

Commentary: Appellate Court Cases

Lops v. Lops, 140 F.3d 927 (11th Cir. 1998)

Other Eleventh Circuit Cases

Seaman v. Peterson,
766 F.3d 1252 (11th Cir. 2014)

Baran v. Beaty,
526 F.3d 1340 (11th Cir. 2008)

Pielage v. McConnell,
516 F.3d 1282 (11th Cir. 2008)

Hanley v. Roy,
485 F.3d 641 (11th Cir. 2007)

Ruiz v. Tenorio,
392 F.3d 1247 (11th Cir. 2004)

Furnes v. Reeves,
362 F.3d 702 (11th Cir. 2004)

Pesin v. Rodriguez,
244 F.3d 1250 (11th Cir. 2001)

Abstention | Child Well Settled | Equitable Estoppel | Delay

This case involves the lapse of a substantial period of time between the disappearance of the children and their discovery, and addresses the issue of active concealment by the abducting parent. Although the court did not specifically discuss the issue of equitable estoppel, return of the children was ordered due to the father's fraudulent conduct—conduct that negated a finding that the children were well settled.

Facts

A husband and wife lived in Germany with their two children. When their marriage ended, they participated in custody litigation in the family court in Germany. While the case was pending with temporary court orders, the father fraudulently obtained passports for the children and absconded with them to Spain and then to the United States. The mother did not know the children's whereabouts. The father stayed with the children's paternal grandmother near Augusta, Georgia, and then moved with the children to a home purchased by the grandmother in nearby South Carolina. The home was purchased, but the ownership of the home was concealed due to grandmother's agreement not to receive actual title to the home for twenty years.

Over the next two-and-one-half years, the father transacted all business in cash, enrolled the children in a private school, drove a car registered to his mother, and only worked for his stepfather. The father reported no income and paid no taxes during 1996 and 1997. Meanwhile, the mother obtained an award of custody of the children in Germany. The father filed for a divorce in South Carolina, but never served the mother. He obtained an order from the South Carolina court granting him sole temporary custody of the children.

The mother enlisted the assistance of multiple state, national, and international agencies in an effort to locate her children. Finally, local law enforcement obtained permission to place a wiretap on the grandmother's phone and through the wiretaps were able to locate the children. The children were detained by law enforcement, and the mother immediately left Germany for the United States. Within a week of locating the children, the mother commenced an action for the return of the children in state court. Due to the inability of local courts to hear the action on an expedited basis, the mother filed an action in federal district court in Augusta.

Discussion

Abstention. The father took the position that the federal court should abstain under the *Colorado River* doctrine;¹ however, the district court declined to abstain in favor of the South Carolina state court proceedings. The Eleventh Circuit noted that abstention is the exception rather than the rule, and found that as a practical matter, the South Carolina court was unable to proceed expeditiously, and the federal court was prepared to so proceed.²

Children Well Settled. The father also argued that due to the passage of one year from the time of wrongful removal until the filing of a petition, that the children were well settled in their new environment. The district court found that the one-year limitation in Article 12 had been “equitably tolled,” so that the defense did not apply. Although the Eleventh Circuit avoided the equitable tolling issue,³ it found that the children were not well settled due to the father’s active concealment of the children and other fraudulent activities, noting that he could face criminal prosecution for his conduct.

The court explained that the very act of concealing a child can contribute to a finding that the child is not well settled. As the Supreme Court observed in *Lozano v. Montoya Alvarez*,

[n]or is it true that an abducting parent who conceals a child’s whereabouts will necessarily profit by running out the clock on the 1-year period. American courts have found as a factual matter that steps taken to promote concealment can also prevent the stable attachments that make a child “settled.” See, e.g., *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1363–1364 (M.D. Fla. 2002) (children not settled when they “lived in seven different locations” in 18 months); *Wigley v. Hares*, 82 So. 3d 932, 942 (Fla. App. 2011) (“The mother purposely kept him out of all community activities, sports, and even church to avoid detection by the father”); *In re Coffield*, 96 Ohio App. 3d 52, 58, 644 N.E.2d 662, 666 (1994) (child not settled when the abducting parent “was attempting to hide [child’s] identity” by withholding child from school and other organized activities). Other signatories to the Hague Convention have likewise recognized that concealment may be taken into account in the factual determination whether the child is settled. . . . Equitable tolling is therefore neither required by the Convention nor the only available means to advance its objectives.⁴

1. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

2. “The district court, on the other hand, was prepared to, and did, expedite the ICARA petition as required by ICARA. The ICARA petition was filed in the district court on December 3. The district court conducted two full days of evidentiary hearings on December 12 and 19 and heard closing arguments on December 22, after which the district court immediately dictated comprehensive findings of fact and conclusions of law, covering sixty-four pages of transcript in the record, and entered final judgment. This is what ICARA contemplates.” *Id.* 943–944.

3. The issue was later resolved by *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014), wherein the Supreme Court held that the concept of equitable tolling was not available in Hague Convention cases.

4. *Id.* at 1236.