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## FAMILY LAW

# Hague Convention Only Considers One Habitual Residence of a Child

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*Special to the Legal*

When a child is removed from or retained in a country that is not a child's habitual residence a parent can seek to have the child returned to their habitual residence country under the Hague Convention on the Civil Aspects of International Child Abduction. Those who handle child custody cases are familiar with this concept. However, the U.S. Court of Appeals for the Third Circuit was faced with a case of first impression when the issue arose as to whether a child can have concurrent habitual residences. The case of *Didon v. Castillo*, 2016 US App. Lexis 17467 (3d. Cir. 2016), had very unique facts that gave rise to this issue. In the *Didon* case, Alicia Castillo



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(referred to as Dominguez in the opinion and this article) had two children: A.D. and J.D. J.D. was from a prior relationship and A.D. was the biological child of Maurice Didon and Dominguez. Didon never formally adopted J.D. but the parties petitioned to change J.D.'s birth certificate to list Didon as her father. The petition was granted and Didon was listed as J.D.'s father on

her birth certificate. The parties lived in Saint Martin. Saint Martin consists of two legally distinct countries: the French Saint Martin and the Dutch Sint Maarten.

In the *Didon* matter, the children lived in the parties' home in Dutch Sint Maarten. However, the children went to school and their doctor's appointments in French Saint Martin. Further, Didon worked in French Saint Martin and the "family's administrative affairs, such as the children's insurance were managed [in French Saint Martin]."

According to the opinion: "In July 2014, Didon filed a custody action in French Saint Martin civil court seeking full custody of A.D. and J.D. Dominguez was neither served with papers in the action nor otherwise notified of the custody proceedings." While that custody action was open,

Dominguez informed Didon that she was taking a trip to New York City with A.D. and J.D. to attend her sister's wedding. Dominguez showed Didon round trip tickets with a return date for the trip.

According to the opinion, when Didon contacted the children's school to inform them that J.D. would be absent due to the vacation, the school informed Didon that they were not expecting J.D. to return as Dominguez had disenrolled the children from the school. After Didon contacted the police who were able to reach Dominguez, Dominguez promised to return the children on the scheduled return date. Dominguez claims to have never made such a promise and she did not return the children on that date.

After hiring a private investigator, Didon located the children in Pennsylvania. Didon thereafter filed a Hague Convention petition in the Middle District of Pennsylvania seeking the return of A.D. and J.D. to French Saint Martin. "Didon also filed an ex-parte motion seeking a temporary restraining order and an expedited hearing on the merits of his petition." After the district court held an ex-parte telephone hearing with Didon's counsel, it entered an order directing the U.S. Marshal's Service to serve

a copy of the order and petition on Dominguez and to confiscate the passports and other travel documents of the children and Dominguez. Dominguez was also enjoined from removing A.D. and J.D. from the Middle District of Pennsylvania pending the hearing on the merits of Didon's petition.

After a full hearing on the merits of Didon's petition, the district court granted Didon's petition regarding A.D. and denied the petition as to J.D.

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The district court found that "for most purposes of its residents' daily life, the island [of Saint Martin] is essentially undivided." The district court held that the evidence supported a finding that J.D. and A.D. were habitual residents of both Dutch Sint Maarten and French Saint Martin. The district court also found that A.D. was wrongfully retained under the Hague Convention because Didon was exercising his custodial rights until Dominguez took

A.D. to the United States. With regard to J.D., the district court "concluded that J.D. was not 'wrongfully' retained under the convention and denied his petition as to J.D.," because Didon did not have custody rights over J.D. at that time since he did not adopt J.D. under the requirements of French law to vest custody in *Didon*.

After the district court's ruling, Dominguez filed an emergency stay of the district court's judgment which the district court denied, and A.D. was transferred to Didon on the same day. Both parties filed cross-appeals from the district court's judgments.

The dispositive issue on appeal before the circuit court was whether the children had concurrent habitual residences. The reason that this issue is so important is that Dutch Sint Maarten does not recognize the Hague Convention and the French Saint Martin (through France) recognizes the Hague Convention. Therefore, if the children are found to have one habitual residence and it is Dutch Sint Maarten, the ruling of the district court would be vacated.

In carefully analyzing the Hague Convention, the circuit court found that the drafters of the Hague Convention only

intended for there to be one habitual residence of a child. Further, according to the opinion: “the overwhelming majority of United States cases that have addressed the issue have concluded that a child may have only one habitual residence country at a time.” The opinion further states: “courts have not strayed from this bedrock principal even where a child has meaningful connections to two countries.” The circuit court gave a further example of a child who lives in New Jersey but attends school and doctor’s appointments in New York. In such an instance, the circuit court stated the child would not be considered a New York resident but rather a New Jersey resident, as the child’s home is in New Jersey.

The circuit court focused on the location of the children’s home. The court further turned toward the ordinary meaning of the term “residence” by citing the Merriam-Webster dictionary as stating a residence is defined as: “‘the place where one actually lives,’ or, put another way, where one has a home.”

In making its decision, the circuit court outlined a two-pronged analytical structure/test that courts should use when determining a child’s habitual

residence country. The first prong is the living test. The living test determines whether the child or children have multiple residence countries. If the children are determined to have multiple residence countries, the court then moves to the second test which is the fact-intensive inquiry. The fact-intensive inquiry “considers a child’s experience in and contacts with her surroundings focusing on whether she ‘developed a certain routine and acquired a sense of environmental normalcy’ by ‘forming meaningful connections with the people and places she encountered’ in a country prior to the retention date.” In other words, the first test determines whether there is a residence country, and the second fact-intensive inquiry test determines which residence is the child’s habitual residence. In the present case, because the children only resided in one country, the second test was not necessary and the court determined that the children’s habitual residence was in Dutch Sint Maarten. Therefore, the circuit court vacated the district court’s judgments and dismissed Didon’s petition. The circuit court also instructed the district court to order A.D. to be returned to the United States forthwith.

Interestingly, the circuit court discussed other cases that found the existence of alternating habitual residences. However, in such instances, the courts are to focus on the last alternating habitual residence in which the child resided to determine the singular habitual residence for purposes of returning a child to a country.

This case is very important for family law practitioners and the bench. This was a case of first impression and, in addition to providing clarity to the issue of the habitual residence under the Hague Convention, it provided a framework to apply the analysis when faced with difficult facts such as this case in determining what is a child’s habitual residence. •