Commentary: Appellate Court Cases

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

Other Fifth Circuit Cases

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

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

Berezowsky v. Ojeda (*Berezowsky II*),
652 Fed. App'x 249 (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)

Habitual Residence | Parental Intent

This case involves the question whether a change in a child's habitual residence may take place when parents share an intent to abandon a previous residence but have not agreed upon the particular place to establish their new home.

Facts

Father and mother had two sons, both born in Venezuela. Father was a urologist and a dual citizen of Spain and Venezuela, and mother was a citizen of Venezuela. The family resided in Venezuela. Due to civil unrest there, mother and father discussed relocating to another country, possibly the United States, Spain, Panama, Ecuador, or others.

The family planned to traveled to Miami in May 2014 for father to attend the annual Congress of Urology. Mother also planned to go to Frisco, Texas, to visit her sister. Two months before their departure, men approached mother, requesting that she pass a note to her father and uncle to "stop messing with the government" and making comments about her "beautiful" children. Mother took this incident as a threat to herself and her sons. Before their trip, the family packed all of their important documents including medical records and the children's school records, as well as jewels and gold. Mother, with father's approval, sent her older child's paperwork to a school in Frisco, Texas, to prepare for his enrollment. The family obtained six-month visas, and when they arrived in Miami, they met with someone who assisted them with applications for political asylum in the United States.

Upon learning that it would require fourteen years of medical school and/or training for him to be able to practice in the U.S., father withdrew his application for asylum and returned to Venezuela a day later. Father testified that he intended that mother and the children would return "sometime" after the expiration of their six-month visas. Mother testified that she never intended to return to Venezuela, but that if father was successful in finding employment outside of Venezuela, she and the children would cancel their asylum requests and reunite with father. Ultimately, father filed for divorce in January 2015.

The district court entered a judgment dismissing father's petition to return the children to Venezuela, finding that the parents had abandoned their prior habitual residence in Venezuela. The Fifth Circuit affirmed.

Discussion

Father's principal argument was that a shared parental intent to abandon a habitual residence must include an agreement to raise the child in the new country. This contention was based on the Fifth Circuit's recent holding in *Berezowsky I*[1] that the mother in that case "[did] not point to any case law supporting her novel argument that parents can form the *shared intent* necessary to abandon a prior habitual residence without—at some point in the child's life—making a *joint decision* to raise the child in the new country."[2] The court rejected father's interpretation of the *Berezowsky I* holding that an intent to abandon a prior habitual residence required an agreement to select a particular place as the new habitual residence. The court explained the distinction between the *Delgado* case and *Berezowsky I*:

> Dr. Delgado relies on this language to support his position that parents must agree on "*the* new country of residence," and not on an unspecified country to be determined at a later time in order to abandon a child's habitual residence. But the argument rejected in *Berezowsky* is highly distinguishable from the situation here. *Berezowsky* involved a bitter custody dispute where the child was moved back and forth between the United States and Mexico largely because the parents sought more favorable forums for their custody dispute. The parents did not share an intent concerning the location of their child's habitual residence, and this court rejected the mother's argument that a shared intent could be established by the parents individually. Here, in contrast, the parents held a shared intent for their children to abandon Venezuela. Thus, Dr. Delgado's reliance on *Berezowsky* is misplaced. Simply because the *Berezowsky* court used the term "the new country" as opposed to "a new country" does not inform our analysis here for an entirely different argument.[3]

1. Berezowsky v. Ojeda (*Berezowsky I*), 765 F.3d 456 (5th Cir. 2014), cert. denied, 135 S. Ct. 1531 (2015).

2. *Id.* at 471.

3. Delgado v. Osuna, 837 F.3d 571, 579–80 (5th Cir. 2016).