Commentary: Appellate Court Cases

In re A.L.C., 607 Fed. App'x 658 (9th Cir. 2015) (unpublished opinion)

Other Ninth Circuit Cases

E.R.S.C. v. Carlwig (*in re* A.L.C.),
607 Fed. App'x 658 (9th Cir. 2015)

Margain v. Ruiz-Bours,
592 Fed. App'x 619 (9th Cir. 2015)

Murphy v. Sloan,
764 F.3d 1144 (9th Cir. 2014)

Valenzuela v. Michel,
736 F.3d 1173 (9th Cir. 2013)

Cuellar v. Joyce (*Cuellar II*),
603 F.3d 1142 (9th Cir. 2010)

Cuellar v. Joyce (*Cuellar I*),
596 F.3d 505 (9th Cir. 2010)

Asvesta v. Petroutsas,
580 F.3d 1000 (9th Cir. 2009)

***In re* B. Del C.S.B.**,
559 F.3d 999 (9th Cir. 2009)

Papakosmas v. Papakosmas,
483 F.3d 617 (9th Cir. 2007)

Von Kennel Gaudin v. Remis (*Gaudin III*),
415 F.3d 1028 (9th Cir. 2005)

Holder v. Holder (*Holder II*),
392 F.3d 1009 (9th Cir. 2004)

Von Kennel Gaudin v. Remis (*Gaudin II*),
379 F.3d 631 (9th Cir. 2004)

Holder v. Holder (*Holder I*),
305 F.3d 854 (9th Cir. 2002)

Von Kennel Gaudin v. Remis (*Gaudin I*),
282 F.3d 1178 (9th Cir. 2002)

Gonzalez-Caballero v. Mena,
251 F.3d 789 (9th Cir. 2001)

Mozes v. Mozes,
239 F.3d 1067 (9th Cir. 2001)

Habitual Residence | Re-Return Orders Following Reversal of Lower Court Order on Appeal

This case involved a child whose parents disagreed about his habitual residence, as well as the question whether an infant child may be a habitual resident of a country where he or she has never lived. It also addressed orders for the re-return of a child after a lower court order is reversed on appeal.[1]

Facts

Mother and father moved from Dubai, the birthplace of their child A.L.C., in 2008. When they departed Dubai in 2012, the parties left nothing behind and settled in Sweden. There their child entered preschool, played soccer, participated in swimming and martial arts, spent time with his father's relatives, and demonstrated some fluency in Swedish. Thirteen months later, A.L.C. accompanied his pregnant mother to Los Angeles for several months. While there he participated in summer camp, preschool, and extracurricular activities. The parties differed on the reason and duration of the trip to Los Angeles. The district court found father's intent was for the trip to last six months to allow mother to give birth to their second child. There was therefore no mutual intent for the parties to change A.L.C.'s habitual residence to the United States.

The district court also found the habitual residence of the newborn, E.R.S.C., was Sweden, despite the fact that the child had never lived in Sweden.

After entry of the district court's order to return both children to Sweden, father relocated both children to Sweden.

1. This issue is also discussed in the case analysis of *Berezowsky v. Ojeda* (*Berezowsky II*), 652 Fed. App'x 249 (5th Cir. 2016), reviewed concurrently with this case.

Other Ninth Circuit Cases (*cont'd.*)

Shalit v. Coppe,
182 F.3d 1124 (9th Cir. 1999)

Discussion

The court discussed the following questions: First, what is the habitual residence of infants? Second, may a child acquire a habitual residence in a country where he or she has never been physically present? Third, although a court may have an equitable power to order a child re-returned after the reversal of a district court order, may the appellate court decline to order the child's re-return?

Habitual Residence. Following Ninth Circuit precedent in *Mozes v. Mozes*,[2] the court found that A.L.C. is a habitual resident of Sweden. It found no evidence of a mutual intent to change habitual residence to the United States and found that there was insufficient evidence of the child's acclimatization to the United States to justify a change in the child's habitual residence. The Ninth Circuit affirmed the district court's order returning A.L.C. to Sweden.

The district court determined that the infant E.R.S.C.'s habitual residence was Sweden. Reversing this finding, the circuit court cited the *Mozes* principle that "habitual residence cannot be acquired without physical presence."[3] The Ninth Circuit dismissed the district court's reliance upon (1) mother's financial situation, (2) her employment, and (3) the untenability of splitting up siblings for custody decisions, noting that these considerations spoke to the merits of custody determinations, not to issues relevant to Hague Convention analysis. The court further determined that at the time father filed his petition for return of the children, E.R.S.C. did not have a habitual residence. The court reasoned that

> justifying E.R.S.C.'s habitual residence as the United States based on her contacts in Los Angeles is ineffective as "it is practically impossible for a newborn child, who is entirely dependent on its parents, to acclimatize independent of the immediate home environment." *Holder,* 392 F.3d at 1020–21. When a child is born under a cloud of disagreement between parents over the child's habitual residence, and a child remains of a tender age in which contacts outside the immediate home cannot practically develop into deep-rooted ties, a child remains without a habitual residence because "if an attachment to a State does not exist, it should hardly be invented." *Id.* at 1020 (quoting Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 89, 112 (1999)); *see also Delvoye v. Lee,* 329 F.3d 330, 333 (3d Cir. 2003) (stating that when a "conflict [of parental intent] is contemporaneous with the birth of the child, no habitual residence may ever come into existence.").[4]

Re-Return Orders. The Ninth Circuit recognized that although it had the equitable power to issue an order for the re-return of E.R.S.C. to the United States, it declined to do so. Quoting a portion of Justice Ginsburg's concurring opinion in *Chafin v. Chafin*,[5] the court held that "'[t]he concept of *automatic* re-return of a child in response to the overturn of [a Convention] order pursuant to which [E.R.S.C. went to Sweden] is unsupported by law or principle, and would . . . be deeply inimical to [E.R.S.C.'s] best interest.'"[6]

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2. 239 F.3d 1067, 1081 (9th Cir. 2014).
3. *Id.* at 1080–81.
4. *In re* A.L.C., 607 Fed. App'x 658, 662 (9th Cir. 2015).
5. 133 S. Ct. 1017 (2013).
6. *In re* A.L.C., 607 Fed. App'x at 663 n.2 (emphasis added) (quoting *Chafin*, 133 S. Ct. at 1029 n. 2 (Ginsburg, J., concurring) (quoting DL v. EL, [2013] EWHC 49, ¶ 59(e))).