Commentary: Appellate Court Cases

Moreno v. Zank, 895 F.3d 917 (6th Cir. 2018)

Other Sixth Circuit Cases

Taglieri v. Monasky,
No. 16-4128, 2018 U.S. App. LEXIS 29178 (6th Cir. Oct. 17, 2018)

Ahmed v. Ahmed,
867 F.3d 682 (6th Cir. 2017)

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

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)

Habitual Residence

This case addressed whether abduction acts as a bar to the establishment of a child's habitual residence in the country to which the child was taken. The Sixth Circuit found that resort to self-help and failure to pursue an action for return of a child under the Hague Convention may result in a change in the child's habitual residence.

A child was abducted by her mother from the U.S. to Ecuador in 2009. The child remained in Ecuador for seven years and formed attachments indicating that she had become acclimatized to Ecuador as her habitual residence. In 2016, father refused to return the child to Ecuador after summer visitation. Mother petitioned for the return of the child to Ecuador.

Facts

In violation of a Michigan custody order, mother initially abducted the parties' daughter to Ecuador in 2009. Although father commenced the administrative process for return of the child, he failed to follow through with filing a case in Ecuador for the child's return under the 1980 Convention. In 2016, mother permitted the child to travel to the United States to visit her father for the summer. Father failed to return the child as previously agreed by the parties. In 2017, mother petitioned for the return of the child to Ecuador. The district court acknowledged that the child lived in Ecuador from age three to ten and that she "had been acclimatized to Ecuador and was settled there." Nevertheless, the district court denied mother's petition for return based on the illegality of abducting the child to Ecuador in 2009. The court concluded that the child's habitual residence was in the United States.

Discussion

Abduction does not act as a bar to the establishment of a child's habitual residence. The Sixth Circuit reversed the district court's decision and remanded the case for additional proceedings. The Sixth Circuit adhered to its former precedents defining habitual

residence for children above the "age of cognizance" as "the nation where, at the time of [her] removal, the child has been present long enough to allow 'acclimatization,' and where this presence has a 'degree of settled purpose from the child's perspective.'"[1] Here, all the facts pointed toward the conclusion that over the course of seven years, the child had acclimatized to Ecuador as her habitual residence. The court reasoned that reabduction involves the same threats to a child's wellbeing because it interferes with the child's "accustomed residence." The court found that living in Ecuador for seven years, along with social, family, and school attachments established that the child lived in that nation with a "settled purpose."

Self-help and the failure to pursue return of the child under the 1980 Convention. The Sixth Circuit reasoned that failure to initiate or follow through with the established procedures under the 1980 Convention for seeking the return of an abducted child may result in adverse consequences to the case of the parent left behind. First, a parent that resorts to self-help reabduction forecloses consideration and adherence to the safeguards that exist under the Hague Convention relating to the child's welfare, the possible objections of a mature child, and the time limits that are built into the application process. Secondly, reabduction poses the same threats to the child's wellbeing as an initial abduction, when the child has become acclimatized to the country to which they were originally abducted.

The court found support in *Ovalle v. Perez*[2] for reaching the conclusion that reabduction was not a favored form of relief where a party failed to take advantage of the 1980 Convention to resolve issues surrounding the determination of a child's habitual residence. In *Ovalle*, father took the parties' child from Guatemala to the United States by subterfuge. The court found that the parents had never formed a settled intent as to where the infant would be raised. The *Ovalle* court took account of the factors indicating the child's settled status in Guatemala: the child lived with mother and family; the child had regular visits to a pediatrician; there were plans for baptism and church attendance; and father was permitted to be with the child in Guatemala. The court found that father's resort to self-help was a factor that weighed against a finding that the child's habitual residence was in the United States.

Both *Moreno* and the *Ovalle* case relied on the reasoning of the Seventh Circuit in *Kijowska v. Haines*[3] on the potential impact of self-help reabductions. In *Kijowaska*, a two-month-old child was taken by her mother to Poland, mother's country of residence. Four months later, mother and child returned to the United States in an apparent attempt to reconcile with the child's father. Meanwhile, father had obtained a custody decree from an Illinois court, and when mother and the child arrived, father convinced U.S. immigration authorities that mother was planning to overstay her visa. The immigration authorities took the child from mother and gave the child to father pursuant to the Illinois order. Mother was refused entrance into the United States, compelling her to return to Poland without the child. Granting mother's application for return of the child under the Hague Convention, the *Kijowska* court found that the child's habitual residence was Poland. The court reasoned that even if mother's removal of the child to Poland was wrongful, father's

1. Moreno v. Zank, 895 F.3d 917, 923 (6th Cir. 2018) (citing Robert v. Tesson, 507 F.3d 981, 993 (6th Cir. 2007) (quoting Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995))).

2. Ovalle v. Perez, 681 Fed. App'x 777 (11th Cir. 2017).

3. 463 F.3d 583 (7th Cir. 2006).

self-help conduct bypassed the provisions of the Hague Convention and contributed to the child's establishment of a habitual residence in Poland.

> [Father]'s remedy would have been to file a petition under the Hague Convention and its implementing federal statute. He did not do that. He merely sought a custody order from an Illinois state court and then used that order to help obtain the self-help remedy of taking the child from the airport. To give a legal advantage to an abductor who has a perfectly good legal remedy in lieu of abduction yet failed to pursue it would be contrary to the Hague Convention's goal of discouraging abductions by denying to the abductor any legal advantage from the abduction. By failing to pursue his legal remedy, [father] enabled [the child] to obtain a habitual residence in the country to which her mother took her, even if the initial taking was wrongful.[4]

4. Kijowska v. Haines, 463 F.3d 583, 588–589 (7th Cir. 2006) (citations omitted).