

# Commentary: Appellate Court Cases

**Aluker v. Yan, No. 21-1279, 2021 U.S. App. LEXIS 23213 (4th Cir. Aug. 5, 2021)**

## Other Fourth Circuit Cases

**Padilla v. Troxell,**  
850 F.3d 168 (4th Cir. 2017)

**Alcala v. Hernandez,**  
826 F.3d 161 (4th Cir. 2016)

**Smedley v. Smedley,**  
772 F.3d 184 (4th Cir. 2014)

**Reyes v. Jeffcoat,**  
548 F. App'x 887 (4th Cir. 2013)

**White v. White,**  
718 F.3d 300 (4th Cir. 2013)

**Maxwell v. Maxwell,**  
588 F.3d 245 (4th Cir. 2009)

**Bader v. Kramer (*Bader II*),**  
484 F.3d 666 (4th Cir. 2007)

**Bader v. Kramer (*Bader I*),**  
445 F.3d 346 (4th Cir. 2006)

**Cantor v. Cohen,**  
442 F.3d 196 (4th Cir. 2006)

**Humphrey v. Humphrey,**  
434 F.3d 243 (4th Cir. 2006)

**Miller v. Miller,**  
240 F.3d 392 (4th Cir. 2001)

## Custody Rights | Settlement Agreements | Choice of Law

In this case, the Fourth Circuit determined the effect of the parties' settlement agreement on a father's Hague petition for return of his children to Portugal after the mother relocated with them to the United States.

### Holding

The Fourth Circuit held that Portuguese provisions for choice of law required the court to apply U.S. law to determine custody rights. Applying that law, the court determined that the father did not have enforceable custody rights under the 1980 Hague Convention because of the terms of the parties' settlement agreement.

### Facts

The father was a dual citizen of Russia and the United States; the mother was a citizen of the United States. The married couple had two children while living in the United States. The family moved to Spain in 2015 and then to Portugal in 2017.

In 2018, the parties entered into a separation and property settlement agreement that provided, "[The mother] shall have sole legal and primary physical custody of [the two children]. [The father] shall be entitled liberal and reasonable visitation with the children."<sup>1</sup> The agreement also provided that each party had "the right to reside at any place . . . without the consent of the other party."<sup>2</sup> The agreement was not incorporated into any court order. Under its terms, it was governed by Virginia law.

Several months after the parties signed the agreement, the father commenced a court proceeding in Portugal to establish custody rights, but the proceeding remained dormant, and no custody orders were made.

1. Aluker v. Yan, No. 21-1279, 2021 U.S. App. LEXIS 23213, at \*2 (4th Cir. Aug. 5, 2021).

2. *Id.* at \*3.

In October 2019, the mother and children relocated to the United States, and the mother informed the father of her actions by email. In September 2020, the father filed a Hague petition for return of the children to Portugal. The mother filed a motion for partial findings under Federal Rule of Civil Procedure 52(c).<sup>3</sup> The court held that her rights as legal custodian precluded the father from asserting enforceable custody rights under the Convention.

## Discussion

Article 3 of the Convention provides that “rights of custody . . . may arise . . . by reason of an agreement having legal effect under the law of that [the habitual residence].”<sup>4</sup> The court held that U.S. law should be applied in determining the custody rights of the parents. Portuguese choice of law provides that “[r]elationships between parents and children are regulated by the common national law of the parents, and in the lack thereof, by the law of their common habitual residence; if the parents habitually reside in different countries, the law of the child’s country of origin shall apply.”<sup>5</sup>

Both parents were citizens of the United States and shared the common national law of the United States. The court found that custody rights in this case should be interpreted under Virginia law. Even if Portugal was the children’s habitual residence, no Portuguese court had awarded the father rights of custody, and the written separation agreement established the mother’s sole rights of custody.

The court held that removal of the children to the United States did not breach any custody rights held by the father.

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3. “If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.”

4. Hague Convention on the Civil Aspects of International Child Abduction art. 3, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501.

5. *Aluker*, 2021 U.S. App. LEXIS 23213, at \*6 (quoting Article 57 of the Portuguese Civil Code).