Commentary: Appellate Court Cases

Hernandez v. Pena, 820 F.3d 782 (5th Cir. 2016)

Other Fifth Circuit Cases

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

Rodriguez v. Yanez,
817 F.3d 466 (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)

Delay Defense | Settlement | Immigration Status

This is a case of first impression in the Fifth Circuit, addressing the meaning of the term *settled* in the context of a delay defense.

Facts

Mother and father are married citizens of Honduras. Their child, D.A.P.G., was born in 2009. The parties separated but did not obtain a divorce or custody order regarding the child. Mother was the child's primary custodian and father maintained regular contact with the child. In May 2014 mother secretly removed the child and illegally entered the United States. Mother and the child were apprehended by U.S. authorities and placed in removal proceedings, but in the meantime, they were released from custody and settled in New Orleans. D.A.P.G. lives with mother, mother's boyfriend, and their four-and-a-half-month-old baby.

Father located his child through the U.S. State Department in May 2015. Father filed a petition for return in August 2015, fourteen months after the child's removal from Honduras. At trial, mother agreed that the child had been wrongfully removed from Honduras, but she relied upon the defense that the child was now settled in his new environment and that the child would suffer a grave risk of harm should he be returned to Honduras. Mother presented testimony that D.A.P.G. was happy and well-adjusted and had formed new friendships at church, school, and at home. Mother failed to appear for her immigration proceedings, however, and her failure to attend potentially triggered an order for removal. The district court found that the child was well-settled and denied father's petition.

Discussion

The Fifth Circuit reversed. Since this was a matter of first impression in the Fifth Circuit, the court looked to the Second and Ninth Circuits' analyses of what factors to consider

when assessing whether a child has become settled.[1] These factors include (1) the child's age, (2) the stability and duration of the child's residence in the new environment, (3) whether the child attends school or day care consistently, (4) whether the child has friends and relatives in the new area, (5) the child's participation in community or extracurricular activities, (6) the respondent's employment and financial stability, and (7) the immigration status of the respondent and the child. The Fifth Circuit noted that although other circuits agree on some aspects of these analyses, there is no consensus on the relevance of immigration status when determining a child's being settled.

The Second Circuit has taken the position that immigration status is not dispositive, but is one of many factors to be taken into account in a fact-specific inquiry that may include (1) the likelihood of deportation or the ability to obtain legal status, (2) the age of the child, and (3) the extent of harm to the child due to the inability to obtain government benefits.[2] On the other hand, the Ninth Circuit has declined to announce a formula for weighing the issue of immigration and has found that immigration status is relevant only if an "immediate threat of deportation" exists.[3] The Fifth Circuit chose to follow the Second Circuit:

> We join the Second and Ninth Circuits in concluding that immigration status is neither dispositive nor subject to categorical rules, but instead is one relevant factor in a multifactor test. This approach recognizes that immigration status alone does not necessarily prevent a child from developing significant connections in a new environment, and is consistent with the text of the treaty, the State Department's guidance, and the purpose of the well-settled defense. Like the other factors, however, immigration status should not be considered in the abstract. In other words, proper application of the framework does not assign automatic treatment to any particular type of immigration status. Instead, we agree with the Second Circuit that an individualized, fact-specific inquiry is necessary in every case.[4]

The Fifth Circuit rejected the district court's consideration of immigration status as an abstract concept rather than looking to the actual facts surrounding the status of the abducting parent. The court undertook a de novo review of the facts relating to the claim of settlement and considered the implications of the actual removal proceedings facing mother. After balancing all of the factors put forth by the Second and Ninth Circuits, the Fifth Circuit was not persuaded that the child had become settled in the new environment, and it vacated the order of the district court, ordering instead that the child be returned to Honduras.

1. Lozano v. Alvarez, 697 F.3d 41 (2d Cir. 2012), aff'd sub nom. Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014); *In re* B. Del C.S.B., 559 F.3d 999, 1008 (9th Cir. 2009).
2. *Lozano*, 697 F.3d at 42–43.
3. *In re* B. Del C.S.B., 559 F.3d at 1012–14.
4. Hernandez v. Pena, 820 F.3d 782, 788–89 (5th Cir. 2016).