Commentary: District Court Cases

Pope v. Lunday, No. CIV-19-01122-PRW, 2019 WL 711615 (W.D. Okla. Dec. 23, 2019)

Other District Court Cases

Leon v. Ruiz,
No. MO:19-CV-00293-RCG, 2020 U.S. Dist. LEXIS 43758 (W.D. Tex. Mar. 13, 2020)

Cunningham v. Cunningham,
237 F. Supp. 3d 1246 (M.D. Fla. 2017)

Marquez v. Castillo,
72 F. Supp. 3d 1280 (M.D. Fla. 2014)

Habitual Residence

This case explored the question of whether a parental agreement reached while the children were in utero could establish habitual residence in a place where the children had never been.

Holding

The district court held that the last shared parental intent for habitual residence, which was reached while the children were in utero, is insufficient to establish habitual residence after their birth.

Facts

An American father and mother lived in Brazil when the mother became pregnant with twins. When the mother was nineteen to twenty weeks into her pregnancy, she left Brazil, ended her relationship with the father (to whom she was married), and relocated to Oklahoma, where she then gave birth to the children. At no time were the children ever physically present in Brazil. The mother had no intention of returning to Brazil.

After the birth of the children, the father filed a petition in the U.S. District Court for the Western District of Oklahoma for an order compelling the children to be "returned" to Brazil, arguing that they were wrongfully retained in the United States. The father based his petition on the argument that Brazil was the children's habitual residence because the last shared intent of both parents (while the children were in utero) was that they would live and raise their children in Brazil.

The mother asserted that the children could not be habitual residents of a place in which they had never been physically present, and that even if an agreement regarding residency in Brazil was reached while the children were in utero, such an agreement could not establish the habitual residence of the subsequently born children.

The district court denied the father's request that the children be "returned" to Brazil.

Discussion

The father argued that an infant must have a habitual residence from the moment of birth, and physical presence is not required. He requested an evidentiary hearing to establish

the existence of the parties' alleged agreement that the children would reside in Brazil after their birth.

The district court acknowledged that some courts have held that a habitual residence can be established even though a child has never been physically present in that location.[1] Nevertheless, the court noted the absence of any authority to support the contention that shared parental intent was sufficient to establish a habitual residence for a child not yet born at the time of the agreement.

> [T]he problem with attempting to apply the 'shared parental intent' construct to the facts of this case is that here—even granting [the father's] factual allegations every benefit of the doubt—there was never shared parental intent with respect to the children because the children did not yet exist at the time of the alleged agreement; they were 19 to 20 weeks *in utero*. . . . Thus, even taking [the father's] claim of an *in utero* agreement at face value, such an agreement differs from the agreement relied on in the cases he cites. Those cases involved agreements with regard to actual, existing children, not agreements regarding children that may or may not be born in the future.[2]

The father also argued that the last shared intent was irrevocable unless it was later modified by a subsequent agreement between the parties, and that the mother could not unilaterally withdraw from the original agreement. The court rejected the father's position, noting,

> Taken to its logical end, this position would mean, for example, that an American man and a woman living in France could date and agree that they would raise their future children in France. That man and woman could break up and go their separate ways, with the woman returning to the United States. But if at any time in the future—even a decade later—that man visits the United States and rekindles the romance and that woman becomes pregnant by him, she would be bound to her long-ago agreement to raise any children in France. That can't be right.[3]

1. *E.g.*, Delvoye v. Lee, 224 F. Supp. 2d 843, 851 (D.N.J. 2002), aff'd, 329 F.3d 330 (3d Cir. 2003) ("[I]f a couple lives in the United States and gives birth to a child during a summer visit to a vacation home in the Swiss Alps, the habitual residence of the child is not Switzerland," *but see Delvoye*, 329 F.3d at 333 (conflicts in parental intent at the time of the child's birth may result in the child having no habitual residence)); E.R.S.C. v. Carlwig (*In re* A.L.C.), 607 F. App'x 658, 662 (9th Cir. 2015) ("'if an attachment to a State does not exist, it should hardly be invented'" (quoting Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction 89, 112 (1999)).

2. Pope v. Lunday, No. CIV-19-01122-PRW, 2019 WL 711615, at *5 (W.D. Okla. Dec. 23, 2019).

3. *Id.*