Commentary: Appellate Court Cases

Abou-Haidar v. Vazquez, 945 F.3d 1208 (D.C. Cir. 2019)

Related Cases

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

Marks v. Hochhauser,
876 F.3d 416 (2d Cir. 2017)

Blackledge v. Blackledge,
866 F.3d 169, 179 (3d Cir. 2017)

Toren v. Toren,
191 F.3d 23 (1st Cir. 1999)

Office of the Children's Lawyer v. Balev,
[2018] 1 S.C.R. 398 (Can.)

Wrongful Retention | Habitual Residence

This case involved a petition for the return of a child to her habitual residence in France, after the couple had relocated to the United States for the mother to accept a consulting contract for eighteen months. Before the end of the eighteen months, the mother filed a petition for a change of custody.

Holdings

The D.C. Circuit affirmed the judgment of the district court, which held that an unlawful retention can occur before the date agreed upon by the parties for the end of a temporary relocation of a child where the actions of one parent demonstrate departure from the agreement. (2) The D.C. Circuit also affirmed the district court's adoption of the criteria in *Mozes v. Mozes*.[1]

Facts

The father and mother married in 2013, and their daughter was born in Paris in 2014. The father was a medical doctor only licensed to practice in France. The mother was an economist with a Ph.D. who worked as an associate professor at a university outside of Paris. The family primarily lived in Paris, but they also spent time at an apartment they owned in Barcelona. When in Barcelona, the mother worked as a visiting professor at the university there. The father traveled back and forth between Barcelona and Paris for his medical practice. There was no serious dispute that the family's habitual residence was France.

In 2018, the mother had the opportunity to serve temporarily as a consultant to the International Development Bank in Washington, D.C. The term of the consultancy was eighteen months, with the possibility of extending it for an additional eighteen months. The mother contemplated that she might stay in D.C. for up to three years. The father agreed to her taking the position. He planned to work ten to twelve consecutive days in Paris and travel to Washington, D.C., for the remainder of the month.

The parties rented out their Barcelona apartment for three years. The mother took temporary leave from her French university, while continuing to supervise her doctoral students and to accrue senior, pension, and retirement credits with the university. She also obtained diplomatic visas for the family, valid for five years. The parties stored their

1. 239 F.3d 1067, 1070 (9th Cir. 2001).

household furniture and appliances in France. Friends of the couple believed that their move to Washington, D.C., was temporary.

The family moved into a rented apartment in the District in July of 2018. The child, E.A.-H.S., was enrolled in a Spanish-English bilingual school, where she made friends and participated in school and extracurricular activities.

By December 2018, the couple's marriage had deteriorated, and in May 2019, the mother filed a petition in the District of Columbia Superior Court, requesting joint legal custody and primary physical custody of the child. The mother then informed the father that she had filed the custody action, that she intended to remain in the United States with the child, and that she wanted to separate.

The father enlisted the assistance of the French Central Authority through the administrative procedures established by the Hague Convention. He also filed a petition for return of the child in federal district court in Washington, D.C. A few weeks later, the father's application to the French Central Authority was denied on the finding that the retention of the child was not unlawful since the child's presence in the United States was the result of both parents' agreement.[2]

The district court found that wrongful retention occurred on the date that the mother served the father with her request for permanent primary physical custody or at least by the time the father filed his opposition to the proposed change in custody rights.[3] Although the agreed-upon time for the child to return to France had not yet arrived, the father was not required to allow the eighteen-month period to expire before he petitioned for the child's return. The district court rejected the mother's position that her actions amounted only to an anticipatory repudiation regarding her future intent and found that her attempt to alter the status-quo custody arrangement was enough to constitute unlawful retention of the child. The district court also found that France was the child's habitual residence, pointing to the child's birth in France, the family's apartment in Paris, the child's attendance at nursery school in Paris, the strong social ties of the child and the parents to Paris, and the employment of both parents in France.

Discussion

Wrongful Retention. At the heart of mother's appeal was the contention that unlawful retention cannot precede the projected date of a child's return to its habitual residence. Such anticipatory retention does not confer jurisdiction for a court to adjudicate a claim of unlawful retention. But the D.C. Circuit did not view the question of wrongful retention as a jurisdictional matter. The court recognized the holdings of other circuits, finding that the date of wrongful retention is "the date consent was revoked" or when the petitioning parent learned the true nature of the situation,"[4] or the "date beyond which the

2. The circuit court gave no weight to the French Central Authority's determination, since the Hague Convention assigns questions regarding wrongful removal or retention to the courts of the states that are parties to the Convention, not the central authorities.

3. Abou-Haidar v. Vazquez, 945 F.3d 1208, 1218 (D.C. Cir. 2019) (citing Mozes v. Mozes, 239 F.3d 1067, 1069–70 & n.5 (9th Cir. 2001)).

4. *Id.* at 1216 (citing Palencia v. Perez, 921 F.3d 1333, 1342 (11th Cir. 2019), and Marks v. Hochhauser, 876 F.3d 416, 422 (2d Cir. 2017)).

noncustodial parent no longer consents to the child's continued habitation with the custodial parent and instead seeks to reassert custody rights, as clearly and unequivocally communicated through words, actions, or some combination thereof."[5] The court deemed the commencement of retention in this case as the date that the mother informed the child's father she was seeking primary physical custody in state court.[6]

The D.C. Circuit contrasted the situation in this case with *Toren v. Toren*.[7] In *Toren*, the First Circuit found no wrongful retention where the scheduled date for the children's return had yet to occur and the mother's complaint in state court was for modification of visitation only, rather than a change in primary custody. But the D.C. Circuit noted,

> Here, in contrast, a series of decisions and corresponding actions already taken by both parties clearly conveys a ripe disagreement about where the child's custody will lie. As Abou-Haidar observes, the First Circuit's dismissal in *Toren* is therefore consistent with the basic principle that, in order to be ripe, a challenge to an "anticipatory retention requires a clear communication that the retaining parent is not returning the child home."
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> Once the parties have made clear that they no longer agree where the child should reside—and especially when, as here, an effort has been made to change the custodial status quo—their prior agreement is no longer adequate to protect custodial forum rights.[8]

Habitual Residence. The court acknowledged the difference among the circuits regarding the question of determining a child's habitual residence—the "shared intent" criteria of *Mozes v. Mozes*[9] and the "child-centered" approach of the Sixth and Third Circuits.[10] Both parties agreed that the criteria set forth in *Mozes v. Mozes* should be used in this case, and the D.C. Circuit affirmed the district court's finding that France was the child's habitual residence.

The court noted the position taken by the U.S. Department of Justice in its amicus capacity, advocating the adoption of a new standard for determining habitual residence issues:

> "[A] child's habitual residence under the Convention is a factual inquiry that must take into account all relevant circumstances in each case bearing on the ultimate question of where the child usually or customarily lives." . . . Under that relatively unguided, totality-of-the-circumstances approach, "both parental intent and acclimatization can be relevant," but "ultimately any determination of a child's habitual residence must 'remain[ ] essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.'"[11]

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5. *Id.* (citing Blackledge v. Blackledge, 866 F.3d 169, 179 (3d Cir. 2017)).
6. *Id.* at 1217.
7. 191 F.3d 23 (1st Cir. 1999).
8. *Abou-Haidar*, 945 F.3d at 1217–18 (citations omitted).
9. 239 F.3d 1067, 1070 (9th Cir. 2001).
10. Taglieri v. Monasky, 907 F.3d 404, 407 (6th Cir. 2018); Ahmed v. Ahmed, 867 F.3d 682, 688 (6th Cir. 2017); Redmond v. Redmond, 724 F.3d 729, 737–38 (7th Cir. 2013).
11. *Abou-Haidar*, 945 F.3d at 1219–20 (citations omitted).