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Unwed fathers should be wary of custody rights, take necessary steps

In the absence of an allocation judgment, an unwed father lacks standing to sue for the return of his child under the Hague Convention on Civil Aspects of International Child Abduction. Such is the holding of the 7th U.S. Circuit Court of Appeals in *Martinez v. Cahue*, 2016 WL 3457617 (2016). An appeal of this decision is currently pending on petition for writ of certiorari before the U.S. Supreme Court.

The case involves a child born out of wedlock to parents who resided in Illinois for the first seven years of the child's life. Although the parties never married, the father had signed a voluntary acknowledgment of paternity and the parties had entered into a private arrangement for custody and parenting time which had never been formalized in a court order.

In the spring of 2013, the child's mother, Jaded Martinez, began contemplating a move back to Mexico. The trial record reflects that mother told the father, Peter Cahue, that she and the child were going to Mexico on vacation.

Cahue signed a notarized letter authorizing the child to travel to Mexico. However, upon arriving in Mexico, it became clear that this was not a temporary vacation, but instead a permanent removal and relocation. The child enrolled in school, joined a soccer club and began establishing roots in the community.

The child remained in Mexico for a year. In summer 2014, upon the pretense of spending summer vacation with his father, the child returned to Illinois. The father retained the child in Illinois and filed a petition for custody and immediate custody with the state court.

The father was granted temporary custody of the child and the court ordered the surrender of the child's passports to prevent further escapades. The mother, thereafter, filed a wrongful retention action under the Hague Convention on Civil Aspects of International

Child Abduction in the Northern District of Illinois seeking to return the child to Mexico, upon the basis that Mexico was the child's habitual residence pursuant to the Hague Convention.

The U.S. District Court found in favor of the father, holding Illinois to be the habitual residence of the child based on an "absence of shared parental intent" in that the parties "did not jointly intend that [the child] should move to Mexico in the first place."

However the matter was overturned on appeal by the 7th U.S. Circuit Court of Appeals, predicated on the finding that in the absence of a custody judgment Illinois law presumes that the mother of a child born out of wedlock has sole custody and therefore sole decision-making authority to determine the minor child's habitual residence pursuant to the Hague Convention.

The 7th Circuit found that the mother's removal of the child to Mexico under somewhat false pretenses was inconsequential because the father had no standing to determine the child's habitual residence without his rights to custody being vested in a judgment.

If the Martinez decision withstands Supreme Court scrutiny, attorneys will be wise to advise unmarried fathers that it is unquestionably in their interests to seek allocation judgments and parenting plans through the legal process.

As noted by the court, "shared intent 'has less salience when only one parent has the legal right' to determine residence."

The fact that the father had executed a voluntary acknowledgment of paternity did not vest any custodial rights or otherwise provide him standing to seek relief under the Hague Convention. The court noted that a judgment of paternity does not confer any rights of custody or visitation, and



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that the right of a biological father to establish paternity does not automatically confer the legal rights flowing from the parent-child relationship, including custody.

Further, the court gave no weight to the parties' private agreement on custody and visitation, noting that Illinois courts generally do not respect private agreements effecting custody. The court found that as of July 2013 when mother moved to Mexico

and August 2014 when the father retained the child in Illinois, the father had no custody rights under Illinois law to decide the child's habitual residence and the mother had an unrestricted right to do so.

Since the events which transpired in the *Martinez* matter, the Illinois Paternity Act has been amended at 750 ILCS 46/305(a) to recognize that a voluntary acknowledgment of paternity

"confers upon the acknowledged father all of the rights and duties of a parent."

The 7th Circuit did not substantively analyze the effect of this statutory amendment, as it was not in effect during the 2013-2014 events. Nonetheless, the court indicated that the amendment would not be sufficient to protect unwed and judgment-less fathers, as a judgment of paternity is essentially a right of access which does not trigger the remedy of return under the Hague Convention.

If the *Martinez* decision withstands Supreme Court scrutiny, attorneys will be wise to advise unmarried fathers that it is unquestionably in their interests to seek allocation judgments and parenting plans through the legal process.

Even an allocation judgment which grants sole decision-making authority to the mother will, by its entry, vest the father with the statutory removal and relocation protections codified in the Illinois Marriage and Dissolution of Marriage Act.

Moreover, in cases where the removal or retention is imminent, the mere filing of an action is sufficient to vest the father's rights. A custodial parent may be enjoined "upon application by a party" from relocating with a child outside of Illinois "pending the adjudication of the issues of custody and visitation." 750 ILCS 45/13.5(a).

By filing an action or otherwise submitting an allocation judgment for court approval, the parties vest their respective rights to establish a habitual residence for a minor child pursuant to the Hague Convention.

Further, any unwed mother seeking to relocate must comply with the statutory provisions on relocation. In the absence of such compliance, the standing of the father to seek return of a child wrongfully abducted is vested under the Hague Convention.