Commentary: Appellate Court Cases

Martinez v. Cahue, 826 F.3d 983 (7th Cir. 2016)

Other Seventh Circuit Cases

Hernandez v. Cardoso,
844 F.3d 692 (7th Cir. 2016)

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

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)

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

Habitual Residence | Custody Rights

This case addresses the fundamental principles of habitual residence and discusses the significance of establishing custody rights and habitual residence when only one parent has the legal right to custody of the child.

Facts

Mother and father were unmarried and had a son in common. Father executed a declaration of paternity at the time of the child's birth. The parties lived in Illinois, though mostly separate and apart during their ten-year relationship. The child lived exclusively with mother, and father had frequent visitation. In 2010 the parties memorialized a private arrangement for custody and visitation, but the child was never the subject of any court orders. When their son was seven years old, mother moved to Mexico and took the child with her. Approximately one year later, father convinced mother to send the child to him for a visit in Illinois but then refused to return the child. Mother filed a petition for return of the child to Mexico. The district court found that the child's habitual residence was Illinois and ordered mother's petition dismissed.

The Seventh Circuit reversed, finding that father did not have sufficient custody rights.

Discussion

Custody Rights. Under Illinois law, the written memorandum that provided father with visitation rights was unenforceable. Moreover, father's rights were for visitation only. Under the Convention, visitation rights are insufficient to establish an action for return of a child, and father did not benefit from a *ne exeat* provision. Father argued that the acknowledgment of paternity was sufficient to confer custody rights, but the Seventh Circuit rejected the claim. A judgment of paternity, under Illinois law, does not mean that custody or visitation rights are automatically conferred. Although an acknowledgment of paternity may have legal consequences for certain purposes, it does not confer custody rights. Mother had the absolute right to determine the child's location and habitual residence.

Habitual Residence. The Seventh Circuit reiterated its *Redmond v. Redmond*[1] adoption of a hybrid *Mozes v. Mozes*[2] approach—habitual residence determined by parental intent[3] and acclimatization[4]—as follows:

> The two most important factors in the analysis are parental intent and the child's acclimatization to the proposed home jurisdiction. [*Redmond*] at 744–45. Courts have differed on the weight each factor should receive. We have tended to privilege the parents' perspective, but even so, we have stressed that this emphasis is dependent on the circumstances. *Id.* at 746. We also have noted that "[t]he intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence." *Id.* at 747 (quoting *Mozes*, 239 F.3d at 1076). Importantly, shared intent "has less salience when only one parent has the legal right" to determine residence. *Id.*[5]

1. 724 F.3d 729 (7th Cir. 2013).
2. 239 F.3d 1067, 1070 (9th Cir. 2001).
3. *Redmond*, 724 F.3d at 745 ("'[T]he intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence'—usually, the parents. When parents jointly intend to raise a child in a place and actually live there, that place becomes the child's habitual residence. The child's habitual residence may change later if the parents mutually intend to abandon the residence in favor of a new one, but only a shared intent will do; the unilateral intent of a single parent will not." (citations omitted) (quoting *Mozes*, 239 F.3d at 1076)).
4. *Id.* at 745–47.
5. Martinez v. Cahue, 826 F.3d 983, 990 (7th Cir. 2016).