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Defining Habitual Residence in the Hague Convention

In *Monasky v. Taglieri*, SCOTUS took the opportunity to define "habitual residence" and proclaimed a uniform legal standard for the first time. The decision alters the trajectory of US Hague Convention jurisprudence on this issue.

By Amy Keating and Chris Reynolds, Family Lawyers

On December 11, 2019, the United States Supreme Court (SCOTUS) heard oral argument in *Monasky v. Taglieri*[1], a case that hinges upon the definition of "habitual residence" for an infant under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Convention"). In fact, this was only the fourth case that the Supreme Court has taken dealing with the Convention and the first time that the Court has spoken on the issue of habitual residence. The term "habitual residence," which is not defined in the Convention itself, afforded SCOTUS the opportunity to consolidate jurisprudence in the United States.

Many family law practitioners find international issues daunting, even if they have a vague understanding of what the Convention is. So, what is it? Plainly, it is a multinational treaty, one of many under the "Hague Convention" umbrella intended to protect children from the harmful effects of international abduction. Its main goals include bringing about children's prompt return, and it is designed to prevent parents from forum shopping in international custody disputes. Like the UCCJEA, the Convention is essentially a forum selection law, intended to be about who decides not what is decided.

The basic components of a Convention claim include: 1) a wrongful removal/retention of a child; 2) when the child was habitually residence in a contracting state; 3) in breach of rights of custody; 4) when the child is under the age of sixteen; 5) within one year of the removal/retention (after one year, the Convention still favors returns but considers whether the child is settled in his/her new environment [Art. 12]). The burden of

proof is on the petitioner who must prove these elements by a preponderance of the evidence in the U.S. Establishing a prima facie case presumes a right of return to the child's habitual residence unless one of the narrow defenses applies.

Three Standards for Habitual Residence

Despite its critical importance, "habitual residence" is not specifically defined in the Convention – primarily because the drafters could not agree on a definition[2]. As a result, prior to *Monasky*, different jurisdictions crafted different legal standards to determine this very key term of the Convention. For purposes of simplicity, there were three standards that developed in the U.S.:

1. Acclimatization standard;
2. Shared Parental Intent standard;
3. A hybrid of both standards.

Acclimatization, the prior standard in the Sixth Circuit[3], focused on where the child has been physically present for an amount of time sufficient for "acclimatization" and which has a "degree of settled purpose *from the child's perspective*."[4] It looks for indicia of the child's connectivity to a place through objective criteria such as school, extracurricular activities, social activities, and meaningful relationships with people in that place.

Shared Parental Intent focused on where the parents intend for the child to be raised. To determine a child's habitual residence, we "look[ed] for the last shared, settled intent of the parents."[5] A court considered the parties' subjective intent but also objective evidence of steps the parties' took in furtherance of that intent – outward manifestations of where the parties intended for the child to be raised[6].

Other circuits have adopted a hybrid standard that considered both Acclimatization and Shared Parental Intent, weighing them differently depending on the jurisdiction. Good examples of this exist in the 8th and 3rd Circuits, among others[7].

Monasky v. Taglieri

In *Monasky*, the parties meet and marry in Illinois, but relocate to Italy, disagreeing as to how long they intend to stay. The parties' marriage deteriorates, and there are credible allegations of domestic violence. Monasky becomes pregnant but, by the time of the child's birth, the marriage is irretrievably broken. After an emergency cesarean section, Monasky cannot leave Italy due to her recovery and lack of a US passport for the child. Monasky tells Taglieri she intends to return with the child to the US as soon as possible; Taglieri alleges that the parties had reconciled. When the child is six weeks old, Monasky and the child are placed in an Italian domestic violence safe house. When the child is 8 weeks old – and as soon as her US passport is issued – Monasky and the child leave Italy for the US. After a four-day bench trial, the district court found that Italy was the infant's habitual residence and ordered a return.

In the Sixth Circuit, acclimatization had been problematic for infants or children with cognitive disabilities. In other words, what should a court do with children that cannot acclimatize? This had been an "open issue" for some time, but the Sixth Circuit had not been forced to contend with it directly. *Monasky* – along with another case that hit the Sixth Circuit at the same time (*Ahmed v. Ahmed*, 867 F.3d 682, 2017) – made it impossible to sidestep any longer. Would the Sixth Circuit agree with the majority of other circuits that shared parental intent was the standard for this category of children? Ultimately, an *en banc* Sixth Circuit agreed that shared parental intent was the proper standard (907 F.3d 404, 2018).

Must Every Child Have a Habitual Residence?

Further, must every child have a habitual residence at all? One camp holds that, while rare, there are times when a child has not formed a sufficient connection to a particular place, either directly or through its parents. In those situations, the Convention simply does not apply because there is no status quo to return to. The other camp argues that a child always has a habitual residence; that it must always exist. In *Monasky*, our position had been that the child never acquired a habitual residence due to her young age and the parental discord about where the child would be raised – the absence of shared parental intent.

Despite agreeing that shared parental intent was the appropriate standard, the en banc Sixth Circuit found that

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[1] In the District Court of Court of Appeals, the case is captioned *Taglieri v. Monasky*.

[2] A more comprehensive analysis of the Convention would necessarily include additional explanation of the other components. Because *Monasky* is focused on habitual residence, we are confining our discussion to only that term.

[3] See *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993) and *Robert v. Tesson*, 507 F.3d 981 (6th Cir. 2007).

[4] *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007).

[5] Valenzuela v. Michel, 736 F.3d 1173, 1177 (9th Cir. 2013).

[6] The seminal case on this standard is Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).

[7] A slightly different version of this exists in the 7th Circuit in Redmond v. Redmond, which implements a totality of the circumstances approach that considers both Acclimatization and Shared Parental Intent as factors. The Supreme Court seems to have relied heavily on *Redmond* and similar cases in this line of reasoning in arriving at its decision in *Monasky*.

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It can be unbearable for a parent facing removal of a child, seeking reunification, or fighting for custody to listen as the GAL testifies about witness statements that are imprecise, mistaken, false, or even fabricated – particularly when there is no opportunity to cross examine, and knowing the statements might influence the Court's decision. While hearsay is not admissible, absent objection, it may be allowed into evidence[5]. A judge is presumed to be able to separate "the wheat from the chaff," but once a judge has heard the "chaff," it may be hard to unring that bell.

Finally, there is always a risk that a GAL's perception of the facts will be contaminated by their own predispositions, that they will prejudge the case, engage in confirmation bias, or for some other reason make recommendations that are not in a child's best interest, and your client will have spent thousands (if not tens of thousands) of dollars for an investigation and GAL report that could cost them custody of their much-loved child. So before you file that motion seeking a GAL appointment, make sure your client appreciates both the potential upside – and downside – of the motion being granted. ■

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[5] O.C.G.A. § 24-8-802

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habitual residence was an issue of "pure fact" subject to clear-error review. It refused to remand the matter so the trial court could apply the facts to the new legal standard and upheld the return by a vote of 10 – 8.

We identified two circuit splits that the Supreme Court agreed merited review. The questions were:

1. Whether a district court's determination of habitual residence under the Hague Convention should be reviewed de novo...or under clear-error review; and
2. Whether, when an infant is too young to acclimate to her surroundings, a subjective agreement between the infant's parents is necessary to establish her habitual residence.

Is Habitual Residence an Issue of Pure Fact?

"Standard of review on appeal" may not seem like a "sexy" topic, but lawyers know that it can make a big difference in the outcome of cases. The Court must determine whether habitual residence is an issue of pure fact – calling for strong deference to the trial court on appeal – or a question of "ultimate fact" or "mixed question of fact/law" – requiring a de novo review.

SCOTUS' Decision

On February 25, 2020, the U.S. Supreme Court issued its opinion in *Monasky v. Taglieri*. SCOTUS held that a child's habitual residence depends on the totality of the circumstances specific to the case – providing one uniform legal standard for this key term for the first time, applicable to *all* children. The Court rejected Monasky's "actual agreement" requirement in favor of a flexible and fact-driven standard. SCOTUS also held that habitual residence determinations should be subject to a "clear error" appellate review.

This decision has altered habitual residence determinations in the US and changed the language and the landscape of habitual residence going forward. Despite the positive effects of a now-unified habitual residence standard, we remain concerned about the practical impact of the Court's adoption of a clear error standard of review.

This pronouncement – and the Court's apparent trade-off of expediency over other considerations – makes it more likely that cases with similar facts will have disparate outcomes driven by the proclivities of the particular judge or court hearing the case with almost no basis for meaningful appellate review. "Prompt but wrong" is not a generally accepted legal norm, and it is especially pernicious when the well-being of children is at stake. While we certainly hope our fears don't materialize, that is now the state of our law. ■

Amy Keating and Chris Reynolds are both OSBA Certified Specialists in Family Relations Law practicing at Zashin & Rich. In 2016, they tried Monasky v. Taglieri *in the Northern District of Ohio. On both appeals in the Sixth Circuit and before the Supreme Court, they were co-counsel with Gibson Dunn in Washington, D.C. and Professor Joan Meier of George Washington University. Amy focuses her practice on family law matters, including child custody and issues concerning parental relocation. Chris has significant experience representing parents in international custody matters, including international child-abduction cases implicating the Hague Convention.*
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