Commentary: Appellate Court Cases

Barzilay v. Barzilay (*Barzilay I*), 536 F.3d 844 (8th Cir. 2008)
Barzilay v. Barzilay (*Barzilay II*), 600 F.3d 912 (8th Cir. 2010)

Other Eighth Circuit Cases

Acosta v. Acosta,
725 F.3d 868 (8th Cir. 2013)

Vasquez v. Colores,
648 F.3d 648 (8th Cir. 2011)

Stern v. Stern,
639 F.3d 449 (8th Cir. 2011)

Sorenson v. Sorenson,
559 F.3d 871 (8th Cir. 2009)

Silverman v. Silverman,
338 F.3d 886 (8th Cir. 2003)

Silverman v. Silverman,
312 F.3d 914 (8th Cir. 2002)

Nunez-Escudero v. Tice-Menley,
58 F.3d 374 (8th Cir. 1995)

Rydder v. Rydder,
49 F.3d 369 (8th Cir. 1995)

Abstention | Habitual Residence

Abstention is not appropriate in a Hague case if the prior proceeding did not include the opportunity to litigate the Hague Treaty issues. The *Barzilay* cases also explain that it is the actual circumstances of a child's life that establish habitual residence, not the wishes of a party.

Barzilay I

Mother and father are Israeli citizens, as are their three children, although the younger two children are also American citizens. In 2001 the family moved from the Netherlands to Missouri. Mother and the children lived there since that time. In 2005 the parties obtained a divorce decree from a Missouri state court awarding the parties joint custody of the children. The divorce decree provided that in the event one of the parents repatriated to Israel, the other parent would "forthwith" relocate to Israel with the minor children. When father repatriated to Israel, mother remained in Missouri. In June 2006 mother took the children to Israel for a visit that was to end on July 9, 2006. After the children's arrival, father filed a request with an Israeli court blocking the minor's exit, alleging that mother had violated the divorce decree by refusing repatriation. Mother agreed to a consent decree providing that

- Mother would repatriate with the children by August 1, 2009;
- The agreement was irrevocable, and constituted the only authority regarding the child's immigration, repatriation, and custody;
- Mother would not file custody proceedings in any place other than Israel, and if she did, the action would be transferred to Israel;
- If the children were not returned pursuant to the agreement, her actions would constitute abduction under the Hague Convention; and
- Mother was to pay $200,000 to father, and post her home in Missouri as collateral for the payment.

Mother later filed an affidavit in district court indicating that she only signed the agreement so that she could leave Israel with the children, and that she had no intention of abiding by its terms.

In December 2006 father obtained a judgment In Israel finding mother in contempt for refusing to permit the children to visit Israel. The contempt judgment was affirmed on appeal. While the Israeli contempt proceedings were going on, mother filed a petition in Missouri state court to modify the prior divorce decree, seeking to restrict father's visitation and prevent the enforcement of the Israeli consent decree. Father specially appeared in the Missouri action, but only for the purpose of challenging jurisdiction. He did not file a petition for return in the Missouri action. Father's challenge to jurisdiction was denied.

Father then filed a petition in federal court for return of the children to Israel. The district court abstained from hearing the case, pursuant to *Younger v. Harris*,[1] on the basis that father had an adequate opportunity to raise his Hague Convention claims in state court.

Discussion

Abstention. The Hague Convention requires that custody proceedings be stayed pending the determination of the issues in a Hague Convention case. The court acknowledged that the Hague Convention requires that custody proceedings be stayed pending the determination of the Hague Convention issues. As such, the existence of a pending state custody proceeding is not grounds for *Younger* abstention. This is especially so since both father and mother had obtained custody decrees from Israel and Missouri, respectively, thus positioning the court hearing the Hague case to decide what court was appropriate to hear and decide custody issues.

The court further noted that although the Hague Convention was mentioned during the course of both the Israeli and Missouri custody proceedings, neither party put before the respective courts a request for return of the children. As such, the existing Missouri court proceeding did not present an adequate opportunity to litigate the Hague issues, and abstention was inappropriate. The case was remanded to the district court to make a determination on the merits of the father's Hague petition.

Barzilay II

Habitual Residence. On remand, the district court found that the United States was the children's habitual residence and dismissed father's petition requesting that the children be returned to Israel. Father appealed, principally raising the effect of the repatriation provisions of the Missouri decree and the Israeli consent decree, contending that those documents established conclusively that the children's habitual residence was Israel.

The Eighth Circuit affirmed. The children had lived for approximately five years in Missouri prior to the time father alleged that they were wrongfully retained. Judgments of foreign courts are entitled to full faith and credit if the foreign court actually adjudicated a Hague claim in conformity with the requirements of the Hague Convention.[2]

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1. Younger v. Harris, 401 U.S. 37 (1971).

2. Where a foreign court departs from the requirements of the Hague Convention, a Hague determination by that court is not entitled to full faith and credit. *See, e.g.*, Carrascosa v. McGuire, 520 F.3d 249, 262–63 (3d Cir. 2008).

Importantly, the Eighth Circuit ruled that habitual residence may not be determined by an agreement of the parties or "by wishful thinking alone":[3] "The notion that parents can contractually determine their children's habitual residence without regard to the actual circumstances of the children is thus entirely incompatible with our precedent."[4]

Habitual residence determinations are factually intensive issues. It would be inappropriate to allow parental agreements to supplant the factual inquiry, notwithstanding that parental intent may be relevant to the issue of habitual residence.

Editor's Note: The Eighth Circuit is one of the circuits that looks to both issues of parental intent and the circumstances surrounding the child. Circuits favoring this approach tend to follow a modified test first enunciated in the Sixth Circuit's seminal case of *Friedrich I*, which calls for courts to direct focus on the "past experiences of the child, not the intentions of the parents." Courts favoring the question of habitual residence from this "child-centered" approach emphasize the facts surrounding the child's degree of settlement, and relegate the question of parental intent to a subordinate role.

Circuits following the Ninth Circuit's *Mozes* rationale place initial focus on parental intent vis-à-vis the acquisition of a new habitual residence or the abandonment of the old habitual residence. Under this approach the first inquiry when deciding whether a new habitual residence has been acquired is, "Did the parents demonstrate a shared intention to abandon the former habitual residence?" The second question in the *Mozes* analysis is whether there has been a change in geography for an "appreciable period of time" that is "sufficient for acclimatization."

3. Citing to Mozes v. Mozes, 239 F.3d 1067, 1070 (9th Cir. 2001).
4. *Barzilay II*, 600 F.3d at 920–921.