Commentary: Appellate Court Cases

Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013)

Other Seventh Circuit Cases

Van De Sande v. Van De Sande,
431 F.3d 567 (7th Cir. 2005)

Walker v. Walker,
701 F.3d 1110 (7th Cir. 2012)

Khan v. Fatima,
680 F.3d 781 (7th Cir. 2012)

Norinder v. Fuentes,
657 F.3d 526 (7th Cir. 2011)

Altamiranda Vale v. Avila,
538 F.3d 581 (7th Cir. 2008)

Kijowska v. Haines,
463 F.3d 583 (7th Cir. 2006)

Koch v. Koch,
450 F.3d 703 (7th Cir. 2006)

Order Compelling Parent to Return | Recognition or Enforcement of Custody Orders | No Retroactive Wrongful Retention | Habitual Residence

Redmond reiterates the principle that the 1980 Hague Convention is not a vehicle for settling jurisdictional disputes regarding competing custody orders and explores in detail the question of habitual residence.

Facts

Mother, a U.S. citizen, and father, an Irish citizen, lived together in Ireland. When their child was about eight months old, mother went to Illinois with the child. Father did not consent. Because the parties were unmarried, Irish law provided that mother was the sole legal custodian of the child, and father had no established rights of custody. Mother and child remained in Illinois. Three-and-one-half years later, in February 2011, an Irish court granted father paternity rights, ordered joint custody, and further ordered that the child live in Ireland. Mother participated in the proceedings. After the entry of the Irish decree, Mother moved back to Illinois, ostensibly for the purpose of gathering up personal belongings. Despite her undertakings to return to Ireland, she remained with the child in Illinois. Father petitioned for a return of the child. The district court granted the petition and ordered both mother and child to return to Ireland. The Seventh Circuit reversed.

Discussion

Ordering Parent Returned with Child. The district court ordered mother and child returned to Ireland based upon the Irish custody order that was entered long after the child had acquired a new habitual residence in the United States. The court found that no provision of the Hague Convention authorizes a court to order a parent to relocate to another country. "As far as we can determine, neither the Hague Convention nor its implementing legislation . . . authorizes the court to order the relocation of parents."[1]

Effect of Custody Orders Issued After Child's Removal. At the time the child was removed from Ireland initially, father had no rights of custody, so the removal of the

1. Redmond v. Redmond, 724 F.3d 729, 735 n.1 (7th Cir. 2013).

child at that time was not wrongful. Father contended that mother's failure to return the child to Ireland after he gained custody rights constituted a wrongful retention. As a matter of first impression, the Seventh Circuit ruled that the 1980 Convention deals with child abductions and is not aimed at determining parent's jurisdictional rights vis-à-vis their custody cases:

> Although our case is not perfectly analogous to either *Barzilay*[2] or *White*[3], the basic point is the same. The Hague Convention targets international child abduction; it is not a jurisdiction-allocation or full-faith-and-credit treaty. It does not provide a remedy for the recognition and enforcement of foreign custody orders or procedures for vindicating a wronged parent's custody rights more generally. Those rules are provided in the Uniform Child-Custody Jurisdiction and Enforcement Act.[4]

Habitual Residence. The Seventh Circuit found that the United States was the child's habitual residence. It held that a parent may not use the 1980 Convention as a vehicle to alter the child's habitual residence status based upon a subsequent custody decision, since the essence of the Convention is to return a child that has been taken from his or her habitual residence.

The court then went on to discuss the nature of the Circuit split on the issue of habitual residence. Ordinarily these commentaries do not contain lengthy quotes from cases, but the following excerpt from the case is an excellent summary on the diverse definitions of habitual residence:

> A majority of the circuits have preferred the Ninth Circuit's approach and adopted the so-called "*Mozes*[5] framework." *See Gitter*[v. Gitter], 396 F.3d [124,] 131 (2d Cir.[2005]); Maxwell v. Maxwell, 588 F.3d 245, 251 (4th Cir. 2009); *Ruiz*[v. Tenorio], 392 F.3d [1247,] 1252 (11th Cir.[2004]). We too have "adopted a version of the analysis set out by the Ninth Circuit in *Mozes*." *Norinder*[v. Fuentes], 657 F.3d [526,] 534 (citing *Koch*[v. Koch], 450 F.3d [703,] 715[(7th Cir. 2006)]). Conventional wisdom thus recognizes a split between the circuits that follow *Mozes* and those that use a more child-centric approach, but we think the differences are not as great as they might seem. Although the Third, Sixth, and Eighth Circuits focus on the child's perspective, they consider parental intent, too. In *Feder*[6] the Third Circuit observed that the inquiry into a child's habitual residence "must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there." 63 F.3d at 224 (emphasis added). *Feder* reversed the district court's habitual-residence determination precisely because the district court had given insufficient attention to the intentions of one of the parents. *See id.* Similarly, in the Eighth Circuit, "[t]he 'settled purpose' of a family's move to a new country is a central element of the habitual residence inquiry. . . . [T]he settled purpose must be from the child's perspective, although parental intent is also taken into account." *Barzilay*, 600 F.3d at 918 (emphasis added).

2. Barzilay v. Barzilay, 600 F.3d 912 (8th Cir. 2010).
3. White v. White, 718 F.3d 300 (4th Cir. 2013).
4. Redmond v. Redmond, 724 F.3d 729, 741 (7th Cir. 2013).
5. Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).
6. Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995).

The same is true on the other side. Although the *Mozes* framework focuses on the shared intent of the parents, the child's "acclimatization" in a country has an important role to play. Indeed, the Ninth Circuit explained in *Mozes* that "a child's life may become so firmly embedded in the new country as to make it habitually resident even though there be lingering parental intentions to the contrary." 239 F.3d at 1078. We have emphasized that the *Mozes* approach is "flexible" and takes account of "the realities of children's and family's lives despite the parent's hopes for the future." *Koch*, 450 F.3d at 715–16.

In substance, all circuits—ours included—consider both parental intent and the child's acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts. *See Karkkainen*[v. Kovalchuk], 445 F.3d [280,] 297 [(3d Cir. 2006)] (describing the disagreement among the circuits as a difference of opinion about how to "weigh [parental intent and the child's acclimatization] against each other if they conflict[ ]").

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To repeat, in loosely adopting the *Mozes* framework, we highlighted its flexibility. *See Koch*, 450 F.3d at 715. We emphasized that the inquiry is "not . . . rigid" and "does not require courts to ignore reality," *id.* at 716, and noted that the Ninth Circuit had acknowledged as much when it said in a subsequent case that "it was 'keenly aware of the flexible, fact-specific nature of the habitual residence inquiry envisioned by the Convention,'" *id.* (quoting *Holder*[v. Holder], 392 F.3d [1009,] 1015[(9th Cir. 2004)]).

In the final analysis, the court's focus must remain on "the child[ ]'s habitual residence." *Holder*, 392 F.3d at 1016 (emphasis added). Shared parental intent may be a proper starting point in many cases because "[p]arental intent acts as a surrogate" in cases involving very young children for whom the concept of acclimatization has little meaning. *Id.* at 1016–17. "Acclimatization is an ineffectual standard by which to judge habitual residence in such circumstances because the child lacks the ability to truly acclimatize to a new environment." *Karkkainen*, 445 F.3d at 296. On the other hand, an emphasis on shared parental intent "does not work when . . . the parents are estranged essentially from the outset." *Kijowska*[v. Haines], 463 F.3d[583,] 587[(7th Cir. 2006)]. In short, the concept of "last shared parental intent" is not a fixed doctrinal requirement, and we think it unwise to set in stone the relative weights of parental intent and the child's acclimatization. The habitual-residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions. *See Kijowska*, 463 F.3d at 586; *Karkkainen*, 445 F.3d at 291; *Friedrich*, 983 F.2d at 1401; *Re Bates*, No. CA 122/89.[7]

7. Redmond v. Redmond, 724 F.3d 729, 745–46 (7th Cir. 2013).