Commentary: Appellate Court Cases

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

Other Tenth Circuit Cases

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

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)

Habitual Residence | Parental Intent | Acclimatization | Time-Limited Relocations

In this case, three children were temporarily removed to Australia for the purpose of providing medical care to one of the children. The father argued that this triggered a change in their habitual residence.

Holdings

The Tenth Circuit affirmed the district court's ruling on habitual residence, finding that the contemplated length of a temporary relocation is just one of several factors to consider when determining whether the children have acquired a new habitual residence, and the length of time a child remains in a new location is one of many factors to consider when determining whether a child has become acclimatized.

Facts

The mother and father were the married parents of three children. They established their home in North Carolina in 2006 and lived there until 2016. In 2016, the parents learned that their middle child needed specialized medical treatments. The father and children were dual citizens of Australia, and both the mother and father agreed to move to Australia to take advantage of Australia's universal health care system. The parents contemplated that they would live in Australia until the completion of their son's medical treatment—a period of two to two-and-a-half years. In preparation for the move, the family rented out their home in North Carolina and moved into the mother's parents' home in Utah. While in Utah, the family visited various places in the western United States, potential future homes after their time in Australia.

In September 2016, the family moved to Australia. They shipped much of their personal property to Australia but maintained ownership of their home in North Carolina. Other personal items were left in Utah, including sentimental items. The father maintained his company in the United States; most of its operations were in North America. The mother applied for and was granted a twelve-month visa to remain in Australia. The children were enrolled in Australian schools, and the family purchased a new home there. The father continued to travel overseas for work. The mother later applied for a permanent visa.

The marriage began to deteriorate, but despite these difficulties, the mother convened a "family meeting" and everyone agreed that the parents should remain together so that their son could continue to receive the needed medical care. But the parents' relationship ended when the father withdrew funds from the parties' joint bank accounts and deauthorized the mother from using their credit cards. When the mother rejected his attempt to reconcile, he withdrew his sponsorship of her application for a permanent visa. Three days later, the mother took the children and flew to Utah. At the time of the children's removal to the United States, the family had lived in Australia for just over eleven months.

The father filed a petition for the return of the children to Australia, but the district court found that the children's habitual residence was in the United States, and it denied his petition.

Discussion

To determine the question of habitual residence, the district court had considered both shared parental intent and the degree of acclimatization by the children.[1]

Parental Intent. The district court had found that the parents never shared an intent to settle in Australia; they moved there solely for their child's expensive orthodontic treatments. The family maintained ownership of their North Carolina residence, kept their U.S. bank accounts intact, and left their sentimental items in Utah. The father continued to operate his business primarily in North America. The family relocated to Australia for a very specific purpose and for a limited time.

The Tenth Circuit found that the evidence supported the district court's findings that the family had not become settled in Australia and that their intent to remain in Australia for an indeterminate stay did not amount to establishing a new habitual residence. The Tenth Circuit also refused the father's invitation to adopt the Third Circuit's holding in *Whiting v. Krassner*[2] that the duration of an intended stay in a second country may itself determine the question of habitual residence. Instead, the Tenth Circuit noted that the contemplated length of the stay is just one factor to consider when determining whether a new habitual residence has been established.

Acclimatization. In this case, the children were seven, ten, and twelve years old at the time they returned to the United States. The district court found that the children had not acclimatized to Australia to a degree that would trigger a change in their habitual residence. The children also knew that they were living in Australia temporarily and "never considered Australia home."[3] Contrary to the father's assertion that a stay of nearly one year in Australia was sufficient to allow for acclimatization, the Tenth Circuit found that the period of time spent in a new country does not control the acclimatization determination, but is just one of many factors to be considered.

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1. Watts v. Watts, 935 F.3d 1138, 1145–47 (10th Cir. 2019) (relying in part on a 10th Circuit unpublished case, Kanth v. Kanth, 232 F.3d 901 (10th Cir. 2000)).

2. 391 F.3d 540, 548–50 (3d Cir. 2004) (habitual residence established despite plan to relocate for only a two-year period).

3. Watts v. Watts, 935 F.3d 1138, 1143 (10th Cir. 2019).