Commentary: Appellate Court Cases

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

Other Eleventh Circuit Cases

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)

Article 18 Discretion to Return Child | Settlement | Repeated Abductions

Article 18 of the1980 Hague Convention provides that "[t]he provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." This case examines the parameters of the court's discretion to order a child returned to his or her habitual residence despite an abducting parent's successful establishment of an Article 12 defense.

Facts

In 2009, a mother abducted her twin sons from Panama to Missouri. Granting the father's petition for return, the District Court for the Eastern District of Missouri ordered the children's return to Panama.[1] In response to that order, the mother returned to Panama with the children. Thereafter the father visited the children regularly on weekends. In 2013, he retained the children for two months in violation of the parties' custody agreement. Upon the mother's application, a Panamanian judge ordered the children returned to their mother. The father did not see or speak with the children for the next eleven months—each parent blaming the other for the hiatus in the father's visits.

The parents continued to litigate custody issues in the Panamanian court. The court issued an order restraining the mother from removing the children from Panama. Despite that order, in February 2014, she took the children to Florida without notifying the father. He made efforts to locate the children but was unsuccessful until January 2015, when he learned that the children were in the United States.

In April 2016, the father petitioned for return of the children in the District Court for the Middle District of Florida—two-and-a-half years after their abduction. The mother raised three defenses: grave risk of harm, the objections of the children, and the fact that the children were settled in their new environment.

The Florida district court denied the father's petition for return, finding that the children were settled in their new environment within the meaning of Article 12. Although the

1. Fernandez v. Bailey, No. 1:10CV00084 SNLJ, 2010 U.S. Dist. LEXIS 90368 (E.D. Mo. Sep. 1, 2010).

district court recognized that it retained discretion to return the children despite the fact that they were settled, it declined to do so on the basis that the children's interests in being settled outweighed the benefits of returning them to Panama.[2] The Eleventh Circuit reversed.

Discussion

Settlement of the Child. The Eleventh Circuit first discussed the concept of a child's settlement in his or her new environment, noting that the concept of settlement must consider not only the child's situation in the new place, but the child's attachments to the habitual residence. The court found that a child is settled when the evidence has shown that "the child has significant connections to their new home that indicate that the child has developed a stable, permanent, and nontransitory life in their new country to such a degree that return would be to the child's detriment."[3] The court went on to clarify that "[a]lthough all returns will necessarily involve some level of disruption to the child or children involved, we caution that disruption should not be considered *per se* detrimental. Rather, the "settled" inquiry requires courts to carefully consider the totality of the circumstances."[4]

Discretion to Return the Child. The Eleventh Circuit cited authority from cases in the First, Second, and Fourth Circuits that give courts the discretion to order a "settled" child returned.[5] The court cautioned against the exercise of broad discretion to return a settled child where such an exercise would render Article 12's defense a "dead letter"[6] or plunge the court into issues related to determining custody. Nevertheless, the circuit court found that Article 18 of the 1980 Convention grants courts the discretion to order a child returned despite the fact that an Article 12 defense to return has been established.

Repeated Abductions and Factors Weighing in Favor of Exercise of Article 18 Discretion. The court found the instant case unique because this was the second time within five years that the mother had abducted the children from Panama to the United States. The Eleventh Circuit found that the district court had given insufficient weight to "the audacity . . . of a second removal."[7] Also, since the Panamanian court was still presiding over the child custody case, this case raised the question of comity between nations and judicial authorities. Lastly, holding child custody proceedings in Florida would disadvantage the father because he would be unable to attend those proceedings[8]—a forum-shopping victory for the mother that would be contrary to the underlying principles of the 1980 Convention.

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2. "Furthermore, the Court believes that the children's interest in settlement in this case outweighs the other interests that would be served by returning the children to Panama. The Court is deeply disturbed by Respondent's actions. This is the second time Respondent has removed the children from Panama without Petitioner's consent. Because Petitioner had been unable to secure a visa to attend the 2010 Hague Convention hearing because of his prior conviction, Respondent likely knew that Petitioner could not travel to the United States to search for the children or participate in person if future custody proceedings were initiated here. As Petitioner correctly pointed out, preventing this type of forum-shopping by parents was a major motivation for the enactment of the Hague Convention." Fernandez ex rel. C.R.F.B. v. Bailey, No. 8:16-cv-2444-T-33TGW, 2016 U.S. Dist. LEXIS 128732 (M.D. Fla. Sep. 21, 2016).

3. Fernandez v. Bailey, 909 F.3d 353, 361 (11th Cir. 2018).

4. *Id.*

5. Yaman v. Yaman, 730 F.3d 1, 18 (1st Cir. 2013); Blondin v. Dubois, 238 F.3d 153, 164 (2d Cir. 2001); Alcala v. Hernandez, 826 F.3d 161, 175 (4th Cir. 2016).

6. *Fernandez*, 909 F.3d at 361 (quoting Gomez v. Fuenmayor, 812 F.3d 1005, 1011 (11th Cir. 2016)).

7. *Id.* at 364.

8. The father is not permitted to enter the United States due to a prior juvenile conviction for felony burglary.