Chafin v. Chafin: Hague Convention, Mootness, Extraterritorial Authority and Futility

This is cross-posted by the author on Letters Blogatory, as well.

We previewed the *Chafin* case on this site when certiorari was granted last summer. It was decided yesterday by a unanimous Court. This is the second Hague Convention case to reach the Court in three years, and while the decision itself is not altogether surprising, Chief Justice Roberts does include an interesting discussion that touches on a wide array of transnational issues (outside of the family law context).

Chafin involves a U.S. Army sergeant and a Scottish woman he had married while stationed in Germany. The couple later moved to Alabama, and after their divorce, disputed the care of their daughter, who is now five years old. After obtaining a federal court order under the Hague Convention declaring that Scotland was the girl's country of habitual residence, Mrs. Chafin returned to Scotland with the child. Sgt. Chafin appealed that decision to the Eleventh Circuit, but that court dismissed the case as moot because the child had already returned to Scotland, and was outside the court's jurisdiction. Circuits have been deeply split over a fundamental and very practical question: Is the court's jurisdiction over the dispute truly limited by the water's edge? In other words, if the case were to be reversed on appeal, does the uncertainty of enforcement of the order abroad render the case moot?

The Supreme Court reversed the decision of the Eleventh Circuit because, in Chief Justice John Roberts's words, "[t]his dispute is still very much alive." "On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised. This is not a case where a decision would address 'a hypothetical state of facts.'" The Respondent and the Eleventh Circuit, the Court held, "confuse[d] mootness with the merits." To be sure, "Scotland [may] ignore a U.S. re-return order, or decline to assist in enforcing it," but a litigants "prospects

of success are … not pertinent to the mootness inquiry," and the "uncertain[]" efficacy of the ultimate judgment "does not typically render cases moot."

That was enough for Mr. Chafin to win before the Court, but here is where the decision got a bit more interesting for transnational litigants writ large. As I've discussed before elsewhere, the circuits are decidedly split on that standard for ordering antisuit injunctions, and recent high-profile cases illustrate the uncertainty surrounding injunctive orders when it concerns foreign parties living abroad. The Court in *Chafin*, however, noted the existence of its power to make such orders with little apparent concern. U.S. courts can "command[] [a party properly before it] to take action … outside the United States" under the pain of sanctions for non-compliance, the Chief Justice said. He then swiftly moved from an assertion of the Court's inherent authority to an acknowledgment of its practical limits. Parties ignore our authority all the time, the Court seems to suggest (without expressly saying it that way, of course). For instance, U.S. Courts often "decide cases against foreign nations, whose choices to respect final rulings are not guaranteed." So Argentine bondholders and an Alabama father find themselves in the same legal limbo. It remains true that a return order may not give Mr. Chafin his daughter, "just as a an order that [a foreign state] pay $100 million may not make a plaintiff rich."

These propositions are little more than an interesting aside to the central holding of the case, but they illustrate the Court's view of its tenuous place in the broader arena of transnational justice.