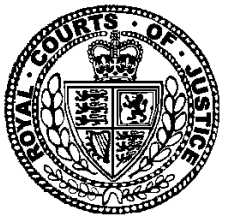

Neutral Citation Number: [2023] EWHC 2766 (Fam)

Case No: FD23P004399

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 November 2023

Before:

MR DAVID LOCK KC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between:

L	**Applicant**
- and –	
K	**Respondent**

- -
- -

Jonathon Evans (instructed by Gillian Radford and Co Solicitors) for the **Applicant**
Patrick Bowe (instructed by Elliot Mather Solicitors) for the **Respondent**

Hearing dates: 30 and 31 October 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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 David Lock KC:

1. In this case L ("**the Mother**") seeks an order pursuant to the Child Abduction and Custody Act 1985 ("**the 1985 Act**"), which brought the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25th October 1980 ("**the Convention**") into effect as part of UK domestic law, that her son, ("**H**") should return to the United States. The Respondent to the application is H's father, K, ("**the Father**"). The Father resists an order for return on the grounds that (a) at the relevant date H had become habitually resident in the United Kingdom and that accordingly there is no jurisdiction under the Convention for this Court to make a return order, (b) H objects to a return and/or that there is a grave risk that his return would expose H to physical or psychological harm or otherwise place the child in an intolerable situation.

2. I remind myself that the purpose of the Convention is not primarily to make best interests decisions about where a child should live. As Lord Hughes explained when giving the majority judgment in *In the matter of C (Children)* [2018] UKSC 8 ("**Re C**") at paragraph 3 the purpose of the summary procedure "*is to enable merits decisions as to the child's future to be made in the correct State, rather than in the State to which the child has been wrongfully taken, or in which he/she has been wrongfully retained*". If the child has already gained habitual residence in the state in which he was living by the date of the wrongful act, the "correct State" to determine welfare issues relating to the child is the State in which the child is living, not the State in which the child had previously been habitually resident.

3. In this case there is no dispute that H had been habitually resident in the United States until August 2022. It is also agreed that his Mother had rights of custody for him and

that she exercised those custody rights by agreeing for him to go to live for an undefined period in England with the Father. Hence, it is common ground that the initial period when H was living in England was not "wrongful". It is also common ground that there came a time when the Mother demanded that H return to the United States and the Father refused to comply with that demand. The Father thus accepts that, for the purposes of the Convention, he acted wrongfully at that point, but says that H had become habitually resident in the UK by the date of any wrongful act. It is also agreed that, in making the decision as to whether H's place of habitual residence has changed from the United States to England for the purposes of this case, I must identify the date of the Father's wrongful act and make a decision where H was habitually resident at that date. In this case, the Mother says that the Father acted wrongfully in November 2022 but the Father submits that he was not guilty of any wrongful act until July 2023. The Father does not resist a conclusion that H had not yet become habitually resident in the UK by November 2022 but submits that the child had become habitually resident in the UK by July 2023. In contrast, the Mother's case is that H remained habitually resident in the United States in July 2023. The Convention defences raised by the Father are only relevant if the Mother is successful in showing that, at the date of the wrongful act by the Father, H was still habitually resident on that date despite his period of stay in England.

4. It was agreed between counsel that, as these are summary proceedings, I should not hear live evidence but make a decision on the basis of the written evidence. I have had the benefit of witness statements from the Mother and the Father, a witness statement from L's mother and H's maternal Grandmother ("**MGM**"), and a report dated 21 September 2023 prepared by Ms Lilian Odze of Cafcass ("**the Cafcass Report**"). Both parties exhibited numerous texts as part of the evidence. Although they accept that they also spoke on the phone, counsel tacitly accepted that I had to approach this case on the basis that the substance of their communications between the Mother and the Father are set out in the approximately 7000 text messages that passed between them.

The facts.

5. The Mother is now 30 years old and the Father is 36 years old. The Father is a UK citizen and the Mother is a citizen of the United States of America. The Mother and the Father commenced a relationship in 2010. They married in Gibraltar in September 2015 and then lived for a short time in Ireland. The Mother suffered a bout of depression and anxiety after her Father's sudden death when she was aged 15 and accepts that she has had problems with her mental health at various points in her life. She says that she was open with the Father about her mental health and "*it was something we had in common*". The Father has also had struggles with his mental health, battled alcoholism in the past and had a liver transplant before he met the Mother. He says that he does not drink alcohol at all in order to protect his transplanted liver.

6. The relationship between the Mother and the Father does not ever appear to have been straightforward and they effectively separated when the Mother went to live in the United States not long after the marriage and the Father lived in England. It is not clear to me whether that was because of visa problems or because they chose to live apart, but it seems to be the latter. H was born in the United States the on 15 August 2016, and is now aged 7. H has joint UK and USA citizenship. The Father was not present for the birth. He was told in 2011 that he would be denied entry to the United States for a period of 5 years, but he has no idea what he has done to justify this decision being taken by the US immigration services.

7. The Mother moved to the UK to recommence living with the Father in November 2017 when H was just over a year old. The parties then lived together in the UK until the relationship failed and they separated in about May or June 2021. The Mother was required to return to the United States because her UK visa was dependant on her being in a relationship with the Father. However, before she left, the parties discussed and agreed arrangements for H. These arrangements were set out in a consent order made in the Family Court in Birmingham on 31 January 2022, although by the date the order was made the Mother had already left the UK to return to the US. This order provided that H will "*live with*" the Mother and it gave her permission to remove H from the UK and to live with him in Kansas. It was agreed that H would spend a 6 week holiday each summer with the Father and for the Father to have H for alternative Christmas holidays.

It was also agreed that H would spend such further or other time with the Father as agreed between the parties.

8. The Mother and the Father commenced divorce proceedings with a decree nisi being made by the English courts on 17 March 2022 and a decree absolute on 10 February 2023. The Mother says that she was very upset by the end of her marriage and that she would have preferred to stay in England with H. However, she was not able to do so because she could not get the appropriate immigration status and hence returned to the US with H in December 2021.

9. The Mother went with H to live with MGM in RR, a town which borders two states in the USA, namely OO and NN. It is clear that, in the late spring and summer of 2022, the Mother's health and well-being was deteriorating. The contemporaneous documents disclosed in this case suggest that, at that time, the Mother had three different but interlinked problems. First, she was drinking large quantities of alcohol and passing out when drunk, even though she was H's main carer. Secondly, she was taking illegal drugs and was described by her Mother as a drug addict, although it is unclear precisely what drugs she was taking. She has referred herself to her smoking "weed" which I take as a reference to cannabis but there is also evidence that she was abusing prescription drugs including opioids. Thirdly, the Mother had developed paranoid delusions about her own Mother, including believing that her Mother was trying to take H away from her. That belief was not delusional because the evidence shows that MGM was so concerned about her daughter and grandson that she was in contact with social services and there was active discussion of the possibility of H either going into care or going to stay with his Father in England because of the risks to H from his Mother.

10. Both sets of US social services became involved in the case, largely as a result of being brought in by MGM. The parties have managed to get part of the records from social services and the events in the period June to August 2022 are also detailed in a series of text messages between the Mother and the Father and between MGM and the Father. Nonetheless, the exact sequence of events is not wholly clear, in part because the Mother was having such a serious mental health crisis at this time that she is unable

to recall exactly what happened. However, it appears that a time came in about June 2022 when MGM was so exasperated at her daughter's drinking and drug taking that she threw her out of her house. That meant that the Mother left with H and went to a hotel for a short period. The Mother then went to live with MGM but her delusions continued and she then left with H to go to live on a farm with a cousin in Missouri, about 50 miles away from Leavenworth. There is some evidence of violence between the Mother and MGM at this time although it is unclear who was violent to whom. The social services reports refers to H saying that MGM was violent to the Mother but the records also contains evidence to suggest the Mother was violent to MGM.

11. There were calls between H and MGM and a time came when MGM collected H from the farm for his own safety. When MGM attempted to keep H away from the Mother she was told by the police that, absent a court order, she could not do this because the Mother had parental responsibility for H. MGM then sought assistance from social services whose assessed that H was at grave risk from his Mother. Meanwhile, the Mother's mental health crisis appears to have worsened and she was hospitalised. It is not clear if the Mother was formally sectioned (under a procedure akin to the Mental Health Act 1983) or was a voluntary patient. The Mother was later diagnosed with a Schizo-Affective Disorder, Type 1 Bi Polar Disorder, post-traumatic stress disorder and attention deficit-hyperactivity disorder.

12. The Mother has been on medication since this period of in-patient treatment and now appears to be in a period of stable mental health. She had a further period as an in-patient in March 2023 when she says was monitored as her drugs were being changed Her counsel also says on instructions but without direct evidence that she is back living with MGM, is working, is not drinking any more, has not taken any illegal drugs since she was hospitalised in July and August 2022.

13. During the height of the Mother's mental health crisis both the Mother and MGM were in communication with the Father and a plan was developed for H to travel to the UK to stay with the Father. MGM felt this was better as she was working full time as a nurse and did not feel able to provide H with the level of support he needed. She may also

have thought that the Mother's prognosis was uncertain and H would be safer if he was kept well away from the Mother until she was well and stable. A text message from the Father to the Mother dated 7 August 2022 summarised the position where the Father said:

> *"I'm sorry it has come to this and it won't be forever but you need some time to get better and your mum us [probably a mistake for "is] not going to have him"*

14. The Father understood that his ban on entering the USA had lapsed but he could only get a US visitor's visa following an interview because he was someone who could not use the electronic ESTA scheme. He knew that there were long delays for such interviews and so his Mother agreed to apply for an ESTA visa and to travel to the United States to collect H. The evidence suggests that all this was explained to the Mother but it is unclear how much she understood at the time. Nonetheless, she signed the requisite documents to allow H to travel and H arrived in the UK on about 26 August 2022.

15. There was some debate between counsel about the precise parameters of any permission given by the Mother for H to live with the Father, but the Mother's counsel made it clear that he does not advance a wrongful removal case. It seems to me that a combination of the witness statements and the contemporaneous documents shows that the Mother reluctantly agreed that she was too unwell at this time to care for H and she agreed for him to travel to the UK to spend time with the Father. There was no clear agreement as to how long H would spend in the UK but it must have been implicit that the child would, at least, be staying until the Mother felt well enough and stable enough to resume caring for him. Although I am confident that neither the Mother or the Father looked at these arrangements through the terms of the Family Court Order of 31 January 2022, I consider that Mr Bowe for the Father is right when he submits that the broad effect of the agreement was that H was given permission by the Mother in August 2002 under paragraph 4(c) of the order to travel to England to spend a period of time with the Father. It was an open-ended permission without any clear agreement being reached at that time on an end date.

H's disclosures.

16. The Mother was clearly in a very difficult psychological place in the spring and summer of 2022. The social services documents confirm that H made a series of disclosures about things his Mother had said to him and done to him. Whilst none of these disclosures have precise dates attached to them, the overall effect of the evidence is that the Mother has been a loving and caring Mother to H for most of his life. However, H clearly went through some very bad experiences whilst his Mother was having an extended mental health crisis. It is not necessary for the purposes of this judgment to consider every allegation but in summary H disclosed:

    a. "*When no one is around, mom beats him*" and he presented with bruising on his arms and shins (although the social services notes say that the source of the bruising was not clear);
    b. The Mother kicked out at H and held him down to the couch with her arm around his neck;
    c. The Mother picked up H by the neck and put her hand over his mouth when she was drunk; and
    d. The Mother said some dreadful things to H including that she wished he was dead and that having him was the biggest mistake of her life, and she threatened to put him in a house and to burn it down.

17. To be fair to the Mother, she was horrified about these disclosures but did not dispute that these things had happened whilst she was in the grip of a schizoid-affective disorder. She does not dispute the serious affect that her behaviour had on H.

18. Once H came to the UK he lived with the Father and started attending the local Infant and Nursery School in September 2022, although he appears to have started school a number of weeks after the beginning of the normal school term. H was attending school in the US before he came to England but he found himself behind his English peers when he started school in England. However, the evidence shows he is a child who knows how

to work hard and is committed to his education. The school reports for July 2023 states the opinion of his class teacher as follows:

> *"H has worked his little socks off this year! He's always enthusiastic about our topics and eager to do his best. H can listen carefully to instructions during whole class time and he confidently joins in with discussion.*
>
> *H has worked incredibly hard to improve his skills. His hard work has paid off because he has made super progress in all areas of his learning. He doesn't always find the tasks easy first time but he is resilient and perseveres to complete his work. ….*
>
> *H is a popular member of our class. He follows our Diamond Rules and plays fairly, so he always has a friend to play with on the playground"*

19. The Headteacher noted that H had had a "*fantastic*" report and that he had "*settled well into our school*". The report suggests that the school anticipated that H would be continuing is education in England in September 2023 and would be attending Pennine Way school in September, as has happened.

The messages between the Mother and the Father.

20. The evidence contains about 7000 text messages between the Mother and the Father. I have read large parts of these messages, albeit not every single message. I am grateful to both counsel for drawing my attention to various aspects of these text messages. The overall impression from the messages is that the Mother was always fearful that the Father would use her mental health crisis as a reason to keep H with him on a longer term basis and the Father, whilst assuring the Mother that this arrangement was not intended to be permanent, was largely reluctant to engage with precise dates when H should return. I accept that the Father's reluctance was, in the early months, largely driven by his concern about what he had learned about what had happened to H in the summer of 2022 and his fear that the Mother's recovery was not as solid as she felt, and

thus his fear that H would be returning to a potentially dangerous situation if he went back to the US before the Mother was fully recovered from her illness.

21. By late autumn of 2022 the Mother started to consider that she was well enough to begin discussions about when H should come back to live with her in the US. On 25 October 2022 the Father had said:

> *"He misses you a lot, and talks all the time of you and [his grand parents]"*

22. By 11 November the Mother was saying to the Father that she would like to talk about preliminary timelines for bringing H back to live in the United States. The Father asked what her thinking was and she said "*I guess we decided what works for him and school and general stability but also I cannot do a year*". She then asked if H could "*whether [I think it should be "weather" as in put up with] a mid year transfer*". At the same time as the Mother was trying to agree a date when H would come back to the United States, she was also raising the different question as to whether the Father was seeking a change to the long-term arrangements for H's care, and she asked whether he was thinking of a 50/50 arrangement. The Father responded by saying:

> *"School ends in June I think and starts again in September sometime. I'm not sure about the spring holidays but I will have a look at the school calendar for you. We will arrange what is going to happen long term or definitely, I know he wants to see you and be around you"*

23. On 21 November 2022 the Mother made it clear that she was not prepared to accept a future arrangement under which the Father became the "*primary custodial parent*". The response from the Father was:

> *"At the moment I am just focusing on getting him to where he needs to be so you could get yourself better"*

24. That answer is consistent with the general thrust of the Father's evidence that, at this stage, he was not satisfied that the Mother had made a sufficient recovery from her very serious mental health difficulties to be able to provide a stable home for H. It does not seem to me to be necessary to make any decisions as to whether the Father was right or not in that assessment but I accept that he remained genuinely concerned that the difficulties H faced the previous summer should not be repeated and therefore was exercising caution in his dealings with the Mother in order to protect his son.

25. On 25 November 2022 there were further exchanges when the Mother said that "*my ideal would be him coming back with me*", but she also said in a text a few minutes later that she understands there were logistical issues to address first.

26. There were further exchanges of messages in January 2023 when the Father made it clear that his preference was for H to complete the school year in England. In response the Mother made it clear that she was insisting on him coming back to the United States for the subsequent school year but she does not directly refuse to agree to H staying in England for the remainder of the school year or otherwise withdraw her permission for him to stay with the Father. Although there is some tension between the parents, the overall tone of the messages is civil and polite, and it seems to me that both parents were struggling to come to an agreement about what should happen. By way of example on 22nd January 2023 the Mother said:

> *"I'm trying to gauge what you think should happen vs what I think should happen and seeing what we have in common. I don't think we should take this on from a points of contention pov [point of view] as much as a points in common pov"*

27. It does not seem to me that any significant progress was made in these discussions until the end of the school year in the summer of 2023. At that point the messages make it clear that the Mother was taking the very clear position that H should return to the United States to live with her in order to start a new school term on 15 August 2023. This is the first time that I can discern any form of clear ultimatum being given by the Mother or any clear failure by the Father to comply with an instruction that the Mother

has given. I accept that the Father started off with a reluctance to allow H to travel back to the United States because he was concerned that the Mother had not yet become well enough to care for his son. It may well be that, as the months went on and as the relationship between him and his son improved, a point may have been reached at which the Father started to ask himself whether it would be better for H if the child stayed in his care on a longer term basis as opposed to going back to live with his Mother in the United States. However, it seems to me more likely that the Father was responding to things on a week by week basis and the evidence does not suggest to me that he did anything specific or said anything specific to the Mother which showed he was resolved to prevent H from going back to live with the Mother at any point prior to July 2023. In particular, he did not make an application to the Family Court to amend the terms of the consent order to allow H to continue living with him in the UK.

28. Nonetheless, Mr Bowe on behalf of the Father accepts that by July 2023, the Mother was requiring H to return to live with her in the United States and the Father was failing to comply with her instructions to allow him to do so. He thus accepts that, by that date, his actions were "wrongful" in Convention terms because the Mother still had the benefit of an order which required H to live with her in the United States. It seems to me that this concession was well made and that the latest date on which the Father can have acted wrongfully for the first time was 12 July 2023 when the Father said:

> *"If you think for one moment that after all that happened that I'm just going to allow him to come and live with you and Trudi again then you are sadly mistaken. If we have to get lawyers involved again to draw up a new agreement then let's, but until then no H isn't going anywhere unless, as I stated, you can arrange something so you can see him in some capacity"*

29. By this point H had been living in the UK for nearly 11 months.

The legal issues.

30. I remind myself again these are summary proceedings. I am primarily required to use the machinery of the Convention to determine whether a court in the United Kingdom

or a Court in the USA should decide long term welfare arrangements for H, not to decide those issues in these proceedings. In order to do that exercise, it is agreed I must resolve whether H was habitually resident in the UK on the date that the Father acted wrongfully by breaching the terms of the Mother's rights as the parent with custody. It seems to me that this joint approach was correct because, as the Supreme Court found in *Re C,* if the child has obtained habitual residence in a new State by the time the "travelling parent" acts wrongfully, the "correct court" to determine welfare issues is the court in the state where the child is now habitually resident: see paragraph 34 of *Re C* where Lord Hughes said:

> *"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"*

31. But what is a "wrongful act" in the context where one parent has permitted the other parent to take the child to another state for an undefined period and the custodial parent does not equivocally demand the child should return and the travelling parent seeks to postpone discussion of the custodial parent's wish to have the child back? In *Re C* the Supreme Court was addressing a slightly different set of questions, namely (a) whether, in a case where one parent has agreed to a child living in another state for a 12 month period, it was possible for the travelling parent to act wrongfully in Convention terms prior to the expiry of the 12 month period (a so-called "anticipatory breach"), (b) if it was possible, for the travelling parent to act wrongfully, what type of conduct by the travelling parent constituted a wrongful act for the purposes of the Convention and (c) did that wrongful act have to be communicated to the other parent or was it sufficient if the wrongful act was communicated to someone else. This case is not entirely on all fours with *Re C* because there was no agreed defined period for H to stay in England. H travelled to the UK because the Mother had a mental health crisis but save that the Father was saying at that point that H's stay in the UK would not be "for ever" there was no clear agreement as to how long the Mother was giving her permission for H to stay in the UK.

32. I am told that there is no direct authority on how the High Court should approach the question as to what is a wrongful act by a travelling parent in circumstances where there is no agreed period for the child to remain in another country. Nonetheless, in my judgment the approach taken by the Supreme Court in *Re C* can be adapted to help identify a wrongful act in circumstances where there is initial agreement between the parents that the child should go abroad but no clear agreement about the period of any stay away from the custodial parent. Having tested the case in submissions, it did not appear to me that either counsel made submissions that I should not adopt the approach set out by Lord Hughes In *Re C.* In *Re C.* The Judge identified the key question at paragraph 37 as follows:

> *"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"*

33. Lord Hughes then looked at the authorities and addressed the question as to what conduct by the travelling-parent constituted wrongful conduct at paragraph 51. For present purposes I only need to refer to sub-paragraphs (i) to (iv) where the Judge said:

> *"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 Page 24 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 ….”

34. In this case both counsel accepted that I must look for an “*objectively identifiable act or acts of repudiation before the retention can be said to be wrongful”.* The competing cases are (a) on the Mother’s case the Father’s actions in November 2023 are said to be wrongful and (b) on the Father’s case, it is submitted that there was no wrongful act prior to July 2012 because the Father had the Mother’s permission for H to be in England for the full school year in England and the only wrongful act by the Father was failing to return H once the school year had finished.

35. The Mother’s case was that prevarication or non-engagement by the Father in the face of the Mother’s demands that she wanted to assert her rights to have H back in her care was sufficient to amount to a wrongful act by the Father. As I understand the Mother’s

case as advanced by Mr Evans, it is that once the Mother raised the possibility that the time had come to discuss H's return, the Father was under a positive duty to accept that concrete plans needed to be put in place for his return and the Father's failure to do so amounted to a breach of the Mother's rights as the custodial parent. Mr Evans acknowledged the difficulties caused by the absence of any clear evidence that the Mother withdrew her permission for H to stay in England or clearly demanded his return prior to July 2023, but he submitted I needed to be cautious when looking at the exchanges. He accepted that, if there was no inequality of power between the parties, it was not wrongful for the Father to seek to persuade the Mother that the Father should keep H here for longer. However, he said that there was real inequality of power between the parties here because the Mother wanted to maintain contact with H and so, to maintain contact, she felt unable to assert her authority as the custodial parent and to demand his return, but she was making her demands sufficiently clear that the Father acted wrongfully by not agreeing an earlier return date.

36. I cannot accept that submission for at least three reasons. First, it implies that the Father can act wrongfully by failing to act, namely by an omission, as opposed to taking a positive wrongful act. Extending wrongfulness to a failure to act substantially expands the ambit of acts which could be wrongful beyond those identified by Lord Hughes as being limited to a "*objectively identifiable act or acts of repudiation".* Secondly, the Father's response to this complaint is that he genuinely did not feel the Mother was well enough in November 2022 to resume full time care for H and therefore, in effect, he negotiated with the Mother for additional time. Given that the genuineness of his position is not under challenge (and it could not be in a case where no oral evidence was called), his case is that, as long as the Father was continuing to negotiate about the length of time that H should stay in the UK based on what he feels are the best interests of his child and as long as the Mother has not clearly terminated her permission for H to stay in the UK or set out any form of ultimatum, he cannot be guilty of a wrongful act in the terms identified by Lord Hughes.

37. Thirdly, I cannot accept that inequality of power can make a difference to what is or is not a wrongful act by the Father in these particular circumstances. Whilst I can

appreciate that the Mother may have been frustrated by the Father's refusal to accept that she was well enough to care for H without exposing him to danger, and I also accept that she wanted to maintain contact, in my judgment neither factor prevented her clearly and unequivocally withdrawing her permission, as the custodial parent, for H to remain with the non-custodial parent, namely the Father. It seems to me that, in contrast to the way that her case was put, her position as the sole custodial parent gave her very considerable power because she could tell the Father she was withdrawing her permission for H to be in England from a particular date and require him to come back to the US. It was, I accept, a power that she was plainly reluctant to exercise. Nonetheless the consequence, in my judgment, of her failure to clearly and unequivocally withdraw her consent to H remaining living with the Father and her continuance of the negotiations meant that the Father was not, in Convention terms, acting wrongfully.

38. The conclusion that there was no wrongful act by the Father is supported by the fact that, in about December 2022 the exchanges showed that the Mother did not actively oppose the Father's plan for H to remain in school in the UK until the end of the school year. That was further confirmation that the Mother was not insisting on H being returned at that time.

39. Thus, I conclude that the Father did not act wrongfully before 12 July 2023 when he finally accepted that he would be seeking to prevent H from returning to the US. It follows that, for the purposes of this action, I have to decide whether H was habitually resident in the UK in mid-July 2023.

The law on habitual residence.

40. I was referred to the helpful observations of Hayden J in *Re B (A Minor: Habitual Residence)* [2016] EWHC 2174 (Fam) [2016] 4 WLR 156. The Judge said at paragraph 17 that the following approach should be taken to determining the place of a child's habitual residence:

"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).

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 lose a pre-existing habitual residence at the same time as gaining a new one (Re B); (emphasis added);

viii) 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);

*ix) 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);
*x) 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);*
xi) 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;
xii) 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).
xiii) 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)"

41. The references to Brussels IIa are no longer relevant but neither party submitted that the test for habitual residence under the Convention has been changed following the UK's departure from the EU, and thus the observations are still indirectly relevant. Hayden J also made the following observations at paragraph 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. I emphasise this because all too frequently and this case is no exception, the statements filed focus predominantly on the adult parties. It is all too common for the Court to have to drill deep for information about the child's life and routine. This should have been mined to the surface in the preparation of the case and regarded as the primary objective of the statements. I am bound to say that if the lawyers follow this approach more assiduously, I consider that the very discipline of the preparation is most likely to clarify where the child is habitually resident. I must also say that this exercise, if properly engaged with, should lead to a reduction in these enquiries in the courtroom. Habitual residence is essentially a factual issue, it ought therefore, in the overwhelming majority of cases, to be readily capable of identification by the parties"*

42. There is some guidance in the caselaw on how quickly a person will become habitually resident in a new country after moving there for what is intended to be a permanent move. In this case, I have to assume that H came to the UK in circumstances where, at least initially, he thought this was a temporary arrangement, albeit one without a defined end date. He was a 7 year old boy who was living with his Father in the UK who missed his Mother and he did not know when, if ever, he would be returning to live with her in the US. Whilst it is clear that H missed his Mother at the same time, he was deeply affected by the experiences he had been subjected to when the Mother was ill. He described those to the Cafcass officer saying "*it was my Mum who got drunk and beat me up*". He also said

> *"he would feel "sad" if the Judge said that he had to go back to America "because I am trying to avoid that right now. …I am scared that my Mum is going to smack me again, like hitting me, I am worried that she gets drunk….for people*

who get drunk, it takes a while to get better and a year is not enough". He told me that this was what his step Mother had told him "and she knows because she is a scientist and she knows that it takes a while for people who get drunk to get better".

43. I accept that there is some legitimate criticism of this observation because it refers to the Father's fiancé, now wife, having talked to H and he may have been coached to an extent. However, there is no doubt that he genuinely has these feelings and the experiences he relates to the Cafcass officer are fully supported by the contemporaneous records from social services in Kansas and Missouri. I accept that the fears that H describes to the Cafcass officer are real and arise out of the incidents he outlined to social services in July and August 2022.

44. By July 2023 H had been in the UK for 11 months. He was living as part of a family with his Father and step-Mother and attending school. He was also attending out of school activities. It is clear that, whilst he was missing daily contact with his Mother, he is loved by his Father and was doing well at school, had developed friends and fitted well into his peer group. In my judgment, he was likely to have become more settled here than he was in the US because his memory of that period must have been overshadowed by the instability of the events in the Summer of 2022 and his awful experiences at the hands of his Mother.

45. Mr Evans submits that he cannot have become "settled" in the UK because his stay here was only ever understood by H to be temporary. Whilst I accept that a child can become habitually resident far more quickly in a new location if the child moves with the knowledge that the new location will be a permanent change (see *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [*2014] AC 1), it is not the law that a child who comes for either a fixed period of time with an intended return date cannot become habitually resident in the child's new location. The same must be true for a child who comes for an undefined period of time. If the child has a stable place to live with members of his own family in the new location and develops "*some degree of integration by the child*

in a social and family environment" then the child may become habitually resident in the new location. That new place of habitual residence will not be prevented from arising solely because one or other parents has the capacity to make decisions that will result in the child leaving this location. Both counsel have accepted that the question as to whether H was habitually resident in the UK on the relevant day (whenever that was) is a matter of fact for me to determine, as best as I am able to do, within summary proceedings based on the documentary evidence.

46. It seems to me that, by July 2023, the only realistic conclusion I can come to is that H was habitually resident in the UK. I reach that decision because:

a. By this date H had completed virtually a full year's school and, I interpret from the school report, was looking forward with his peers to moving on from infant to middle school;
b. He was living with his Father and his fiancé (now his wife), who he refers to as his "Step Mother" in a stable family unit;
c. He was involved in some out of school activities;
d. He had settled well into school and had friends, all of which indicates some level of integration into his new setting;
e. Whilst he was missing his Mother, he had conflicted feelings about her because of the experiences he had suffered as a direct result of her mental health condition and her other problems, and the evidence suggests that he reacted to that by responding well to the security and consistency offered by the home that his Father was able to provide.

47. Given that I have decided that H was habitually resident in the UK at the date of the wrongful act by his Father, it must follow that, adopting the language of Lord Hughes in *Re C* that the "*correct court*" to decide where H should live is the UK court.

48. In those circumstances it is not necessary for me to decide the remaining issues in the case. However, in case this matter goes further, I indicate what I would have decided if

I had concluded that, at the date of a wrongful retention, H was still habitually resident in the USA.

49. In that case article 12 of the Convention provides:

> *"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"*

50. I do not accept that, on the evidence, H's concerns about returning to the US amount to child objections. He is worried and has concerns but that is not the same thing as objecting to a return. In the end, on the evidence, this issue was not strongly pressed by Mr Bowe.

51. However, I would have been far more troubled by the defence under article 13(b). In summary, I would have found that case was made out primarily because I do not consider that I was in a position to assess how much risk H would be exposed to if he returned to the US. I accept that, if the Mother continues to take her medication, abstains from alcohol and abstains from illegal drugs, H will be at no grave risk of harm from her. The Mother's psychiatrist confirms that, as long as she takes her medication, she is no risk to H. The Mother says that she has complied with all 3 requirements since the autumn of 2022 but no medical records have been disclosed and there is no evidence of the steps she has taken, if any, to address the psychological drivers which led to her alcohol and/or drug abuse in the past. There is no evidence that she has attended Alcoholics Anonymous or a similar group or taken steps to understand how she came to abuse drugs and what steps she needs to take to minimise the chances that she will lapse back into narcotic abuse in the future. Whilst I accept that her firm intention is to remain clean, at present there is a dearth of evidence to explain whether and if so how she is addressing the underlying issues which led her down that path in the first place.

52. The protective measures go some way to meeting those concerns but, in the end, I would not have found that they go far enough for the simple reason that all those mechanisms were effectively in place in the summer of 2022 and they did not prevent H going through the events that he describes and which could have been far more serious for him. Counsel for the Mother says that I have to look at a short time window prior to family proceedings in the United States. Whilst that is usually correct, I cannot ignore the fact that the Father does not have the financial means to commence litigation in the United States and that, in all probability, it will be many months if not longer before he can even get a visa interview and so cannot visit the United States to progress such an action. It thus seems to me, that in assessing whether there is a grave risk to H, I have to consider a slightly longer time horizon.

53. In the end I am not conducting a welfare analysis and do not have the material to do so. However, I accept that given what happened last summer and the continuing risks, there are serious questions as to how safe H will in fact be if he was to return to live with his Mother. I consider that those risks remain even if the measures that the Mother proposes were to be put in place. I thus would have accepted that the evidence shows that H will be at a grave risk and thus I would have found that this defence was established.