Commentary: Appellate Court Cases

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

Other Fifth Circuit Cases

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

Hernandez v. Pena,
820 F.3d 782 (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)

Exercise of Custody Rights | Child's Objection to Return

The exercise of custody rights exists where a parent maintains some sort of relationship with the child. The objection of the child to return may not be sustained by mere preference, as opposed to an actual objection, but the child's preference to remain with a parent may be relevant to sustain an objection to return.

Facts

Father timely petitioned for the return of his eleven-year-old daughter to Chihuahua, Mexico. The child was removed from Mexico by her mother in October 2013 without father's permission. At the time the child was conceived, both mother and father were married to other individuals. Father acknowledged the child as his and attended the birth. Thereafter he still lived with his wife, but stayed at mother's house in Torreón—the domicile of mother and child—between one to five days a month. He also provided financial assistance, including paying tuition for the child to attend private school. In 2011 or 2012, mother and the child moved from Torreón to Chihuahua. Despite the travel time of a few hours between the cities, father visited every four to six weeks. Mother and the child moved to Texas in October 2013. Father attempted to contact the child in Texas but had limited contact with her.

Father described his relationship with his daughter as "beautiful." Mother testified that she would never allow the child to be alone with her father and that father only spoke to the child to inquire about mother's love life. Mother testified that father was drunk and almost always violent with her on his visits.

The district court questioned the child in camera twice during the proceeding. The child explained that although she was happy living in both Mexico and Texas, she was happier in Texas because she wanted to learn there.

The district court denied father's petition for return. The court concluded that father did not exercise his custody rights: there was insufficient evidence that he physically cared for the child or provided financial assistance and sufficient evidence that the purpose of

his visits were to harass mother rather than spend time with the child. The court also noted the lack of evidence of a custody determination or other judicial relief when mother moved five hours away from Torreón.

The district court found that the child was of sufficient age and maturity for the court to consider her testimony and found a "clearly expressed desire" to remain with her mother in the United States. This was confirmed by her in camera statement to the court that she would be happier remaining in the United States.

Discussion

Exercise of Custody Rights. The Fifth Circuit reversed the district court's holding that father had not exercised his custody rights. The court affirmed its previous expansive interpretation of "exercise" of custody rights based upon the Sixth Circuit's holding in *Friedrich II*[1] and its own holding in *Sealed Appellant*[2]:

> Under this standard, "when a parent has custody rights under the laws of that country, even occasional contact with the child constitutes 'exercise' of those rights. To show failure to exercise custody rights, the removing parent must show the other parent has abandoned the child." "Once it determines that the parent exercised custody rights in any manner, the court should stop—completely avoiding the question whether the parent exercised the custody rights well or badly. These matters go to the merits of the custody dispute and are, therefore, beyond the subject matter jurisdiction of federal courts."[3]

The circuit court dismissed mother's argument that father's visits with the child were merely collateral to his main interest in maintaining a "mistress relationship" with her. The court found that father exercised his custody rights by providing financial support, and that father maintained "*some* sort of relationship" with the child.

Child's Objection to Return. The Fifth Circuit vacated the district court's decision to deny return on the basis of the child's objection to return and remanded the case for further consideration.

The "age and maturity" exception to return requires two prongs: (1) that "the child has attained an age and degree of maturity at which it is appropriate to take account of the child's views"[4] and (2) the child objects to being returned.[5] The circuit court sustained the district court's finding that the child had attained a sufficient degree of age and maturity, finding no clear error. The Fifth Circuit found, however, that the child did not object to being returned to Mexico, and only expressed a preference for remaining in the United States. The circuit court emphasized that the "age and maturity" exception was to be applied narrowly and distinguished between the two concepts:

> A preference is not an objection. This is not a matter of magic words or talismanic language. There is a substantive difference between preferring to live in one of

1. Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996).
2. Sealed Appellant v. Sealed Appellee, 394 F.3d 338 (5th Cir. 2004).
3. Rodriguez v. Yanez, 817 F.3d 469, 472–73 (5th Cir. 2016) (footnotes omitted).
4. Hague Convention on the Civil Aspects of International Child Abduction art. 13, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501.
5. *Id.*

> two countries—when living in either country would be acceptable—and affirmatively objecting to returning to one country—when living in that country would be unacceptable. Only an objection is sufficient to trump the Convention's strong presumption in favor of return.[6]

The circuit court vacated the district court's finding that the child's preference served as grounds to deny return; it remanded the case to the district court to conduct a new interview of the child to reassess the question of whether the child actually objected to returning to Mexico.

Relevance of Child's Preference for a Certain Parent. The Fifth Circuit's opinion in this case stands as the only circuit court case providing an in-depth discussion of the relevance of the child's preference for living with a certain parent.

Here, both mother and the child's guardian ad litem argued that the child had shown a preference for living with her mother in the United States. This preference was based upon the child's perception of father's psychological harassment of her mother, his physical abuse of her mother, father's use of foul language, his interrogation of the child for information regarding her mother, and her fear of her father. In response, father argued that adopting a rule that allowed a child to object to return on the basis of wanting to live with a particular parent would embroil the court in questions relating to child custody issues—which the Convention eschews.

The Fifth Circuit disagreed with father's argument. It reasoned that the Pérez-Vera report noted that the "age and maturity" defense gave children "the possibility of interpreting their own interests."[7] The court interpreted the objection provision of the Convention as follows:

> [T]he drafters of the Convention simply deemed it inappropriate to return a mature child "against its will"—whatever the reason for the child's objection. In such cases, the child's autonomy trumps the Convention's interest in preventing wrongful removals.[8]

The court reasoned that a rule prohibiting consideration of the child's preference to remain with a particular parent would not be practical; a child's desire to live with the abducting parent is relevant to the child's immediate "interests." If children can only express an opinion about their preferred country, they may be coached to suppress custody preferences and focus on facts relating to their habitual residence. This would give trial courts the "impossible task" of determining whether the child was concealing his or her actual feelings. The court disagreed that consideration of the child's preference as to which parent she would like to live with would simply encourage the abducting parent to coach the child. If the child's preference appears to be the product of a parent's undue influence, it should be given little weight. The court held that whether the child

> *wants* to live with the abducting parent is very relevant to her interpretation of her immediate "interests." Indeed, it is likely the most important consideration. . . .

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6. *Rodriguez*, 817 F.3d at 477 (footnote omitted).

7. Elisa Pérez-Vera, Explanatory Report: Hague Convention on Private International Law, *in* 3 Acts and Documents of the Fourteenth Session 426, 433 ¶ 30 (1982).

8. *Rodriguez*, 817 F.3d at 475–76.

> [A]n objection by the child to being returned, if found to be a considered and mature decision, will be honored whether or not it rests in part on her objection to living with the abducting parent.[9]

The Fifth Circuit acknowledged that contrary authority exists, citing *Hirst v. Tiberghien*,[10] *Haimdas v. Haimdas*,[11] *Lieberman v. Tabachnik*,[12] and *Hazbun Escaf v. Rodriquez*,[13] but comparing these with *Bowen v. Bowen*[14] and *Custodio v. Samillan*.[15]

9. *Id.* at 476.

10. 947 F. Supp. 2d 578, 597 (D.S.C. 2013).

11. 720 F. Supp. 2d 183, 208 (E.D.N.Y. 2010), aff'd, 401 F. App'x 567 (2d Cir. 2010).

12. 625 F. Supp. 2d 1109, 1126 (D. Colo. 2008) (quoting *In re* Nicholson, No. 97-1273-JTM, 1997 WL 446432 (D. Kan. July 7, 1997)).

13. 200 F. Supp. 2d 603, 615 (E.D. Va. 2002).

14. No. 2:13-cv-731, 2014 U.S. Dist. LEXIS 70209, at *46–47 (W.D. Pa. May 22, 2014) (objection included consideration that child was closer to father than mother).

15. No. 4:15-CV-01162 JAR, 2015 U.S. Dist. LEXIS 172712, at *16–17 (E.D. Mo. Dec. 29, 2015) (in addition to other factors, children preferred not to return to their father).