Commentary: Appellate Court Cases

Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006)

Other Third Circuit Cases

Karpenko v. Leendertz,
619 F.3d 259 (3d Cir. 2010)

Tsai-Yi Yang v. Fu-Chiang Tsui (*Yang II*),
499 F.3d 259 (3d Cir. 2007)

In re Application of Adan,
437 F.3d 381 (3d Cir. 2006)

Baxter v. Baxter,
423 F.3d 363 (3d Cir. 2005)

Yang v. Tsui (*Yang I*),
416 F.3d 199 (2005)

Whiting v. Krassner,
391 F.3d 540 (3d Cir. 2004)

Delvoye v. Lee,
329 F.3d 330 (3d Cir. 2003)

Feder v. Evans-Feder,
63 F.3d 217 (1995)

Habitual Residence

Karkkainen addresses the circuit split over the test for acquiring a new habitual residence. Quoting liberally from other circuit cases that addressed a number of disparate issues, the Third Circuit invoked considerations of shared parental intent, acclimatization of the child, degree of settled purpose, and the child's age and maturity and held that the eleven-year-old child involved in the case acquired a new habitual residence over the period of two months.

Facts

The child in question was born in 1992 and habitually resided with her mother in Finland. Her mother and father divorced and each remarried. Father moved to the United States with his new spouse. After some initial problems obtaining a visa for the child to visit her father in the United States, the child was granted a visa as a permanent resident. Both parents agreed to this change in the child's immigration as necessary to allow the child to visit her father in the United States. The child visited her father in October and December 2002, and over Easter break in April 2003.

The child's parents agreed that the child could come to the United States in early June 2003, and it was anticipated that the child would remain indefinitely thereafter. Mother participated in sending school records to a private school in the United States so that the child could enter in the fall of 2003. The child was under the firm impression that she had been given the right to decide where she was going to live.

When the child did not return to Finland by August 10, 2003, mother filed a petition for return of the child to Finland. The district court denied the petition, finding that the child had become acclimatized to her new environment, that the United States had become her habitual residence, and that the parents had given the child the discretion to choose where she was going to live.

Habitual Residence. The court observed that issues relating to the acquisition of a habitual residence are "fact-intensive," especially where a child goes to another country

for an indefinite period of time. Quoting from their earlier opinion in *Feder v. Evans-Feder*,[1] the court defined habitual residence as

> the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective.[2]

The court went on to comment that this test focused upon the child's experiences and contacts that occurred before the date of wrongful retention. These considerations led to an analysis of whether the degree of the contacts and experiences resulted in the child becoming acclimatized or "rooted" in the new country. If so, the new country becomes the child's habitual residence.

The court observed that "shared parental intent remains relevant to habitual residence in *all* cases under the Hague Convention,"[3] and proceeded to analyze the issue of parental intent from two perspectives: (1) whether the child's attitude toward acclimatization would be influenced by knowledge of the parental intent; and (2) what was the parents' shared intent regarding the child's presence in the new country. The court gave weight to both the "child-centered" focus of the Sixth and Eighth Circuit's opinions in *Friedrich v. Friedrich*[4] and *Silverman v. Silverman*,[5] and the Ninth Circuit's focus on parental intent and whether it could be outweighed by acclimatization.[6] The court departed from the Sixth Circuit's primary focus on acclimatization and settled purpose from the child's perspective[7] and stated,

> When the parents share an intent as to the child's habitual residence, it must be given some weight. Were a court to exclude shared parental intent entirely from the habitual residence inquiry, and instead focus solely on a child's contacts and experiences, it would fail to consider whether a parent is acting unilaterally to alter what was jointly intended or agreed upon. Factoring shared parental intent into habitual residence therefore serves one of the primary goals of the Hague Convention.[8]

Factors. The court acknowledged that this was a close case, especially given that the child had only visited the United States a couple of times in the year before she came in the summer of 2003, and her stay at that time amounted to slightly over two months. Nevertheless, it appeared to the court that the child was extraordinarily mature for her age, uniquely talented, and highly intelligent. She spoke Finnish, English, and Russian, had registered for summer school in the school she intended to attend in the fall, took photography classes there, and traveled with her father and step-mother. Her parents agreed when she left Finland that the child had the maturity and psychological assets to decide where she was going to live. Accordingly, the Third Circuit upheld the district

1. 63 F.3d 217, 222 (3d Cir. 1995).
2. *Id.* at 291–92.
3. *Karkkainen*, 445 F.3d at 296.
4. Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).
5. Silverman v. Silverman, 338 F.3d 886, 898 (8th Cir. 2003).
6. Citing to Holder v. Holder, 392 F.3d 1009, 1019 (9th Cir. 2004) and Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).
7. *See* Robert v. Tesson, 5078 F.3d 981, 989 (6th Cir. 2007).
8. *Id.* at 296.

court's determination that the child had become acclimatized to her life in the United States and demonstrated a degree of settled purpose to remain.

Underscoring the unique nature of this case, the Third Circuit distinguished its holding in *Karkkainen* from its analysis in *Yang v. Tsui*[9] involving a younger, less mature child:

> [Father] attempts to analogize this case to *Karkkainen*. Such an analogy is improper because the facts of the two cases are too dissimilar, and as we have said these types of cases are extremely fact-intensive. Our main focus in *Karkkainen* was on the perspective of the eleven-year-old child who we determined had become acclimatized in the United States. [*Karkkainen*,]445 F.3d at 293–97. There is no such evidence in this case. Additionally, the shared intent in that case was that the child could determine, after spending the summer in the United States, whether or not to remain permanently in the United States. *Id.* at 297. Such a mutual intent is nothing like an agreement that a child reside in Pittsburgh for a couple of months until her mother recovered from surgery. Therefore, although the cases share some similar facts, such as the mother assisting with the child being enrolled in school and the packing of items beyond those needed for a short stay, *Karkkainen* does not control the outcome of this case.[10]

9. Yang v. Tsui (*Yang II*), 499 F.3d 259 (3d Cir. 2007).
10. *Id.* at 274 (footnotes omitted).