

# Commentary: Appellate Court Cases

**Bader v. Kramer (*Bader I*), 445 F.3d 346 (4th Cir. 2006)**

**Bader v. Kramer (*Bader II*), 484 F.3d 666 (4th Cir. 2007)**

## Other Fourth Circuit Cases

**Padilla v. Troxell,**  
850 F.3d 168 (4th Cir. 2017)

**Alcala v. Hernandez,**  
826 F.3d 161 (4th Cir. 2016)

**Smedley v. Smedley,**  
772 F.3d 184 (4th Cir. 2014)

**Reyes v. Jeffcoat,**  
548 Fed. Appx. 887 (4th Cir. 2013)

**White v. White,**  
718 F.3d 300 (4th Cir. 2013)

**Maxwell v. Maxwell,**  
588 F.3d 245 (4th Cir. 2009)

**Cantor v. Cohen,**  
442 F.3d 196 (4th Cir. 2006)

**Humphrey v. Humphrey,**  
434 F.3d 243 (4th Cir. 2006)

**Miller v. Miller,**  
240 F.3d 392 (4th Cir. 2001)

## Rights of Custody

The *Bader* cases deal with the establishment of rights of custody, and proof of the exercise of those custody rights in the petitioner's case-in-chief. *Bader I* dealt with establishment of custody rights by operation of law (in this case German law). *Bader II* dealt with the degree of proof necessary to establish that custody rights were being exercised at the time of the child's removal.

### *Bader I*

In *Bader I*, the Fourth Circuit reversed the finding of the district court that father did not have enforceable custody rights. The family, consisting of father, mother, and child, had lived in Germany throughout their marriage, the birth of the child, and subsequent divorce proceedings. Although the parties were divorced, and the German court adopted a visitation schedule for father, the court made no decision about mother and father's custody rights. As a consequence, pursuant to German law, both mother and father retained parental responsibility for the child. The

Fourth Circuit remanded the case to the district court to determine whether father was actually exercising his custody rights at the time of the child's removal and whether any other defenses applied to the case.

### *Bader II*

*Bader II* principally dealt with the concept of whether a parent is actually exercising his or her custody rights at the time of the wrongful removal or retention. This issue was raised in connection with the Convention's requirement that proof of the "exercise" of custody rights must be shown as part of a petitioner's case-in-chief. Following the language of *Friedrich II*,<sup>1</sup> the Circuit adopted the "nearly universal" standard:

[W]e will "liberally find 'exercise' whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child.

1. *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1065 (6th Cir. 1996).

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Under this approach, “a person [who] has valid custody rights to a child under the law of the country of the child’s habitual residence . . . cannot fail to ‘exercise’ those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child.”<sup>2</sup>

The facts of *Bader* showed that the exercise of custody rights was irregular. The child was born in 1999, and after the parents separated in August 2000, the child lived exclusively with her mother. Three months after the parties’ separation, father was arrested and incarcerated for a little over two years. During the first six months of his incarceration, mother took child to visit with father. Shortly after father’s release from prison in December 2003, he took the child for a three-day visit, and later the same month for an eight-day ski vacation. Father also had the child for an overnight visit in April. Father paid child support when he was ordered to do so. Within days of the last visit, mother absconded with the child to the United States. From the foregoing, the circuit court found that father had not “clearly and unequivocally” abandoned the child, and thus, was exercising his custodial rights at the time of the child’s wrongful removal.

Note that the issue of exercise of custodial rights may arise in two different contexts under the Convention: (1) As in this case, a petitioner must show that custody rights were being exercised as part of his or her case-in-chief, and (2) petitioner’s lack of custody rights may be raised as a defense to an action for the return of the child under Article 13(a).<sup>3</sup> The Fourth Circuit found that even though the district court did not specifically rule on mother’s 13(a) defense, its findings that father had demonstrated “exercise” as part of his case-in-chief were sufficient to defeat mother’s contention that father failed to show that he was actually exercising his custodial rights at the time of the removal of the child.

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2. *Bader v. Kramer (Bader II)*, 484 F.3d 666, (4th Cir. 2007) (quoting *Friedrich II*, 78 F.3d at 1065–66).

3. International Child Abduction Convention art. 13, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 98 (“Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution, or other body that opposes its return establishes that—a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention.”).