

Commentary: Appellate Court Cases

Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005)

Other Seventh Circuit Cases

Redmond v. Redmond,
724 F.3d 729 (7th Cir. 2013)

Walker v. Walker,
701 F.3d 1110 (7th Cir. 2012)

Khan v. Fatima,
680 F.3d 781 (7th Cir. 2012)

Norinder v. Fuentes,
657 F.3d 526 (7th Cir. 2011)

Altamiranda Vale v. Avila,
538 F.3d 581 (7th Cir. 2008)

Kijowska v. Haines,
463 F.3d 583 (7th Cir. 2006)

Koch v. Koch,
450 F.3d 703 (7th Cir. 2006)

Grave Risk | Domestic Violence

This case focuses upon the degree of domestic violence that will sustain an Article 13(b) “grave risk” defense. The district court granted father’s request for summary judgment ordering the children’s return to Belgium, relying upon the ability of the Belgian legal system to protect the children. The Seventh Circuit reversed, remanding the case to the district court to conduct an evidentiary hearing on mother’s defenses.

Facts

Mother presented affidavits from herself, her parents, a brother, and a friend that set forth a serious pattern of abuse. The abuse began shortly after the marriage, while mother was seven months pregnant, consisting of slamming mother’s head against a wall, choking her, and threatening to push her down a flight of stairs. The beatings continued several times a week, and the conduct included choking, kicking, and throwing mother against a wall. This conduct started while the parties lived in the United States and continued when the parties moved to Belgium. Father’s mother sometimes joined in the abuse by participating in the beatings. Belgian police declined to intervene unless mother went to a doctor to verify her injuries. The beatings continued after the birth of two children, and occurred in the children’s presence. Father also beat the eldest child (then four years old) by spanking and, on one occasion, striking the child on the head. When mother attempted to intervene in the beating of the child, father grabbed mother by the throat and shoved her out of the room. When mother informed father that she was going to the United States with the children, he threatened to kill the children.

Grave Risk of Harm. The Seventh Circuit found that the abuse described by mother in her affidavits amounted to clear and convincing evidence of a risk of harm to the children, and that the risk of harm was grave.¹

Adequacy of Laws of Habitual Residence to Ameliorate Harm. The circuit court analyzed the question whether the laws in effect in the habitual residence were adequate to protect against the abuse, and if so, whether the existence of those laws provided sufficient reason to order the children’s return. Disagreeing with dictum in *Friedrich II*²—

1. Van De Sande v. Van De Sande, 431 F.3d 567, 570 (7th Cir. 2005).

2. Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

suggesting the consideration of the adequacy of local systems of law to obviate grave risks—the court found that in this case, reliance upon the existence of laws or the extent to which they are enforced for the protection of children would not ameliorate the risk of harm:

There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations.

* * * * *

To give a father custody of children who are at great risk of harm from him, on the ground that they will be protected by the police of the father's country, would be to act on an unrealistic premise. The rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody.³

Whether Undertakings Can Be Used as Part of a “Safe Return” Order. The court acknowledged that a court might consider a return order conditioned upon the alleged abuser having no contact with the children pending a full hearing on custody issues in the courts of the habitual residence. The court cautioned, however, that undertakings would not always suffice to protect the child, citing to the First Circuit's opinion in *Walsh v. Walsh*,⁴ which eschewed the approval of undertakings where it appeared that the continued abusive conduct of the abuser continued unabated in the face of laws or court orders.

Accordingly, the Seventh Circuit remanded the case to the district court to conduct an evidentiary hearing on the evidence of grave risk, and the doubtful sufficiency of father's agreement to a “no contact” order pending a court hearing in Belgium.

3. *Id.* at 570–71.

4. *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000).