

Commentary: Appellate Court Cases

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

Other Second Circuit Cases

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

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

Wrongful Retention | Single or Continuing Act | Date of Entry into Force

The Second Circuit explored whether the 1980 Hague Convention came into force between the U.S. and Thailand before the mother in this case wrongfully retained her children. It also dealt with whether wrongful retention is a single act or a continuing one.

Facts

Mother and father were U.S. citizens with three sons—a fifteen-year-old and twelve-year-old twins—and the family had lived in Bangkok, Thailand, since 2005. The parties divorced in 2015, and mother gained sole custody of the children.¹ In September 2015, mother traveled to New York for three weeks, with plans to return to Thailand on October 10, 2015. Three days before her scheduled return, mother sent father an email informing him that she had decided to remain in the United States permanently.

The district court held that the retention of the children was a single act, rather than a continuing act, and that the wrongful retention occurred before the Convention had entered into force between the United States and Thailand. The Second Circuit affirmed.

Discussion

Entry into Force. Because Thailand was not a member state at the time of the adoption of the 1980 Convention, it could only be bound by the Convention once it had gone through the process of accession. Thailand acceded to the

Convention in 2002, but the United States did not formally accept that accession until 2016. Under the terms of Article 38, only after the existing member state has declared

1. Months after mother's departure from Thailand, the Thai court of appeals vacated the judgment that awarded mother sole custody and instead awarded joint custody of the children to both mother and father.

its acceptance of the acceding state will the Convention enter into force between those two states, on the “first day of the third calendar month after the deposit of the declaration of acceptance.”² The United States accepted Thailand’s accession on January 26, 2016, meaning the Convention went into force between the two countries on April 1, 2016.

The Second Circuit declined to adopt the reasoning of *Viteri v. Pflucker*³ holding that the Convention applies if it is in force in each country—that is, if both countries involved have either ratified or acceded to the Convention on the date of the wrongful removal or retention.

Wrongful Retention. The circuit court further held that wrongful retention is a single, not continuing, act. This interpretation is reinforced by the provisions of Article 35 of the Convention, which states that the Convention “shall apply as between Contracting States only to wrongful removals or retentions occurring *after* its entry into force in those States.”⁴ Similarly, Article 12, the one-year provision, states that proceedings must be brought within one year “from the date of the wrongful removal or retention.”⁵ If retention were deemed to be a continuing act, then the provisions of Article 12 would have no effect, and a case would be actionable so long as the retention continued and until the Convention entered into force between the two countries involved.

Additionally, the Pérez-Vera report states that

[t]he fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child’s stay in a place other than that of its habitual residence.⁶

Father filed his petition for the return of the children on September 9, 2016. The wrongful retention of the children commenced on the date that mother unequivocally informed father that she was not returning with the children: October 7, 2015. At the time of mother’s notification, the Convention had not yet entered into force between Thailand and the United States.

2. Hague Convention on the Civil Aspects of International Child Abduction art. 38, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501.

3. 550 F. Supp. 2d 829 (N.D. Ill. 2008).

4. Hague Convention on the Civil Aspects of International Child Abduction art. 35, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501.

5. Hague Convention on the Civil Aspects of International Child Abduction art. 12, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501.

6. Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, *in* 3 Acts and Documents of the Fourteenth Session 426, 458 ¶ 108 (1982).