No. 16-___

IN THE

Supreme Court of the United States

DANILO PENNACCHIA,

Petitioner,

v.

DENA MICHELLE HAYES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Aiming 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*," the Hague Convention on International Child Abduction (the "Hague Convention" or the "Convention") requires a Contracting State to order the return of a child who has been wrongfully removed or retained. Hague Convention Preamble, art. 12, App. 25a, 30a-31a (emphasis added). The questions presented are:

1. What does "habitual residence" mean under the Hague Convention?

2. What inquiry must be conducted to determine a child's habitual residence in proceedings under the Convention and the International Child Abduction Remedies Act, 22 U.S.C. § 9001, *et seq.*?

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PETITION FOR WRIT OF CERTIORARI

Danilo Pennacchia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 20, 2016. App. 1a-4a. The United States District Court for the District of Idaho entered its memorandum decision on July 28, 2016. App. 5a-24a. Citations for the appellate and district court decisions are, respectively, 2016 WL 7367848 (9th Cir. Dec. 20, 2016) and 2016 WL 4059246 (D. Idaho July 28, 2016).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 20, 2016. App. 1a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

The Hague Convention on the Civil Aspects of International Child Abduction[1] (the "Hague Convention" or the "Convention") and the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq.*, are reproduced in Appendices C and D, respectively.

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[1] Oct. 25, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11, 1343 U.N.T.S. 89, 19 I.L.M. 1501. The Convention is available online at https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf) (last accessed Mar. 10, 2017).

STATEMENT OF THE CASE

This case presents two related and important questions of international law over which the federal courts of appeal are divided: (1) what is the meaning of the core connecting factor of the Hague Convention – "habitual residence;" and (2) what inquiry must be conducted to determine a child's habitual residence in proceedings under the Convention? The conclusion reached by the court of appeals below not only disregards the plain meaning of the term, it conflicts with the consensus of courts in sister signatories who have defined "habitual residence" under the Convention. The issue of habitual residence arises in every case brought under the Convention and, therefore, constitutes "perhaps the most important inquiry under the Convention." *Murphy v. Sloan*, 764 F.3d 1144, 1150 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1183 (2015).

1. The United States is a signatory to the Hague Convention and Congress has implemented its provisions through ICARA. *Abbott v. Abbott*, 560 U.S. 1, 5 (2010). Under the Convention, a parent has the right to have his or her child returned to the country of the child's habitual residence if the child "has been wrongfully removed or retained." Convention art. 12, App. 30a-31a. A retention is "wrongful" where the child is retained in violation of "rights of custody." *Abbott*, 560 U.S. at 9; Convention art. 3, App. 26a. The "Convention's central operating feature is the return remedy" and that remedy "does not alter the pre-abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence." *Abbott*, 560 U.S. at 9; Convention art. 19, App. 33a; 22 U.S.C. § 9001(b)(4), App. 45a ("[t]he Convention and [ICARA] empower courts in the United States to determine only rights under the

Convention and not the merits of any underlying child custody claims"). Indeed, "the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e., of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal." Elisa Perez-Vera, Explanatory Report, ¶ 19, in 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982) ("Perez-Vera Report").[2]

2. Petitioner Danilo Pennacchia, an Italian citizen, and Respondent Dena Michelle Hayes, an American citizen, are the unwed parents of the six year old child S.A.P.H., who was born in the United States on August 24, 2010, and is a citizen of both the United States and Italy. App. 5a. Beginning in October of 2010, petitioner, respondent, and S.A.P.H. all lived together as a family in Anagni, Italy at petitioner's home. *Id.* at 5a, 12a.

In 2012, respondent moved out of the Anagni home to an apartment in Rome, and the parents arranged visitation schedules to account for their living in different Italian cities. *Id.* at 17a-18a. From 2012 until her retention in the United States in 2015, S.A.P.H. was enrolled in and attended school in Rome and had

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[2] Many courts hold the Perez-Vera Report to be an authoritative source for interpreting the Convention, *see Robert v. Tesson*, 507 F.3d 981, 988 n.3 (6th Cir. 2007), and the report is "recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." *See* Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, at 10503 (Mar. 26, 1986) (hereinafter cited as "Public Notice 957"). The report is available online at https://assets.hcch.net/upload/expl28.pdf (last accessed Mar. 10, 2017).

Italian certificates of birth, citizenship, and residence as well as Italian public healthcare coverage. *Id.* at 18a. These objective facts were not in dispute. *Id.* at 18a-19a, 22a ("S.A.P.H. lived in Italy for several years").

During much of this time, the parties were involved in extensive custody proceedings in Italian courts. *Id.* at 19a-20a. On June 12, 2014, the Italian court rejected respondent's request to relocate S.A.P.H. to the United States, ordered shared custody to both parents, and ruled that S.A.P.H. was habitually resident in Italy. *Id.*

In July of 2015, petitioner agreed to allow respondent (who had been living apart from petitioner, but still in Italy, since early 2012) to travel with S.A.P.H. to the United States with a planned return to Italy in August of 2015. *Id.* at 6a, 17a. Respondent did not return to Italy. *Id.* at 6a. Italy is a signatory to the Convention (*id.* at 7a) and in November of 2015, petitioner sought S.A.P.H.'s return to Italy by filing a Return Application under the Convention with the Italian Central Authority. *Id.* at 6a. The application was forwarded to the American Central Authority (Department of State), who sent a voluntary return letter to respondent on December 15, 2015. *Id.* To date, respondent has not returned S.A.P.H. to Italy. *Id.*

3. Petitioner initiated this case on April 26, 2016, filing a petition for return of child and for provisional relief pursuant to the Hague Convention and ICARA. *Id.* at 6a-7a. Following an evidentiary hearing, the district court denied the petition. *Id.* at 5a-24a.

The district court found that, notwithstanding the record facts noted above, petitioner "failed to prove, by

a preponderance of the evidence, that *the parties' intention* was for S.A.P.H.'s habitual residence to be Italy." *Id.* at 14a (emphasis added). Instead, the district court found that steps undertaken by respondent immediately after S.A.P.H.'s August 2010 birth evidenced respondent's *intent* that the child be a resident of the United States and "ensured that S.A.P.H.'s habitual residence was the United States before [she and respondent] departed for Italy in October of 2010" to live in Anagni with petitioner. *Id.*

4. Petitioner timely filed his notice of appeal and the appellate court, having jurisdiction pursuant 28 U.S.C. § 1291, affirmed the district court's denial of the petition. App. 2a, 4a. The panel held that the district court "applied the correct legal standard by focusing on the 'shared settled intent of the parents,'" reaffirming well-settled Ninth Circuit precedent that *intent* is the most important, if not outcome determinative, factor of the habitual residence inquiry. App. 3a. First, the court concluded that the district court did not err in concluding that the child's initial habitual residence turned on the parents' *intentions* during the two-month period between S.A.P.H.'s birth and the move to Italy in October 2010. *Id.* at 3a-4a. Moreover, the panel determined that "[f]or S.A.P.H.'s habitual residence to change, 'the agreement between the parents and the circumstances surrounding it must enable the court to infer a *shared intent* to abandon the previous habitual residence.'" *Id.* at 4a (emphasis added) (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1081 (9th Cir. 2001). Finding no such shared intent to abandon the initial U.S. habitual residence and adopt a new habitual residence in Italy, the panel affirmed. *Id.*

REASONS FOR GRANTING THE WRIT

The "driving objective" of the Hague Convention "is to facilitate custody adjudications, promptly and exclusively, in the place where the child habitually resides." *Chafin v. Chafin*, 133 S. Ct. 1017, 1028 (2013) (Ginsburg, J., concurring). A leading treatise on the Convention (*see Mozes*, 239 F.3d at 1072) notes that the concept of "habitual residence" is well-established within the Hague Conference and has "been regarded as the primary connecting factor employed in the initiatives undertaken by that body." Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 88 (1999) (hereinafter cited as "Beaumont & McEleavy"); *see also* Perez-Vera Report, ¶ 66. Yet, despite the central role of "habitual residence" in the application of the Convention, this Court has never interpreted the term.

In the absence of guidance from this Court, the federal courts have fractured and are divided on the issue of what it means to be "habitually resident" in a country and how to determine the habitual residence of children who may have been abducted. This circuit conflict undermines the Convention's protective purposes and frustrates the Convention's twin objectives of (1) securing the prompt return of children wrongfully removed to or retained in any Contracting State, and (2) ensuring that the rights of custody and access under the law of one Contracting State are respected in others. *See* Public Notice 957 at 10504; *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1228 (2014). This case presents an opportunity for this Court to resolve the conflict and establish clear and uniform standards for interpreting this fundamental term.

The Ninth Circuit's approach (which has been adopted, with some variation, by a majority of federal

circuits) is at odds with the contemporary consensus of Contracting States to the Convention, runs counter to this Court's instruction to give "considerable weight" to the opinions of our sister signatories, and is at cross-purposes with Congress' recognition of the need for "uniform international interpretation of the Convention." *See Abbott*, 560 U.S. at 16; 22 U.S.C. § 9001(b)(3), App. 45a.

I. Federal Courts Are Divided Over How to Define "Habitual Residence" under the Convention.

1. There is conflict among the federal circuits on the questions presented. Courts and commentators have long recognized the disagreement and have lamented its effects. *See, e.g., Redmond v. Redmond*, 724 F.3d 729, 744-45 (7th Cir. 2013) (noting split in authority between "majority of the circuits" and the Sixth Circuit and collecting cases); *Larbie v. Larbie*, 690 F.3d 295, 310 (5th Cir. 2012) (noting that "[c]ourts use varying approaches to determine a child's habitual residence" and collecting cases); *Robert v. Tesson*, 507 F.3d 981, 987-90 (6th Cir. 2007) (discussing and contrasting Sixth and Ninth Circuit approaches to habitual residence analysis); Ann Lacquer Estin, *The Hague Abduction Convention and The United States Supreme Court*, 48 Family Law Quarterly 235, 247 (2014) (noting "split of authority in the United States regarding habitual residence" that "has developed over more than a decade"); Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases under the Hague Convention*, 77 Fordham L. Rev. 3325, 3344-54 (2009) (analyzing conflict among circuits in defining habitual residence and discussing cases).

Viewed as a continuum of increasing emphasis on parental intent, the conflict manifests itself in three broad, competing approaches.

a. *The Child's Experience and Objective Circumstances.* The Sixth Circuit has held that "habitual residence should not be determined through the 'technical' rules governing legal residence or common law domicile." *Robert*, 507 F.3d at 989. Reasoning that "because the Hague Convention is concerned with the habitual residence of the child, the court should consider only the child's experience." *Id.* Moreover, the Sixth Circuit approach "focus[es] exclusively on the child's 'past experience'" noting that "'[a]ny future plans' that the parents may have 'are irrelevant to [the] inquiry.'" *Id.*; *see also Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993).

The Sixth Circuit acknowledges as conflicting and criticizes the Ninth Circuit's approach as inconsistent with the Convention's goal of deterring parents from crossing borders in search of a more sympathetic court, because by considering the subjective intentions of the parents it empowers a future abductor to lay the foundation for an abduction by expressing reservations over an upcoming move. *See Robert*, 507 F.3d at 991-92. The Sixth Circuit further holds that its child-centered approach to habitual residence comports with the Convention's aim, as articulated in the official commentary, that children should be regarded as individuals and not merely as their parents' property. *Id.* at 992 (citing Perez-Vera Report, ¶ 24).

b. *Hybrid Approach.* The Third, Fourth, Seventh, and Eighth Circuits employ a hybrid approach, examining both the child's circumstances and the shared intentions of the child's parents. *See, e.g., Tsai-Yi*

Yang v. Fu-Chiang Tsui, 499 F.3d 259 (3d Cir. 2007); *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3d Cir. 2006); *Maxwell v. Maxwell*, 588 F.3d 245 (4th Cir. 2009); *Redmond*, 724 F.3d 729; *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006); *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010); *Sorenson v. Sorenson*, 559 F.3d 871 (8th Cir. 2009); *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003). Under this approach, courts have indicated that the term is to be interpreted "from the child's perspective, although parental intent is also taken into account." *Silverman*, 338 F.3d at 898.

c. *Parental Intent as First and Often Deciding Factor.* Although there is some variation, the First, Second, Fifth, Ninth, and Eleventh Circuits generally agree that parental intent, with a secondary examination of acclimatization, determines habitual residence of a child under the Convention. *See, e.g., See Mauvais v. Herisse*, 772 F.3d 6 (1st Cir. 2014); *Guzzo v. Cristofano*, 719 F.3d 100 (2d Cir. 2013); *Hofmann v. Sender*, 716 F.3d 282 (2d Cir. 2013); *Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010); *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005); *Larbie*, 690 F.3d 295; *Mozes*, 239 F.3d 1067; *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004). Under this approach, a child's habitual residence is presumptively determined by the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared and this presumption may be overcome only if "the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent." *Gitter*, 396 F.3d at 134. The First Circuit makes the presumption nearly irrebutable. *See Mauvais*, 772 F.3d at 14 (stating, "evidence of acclimatization is generally insufficient 'to establish a

child's habitual residence in a new country when contrary parental intent exists'").

2. The division of authority is considered, mature, and entrenched. As noted above, courts and commentators readily recognize the disunity among the circuits on the questions presented. Indeed, the panel below explicitly acknowledged competing approaches, noting, "[o]ur court was recently invited 'to adopt a habitual residence standard that would focus on the subjective experiences of the child' and declined to do so." App. 3a (quoting *Murphy*, 764 F.3d at 1150).

Nor would the questions presented benefit from further percolation. Of late, courts confronting the habitual residence question and the inter-circuit split have simply acknowledged the conflict and chosen sides. There is nothing in the cases to indicate a trend toward uniformity; it is unlikely that the divergent approaches to the questions presented will be harmonized without the Court's intervention.

3. The conflicting circuit approaches produce "anomalies" in federal law. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 171 (1999). In its most basic manifestation, the same case involving the same parties could be decided differently based solely on the judicial circuit to which a parent has removed the child. In this case, for example, had respondent decided to retain S.A.P.H. in Michigan, rather than Idaho, there is little doubt that the child would have been returned to Italy. Where, as here (and, indeed, in every case under the Convention), the "well-being of a child is at stake" (*Chafin*, 133 S. Ct. at 1027), determinations as to where that child will be raised and make her home should not turn on an accident of geography.

4. This case is well-suited to resolve the federal conflict. The facts relevant to the habitual residence inquiry, i.e., those relating to where the child resided, for how long, and the circumstances of her life in Italy are, for the most part, undisputed and in the record developed in the district court. Thus, the application of those facts to the standard(s) articulated by this Court should be straightforward and easily decided on remand. Nor is there any risk that the case might become moot before this Court can resolve it or the lower court(s) can rule. S.A.P.H. remains today in the United States. And, because the Convention applies until the she turns sixteen (Convention art. 4, App. 26a) – an age she will not reach until August 2026 – the Court can consider the questions presented free of any concern that its decision will have no effect on the parties.

II. Uniformity with Sister Signatories – The U.S. Majority View Conflicts with the International Consensus.

When interpreting a treaty or convention, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. 392, 396 (1985). Indeed, this Court has examined case law of sister signatories in defining critical terms under the convention at issue. *See Abbott*, 560 U.S. at 16-18.

1. Likewise, in announcing its landmark decision in *Mozes*, the Ninth Circuit engaged in extensive analysis of international authorities under the Hague Convention bearing on issues ranging from procedural (e.g., appropriate standards for appellate review) to substantive (e.g., the interplay of parental consent and objective factual circumstances of the child's life in

determining habitual residence). *See Mozes*, 239 F.3d at 1071-84. In particular, the *Mozes* court, like courts in other English-speaking signatory states, looked to the decisions of the United Kingdom on the issue of habitual residence and the test for habitual residence derived from *Shah v. Barnet London Borough Council*, [1983] 1 All E.R. 226 (Eng. H.L.), which focused on the habitual intent of the parent. *See id.* at 1073-74; *Punter v Secretary for Justice* [2007] 1 NZLR 40, para. 118 (N.Z.) (collecting cases discussing *Shah*). Still, most English speaking signatories, even those that gave credence to the *Shah* decision, have opted for a mixed model approach to determining habitual residence, which takes a more child-centric and fact-based approach. *See, e.g.*, *LK v Director-General, Department of Community Services* [2009] HCA 9 (Austl.); *Punter v Secretary for Justice* [2007] 1 NZLR 40, para. 106 (N.Z.) (adopting factual inquiry of all relevant factors and criticizing *Mozes* for putting "too much emphasis on parental purpose, thus obscuring the factual nature of the inquiry"); Case C-376/14 PPU, *C v. M* [2014] All ER (D) 160 (Oct); Case C-497/10 PPU, *Mercredi v Chaffe* [2010] E.C.R. I-14309. In Canada, there is not a consensus among courts as to the appropriate habitual residence test, with most courts applying the *Shah* test, *see, e.g.*, *Korutowska-Wooff v. Wooff*, (2004), 242 D.L.R. (4th) 385 (Ont. C.A.) O.J. No. 3256, while the Quebec courts' test focuses on the circumstances of the child, *see, e.g.*, *Droit de la famille – 3713*, [2000] R.D.F. 585 (Que. C.A.); *Droit de la famille – 131863*, 2013 CanLII 1196 (Que. C.A.) (in post return case, discussing split in both Canadian and American courts and noting that "had the initial matter in this case been decided according to the law applied in Quebec or, say, in Michigan, the children would very likely

have stayed where they had been since August 2011.").

2. In 2013, the United Kingdom Supreme Court abandoned almost 30 years of precedent applying the parent-centric test from *Shah* in favor of the objective, fact-based approach in conformance with the Court of Justice of the European Union ("CJEU"). *A v A* [2013] UKSC 60 (2013 WL 4764942**)** (adopting habitual residence test of the CJEU, that "focus[es] on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors"); *Re LC (Children)* [2014] UKSC 1 (2014 WL 16424) ("This is a child-centred approach. It is the child's habitual residence which is in question."); *In re R (Children)* [2015] UKSC 35 (rejecting previously held position that one parent with parental responsibility could not achieve a change in the child's habitual residence without the consent of the other parent with parental responsibility). With the U.K.'s move to conform with the CJEU's treatment of habitual residence, the jurisdictions in Canada and the United States that continue to focus on the intent of the parents over all other factors are now in the minority, at least of signatories with English language case law, in their interpretation of habitual residence under the Hague Convention.

III. The Decision Below Is Wrong on the Merits – The Child's Habitual Residence Immediately before the Retention at Issue Was Italy.

As Chief Justice Roberts noted in *Chafin*, the Convention "generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the

United States." 133 S. Ct. at 1021. And, as to the use of the term habitual residence, the leading treatise on the Convention (*see Mozes*, 239 F.3d at 1072) observes that the concept is well-established within the Hague Convention and has "been regarded as the primary connecting factor employed in the initiatives undertaken by that body." Beaumont & McEleavy at 88; *see also* Perez-Vera Report, ¶ 66. Thus, according to Beaumont and McEleavy,

> The choice of a child's habitual residence as the basis on which to found the summary return mechanism [of the Convention] would appear, prima facie, entirely appropriate. Where else should the court send a wrongfully removed or retained child but to the environment and society of which the latter was a member. The success of the [Convention] drafters lay not so much in focusing upon habitual residence, but in not including any alternative connecting factors.

Beaumont & McEleavy at 88.

1. Although not defined in the Convention, the term is to be interpreted "according to 'the ordinary and natural meaning of the two words it contains'" and, thus, is "intended to be a description of a factual state of affairs." *Mozes*, 239 F.3d at 1071, 1081; *Redmond*, 724 F.3d at 743; *Guzzo*, 719 F.3d at 106. The focus of the habitual residence analysis is the child. Beaumont & McEleavy at 91; *Holder v. Holder*, 392 F.3d 1009, 1016-17 (9th Cir. 2004); *Silverman*, 338 F.3d at 898; *Friedrich*, 983 F.2d at 1401; *Tsai-Yi Yang*, 499 F.3d at 271-72 ("[t]he inquiry focuses on the child, but also must consider the 'parents' present, shared intentions

regarding their child's presence [in a particular location]'"). Indeed, while the intentions of parents are germane (and, when shared, settled and coupled with actual geography and time, may be temporarily dispositive), the analysis can be problematic when "undue emphasis is placed on the intention imputed to the parents and not on the child's personal link to the State in question." Beaumont & McEleavy at 112. Emphasis on parental intent is undue when it crowds out consideration of the "unique circumstances" of a child's habitual residence because:

> Habitual residence, notwithstanding certain developments, remains in essence a factual concept which responds to changes in peoples' lives. To allow it to be artificially suspended, whatever the motives, would be to deprive it of all effect. Had the drafters wished such a connecting factor they would simply have turned to the concept of domicile.

Beaumont & McEleavy at 100-101.

To be habitual, the residence must have achieved some degree of continuity and settled purpose. *See Silverman*, 338 F.3d at 898; *Mozes*, 239 F.3 at 1074. Continuity does not foreclose periodic travel outside of the residence: "if a person has lived in a particular place over a period of time, notwithstanding short absences, he or she will be deemed to be habitually resident there." Beaumont & McEleavy at 90. The *sine qua non* of the habitual residence inquiry is to vindicate the child's best interests[3] by "prevent[ing] a

[3] On this point, the official commentary notes: "It is thus legitimate to assert that the two objects of the Convention – the one preventative, the other designed to secure the immediate reintegration of the child into its habitual environment – both

circumstance where 'the child is taken out of the family and social environment in which its life has developed.'" *Robert*, 507 F.3d at 988 (quoting Perez-Vera Report, ¶ 12). Accordingly, "contrived solutions" and "artificial jurisdictional tie[s]" must yield to a search for the child's "normal residence" and "primary locus" where she or he is "firmly rooted" with a "strong and perceptible link," a "real and active connection," as a result of being "settled in that State for more than a token period." Beaumont & McEleavy at 101, 106, 108, 109, 112; *Redmond*, 724 F.3d at 743; *Guzzo*, 719 F.3d at 106-07; *Holder*, 392 F.3d at 1019; *Mozes*, 239 F.3d at 1073-74, 1079; *Friedrich*, 983 F.2d at 1401. Even in those circuits emphasizing parental intent, "wishful thinking alone" is not enough and "given enough time and positive experience, a child's life may become so firmly embedded in a new country as to make it habitually resident *even though there be lingering parental intentions to the contrary*." *Mozes*, 239 F.3d at 1078 (emphasis added).

As Petitioner acknowledged, current Ninth Circuit law, binding on the panel below, requires courts in that circuit to focus first on the last shared, settled intent of the parents. *See* App. 3a ("The parties agree that to determine a child's habitual residence, we first 'look for the last shared, settled intent of the parents.'"). [4] However, the decisions below that

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correspond to a specific idea of what constitutes the 'best interests of the child.'" Perez-Vera Report, ¶ 25.

[4] In light of the well-settled nature of the point within the Ninth Circuit, the court's recent rejection of "a habitual residence standard that would focus on the subjective experiences of the child," *Murphy*, 764 F.3d at 1150, and in the interest of overall expedition, petitioner did not seek reconsideration of the panel's decision or *en banc* review of the Ninth Circuit's approach. *Cf. Chafin*, 133 S. Ct. at 1017 (rejecting routine stays of return orders

S.A.P.H. was habitually resident in the United States based on the actions and intent of her mother during the first two months of the child's life completely ignore the factual state of affairs immediately prior to the retention at issue and cannot be squared with the Convention's objectives or the ordinary and natural meaning of habitual residence.

2. In addition, an Italian court has expressly found that as of June 2014, S.A.P.H. was habitually resident in Italy. App. 19a-20a. And, though respondent appealed that order on the issues of custody and relocation to the United States, she has not challenged the predicate finding of S.A.P.H.'s Italian habitual residence on appeal. App. 20a.

In its June 12, 2014 Order, the Common Court of Rome determined, as a threshold matter, that it had jurisdiction to resolve the disputes pursuant to Articles 1 and 2 of the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, concluded on October 5, 1961 and ratified by Italy by Italian Law No. 742 of October 24, 1980, (the "Hague Protection of Minors Convention")[5] because S.A.P.H.'s "habitual residence" was Italy. App. 20a. Absent the habitual

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because "a child would lose precious months when she could have been readjusting to life in her country of habitual residence, even though the appeal had little chance of success" and that "[s]uch routine stays due to mootness . . would conflict with the Convention's mandate of prompt return to a child's country of habitual residence").

[5] A copy of the Hague Protection of Minors Convention is available online at https://assets.hcch.net/docs/d79fb51a-00f8-41f4-8790-28339b415bae.pdf (last accessed Mar. 10, 2017).

residence predicate, the Italian court would not have jurisdiction.[6]

The Italian court's determination that Italy was the habitual residence of S.A.P.H. is entitled to recognition under settled principles of comity. *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). Notions of comity play an especially important role in cases under The Hague Convention. As the Second Circuit has noted:

> [T]he careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but

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[6] The district court correctly pointed out that the Hague Protection of Minors Convention is, self-evidently, a "different treaty" than the Convention at issue here. *See* App. 21a, n.9. But, the court failed to provide any analysis of the term, its use, or context in the two treaties to support a conclusion that the meaning of "habitual residence" as used in two conventions developed by the same Hague Conference dealing with the same issues (i.e., cross-border protection of children) should have divergent meanings. By contrast, the Convention's official reporter and the Ninth Circuit have emphasized that the term should be consistently defined across relevant Hague documents, noting that the term "habitual residence" is "a well-established concept in the Hague Conference," and is a term that "appears throughout the various Hague Conventions." *Mozes*, 239 F.3d at 1071 (quoting Perez-Vera Report, ¶ 66). Similarly, that the United States is not a party to the Hague Protection of Minors Convention is of no moment. *See* App. 21a, n.9. Petitioner knows of no cannon of construction mandating that identical, familiar, well-known terms intentionally and consistently used across treaties developed by the same Conference governing the same subject matter have or ought to take on different meanings simply because the United States is a party to one and not the other. Indeed, such hair-splitting would lead to the very inconsistent and "idiosyncratic" usage that the Convention drafters sought to avoid by using this "well-established concept" in the Convention. *See Mozes*, 239 F.3d at 1071 (citations omitted).

> also to protect American children abducted to other nations-whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection. In the exercise of comity, "we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it."

Souratgar v. Lee, 720 F.3d 96, 108-09 (2d Cir. 2013) (citation omitted).

* * *

In *Mozes*, the Ninth Circuit announced a series of questions to be answered in determining whether a removal or retention is "wrongful" under the Hague Convention. 239 F.3d at 1070. The second of those questions is especially important in this case: "Immediately prior to the removal or retention, in which state was the child habitually resident." Answering that question here is straightforward. At the time of the retention in August 2015, S.A.P.H. was plainly habitual resident in Italy. But for the first two months of her life, she spent all of her life in Italy, save for occasional trips to the United States with her mother. By any measure and under any analysis that is tethered to the Convention and its principal "connecting factor" – habitual residence – Italy was the locus of S.A.P.H.'s life, the home always returned to, the environment in which her life had developed. The decisions below cannot be squared with these fundamental and indisputable facts. The Ninth Circuit's decision warrants this Court's review and correction.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 15, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35635
D.C. No. 1:16-cv-00173-EJL

DANILO PENNACCHIA,

Petitioner-Appellant,

v.

DENA MICHELLE HAYES,

Respondent-Appellee.

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Idaho

Edward J. Lodge, District Judge, Presiding

Argued and submitted December 9, 2016
Seattle, Washington

[Filed: Dec. 20, 2016]

Before: TALLMAN and CHRISTEN, Circuit Judges, and ENGLAND,[**] District Judge.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.

Danilo Pennacchia appeals from the district court's denial of his petition to return his minor child to Italy under the Hague Convention on the Civil Aspects of International Child Abduction.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm.[2]

Article 3 of the 1980 Hague Convention provides that the removal or retention of a child is wrongful where it is in breach of actually exercised custody rights under the law of a state in which the child was habitually resident immediately before the removal or retention. Convention, art. 3, 19 I.L.M. at 1501. The parties' dispute hinges on SAPH's habitual residence under the Convention.

"[W]e approach the question of habitual residence as a mixed question of law and fact." *Valenzuela v. Michel*, 736 F.3d 1173, 1176 (9th Cir. 2013). We give "appropriate deference to the district court's findings of fact and credibility determinations," and "accept the district court's historical or narrative facts unless they are clearly erroneous." *Papakosmas v. Papakosmas*, 483 F.3d 617, 622–23 (9th Cir. 2007) (quotation marks and citation omitted). "After scrutinizing the circumstances of a particular case, we must determine whether the discrete facts add up to a showing of habitual residence," *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004), and we review "the ultimate issue of habitual residence de novo." *Valenzuela*, 736 F.3d at

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[1] Oct. 25, 1980, 19 I.L.M. 1501, as implemented by the International Child Abduction Remedies Act (ICARA), 22 U.S.C. §§ 9001–11 (hereinafter the 1980 Hague Convention or the Convention).

[2] The parties are familiar with the facts, so we do not recount them here. Following the practice of the parties and in the interest of privacy, we will refer to the child as SAPH throughout this disposition.

1176 (quoting *In re B. Del C.S.B*, 559 F.3d 999, 1008 (9th Cir. 2009)).

The parties agree that to determine a child's habitual residence, we first "look for the last shared, settled intent of the parents." *Valenzuela*, 736 F.3d at 1177 (citing *Mozes v. Mozes*, 239 F.3d 1067, 1084 (9th Cir. 2001)). Our court was recently invited "to adopt a habitual residence standard that would focus on the subjective experiences of the child" and declined to do so. *Murphy v. Sloan*, 764 F.3d 1144, 1150 (9th Cir. 2014).

The district court concluded SAPH's habitual residence was the United States. In doing so, the court applied the correct legal standard by focusing on the "shared, settled intent of the parents." *See Holder*, 392 F.3d at 1020 n.11 (observing that even for a new born baby "[i]t is the settled intentions of the parents that render that 'residence' of the baby habitual" (citation omitted)). The district court acknowledged that the parents' testimony differed concerning their intentions at the time they left the United States, but found Pennacchia's "testimony lacks credibility and evidence to support his position." We give heavy deference to factual determinations such as which witnesses to believe and which documents corroborate the most credible version of disputed testimony. *See, e.g.*, FED. R. CIV. P. 52(a) (reviewing courts "must give due regard to the trial court's opportunity to judge the witnesses' credibility"). The district court found Pennacchia agreed to and signed several documents, including paperwork appointing United States guardians, that support the mother's testimony and evidenced the parties' initial agreement that "their living arrangement in Italy was conditional and 'a trial period.'" The district court did not err when it concluded that, for

both parents, "the settled intention was for SAPH's habitual residence to be the United States."

For SAPH's habitual residence to change, "the agreement between the parents and the circumstances surrounding it must enable the court to infer a shared intent to abandon the previous habitual residence." *Mozes*, 239 F.3d at 1081. "Although it is possible for a child's contacts standing alone to be sufficient for a change in habitual residence, in view of 'the absence of settled parental intent, [we] should be slow to infer from such contacts that an earlier habitual residence has been abandoned.'" *Holder*, 392 F.3d at 1019 (alteration in original) (quoting *Mozes*, 239 F.3d at 1079). "To infer abandonment of a habitual residence by acclimatization, the 'objective facts [must] point *unequivocally* to [the child's] ordinary or habitual residence being in [the new country].'" *Murphy*, 764 F.3d at 1152 (emphasis and alterations in original) (quoting *Mozes*, 239 F.3d at 1081).

SAPH has significant contacts in Italy, but the district court did not find a shared parental intent to abandon her habitual residence in the United States or that the objective facts point unequivocally to a change in SAPH's habitual residence. Pennacchia did not meet his burden on acclimatization, and therefore, the district court did not err by concluding SAPH's habitual residence under the 1980 Hague Convention remains the United States. The district court properly denied Pennacchia's petition.

The parties shall bear their own costs on appeal.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 1:16-CV-00173-EJL

DANILO PENNACCHIA,

Petitioner,

v.

DENA MICHELLE HAYES,

Respondent.

MEMORANDUM DECISION AND ORDER

INTRODUCTION

Before the Court in this matter is a Verified Petition for Return of Child. The Court held an evidentiary hearing and parties have filed briefing and supporting materials on the Petition. Having considered the entire record, the Court denies the Petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Petitioner, Danilo Pennacchia, and Respondent, Dena Michelle Hayes, are the unwed parents of the five year old child ("SAPH" or "the Child") who is the subject of this case. The Petitioner is a citizen of Italy and the Respondent is a citizen of the United States. SAPH was born in Seattle, Washington on August 24, 2010 and is a citizen of both the United States and Italy. Beginning in October of 2010, the Petitioner, Respondent, and SAPH all lived together in Italy.

In July of 2015, the Petitioner agreed to the Respondent traveling with SAPH to the United States but claims the Respondent was to return SAPH to Italy in August of 2015. (Dkt. 1 at ¶ 8.) The Respondent has not returned SAPH to Italy. Petitioner claims SAPH has been wrongfully retained in the United States since August of 2015 and is currently in the State of Idaho. (Dkt. 3-3, Dec. Pennacchia.) Petitioner claims he has custody rights stemming from a May 30, 2014 decision of the Common Court of Rome in Italy. (Dkt. 3-3, Dec. Pennacchia, Ex. C-4.). Petitioner maintains he was exercising his custody rights as SAPH's father at the time of SAPH's wrongful retention. (Dkt. 3-3, Dec. Pennacchia.)

In November of 2015, Petitioner requested SAPH's return through a Hague Convention Application filed with the Central Authority in Italy which was forwarded to the United States Central Authority. (Dkt. 3-4, Ex. D.) On December 15, 2015, the United States Central Authority sent a voluntary return letter to the Respondent to which the Respondent's Italian attorney responded. (Dkt. 3-5, Ex. E) (Dkt. 3-6, Ex. F.) Thereafter, on February 24, 2016, an attorney in Boise, Idaho representing the Petitioner sent a written letter to the Respondent advising that Petitioner would initiate proceedings under the Hague Convention unless Respondent provided assurance that SAPH would be voluntarily returned to Italy. (Dkt. 3-7, Ex. G.) The Respondent replied to that letter by email on March 3, 2016. (Dkt. 3-8, Ex. H.) Respondent and SAPH remain located in Boise, Idaho.

Petitioner initiated this proceeding on April 26, 2016 by filing a Verified Petition for return of child and for provisional relief pursuant to The Convention on the Civil Aspects of International Child Abduction, done

at the Hague on October 25, 1980 ("the Convention") and the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001 *et seq*. (Dkt. 1, 3.) Both countries at issue in this matter, Italy and the United States, are signatory nations to the Convention. The Petition requested a Temporary Restraining Order ("TRO"), expedited Preliminary Injunction, and return of SAPH to Italy. (Dkt. 1, 3.) The Court denied the TRO and set an evidentiary hearing on the merits of the Petition. (Dkt. 5, 11, 12.) On the June 29, 2016, the Court held the evidentiary hearing. (Dkt. 12, 28, 29.) The parties have filed their briefing on the Petition and the matter is ripe for the Court's consideration.

DISCUSSION

1. The Convention

The Convention is a multilateral international treaty on parental kidnaping which provides a civil legal mechanism to parents seeking the return of, or access to, their child. The Convention "was adopted in 1980 in response to the problem of international child abductions during domestic disputes [and] . . . seeks to secure the prompt return of children wrongfully removed to or retained in any Contracting State [.]" *Abbott v. Abbott*, 560 U.S. 1, 8 (2010) (internal quotation marks omitted). The Convention seeks 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 secure protection for rights of access." *Maxwell v. Maxwell*, 588 F.3d 245, 250 (4th Cir. 2009) (quoting Hague Convention, pmbl., 19 I.L.M. at 1501) (internal quotations omitted). The objects of the Hague Convention are: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and (2) "to ensure

that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States." Hague Convention, art. 1; *see also* 22 U.S.C. § 9001(a). The Convention applies where a child has been removed or retained away from his or her habitual residence in breach of the custody rights that the petitioner was exercising at the time of the wrongful removal or wrongful retention. *See* 22 U.S.C. § 9003(e); Hague Convention, art. 3. "The Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must order the return of the child forthwith, unless certain exceptions apply." *Abbott*, 560 U.S. at 9 (citation and internal quotation marks omitted). This Court's role in this proceeding is limited to determining the rights under the Convention, not the merits of the underlying custody dispute between the parties. *See Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001) (citing Elisa Pérez-Vera, Explanatory Report ¶¶ 13, 16, in 3 Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982)); 22 U.S.C. § 9001(b)(4).

2. The Petition

Petitioner argues SAPH's retention in the United States since August of 2015 is wrongful and he seeks SAPH's return to Italy arguing that Italy is SAPH's habitual residence and the nation that should hear the underlying custody claim between the parties. (Dkt. 1, 3.) Respondent counters that the Petition should be denied because SAPH's habitual residence is the United States and, therefore, there has been no wrongful removal or retention in the United States. Respondent also raises several affirmative defenses

including that the Petitioner consented/acquiesced to the removal and/or retention of the Child to and in the United States, granting the petition would expose the child to grave risk of psychological harm and/or place the child in an intolerable situation, and the child is of sufficient age and maturity that her opinion should be considered. (Dkt. 13 at 8, ¶¶ A-L.)

In determining whether the removal or retention of a child is "wrongful" under the Convention, the Court must answer a series of four questions: (1) when did the removal or retention at issue take place (2) immediately prior to the removal or retention, in which state was the child habitually resident (3) did the removal or retention breach the rights of custody attributed to the petitioner under the law of the habitual residence (4) was the petitioner exercising those rights at the time of the removal or retention. *Mozes*, 239 F.3d at 1070.

The Petitioner bears the burden of proving by a preponderance of the evidence that the Child in question has been wrongfully removed from or retained outside the nation of her habitual residence. *See* 22 U.S.C. § 9003(e)(1)(A); Hague Convention, arts. 3 and 4. If Petitioner establishes that the removal or retention was "wrongful," the Child must be returned unless the Respondent can establish one or more of four defenses: 1) the ICARA proceedings were not commenced within one year of the Child's abduction; 2) the Petitioner was not actually exercising custody rights at the time of the removal or retention; 3) there is a grave risk that return would expose the Child to "physical or psychological harm" or otherwise place the Child in an "intolerable situation"; or 4) return of the Child "would not be permitted by the fundamental principles . . .

relating to the protection of human rights and fundamental freedoms." *Blondin v. Dubois*, 189 F.3d 240, 245 (2nd Cir. 1999); Hague Convention, arts. 12, 13 and 20. The first two defenses can be established by a preponderance of the evidence; the last two must be established by clear and convincing evidence. *Blondin*, 189 F.3d at 245–46; 22 U.S.C. § 9003(e)(2).

This case hinges on the determination of SAPH's habitual residence.[1] "Determination of 'habitual residence' is 'perhaps the most important inquiry under the Convention.'" *Murphy v. Sloan*, 764 F.3d 1144, 1150 (9th Cir. 2014) (quoting *Asvesta v. Petroutsas*, 580 F.3d 1000, 1017 (9th Cir. 2009)). Habitual residence is a mixed question of law and fact, and courts are instructed to "consider the unique circumstances of each case when inquiring into a child's habitual residence." *Holder v. Holder*, 392 F.3d 1009, 1016 (9th Cir. 2004). The term "habitual residence" was intentionally left undefined in the Convention to avoid formalistic determinations but the ambiguity has caused some confusion as to how the courts should interpret a child's residence. *See id.* at 1015. In the Ninth Circuit, the analytical framework for determining habitual residence is laid out in *Mozes*. There, the Ninth Circuit recognized that the concept of habitual residence is based on the "settled purpose" to live in a particular place. *Mozes*, 239 F.3d at 1074. In making this determination, the Ninth Circuit instructs that the Court

[1] The parties do not appear to disagree or seriously contest the other *Mozes* questions asking when the removal or retention took place, whether the Petitioner's rights of custody have been breached, and if Petitioner was exercising his rights at the time of the removal or retention. Regardless, because the habitual residence question is the dispositive inquiry in this case, the Court has not discussed the other *Mozes* questions.

look to the intentions of "the person or persons entitled to fix the place of the child's residence." *Id.* at 1076 ("The intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence."). Where, as here, the child at issue has "not yet reached a stage in their development where they are deemed capable of autonomous decisions as to their residence," the appropriate inquiry is the subjective intent of the parents. *Holder*, 392 F.3d at 1016-17. Thus, the Court will "look for the last shared, settled intent of the parents." *Murphy*, 764 F.3d at 1150 (quoting *Valenzuela v. Michel*, 736 F.3d 1173, 1177 (9th Cir. 2013); *see Mozes*, 239 F.3d at 1074. After taking into account the shared, settled intent of the parents, the Court then asks whether there has been sufficient acclimatization of the child in the new country to trump that intent. *Murphy*, 764 F.3d at 1150 (citing *Mozes*, 239 F.3d at 1076-79) (citations omitted).

A. Shared, Settled Intent of SAPH's Habitual Residence

In this case, the parents dispute what their shared intent of SAPH's habitual residence was from the beginning. Both sides argue they intended for SAPH to live in one country or the other, either Italy or the United States, and that SAPH's travel outside of their chosen country was only temporary. The Court has combed through the many emails, letters, and various exchanges between the parties. These communications reveal language and cultural barriers that made communication and understanding between the parties difficult.[2] When the parties entitled to fix the

[2] The parties are not fluent in one another's language. At the hearing, both parties stated they used internet tools and other

child's residence no longer agree on their intentions, "the representations of the parties cannot be accepted at face value, and courts must determine from all available evidence whether the parent petitioning for return of a child has already agreed to the child's taking up habitual residence where it is." *Mozes*, 239 F.3d at 1076.

SAPH began her life on August 24, 2010 in Seattle, Washington. (Tr. 92:1-3.) After SAPH's birth, the parties remained in the United States for two months during which time they decided that Ms. Hayes and SAPH would travel with Mr. Pennacchia to his home in Anagni, Italy to try and live as a family. (Dkt. 24-1, Dec. Hayes at ¶ 16.) The parties have presented diverging intentions and understandings concerning this arrangement. Petitioner argues the parties' intention was to move to and live in Italy as a family and, therefore, SAPH's habitual residence is Italy because that is where she has lived from the time she was two months old, attended preschool, and is where the locus of her family and social environment has developed for the majority of her life. (Dkt. 31) (Tr. 28:19-29:3.) Respondent counters that she agreed to live with the Petitioner in Italy during her year of maternity leave but that it was a "trial basis" and a "conditional stay" that could be terminated if the parties' relationship did not work out. (Dkt. 24-1, Dec. Hayes at ¶¶ 16-23) (Tr. 92:18-93:14, 94:22-95:12.) Respondent maintains that the United States has always been SAPH's habitual residence since her birth and no subsequent circumstances have changed that fact. (Dkt. 32.)

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means to translate the emails and other correspondence received from one another. Many of these emails were long and detailed.

Before traveling to Italy in October of 2010, Ms. Hayes made several arrangements and executed many documents evidencing her intention was that SAPH's habitual residence was the United States. (Tr. 93:20-94:21, 95:13-96:24.) Following SAPH's birth, Ms. Hayes executed a will and opened a college savings plan for SAPH under Section 529 of the Internal Revenue Code. Notably, Ms. Hayes prepared paperwork to appoint guardians for SAPH in the United States. Ms. Hayes presented the document to Mr. Pennacchia who agreed to and signed the paperwork appointing the United States guardians. (Dkt. 24, Dec. Hayes, Ex. H) (Petitioner's Ex. C.)[3] Ms. Hayes also obtained a United States passport for SAPH, private United States medical insurance, a Social Security account, and listed SAPH as her dependent on her United States taxes.

The Respondent took other actions that demonstrate her own intention was to remain a resident of the United States. Despite the fact that the Respondent traveled internationally extensively and for long periods of time for her work, she consistently maintained a home, vehicle, bank accounts, credit cards,

[3] With regard to the guardianship document, and certain other paperwork, Mr. Pennacchia testified that he had not been provided Italian translations, Ms. Hayes had prepared and translated the documents for him, and/or he did not know/understand what he was signing. (Tr. 27:19-28:14, 29:11-32:8, 34:2-36:19, 69:21-22, 70:17-18.) While the Court does not find the Petitioner to be wholly untruthful, particularly given the language barrier, the Court does not necessarily find his testimony to be credible. Moreover, the Court finds the Petitioner's denials and explanations concerning these documents are insufficient, to meet his burden in this case. The documents speak for themselves and are consistent with the Respondent's position and evidence that her intention was always for SAPH's habitual residence to be the United States.

driver's license, and health care all in the United States. In addition, the Respondent paid taxes and voted in the United States and traveled on a United States passport. The Court agrees with Petitioner that these action only establish the Respondent's residence, not SAPH's. While these actions by the Respondent are not determinative of SAPH's habitual residence, the Court does find these actions are indicative of the Respondent's intentions concerning her own permanent residence and, naturally, her intentions as to SAPH's place of habitual residence. It is reasonable to infer the Respondent's intention was for her infant child to be a habitual resident of the same country that she too called home. *See Holder*, 392 F.3d at 1016-17.

In October of 2010, Mr. Pennacchia also took actions evidencing his intention was for SAPH to reside in Italy. For instance, Mr. Pennacchia took out a mortgage to renovate his home in Italy in order to accommodate Ms. Hayes and SAPH living there. (Dkt. 31 at 8) (Petit. Ex. KK.) Mr. Pennacchia testified that his intention was for he, Ms. Hayes, and SAPH to live as a family in Italy. (Tr. 68:21-22.)

Based on the foregoing and having viewed and considered all of the evidence and materials presented, the Court finds the Petitioner has failed to prove, by a preponderance of the evidence, that the parties' intention was for SAPH's habitual residence to be Italy. Instead, the Court finds the evidence proves that SAPH's habitual residence was and is the United States. The evidence and materials in the record establish the definitive and measured steps undertaken by the Respondent ensured that SAPH's habitual residence was the United States before they departed for Italy in October of 2010. The Respondent was certain and credible in her testimony that she

consistently and repeatedly told the Petitioner that her intention was for SAPH to be raised in the United States and that their living arrangement in Italy was temporary and conditional. (Tr. 92:18-93:14, 95:13-19.) The Respondent further testified that the Petitioner agreed and understood that the relocating to Italy was conditional in nature and only for a trial period. (Tr. 93:1-14, 94:22-95:2.) In his testimony, the Petitioner disagrees with the Respondent's testimony and generally denies the meaning and accuracy of the Respondent's testimony and documents. (Tr. 163:6-14.)

Having viewed the evidence and testimony first-hand, the Court finds the Petitioner's testimony lacks credibility and evidence to support his position. The Petitioner's initial actions and communications show the Petitioner knew their arrangement living together in Italy was conditional and he generally did not oppose the Respondent traveling with SAPH to the United States. (Petit. Ex. D, E, LL.)[4] In his later

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[4] Petitioner's September 23, 2012 email to the Respondent states, in part:

> We will sign the embassy letter when you go away. I repeat herein that this letter has legal value as a written document. I, DANILO PENNACCHIA, hereby agree to your request to relocate yourself and [SAPH] to America, as I am aware that you are uncomfortable living in a place where you do not feel at home and are far away from your family. I am aware that you will do your best for our daughter, bearing in mind that I am [SAPH's] one and only father and that, by consenting to your departure, I do not renounce any of my rights as a father.

(Petit. Ex. LL and Resp. Ex. 15 at Hayes_000046, ¶ 2) (emphasis in original). The Court notes that the Petitioner denies having signed any embassy letter. (Tr. 33:13-36:19.) The Court makes no determination here that Petitioner consented but, instead, finds

correspondence and conduct, beginning in mid to late 2012, and now his testimony in this case, the Petitioner appears to have changed his position. (Resp. Ex. 47, 83, 25.) The evidence of the Petitioner's initial understanding, however, is consistent with the Respondent's testimony and evidence that their living arrangement in Italy was conditional and a "trial period." That the Petitioner later changed his position does not prove or overcome the Respondent's evidence that SAPH's habitual residence at the time she traveled to Italy in October of 2010 was the United States.

As concluded above, the Court finds the Respondent's testimony was credible and corroborated by other witnesses. The evidence presented by Respondent showing the steps she took to establish SAPH's habitual residence in the United States was substantial and significant. The Court finds the evidence shows the settled intention was for SAPH's habitual residence to be the United States and SAPH's initial translocation from her habitual residence in the United States to Italy was intended to be for a limited, trial period. *See Mozes*, 239 F.3d at 1077. The Court next considers whether there was a sufficient acclimatization to have changed that intent and for SAPH's habitual residence to have become Italy. *Murphy*, 764 F.3d at 1150.

B. Acclimatization

In order to acquire a new habitual residence, there must be a settled intention to abandon the one left behind, an actual change in geography, and a passage of an appreciable period of time. *Holder*, 392 F.3d at

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this language from his email is indicative of Petitioner's understanding and position concerning the parties' arrangement to live in Italy.

1015 (citing *Mozes*, 239 F.3d at 1071-75). A child's life may "become so firmly embedded" in a new country such that the child has acclimatized and formed a new habitual residence. *Mozes*, 239 F.3d at 1078. In cases where there is no shared, "settled intention," a country may be deemed a child's habitual residence if unequivocal and objective facts prove the child has acclimatized to the new country to a degree that the Court could "say with confidence that the child's relative attachments to the two countries have changed to the point where requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.'" *Id.* at 1081. Acclimatization, absent a settled parental intent, should only be inferred where "the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place." *Id.*

While little testimony or evidence was offered concerning the parties' first year in Italy, both parties testified that their relationship was not destined to succeed. (Tr. 32:19-21, 97:3-8.) As a result, the Respondent and SAPH began traveling to the United States more and more frequently. (Tr. 97:3-8.)[5] Towards the end of 2011, the Respondent's maternity leave was at an end and, in 2012, she moved out of the Petitioner's home in Anagni, Italy to an apartment in Rome, Italy

[5] That Ms. Hayes sometimes referred to her trips from Italy to the United States as "holidays" and "vacations" does not overcome her calculated efforts, which Mr. Pennacchia was aware of, to maintain the United States as her own and SAPH's residence. (Petit. Ex. SS at 121.) In particular, Ms. Hayes' insistence that SAPH be born in the United States, receive regular pediatrician check-ups in the United States, and travel on her United States passport – with the exception of when her United States passport was stolen. (Dkt. 24-1, Dec. Hayes.)

to begin working for a company that was based there. (Tr. 99:6-100:5.) The parties arranged there own visitation schedule for SAPH now that they lived apart and in different cities.

From 2012 to 2015, SAPH was enrolled in a preschool in Rome, Italy. (Petit. Ex. J, K, L.) The school, La Maisonnette, is a trilingual international school where SAPH was known as the "American girl." (Resp. Ex. 66 at ¶ 24) (Tr. 107:4-108:24) (Tr. 152:3-9.) Ms. Hayes testified that she hired a nanny from the United States to watch SAPH in Italy so that SAPH would be exposed to another American-English speaking person while they were in Italy. (Tr. 98:21-99:5.) Ms. Hayes testified that she took these steps to prepare SAPH for her planned return to "grow up in the school system in the United States." (Tr. 94: 3-4.)

The Respondent called Judy Mansour and Anja Lesa to testify at the hearing. (Tr. 76:2-11, 77:13, 78:8-12) (Tr. 149:21-161:25.) Ms. Mansour is one of SAPH's United States guardians and Ms. Lesa's son was a classmate of SAPH's at La Maisonnette from 2011 to 2015 who also spent time with the Respondent and SAPH outside of school. Both witnesses confirmed the Respondent had expressed her intention to return with SAPH to the United States and that the Respondent had no intention of raising SAPH in Italy.

Petitioner has offered as evidence SAPH's Italian certificate of residence, Italian citizenship, Italian birth certificate, and Italian healthcare certificates. (Petit. Ex. A-B) (Tr. 25:1-26:24, 146:16-22.) These documents are reflective of the fact that SAPH was residing in Italy at that time and is a citizen of Italy. Those

facts are not in dispute. These documents do not, however, evidence a change in SAPH's habitual residence from the United States.[6]

As further evidence to support his position, Petitioner relies on the custody proceedings in Italy. In particular, the Petitioner argues that the Respondent initiated those proceedings and has agreed that the Italian court has jurisdiction in the custody matters is proof of SAPH's habitual residence in Italy. (Tr. 136:21-139:25.) Moreover, Petitioner notes the Italian court's rulings determined SAPH's habitual residence to be Italy.[7] Respondent disputes these arguments pointing out that she initiated the Italian custody proceedings only after SAPH's United States passport was stolen and only for the purpose of securing a new passport for SAPH.

Towards the end of 2012, the Respondent told the Petitioner that she intended to relocate herself and SAPH to the United States. (Tr. 112:5-16.) Shortly thereafter, the Respondent and SAPH's United States passports were stolen.[8] When Respondent sought to

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[6] For the same reasons, the Court also finds these documents do not establish SAPH's initial habitual residence was Italy.

[7] To the extent the Petitioner argues the Italian custody proceedings, order, and findings are evidence of the settled intention as to SAPH's habitual residence from the time of her birth, the Court disagrees. The Italian proceedings were initiated well after SAPH's birth and the settled intention for SAPH's habitual residence to be the United States had been made. For these reasons, this evidence is applicable here only as to the acclimatization issue.

[8] The Respondent alleges the Petitioner had some involvement in the passports being stolen. (Dkt. 32 at 8.) The Court has not attributed any weight to this argument in making its ruling in this case. That is a collateral matter for a different tribunal to resolve.

have SAPH's United States passport reissued, the Petitioner declined to consent. (Resp. Ex. 24.) As a result, the Respondent applied to the Italian court to get permission for issuance of a passport for SAPH which further necessitated seeking a custody determination from the Italian court. (Tr. 116: 22-25.) The parties then began litigating the custody proceeding in Italy. In July of 2013, the Italian court issued a temporary, conditional Italian passport for SAPH and the United States Embassy, in turn, also issued SAPH a limited, temporary passport. The Respondent and SAPH traveled to the United States in August of 2013. They returned to Italy approximately six weeks later because the temporary passports were going to expire. Thereafter, the parties continued to litigate the custody proceedings in Italy.

On June 12, 2014, the Court of Rome issued its ruling rejecting the Respondent's request to move SAPH to the United States and ordering shared custody to both parents. (Petit. Ex. N, O, P) (Resp. Ex. 28.) The Court of Rome placed SAPH with the Respondent in Rome and entered a visitation schedule for Petitioner. Notably, the Court of Rome's decision states in several places that SAPH's habitual residence is Italy. Those statements are made in relation to the Italian court's determination that it had jurisdiction over the custody proceeding under Articles 1 and 2 of the 1961 Hague Convention and Italian law. The Respondent has filed an appeal of the Court of Rome's order that is pending. (Petit. Ex. Q.)

This Court has reviewed the Court of Rome's ruling in arriving at its decision in this case and taken particular note of the context and circumstances surrounding those proceedings. Having done so, the Court finds that the Italian custody proceedings do

not establish SAPH's habitual residence is in Italy under the 1980 Hague Convention. The Italian custody proceedings were not brought under the same 1980 Hague Convention as the Petition in this case and, therefore, they are not directly binding on this Court in this proceeding.[9] The fact that the Italian courts had jurisdiction over the custody proceedings before it and/or that Ms. Hayes recognized that jurisdiction is not determinative of the question presented in this case – SAPH's habitual residence under the 1980 Convention. Further, the fact that the custody proceeding in Italy is ongoing does not establish SAPH's habitual residence. *See Holder*, 305 F.3d at 865 (state custody proceeding determination is afforded preclusive effect in a subsequent Hague Convention claim only if the state court actually adjudicated a Hague Convention claim); *Mozes*, 239 F.3d at 1085 n. 55; *Barzilay v. Barzilay*, 600 F.3d 912, 920-21 (8th Cir. 2010) ("federal courts adjudicating Hague Convention petitions must accord full faith and credit only to the judgments of those state or federal courts that actually adjudicated a Hague Convention claim in accordance with the dictates of the Convention."). The Court finds the circumstances under which the

[9] The October 5, 1961 Hague Convention is a different treaty concerning the powers of authorities and the law applicable to the protection of minors. *See* Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (1982), at 436 ¶ 38 (stating the 1980 Hague Convention is "autonomous" and "independent" of the 1961 Hague Convention). The United States is not a party to the 1961 Hague Convention. The 1980 Hague Convention, applicable in this proceeding and to which the United States is a party, is designed to protect children from the wrongful removal or retention of a child from its habitual residence. While both treaties use the term "habitual residence," neither defines it.

Respondent pursued the custody dispute in Italy dispels the inference by Petitioner that the Respondent's intention or belief was that SAPH's habitual residence was Italy. The custody proceedings were initiated by the Respondent out of necessity and for the purpose of obtaining SAPH's passport after it had been stolen.

The Court further finds the evidence does not show that SAPH has acclimated to Italy such that her habitual residence has changed from the United States. While SAPH lived in Italy for several years, the Petitioner offered only very limited evidence of SAPH's Italian influences or her acclimatization. Petitioner showed photographs of SAPH's room at his home in Anagni, Italy. (Petit. Ex. KK.) Petitioner had demanded that SAPH's passport reflect her full name, including her Italian last name. (Tr. 30:6-19.) Petitioner testified that SAPH attended school in Rome, Italy for three years and her teachers and principal told him that SAPH was a "very smiley girl," "happy to be with her father," and she invited her friends to come to his house in Anagni, Italy. (Tr. 38:6-39:6, 44:1-6, 57:14-58:9.) Petitioner testified that while SAPH was in Rome he would pick her up and take her to Anagni, Italy for his visitations where there was "nature" and she was given lots of love and affection. (Tr. 58:9, 59:7-10.) These facts and evidence reveal SAPH has a loving father who was involved in her life, was exercising his custody rights, and spent time with her while she was in Italy. Mr. Pennacchia has not, however, shown that SAPH acclimated to Italy such that her habitual residence had changed from the United States.

The Respondent, on the other hand, has come forward with compelling, credible evidence that SAPH's habitual residence was, and remained, the United States during their time in Italy. While in Italy, SAPH

attended a trilingual school where she was known as the "American Girl," celebrated the Fourth of July and, for nine months, had an American-English speaking nanny. SAPH traveled to the United States frequently and for extended stays with her American family and friends. These strong cultural ties to the United States demonstrate that despite her residing in Italy for large portions of the year, she retained her original habitual residence in the United States.

Based on the foregoing, the Court concludes SAPH's habitual residence is the United States and, therefore, the Petition is denied.[10] In reaching this conclusion, the Court is mindful that its role in this matter is limited to determining whether, by a preponderance of the evidence, removal or retention of the child is wrongful under the Convention, and if so, to order return of the minor child to the country of habitual residence. 22 U.S.C. § 9001(b)(4); *see also Holder*, 392 F.3d at 1013 ("The Convention's focus is [] whether a child should be returned to a country for custody proceedings and not what the outcome of those proceedings should be."). Custody determinations are not before this Court and the Court has not considered any arguments or evidence concerning custody, what may or may not be in the best interests of SAPH, and/or parental suitability.

Furthermore, the Court notes the Convention's primary purpose is to deter parents from moving children across international boarders in order to gain the upper hand in custody disputes. *See Cuellar v. Joyce*, 596 F.3d 505, 508 (9th Cir. 2010). The Court finds the

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[10] Having found SAPH's habitual residence is the United States, the Court need not discuss the Respondent's affirmative defenses.

Respondent's actions in this case do not run afoul of that purpose despite her contention that she has not yet traveled back to Italy, in part, because of the alleged abuse and coercive actions by Petitioner. (Dkt. 32 at 11-12.) The Respondent's refusal to travel to Italy after August of 2015 and her reasoning for not doing so have not factored into the Court's ruling as it is not relevant to the determination of SAPH's habitual residence. The determination here turns on the facts and evidence of events preceding the Respondent's decision to not travel back to Italy in August of 2015. Additionally, the Court does not find this to be a case where the Respondent has sought to influence the outcome of custody proceedings by unilaterally changing the circumstances, i.e., removing or retaining SAPH from her habitual residence. As concluded above, the United States has been and remains SAPH's habitual residence since her birth. For these reasons, the Petition is denied.

ORDER

THEREFORE IT IS HEREBY ORDERED that the Verified Petition for Return of Child (Dkt. 1) is DENIED.

DATED: July 28, 2016

/s/ Edward J. Lodge
Honorable Edward J. Lodge
U.S. District Judge

APPENDIX C

HAGUE CONFERENCE ON PRIVATE LAW

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION[1]

(Concluded 25 October 1980)

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

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Child Abduction Section". For the full history of the Convention, *see* Hague Conference on Private International Law, *Actes et documents de la Quatorzième session (1980)*, Tome III, *Child abduction* (ISBN 90 12 03616 X, 481 pp.).

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 organisations 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 organising 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 recognised 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 organising 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 organising 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 legalisation 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 authorisation 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 organising 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 authorised thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, 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.

APPENDIX D

International Child Abduction Remedies Act

22 U.S.C. § 9001, *et seq.*

§ 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 well-being.

(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.

§ 9002. Definitions

For the purposes of this chapter—

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 653 of Title 42;

(4) the term "petitioner" means any person who, in accordance with this chapter, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this chapter, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 9006(a) of this title.

§ 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) of this section 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) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section 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.

§ 9004. Provisional remedies

(a) Authority of courts

In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the

provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 9003(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 9003(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

§ 9005. Admissibility of documents

With respect to any application to the United States Central Authority, or any petition to a court under section 9003 of this title, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.

§ 9006. United States Central Authority

(a) Designation

The President shall designate a Federal agency to serve as the Central Authority for the United States under the Convention.

(b) Functions

The functions of the United States Central Authority are those ascribed to the Central Authority by the Convention and this chapter.

(c) Regulatory authority

The United States Central Authority is authorized to issue such regulations as may be necessary to carry out its functions under the Convention and this chapter.

(d) Obtaining information from Parent Locator Service

The United States Central Authority may, to the extent authorized by the Social Security Act, obtain information from the Parent Locator Service.

(e) Grant authority

The United States Central Authority is authorized to make grants to, or enter into contracts or agreements with, any individual, corporation, other Federal, State, or local agency, or private entity or organization in the United States for purposes of accomplishing its responsibilities under the Convention and this chapter.

(f) Limited liability of private entities acting under the direction of the United States Central Authority

(1) Limitation on liability

Except as provided in paragraphs (2) and (3), a private entity or organization that receives a grant from or enters into a contract or agreement with the United States Central Authority under subsection (e) of this section for purposes of assisting the United States Central Authority in carrying out its responsibilities and functions under the Convention and this chapter, including any director, officer, employee, or

agent of such entity or organization, shall not be liable in any civil action sounding in tort for damages directly related to the performance of such responsibilities and functions as defined by the regulations issued under subsection (c) of this section that are in effect on October 1, 2004.

(2) Exception for intentional, reckless, or other misconduct

The limitation on liability under paragraph (1) shall not apply in any action in which the plaintiff proves that the private entity, organization, officer, employee, or agent described in paragraph (1), as the case may be, engaged in intentional misconduct or acted, or failed to act, with actual malice, with reckless disregard to a substantial risk of causing injury without legal justification, or for a purpose unrelated to the performance of responsibilities or functions under this chapter.

(3) Exception for ordinary business activities

The limitation on liability under paragraph (1) shall not apply to any alleged act or omission related to an ordinary business activity, such as an activity involving general administration or operations, the use of motor vehicles, or personnel management.

§ 9007. Costs and fees

(a) Administrative costs

No department, agency, or instrumentality of the Federal Government or of any State or local government may impose on an applicant any fee in relation to the administrative processing of applications submitted under the Convention.

(b) Costs incurred in civil actions

(1) Petitioners may be required to bear the costs of legal counsel or advisors, court costs incurred in connection with their petitions, and travel costs for the return of the child involved and any accompanying persons, except as provided in paragraphs (2) and (3).

(2) Subject to paragraph (3), legal fees or court costs incurred in connection with an action brought under section 9003 of this title shall be borne by the petitioner unless they are covered by payments from Federal, State, or local legal assistance or other programs.

(3) 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.

§ 9008. Collection, maintenance, and dissemination of information

(a) In general

In performing its functions under the Convention, the United States Central Authority may, under such conditions as the Central Authority prescribes by regulation, but subject to subsection (c) of this section, receive from or transmit to any department, agency, or instrumentality of the Federal Government or of any State or foreign government, and receive from or transmit to any applicant, petitioner, or respondent, information necessary to locate a child or for the purpose of otherwise implementing the Convention with respect to a child, except that the United States Central Authority—

(1) may receive such information from a Federal or State department, agency, or instrumentality only pursuant to applicable Federal and State statutes; and

(2) may transmit any information received under this subsection notwithstanding any provision of law other than this chapter.

(b) Requests for information

Requests for information under this section shall be submitted in such manner and form as the United States Central Authority may prescribe by regulation and shall be accompanied or supported by such documents as the United States Central Authority may require.

(c) Responsibility of government entities

Whenever any department, agency, or instrumentality of the United States or of any State receives a request from the United States Central Authority for information authorized to be provided to such Central Authority under subsection (a) of this section, the head of such department, agency, or instrumentality shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality in order to determine whether the information requested is contained in any such files or records. If such search discloses the information requested, the head of such department, agency, or instrumentality shall immediately transmit such information to the United States Central Authority, except that any such information the disclosure of which—

(1) would adversely affect the national security interests of the United States or the law enforcement interests of the United States or of any State; or

(2) would be prohibited by section 9 of Title 13;

shall not be transmitted to the Central Authority. The head of such department, agency, or instrumentality shall, immediately upon completion of the requested search, notify the Central Authority of the results of the search, and whether an exception set forth in paragraph (1) or (2) applies. In the event that the United States Central Authority receives information and the appropriate Federal or State department, agency, or instrumentality thereafter notifies the Central Authority that an exception set forth in paragraph (1) or (2) applies to that information, the Central Authority may not disclose that information under subsection (a) of this section.

(d) Information available from Parent Locator Service

To the extent that information which the United States Central Authority is authorized to obtain under the provisions of subsection (c) of this section can be obtained through the Parent Locator Service, the United States Central Authority shall first seek to obtain such information from the Parent Locator Service, before requesting such information directly under the provisions of subsection (c) of this section.

(e) Recordkeeping

The United States Central Authority shall maintain appropriate records concerning its activities and the disposition of cases brought to its attention.

§ 9009. Office of Children's Issues

(a) Director requirements

The Secretary of State shall fill the position of Director of the Office of Children's Issues of the Department of State (in this section referred to as the "Office") with an individual of senior rank who can ensure long-term

continuity in the management and policy matters of the Office and has a strong background in consular affairs.

(b) Case officer staffing

Effective April 1, 2000, there shall be assigned to the Office of Children's Issues of the Department of State a sufficient number of case officers to ensure that the average caseload for each officer does not exceed 75.

(c) Embassy contact

The Secretary of State shall designate in each United States diplomatic mission an employee who shall serve as the point of contact for matters relating to international abductions of children by parents. The Director of the Office shall regularly inform the designated employee of children of United States citizens abducted by parents to that country.

(d) Reports to parents

(1) In general

Except as provided in paragraph (2), beginning 6 months after November 29, 1999, and at least once every 6 months thereafter, the Secretary of State shall report to each parent who has requested assistance regarding an abducted child overseas. Each such report shall include information on the current status of the abducted child's case and the efforts by the Department of State to resolve the case.

(2) Exception

The requirement in paragraph (1) shall not apply in a case of an abducted child if—

(A) the case has been closed and the Secretary of State has reported the reason the case was closed to the parent who requested assistance; or

(B) the parent seeking assistance requests that such reports not be provided.

§ 9010. Interagency coordinating group

The Secretary of State, the Secretary of Health and Human Services, and the Attorney General shall designate Federal employees and may, from time to time, designate private citizens to serve on an interagency coordinating group to monitor the operation of the Convention and to provide advice on its implementation to the United States Central Authority and other Federal agencies. This group shall meet from time to time at the request of the United States Central Authority. The agency in which the United States Central Authority is located is authorized to reimburse such private citizens for travel and other expenses incurred in participating at meetings of the interagency coordinating group at rates not to exceed those authorized under subchapter I of chapter 57 of Title 5 for employees of agencies.

§ 9011. Authorization of appropriations

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the purposes of the Convention and this chapter.