Commentary: Appellate Court Cases

Taglieri v. Monasky, No. 16-4128, 2018 U.S. App. LEXIS 29178 (6th Cir. Oct. 17, 2018)

Other Sixth Circuit Cases

Moreno v. Zank,
895 F.3d 917 (6th Cir. 2018)

Ahmed v. Ahmed,
867 F.3d 682 (6th Cir. 2017)

Pliego v. Hayes,
843 F.3d 226 (6th Cir. 2016)

Jenkins v. Jenkins,
569 F.3d 549 (6th Cir. 2009)

Simcox v. Simcox,
511 F.3d 594 (6th Cir. 2007)

Robert v. Tesson,
507 F.3d 981 (6th Cir. 2007)

Taveras v. Taveraz,
477 F.3d 767 (6th Cir. 2007)

March v. Levine,
249 F.3d 462 (6th Cir. 2001)

Sinclair v. Sinclair,
121 F.3d 709 (6th Cir. 1997)

Friedrich v. Friedrich (*Friedrich II*),
78 F.3d 1060 (6th Cir. 1996)

***In re* Prevot**,
59 F.3d 556 (6th Cir. 1995)

Friedrich v. Friedrich (*Friedrich I*),
983 F.2d 1396 (6th Cir. 1993)

Habitual Residence | Infants

This case addressed what standard should be used to determine the habitual residence of an infant who has lived in only one location prior to the its wrongful removal. Father petitioned for return of his six-week-old child to Italy, where child was born and had lived exclusively before mother wrongfully removed the child to the United States.

Facts

In 2011, father, an Italian citizen studying at the University of Illinois, met and married mother, also a student at that university. In 2013, the couple decided to move to Italy for their careers. Father was licensed to practice medicine in Italy, and mother received two fellowships for further study in Italy. Father moved to Italy first, in February 2013; mother later followed. Before her move, mother sent an email to father indicating that she did not believe "[the fact that we are moving to Milan or Rome] means we are done with the US [for good]."

Mother became pregnant in May 2014. Father became sexually and physically abusive. The parties' relationship deteriorated, and they discussed divorce. Mother applied for U.S. jobs but also made plans to have the child in Italy. After one of mother's pregnancy check-ups in mid-February, she began having contractions. Father remained at the parties' apartment while she took a taxi to the hospital. Their versions of why father did not immediately join mother conflicted. Father arrived at the hospital later for the birth. The child was delivered by emergency caesarean section. After the birth, father returned to the parties' apartment, and mother went to a residence in Basiglio, a suburb of Milan. The parties briefly reconciled but separated shortly thereafter due to arguments and father's alleged threats of physical harm to mother.

On April 15, 2015, mother left for the United States with the parties' six-week-old child. Various factors influenced mother's eventual move back to the United States—her

inability to obtain recognition of her academic credentials Italy, her lack of Italian language skills, and her complicated pregnancy. Less than a month later, father commenced an action under the Hague Convention for the return of the child. In March 2016, the district court held a four-day trial. In October 2016, the district court found that Italy was the child's habitual residence and granted father's application for the child's return. Stays requested by mother were denied, and the child was returned to Italy. Mother appealed, but the judgment was affirmed by a divided panel in *Taglieri v. Monaski*.[1] A petition for an en banc hearing was granted, resulting in the opinion discussed in this commentary.

Discussion

Habitual Residence. The Sixth Circuit reiterated its holding in *Ahmed v. Ahmed*[2] that the circuit considers two factors when determining habitual residence: (1) whether the child has become acclimatized, and (2) whether a shared parental intent existed. The second factor is considered a backup test when the child in question is too young or disabled to become acclimatized. The court noted that every circuit to consider the issue of habitual residence looks to both standards.[3] Acclimatization typically involves factors such as academic activities, social connections, sports activities, excursions, and the formation of meaningful connections with people and places. Here, the court noted that the age of the child foreclosed consideration of acclimatization as a method to determine habitual residence. Thus, the district court had properly looked to shared parental intent as the appropriate test in this case.

The district court had resolved the issue of habitual residence in the face of the conflicting evidence and arguments of the parties. In affirming the district court's finding that Italy was the child's habitual residence, the Sixth Circuit panel gave great weight to the factual determinations the district court made after the four-day trial. The panel applied a "clear error" standard of review: "[W]e leave this work to the district court unless the fact findings 'strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" Recognizing that there was evidence in the record that could have supported the conclusion that the child's habitual residence was in the United States instead of Italy, the Sixth Circuit deferred to the district judge and concluded that he

> had the authority to rule in either direction. He could have found that Italy was A.M.T.'s habitual residence or he could have found that the United States was her habitual residence. After fairly considering all of the evidence, he found that Italy was A.M.T.'s habitual residence. . . . Call our standard of review what you will—clear-error review, abuse-of-discretion review, five-week-old-fish review—we have no warrant to second-guess Judge Oliver's well-considered finding.[4]

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1. 876 F.3d 868 (6th Cir. 2017).
2. 867 F.3d 682 (6th Cir. 2017).
3. Taglieri v. Monasky, No. 16-4128, 2018 U.S. App. LEXIS 29178, at *5 (6th Cir. Oct. 17, 2018) ("Every circuit to consider the question looks to both standards. *Ahmed,* 867 F.3d at 689; *see Mauvais v. Herisse*, 772 F.3d 6, 11 (1st Cir. 2014); *Guzzo v. Cristofano*, 719 F.3d 100, 110 (2d Cir. 2013); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 296 (3d Cir. 2006); *Maxwell v. Maxwell*, 588 F.3d 245, 253 (4th Cir. 2009); *Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012); *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013); *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Holder v. Holder*, 392 F.3d 1009, 1020 (9th Cir. 2004); *Kanth v. Kanth*, No. 99-4246, 2000 WL 1644099, at *1–2 (10th Cir. Nov. 2, 2000); *Chafin v. Chafin*, 742 F.3d 934, 938–39 (11th Cir. 2013).").
4. *Id.* at *8.

The district court had found that the parties shared intent was to raise the child in Italy, and the Sixth Circuit found that the district court had used the proper test for determining habitual residence. In the absence of clear error, the district court's decision should be affirmed.

The en banc court also rejected mother's argument that the district court had erred because there was never a showing that there was a "meeting of the minds" between father and mother regarding the child's habitual residence. The circuit court noted that such an agreement is not required for a finding that the parties had a shared intent.

> An absence of a subjective agreement between the parents does not by itself end the inquiry. Otherwise, it would place undue weight on one side of the scale. Ask the products of any broken marriage, and they are apt to tell you that their parents did not see eye to eye on much of anything by the end. If adopted, [mother's] approach would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected.[5]

Concurring Opinion of Judge Boggs. Judge Boggs agreed with the result in the majority opinion, but he pointed out that strict adherence to *Ahmed*'s binary choice between the acclimatization test or the shared parental intent test opens up the possibility that the child might be found to have no habitual residence. Judge Boggs suggested that absent unusual circumstances, if a child has lived exclusively in one country, that country should be the child's habitual residence. The failure to recognize such a rule could result in a court making a finding that neither acclimatization nor shared intent exists. This conclusion would produce a determination that an infant has no habitual residence—relegating parents to self-help as a remedy for abductions. This result, Judge Boggs concluded, ignores the purposes of the 1980 Hague Convention.

Three Separate Dissenting Opinions: Judge Moore, Judge Gibbons, and Judge Stranch. The dissenting opinions all noted that the district court's decision was rendered before the Sixth Circuit's opinion in *Ahmed*. As a result, that court had not analyzed the case within the parameters later set forth in *Ahmed*. The dissenters also found that the district court determined shared parental intent on the basis of where the parents had actually established a residence, rather than where they intended to live. Judge Moore wrote that courts must look to the external indicia of the parties' shared intent. Judge Moore also pointed out that although a habitual residence determination is essentially a question of fact, whether the district court used the proper standard for determining habitual residence is a matter to be reviewed de novo by an appellate court. Judges Gibbons and Stranch observed that *Ahmed* defined the shared intent test to reflect the parents' intention for the child's residence. However, the district court focused on the parents' established marital residence in Italy and mother's failure to leave that residence after the birth of the child. The dissenters agreed that the case should be remanded for the district court to reanalyze the case in light of *Ahmed*.

5. *Id.* at *9.