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A minor child may establish his own best interests for purposes of the Hague Convention on International Child Abduction

By Juli Campagna

***De Silva v. Pitts*, 481 F.3d 1279 (10th Cir. 2007)**

A child's testimony that he prefers to stay with the parent who wrongfully retained him in violation of the Hague Convention on the Civil Aspects of International Child Abduction (Convention) may be sufficient to overcome the petitioning parent's right to have the child promptly returned to his country of habitual residence.

The 10th Circuit held that a 13-year-old boy's in camera interview with a magistrate judge—where neither the parents nor their counsel were in attendance—provided sufficient evidence to defeat a repatriation claim brought by his mother, with whom he was living, in Canada.

The Convention protects children from wrongful removal or retention in a foreign country and establishes procedures for their return. The Convention applies to all children under the age of sixteen. A remedy is available only when the child was removed from a signatory country to the Convention and retained in another signatory country. Both Canada and the United States are states parties to the Convention. In the U.S. implementing legislation for the Convention, Congress declared that "persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention." International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§11601-11610. Courts are specifically directed to decide cases in accordance with the Convention.

In an action for the return of a child to the habitual residence, a petitioner must prove only that the child was removed or retained

"wrongfully." Under Article 3 of the Convention, the removal of a child is wrongful when it breaches the custody rights of a person, an institution or any other body, either jointly or alone, under the law of the State where the child was habitually resident immediately before the removal or retention; and the party with custody was actually exercising those rights at the time of removal or retention, or would have exercised those rights but for the removal or retention. Habitual residence is the ordinary residence of the child prior to removal. A person can have only one habitual residence.¹

Under Article 19 of the Convention, the court's authority is limited to determining the merits of the abduction claim. It may not decide the merits of the underlying custody claim. The federal implementing legislation grants concurrent jurisdiction to state and federal courts to hear ICARA claims.

Petitioner must establish that the removal was wrongful by a preponderance of the evidence.² A respondent who opposes the return of a child may advance four defenses set out in the Convention.³ All defenses are narrowly construed.⁴ In this case, however, the court did not look to any of the four affirmative defenses. Instead, it based its decision on a fifth consideration found in Article 13 of the Convention. As the court noted, this consideration is left to the court's discretion and "allows for refusal to order the return of a child where 'the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account of its views.'"⁵ What the court failed to note is that the same article requires

the court to "take into account the information relating to the social background of the child provided by the Central Authority or other component authority of the child's residence" when considering this or any of the four affirmative defenses.⁶ There was no evidence that such information was sought, submitted, or weighed.

Although the court did not follow the Convention in applying the "age and maturity" exception, it did look to case law for guidance. When applying the "age and maturity" exception as the sole basis for refusing to repatriate a child, courts must apply a stricter standard than they would if the child's wishes were part of a broader analysis.⁷ If the court finds that the child has been unduly influenced or indoctrinated by the retaining parent, the court will not take the child's wishes into account.⁸ The court called the inquiry both fact intensive and idiosyncratic.

The parents of Jonathan Pitts, a 13-year-old, were in a custody dispute at the time of the ICARA action. Jonathan spent the summer of 2005 at his father's home in Oklahoma. He traveled on a round-trip ticket from Canada, where he lived with his mother. Jonathan had lived with his mother since infancy. They had lived in her native Sri Lanka for nine years before fleeing to Canada in 2003. He and his father had stayed in touch, and this was not his first trip to Oklahoma. The father wanted to keep his son in Oklahoma, and had told him so on earlier visits. Jonathan testified that he had not felt ready to stay there until the summer of 2005.

Although his mother brought an immedi-

ate claim, the federal district court refused to order Jonathan's return to Canada. While noting that "courts in signatory nations take violations of the Convention very seriously," the court rejected the mother's argument that the child had been swayed by his father's lavish gifts and lifestyle.

The factors supporting this court's application of the "age and maturity exception" were the child's intelligence, his ability to express himself, and his well-developed understanding of his situation and his parents' positions. In Canada, he told the magistrate, he had a sister with whom he got along as well as a lot of friends. He had also made friends in Oklahoma, and had joined the football and wrestling teams there. His father's house was

"really big." His dad had given him "a computer and everything he needed for school." He told the court that he wanted to stay in his father's town because he thought the school was better. There is no evidence that he had ever attended the school. Based on this testimony, the court found that Jonathan had made his decision "without apparent adult indoctrination."

Ms. De Silva, a Sri Lankan refugee living in Canada, argued the appeal pro se.

The 10th Circuit found that the refusal to order the child returned was not an abuse of discretion.

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1. *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993).

2. 42 U.S.C. §11603(e)(1).

3. For the available affirmative defenses, see Convention on the Civil Aspects of International Child Abduction, arts. 12, 13, and 20, Oct. 25, 1980, 1343 U.N.T.S., 19 I.L.M. 1501. [hereinafter Hague Convention] For the differing burdens of proof required of the respondent according to the defenses asserted, see 42 U.S.C. §11603 (e)(2).

4. *De Silva v. Pitts*, 481 F.3d 1279, 1285 (10th Cir. 2007), citing *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995).

5. Hague Convention, art. 13.

6. *Id.*

7. *De Silva v. Pitts*, 481 F.3d at 1286 citing *Blondin v. DuBois*, 238 F.3d 153, 166 (2d Cir. 2001).

8. *Id.* citing *In re Robinson*, 983 F.Supp. 1339, 1343-44 (D. Colo. 1997).

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