

# Commentary: Appellate Court Cases

## Pfeiffer v. Bachotet, 913 F.3d 1018 (11th Cir. 2019)

### Other Eleventh Circuit Cases

**Palencia v. Perez,**

921 F.4d 1333 (11th Cir. 2019)

**Grau v. Grau,**

780 F. App'x 787 (11th Cir. 2019)

**Fernandez v. Bailey,**

909 F.3d 353 (11th Cir. 2018)

**Gomez v. Fuenmayor,**

812 F.3d 1005 (11th Cir. 2016)

**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)

**Lops v. Lops,**

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

### Custody Rights | Habitual Residence

#### Facts

A father and mother lived with their two children in Switzerland from 2012 until 2018. After a divorce judgment issued in 2017, the parties shared custody of both children, and the consent of both parents was needed to relocate the children to a new residence. However, one provision of the divorce judgment provided that “[the father] does not object to the mother’s taking residence abroad (U.S. or France) at/after the end of the school term 2016/2017.”<sup>1</sup> Other provisions of the divorce judgment also anticipated the possibility that the mother might relocate outside Switzerland with the children.

The mother left Switzerland and moved with the children to Marietta, Georgia, in the United States, on June 17, 2018. Before the move, the father spent time with the children every other weekend, on holidays, and during the summer. But at the end of the children’s 2016–2017 school term, the mother applied for and received U.S. immigrant visas for herself and the children.

On June 9, the mother received a letter from the father in which he revoked his consent to her relocation with the children. She booked plane tickets for the United States that day and left with the children on June 17. Two days before their departure, the father sent a letter to the divorce court

revoking his consent to the relocation of his children. He requested that the court pose an immediate travel ban, but there is no record of an order from the Swiss court.

One month after the mother and children left for the United States, the father filed a Hague petition in district court for return of the children. After an evidentiary hearing, the court denied his petition, finding that he had failed to satisfy his burden to show that the mother’s removal of the children from Switzerland violated his rights of custody in light of the divorce judgment. The Eleventh Circuit affirmed.

1. Pfeiffer v. Bachotet, 913 F.3d 1018, 1021 (11th Cir. 2019).

## Discussion

**Habitual Residence.** The court noted that this case presents not only a mixed question of law and fact, but also questions of foreign law and treaty interpretation. Analysis of a child's habitual residence has changed; the court referenced its decision in *Ruiz v. Tenorio*<sup>2</sup> and also cited the Ninth Circuit's decision in *Mozes v. Mozes*.<sup>3</sup> The Eleventh Circuit held that the children's habitual residence was Switzerland. But the court also found that the parent entitled to determine a child's residence has the authority to form an intention to abandon a prior residence.

**Custody Rights.** The Eleventh Circuit observed that the Convention treats rights of custody and rights of access differently. When removal by one parent violates the custody rights of another, the Convention authorizes the return of the child. This is not the case, however, when rights of access have been breached. Turning to Swiss law, the court observed that although Swiss law generally provides parents with a *ne exeat* right over removal from the country (required consent before the other parent removes a child), in this case, the divorce judgment expressly empowered the mother to relocate to the United States or France after the end of the 2016–2017 school term. She initiated plans to relocate the children to the United States immediately at the end of this school term.

The father also argued that an earlier modification to the custodial agreement by another Swiss court nullified this right to remove the children. Rejecting this argument, the Eleventh Circuit noted that the original divorce judgment was never modified and the father's letter to the divorce court, after he learned of the mother's plans to leave, indicated that he was aware of this problem. He did not provide any evidence that the divorce court granted his request. "[A] parent's formal expression of a change in his or her desire about a child's place of residence cannot, in and of itself, legally somehow modify a court order."<sup>4</sup>

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2. 392 F.3d 1247, 1251 (11th Cir. 2004).

3. 239 F.3d 1067, 1073.

4. *Pfeiffer*, 913 F.3d at 1027.