No. 11-15355

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LYNNE HALES CHAFIN,

Petitioner – Appellee,

v.

JEFFREY LEE CHAFIN,

Respondent – Appellant.

On Appeal from the United States District Court
For the Northern District of Alabama
Northeastern Division

CV-11-J-1461-NE

BRIEF OF APPELLEE, LYNNE HALES CHAFIN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for the Appellee, Lynne Hales Chafin, certifies pursuant to 11th Cir. R. 26.1 that the Certificate of Interested Persons and Corporate Disclosure Statement submitted with Appellee's Motion to Dismiss in this matter is complete.

/s/Kelly A. Powers
Kelly A. Powers
Attorney of Record for Appellee

STATEMENT REGARDING ORAL ARGUMENT

In Appellee's submission, oral argument is not necessary in this matter because an appeal of a Hague Convention return order is moot upon the child's exit from the United States and return to her country of habitual residence, and any appeal must be dismissed as moot. The Appellee therefore requests that this appeal be dismissed as moot and submits that oral argument is not necessary.

/s/Kelly A. Powers
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Attorney of Record for Appellee

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JURISDICTIONAL STATEMENT

The child's exit from the United States in this case and return to her habitual residence of Scotland renders this appeal moot. As fully set forth in the Argument section of this brief below, because the child has already returned to Scotland, this Court can provide the Appellant with no actual affirmative relief. Any words by this Court would be merely advisory. There is no live case or controversy in this matter. The case is therefore moot, this Court does not have jurisdiction to provide Appellant with any actual relief and the appeal must be dismissed.

STATEMENT OF ISSUES PRESENTED

1. The Appellant's appeal of the lower court's Hague Convention return order is moot upon the child's exit from the United States and return to her country of habitual residence, and any appeal must be dismissed as moot.

STATEMENT OF THE CASE

This case is the appeal by Appellant, Jeffrey Lee Chafin (the "Father"), from the United States District Court for the Northern District of Alabama's Order granting the Verified Petition for Return of Child to Scotland (the "Petition") filed by the Appellee, Lynne Hales Chafin (the "Mother"). The Petition was filed pursuant to The Convention on the Civil Aspects of International Child Abduction,

done at the Hague on October 25, 1980 (the "Hague Convention").[1] The child, E.E.C., born in 2007 ("the child"), returned home to Scotland on October 12, 2011 pursuant to the lower court's Order, will remain in Scotland and has not left Scotland since her return home.

The law in this Circuit is crystal clear that an appeal of a Hague Convention return order is moot upon the child's exit from the United States and return to her country of habitual residence, and any appeal must be dismissed as moot. *Bekier v. Bekier*, 248 F.3d 1051, 1054-6 (11th Cir. 2001).[2] The Mother therefore requests that this appeal be dismissed as moot.

FACTS RELEVANT TO THE ISSUES PRESENTED

On May 2, 2011, the Mother instituted her action in the United States District Court for the Northern District of Alabama to secure the return of her daughter to Scotland pursuant to the Hague Convention and the International Child Abduction Remedies Act (hereinafter "ICARA"),[3] after the child had been wrongfully retained in the United States by the Respondent, Jeffrey Lee Chafin ("Father" or "Mr. Chafin"). (R.E. Doc./Tab No. A; Doc./Tab No. 1).

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[1] T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10,493 (1986); text at: http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24 (last accessed February 3, 2012).

[2] *Cf. Fawcett v. McRoberts*, 326 F.3d 491, 494 (4th Cir. 2003) (not following *Bekier* mootness analysis), *rev'd on other grounds*, *Abbott v. Abbott*, 130 S.Ct. 1986, 176 L.Ed 789 (2010).

[3] 42 U.S.C. § 11601 *et seq.* (2001).

The Mother requested that the lower court rule that the Father had wrongfully retained the parties' daughter in the Northern District of Alabama and that it should order the child's return to Scotland with the Mother forthwith. (R.E. Doc./Tab No. 1). A two-day evidentiary hearing was held on the Mother's Petition on October 11 and 12, 2011. (R.E. Doc./Tab No. A).

At the conclusion of the trial the lower court immediately issued an oral opinion and order from the bench holding that the Father had indeed wrongfully retained the child in the United States and ordering the child to be returned to Scotland with the Mother forthwith. (R.E. Doc./Tab No. 33).

Within minutes after the lower court had issued its oral opinion and order from the bench, and had adjourned the proceedings, and the Petitioner and her counsel had left the courtroom, the Father's counsel handed the Mother's counsel a Motion to Stay Implementation of Order. (Appellee's Motion to Dismiss at Ex. C).

The Mother's counsel therefore returned immediately to the lower court to bring the Motion to Stay to the Court's attention and to seek direction with respect to responding to the Motion to Stay and whether the Mother and child were still permitted to return to Scotland while the Motion to Stay was pending. *Id*. The Father's counsel was still present in the courthouse when the Mother's counsel returned seeking direction from the lower court. *Id*.

The Motion to Stay had not yet even been filed with the Clerk of the Court and therefore at the Court's instruction the Father's counsel was sent to file the Motion to Stay in the Clerk's Office. *Id*. The lower court then considered the Motion to Stay in chambers and issued a written Order denying the Motion to Stay and further ordering that "[t]he petitioner is permitted to return to Scotland this day with her minor child in accordance with this court's Order." (Appellee's Motion to Dismiss at Ex. D).

With a copy of the lower court's October 12, 2011 Order in hand, the Mother and child immediately returned home to Scotland. (Appellee's Motion to Dismiss at Ex. E).

The Mother and child are now home in Scotland and have not returned to the United States. *Id*.

On October 13, 2011, the lower court issued a ten (10) page written Order, making its findings of fact and conclusions of law. (R.E. Doc./Tab No. 31)

On October 25, 2011, the Father filed a Motion to Alter or Amend Order. (R.E. Doc./Tab No. A). The Court issued an Order denying the Respondent's Motion to Alter or Amend Order the next day. (R.E. Doc./Tab No. A).

On November 14, 2011, the Father filed his Notice of Appeal. (R.E. Doc./Tab No. A). The Father's appeal is moot.

SUMMARY OF ARGUMENT

The child's exit from the United States in this case and return to her habitual residence of Scotland renders this appeal moot. As fully set forth in the Argument section of this brief below, because the child has already returned to Scotland, this Court can provide the Appellant with no actual affirmative relief. Any words by this Court would be merely advisory. There is no live case or controversy in this matter. The case is therefore moot, this Court does not have jurisdiction to provide Appellant with any actual relief and the appeal must be dismissed.

STANDARD OF REVIEW

In Appellee's submission, there is no applicable standard of review in this matter because this entire appeal is moot and should be dismissed. There is therefore nothing to be reviewed from the lower court's decision. The child's return to Scotland has rendered this appeal moot and this Court can provide the Appellant with no actual affirmative relief.

ARGUMENT

The Hague Convention establishes legal rights and procedures for the prompt return of children who have been "wrongfully removed to or retained in" a nation that is a party to the Convention. Hague Convention, art. 1; ICARA § 11601; *Abbott v. Abbott*, 130 S.Ct. 1982, 1989 (2010); *see also*, *Ruiz v. Tenorio*, 392 F.3d 1247, 1251 (11th Cir. 2004); *Lops v. Lops*, 140 F.3d 927, 935 (11th Cir. 1998); *Sewald v.*

Reisinger, Slip Copy 2009 WL 150856, 1 (M.D. Fla. 2009); *Bocquet v. Ouzid*, 225 F. Supp. 2d 1337, 1340 (S.D. Fla. 2002); *Pesin v. Osorio Rodriguez*, 77 F.Supp.2d 1277, 1284 (S.D. Fla. 1999), *aff'd*, 244 F.3d 1250, 1253 (11th Cir. 2001).

Through the adoption of the Convention, the signatory nations, including the Scotland and the United States, sought "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, preamble. Thus, the primary purpose of the Hague Convention is "to restore the pre-abduction status quo." *See*, *Abbott*, 130 S.Ct. at 1989; *Ruiz*, 392 F.3d at 1251; *Lops*, 140 F.3d at 935; *Sewald* 2009 WL 150856, 1; *Bocquet*, 225 F. Supp. 2d at 1340; *Pesin*, 77 F.Supp.2d at 1284.

The scope of a court's inquiry under the Hague Convention is limited to the merits of the claim for wrongful removal or retention. Hague Convention, art. 16, 19; ICARA § 11601(b)(4); *Abbott*, 130 S.Ct. at 1989. The merits of any underlying custody case are therefore not at issue. *Id.*; *see also Miller v. Miller*, 240 F.3d 392, 397 (4th Cir. 2001); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

The court's role is not to make traditional custody decisions but to determine in what jurisdiction the minor children should be physically located so that the

proper jurisdiction can make a custody decision. *Loos v. Manuel*, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994).

"A case is moot if no case or controversy exists for [the appellate court] to resolve: 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Bekier v. Bekier*, 248 F.3d 1051, 1054 (11th Cir. 2001) (quoting *Reich v. Occupational Safety and Health Review Comm.,* 102 F.3d 1200, 1201 (11th Cir. 1997) (internal quotations omitted). An appellate court has "no authority 'to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [the Court].'" *Bekier*, 248 F.3d at 1054 (quoting *Church of Scientology v. U.S.*, 506 U.S. 9 (1992). "If an event occurs during the pendency of an appeal 'that makes it impossible for this court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed.'" *Id.*

In the *Bekier* case, this Court analyzed the concept of mootness in the context of a Hague Convention case where the child at issue had returned to his habitual residence of Israel with the father. This Court held that a child's return to its habitual residence from the United States pursuant to a district court order during the pendency of an appeal of the district court order renders the appeal moot. *Bekier*, 248 F.3d at 1054.

The material facts in this case are akin to the facts in *Bekier*. In *Bekier*, the child at issue had been wrongfully removed from Israel and was being wrongfully retained in the United States by the child's mother. *Id*. at 1053. The father filed a petition in the Southern District of Florida seeking the child's return to his habitual residence of Israel pursuant to the Hague Convention. *Id*. The district court ordered that the child be returned to the father and returned to the child's habitual residence of Israel. *Id*. The mother filed a motion to stay the district court's order. *Id*. The district court issued a conditional stay ordering the child's return to Israel be stayed, but only if the mother filed an appeal within ten days and posted a $100,000.00 bond. *Id*. The mother filed her appeal within ten days but failed to post the required bond. *Id*. The stay therefore expired by its own terms and the father returned to Israel with the child pursuant to the district court's order. *Id*.

When *Bekier* came before this Court on appeal, this Court held that the child's exit from the United States and return to his habitual residence of Israel pursuant to the district court's order "raised the question of whether [the] case is moot." *Id*. at 1054. This Court concluded that the child's exit from the United States and return to his habitual residence rendered the case moot. *Id*.

This Court explained that although the mother had appealed the district court's decision, "what relief we can offer her or what 'legally cognizable interest [she has] in the outcome [of this appeal]' is not clear." *Bekier*, 248 F.3d at 1054

(quoting *Wakefield v. Church of Scientology of Cal.* 938. F.2d. 1226, 1229 (11th Cir. 1991)). This Court further explained that a reversal of the district court's order would "provide Ms. Bekier with no actual affirmative relief. [The child] has already returned to Israel. Ms. Bekier's potential remedies now lie in the Israeli courts. Any words by us would be merely advisory." *Bekier*, 248 F.3d at 1054 (internal citations omitted).

This Court explained that although a party "need not necessarily seek a stay of a lower court's judgment to perfect an appeal, 'the consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final.'" *Bekier*, 248 F.3d at 1054 (quoting *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.3d 1294, 1295 (11th Cir. 1984)). This Court continued: "[w]hen [the child] returned to Israel with his father, we became powerless to grant the relief requested by Ms. Bekier. And so we must dismiss this appeal." *Bekier*, 248 F.3d at 1055 (emphasis added).

Ms. Bekier argued to this Court that dismissal of her appeal would defeat the spirit and intention of the Hague Convention. *Id*. This Court considered her position, but determined that "the United States Courts are restricted by the jurisdictional doctrine of mootness. Given our duty to respect the limits of our judicial authority, we will not create a 'live' case or controversy in an effort to promote the spirit of the Convention." *Id*. (citing *Walsh v. Walsh*, 221 F.3d 204,

214 (1st Cir. 2000) ("Neither the Convention nor the U.S. implementing legislation restricts the appellate process")).

This Court concluded in *Bekier* that "[w]here a case becomes moot after the district court enters judgment but before the appellate court has issued a decision, the appellate court must dismiss the appeal, vacate the district court's judgment and remand with instructions to dismiss as moot." *Bekier,* 248 F.2d at 1055-6. The child's return to Israel therefore rendered the *Bekier* appeal moot and the appeal was dismissed. *Id*. at 1056.

So here. The appeal in this case also must be dismissed as moot. As in *Bekier*, there was no stay in place at the time the child was returned to Scotland. Here, the Father's motion requesting a stay in the lower court was denied and the Father did not seek a stay in this Court following the lower court's denial of his request. (R.E. Doc./Tab No. A; Appellee's Motion to Dismiss at Ex. D). The mother returned home with the child to Scotland pursuant to two valid orders issued by the lower court. The Father's remedies now lie with the Scottish courts.

The child's exit from the United States and return to her habitual residence of Scotland in this case renders the Father's appeal moot. Because the child has already returned to Scotland, just as in *Bekier*, this Court can provide the Father with no actual affirmative relief. Any words by this Court would be merely

advisory. There is no live case or controversy in this matter. The case is therefore moot and must be dismissed.

CONCLUSION

For the foregoing reasons, Ms. Chafin requests that this Court dismiss this appeal. In the event this appeal is indeed dismissed, Ms. Chafin further requests -- following separate briefing – that she be awarded her appellate attorneys' fees and costs pursuant to 42 U.S.C. § 11607, FRAP 38, 11th Cir. R. 38-1 and this Court's Internal Operating Procedures.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2012, a copy of the foregoing Appellee's Brief has been filed electronically and that it is available for viewing and downloading from the ECF system, and was sent via e-mail and Federal Express to:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2,698 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii),

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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