

# Commentary: Appellate Court Cases

## Custodio v. Samillan, 842 F.3d 1084 (8th Cir. 2016)

### Other Eighth Circuit Cases

**Acosta v. Acosta**,  
725 F.3d 868 (8th Cir. 2013)

**Vasquez v. Colores**,  
648 F.3d 648 (8th Cir. 2011)

**Stern v. Stern**,  
639 F.3d 449 (8th Cir. 2011)

**Barzilay v. Barzilay (Barzilay II)**,  
600 F.3d 912 (8th Cir. 2010)

**Sorenson v. Sorenson**,  
559 F.3d 871 (8th Cir. 2009)

**Barzilay v. Barzilay (Barzilay I)**,  
536 F.3d 844 (8th Cir. 2008)

**Silverman v. Silverman (Silverman II)**,  
338 F.3d 886 (8th Cir. 2003)

**Silverman v. Silverman (Silverman I)**,  
312 F.3d 914 (8th Cir. 2002)

**Nunez-Escudero v. Tice-Menley**,  
58 F.3d 374 (8th Cir. 1995)

**Rydder v. Rydder**,  
49 F.3d 369 (8th Cir. 1995)

### Child's Objection to Return | Mootness

The 1980 Convention ceases to apply to a child who reaches the age of sixteen during Convention proceedings, even if the petition for return was filed before the child turned sixteen. A mature child's objection to return may be based on issues also relevant to a custody proceeding.

### Facts

Father and mother were Peruvian citizens with two children. They married in 2002 and separated in 2004. Mother obtained permission from a Peruvian court to take the children to the United States to obtain medical treatment for the older child. She arrived in St. Louis in February 2014 and failed to return in March 2014, as required. Mother married an American citizen with whom she had another child.

Father petitioned for return of his two children. Their first child, M., turned sixteen years old during the pendency of father's petition for return. Their second child, G., was fifteen years old. The district court denied the petition, and father appealed.

### Discussion

The Eighth Circuit addressed the following questions: (1) Is a child who turns sixteen during the pendency of return proceedings still subject to jurisdiction under the Convention? (2) What is the standard of review of a trial court's determination regarding a child's objection to return: *de novo* or clear error? (3) Can a child's objection to return be based on considerations typically pertinent to custody decisions.

**Mootness.** The older child turned sixteen during the time that father's petition was pending before the court. Despite the fact that the child was fifteen at the time of abduction, the circuit court found that when the child turned sixteen, the Convention no longer applied, and the court dismissed the appeal as moot. This conclusion was based

upon the interpretation of the 1980 Convention by the State Department’s Text and Legal Analysis and Elisa Pérez-Vera’s Explanatory Report.<sup>1</sup>

**Objection of the Child.** Ruling on a matter of first impression in the Eighth Circuit, the court held that appellate review of a trial court’s determination on a child’s objection to return should be accorded great deference and should be subject to clear error review. In reaching this conclusion, the Eighth Circuit relied on precedent from the Second, Third, Fifth, and Tenth Circuits.<sup>2</sup> The court observed that when a child’s objection is the sole basis for refusing return, courts “must apply a stricter standard in considering a child’s wishes.”<sup>3</sup>

In this case, the child objected to return to Peru because he wished to remain with his mother, stepfather, and two brothers. He also objected because he did not feel safe with father, noting his father’s aggressive nature, and because he preferred to remain at his school and with the friends he had made in the United States. The district court found the child to be very thoughtful and intelligent.

Father argued that the child’s reasons for objecting to return were relevant only to custody determinations and were therefore inappropriate to consider in support of a defense against return. The court acknowledged that the Convention generally eschews consideration of evidence of “custody claims” in Convention proceedings—consideration of evidence related to the best interests of the child cannot be considered when evaluating a grave risk defense. The court noted, however, that the Explanatory Report “makes clear that a mature child’s views on return can be ‘conclusive.’”<sup>4</sup> Following the Fifth Circuit’s reasoning in *Rodriguez v. Yanez*,<sup>5</sup> the Eighth Circuit observed that

the Explanatory Report “does not suggest the child’s interpretation of [his] ‘own interests’ is invalid if it is based” on custody considerations. Rather, “the drafters of the Convention simply deemed it inappropriate to return a mature child ‘against its will’—whatever the reason for the child’s objection.” We agree with the Fifth Circuit’s well-reasoned interpretation of the mature child defense. Requiring the district court to distinguish between a child’s custody-based and non-custody-based objections would likely be an impossible task—a task that the Convention does not require. Accordingly, the district court did not err in considering objections that may also be relevant to a custody proceeding.<sup>6</sup>

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1. Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986); Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1982) [hereinafter Explanatory Report].

2. *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259 (3d Cir. 2007); *Vasconcelos v. Batista*, 512 F. App’x 403, 407 (5th Cir. 2013) (unpublished opinion); *de Silva v. Pitts*, 481 F.3d 1279 (10th Cir. 2007).

3. *Custodio v. Samillan*, 842 F.3d 1084, 1089 (8th Cir. 2016) (quoting *Tsai-Yi Yang*, 499 F.3d at 278 (quoting *de Silva*, 481 F.3d at 1286)).

4. *Custodio*, 842 F.3d at 1091 (quoting Explanatory Report, *supra* note 1, at 433 ¶ 30).

5. *Rodriguez v. Yanez*, 817 F.3d 466, 474 (5th Cir. 2016).

6. *Custodio*, 842 F.3d at 1091 (citations omitted) (quoting *Rodriguez*, 817 F.3d at 475–76).