Commentary: Appellate Court Cases

Smedley v. Smedley, 772 F.3d 184 (4th Cir. 2014)

Other Fourth Circuit Cases

Padilla v. Troxell,
850 F.3d 168 (4th Cir. 2017)

Alcala v. Hernandez,
826 F.3d 161 (4th Cir. 2016)

Reyes v. Jeffcoat,
548 Fed. Appx. 887 (4th Cir. 2013)

White v. White,
718 F.3d 300 (4th Cir. 2013)

Maxwell v. Maxwell,
588 F.3d 245 (4th Cir. 2009)

Bader v. Kramer (*Bader II*),
484 F.3d 666 (4th Cir. 2007)

Bader v. Kramer (*Bader I*),
445 F.3d 346 (4th Cir. 2006)

Cantor v. Cohen,
442 F.3d 196 (4th Cir. 2006)

Humphrey v. Humphrey,
434 F.3d 243 (4th Cir. 2006)

Comity

Facts

Father, a member of the U.S. military was stationed in Germany from 2000 to 2010. He and his wife had two children, born in 2000 and 2005. Aside from a one-year stay in Tennessee, the family spent the remainder of their time in Germany. In 2010 father was transferred to North Carolina, so the family moved to the United States. Mother took the children back to Germany in mid-July of 2011 with father's permission. Father purchased roundtrip tickets with a return date for August 11, 2011. Mother refused to return from Germany, alleging that father consented to her and the children remaining in Germany if she chose to stay, and he would attempt to relocate back to Germany. Father contended that the trip was a one-month vacation and that he did not consent to a permanent move.

First Hague Convention Proceeding: Germany, 2011. Father petitioned in a German court for return of the children. The trial court denied father's petition for return on the basis that he had abused one of the children, sustaining mother's 13(b) defense. On father's appeal to a higher court, the appellate court denied the petition on the grounds that father had consented to the removal of the children to Germany, thus upholding mother's "consent" defense.

The children remained with mother in Germany over the next two years. In August 2013, mother allowed the children to travel to the United States for a vacation. Father signed a document promising to return the children on or about August 26, 2013. Father did not send the children back as promised, citing concerns over the children's dental care and their schooling. He enrolled the children in school in North Carolina.

Second Hague Convention Proceeding: United States, 2013. Mother filed an action for return of the children in district court. The district court found that mother did not wrongfully remove the children to Germany, and gave comity to the German decision. The district court further found that the children had acclimatized to life in Germany during their stay from 2011 to 2013, and found that the children's habitual residence was in Germany. Father's petition was denied. The Fourth Circuit affirmed.

Discussion

Comity. The Fourth Circuit affirmed the district court's extension of comity to the 2011 German decision denying the children's return to the United States. The court adopted the Ninth Circuit's test for analyzing the question of extending comity as stated in *Asvesta v. Petroutsas*[1]:

> [W]e may properly decline to extend comity to the [foreign] court's determination if it clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.

Standard of Review. The Fourth Circuit did not decide whether the standard for review for granting comity to a foreign decision was a de novo review or abuse of discretion, as the German decision would have passed a review on either grounds. The court further acknowledged that the Second Circuit, in *Diorinou v. Mezitis*,[2] held that when accepting the ruling of a foreign court, the standard of review is de novo.[3] The court also acknowledged the Ninth Circuit's holding in *Asvesta*[4] that previous case law in that circuit suggested an "abuse of discrtetion" approach. The court in *Asvesta*, however, was not required to decide the issue, based upon its review that comity under either the de novo or abuse of discretion standard should not be granted to the Greek judgment before it.

Failure to Make Finding on Habitual Residence. Father contended that in the 2011 proceedings, the German court failed to make a finding that Germany was the children's habitual residence. The Fourth Circuit disposed of this argument, holding that a habitual residence determination was not critical since the German court found that father had consented to the children's relocation to Germany. Whether the children's habitual residence was in the United States or in Germany would not have had bearing on the issue of whether father consented to the removal of the children. The court found nothing in the law that required a finding of habitual residence before proceeding on to decide the case on a defense that did not depend on a finding of habitual residence.[5]

Sufficiency of the Evidence. Father argued that the German findings were unreasonable and unsupported by the evidence. The Fourth Circuit held to the contrary, finding that there was sufficient evidence to show that father had consented to the children's unconditional removal to Germany, and that given the state of the evidence, "the German court's decision was at least minimally reasonable."[6]

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1. 580 F.3d 1000 (9th Cir. 2009).
2. 237 F.3d 133 (2nd Cir. 2001).
3. *Id.* at 139–140.
4. *See generally* 580 F.3d 1000.
5. The court distinguished the instant fact situation from that in *Asvesta*, where the Greek court denied a return petition on the basis that the petitioner in that action was not exercising his custody rights at the time of removal. Because the interpretation of custodial rights depends upon the law of the habitual residence, a decision lacking reference to the law of the habitual residence would have been flawed. Smedley v. Smedley, 772 F.3d 184, 189–190 (4th Cir. 2014).
6. *Id.* at 190.