

Court/Tribunal: United States Tenth Circuit Court of Appeals

Case: *Leser v. Berridge*

Date: December 28, 2011

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### Background Information

The Respondent, Alena Berridge, moved to Denver from the Czech Republic with her two children. The Petitioner, Max Joseph Leser, is her ex-husband and father to both children. Leser sued Berridge for wrongful removal of the two children under both the Hague Convention and the International Child Abduction Remedies Act (“ICARA”).

In 1980, the Hague Conference, consisting of seventy-one states and the European Union, created the Hague Convention on the Civil Aspects of International Child Abduction. The purposes of the Hague Convention are to ensure respect of custody agreements between the countries involved and to secure the return home of children who are wrongfully removed from their proper home country. Under the Hague Convention Article 3, a child is “wrongfully removed” where the removal “is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention.” The United States Congress later implemented the Hague Convention by passing ICARA. 46 U.S.C. 11601 11610. In addition to the language of the Hague Convention, ICARA states that if such wrongful removal occurs, a person may file a petition for return of the child in a federal or state court in the place where the child is located.

### Question Presented

The issue in this appeal was whether the appellate court could grant any relief where a district court granted a petition for the return of children to the Czech Republic, based not on a finding of wrongful removal, but instead on the parent’s stipulation that the children would return to the country of habitual residence for a custody hearing.

### Procedural Posture

Petitioner filed a petition in the United State District Court for the District of Colorado seeking return of his children to the Czech Republic pursuant to The Hague Convention and ICARA. Both Petitioner and Respondent stipulated to the fact that the Czech court was the court where all custody issues should be heard, including whether Respondent had the right to relocate the children to the United States. Respondent appealed and thereafter filed a motion to stay the judgment.

### The District Court’s Holding

In the original suit for the return of the children to the Czech Republic, the district court stated that it did not believe the real issue before the court was whether Respondent had wrongfully removed the children to the United States, but rather which court, the Czech Court or the United States court, should interpret the custody orders. Because both parties agreed that the Czech Court was the proper court to hear these issues, the district court ordered the children returned to the Czech Republic for the hearing.

### **The Appellate Court's Analysis**

After reviewing the record, the appellate court first considered whether the entire matter was moot. Respondent's argument on appeal was that the district court erred in issuing its "summary judgment" order because Petitioner did not meet his burden of proof that Respondent breached his rights of custody under ICARA. Respondent contended that this issue was not moot because the Czech court relied on the district court's "finding" of wrongful removal.

In contrast, Petitioner argued that the district court did not err in granting the petition in full based on the stipulation of the parties that the children would return to the Czech Republic. Petitioner contended that because the Czech Court was determining the underlying custody dispute, there was nothing left for the district court to adjudicate. Petitioner made three arguments as to why the district court's order granting his petition for return of the children was not an adjudication. First, the Czech courts are the ones adjudicating whether Respondent can relocate the children. Second, the Hague Convention does not require an evidentiary hearing and Petitioner made his prima facie case of wrongful removal in his pleadings. Third, Respondent failed to preserve any affirmative defenses under ICARA, such as physical or psychological harm if the children returned to the Czech Republic or the desire of the children not to return to the Czech Republic.

The appellate court reasoned that the district court made no finding as to wrongful removal, either implicitly or explicitly. Instead, the district court merely granted the petition for return of the children based on the parents' stipulation that the Czech Republic was the proper venue for the custody hearing. Article III limits a federal court's jurisdiction to cases and controversies. The federal court must decide actual controversies by a judgment and not give opinions about moot questions or abstract propositions. A case or controversy no longer exists when it is impossible to grant any effectual relief. The district court order clearly stated the court's belief that no disputed issues existed because of the parties' stipulation to return the children to the Czech court. The district court order also says that the children shall remain within the jurisdiction of the Czech court until directed or authorized otherwise by such court. The language of the written order shows that the district court based its order on the parent's agreement that the children would return to the Czech Republic. Therefore, the district court made no actual finding of wrongful removal, but rather stated in its order that no disputed issue existed for that court to determine. Thus the appellate court determined that the civil action was moot.

The appellate court further disagreed with Respondent's argument that the case was not moot because a lower Czech court allegedly depended on the district court order. However, this argument is wrong because The Hague Convention Article 19 clearly states that a decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issues. Even if a foreign court misinterprets a United States Court's order, that incorrect reading does not revive a moot case or controversy.

Respondent's final argument was that the United States district courts will replace courts of appeal and become courts of last resort in ICARA actions. This argument is false as parties retain two options in these cases. First a party could file a motion under Federal Rule of Civil Procedure 59(e) with the district court to correct any alleged error in findings before appealing. Second, a respondent may file a motion pursuant to Federal Rule of Appellate Procedure 8 to stay the district court's judgment. Here, Respondent did not take advantage of the first option. Even though she did file a stay under Rule 8, the appellate court, not the district court, made the ultimate decision not to issue a stay of judgment. Respondent was incorrect in her argument that the district courts are becoming courts of last resort.

### Holding

The appellate court dismissed the appeal as moot and vacated the district court opinion with orders to remand the case to the district court with instructions to dismiss the petition for lack of subject matter jurisdiction.