

Commentary: Appellate Court Cases

Saada v. Golan, 930 F.3d 533 (2nd Cir. 2019)

Other Second Circuit Cases

Eidem v. Eidem,

No. 19-1417, 2019 U.S. App. LEXIS 36488 (2d Cir. Dec. 10, 2019)

Marks v. Hochhauser,

876 F.3d 416 (2d Cir. 2017)

Tann v. Bennett,

648 F. App'x 146 (2d Cir. 2016)

Ermini v. Vittori,

758 F.3d 153 (2d Cir. 2014)

Hollis v. O'Driscoll,

739 F.3d 108 (2d Cir. 2014)

Souratgar v. Lee,

720 F.3d 96 (2d Cir. 2013)

Guzzo v. Cristofano,

719 F.3d 100 (2d Cir. 2013)

Hofmann v. Sender,

716 F.3d 282 (2d Cir. 2013)

Ozaltin v. Ozaltin,

708 F.3d 355 (2d Cir. 2013)

Mota v. Castillo,

692 F.3d 108 (2d Cir. 2012)

Duran v. Beaumont,

622 F.3d 97 (2d Cir. 2012)

Gitter v. Gitter,

396 F.3d 124 (2d Cir. 2005)

Grieve v. Tamerin,

269 F.3d 149 (2d Cir. 2001)

Blondin v. Dubois (*Blondin II*),

238 F.3d 153 (2d Cir. 2001)

Diorinou v. Meztis,

237 F.3d 133 (2d Cir. 2001)

Blondin v. Dubois (*Blondin I*),

189 F.3d 240 (2d Cir. 1999)

Grave Risk | Court's Discretion to Return | Undertakings | Habitual Residence

In this case, a child was ordered returned to its habitual residence in Italy, but the undertakings that conditioned the return were unenforceable. The Second Circuit remanded the case to the district court to consider conditions of return that would protect the child.

Holdings

The Second Circuit affirmed the lower court's finding on habitual residence but remanded the case for further consideration of undertakings, given the likelihood that the proffered undertakings could not be enforced.

Facts

The father, an Italian citizen, and the mother, a U.S. citizen, married in Milan, Italy, in 2014. They had a child together in 2015. Soon after their marriage, the father began abusing the mother physically, verbally, and emotionally. This abuse continued throughout the marriage. On one occasion, the father threatened to kill the mother. This behavior often took place in the presence of the child.

The child lived in Italy for his first two years. In July 2018, the mother traveled with the child to the United States to attend her brother's wedding. She did not return to Italy with the child and moved into a domestic violence shelter in New York.

After a nine-day trial, the district court found that Italy was the child's habitual residence, and ordered the child be returned to Italy subject to certain undertakings. The court found that returning

the child to Italy would expose him to a grave risk of harm, and specifically concluded that a return could result in significant adverse effects upon his psychological health and development. The court further found that the father was unlikely to change his behavior, and "could not control his anger or take responsibility for his behavior." Therefore, as a

condition of the child’s return, the district court adopted undertakings intended to “sufficiently ameliorate the grave risk of harm.” Those undertakings included (1) payment for housing, support, and legal fees in the sum of \$30,000; (2) an order that the father stay away from the mother; and (3) the requirement that the mother must first consent for the father to be able to visit the child.

Discussion

Habitual Residence. The Second Circuit reiterated its previous test for determining habitual residence: look to the last shared intent to fix the child’s residence.¹ The court noted that it reviews a district court’s factual findings for clear error and reviews those facts *de novo*.² Based on the evidence cited by the district court, the Second Circuit affirmed the lower court’s finding that Italy was the child’s habitual residence.

Grave Risk | Undertakings. District courts have considerable discretion to order the return of a child even when the abducting parent has established a defense against return.³ The Second Circuit followed its precedent in *Blondin I*⁴ that district courts should “take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child’s repatriation.”⁵ When undertakings are unenforceable, the return of a child in the face of a proven defense is generally disfavored.⁶ This is especially so in cases like this one. The court concluded that

in cases in which a district court has determined that repatriating a child will expose him or her to a grave risk of harm, unenforceable undertakings are generally disfavored, particularly where there is reason to question whether the petitioning parent will comply with the undertakings and there are no other “sufficient guarantees of performance.”⁷

Finding that the undertakings given by the father in this case were unsupported by guarantees of his performance, the Second Circuit vacated the district court’s order of return and remanded the case for consideration of remedies that would allow for the return of the child and protection from harm. The Second Circuit urged the district court to consider whether the Italian courts would enforce the restraining order. Addressing whether an order of return conditioned on a foreign court’s enforcement of such an order is appropriate, the Second Circuit reasoned,

[W]e do not think that international comity precludes district courts from ordering, where practicable, that one or both of the parties apply to courts in the country of habitual residence for any available relief that might ameliorate the grave risk of

1. *Saada v. Golan*, 930 F.3d 533, 539 (2d Cir. 2019) (citing *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005)).

2. *Id.* at 538 n. 13 (citing *Guzzo v. Cristofano*, 719 F.3d 100, 109 (2d Cir. 2013)). The court also noted that on June 10, 2019, the Supreme Court granted certiorari to review the question as to the appropriate standard of review for habitual residence determinations. See *Taglieri v. Monasky*, 907 F.3d 404 (6th Cir. 2018) (en banc), cert. granted, 140 S. Ct. 719 (2020).

3. *Id.* at 539 (citing *Souratgar v. Lee*, 720 F.3d 96, 103 (2d Cir. 2013)).

4. *Blondin v. Dubois (Blondin I)*, 189 F.3d 240 (2d Cir. 1999).

5. *Id.* at 248.

6. *Saada*, 930 F.3d at 540 (citing *Simcox v. Simcox*, 511 F.3d 594, 608 (6th Cir. 2007)).

7. *Id.* (citations omitted).

harm to the child. So long as the purpose of such an order is to ascertain the types of protections actually available, and the district court does not condition a child's return on any particular action by the foreign court, there is little risk that this "practice would smack of coercion of the foreign court."⁸

8. *Id.* at 541–542.