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## International Child Custody Cases Heard in Maine Court

Shortly before Christmas, several U.S. media outlets covered the story of Sean Goldman, whose American father was able to regain custody of his son after the death of his mother in Brazil. Goldman and the boy's mother were married, when Brazilian citizen Bruna Bianchi took Sean from the family home in New Jersey to Brazil for a short vacation in 2004. She and Sean never returned, and a protracted custody battle began. Bruna Bianchi remarried in Brazil and died in childbirth in 2008.

At the same time the Goldman case was being covered by CNN and others, two international custody disputes were playing out in the District Court in Maine, both in Judge George Singal's court.

Attorney Daniel Nuzzi, who represents the Australian father in *Nicolson v. Pappalardo*, said it's just a coincidence that there's been a "flurry" of international custody cases recently. Nuzzi practices with Brann & Isaacson in Lewiston. Judge Singal ultimately decided that the child in *Nicolson* should be returned to Australia, where courts will determine issues of custody, visitation, and support.

David A. Sinclair, a third-year law student at the Maine Law School, represents the German mother in *Falk v. Sinclair*. Magistrate John H. Rich III recommended in that case that the child be returned to the mother in Germany so that German courts could determine custody, visitation, and support issues. Faculty members E. James Burke and Christopher M. Northrup also represent Falk. Student-attorney Sinclair and respondent Sinclair are not related.

Nuzzi noted that cases brought under the Hague Convention on the Civil Aspects of International

Child Abduction are really about jurisdiction. "The question is which court gets to decide the custody issue," Nuzzi said. "The purpose of the Hague Convention is to preserve the *status quo* prior to a wrongful child abduction," so custody can be decided in the appropriate venue.

Peter Evans of Givertz, Hambley, Scheffee & Lavoie in Portland represents the American mother in *Nicolson v. Pappalardo*. A call to him was not returned by press time.



Daniel Nuzzi



David Sinclair

Attorney Donna L. Martin of South Paris represents the American father in *Falk*. She has filed an objection to the magistrate judge's recommended decision, citing three key issues: the question of habitual residence of the child, the child's objection affirmative defense, and an argument that the original petition was not timely filed. She

made the brief available to *MLR*.

Sinclair said, "I don't understand the math" of the filing argument. The Hague Convention calls for filing within a year of the wrongful retention of a child. The court determined that occurred on August 5, 2008; the petition was filed on August 4, 2009. Because the Convention uses vague language — "a year" — petitioner relied on Federal Rule of Civil Procedure 6(a)(1) for the timing.

In her objection to the recommended decision, Martin wrote, "Petitioner did not file her petition until at least a full year later, on August 4, 2009, the 365th day that the child was retained . . . . To comply with the standard mandated under Art. 12, Petitioner had to file her Petition no later than August

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365th day that the child was retained . . . . To comply with the standard mandated under Art. 12, Petitioner had to file her Petition no later than August 3, 2009, when 364 days had elapsed from the date of retention, but when the August 4, 2009 Petition was filed, exactly one year had elapsed from the date of the retention."

Aside from the timing issue, there were similarities in the two cases beyond their arising under an international treaty. In both cases, wrongful retention of a child had to be demonstrated, which required discussions of "habitual residence" and parental intention.

In *Nicolson*, Lucas Nicolson and Erica Pappalardo met when she was traveling in Australia. Pappalardo became pregnant and returned to the US. After a brief long-distance relationship, she returned to Australia and the couple was married. They lived in Australia with the child, S.G.N. It was a stormy relationship, and Pappalardo eventually returned to the US with the child. Nicolson believed it was for a short visit, but Pappalardo and S.G.N. never returned to Australia.

In *Falk*, Jon Sinclair and Sonja Falk met when Sinclair was living and working in Germany in 2000. Their daughter, J.J.F., was born in July 2001. When she was five months old, Sinclair moved in with Falk and the child and the three lived together in Germany until 2005, when they moved to a home owned by Sinclair's parents in Maine. J.J.F. has attended school in both Germany and Maine.

In 2007, Falk and J.J.F. returned to Germany; Falk did not intend to return to the U.S. Falk and Sinclair drafted a custody agreement, which was notarized. They agreed that J.J.F. would spend the school year in Germany and the summer in Maine, and also came to an agreement as to support.

When J.J.F. arrived for her visit in June 2008, Sinclair became upset about issues related to her schooling and her relationship with her mother. He informed Falk that he believed Falk had not lived up to their agreement, and that he would not be returning J.J.F. to Germany.

Magistrate Rich met *in camera* with J.J.F. he found her "to be bright, articulate, and mature for her age. She seemed comfortable and relaxed with me, even displaying a charming sense of humor." He found that "While she did strongly object to returning to her school in Germany and expressed a preference to speak English rather than German and to remain in Maine, she did *not* object to returning to Germany."

In her objection, Martin wrote, "The court does not explain as a matter of law how such a dichotomy can lead to that conclusion. Therefore, Respondent respectfully requests that the court receive further evidence from J.J.F. and any other witness the court may wish to hear regarding J.J.F.'s objection to returning to Germany pursuant to the court's authority under 28 U.S.C. § 636(C)."

Sinclair said, "The magistrate met with the child *in camera*, so the only way respondent and counsel could know what was said is if the child told them after or they told the child what to say." He characterized the argument as "interesting."

Martin argued, "J.J.F. stated to both parents in January 2007 that she did not want to return to Germany and petitioner testified that she told her several times that she wanted to return to her school in the United States."

In *Nicolson*, Judge Singal noted, "A child's 'habitual residence' is a mixed question of law and fact and is intended to be a fluid concept to allow for the consideration of the specific facts of each individual case. The Hague Convention purposely avoided defining 'habitual residence' and the First Circuit has not thoroughly addressed the issue. Thus, there is no clear precedent in this circuit. However, the majority of circuits have adopted the approach set forth in *Mozes v. Mozes*, ... which focuses on determining the parents' 'shared intent' or 'settled intent.'"

Although a child's place of birth is not automatically her habitual residence, in *Nicolson*, S.G.N. lived in Australia with her parents for the first three months of her life. In addition, Judge Singal found that the habitual residence did not change when S.G.N. was taken to Maine, because the parents did not share the intent for South Portland to become the child's residence. Her father believed it would only be a brief visit.

Because the child in *Falk* was much older, and had gone back and forth between the U.S. and Germany, determining habitual residence was more complicated. The court relied heavily on the written agreement between the parents for demonstration of their shared intent that J.J.F. would reside in Germany.

These decisions do not determine the custody outcome in these cases; rather, they establish which courts have jurisdiction to decide custody. As Nuzzi said, "this is a fight over venue, in a way."

An additional challenge in *Falk* is that petitioner does not speak English well. Nonetheless, Sinclair put her on the stand as well as her mother, the child's grandmother. They testified via a translator. Sinclair said he was "shocked" to discover the court did not have the authority to pay for interpreter services.

The German Central Authority in Bonn contacted the Cumberland Legal Aid Clinic at the law school and asked them to take Falk's case. Sinclair said it was a "huge, huge honor" to have the opportunity to argue before a District Court Magistrate as a law student. Sinclair will be filing a response to respondent's objection and is hopeful that Judge Singal will affirm the magistrate's decision.

The decision in *Nicolson v. Pappalardo*, MLR# 119-10, is summarize in this issue on page 4. The recommended decision in *Falk v. Sinclair* is noted on page 12.