

Comment,
THE SUPREME COURT ADDRESSES
INTERNATIONAL CHILD ABDUCTION
UNDER THE HAGUE CONVENTION

I. Introduction to International Child Abduction

As international travel has become increasingly affordable and popular, the formation of “international families” has also become more common.¹ In the face of this globalization, courts across the world encounter issues involving international families, including protecting children from the harm of wrongful removal from their home country.² When a parent unilaterally moves a child to a new country, the relocation may be considered wrongful, and the parent may face consequences.³ The removal or retention of a child by one parent across country lines in a manner that violates the custodial rights of the other parent, can be considered international child abduction.⁴ In these instances, international courts can turn to the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”), which is a uniform treaty that effectively deters international child abductions and maintains procedures for the repatriation of children after unlawful removal.⁵

When a petitioner files a Hague Convention petition within a year of the wrongful removal or retention, the proper remedy is return of the child to his or her country of habitual residence.⁶

¹ Jennifer Baum, *Ready, Set, Go to Federal Court: The Hague Child Abduction Treaty, Demystified*, AMERICAN BAR ASSOCIATION (2014), <https://www.americanbar.org/groups/litigation/committees/childrens-ri...014/ready-set-go-fed-court-hague-child-abduction-treaty-demystified/> (last visited Jan 23, 2019).

² Timothy L. Arcaro, *Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction*, 40 U. MIAMI INTER-AM. L. REV. 109–138, 111 (2008).

³ *Defenses to International Child Abduction Under the Hague Abduction Convention*, CARLTON FIELDS (2011), <https://www.carltonfields.com/insights/publications/2011/defenses-to-international-child-abduction-under-th> [hereinafter *Defense to International Child Abduction*].

⁴ Arcaro, *supra* note 2, at 112.

⁵ *Defenses to International Child Abduction*, *supra* note 3.

⁶ Arcaro, *supra* note 2, at 113.

Habitual residence is a fact-heavy term that generally refers to the home of the child, although there are many caveats to the definition.⁷ The goal of the Convention is for a prompt return, unless the return would be exempt under the Convention articles, due to the safety of the child.⁸ For example, Article 13(b) of the Convention provides an exception that the child should not relocate if the child is at risk of grave danger by returning to his or her home country.⁹ In some courts, grave danger includes instances in which the relocating parent was a victim of domestic violence, causing him or her to flee the country with the child.¹⁰

International cooperation between the one hundred and one countries that have adopted the Convention is vital to ensure the timely return of children to the proper home country.¹¹ The return allows the appropriate court to make decisions regarding the custody arrangements of the child.¹² Allowing the home country to make custody evaluations ensures that cultural bias and preferences do not influence the placement of the child.¹³ By creating uniform rules, the convention diminishes the ability of a parent to “forum shop” by fleeing to a country where biases or laws may favor the relocating parent.¹⁴ However, not every country has the same uniform understanding of the articles, which can affect the international goal of uniformity in high-stress international abduction cases.¹⁵ Hague Convention cases require a subjective test since the facts of each case vary drastically depending on the location, country, and a variety of other factors. Additionally, factors such as the age of the child, the

⁷ *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

⁸ *Defenses to International Child Abduction*, *supra* note 3.

⁹ Hague Convention on the Civil Aspects of International Child Abduction art. 13, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (reprinted at 51 Fed. Reg. 10494, Mar. 25, 26, 1986), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> (last visited Mar. 28, 2020) [hereinafter Hague Convention].

¹⁰ Kevin W Puckett, *Hague Convention on International Child Abduction: Can Domestic Violence Establish the Grave Risk Defense Under Article 13*, 30 J. AM. ACAD. MATRIM. LAW. 259, 263 (2017).

¹¹ Baum, *supra* note 1.

¹² Marisa Leto, *Whose Best Interest? International Child Abduction Under the Hague Convention*, 3 CHI. J. INT'L. L., 247, 252 (2002).

¹³ *Abott v. Abott*, 560 U.S. 1, 20 (2010).

¹⁴ Baum, *supra* note 1.

¹⁵ Leto, *supra* note 12, at 248.

resiliency of the child, or evidence of agreement between the parents can affect the outcome. The decisions that courts make in Convention cases even vary within countries, especially among circuit courts within the United States.¹⁶

The Supreme Court of the United States recently decided a Hague Convention case involving the abduction of a child, known as A.M.T., in *Michelle Monasky v. Domenico Taglieri*.¹⁷ A.M.T. was born to her parents, Michelle Monasky (“Monasky”), a U.S. citizen, and Taglieri (“Taglieri”), an Italian citizen, in February 2015 in Italy.¹⁸ Monasky, the mother of A.M.T., moved to the United States when the child was a newborn, while the minor child’s father remained in Italy.¹⁹ Taglieri filed Hague Convention petitions in Italy and Ohio, requesting the return of his daughter to Italy.²⁰ The Italian court, finding in favor of Taglieri, terminated Monasky’s parental rights after an ex-parte hearing.²¹ Following the decision in Italy, the U.S. Sixth Circuit Court of Appeals affirmed the decision of the Italian Court and issued the return of the minor child to Italy.²² The U.S. Supreme Court heard the matter on February 25, 2020 and decided in favor of Taglieri on three main issues.²³

The case of *Monasky v. Taglieri* has proven to be a controversial case, with multiple organizations filing amicus briefs due to their investment in the final Supreme Court decision. Organizations that have filed amicus briefs in support of Monasky include Sanctuary for Families, National Network to End Domestic Violence, Pathways to Safety International, and Legal Momentum. The brief filed by the Sanctuary for Families and fellow supporters focuses on the effect the outcome could have on survivors of domestic violence.²⁴ Similarly, the brief of Frederick K. Cox International Law Center (“Cox Center”) supports the peti-

¹⁶ Baum, *supra* note 1.

¹⁷ 140 S. Ct. 719 (2020).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Taglieri v. Monasky*, 767 Fed. Appx. 597, 600 (2017).

²¹ *Monasky*, 140 S. Ct. at 724.

²² *Taglieri*, 767 Fed. Appx. at 600.

²³ *Monasky*, 140 S. Ct. at 719.

²⁴ Sanctuary for Families, National Network to End Domestic Violence et al. as Amici Curiae in Support of Petitioner at 1, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935) [hereinafter Sanctuary for Families].

tioner by highlighting the importance of preserving the meaning of the habitual residence requirement in international law.²⁵ The mission of Cox Center is to advance international law by ensuring a child is only assigned a habitual residence when the facts support such a determination.²⁶

Amicus briefs filed in support of Taglieri include the American Academy of Matrimonial Lawyers (“AAML”) and the International Academy of Family Lawyers (“IAFL”). In its brief, the AAML states its belief that all children must be assigned a habitual residence in order for the Convention to have jurisdiction and uphold the safety of children.²⁷ Further, the AAML’s brief promotes the importance of consistent results between courts and circuits.²⁸ While supporting Taglieri, the brief of the IAFL focuses on the deterrent power of the Convention.²⁹ The IAFL states concerns over the effectiveness of preventing future kidnappings if the court finds in favor of Monasky, while advocating for uniform Hague Convention interpretations.³⁰ The Reunite International Child Abduction Centre (“Reunite”) also filed a brief that presented current English and international laws, while not supporting either party.³¹ Reunite outlines the importance of upholding consistency in Convention decisions across the world.³² Although the amicus briefs differ vastly in regard to their concerns and solutions, each brief raised issues for the application of future cases depending on the outcome of *Monasky*.

This Comment seeks to examine the practical application of the Hague Convention, while considering precedent, societal pressures, and potential effects of the Supreme Court decision in *Monasky*. Part II introduces the goals of the Hague Convention

²⁵ Frederick K. Cox International Law Center in Support of Petitioner at 2, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935).

²⁶ *Id.*

²⁷ The International Academy of Family Lawyers as Amicus Curiae in Support of Respondent at 2, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935) [hereinafter International Academy of Family Lawyers].

²⁸ *Id.* at 6.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ Reunite International Child Abduction Center in Support of Neither Party at 1, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935).

³² *Id.* at 2.

and presents the application of statutes and case law in international abduction cases. Part II shows the elements the petitioner must prove plus the defenses that may be raised in response to a Convention claim. Part III provides an in-depth look at the recent Supreme Court case, *Monasky*, including the procedural and factual history of the case and issues decided by the Court. The issues include the proper standard of review courts must apply, the evaluation of timeliness in filing international abduction petitions, and the determination of habitual residence for a young child. Part III also includes the questions raised during the December 2019 oral arguments and the final opinion published in February of 2020. The article closes in Part IV by outlining the importance of Hague Convention remedies in general and provides resources for family law attorneys interested in becoming involved in Hague Convention cases.

II. The Hague Convention and Expansion of International Abduction Cases

A. *The Creation and History of the Hague Convention*

The Hague Convention was held on October 25, 1980 to assist the then twenty-nine member states in resolving the issues of international family abductions and retentions.³³ The Convention sought to establish a uniform process for determining the proper home country of a child in order to return the child to the correct court for custody evaluations.³⁴ The treaty is composed of forty-five articles, which outline the procedures for return of an abducted child to the child's home country, while highlighting the importance of cooperation between countries to uphold the safety of children.³⁵

When determining the home of the child, the drafters of the Convention chose the term "habitual residence" to dictate the proper country for repatriation. In the articles of the Convention, the drafters purposefully left habitual residence unde-

³³ Arcaro, *supra* note 2, at 112.

³⁴ Hague Convention, *supra* note 9.

³⁵ *Id.*

fined.³⁶ The official reporter for the Convention stated that habitual residence was already a well-established notion that differed from the definition of domicile and was a question of pure fact.³⁷ The purpose of excluding a definition for habitual residence was to allow the definition to remain broad and to avoid rigid or inconsistent results between countries.³⁸ Broad interpretations have led the definition of habitual residence to be a contested topic. For example, the AAML points to the “common meaning” of habitual residence, which is where the child customarily lives, to determine the proper return location for the child.³⁹ Other definitions of habitual residence may focus on the acclimatization of the child to a new environment or the intent of the parents, with each definition presenting problems in practical application.⁴⁰

To ensure timeliness, children will be returned to their habitual residences when a parent files a Hague Convention petition within twelve months of the removal or the wrongful retention of the child.⁴¹ Under the Hague Convention, the ideal timeline for case resolution is about six weeks once filed.⁴² Article eleven of the Convention, which outlines the importance of expedited cases, works to avoid the potential harm the child may suffer during evaluations.⁴³ Quick resolutions are important because, in some cases, the return of the child can be just as traumatic or even more terrifying than the initial move, especially if the child has formed connections in his or her current home.⁴⁴ The child may also suffer if separated from the other parent for too long

³⁶ Brief for Petitioner at 4, *Monasky v. Taglieri*, 140 S. Ct. 719 (No. 18-935) [hereinafter Brief for Petitioner].

³⁷ Brief for Respondent at 3, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935) [hereinafter Brief for Respondent].

³⁸ Brief for Petitioner, *supra* note 36, at 4.

³⁹ International Academy of Family Lawyers, *supra* note 27, at 23.

⁴⁰ Tristan Medlin, *Habitually Problematic: The Hague Convention and the Many Definitions of Habitual Residence in the United States*, 30 J. AM. ACAD. MATRIM. LAW. 241 (2017).

⁴¹ Hague Convention, *supra* note 9, at art. 12.

⁴² *Id.*

⁴³ *Id.* at art. 11.

⁴⁴ Kilpatrick Townsend, *Litigating International Child Abduction Cases Under the Hague Convention*: NCMEC INTERNATIONAL CHILD ABDUCTION TRAINING MANUAL 2 1-117, 100 http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf (last visited Mar. 28, 2020).

due to the stress the distance can put on the parent-child relationship.⁴⁵ However, the decision for repatriation can be based on more than timeliness if there have been any accusations involving the welfare of the child, which can cause repatriation to be prolonged or cancelled.⁴⁶

Determining if the filing of a Hague Convention case was timely can prove difficult since cases often depend on subjective facts and conflicting testimonies. When considering a wrongful removal, the date of the kidnapping will likely be evident because a parent can prove when the child was removed from the country. On the other hand, when considering wrongful retention, a parent might find it more difficult to establish a timeline, because the facts may be less clear on when the stay of the child became wrongful.⁴⁷ Retention cases often create the most evidentiary issues because the facts typically show that both parents had agreed to the home of the child at a certain point but later disagreed, such as in *Zuker v. Andrews*.⁴⁸ For example, in *Zuker*, both parents agreed that the mother could visit the United States with the child; however, the mother was not truthful regarding her intentions to extend her visit permanently and refused to return to their original country without informing the father.⁴⁹ Typically, both parties will present evidence establishing or denying an agreement between the parties, and courts must determine the accuracy of the evidence. Evidence to make such determinations might be scarce since parents do not typically document every agreement they make in writing; however, a definitive conversation is not necessary to establish the retention occurred.⁵⁰

When filing a Hague Convention case, the petitioner must request the court where the child is currently residing to exercise jurisdiction for purposes of ordering the return of the child.⁵¹ Once the court establishes temporary jurisdiction, the court then

⁴⁵ *Id.* at 116.

⁴⁶ Hague Convention, *supra* note 9, at arts. 12, 13, and 20.

⁴⁷ Townsend, *supra* note 44, at 30.

⁴⁸ 2 F. Supp. 2d 134 (D. Mass. 1998).

⁴⁹ *Id.*

⁵⁰ Townsend, *supra* note 44, at 29.

⁵¹ 42 U.S.C. § 11603(b).

reviews the facts and determines three fact-specific elements.⁵² The petitioner bears the burden of proving the elements, including the home of the child, circumstances of removal, and custody rights.⁵³ The petitioner must prove the following elements by a preponderance of the evidence:

- (1) prior to removal or wrongful retention, the child was habitually resident in a foreign country; (2) the removal or retention was in breach of custody rights under the foreign country's law; and (3) the petitioner actually was exercising custody rights at the time of the removal or wrongful retention.⁵⁴

The first element looks to establish the home country of the child at the time of the removal. The second element requires proof that the removing parent violated the custody rights of the petitioning parent through removal or retention of the minor child. The third element requires the petitioning parent to show that he or she was actually exercising custody rights at the time of the child's removal. Last, the minor child must be under sixteen years of age to satisfy requirements for a Hague case.⁵⁵ Once the court exercising jurisdiction determines the proper venue to decide the custody of the child, the court enters an order sending the child back to that jurisdiction for further determination.⁵⁶ After the child has returned, the proper home court can determine the custody rights of the parents.⁵⁷

B. *Defenses to Justify the Removal or Retention of a Child*

The removing parent can raise certain defenses to justify the removal of the child through exceptions in the Articles of the Convention. Since evidence is important in international abduction cases, each kidnapping claim requires careful analysis and review of the facts. If the removing parent proves that the petitioning parent was not exercising custody rights prior to the removal of the child, the removing parent may have a defense.⁵⁸ When proving he or she was "exercising custody rights," the peti-

⁵² Hague Convention, *supra* note 9, at art. 3

⁵³ 42 U.S.C. § 11603(e).

⁵⁴ Hague Convention, *supra* note 9, at art. 3.

⁵⁵ *Id.* at art. 4.

⁵⁶ Medlin, *supra* note 40, at 243.

⁵⁷ *Id.*

⁵⁸ Hague Convention, *supra* note 9, at art. 13(a).

tioning parent does not have a difficult burden to meet.⁵⁹ Courts typically apply a liberal interpretation of “exercise” to include any attempt by a parent to maintain a regular relationship with the child.⁶⁰

Additionally, article 13(a) provides a defense when the petitioning parent consented to or acquiesced to the move.⁶¹ If the removing parent can prove by a preponderance of the evidence that the other parent consented to the move, the removal is not considered wrongful and the child will not automatically return to his or her home country.⁶² In cases where the petitioning parent consented to the home of the child, the defending parent will likely be able to show more evidence that the other parent agreed, compared to cases where the removing parent must prove the other parent acquiesced to the move. For example, to prove acquiescence, the removing parent may present evidence of indifference, such as testimony showing a consistent attitude of disregard to the home of the child.⁶³ When proving the other parent consented to the move, physical evidence such as emails or written renunciation of rights can prove the move was agreeable.⁶⁴

While the first two defenses focus on the actions of the parents, the remaining defenses focus on the position of the child. A defense to removal can arise when the child’s age and level of maturity allows the child to give input on his or her preferred home or object to returning to another country.⁶⁵ The court may consider the wishes of the child in cases where an older child demonstrates high awareness of the situation and can make informed decisions about his or her own life. A major objective of the Convention is to protect children; therefore, ensuring children can feel heard and understood when appropriate, may promote stability in their lives and advance the purpose of the Convention.

⁵⁹ *Friedrich v. Friedrich*, 78 F.3d 1060, 1066 (6th Cir. 1996); *Rodriguez v. Yanez*, 817 F.3d 466 (5th Cir. 2016).

⁶⁰ *Friedrich*, 78 F.3d at 1066.

⁶¹ Hague Convention, *supra* note 9, at art. 13(a).

⁶² *Defenses to International Child Abduction*, *supra* note 3.

⁶³ *Friedrich*, 78 F.3d at 1066.

⁶⁴ *Id.*

⁶⁵ Hague Convention, *supra* note 9, at art. 13.

The defense governed by Article 12 applies if two conditions are met: the initial petition was not filed within twelve months of the removal and the child has already acclimated to his or her new environment.⁶⁶ The removing parent must first demonstrate by a preponderance of the evidence that the petitioner filed his or her case outside of the twelve month requirement.⁶⁷ Courts may find it difficult to determine when the twelve month timeline began in instances when the parties temporarily agreed to the home or move of a child, but later disagreed. Following the time determination, the removing parent can present evidence to show the child has “significant connections to the new country.”⁶⁸ Factors for proving the acclimatization of the child established by the U.S. State Department include:

the child’s age, the stability and duration of the child’s residence in the new environment, the stability and duration of the child’s residence in the new environment; whether the child has friends and relatives in the new area; the child’s participation in community or extracurricular school activities, such as team sports, youth groups or school clubs; and the respondent’s employment and financial stability.⁶⁹

The last defense, under Article 13(b), involves the grave risk of physical or psychological harm if the child returns to the country of habitual residence.⁷⁰ The respondent must demonstrate by clear and convincing evidence, which is a higher standard than previous defenses, that grave risk of harm falls upon the child if returned.⁷¹ In the United States, court opinions among circuits vary regarding if domestic violence is enough alone to establish a grave risk of harm.⁷² Along with the 13(b) defense, the return of a child may be refused under Article 20 of the Convention if the return would violate fundamental principles relating to the protection of human rights.⁷³

⁶⁶ Hague Convention, *supra* note 9, at art. 12.

⁶⁷ *Id.*

⁶⁸ 51 Fed. Reg. at 10509.

⁶⁹ *In re B. Del C.S.B.*, 559 F.3d 999, 1009 (9th Cir. 2008).

⁷⁰ Hague Convention, *supra* note 9, at art. 13(b).

⁷¹ *Id.*

⁷² Puckett, *supra* note 10, at 262.

⁷³ *Id.*

III. *Monasky v. Taglieri*

A. *The Factual History of the Monasky Case*

The Supreme Court's decision in *Monasky* has the power to impact the application of the articles in future Hague Convention abduction cases.⁷⁴ The outcome of a Hague Convention case greatly depends on the specific facts and evidence, and the case at hand was no exception. When determining the intent of the parties, the courts faced difficulty due to conflicting timelines, testimonies, and high contention throughout the relationship. The courts viewed the entire relationship of the couple to determine if removal of the child was unlawful or justified.

Monasky and Domenico Taglieri married in Illinois in 2011, before moving to Italy two years later.⁷⁵ Upon arrival in Milan, Italy, the relationship of the parties began to deteriorate.⁷⁶ According to Monasky, both parties knew her move to Italy was temporary and she planned to move back to the United States.⁷⁷ Taglieri agrees that Monasky always wanted to go back to the United States and was never happy in Italy.⁷⁸ Monasky had no family in Italy and she never learned Italian, although she began applying for an Italian driver's license and requesting that her academic credentials be recognized in Italy.⁷⁹ Monasky later testified that Taglieri began physically abusing her around March 2014 while the parties resided in Milan.⁸⁰

In addition to physical abuse, Monasky reported that Taglieri was sexually abusive, ultimately leading to the conception of A.M.T.⁸¹ Monasky maintained that she had not consented to the pregnancy, while Taglieri believed that the parties decided to start a family together.⁸² Following the conception of the child in May of 2014, Taglieri moved three hours away to Lugo, Italy.⁸³ During this time, the relationship became more strained; how-

⁷⁴ *International Academy of Family Lawyers*, *supra* note 27, at 2.

⁷⁵ Brief for Respondent, *supra* note 37, at 4.

⁷⁶ Brief for Petitioner, *supra* note 36, at 5.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Brief for Respondent, *supra* note 37.

⁸⁰ Brief for Petitioner, *supra* note 36, at 6.

⁸¹ *Id.*

⁸² Brief for Respondent, *supra* note 37, at 5.

⁸³ Brief for Petitioner, *supra* note 36, at 6.

ever, Taglieri believed the parties still functioned as a married couple.⁸⁴ According to Monasky, the relationship was not intact and she searched for employment, daycare, healthcare, and divorce attorneys in America.⁸⁵ At the same time, the parties began looking into childcare and apartments in Italy.⁸⁶ The parties chose an apartment that allowed the cancellation of the lease with three months' notice, which Monasky insisted was important.⁸⁷

According to Monasky's testimony, when Taglieri traveled back to Milan for visits with Monasky during her pregnancy, he would physically abuse her.⁸⁸ During visits, Monasky continued to discuss divorce and moving back to the United States.⁸⁹ In an email to Monasky's mom in August of 2014, Monasky stated that she wanted to come back to America.⁹⁰ However, Monasky's doctors recommended no travel by airplane for the rest of her pregnancy due to complications.⁹¹ Despite the travel restrictions, both Monasky and Taglieri traveled to America together in July of 2014, for Monasky's sister's wedding.⁹²

The parties' accounts of the state of the relationship in the weeks leading up to the birth of their child differed greatly. The parties' relationship appeared less turbulent during the month of January 2015 as emails exchanged between the parties indicated the parties spoke affectionately to each other and continued to jointly plan for the arrival of A.M.T.⁹³ However, the following month, the parties' relationship became strained once again, including instances of physical altercations.⁹⁴ According to Monasky, Taglieri smacked her in the head on February 10, 2015, when she was nine months pregnant.⁹⁵ Following this incident, Monasky sent Taglieri an email discussing divorce, including

⁸⁴ Brief for Respondent, *supra* note 37, at 5.

⁸⁵ Brief for Petitioner, *supra* note 36, at 7.

⁸⁶ Brief for Respondent, *supra* note 37, at 6.

⁸⁷ *Id.*

⁸⁸ Brief for Petitioner, *supra* note 36, at 7.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Brief for Respondent, *supra* note 37, at 7.

⁹⁴ Brief for Petitioner, *supra* note 36, at 8.

⁹⁵ *Id.*

quotes from multiple international moving companies.⁹⁶ The following day, the parties attended Monasky's doctor visit together, where the doctor suggested inducing labor.⁹⁷ Monasky rejected the suggestion to induce labor, while Taglieri disagreed with her decision.⁹⁸

On the way home from the appointment, the parties continued to argue over Monasky's decision not to induce labor.⁹⁹ While in the car, Monasky informed Taglieri that she was experiencing contractions and requested they return to the hospital.¹⁰⁰ According to Taglieri, he recommended she wait to determine "how the contraction-like pains proceeded."¹⁰¹ The argument continued, with Taglieri ultimately suggesting Monasky could take a taxi back to the hospital.¹⁰² In the middle of the night, Monasky ordered a taxi and traveled alone to the hospital.¹⁰³ When Taglieri woke up to find Monasky had gone, he drove to the hospital to see her.¹⁰⁴ Later that day, Taglieri picked Monasky's mother up from the airport.¹⁰⁵ He stayed at the hospital with Monasky while she underwent an emergency cesarean section.¹⁰⁶ While in the hospital, Taglieri's attitude towards his newborn daughter was obscene, including screaming at his daughter to "shut up," according to Monasky.¹⁰⁷ Once the parties left the hospital, Taglieri returned to Lugo while Monasky's mother stayed in Milan for two weeks to assist with her recovery.¹⁰⁸

Monasky's recovery from the cesarean section was difficult due to a previous back surgery, which caused her to have physical pain that prevented her from caring for A.M.T. or even bath-

⁹⁶ Brief for Respondent, *supra* note 37, at 6.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 7.

¹⁰³ Brief for Petitioner, *supra* note 36, at 8.

¹⁰⁴ Brief for Respondent, *supra* note 37, at 7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Brief for Petitioner, *supra* note 36, at 8.

¹⁰⁸ *Id.*

ing on her own.¹⁰⁹ Monasky's mother assisted her with basic tasks for two weeks, before returning to America.¹¹⁰ Once Monasky's mother left, Taglieri returned to Milan to help care for A.M.T.¹¹¹ While in Milan, Monasky once again requested a divorce and permission to return to the United States with A.M.T. but Taglieri denied the request.¹¹² Instead, the parties traveled to Lugo together on March 3, to stay at Taglieri's home.¹¹³ However, the parties' reasons for residing together differed greatly.¹¹⁴ Monasky was unable to travel due to her post cesarean section physical restrictions, and therefore, she needed assistance caring for A.M.T. Further, she could not travel with her infant daughter until she obtained a passport for her, which required the consent of Taglieri.¹¹⁵ While Taglieri consented to applying for an American passport for A.M.T., both parties also agreed to apply for an Italian passport.¹¹⁶

Contrastingly, Taglieri viewed the visit to Lugo as a reconciliation between the parties.¹¹⁷ According to testimony from Taglieri, the parties returned to their regular course of business while residing in Lugo.¹¹⁸ For example, Monasky continued to apply for a driver's license, invited her aunt to visit in September, and scheduled doctors' appointments for A.M.T.¹¹⁹ Additionally, Monasky asked Taglieri's mother if she could plan a stay to care for A.M.T. while Monasky attended a conference that would be held a few months after the birth of A.M.T.¹²⁰ During their time in Lugo, Monasky continued to reiterate that she planned to divorce her husband and move to the United States with their daughter.¹²¹ Monasky supported her claim that her stay in Lugo was temporary by showing that she only brought a

109 *Id.*

110 *Id.*

111 Brief for Respondent, *supra* note 37, at 7.

112 *Id.*

113 *Id.*

114 Brief for Petitioner, *supra* note 36, at 9.

115 *Id.*

116 *Id.*

117 Brief for Respondent, *supra* note 37, at 7.

118 *Id.*

119 *Id.*

120 *Id.* at 8.

121 Brief for Petitioner, *supra* note 36, at 9.

few suitcases and a stroller.¹²² Additionally, she asserted that she continued to schedule doctors' appointments for A.M.T. as a "routine practical reality."¹²³ She argued that she continued to take steps to acclimate, such as applying for a driver's license in Italy, so she would be able to care for A.M.T.¹²⁴

The final altercation between the parties occurred on March 31, 2015.¹²⁵ In Lugo, Monasky planned to change A.M.T.'s clothes since they were covered in urine; however, Taglieri refused to allow her to change their daughter's clothing due to the cost of laundry.¹²⁶ During the argument, Monasky states that Taglieri screamed and raised his hand as if to strike her but instead went into the kitchen, where Monasky believes she heard the sound of her husband "picking up [a] knife and putting . . . it back."¹²⁷ Once Taglieri left for work, Monasky fled to the police station with A.M.T. where they were placed in a safe house for domestic violence victims.¹²⁸ When Taglieri returned home from work and realized Monasky and A.M.T. were gone, he immediately contacted the police and revoked his consent for A.M.T.'s American passport.¹²⁹ For the following two weeks, Monasky and A.M.T. stayed at three different safe houses until A.M.T.'s passport arrived.¹³⁰ When A.M.T. was eight weeks old, her passport arrived and they left protective care to travel to the United States.¹³¹

B. *The Procedural History of Monasky*

On April 29, 2015, Taglieri filed a petition in Italy to terminate the parental rights of Monasky for withholding the minor child.¹³² The Italian court heard the matter *ex parte* and ordered Monasky to return A.M.T. to Italy on the grounds that the coun-

¹²² *Id.*

¹²³ Brief for Respondent, *supra* note 37, at 12.

¹²⁴ Brief for Petitioner, *supra* note 36, at 53.

¹²⁵ Brief for Respondent, *supra* note 37, at 8.

¹²⁶ Brief for Petitioner, *supra* note 36, at 10.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Brief for Respondent, *supra* note 37, at 8.

¹³⁰ Brief for Petitioner, *supra* note 36, at 10.

¹³¹ *Id.*

¹³² *Id.* at 11.

try was her habitual residence.¹³³ The decision of the court limited Monasky's visitation rights by terminating her parental rights.¹³⁴ Additionally, Taglieri filed a Hague Convention petition in the U.S. District Court for the Northern District of Ohio on May 15, 2015.¹³⁵ The Ohio court held a four day bench trial and decided to grant Taglieri's petition, ordering the return of A.M.T. to Italy.¹³⁶

Prior to the bench trial, the district court had not previously decided what standard applies for habitual residence when the child is an infant.¹³⁷ When determining the habitual residence of older children, the court had focused on an "acclimation" standard, while declining to consider parental intent.¹³⁸ However, when evaluating the habitual residence of an infant, such as A.M.T., the court determined that a different standard would apply. The court held that it must examine the "settled purpose and shared intent of the child's parents in choosing a particular habitual residence" when the infant is too young to acclimate to any residence.¹³⁹ Absent any binding precedent, the court created a legal standard to establish shared intent by looking for a matrimonial home.¹⁴⁰ According to the court, the existence of a marital residence supports the belief that the intent and settled purpose of the parties is to reside in that place.¹⁴¹ Therefore, no further consideration for habitual residence is needed.¹⁴² The court gave no further definition of a "matrimonial home," which could be important for the case at hand given that the parties had not shared a residence since Monasky was one month pregnant.¹⁴³ Further, no other court has adopted the "marital home"

¹³³ Brief for Petitioner, *supra* note 36, at 11.

¹³⁴ *Id.*

¹³⁵ Brief for Respondent, *supra* note 37, at 8.

¹³⁶ *Id.*, at 9.

¹³⁷ Brief for Petitioner, *supra* note 36, at 10.

¹³⁸ *Id.*

¹³⁹ Brief for Respondent, *supra* note 37, at 9.

¹⁴⁰ Brief for Petitioner, *supra* note 36, at 11.

¹⁴¹ Brief for Respondent, *supra* note 37, at 9.

¹⁴² *Id.*

¹⁴³ Brief for Petitioner, *supra* note 36, at 11.

presumption.¹⁴⁴ Ultimately, the court found there was no question that the established marital residence was in Italy.¹⁴⁵

The parties presented the court with conflicting evidence whether there had been an understanding that Monasky's stay in Italy would be temporary.¹⁴⁶ The district court found there was no agreement that Monasky would only reside in Italy for a brief, definite period of time, instead finding that Monasky came to Italy to live and work with her husband.¹⁴⁷ Further, the court found that Monasky had no clear plan to return to America, although the parties had agreed to the possibility of one day returning to her home country.¹⁴⁸

Courts face obstacles when determining the habitual residence of a child in instances where the parents' marriage breaks down before or shortly after the birth of a child.¹⁴⁹ During contentious separations, parents generally do not agree on big issues and may be physically separated, causing difficulty establishing the residence of the child or plans for a future home for the child. However, the district court found that when there is an established marital home where the child resides, the unilateral actions of one parent are not enough to disestablish the habitual residence of the child.¹⁵⁰

Monasky proposed a legal theory that "where a parent determines at, or before, the birth of a child that her marriage has broken down and has a plan to raise her child not in the state of her matrimonial home, but elsewhere, the court should find that no habitual residence exists."¹⁵¹ According to this theory, the minor child should not have a habitual residence in instances where one parent has decided the marriage has ended and does not plan to raise the child in the marital home.¹⁵² To establish the child has no habitual residence, the burden of proof shifted to Monasky to prove that her marriage was irretrievably broken.¹⁵³

144 *Id.*

145 Brief for Respondent, *supra* note 37, at 9.

146 *Id.* at 10.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 Brief for Petitioner, *supra* note 36, at 11.

153 *Id.*

Monasky argued that the marriage broke down in February 2015; however, the district court determined that the marriage did not completely dissolve until the final altercation of the parties on March 31, 2015.¹⁵⁴ While the district court acknowledged the instability of the parties' relationship, Monasky needed to show more than an intent to divorce to prove the marriage had fundamentally broken down.¹⁵⁵ Monasky never established when she would officially return to the United States, and instead, she took steps to remain in Italy for an undetermined amount of time.¹⁵⁶ Although the court took issue with the indecisiveness of Monasky's plan, the court still made findings that she intended to live in America with her child "as soon as possible in the future."¹⁵⁷ Further, the court concluded the parents lacked an agreement to raise A.M.T. in Italy.¹⁵⁸

Following the district court's finding in favor of Taglieri, Monasky appealed and requested the Sixth Circuit issue a stay of the return order.¹⁵⁹ In the court of appeals, a three-judge panel affirmed the district court's judgment in favor of Taglieri, while rejecting the "matrimonial home" standard of the district court.¹⁶⁰ Instead, the appeals court held that if a child has resided exclusively in one country before removal, that country is the habitual residence of the child.¹⁶¹ Despite the majority opinion, the dissent disagreed with the new "single-country rule," since it conflicted with the precedent set by ten other circuits.¹⁶² The ten other circuits examine the acclimation of children to their current surroundings when there is no finding of shared parental intent.¹⁶³ Ultimately, the Sixth Circuit Court of Appeals denied the stay of the minor child when A.M.T. was nearly two years old and ordered her removal from her mother to return to Italy.¹⁶⁴ At this time, A.M.T. had spent most of her life in

¹⁵⁴ Brief for Respondent, *supra* note 37, at 11.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Brief for Petitioner, *supra* note 36, at 11.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 12.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

America with her mother, so Monasky moved to Italy to remain close to her daughter.¹⁶⁵ Then, Monasky requested a rehearing en banc, which was heard by eighteen judges.¹⁶⁶

During the en banc hearing, the decision of the district court was affirmed by a 10-8 vote by relying on precedent.¹⁶⁷ The appeals court relied on two established methods to determine a child's habitual residence, stating that the primary approach is to consider the acclimatization of the child. When the child is too young or too disabled to acclimate, the backup approach is a "shared parental intent" determination.¹⁶⁸ Since there was no belief that the child was able to acclimate to either country due to her age, the court considered the shared parental intent of the parties.¹⁶⁹ According to the court, finding shared parental intent does not require a "meeting of the minds" between the parents regarding where to raise the child.¹⁷⁰ The court would find difficulty in establishing the habitual residences of most infants during the parents' separation if the court had to rely on a subjective agreement between parents, because divorcing parents might not agree on most matters.¹⁷¹ The dissenting judges argued that while shared parental intent is the correct standard for establishing the habitual residence of infants, the court must look to external evidence to determine the last shared intent of the parents.¹⁷² If external evidence is unable to clarify the shared intent of the parents, the party arguing for repatriation has not met his or her burden.¹⁷³ Under this theory, Taglieri was the party that had to meet the burden of establishing habitual residence by proving his shared intent with his wife.

In reviewing the district court's determination of A.M.T.'s habitual residence, the court of appeals relied on the "clear-er-

¹⁶⁵ Sabrina Eaton, *U.S. Supreme Court Hears International Child Custody Spat from Cleveland Area*, CLEVELAND.COM (2019), <https://www.cleveland.com/open/2019/12/us-supreme-court-hears-international-child-custody-spat-from-cleveland-area.html>.

¹⁶⁶ Brief for Respondent, *supra* note 37, at 13.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Brief for Petitioner, *supra* note 36, at 12.

¹⁷¹ Brief for Respondent, *supra* note 37, at 14.

¹⁷² Brief for Petitioner, *supra* note 36, at 14.

¹⁷³ *Id.*

ror” standard of review, which was affirmed by the en banc judges.¹⁷⁴ During its review, the court of appeals did not find that the district court made any obvious or substantial mistake in establishing the minor child’s habitual residence. The en banc majority found that the question of habitual residence is a “question of fact,” which supported the finding that clear-error was the correct standard of review. However, the eight dissenting judges found that the determination of habitual residence should be reviewed “de novo.”¹⁷⁵ Similarly, Monasky argued for de novo as the ultimate standard of review for habitual residence, while contending that the district court’s underlying findings of historical fact should be reviewed with the clear-error standard.¹⁷⁶ Reviewing habitual residence with the de novo standard can establish a uniform international interpretation that can act as a guide for lower courts.¹⁷⁷

C. *Analysis by the Supreme Court*

When deciding *Monasky*, the Supreme Court reviewed two main questions that needed to be resolved. First, the Court addressed, “Whether a district court’s determination of habitual residence under the Hague Convention should be reviewed *de novo*, as seven circuits have held, under a deferential version of *de novo* review, as the First Circuit has held, or under clear-error review, as the Fourth and Sixth Circuits have held.”¹⁷⁸ Second, the Court considered, “Where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant’s parents is necessary to establish her habitual residence under the Hague Convention.”¹⁷⁹

1. *The Proper Standard of Review*

Since the lower courts already found in favor of Taglieri, Monasky requested that the Supreme Court apply a de novo review, allowing the Justices to review all the facts from the start.¹⁸⁰

¹⁷⁴ Brief for Respondent, *supra* note 37, at 13.

¹⁷⁵ Brief for Petitioner, *supra* note 36, at 14.

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

¹⁷⁸ Brief for Petitioner, *supra* note 36, at i.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 19.

Monasky pointed to the Convention's goal of uniformity to support her claim for *de novo* review.¹⁸¹ In the implementing statute in the United States,¹⁸² the articles reference the importance of uniformity in decisions. While lower courts might rule differently on the same facts, if the appellate court is able to review the matter from the beginning, the application of law will be more universal.¹⁸³ Further, Monasky argued that appellate courts are better positioned to make rulings, and therefore, provide "consistency and predictability" for parents.¹⁸⁴ Last, Monasky contended that habitual residence determinations require more than an examination of pure fact because they require complex examinations of legal principles set forth to govern the Convention.¹⁸⁵

While Taglieri agreed that the habitual residence test is more than a fact determination, he disagreed with the position of allowing the higher courts to make the determination.¹⁸⁶ Taglieri argued that the lower court had already made the fact evaluation, and therefore, the appellate court should not review the facts further.¹⁸⁷ According to the appellee, the proper standard is the "clear-error standard," meaning a factual review only occurs if the Court finds the lower court's decision was factually incorrect.¹⁸⁸ The clear-error standard applies when the decision of the lower court is a mixed question of fact and law that requires case-specific determinations.¹⁸⁹ Further, a *de novo* review would contradict the goal of the Convention of prompt return because allowing courts to review each case from the start would be a lengthy process.¹⁹⁰

181 *Id.*

182 22 U.S.C. § 9001(b)(3)(b).

183 Brief for Petitioner, *supra* note 36, at 20.

184 *Id.* at 24.

185 *Id.*

186 Brief for Respondent, *supra* note 37, at 21.

187 *Id.*

188 *Id.*

189 *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018).

190 Brief for Respondent, *supra* note 37, at 20.

2. *The Necessity of a Subjective Agreement Between Parents*

The parties agree that the Court must look at shared parental intent to establish the habitual residence of a child when an acclimatization standard is improper due to the young age of the child.¹⁹¹ However, the parties disagree on the existence of a shared agreement between the parties.¹⁹² According to Monasky, the child's presence in a country can only "truly be considered settled, continuous, and stable" when the parents agree to raise the child in a specific place.¹⁹³ Monasky believed it remained clear that the parties did not share an intent to raise the child in Italy, and further, that Monasky planned to raise her child in America.¹⁹⁴

The lower courts also concluded that the parents were not in agreement after the birth of their child.¹⁹⁵ Monasky argued that the requirement of an actual agreement allows the court to quickly analyze the facts to find existence of an agreement, as opposed to reviewing subjective evidence of each party's understanding.¹⁹⁶ If no agreement exists between the parents regarding the home of the child, the habitual residence of the child is not established. Courts in Australia and the United Kingdom have found that children may not always have a habitual residence.¹⁹⁷

Taglieri argued that intent alone is not determinative of the child's habitual residence, because the precedent of the Convention requires "consideration of all facts relevant to determining where the child usually lives."¹⁹⁸ The intent of the parents is a factor in assessing the habitual residence of the child, among other factors.¹⁹⁹ Moreover, the parent may satisfy the intent determination through subjective evidence, such as the statements

¹⁹¹ Brief for Petitioner, *supra* note 36, at 16.

¹⁹² *Id.*

¹⁹³ *Id.* at 17.

¹⁹⁴ *Id.* at 18.

¹⁹⁵ *Id.* at 17.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Brief for Respondent, *supra* note 37, at 18.

¹⁹⁹ *Id.*

and actions of the parent.²⁰⁰ If the parents were required to prove an actual agreement, a large number of children would not be assigned a habitual residence.²⁰¹ A standard presumption of no habitual residence for young children would not properly protect the population most vulnerable to abduction.²⁰²

While Taglieri argued that the actual agreement standard leaves children vulnerable to international kidnapping, Monasky believed the actual agreement would protect children in instances of domestic violence, who are highly vulnerable to forum shopping.²⁰³ Support groups for Monasky, such as Sanctuary for Families, raised concerns that domestic violence often occurs in international abduction cases and children should not be ordered to return to abusive situations.²⁰⁴ Supporters believed each court must evaluate safety before returning the child, instead of making a prompt return on the sole basis that the petition was filed within twelve months.²⁰⁵

Taglieri argued that courts should promptly return a child, absent an exception outline in the articles, so the home court can evaluate which parent will best protect the child. Allowing courts to analyze the home life of the child may impose a “best interest of the child” standard, which is improper.²⁰⁶ The best interest standard is a determination for the home courts to make.²⁰⁷ Further, courts may incorrectly decide two cases with the same facts differently depending on the resiliency of each child to adapt to their surroundings.²⁰⁸ Advocates fear that adding an acclimation analysis to these cases might diminish the deterring capacity of the Convention.²⁰⁹ If a parent finds that they can remove the child from their home because the child has the ability to acclimate well, the parent might disregard potential consequences and remove the child.²¹⁰ In this instance, the out-

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 19.

²⁰³ Brief for Petitioner, *supra* note 36, at 17.

²⁰⁴ *Sanctuary for Families*, *supra* note 24, at 8.

²⁰⁵ *Id.* at 9.

²⁰⁶ *Abott*, 560 U.S. at 20.

²⁰⁷ *Id.*

²⁰⁸ *International Academy of Family Lawyers*, *supra* note 27, at 10.

²⁰⁹ *Id.* at 5.

²¹⁰ *Id.*

come could be determined by the resiliency of the child, instead of the actions of the parents.²¹¹

IV. The Supreme Court Hears *Monasky*

A. Oral Arguments

On December 11, 2019, the U.S. Supreme Court held an oral argument on the appeal filed by Monasky regarding child custody.²¹² At this point, A.M.T. had resided in Italy for three years.²¹³ In the proceeding, Monasky's attorney, Amir Tayrani, argued for a re-return of A.M.T. to the United States, while Taglieri's attorney, Andrew Pincus argued for the establishment of Italy as the minor child's habitual residence.²¹⁴ Additionally, Sopan Joshi argued on behalf of the United States, in support of neither party.²¹⁵ During oral arguments, the Justices voiced their concerns regarding the potential outcomes of their decision.

To start off, the Justices reviewed the habitual residence question. Chief Justice John Roberts stated that habitual residence is a "meaningless concept for" infants, considering that infants do not have habits.²¹⁶ Still, the Court faced the issue of deciding the best way to handle assigning a residence to infants for purposes of repatriation. Justice Ruth Bader Ginsburg argued that if the Court applied the proposed theory that infants do not have habitual residences when there is no meeting of the minds of parents, too many children would not have habitual residences.²¹⁷ Taglieri's attorney contended that cases where the parents disagreed about habitual residences of an infant, would only occur in rare instances where the couple's relationship broke down during the pregnancy or immediately following the birth of the child.²¹⁸ Justice Ginsburg disagreed that cases where parents were unable to agree were rare, considering that many of the cases brought under the Hague Convention are extremely

²¹¹ *Id.* at 10.

²¹² Transcript of Oral Argument at 1, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935) [hereinafter Transcript].

²¹³ Brief for Respondent, *supra* note 37, at 20.

²¹⁴ Transcript, *supra* note 212, at 1.

²¹⁵ *Id.*

²¹⁶ *Id.* at 35.

²¹⁷ *Id.* at 5.

²¹⁸ *Id.* at 6.

contentious and that the parents are unlikely to form agreements regarding the child's residence.²¹⁹ Chief Justice Roberts pointed out that no other parties to the Convention require the meeting of the minds of the parents to determine the child's residence.²²⁰

The Justices then tackled the issue of the standard of review. Judge Brett Kavanaugh voiced concern that Hague Convention cases may become prolonged if the losing parent knew that filing an appeal would allow the appeals court to review the entirety of facts from the start.²²¹ The attorney for Monasky pointed out that since international abduction cases are already fiercely disputed, the losing parent is likely to file an appeal regardless of the standard of review applied.²²² Justice Elena Kagan proposed a different rule completely that would provide stricter guidance to the courts when determining an infant's habitual residence.²²³ The test would determine that if an infant has lived somewhere his or her entire life, the country where he or she lives would be considered the habitual residence.²²⁴ Mr. Joshi, on behalf of the United States, rejected this strict test and countered that the test for habitual residence must remain a "flexible, fact-intensive concept."²²⁵ He stated that in some instances, Justice Kagan's proposed test would correctly determine an infants' habitual residence; however, under less straightforward circumstances, the test would not appropriately determine the full life and home of the infant.²²⁶

Justice Ginsburg questioned the attorney for Taglieri regarding the allegations of abuse. Justice Ginsburg pointed out that Monasky had to choose between escaping a situation of domestic violence and leaving her infant child behind.²²⁷ Additionally, Justice Stephen Breyer added that Monasky did not have a job or speak Italian.²²⁸ In response, Taglieri's attorney countered that

²¹⁹ *Id.* at 7.

²²⁰ *Id.* at 8.

²²¹ *Id.* at 16.

²²² *Id.*

²²³ *Id.* at 27.

²²⁴ *Id.*

²²⁵ *Id.* at 30.

²²⁶ *Id.* at 33.

²²⁷ *Id.* at 50.

²²⁸ *Id.* at 52.

fleeing to America was not Monasky's only choice.²²⁹ It would have been possible to stay in the safe house longer given that she generally intended to stay in Italy according to the district court.²³⁰

B. *The Final Opinion*

On February 25, 2020, the Supreme Court affirmed the decision of the lower courts, in favor of Taglieri.²³¹ The opinion written by Justice Ginsburg was joined by Justices Roberts, Breyer, Sotomayor, Kagan, Gorsuch, and Kavanaugh, and all the Justices agreed with the outcome of the judgment.²³² The opinion included concurrences from both Justices Thomas Clarence and Samuel Alito.²³³ The Court held that habitual residence should be determined by the totality of circumstances, absent an actual agreement.²³⁴ While the opinion recognized that habitual residence has not been clearly defined by the Convention, the Court stated that the determination is fact-driven.²³⁵ The decision for habitual residence is specific to each case and "no single fact is dispositive across all cases."²³⁶ When considering infants, habitual residence needs to be shown through more than "mere physical presence."²³⁷ A variety of facts, including indications that parents have chosen a particular place as their home, can establish the habitual residence.²³⁸ Evaluating the habitual residence of an infant is a question of fact, which falls in line with the practices of the Court of Justice of the European Union, the Supreme Court of Canada, and the High Court of Australia.²³⁹

In these instances, the Court found that an actual agreement between the parents is not necessary and further, that an actual agreement approach would affect the safety of children of domestic violence, whose parents often are unable to agree on a

²²⁹ *Id.* at 50.

²³⁰ *Id.*

²³¹ *Monasky*, 140 S. Ct. 719 (2020) (Syllabus).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 723.

²³⁵ *Id.* at 727.

²³⁶ *Id.*

²³⁷ *Id.* at 729.

²³⁸ *Id.* at 726.

²³⁹ *Id.* at 728.

home, because the child would be unable to fall under the jurisdiction of the Convention.²⁴⁰ Although the opinion recognized that Taglieri was abusive to Monasky, it pointed out that Article 13(b) of the Convention has already carved out an exception when dealing with domestic abuse in Hague cases.²⁴¹ Further, domestic violence will be considered when determining the custody of the child when returned to the child's home country.²⁴²

The Supreme Court held that the clear error standard for review is the most appropriate for a first-instance habitual residence determination.²⁴³ The Court found that the habitual residence test is a mixed question of fact and law, but since the determination is fact heavy, the appropriate standard of review should give deference to the trier of fact.²⁴⁴ The task of determining if the child was home in a certain country is a question best answered by fact-finding courts, and not the appellate courts.²⁴⁵ Applying clear error review is important to ensure the appeals process can be quick, since the return of the child is a time-sensitive matter.²⁴⁶ While the Court may look to precedent when ordinarily selecting a standard of review in other areas of the law, there is no need to consider history when selecting the review standard for habitual residence because it is so evident the evaluation is fact intensive.²⁴⁷ Even if the Court considered historical practices, judges would have difficulty discerning the precedent of prior habitual residence determinations because there has been no uniformity in prior court decisions.²⁴⁸

In their partial concurrences, both Justices Thomas and Alito agreed with the outcome of the judgment, while their opinions on the methods used differed from that of the majority. Justice Thomas believed an opinion formed principally on the plain meaning of the Convention's text was sufficient to determine the outcome of *Monasky*.²⁴⁹ According to Justice Thomas,

²⁴⁰ *Id.* at 729.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 730.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 730.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Monasky*, 140 S. Ct. 731 (Thomas, J., concurring).

“the ordinary meaning of the relevant language at the time of the treaty’s enactment provides strong evidence that the habitual-residence inquiry is inherently fact driven.”²⁵⁰ The plain meaning of habitual residence as indicated by the Convention, shows the determination is fact heavy, which is sufficient to guide the Court’s decision, without looking to other sources.²⁵¹

Similarly, Justice Alito also believed that the Court must assert an independent interpretation of habitual residence, without influence from other sources.²⁵² Justice Alito considered the term “child’s home” to accurately capture the meaning of habitual residence.²⁵³ The term “home” also has a broad range of meanings, which have been encompassed by the Convention, according to Justice Alito.²⁵⁴ He considered “habitual residence” to indicate a place where a child has been living for an extended period of time unless the child feels strong attachment to another place or the place was only intended to be temporary.²⁵⁵ While he agreed the issue is fact heavy, the concept is not a pure question of fact, and therefore, he believed “abuse of discretion” should be the proper standard of review.²⁵⁶ Ultimately, the Justices decided upheld the decision of the lower courts in a unanimous decision to allow A.M.T. to remain in Italy.²⁵⁷

V. Conclusion

The international abduction of children is an issue that will continue to rise as the world continues to globalize.²⁵⁸ As cases continue to appear in courts internationally, courts can look to the U.S. Supreme Court’s decision for guidance in instances involving the home of an infant. The Hague Convention was drafted to protect children affected by international abduction, but issues of child safety are evolving.²⁵⁹ The controversial case

²⁵⁰ *Id.* at 733.

²⁵¹ *Id.*

²⁵² *Monasky*, 140 S. Ct. 734 (Alito, J. concurring).

²⁵³ *Id.*

²⁵⁴ *Id.* at 734.

²⁵⁵ *Id.* at 734-35.

²⁵⁶ *Id.* at 735.

²⁵⁷ *Monasky*, 140 S. Ct. at 731.

²⁵⁸ Puckett, *supra* note 10, at 259.

²⁵⁹ Hague Convention, *supra* note 9, at preamble.

of *Monasky* has raised awareness of the deeper issues regarding the security of all children. While the Court's holding has essentially avoided answering the issue of domestic violence in Hauge cases, the opinion outlined the remedies already in place to protect international families and children from remaining in abusive situations, such as the risk of grave harm defense.²⁶⁰ While critics have argued that this defense applies narrowly to the worst circumstances, with more research and advocacy from advocates, such as the organizations that filed amicus briefs in *Monasky*, further solutions can be created.²⁶¹

As more Hague Convention cases arise, unfortunately the availability of practitioners who understand complex family matters remains low. Family court practitioners can volunteer to represent parties in international abduction cases by contacting the office that acts as the Central Authority for Hague Cases in the United States: The Civil Division of the Department of Justice, Office of International Judicial Assistance.²⁶² Additionally, the International Child Abduction Attorney Network ("ICAAN"), which connects attorneys with Hague Convention clients, is a great resource for international abduction case referrals.²⁶³ Attorneys may also connect with clients needing assistance in international abduction cases by contacting the National Center for Missing and Exploited Children, which is an organization that has experience in Hague cases.²⁶⁴ Lastly, attorneys can contact local federal court pro se clerks to notify the office of their willingness to accept international abduction cases.²⁶⁵ Attorneys passionate about child and family matters should consider volunteering time to Hague cases, since international abductions can be similar to the type of emotional and rewarding work that family practitioners are trained to handle.

Olivia Claire Dobard

²⁶⁰ *Monasky*, 140 S. Ct. at 729.

²⁶¹ Puckett, *supra* note 10, at 262.

²⁶² Baum, *supra* note 1.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

