveling here in February 2010, the evidence adduced at trial did not support this claim. Uncontroverted evidence and testimony established that the petitioner decided to return to Scotland with the child in early May, 2010, that but for the respondent serving the petitioner with a petition for divorce and an emergency custody restraining order, the petitioner would have left the United States with the child in May 2010, and that the respondent took actions to prevent the child from leaving the United States beginning in May 2010 and continuing thereafter. The court has found no shared intention between the petitioner and respondent to abandon Scotland as the child's habitual residence. Like the facts before the court in *Ruiz v. Tenorio*, at

most the petitioner and child came here for a trial period, which did not work out. *Id.,* 392 F.3d 1247, 1254 (11th Cir.2004). *See also Sewald v. Reisinger,* 2009 WL 150856, at 2 (M.D.Fla.2009) (discussing factual issue of shared settled intent concerning residence of the child).

The evidence before the court was further undisputed that the petitioner never intended to permit the child to reside in the United States while she returned to or remained in Scotland.[4] The petitioner testified that when she and the child came to the United States in February, 2010, she was traveling on a 90 day visitor's visa, and that she was required to have a pre-purchased return ticket to Scotland in order to obtain such a visa. This evidence was uncontradicted. She further maintained her residence in Scotland, a rental home, at that time.

Further reflecting a lack of intent to allow the child to remain in the United States was petitioner's undisputed testimony that she believed the respondent would be transferred to Germany in September 2010. Similarly, the evidence was not disputed that the petitioner had secured a place for the child within the Scottish educational system and the child was scheduled to begin the same in April 2010. There was

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[4] Indeed, while the court does not lay out the details of the respondent's testimony in detail here, the respondent's proof focused on the actions of the petitioner as evidence of whether the petitioner ever intended to change the habitual residence of the child.

no evidence that said enrollment was ever cancelled by the petitioner.

In a final attempt to salvage their marriage, the petitioner and respondent took a trip together in April 2010, which both parties' agreed was a disaster. The petitioner testified at that time she and the respondent agreed to work out a split so she and the child could return to Scotland. However, as stated above, before the petitioner could return to Scotland with the child, the respondent served petitioner with an emergency custody petition and removed the child's passports[5] from their customary location. After the court hearing on May 19, 2010, the respondent again agreed the petitioner could return to Scotland with the child, but again would not return the child's United Kingdom passport.[6] For that reason, the petitioner continued to live with the respondent, although they both testified their marriage was over, the respondent had served the petitioner with a complaint for divorce, and they occupied separate bedrooms from at least sometime in the fall of 2010 until the petitioner's deportation proceedings began in December 2010.[7]

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[5] The child in question has dual citizenship with the United States and the United Kingdom, and hence has two passports.

[6] The respondent's testimony regarding the petitioner's access to this passport was not credible.

[7] The evidence was undisputed that but for the petitioner's deportation, she would have never left the child here. Each time the child had visited the United States previously, such visit was

(Continued on following page)

In consideration of the above evidence, the court can find no agreement between the parties to change the child's habitual residence from the United Kingdom to the United States. Furthermore, as stated above, the court finds that prior to February 2010, and continuing at least through May 2010 when she was in essence prohibited from leaving the country with the child, the petitioner was exercising her custody rights.

The court further finds that the child was wrongfully retained in the United States as of May 15, 2010, when the respondent removed the child's passport's from their location, hence removing petitioner's access to the same. That retention continued after May 19, 2010, when the uncontradicted testimony was that the respondent represented to an Alabama State judge that he would return the passports, was told to return the passports by that judge, and failed to do so. Therefore, the court finds that neither petitioner's nor the child's presence in the United States after that date was with the intent of changing the child's residence. Habitual residence is not established when the removing spouse is coerced involuntarily to remain in another country. *See e.g., Tsarbopoulos v. Tsarbopoulos,* 176 F.Supp.2d 1045, 1055 (E.D.Wash.2001). Similarly, although respondent repeatedly offered evidence for purposes of

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either accompanied by the petitioner, or with the petitioner's clear intent, ability, and actions to reclaim the child and return to Scotland after each such visit.

establishing that the child was acclimated here, such testimony is irrelevant to the issue before the court. A removing parent "must not be allowed to abduct a child and then – when brought to court – complain that the child has grown used to the surroundings to which they were abducted." *Friedich* [sic] *v. Friedich* [sic] (*Friedrich II*), 78 F.3d 1060, 1068 (6th Cir.1996).

Grave Risk:

Pursuant to Article 13b of the Convention, the court may decline to return a child wrongfully removed from his habitual residence if it is established by clear and convincing evidence that the return would present a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. *Baran v. Beaty,* 526 F.3d 1340, 1345 (11th Cir.2008). The "grave risk of physical or psychological harm" defense is an affirmative defense under Article 13(b) of the Convention that must be proved with clear and convincing evidence. 42 U.S.C. § 11603(e)(2)(A).

The respondent argues that the child's return to Scotland would expose her a grave risk of physical or psychological harm. However, at most the respondent established that while in the United States in 2010, the petitioner would consume one to two bottles of wine per week, which the petitioner testified she no longer does. Additionally, on occasions, the petitioner consumed too much alcohol, leading to one arrest for disorderly conduct. However, respondent presented

no evidence that petitioner is currently engaging in behavior which is harmful to herself or that she has ever harmed her child[8]. Absent specific evidence of severe child abuse or neglect, which respondent has not presented, the grave risk of harm defense fails.[9] *Sewald,* 2009 WL 150856 at 34 citing *Lopez v. Alcala,* 547 F.Supp.2d 1255, 1260 (M.D.Fla.2008); *Jaet v. Siso,* No. 08-81232-CIV, 2009 WL 35270, at *7 (S.D.Fla. Jan.5, 2009).

Accordingly, respondent has failed to establish by clear and convincing evidence that return of the child to Scotland would expose her to grave risk of harm. In fact, the sole evidence presented by the respondent concerning the plaintiff's harmful tendencies while drinking in the presence of the child involved claims that the petitioner hit the respondent on two occasions, one in 2009 being a slap on the back and the

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[8] The petitioner was arrested for domestic violence on either December 23 or December 24, 2010. While the court does not specifically find that the respondent manufactured the entire event he reported to 911 and to which he testified before the undersigned, the court does note that respondent's version of those events ranged from a point of questionable veracity to complete incredulity, as stated by the court on the record on October 12, 2011. The charges were later dismissed with prejudice upon motion of the prosecution.

[9] Other cases have found that sending a child to a "zone of war, famine or disease" also constitute grave danger. *See e.g., Silverman v. Silverman,* 338 F.3d 886 (8th Cir.2003). There is no allegation such conditions exist in the United Kingdom at the present time

other in 2008 being of questionable intention.[10] There absolutely was no evidence that the petitioner has ever taken any action which could present a risk to the child, grave or otherwise.

For the reasons set forth above and as stated on the record and in open court by the undersigned on October 12, 2011; it hereby **ORDERED**, **ADJUDGED** and **DECREED** that the verified petition for return of child to Scotland is **GRANTED**. Petitioner may return with the child to Scotland for appropriate custody proceedings to commence there.

It is further **ORDERED** by the court that the petitioner may file a separate motion for fees and costs in accordance Rule 54(d), Fed.R.Civ.P. The Clerk is directed to close this case.

DONE and **ORDERED** this the 13th day of October, 2011.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE

[10] The respondent testified that on this occasion the petitioner had been drinking and was lying in bed with the child, when the petitioner's foot caught the respondent's head. No evidence or testimony that this was anything more than an accident was put before the court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

LYNN HALES CHAFIN,

Petitioner,

vs.

JEFFREY LEE CHAFIN,

Respondent.

Case Number:
CV 11-J-1461-NE

ORDER

(Filed Oct. 12, 2011)

A trial was held on plaintiff's petition and defendant's answer on October 11 and October 12, 2011. At the end of the trial, the court granted the plaintiff's petition to return the parties' minor child to Scotland with plaintiff. The court informed the parties that a separate written order setting forth the court's findings would be issued at a later date. Defendant filed a motion to stay implementation of the Order October 12, 2011 (doc. no. 29) which the court has considered. Said motion to stay is DENIED. The petitioner is permitted to return to Scotland this day with her minor child in accordance with this court's Order.

DONE and ORDERED this 12th day of October, 2011

/s/ Inge Prytz Johnson
Inge Prytz Johnson
United States
District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
NORTHEASTERN DIVISION**

LYNN HALES CHAFIN,

Petitioner,

vs.

JEFFREY LEE CHAFIN,

Respondent.

CASE NO.
CV-11-J-1461-NE

ORDER

(Filed March 7, 2012)

The Eleventh Circuit Court of Appeals having returned jurisdiction to this court with instructions to vacate this court's Order of October 13, 2011, and dismiss this action as moot;

It is therefore **ORDERED** that this court's Order of October 13, 2011, is **VACATED**. This case is **DISMISSED** as **MOOT**.

DONE and **ORDERED** this the 7th day of March, 2012.

/s/ Inge Prytz Johnson
INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE