APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOMENICO TAGLIERI,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 16-4128
	)	
MICHELLE MONASKY,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 1:15-cv-00947—Solomon Oliver, Jr., Chief District Judge.

Argued: June 13, 2018

Decided and Filed: October 17, 2018

Before: COLE, Chief Judge; BOGGS, BATCHELDER, MOORE, CLAY, GIBBONS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, and NALBANDIAN, Circuit Judges.

COUNSEL

REARGUED EN BANC: Aidan Taft Grano, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., for Appellant. John D. Sayre, NICOLA, GUDBRANSON & COOPER, LLC, Cleveland, Ohio, for Appellee. **ON SUPPLEMENTAL BRIEF**: Aidan Taft Grano,

Amir C. Tayrani, Melanie L. Katsur, GIBSON, DUNN & CRUTCHER LLP, Washington, D.C., Christopher R. Reynolds, Amy M. Keating, ZASHIN & RICH CO., L.P.A., Cleveland, Ohio, for Appellant. John D. Sayre, Amy Berman Hamilton, NICOLA, GUDBRANSON & COOPER, LLC, Cleveland, Ohio, for Appellee. Michael A.F. Johnson, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C., Rachel G. Skaistis, CRAVATH, SWAINE & MOORE LLP, New York, New York, for Amici Curiae.

SUTTON, J., delivered the opinion of the court in which BOGGS, BATCHELDER, COOK, McKEAGUE, KETHLEDGE, THAPAR, BUSH, LARSEN, and NALBANDIAN, JJ., joined. BOGGS, J. (pp. 11–16), delivered a separate concurring opinion in which BATCHELDER, COOK, McKEAGUE, and BUSH, JJ., joined. MOORE, J. (pp. 17–24), delivered a separate dissenting opinion in which COLE, C.J., and CLAY, GIBBONS, GRIFFIN, WHITE, STRANCH, and DONALD, JJ., joined. GIBBONS, J. (pp. 25–27), delivered a separate dissenting opinion in which COLE, C.J., and MOORE, CLAY, GRIFFIN, WHITE, and STRANCH, JJ., joined. STRANCH, J. (pp. 28–29), delivered a separate dissenting opinion in which COLE, C.J., and MOORE, CLAY, GIBBONS, and WHITE, JJ., joined.

OPINION

SUTTON, Circuit Judge. Domenico Taglieri and Michelle Monasky were married. When the union fell apart, Monasky took A.M.T., their two-month-old daughter, from Italy to the United States. Taglieri filed a petition under the Hague Convention to return A.M.T. to Italy. The district court granted the petition

after finding that Italy was A.M.T.'s country of habitual residence. Monasky appealed.

Who wins turns on who decides. The Hague Convention places the child's habitual residence front and center in trying to achieve its goal of discouraging spouses from abducting the children of a once-united marriage. The Convention and our cases establish that the inquiry is one of fact. Judge Oliver held a four-day hearing about the point, after which he wrote a 30-page opinion that carefully and thoughtfully explained why Italy was A.M.T.'s habitual residence. No part of that decision goes awry legally, and no part of his habitual-residence finding sinks to clear error. We affirm.

I.

Taglieri, an Italian, and Monasky, an American, met in Illinois. Taglieri, who was already an M.D., was studying for his Ph.D. and worked with Monasky, who already had a Ph.D. They married in Illinois in 2011. Two years later, the couple moved to Italy to pursue their careers, with Taglieri arriving in February and Monasky arriving in July. At first, the couple lived in Milan, where they each found work—Taglieri as an anesthesiologist, Monasky as a research biologist. The marriage had problems, including physical abuse. Taglieri struck Monasky in the face in March 2014. After that, Monasky testified, he continued to slap her, making her increasingly afraid of him, and "forced himself upon [her] multiple times." R. 88-4 at 201.

Monasky became pregnant with A.M.T. in May 2014, after one of the times Taglieri forced her to have sex, she claims. In June 2014, Taglieri took a job at a hospital in Lugo, about three hours from Milan.

Monasky stayed in Milan, where she worked at a different hospital. Monasky had a difficult pregnancy, which, when combined with the long-distance separation, strained the relationship further. To make matters worse, she didn't speak Italian or have a valid driver's license, increasing her dependence on Taglieri for help with basic tasks. Monasky began investigating health care and child care options in the United States and looking for American divorce lawyers. But the couple also looked into child care options in Italy and prepared for A.M.T.'s arrival at the same time.

In February 2015, Monasky emailed Taglieri about seeking a divorce and investigated a move back to the United States. The next day, Monasky and Taglieri went to the hospital in Milan for a pregnancy checkup. The doctors recommended that they induce labor. Monasky refused because she preferred a natural birth, upsetting Taglieri and prompting more verbal sparring. On the ride home from the hospital, Monasky asked Taglieri to turn the car around because she felt contractions. Taglieri refused. Back at their apartment, the arguments continued, with Taglieri calling her "the son of a devil." R. 88-4 at 113.

Later that night, Monasky took a taxi to the hospital. Once Taglieri realized she had left, he went to the hospital and was there, along with Monasky's mother, during the labor and at A.M.T.'s birth by emergency cesarean section. After Monasky and A.M.T. left the hospital, Taglieri returned to Lugo, and Monasky stayed in Milan with A.M.T. and her mother.

In March 2015, after Monasky's mother returned to the United States, Monasky told Taglieri that she wanted to divorce him and move to America. A few days later, however, Monasky left Milan to stay with

Taglieri in Lugo. While Taglieri said he thought this would help them "clarify any existing issues," R. 88-1 at 39, Monasky said she went to Lugo because she couldn't recover from her cesarean section and take care of A.M.T. alone. Monasky and Taglieri dispute whether they reconciled in Lugo. Taglieri says they did. Monasky says they didn't. During this time, the two jointly initiated applications for Italian and American passports for A.M.T.

In late March, Taglieri and Monasky had another argument. As the dispute escalated, Monasky slammed her hand on the table. Taglieri raised his hand as if he were going to hit her. But he didn't. He instead went into the kitchen. Monasky thought she heard Taglieri pick up a knife, but he came back into the room carrying ice cream. Soon after, Taglieri went to work and Monasky took A.M.T. to the police, seeking shelter in a safe house. She told the police that Taglieri was abusive. After Taglieri returned home and found his wife and daughter missing, he went to the police to revoke his permission for A.M.T.'s American passport. Two weeks later, Monasky left Italy for the United States, taking eight-week-old A.M.T. with her.

Taglieri filed an action in Italian court to terminate Monasky's parental rights. The court ruled in Taglieri's favor ex parte. Then Taglieri filed a petition in the Northern District of Ohio seeking A.M.T.'s return under the Hague Convention. The district court granted Taglieri's petition. Monasky appealed. After this court and the United States Supreme Court denied her motion for a stay pending appeal, Monasky returned A.M.T. to Italy.

On appeal, a divided panel of this court affirmed the district court. 876 F.3d 868 (2017). We granted

Monasky's petition for rehearing en banc. No. 16-4128 (Mar. 2, 2018).

II.

Ninety-nine countries, including the United States and Italy, have signed the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. *See* Status Table, HCCH, https://www.hcch.net/en/instruments/ conventions/status-table/?cid=24 (last updated Sept. 12, 2018). The treaty addresses a pressing and never-ceasing policy problem—the abductions of children by one half of an unhappy couple. The Convention's mission is basic: to return children "to the State of their habitual residence," to require any custody disputes to be resolved in that country, and to discourage parents from taking matters into their own hands by abducting a child. Hague Convention pmbl.

Federal law, namely the International Child Abduction Remedies Act, implements the Hague Convention and hews to the treaty's language. 22 U.S.C. § 9001 *et seq.* A parent may petition a federal or state court to return abducted children to their country of habitual residence. *Id.* § 9003(b). The federal or state court determines whether to return the child. *Id.* § 9001(b)(4). Courts in the country of habitual residence then determine the "merits of any underlying child custody claims." *Id.* The parent seeking return of a child must prove by a preponderance of evidence that the child was "wrongfully removed . . . within the meaning of the Convention." *Id.* § 9003(e)(1)(A). The Hague Convention defines wrongful removal as taking a child in violation of custodial rights "under the law of the State in which the child was habitually resident immediately before the removal." Hague Convention art. 3.

The key inquiry in many Hague Convention cases, and the dispositive inquiry here, goes to the country of the child's habitual residence. Habitual residence marks the place where a person customarily lives. *See Webster's New International Dictionary* 1122, 2119 (2d ed. 1942) (defining "residence" as a place where a person "actually lives" and "habitual" as "customary").

Building on our cases in the area, *Ahmed v. Ahmed* offers two ways to identify a child's habitual residence. 867 F.3d 682 (6th Cir. 2017). The primary approach looks to the place in which the child has become "acclimatized." *Id.* at 687. The second approach, a back-up inquiry for children too young or too disabled to become acclimatized, looks to "shared parental intent." *Id.* at 689; *see also Robert v. Tesson*, 507 F.3d 981, 992 n.4 (6th Cir. 2007). Every circuit to consider the question looks to both standards. *Ahmed*, 867 F.3d at 689; *see Mauvais v. Herisse*, 772 F.3d 6, 11 (1st Cir. 2014); *Guzzo v. Cristofano*, 719 F.3d 100, 110 (2d Cir. 2013); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 296 (3d Cir. 2006); *Maxwell v. Maxwell*, 588 F.3d 245, 253 (4th Cir. 2009); *Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012); *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013); *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Holder v. Holder*, 392 F.3d 1009, 1020 (9th Cir. 2004); *Kanth v. Kanth*, No. 99-4246, 2000 WL 1644099, at *1–2 (10th Cir. Nov. 2, 2000); *Chafin v. Chafin*, 742 F.3d 934, 938–39 (11th Cir. 2013).

As to the first approach, the question is "whether the child has been physically present in the country for an amount of time sufficient for acclimatization and whether the place has a degree of settled purpose from the child's perspective." *Ahmed*, 867 F.3d at 687 (quotations omitted). District courts ask these sorts

of questions in determining a child's acclimatization: whether the child participated in "academic activities," "social engagements," "sports programs and excursions," and whether the child formed "meaningful connections with the [country's] people and places." *Id.* (quotations omitted).

But the acclimatization inquiry, as *Ahmed* appreciated, may prove difficult, sometimes impossible, for young children. An infant "never forms" "or is incapable of" forming the kinds of "ties" to which the acclimatization standard looks. *Id.* at 689. Unwilling to leave infants with no habitual residence and thus no protection from the Hague Convention, *Ahmed* adopted an alternative inquiry for infants incapable of acclimating. In that setting, *Ahmed* tells courts to determine the "shared parental intent of the parties" and to identify the location where the parents "intended the child[] to live." *Id.* at 690. *Ahmed* says that "the determination of when the acclimatization standard is impracticable must largely be made by the lower courts, which are best positioned to discern the unique facts and circumstances of each case." *Id.*

Both of these inquiries come back to the same, all-important point—the habitual residence of the child—on which the protections of the Hague Convention pivot.

The Hague Convention's explanatory report treats a child's habitual residence as "a question of pure fact." Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, *in 3 Acts and Documents of the Fourteenth Session, Child Abduction* 426, 445 (1982); *see Medellín v. Texas*, 552 U.S. 491, 507 (2008) (looking to "the postratification understanding" of signatory nations in interpreting a

treaty (quotation omitted)). Consistent with that understanding, our cases treat the habitual residence of a child as a question of fact. *See*, *e.g.*, *Ahmed*, 867 F.3d at 686; *Jenkins v. Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009); *Tesson*, 507 F.3d at 995.

Measured by these insights and these requirements, the district court's ruling should be affirmed. No one thinks that A.M.T. was in a position to acclimate to any one country during her two months in this world. That means this case looks to the parents' shared intent.

In answering that question, we must let district courts do what district courts do best— make factual findings—and steel ourselves to respect what they find. While we review transcripts for a living, they listen to witnesses for a living. While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living. Consistent with the comparative advantages of each role, clear-error review is highly deferential review. In the words of the Supreme Court, we leave fact finding to the district court unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). In the words of the Sixth Circuit, we leave this work to the district court unless the fact findings "strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *United States v. Perry*, 908 F.2d 56, 58 (6th Cir. 1990) (quotation omitted).

Nothing in Judge Oliver's habitual-residence finding leaves a "definite and firm conviction that a mistake" was made or, more pungently, strikes one as wrong with "the force of a five-week-old, unrefrigerated" aquatic animal. He presided over a four-day

bench trial and heard live testimony from several witnesses, including most essentially the two parents: Monasky and Taglieri. After listening to the witnesses and weighing their credibility, Judge Oliver issued a 30-page opinion finding that Italy is A.M.T's country of habitual residence. *Taglieri v. Monasky*, No. 1:15 CV 947, 2016 WL 10951269 (N.D. Ohio Sept. 14, 2016).

Judge Oliver's opinion is thorough, carefully reasoned, and unmarked by any undue shading of the testimony provided by the competing witnesses. Some evidence, as he pointed out, supported the finding that Monasky and Taglieri intended to raise A.M.T. in Italy. For example: Monasky and Taglieri agreed to move to Italy to pursue career opportunities and live "as a family" before A.M.T.'s birth. *Id.* at *7. The couple secured full-time jobs in Italy, and Monasky pursued recognition of her academic credentials by Italian officials. *Id.* Together, Monasky and Taglieri purchased several items necessary for raising A.M.T. in Italy, including a rocking chair, stroller, car seat, and bassinet. *Id.* at *8. Monasky applied for an Italian driver's license. *Id.* And Monasky set up routine checkups for A.M.T. in Italy, registered their family to host an *au pair* there, and invited an American family member to visit them there in six months. *Id.*

Some evidence, as the trial court acknowledged, pointed in the other direction. For example: Monasky at times expressed a desire to divorce Taglieri and return to the United States. *Id.* She contacted divorce lawyers and international moving companies. *Id.* at *2, *8–9. And Monasky and Taglieri jointly applied for A.M.T.'s passport, so that she could travel to the United States. *Id.* at *3.

Faced with this two-sided record, Judge Oliver had the authority to rule in either direction. He could have found that Italy was A.M.T.'s habitual residence or he could have found that the United States was her habitual residence. After fairly considering all of the evidence, he found that Italy was A.M.T.'s habitual residence. *Id.* at *10. Call our standard of review what you will—clear-error review, abuse-of-discretion review, five-week-old-fish review—we have no warrant to second-guess Judge Oliver's well-considered finding.

Monasky resists this conclusion on several grounds. She claims that the district court's determination of habitual residence is a finding of "ultimate fact" that we review de novo. Appellant's Supp. Br. 20. Whatever Monasky means by *ultimate* fact, our cases lack such ambiguity: So long as the district court applies the correct legal standard, as Judge Oliver did here, the determination of habitual residence is a question of fact subject to clear-error review, sometimes characterized as abuse-of-discretion review, as the Convention's explanatory report says and as our cases confirm. *See Ahmed*, 867 F.3d at 686; *see also Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. . . . It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts."). No such error occurred here.

Nor does it make a difference that the district court's decision predated *Ahmed*. Because Ahmed followed existing circuit law, *see Tesson*, 507 F.3d 981; *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), Judge Oliver had no problem framing the habitual-

residence inquiry. He found no acclimatization for this infant or any other because they "lack cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose." *Taglieri*, 2016 WL 10951269, at *6 (quoting *Tesson*, 507 F.3d at 992 n.4). Monasky embraces that standard and that finding, as do we.

Judge Oliver then "[a]ssume[d] that the Sixth Circuit would hold that the shared intent of the parties is relevant in determining the habitual residence of an infant child," *Taglieri*, 2016 WL 10951269, at *10, as every other circuit to consider the question has done. He found that, considering the record as a whole, Monasky and Taglieri intended to raise A.M.T. in Italy. *Id.* That legal inquiry respects *Ahmed*, which applied the same standard. Monasky agrees with that standard; she just disagrees with the trial judge's finding under it.

Any further concerns about the point can be resolved by recalling this reality. Ahmed itself affirmed the district court in that case. It saw no need to ask the district court to make any more findings or do anything more than it already had done. What was good for that case is good for this one.

Monasky argues that she and Taglieri never had a "meeting of the minds" about their child's future home. Appellant's Br. 34. But that possibility offers a sufficient, not a necessary, basis for locating an infant's habitual residence. An absence of a subjective agreement between the parents does not by itself end the inquiry. Otherwise, it would place undue weight on one side of the scale. Ask the products of any broken marriage, and they are apt to tell you that their parents did not see eye to eye on much of anything by the end. If adopted, Monasky's approach would create

a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected.

Monasky claims that Judge Oliver placed too much weight on the fact that Monasky and Taglieri established a matrimonial home in Italy and the fact that Monasky lacked definite plans to leave Italy. *Taglieri*, 2016 WL 10951269, at *7–8. But if clear-error review entitles an appellate court to rebalance the *relative weights* assigned to these sorts of details, that would indeed create a de novo standard of review, which is just what our cases prohibit. The question remains one of habitual residence. All agree that both facts—the location of the matrimonial home and any plans to leave it—bear on the riddle and thus were relevant considerations. Nothing in Judge Oliver's opinion suggests that he considered either one of them dispositive. That an "infant will normally be a habitual resident of the country where the matrimonial home exists" is a fact of life that we cannot change. *Id.* at *7.

That does not mean that an infant's place of birth *always* will be the habitual residence if she remains there up to the abduction. That approach would create problems of its own. Imagine an American couple who gives birth to an infant during a brief stay in Italy, perhaps during a vacation or month-long residency, after which one of them takes the child before the vacation (and marriage) ends. In those instances, it would be difficult to maintain that the child habitually resides in Italy.

That leaves one last argument for reversing Judge Oliver's decision: a preference for creating a presumption *against* finding a habitual residence for infants. But that is the worst of all possible worlds because it

turns the Convention upside down. It would deprive the children most in need of protection—infants—of any shelter at all and encourage self-help options along the way, creating the risk of "abduction ping pong" at best, *Ovalle v. Perez*, 681 F. App'x 777, 784 (11th Cir. 2017), or making possession 100% of the law at worst.

Sometimes the only way to resolve a complicated problem is to recognize that there is no single solution. As often happens with child-abduction disputes, the issues are fraught, the fact patterns unfortunate. Escalating acrimony between parents often severs a relationship beyond repair. And that usually results in conflicting testimony as to how things fell apart. But we will not make this case easier, and we are sure to make the next case harder, by assuming the role of principal decision maker. As with other fact-bound inquiries, so with this one. We must trust those with a ring-side seat at the trial to decide whose testimony is most credible and what evidence is most relevant. And to do that, we must treat the habitual-residence inquiry as we always have: a question of fact subject to deferential appellate review.

Because the district court applied the correct legal standard and made no clear errors in its habitual-residence finding, and indeed quite carefully considered all of the competing evidence in its 30-page opinion, we affirm.

CONCURRENCE

BOGGS, Circuit Judge, concurring. I join the majority opinion and concur in its conclusion that the habitual residency inquiry is a question of fact and that

the district court made no clear error in its factual findings in this case. I take issue, however, with the characterization that all Hague Convention cases are to be governed by a strict two-part test attributed to our recent case, *Ahmed*.

For cases such as this one, there exists a simple standard consistent with precedent: absent unusual circumstances, where a child has resided exclusively in a single country, especially with both parents, that country is the child's habitual residence. An excessive reliance solely on the two-part test, one that will often turn exclusively on "shared parental intent," could jeopardize that simple conclusion for young children, leaving them without a habitual residence and therefore unprotected by the Hague Convention. In such circumstances, either parent will be free to grab the child and go, leaving no law, only self-help, as the remedy for the abduction. This is contrary not just to case law and the purposes of the Convention, but also common sense.

When a child has a habitual residence, the Hague Convention generally requires that a determination of custody rights must be made in that country. Convention on the Civil Aspects of International Child Abduction, arts. 3, 12, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49 (reprinted at 51 Fed. Reg. 10494 (Mar. 26, 1986)); *Chafin v. Chafin*, 568 U.S. 165, 180 (2013). On the other hand, when a child has no habitual residence, either parent is free, so far as the Convention is concerned, to take the child to, or to retain the child in, any country, without fear of legal process. *See Friedrich v. Fried*rich, 983 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*"). Determination of habitual residence, then, is often the be-all and end-all in Hague Convention cases. *Mozes v. Mozes*, 239 F.3d

1067, 1072 (9th Cir. 2001) ("'Habitual residence' is the central—often outcome-determinative—concept on which the entire system is founded.").

Relying solely on the child's "acclimatization" and "shared parental intent" to determine habitual residence can too often mean that a young child has no habitual residence and therefore that the Hague Convention will not be able to protect against the child's abduction or provide a mechanism for the child's return. Infants and newborns almost surely "lack the cognizance to acclimate" to their country of birth. *See Ahmed v. Ahmed*, 867 F.3d 682, 690 (6th Cir. 2017). And arguably a child of even a year or two may be too young to acclimate to a country that it cannot, or can only barely, recognize.[1] *See Ahmed*, 867 F.3d at 690 (affirming district court's determination that nine-month-old twins were incapable of acclimating "anywhere").

Unable to show that a young child had acclimated to its country of birth in the short time it lived there before being abducted, it often will be the case that a party who petitions for the child's return under the Hague Convention likewise will be unable to establish a shared parental intent for the child to reside in that country. After all, in most circumstances where the inter-family tension is so great that one parent has abducted a young child, it is very likely that the par-

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[1] Since the two-part test also applies to developmentally disabled children, it is worth noting that such children, depending on the extent of their disability and the degree of rancor in their home, may *never* acquire a habitual residence at all. That cannot be what the framers of the Hague Convention had in mind.

ents will have quarreled about many things, most especially about their hopes and plans for where the child will be raised.

There is a better way to handle cases like this. Where, as here, a child has lived in only one country with his or her parents, and the child's parents do not intend their stay there to be temporary, then that country is the child's habitual residence, absent unusual circumstances. *See Holder v. Holder*, 392 F.3d 1009, 1020 (9th Cir. 2004). Such circumstances might be present, for instance, in cases of "birth tourism," where, for medical, legal, or financial reasons, a child is born in a country where at least one of the parents has few ties and no intent to remain after the birth. *See Delvoye v. Lee*, 329 F.3d 330, 334 (3d Cir. 2003).

But such unusual cases should only set the limits of the general rule. They should not preclude the common-sense conclusion that a young child who has resided exclusively in an established, albeit inharmonious, living arrangement with his or her parents in a single country has a habitual residence in that country. There is no reason to permit the exceptional to outweigh the ordinary, but in many cases adhering to the two-part test at the exclusion of all else will not just allow, but dictate, that result. While I agree that the habitual-residence inquiry is and should remain fact-intensive, most cases in which a child has lived in just one country should result in the conclusion that that country is the child's habitual residence, a determination that will bring the child within the protections of the Hague Convention.

Indeed, this court's precedent has always been in keeping with the common-sense view that children who have known but one country generally are habitual residents of that country. We suggested as much

in *Friedrich I*, where we held that a child who "was born in Germany and resided exclusively in Germany until his mother removed him to the United States [when he was nineteen months old] . . . was a habitual resident of Germany at the time of his removal." 983 F.2d at 1402; *see also id.* at 1401 ("[T]here is no real distinction between ordinary residence and habitual residence.") (citing *Re Bates*, No. CA 122.89, High Court of Justice, United Kingdom (1989)). Likewise, in *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007), we concluded that a child who "was born in Mexico and resided there her entire life (other than for some temporary sojourns abroad)" was a habitual resident of Mexico. *Id.* at 602.

Although we described *Friedrich I* as a "simple case," 983 F.2d at 1402, such an obvious result likely would no longer be permissible under a framework that solely looks to shared parental intent in cases in which a child is too young to acclimate. *See Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (observing that focusing on shared parental intent makes easy cases hard and leads to questionable results in determining habitual residence). The nineteen-month-old child at the center of *Friedrich I* may have been too young to acclimate to Germany, and there was considerable evidence of marital discord and a lack of shared parental intent, with the child's American servicewoman mother claiming that she always had intended to return to the United States with her son when her tour of duty was complete. *Friedrich I*, 983 F.2d at 1401. Consequently, applying this two-part formulation to the habitual-residence determination in *Friedrich I* might very well have resulted in denying relief under the Hague Convention in what was otherwise a "simple case" that yielded the opposite outcome.

The two-part analytical framework at issue is said to stem from *Ahmed*, which built off our prior case, *Robert*, but neither holding adopted the acclimatization test for *all* habitual residence cases. *Robert* embraced the acclimatization test to address the set of facts faced there—children moving back and forth between two countries. We explained in *Robert* that *Friedrich I* had nothing to say about the standard to apply "when a child has alternated residences between two or more nations." 507 F.3d at 992. But we then noted, "[f]ortunately, several other Circuits have considered *this issue*." *Ibid.* (emphasis added). Examining other circuits' use of an "acclimatization test" for that *issue*—i.e., the habitual residence of a child who has lived in more than one country—we "h[e]ld 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." *Id.* at 993 (quotation marks and citation omitted). Although we observed that this holding was consistent with F*riedrich I*, nowhere did we suggest that it *supplanted Friedrich I*'s holding. *Ibid.* Accordingly, Robert adopted the acclimatization test to use when, and only when, the child has lived in multiple countries, leaving *Friedrich I* intact as our precedent for one-country cases.

Although it is true that *Ahmed* supplemented the acclimatization test by adopting a shared-parental-intent exception to it for very young children, it is incorrect to say that the *Ahmed* framework is generally applicable to all Hague Convention cases. Such a broad construction of *Ahmed* is not warranted. *Ahmed*, like *Robert* and unlike *Friedrich I*, involved children who had resided in two different countries—in the Ah-

meds' case, the United States and the United Kingdom. In determining whether the U.K. was the children's habitual residence, the *Ahmed* court, following *Robert*, looked first to whether the children had become acclimatized there. Finding the acclimatization test impracticable in those circumstances, given the children's young age, the court then considered whether their parents shared an intent to raise them in the United Kingdom. 867 F.3d at 690.

The holdings—and therefore the authoritative teaching—of *Robert* and *Ahmed*, being no more extensive than the facts that undergird them, provide meaningful guidance only in multiple-country cases.[2] They do not disturb the preexisting common-sense simplicity of single-country cases, such as *Friedrich I* and *Simcox*, where the child's only country of residence unremarkably was held to be the child's habitual residence.[3]

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[2] We should be mindful of "Chief Justice Marshall's sage observation that 'general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). *See also United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (observing that cases implicating issues neither brought to the attention of the court nor ruled upon do not establish binding precedent on the unexamined point).

[3] Our analysis in *Ahmed* further supports restricting the acclimatization test, and its shared-parental-intent exception, to cases involving multiple countries. As authority for adopting the shared-parental-intent test in *Ahmed*, we turned to other circuits' cases. Every one of those cases involved children living in multiple countries. *See Mauvais v. Herisse*, 772 F.3d 6 (1st Cir.

This uncomplicated approach also has been employed in rulings by our sister circuits. The Ninth Circuit is one of the few courts to explicitly consider what it takes for very young children to acquire an initial habitual residence. In *Holder*, the court first observed that a child does not automatically become a habitual resident of the place in which the child is born. 392 F.3d at 1020. True enough. "Nonetheless," the court continued, "if a child is born where the parents have their habitual residence, the child normally should be regarded as a habitual resident of that country." *Ibid.* Those circumstances "clearly appl[ied]" to the Holders' youngest son: "He was born in California while both of his parents were habitual residents of the United States." *Ibid.* (holding that child was habitual resident of United States when family moved to Germany when he was two months old); *see also Nicolson v. Pappalardo*, 605 F.3d 100, 104–05 (1st Cir. 2010) (concluding that parties' three-month-old daughter, who had lived exclusively in Australia with her married parents, had acquired an initial habitual residence in that country by the time her American mother took her to Maine, despite the mother's claims

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2014) (United States, Haiti, France, and Canada); *Guzzo v. Cristofano*, 719 F.3d 100 (2d Cir. 2013) (United States and Italy); *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006) (United States, Finland, and Russia); *Maxwell v. Maxwell*, 588 F.3d 245 (4th Cir. 2009) (United States and Australia); *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012) (United States and United Kingdom); *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013) (United States and Ireland); *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010) (United States, Netherlands, and Israel); *Holder*, 392 F.3d 1009 (9th Cir. 2004) (United States, Germany, and Japan); *Kanth v. Kanth*, No. 99-4246, 2000 WL 1644099 (10th Cir. Nov. 2, 2000) (United States, Denmark, and Australia); *Chafin v. Chafin*, 742 F.3d 934 (11th Cir. 2013) (per curiam) (United States and Scotland).

that she never shared an intent to raise the child in Australia due to disintegration of marriage). Consistent with *Holder* and *Nicolson*, courts often have concluded, implicitly or with little analysis, that a young child is habitually resident in the country of its birth when it lived there in an established home with its parents. *See*, *e.g.*, *Larbie v. Larbie*, 690 F.3d 295, 298, 311 (5th Cir. 2012) (holding that, for a twenty-three-month-old child who had lived exclusively in Texas prior to his mother taking him to the United Kingdom, where she was a permanent resident, the United States "was indisputably his habitual residence before his arrival in the U.K."); *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1057 (E.D. Wash. 2001) (concluding that two-month-old child's habitual residence was the United States prior to the family's move to Greece).

The strict two-part "*Ahmed* test" all too often will compel the conclusion that a very young child is without a habitual residence. It therefore conflicts with the very purposes of the Hague Convention by leaving many young children unprotected. We have observed that the Convention is "generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court." *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996) ("*Friedrich II*"). Under the two-part test, parents who are at odds with one another will be able to "freely engage in a continuous game of abduction ping pong, given the many months or even years in which they could freely abduct the child before any particular location became the child's habitual residence."[4] *Ovalle v. Perez*, 681 F. App'x 777, 784 (11th

[4] It bears emphasizing that a finding of no habitual residence means that either parent, regardless of gender, is free to abduct

Cir. 2017) (per curiam). Such a result is inconsistent with the Hague Convention's laudable goals.

Thus, I concur in Judge Sutton's opinion on its own terms and agree with his reasoning as to one way of upholding Judge Oliver's decisions. I agree that the district court's factual determinations were not clearly erroneous and that *Ahmed*'s two-part test is one way of assessing habitual residence, particularly in multiple country cases. However, I also would hold that the decision below is correct for the reasons set out above.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. The admirable goal of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, ("Hague Convention"), is to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence . . . ." Hague Convention, pmbl. "Additionally, according to the official commentary on the Hague Convention, the Convention should be read to prevent a circumstance where 'the child is taken out of the family and social environment in which its life

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the child and that in such a case *neither* parent will be entitled to relief under the Hague Convention. In other words, had the circumstances been reversed in this case—an American mother who gave birth in the United States and an Italian father who was as disconnected to this country as Monasky was to Italy—the father would have been perfectly entitled to take the child back to Italy (or any other country), and the Hague Convention would have nothing to say about it.

has developed.'" *Robert v. Tesson*, 507 F.3d 981, 988 (6th Cir. 2007) (quoting Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* ¶ 12, *in* 3 Acts and documents of the Fourteenth Session, Child Abduction (1982) [hereinafter Pérez-Vera Report], https://assets.hcch.net/upload/expl28.pdf). To that end, the Hague Convention requires the return of a child who is wrongfully removed or retained to her country of habitual residence.

In this case, plaintiff-appellee Domenico Taglieri must prove by a preponderance of the evidence that his daughter, A.M.T., was wrongfully removed from Italy by her mother, defendant-appellant Michelle Monasky, when A.M.T. was eight weeks old. The key question in this case is: Where was A.M.T. habitually resident prior to her removal from Italy? If her habitual residence was Italy, then her removal was wrongful; conversely, if A.M.T.'s habitual residence was not Italy, then her removal was not wrongful. The district court, analyzing the issue without the benefit of our decision in *Ahmed v. Ahmed*, 867 F.3d 682 (6th Cir. 2017), concluded that Taglieri had proved by a preponderance of the evidence that A.M.T. was habitually resident in Italy.

I agree with the lead opinion that *Ahmed* provides the correct legal standard for determining a child's habitual residence. But I believe that it is the district court's role to decide this case in the first instance, with the benefit of our clarification of the law, and in accordance with the proper standard of review. Thus, I respectfully dissent from the decision to affirm on the basis of the cold record, and believe that we should remand to the district court, who had the benefit of

presiding over the hearing in this case, to make the relevant determinations.

I.

"The Convention does not define 'habitual residence.'" *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1400 (6th Cir. 1993). Instead, as the lead opinion explains, we have developed a two-step analytical framework to determine a child's habitual residence.

Our "primary approach" is the acclimatization standard. *Ahmed*, 867 F.3d at 688–89. Under this standard, "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.'" *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007) (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)). Factors that are relevant to our inquiry of whether a child is acclimatized to a particular country include: (1) the child's attendance at school or pre-school, *see id.* at 996; (2) "the child's activities . . . including social engagement and extracurricular programming," *Neumann v. Neumann*, 684 F. App'x 471, 479 (6th Cir. 2017); *see Redmond v. Redmond*, 724 F.3d 729, 743 (7th Cir. 2013); (3) the child's significant personal connections with people in the country, *see Robert*, 507 F.3d at 996; (4) the child's fluency in the language of that country, *see Jenkins v. Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009); (5) the location of the child's belongings, *see id.* at 557; and (6) the child's expressed desire to live in a particular place, *see Robert*, 507 F.3d at 996. Not all of these factors may be relevant in every case, and there may be other pertinent information that is also suggestive of a child's acclimatization. Furthermore, some factors may be more indicative of acclimatization than

others, such as where a child attends school. *Robert*, 507 F.3d at 996.

When conducting this fact-intensive analysis, we are guided by a set of overarching principles. *Id.* at 989. First, habitual residence is not an inquiry governed by technical rules, but rather "[t]he facts and circumstances of each case should . . . be assessed without resort to presumptions or pre-suppositions." *Friedrich I*, 983 F.2d at 1401 (quoting *In re Bates*, No. CA 122/89, High Court of Justice, Family Div'n Ct., Royal Court of Justice, United Kingdom (1989), 1989 WL 1683783). Second, because the issue of wrongful removal or retention revolves around the child's habitual residence, "the court must focus on the child, not the parents." *Id.* Third, our inquiry must focus on the child's "past experience, not future intentions." *Id.* Fourth, only one nation can be a child's habitual residence. *Id.* Fifth, the nationality of a child's parents or which parent is the primary caregiver does not affect a child's habitual residence. *Id.* at 1401–02. Finally, the contested action—whether it be the removal or retention of the child—cannot alone alter a child's habitual residence; instead only "a change in geography and the passage of time" can do so. *Id.* at 1402.

But when a child is so young, or developmentally disabled, as to "lack the cognizance to acclimate to any residence," the acclimatization standard is unworkable. *Ahmed*, 867 F.3d at 690. If that is the case, then we instead use the shared parental intent standard. Lead Op. at 5; *Ahmed*, 867 F.3d at 690. The question of when a child is developmentally unable to acclimatize "is not a bright-line rule, and the determination of when the acclimatization standard is impracticable must largely be made by the lower courts, which are

best positioned to discern the unique facts and circumstances of each case." *Ahmed*, 867 F.3d at 690. In *Ahmed*, for example, we affirmed the district court's conclusion that twins who were around nine months old were not old enough to acclimatize to their surroundings. *Id.*

Once a district court has determined that the acclimatization standard is unworkable in a particular case, it must determine whether the parties shared an intent about where to raise the child by looking for external indicia of parties' intent. In order to determine whether the parties shared an intent about where to raise the child, we must look for external indicia of the last shared agreement of the parties. *See Mauvais v. Herisse*, 772 F.3d 6, 12 (1st Cir. 2014) ("We look specifically to the latest moment of the parents' shared intent, as the wishes of one parent alone are not sufficient to change a child's habitual residence." (internal quotation marks omitted)); *cf. Berezowsky v. Ojeda*, 765 F.3d 456, 468 (5th Cir. 2014) ("A shared parental intent requires that the parents actually *share* or jointly develop the intention. In other words, the parents must reach some sort of meeting of the minds regarding their child's habitual residence, so that they are making the decision together."). Self-serving testimony by either party about their internal thought process is insufficient on its own to establish either a shared parental intent or a lack thereof.

For example, in *Ahmed* we affirmed the district court's factual finding about the couple's lack of shared parental intent, which was based on: (1) testimony regarding the parties' acrimonious marital relationship; (2) Mrs. Ahmed's contemporaneous comments to a friend that she planned to return to Amer-

ica and not permanently reside in the United Kingdom; and (3) Mrs. Ahmed's decision to make medical appointments for her children in the United States and maintain her professional license and numerous insurance policies in this country. 867 F.3d at 690–91. Importantly, even though Mr. Ahmed demonstrated that the couple had a "settled mutual intent to live in the United Kingdom in the fall of 2013, before the twins were conceived," we affirmed the district court's finding that the parties lacked a mutual intent to raise their infants in the United Kingdom "from the time the children were conceived until Mrs. Ahmed retained them." *Id.* at 690–91.

Other factors federal courts have considered in this analysis include: (1) a separation agreement signed by both parents stating that the child would reside in a particular country, *Guzzo v. Cristofano*, 719 F.3d 100, 110 (2d Cir. 2013); (2) the parents' and child's visa status in the country that the petitioner claims is the child's habitual residence, *id.* at 111; *Kijowska v. Haines*, 463 F.3d 583, 588 (7th Cir. 2006); (3) a disavowal by one parent to seek custody of the child, *Kijowska*, 463 F.3d at 588; (4) the parents' living situation, including whether they lived together, they owned or rented a home, the length of the lease, the retention of other residences, etc., *Mauvais*, 772 F.3d at 13; *Maxwell v. Maxwell*, 588 F.3d 245, 252 (4th Cir. 2009); (5) the parents' employment, *Maxwell*, 588 F.3d at 252; and (6) the depth of any ties maintained by the parties to other countries, *id.*

This is necessarily a fact-intensive inquiry. Pérez-Vera Report ¶ 15; *cf. Friedrich I*, 983 F.2d at 1401. Thus, for example, the purchase of a bassinet or a car seat for a newborn does not definitely indicate the parents' shared intent to raise the child in a particular

country; the parents may merely wish to bring the child home from the hospital safely and not have him sleep on the floor. In contrast, if the parents' purchase of the bassinet and car seat is in conjunction with their decoration and outfitting of an entire nursery with other supplies that are not essential to an infant's immediate needs, this objective evidence points towards a shared parental intent to raise the child in that place.

It is possible that, after the district court analyzes the facts under the shared parental intent standard, the court will conclude that it is unclear whether the parents shared an intent. Because the petitioner in a Hague Convention case must establish by a preponderance of the evidence that a child has been wrongfully removed or retained from her habitual residence, 22 U.S.C. § 9003(e)(1)(A), if the petitioner cannot demonstrate where the child's habitual residence is located she has not satisfied her burden. *Ahmed*, 867 F.3d at 691.

In rare situations, an infant may not have a habitual residence. *Delvoye v. Lee*, 329 F.3d 330, 333 (3d Cir. 2003) ("[W]here the [marital] conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence."); *In re A.L.C.*, 607 F. App'x 658, 662 (9th Cir. 2015) ("When a child is born under a cloud of disagreement between parents over the child's habitual residence, and a child remains of a tender age in which contacts outside the immediate home cannot practically develop into deep-rooted ties, a child remains without a habitual residence because if an attachment to a State does not exist, it should hardly be invented." (internal quotation marks and citation omitted)). When a child does not

have a habitual residence, the Hague Convention is inapplicable.

This does not create a legal presumption against finding a habitual residence for infants. In most cases, sufficient objective external indicia will exist to guide the district court's analysis of the shared parental intent. For example, every party will have an immigration status in the country of purported habitual residence, whether it be citizenship, permanent residency, a work visa, a tourist visa, or a lack of any legal status. Furthermore, every party will have some kind of living situation. The point is that if, after analyzing a child's habitual residence under our two-step framework, the district court cannot determine where a child is habitually resident, it should not invent a habitual residence because of the faulty assumption that every child must have such a residence.

II.

"We review the district court's findings of fact for clear error and review its conclusions about American, foreign, and international law *de novo*." *Friedrich v. Friedrich* (*Friedrich II*), 78 F.3d 1060, 1064 (6th Cir. 1996). The district court's ultimate determination of habitual residence—in other words, its application of the legal standard to its findings of fact—is reviewed de novo. *See Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc) ("Lower court findings of ultimate facts based upon the application of legal principles to subsidiary facts are subject to *de novo* review."). The lead opinion muddies these long-established waters, and states that this is entirely a question of fact. Lead Op. at 6–8. This is an unacknowledged re-writing of our precedent. *See*, *e.g.*, *Ahmed*, 867 F.3d at 686; *Simcox v. Simcox*, 511 F.3d 594, 601 (6th Cir. 2007); *Robert*, 507 F.3d at 995. And it also

puts us at odds with the standard of review used by our sister circuits in these cases. *See Darin v. Olivero-Huffman*, 746 F.3d 1, 9 (1st Cir. 2014); *Larbie v. Larbie*, 690 F.3d 295, 306 (5th Cir. 2012); *Maxwell*, 588 F.3d at 250; *de Silva v. Pitts*, 481 F.3d 1279, 1281 (10th Cir. 2007); *Koch v. Koch*, 450 F.3d 703, 710 (7th Cir. 2006); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004); *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004); *Gitter v. Gitter*, 396 F.3d 124, 129, 132–133, 133 n.8 (2d Cir. 2005); *Feder*, 63 F.3d at 222 n.9; *but see Silverman v. Silverman*, 338 F.3d 886, 897 (8th Cir. 2003) (en banc) (holding that "habitual residence [is] a legal determination subject to de novo review" and not applying clear-error review to the district court's findings of fact).

III.

In this case, the district court attempted to analyze the parties' shared parental intent in its determination of A.M.T.'s habitual residence. R. 70 (Dist. Ct. Op. at 21) (Page ID #1885). But because the district court issued its decision prior to our adoption of the shared parental intent standard in *Ahmed*, the district court was forced to hypothesize about the contours of this standard. Consequently, in its analysis the district court focused on two circumstantial facts, almost to the total exclusion of other direct evidence.

First, the district court emphasized that Monasky lacked definitive plans to leave Italy when A.M.T. was born; in other words, she did not yet have a plane ticket to the United States. *Id.* at 22 (Page ID #1886). But even assuming, counterfactually, that Monasky and Taglieri were in perfect accord that Monasky would travel to the United States with A.M.T. shortly after the child's birth, Monasky needed to wait until A.M.T.'s passport was issued. Therefore, the lack of a

specific departure date is relevant, but not dispositive. There is reason to be cautious in overly emphasizing this factor: In some situations, there may be logistical obstacles preventing a child from traveling across international borders that mean that the child's continued presence in a country is not suggestive of the parents' shared parental intent. *See*, *e.g.*, *Maxwell*, 588 F.3d at 248–49, 253 (holding that the mother and children's continued residence in Australia did not indicate that the mother agreed with the father that their children should be raised in that country, as the father had hidden the children's passports and refused to provide consent when the mother tried to apply for new travel documents). Conversely, a parent's travel plans may be a poor proxy for the parents' agreement to raise their child in a particular locale. The fact that one parent plans to leave the country with the child—and may even have bought plane tickets to do so—cannot alone demonstrate that the parents' shared parental intent was to raise the child in that destination country or that the parents lacked the intent to raise the child in the originating country.[1]

Second, the district court's conclusion that the parties had established a marital home in Italy at some point in time appears to have been the predominant factor in its analysis. R. 70 (Dist. Ct. Op. at 20–

[1] To hold otherwise would allow one party's change of mind to manipulate a child's habitual residence. Imagine a case in which there are external indicia that the parents intend to raise their newborn in Country A. The evidence indicates that the parents shared this intent until their infant was six months old. Then the mother decides unilaterally that she wants to raise the child elsewhere and removes the child to Country B. The court must look to the parties' shared intent prior to the mother's unilateral change of heart otherwise the removing or retaining parent's wishes would be sufficient to change a child's habitual residence.

21) (Page ID #1885–86). The district court's almost total reliance on a marital home that existed for less than a year in its evaluation of the parties' shared parental intent is somewhat confusing, especially considering that the parties resided approximately three hours apart from shortly after Monasky conceived A.M.T. until her final trip to Lugo in March 2015. R. 47 (Jt. Stip. at ¶¶ 10–11, 26) (Page ID #1018, 1020). More importantly, although any existence of a marital home is relevant evidence of parties' shared parental intent, it cannot be dispositive. The key inquiry under the shared parental intent standard is where the parents "intended the children to live." *Ahmed*, 867 F.3d at 690; *cf. Holder*, 392 F.3d at 1016–17 ("In analyzing [the parents'] intent, we do not lose sight of the fundamental inquiry: the *children's* habitual residence. Parental intent acts as a surrogate for that of children who have not yet reached a stage in their development where they are deemed capable of making autonomous decisions as to their residence." (footnote omitted)). Certainly, if the parents resided together in a particular locale prior to and after the birth of an infant this is evidence that they shared an intent to raise their child in that place. But the existence of a marital home is still only proxy evidence, and thus cannot be the overriding factor. *See Ahmed*, 867 F.3d at 690–91 (holding that, even though the parties "had a settled mutual intent to live" together in the United Kingdom before their twins were conceived, there was no shared parental intent to raise the children in that country).

The lead opinion argues that, as an appellate court, we should not "rebalance the relative weights" of the various facts, as considered by the district court. Lead Op. at 9 (emphasis omitted). But here the district court was speculating about the contours of the

shared parental intent standard because we had not yet adopted that test. Indeed, our prior case law left open the question of whether the acclimatization standard was the appropriate test to determine a very young or developmentally disabled child's habitual residence. *Robert*, 507 F.3d at 992 n.4; *Simcox*, 511 F.3d at 602 n.2. As the appellate court, we should not presume that the district court would make the same decision with the benefit of our decision in Ahmed. Instead, we should give proper deference to the district court and remand so that the district court can evaluate A.M.T.'s habitual residence in light of *Ahmed* and our decision today. *See Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 901 (6th Cir. 2016) ("[A] remand is required for the district court to apply the correct legal standard.").

IV.

Like many Hague Convention cases, this is a deeply troubling and hard case. As it turns on conducting a fact-intensive inquiry, as guided by our decision in *Ahmed*, I believe that we should remand to the district court so that it can decide the facts within the proper legal framework. Thus, although I agree with the lead opinion about the applicable legal standard, I respectfully dissent from its conclusion to affirm.

DISSENT

JULIA SMITH GIBBONS, Circuit Judge. I concur in Judge Moore's and Judge Stranch's opinions in full. I therefore agree with the majority that *Ahmed* provides the correct legal standard for determining a child's habitual residence but believe that the case

should be remanded so that the district court can make that determination in this instance. I offer the following separate dissenting remarks.

If there is one point on which we all seem to agree, it is that child-abduction cases are difficult and contentious. Such cases are highly fact-intensive yet often involve tangled and conflicting accounts from the opposing sides. That is why these cases are best resolved by the district judges, who engage directly with the testimony and other evidence.

I write separately to address the issue raised by the majority: whether Judge Oliver's opinion contains reversible error. Because I believe that the district court is the better forum in deciding the weight of the evidence under our newly-adopted standard, I dissent from the majority and argue that we should remand the case and allow the district court to evaluate A.M.T.'s habitual residence.

Although a district court's habitual residence determination is based on factual findings that we review for clear error and the determination itself is reviewed for abuse of discretion, "[t]he question of *which standard* should be applied in determining a child's habitual residence under the Hague Convention is one of law, and is reviewed de novo by this Court." *Ahmed v. Ahmed*, 867 F.3d 682, 686 (6th Cir. 2017) (emphasis added); *see also Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003) ("Mixed questions of law and fact are reviewed *de novo*. A district court's findings of ultimate facts, based upon the application of legal principles to subsidiary facts, are also subject to *de novo* review.") (citing *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc)).

To be sure, there was no clear error in Judge Oliver's factual determinations. Nothing in his opinion leaves a "definite and firm conviction that a mistake has been committed," *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), or "strikes one as wrong with 'the force of a five-week-old, unrefrigerated' aquatic animal" as the majority points out. *Supra* at 7. It thoroughly engages with the facts and even correctly "[a]ssum[es]" that the shared intent of the parents is "relevant" to the resolution of this case. *Taglieri v. Monasky*, No. 1:15 CV 947, 2016 WL 10951269, at *10 (N.D. Ohio Sept. 14, 2016).

But it is difficult to apply a legal standard that you do not know. At the time of his decision, Judge Oliver did not have the benefit of our opinion in *Ahmed* articulating the proper shared parental intent standard. While the holding in *Ahmed* follows from existing precedent, it also, at a minimum, defines the shared parental intent standard in a way not previously provided by our court. Judge Oliver therefore had no choice but to try and predict the standard's precise dimensions. As a result, rather than focusing on where the parents "intended the child[] to live," *Ahmed*, 867 F.3d at 690, Judge Oliver incorrectly centered his inquiry on whether the parties had established a "marital home" in Italy and on Monasky's failure to immediately leave that marital home for the United States after the child's birth, *Taglieri*, 2016 WL 10951269, at *10.

The majority is correct in finding no error in Judge Oliver's factual findings but errs in appraising his application of those factual findings to an incorrect legal standard—one that focused on the parents' relationship rather than on their intent for the child's home. *See Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396,

1401 (6th Cir. 1993) ("To determine the habitual residence, the court must focus on the child, not the parents . . . ."). Accordingly, because we review the application of the correct legal standard de novo and Judge Oliver did not apply the correct standard, there was reversible error. Reviewing the court's determination in that regard does not strip the district courts of their ability to rule as the facts of each specific case dictate.

The majority is concerned that an inquiry focused on the shared intent of the parents for the child would create a legal presumption against finding a habitual residence for infants, because parents will so often disagree on such aspects of their child's life. Similarly, Judge Boggs, in his concurrence, worries that a strict two-part test would run the risk of leaving very young children, who do not have the capacity to acclimate, unprotected by the Hague Convention. Yet, I agree with Judge Moore that district courts have the ability to rule as the facts of each specific case dictate. *See*, *e.g.*, *Moore Dissent* at 18 ("[H]abitual residence is not an inquiry governed by technical rules, but rather '[t]he facts and circumstances of each case should . . . be assessed without resort to presumptions or presuppositions.'") (quoting *Friedrich I*, 983 F.2d at 1401)); *Id.* at 19 ("The question of when a child is developmentally unable to acclimatize 'is not a bright-line rule, and the determination of when the acclimatization standard is impracticable must largely be made by the lower courts, which are best positioned to discern the unique facts and circumstances of each case.'") (quoting *Ahmed*, 867 F.3d at 690)); *Id.* at 20 ("This is necessarily a fact-intensive inquiry."). I thus advocate that the case be remanded back to the district court to make that determination. Determining habitual residence is a fact-intensive inquiry. But, determining

whether the district court applied the right standard in appraising those facts is a legal determination.

In determining whether parents had a shared intent, Judge Oliver, as well as future district judges faced with this question in similar cases, may very well find that an infant has an established habitual residence despite her young age. But such a finding should follow from the application of the shared parental intent standard, not from a district court's previous best attempt to divine the correct standard on its own. The deference owed the district court entails letting it decide how the facts apply following *Ahmed* and the opinions here. Affirmance without the opportunity to place its factual findings within the proper legal framework takes the decision away from the district court. Accordingly, the proper result in this case is to reverse and remand with instructions for Judge Oliver to apply the shared parental intent standard as it is now defined.

DISSENT

JANE B. STRANCH, Circuit Judge, dissenting. I join fully in the dissents of Judge Moore and Judge Gibbons. I write separately because I find perplexing the lead opinion's conclusion that the dissent would surely "make the next case harder[] by assuming the role of principal decision maker." Lead Op. at 10. It is the lead opinion that usurps the role rightly belonging to the district court by determining how that court should apply our newly created standards to the facts the district court found from its "ring-side seat at the trial." *Id.* The lead opinion implies that it can say how the district court would rule because that court predicted the standard we would subsequently adopt

in *Ahmed*. It did not. The district court addressed parental intent based on its assumption that "ordinarily a court would conclude that the intent of the parties" is to remain in the "marital home." *Taglieri v. Monasky*, No. 1:15 CV 947, 2016 WL 10951269, at *10 (N.D. Ohio Sept. 14, 2016). That presumption is not the test we formulated in *Ahmed* or that the lead opinion re-affirms today. As the lead opinion explains, *Ahmed* asks the court to "identify the location where the parents 'intended the child[] to live.'" Lead Op. at 6 (citing *Ahmed v. Ahmed*, 867 F.3d 682, 690 (6th Cir. 2017). The district court has not had the opportunity to assess the facts of this case in light of the standards we developed after its 2016 decision.

We cannot presume what the district court would do under our new standards. We should instead follow the procedure of our sister circuit and return this case to the district court. *Gitter v. Gitter*, 396 F.3d 124, 136 (2d Cir. 2005) ("The district court did not know at the time of its decision the legal standard by which this court would adjudicate Hague Convention disputes. We accordingly remand to permit the district court to consider the facts explicitly in light of this opinion."). The principle underlying this procedure applies even more so here. Since the district court's 2016 decision, our court has addressed the legal standards applicable to Hague Convention disputes not once but twice, resulting in the *Ahmed* panel decision and ultimately the several opinions now emerging from the en banc court. We have struggled to choose and to articulate our standard, which suggests to me that our sister circuit has it right. We should remand this case to the district court to "do what district courts do best," Lead Op. at 7, and exer-

cise its right and ability "to consider the facts explicitly in light of" the legal standards as we have now articulated them. *Gitter*, 396 F.3d at 136.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-4128

DOMENICO TAGLIERI,

Plaintiff-Appellee,

v.

MICHELLE MONASKY,

Defendant-Appellant.

Before: COLE, Chief Judge; BOGGS, BATCHELDER, MOORE, CLAY, GIBBONS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, LARSEN, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs and arguments of counsel,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOMENICO TAGLIERI,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 16-4128
	)	
MICHELLE MONASKY,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:15-cv-00947—Solomon Oliver, Jr.,
District Judge.

Argued: May 3, 2017

Decided and Filed: November 30, 2017

Before: BOGGS, MOORE, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Christopher J. Baum, GIBSON, DUNN & CRUTCHER, LLP, Washington, D.C., for Appellant. John D. Sayre, NICOLA, GUDBRANSON & COOPER, LLC, Cleveland, Ohio, for Appellee. **ON BRIEF**: Christopher J. Baum, Amir C. Tayrani, Melanie L. Katsur, GIBSON, DUNN & CRUTCHER, LLP, Washington, D.C., Christopher R. Reynolds, Amy M. Keating, ZASHIN & RICH CO., L.P.A., Cleveland, Ohio, for Appellant. John D. Sayre, Amy Berman

Hamilton, NICOLA, GUDBRANSON & COOPER, LLC, Cleveland, Ohio, for Appellee. Rachel G. Skaistis, CRAVATH, SWAINE & MOORE LLP, New York, New York, for Amicus Curiae.

BOGGS, J., delivered the opinion of the court in which McKEAGUE, J., joined. MOORE, J. (pp. 15–22), delivered a separate dissenting opinion.

OPINION

BOGGS, Circuit Judge. Our decision in this case is controlled by the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Convention" or "Hague Convention"), which dictates that a wrongfully removed child must be returned to the country of habitual residence. Our precedent has demonstrated that where a child lives exclusively in one country, that country is presumed to be the child's habitual residence. In fact, we have gone so far as to call such cases "simple." Because we hold that in this case the country of habitual residence is Italy and that there is no grave risk of harm to the child under the meaning of the Convention, we must affirm the district court's judgment ordering the return of A.M.T. to Italy under the Hague Convention.

I

Domenico Taglieri, a citizen of Italy, was studying for a doctoral degree at the University of Illinois at Chicago, when he met Michelle Monasky, an American citizen who was joining his research team. The two colleagues began dating and eventually married in September 2011. Taglieri received his Ph.D. in 2011 and obtained a post-doctoral appointment at the University of Illinois at Chicago. The two made the

mutual decision to move to Italy to pursue career opportunities, with Taglieri leaving first in February 2013. According to Taglieri, he had made it clear that he considered Italy to be his long-term destination, as he was licensed to practice medicine in Italy and would have had to acquire certifications and meet onerous requirements to practice in the United States. But in an e-mail Monasky sent to Taglieri in April 2013, she wrote: "don't think that [the fact that we are moving to Milan or Rome] means we are done with the US [for good.]"

Taglieri began working at a hospital in Palermo, Italy, in February 2013. In June 2013, he switched to a new position as an anesthesiologist at Humanitas Hospital in Milan. The next month, Monasky moved to Italy to join Taglieri in Milan. She received a fellowship with Università Vita Salute San Raffaele in Milan in September 2013. In April 2014, Monasky was given a two-year fellowship with Humanitas Hospital, with a significant increase in pay. Taglieri had a one-year contract with Humanitas Hospital, which the hospital did not offer to renew, and he began looking elsewhere for a new position. In June 2014, he secured a permanent position with Maria Cecilia Hospital in Lugo, a city outside of Ravenna that is about two hours and forty minutes by car southeast of Milan. In addition, he found an apartment in Lugo where he could stay during the workweek.

Monasky became pregnant in May 2014. According to Taglieri, the couple had decided to start a family and try for a child. Monasky disputes this description, stating that she had become pregnant despite her wishes because of Taglieri "becoming more aggressive with sex." She recounts in particular one occasion where Taglieri allegedly got on top of her and insisted,

"[S]pread your legs, or I will spread them for you." In addition to sexual abuse, Monasky alleges that Taglieri frequently slapped or hit her with force, causing her to grow increasingly fearful. Taglieri acknowledges "smack[ing]" Monasky once in March 2014, but denies that he struck her again after that time. The district court in this case concluded that Taglieri had "struck Monasky on her face in March 2014," and found Monasky's further testimony with respect to the domestic abuse credible.

Tension was increasing in the marriage for other reasons in addition to the physical and sexual abuse. The long-distance arrangement of Taglieri's frequent travel and stays in Lugo while Monasky was in Milan put greater strain on the marriage. Furthermore, in accordance with Italian law, Monasky was required to suspend her work and go on maternity leave in January 2015, in anticipation of the upcoming birth of her child. She encountered difficulties in having her academic credentials recognized by Italy, to the degree that she wrote to the United States Senator of her family's home state of Ohio for assistance. Monasky did not speak much Italian and had significant problems performing basic tasks, such as calling someone to fix the electricity, as a result. Finally, her pregnancy was medically complicated, with Monasky suffering a near-miscarriage early on.

All of these stressors produced a rocky relationship. Monasky applied for jobs in the United States, contacted American divorce lawyers, and researched American health- and child-care options. But the couple also investigated Italian child-care options and discussed purchasing items for the baby, such as a stroller, car seat, and night light. Monasky sought an Italian driver's license and she and Taglieri moved to

a larger apartment in the Milanese suburb of Basiglio under a one-year lease under Monasky's name (with the option to break the lease on three months' notice). By January, "emails between the parties, reflecting words of affection, suggest that their relationship was less turbulent than before." Serenity, if it did exist, was short-lived. In early February, the two began "having a lot of fights," and arguing over how the birth would proceed. Monasky e-mailed Taglieri regarding a possible collaborative divorce. At the same time, she sought quotes for the cost of moving to back to Ohio.

At a subsequent pregnancy-check-up appointment in mid-February, doctors recommended that labor be induced. Monasky declined and the two left despite Taglieri's protestations. According to Taglieri, he was angry, concerned, and embarrassed that Monasky had refused the procedure, rejected the advice of fellow physicians, and declined to stay at the hospital. During the forty-minute ride home, the pair argued over Monasky's decision. Minutes before they arrived at their apartment, Monasky told Taglieri that she had begun experiencing contraction-like pains and asked him to bring her back to the hospital. Taglieri refused, advising that they should wait and see how things progressed. By this point, it was after ten o'clock in the evening. The two arrived at the apartment and continued to argue. During this "heated conversation," Taglieri called Monasky "the son of a devil" and told her that she could take a taxi back to the hospital if she wanted to return. Sometime during the very early morning hours of the next day, Monasky took a taxi to the hospital—having experienced contractions all night long. Taglieri contends that Monasky left while he was sleeping, and he immediately went to the hospital once he awoke and learned that Monasky was already on her way.

After protracted labor, A.M.T. was born via an emergency caesarean section. Taglieri and Monasky's mother, whom he had brought from the airport, were present for the birth. After Monasky was released from the hospital after a week's stay, Taglieri returned to Lugo while Monasky endured a "difficult" recovery in Basiglio, cared for by her mother. Her recovery was hampered by a previous surgery, which—coupled with the caesarean section—made rising or sitting strenuous. Taglieri returned to Basiglio at the beginning of March, following the departure of Monasky's mother, and Monasky broached the subject of divorce once more. She renewed the discussion in an e-mail sent the next day, noting that although Taglieri "seemed . . . not ready," she wanted to divorce him amicably and leave Italy with A.M.T. Monasky informed her family of her intentions to divorce Taglieri through numerous e-mails. Taglieri returned to Lugo alone on March 2, but the next day Monasky agreed to join him in Lugo with A.M.T. The parties strongly dispute the motivation behind the trip: Monasky stated that she agreed "in a moment of weakness," given the difficulties of caring for a newborn child alone while recovering from the caesarean section, and brought only "a couple of suitcases and [a] stroller." Taglieri hoped the couple would use the time to "clarify any existing issues."

Taglieri described the family's time in Lugo as a reconciliation, during which they returned to "the regular course of . . . life." Monasky continued preparations to take her Italian driving test by signing up with a driving school for mandatory lessons and completing a number of sessions, registered the family for an au pair and sought childcare for "June [through] August," scheduled doctor's appointments for A.M.T., and coordinated with her aunt to schedule a future

visit to Italy in September. The couple celebrated A.M.T.'s one-month birthday, traveled to Bologna for a family day-trip, discussed ideas regarding their scientific work, and asked Monasky's mother-in-law to babysit A.M.T. when Monasky traveled to a professional conference in Germany in July.

Conversely, Monasky stated that the trip to Lugo was not an attempt to reconcile the marriage; rather, her intent to leave Italy was fixed. She explained the coordination with her aunt was the result of not wanting to mention an impending divorce to a family member who was only an infrequent contact, and she hoped to be able to explain things face-to-face in the United States. As for the driver's license and medical appointments, Monasky testified that they were necessary to take care of A.M.T. and "until [she and A.M.T.] could return to the United States, [she and Taglieri] were just doing what any parent would do and just schedul[ing] appointments."

Monasky also engaged in a number of other activities that indicated that she would be in Italy in at least the near future: she wrote to her OB/GYN in Milan and stated that she hoped to bring A.M.T. to meet her and she continued her attempts to get her degrees recognized. She was, however, in contact with Italian divorce attorneys in an attempt to learn more about Italian divorce law and child custody. Additionally, in early March 2015 Monasky withdrew Taglieri's access to a joint investment account, allegedly out of concern that he would remove all of its funds and then leave her with nothing. Taglieri was upset that he could not view the account, and Monasky restored his access within a week. While the two were in Lugo, they arranged to complete the process of registering A.M.T.'s birth at the United States consulate and obtaining her

Italian and American passports (a process that had begun in late February). According to Taglieri, these passports were necessary for a trip that was planned for the family to visit Monasky's family in the United States in May.

On March 31, 2015, Monasky and Taglieri had another argument, which began over Taglieri refusing to allow Monasky to change A.M.T.'s clothes after she had urinated in them because of the cost of laundry. In the course of the argument, Monasky slammed the table. According to Monasky, Taglieri raised his hand as if to strike her with a terrible look on his face that frightened her. Taglieri did not hit her, however. After this, Taglieri left for work and Monasky took A.M.T. to the police, reported her husband, and sought refuge in a safe house in an undisclosed location. Her statement to the police indicated that her husband was abusive, that at the hospital nursery he had shouted at a crying A.M.T. that he would buy formula and shove it up A.M.T.'s bottom, and that she was frightened that Taglieri would kill her. She indicated that she was "waiting in Lugo for [her] exam [on] April 15, then [would] try to return to Milan, and try to open a new bank account for my salary, [etc.]" Taglieri returned home to find an empty apartment and neither Monasky nor her parents would answer his phone calls. He went to the police, explaining that he could not find his wife and child, and asked if they could send a police car to check the Basiglio apartment to see if she was home. The police instead suggested that he find himself a lawyer.

Taglieri did acquire counsel and eventually was put into contact with Monasky over the phone. Through his counsel, he sought to withdraw his consent for the American passport application and to

block A.M.T.'s passports to prevent her from leaving the country. Despite these efforts, Monasky obtained her daughter's American passport and left Italy with eight-week-old A.M.T. on April 15, 2015, for the United States. Taglieri was informed that Monasky and A.M.T. had gone missing from the safe house and he sought proceedings in an Italian court to determine his parental rights. The court terminated Monasky's parental rights, and Taglieri filed a petition in the United States District Court for the Northern District of Ohio on May 14, 2015, seeking the return of his daughter to Italy pursuant to the Convention. The parties then presented their arguments before Chief Judge Solomon Oliver, and Monasky sought summary judgment and the denial of the request for a return order.

After denying Monasky's motion for summary judgment, the district court held a four-day trial in March 2016. In an order issued six months later, the district court granted Taglieri's petition for the return of A.M.T. to Italy, to be accomplished within forty-five days. The district court held that in cases of very young children, "the shared intent of the parties is relevant," and that under this standard, A.M.T.'s habitual residence (and therefore the location that she should be returned to) was Italy. Chief Judge Oliver found that Monasky had no definitive plans to return to the United States until the final altercation at the end of March. Finally, the court also held that the other requirements of the Convention had been met: Taglieri had properly exercised his custody rights, A.M.T.'s removal was wrongful, and Monasky had not shown by clear and convincing evidence that Taglieri posed a grave risk of harm to A.M.T. Monasky moved to stay the order pending appeal to the Sixth Circuit and her motion was partially granted by the district

court to give this court the opportunity to rule on the motion. We denied the motion to stay, finding that "a balance of . . . [relevant] factors weighed against staying the return order." An application for an emergency stay pending appeal submitted to Justice Kagan also was denied. As a result, A.M.T. was returned to Italy.

II

The object of the Hague Convention, as professed in its preamble, is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Convention on the Civil Aspects of International Child Abduction pmbl., Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49 (reprinted at 51 Fed. Reg. 10494 (Mar. 26, 1986)). In order to do so, the Convention established a system whereby "a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute." *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) ("*Friedrich II*"); Convention art. 19. This system is "generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court." *Friedrich II*, 78 F.3d at 1064.

Under the federal implementing statute, the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. §§ 9001–9008, 9010–9011 (Supp. II 2014), 42 U.S.C. § 663 (2012), a petitioner seeking the return of a child must establish by a preponderance of the evidence "that the child has been wrongfully removed or retained within the meaning of the Convention." 22 U.S.C. § 9003(e)(1)(A). The Convention (in relevant

part) defines as wrongful the removal or retention of a child "in breach of rights of custody . . . under the law of the [Contracting] State in which the child was habitually resident immediately before the removal or retention." Convention art. 3. The initial critical question that we must address is whether Taglieri has established that A.M.T. was removed in breach of the law of the State in which she was habitually resident. If so, we must determine whether an exception applies. "We review the district court's findings of fact for clear error and review its conclusions about American, foreign, and international law *de novo*." *Friedrich II*, 78 F.3d at 1064.

A. Habitual Residence

The answer to the first question depends upon the meaning of the term "habitual residence." This court has had the opportunity to explore its meaning before, and a brief summary of our past analysis is in order here. When we were first confronted with the term in *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) ("*Friedrich I*"), we called the facts before us "a simple case. [The child] was born in Germany and resided exclusively in Germany until his mother removed him to the United States . . . ; therefore, we hold that [the child] was a habitual resident of Germany at the time of his removal." *Id.* at 1402. In *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007), we also held that a child who "was born in Mexico and resided there her entire life (other than for some temporary sojourns abroad)" was a habitual resident of Mexico, describing the case as similarly simple. *Id.* at 602. *Simcox* and *Friedrich I* therefore stand for the proposition that when a child has lived exclusively in one country, that country is presumed to be the child's habitual residence.

In *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007), we considered a more difficult question, namely, "what standard should apply when a child has alternated residences between two or more nations." *Id.* at 992. In those cases, we held 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.'" *Id.* at 993 (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)). However, we expressly left resolution of the yet more difficult questions of the application of *Robert*'s acclimatization standard to the case of a child "who lacks cognizance of his or her surroundings," and whether the subjective intentions of such a child's parents are relevant to determining habitual residence. *Id.* at 992 n.4; *see also Simcox*, 511 F.3d at 602 n.2 ("[T]his standard may not be appropriate in cases involving infants or other very young children."). We recently resolved these questions in *Ahmed v. Ahmed*, 867 F.3d 682 (6th Cir. 2017), a case involving very young children traveling between nations. We concluded that, under those circumstances, a court may determine a very young child's habitual residence by considering the "shared parental intent" of where the parents last mutually intended the child to live. *Id.* at 689–90.

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 stand-

ard. *See id.* at 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.").

With this framework in mind, we observe that a straightforward application of precedent would seem to compel the conclusion that the habitual residence of A.M.T. was Italy. Here, A.M.T. was born in Italy and resided there exclusively until Monasky took A.M.T. to the United States in April 2015. Similarly, *Friedrich I* based its conclusion that the child in question had a habitual residence in Germany on the fact that the child had "resided exclusively in Germany." 983 F.2d at 1402. *Simcox* also found exclusive residence dispositive. 511 F.3d at 602.

Monasky and the dissent contend that our recent opinion in *Ahmed* requires a different result. It is true that *Ahmed* spoke broadly about young children, but it dealt specifically with the application of the acclimatization standard, which both *Robert* and *Simcox* recognized as difficult to apply in cases of small children. *Robert*, 507 F.3d at 992 n.4; *Simcox*, 511 F.3d at 602 n.2. But *Robert* made clear that the acclimatization test did not apply to children who had remained in one nation; rather, that test "should apply when a child has alternated residences between two or more nations." 507 F.3d at 992. Properly understood, then,

Ahmed's adoption of a shared-parental-intent standard makes such intent relevant only in those cases where the acclimatization standard both applies and fails. *See Ahmed*, 867 F.3d at 689 (explaining that the "most compelling reason" for adopting the shared-parental-intent standard was the inability of the acclimatization test of *Robert* to address the situation of young children). Accordingly, *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.

Consequently, the dispositive factor here is that this is not a case where "a child has alternated residences between two or more nations," the situation that *Robert*'s acclimatization test was crafted to address and the one that faced the *Ahmed* panel. *Robert*, 507 F.3d at 992; *see also Ahmed*, 867 F.3d at 684–86. Instead, prior to the removal in question, A.M.T. never was outside of Italy. "It would seem that [if] the child has only ever lived in the country where he is born, he must be habitually resident there." Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* 203 (2013). Such a statement appears to hold true for the mine-run of cases. Where 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.[1]

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[1] Again, we reiterate that our case does not concern an infant who has resided in multiple countries, which is the situation that *Ahmed* addressed. We limit our scope to those cases where a

We recognize that there can be some difficulties with our approach. What of the case of *Delvoye v. Lee*, 329 F.3d 330 (3rd Cir. 2003), where a pregnant mother was convinced by the father of the child to give birth in his country for reasons of cost, but lived out of her suitcases and never intended to remain in the new country? *Id.* at 332. Such a scenario is not beyond imagination in our circuit; "birth tourism" for reasons of cost or citizenship is not unheard of and could lead to situations like that in *Delvoye*. We presume that such cases will be few and best dealt with as they arise, in keeping with the Convention's more flexible and fact-intensive nature.[2] *See Robert*, 507 F.3d at 989 ("[H]abitual residence should not be determined through the 'technical' rules governing legal residence or common law domicile" and instead should be guided by "[t]he facts and circumstances of each case.") (second alteration in original) (quoting *Friedrich I*, 983 F.3d at 1401).

B. Exercise of Custody Rights

The district court also concluded that "Taglieri has proven, by a preponderance of the evidence, that he was exercising his custody rights to A.M.T. under Italian law at the time of her removal." The burden of proving the exercise of custody rights falls on the petitioner, who must establish it by a preponderance of the evidence. *Friedrich II*, 78 F.3d at 1064; 22 U.S.C. 9003(e)(1)(A). "Custody rights 'may arise in particu-

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child has been residing exclusively in one State prior to a contested removal.

[2] 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.

lar by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State.'" *Friedrich II*, 78 F.3d at 1064 (quoting Convention art. 3).

Under Italian law, parental responsibility and authority over a child are held by both parents, exercised by mutual accord. 1 C.c. tit. IX, art. 316 (It.). With marriage, a husband and wife acquire the same rights and assume the same duties. 1 C.c. tit. VI, art. 143 (It.). But even upon separation of married parties, the parental responsibilities of both parents continue. 1 C.c. tit. IX, art. 317 (It.). "Under Italian law, the term 'parental responsibility,' though not explicitly defined, 'implies the totality of rights and duties exercised exclusively in the interest of the child by the parents.'" *Taglieri v. Monasky*, No. 1:15-cv-00947-SO, slip op. at 23 (quoting Pl.'s Ex. 60, Prof. Salvatore Patti et al., *Parental Responsibilities: Italy* ¶ 1). Moreover, an Italian juvenile court has determined that Taglieri has parental rights. Thus, it is clear that Taglieri had custody rights to A.M.T. at the time of the removal.

"[I]f 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." *Friedrich II*, 78 F.3d at 1066. There is no evidence of such acts in this record. Taglieri took A.M.T. on a family trip to Bologna and held a celebration for her first month, among other parental acts. Even after A.M.T. was removed from Italy, "Taglieri [took] steps to remain in contact with A.M.T." *Taglieri v. Monasky*, No. 1:15-cv-00947-SO, slip op. at 24. The district court's conclusion that Taglieri was exercising his custody rights to A.M.T. was

not clear error. Accordingly, Taglieri sufficiently demonstrated that the removal of A.M.T. was wrongful.

C. Grave Risk of Harm

Our holding that the removal of A.M.T. was wrongful does not completely resolve the case. Monasky argues that even if we hold that the removal was wrongful, an exception applies. The Convention provides that "the judicial . . . authority of the requested State is not bound to order the return of the child if [the opposing party] establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention art. 13. The burden of proof established by ICARA is Monasky's, who must demonstrate the grave risk of harm by "clear and convincing evidence." 22 U.S.C. 9003(e)(2)(A). We review the district court's decision with regard to grave risk *de novo*. *Simcox*, 511 F.3d at 601.

Simcox illustrates the required showing where a grave risk is alleged. We stressed that the exception "is to be interpreted narrowly, lest it swallow the rule." *Id.* at 604. But we also noted 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." *Id.* at 608. Findings of grave risk are necessarily fact intensive, and thus the findings of the district court are particularly instructive. In this case, the district court found Monasky's testimony with respect to the domestic and sexual abuse against her to be credible. But the court also observed that "the frequency with which Taglieri subjected Monasky to physical violence and severity of the physical violence is unclear," and

found that there was "no evidence to suggest that Taglieri was ever physically violent towards A.M.T." The first half of the exception makes plain that the risk of physical or psychological harm is directed to the child. In *Simcox*, the petitioner (the children's father) had repeatedly struck and belted the children, under the ostensible authority of parental discipline. *Id.* at 599. Our court held that the burden of establishing by clear and convincing evidence a grave risk of harm had been met in that case and that undertakings directed to maintaining the safety of the children likely were appropriate, subject to the discretion of the district court. *Id.* at 609–10. But we found Simcox to be "a close question," and weighed the "serious nature of the abuse, the extreme frequency with which it occurred, and the reasonable likelihood that it will occur again absent sufficient protection." *Id.* at 609. As noted above, Chief Judge Oliver found that the frequency and severity of violence to Monasky were unclear, and that there was no evidence that violence was ever directed at A.M.T.

This is not to say that a child who is not herself subject to physical abuse is never in grave risk of psychological harm or of being placed in an "intolerable situation." Amici argue that A.M.T. was both a direct and indirect victim of physical domestic abuse in utero; that her exposure to domestic violence as an infant creates a grave risk of harm; that Taglieri's history of abusive behavior makes it more likely that he will engage in abusive behavior in the future creating an intolerable situation for A.M.T.; that a pattern of abuse and neglect of A.M.T. creates a grave risk of physical and psychological harm to A.M.T. and places her in an intolerable situation; and that A.M.T.'s separation from her supportive parent, Monasky, further perpetuates the abuse and increases the grave risk of

physical harm. But we must acknowledge that the facts before us, while demonstrating that Taglieri has engaged in appalling and justly censurable activity, do not "show that the risk to the child is grave, not merely serious." *Friedrich II*, 78 F.3d at 1068 (quoting Public Notice 957, 51 Fed. Reg. 10494, 10510 (Mar. 26, 1986)). As a result, Monasky has failed to meet her burden to show by clear and convincing evidence that a grave risk of harm to A.M.T. exists or that there is a grave risk that A.M.T. would be placed in an intolerable situation.

III

The foundation of our test for determining habitual residence has always been the experiences of the child. With regard to determining A.M.T.'s experiences here, "[t]his is a simple case." *Friedrich I*, 983 F.2d at 1402. Having spent her entire life in Italy, it is appropriate to hold that her habitual residence was Italy. Accordingly, we AFFIRM the district court's decision to grant Taglieri's petition to return A.M.T. to her country of habitual residence, Italy.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. The Hague Convention's admirable goal is to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Convention on the Civil Aspects of International Child Abduction (1980). The key question in this Hague Convention case is: Where is A.M.T.'s habitual residence, if one exists at all? The majority recharacterizes our prior

decisions on this issue and, in doing so, alters the standards we have used to determine a child's habitual residence under the Hague Convention. Because I believe that the majority's analysis in this case distorts our precedent, I respectfully dissent.

A.

"The question of which standard should be applied in determining a child's habitual residence under the Hague Convention is one of law, and is reviewed *de novo* by this Court." *Robert v. Tesson*, 507 F.3d 981, 987 (6th Cir. 2007). The determination of habitual residence, on the other hand, "is one of fact, and is reviewed for abuse of discretion." *Id.* at 995. Pursuant to the Hague Convention, "the petitioner must prove by a preponderance of the evidence that the children who are the subject of the petition were removed from their habitual residence." *Id.* (citing *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1400 (6th Cir. 1993)).

B.

We first addressed the question of habitual residence in *Friedrich I*, 983 F.3d 1396. In that case, we articulated "five principles which guide this Court" in determining a child's habitual residence." *Robert*, 507 F.3d at 989. First, habitual residence should not be determined on the basis of technical rules. *Friedrich I*, 983 F.2d at 1401. *Friedrich I* instead said that "[t]he facts and circumstances of each case should . . . be assessed without resort to presumptions or presuppositions." *Id.* (quoting *In Re Bates*, No. CA 122.89, High Court of Justice, Family Div'n Ct., Royal Court of Justice, United Kingdom (1989)). Second, "the court must focus on the child, not the parents" and evaluate the child's experience. *Id.* Third, an inquiry

into a child's habitual residence must "examine past experience, not future intentions." *Id.* Fourth, an individual "can have only one habitual residence." *Id.* Finally, the parents' nationality does not affect the child's habitual residence, but rather the habitual residence is controlled by "geography and the passage of time." *Id.* at 1401–02.

The principles elucidated by *Friedrich I* worked well in that case, where the child had lived exclusively in Germany for two years after he was born, but we recognized that the case provided minimal guidance in other situations. *Robert*, 507 F.3d at 992. Thus, in *Robert*, we adopted an approach developed by other circuits, which we found was "consistent with *Friedrich I*'s holding." 507 F.3d at 993. In *Robert*, we held "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.'" *Id.* (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995)). In adopting this "acclimatization standard," however, we recognized that it would prove difficult to apply in a case involving "a very young or developmentally disabled child [who] may lack cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose" and left open the question of what standard to apply in such a situation. *Robert*, 507 F.3d at 992 n.4. In *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007), decided shortly after Robert, we reaffirmed that the acclimatization standard was the appropriate test to utilize when determining a child's residency, but recognized that "this standard may not be appropriate in cases involving infants or other very young children." 511 F.3d at 602 & n.2.

In our recent decision in *Ahmed v. Ahmed*, 867 F.3d 682 (6th Cir. 2017), we reached the question left open by *Robert* and *Simcox* and addressed the issue of determining habitual residence for infants who are not old enough to have developed "a sense of settled purpose." Because the facts and analysis in that case mirror the case at bar, I will discuss *Ahmed* in detail.

Mr. and Mrs. Ahmed married in 2009 while Mr. Ahmed, a U.K. citizen, lived in London and Mrs. Ahmed, a U.S. citizen, lived in Michigan. *Ahmed*, 867 F.3d at 684. After Mrs. Ahmed finished her optometry studies in the United States, she moved to London to live with her husband. Upon her arrival in 2011, she sought to become a licensed optometrist in the United Kingdom and received the U.K. equivalent of a Social Security Number. *Id.* at 685. Mrs. Ahmed then returned to the United States for further optometry training. Subsequently, in 2013, Mrs. Ahmed rejoined her husband in the United Kingdom; she intended for this to be a permanent move and applied for Indefinite Leave to Remain in the United Kingdom. Following Mrs. Ahmed's return to the United Kingdom, the couple's relationship grew acrimonious. In February 2014, Mrs. Ahmed became pregnant with twins. Following "a bitter argument" in May 2014, she returned to the United States. *Id.* The couple disputed whether or not Mrs. Ahmed planned to return, but Mrs. Ahmed claimed she did not, and brought her valuables back to the United States. Mr. Ahmed traveled to the United States on a three-month visa in order to be present at the birth of the couple's twins. When his visa expired, Mr. Ahmed returned to the United Kingdom. In May 2015, the whole family journeyed to the United Kingdom. Mr. Ahmed asserted that this was a permanent relocation; in contrast, Mrs. Ahmed claimed that this was a short visit to determine

whether her marriage was still viable. In August 2015, Mrs. Ahmed returned to the United States with her children via Bangladesh. *Id.* at 686. Mr. Ahmed subsequently filed a petition in the Eastern District of Tennessee to return the twins under the Hague Convention. The district court denied Mr. Ahmed's petition.

In our subsequent decision affirming the district court's denial of Mr. Ahmed's petition, we extensively discussed our prior cases analyzing the Hague Convention. We began by stating that "[w]e have generally preferred the acclimatization standard because it serves one of the main purposes of the Hague Convention: ensuring a child is not kept from her family and social environment." *Id.* at 688. We noted, however, that there was a "gap" in our precedent "concerning especially young children." *Id.* at 689. Consequently, we discussed the reasons for adopting a different standard for determining habitual residence for infants than for older children. First, "[t]he most compelling reason for applying the settled mutual intent standard is the difficulty, if not impossibility, of applying the acclimatization standard to especially young children." *Id.* Furthermore, we noted the persuasive authority of other circuits: "Every circuit to have determined whether a country constituted a habitual residence considers both the acclimatization and shared parental intent standards. . . . And all but the Fourth and Eighth Circuits prioritize shared parental intent in cases concerning especially young children." *Id.* at 689–90 (collecting cases in which the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh circuits utilize the shared-parental-intent standard). Based on these reasons, we concluded that:

> [I]t is appropriate to consider the shared parental intent of the parties in cases involving especially young children who lack the cognizance to acclimate to any residence. This is not a bright-line rule, and the determination of when the acclimatization standard is impracticable must largely be made by the lower courts, which are best positioned to discern the unique facts and circumstances of each case. We make no changes to the acclimatization standard itself, which lower courts should continue to apply in accordance with our precedent.

Id. at 690 (citations omitted).[1]

Applying this newly clarified analysis to the Ahmeds' situation, we first began with the acclimatization standard as articulated in *Simcox*: "[A] court should consider whether the child has been 'physically present [in the country] for an amount of time sufficient for acclimatization' and whether the place 'has a degree of settled purpose from the child's perspective.'" *Simcox*, 511 F.3d at 602 (second alteration in original) (quoting *Robert*, 507 F.3d at 989). We concluded that the Ahmed twins—who were less than a year old when they traveled from the United Kingdom

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[1] *Ahmed* did not discuss whether the shared-parental-intent standard should apply to "developmentally disabled child[ren who] may lack cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose." *Robert*, 507 F.3d at 992 n.4. This issue is not presented here, but I believe that the reasoning in *Ahmed* as to why the shared-parental-intent standard is appropriate in determining the habitual residence of a very young child is equally applicable to a child who, despite her biological age, is so significantly developmentally disabled that her level of consciousness of her surroundings is equal to that of an infant.

to the United States in August 2015—were unable to have acquired a "degree of settled purpose." *Ahmed*, 867 F.3d at 690. Therefore, "[t]he conclusion that the acclimatization standard is unworkable with children this young then requires consideration of any shared parental intent to determine if Mr. Ahmed has shown that the United Kingdom was the children's habitual residence when they were retained." *Id.* After reviewing the district court's findings of fact, we held that the district court was not clearly erroneous when it found that the Ahmeds lacked a shared intent as to their children's residence. *Id.* Mr. Ahmed, therefore, "failed to carry his burden under the shared parental intent standard." *Id.* Because Mr. Ahmed could not "prove[] by a preponderance of evidence, under either standard, that the United Kingdom was the children's habitual residence when Mrs. Ahmed traveled with them to the United States," we affirmed the district court's denial of his petition. *Id.* at 691.

C.

The majority today holds that A.M.T.'s habitual residence was Italy, the country from which she was taken. Maj. Op. at 11. It reaches that erroneous result by adopting a formalistic, rigid, bright-line rule that a child's habitual residence is her country of birth if she has exclusively resided in that country. Maj. Op. at 10. This conclusion is in contravention of *Friedrich I*'s admonition that residence should not be determined on the basis of bright-line rules and instead "[t]he facts and circumstances of each case should . . . be assessed without resort to presumptions or presuppositions." *Friedrich I*, 983 F.2d at 1401 (internal quotation marks omitted). Furthermore, the majority claims that its bright-line rule is one of "three distinct

standards" that our caselaw has developed to determine a child's habitual residence. Maj. Op. at 9. This characterization distorts our prior precedent which has articulated two standards. "We have generally preferred the acclimatization standard," but when that standard is unworkable, we have applied the shared-parental-intent standard. *Ahmed*, 867 F.3d at 688–90; *see also Simcox*, 511 F.3d at 602 (applying the acclimatization standard, but recognizing another standard may need to be used for children incapable of forming a degree of settled purpose); *Robert*, 507 F.3d at 992–93 (same). *Friedrich I* provides a further set of principles that we use when considering the specific facts and circumstances of each case within the framework of the applicable standard. Simply, our prior precedent does not support the majority's approach in this case.

D.

Our analysis in *Ahmed* compels the result in this case. First, it is clear that the acclimatization standard is not "workable" in this situation. Here, A.M.T. resided in Italy for only eight weeks, from her birth in February 2015 until Monasky returned with her to the United States in April 2015. R. 70 (Dist. Ct. Op. at 1, 8) (Page ID #1865, 1872). We concluded that the eight-month-old twins in *Ahmed* were unable to have a "degree of settled purpose" in Italy due to their age. *Ahmed*, 867 F.3d at 690. Consequently, A.M.T.—an eight-week-old newborn—must also be too young to have developed a "degree of settled purpose" and acclimatized to Italy. Thus, following the analysis in *Ahmed*, because we cannot answer whether Italy is A.M.T.'s habitual residence under the acclimatization standard, we must then turn to the shared-parental-intent standard. *Id.* at 690. If the parties have no

shared intent, then the child has no habitual residence. *See Delvoye v. Lee*, 329 F.3d 330, 333 (3d Cir. 2003) ("[W]here the conflict [in a marriage] is contemporaneous with the birth of the child, no habitual residence may ever come into existence.").

The district court did consider the lack of shared intent to be relevant to its determination of A.M.T.'s habitual residence. R. 70 (Dist. Ct. Op. at 21) (Page ID #1885). It did so, however, without the guidance of our decision in *Ahmed*, and consequently its analysis does not comport with the correct legal standard. The district court incorrectly focused on Monasky's lack of definitive plans to leave Italy immediately—she was waiting until A.M.T.'s passport was issued—and whether or not Monasky and Taglieri had established a marital home in Italy.[2] *Id.* at 21–22 (Page ID #1885–

[2] The district court stated that: "Assuming that the Sixth Circuit would hold that the shared intent of the parties is relevant in determining the habitual residence of an infant child, the court finds that such inquiry in this case would begin with determining whether there is a marital home where the child has resided with his parents." R. 70 (Dist. Ct. Op. at 21) (Page ID #1885). The district court's conclusion, however, that the parties had established a marital home in Italy appears to have been not only the first inquiry in its analysis, but also the overriding factor in its decision. *Id*. at 20–21 (Page ID #1885–86). But while the existence of a marital home may be evidence of a shared-parental intent for the child to be raised in that locale, it is not dispositive. *See Redmond v. Redmond*, 724 F.3d 729, 732 (7th Cir. 2013) ("The determination of habitual residence under the Hague Convention is a practical, flexible, factual inquiry that accounts for all available relevant evidence and considers the individual circumstances of each case."); *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004) (explaining that the Hague Convention intended for the inquiry into habitual residence to be "flexible" and "fact-specific" (citing Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 89 (1999)). Consider, for example, a hypothetical childless couple who have

86). What matters, however, under the shared-parental intent standard is where the parents "intended the children to live." *Ahmed*, 867 F.3d at 690; *cf. Holder v. Holder*, 392 F.3d 1009, 1016–17 (9th Cir. 2004) ("In analyzing . . . [the parents'] intent, we do not lose sight of the fundamental inquiry: the children's habitual residence. Parental intent acts as a surrogate for that of children who have not yet reached a stage in their development where they are deemed capable of making autonomous decisions as to their residence." (emphasis in original)). Furthermore, because the petitioner-parent has the burden of proof, if the shared intent is "either unclear or absent," the petitioner necessarily has not met his or her burden. *Ahmed*, 867 F.3d at 691.

Here, the district court's findings of fact indicate that Taglieri has failed to satisfy his burden of proof under the shared-parental-intent standard as elucidated in *Ahmed*. The district court found that the parties' marriage "during the time surrounding the birth of their daughter was fraught with difficulty." R. 70 (Dist. Ct. Op. at 17–18) (Page ID #1881–82). In the months before and after A.M.T.'s birth, Taglieri subjected Monasky to physical and sexual abuse. *Id.* at

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established a marital home in Country A. They both live and work in Country A and it is their shared intent to continue maintaining their marital home there. After the wife conceives a child, the couple forms a shared parental intent to raise the child in Country B, where the wife's family lives and can provide support. Following the birth of the child, the wife travels to Country B with the newborn to raise the child there. The spouses plan, however, for the wife and child to return frequently to Country A for vacations and for the wife to resume habitation in the marital home after the child is an adult. In this situation, the existence of the marital home in Country A at the time of the child's birth does not affect the shared parental intent to raise the child in Country B.

27–28 (Page ID #1891–92). During her pregnancy, Monasky began "applying for jobs in the United States, inquiring about American health care and child care options, and looking for American divorce lawyers." *Id.* at 3–4 (Page ID #1867–68). She obtained "quotes from international moving companies regarding a move from Italy to the United States," *id.* at 5 (Page ID #1869), and repeatedly indicated that she wanted to divorce Taglieri and return to the United States with A.M.T. *Id* at 6–7 (Page ID #1870–71). During the bench trial, Taglieri vigorously disputed the inferences that could be drawn from these actions and pointed to other conduct— such as searching for an *au pair* for A.M.T. and scheduling medical appointments—that suggest the parties' shared intent was for Italy to be A.M.T.'s habitual residence. *See, e.g., id.* at 4, 6–7 (Page ID #1868, 1870–71). All of these findings suggest that Monasky's and Taglieri's plans for A.M.T.'s upbringing did not "converge." *Ahmed*, 867 F.3d at 691 (holding that a "couple's settled intent to live in the United Kingdom" prior to the wife's pregnancy did not mean that the couple had a shared parental intent to raise their children in that country, because the evidence demonstrated that the couple had divergent plans regarding their twins' residence starting from when the children were in utero); *see also Berezowsky v. Ojeda*, 765 F.3d 456, 468–69 (5th Cir. 2014) ("A shared parental intent requires that the parents actually share or jointly develop the intention. In other words, the parents must reach some sort of meeting of the minds regarding their child's habitual residence, so that they are making the decision together.").

Because the district court did not have the benefit of our decision in *Ahmed* when applying the shared-

parental-intent standard, but rather had to hypothesize about the content of this standard, I would reverse and remand this case so that the district court can conduct its factfinding utilizing the correct legal analysis as articulated in *Ahmed*. *See Brumley v. Albert E. Brumley & Sons, Inc.*, 727 F.3d 574, 577 (6th Cir. 2013) ("Reversal is appropriate when the trial court applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." (internal quotation marks omitted)); *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 901 (6th Cir. 2016) ("[A] remand is required for the district court to apply the correct legal standard.").

E.

This is a deeply troubling case, as Hague Convention cases often are. And I must respectfully disagree with my colleagues' failure to follow binding Circuit precedent. This is "a simple case," Maj. Op. at 14, because our decision in *Ahmed* compels the outcome in this case. 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. I would therefore reverse the judgment of the district court and remand so that the district court, in accordance with the correct legal standard as explained in this opinion and *Ahmed*, can determine whether Taglieri demonstrated by a preponderance of the evidence that a shared parental intent for A.M.T. to reside habitually in Italy existed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-4128

DOMENICO TAGLIERI,

Plaintiff-Appellee,

v.

MICHELLE MONASKY,

Defendant-Appellant.

Before: BOGGS, MOORE, and McKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED the district court's decision to grant Domenico Taglieri's petition to return A.M.T. to Italy, her country of habitual residence, is AFFIRMED.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOMENICO TAGLIERI,	)	Case No.: 1:15
	)	CV 947
Plaintiff	)	
	)	JUDGE
v.	)	SOLOMON
	)	OLIVER, JR.
MICHELLE MONASKY,	)	
	)	
Defendant	)	ORDER
	)	
	)	

Currently pending before the court is Plaintiff Domenico Taglieri's Petition for Return of Child Pursuant to the International Child Abduction Remedies Act ("Petition for Return"). (ECF No. 1.) The court held a four-day bench trial beginning on March 15, 2016. For the reasons set forth below, Plaintiff's Petition for Return is granted.

I. FINDINGS OF FACT

Plaintiff Domenico Taglieri ("Taglieri") is a citizen and resident of Italy. (Jt. Stipulations ¶ 1, ECF No. 47.) Michelle Monasky ("Monasky") is a citizen and resident of the United States. (*Id*. ¶ 2.) Taglieri and Monasky are the parents of a daughter, A.M.T., who

was born in February 2015, in Italy.[1] Taglieri and Monasky were married in September 2011, in Illinois. (*Id*. ¶ 3.) Following their marriage, the parties made the mutual decision to relocate to Italy for career opportunities, but left open the possibility of returning to the United States at some point in the future should better career opportunities present themselves. (*Id*. ¶ 4; Def.'s Exs. B, C, E; Tr. vol. 4, 473-77, ECF No. 60.) Taglieri moved to Italy in February 2013, and Monasky joined him in July 2013. (Jt. Stipulations ¶¶ 5, 7.)

Both parties secured employment in Italy. In June 2013, Taglieri obtained a temporary position at Humanitas Hospital ("Humanitas") in Milan, Italy, which lasted until April 2014, after which he took a permanent position in a hospital in Lugo.[2] (*Id*. ¶¶ 6, 11.) In September 2013, Monasky secured a fellowship position with the Universita Vita Salute San Raffaele in Milan, Italy, in September 2013. (*Id*. ¶ 8.) In April 2014, Monasky left that job, but remained in Milan, securing a two-year fellowship position with Humanitas. (*Id*. ¶ 9.) At that time, Monasky began pursuing recognition of her academic credentials by the Italian Ministry of Justice. Although the parties dispute Monasky's reasons for seeking recognition, she was unsuccessful as of January 2015, despite seeking the assistance of Ohio Senator Sherrod Brown. (*See* Tr. vol. 1, 32, ECF No. 57; Pl.'s Ex. 3; *and compare* Tr. vol. 3, 412-12, ECF No. 59 *with* Tr. vol. 4, 481-82.)

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[1] The court withholds A.M.T.'s name and exact date of birth pursuant to Federal Rule of Civil Procedure 5.2.

[2] Lugo is approximately two hours and forty minutes southeast of Milan. (Jt. Stipulations ¶ 11.)

With respect to Taglieri, his employment with Humanitas ended in April 2014. (*Id*. ¶ 8, 11; Tr. vol. 2, 67, ECF No. 58.)

A. Summer and Fall 2014

Monasky became pregnant in May 2014. (Jt. Stipulations ¶ 10.) The parties dispute whether the pregnancy was voluntary. According to Monasky, despite her expressed reservations about becoming pregnant in the spring of 2014, Taglieri disregarded her wishes, becoming "more aggressive with sex," and ultimately forcing her to become pregnant. (*See* Tr. vol. 4, 488-91; *see also* 638.) According to Taglieri, he and Monasky jointly decided to start a family. (*See* Tr. vol. 2, 65-67.)

During the summer and fall, the parties continued to live as a married couple, but their relationship was rife with difficulties. (*See* Tr. vol. 1, 35-36, vol. 3, 280.) After having first struck Monasky on her face in March 2014, (*see* Tr. vol. 3, 365-66, 371-72), according to Monasky, Taglieri "started slapping [her] more frequently" and "harder." (Tr. vol. 4, 485.) Because of Taglieri's violence, Monasky contends that she became increasingly fearful of him. Taglieri, however, disputes that he hit Monasky again, after the March incident. (*See* Tr. vol. 2, 237.) The long-distance arrangement, resulting from Taglieri's employment in Lugo, "further strained the parties' marriage." (Jt. Stipulations ¶¶ 11, 12; *see also* Tr. vol. 2, 68.) Additionally, Monasky could not speak Italian and made little attempt to learn. (*See* Tr. vol. 2, 207; Def.'s Ex. DDD (Taglieri noting to Monasky's father that Monasky "doesn't put any effort into learning [Italian].").) As a result, she struggled to perform certain basic tasks and felt that Taglieri was not doing enough to help her. (*See* Jt. Exs. 7, 6, 8; Tr. at 498.)

Monasky also struggled with a difficult pregnancy. While having access to health care was an important consideration for the parties, they frequently fought over Monasky's pre-natal care and birthing of the baby. (*See* Tr. vol. 1, 34, vol. 3, 403, vol. 4, 504-05, 513-14; *see also* Def.'s Exs. O ¶ 9, MM.) Because of the pregnancy complications, Monasky's physicians placed her under travel restrictions. (*See* Tr. vol. 4, 507-08.) Despite the restrictions, however, both Monasky and Taglieri traveled to the United States in July 2014, to attend Monasky's sister's wedding. (*Id*.)

In light of the growing acrimony, Monasky began – without Taglieri's knowledge – applying for jobs in the United States, inquiring about American health care and child care options, and looking for American divorce lawyers. (*See* Jt. Stipulations ¶¶ 13-14; Tr. vol. 4, 499-502, 512-14, 543-45; Jt. Exs. 4, 5; Def.'s Ex. V.) However, also during this time, the parties made inquiries about Italian child care options (*see* Pl.'s Exs. 8, 9; Tr. vol. 4, 514-14), and discussed purchasing items, such as a combination stroller, car seat, and bassinet for A.M.T. (Tr. vol. 2, 86, vol. 4, 417, 558.)

At the same time, Monasky began taking driving lessons so that she could obtain an Italian driver's license, (*see* Tr. vol. 4, 535-36), and the parties looked for a larger apartment. (*See* Tr. vol. 2, 83, vol. 4, 531-33.) But Monasky made it clear that, regardless of the duration of the lease, it was important that the agreement allow the parties to break the lease on three-months' notice. (*See* Def. Ex. NN; Tr. vol. 4, 531-33.) Ultimately, the parties secured a one-year lease with a three-month escape clause, under Monasky's name, for an apartment in Basigilio [sic], Italy. (Jt. Stipulations ¶ 16; Jt. Ex. 10; Tr. vol. 2,197, vol. 4, 530-33.)

B. Winter and Spring 2015

In January 2015, Monasky stopped working at Humanitas to officially begin her five-month maternity leave, which, according to Monasky, was compulsory in Italy. (Jt. Stipulations ¶ 15; Tr. vol. 4, 529.) In conjunction with her maternity leave, Monasky completed paperwork with Humanitas's grants office to suspend her contract for the duration of her maternity leave. (*See* Tr. vol. 3, 414, vol. 4, 529; Pl.'s Ex. 29.) Thus, the end date of Monasky's Humanitas contract shifted by five months to November 2016. (*See* Tr. vol. 3, 414.) Throughout January, the parties continued to prepare for A.M.T.'s birth, (*see* Tr. vol. 2, 92-93; Pl.'s Ex. 24), and emails between the parties, reflecting words of affection, suggest that their relationship was less turbulent than before. (*See* Pl.'s Exs. 18-24.)

But in early February 2015, the parties were "having a lot of fights" regarding how A.M.T.'s birth would proceed. (*See* Tr. vol. 4, 538-40; *see also* Def.'s Ex. O ¶ 9.) On February 10, 2015, Monasky emailed Taglieri regarding the possibility of a collaborative divorce. (*See* Tr. vol. 4, 543¬44; Def.'s Ex. OO.) Additionally, Monasky obtained quotes from international moving companies regarding a move from Italy to the United States. (Tr. vol. 4, 544-45; Def.'s Exs. PP, QQ, RR.) The following day, Monasky went to the hospital for a pregnancy checkup, and her doctors recommended that labor be induced. (*See* Jt. Stipulations ¶ 17; Tr. vol. 2, 98, 101-03, vol. 4, 464.) Monasky, hoping to have a natural birth, refused. (Tr. vol. 2, 98, 101-03, vol. 4, 464) According to Taglieri, he was "shocked," angry, concerned, and embarrassed that Monasky would not agree to the procedure. (*See id*.

vol. 2, 102, vol. 3, 244-45.) On the ride home, the parties argued about Monasky's decision to refuse induction. (*See id*. vol. 4, 547.) Before arriving at their apartment in Basiglio, Monasky requested that Taglieri turn around and drive her back to the hospital because she was having contraction-like pains, but Taglieri refused, concluding that it would be better to go home and see how the contraction-like pains proceeded. (*See id*. at vol. 2, 105-106, vol. 4, 547.) Once at the apartment, the parties continued to argue and "in the course of a heated conversation," Taglieri told Monasky to take a taxi to the hospital and that she was "the son of a devil." (*Id*. at vol. 2, 108, vol. 3, 245, vol. 4, 548.)

Ultimately, Monasky took a taxi to the hospital in the early hours of the morning the next day. (Jt. Stipulations ¶ 18; Tr. vol. 4, 548; Def.'s Ex. SS.) While Taglieri does not dispute that he told Monasky to take a taxi to the hospital, he contends that he did not know that Monasky had actually done so until he awoke the next morning. (*Id*. vol. 2, 107-08.) After a long and difficult labor, A.M.T. was born via an emergency cesarean section. (Tr. vol. 2, 114, vol. 4, 550.) Taglieri and Diana Monasky (Monasky's mother) were both present for A.M.T.'s birth. (Jt. Stipulations ¶ 20.) When Monasky and A.M.T. were released from the hospital after their recovery period, Taglieri returned to Lugo. Diana Monasky stayed in Basiglio to help Monasky with the baby and her recovery, which, partly due to a previous back surgery, was "long" and "difficult." (*See* Tr. at 553, 555-56.)

On or about March 1, 2015, just days after Monasky's mother returned to the United States, Monasky again indicated to Taglieri that she wished to divorce him and return to the United States with

A.M.T., and, on March 2, sent an email reiterating her desire. (*See* Tr. vol. 1, 37, vol. 3, 249¬54, vol. 4, 559-60; Jt. Ex. 16.) Monasky also communicated her desire to divorce Taglieri and return to the United States to members of her immediate family. (*See* Tr. vol. 3, 289-90, 352-53, vol. 4, 563-65,583-84; Def.'s Exs. Y, Z, AA, BB, CC, EE, GG, VV, ZZ; Jt. Exs. 15, 17, 18.) Just days after their conversation regarding divorce, Monasky agreed that she and A.M.T. would join Taglieri in Lugo. (*See* Tr. vol. 1, 39, vol. 4, 562-63.) While Taglieri viewed Monasky's decision to join him as an opportunity for the parties to "clarify existing issues" (Tr. vol. 1, 39), Monasky asserts that she "broke down" and went to Lugo because she could not both tend to her own recovery from the cesarean section and take care of A.M.T. alone. (*See* Tr. vol. 4, 562-63.) Monasky did not view the trip to Lugo as a "move," and, thus, only took "a couple of suitcases and [a] stroller." (*Id*.)

The parties sharply dispute whether, while in Lugo, Monasky and Taglieri reconciled. On the one hand, Taglieri contends that the parties got back to "the regular course of life," and points out that Monasky continued to pursue her driver's license, inquired about hosting an *au pair*, and scheduled doctor appointments for A.M.T. (*See* Tr. vol. 1, 39-43, vol. 2, 121-23, 126-29; Pl's Exs. 40, 47, 49, 52, 54.) Moreover, Taglieri points out that Monasky coordinated with her aunt to arrange a time for her to visit the parties and A.M.T. in Italy in September 2015. (*See* Tr. vol. 3, 424-25; Pl.'s Ex. 44.) By contrast, Monasky contends that she did not waiver on her intent to divorce and return to the United States with A.M.T. (*See* Tr. vol. 4, 565.) Instead, she asserts that she did not feel comfortable sharing the fact that the parties' relationship

was ending with extended relatives with whom she infrequently communicated by email. (*See* Tr. vol. 4, 579-80.)

Additionally, Monasky testified that she continued to pursue an Italian driver's license so that she could take care of A.M.T. in Italy until the two were able to leave. (*See*. Tr. vol. 4, 536-38.) With respect to scheduling routine medical appointments for A.M.T., Monasky testified that "until [she and A.M.T.] could return to the United States, [she and Taglieri] were just doing what any parent would do and just schedule appointments." (Tr. vol. 4, 578.) According to Monasky, during her stay in Lugo, Taglieri knew that she was committed to divorcing. Among other things, one source of contention was the parties' Vanguard account. Monasky implored Taglieri not to "drain" the account of the parties' money, and, in fact, limited his access to ensure that he did not; Taglieri became increasingly upset over his inability to access what he regarded as his money. (*See* Tr. vol. 4, 567-569; *see also* Def.'s Exs. XX, YY, WW.) Monasky also contends that she used the time in Lugo to complete the process of obtaining passports for A.M.T. so that she and A.M.T. could return to the United States. While it is undisputed that the parties jointly initiated the passport application process soon after A.M.T.'s birth and made arrangements to complete the process while Monasky and A.M.T. were in Lugo (Jt. Stipulations ¶¶ 22, 30, 32), Taglieri contends that the parties agreed to obtain A.M.T.'s passport so that she and Monasky could visit family in the United States in May 2015. (*See* Tr. vol. 2, 125, vol. 3, 400.) Monasky also points out that, on March 20, 2015, she reiterated her desire for a divorce and contacted several Italian divorce attorneys to understand the divorce process

and her options with respect to alimony and child custody. (*See* Tr. vol. 3, 381; Def.'s Exs. GG, ZZ.)

C. A.M.T.'s Removal

On March 31, Taglieri and Monasky had yet another argument, which began over Taglieri's refusal to allow Monasky to change A.M.T.'s urine-soiled clothing because of the cost of laundry. (Jt. Stipulations ¶ 32.) According to Monasky, the fight escalated, and in the middle of arguing, she slammed her hand down on the table. (*See* Tr. vol. 4, 591-94.) In response, Taglieri raised his hand as if to hit Monasky, but ultimately, did not hit her. (*Id*.) After the argument, Taglieri went to work and Monasky, without Taglieri's knowledge [sic], gathered A.M.T., went to the police, and sought shelter in a "safe house" in an undisclosed location in Italy. (Jt. Stipulations ¶ 32; *See also* Tr. vol. 1, 44, vol. 4, 594-95.) In a written statement that she provided to the police, Monasky indicated that Taglieri was abusive and that she intended to return to Milan and open a bank account into which her salary would be deposited. (*See* Tr. vol.4, 678; Jt. Ex. 19.) Once Taglieri returned home and learned that Monasky and his daughter were gone, he went to the police to revoke his permission for the issuance of A.M.T.'s American passport. (Jt. Stipulations ¶ 33.) The parties communicated by telephone on April 3, while Monasky and A.M.T. were in the safe house. (*Id*. ¶¶ 34-35.) About two weeks later, Monasky left Italy for the United States with eight-week old A.M.T. (*Id*.) On April 29, 2015, shortly after Monasky's departure with A.M.T., Taglieri sought a judicial determination of his parental rights in an Italian court, which ultimately ruled in Taglieri's favor and terminated Monasky's parental rights. (*See* Tr. vol. 2, 63;

Pl. Ex. 61.) Monasky was not present for the proceeding. (*See* Tr. vol. 4, 601-02). Taglieri filed the instant Petition on May 15, 2015. Since the time of Monasky's departure from Italy with A.M.T., they have lived with Monasky's parents in Painesville, Ohio.

II. LEGAL STANDARD

The purpose of the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), Oct. 25, 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89, is to "'protect children internationally from the harmful effects of the wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence . . . ." *Robert v. Tesson*, 507 F.3d 981, 988 (6th Cir. 2007) (quoting Hague Convention, preamble). The United States is among the contracting states to the Convention, and "Congress has implemented its provisions through the International Child Abduction Remedies Act ("ICARA"), 102 Stat. 437, 22 U.S.C. § 9001 *et seq*. (formerly 42 U.S.C. §11601 *et seq*.). *Panteleris v. Panteleris*, 601 F. App'x 345, 347 (6th Cir. 2015) (citing *Abbot v. Abbot*, 560 U.S. 1, 5 (2010)). Underlying the Convention and the ICARA are "two general principles": (1) "a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute"; and (2) "the [ ]Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court." *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996) ("*Friedrich II*") (internal citations omitted).

When determining a petition for return of a child, the Convention instructs that the removal of a child from one nation to another is considered wrongful 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."

Tesson, 507 F.3d at 988 (citing Hague Convention, art. 3).

Under the ICARA, the burden is on the petitioner to establish, "by a preponderance of the evidence that [the child was] wrongfully removed or retained in breach of [the petitioner's] custody rights under the laws of the contracting state in which [the child] habitually resided immediately before the removal or retention." *Panteleris*, 601 F. App'x at 348 (citing 22 U.S.C. §9003(e)(1)). Generally, if the petitioner meets its burden, then the child must be returned. *March v. Levine*, 249 F.3d 462, 466 (6th Cir. 2001) (citing Hague Convention, art. 12). But, a court is not required to order the child's return if the respondent establishes certain exceptions under the Convention. *Id*. (citing Hague Convention, art. 13).

III. LAW AND ANALYSIS

Because removal or retention is only "wrongful" if the child is removed from her habitual residence, habitual residence is a threshold determination under the Convention. *Redmond v. Redmond*, 724 F.3d 729, 742 (7th Cir. 2013) ("[E]very Hague Convention petition turns on the threshold determination of the

child's habitual residence; all other [Convention] determinations flow from that decision."); *Holder v. Holder*, 392 F.3d 1009, 1011 (9th Cir. 2004); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*").

A. Habitual Residence

The Convention's Articles are silent on the meaning of the term "habitual residence." *Friedrich I*, 98 F.2d at 1400. However, since the Convention's enactment, the Sixth Circuit has provided some clarity on the construction of "habitual residence." In *Friedrich I*, the court was faced with deciding the habitual residence of a nineteen-month-old child who was born, and had lived, in Germany with his American mother, who was in the military, and his German father. *Id*. at 1389. The parents had a rocky relationship, which culminated in the mother returning to the United States with the child within a few days of an incident in which her husband ordered her to leave their apartment with the child and put most of their belongings in the hallway. *Id*. at 1398-99. The court declared: "[T]his is a simple case. Thomas was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore we hold that [the child] was a habitual resident of Germany at the time of his removal." *Id*. at 1402. The court further noted that, "to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions." *Id*. at 1401. Therefore, the court found it irrelevant that the mother, for example, had planned to bring the child back to the United States after her military service. *Id*. All that mattered was

the fact that the child had lived exclusively in Germany before he was removed without the consent of his father. *Id*. at 1402. None of the mother's future plans were sufficient to alter the child's habitual residence. *Id*. at 1401.

Later, in *Tesson*, the Sixth Circuit further clarified the principles relevant to a determination of habitual residence, stating:

> *Friedrich I* provides five principles which guide this Court in weighing more complicated decisions. First, habitual residence should not be determined through the "technical" rules governing legal residence or common law domicile. Instead, courts should look closely at "[t]he facts and circumstances of each case." Second, because the Hague Convention is concerned with the habitual residence of the child, the court should consider only the child's experience in determining habitual residence. Third, this inquiry should focus exclusively on the child's "past experience." Any future plans that the parents may have "are irrelevant to our inquiry." Fourth, "[a] person can have only one habitual residence." Finally, a child's habitual residence is not determined by the nationality of the child's primary care-giver. Only "a change in geography and the passage of time" may combine to establish a new habitual residence.

570 F.3d at 989 (internal citations omitted). Building on *Friedrich I*, the Sixth Circuit held in *Tesson*, 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.'" *Id*. at 993 (quoting *Feder*, 63 F.3d at 224). The Sixth Circuit also cited to *Karkkaninen v. Kovalchuk*, 445 F.3d 280, 293 (3d Cir. 2006), noting with approval that courts in the Third Circuit consider other factual circumstances, such as academic activities, social engagements, sports programs, and "meaningful connections with people and places" in Italy, to determine whether a child has acclimatized. *Id*. at 996. As the court stated, it is the "child's perception of where home is, rather than one which subordinates the child's experience to their parent's subjective desires" that is important. *Id*. at 992.

Tesson involved twin boys who were removed by their American mother at the age of six from France, where they were living with her and their French father, had previously lived for a substantial period with both parents in the United States and France, and had been enrolled in a Montessori School in the United States and also attended school in France. Focusing on the perspective of the children, the court found that the United States was the habitual residence of the twins. It was the nation where they had been physically present a sufficient amount of time for purposes of "acclimatization" and where their presence had "a degree of settled purpose" from their perspective. *Id*. at 998.

The children involved in *Tesson* were of such age that one could look at a variety of factors to determine their degree of acclimatization to the United States and France, both places where they had lived with their parents before they were removed. In *Friedrich*, on the other hand, the nineteen-month-old child had only lived in Germany, except for short visits to the United States. *See Friedrich I*, 98 F.2d at 1399. Also, in contrast to *Tesson*, the court in *Friedrich* spent no

time discussing whether the nineteen-month-old had become acclimatized, or whether he could be at such a young age, though it did emphasize that habitual residence is to be determined from the perspective of the child. *Id*. at 1401.

After *Tesson*, a question clearly arises regarding how one determines the perspective of a child too young to permit the reasonable application of the acclimatization factors set out in *Tesson* and other cases. A strict application of *Tesson* in cases involving infants, such as A.M.T., would lead to perverse results. *See Whiting v. Krassner*, 391 F.3d 540, 551 (3d Cir. 2004) (noting that focusing on the "degree of acclimatization" of an infant at the time of her abduction "would provide a perverse incentive to any parent contemplating an abduction to take the child as early as possible in a new environment."). Furthermore, since the court in *Friedrich* reached its decision without discussing acclimatization, one might conclude that A.M.T.'s habitual residence is Italy, since that is the only place the child lived before being removed to the United States. This possible conclusion is bolstered by the fact that *Friedrich* disavowed reliance on the subjective intent of the parents as a factor to be considered, and *Tesson* highlighted this point by indicating that the Sixth Circuit refused to join other Circuits which had, in cases since *Friedrich*, given some consideration to the parent's shared intent in determining a child's habitual residence.

However, the Sixth Circuit, in *Tesson*, recognized that a distinction could be made between cases where children are old enough to apply the acclimatization factors and cases where "very young . . . children may lack cognizance of their surroundings sufficient to be-

come acclimatized to a particular country or to develop a sense of settled purpose[.]" *Tesson*, 507 F.3d at 992 n.4. The court acknowledged that the Third Circuit has held that the subjective intentions of a "very young" child's parents are particularly important to determining the child's habitual residence. *Id*. (citing *Whiting v. Krassner*, 391 F.3d at 550); *see also Panteleris*, 601 F. App'x at 350.

Yet, in *Tesson*, and later in *Panteleris*, the court expressly declined to opine on whether parental intent should be considered in these kinds of cases because the facts of neither case required such a determination. *See Tesson*, 507 F.3d at 992 n.4; *Panteleris*, 601 F. App'x at 350. Since *Tesson*, other district courts within the Sixth Circuit faced with petitions under the Convention concerning infants, as well as other circuit courts, have given some consideration to both shared parental intent and settled purpose. *See e.g. Kijowska v. Haines*, 463 F.3d 583, 588 (7th Cir. 2006); *Holder*, 392 F.3d at 1016; *Nicholson v. Pappalardo*, 605 F.3d 100, 104 (1st Cir. 2010); *Holmes v. Holmes*, 887 F. Supp. 2d 755, 758 (E.D. Mich. 2012); *McKie v. Jude*, No. 10-103-DLB, 2011 WL 53058 (E.D. Ky. Jan. 7, 2011). Assuming that these are appropriate factors, the question arises as to when and how they should be applied.

1. Habitual Residence of Very Young Children

In *Delvoye v. Lee*, 329 F.3d 330 (3d Cir. 2003), the Third Circuit noted that, generally, "[w]here a matrimonial home exists, i.e. where both parents share a settled intent to reside, determining the habitual residence of an infant presents no particular problem . . . ." *Id*. at 333. However, determining habitual residence becomes thornier "[w]here the parents' relationship has broken down." *Id*. Although it does not

necessarily follow that conflict between the parents "disestablish[es]" a child's habitual residence, "where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence." *Id.*; *see also A.L.C. v. Carlwig*, 607 F. App'x, 658, 662-63 (9th Cir. 2015) (concluding that the nine-month-old infant failed to acquire a habitual residence where its parents never shared an intent for the child to reside in the United States); *Kijowska*, 463 F.3d at 587 (noting the difficulty of determining the "habitual residence" of a child based on the parents' shared intent where "the parents are estranged essentially from the outset, the birth of the child (or indeed before).").

Similarly, the Ninth Circuit suggests:

> When a child is born under a cloud of disagreement between parents over the child's habitual residence, and a child remains of a tender age in which contacts outside the immediate home cannot practically develop into deep-rooted ties, a child remains without a habitual residence because "if an attachment to a State does not exist, it should hardly be invented."

A.C.L., 607 F. App'x, at 662. Thus, like the Third Circuit, other circuits have concluded that, as it relates to young children, the court must look to the "settled purpose and shared intent of the child's parents in choosing a particular habitual residence." *Whiting*, 391 F.3d at 551;*Nicholson*, 605 F.3d at 104; *Kijowska*, 463 F.3d at 588; *Holder*, 392 F.3d at 1016. District courts within the Sixth Circuit have also reached this conclusion. *See e.g., Holmes*, 887 F. Supp. 2d at 758; *McKie*, 2011 WL 53058, at *9-12.

2. A.M.T.'s Habitual Residence

This case turns on the issue of whether A.M.T., who was removed from Italy at just eight weeks old, ever acquired a habitual residence. The parties sharply dispute this issue. Taglieri argues that objective evidence of the parties' settled purpose supports a finding that A.M.T.'s habitual residence is Italy. (Pl.'s Closing Br. at 2, ECF No. 66.) In support of his argument, Taglieri points out that the parties jointly decided to move to Italy and "establish a life together." (*Id*.) In opposition, Monasky argues that the parties' daughter did not acquire any habitual residence because the parties lacked a shared intent for A.M.T. to reside in Italy. (Def.'s Closing Br. at 1, ECF No. 64-1.) Specifically, Monasky contends that the parties never agreed to settle in Italy permanently, and, due to the disintegration of the parties' marriage, Monasky made it clear to Taglieri that she wished to return to the United States with A.M.T. after her birth. (*See generally id*.) Thus, the parties had no shared intent to raise their daughter in Italy. Consequently, Italy was not her habitual residence or that of the child.

As noted above, several circuits have instructed that, "[w]here a matrimonial home exists, i.e., where both parents share a settled intent to reside, determining the habitual residence of an infant presents no particular problem"–the infant will normally be a habitual resident of the country where the matrimonial home exists. *See Delvoye*, 329 F.3d at 333; *see also Holder*, 392 F.3d at 1020 ("[I]f a child is born where the parents have their habitual residence, the child normally should be regarded as a habitual resident of that country."); *A.L.C.*, 607 F. App'x at 662. The court notes that this principle also seems to be implicit in

the Sixth Circuit's habitual residence determination in *Friedrich I*, 983 F.2d at 1402 (noting that the child was born in Germany, the parties' marital home was in Germany, and the child lived exclusively in Germany up until the time of his removal nineteen months later).

Here, the parties jointly agreed to move to Italy to pursue career opportunities and live as a family. Although Monasky contends that she never understood the move to Italy to be permanent, it is undisputed that the parties agreed to live in Italy for an undetermined period of time. *See Mozes*, 239 F.3d at 1074 ("Being habitually resident in a place must mean that you are, in some sense, 'settled' there– but it need not mean that's where you plan to leave your bones."). In making their move to Italy, the parties did not maintain a residence or any other material ties, aside from Monasky's family, to the United States. Moreover, Taglieri and Monasky secured jobs in Italy. Specifically, shortly after her arrival, Monasky secured a two-year position at Humanitas Hospital, and took steps to ensure that her contract was suspended during her mandatory five-month maternity leave, thus extending her employment contract with Humanitas until November 2016. Furthermore, Monasky asked her then-mother-in-law, Angela Mallamaci, to come to Milan in June or July of 2015 and care for A.M.T. while she was in Lindou, Germany for a work conference. (*See* Tr. vol. 2, 69-70, 165.) Beyond obtaining employment in Italy, Monasky continued to pursue, as late as January, 2015, the recognition of her academic credentials by the Italian Ministry.

Arguably, Monasky, who agreed to move to Italy with Taglieri, was a habitual resident of Italy, despite the fact that she had an intention to return to the

United States at some point in the future. *See Nicholson*, 605 F.3d at 105 n.3 (noting that "[h]aving moved back to Australia to live with Nicholson, arguably Pappalardo's own habitual residence became Australia, notwithstanding her later-developed intention to relocate at a future point to Maine."). But the court does not rest its analysis here. As the Third Circuit points out, the habitual residence analysis is not necessarily straightforward where "the parents' relationship has broken down . . . [and] where the conflict is contemporaneous with the birth of the child . . . ." *Delvoye*, 329 F.3d at 333. Indeed, in such cases, "no habitual residence may ever come into existence." *Id*. Monasky maintains this is such a case. The essence of Monasky's argument is that the parties' marriage irrevocably broke down in February 2015, before A.M.T.'s birth, and afterward, there was no degree of "common purpose" or "shared intent" for the child to reside in Italy. Thus, no habitual residence came into existence for the child.

The court will determine the nature and extent of any such breakdown and whether the facts and circumstances surrounding it are consistent with those limited number of cases where courts have held that no habitual residence for the child came into existence. On February 10, 2015 – days prior to A.M.T.'s birth – Monasky indicated to Taglieri that she wanted to divorce and return to the United States with the parties' daughter. On that same day, Monasky sought quotes for a move from Italy to the United States from international moving companies. Again, on March 1, 2015, and via email on March 2, 2015, shortly after A.M.T.'s birth, Monasky reiterated her desire to divorce and return to the United States with the parties' daughter. It is clear that the parties' relationship during the time surrounding the birth of their daughter

was fraught with difficulty due, in part, to fundamental disagreements regarding the manner in which Monasky would give birth to A.M.T. Leading up to A.M.T.'s birth, and in fact during Monasky's labor, the parties argued relentlessly. If the court considers only Monasky's stated desire to divorce, and the period of time immediately surrounding A.M.T.'s birth, it might conclude that the parties' relationship had fundamentally "broken down."

However, there is also evidence which suggests that, despite Monasky's stated desire to divorce Taglieri and return to the United States as soon as possible, Monasky lacked definitive plans as to how and when she would actually return to the United States. This evidence suggests that Monasky, in fact, took steps to be able to remain in Italy with the parties' daughter for an undetermined period of time. For instance, Monasky and Taglieri acquired items necessary for A.M.T. to reside in Italy, including, but not limited to, a rocking chair, stroller, car seat, and bassinet. Additionally, as late as March 2015, Monasky continued to pursue an Italian driver's license. Monasky also continued to set up routine medical appointments for A.M.T., informed Taglieri that she registered them as a host family for an *au pair*, and invited an American family member to visit the parties in Italy in mid-September. With respect to the driver's license, Monasky explained that she pursued the license so that she could transport A.M.T. to and from the parties' apartment in the Basiglio (a suburb of Milan) "until she could leave Italy and come back [to the United States]." As to continuing to schedule appointments, Monasky testified that "until [she and A.M.T.] could return to the United States, [she and Taglieri] were just doing what any parent would do and just schedule appointments." Additionally, with

respect to the divorce process, Monasky conceded that if a "peaceful divorce" was not possible, a "judicial divorce" in Italy, which Monasky seemed to contemplate based on the fact that she was in communication with Italian divorce lawyers in March 2015, might have taken years. These facts support, rather than undermine, a court's conclusion that, despite her intent to return to the United States with A.M.T. as soon as possible in the future, Monasky had no crystalized plan in place to do so. And, as the First Circuit noted, "standing alone, of course, the mother's intent that the child should one day live in the United States [cannot] support a finding of habitual residence." *Nicholson*, 605 F.3d at 105 (citing *Ruiz v. Tenorio*, 392 F.3d 1247, 1253 n.3 (11th Cir. 2004)).

Based on all of the evidence, it appears that it was not until the March 31, 2015 incident, where Taglieri raised his hand as if to hit Monasky, that Monasky's plan to leave Italy became crystalized. It is true that Monasky made email inquires [sic] to international moving companies about rates for a move from Italy to the United States and communicated her desire to divorce Taglieri to her family in March 2015. However, the court cannot discern any other concrete steps that Monasky took to allow for her and A.M.T.'s return to the United States in the immediate future. On the contrary, most of the steps that Monasky took in March 2015, seemed to reflect a settled purpose and intent to remain in Italy, at least for an undetermined period of time.

This case is strikingly different than other Hague Convention cases where the court determined that the infant lacked a habitual residence. Most often, in those cases, the child was born while the mother was

temporarily present in a country that was not the parents' habitual residence. *See, e.g., Delvoye*, 329 F.3d at 331 (affirming district court's finding of no habitual residence where the respondent traveled to Belgium on a three-month visa, taking only two suitcases of maternity clothes, to give birth to the parties' child and avoid the high costs associated with giving birth in the United States); *A.L.C.*, 607 F. App'x at 662-63 (finding that the infant child, who was born during the mother's temporary stay in the United States – away from the parties' marital home in Sweden – had no habitual residence because "the parties never shared an intent for [the infant] to reside in the United States beyond the [mother's] period of recovery after giving birth."); *Holmes v. Holmes*, 887 F. Supp. 2d 755, 758-59 (E.D. Mich. 2012) (finding that the infant had no habitual residence where the parties traveled to Ireland, where petitioner was a citizen, to receive health care for the mother and child during birth, and where the court credited the respondent's testimony that the move to Ireland was meant to be temporary).

The facts in this case are, however, similar to those in *Nunez-Escuerdo v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995), where an American mother and a Mexican father married and lived in Mexico for a little more than a year before the mother removed their two year old son to the United States. It is worth noting that the Third Circuit in *Delvoye* commented on *Nunez-Escuerdo*, opining that there was "a basis existing for finding the child's habitual residence to be in Mexico." 329 F.3d at 334. The facts of the instant case are also similar to those in *Nicolson v. Pappalardo*, where the respondent, Pappalardo, argued that the parties' infant, S.G.N., never acquired a habitual residence because Pappalardo did not share an intent for S.G.N. to habitually reside in Australia. 605 F.3d

at 104. Like Monasky, Pappalardo contended that the parties had various discussions about "the viability of their marriage" both before and after S.G.N.'s birth, and that the breakdown of the parties' relationship coincided with S.G.N.'s birth. *Id*. Unlike Monasky, Pappalardo indicated to Nicolson that she wished to leave Australia as soon as the child was medically cleared to travel, and prepared for her departure by "shipping a large quantity of belongings" to the United States and transferring the title to the parties' car to Nicolson. *See id*. at 101-02. On the other hand, Pappalardo testified that it was not until after she moved to the United States that she realized that the parties' relationship was over, and that reconciliation was not a possibility. *Id*. at 105. Based on these facts, the First Circuit concluded that the child's habitual residence, before her removal, had been in Australia. *Id*.

While Monasky certainly exhibited ambivalence about the state of the parties' relationship, a conflict between parents does not necessarily "disestablish" a child's habitual residence. *See Delvoye*, 329 F.3d at 333. The court can hardly conclude that an acrimonious marriage alone prevents a young child from acquiring a habitual residence, as most Hague Convention cases involve less than harmonious marital circumstances. Here, Monasky's conduct following A.M.T.'s birth also suggests that Monasky "remained equivocal as to her ultimate plans." *Nicolson*, 605 F.3d at 105. It is true that scheduling doctor's appointments for A.M.T. may certainly amount only to "routine, practical realities," as Monasky argues, and not indicia of Monasky's intent to remain in Italy with A.M.T. But, the court is not persuaded that registering the parties for an *au pair*, continuing to take driver's lessons, and scheduling times for American family members to visit the parties in Italy months in

the future are also the result of "routine practical realities." That Monasky had a "fixed subjective intent" to take A.M.T. to the United States at some future point, does not render all other circumstances irrelevant.

Assuming that the Sixth Circuit would hold that the shared intent of the parties is relevant in determining the habitual residence of an infant child, the court finds that such inquiry in this case would begin with determining whether there is a marital home where the child has resided with his parents. If the answer is yes, ordinarily a court would conclude that the intent of the parties and their settled purpose is to be in that place. Thus, the habitual residence of the child is in that place. While there are particular facts and circumstances that might necessitate the consideration other factors, the court finds that, in this case, despite all the acrimony between the parties, the facts and circumstances do not require such consideration.

First, there is no question that the parties established a marital home in Italy, and resided in that place with the child until Monasky departed with her to the United States. It is also clear that when Monasky came to Italy that the parties were not in agreement that she would come only for a short, definite period of time and then return to the United States. She and Tagliari [sic] were coming to Italy to live together and work, with no definitive plan to return to the United States, though that was not ruled out as possibility in the future. Courts grappling with the breakdown of the marriage before, or at the time of, the birth of a child have not indicated that, where is an established marital home in which the child resides, the unilateral actions and intentions of one parent are sufficient to disestablish what would normally

be the habitual residence of the child. Furthermore, most of the cases in which the court has found that the child had no habitual residence involve two situations: (1) where there was no established marital residence, or where the residence of one parent in the place argued to be the habitual residence by the other was of so temporary a nature that the court could not find it to be a habitual residence. No such facts exist here.

Accordingly, the court finds that Taglieri has established, by a preponderance of the evidence, that A.M.T.'s habitual residence at the time of removal was Italy. Further, even if the law could be read to support the proposition urged by Monasky – that, where a parent determines at, or before, the birth of a child that her marriage has broken down and has a plan to raise her child not in the state of her marital home, but elsewhere, the court should find that no habitual residence exists – such was not the case here. She continued after the birth of the child to live in Italy and had no definitive plans to bring her to the United States until the last altercation which precipitated her return to the United States. Thus, the child's habitual residence was the parties' marital home, Italy, at the time of removal.

B. The Exercise of Custody Rights

Taglieri "has the burden of proving the exercise of custody rights by a preponderance of the evidence." *Friedrich II*, 78 F.3d at 1064 (citation omitted). The Sixth Circuit has explained that, "[c]ustody rights "may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State." *Id.* (citing Hague Convention, Article 3). To determine whether a parent "exercise[d]" his or her custody rights, the Sixth Circuit held 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." *Id.* at 1066.

At the time that Monasky removed A.M.T. from Italy, there were no court orders or agreements between Taglieri and Monasky with regard to A.M.T.'s custody. Thus, Italian law determines Taglieri's custody rights. Under Italian law, the term "parental responsibility," though not explicitly defined, "implies the totality of rights and duties exercised exclusively in the interest of the child by the parents." (Pl.'s Ex. 60, Prof. Salvatore Patti et al., *Parental Responsibilities - ITALY, National Report of Italy*, ¶ 1.) With respect to a child born during the parties' marriage, "the exercise of parental responsibilities is based on a common agreement of the parents." (*Id*. at ¶ 14 (citing Art. 316 § 2 Italian Civil Code); *see also Fabri v. Pritikin-Fabri*, 221 F. Supp. 2d 859, 871 (N.D. Ill. 2001) ("A child is subject to the authority of its parents until majority . . . or emancipation. The authority is exercised by both parents by mutual agreement." (citing Title IV, Italian Civil Code of Law, Art. 316)). Therefore, in the case of parents who are married at the time of the child's birth, both parents have parental responsibilities and those responsibilities are held equally. (Patti, *supra*, at ¶¶ 14, 15(a)) (citing Art. 13 § 2 Italian Civil Code).) Moreover, "parental responsibilities do not expire after a factual separation." (*Id*. at ¶ 16(d).)

At the time of A.M.T.'s birth, the parties were married, the court, thus, finds that Taglieri had custody rights at the time of A.M.T.'s removal, in April

2015. The court also finds that Taglieri has established, by a preponderance of the evidence, that he was exercising those rights at the time of the alleged wrongful removal. Taglieri was present for A.M.T.'s birth, and has, since that time, been involved in her life. Taglieri testified that, on the weekends, the parties and A.M.T. would spend time together, and introduced several photos of the parties interacting on family vacations in Italy and commemorating important milestones in A.M.T.'s life. Following A.M.T.'s removal from Italy, Taglieri has taken steps to remain in contact with A.M.T. Based on the record before the court, there is no evidence to suggest that Taglieri engaged in "acts that constitute clear and unequivocal abandonment of the child." *Friedrich II*, 78 F.3d at 1066. Therefore, the court finds that Taglieri has proven, by a preponderance of the evidence, that he was exercising his custody rights to A.M.T. under Italian law at the time of her removal. Accordingly, the court concludes that Taglieri has met his burden of showing by a preponderance of the evidence that A.M.T.'s removal was wrongful. *See Panteleris*, 601 F. App'x at 348 (citing 22 U.S.C. § 9003(e)(1)).

C. Exceptions or Defenses of Return of the Child

Monasky argues that, if this court finds that A.M.T.'s habitual residence is Italy, the court should decline to issue a return order because "it would place A.M.T. in grave risk of harm," as defined under Article 13(b) of the Hague Convention. (Def.'s Closing Br. at 35.) Article 13(b) of the Hague Convention provides that a court "is not bound to order the return of the child if . . . there is a grave risk that his or her return would expose the child to physical or psychological

harm or otherwise place the child in an intolerable situation." *Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007) (internal quotations omitted) (citing 22 U.S.C. 9003(e)(2)(A)). The burden is on the respondent to "demonstrate 'by clear and convincing evidence' that the exception applies." *Id*. With respect to the exception's construction, the Sixth Circuit has noted:

> The "grave risk" exception is to be interpreted narrowly, lest it swallow the rule. That rule–that [c]hildren who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned . . .–was designed to protect the interests of the state of habitual residence in determining any custody dispute, and to deter parents from unilaterally removing children in search of a more sympathetic forum. These purposes, however, must "give[ ] way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." It thus makes sense that the Convention's purposes [would] not . . . be furthered by forcing the return of children who were the direct or indirect victims of domestic violence.

Simcox, 511 F.3d at 604-05 (internal citations omitted).

Monasky first points out that, due to pending criminal charges against her in Italy, she cannot return to Italy with A.M.T., and, thus, would be forced to leave the parties' daughter in Taglieri's care. (Def.'s Closing Br. at 35.) Forcing such a separation between A.M.T. and her mother (and primary caretaker), Monasky argues, would place the parties' daughter at

a grave risk of harm. (*Id*.) The court neither underestimates, nor takes lightly, the immense impact that separating a young child from her mother–most especially a parent who has served as the child's primary caretaker–can have. As the court has noted on prior occasions, it is a deeply saddening situation when parents, due to the acrimony between them, cannot come to a collaborative resolution regarding their child's future. This court is loathe [sic] to see the separation of a child from either of its parents. Nonetheless, this court cannot factor this impact into its determination, as the Sixth Circuit and several other courts have declined to find a "grave risk" where the respondent claims that a return order separating the abducting parent from the child would result in psychological damage to the child. *See Friedrich II*, 78 F.3d at 1068-69 *and Walsh v. Walsh*, 221 F.3d 204, 218 (1st Cir. 2000) (collecting cases); *Nunez-Escudero*, 58 F.3d at 377 (noting that the district court improperly considered the possibility of separation of the mother and child when determining whether returning the child to Mexico would constitute a "grave risk"); *Neumann v. Neumann*, – F. Supp. 3d –, 2016 WL 2864969, at *15 (E.D. Mich. May 17, 2016) ("Accounting for psychological harm attributable to the separation may provide a removing parent with an incentive or an advantage, potentially undermining the purpose of the Convention." (citing *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000))). Moreover, "in evaluating whether the person opposing the return of the child has established that there is a grave risk of harm, the court is not to make a determination of the child's best interest." *March v. Levine*, 136 F.Supp. 2d 831, 843-44 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001); *see also Friedrich II*, 78 F.3d at 1069 ("[The grave risk of harm] provision was not intended to be

used by defendants as a vehicle to litigate (or relitigate) the child's best interests.").

Monasky also argues that an order of return would put the parties's daughter at a "grave risk of harm" because A.M.T. would be subjected to Taglieri's "disregard for [her] well-being and care." (Def.'s Closing Br. at 35.) But Monasky points to no evidence, much less clear and convincing evidence, that demonstrates that Taglieri has a "disregard" for A.M.T.'s well-being and care. Thus, Monasky fails to meet her burden on this point. Last, Monasky argues that Taglieri's history of "violent behavior" and his "cavalier attitude toward his domestic abuse," would also put A.M.T. at a "grave risk of harm." The evidence supports the conclusion that Taglieri struck Monasky on her face in March 2014. At trial, Taglieri characterized this action as an "unwelcome touch," and explained that his previous use of the word "smack" was due to his misunderstanding of the word in English. The court finds this explanation to be disingenuous and not credible because throughout the four-day bench trial, Taglieri exhibited a sophisticated command of the English language.

Whether, following the March 2014 incident, the physical abuse continued is disputed. According to Monasky, Taglieri consistently subjected her to physical abuse. The testimony of Monasky's family members supports Monasky's argument that Taglieri hit her on more than one occasion. Monasky also contends that Taglieri forced her to have sex on several occasions throughout their marriage. Taglieri vehemently denies this allegation.[3] Taglieri also denies

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[3] Taglieri argues that "[Monasky's] acknowledgment that [the parties] had sex multiple times suggests that she was not an entirely unwilling participant. (Pl.'s Closing Br. at 6.) The court

that he hit Monasky again after the March 2014 incident. In support of his argument, Taglieri points out that Monasky's email to her mother indicating, "if he's going to get worse and start beating me," reveals that as of February 10, 2015, "no pattern of abuse had developed." However, within that email, Monasky also

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finds this argument puzzling in light of the following colloquy between counsel for Taglieri and Monasky:

> Q: Okay. In connection with forcing you to have a baby, do you think that the time that Domenico, quote, forced you to have a baby is the time that you conceived [A.M.T.]?
>
> A: He forced himself upon me multiple times, and I don't know which particular time was the time that I got pregnant.
>
> Q: When you say he forced himself on you, are you saying that he raped you?
>
> A: He forced me to have sex that he knew I didn't want to have.
>
> Q: How did that happen, Ms. Monasky? Did he hold you down on the bed?
>
> A: I remember at one point I was actually laying on the bed. He was on top of me, and he told me "spread your legs, or I will spread them for you."
>
> Q: And if you didn't do that what would happen?
>
> A: I don't know. I guess I didn't find out.
>
> Q: Ok. So you consented. Is that right? . . .
>
> A: No.

(Tr. vol. 4, 636-37.) While there may have been occasions that the parties engaged in consensual intercourse, the court rejects the antiquated and erroneous proposition, which Taglieri seems to suggest, that non-consensual intercourse between spouses occurs only where one partner physically forces the other, or that consent to prior occasions of sexual intercourse somehow functions as an overarching consent to all future occasions of sexual intercourse with the same partner.

indicates that "he has been violent about it [Monasky picking her skin] before."

The court finds Monasky's testimony with respect to the domestic abuse to be credible. Nevertheless, the court concludes that Monasky has failed to demonstrate, by clear and convincing evidence, that returning A.M.T. to Italy would "expose her to a grave risk of physical or psychological harm or otherwise place [her] in an intolerable situation." *Simcox*, 511 F.3d at 604. Based on the record, the frequency with which Taglieri subjected Monasky to physical violence and severity of the physical violence is unclear. Moreover, there is no evidence to suggest that Taglieri was ever physically violent towards A.M.T. *Cf. Flynn v. Borders*, 472 F. Supp. 2d 906, 912 (E.D. Ky. 2007) (noting and collecting cases demonstrating that "[i]n general, respondents who successfully rely on this exception have alleged sustained physical or psychological abuse directed at the child.").

While the court is deeply troubled by, and in no way discounts the seriousness of the physical abuse Monasky suffered–regardless of the frequency, severity, or duration–the Sixth Circuit has instructed that the grave risk exception is "to be interpreted narrowly." *Simcox*, 511 F.3d at 604. The court echos the words of a sister district court that noted:

> Much has been written regarding the difficulty victims of domestic abuse face in litigating ICARA cases. Compounding this is the inherent difficulty of attempting [to] prov[e] rape and domestic abuse allegations in court. Unfortunately, this leaves the Court in the uncomfortable position of both understanding why there is little proof of these allegations, and still requiring more under the law.

Pliego v. Hayes, 86 F. Supp. 3d 678, 703 (W.D. Ky. 2015) (internal citations omitted) (finding no grave risk exception where the respondent, who the court deemed credible, testified in detail regarding several occasions of physical and sexual abuse by the petitioner). Constrained by the requirements of the law, the court concludes that Monasky has failed to demonstrate by clear and convincing evidence that issuing an order of return would place A.M.T. at a grave risk of harm.

D. Attorney's Fees and Other Costs

Under Article 26 of the Hague Convention and the ICARA, courts must award fees and costs to prevailing parties. The ICARA instructs:

> Any court ordering the return of a child pursuant to an action brought under section 9003 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

22 U.S.C. § 9007(b)(3). Consistent with this provision, the court hereby orders Taglieri to file an itemized statement of said costs with the court within fourteen (14) days of the date of this Order. Monasky may file objections to Petitioner's itemized statement of costs within fourteen (14) days thereafter.

IV. CONCLUSION

This is a sad and difficult case. When a parental relationship breaks down, resulting in the kind of acrimony and contentiousness involved here, the child

has the most to lose. This is especially so when the controversy involves parents located in different countries. However, since the parties were not able to otherwise work out a solution on their own, or with the assistance of others, the court was called upon to determine whether the Hague Convention, to which the United States is a signatory, requires the return of the child from the United States to Italy. In doing so, I was constrained from considering issues related to custody. Those issues are to be determined by the country wherein the child was a resident at the time of removal.

For the reasons stated herein, Taglieri's Petition is granted, and the court directs Monasky to take all appropriate steps to ensure that A.M.T. is returned to Italy within forty-five (45) days of the date of this Order.

IT IS SO ORDERED.

/s/ *SOLOMON OLIVER, JR.*
CHIEF JUDGE
UNITED STATES DISTRICT COURT

September 14, 2016

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOMENICO TAGLIERI,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 16-4128
	)	
MICHELLE MONASKY,	)	
	)	
Defendant-Appellant.	)	

Decided and Filed: March 2, 2018

Before: COLE, Chief Judge; BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, BUSH, and LARSEN, Circuit Judges.

ORDER

A majority of the Judges of this Court in regular active service has voted for rehearing en banc of this case. Sixth Circuit Rule 35(b) provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly, it is ORDERED, that the previous decision and judgment of this court are vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION.

The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions —

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are —

a to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this

purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where —

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.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention —

a 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II — CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures —

a to discover the whereabouts of a child who has been wrongfully removed or retained;

b to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

c to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

d to exchange, where desirable, information relating to the social background of the child;

e to provide information of a general character as to the law of their State in connection with the application of the Convention;

f to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;

g where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

h to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;

i to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III — RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain —

a information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b where available, the date of birth of the child;

c the grounds on which the applicant's claim for return of the child is based;

d all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by —

e an authenticated copy of any relevant decision or agreement;

f a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

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 which 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, or had consented to or subsequently acquiesced in the removal or retention; or

b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for

the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may

take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV — RIGHTS OF ACCESS

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V — GENERAL PROVISIONS

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be

entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the

child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units —

a any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of

origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI — FINAL CLAUSES

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force —

1 for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

2 for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at

least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following —

1 the signatures and ratifications, acceptances and approvals referred to in Article 37;

2 the accessions referred to in Article 38;

3 the date on which the Convention enters into force in accordance with Article 43;

4 the extensions referred to in Article 39;

5 the declarations referred to in Articles 38 and 40;

6 the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

7 the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the ..... day of ..... 19...., in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to

each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

* * *

22 U.S.C. § 9001. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their wellbeing.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

(Pub. L. 100–300, §2, Apr. 29, 1988, 102 Stat. 437.)

* * *

22 U.S.C. § 9003. Judicial remedies

(a) Jurisdiction of courts

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter—

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.

(Pub. L. 100–300, § 4, Apr. 29, 1988, 102 Stat. 438.)