INSIDE LOOK

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Little Known Case Has Big Impact On Custody Jurisdiction

By Gregory S. Forman, JD

Occasionally I blog on little known cases that I find myself referencing often. Thus today's blog about *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 620 S.E.2d 333 (Ct.App.2005).

Widdicombe arises out of a custody modification case. Subsequent to a South Carolina court-approved custody agreement, Father moved to Illinois. He filed a custody modification complaint in South Carolina on August 22, 2000. In his compliant he alleged Mother had moved numerous times without notifying him (in violation of the custody order), that her present whereabouts were unknown, but that her last known address was in South Carolina.

On August 28, 2000, Father obtained an *ex parte* order granting him custody of the child. Mother filed an answer and counterclaim on November 11, 2000. In that pleading, she stated she'd moved to North Carolina in 1998 but returned to South Carolina in August 2000, claimed she was a resident of Charleston County, South Carolina, and agreed that South Carolina had jurisdiction.

On February 15, 2001, the family court issued a temporary order granting Father custody. On August 1, 2001, the family court struck the case from the active roster but left the temporary order in effect. Mother then filed a motion to dismiss the case, alleging a lack of personal and subject matter jurisdiction and asserting she had been a resident of North Carolina the date the *ex parte* order issued. The family court denied the motion noting Mother's answer claimed she had been a South Carolina resident at the time Father's action was filed and that no custody litigation was pending in another state. Mother sought reconsideration[i], which the family court denied. Mother appealed and the Court of Appeals dismissed her appeal as interlocutory.

On January 6, 2004, Mother filed another motion to dismiss, which the family court denied. She filed a motion to reconsider, which the family court denied. She then appealed.

This time the Court of Appeals agreed to address her interlocutory appeal, noting "[u]nder the unique factual circumstances of the present case, we conclude the family court orders have the practical effect of a final order affecting Mother's substantial rights. In any event, the issues raised by Mother on appeal have been the subject of much contention in this case. They will inevitably be raised to the family court again in the future and, because they have been fully briefed by the parties, we find that it would be in the interest of judicial economy to decide the matters now."

Addressing the jurisdictional issue, the Court of Appeals noted the muddled evidence of Mother's residence at the time the action commenced. However, it concluded there was sufficient evidence that she was a South Carolina resident at the time of filing for South Carolina to retain subject matter juris-

PROPOSED 2022 CHILD SUPPORT GUIDELINES UPDATE

by Leigh B. Sellers, JD

The proposed 2022 child support guidelines have been published, although they are not yet effective, as explained below. The combined income has been increased to $40,000.00 a month. You can see the proposed schedules at this link.

Before effective, the proposed guidelines first must be reviewed and then approved by the General Assembly. The matter will be before them when they begin the 2023 session. Once approved, the Palmetto Automated Child Support System (PACSS) Guidelines Calculator, as well as the other materials provided by South Carolina Department of Social Services (SCDSS) must be updated. It is estimated that the length of time to perform those upgrades will also play a small role in the effective date of the revised guidelines.

The only estimate given by the 2022 Guidelines Review Committee for the Child Support Division of the SCDSS is that the process should take at least six months.

diction to modify custody. While not explicitly noted, the Court of Appeals opinion demonstrates that jurisdiction was not lost during the pendency of the litigation despite Mother's relocation to North Carolina shortly after August 2000: "Because we conclude Mother was a resident of South Carolina at the time Father filed his complaint, the PKPA's [the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A] third requirement for continuing jurisdiction is satisfied."

The Supreme Court granted Mother's petition to review the Court of Appeals' opinion and vacated a finding that Mother's unclean hands was a basis to deny her motion to dismiss. *Widdicombe v. Tucker-Cales,* 375 S.C. 427, 653 S.E.2d 276 (2007). However it affirmed the finding of subject matter jurisdiction.

Widdicombe establishes two reciprocal issues on jurisdiction. First, South Carolina is not deprived of subject matter jurisdiction in the midst of child custody litigation despite all parties and the child no longer living here. Second, if there is ongoing custody litigation in another state, and no party or the child remains there, that state still has subject matter jurisdiction until the litigation ends or until that state relinquishes jurisdiction.

When seeking to modify custody in South Carolina when there is ongoing custody litigation in another state, that state must first relinquish jurisdiction before South Carolina can exercise jurisdiction. The recent decision in *Williams v. Williams*, 436 S.C. 550, 873 S.E.2d 785 (Ct.App. 2022), held that jurisdiction must be established before the family court can grant temporary relief. Thus, filing custody modification litigation when South Carolina's jurisdiction may be challenged will substantially delay any potential temporary relief. *Widdicombe* is a case all South Carolina custody attorneys should know.

[i] I actually assisted Mother's counsel on this motion.

A Few Observations

The Honorable Kimaka Nichols-Graham
Family Court Judge At-Large

Sometimes things related to the practice of law slowly change over a period of time. So I am taking a few moments of your time to redirect a tiny amount of your attention to things that could weaken the profession and negatively impact the people we strive to serve in family court.

A basic element of due process is notice of a hearing. Definitive notice is too important to remain hidden during a time when some people appear to be prone to garnering attention by questioning justice and fairness. There was a time when attorneys would routinely file a signed copy of the cover letter that notifies the opposing party of the date, time and location of the final hearing with an attached certified mail receipt. We do not have electronic filing in family court. Nevertheless, today it is rare to open a file in family court and find a copy of the actual notice provided for a final hearing. Often, the file contains something like a voucher in the form of a Certificate of Mailing or a Certificate of Service signed by a paralegal without the tracking number. The practice of law has slowly changed to routinely filing only the additional document created without a simple copy of the documents that already exist.

Speaking of due process, many assume the Court will accept an affidavit in lieu of an appearance at a final hearing in cases that do not fall within Rule 28, SCRFC. It is amazing how often an attorney appears at a final hearing and asks to submit an affidavit instead of requiring a self-represented party to appear even briefly in the virtual courtroom to be questioned about whether there is a clearly defined agreement that meets the terms of fundamental fairness. The attorney has prepared the proposed order with a written and signed agreement. Unfortunately, in some areas Guardians ad Litem are also, routinely submitting an affidavit instead of appearing at uncontested final hearings without asking to be excused from hearing, before the hearing. The emergency operation of courts allowed various levels of flexibility for approximately eighteen months but most of the flexibility allowed during the pandemic have been adopted into civil procedure. Therefore some practices that developed during the pandemic were supposed to end.

Finally, there was a time when it was rare for minor children to testify in chambers or in court and their statements were not routinely included in affidavits prepared for temporary hearings without so much as the batting of an eye lash. More and more children are prepared to testify in family court about traumatic events when the Guardian ad Litem can effectively communicate the child's preference or the child's testimony is only essential to establish certain facts due to an oversight regarding the rules of evidence. It is becoming exceeding rare for attorneys to acknowledge hearsay included in affidavits prepared or reviewed by attorneys that are submitted at temporary hearings. If imitation is really the highest form of flattery then we should begin to brace of ourselves because there are a lot of self-represented litigants paying attention in family court.

Minor adjustments to the practice of law here and there can improve a lawyer's reputation and the profession.

Basics of 1980 Hague Convention Litigation & SCOTUS Update

by Jonathan W. Lounsberry, JD

Each year some parents are faced with a devastating reality: their partner has taken their child to another country and is refusing to return. They are left behind and at a loss of what do. Fortunately, there is a legal remedy to help the left-behind parent recover their child: The 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").

The Hague Convention was created "…to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access…" See Hague Convention, preamble. Thus, "[t]he objects of the present Convention are – a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." See Hague Convention, art. 1. In the United States, the Hague Convention is enacted by the International Child Abduction Remedies Act (ICARA) (22 U.S.C. §§ 9001 et seq.) which allows a left-behind parent to seek return of the abducted child in State or Federal court.

A petitioner is required to demonstrate "… (1) the children were 'habitually resident' in [the left-behind country] at the time [taking parent] removed them to the United States; (2) the removal was in breach of [left behind parent's] custody rights under [left behind country's] law; and (3) she had been exercising those rights at the time of removal." See *Miller v.* Miller, 240 F.3d 392, 398 (4th Cir. 2000). Of note, following SCOTUS' ruling in *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), there is now a uniform test for habitual residence: "A child's habitual residence depends on the totality of the specific circumstances, not on categorical requirements such as an actual agreement between the parents."

If the petitioner can demonstrate their *prima facie* case, then the burden shifts to the respondent to demonstrate any one of the following exceptions to the mandatory return: (1) the left-behind parent was not exercising their rights of custody; (2) the left-behind parent acquiesced/consented to the removal/retention; (3) a mature child objects to a return; (4) the child is well-settled; (5) there is a grave risk of physical/psychological harm to the child if they are returned; and (6) the return would violate the child's human rights/fundamental freedoms. Keep in mind that even if an exception is demonstrated by a respondent, the court can still order the mandatory return.

It is important to note that "[t]he Convention's return requirement is a 'provisional' remedy that fixes the forum for custody proceedings … [u]pon the child's return, the custody adjudication will proceed in that forum." See *Monasky v. Taglieri*, 140 S. Ct. 719, 724 (2020) (internal citations omitted). Thus, a decision from a Hague Convention matter cannot determine the jurisdiction for the underlying custody case: The Hague Convention does not override the UCCJEA. If the habitual residence is the home state, then it will remain the home state so long as custody litigation is pending in that jurisdiction -- "That

is, the primary purpose of the Hague Convention is 'to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.' *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) (*Friedrich I*)." See *Miller*, 240 F.3d at 398 (4th Cir. 2000).

The Supreme Court of the United States has addressed the issue of the Hague Convention a total of five times since the Hague Convention's creation. The two most recent opinions were delivered in 2020 (*Monasky v. Taglieri*, 140 S. Ct. 719 (2020)) and 2022 (*Golan v. Saada*, 596 U.S. ___ (June 15, 2022) (Op. No. 20-1034)). In these opinions, SCOTUS addressed issues central to the basic components of a Hague Convention matter: the determination of habitual residence and the interplay of ameliorative measures and a grave risk of harm finding.

Determination of Habitual Residence

Prior to the *Monasky* opinion, each circuit had its own specific test for determining a child's habitual residence, which is a mixed question of fact and law. Some tests relied on whether there was an agreement between the parties to either abandon or taken up a habitual residence. As a result, the *Monasky* court took the chance to clarify the circuit splits, holding: "Because locating a child's home is a fact-driven inquiry, courts must be 'sensitive to the unique circumstances of the case and informed by common sense.' *Redmond*, 724 F.3d at 744. For older children capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimatization will be highly relevant. Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations. No single fact, however, is dispositive across all cases. Common sense suggests that some cases will be straightforward: Where a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence. But suppose, for instance, that an infant lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus. See *Karkkainen*, 445 F.3d at 291 ("The inquiry into a child's habitual residence is a fact-intensive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case.")." *Monasky*, 140 S. Ct. at 727 (2020) (internal footnote omitted).

Thus, the new (universal) test for habitual residence is that "[a] child's habitual residence depends on the totality of the specific circumstances, not on categorical requirements such as an actual agreement between the parents." *Id.* at 719 (2020).

Use of Ameliorative Measures & Grave Risk of Harm Defense

In *Golan v. Saada*, SCOTUS addressed a less varied circuit split: the Second Circuit had a mandatory requirement that courts consider all ameliorative measures to effectuate a return if a finding of grave risk of harm was made. See 596 U.S. ____ (June 15, 2022) (Op. No. 20-1034).

In its opinion, the *Golan* court eliminated the mandatory consideration of ameliorative measures and took great care in addressing a court's discretion in considering ameliorative measures: "While a district court has no obligation under the Convention to consider ameliorative measures that have not been raised by the parties, it ordinarily should address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case, such as in the example of the localized epidemic. See supra, at 10." *Id*.

The *Golan* court also took the opportunity to give guidance on the use and consideration of ameliorative measures:

- "First, any consideration of ameliorative measures must prioritize the child's physical and psychological safety…" *Id*.

- "Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute … To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropriate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings." *Id*.

- "Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts 'act expeditiously in proceedings for the return of children.'" *Id*.

The *Monasky* and *Golan* opinions give practitioners clearer guidance on two of the most litigated issues: habitual residence and the grave risk of harm exception. Because there are so few Hague Convention cases brought before SCOTUS, it is also helpful to review the briefs and amici briefs filed with SCOTUS when addressing these issues in litigation.