Commentary: Appellate Court Cases

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

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)

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

Habitual Residence | Rights of Custody | Grave Risk | Consent and Acquiescence

Friedrich I was the first Federal Circuit case to deal with the 1980 Hague Convention. At the time of its publication, the Hague Convention had only been in force in the United States for three-and-one-half years. No other federal appellate cases had yet been decided.

Friedrich I

Habitual Residence. The case dealt primarily with the concept of habitual residence and the defense of consent. The court enunciated what would later become the seminal language for the Sixth Circuit's test for habitual residence: "To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions."[1]

The Sixth Circuit later modified the *Friedrich I* test in *Robert v. Tesson*[2] by adopting part of the Third Circuit's approach in *Feder v. Evans-Feder*[3] that

> a child's habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization, and where this presence has a "degree of settled purpose from the child's perspective." *Feder,* 63 F.3d at 224. Such a holding is not only consistent with the collective wisdom of many of our sister Circuits, but it is also consistent with *Friedrich I*'s holding that a habitual residence inquiry must "focus on the child, not the parents, and examine past experience, not future intentions."[4]

This approach to determining habitual residence set up the split with other circuits that focus on parental intent in deciding habitual residence—primarily those circuits that follow the Ninth Circuit's decision in *Mozes v. Mozes*.[5]

1. Friedrich v. Friedrich (*Friedrich I*), 983 F.2d 1396, 1401 (6th Cir. 1993).
2. 507 F.3d 981 (6th Cir. 2007).
3. 63 F.3d 217, 224 (3d Cir. 1995).
4. *Robert*, 507 F.3d at 993.
5. 239 F.3d 1067 (9th Cir. 2001).

Friedrich I reversed the district court's finding that the United States was the child's habitual residence and the matter was remanded to consider the issue of custody rights and for consideration of any defenses.

Friedrich II

After the decision on remand, the case was again appealed. The subsequent case, *Friedrich II*, dealt with a broader range of issues and became one of the seminal cases for determining issues relating to the exercise of custody rights, grave risk of harm, consent, and acquiescence.

Exercise of Custody Rights. In *Friedrich II*, the court recognized that up until one week before mother removed the child from the family home in Germany, the family was intact, and that under German law, father had de jure rights of custody. The court defined the test for exercise of custody rights under Article 3(b) as follows:

> 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.[6]

Article 13(b) Grave Risk. The court summarily refused to sustain mother's arguments that the child would suffer psychological problems if ordered to return to Germany as a result of being uprooted from his new home in the United States and separated from his mother. In dicta, the court reasoned in language that has been oft-quoted:

> [W]e believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute—*e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.[7]

Acquiescence. Mother conceded that father had acquiesced in the removal of the child, based upon statements made to a third party at a cocktail party that he lacked the means to take care of the child and was not seeking custody. The court ruled,

> [W]e believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.[8]

6. Friedrich v. Friedrich (*Friedrich II*), 78 F.3d 1060, 1066 (6th Cir. 1996).
7. *Id*. at 1069.
8. *Id*. at 1070 (footnotes omitted).