

Commentary: Appellate Court Cases

Cuellar v. Joyce (Cuellar I), 596 F.3d 505 (9th Cir. 2010)

Cuellar v. Joyce (Cuellar II), 603 F.3d 1142 (9th Cir. 2010)

Other Ninth Circuit Cases

In re A.L.C.,
607 Fed. App'x 658 (9th Cir. 2015)

E.R.S.C. v. Carlwig (in re A.L.C.),
607 Fed. App'x 658 (9th Cir. 2015)

Margain v. Ruiz-Bours,
592 Fed. App'x 619 (9th Cir. 2015)

Murphy v. Sloan,
764 F.3d 1144 (9th Cir. 2014)

Valenzuela v. Michel,
736 F.3d 1173 (9th Cir. 2013)

Asvesta v. Petroutsas,
580 F.3d 1000 (9th Cir. 2009)

In re B. Del C.S.B.,
559 F.3d 999 (9th Cir. 2009)

Papakosmas v. Papakosmas,
483 F.3d 617 (9th Cir. 2007)

Von Kennel Gaudin v. Remis (Gaudin III),
415 F.3d 1028 (9th Cir. 2005)

Holder v. Holder (Holder II),
392 F.3d 1009 (9th Cir. 2004)

Von Kennel Gaudin v. Remis (Gaudin II),
379 F.3d 631 (9th Cir. 2004)

Holder v. Holder (Holder I),
305 F.3d 854 (9th Cir. 2002)

Von Kennel Gaudin v. Remis (Gaudin I),
282 F.3d 1178 (9th Cir. 2002)

Gonzalez-Caballero v. Mena,
251 F.3d 789 (9th Cir. 2001)

Mozes v. Mozes,
239 F.3d 1067 (9th Cir. 2001)

Shalit v. Coppe,
182 F.3d 1124 (9th Cir. 1999)
Cir. 1999)

Grave Risk | Attorneys' Fees

Cuellar I: Grave Risk

Cuellar I represents an example of a parent's attempt to use the 1980 Convention as a vehicle for determining a child's "best interests" based upon the disparity between living conditions in a remote area of Panama versus the United States.

Facts

Father, a college professor and U.S. citizen, met mother, a Panamanian exotic dancer and they had a child together. Thereafter the parties separated, with father returning to the U.S. and mother remaining in Panama with the child. Father visited the child sporadically in Panama. Father arranged to abduct the child by convincing mother and the child to meet him at the Sydney airport in Australia. While in the airport, father took the child and returned to Montana.

Discussion

Grave Risk. The district court sustained father's objections to return on Article 13 grounds. Father's Article 13 defense rested on his assertions that the child's living conditions were substandard, that she suffered from a medical condition that could not be treated in remote Panama, and that the child would suffer psychological harm due to her separation from her father and return to Panama. The Ninth Circuit reversed, primarily due to a lack of evidence that the facts supported the defense.

1. Living Conditions and Parenting Skills. Accepting that the child’s home lacked indoor plumbing and other rudimentary appliances, the court noted that

Billions of people live in circumstances similar to those described by Richard. If that amounted to a grave risk of harm, parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living.¹

The court further noted that the evidence that mother was neglectful was weak, and did not amount to “serious abuse” that was “a great deal more than minimal.”² The evidence presented consisted only of information that bore on the ultimate issue of custody and did not rise to the level required by Article 13(b). As explained by the U.S State Department:³

[Article 13(b)] was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child’s best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court’s determination. The person opposing the child’s return must show that the risk to the child is grave, not merely serious.

A review of deliberations on the Convention reveals that “intolerable situation” was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State.⁴

2. Psychological Harm. The trial court found that Article 13 applied because the child would be separated from father and was attached to him and the U.S. The Ninth Circuit warned,

This was a very serious error. The fact that a child has grown accustomed to her new home is never a valid concern under the grave risk exception, as “it is the abduction that causes the pangs of subsequent return.” *Friedrich*, 78 F.3d at 1068; see also *Asvesta*, 580 F.3d at 1020–21; *England v. England*, 234 F.3d 268, 271–72 (5th Cir. 2000). Rather than allowing an abducting parent to profit from the psychological dislocation that he has caused, the Convention attempts to avoid the harm by deterring parents from abducting their children in the first place.⁵

Cuellar II: Attorneys’ Fees

After securing an order of return, mother petitioned for fees and costs incurred on appeal. Granted.

1. *Cuellar v. Joyce (Cuellar I)*, 596 F.3d 505, 509 (9th Cir. 2010).

2. *Id.* at 510 (citing *Gaudin v. Remis (Gaudin III)*, 415 F.3d 1028, 1035 (9th Cir. 2005)).

3. Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10494-01 (State Dept. Mar. 26, 1986).

4. *Id.* at 10510.

5. *Cuellar I*, 596 F.3d at 511.

Discussion

Father engaged in delaying tactics, causing both parties' fees to increase. The court held that despite mother's representation by pro bono counsel, mother's counsel was entitled to fees:

The fact that Cuellar's lawyers provided their services pro bono does not make a fee award inappropriate. Fee awards serve in part to deter frivolous litigation, and denying fees in this case would encourage abducting parents to engage in improper delaying tactics whenever the petitioning parent is represented by pro bono counsel. *Cf. Morrison v. CIR*, 565 F.3d 658, 664 (9th Cir. 2009). We see no reason to give abducting parents such a perverse incentive.⁶

6. *Cuellar v. Joyce (Cuellar II)*, 603 F.3d 1142, 1143 (9th Cir. 2010).