Commentary: Appellate Court Cases

Taglieri v. Monasky, 876 F.3d 868 (6th Cir. 2017)

Other Sixth Circuit Cases

Ahmed v. Ahmed,
867 F.3d 682 (6th Cir. 2017)

Pliego v. Hayes,
843 F.3d 226 (6th Cir. 2016)

Jenkins v. Jenkins,
569 F.3d 549 (6th Cir. 2009)

Simcox v. Simcox,
511 F.3d 594 (6th Cir. 2007)

Robert v. Tesson,
507 F.3d 981 (6th Cir. 2007)

Taveras v. Taveraz,
477 F.3d 767 (6th Cir. 2007)

March v. Levine,
249 F.3d 462 (6th Cir. 2001)

Sinclair v. Sinclair,
121 F.3d 709 (6th Cir. 1997)

Friedrich v. Friedrich (*Friedrich II*),
78 F.3d 1060 (6th Cir. 1996)

***In re* Prevot**,
59 F.3d 556 (6th Cir. 1995)

Friedrich v. Friedrich (*Friedrich I*),
983 F.2d 1396 (6th Cir. 1993)

Habitual Residence | Infants | Custody Rights | Grave Risk and Domestic Violence

This case dealt with the question of what standard to apply when determining the habitual residence of an infant who has lived in only one location prior to wrongful removal.

Editor's Note: Judge Boggs authored the majority opinion in this case. Judge Boggs also authored *Friedrich v. Friedrich* (*Friedrich I*)[1] in 1993, the first federal appellate case involving the 1980 Hague Convention, and he authored the subsequent iteration of that case, *Friedrich II*,[2] in 1996. *Friedrich II* is the most-cited case involving the 1980 Hague Convention.

Facts

In 2011, father, an Italian citizen studying at the University of Illinois, met and married mother, also a student at the university. In 2013, the couple decided to move to Italy for their careers. Father was licensed to practice medicine in Italy, and mother received two fellowships for further study in Italy. Father moved first in February 2013, and mother followed. Before her move, mother sent an email to father indicating, "[I]don't think that [the fact that we are moving to Milan or Rome] means we are done with the U.S. [for good]."

Mother became pregnant in May 2014. Father became sexually and physically abusive. The parties' relationship deteriorated—they discussed divorce, and mother applied for U.S. jobs but also made plans to have the child in Italy. After one of mother's pregnancy check-ups in mid-February, she started having contractions. She took a taxi to the hospital while father remained at the apartment. Their versions of why father did not immediately join mother conflicted. Father later came to the hospital for the birth. The child was delivered by emergency caesarean section. After the birth, father returned to

1. 983 F.2d 1396 (6th Cir. 1993).
2. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1063 (6th Cir. 1996).

the apartment, and mother went to a residence in Basiglio, a suburb of Milan. The parties briefly reconciled but separated shortly thereafter due to arguments and alleged threats of physical harm by father.

On April 15, 2015, mother left with her six-week-old child for the United States. Various factors influenced mother's move back to the United States: her inability to obtain recognition of her academic credentials in Italy, her lack of Italian language skills, and her complicated pregnancy. Father commenced an action under the Hague Convention for the return of the child on May 14, 2015. In March 2016, the district court held a four-day trial. The district court granted father's application for return in October 2016. Stays requested by mother were denied, and the child was returned to Italy.

Discussion

Habitual Residence. The Sixth Circuit began with a summary of its previous holdings in *Friedrich I*,[3] *Simcox v. Simcox*,[4] *Robert v. Tesson*,[5] and *Ahmed v. Ahmed*[6] as they related to the question of determining habitual residence:

> This brief survey reveals that we use three distinct standards to determine a child's habitual residence under the Convention. In cases where the child has resided exclusively in a single country, that country is the child's habitual residence. But when the child has alternated residences between two or more nations, our analysis is more complicated. In such cases, we begin by applying the acclimatization standard. *See* [Ahmed v. Ahmed, 867 F.3d 682] 690. If that test supports the conclusion that a particular country is the child's habitual residence, then that is the end of the analysis. But if the case cannot be resolved through application of the acclimatization standard, such as those cases that involve "especially young children who lack the cognizance to acclimate to any residence," we then consider the shared parental intent of the child's parents. *Ibid.* ("The conclusion that the acclimatization standard is unworkable with children this young then requires consideration of any shared parental intent.")[7]

In this case, the child lived in only one place—Italy—before she was removed by mother to the United States. There was no shuttling back and forth between countries, and there was no opportunity for the child to become acclimatized, as might be the case with an older child. If a child has lived in only one place, then that place "may be considered its residence."[8]

Continuing the argument set forth by the dissent, the court found that "*Ahmed* did not modify or displace the alternative standard and guidance that *Friedrich I* and *Simcox* provided for children with exclusively one country of residence. *Robert* and *Ahmed* dealt with one situation, while *Friedrich I* and (in part) *Simcox* dealt with another."[9] The decision in *Robert* regarding acclimatization applied only when a child has alternated between residences in two or more nations. The decision in *Ahmed* adopting a stand-

3. 983 F.2d at 1396.
4. 511 F.3d 594 (6th Cir. 2007).
5. 507 F.3d 981 (6th Cir. 2007).
6. 867 F.3d 682 (6th Cir. 2017).
7. Taglieri v. Monasky, 876 F.3d 868, 876 (6th Cir. 2017).
8. *Id.* at 877.
9. *Id.* at 876.

ard of shared parental intent makes that intent relevant only when the acclimatization standard is applied, but it fails to provide guidance to the court, especially in cases involving small children. The court concluded that

> [w]here a child has remained in one place for its entire life, that place is the expected location where it may be found and may be considered its residence. Thus, A.M.T.'s habitual residence was the country from which she was taken, Italy.[10]

The court recognized that difficulties could arise with individual cases, citing *Delvoye v. Lee*,[11] where the mother was convinced to remain in the father's country for financial reasons. Such cases are rare and reflect the "flexible and fact-intensive nature"[12] of the question of habitual residence.

Exercise of Custody Rights. The court concluded that father exercised his custody rights under Italian law, both by statute and an order from an Italian juvenile court. Father proved that he had such rights and was exercising them at the time of the child's removal. The court pointed to its oft-cited statement in *Friedrich II* that "if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to 'exercise' those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child."[13] There were no such facts in this case. Father established his rights of custody.

Grave Risk of Harm. The court referred to its analysis in *Simcox* that discussed the spectrum of conduct that falls under the definition of domestic violence, reiterating that the definition of grave risk as a result of domestic violence is to be interpreted narrowly, "lest it swallow the rule."[14] The court in that case cautioned, however, that "there is a danger of making the threshold so insurmountable that district courts will be unable to exercise any discretion in all but the most egregious cases of abuse."[15] In this case, the Sixth Circuit found the mother's accounts of abuse to be credible, but noted that the district court found that evidence lacking clarity on the frequency and severity of the violence. There was also no evidence indicating that the violence had been directed toward the child. The court acknowledged that a child could be in grave risk of psychological harm or placed in an intolerable situation due to the abuse of the parent alone, but in this case the evidence failed to amount to a grave risk of harm or show that the child was in an intolerable situation.

Dissent. The dissent analyzed the progression of the Sixth Circuit's holdings on habitual residence from *Friedrich I* (facts not presumptions, focus on child's past experiences not parent's, one habitual residence, look to geography and time), *Robert*, and *Simcox,* (acclimatization and degree of settled purpose). In *Simcox*, the court acknowledged that "the acclimatization standard may not be appropriate in cases involving infants or

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10. *Id.* at 877 (footnote omitted).
11. 329 F.3d 330 (3rd Cir. 2003).
12. *Taglieri*, 876 F.3d at 877 (citing Robert v. Tesson, 507 F.3d 981, 989 (6th Cir. 2007). At note 2 of the *Taglieri* opinion, the court left the door open to future interpretations: "Other cases with potential problems might include unexpected births in a foreign country, children born to itinerant parents, or physical coercion. We express no opinion on what the appropriate standard should be for such cases."
13. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1063 (6th Cir. 1996).
14. *Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007).
15. *Id.* at 608.

other very young children."[16] In *Ahmed*,[17] the court addressed the issue of habitual residence for infants and children not old enough to develop a "sense of settled purpose." The *Ahmed* court focused on the presence or absence of the parents' shared intent in a situation where the children were too young to have acquired a "degree of settled purpose." In such cases, courts must shift focus to the issue of shared parental intent. In *Ahmed*, the court found that father had not proved that there was a shared intent for the children to remain in England when mother removed them to the United States. The dissent reasoned that *Ahmed*'s facts and analysis mirrored the *Taglieri* case.

Because the child in this case was similarly unable to acquire a degree of settled purpose or become acclimatized, the court should look to the issue of parental intent. If there is no shared parental intent, the dissent concluded that no habitual residence is acquired, citing *Delvoye v. Lee*.[18] The dissent proposed that the rules regarding infants should follow existing precedent.

> Our acclimatization standard is sufficient to determine the habitual residence of most children, and when it is not, we must then use the settled-parental-intent standard. Where the child is too young to have acclimatized to her community and surroundings, and where the parents do not have a settled mutual intent, I would conclude that the child cannot have a habitual residence.[19]

Since the *Ahmed* case had not been decided when the district court decided this case, the dissent recommended a remand to the district court to consider the issue of parental intent within the context of *Ahmed*.

16. *Id.* at 602, n.2.
17. *Ahmed v. Ahmed*, 867 F.3d 682 (6th Cir. 2017).
18. 329 F.3d 330 (3rd Cir. 2003).
19. Taglieri v. Monasky, 876 F.3d 868, 884 (6th Cir. 2017).