

Commentary: Appellate Court Cases

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

Other Fifth Circuit Cases

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

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)

Domestic Violence | Grave Risk

In this case, the Fifth Circuit evaluated whether the district court's finding that there was a lack of "objective evidence" to support abuse allegations impermissibly increased mother's burden to prove a grave risk, and whether the existence of spousal abuse requires a finding of grave risk to a child.

Facts

In September of 2014, after a nine-year marriage, mother and father, who were both Mexican citizens residing in Mexico, mutually decided to divorce. In the spring of 2015, mother told father she was taking two of her three children to a party in another town three hours away; instead she took them to the United States, seeking political asylum.¹ Father filed a petition in district court for return of the children under the Hague Convention. Mother's defense argued that there was a grave risk to the children because of domestic violence. In the district court, both mother and father accused each other of domestic violence, adultery, and financial irresponsibility. The district court found that

[Mother]'s allegations of abuse—that [Father] physically and psychologically abused her, sometimes in front of their children, and that [Father] allegedly physically assaulted their daughter on one occasion—are in conflict with [Father's] testimony. [Father] testified that he could recall one instance in which he and [Mother] engaged in a physical fight, but [Father] denied any other instances of abuse. Because neither side is able to provide *objective evidence*, [Mother's] allegations of abuse fail to rise to the level of clear and convincing evidence of a grave risk of harm.²

The district court granted the petition for return. Denying a subsequent motion for stay requested by mother, the district court noted that despite mother's challenge to its "ob-

1. This case ultimately applied only to one of the two children because the other child "aged out" (that is, the child turned sixteen during the pendency of the Hague Convention proceedings). The asylum petition was pending at the time of the decision in this case.

2. *Soto v. Contreras*, 880 F.3d 706, 709 (5th Cir. 2018) (quoting *Soto v. Contreras*, 2016 U.S. Dist. LEXIS 192540, at *4–5 (N.D. Tex. Oct. 18, 2016) (emphasis added)).

jective evidence” finding, the district court “did not disregard the testimony of the two children . . . rather, . . . [it] noted that there was no evidence of physical abuse of the Child, which is the more pertinent issue for likelihood of grave risk of harm to the child.”³

The Fifth Circuit declined to consider the district court’s stay ruling. The stay ruling did not amend the district court’s trial findings and as such was not part of that court’s findings of fact and conclusions of law.

Discussion

The Fifth Circuit affirmed the district court’s decision granting father’s petition for return. The court began its analysis by restating the fundamental principles underlying an Article 13(b) defense: defenses under the Hague Convention are narrow,⁴ findings of grave risk are rare,⁵ and the party raising the defense must show that return of the child would expose the child to a *grave* risk of harm, not merely a serious risk.⁶ Grave risk is one of two defenses that must be proved by “clear and convincing evidence.”⁷ In this case, the Fifth Circuit noted that the district court’s reference to “objective evidence” did not demonstrate that the court’s ruling was “based on a misconception of the underlying legal standard.”⁸

Mother’s first contention was based on the district court’s comments on the lack of “objective evidence” to sustain mother’s abuse allegations. Mother argued that this characterization of the evidence impermissibly heightened the existing legal standard of clear and convincing evidence. While the circuit court agreed that a person asserting an Article 13(b) defense is not required to provide objective evidence in order to prove the defense, the court also found that the district court did not actually require “objective evidence” of abuse. The use of the phrase by the district court was simply part of its factual finding that the evidence mother provided was insufficient to meet her burden to show a grave risk to the child by clear and convincing evidence.

Mother raised an additional ground for appeal: the district court noted in its decision that mother did not provide any evidence that father abused the child in question. Mother argued that case law supported a finding of grave risk to the child in the case of spousal abuse, even without proof of violence directed toward the child itself. The Fifth Circuit acknowledged the existence of case law supporting this position, but the court held that there is no bright-line rule that requires a court to find a grave risk whenever it finds evidence of spousal abuse. When considering the case law examples mother provided, the court reasoned that those cases

3. *Soto v. Contreras*, 2016 U.S. Dist. LEXIS 192541, at *3 (N.D. Tex. Oct. 25, 2016).

4. *Soto*, 880 F.3d at 709–10 (citing *Tavarez v. Jarrett*, 252 F. Supp. 3d 629, 640 (S.D. Tex. 2017) (citing *England v. England*, 234 F.3d 268, 271 (5th Cir. 2000))).

5. *Id.* at 710 (citing *Delgado v. Osuna*, 2015 WL 5095231, at *13 (E.D. Tex. 28 Aug. 2015), *aff’d*, 837 F.3d 571 (5th Cir. 2016)).

6. *Id.* (citing Hague International Child Abduction Convention; Text and Legal Analysis, 51 FR 10494–01 (Mar. 1986)).

7. 22 U.S.C.S. § 9003(e)(2)(A).

8. *Soto v. Contreras*, 880 F.3d 706, 711 (5th Cir. 2018) (citing *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 339 n.16 (5th Cir. 1984)).

stand only for the proposition that sustained spousal abuse can, in some instances, create such a risk. Indeed, a bright-line rule that allegations of spousal abuse create grave risk to a child would circumvent the Hague Convention's principle that "the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence."⁹

9. *Id.* at 713 (citations omitted).