

Commentary: Appellate Court Cases

Madrigal v. Tellez, 848 F.3d 669 (5th Cir. 2017)

Other Fifth Circuit Cases

Soto v. Contreras,
880 F.3d 706 (5th Cir. 2018)

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 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)

Return Orders | Enforcement | Place of Return

This case involves consideration of motions filed by both parents to modify and vacate the order of return. At the time of the hearing on the motions, the children had been returned to their habitual residence, Mexico.

Facts

Both mother and father were Mexican citizens residing in Mexico City with their two daughters, ages three and five. In 2015, mother took the children to the United States for a vacation, but ultimately decided to remain in El Paso, Texas. Father petitioned for the return of the children to Mexico, and the district court granted his petition. After the issuance of the return order, mother filed a notice of compliance with the court order, indicating that the children had been returned to Mexico and were residing in Ciudad Juárez. Father sought posttrial enforcement of the return order, claiming that mother had placed the children with their maternal grandparents in Ciudad Juárez for some weeknights, but that the children spent weekdays and weekends in El Paso, Texas. Father requested orders to deliver the children to

him in Mexico City and to prohibit the children's travel outside of Mexico. Mother also filed a posttrial request to vacate the return order based upon newly discovered evidence. The Fifth Circuit affirmed the district court's denial of both parents' posttrial motions.

Discussion

It is significant that the parents' posttrial motions were made after the children had already been returned to Mexico. Mexican courts acquired jurisdiction over all custody issues. The Fifth Circuit declined to adopt a rule that requires orders of return to correspond with the status quo that existed before removal. The court noted, "The return remedy, in particular, was designed principally to address situations that cannot be re-

solved unilaterally by the state of habitual residence.”¹ To the extent that the court seeks to determine the location of the child’s habitual residence within the state, or to order the child to attend certain schools or to be subject to visitation orders, the court takes on issues that begin to resemble those in child custody cases. Citing to its previous holding in *Hernandez v. Garcia Pena*,² the court reiterated that the remedy of return “only determines where any custody decision should be made.”

As the court observed, mother and father both agreed that because the children had been returned to Mexico, the Mexican courts had jurisdiction to decide all custody matters. The court further held that “the Convention and its return remedy do not control or regulate children whose custody matters are within the exclusive jurisdiction and control of the state of habitual residence.”³ Therefore, the courts of Mexico are the proper venue for deciding issues relating to the residence or placement of the children.

Mother’s posttrial motions to vacate were based on her claims that events occurring after the trial supported a defense of grave risk. Her first claim was that her husband had convinced a Mexican court to issue a warrant for her arrest for “fraudulent administration,” a crime that carried no bail. Mother argued that if she were arrested on the warrant, she would be separated from the children for an indefinite period of time, causing grave risk to the children. The circuit court denied the motion on the grounds that the separation of a child from a parent is insufficient to trigger the grave risk exception and that principles of comity foreclose the court from second-guessing the decisions of Mexican courts in their own cases. Mother’s second claim of grave risk was based on a death threat against her that her attorneys received. The threat was contained in the subject line of an email that had no body text; it was vague and was sent by an unknown source.

The court acknowledged that while threats against a parent could create a grave risk to a child,⁴ the vague and uncertain facts of this case did not, and the Fifth Circuit affirmed the district court’s decision not to vacate the return order based upon this posttrial evidence.

1. *Madrigal v. Tellez*, 848 F.3d 669, 674 (5th Cir. 2017) (citing Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, *in* 3 Acts and Documents of the Fourteenth Session 426, 430 (1982)).

2. 820 F.3d 782, 786 (5th Cir. 2016).

3. *Madrigal*, 848 F.3d at 674.

4. *Madrigal*, 848 F.3d at 677 (citing *Gomez v. Fuenmayor*, 812 F.3d 1005, 1007–10 (11th Cir. 2016); *Ermini v. Vittori*, 758 F.3d 153, 164 (2d Cir. 2014); *Van De Sande v. Van De Sande*, 431 F.3d 567 (7th Cir. 2005); *Walsh v. Walsh*, 221 F.3d 204, 219–20 (1st Cir. 2000); and *Sabogal v. Velarde*, 106 F. Supp. 3d 689, 705–06 (D. Md. 2015)).