

# Commentary: Appellate Court Cases

## Takeshi Ogawa v. Kyong Kang, 946 F.3d 1176 (10th Cir. 2020)

### Other Tenth Circuit Cases

**Watts v. Watts**,  
935 F.3d 1138 (10th Cir. 2019)

**West v. Dobrev**,  
735 F.3d 921 (10th Cir. 2013)

**Leser v. Berridge**,  
668 F.3d 1202 (10th Cir. 2011)

**Navani v. Shahani**,  
496 F.3d 1121 (10th Cir. 2007)

**de Silva v. Pitts**,  
481 F.3d 1279 (10th Cir. 2007)

**Shealy v. Shealy**,  
295 F.3d 1117 (10th Cir. 2002)

**Ohlander v. Larson**,  
114 F.3d 1531 (10th Cir. 1997)

### Custody Rights<sup>1</sup>

In this case, a Japanese couple entered into a divorce agreement that granted the mother parental authority over their children. Japanese law defined the terms of that agreement as giving the mother the right to determine children’s residence.

### Holding

The Tenth Circuit affirmed the district court’s decision that the parties’ divorce agreement made under Japanese law failed to confer rights of custody to the father that would entitle him to file a petition for return of the children to Japan.

### Facts

A South Korean mother and a Japanese father were married in Japan in 2003. In 2006, their twin girls were born there, and the family lived together until the parents’ divorce in 2013. Japanese law gives married couples the option to implement their own divorce by entering into a binding agreement made between the parties without any involvement from the Japanese judiciary. In this case, the parents opted to enter into such an agreement, which contained arrangements for the custody and support of the children. The agreement provided the following:

- the mother obtained “parental authority over” the children
- the father was to “give due consideration to the welfare of [the twins] when exercising custody”
- the father was to “hand over [the twins] to [the mother] on the last day of March 2017,” but the father continued “to maintain the right of custody of [the twins]” after that date
- the father was to begin paying child support in April 2017, and was to continue until the twins reached twenty years of age
- either party could “visit [the twins] once a year”

Pursuant to the divorce agreement, the children began living with their father in Japan in 2013. At the end of March 2017, the father failed to hand over the daily physical control of

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1. The 1980 Hague Convention provides that custody rights may be established by “an agreement having legal effect” under the law of the child’s habitual residence. Hague Convention on the Civil Aspects of International Child Abduction art. 3, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501.

the children to their mother and failed to provide child support payments.<sup>2</sup> In October 2017, the children traveled to South Korea to celebrate a traditional festival with their maternal grandparents. After they arrived, the mother took the children to the United States without the father's permission. The father filed a petition for return of the children in April 2018. The district court denied the father's petition, finding that he failed to prove that the mother had breached his custody rights. The district court found that the mother had full parental authority and decision-making power under the parties' divorce agreement and that the father had the right to exercise some physical custody at undetermined future dates. The court also found that both twelve-year-old girls objected to being returned to Japan.<sup>3</sup>

## Discussion

**Legal Effect of the Parties' Divorce Agreement.** The children had established habitual residence in Japan at the time of their removal to the United States. Both the mother and father agreed that their divorce agreement governed their custody arrangement and that the father's custody rights were subject to Japanese law. Japanese law provides that "parental authority" includes various rights, including the right to determine a child's residence. Since the mother was the only parent granted "parental authority" over the children, she alone had the right to select the place where the children would live. The father argued that the divorce agreement provided that he would continue to have a "right of custody" of the children even after they were transferred to the mother in March 2017. His argument was based on language from the Supreme Court's *Abbott v. Abbott*<sup>4</sup> decision, in which that father had custody rights despite the other parent's right to sole custody. The Tenth Circuit distinguished this case from *Abbott*, finding that the father's visitation rights in *Abbott* were accompanied by a *ne exeat* clause prohibiting the removal of the children without that father's consent.<sup>5</sup> Here, however, the father had no such right to object to the removal of the children from Japan.

Under Japanese law, the mother's "parental authority" also included other rights, such as the right to determine the children's care, education, and discipline, and to manage their financial affairs and take legal actions on their behalf. The father did not provide any evidence that Japanese law defined his residual custody rights as including any of the parental rights the mother had. Although the father had some residual custody rights, the Tenth Circuit found that those rights were not the parental rights required to support a petition for return under the Hague Convention.

**Determination by the Japanese Central Authority.** The father also argued that the act of the Japanese Central Authority, which forwarded his request for assistance to the U.S. Central Authority, implied that he possessed enforceable custody rights under Japanese law. He argued that Japanese law requires its Central Authority to dismiss applications made under the Hague Convention if the applicant does not have rights of custody. The

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2. See *Takeshi Ogawa v. Kyong Kang*, No. 2:18CV335DAK, 2018 WL 2376338, at \*1 (D. Utah May 24, 2018).

3. Because the Tenth Circuit affirmed the district court's determination that the father did not have enforceable custody rights under the 1980 Hague Convention, it did not address the issue of the children's objections to being returned to Japan. *Takeshi Ogawa v. Kyong Kang*, 946 F.3d 1176, 1177 n. 1 (10th Cir. 2020).

4. 560 U.S. 1, 9 (2010).

5. *Takeshi Ogawa*, 946 F.3d at 1181 (quoting *Abbott*, 560 U.S. at 11).

failure to do so was therefore tantamount to a determination under Japanese law that he possessed enforceable rights of custody. But the Tenth Circuit found that Japanese law only required the Japanese Central Authority to dismiss an application for assistance if “[i]t is obvious that the applicant does not have the rights of custody.”<sup>6</sup> The court dismissed the father’s argument, finding that even the preliminary opinion of an administrative body did not amount to a finding, under Japanese law, that he possessed rights of custody.

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6. *Id.* at 1183.