

Commentary: Appellate Court Cases

Berezowsky v. Ojeda (*Berezowsky II*), 652 F. App'x 249 (5th Cir. 2016) (unpublished opinion)

Other Fifth Circuit Cases

Delgado v. Osuna,
837 F.3d 571 (5th Cir. 2016)

Hernandez v. Pena,
820 F.3d 782 (5th Cir. 2016)

Rodriguez v. Yanez,
817 F.3d 466 (5th Cir. 2016)

Berezowsky v. Ojeda (*Berezowsky I*),
765 F.3d 456 (5th Cir. 2014)

Sanchez v. R.G.L.,
761 F.3d 495 (5th Cir. 2014)

Salazar v. Maimon,
750 F.3d 514 (5th Cir. 2014)

Larbie v. Larbie,
690 F.3d 295 (5th Cir. 2012)

Sealed Appellant v. Sealed Appellee,
394 F.3d 338 (5th Cir. 2004)

England v. England,
234 F.3d 268 (5th Cir. 2000)

Re-Return Orders Following Reversal of Lower Court Order on Appeal

In keeping with a district court order for return of the child to Mexico from Texas, mother took the child to Mexico. The Fifth Circuit reversed, remanding the case and directing the district court to vacate its order of return and dismiss the case (*Berezowsky I*).¹ On remand, the district court denied father's request for a "re-return" (that is, that the child be returned back to Texas from Mexico). This decision was affirmed by the Fifth Circuit (*Berezowsky II*).²

Facts

Berezowsky I involved a complex history of mother and father's contemporaneous child custody litigation in both Mexico and Texas, each seeking a friendly forum for their claims. In November 2012, mother filed a Hague Convention petition in the Southern District of Texas and obtained an order returning the child to Mexico, where mother had obtained a judgment granting her custody. Pursuant to the district court order, mother returned to

Mexico with the child. On appeal, the Fifth Circuit found that the child's habitual residence was Texas, not Mexico, so it reversed and directed that the district court vacate the return order and dismiss the case. In light of the Fifth Circuit's holding that Texas was the child's habitual residence, father requested that the district court issue a re-return order, compelling the return of the child back to Texas. The district court refused the order. Father appealed to the Fifth Circuit, contending that the district court's refusal to grant an order compelling the child's return was an abuse of discretion, allowing mother to possess the child by virtue of a vacated return order.

Discussion

In question were the following: first, whether the Fifth Circuit's order on remand to the district court to vacate its order of return and to dismiss the case foreclosed the issu-

1. *Berezowsky v. Ojeda*, 765 F.3d 456 (5th Cir. 2014).

2. Re-return orders are also discussed in the case analysis of *In re A.L.C.*, 607 Fed. App'x 658 (9th Cir. 2015), reviewed concurrently with this case.

ance of an order of re-return of the child to Texas, and second, whether the district court's refusal to grant father's request for a re-return order was an abuse of discretion.

The Fifth Circuit found that courts possessed inherent power to order the re-return of children, citing the Supreme Court's decision in *Chafin v. Chafin*.³

The court also ruled that its failure to direct the district court to order the child re-returned did not foreclose the district court from issuing such an order. Although issues decided implicitly by courts of appeals may be reexamined by trial courts, a court may not proceed on matters decided by "necessary implication."⁴ Given that a re-return order was not foreclosed by the circuit court's order on remand (to vacate the order of return and order the case dismissed), the district court was free to consider the issue of re-return and grant or deny the same. Finding no abuse of discretion in the lower court's denial of father's re-return motion, the judgment was affirmed.

3. 133 S. Ct. 1017 (2013); see also *In re A.L.C.*, 607 Fed. App'x at 663.

4. *Berezowsky v. Ojeda (Berezowsky II)*, 652 Fed. App'x 249, 252 (5th Cir. 2016).