Commentary: Appellate Court Cases

E.R.S.C. v. Carlwig (*in re* A.L.C.), 607 Fed. Appx. 658 (9th Cir. 2015)

Other Ninth Circuit Cases

***In re* A.L.C.**,
607 Fed. App'x 658 (9th Cir. 2015)

Margain v. Ruiz-Bours,
592 Fed. App'x 619 (9th Cir. 2015)

Murphy v. Sloan,
764 F.3d 1144 (9th Cir. 2014)

Valenzuela v. Michel,
736 F.3d 1173 (9th Cir. 2013)

Cuellar v. Joyce (*Cuellar II*),
603 F.3d 1142 (9th Cir. 2010)

Cuellar v. Joyce (*Cuellar I*),
596 F.3d 505 (9th Cir. 2010)

Asvesta v. Petroutsas,
580 F.3d 1000 (9th Cir. 2009)

***In re* B. Del C.S.B.**,
559 F.3d 999 (9th Cir. 2009)

Papakosmas v. Papakosmas,
483 F.3d 617 (9th Cir. 2007)

Von Kennel Gaudin v. Remis (*Gaudin III*),
415 F.3d 1028 (9th Cir. 2005)

Holder v. Holder (*Holder II*),
392 F.3d 1009 (9th Cir. 2004)

Von Kennel Gaudin v. Remis (*Gaudin II*),
379 F.3d 631 (9th Cir. 2004)

Holder v. Holder (*Holder I*),
305 F.3d 854 (9th Cir. 2002)

Habitual Residence

Facts

Mother and father established their residence in Sweden, along with their son, A.L.C. While living in Sweden, mother became pregnant with their second child, E.R.S.C. Mother wanted to give birth to the child in the United States, so father purchased round-trip tickets from Stockholm to Los Angeles. The travel arrangements provided for departure in January 2013, and return in September 2013. E.R.S.C. was born in May 2013 in the United States. Mother refused to return to Sweden. Father brought his petition for the return of both children to Sweden in February 2014. After an evidentiary hearing, the district court found that Sweden was the habitual residence of both children, and ordered their return to Sweden.

Discussion

In a memorandum opinion, the Ninth Circuit affirmed the order of return for A.L.C., but reversed the finding that E.R.S.C. was a habitual resident of Sweden. The Ninth Circuit found that E.R.S.C. had no habitual residence, and thus fell outside the purview of the Hague Convention.

Other Ninth Circuit Cases (*cont'd.*)

Von Kennel Gaudin v. Remis (*Gaudin I*), 282 F.3d 1178 (9th Cir. 2002)

Gonzalez-Caballero v. Mena, 251 F.3d 789 (9th Cir. 2001)

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

Shalit v. Coppe, 182 F.3d 1124 (9th Cir. 1999)

The Ninth Circuit's affirmance of the district court's finding that the habitual residence of A.L.C. was Sweden is not surprising under the facts of the case.[1] The child had lived in Sweden for over a year with both parents. It was only when mother became pregnant with her second child, that there was any discussion of A.L.C. traveling to the United States with his mother. The evidence supported the conclusion that the trip to the United States was not a permanent one, and that there was no evidence that both parties intended to abandon Sweden as A.L.C.'s residence. After the birth of E.R.S.C., it became apparent that mother did not intend to reunite with her husband in Sweden. Father filed a timely petition for the return of both children. The court relied on *Mozes v. Mozes*,[2] finding that there was a lack of shared intent to support the acquisition of a new habitual residence. Lacking a shared intent to abandon Sweden as the child's habitual residence, the only consideration left was to determine whether an acclimatization occurred to the extent that a return to Sweden would amount to removing A.L.C. from the place that he called home. While there was some evidence of acclimatization in Los Angeles, it did not rise to the level that it overcame the last shared intentions of the parents.[3]

In what appears to be a unique holding, the Ninth Circuit reversed the finding of the district court regarding the infant E.R.S.C. and found that the child had not acquired a habitual residence. The court made the following observations: the United States was not the child's habitual residence simply because the United States was the country of the child's birth; there was a conflict of parental intent as to the child's habitual residence; and no evidence of acclimatization was presented. Consequently, the court concluded that no habitual residence for the infant E.R.S.C. had come into existence, citing the comments of Paul R. Beaumont and Peter E. McEleavy:[4] "if an attachment to a State does not exist, it should hardly be invented." The court also noted the dicta in *Delvoye v. Lee*, stating that when a "conflict [of parental intent] is contemporaneous with the birth of the child, no habitual residence may ever come into existence."[5]

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1. The decision is unpublished, with the court noting that "[t]his disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3." Ninth Circuit Rule 36.3 states in part:

> (a) Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.
>
> (b) Citation of Unpublished Dispositions and Orders Issued on or After January 1, 2007. Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1.

Federal Rules of Appellate Procedure rule 32.1 states in part that:

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
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> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
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> (ii) issued on or after January 1, 2007.

2. 239 F.3d 1067 (9th Cir. 2001).
3. *Id.* at 1081.
4. The Hague Convention on International Child Abduction 89, 112 (1999).
5. 329 F.3d 330, 333 (3d Cir. 2003).

Editor's Note: The ultimate disposition in this case will result in the courts of Sweden having jurisdiction to resolve custody issues relating to A.L.C. and in all likelihood the courts of California having jurisdiction over the custody questions involving E.R.S.C. pursuant to the provisions of the U.C.C.J.E.A. The Ninth Circuit recognized the conundrum, but specifically rejected the district court's rationale in finding E.R.S.C. was habitually resident in the United States:

> We reject the other rationales cited by the district court in deciding E.R.S.C. was a habitual resident of Sweden. The district court's explanations that it would be untenable to split up the siblings for custody determinations and that Mr. Carlwig is employed in Sweden while Ms. Carlwig "is unemployed here in the U.S. and rel[ies] on financial support from [the] Father as well as governmental assistance," because they go to the merits of the custody claims and are not relevant to the Convention's required analysis. *See* 22 U.S.C. § 9001(b)(4) ("The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.").[6]

6. E.R.S.C. v. Carlwig (*in re* A.L.C.), 607 Fed. Appx. 658, 662 (9th Cir. 2015).