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Family Law—Child Abduction

Defense to Return Not Tolled By Abducting Parent's Concealment of Child

The ''now settled'' defense—available under the Hague Convention on the Civil Aspects of International Child Abduction to prevent the return of an abducted child to her country of habitual residency—is not subject to equitable tolling, the U.S. Court of Appeals for the Second Circuit held Oct. 1 (*Lozano v. Alvarez*, 2d Cir., 11-2224-cv, 10/1/12).

Writing for the court, Judge Robert Allen Katzmann also found that the child's status as an illegal immigrant did not categorically prevent a finding that the child is ''now settled'' in the United States. Based on these findings, the court affirmed a lower court's denial of a petition to return an abducted child to the United Kingdom for custody proceedings.

Preston Findlay, counsel for the Missing Children Division of the National Center for Missing & Exploited Children, Alexandria, Va., cited a report prepared by the Hague Permanent Bureau and told BNA Oct. 3 that the now settled defense accounted for 25 percent of the children that were not returned from the United States in 2008, compared to 13 percent globally.

Abduction. Diana Lucia Montoya Alvarez and Manuel Jose Lozano are both from Columbia. While living in London, the two met and began dating. Although they never married, they had a daughter in October 2005. For three years, Alvarez, Lozano, and their daughter lived together in London.

In November 2008, Alvarez left to take her daughter to nursery school, but never returned home. Since July 2009, Alvarez and her daughter have resided in New York City with Alvarez's sister and family. The daughter has attended the same school, been enrolled in ballet classes, and attended church since arriving in New York. The daughter has also made friends and spends time with extended family. Although they initially entered the United States legally, their visas have since expired.

After Alvarez and the little girl disappeared, Lozano attempted to locate them. Upon discovering that they were living in New York, Lozano filed a petition for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction. The petition, filed in the U.S. District Court for the Southern District of New York, sought the return of the daughter to the United Kingdom for custody proceedings there.

Hague Convention Defenses Construed Narrowly. Under the Hague Convention and its implementing legislation—the International Child Abduction Remedies Act—a child that was unlawfully removed from her country of habitual residency must be returned to that country unless an affirmative defense is established. The Hague Convention sets forth the available affirmative defenses, which, according to the Hague Convention's Explanatory Report, are to be construed narrowly.

One available affirmative defense is the ''now settled'' defense. Specifically, a court may refuse to return a child to her country of habitual residency if the court determines that the child is now settled in her current country and that it would be in the child's best interests to remain there. The now settled defense is available only if at least one year has elapsed between the date of the wrongful removal and the filing of the petition to return.

The district court denied Lozano's petition, finding that his daughter was now settled in the United States. In doing so, the district court rejected Lozano's argument that the one-year period triggering the now settled defense should be tolled until Lozano could have discovered his daughter's whereabouts. Additionally, the district court refused to find that the daughter's lack of legal immigration status categorically prohibited a finding that she was settled in the United States. Lozano appealed.

Circuits Split on Equitable Tolling. On Lozano's equitable tolling argument, the court acknowledged that three circuits—the Fifth, Ninth, and Eleventh circuits—have permitted equitable tolling where the child's whereabouts were concealed from the petitioning parent. However, the court here found that ''while an abducting parent's conduct may be taken into account when deciding whether a child is settled in his or her new environment, the one-year period [] is not subject to equitable tolling.''

In particular, the Second Circuit rejected the other circuits' determination that tolling was required to prevent the abducting parent from benefiting from his or her efforts to conceal the child's location. The court here said that equitable tolling was ''unnecessary'' be-

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cause even where the court determines that the child is now settled in his or her new country, the decision not to return the child is discretionary. It emphasized ''that *in most instances*, a child's welfare is best served by a prompt return to that country.''

Additionally, the court rejected the other circuits' characterization of the one-year trigger as a statute of limitation, which are generally subject to equitable tolling. The court said that the expiration of a statute of limitations bars a parent from bringing an action, whereas the time period at issue here ''merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency.''

Finally, the court determined that the child's immigration status was not dispositive of whether the child is now settled in the new country, but ''should only be one of many factors courts take into account.'' The weight given to the immigration status will vary for each case, the court said. Here, because the child was not likely to be deported ''in the near future,'' the district court did not err in finding that the child was now settled in the United States, the appeals court said.

Accordingly, the appeals court affirmed the district court's denial of Lozano's petition.

John R. Hein, Hunton & Williams LLP, New York, who represented Lozano, told BNA Oct. 3 that ''Lozano is deeply disappointed with the decision,'' and that he is ''investigating options for further appeal.''

However, a representative of Cravath, Swaine & Moore LLP, the firm representing Alvarez, told BNA Oct. 5 that the court's decision was ''correct on both grounds.'' Regarding equitable tolling, the firm acknowledged that ''[t]he majority of courts that have considered the equitable tolling issue have held that the one-year period [] (after which a party may rely on the ''now settled'' defense) is subject to equitable tolling.'' However, the firm believed that the court's decision not to allow equitable tolling was the right one because ''[t]he court's reasoning is based on the text of the Hague Convention, the history and purpose of the 'now settled' defense, and the State Department's interpretation of the defense.'' Regarding immigration status, ''[t]he only reported decision of which [the firm is] aware to address this issue, a case out of the Ninth Circuit, held that immigration status is not dispositive, which is consistent with the Second Circuit's holding.'' Lauren A. Moskowitz, Cravath, Swaine & Moore LLP, New York, argued for Alvarez.

Comprehensive Consideration of Facts. In an Oct. 2 BNA interview, Findlay applauded the court's ''comprehensive[]'' consideration of the facts. He said that courts should refrain from focusing on just one issue, and should instead consider all relevant factors, especially when considering a defense to return.

He explained that ''the treaty in general is concerned with children's best interests,'' not the interests of a ''singular child.'' It's only in the defenses to return that the treaty goes ''into an individual child's situation,'' he said. While the treaty ''inherently says that abduction hurts children,'' the defenses permit a court to examine a child's situation to determine if that is true in that particular case, he said.

Through a cooperative agreement with the State and Justice departments, the National Center for Missing & Exploited Children processed cases under the Hague Convention from 1995 to April 2008. During that period,''NCMEC handled approximately 5,600 incoming Convention cases''—cases where children are brought into the United States—''and over 2,300 outgoing Convention cases''—cases where children are taken from the United States, Findlay said. Because of ''increased mobility,'' the number of Convention cases is ''generally increasing every year,'' he said.

This increase may be why the Supreme Court has considered two Hague Convention cases since 2010. In *Abbott v. Abbott*, 78 U.S.L.W. 4373 (U.S. 2010), the court considered whether a ne exeat clause—a clause prohibiting one parent from removing a child from the country without the other parent's consent—was a ''right of custody'' that invoked the remedies under the Hague Convention.

The court also is set to hear oral arguments Dec. 5 in *Chafin v. Chafin* (81 U.S.L.W. 3069), which will consider whether a petition for return is mooted by the return of the child to his or her habitual residence.

Judges Richard C. Wesley and Gerard E. Lynch joined the opinion.

BY KIMBERLY ROBINSON

Full text at http://pub.bna.com/lw/112224cv.pdf.

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