Commentary: Appellate Court Cases

Mauvais v. Herisse, 772 F.3d 6 (1st Cir. 2014)

Other First Circuit Cases

Mendez v. May,
778 F.3d 337 (1st. Cir. 2015)

Sánchez-Londoño v. González,
752 F.3d 533 (1st Cir. 2014)

Neergaard-Colon v. Neergaard,
752 F.3d 526 (1st Cir. 2014)

Darin v. Olivero-Huffman,
746 F.3d 1 (1st Cir. 2014)

Yaman v. Yaman,
730 F.3d 1 (1st Cir. 2013)

Patrick v. Rivera-Lopez,
708 F.3d 15 (1st Cir. 2013)

Felder v. Wetzel,
696 F.3d 92 (1st Cir. 2012)

Charalambous v. Charalambous,
627 F.3d 462 (1st Cir. 2010)

Nicolson v. Pappalardo,
605 F.3d 100 (1st Cir. 2010)

Kufner v. Kufner,
519 F.3d 33 (1st Cir. 2008)

Rigby v. Damant,
486 F.3d 692 (1st Cir. 2007)

Danaipour v. McLarey (*Danaipour II*),
386 F.3d 289 (1st Cir. 2004)

Whallon v. Lynn,
356 F.3d 138 (1st Cir. 2004)

Danaipour v. McLarey (*Danaipour I*),
286 F.3d 1 (1st Cir. 2002)

Walsh v. Walsh,
221 F.3d 204 (1st Cir. 2000)

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

Zuker v. Andrews,
181 F.3d 81 (1st Cir. 1999)

Habitual Residence | Acclimatization | Grave Risk

Facts

Father petitioned for return of his two children, aged five and nine, to Canada. Before 2010, the parties lived principally in Haiti, although mother lived for a time in France. Mother moved to Massachusetts in 2009, where the parties' second child was born. Haiti experienced a disastrous earthquake in January 2010. Father, who was living in Haiti with the eldest child, moved with the child to Québec, Canada. Mother moved with the youngest child from Massachusetts to Montréal and joined father. The parties lived together for one year, at which time mother moved with the two children to another apartment in Montréal. The parties reunited approximately one year later.

While living in Montréal, the children visited with relatives on both sides of their family, attended church and Sunday school, and developed Québécois accents. The eldest child went to primary school, and the youngest was enrolled in full-time day care. The eldest child developed health problems, and both parents agreed that the child could be temporarily treated in the United States and returned to Canada by September 20, 2013. While in the U.S., the child lived with mother's aunt in Massachusetts. The child was not returned as anticipated, and mother left Canada with the youngest child and moved in to her aunt's home. She refused to return the two children to Canada.

The district court granted father's petition for the return of the children, finding that the children's habitual residence was Canada, and that there were no defenses to the petition.

The First Circuit affirmed.

Discussion

Habitual Residence. The court noted that its inquiry into the habitual residence issue begins with consideration of the parents' shared intent or settled purpose regarding their child's residence and, secondly, evidence of the child's acclimatization.[1] Particularly in regard to younger children who lack the psychological means to decide their own habitual residence, the court looks to the "latest moment of the parents' shared intent."[2] The court followed the majority of circuits in looking to the *Mozes v. Mozes*[3] test: the acquisition of a new habitual residence requires a settled intention to abandon the former (although the court did not specifically mention the *Mozes* case).

The facts as found by the district court were that mother voluntarily, although reluctantly, moved to Canada, where she remained living with father for approximately ten months, after which mother separated from father, taking the children with her to a different apartment in Montréal. The parties again reconciled. This resulted in the children living in Canada for approximately three-and-one-half years before their removal to the United States. Although mother and father may not have initially agreed to select Canada as the children's habitual residence, they did so at some later time in the three-and-one-half-year continuum. The district court found that for at least two years during this period of time, the parties were "content" to have the children remain in Canada.

Acclimatization. Quoting liberally from the First Circuit's decisions in *Sanchez-Londono v. Gonzalez*,[4] *Neergaard-Colon v. Neergaard*,[5] and *Darin v. Olivero-Huffman*,[6] Judge Torruella summarized the issue of acclimatization:

> Factors evidencing a child's acclimatization to a given place—like a change in geography combined with the passage of an appreciable period of time—may influence our habitual-residence analysis. In certain circumstances, a child can lose its habitual attachment to a place even without a parent's consent if the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place. However, courts should be "slow to infer" that an established country of habitual residence has been abandoned, when the parents have not demonstrated a shared intent to do so. Relatedly, evidence of acclimatization is generally insufficient to establish a child's habitual residence in a new country when contrary parental intent exists.[7]

In this case, the evidence showed that the children had become acclimatized by virtue of the time they had spent in Canada, their relationship with extended family there, their school and church activities, and the development of local Québécois accents.

Grave Risk. Mother alleged that father had raped her on multiple occasions, sometimes in the presence of the children, and that a child from father's previous relationship had

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1. Mauvais v. Herisse, 772 F.3d 6, 11 (1st Cir. 2014) (citing Nicolson v. Pappalardo, 605 F.3d 100, 103–04 (1st Cir. 2010)).
2. *Id.* at 12.
3. 239 F.3d 1067 (9th Cir. 2001).
4. 752 F.3d 533 (1st Cir. 2014).
5. 752 F.3d 526 (1st Cir. 2014).
6. 746 F.3d 1 (1st Cir. 2014).
7. Mauvais v. Herisse, 772 F.3d 6 (1st Cir. 2014) (internal quotes, punctuation, and citations omitted).

exhibited sexually aggressive behavior toward one of the parties' children and sexually acted out. Mother also presented the testimony of an expert witness that a return of the children to Canada would expose them to grave risk. Without discounting the severity of mother's allegations, the district court found that mother's allegations were largely general and vague, and essentially lacking in credibility due to mother's actions as a whole. The court refused to accept that the factual situation in this case was like that in *Walsh v. Walsh*,[8] where the First Circuit assumed Mrs. Walsh's version of the facts to be true. Here, by contrast, it did not appear that the district court found mother's assertions to be true. The court noted that although the district court did not find a grave risk based upon mother's evidence, mother would be free to develop the facts before the Canadian courts in custody litigation.

8. Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000).