

Commentary: Appellate Court Cases

Palencia v. Perez, 921 F.4d 1333 (11th Cir. 2019)

Other Eleventh Circuit Cases

Pfeiffer v. Bachotet,
913 F.3d 1018 (11th Cir. 2019)

Grau v. Grau,
780 F. App'x 787 (11th Cir. 2019)

Fernandez v. Bailey,
909 F.3d 353 (11th Cir. 2018)

Gomez v. Fuenmayor,
812 F.3d 1005 (11th Cir. 2016)

Seaman v. Peterson,
766 F.3d 1252 (11th Cir. 2014)

Baran v. Beaty,
526 F.3d 1340 (11th Cir. 2008)

Pielage v. McConnell,
516 F.3d 1282 (11th Cir. 2008)

Hanley v. Roy,
485 F.3d 641 (11th Cir. 2007)

Ruiz v. Tenorio,
392 F.3d 1247 (11th Cir. 2004)

Furnes v. Reeves,
362 F.3d 702 (11th Cir. 2004)

Pesin v. Rodriguez,
244 F.3d 1250 (11th Cir. 2001)

Lops v. Lops,
140 F.3d 927 (11th Cir. 1998)

Custody Rights | Wrongful Retention

In this case, the Eleventh Circuit explored the definition of custody rights and gave guidance on how to determine the date of wrongful retention when an abducting parent falsely represents to the other parent the date of the child's return.

Facts

A child was born to an unmarried Guatemalan couple in 2013. The family lived together in Guatemala until October 2016, when the mother told the father that she intended to visit relatives in Mexico. Because the mother had done this in the past and returned to Guatemala, the father did not object. But she instead took the child to the United States, where they were detained at the border. The mother contacted the father twelve days later, said she had made a mistake, and asked for his assistance with obtaining passports for herself and the child. He cooperated and she promised to return as soon as she had the passports. This process took months, and as soon as the mother received the passports, she informed the father that she and the child would not be returning to Guatemala.

When the father filed his Hague petition, he learned that the mother had filed an asylum petition for herself and their child upon arriving to the United States. As part of her asylum petition, she stated that she had never been a victim of domestic violence.

The district court held an evidentiary hearing on the Hague petition and heard evidence from both parents, family members, and mental health professionals, as well as two Guatemalan attorneys. The court granted the father's petition and ordered the child returned to Guatemala. The Eleventh Circuit affirmed.

Discussion

Custody Rights. The Eleventh Circuit noted that the Hague Convention does not give the term *rights of custody* a fixed definition, nor is this concept limited to physical custody. Rather, the Convention takes an expansive view that includes rights relating to the care of the child and the right to determine the child’s place of residence. Quoting Eleventh Circuit case law, the court observed that

“[t]he intention of the Convention is to protect *all* the ways in which custody of children can be exercised, and the Convention favors a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration. . . . [T]he violation of a *single* custody right suffices to make removal . . . wrongful. . . . [A] parent need not have ‘custody’ to be entitled to return [of the child]; rather, he need only have one right of custody.”¹

The Eleventh Circuit looked to Guatemalan law to determine the father’s rights of custody under the Hague Convention. Such rights are determined by the law of the country in which the child habitually resides at the time of removal. After a thorough review of Guatemalan law, the court determined that an unmarried father does have rights of custody under the Hague Convention and Guatemalan law. The court also observed that the Guatemalan courts have the authority to determine ultimate physical custody rights.²

Wrongful Retention. The mother argued that she was entitled to assert the Article 12 “delay” defense because the father’s petition for return of the child was filed in February 2019—more than one year after she first took the child from Guatemala in October 2016. The father asserted that wrongful retention began on the date that he was informed she would not be returning the child to Guatemala: July 2017. Reviewing the facts of this case, the court noted that the mother had misrepresented her intentions and had assured the father that she would return once she received the passports. This deception led to his delay in filing the petition. Following precedent from the First, Second and Third Circuits,³ the court held that the date the petitioning parent learns the true nature of the removing parent’s intentions starts the clock of wrongful detention. and in this case, that was July 2017.

1. *Palencia v. Perez*, 921 F.3d 1333, 1339 (11th Cir. 2019) (quoting *Hanley v. Roy*, 485 F.3d 641, 644 (11th Cir. 2007) (internal quotation marks and citations omitted)).

2. *Id.* at 1342.

3. *Marks v. Hochhauser*, 876 F.3d 416, 417, 420–23 (2d Cir. 2017); *Blackledge v. Blackledge*, 866 F.3d 169 (3d Cir. 2017); *Darin v. Olivero-Hoffman*, 746 F.3d 1, 10–11 (1st Cir. 2014).