Neutral Citation Number: [2024] EWHC 3576 (Fam)

Case No: FD24P00321

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

17 December 2024

Before :

Nicholas Stonor KC
sitting as a Deputy High Court Judge

- -

Between :

The Father	**Applicant**
- and -	
The Mother	**Respondent**

- -

Re EF and GH (Children) (1980 Hague Child Abduction Convention)

- -

Harry Langford (instructed by Freemans Solicitors) **Applicant Father**
Jonathan Evans (instructed by Brethertons LLP) **Respondent Mother**

Hearing dates: 11-13 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Stonor KC:

1. Introduction

1. By an application dated 25 July 2024, the father (F) seeks a return order under the Child Abduction and Custody Act 1985 incorporating the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention') in relation to his daughters, EF (who is aged 5) and GH (who is aged 3). The application is opposed by the children's mother (M).

2. F and M are married. F is a USA national. M is a British national who has acquired US citizenship. The children have dual nationality.

3. The family lived in Iowa, USA until 09 December 2023 when they travelled to M's hometown in the South of England. M and the children have remained living there ever since. F returned to the USA in January. For reasons which are disputed, return flights to the USA for M and the children had been booked for 12 April 2024. On 10 April 2024, during an exchange of messages, M made it clear to F that she and the children would not be returning to the USA on 12 April 2024. Later that day (10 April 2024), F commenced divorce proceedings in Iowa.

4. On 07 May 2024, F applied to the District Court in Iowa for orders including the return of the children. On 31 May 2024, M applied for a child arrangements order and an inherent jurisdiction declaration as to habitual residence. Ultimately, these other applications relating to the children, in Iowa and in England, have been stayed pending determination of F's application under the 1980 Hague Convention.

5. During closing submissions, counsel agreed that the issues in the case could be formulated as set out in the following paragraphs.

6. F's application is put on the following bases:
   (1) He had agreed to a temporary and not a permanent relocation, and he fully expected the children to be returned to the USA on 12 April 2024.
   (2) Accordingly, for the purposes of Article 3 of the 1980 Convention:
      a. On 09 December 2023, M wrongfully removed the children from the USA because:
         i. Permanent relocation was not in the parties' joint contemplation; *and/or,*
         ii. By dishonestly allowing F to believe that the relocation was only temporary when she herself intended it to be permanent, she obtained F's consent by deception and that consent is therefore vitiated; *or*
      b. By 04 January 2024 (when M enrolled the children in nursery), or by 24 January 2024 (when M registered the children with a GP in England), or by 01 March 2024 (when M applied for a job in England), or by around 04 April 2024 (by which date M had secured Universal Credit and had obtained a self-assessment record and unique tax-payer reference from HMRC), M wrongfully retained the children in the UK because, by her actions, she had unilaterally repudiated the parties' agreement to a temporary relocation and had thereby repudiated F's custody rights; *or*

c. On 10 April 2024, M wrongfully retained the children in the UK when she informed F that the children would not be returning on 12 April 2024.
d. Whichever date is taken for M's wrongful removal or retention, the children remained habitually resident in the USA as at that date.

7. M opposes F's application on the following bases:
(1) The parties had agreed that the move to the UK on 09 December 2023 was a permanent relocation for the children: they would live full-time with M, and F would seek to organise his work such that he could spend as much time as possible with M and the children in the South of England.
(2) Accordingly, Article 3 is not engaged because:
a. There was no wrongful removal on 09 December 2023 because M did not act dishonestly in any way and her actions were in accordance with the parties' joint contemplation at the time.
b. There was no wrongful retention at any of the points asserted by F because:
i. M's actions were simply in accordance with the agreed permanent relocation; *or*
ii. Even if M's actions were unilateral and not in accordance with an agreed permanent relocation, the children's habitual residence had by then changed from the USA to the UK.
(3) Alternatively, if Article 3 is engaged, then M relies on the following Article 13 defences:
a. Article 13(a): F consented *or* acquiesced in the wrongful removal or retention of the children; *and/or*
b. Article 13(b): F's alleged abusive behaviours and M's alleged mental health difficulties are such that there is a grave risk that a return to the USA would expose both girls to physical or psychological harm or would otherwise place them in an intolerable situation,
and the court should exercise its discretion so as to refuse to make a return order.

8. F resolutely disputes that any defence is made out. Without conceding any aspect of M's case as to 'Harm/Intolerability', F proposes a range of protective measures and asserts that, even if the court were to find that one or more defence is made out, the court should nonetheless exercise its discretion so as to make a return order.

9. I am of course not deciding the long-term care arrangements for EF and GH. Whether or not I make a return order will simply determine whether issues relating to long-term care arrangements are to be resolved by an Iowan court or an English court.

2. This Hearing

10. In accordance with previous directions, the case was listed before me for final hearing on 11 December 2024 with a time estimate of three days. For the first two days, F joined remotely from Iowa; M attended in person. On the third day, all partied joined remotely for a short hearing at which I announced my decision (with this written judgment following shortly thereafter).

11. I have considered the core bundle which includes:
(1) Statements from M and F.

(2) Written evidence from Dr Tom McClintock, a consultant in forensic psychiatry, who was jointly instructed with the court's permission to report in relation to M.
(3) Documents relating to the divorce proceedings in Iowa.
(4) Documents relating to M's application for a declaration as to habitual residence.

12. The court had given permission to the parties jointly to instruct an expert to report on whether the protective measures proposed by F would be effective in Iowa. The parties were unable to identify a suitable expert and, sensibly, neither party sought an adjournment to allow further enquiries to be made.

13. I received detailed skeleton arguments from counsel. In his skeleton on behalf of M, Mr Evans complained that F's primary case (that M had wrongfully removed the children on 09 December 2024) had been signalled late in the day and M had not had an opportunity to respond to it. At the outset of the hearing, Mr Evans confirmed that M was not seeking an adjournment of the final hearing. I indicated that, without forming any view as to whether there had been a late change in F's position or the significance of any such change, I would adopt a flexible approach to evidence and submissions to ensure that both parties cases were fully heard.

14. Given the factual issues in this case and having regard to para 3.14 of the President's Guidance *"Case Management and Mediation of International Child Abduction Proceedings"* (01 March 2023), I heard focused oral evidence from the parties. I then heard oral submissions from counsel before taking time to reflect and prepare this judgment.

15. I am grateful to Mr Langford and Mr Evans, and their respective instructing solicitors, for their assistance.

3. Legal Framework

16. There is no dispute as to the law. It is however necessary to burden this judgment with relatively lengthy extracts from case law given the multiple and, to a degree, over-lapping issues in the case.

3.1 Article 3

17. Article 3 of the 1980 Hague Convention provides as follows:

> 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. The relevant date for assessing whether a removal or retention is in fact wrongful is the date of the alleged removal or retention (*Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105, *per* Moylan LJ at para 68).

19. The burden of proving a wrongful removal or retention rests with the applicant (here, F). However, issues of consent do of course pertain to both Article 3 (was the removal or retention wrongful?) and Article 13(a) (has the defence of 'consent' been established?). As explained by Ward LJ in *Re P (A Child) (Abduction: Custody Rights)* [2004] EWCA Civ 971, at para 33 (and recently endorsed by Peter Jackson LJ in *Re G (Abduction: Consent / Discretion)* [2021] EWCA Civ 139 at para 15), where there is a prima facie wrongful removal, issues of consent are to be addressed under Article 13(a) and the burden of proving consent rests with the respondent (here, M).

3.2 Habitual Residence

20. The habitual residence of the children as at the relevant date is a key consideration. As explained by Lord Hughes in *Re C (Children)* [2018] UKSC 8 at para 34: "The Convention cannot be invoked if by the time of the alleged wrongful act, whether removal or retention, the child is habitually resident in the State where the request for return is lodged."

21. In *Re M* (above), between paras 42 and 63, Moylan LJ provides a helpful digest and consolidation of the substantial body of case law which relates to the meaning of "habitual residence". In doing so, at para 63, Moylan LJ endorses the thirteen point summary provided by Hayden J in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (at para 17) save that Moylan LJ suggests that the original point (viii)[1] of Hayden J's summary should be omitted in the future "so that the court is not diverted from applying a keen focus on the child's situation at the relevant date". The twelve remaining points of Hayden J's summary read as follows:

    i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (*A v A*, adopting the European test).

    ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (*A v A*, *Re KL*).

    iii) In common with the other rules of jurisdiction in Brussels IIR its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned': *A v A* (para 80(ii)); *Re B* (para 42) applying *Mercredi v Chaffe* at para 46).

[1] Hayden J's sub-paragraph (viii) read: "In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (*Re B – see in particular the guidance at para 46*)".

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (*Re R*).

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (*Re LC*). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.

vi) Parental intention is relevant to the assessment, but not determinative (*Re KL*, *Re R* and *Re B*).

vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (*Re B*); (emphasis added).

viii) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi).

ix) The relevant question is whether a child has achieved **some** degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident (Re R) (emphasis added).

x) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIR envisages within 3 months). It is possible to acquire a new habitual residence in a single day (A v A; Re B). In the latter case Lord Wilson referred (para 45) those 'first roots' which represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move.

xi) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (Re R).

xii) The structure of Brussels IIa, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; as such, “if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual

> residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B supra).

22. Hayden J continued in *Re B* (above) at para 18: "If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven."

23. In *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659, at para 45, Moylan LJ cautioned that that ""some degree of integration" is not a substitute for the required global analysis."

3.3 Repudiatory Retention

24. As set out above, one aspect of F's case is that at various points between 09 December 2023 and 10 April 2024, M acted in ways which – whether taken individually or cumulatively – constituted a "repudiatory retention".

25. The concept of repudiatory retention was endorsed by the Supreme Court in *Re C (Children)* [2018] UKSC 8. In setting out the background, Lord Hughes (giving the leading judgment in respect of legal principles) said:

> 11. In the simple paradigm case of wrongful removal, one parent will have taken the child from the State where s/he is habitually resident to a destination State. Similarly, in the simple paradigm case of wrongful retention, one parent will have travelled with the child from the State of habitual residence to the destination State, for example for an agreed fortnight's holiday (and thus without the removal being wrongful), but will then wrongfully have refused to return. In each of those paradigm cases, the child will have remained habitually resident in the home State. An application under the Abduction Convention will be made in the destination (or "requested") State for the return of the child to the State of habitual residence. The return will be a summary one, without investigation of the merits of any dispute between the parents as to custody, access or any other issue relating to the upbringing of the child (article 16). Such merits decisions are for the courts of the State of the child's habitual residence.
>
> 12. In some cases, however, it is possible that by the time of the act relied upon as a wrongful removal or retention, the child may have acquired habitual residence in the destination State. It is perhaps improbable in the case of removal, but it is not in the case of retention. It may particularly happen if the stay in the destination State is more than just a holiday and lasts long enough for the child to become integrated into the destination State. It is the more likely to happen if the travelling parent determines, however improperly, to stay, and takes steps to integrate the child in the destination State. Even in the case of wrongful removal it may be possible to imagine such a situation if, for example, there had been successive periods of residence in the destination State, followed by a removal from the State of origin which infringed the rights of custody of the left-behind parent.

26. I have found it helpful to consider the way in which Lord Hughes framed the concept of "repudiatory retention". I have added my own emphasis in **bold**:

> 37. There is some difficulty in devising a suitable shorthand for the possibility of wrongful retention in advance of the due date for return. One which has been used is "anticipatory retention". This is certainly convenient but it may lead to misconceptions. If early wrongful retention is a legal possibility, it is not because there is an anticipation of retention. On the contrary, the child is retained in the destination State from the moment of arrival, just as he is removed from the home State at the moment of departure. **If the departure and arrival are permitted by agreement with the left-behind parent, or sanctioned by the court of the home State, they are still respectively removal and retention, but they are not wrongful. So what is under consideration is a retention which becomes wrongful before the due date for return.**
>
> 38. The key to the concept of early wrongful retention, if it exists in law, must be that the travelling parent is thereafter denying, or repudiating, the rights of custody of the left-behind parent and, instead of honouring them, is insisting on unilaterally deciding where the child will live. In the absence of a better expression, the term which will be used here will, for that reason, be "repudiatory retention". That is not to import contractual principles lock stock and barrel into the concept, for the analogy with a contract is only partial. It is simply to attempt a shorthand description.
> . . .
> 43. When the left-behind parent agrees to the child travelling abroad, he is exercising, not abandoning, his rights of custody. Those rights of custody include the right to be party to any arrangement as to which country the child is to live in. It is not accurate to say that he gives up a right to veto the child's movements abroad; he exercises that right by permitting such movement on terms. **He has agreed to the travel only on terms that the stay is to be temporary and the child will be returned as agreed. So long as the travelling parent honours the temporary nature of the stay abroad, he is not infringing the left-behind parent's rights of custody. But once he repudiates the agreement, and keeps the child without the intention to return, and denying the temporary nature of the stay, his retention is no longer on the terms agreed.** It amounts to a claim to unilateral decision where the child shall live. It repudiates the rights of custody of the left-behind parent, and becomes wrongful.
>
> 44. The plain purpose of the Abduction Convention is to prevent the travelling parent from pre-empting the left-behind parent. The travelling parent who repudiates the temporary nature of the stay and sets about making it indefinite, often putting down the child's roots in the destination State with a view to making it impossible to move him home, is engaging in precisely such an act of pre-emption.
> . . .
> 50. For all these reasons, the principled answer to the question whether repudiatory retention is possible in law is that it is. The objections to it are insubstantial whereas the arguments against requiring the left-behind parent to do nothing when it is clear that the child will not be returned are convincing and conform to the scheme of the Abduction Convention. The remaining question is what is needed to constitute such repudiatory retention.

27. Lord Hughes then considered the test to be applied where repudiatory retention is alleged. Again, I have added my own emphasis in **bold**:

> 51. As with any matter of proof or evidence, it would be unwise to attempt any exhaustive definition. The question is whether the travelling parent has manifested a denial, or repudiation, of the rights of the left-behind parent. Some markers can, however, be put in place.
>
> (i) It is difficult if not impossible to imagine a repudiatory retention which does not involve a subjective intention on the part of the travelling parent not to return the child (or not to honour some other fundamental part of the arrangement). The spectre advanced of a parent being found to have committed a repudiatory retention innocently, for example by making an application for temporary permission to reside in the destination State, is illusory.
>
> (ii) A purely internal unmanifested thought on the part of the travelling parent ought properly to be regarded as at most a plan to commit a repudiatory retention and not itself to constitute such. If it is purely internal, it will probably not come to light in any event, but even supposing that subsequently it were to do so, **there must be an objectively identifiable act or acts of repudiation before the retention can be said to be wrongful.** That is so in the case of ordinary retention, and must be so also in the case of repudiatory retention.
>
> (iii) That does not mean that the repudiation must be communicated to the left-behind parent. To require that would be to put too great a premium on concealment and deception. Plainly, some acts may amount to a repudiatory retention, even if concealed from the left-behind parent. A simple example might be arranging for permanent official permission to reside in the destination State and giving an undertaking that the intention was to remain permanently.
>
> (iv) There must accordingly be some objectively identifiable act or statement, or combination of such, which manifests the denial, or repudiation, of the rights of custody of the left-behind parent. A declaration of intent to a third party might suffice, but a privately formed decision would not, without more, do so.
>
> (v) There is no occasion to re-visit the decision of the House of Lords in *In re H; In re S* (para 28 above) that wrongful retention must be an identifiable event and cannot be regarded as a continuing process because of the need to count forward the 12-month period stipulated in article 12. That does not mean that the exact date has to be identifiable. It may be possible to say no more than that wrongful retention had clearly occurred not later than (say) the end of a particular month. If there is such an identifiable point, it is not possible to adopt the submission made to the Court of Appeal, that the left-behind parent may elect to treat as the date of wrongful retention either the date of manifestation of repudiation or the due date for return. It may of course be permissible for the left-behind parent to plead his case in the alternative, but that is a different thing. When once the actual date of wrongful retention is ascertained, the article 12 period begins to run.

3.4 Articles 12 and 13

28. The relevant parts of Article 12 are as follows:

> 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.

29. The relevant parts of Article 13 of the 1980 Convention are as follows:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
>
> 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.
>
> . . .
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

3.5 Consent

30. The correct approach was helpfully summarised by Peter Jackson LJ in *Re G (Abduction: Consent / Discretion)* [2021] EWCA Civ 139. Again, I have added my own emphasis in **bold**:

> 25. The position can be summarised in this way:
>
> (1) The removing parent must prove consent to the civil standard. The inquiry is fact-specific and the ultimate question is: had the remaining parent clearly and unequivocally consented to the removal?
>
> (2) **The presence or absence of consent must be viewed in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract**. The court will focus on the reality of the family's situation and consider all the circumstances in making its assessment. A primary focus is likely to be on the words and actions of the remaining parent. The words and actions of the removing parent may also be a significant indicator of whether that parent genuinely believed that consent had been given, and consequently an indicator of whether consent had in fact been given.

(3) **Consent must be clear and unequivocal but it does not have to be given in writing or in any particular terms. It may be manifested by words and/or inferred from conduct.**

(4) A person may consent with the gravest reservations, but that does not render the consent invalid if the evidence is otherwise sufficient to establish it.

(5) **Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties.**

(6) **Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid.**

(7) Consent must be given before removal. Advance consent may be given to removal at some future but unspecified time or upon the happening of an event that can be objectively verified by both parties. To be valid, such consent must still be operative at the time of the removal.

(8) Consent can be withdrawn at any time before the actual removal. The question will be whether, in the light of the words and/or conduct of the remaining parent, the previous consent remained operative or not.

(9) The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective.

26. All of these matters are well-established, with the exception of the last point, which did not arise for consideration in the reported cases. As to that, there are compelling reasons why the removing parent must be aware of whether or not consent exists. The first is that as a matter of ordinary language the word ‘consent’ denotes the giving of permission to another person to do something. For the permission to be meaningful, it must be made known. This natural reading is reinforced by the fact that consent appears in the Convention as a verb (“avait consenti/had consented”): what is required is an act or actions and not just an internal state of mind. But it is at the practical level that the need for communication is most obvious. Parties make important decisions based on the understanding that they have a consent to relocate on which they can safely rely. It would make a mockery of the Convention if the permission on which the removing parent had depended could be subsequently invalidated by an undisclosed change of heart on the part of the other parent, particularly as the result for the children would then be a mandatory return. Such an arbitrary consequence would be flatly contrary to the Convention’s purpose of protecting children from the harmful effects of wrongful removal, and it would also be manifestly unfair to the removing parent and the children.

3.6 Acquiescence

31. The applicable principles were summarised by Lord Browne-Wilkinson in *Re H and Others (Minors) (Abduction: Acquiescence)* [1997] 1 FLR 872, at page 884:

(1) For the purposes of Art 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill LJ said in [*Re S (Minors) (Abduction: Acquiescence)* [1994] 1 FLR 819 at 838]: "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".

(2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.

(3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.

(4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent clearly is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

3.7. Harm / Intolerability

32. In the recent case of *Re W and E (Habitual Residence)* [2024] EWHC 2596, Cobb J provided a helpful distillation of the authorities and a summary of the applicable principles. That case also involved a mother who had raised domestic abuse and mental health issues. Each case must of course be considered on its own facts. I nonetheless consider it helpful to set out paras 67 to 74 of Cobb J's judgment in full:

67. The legal principles engaged on an application under the 1980 Hague Convention where Article 13(b) is raised are well-established. They were extensively discussed in *Re A (Children) (Abduction: Article 13b)* [2021] EWCA Civ 939, (*"Re A"*). In his judgment in that case Moylan LJ drew from the Supreme Court decisions of *In re E (Children) (Abduction Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 (*"Re E"*) and *Re S (Abduction: Article 13(b) Defence)* [2012] 2 AC 257 (*"Re S"*). I have also found particularly useful the judgment of Baker LJ in *Re IG (Child Abduction: Habitual Residence: Article 13(b))* [2021] EWCA Civ 1123, and Moylan LJ in *Re C (Article 13(b))* [2021] EWCA Civ 1354 ("Re C").

68. The following principles emerge from these authorities, relevant to the 1980 Hague application:

i) Article 13(b) is, by its very terms, of restricted application: [§31: *Re E (Children)*]; the defence has a high threshold;

ii) The focus must be on the child, and the risk to the child in the event of a return;

iii) The burden of proof lies with the person, institution or other body which opposes the child's return. The standard of proof is the ordinary balance of

probabilities, subject to the summary nature of the Hague Convention process: [§32: *Re E (Children)*];

iv) The risk to the child must be "grave" and, although that characterises the risk rather than the harm, "there is in ordinary language a link between the two": [§33: *Re E (Children)*];

v) "Intolerable" is a strong word, but when applied to a child must mean a situation which this particular child in these particular circumstances should not be expected to tolerate. Amongst these are physical or psychological abuse or neglect of the child: [§34: *Re E (Children)*];

vi) Article 13(b) is looking to the future, namely the situation as it would be if the child were to be returned forthwith to his home country: [§35: *Re E (Children)*];

vii) In a case where allegations of domestic abuse are made:

> "… the court should first ask whether, *if they are true*, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison Judges are so helpful." [§36]: *Re E (Children)* (Emphasis by italics added).

viii) In this case, I have noted in particular the passage in §34 of *Re S* (Lord Wilson):

> "The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned".

ix) The court must examine in concrete terms the situation in which the child would be on a return. In analysing whether the allegations are of sufficient detail and substance to give rise to the grave risk, the judge will have to consider whether the evidence enables him or her confidently to discount the possibility that they do;

x) The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Thus:

> "… the clearer the need for protection, the more effective the measures will have to be" [§52: *Re E* (Children)].

69. Moylan LJ in *Re C* [2021] (citation above) emphasised that the risk to the child must be a *future* risk (§49-50). He cited from the Good Practice Guide to emphasise that:

> "… forward-looking does not mean that past behaviours and incidents cannot be relevant to the assessment of a grave risk upon the return of the child to the State of habitual residence. For example, past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists. That said, past behaviours and incidents are not per se determinative of the fact that effective protective measures are not available to protect the child from the grave risk". (§50)

70. Thus, an assessment needs to be made of the

> "… circumstances as they would be if the child were to be returned forthwith. The examination of the grave risk exception should then also include, if considered necessary and appropriate, consideration of the availability of adequate and effective measures of protection in the State of habitual residence" (§50).

He added:

> "It is also axiomatic that the risk arising from the child's return must be *grave*. Again quoting from *Re E,* at [33]: "It must have reached such a level of seriousness as to be characterised as 'grave'". As set out in *Re A,* at [99], this requires an analysis "of the nature and degree of the risk(s)" in order to determine whether the required grave risk is established" (emphasis in the original).

71. I am clear that my role is not to engage in a fact-finding exercise, but as Moylan LJ went on to observe:

> "… unless the court properly analyses the nature and severity of the potential risk which it is said will arise if the child is returned to the requesting State, the court will not be in a position properly to assess whether the available protective measures will sufficiently address or ameliorate *that* risk such that the grave risk required by *Article 13(b)* will not have been established. As set out in *Re E,* at [36], the question the court is considering is "how the child can be protected against the risk" (my emphasis). The whole analysis is contextual and forms part of the court's process of reasoning, as referred to by me in *Re A,* at [97], adopting this expression from *Re S (A Child) (Abduction: Rights of Custody)* [2012] 2 AC 257, at [22]". (§58)

72. I also have regard, as I must to the definition of domestic abuse contained in section 1(3) of the Domestic Abuse Act 2021 and PD12J FPR 2010.

73. It is relevant, in a case in which the mother has raised both domestic abuse and mental health issues, that I look at the allegations cumulatively and not independent of each other. In *In re B (Children)* [2022] 3 WLR 1315, Moylan LJ said:

> "[70] The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent <u>as a whole, not individually</u>. There may, of course, be distinct strands which have to be

analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s)." (emphasis by underlining added).

74. Given the existence of the mental health concerns, I have further had regard to *Re S (a child) (abduction: article 13(b): mental health)* [2023] EWCA Civ 208 and to my own decision in *Re A (Article 13(b): Mental Ill-health)* [2023] EWHC 2082 (Fam).

3.8 Discretion

33. If I find that one of the defences is made out, then the court's discretion is at large. As explained by Baroness Hale in *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55:

42. In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the Contracting States and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the Contracting States.

43. My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe LJ in the passage quoted in para 32 above, save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.

44. That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.

45. By way of illustration only, as this House pointed out in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, para 55, "it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate." It was not the policy of the

Convention that children should be put at serious risk of harm or placed in intolerable situations. In consent or acquiescence cases, on the other hand, general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her future can be decided in her home country.

34. In *Re G (Abduction: Consent/Discretion)* [2021] EWCA Civ 139, Peter Jackson LJ said:

> 41. To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.
>
> 42. In a consent case, the better view is that the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction may be relatively slight, while the weight to be attached to home-based decision-making and comity will depend critically on the facts of the case and the view that the court takes of the effect of a summary return on the child's welfare.

3.9 Fact-Finding

35. Insofar as it is necessary for me to resolve disputed facts, I keep well in mind the well-established principles relating to fact-finding. These include: the burden is on the party asserting that any particular fact is true; the standard of proof is the balance of probabilities; I must consider all of the evidence in the round, whatever the nature of the evidence; in relation to oral evidence, I must be cautious when drawing any inferences from a witness's demeanour and must make allowance for the fallibility of memory; people tell lies for all sorts of reasons; just because a person has lied about one matter, it does not mean that they have lied about other matters.

4. Relevant Background

36. M and F met online in September 2017. Their relationship developed quicky. In September 2018, M travelled to Iowa for what was intended to be a ten-day visit but she stayed longer and the parties were married in December 2018. They set up home in Iowa, though both agree that M was never really happy there. M says that F had known for many years that she longed to return to England. F says that he was aware of M's wishes from some time in 2022.

37. M says that the marriage was characterised by domestic abuse from its very early stages. She says that the abuse, which is robustly denied by F, involved (1) sexual abuse (including rape, the first occasion being in 2019) and (2) coercive and controlling behaviour (including verbal abuse, financial abuse and F using technology to spy on her and record her conversations without her permission).

38. EF was born in 2019, and GH was born in 2021.

39. Following the pandemic, M and the children had two extended trips to England. The first was from April to June 2022. F joined them for the whole of that trip.

40. In July 2022, F messaged a family friend confirming that he was looking for remote jobs and that *"Hope for anything that will allow me to work remotely in the UK for 182 days a year."* F told me that this would have been advantageous from a tax perspective and that whilst they were exploring a *"multi-country future"* their *"base would always be in the US"*.

41. There is a letter to M's grandparents dated 28 July 2022, purportedly from both M and F, in which it is stated: *"As you know, we are moving back to England"*. F told me that he had not seen this letter before it was produced during these proceedings. M said that she had typed the letter but it had been *"jointly worded with [F]"*.

42. In August 2022, M made the first of a series of job applications for positions in the South of England. Some of these positions involved a mix of "in person" as well as "remote" working. M said that F was aware of this. F told me that he had understood that they were wholly remote positions.

43. The second extended trip to England was from December 2022 to March 2023. F did not join M and the children for that trip save that he accompanied them on their journeys to and from England.

44. In January 2023, M messaged F about the possibility of her setting up as "an LLC" (a 'limited liability company') saying *"I won't be a resident anymore"* (referring to her residence in the USA). In his response, F said: *"Having an LLC and not being a resident is not an issue . . ."*.

45. Early in 2023, M started keeping a diary. In the weeks and months that followed, she records multiple examples of F's alleged abusive behaviours (which he robustly disputes) and her own deep unhappiness.

46. On 27 February 2023, M noted in her diary that she had told F calmly that *"no part of me. Not one bit"* wanted to return to the USA. F told me that he recalled M saying that.

47. On 21 March 2023, M saw a medical practitioner in Iowa with a presenting complaint of "blood blister". The medical practitioner noted: *"she recently returned from visiting her family in England. She is really missing her family. She reports frustrations with her restrictions due to limitations from not driving, no personal finances and minimal support . . . she reports that she has no emotional support from her husband."* M was described as tearful but with *"no acute distress"* and it was recommended that she continue with counselling. M had previously received counselling in 2020.

48. M received counselling in Iowa from around April 2023. This continued through to August 2024. There is a letter from the therapist who wrote: *"throughout counselling, [M]'s reports of the patterns of action as well as how she reported them, was consistent over time. I diagnosed M with adjustment disorder with mental anxiety and*

depressed mood swing stemming predominantly from her treatment by [F]. This was exacerbated by her isolation from her family and culture."

49. On 24 April 2023, M saw a medical practitioner with, again, a presenting complaint of "blood blister". The medical practitioner noted that M appeared nervous so asked about her welfare and noted: *"She feels trapped in an abusive and controlling relationship. He is tracking her phone and has cameras around the house so he knows always where she is and what she is doing. She would like to leave him but is afraid she will lose her children as well. His family is wealthy and hers is not. Her family is in England and are supportive from afar. She does not drive so he has to drive her everywhere."* The medical practitioner consulted a social worker who came to the clinic and spoke to M. M told the social worker that she had recently felt unsafe in her home with her husband and children; that there was no physical abuse, but verbal and emotional abuse. When the social worker asked M what would help her most, M said she *"just needed a plan B in case things do not go well."* The social worker provided M with links to support.

50. F agreed (with some reluctance) that, from around April 2023, he and M had "serious discussions" about the family moving to England. F said that these discussions were "driven by [M]" and were "exploratory only". M says that these discussions were all with a view to implementing their joint plan for permanent relocation.

51. M and F made extensive enquiries about buying a house in the South of England. These enquiries involved viewing properties (with the assistance of M's family in England) and communicating with a conveyancing solicitor and a financial adviser. F assisted by providing financial information and signposting M to mortgage brokers.

52. In May 2023, a letter was sent, purportedly from M and F, to the owners of a property which was for sale. F says that he had not seen this letter until it was produced within these proceedings. The letter accompanied a pre-auction offer. It included the following:
"Thank you for letting my mum view your properties on 9th May on our behalf. We thought it was best for us to introduce ourselves. Firstly, we are a family and see this property as our forever-home. . . . We would like to raise our family and create a stable base for them. . . .Secondly, in order to return to the UK, we need a place to live. And we have some very specific requirements which are surprisingly all found in your property!. . . We really do see this as our forever home."

53. On 29 June 2023 M obtained US citizenship. She told me that this was a positive step because it meant that she could live in England and return to the USA from time to time without restrictions.

54. On 18 October 2023, F's sister informed M that her forthcoming wedding would probably take place in early May 2024. M's reply included the following: *"April or May sounds good for us as we'll likely be in England like last year for Christmas until spring again. My sister is pregnant! And due in March so I want to be there for that. And then back in England again for June and my 30th birthday in July. But we don't have any plans in place April/May."*

55. On 02 November 2023, M says that she told F that she *"would rather die than live in the USA"* and that F assured her that *"he would help get the girls and I home"*. F told me that M had told him that she would rather die than live in the USA. He could not recall when and he had not given the assurance which M says he did.

56. On 11 November 2023, M registered EF for the local 'Rainbows' in England. F told me that he had not been aware of this. M said that F had indeed been aware and had responded positively as *"it sounded like American Girls Scouts"*.

57. On 15 November 2023, M sent an email to a prospective employer in the South of England who had previously offered M a job which she had turned down. In the email, M updated the prospective employer about her US citizenship and wrote: *"I'll be looking for more permanent opportunities to start in the new year."* F says he had not been aware of this email until these proceedings.

58. On 16 November 2023, M says that F told her that he had two jobs lined up to enable him to travel to England to see her and the children. F told me (again with some reluctance) that he could recall saying that he had one job lined up, but he may have said two.

59. On 18 November 2023, F booked flights for the family to leave the USA on 09 December 2023. F also booked return tickets for 12 April 2024. M says that she told F that return tickets were not necessary but he *"took the laptop from me"* and went on and booked them. She says that she believes he did so because it must have made good financial sense. She draws attention to the fact that, unlike with previous transatlantic travel, F had not booked flights with a view to him accompanying M and the children back to the USA on 12 April 2024. F disputes M's account and says that he booked return flights because the plan had been for an extended stay only, to allow M to be present for the birth of her niece in March 2024 and for Easter 2024, but for her and the children to return in time for his sister's wedding. M says that she never in fact received an invitation to the wedding.

60. On 29 November 2023, M sent an email to the local nursery in England: *"Hi, I'm from [M's home county] but for the last few years I've been living abroad. I now have a 2 year old and a 4 year old. I have been a stay at home mum for them so far but we are returning to [M's local area] this Christmas and I'd like to start them in a nursery in January. Please could I have some more information if there's places available? And any advice on how to navigate nurseries and funding would be appreciated!"* F says that he had been aware of this approach but had thought the girls' attendance at nursery was to be on a temporary basis to allow M to care for her ailing grandmother.

61. On 09 December 2023, the family left the USA and arrived in England the next day. The family brought a considerable amount of belongings with them including, M says, a poster from EF's wall. Whilst a considerable amount of belongings were left in Iowa (and the family dog, who M says was more of a guard-dog than a pet dog), M says that this made sense because at that stage F was going to be returning to live in Iowa.

62. M told me that, on arrival, she remembered F telling the immigration officer that *"the girls are staying"* but he would be returning to the USA. It was put to M that F had in

fact said *"the girls are staying longer"* but M insisted that she had listened carefully and that her account was correct.

63. It is agreed that in December 2023 and January 2024, M and F looked at a number of properties as potential homes.

64. On 12 December 2023, F bought a one-year membership which would grant free admission to M and the children to visit National Trust properties. On the same day, M obtained library cards for the children.

65. In December 2023, F booked return flights for a trip from London to Athens in June 2024. F says that these were in fact intended to be connecting flights and that the journey would have begun and ultimately ended in the USA, though no return flights from the USA had been booked. M says that these flights were booked to and from London because it was agreed and understood that England was now the girls' home.

66. On 04 January 2024, M and F visited the local nursery which M had previously emailed. They had a look around, completed the girls' registration there and bought uniforms. As I have already mentioned, F says that he had agreed to this on the understanding that it was to be a temporary placement which would allow M to support her ailing grandmother. M says that this was an open-ended placement for both girls. The Nursery Manager has written a letter dated 31 July 2024 which includes: *"On the show around I felt Dad was a little domineering and forceful in the way he spoke to Mum. He did not take much of an interest in the details of the nursery other than stating his preference of what days and times he wanted the girls to attend."*

67. At some point in December 2023 or early January 2024, M and F watched the girls in a dance class, M having enrolled them for dance lessons. F told me that he had thought it was *"cool"*.

68. In early-mid January 2024, F travelled to Europe on his own. He brought forward his return to the USA and flew back on 18 January 2024.

69. On 24 January 2024, M registered the children with a local GP and subsequently with a local dentist. Before leaving the USA, M had obtained the children's medical records to bring with them to England. F disputes M's assertions that he had been aware of these steps being taken.

70. On 26 January 2024, M sent an email to F with some *"good news"* about a property they had been interested in: *". . . It's one of three remaining houses left on the estate they need to sell before removing the sales team. . . . They've asked us to write down what we would like them to offer and then he can put it forward to the bosses. As an offer package. Can you crunch some numbers and have a think please? [Happy emoji]"*. F did not assist and M told me that, from around this point, she knew that there would be no imminent house purchase and so she started focusing on rental properties.

71. On 25 February 2024, M messaged F to tell him that she had a job interview. F replied: *"well done, hope it went well for you"*. On 27 February 2024, M messaged F saying: *"I need to find a car. . .."*.

72. On 01 March 2024, M messaged F saying: *"Good news! I got a job! [happy emoji]"*. F replied: *"Good job"*. When asked, M readily agreed that she had not provided F with any information about the job, saying that he had not asked for any.

73. On 03 March 2024, M messaged F asking him to transfer $18 000 for a new car. F replied on 06 March 2024: *"Do you think we just have 18 grand lying around?"*

74. On F's account, some time in late March 2024 (he said it was about a fortnight before 10 April 2024), F consulted lawyers in the USA with a view to lodging a divorce petition.

75. On 28 March 2024, F's mother messaged M: *"It has been quite a while since we've heard from you and the girls and we miss you so much . . . I'm looking forward to seeing you all in April when you come back. . . ."*. M replied the next day with a brief update and some photos. F invites me to place weight on the fact that M did not tell his mother that she and the children were not coming back. M told me that, before this message, she had had little if any direct contact with F's mother since July 2023 and she did not want to cause problems by telling her the truth. F also invites me to place weight on a message apparently sent to him from M's step-father which suggests that M's mother and step-father had not been aware of a plan for permanent relocation. M says that this message had been altered by F and that her mother and step-father had indeed been aware.

76. On all the evidence, following F's return to the USA on 18 January 2024, communication between the parents was sparse. M says that F hardly ever asked to see the girls. F does not accept that. In any event, there was very little contact between the girls and F. There was no contact at all during February 2024.

77. F agrees that following their arrival in England on 10 December 2023, he and M had no communications whatsoever about M and the children returning to the USA or about the practicalities of what was going to happen with the return flights which F had booked for 12 April 2024. It was M who contacted F on 10 April 2024. When pressed, F said he did not know what he would have done about arrangements for 12 April 2024 if M had not made contact with him.

78. On 10 April 2024, starting at 1059 US time, there was an exchange of messages between M and F:

    M: *I'm guessing you've already cancelled the flights. If not it might be good to as soon as possible to recoup the costs.*

    F: *No*
    They can't be cancelled.
    I'm planning to pick you and the girls up on Friday.

    [There was a missed call from F to M]

F: *Are you going to talk to me?*

M: *I can't talk on the phone I'm corralling the girls*

F: *Then why did you send something like that?*

M: *We haven't discussed return plans. I'm working on Friday.*

F: *Discussed? These were plans we made well before you got a job.*
This is what you agreed to.
You have taken the girls away from me far too long already.

M: *I didn't agree to it when you booked them and we haven't discussed it since. I did what you told me to do, I got a jobbie here.*

[There was a further missed call from F to M]

F: *Yes you did.*
And I never told you to get a job there.
I'm not ok with continuing to be away from my girls in any way. Especially with your lack of communication and encouragement of being able to talk to them."

[There was a further missed call from F to M]

79. Later that day, F filed a divorce petition in Iowa.

80. On 11 April 2024, F altered the booking so that the return flights were scheduled for 12 October 2024.

81. On 16 April 2024, EF was offered a place at the local primary school. F says this was arranged without his knowledge.

82. On 19 April 2024, M was served with F's divorce petition. Prior to that point, she had no knowledge of F's intention to divorce.

83. On 07 May 2024, F applied to the District Court in Iowa and sought the return of the children to Iowa.

84. Later in May 2024, M was offered a tenancy and subsequently moved with the girls into rented accommodation.

85. On 31 May 2024, M applied for a child arrangements order and an inherent jurisdiction declaration as to habitual residence. In her application, M alleged coercive and controlling behaviour but only limited detail was provided in her supporting statement.

86. On 12 June 2024, F applied to the US Central Authority and, following liaison with ICACU, an application for a return order under the 1980 Hague Convention was made on 25 July 2024.

87. As I have already mentioned, M's application in England and F's application in Iowa were stayed pending determination of F's application under the 1980 Hague Convention.

5. Findings of Fact

88. I found the oral evidence to be illuminating both of itself and in the way it shed light on the significance or otherwise of certain parts of the documentary evidence. This is a classic case where all of the evidence needs to be considered in the round. I have also been assisted by counsel's submissions and have them well in mind.

89. It cannot have been easy for F giving evidence remotely. However, F is clearly an intelligent man who understood the questions that were being asked of him. F made some concessions, but these were generally extracted from him in cross-examination and were rarely, if ever, volunteered. When asked about aspects of the evidence which did not support his case, his responses tended to become vague. At times, his answers were simply incredible: for example, when he insisted that he had understood that M had been applying for remote work only; or when he maintained that he would have to go and check to see whether EF's poster had in fact been taken down from her bedroom wall. All in all, I did not consider F to be a reliable witness.

90. M was clearly uncomfortable giving evidence but answered questions in a straightforward manner. She made concessions readily (for example, when confirming that she had not given F any details about the job she had been offered in late February 2024) and her answers lacked embellishment. I found her to be an essentially credible witness who was doing her best to assist the court.

91. Overall, where M and F's evidence differs, it is M's evidence which I prefer. As far as the state of knowledge of M's mother and step-father, I am not in a position to determine the authenticity of the message produced by F. In any event, even if the message is authentic, it is open to different interpretations, one being that M's step-father did not want to get involved in the dispute between M and F.

92. I am satisfied that the evidence overall yields the following findings:

    (1) From March 2023, following the second extended stay in England, M and F made enquiries with a view to M and the children moving permanently to England. Those enquiries included:
        a. Searching for a family home which was to be *"a forever home"* and not a temporary home.
        b. M exploring jobs for herself with F's knowledge.
        c. F exploring jobs for himself with M's knowledge (with F, even on his own account, informing M on 16 November 2023 that he had at least one job lined up).
        d. M enrolling the children in 'Rainbows' with F's knowledge and approval.
        e. M contacting the local nursery with F's knowledge and approval.

(2) Whilst M was more enthusiastic about these enquiries, F was either directly involved in them or was aware of them and did nothing to dissuade M from pursuing them.

(3) F knew that these enquiries were not simply exploratory but were being made with a view to a permanent relocation taking place.

(4) When the family left the USA on 09 December 2023:

a. M genuinely believed that this was for the purposes of a joint plan of permanent relocation.

b. Whilst F may still have been equivocal in his own mind about the plan for permanent relocation, he did nothing to disabuse M of her genuine belief.

(5) M's account of the purchase of return tickets is correct, so is her account of what F said to the immigration officers. It may well have made financial sense for F to purchase return tickets, but whatever his reasoning, he did not tell M that he was purchasing return tickets because he was not agreeing to a permanent relocation.

(6) Following the arrival in England, until F's return to the USA, M and F acted jointly to implement a permanent relocation:
a. By visiting properties to buy.
b. By enrolling the children in nursery on an open-ended and not temporary basis.
c. By enrolling the children in dance classes.

(7) Following F's return to the USA, M continued to act to implement a permanent relocation:
a. By registering the children with a GP and dentist.
b. By securing a job for herself.
c. By securing a place for EF in primary school.
d. By securing state benefits and rented accommodation.

(8) F did nothing to suggest to M that she should not take these steps. For example, when informed about M's job offer and her wish to have a car, both of which reflected a permanent move, F did not protest or even question M about her reasoning.

(9) Generally, following his return to the USA, F displayed a striking lack of enquiry or concern for his children or their mother.

6. 1980 Hague Convention

6.1 The Position as at 09 December 2023

93. There is no issue that, as at 09 December 2023, the children were habitually resident in the USA.

94. When M removed the children from the USA on 09 December 2023, she did so with F and, even on F's case, on the basis that the children would not be returning to the USA for some five months. M did so in the genuine belief that this was to be a permanent

relocation. F had done nothing to disabuse M of her genuine belief. M did not act dishonestly or deceptively. Reminding myself of the observations of Lord Hughes in para 37 of *Re C (Children)* [2018] UKSC 8 (in **bold** above), there was nothing wrongful about this removal.

6.2 Repudiatory Retention

95. M's actions were in furtherance of what she understood to be a joint plan for the permanent relocation of the children. But was it in fact a joint plan? Had F consented to that plan in a way which was sufficiently clear and unequivocal? If he had not, then even though the removal on 09 December 2023 was not wrongful, a subsequent repudiatory retention would be wrongful.

96. There is no "silver bullet" piece of evidence, whether a formal agreement, an email or message, or even a clearly-recalled conversation where F is said to have "signed up unequivocally" to a permanent relocation. However, as explained in *Re G (Abduction: Consent / Discretion)* [2021] EWCA Civ 139, the issue of consent is to be viewed *"in the context of the common sense realities of family life and family breakdown, and not in the context of the law of contract"* and consent *"may be manifested by words and/or inferred from conduct."* In my judgment, and in light of my findings, consent can indeed be inferred from F's conduct – from both his acts and his omissions. M has discharged the burden of proof in this regard. There was no repudiatory retention.

6.3 The Position as at 10 April 2024

97. For similar reasons, there was no wrongful retention on 10 April 2024.

6.4 Habitual Residence

98. In case my analysis is wrong in respect of repudiatory retention or a "paradigm" wrongful retention, I should address the issue of the children's habitual residence at the relevant dates.

99. In my judgment, considering all the evidence and keeping my focus on the situation *for the children*, this is a case where habitual residence changed very swiftly following the children's arrival in England on 10 December 2023. My reasons for so concluding are as follows:
    (1) The children were aged just 4 and 2. Their principal carer, M, had brought them to England with a sure intention that she and they should remain here permanently.
    (2) Prior to arrival, arrangements had been set in train to promote the children's integration in terms of health care, nursery and Rainbows.
    (3) The children quickly became ensconced within the home and care of the maternal family with whom they had previously spent two extended trips.
    (4) Prior to F's return to the USA on 18 January 2024, the children's parents had acted jointly with a view to consolidating the children's integration in England, through enrolling them at nursery (and buying their uniforms), taking them to dance classes and searching for a suitable family home.
    (5) Following F's return to the USA, M continued the process of consolidating their integration in England.
    (6) As reported by the nursery (on 31 July 2024), following their commencement at nursery on 19 January 2024, the children settled well, formed friendships, and felt happy and secure with staff members.

(7) Though this factor does not weigh heavily in my reasoning, the impression I have formed from all the evidence is that the children and M led a somewhat isolated life in Iowa where they had relatively limited contact with the paternal family and even less with the wider community.
(8) I remind myself that it is the stability rather than the permanence of the children's residence which is relevant. Very soon after their arrival, the children were enjoying a stable life in the South of England.
(9) Standing back from it all, and taking all these considerations into account, I am satisfied that the children were very quickly integrated into the social and family environment surrounding them in the South of England.

100. The earliest date pleaded by F for a repudiatory retention is 04 January 2024. I struggle to see how two parents enrolling their children in nursery, whatever their respective private views about the duration of the nursery placement, could sensibly be viewed as a repudiatory retention. But in any event, by that date, the children had been in England for three and a half weeks. The next date pleaded is 24 January 2024. By that date, the children had been in England for six and a half weeks. The last date pleaded is that of the "paradigm" wrongful retention on 10 April 2024.

101. On the facts of this case, in my judgment, habitual residence had clearly changed by 10 April 2024. It had in fact changed swiftly following arrival into England. In my judgment, habitual residence had changed comfortably by 24 January 2024 and, on balance, it had changed by 04 January 2024.

6.5 Article 13(a)

102. What if I am wrong in my analysis under Article 3, and that (1) there was *either* a wrongful removal or retention and (2) habitual residence had not in fact changed by the relevant date?

103. I have already considered the issue of consent, and so this part of my judgment is predicated on my analysis in relation to consent also being wrong.

104. Has M proved that F acquiesced to the wrongful removal or retention? I have well in mind the four factors highlighted by Lord Browne-Wilkinson in *Re H and Others (Minors) (Abduction: Acquiescence)* [1997] 1 FLR 872. What was F's subjective intention? Considering his actions and inactions as I have described, and my findings, it is difficult to contemplate other than that he had acquiesced to the wrongful removal or retention. Furthermore, with regard to Lord Browne-Wilkinson's fourth factor, I am satisfied that F's conduct led M to believe that F was not going to assert his right to the summary return of the children, and justice requires that F should be held to have acquiesced.

6.6 Article 13(b)

105. I then turn to M's defence of 'harm / intolerability'. M relies on domestic abuse allegations and her own mental health.

106. In respect of M's domestic abuse allegations, I am not in a position to make findings one way or another but must adopt a realistic approach taking M's allegations at their highest. On any view, taken at their highest, M's allegations are extremely serious. They include rape; other forms of sexual abuse; and multi-faceted coercive

and controlling behaviours. If the children were to be exposed to these alleged behaviours, there would plainly be a grave risk of psychological harm for them.

107. M recorded some of her concerns in her diary and raised some of them with health professionals in Iowa. M has produced messages from another woman, Z, who reported sexually inappropriate behaviours by F.

108. F robustly denies M's allegations insisting that they are either fabricated or grossly exaggerated. He points to the fact that M did not contact the Police in Iowa and made only limited comments to health professionals. He also points to the fact that M's allegations were not set out fully in the earlier court proceedings in Iowa and in England.

109. However, as I have described, there is at least some supporting evidence for M's allegations (her diary entries; her comments to health professionals; the messages from Z). Furthermore, it is now trite to observe that victims of abuse do not all respond the same way, nor do they respond in the way that they might previously have been "expected to respond". For all sorts of reasons, some will find it harder to seek external assistance, whether from the Police, health professionals or other services; some will find it harder to provide a "full account" of their abuse.

110. I must consider M's domestic abuse allegations cumulatively with the issues raised in respect of M's mental health. Dr McClintock was asked to address a number of matters. He met with M for two hours and fifteen minutes on 17 October 2024. He reviewed relevant information in the case papers and in M's medical records.

111. In terms of diagnosis, Dr McClintock concluded (with my emphasis in **bold**):

"d. M was clearly unhappy during the latter part of her marriage in the United States, there were mood symptoms, difficulties in the relationship with her partner and she sought help from a counsellor. Based on the information available, it is difficult to be certain whether she was simply unhappy and under stress at that time, or whether her symptoms would have been so marked as to warrant a diagnosis of, for example, an adjustment disorder. This is sometimes known as reactive depression and describes a more marked psychological reaction to life events than might be generally anticipated. **My overall view is that M's presentation at that time was likely to have been on the borderline between what would have been considered as a reaction to stress and what might have been considered as an adjustment disorder**.

e. M has been staying in the United Kingdom with the children for a number of months, in her mind she views this as having relocated and whilst she is aware that the court might require the children to return to the United States, she has put this to the back of her mind and is pinning her hopes on a favourable judgement from the court. This is undoubtedly a very stressful time for her, at interview I felt her mood and presentation were largely unremarkable, she became tearful, albeit briefly, at times when we were discussing more emotive issues, but **I am satisfied that she does not have a mood disorder such as a depressive episode or an adjustment disorder/reactive depression**.

f. M reported intrusive thoughts and some nightmares about how she had been allegedly treated by her former partner and clinically, these symptoms would be consistent with a mild form of PTSD. However, this diagnosis cannot be made without the individual being exposed to an unpleasant event or events, which are serious and outside the normal range of experience. If the court agreed with the account of the father, then in the absence of such trauma, this diagnosis could not be made. **However, I would stress that even if the court agreed with the account which has been provided by the mother, about her relationship, her symptoms of PTSD are at the less severe end of the spectrum**. M does not have any other mental health condition such as substance misuse or a personality disorder."

112. In terms of treatment, Dr McClintock concluded:

"a. Given M's current presentation I do not consider that she requires treatment with any form of psychotropic medication such as an antidepressant or a sedative. It would be useful for her to consult the general practitioner or local talking therapy services so that she could have sessions of supportive therapy, to help her at this difficult time and these should continue until she no longer feels they are necessary.

b. If M is permitted to remain in the United Kingdom, she may wish to engage with sessions of trauma focused therapy, perhaps six to twelve in number, to help with the impact of how she was allegedly treated by the father. However, under these circumstances she may feel that the geographical distance between them allows her to put ideas of how he had allegedly treated her, to the back of her mind and such treatment would not be necessary."

113. As for the likely impact of a return on M's well-being and her ability to parent, Dr McClintock concluded (my emphasis in **bold**):

"a. M appeared to have formed the view that she had permanently relocated to the United Kingdom and whilst she was aware that the children may be required to return to the United States, M is hoping that this will not happen. I consider that by largely using denial as a coping mechanism she could be faced with having to suddenly deal with the impact of a court order to take the children back to the United States and under such circumstances, it is likely to be much more difficult for her to cope psychologically. **It is likely that she would become more anxious and distressed and she may develop a reactive depression/adjustment disorder. It is, however, very difficult to predict the exact nature of the symptoms she would experience or their severity. It is also likely that by returning to the United States, where her former partner is resident, she would have an increase in the frequency and severity of intrusive thoughts and nightmares about how he had reportedly treated her. Again, it is difficult to predict the exact magnitude of these symptoms.**

b. I have not been informed of any significant, current concerns regarding the mother's ability to look after these children, this was her report to me at interview and she did not feel that there had been any problems with the care she provided to them whilst living in the United States. **I consider that there is unlikely to be a significant impact on her ability to parent the children if required to return to**

the United States, even if her mood symptoms and the symptoms of PTSD, became more marked."

114. In respect of potential protective measures, Dr McClintock concluded:

"b. If M's mental state deteriorates in the period whilst she is still in the United Kingdom, before returning to the United States, it may be appropriate for the general practitioner to prescribe a small dose of a sedative antidepressant, such as amitriptyline, which is used for anxiety. The beta blocker propranolol may also be useful as a way of treating her anxiety. These medications, or similar, should continue once she returns to the United States and should be prescribed for as long as they are required. M should also continue to engage with the sessions of supportive counselling which I have recommended and again, she would be able to continue with these sessions until they were no longer felt necessary.

c. I consider that M is more likely to feel that trauma focused therapy would be necessary, should she return to the United States. At least twelve such sessions would be necessary, depending on the clinical outcome."

115. In response to a question on behalf of M in relation to the trauma focused therapy, Dr McClintock said that "Ideally this should be completed before a possible return".

116. On behalf of their respective clients, Mr Evans and Mr Langford have understandably sought to highlight those parts of Dr McClintock's conclusions which might be viewed as lending support to their respective cases.

117. Whilst not conceding 'risk / intolerability', F has proposed a range of protective measures in the form of undertakings and practical assistance. These include "non-molestation" undertakings and financial support so that M and the children can live and be maintained in suitable rented accommodation in Iowa. In the absence of expert evidence as to the enforceability of these undertakings in Iowa, F proposes that a consent order containing similar provisions should be submitted to the court in Iowa. Mr Langford told me that he anticipated that this could be achieved within a relatively short space of time. Whilst M does not concede that any protective measures would adequately address the 'risk / intolerability', she would also seek the payment of her legal fees in Iowa which F says he cannot afford.

118. My focus remains squarely on the children and the situation they would face on a return to Iowa. Whilst Dr McClintock considers it unlikely that M's response to being required to return to Iowa would impact significantly on her parenting capacity, he is clear in his view that the precise nature and severity of M's likely symptoms cannot be predicted. Given this unpredictability and the seriousness of M's allegations, I am satisfied that I cannot confidently discount the possibility that a return order would expose these two young children to a grave risk of harm. In my judgment, the protective measures proposed by F do not, and could not, adequately address that risk. Even if F were to obtain a consent order in Iowa and abide by his undertakings, there is still the possibility that M may suffer a significant deterioration in her mental health. Whilst that possibility may be low (but cannot be predicted), the consequences for these children would be grave.

6.7 Discretion

119. Realistically, the discretion would fall to be considered in respect of the Article 13(b) defence. I can deal with this relatively quickly. An important feature of this case is that the children have now been in England for a full year. The prospect of a "speedy return" has long passed, and the policy considerations supporting the prompt return of children who are wrongfully removed or retained are relatively weak.

120. Furthermore, welfare considerations point firmly against the making of a return order which would involve considerable disruption for the children in terms of day-to-day life, school (for EF) and nursery (for GH). If care arrangements cannot be agreed, then the English court will be better placed to gather evidence (including from school and nursery) and make a fully-informed and holistic welfare evaluation. It will be for the English court to decide whether the disruption which would accompany a return to the USA is nevertheless in the children's welfare interests.

7. Decision

121. In my judgment, for the reasons set out above:
(1) Article 3 of the 1980 Convention is not engaged.
(2) If Article 3 is in fact engaged and the children have been wrongfully removed or retained, then M has established defences under Article 13(a) and Article 13(b), and I exercise my discretion to refuse to make a return order.

122. Accordingly, F's application for a return order is dismissed.

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