Commentary: Appellate Court Cases

Didon v. Castillo, 838 F.3d 313 (3d Cir. 2016)

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)

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

***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 | Concurrent Habitual Residences | Stays

This case addresses (1) whether a child may have two concurrent habitual residences, (2) what factors are involved in determining habitual residence when children spend substantial time in two adjacent countries, and (3) whether lower courts should stay orders of return pending appeal.

Facts

Mother and father had a son, A.D., together. Mother had a daughter, J.D., from a previous relationship.[1] The family lived in Saint Martin. Only thirty-four square miles, this island comprises two separate countries, the Dutch Sint Maarten and the French Saint Martin. The French side is a signatory to the 1980 Convention; the Dutch side is not.[2] The family's residence was in the Dutch side. Most other aspects of the family's lives took place in French side: the children's school, the family's doctors, father's employment, and the administrative affairs of the family, such as insurance.

In August 2014, mother took the children to the United States under the pretense of attending a wedding. She refused to return, however, and eventually moved with the children to Pennsylvania. Father contemporaneously filed a custody action in the French civil court, requesting custody of both children.

In August 2015, father filed a petition in the Middle District of Pennsylvania seeking the return of the children. The district court found that father had no custody rights over mother's child from a previous relationship and so denied father's petition for return of that child. However, the district court granted father's petition for the return of A.D. (the biological child of both parents), finding that the child had two concurrent habitual residences, French Saint Martin and Dutch Sint Maarten. The district court noted that

1. The parties obtained an order from French Saint Martin changing J.D.'s birth certificate to designate the petitioner as the child's father. This order did not amount to a formal adoption.

2. *See* U.S. Department of State, International Parental Child Abduction website, https://travel.state.gov/content/childabduction/en/country/SintMaarten.html.

> "[t]he parties' testimony reveals that the border [between Dutch Sint Maarten and French Saint Martin] is so permeable as to be evanescent, and is regularly and readily traversed by residents and travelers alike. . . . [F]or most purposes of its residents' daily life, the island is essentially undivided." . . . "[T]he record facts, in addition to the nature of the island itself, support a finding that J.D. and A.D. were habitual residents of *both* [Dutch] Sint Maarten and [French] Saint Martin."[3]

Upon denial of mother's petition for an emergency stay, custody of A.D. was transferred from mother to father, and the child returned with father to Saint Martin.

The Third Circuit reversed.

Discussion

Habitual Residence: The Hague Convention Precludes the Concept of Concurrent Habitual Residences. The Third Circuit concluded that "the text of the Hague Convention unambiguously contemplates that a child may have only one habitual residence country at a time."[4] This conclusion was supported by the actual text of the Convention's repeated references to "the State" of a child's habitual residence. Elisa Pérez-Vera's Explanatory Report further supported this interpretation, referring to "one" state.[5] Most U.S. and sister-state cases that have discussed the issue of multiple habitual residences have concluded that a child may have only one habitual residence.

Habitual Residence: Clarification of the Term "Concurrent." The Third Circuit acknowledged that the Ninth Circuit discussed the concept of multiple habitual residences in two prior cases—*Mozes v. Mozes*[6] and *Reyes Valenzuela v. Michel*.[7] In *Mozes*, the Ninth Circuit expressed dicta that a person may only have a single habitual residence, but that "[t]he exception would be the rare situation where someone consistently splits time more or less evenly between two locations, so as to retain alternating habitual residences in each,"[8] referencing Beaumont & McEleavy's treatise that advocated for the possibility of concurrent habitual residences.[9] In *Reyes Valenzuela*, the Ninth Circuit interpreted the above *Mozes* quote to apply to alternating habitual residences.[10]

The Third Circuit declined to extend the *Mozes* concept of "alternating" habitual residences to the existence of "concurrent" habitual residences, noting that "to the extent that *Mozes* can be read to support concurrent habitual residence, we reject that interpretation of the Hague Convention as inconsistent with the Convention's unambiguous text."[11]

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3. Didon v. Castillo, 838 F.3d 313, 319 (3rd Cir. 2016) (citations omitted).
4. *Id.* at 321.
5. *Id.* at 322 (quoting Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426, 434–35 ¶ 34 (1982)).
6. 239 F.3d 1067 (9th Cir. 2001).
7. 736 F.3d 1173 (9th Cir. 2013).
8. 239 F.3d at 1075 n.17.
9. Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction 110 (1999).
10. 736 F.3d at 1177–79.
11. Didon v. Castillo, 838 F.3d 313, 323 (3rd Cir. 2016).

The court was careful to delineate the meanings of words and phrases meant to signify different scenarios that might arise when children spend substantial time in two different countries, noting that

> [t]he authorities on this issue are inconsistent in their usage of terminology. The phrases "concurrent habitual residence," "alternating habitual residence," and "dual habitual residence" are sometimes used interchangeably. However, "concurrent habitual residence" refers to a situation where a child is habitually resident in two countries *at the same time*, whereas "alternating habitual residence" refers to a distinct situation where a child is moved in between two countries on a regular basis (known as "shuttle custody") such that her habitual residence alternates between those countries. "Dual habitual residence" can be used to refer to either or both situations. For the sake of clarity, we will refer to the phrases "concurrent habitual residence" and "alternating habitual residence" in the manner just described and will not use the term "dual habitual residence."[12]

Habitual Residence: Factors. The Third Circuit referred to the *Black's Law Dictionary* definition of *habitual residence* as a person's "customary place of residence" and further defined the term *residence* as "the place where one actually lives" or "where one has a home."[13] The court reasoned that the question of where a child has "lived" should precede the analysis of habitual residence based upon parental intent and acclimatization. In this case, the children "lived" in Dutch Sint Maarten because that was the place where the children's home was situated. Since the Hague Convention is not in force between that nation and the United States, the Third Circuit vacated the district court's judgment and denied father's petition for return.

Stays Pending Appeal. The circuit court also instructed the district court to order the return of A.D. to the United States. On the subject of stays pending appeal, the court also advised as follows:

> The result of our decision today is that A.D. must be transferred back to the United States from Saint Martin. After that transfer, A.D. will have been relocated between Saint Martin and the United States three times in two years. We are naturally concerned that these multiple relocations of the child have been or will be detrimental to his well-being. Accordingly, we reiterate here that a district court issuing a return order in a Hague Convention matter should seriously consider the possibility of staying that order pending appeal. While we do not endorse "[r]outine stays" in such matters, a district court should carefully consider the traditional stay factors when "considering whether to stay a return order":
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> > (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[14]

12. *Id.* at 316 n.6.

13. *Id.* at 324.

14. *Id.* at 319 n.12 (citations omitted) (quoting Chafin v. Chafin, 133 S. Ct. 1017, 1026–27 (2013) (internal quotation marks omitted) (quoting Nken v. Holder, 556 U.S. 418, 434 (2009))).