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Applying the Elián González Case to Child Abuse Laws

S. Luke Leininger

In the context of infant child abuse law, the similarities between the circumstances of Elián González in Cuba and those of any abused American child require an examination of the decision to send him back to Cuba.

In June of 1970, Laura Marie Hernandez and her husband were charged with aggravated assault upon their small son Bobby. On March 25, 1971, after a year of counseling, Mrs. Hernandez pled guilty to criminal neglect and abuse of her child. On October 5, 1972, the juvenile court reviewed the case and recommended that Bobby undergo a physical examination at a guidance clinic. On November 22, 1972, Protective Services received a report from the boy's kindergarten teacher that he had come to school with facial bruises inflicted by the mother and her husband. Bobby had suffered excessive abuse. Authorities finally removed him from his home and admitted him to a pediatric unit for treatment.

The ensuing custody trial revealed the appalling abuse inflicted upon the child. The record exposed horrible acts of parental neglect and mistreatment including "forcing the minor to hug a tree for long periods of time; making him stand outside in a bucket of water; locking him in a closet; kicking a chair out from underneath him ... kicking him in the stomach; beating him with a shoe, towel, belt buckle," etc. In deciding whether to grant parental rights to Mr. and Mrs. Hernandez, the court consulted a variety of infant child abuse standards. In particular, Corpus Juris Secundum says that "the court may divest parents of their rights to a child found to be deprived, or shown
to be abused, or likely to be abused in view of the abuse of other children in the family.” Basing their decision on this standard, the court terminated the parental rights of the Hernandez couple in light of their consistent and ongoing record of abuse and neglect.

In this case, Hernandez v. State Ex Rel. Arizona Dept. of Econ. Sec., the court established the modern interpretation for the termination of parental rights in the United States. When formulating his decision, the judge referred to A.R.S. §8-533, which sets forth the following five grounds for parental rights termination:

1. That the parent has abandoned the child or that the parent has made no effort to maintain a parental relationship with the child.
2. That the parent has neglected or wilfully abused the child.
3. That the parent is unable to discharge the parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period.
4. That the parent is deprived of his civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child, or if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.
5. That the parents have relinquished their rights to a child to an agency or have consented to the adoption.

The second of these grounds has particular application to the issue of child abuse and parental rights. The Corpus Juris Secundum definition and A.R.S. §8-533 show that the policy of the American legal system is not to send children back to abusive environments. In fact, the primary object of infant child abuse law is to make all attempts to save children from abuse and to further secure their safety. Immigration and Nationalization Services and the Eleventh Circuit Court of Appeals violated this principle when they, in essence, awarded parental rights to a self-proclaimed and abusive father, Fidel Castro, and returned Elián Gonzalez back to his hostile home in Cuba.

On November 21, 1999, Cuban citizen Elizabet Broton made a courageous decision. Taking her six-year-old son Elián Gonzalez with
her, Elizabeth fled the highly abusive environment on the communist island of Cuba. By attempting to escape from Cuba, she did what one-fifth of the population of Cuba has done since Fidel Castro ruthlessly took power in 1959. Seeking freedom from the abusive dictatorship of Fidel Castro, Elizabeth boarded a rickety aluminum boat with her son and nine others and headed for Florida.

Sadly, Elizabeth's treacherous journey came to an end when her aluminum boat developed a leak and she drowned at sea. She gave her life to rescue her child from an abusive home and an abusive country. Elián was rescued from the ocean and brought to the safehold his mother had envisioned, which was the home of her relatives in Miami, Florida.

Citing Cuba's "systematic violation of human rights" the United Nations Human Rights Commission recently condemned the nation for the eighth time. Amnesty International and the U.S. State Department have pronounced similar rebukes upon Cuba. Aware of these conditions, the Eleventh Circuit Court referred to the U.S. State Department's 1999 Country Reports on Human Rights Practices for Cuba. The Court states: "[The Cuban Government] continue[s] systematically to violate fundamental civil and political rights of its citizens." Thousands of Cubans who risk their lives every year traveling across the ocean in fragile boats to escape the oppressive, Castro-dominated society provide only further evidence of the political and physical abuse that continues to occur in Cuba. Cuban children are denied the right to learn about God; they are forced to work under degrading conditions in agricultural labor camps; and they suffer from severe shortages of food, rationing of soap and meat, and a lack of toothpaste and anesthesia.

The absence of basic rights and freedoms in Cuba is in stark contrast to the liberties most people enjoy in the United States; the lack of liberties can be likened to the environment of an abused child. Fidel Castro is as an abusive father to the citizens of Cuba as he deprives them of freedom and many of the common joys of life. In the context of infant child abuse law, the similarities between the circumstances of Elián Gonzalez in Cuba and those of any abused American child require an examination of the decision sending him back to Cuba.

As shown in Hernandez v. State Ex Rel. Arizona Dept. of Econ. Sec., laws protect children from being sent back to abusive parents,
under whose care they will continue to suffer. Tragically, Elián Gonzalez did not receive the same protection. Instead, an INS swat team abducted him, dragged him into the court system, and eventually deported him back to guardians who will deprive him of his freedom and subject him to the abusive conditions.

In upholding the INS decision to reject Elián's application for asylum, the Eleventh Circuit Court of Appeals relies on the INS policy that only a parent can assist a child with asylum applications. Because Elián's father, Juan Miguel Gonzalez, refused permission for Elián to seek asylum, the INS dismissed all three of Elián's requests without consideration. According to United States Code, "any alien . . . may apply for asylum." However, because the Code does not address the procedure for children applying for asylum, the Court grants "executive discretion" to the agency to develop their own policy. Using this discretion, the agency required asylum requests for six-year-olds to be filed by their parents.

Specifically, INS policy determined the following: (1) six-year-old children lack the capacity to sign and to submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist-totalitarian state (such as Cuba), in and of itself, does not constitute a special circumstance requiring the selection of a nonparental representative. While the first three points seem reasonable, the fourth violates the principles behind the child abuse laws set forth in C.J.S. and A.R.S. §8-533. Juan Miguel Gonzalez not only wanted to return his child to a "communist-totalitarian state," but also to an abusive environment where he would then yield his parental rights to Fidel Castro, an acknowledged abuser. Clearly this attitude shows that Mr. Gonzalez is not an adequate representative of his child. Indeed, it appears that the INS has placed a greater value on the issue of a father's rights to representation than it has on a child's right to protection from abuse.

The Eleventh Circuit Court of Appeals and other agencies mistakenly construed the main issue of the case to be about a father's rights. After all, most Americans are strong believers in the sanctity of
the family. In her argument before the Federal Court supporting the return of Elián to Cuba, Deputy Assistant Attorney General Patricia Maher made this point, “That decision, which was ratified by the attorney general [to return Elián to Cuba] gives effect to a long-standing policy of family unification and the internationally accepted doctrine that parents have the right to speak for their children.” This interpretation reflects a noble desire to unite families when possible. In fact, at first glance the United States Legal Custody Requirement seems to concur with the INS and favor this interpretation of letting Elián’s rights rest in the hands of his father, Juan Miguel Gonzalez, who wanted him to return to Cuba. The Requirement says, “The putative father of an illegitimate child has a right to custody of the child superior to everyone but the natural mother.” However, there must be exceptions to these stipulations when the well-being of the child is in danger.

For this reason, the Requirement also says, similar to the “special circumstance” clause in the INS policy, that United States policy is to keep children with their natural parents “unless there is a compelling reason “not to.” The exception is granted, even here, for a parent to be denied custody if there is a “compelling reason.” Certainly there is no more “compelling reason” than a communist country that has repeatedly shown itself to be excessively oppressive and abusive to its citizens.

Many are forgetting that when the INS sent Elián Gonzalez back to Cuba with his father, they might as well have been placing him in the hands of Fidel Castro himself. In Cuba, parental rights do not exist. They were not sending a son to be with his father. Once Elián and his father set foot in Cuba, Mr. Gonzalez’s rights as a parent, which our Justice Department worked so hard to protect, were stripped from him, and Elián’s rights once again belonged to an abusive parent who continues to deny basic human rights to millions of Cubans. Elián’s rights might have been granted to his father by the U.S. Justice Department, but the consequent flight to Cuba speedily returned those rights to Fidel Castro and a government that does not grant rights to biological parents.

Cuba’s Code of the Child says, “Society and the state work for the efficient protection of youth against all influences contrary to their communist formation.” According to this law, if a parent in Cuba
attempted to exercise parental rights in such a way that was beneficial to the child but contrary to the will of the State, they would be overruled. The Code also says, "Society and the state watch to ascertain that all persons who come in contact with the child . . . constitute an example for the development of his communist personality."\textsuperscript{20} Cuba's own laws betray the reality that in Cuba the actions of parents are determined by the will of the government. Commenting on the Code of the Child, Alberto Luzarraga of the Cuban American Research Group says, "The words are long and boring. But their meaning is inhuman. They mean that in Cuba, the real parent is the Marxist State."\textsuperscript{21}

How will Fidel Castro and the Marxist State, Elián's self-declared parents, treat him? In Cuba, Elián is already in the process of being forcefully indoctrinated into a socialist way of thought. He will live with his father until the age eleven. At this age, he will be sent to work in a farm-labor camp for forty-five to sixty days per year. At these camps, many children do not leave without venereal diseases and other serious health problems. He will be enrolled in compulsory military service until the age of twenty-seven. His chances for a college education will depend, not on his capacity for learning, but on whether or not his "political attitude and social conduct" are in line with the communist regime. In school he will be taught not to believe in religion and to hate everything that is contrary to communism, which includes his own mother.\textsuperscript{22} As Cuba's Code of the Child shows, this is the policy of the Cuban State toward children. Juan Miguel Gonzalez has almost no influence or power to save his son from this abuse.

How could we consider Juan Miguel Gonzalez the "putative father" of Elián Gonzalez and put him in control of Elián's rights, knowing that in Cuba "the real parent is the Marxist State"? Certainly, a "special circumstance" should have been granted for Elián's rights to be represented by someone other than an abusive dictator. Mr. Gonzalez was not in the United States as a father; he was here as a vassal of Fidel Castro, representing him in word and deed. Recall that U.S. custody law states that "the court may divest parents of their rights to a child found to be deprived, or shown to be abused, or likely to be abused in view of the abuse of other children in the family."\textsuperscript{23} Considering the undeniable evidence of the abusiveness of Fidel Castro and the Cuban government toward their people, the Eleventh Circuit Court should
have effectively terminated their parental rights to Elián Gonzalez and granted an asylum request.

Alina Fernandez, the exiled daughter of Fidel Castro, supported this view in her interview with Larry King when she said, "But you know, among Americans, you use the word 'custody' and 'parental care' and stuff like that. It doesn't exist in Cuba. And then you're forgetting, too, that the American legal system is not sending back a boy to his father. The American legal system is sending back a boy to a dictator who leads a regime that four years ago sank a tugboat, killing 11 children, in front of the Cuban harbor. That's the point." While it may be noble and right to strive for family unification through parental rights, it becomes wrong and even illegal to return a small child to an abusive home.

Elián Gonzalez's mother gave her life to save her boy from a future of exploitation and slavery. When the United States government condemned the boy to return to this abuse and oppression by his proclaimed parents, Fidel Castro and the communist regime, they might as well have sent every victim of child abuse back to live with their abusers.

Notes

1. Not his real name.


22. Jeff Jacoby, “If Elián Returns to Cuba, Misery Awaits.”
