Commentary: Appellate Court Cases

Mendez v. May, 778 F.3d 337 (1st. Cir. 2015)
(Petition for Certiorari docketed on June 17, 2015)

Other First Circuit Cases

Sanchez-Londono v. Gonzalez,
752 F.3d 533 (1st Cir. 2014)

Neergaard-Colon v. Neergaard,
752 F.3d 526 (1st Cir. 2014)

Darin v. Olivero-Huffman,
746 F.3d 1 (1st Cir. 2014)

Yaman v. Yaman,
730 F.3d 1 (1st Cir. 2013)

Patrick v. Rivera-Lopez,
708 F.3d 15 (1st Cir. 2013)

Felder v. Wetzel,
696 F.3d 92 (1st Cir. 2012)

Nicolson v. Pappalardo,
605 F.3d 100 (1st Cir. 2010)

Charalambous v. Charalambous,
627 F.3d 462 (1st Cir. 2010)

Kufner v. Kufner,
519 F.3d 33 (1st Cir. 2008)

Rigby v. Damant,
486 F.3d 692 (1st Cir. 2007)

Danaipour v. McLarey (*Danaipour I*),
286 F.3d 1 (1st Cir. 2002)

Danaipour v. McLarey (*Danaipour II*)
386 F.3d 289 (1st Cir. 2004)

Whallon v. Lynn,
356 F.3d 138, (1st Cir. 2004)

Walsh v. Walsh,
221 F.3d 204, (1st Cir. 2000)

Toren v. Toren,
191 F.3d 23 (1st Cir. 1999)

Zuker v. Andrews,
181 F.3d 81, (1st Cir. 1999)

Habitual Residence

Facts

Father, an Argentinian citizen, and mother, a U.S. citizen, lived in Argentina. They had a child in 2007. The child lived exclusively in Argentina. The parties separated in 2009. Pursuant to a 2012 custody agreement, father had visitation time with the child, and mother was permitted to travel abroad with the child forty-five days each year. In August 2013, mother obtained employment in Boston. The parties had several conversations concerning this move, and the parents ultimately agreed that their son could relocate to the United States with mother. In the interim, father's visitation time would increase. Mother moved to the United States in mid-September 2013. The child remained with his maternal grandmother in Argentina, and father began his increased visitation with the child. The agreement for the child to relocate to the United States broke down when the parties could not agree upon an exact date for the child to join his mother in the United States—before the Christmas holidays in 2013, or in early January 2014. This disagreement led to father obtaining an order denying mother's permission for the child to travel to the United States. Mother thereupon took the child to Paraguay to avoid Argentinian exit controls, and then flew with the child to the United States.

Discussion

On father's Hague application for the child's return, the district court ordered the child returned to Argentina. The First Circuit reversed, finding that the child's habitual residence changed upon proof of the parents' joint shared intent that the child be allowed to relocate with his mother to

Boston. Father's later unilateral change of mind did not alter the child's habitual residence. The court further held that under the facts of this case, it was not necessary that a change in habitual residence be accompanied with a "change in geography," that is, a physical move to the United States.

Shared Intent. Father timely petitioned in the Massachusetts district court for the return of the child. The district court found that the child's habitual residence was Argentina, opining that the parents did not actually form a shared intent to have the child relocate to the United States. The First Circuit reversed this finding as constituting clear error based upon evidence that father confirmed the parties' oral agreement to allow the move, corroborated by emails, and father's own statements. The parties' disagreement over the actual date for the child to relocate to the United States only amounted to an approximate five-week period of time—with mother wanting the child to come in early December, and father agreeing to January 8, 2014. The subsequent breakdown in communication between the parents resulted in father changing his mind, and resorting to Argentinian courts to prohibit the child's removal. The First Circuit found that the evidence established that the last shared intent of the parties was for the child to relocate permanently to the United States. Citing to *Sánchez-Londoño v. Gonzalez*,[1] the court pointed out that unilateral intent of one parent is insufficient to overcome the "last settled intent" of both. Further, the court found that the absence of a written agreement between the parties allowing the child to change his habitual residence was not required, and that the settled intention of the parties could be proven by other evidence.

"Change in Geography" May Be Relevant, but Not Requisite. The district court found that the child's habitual residence had not changed for the additional reason that in this case there was no actual "change in geography," relying on the habitual residence test enunciated in *Mozes v. Mozes*.[2] *Mozes* held that "[w]hile the decision to alter a child's habitual residence depends on the settled intention of the parents, they cannot accomplish this transformation by wishful thinking alone. First, it requires an actual "change in geography."[3]

The First Circuit clarified that its prior decisions did not require a "change in geography" as part of a habitual residence test. Rather, the court explained that

> [t]his circuit has never added such a requirement in the context of the habitual residence test. To the contrary, we have explicitly described a change in the child's geography as but one "consideration[ ] for the court" and "one factor in our [habitual residence] analysis," not as a full-fledged prerequisite. *Darin*, 746 F.3d at 12–13; *see also Mauvais*[v. Herisse], 772 F.3d [6, 14 (1st Cir. 2014)] ("'[F]actors evidencing a child's acclimatization to a given place—like a change in geography combined with the passage of an appreciable period of time—may influence our habitual residence analysis.'") (emphasis added) (quoting *Sánchez-Londoño*, 752 F.3d at 542). To be sure, there may be situations in which an actual change in the child's geography factors heavily in the habitual residence analysis. Lest there be confusion, a child's presence in a new country of habitual residence is not required to effectuate his parents' settled intention to abandon his old place of residence and acquire a new one. A contrary requirement would

1. Sánchez-Londoño v. Gonzalez , 752 F.3d 533, 540 (1st Cir. 2014).
2. Mozes v. Mozes , 239 F.3d 1067 (6th Cir. 1999).
3. *Id.* at 1078 (citing *Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993)).

incentivize a feuding parent to move his or her child immediately upon the formation of an agreement even if, as here, it would be better for the child to finish out a school year or wait until the parent has settled the family's living situation before the child joins her.[4]

4. Mendez v. May, 778 F.3d 337, 346 (1st Cir. 2015).