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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

In re Marriage of: Petitioner: REED RANDOY and Respondent: MARIEKE RANDOY	Case No. BD621137 **PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CALIFORNIA BEING THE MINOR CHILD'S HOME STATE** DATE: July 31, 2015 TIME: 8:30 a.m. DEPT: 22 JUDGE: Hon. Tamara E. Hall

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

The parties met, dated and married in Los Angeles County, California. On April 11, 2011 they married in Long Beach, California. The parties have one minor child, HUNTER RANDOY, who was born in Los Angeles and is 3-years old (born April 10, 2012). Petitioner and the child are U.S. citizens; Respondent is both a U.S. and Canadian citizen. After the birth of their child, the parties continued to reside in California. Respondent then decided that she wanted to try to pursue acting opportunities in Vancouver, Canada. In April 2014, Petitioner reluctantly agreed that Respondent could temporarily move to Vancouver, Canada with Hunter for a trial period of 1-year so that Respondent could earn acting credits like her friend, Luci, and then return to California and pursue acting opportunities in Los Angeles and in Canada. During this trial period, Petitioner would travel to Canada to see Respondent and the child every 3- to 4-weeks if their finances would permit. The parties' relationship, which had become strained after their son was born, grew increasingly strained. On Petitioner's last visit to Vancouver, Respondent simply walked out the door and left Petitioner and their son to attend his third birthday in Seattle with Petitioner's family. Respondent was invited but she did not attend.

In April 2015, at the end of the 1-year trial period, while Respondent and the child were in California, Petitioner informed Respondent that he felt that the trial period was unsuccessful and that it was time for them to move back to California as he needed to be in his son's life every day. This prompted Respondent to notify Petitioner that she wanted a divorce immediately and that she intended to go back to Canada. The facts leading up to the filing of this case is detailed in Petitioner Request for Order filed on June 5, 2015. JUDICIAL NOTICE IS RESPECTFULLY REQUESTED OF PETITIONER'S JUNE 5, 2015 REQUEST FOR ORDER.

Petitioner filed for divorce on May 19, 2015 seeking among other relief custody and visitation orders. On May 21, 2015, Respondent was personally served with the Summons

and Petition in California, proof of which was filed with this Court on June 5, 2015. The Automatic Temporary Restraining Orders ("ATROs") went into effect upon service and Petitioner advised Respondent that the ATROs prevented her from leaving California with Hunter. On May 28, 2015, one week after being served with the Summons, Respondent wrongfully removed Hunter from his grandmother's care under the guise that she was taking him to the park, and fled to Canada where she detained Hunter and refused to let Petitioner speak to him until the date on which this Court ordered Respondent to bring Hunter to Court, July 1, 2015.

On June 5, 2015, Petitioner filed an Ex Parte Request for Order seeking temporary emergency orders, including the immediate return of the child from Canada to Petitioner's custody in California along with the turnover of Hunter's passports and visas. This Court granted Petitioner's requests ordering custody to Petitioner with no visits to Respondent, and that the child could not be removed from Los Angeles County, the state of California, and the U.S.

On June 17, 2015, Respondent filed a Special Appearance Response requesting that this Court grant her sole custody and order that Canada has jurisdiction of this matter. On June 18, 2015, Respondent filed a Response to the Petition for Dissolution.

On July 13, 2015 and July 15, 2015, Respondent filed what sounds like identical Ex Parte Applications seeking the immediate return of the minor child to Canada. Petitioner was never properly noticed for either of Respondent's Ex Parte Applications (as set forth in this counsel's Declaration filed on July 16, 2015 – JUDICIAL NOTICE IS RESPECTFULLY REQUESTED OF SAID DECLARATION FILED ON JULY 16, 2015). This Court denied both of Respondent's Ex Parte Applications finding that it must determine the jurisdiction issue, and correctly ruled that the ATROs prevail in the interim and that Respondent's removal of the child was in violation of the ATROs.

The action before this Court involves an initial child custody determination. There is no known previous child custody determination entitled to be enforced. Respondent has represented to this Court that she filed a divorce action in Vancouver but this was done

after she was served for this divorce case and after she had filed her Response thereto. The only child custody proceeding that has been commenced in a court of a state having jurisdiction under California *Family Code* sections 3421 and 3423 is this state as set forth below and in the supported Declaration of Reed Randoy filed concurrently herewith. Petitioner asserts that California is the child's home state, has always been the child's home state, and that the temporary move to Vancouver, B.C. was a trial period which expired when the parties' Vancouver apartment lease expired (it was only for a 1-year term). Thus, this Court has jurisdiction to adjudicate the issue of child custody pursuant to *Family Code* section 3424.

II

POINTS AND AUTHORITIES

A. This Court has Paramount Jurisdiction to Adjudicate the Initial Issue of Custody Because California is the Child's Home State

California *Family Code* section 3421 states:

> **(a) Except as otherwise provided in Section 3424, a court of this state has jurisdiction to make an initial child custody determination only if any of the following are true:**
> **(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.**
> (2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under Section 3427 or 3428, and both of the following are true:
> (A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.
> (B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
> (3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 3427 or 3428.

> (4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).
> (b) Subdivision (a) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.
> **(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.**
>
> [Emphasis added]

Family Code section 3402(g) defines "home state" as:

> **The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.** In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. **A period of temporary absence of any of the mentioned persons is part of the period.**
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> [Emphasis added]

California's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is the exclusive jurisdictional basis for making a child custody determination by a court of this state. "[I]t is well settled in California that the UCCJEA is the exclusive method of determining subject matter jurisdiction in custody disputes involving other jurisdictions." *Ocegueda v. Perreira*, 232 Cal.App.4th 1079, 1084 (2015). Since jurisdiction cannot be exercised on any other basis, it is not conferred by mere presence of, or personal jurisdiction over, a parent or the child in the forum state.

This Court has paramount jurisdiction to adjudicate child custody and visitation in this action and does not require personal jurisdiction over the parents or the child. *Family Code* section 3421(c). It is irrelevant that Respondent is not physically present in California or whether this Court has personal jurisdiction over Respondent for the purposes of its determination of child custody. The UCCJEA applies to all custody proceedings, including this one, and determines that the proper jurisdiction situs for litigation of this custody and visitation dispute is appropriately before this Court in the state of California. The UCCJEA's jurisdictional test for an initial custody determination is met here because at the time the litigation was commenced, on May 19, 2015 when Petitioner filed this action, California was the child's home state. Hunter's temporary absence from this state was due to his parents'

agreement that Respondent would try to earn acting credits in Canada over the course of 1-year. This trial period was never intended to be permanent as evidenced by EXHIBIT "A" attached to the Declaration of Reed Randoy filed concurrently herewith. Respondent failed to earn her acting credits and simply decided to shelve their temporary plan so that she could continue to live in Vancouver and try to earn acting credits.

Prior to Hunter's temporary stay in Canada, he had no ties there. Hunter was born and raised here. His parents met, dated and married here. The parties had always lived together with Hunter, and planned on continuing to do so until Respondent unilaterally decided that Vancouver is now her home, and since Hunter is with her, it is Hunter's home as well. That is not how a child's home state is determined. There was never an intent to abandon California as Hunter's home state.

B. The Home State of the Child is California

California continues to be the child's home state. Hunter was born in California on April 10, 2012, is a U.S. citizen, and has lived in California with both of his parents for the majority of his life from birth until age 2 (he is now 3). In April 2014, when Respondent moved to Canada taking Hunter with her to try to pursue acting credits, California was never abandoned; rather it continued to be Hunter's home state because their move was merely a temporary absence marked by the parties' shared agreement that Respondent could move to Canada for a 1-year trial period only. Canada did not become the child's home state because the parties intended that the move be temporary while Petitioner remained in California.

During the 1-year trial Respondent was unable to obtain gainful employment and was entirely dependent on Petitioner's financial contributions to sustain herself and Hunter, and the apartment in Canada for the entire 1-year period. This was why a 1-year lease was signed in Vancouver. Meanwhile, Petitioner's livelihood had always been here and he was having to work hard to send money to Respondent and pay for his travel to Canada to see them. Petitioner's finances only permitted him to travel to Canada every 3- to 4-weeks and this frequency left Petitioner wanting more time and yearning to be part of the child's

everyday life. Since Petitioner never had employment opportunities in Canada it would have been impractical for him to move there and support the family during the 1-year period. During the 1-year period, the parties' relationship became increasingly strained. At the end of the 1-year trial period, Respondent returned to California with the child in April 2015, at which point Petitioner informed Respondent that the trial period did not work out. That prompted Respondent to demand an immediate divorce.

Given that the trial period was only temporary and that the child lived with his parents in California for two consecutive years from birth prior to the trial period, his temporarily absence from California should be counted towards the home state six-month consecutive requirement.

C. Ninth Circuit Approach to Determining Habitual Residence is Dispositive on the Issue of the Child's Home State

The Ninth Circuit Appellate Court's approach to determining a child's habitual residence within the context of the Hague Convention is dispositive on the issue of whether the child's habitual residence shifted from California to Canada where Petitioner agreed to their temporary move and Respondent and the child subsequently lived in Canada for a 1-year trial period.

To determine a child's habitual residence, the Ninth Circuit has adopted the subjective "settled intent" test and looks for "the last shared, settled intent of the parents." *Valenzuela v. Michel*, 736 F.3d 1173, 1177 (9th Cir. 2013). "Where a child has a 'well-established habitual residence, simple consent to [her] presence in another forum is not usually enough to shift' the habitual residence to the new forum." *Mozes v. Mozes*, 239 F.3d 1067, 1081 (9th Cir. 2001). "**Rather, the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration**." *Id.* (Emphasis added.)

The first step toward acquiring a new habitual residence is forming a settled intention to abandon the old one. *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004); *Mozes v.*

Mozes, supra, 239 F.3d at 1075; and *Murphy v. Sloan*, 764 F.3d 1144, 1150 (9th Cir. 2014). The Ninth Circuit also considers whether it can "say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child out of the family and social life in which its life has developed." *Mozes v. Mozes*, supra, 239 F.3d at 1081; *Murphy v. Sloan*, supra, 764 F.3d 1144 at 1150.

The Ninth Circuit Court in *Mozes v. Mozes* held that the District Court's determination of habitual residence gave insufficient weight to the importance of "shared parental intent" where children clearly had an established habitual residence in Israel, they did not "ipso facto" acquire a new habitual residence in the U.S. when Husband agreed to allow them to move with Wife to Beverly Hills for 15 months to learn English, get acquainted with American culture and make friends. *Mozes v. Mozes* supra, 239 F.3d at 1084.

In *Holder v. Holder*, the Ninth Circuit Court ruled that a family residing on an American military base in Germany for eight months did not render Germany the children's habitual residence. Since the parents had different views as to how long they were going to stay in Germany when they left the U.S., the Court found that there was a lack of shared parental intent to abandon the U.S. as the children's habitual residence. Further, the child attending kindergarten, participating in sports, and going on excursions with his parents in Germany did not show the "deep-rooted ties" sufficient to overcome the lack of shared parental intent to abandon the habitual residence. 392 F.3d at 1015 at 1020-1021.

In *Murphy v. Sloan*, the Ninth Circuit found no settled mutual intent to abandon the U.S. as habitual residence holding that the U.S. was the country of habitual residence where the mother and child's move to Ireland was "intended as a trial period," not as a permanent relocation even though the exact length of the child's stay was left open to negotiation. *Murphy v. Sloan*, supra, 764 F.3d 1144 at 1152. The Court further held that though significant, the child's attachments to Ireland that developed over a three-year period through school, extracurricular activities, contacts with her mother's family, etc. did

not overcome the absence of a shared settled intention by her parents to abandon the U.S. as a habitual residence. *Id.* Although the child developed strong ties to Ireland through school, extracurricular activities, and contacts with her mother's family, she also maintained broad and deep "family, cultural, and developmental ties to the U.S." while living in Ireland, "maintain[ed] a relationship with her father's extended family," "maintain[ed] a community" and "receive[d] her dental and medical care in California while living overseas." *Id.* at 1153.

As in *Mozes v. Mozes*, Petitioner's consent to Respondent and Hunter's move to Canada *for a limited, definitive period of time* to pursue acting opportunities did not result in a new habitual residence. Rather, Hunter retained his established habitual residence in California. Before leaving to Canada the child's habitual residence was California, having been born to Petitioner and Respondent, both of whose habitual residence was California. "**If a child is born where the parents have their habitual residence, the child normally should be regarded as a habitual resident of that country**." *Holder v. Holder*, supra, 392 F.3d at 1020. (Emphasis added.)

As in *Holder v. Holder*, the fact that Respondent and Hunter lived in Canada for 1-year does *not* render Canada the child's habitual residence, particularly when there appears to be a lack of shared parental intent between the parties to abandon California as the child's habitual residence. As in *Murphy v. Sloan*, the last shared intent of the parties occurred before departure, in April 2014 when the parties expressly declared their shared intent that Respondent could move to Canada with the child for a limited 1-year period so Respondent could try to pursue acting opportunities. Petitioner never intended that the stay in Canada to be anything but a trial period; Petitioner never agreed that the child could take up habitual residence in Canada. Nor was there a shared intent to abandon the habitual residence in favor of Canada as Petitioner continued to live and work in California, traveling to Canada to visit as often as finances permitted but never having moved there himself. At the end of the trial period, Petitioner informed Respondent that the trial had not been successful, and Respondent reacted by breaking their agreement and arbitrarily

deeming Canada the home of Hunter. This is not what she texted to Petitioner (please see EXHIBIT "A" to Declaration of Reed Randoy filed concurrently herewith).

In Respondent's Declaration, she initially stated that the parties agreed to relocate as a family and establish their home in Canada, yet later in the same Declaration she admits that "[t]hroughout the marriage, and especially towards the end of it, Petitioner was adamant about bringing me back to Los Angeles..." See Special Appearance Response Declaration of Respondent filed June 17, 2015. Thus, the parties' last shared intent was that the 1-year trial period would be temporary, beginning in April 2014 and ending in April 2015.

Any acclimatization in this case, through the child's residence, schooling, and other activities in Canada do not unequivocally overcome an absence of a shared settled intention by Petitioner and Respondent to abandon the U.S. as a habitual residence. As in *Murphy v. Sloan*, the child here retains deep-rooted ties to his community in California. Family and friends of Hunter still reside in California, including the child's maternal aunt and his father who has continued to live and work here while visiting Hunter in Canada every 3- to 4-weeks. The Declarations of Elaine Dotts, James Campbell, and Petitioner filed on June 5, 2015 all illustrate Hunter's strong personal relationships in California. Before being wrongfully removed from California by Respondent on May 28, 2015, Hunter was in his paternal grandmother's care in California and their loving relationship is depicted in the "Declaration of Elaine Dotts" filed on June 5, 2015. When Respondent traveled back to California in April 2015 to receive medical treatment, the child received medical treatment here as well. In other words, Hunter still receives medical care in California, yet another indication that California has always been his home state.

In light of the above, Petitioner contends that California is the child's home state and his habitual residence, and this Court has paramount jurisdiction to adjudicate the issues of custody and visitation.

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III

CONCLUSION

For the reasons set forth herein and in the attached Declaration, those pleadings on file with the court, and any further oral argument permitted at the time of the hearing, Petitioner respectfully requests that this Court find that California is the minor child's home state and that this Court has jurisdiction to adjudicate the issue of custody.

Respectfully submitted.

DATED: July 17, 2015

SALICK FAMILY LAW GROUP, APLC

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REED RANDOY