Commentary: Appellate Court Cases

Pliego v. Hayes, 843 F.3d 226 (6th Cir. 2016)

Other Sixth Circuit Cases

Jenkins v. Jenkins,
569 F.3d 549 (6th Cir. 2009)

Simcox v. Simcox,
511 F.3d 594 (6th Cir. 2007)

Robert v. Tesson,
507 F.3d 981 (6th Cir. 2007)

Taveras v. Taveraz,
477 F.3d 767 (6th Cir. 2007)

March v. Levine,
249 F.3d 462 (6th Cir. 2001)

Sinclair v. Sinclair,
121 F.3d 709 (6th Cir. 1997)

Friedrich v. Friedrich (*Friedrich II*),
78 F.3d 1060 (6th Cir. 1996)

***In re* Prevot**,
59 F.3d 556 (6th Cir. 1995)

Friedrich v. Friedrich (*Friedrich I*),
983 F.2d 1396 (6th Cir. 1993)

Intolerable Situation | Courts of Habitual Residence

This case addresses whether an "intolerable situation" under Article 13(b) includes the inability of the courts of the habitual residence to litigate child custody.

Facts

Mother was an American citizen. Father was a Spanish diplomat. The parties had one child, born in 2011. Since 2012 the family had been living in Ankara, Turkey, where father was an attaché at the Spanish Embassy. The marriage deteriorated, and in 2014 mother took the child from Turkey to Kentucky. Father filed his first petition for return of the child in the District Court for the Western District of Kentucky. That court found that the child had been wrongfully removed by the mother. Mother defended the case, alleging that there was a grave risk if the child was returned, alleging spousal and child abuse. The court found that mother did not put forward clear and convincing evidence of abuse and ordered the child returned to Turkey.

After the child's return to Turkey, mother commenced custody proceedings in the Turkish courts and obtained an order granting her temporary custody of the child. Father moved to dismiss mother's temporary order, asserting that he had diplomatic immunity and that Turkish courts could not adjudicate custody of the child. The Turkish courts acceded to father's objection based on diplomatic immunity and dismissed mother's temporary custody order. Shortly thereafter mother went into hiding with the child and again abducted the child to the United States.

Father filed his second petition for return of the child in the same district court in Kentucky. Pending a hearing on the merits, the court granted father temporary custody of the child and gave mother visitation with the child in public places. At trial, mother's defense to the return petition was the allegation that father still retained diplomatic immunity for non-custody matters and that as a diplomat, he had "undue influence" with Turkish authorities. Father then waived his diplomatic immunity in the Turkish courts, thus allowing the Turkish courts to adjudicate the custody issue. The district court granted father's petition for return and awarded him $100,471 in attorneys' fees. Mother appealed.

Discussion

The Sixth Circuit addressed the following questions: 1) Is a case is moot after the child has been returned and custody adjudication continues in the courts of the habitual residence? 2) Does an "intolerable situation" exist when the courts of the habitual residence are unable to adjudicate the underlying custody dispute? 3) Is a parent who obtains an order for return of a child entitled to an award of fees, costs, and expenses for successfully defending the return order on appeal?

Mootness. Mother's appeal effectively requested the court to order a re-return of the child. Despite the difficulty of enforcing such an order, the court concluded that the absence of the child did not moot the case, citing *Chafin v. Chafin*.[1]

Intolerable Situation. Article 13(b) of the 1980 Convention provides a defense to return of a child when "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

Mother contended that the child faced an intolerable situation because Turkish courts would not be able to adjudicate custody or protect the child in the event of abuse. She also argued that the combined effect of father's diplomatic status, his influence on Turkish authorities, and the previous allegations of physical abuse of the child compelled reversal of the order of return. Father objected to mother's interpretation of the term "intolerable situation" as unsupported by the case law and an unwarranted extension of the Article 13(b) defense. The circuit court rejected father's argument, noting that an "intolerable situation" may encompass situations "where the courts of the state of habitual residence are practically or legally unable to adjudicate custody."[2]

The Sixth Circuit invoked Supreme Court precedent[3] and the Vienna Convention on the Law of Treaties,[4] interpreting the term "intolerable situation" by looking to the plain text of the Convention, its objectives, and the interpretation of this phrase by sister state courts. An "intolerable situation" does not necessarily involve the infliction of physical or psychological harm, but is nevertheless serious in nature. The Sixth Circuit concluded that the inability of the courts of a child's habitual residence to adjudicate custody issues may indeed rise to the level of an intolerable situation.[5]

---

1. 133 S. Ct. 1017, 1023–26 (2013).
2. Pliego v. Hayes, 843 F.3d 226, 232 (6th Cir. 2016).
3. Lozano v. Montoya Alvarez, 134 S.Ct. 1224, 1229, 1232–33 (2014); Abbott v. Abbott, 560 U.S. 1, 10, 16, 20 (2010).
4. May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("VCLT").
5. In Caro v. Sher, 296 N.J. Super. 594 (1996), a New Jersey chancery court reviewed evidence of a Spanish courts' four-year delay in hearing an appeal of a Hague petition involving the relocation of children to the United States. The court declined to find that the delay amounted to a violation of Article 20 of the Convention, which provides a defense to return if contrary to "human rights and fundamental freedoms." The court found the protracted appeals process to be systemic in the Spanish judicial system and noted that mother failed to show she would be refused an expedited hearing if an emergency arose. "In the final analysis, there is nothing that leads this court to conclude that the Spanish courts would not address the respondent's present, specific custody concerns in the best interests of the children. If these concerns could not be addressed by the foreign courts, this court would still have to consider whether the exceptions under Article 13(a) and (b) of the Convention should be applied, and have required proofs presented by the respondent." *Id.* at 607.

However, the circuit court agreed with the district court that mother failed to prove the existence of an intolerable situation in this case: father waived diplomatic immunity; there was no evidence proffered that Turkish courts were unduly influenced by father; and mother had failed to prove abuse in the earlier proceedings.

Attorneys' Fees, Costs, and Expenses. Father petitioned for an award of attorneys' fees, costs and expenses incurred during the appeal. Citing to cases from the Second and Tenth Circuits,[6] the court declined to make this award, finding that the fee award provisions in both the Convention and ICARA applied to trial courts, not courts of appeal.

6. Hollis v. O'Driscoll, 739 F.3d 108, 113 (2d Cir. 2014); West v. Dobrev, 735 F.3d 921, 933 n.9 (10th Cir. 2013).