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You Must Go Home Again: Friedrich v. Friedrich, the Hague Convention and the International Child Abduction Remedies Act

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Cover Page Footnote

International Law; Commercial Law; Law

You Must Go Home Again: *Friedrich v. Friedrich*, The Hague Convention and The International Child Abduction Remedies Act

I. Introduction

The increasing globalization of society, due to technological innovation and political cooperation, has effected profoundly the nature of international divorce and child custody and has highlighted the necessity of a multi-national solution to the legal, practical and emotional problems associated with international custody disputes. Jurisdictional differences and national sovereignty issues have inhibited the development of such solutions, however, and in fact have encouraged "child-snatching." In many instances, an abducting parent is able to take the child to another nation, re-open litigation, and be awarded custody in the new jurisdiction.¹

The Hague Convention on the Civil Aspects of International Child Abduction (Convention) is an international effort to reconcile the competing policies of national jurisdictional discretion and the deterrence of parental abduction.² The Convention has two stated objectives: "to secure the prompt return of children wrongfully removed or retained in any Contracting state; and to ensure that the rights of custody and access under the laws of one Contracting state are effectively respected in the other Contracting states."³ The overriding goal of the Convention is the prompt return of the abducted child to the country of his or her "habitual residence."⁴ An international analysis of "the merits of any custody issue" specifically is

¹ Child snatching is defined as the abduction of a child, prior to a custody decree, by a parent seeking to prevent the other parent from obtaining custody; or after a custody decree by either parent in violation of the decree. Most cases involve a non-custodial parent kidnapping or retaining a child in violation of the custodial parent's rights. SANFORD N. KATZ, *CHILD SNATCHING* 14 (1981) [hereinafter KATZ, *CHILD SNATCHING*]; see also Dana R. Rivers, *The Hague International Child Abduction Convention and The International Child Abduction Remedies Act: Closing the Doors to the Parent Abductor*, 2 *TRANSNAT'L LAW* 589 (1989) [hereinafter Rivers, *Child Abduction*]. Custody proceedings are not considered final judgments, and as a result, they are potentially modifiable by a court which can establish jurisdiction. KATZ, *CHILD SNATCHING*, *supra* at 61-71.

² Bridgette M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 *FAM. L. Q.* 99, 102 (1980).

³ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 1, 51 Fed. Reg. 10,498 (1986) [hereinafter Convention].

⁴ *Id.* at pmb1.

precluded.⁵

The United States adopted the Convention in 1988 in the International Child Abduction Remedies Act (ICARA).⁶ Since that time, several state courts have ordered the return of children abducted to the United States.⁷ Yet, few appellate courts have considered ICARA cases. In *Friedrich v. Friedrich*,⁸ however, the Sixth Circuit reversed the district court in an ICARA matter and remanded the case for consideration under appropriate German law. In doing so, the circuit court strictly adhered to the essence of the Convention and its emphasis that the merits of the custody struggle be analyzed "under the laws of the country of habitual residence."⁹ This Note will examine the reasoning behind the court's decision in *Friedrich*, the potential effects of the holding, and its relation to the ancillary policies of the Convention and ICARA. This Note concludes that the court's resolution of the case is vitally important to the continuing success and reciprocity of the Convention, and ultimately reinforces this nation's commitment to deterring future abductions.

II. Statement of the Case

Emanuel and Jeana Friedrich were married in December 1989, in the Federal Republic of Germany.¹⁰ Mrs. Friedrich, a U.S. citizen and member of the U.S. Army, was stationed in Bad Aibling, Germany. Her husband, the petitioner in this case, is a German citizen.¹¹ The couple had one child, Thomas, who was born in Germany shortly after the marriage. After his birth, Thomas resided off-base with both of his parents. The Friedrichs separated twice during their marriage—briefly in June 1990, and again in March 1991, during which time Mr. Friedrich retained physical custody of Thomas.¹² The couple was reunited from mid-May until July 27th, when Mr. Friedrich ordered his wife to leave their apartment and to take their son. Mrs. Friedrich returned to the Army base, where she and Thomas remained for four days.¹³ During that period, the couple met at least twice to discuss their separation and their son's well-being.¹⁴

⁵ *Id.* art. 19.

⁶ 42 U.S.C. §§ 11601-11610 (1988).

⁷ See, e.g., *Navarro v. Bullock*, 15 Fam. L. Rep. (BNA) 1576 (1989) (ordering children's return to Spain after mother retained them after visitation); *Becker v. Becker*, 15 Fam. L. Rep. (BNA) 1605 (1989) (ordering children's return to Australia when father retained them after visitation); *Sheikh v. Cahill*, 546 N.Y.S.2d 517 (1989) (ordering return to United Kingdom when father retained child in violation of British custody order).

⁸ 983 F.2d 1396, 1403 (6th Cir. 1993) (Lambros, C.J., dissenting).

⁹ *Id.* at 1402.

¹⁰ *Id.* at 1398.

¹¹ *Id.*

¹² *Id.* at 1399.

¹³ *Friedrich v. Friedrich*, 983 F.2d 1396, 1399 (6th Cir. 1993).

¹⁴ *Id.*

On August 1st, without the consent, knowledge or permission of her husband, Mrs. Friedrich took her son and left Germany to go to the United States.¹⁵ Upon discovering that his son had been removed to the United States, Mr. Friedrich filed a claim in Germany for custody of Thomas.¹⁶ Meanwhile, Mrs. Friedrich arrived in Ohio, and on August 9th, she instituted divorce proceedings within that state. On August 22nd, a German court awarded custody of Thomas to Mr. Friedrich. On August 28th, an Ohio court granted custody to Mrs. Friedrich. Both parties claimed they did not receive notice of each other's proceeding.¹⁷ Following these decisions, Mr. Friedrich then filed a claim in the U.S. District Court for the Southern District of Ohio, alleging that his wife's removal of their son from Germany violated the Hague Convention.¹⁸

The Convention limits the authority of the court solely to the merits of the abduction claim and to the determination of whether the child has been "wrongfully removed" from the country in which that child habitually resided.¹⁹ The Convention defines "wrongful removal" as one that is in breach of custody rights attributed under the laws of the State in which the child habitually resided before removal, provided that at the time of removal, these rights actually were exercised.²⁰ Under ICARA, the petitioner has the burden of demonstrating wrongful removal.²¹

The district court²² held that Mr. Friedrich failed to make the requisite showing for wrongful removal. The court determined that by kicking his wife and son out of the apartment on July 27th, Mr. Friedrich simultaneously "altered" Thomas's habitual residence from Germany to the U.S. and "terminated" his custody rights. Without custody rights there could be no breach of those rights, and consequently, no wrongful removal.²³

The court of appeals explicitly rejected the district court's finding that "habitual residence" and rights of custody were immediately altered by Mr. Friedrich's expulsion of his wife and child from the apartment.²⁴ While both the district court and court of appeals agreed that prior to July 27 Thomas's habitual residence was in Germany, in interpreting the term "habitual residence," the court of ap-

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Convention, *supra* note 3, at 10,500.

²⁰ *Id.* at 10,498. See *infra* note 63 and accompanying text.

²¹ 42 U.S.C. § 11603 (e)(1).

²² 42 U.S.C. § 11603 (a) grants state and federal courts concurrent original jurisdiction to hear cases under the Convention. This is a radical departure from tradition, as federal courts do not generally entangle themselves in domestic relations.

²³ Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993).

²⁴ *Id.* at 1401.

peals determined that it "must focus on the child, not the parents, and examine past experience, not future intentions."²⁵ Limiting its analysis in this manner, the court noted that the boy was born in Germany and lived there almost exclusively for his entire life.²⁶ The court concluded that Mrs. Friedrich's plans for Thomas to reside eventually in the United States were "irrelevant to our inquiry."²⁷

According to the Sixth Circuit, a change of habitual residence would require both a change in geography and the passage of time, and would necessarily precede any questionable, unilateral removal.²⁸ To hold otherwise, the court reasoned, would effectively encourage abduction under the guise of "alterations of habitual residence."²⁹ Finding no evidence to support the holding that Mr. Friedrich's expulsion of his wife and child from their apartment was tantamount to his acquiescence to their subsequent departure from Germany, the court held that Thomas was a habitual resident of Germany at the time of the removal.³⁰

Similar reasoning was applied to the status of Mr. Friedrich's custody rights after expelling his wife and son from the apartment. The court wrote: "[U]nder the Convention, a determination of whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residence."³¹ The court already held that Thomas' habitual residence was Germany, but neither party, nor the district court, had considered German custody law. They had considered American law, under which "custodial rights can only be terminated by judicial action, or by circumstances much more extraordinary than those presented here."³² The court of appeals thus chose to remand the case to the district court with instructions "to make a specific inquiry as to whether, *under German law*, Mr. Friedrich was exercising his custody rights at the time of Thomas' removal."³³

In dissent, Chief District Judge Thomas D. Lambros³⁴ found the trial judge's efforts "laudable" and completely compatible with the

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* The court reiterated its insistence on focusing on the child and not the parents, adding that habitual residence is not based upon whether the father or the mother "assumes the role of primary caretaker," and is unaffected "by changes in parental affection and responsibility." *Id.* at 1401-02.

²⁸ Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).

²⁹ *Id.*

³⁰ *Id.* at 1402. The court took note of the fact that after the separation, Mr. Friedrich continued to have contact with both his wife and son, and that on August 1st (the day Mrs. Friedrich left Germany), had arranged specific times to meet with Thomas during the next week. *Id.*

³¹ *Id.*; see also Convention, *supra* note 3, art 3.

³² Friedrich, 983 F.2d at 1402.

³³ *Id.* (emphasis added).

³⁴ Chief Judge, U.S. District Court for the Northern District of Ohio, sitting by designation.

objectives of the Convention.³⁵ Rights of custody, under the Convention, include those rights relating to the care of the child and the right to determine the child's place of residence.³⁶ Applying the "clearly erroneous" standard of review,³⁷ Judge Lambros accepted the lower court's finding that the petitioner, by expelling his wife and child from the apartment, terminated his right to determine the child's place of residence and his actual exercise of his parental custody rights.³⁸ Without a right to custody, the petitioner had no cause of action for wrongful removal.

III. Background Law

The adversarial and extremely emotional nature of custody proceedings often leads to physical and psychological manipulation of a child by the parents.³⁹ Child custody law has historically been rife with ambiguity concerning jurisdiction and, as a result, it has encouraged forum shopping and child abduction.⁴⁰ Until 1968, jurisdiction to make or modify both domestic and international child custody decrees could be based on any one of several factors, including domicile of the child, residence of the child or at least residence of one parent in the state, or personal jurisdiction over both parents.⁴¹ Utilizing one of these alternatives and a "best interests of the child" rationale, courts regularly would exercise concurrent jurisdiction over custody cases and modify, rather than enforce, existing decrees.⁴² As a result, the problem of child abduction was exacerbated.

A. Statutory Law

In an effort to provide uniform regulation to the problem of inter-jurisdictional custody litigation, the United States adopted two critical pieces of legislation, the Uniform Child Custody Jurisdiction Act (UCCJA),⁴³ and the Parental Kidnapping Prevention Act (PKPA).⁴⁴ While the primary focus of these acts is domestic custody disputes, the UCCJA specifically authorizes the unilateral application

³⁵ *Friedrich*, 983 F.2d at 1403. (Lambros, C.J., dissenting).

³⁶ *Id.* Convention, *supra* note 3, art. 5.

³⁷ FED. R. CIV. PRO. 52(a). The "clearly erroneous" standard requires that findings of fact by the trial judge remain undisturbed unless the appellate court determines by the weight of the entire evidence that a definite mistake has been made. Generally, great deference should be given to the trial court, because it alone has the opportunity to judge the credibility of the evidence. *Id.*

³⁸ *Friedrich*, 983 F.2d at 1403. (Lambros, C.J., dissenting).

³⁹ *Rivers*, *Child Abduction*, *supra* note 1, at 595.

⁴⁰ Christopher Blakesley, *Child Custody—Jurisdiction & Procedure*, 35 EMORY L.J. 291-297 (1986) [hereinafter Blakesley, *Child Custody*].

⁴¹ *Id.* at 298.

⁴² See KATZ, *CHILD SNATCHING*, *supra* note 1, at 13.

⁴³ 9 U.L.A. 115 (1968).

⁴⁴ 28 U.S.C. § 1738A (1993).

of its provisions to foreign custody decrees.⁴⁵ As such, an examination of its jurisdictional elements provides insight into the state of American law prior to the adoption the Convention.⁴⁶

Under the UCCJA, which was enacted in 1968, jurisdiction primarily is based on either a "home state" or a "best interest" analysis.⁴⁷ "Home state" is defined as the state in which the child and at least one parent has lived for a minimum of six months immediately preceding the commencement of a present action.⁴⁸ A state can invoke jurisdiction under the "best interests" test if it can show that it has significant connections regarding the child's present or future care and personal relationships.⁴⁹ This dichotomy does not resolve the problems of concurrent jurisdiction even though the Act requires that states enforce decrees from other states or nations.⁵⁰ Recognition and enforcement is only mandated for decrees issued in accordance with the Act however, and a judge is free to exercise discretion in determining whether a previous court has complied sufficiently with UCCJA provisions.⁵¹

Additional uncertainty surrounds the recognition and enforcement of foreign custody decrees. Not only are there problems with ambiguous notice requirements,⁵² but courts hearing international cases have relied on analyses regarding "changed circumstances" or the "best interests of the child" in deciding not to enforce foreign decrees.⁵³ In addition, American courts traditionally have been hos-

⁴⁵ "The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees . . . of other nations if reasonable notice and opportunity to be heard were given to all affected persons." UCCJA, 9 U.L.A. 115 § 23 (1968).

⁴⁶ *See id.* § 3.

⁴⁷ *Id.*

⁴⁸ *Id.* at § 2. "'Home state' means the state in which the child immediately preceding the time involved lived with his parents, a parent, or person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period." *Id.*

⁴⁹ *Id.* § 3(2). The purpose of providing alternative grounds for jurisdiction was to ensure sufficient flexibility in the Act to cover diverse factual scenarios. Consider a case where state A was the site of the marital home and residence of the family for five years, before one spouse and the child moved to state B for six months. While state B satisfies the definitional requirements to invoke "home state" jurisdiction, it is inherently illogical to deny any jurisdictional rights to state A, which in a sense has "maximum contacts" with the child. *See, e.g.,* *Houtchens v. Houtchens*, 488 A.2d 726 (R.I. 1985) (holding that jurisdiction based on "significant connections" was proper where paternal grandparents and father both resided in state and took part in raising children, despite fact that father unilaterally removed children from their home state); *E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982) (holding that UCCJA does not compel strict adherence to home state jurisdiction, but permits state best positioned to consider the best interests of the child to render a custody decision); *see also* Blakesley, *Child Custody*, *supra* note 40, at 359.

⁵⁰ UCCJA, 9 U.L.A. 115, § 13 (1968).

⁵¹ *See* KATZ, *CHILD SNATCHING*, *supra* note 1, at 32.

⁵² *See supra* note 45.

⁵³ Rivers, *Child Abduction*, *supra* note 1, at 607-08.

tile toward decrees issued by nations whose cultural, political and legal traditions vary widely from those of the United States.⁵⁴ In spite of its goals, vague language and jurisdictional loopholes have prevented the UCCJA from successfully deterring child abduction.⁵⁵

Congress passed the PKPA in 1980 to remedy the jurisdictional gaps and contradictions in the UCCJA.⁵⁶ The PKPA has not impacted significantly international custody disputes, however, because it fails to address or mandate giving "full faith and credit" to foreign decrees.⁵⁷ Despite its purpose as a complement to the UCCJA, the PKPA makes no mention of international custody decrees or international child abduction. Its provisions instead are expressly limited to domestic custody cases.⁵⁸ While the combination of the UCCJA and the PKPA helped to resolve some of the problems surrounding domestic abductions, the problem of international child abduction clearly required some international resolution.

B. The Hague Convention and the International Child Abduction Remedies Act (ICARA)

The Convention unanimously was adopted on October 24, 1980, at the Fourteenth Session of the Hague Conference.⁵⁹ The United States adopted the Convention in 1988 in the International Child Abduction Remedies Act (ICARA).⁶⁰ The Convention uniquely is designed to attack the problem of international child abduction in that it authorizes a court in a contracting state⁶¹ to determine the merits of the abduction claim only, not the merits of the underlying custody dispute.⁶² In recommending the Convention for Senate approval, President Ronald Reagan described its objectives as follows:

The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction . . . as resort to the Conven-

⁵⁴ See KATZ, CHILD SNATCHING, *supra* note 1, at 77.

⁵⁵ Rivers, *Child Abduction*, *supra* note 1, at 608.

⁵⁶ 28 U.S.C. § 1738A.

⁵⁷ Rivers, *Child Abduction*, *supra* note 1, at 609.

⁵⁸ See 28 U.S.C. § 1738A. Subsection (b)(8) defines 'state' as used in the Act to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States." *Id.*

⁵⁹ See Convention, *supra* note 3.

⁶⁰ 42 U.S.C. § 11601-11610 (1988).

⁶¹ As of March 17, 1992, the following nations ratified the Convention: Argentina, Australia, Austria, Canada, Denmark, France, Germany, Ireland, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, United Kingdom, United States, and Yugoslavia. 18 Fam. L. Rep. (BNA) 1232 (1992).

⁶² Convention, *supra* note 3, art. 19.

tion is to affect the child's swift return to his or her circumstances before the abduction In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.⁶³

The decision to limit court discretion in reviewing the merits of foreign custody decrees demonstrates the Convention's overriding commitment to deterring parental abduction.⁶⁴ Full recognition and enforcement of foreign rulings and immediate restoration of the *status quo ante* were considered essential in eliminating any incentive to or advantage for the parent abductor.⁶⁵ The Convention itself defines its objectives as securing "the prompt return of children wrongfully removed to or retained in any Contracting State," and ensuring "that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."⁶⁶ Removal of a child is "wrongful" within the terms of the Convention when:

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.⁶⁷

Custody rights under the Convention include all rights relating to the welfare of the child, and "in particular, the right to determine the child's place of residence."⁶⁸ In many countries, including the United States, such custody rights are shared equally by both parents prior to the issuance of a court order, and thus, may be violated by the unilateral action of one parent without the consent of the other.⁶⁹

The Convention does not define the term "habitual residence," and instead relies on courts to apply a generally understood meaning of the term to the particular facts and circumstances presented in each case.⁷⁰ This flexibility avoids the difficult problem of imposing international jurisdictional rules, and ensures that the prompt return

⁶³ Letter of Transmittal from President Ronald Reagan (Oct. 30, 1985), 51 Fed. Reg. 10,495 (1986).

⁶⁴ Bodenheimer, *supra* note 2, at 102.

⁶⁵ *Id.*

⁶⁶ Convention, *supra* note 3, art. 1.

⁶⁷ *Id.* art. 3. Article 3 also includes the following provision concerning the source of custody rights: "The rights of custody mentioned . . . above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of agreement having legal effect under the law of that state." This is essential, because it affords the convention's protection to parents who do not have a judicial custody decree.

⁶⁸ *Id.* art. 5.

⁶⁹ Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,506 (1986) [hereinafter Legal Analysis].

⁷⁰ 4 CHILD CUSTODY & VISITATION LAW AND PRACTICE § 32.02[2], (John P. McCahey, ed., 1993) [hereinafter McCahey]; see also, In Re Bates, No. CA 122.89 High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989) (courts should avoid

of children remains the principle objective of the Convention.⁷¹ In addition, the focus on habitual residence deprives the abductor of any advantage otherwise gained by forum shopping.⁷²

Even if the petitioner can establish that the child was wrongfully removed from his or her habitual residence, there are four exceptions in the Convention which the respondent can invoke to defeat the action for return.⁷³ These exceptions illustrate the desire of the drafters to allow contracting states to retain some autonomy in custody disputes and protect the best interests of the child in particular fact situations.⁷⁴ Implicit in the adoption of these exceptions was the understanding that, in order to effectuate the goals and objectives of the Convention, they are to be used sparingly.⁷⁵

Section 13(a) of the Convention creates a "no custodial rights" exception. If the respondent can show that the petitioner either was not actually exercising custody rights at the time of removal, or consented to or acquiesced in the removal, then such action is not "wrongful" within the meaning of the Convention.⁷⁶ Section 13(b) creates a second exception, which allows retention if "there is a grave risk of harm that return . . . would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."⁷⁷ The precise language of this exception indicates the narrow scope the drafters intended it to have. According to the Legal Analysis of the Hague Convention, a document accompanying the Convention and detailing its legislative purpose and intent, "[t]his provision was not intended to be used . . . as a vehicle to litigate the child's best interests The person opposing the child's return must show that the risk to the child is grave, not merely serious."⁷⁸ The Convention also allows a court to refuse return based on the preferences of the child.⁷⁹ Consideration of such preferences are left to the discretion of the court and should be based on a finding that the child has reached an appropriate age and degree of maturity to make such a decision.⁸⁰

The most ambiguous, and consequently the most potentially

developing restrictive rules about habitual residence, and instead should focus on the particular facts and circumstances of each case without presumptions).

⁷¹ McCahey, *supra* note 70, § 32.02[2].

⁷² *Id.*

⁷³ *Id.* arts. 13, 20.

⁷⁴ Rivers, *Child Abduction*, *supra* note 1, at 618.

⁷⁵ See Legal Analysis, *supra* note 69, at 10,509.

⁷⁶ Convention, *supra* note 3, art. 13(a).

⁷⁷ *Id.* art. 13(b).

⁷⁸ Legal Analysis, *supra* note 69, at 10,510.

⁷⁹ Convention, *supra* note 3, art. 13.

⁸⁰ *Id.* Neither the Convention nor the Legal Analysis specify what constitutes an "appropriate" age, instead leaving the matter to the discretion of the court. See, e.g., *Tahan v. Duquette*, reported in 19 Fam. L. Rep. (BNA) 1003 (1992) (nine year-old child is of insufficient age or maturity for the court to consider his preferences in custody decision).

damaging to the goals of the Convention, is the public policy exception.⁸¹ This section allows a court to refuse return if such action would be prohibited by the "fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."⁸² Because of the obvious potential for abuse, the drafters of the Convention suggested that this exception be limited only to those cases where return of a child would violate the law of the requested country, or where a similar exception would be invoked in a domestic case.⁸³

While it was clearly the intent of the drafters that these exceptions be construed narrowly, the legislation implementing the Convention in the United States takes a step away from a limited application.⁸⁴ ICARA requires that a respondent claiming either the "grave risk of harm" or "fundamental principles" exception meet a clear and convincing evidentiary burden.⁸⁵ For the other affirmative defenses, however, the respondent need only meet a preponderance of the evidence standard.⁸⁶ This reduced burden of proof makes it easier for a respondent to prevent the child's return from the United States and indicates a retreat from the U.S. commitment to the essential anti-abducting purpose of the Convention.⁸⁷ The effectiveness of ICARA hinges on the willingness of courts to permit these exceptions to prevent return of an abducted child.⁸⁸

C. Case Law

Case law interpreting the ICARA provisions is somewhat limited, although Department of State statistics indicate that the number of cases continues to grow each year.⁸⁹ While both state and federal courts have jurisdiction to hear these cases, the majority are brought in state courts.⁹⁰

Most judicial interpretations of ICARA have reiterated and reinforced the basic premise of the Convention and ordered the return of the abducted child. In *David S. v. Zamira S.*,⁹¹ the respondent, a resident of Canada, fled to New York with her two children. A separation agreement executed before the birth of her second child

⁸¹ Rivers, *Child Abduction*, *supra* note 1, at 627-28.

⁸² Convention, *supra* note 3, art. 20.

⁸³ Legal Analysis, *supra* note 69, at 10,510-10,511.

⁸⁴ See 42 U.S.C. § 11603 (1988).

⁸⁵ *Id.* § 11603(e)(2)(A).

⁸⁶ *Id.* § 11603(e)(2)(B).

⁸⁷ Rivers, *Child Abduction*, *supra* note 1, at 636-37.

⁸⁸ See *id.*

⁸⁹ Between 1988 and 1991, there were 683 cases brought under the Convention in U.S. courts, of which 262 were in the first nine months of 1991. See 18 Fam. L. Rep. (BNA) 1112 (1992).

⁹⁰ See, e.g., *Navarro v. Bullock*, 15 Fam. L. Rep. (BNA) 1576 (1989); *Becker v. Becker*, 15 Fam. L. Rep. (BNA) 1605 (1989); *Sheikh v. Cahill*, 546 N.Y.S.2d 517 (1989).

⁹¹ 574 N.Y.S.2d 429 (Fam. Ct. 1991).

awarded the respondent custody of her first child, but required her to remain in the Toronto area to allow her husband to exercise visitation rights.⁹² The New York court supported the international perspective of ICARA by deferring repeatedly to the custody laws of Canada, which it deemed the habitual residence of the children.⁹³ The court also held that respondent's relocation to New York was clearly "wrongful" within the meaning of ICARA. Such action breached petitioner's rights of visitation to the one child, and more significantly, his right to custody of the other child despite "the absence of any formal decree of custody."⁹⁴

A New Jersey court was similarly circumspect in considering a respondent's claim for a "grave risk of harm" exception in *Tahan v. Duquette*.⁹⁵ The petitioner planned to introduce testimony from a psychologist and from the child's teacher to show the psychological harm the child faced if forced to return to Canada.⁹⁶ The court very clearly announced that it would not intrude on the jurisdiction of the habitual residence and consider issues that go to the underlying custody issue.⁹⁷ In determining whether a child actually faces a risk of harm upon return however, the court must be permitted to evaluate the environment to which the child would be sent, including the basic personal qualities of those who would be in close contact with the child.⁹⁸ Respondent's evidence did not address these elements, but instead focused on substantive custody issues; therefore, the court ordered the return of the child.⁹⁹

Meredith v. Meredith is one of a limited number of federal cases concerning ICARA.¹⁰⁰ Considering the question of habitual residence, the court noted that the term is undefined in the Convention, and thus "must be determined by the facts and circumstances presented in each particular case."¹⁰¹ The child in this case resided her whole life in Arizona, leaving only to accompany her mother on a trip to Europe. The mother then retained the child in Europe, thus violating the father's custody rights.¹⁰² After securing a custody

⁹² *Id.* at 432. The separation agreement was silent as to the custody of the second child, who was not yet born at the time of its execution. As a result, both parents had an equal right to custody of this child. *Id.*

⁹³ *Id.*

⁹⁴ *Id.*; see also, *In Re C (A Minor)*, UK Ct. App. (Civil) 1988, reported in 139 New L. J. 226 (1989) (although mother was vested with physical custody of child, it was a violation of father's "custody rights" within the Convention for her to remove child from the country without his consent, when such consent was required by the custody decree).

⁹⁵ *Tahan v. Duquette*, 19 Fam. L. Rep. (BNA) 1003 (1992).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1004.

⁹⁹ *Id.*

¹⁰⁰ 759 F. Supp. 1432 (D. Ariz. 1991).

¹⁰¹ *Id.* at 1434.

¹⁰² *Id.* at 1433. Prior to the custody award by the Arizona Court, both parents had an equal right to the custody of the child. Thus, the unilateral retention of the child in Eu-

award in Arizona, the father went to Europe and retrieved his daughter. At that time, the mother instituted this action under the Convention for return of her daughter, alleging that her habitual residence was now England, not the United States.¹⁰³ Finding that the child had spent all of her life in the United States prior to her removal, the court concluded the United States was indeed her habitual residence irrespective of the child's temporary removal. A contrary conclusion, the court noted, would only reward the abducting parent and subvert the purpose of the Act.¹⁰⁴ The court also held that although the father acquiesced in the international travel of the child, the subsequent unilateral retention of the child abroad was without his consent, and thus violated the father's custody rights within the meaning of the Act.¹⁰⁵

The application of ICARA in the above cases reiterates the Act's elemental principle that courts should avoid resolution of the merits of a custody dispute and facilitate a restoration of the *status quo ante*. These decisions illustrate the importance of a court's limited exercise of discretion and narrow interpretation of statutory exceptions in effectuating the primary goal of the Act, deterring parental abduction.¹⁰⁶

IV. Significance of the Case

The decision in *Friedrich v. Friedrich* is important in the ongoing development of ICARA jurisprudence. The Sixth Circuit Court of Appeals is the highest court to hear an ICARA case, and the decision comes down squarely in favor of the international aspects and objectives of the Convention. In considering the issues of habitual residence and the exercise of custody rights, the court's factual analysis was governed by the Convention's overriding policy to return the abducted child.¹⁰⁷

The court's determination of the issue of habitual residence turned upon the rejection of the lower court's finding that the petitioner "altered" his son's habitual residence when he removed the

rope by the mother violated the father's custody rights, even in the absence of any formal decree. *Id.* at 1435.

¹⁰³ *Id.* at 1433-34.

¹⁰⁴ *Id.* at 1435.

¹⁰⁵ Meredith v. Meredith, 759 F. Supp. 1432, 1435 (D. Ariz. 1991).

¹⁰⁶ The overriding importance of the principle that a court should not reach the merits of a custody dispute is difficult to overstate. In analyzing a Swiss case in which the court ignored this principle, the Family Law Reporter stated:

This decision is remarkable, if not indeed perplexing, inasmuch as the Convention was specifically intended to restore pre-abduction status quo . . . without reaching the merits of a custody dispute or a "best interests" analysis, which is supposed to be resolved later in the country of the child's habitual residence.

15 Fam. L. Rep. (BNA) 1606 (1989).

¹⁰⁷ Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).

child and his mother from their apartment.¹⁰⁸ Habitual residence cannot be altered so easily and is not predicated on which parent assumes the role of primary caretaker. Instead, such an alteration requires both a change in geography and the passage of time.¹⁰⁹ The essence of the holding on this issue is the court's concern with the broader, anti-abduction goals of the Convention. This portion of the opinion concludes, "[i]f we were to determine that . . . removing Thomas from his habitual residence . . . 'altered' Thomas' habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence."¹¹⁰

The court's review of the lower court's holding that Mr. Friedrich "terminated" his custody rights is similarly guided by the overriding international goals of the Convention. The district court's ruling, and Chief Judge Lambros' dissent in the court of appeals both examine elements of the custody dispute itself. The majority expressly refuses to consider any of the underlying custody issues, and insists that the laws of the child's habitual residence must control.¹¹¹ As such, the court remands the case for consideration of this affirmative defense under the appropriate German law.¹¹²

The opinion itself reiterates the importance of the policies of the Convention in its decision. It concludes that

[t]he rights and wrongs of the actions of the respective parents are not before us for disposition on the merits [I]t is the clear import of the Convention that in most cases the duty . . . when the niceties of the Convention have been met, is to return the child to the country of habitual residence for resolution of the custody disputes under the laws of that state.¹¹³

This conclusion is consistent with the stated goals of both the Convention and ICARA, and firmly places the weight of judicial precedent behind deterrence of abduction. The manifest jurisdictional problems of international custody cases prior to the adoption of the Convention illustrated the necessity of uniformity to protect the best interests of the world's children. By tailoring its holding to the express purposes of the Convention, the Sixth Circuit emphasizes the American judicial commitment to uniformity and international comity in this area.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1401-02.

¹¹⁰ *Id.*

¹¹¹ Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993).

¹¹² *Id.* at 1402-03.

¹¹³ *Id.*

V. Conclusion

The Sixth Circuit's holding in *Friedrich v. Friedrich* represents the triumph of the policy considerations behind the Convention. The court recognized that implicit in the success of the Convention is a strict application of its provisions.¹¹⁴ Despite the reduced burdens of proof adopted in the ICARA, the court rejected a broad interpretation of the exceptions that the drafters so feared.¹¹⁵ As one of the highest judicial holdings on these provisions, the precedential effects are far reaching, and although this action frustrates the efforts of an American citizen, "it ultimately ensures the prompt return of the American children abducted to foreign countries pursuant to the broadest sense of reciprocity under the Convention."¹¹⁶ Only by adopting this global perspective and setting aside concerns about jurisdictional and national sovereignty can the international community deter abduction and effectively protect children.

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¹¹⁴ Rivers, *Child Abduction*, *supra* note 1, at 592.

¹¹⁵ Legal Analysis, *supra* note 69, at 10,509-10,510.

¹¹⁶ Rivers, *Child Abduction*, *supra* note 1, at 590.