

WHO SAYS YOU CAN'T GO HOME: DETERMINING THE HABITUAL RESIDENCE OF INFANTS UNDER THE HAGUE CONVENTION

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I. INTRODUCTION

After a tumultuous marriage and a difficult pregnancy, Michelle Monasky wanted out of her relationship and out of Italy. Eight weeks after the birth of her daughter, Monasky abducted her baby and returned to her hometown of Painesville, Ohio. Domenico Taglieri, Monasky's husband and father of their child, was left behind in Italy. Taglieri availed himself of the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"), a multilateral treaty designed to combat international parental child abduction. From these facts followed years of litigation in federal court, which resulted in their baby (who will turn five years old in February 2020) being returned to Italy with her father. Presently, the mother's quest to return her child to the United States continues. Following an *en banc* decision from the United States Court of Appeals for the Sixth Circuit, which issued a splintered opinion,¹ Monasky filed for a writ of certiorari with the United States Supreme Court, which was granted, and the Court held oral arguments on December 11, 2019.²

The underlying litigation in the *Taglieri* case provides a fascinating peek into the application of the Hague Convention to international parental child abduction cases.³ International parental child abduction is not uncommon when an international relationship

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1. *Taglieri v. Monasky (Taglieri II)*, 907 F.3d 404 (6th Cir. 2018) (*en banc*)

2. See Amy Howe, *Argument Analysis: Justices Debate Determination of "Habitual Residence" for Infants in International Custody Cases*, SCOTUSBLOG (Dec. 11, 2019, 4:29 PM), <https://www.scotusblog.com/2019/12/argument-analysis-justices-debate-determination-of-habitual-residence-for-infants-in-international-child-custody-cases/>.

3. The Sixth Circuit's *en banc* decision highlights not only the different reasoning and approaches taken by the eighteen judges who decided this case, but also the divergent approaches adopted by sister circuits in dealing with similar cases.

deteriorates.⁴ The stakes are always high for the parties involved because the ultimate decision in every international child abduction case involves the life-changing decision as to what country's court system will adjudicate a child's custody.

Habitual residence is a critical element to Hague Convention cases since children are only afforded the protections of the Hague Convention if it is judicially determined that they have a habitual residence. Among the circuits, three standards have developed to determine habitual residence: (1) a rebuttable presumption that the country in which the child has exclusively lived is the habitual residence;⁵ (2) whether there was a shared parental intent to abandon the child's habitual residence and adopt a new habitual residence;⁶ and (3) whether the child has acclimatized in a country to a degree of settled purpose.⁷

The Sixth Circuit, prior to its recent *en banc* decision, utilized the rebuttable presumption standard in cases that involved young children who had been wrongfully removed from the country in which they exclusively lived. The *Taglieri* opinion, however, replaced that presumption standard with the shared parental intent standard for very young children. The decision defies the history of Sixth Circuit case law regarding the Hague Convention and the overarching goals of the Hague Convention.

Part II of this Article describes the Hague Convention, its goals, the distinction between wrongful removal and wrongful retention cases, and the meaning of habitual residence. Part III details the development of Hague Convention case law and discusses the three different standards used to determine habitual residence. Part IV then discusses the *en banc* decision in *Taglieri*: the relevant facts and procedural history, the flaws in the lead opinion, and the ways in which the concurring opinion most accurately reflects circuit precedent and the goals of the Hague Convention.

II. BACKGROUND: THE HAGUE CONVENTION

The Hague Convention is a multilateral treaty that “seeks to combat parental child abduction by providing a system of co-operation between Central Authorities and a rapid procedure for the return of the child to the country of the child's habitual residence.”⁸ To date,

4. For example, in 2015, the United States received 313 return applications involving 461 children. See Hague Conf. on Priv. Int'l Law *et al.*, *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017*, at 142–44 (Oct. 2017), <https://assets.hcch.net/docs/6ca61ff3-5ca6-4fbc-a79a-cb6e7485f4b0.pdf>.

5. *Taglieri II*, 907 F.3d at 411.

6. *Id.* at 407.

7. *Id.*

8. *Outline: The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL

the United States, along with ninety-eight other countries, has signed the Hague Convention.⁹ Significantly, a member state's court may only consider petitions for the return of a child if both countries involved are signatories to the Hague Convention.¹⁰

The Hague Convention is invoked when a parent either wrongfully removes or wrongfully retains his or her child.¹¹ The relocation across borders is considered wrongful when the parent taking the child does not have the right to change the child's place of residence.¹² Usually, the motive of an abducting parent is to "obtain a right of custody from the authorities of the country to which the child has been taken"¹³ and ultimately gain sole custody of the child.¹⁴ Hence, the Convention aims to remove the incentive of abducting parents by halting the custody proceeding until there is a determination of the habitual residence of the child.¹⁵

The Hague Convention provides two main goals. The first goal is "to deter future child abductions," and the second goal is to "provide a prompt and efficient process for the return of the child to the status quo that existed before the abduction."¹⁶ At the forefront of the Convention's objectives is a restoration of the child's status quo.¹⁷ The procedural mechanisms established by the Hague Convention do not evaluate the merits of the case, but are simply a determination of

LAW 1 (May 2014), <https://assets.hcch.net/docs/e6a6a977-40c5-47b2-a380-b4ec3a0041a8.pdf>.

9. *Hague Convention Countries 2019*, WORLD POPULATION REV. (Oct. 1, 2019), <http://worldpopulationreview.com/countries/hague-convention-countries/>.

10. James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges*, FED. JUD. CENT., at x (2012), <https://www.fjc.gov/sites/default/files/2012/HagueGuide.pdf> (using the qualifying language "Contracting State").

11. *Id.* at ix. A "child abduction" occurs when there is a wrongful removal from, or a non-return to, a child's country of "habitual residence" by a parent of the child. *See International Parental Child Abduction: Patterns, Legal Framework, Services Offered*, INT'L SOC. SERV. 1 (Oct. 17, 2017), <https://assets.hcch.net/docs/433be3b2-531e-4536-97ee-9d0e63dd0518.pdf>.

12. Garbolino, *supra* note 10, at ix (noting that, most commonly, this arises when "one parent relocates with a child across an international border without the consent of the left-behind parent or without a court order permitting that relocation.").

13. Eliza Pérez-Vera, *Explanatory Report*, ¶ 13, 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 426 (1982) [hereinafter Pérez-Vera Report].

14. *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001).

15. *Id.*

16. Garbolino, *supra* note 10, at 6; *see also* Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 (Hague Conference on Private International Law) ¶ 1 [hereinafter Hague Convention].

17. Pérez-Vera Report, *supra* note 13, at ¶¶ 12, 16. 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 has developed." *See Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (quoting Pérez-Vera Report ¶ 12).

which country should be responsible for adjudicating the custody proceeding.¹⁸

In order for a court to consider a petition for return of a child pursuant to the Hague Convention, the removal or retention of the child must have been wrongful.¹⁹ Because of the factual distinctions between wrongful removal and wrongful retention cases, courts have developed different standards for the two types of international parental child abduction.²⁰

The Hague Convention “places the child’s habitual residence front and center.”²¹ On a practical level, habitual residence is necessary to determine whether there was wrongful conduct.²² On a deeper level, however, the establishment of the habitual residence of a child is the basis upon which a child gains access to the protections of the Hague Convention. The Hague Convention explicitly makes habitual residence a threshold inquiry.²³ Thus, if a court determines that a child does not have a habitual residence or does not have a

18. Hague Convention, *supra* note 16, at art. 19; Perez–Vera Report, *supra* note 13, at ¶ 19.

19. Hague Convention, *supra* note 16, at art. 3. There are two types of removal or retention, which are deemed “wrongful” under the Hague Convention and constitute an abduction. *See id.* First, wrongful removal occurs when a parent takes a child from his or her habitual residence without the permission of the other parent. *See id.*; *see also* Friedrich v. Friedrich, 983 F.2d 1396, 1399 (6th Cir. 1993). Second, wrongful retention occurs when both parents agree to allow the children to travel away from the habitual residence, but one parent decides not to return the children to their habitual residence. *See id.*; *see also* Mozes, 239 F.3d at 1069. “This frequently occurs when a parent leaves with a child for a visit or vacation in another country.” Garbolino, *supra* note 10, at 24.

20. *See Friedrich*, 983 F.2d at 1402 (creating the rebuttable presumption for wrongful removal cases in the Sixth Circuit); *see also Robert*, 507 F.3d at 992–93 (adopting the acclimatization standard for wrongful retention cases). One major distinction between these two types of child abduction cases is that wrongful removal cases often involve a single jurisdiction whereas wrongful retention cases are inherently a multi-jurisdictional question. *Compare Friedrich*, 983 F.2d at 1401 (involving a child who had only lived in one country prior to the wrongful removal) with *Mozes*, 239 F.3d at 1069 (involving children who had lived in two countries prior to the wrongful retention). *But see* Simcox v. Simcox, 511 F.3d 594, 599 (6th Cir. 2007) (involving a wrongful removal case involving multiple jurisdictions). Additionally, wrongful removal cases are distinct because unlike wrongful retention cases, there was never an agreement between the parents that their child would leave his or her habitual residence. *See* Garbolino, *supra* note 10, at 24. This is in contrast with wrongful retention cases, which begin with the lawful travel of a child across borders. *See id.*

21. *Taglieri II*, 907 F.3d 404, 405 (6th Cir. 2018) (en banc).

22. Garbolino, *supra* note 10, at 41 (noting that habitual residence is the “starting point” because without it a court cannot determine whether a child was wrongfully removed or retained from a country).

23. Hague Convention, *supra* note 16, at art. 4 (stating that Article 4 shall “apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights”).

habitual residence in a contracting state, then the Hague Convention does not afford protection.²⁴

Despite the importance of habitual residence, the drafters left this term undefined leaving courts the discretion to develop their own standards.²⁵ As a result, “the Convention question that has seen the most appellate litigation and petitions for certiorari concerns the definition of habitual residence under the Hague Convention. This has been a subject of ongoing debate among the federal courts of appeal, and in other Convention countries as well.”²⁶

III. THE DEVELOPMENT OF HAGUE CONVENTION CASE LAW IN THE SIXTH CIRCUIT²⁷

The Sixth Circuit has adopted three different standards to determine a child’s habitual residence under the Hague Convention.²⁸ First, when a child has resided exclusively in a single country, that country is presumed to be the child’s habitual residence.²⁹ Next, when a child has lived in two or more countries, the Sixth Circuit begins by applying an acclimatization standard.³⁰ Finally, when a child has lived in two or more countries and habitual residence cannot be determined through an acclimatization standard, the Sixth Circuit defers to the use of a shared parental intent test.³¹ These standards are reflective of how other circuits have analyzed habitual residence.³²

A. *Rebuttable presumption of habitual residence when child has exclusively lived in one country*

Friedrich v. Friedrich,³³ the first Hague Convention case decided by the Sixth Circuit, developed a presumption of habitual residence where a child has exclusively lived in one country.³⁴ There, the court was tasked with determining “when the removal of a child from one country to another by one parent, without the consent of the other, is

24. See Garbolino, *supra* note 10, at 41 & n.154; Ann Laquer Estin, *The Hague Abduction Convention and the United States Supreme Court*, 48 *Fam. L.Q.* 235, 236 (2014).

25. The drafters of the Hague Convention did not “dwell . . . upon the notion of habitual residence.” Perez–Vera Report, *supra* note 13, at ¶ 66.

26. Estin, *supra* note 24, at 247.

27. The Supreme Court has yet to speak on the issue of habitual residence, although its impending decision in this case will likely provide some guidance to the lower courts.

28. *Taglieri v. Monasky (Taglieri I)*, 876 F.3d 868, 876 (6th Cir. 2017), *aff’d*, 907 F.3d 404 (6th Cir. 2018) (en banc).

29. *Id.*

30. *Id.*

31. *Id.*

32. See, e.g., *Koch v. Koch*, 450 F.3d 703, 713–15 (7th Cir. 2006); *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004); *Feder v. Evans–Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

33. 983 F.2d 1396 (6th Cir. 1993).

34. *Id.* at 1398.

‘wrongful’ as defined by the Hague Convention on the Civil Aspects of International Child Abduction.”³⁵

At the time of this case, the Sixth Circuit noted that “no United States cases provides guidance on the construction of habitual residence.”³⁶ Nevertheless, the court found this to be a “simple case” because the child was “born in Germany and resided exclusively in Germany until his mother removed him to the United States.”³⁷ Thus, the court determined that the child was a habitual resident of Germany. The mother’s subjective and future desires to return to the United States with her son were “irrelevant to [the court’s] inquiry.”³⁸ Instead, the court indicated that the focus must remain “on the child, not the parents, and examine past experiences, not future intentions.”³⁹ The *Friedrich* decision stands for the principle that in situations where a child has been wrongfully removed from a country in which he has exclusively lived, the child is a habitual resident of that country.⁴⁰

B. Acclimatization

The acclimatization standard was developed in *Feder v. Evans-Feder*,⁴¹ the “first post-*Friedrich* court of appeals decision to consider the meaning of habitual residence.”⁴² In *Feder*, the Third Circuit held that “a child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization, and which has a degree of settled purpose from the child’s perspective.”⁴³ The acclimatization approach considers “a child’s experience in and contacts with her surroundings, focusing on whether she develop[ed] a certain routine and acquire[d] a sense of environmental normalcy.”⁴⁴ Courts will consider whether a child has formed meaningful connections with people and places encountered prior to the retention date.⁴⁵ The ultimate goal is to determine “whether a child has made a country her home before the date of her removal or retention.”⁴⁶ The acclimatization standard can be difficult to apply in circumstances involving young children⁴⁷ because the time spent in a given location is “but one component of acclimatization.”⁴⁸

35. *Id.*

36. *Id.* at 1401.

37. *Id.* at 1402.

38. *Id.* at 1401.

39. *Id.*

40. *Id.* at 1402.

41. 63 F.3d 217 (3d Cir. 1995)

42. *Robert v. Tesson*, 507 F.3d 981, 992 (6th Cir. 2007).

43. *Id.* (quoting *Feder*, 63 F.3d at 224).

44. *Karkkainen v. Kovalchuk*, 445 F.3d 280, 292 (3d Cir. 2006).

45. *Id.*

46. *Id.*

47. *Robert*, 507 F.3d at 992 n.4.

48. *Ahmed v. Ahmed*, 867 F.3d 682, 689 (6th Cir. 2017). What a child “does in a country” and “how she feels about it” are as important as the length of the stay. *Id.*

Therefore, especially young children, and infants in particular, simply lack the cognizance to make these meaningful connections.⁴⁹

In *Robert v. Tesson*,⁵⁰ the Sixth Circuit simultaneously adopted the acclimatization standard and rejected the shared parental intent standard.⁵¹ This case presented an issue of first impression in the Sixth Circuit—how to determine habitual residence in wrongful retention cases.⁵² Ultimately the court adopted the *Feder* test,⁵³ finding that the adoption of the *Feder* standard for acclimatization was consistent with its *Friedrich* decision because it focused on the child's perspective rather than the parents' perspective, and it required courts to focus on past experiences, not future intentions.⁵⁴ The court concluded that the children were habitual residents of the United States.⁵⁵ In coming to this conclusion, the court relied on different markers to determine acclimatization, including “academic activities,” “sports programs and excursions, and meaningful connections with people and places.”⁵⁶

C. Shared Parental Intent

Shared parental intent asks as its primary inquiry whether there was “settled intent on the part of the parents to abandon the child's prior habitual residence.”⁵⁷ As a backstop, this standard recognizes that if the “objective facts point unequivocally to a [child's] ordinary or habitual residence being in a particular place,” then he or she can have a habitual residence without the prerequisite of settled intent of the parents to change habitual residence.⁵⁸ Hence, the shared parental intent standard starts with the intentions of the parents and uses an acclimatization-like inquiry as a secondary analysis when there is a lack of shared parental intent.

In *Mozes v. Mozes*,⁵⁹ the Ninth Circuit concluded that “the first step toward acquiring a new habitual residence is forming a settled

49. *See id.* The court recognized, however, that determining acclimatization may be difficult for especially young children and disabled children because they often lack the cognizance to meaningfully acclimatize. *See id.*; *see also Robert*, 507 F.3d at 992 n.4.

50. 507 F.3d 981 (6th Cir. 2007).

51. *Id.* at 992.

52. Ivan Robert (a French citizen) and Gayle Tesson (a United States citizen) were married in the United States on January 6, 1996. *Id.* at 984. On May 22, 1997, the couple welcomed the birth of twin boys in Houston, Texas. *Id.* The family lived in the United States until their move to France in December of 1998. *Id.* Over the course of approximately five years, the twin boys regularly moved back and forth between France and the United States. *Id.* at 984–87.

53. *Id.* at 992–93.

54. *Id.* at 993.

55. *Id.* at 995.

56. *Id.* at 996 (quoting *Karkkainen v. Kovalchuk*, 445 F.3d 280, 293–94 (3d Cir. 2006)).

57. *Mozes v. Mozes*, 239 F.3d 1067, 1081 (9th Cir. 2001).

58. *Id.* (quoting *Zenel v. Haddow* (1993) SC 612, 617, SLT 975, 979 (Scot.)).

59. 239 F.3d 1067 (9th Cir. 2001).

intention to abandon the one left behind.”⁶⁰ Because “[c]hildren, particularly the ones whose return may be ordered under the Convention, normally lack the material and physiological wherewithal to decide where they will reside,” the relevant intent is the “person or persons entitled to fix the place of the child’s residence.”⁶¹

The Sixth Circuit routinely rejected the opportunity to adopt and apply shared parental intent, as laid out in *Mozes*.⁶² So *Ahmed v. Ahmed*,⁶³ which adopts shared parental intent, marks a significant change in Sixth Circuit jurisprudence. Although the District Court applied the acclimatization standard,⁶⁴ the Court of Appeals, found that because of the young age of the children, that standard could not be meaningfully applied. The approximately ten months since the twins had been born was littered with international travel,⁶⁵ making the “analysis” simply a comparison between how much time the twins had spent in the United States versus the United Kingdom. Furthermore, the Court of Appeals held that “incorporating the shared parental intent standard in cases concerning especially young children would mean addressing a gap, not overturning precedent,”⁶⁶ consistent with “the law of our sister circuits.”⁶⁷ Because the intent of the Ahmeds was either “unclear” or “absent” for the relevant time period, Mr. Ahmed was unable to carry his burden in proving that the United Kingdom was the twins’ habitual residence.⁶⁸ Put another way, this meant that the twins did not have a habitual residence and therefore were not protected by the Hague Convention. Thus, the country in which the twins had been wrongfully retained would adjudicate the custody proceeding.

60. *Id.* at 1075.

61. *Id.* at 1076.

62. *See, e.g.*, *Robert v. Tesson*, 507 F.3d 981, 991 (6th Cir. 2007) (rejecting the shared parental intent standard articulated in *Mozes*, branding it inconsistent with *Friedrich* because it does not “focus[] solely on the past experiences of the child,” but rather looks to the parents’ subjective intentions in determining a child’s habitual residence.); *Panteleris v. Panteleris*, 601 Fed. App’x 345, 350 (6th Cir. 2015) (unpublished).

63. 867 F.3d 682 (6th Cir. 2017).

64. Being “bound by circuit court precedent,” the district court applied the acclimatization standard; as such, the district court considered “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.” *Id.* at 687 (quoting *Simcox v. Simcox*, 511 F.3d 594, 602 (6th Cir. 2007)).

65. *Ahmed*, 867 F.3d at 684–86.

66. *Id.* at 689.

67. *Id.*

68. *Id.* at 691.

IV. THE TAGLIERI CASE

A. *Factual and Procedural Background*

Domenico Taglieri, an Italian citizen, met Michelle Monasky, a United States citizen, while studying for a doctoral degree at the University of Illinois at Chicago.⁶⁹ The pair married in September 2011 and mutually decided to pursue career opportunities in Italy.⁷⁰ Domenico returned to Italy in February 2013 and began working as a physician.⁷¹ Monasky joined him in July 2013.⁷² Monasky, who has a Ph.D. in biology, received a two-year fellowship with Humanitas Hospital where she worked until she started her maternity leave.⁷³

As is typical in Hague Convention cases, there is much dispute over what actually happened. However, by the time Monasky became pregnant in May 2014, their marriage was certainly experiencing difficulties.⁷⁴ Monasky alleged she began looking for employment in the United States in 2014.⁷⁵ However, in January 2015, she requested an extension of her fellowship in Italy.⁷⁶

Amidst the difficult pregnancy and tumultuous marriage, the couple welcomed their daughter, A.M.T., in February 2015.⁷⁷ Around the same time, Monasky allegedly introduced the idea of divorce to Taglieri.⁷⁸ Nevertheless, after recovering in the hospital, Monasky and their newborn daughter moved to Lugo so that Taglieri could help with Monasky's recovery and care for their daughter.⁷⁹

On March 31, 2015, the couple had an argument.⁸⁰ Monasky fled their home in Lugo and went to the police, who placed her in an Italian safe house.⁸¹ On April 15, 2015, Monasky abducted their eight-week-old daughter to the United States without the consent or knowledge of Taglieri.⁸² On May 14, 2015, Taglieri filed for the return of his daughter to Italy pursuant to the Hague Convention on the basis that she had been wrongfully removed from her habitual residence.⁸³

After a four-day bench trial, the District Court determined that A.M.T.'s habitual residence was Italy.⁸⁴ This decision was affirmed

69. *Taglieri I*, 876 F.3d 868, 871 (6th Cir. 2017).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 871–72.

74. *Id.*

75. *Id.* at 872.

76. *Taglieri v. Monasky*, No. 1:15 CV 947, 2016 WL 10951269, at *2 (N.D. Ohio Sept. 14, 2016).

77. *Id.* at *1–*2.

78. *Id.* at *2.

79. *Id.* at *3.

80. *Id.*

81. *Id.* at *4.

82. *Taglieri I*, 876 F.3d 868, 874 (6th Cir. 2017).

83. *Id.*

84. *Id.*

by the Court of Appeals. The majority opinion noted “[o]ur precedent has demonstrated that where a child lives exclusively in one country that country is presumed to be the child’s habitual residence.”⁸⁵ The majority further held that Sixth Circuit’s recent *Ahmed* decision was distinguishable from the facts of *Taglieri*, and therefore inapplicable. Monasky’s motion for a rehearing *en banc* was granted, and the case was reargued on June 13, 2018, with a decision rendered on October 17, 2018.⁸⁶

B. *Analysis of the En Banc Opinion*

Although the granting of an *en banc* hearing is intended to provide clarity on the law of the circuit, the fractured *Taglieri* opinion achieved the opposite result. Instead, the court delivered a lead opinion, a concurrence, and three dissenting opinions. The lead opinion oversimplifies and mischaracterizes Hague Convention jurisprudence. It relies on a reading of *Ahmed* that ignores Sixth Circuit precedent and the goals of the Hague Convention. The concurring opinion, written by Judge Boggs, most accurately reflects the Sixth Circuit case law, appropriately interprets the *Ahmed* decision, and furthers the purpose of the Hague Convention.

The lead *en banc* opinion is based on a questionable understanding of the scope of *Ahmed*. It interprets *Ahmed* to stand for the principle that there are “two ways to identify a child’s habitual residence.”⁸⁷ The primary approach is to look at the place in which the child has been acclimatized and the second, “back-up inquiry for children too young or too disabled to become acclimatized, looks to shared parental intent.”⁸⁸

Significantly, this approach misses the distinction between wrongful retention and wrongful removal cases. The court in *Ahmed* was quick to point out that it was writing an opinion for a wrongful *retention* case in which the children were too young to meaningfully acclimatize.⁸⁹ This is a subset of wrongful retention cases that consistently presents the most difficult facts, a nuance the lead *en banc* opinion misses.⁹⁰ Courts apply different standards for cases,

85. *Id.* at 871.

86. *Taglieri II*, 907 F.3d 404, 407 (6th Cir. 2018) (*en banc*).

87. *Id.*

88. *Id.*

89. *Ahmed*, 867 F.3d at 684 n.1.

90. This point is furthered by looking at the cases the majority cites when stating “[e]very circuit to consider the question looks to both standards.” *Taglieri II*, 907 F.3d at 407–08. The eleven cases that the court cites all involve children who have lived in more than one country and involve wrongful retention by a parent. *See Ahmed*, 867 F.3d at 689; *Mauvais v. Herisse*, 772 F.3d 6, 11 (1st Cir. 2014); *Chafin v. Chafin*, 742 F.3d 934, 938–39 (11th Cir. 2013); *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013); *Guzzo v. Cristofano*, 719 F.3d 100, 110 (2d Cir. 2013); *Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012); *Barzilay v. Barzilay*, 600 F.3d 912, 918 (8th Cir. 2010); *Maxwell v. Maxwell*, 588 F.3d 245, 253 (4th Cir. 2009); *Karkkainen v. Kovalchuk*, 445 F.3d 280, 296 (3d Cir. 2006); *Holder v. Holder*, 392 F.3d 1009, 1020 (9th Cir. 2004); *Kanth v. Kanth*, No. 99-

such as *Taglieri*, where children have exclusively lived in one country prior to the wrongful *removal*.⁹¹ The majority overlooked this distinction through its wholesale adoption of *Ahmed* and disregard for the distinction between wrongful removal and wrongful retention cases.

As noted by Judge Boggs, the Sixth Circuit already had a standard for “cases such as this one.”⁹² In fact, the *en banc* concurrence is premised on the judges’ issue with the “characterization that all Hague Convention cases are to be governed by a strict two-part test attributed to . . . *Ahmed*.”⁹³ Consistent with precedent dating back to *Friedrich*, “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.”⁹⁴

The drafters of the Hague Convention intended habitual residence to be a “question of pure fact.”⁹⁵ The habitual residence inquiry requires courts to “look closely at the facts and circumstances of each case.”⁹⁶ The development of Sixth Circuit case law reflects the factual nature of habitual residence. The first time the Sixth Circuit faced a Hague Convention case, it was “simple” because the child had only ever lived in one country. As the Sixth Circuit was confronted with more complex factual scenarios, such as cross-border wrongful retention, the Sixth Circuit developed the acclimatization standard. The facts of *Ahmed* presented an even more difficult issue: how to decide the habitual residence of infants who have lived in more than one country? The Sixth Circuit adopted the shared parental intent standard to handle this class of cases. It is clear that the adoption of the shared parental intent standard was not meant to supplant the other methods. The overhaul of Sixth Circuit case law that the lead opinion advocates is simply not necessary.⁹⁷ *Ahmed* and *Taglieri* are unquestionably distinguishable. Applying a shared parental intent standard to the facts of *Taglieri* reflects a lack of understanding as to the development of habitual residence jurisprudence in the Sixth

4246, 2000 WL 1644099, at *1–2 (10th Cir. Nov. 2, 2000). Thus, the lead opinion misleads the reader by saying that every circuit to consider the issue uses a two-fold analysis like *Ahmed*. This may be true for wrongful retention cases, but it is not true for wrongful removal cases.

91. Sister circuits have adopted a presumption similar to that found in *Friedrich* for young children who have lived exclusively in one country prior to wrongful removal. See, e.g., *Larbie*, 690 F.3d at 298 (5th Cir. 2012); see also *Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045, 1057 (E.D. Wash. 2001).

92. *Taglieri II*, 907 F.3d at 411 (Boggs, J., concurring).

93. *Id.*

94. *Id.*

95. The Hague Convention’s explanatory report treats the habitual residence of a child as a “question of pure fact.” Pérez-Vera Report, *supra* note 13, at ¶ 66.

96. *Panteleris v. Panteleris*, 601 Fed. App’x 346, 349 (6th Cir. 2015) (unpublished).

97. See *Ahmed*, 867 F.3d at 689 (“Consequently, incorporating the shared parental intent standard in cases concerning especially young children would mean addressing a gap, not overturning precedent.”).

Circuit. The *Ahmed* decision does not apply to *Taglieri*, nor should it apply.

The most obvious distinction between *Ahmed* and *Taglieri* is that the former is a wrongful retention case and the latter is a wrongful removal case.⁹⁸ Mr. Ahmed gave his wife permission to travel with their children and was aware of the travel.⁹⁹ In contrast, *Taglieri* never gave Monasky the authority to remove their daughter from Italy and did not discover the abduction until after the removal had taken place.¹⁰⁰ This critical distinction is why *Ahmed* is a wrongful retention case and *Taglieri* is a wrongful removal case. An equally critical distinction is that the Ahmed twins had lived in more than one country prior to their retention¹⁰¹ whereas A.M.T. had never left Italy.¹⁰² Hence, the *Friedrich* presumption was available in *Taglieri* but unavailable in *Ahmed*. Although *Ahmed* and *Taglieri* both involve infants, the dispositive distinction is that *Ahmed* is a wrongful retention case and *Taglieri* is a wrongful removal case.¹⁰³

Moreover, not only is *Taglieri* easily distinguished from *Ahmed*, but it is almost identical in facts to *Friedrich*. Because *Friedrich* is still good law in the Sixth Circuit,¹⁰⁴ it should control the decision in *Taglieri*. Both *Friedrich* and *Taglieri* involve American women working and living in a country that is the home of their spouse.¹⁰⁵ In both cases, the couples decide to have a child despite signs of a tumultuous marriage.¹⁰⁶ And in both cases, the mothers abducted their children from the only country they have ever called home to bring them to the United States.¹⁰⁷ All of the legally relevant facts in *Taglieri* mirror those found in *Friedrich*. It only makes sense that *Friedrich* should control the outcome of *Taglieri* and that the presumption the court found in *Friedrich* should also apply to *Taglieri*.

There are also strong policy implications against adopting the strict two-part *Ahmed* standard for all Hague Convention cases. Applying the two-part *Ahmed* standard to wrongful removal cases involving infants and young children would actually encourage child abduction and lengthen the process for the prompt return of a child to status quo, which is opposite the Convention's first goal. The *Friedrich* presumption is better positioned to deter future child abductions and provide a prompt return to status quo than shared

98. *Id.* at 684 n.1; *Taglieri II*, 907 F.3d at 407.

99. *Ahmed*, 867 F.3d at 685–86.

100. *Taglieri I*, 876 F.3d 868, 874 (6th Cir. 2017).

101. *Ahmed*, 867 F.3d at 685–86.

102. *Taglieri I*, 876 F.3d at 874.

103. *See Taglieri II*, 907 F.3d at 408.

104. *See Ahmed*, 867 F.3d at 689 (discussing the fact that shared parental intent was not overturning circuit precedent).

105. *Friedrich v. Friedrich*, 983 F.2d 1396, 1398 (6th Cir. 1993); *Taglieri II*, 907 F.3d at 406.

106. *Friedrich*, 983 F.2d at 1398–99; *Taglieri II*, 907 F.3d at 406.

107. *Friedrich*, 983 F.2d at 1398–99; *Taglieri II*, 907 F.3d at 406–07.

parental intent because under this presumption a parent will not be rewarded with a “more sympathetic court” by abducting a child who has lived exclusively in one country prior to removal.¹⁰⁸ A shared parental intent standard, on the other hand, allows the abducting parent to argue there was no habitual residence based solely on their subjective intent.

Furthermore, there is a concern that a strict adoption of the *Ahmed* two-part standard will lead to an increase in cases finding that children lack a habitual residence.¹⁰⁹ This standard “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”¹¹⁰ because a determination that a child has no habitual residence leaves the child unprotected from the Hague Convention.¹¹¹ The *Ahmed* structure makes a determination of habitual residence more difficult for young children, in large part because it is difficult to discern shared parental intent in Hague Convention cases.¹¹² A shared parental intent standard creates an incentive to re-interpret history to make it seem as though there was no shared parental intent. If a parent is successful in these efforts, then the child will be left without a habitual residence and “parents who are at odds with one another will be able to ‘freely engage in a continuous game of abduction ping pong.’”¹¹³ The *Taglieri* case highlights this concern. Although the District Court found a shared parental intent to raise A.M.T. in Italy, there were certainly facts which would support a finding of no shared parental intent.¹¹⁴ In using the shared parental intent standard, the District Court gave Monasky an opportunity to overshadow the objective facts with her subjective intentions—this is unacceptable.

The second goal of the Hague Convention, the prompt return of children to their status quo, is best furthered by the *Friedrich* presumption. Hague Convention cases are intended to be speedy and have an “expected time frame for handling . . . [of] six weeks.”¹¹⁵ To achieve this speed, “the Convention urges trial and appellate courts to use the most expeditious procedures that are available to hear and issue a ruling on the case.”¹¹⁶ Presuming the country in which a child

108. *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996).

109. *Taglieri II*, 907 F.3d at 412.

110. *Id.* at 415.

111. *Id.* at 411.

112. *Id.* at 412.

113. *Id.* at 415 (quoting *Ovalle v. Perez*, 681 Fed. App'x 777, 784 (11th Cir. 2017) (per curiam)).

114. See *Taglieri v. Monasky*, No. 1:15 CV 947, 2016 WL 10951269, at *8, *10 (N.D. Ohio Sept. 14, 2016).

115. Garbolino, *supra* note 10, at x; Hague Convention, *supra* note 16, at art. 11.

116. Garbolino, *supra* note 10, at x, 115–18 (discussing expeditious handling of Hague Convention cases). Yet a 2018 report published by the Hague Convention indicated that on average, it took the United States a longer time to

has exclusively lived to be the child's habitual residence is the most efficient procedure. The reality is that Hague Convention cases can drag on for years. The *Friedrich* presumption may not solve this efficiency crisis for every classification of Hague Convention cases, but it could go a long way in expediting cases in which a child has been wrongfully removed from the country in which the child has exclusively resided.

The *Taglieri* case illuminates this contention. Taglieri filed an action in the Northern District of Ohio for the return of his daughter to Italy on May 14, 2015.¹¹⁷ The District Court opinion was not released until September 14, 2016, significantly past the six-week target timeline.¹¹⁸ And the Supreme Court will not issue its decision until 2020. Hague Convention cases have turned into complicated and lengthy proceedings, which will be made worse by the adoption of the *Ahmed* two-step standard for all Hague Convention cases.

V. CONCLUSION

The *Taglieri* case presents a narrow legal issue. It asks how courts should determine habitual residence for infants in wrongful removal cases when they have been removed from the only country in which they have resided. A look at Sixth Circuit precedent and an understanding of the policies behind the Hague Convention indicate that the court, in rehearing the case *en banc*, erred in finding that the *Ahmed* two-step standard was applicable in this situation. The concerns raised by the lead opinion are resolved through the possibility of rebutting the presumption. Dating back to *Friedrich*, the Sixth Circuit has consistently held that when a child has lived exclusively in one country prior to removal, that country is presumed to be the habitual residence. The departure from this standard to a shared parental intent standard runs counter to the goals of the Hague Convention and will leave infants vulnerable to parental child abduction.

reach a final settlement in the return applications compared to the global average. See NIGEL LOWE & VICTORIA STEPHENS, PART III – A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2015 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION – NATIONAL REPORTS 142 (July 2018), <https://assets.hcch.net/docs/6ca61ff3-5ca6-4fbc-a79a-cb6e7485f4b0.pdf>. Thus, the United States has a particularly difficult time with quick disposition of Hague Convention cases.

117. *Taglieri I*, 876 F.3d 868, 874 (6th Cir. 2017).

118. *Taglieri*, 2016 WL 10951269, at *1.