

*Valenzuela v. Michel*

One of the ever-fascinating aspects of the law is its constant attempt to reconcile issues of evolving societal modernity with doctrines of traditional precedent. In *Valenzuela v. Michel*, we are introduced to a new legal concept and terminology, i.e., “*Shuttle Custody*.” The Ninth Circuit determined and explained that a child can have dual habitual residences under Hague Convention protocols.

This past year has seen legislative approval that a child can have “more than two parents” [see SB 274, 2013 Cal.Fam.Law Monthly (November 2013) 323-329]. This would have been unthinkable only a decade ago. Now we learn that a child’s habitual residence need not be limited to a *sole* habitual residence in one country, but that a child can legally and legitimately have a habitual residence in more than one country. This is a departure from traditional Hague Convention interpretation, and, as noted in Justice Reinhardt’s concurring opinion, “questions of ‘shuttle custody’ and ‘dual habitual residence’ are deserving of more thorough consideration than is possible in the case before us...Justice Noonan has done us a service by beginning that exploration here.”

*Valenzuela* involved twin girls who split custody time with their father in Arizona, and with mother just over the border in Mexico. The Arizona U.S. District Court determined the girls could stay with father in Arizona and need not be returned to Mother in Mexico. The Ninth Circuit affirmed.

It never hurts to revisit and restate core principles of Hague Convention jurisdiction, as did the court here:

1. The central purpose of the Convention is to prevent forum shopping in custody battles;
2. Hague Convention protocols are explicitly not aimed at adjudicating the underlying custody dispute;
3. The Convention’s focus is whether a child should be returned to a country for custody proceedings, not what the outcome of those proceedings should be;
4. The question of habitual residence should be approached as a mixed question of fact and law.

The *Valenzuela* determination was that the parents shared a settled intention to abandon Mexico and adopt the United States as the children’s habitual residence. Thus, Hague Conventions rules did not attach. But, in the first ever holding of a Circuit Court, the panel concluded that the father could also have prevailed on the basis that he and the mother shared a

settled intention to abandon Mexico as the *sole* habitual residence, that there was an actual change in geography, and that an appreciable period of time had passed. This led to the finding that all three elements could have been satisfied by father so that the twin girls had habitual residence in the U.S. when father retained them; thus their retention was not ‘wrongful.’

It has become apparent that move-away cases and Hague Convention international custody jurisdiction disputes arise with increasing frequency. The emotional overtones, factual complexities, best interests of the children involved, financial considerations of support, as well as evolving concepts of judicial interpretation, make these cases worthy of careful consideration and creative legal analysis.

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