by Ronald H. Kauffman

Like Home: The New Definition of Habitual Residence

In the *Wizard of Oz*, Dorothy clicked her ruby slippers three times and was immediately whisked back to Kansas.[1] For lawyers responding to the heel clicks of other wrongfully removed children, returning home is not so easy. That is because courts have had different standards for determining a child's "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980 (the Hague Convention).

It has been one year since the U.S. Supreme Court decided the highly anticipated case of *Monasky v. Taglieri*, 140 S. Ct. 719 (2020), the first time the Court squarely addressed the subject of habitual residence. The controversy? How to establish a child's habitual residence under the Hague Convention, and what the appellate standard of review should be after making that determination. This article is a primer on the Hague Convention on international child abductions and the recent *Monasky* case.

We're Not in Kansas Anymore

Headquartered in the Netherlands, the Hague Conference on Private International Law is an international organization of member countries who work for the unification of private international law. The Hague Conference accomplishes this goal through different "conventions" — multi-lateral treaties negotiated and adopted by member countries. There have been over 40 conventions adopted.[2]

The Hague Convention has become the primary international legal instrument to ensure the return of children who have been abducted from his or her country of habitual residence. The Hague Convention's mission is to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the country of their habitual residence, as well as to secure parental rights of access.[3] The Hague Convention was not designed to resolve underlying custody disputes, but to determine the merits of a wrongful removal and retention claim.[4]

The U.S. Congress implemented the Hague Convention by enacting the International Child Abduction Remedies Act (ICARA).[5] ICARA vests concurrent jurisdiction over claims brought under the Hague Convention in federal and state courts.[6] Congress found that the wrongful removal and retention of children is harmful to their well-being, and that persons should not be permitted to obtain custody of children by virtue of the child's wrongful removal or retention.[7]

The U.S. State Department is the designated central authority responsible for preventing abductions and responding when international child abductions occur. The State Department also issues compliance reports identifying countries that are noncompliant with the convention and cases that remain active for 18 months or more after a Hague Convention application is filed.

In 2014, Congress modified ICARA because of obstacles American parents faced trying to ensure the return of their child from other Hague Convention signatory countries. The case of Sean Goldman's abduction to Brazil from New Jersey by his mother was one widely reported example. A Brazilian court awarded the mother custody after she refused to return Sean during their vacation in Brazil. The mother re-married, then died unexpectedly in childbirth. Incredibly, a Brazilian judge awarded custody to the mother's Brazilian widower, not the natural father. Ultimately, Brazil's Supreme Court ordered Sean's return five years later. The Goldman fiasco resulted in the passage of the Sean and David Goldman International Child Abduction Prevention and Return Act (ICAPRA).[8]

The newer ICAPRA expanded the responsibility and authority of the State Department in international parent-child abduction cases, gave additional assistance to left-behind parents, authorized the U.S. Secretary of State to take coercive action, increased U.S. interagency cooperation and outreach to foreign countries, and renumbered the ICARA statute in the U.S. Code.

Follow the Yellow Brick Road

A left-behind parent seeking his or her child's return has to prove, by a preponderance of the evidence, that their child was wrongfully removed or retained within the meaning of the convention from the child's Habitual Residence.[9] To establish a prima facie case, the parent must prove that the habitual residence of their child immediately before the date of the alleged wrongful removal or retention was in a foreign country; that the removal or retention was in breach of custody rights under the foreign country's law; and the left-behind parent was exercising custody rights at the

time of the alleged wrongful removal or retention.[10]

Generally speaking, "wrongful removal" refers to the taking of a child from the person who was exercising actual custody of the child. "Wrongful retention," on the other hand, is the act of keeping the child without the consent of the person who was exercising actual custody. The classic example of wrongful retention is the refusal by a parent to return a child at the end of an agreed visitation period.[11]

The Hague Convention uses the phrases "wrongful removal or retention" and "right of custody" as terms of art. "Rights of custody" 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."[12] "Rights of access" are different and include the right to take a child for a limited period of time to a place other than the child's habitual residence. The distinction between rights of custody and rights of access is important, as the remedies available under the convention are different.[13]

If a left-behind parent satisfies his or her burden of proof, by a preponderance of the evidence, then the child must be returned to the child's country of habitual residence unless the alleged taking parent can establish one of the convention's narrow affirmative defenses.[14]

The affirmative defenses under the Hague Convention are as follows:

1) returning the child to his or her habitual residence would place the child in grave risk of physical or psychological harm;

2) the child's human rights and fundamental freedoms would be threatened if returned;

3) the petitioning parent consented or acquiesced to the removal or retention;

4) the petitioner was not actually exercising custody rights at the time of the alleged wrongful removal or retention;

5) the child is now settled in his or her new environment and the petition to return the child was filed one year or more after the alleged wrongful removal or retention; and

6) a child who "has attained an age and degree of maturity" expresses a desire to remain in the new country.[15]

Courts have the power, and use it when appropriate, to return a child to the habitual residence — even when an affirmative defense is established — if returning the child furthers the aims of the treaty.[16]

Ironically, given the importance of the term "habitual residence" and how frequently it is used in various Hague Conventions, it is not defined in the Hague Convention or in ICARA. The convention's lack of a definition for habitual residence is in contrast to the Uniform Child Custody Jurisdiction and Enforcement Act's (UCCJEA) definition for the similar concept of "home state."[17]

The inquiry into a child's habitual residence has become a fact-intensive analysis, and the determination can vary from case to case. The lack of a legal definition may have helped courts avoid formalistic determinations like "home state" under the UCCJEA, but the result has been conflicts over how courts should interpret and apply the concept of habitual residence.[18]

American courts have built three yellow brick roads leading to a child's

habitual residence. The three-way split between federal circuits has been whether to focus on the parents' shared intentions, examine where the child has been physically present for an amount of time to become acclimatized, or some blend of those two standards.

The Ninth, 11th, and Fifth circuits have adopted an approach that begins with an inquiry into the parents shared intent, or civil purpose regarding their child's residence.[19] The "shared parental intent" approach gives more weight to the parents' subjective intentions relative to the child's age. For example, the parents' intentions are usually dispositive in cases in which a child is too young to decide the issue of residency. In cases of very young children, the threshold test is whether both parents intended for the child to "abandon the habitual residence left behind."[20]

Absent shared intent of the parents, a prior habitual residence should be deemed changed when the parents share a "settled intention" to leave the old habitual residence behind; and there's been an actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized.[21]

Conversely, other circuits have focused on the child's "acclimatization" instead of parental intent.[22] The acclimatization approach requires a court to look back in time and consider the child's academic activities, social engagements, participation in sports programs, and meaningful connections with the people and places in the new country.[23]

However, in its own *Monasky* decision, the Sixth Circuit acknowledged that acclimatization was difficult, "sometimes impossible," to apply as a benchmark because young children may not have the kinds of ties to which the acclimatization standard looks. Instead of leaving infants without a habitual residence, the Sixth adopted the "shared parental intent of the parties" in the case of infants.[24]

The inter-circuit conflict was best highlighted by the Second Circuit and others, which chose to blend the two tests.[25] The blended standard for habitual residence starts with the shared intent of those entitled to fix the child's residence (usually the parents).

Normally the shared intent of the parents should control the habitual residence. If not, courts should next inquire "whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and has acquired a new habitual residence, notwithstanding the parents' latest shared intent."[26]

Off to See the Wizard

On January 15, 2019, Ohio resident Michelle Monasky filed a petition for a writ of certiorari to the U.S. Supreme Court in *Monasky v. Taglieri*.[27] The case involved her marriage to Domenico Taglieri, a citizen and resident of Italy. Taglieri and Monasky are the parents of a daughter born in Italy.

The parties met and married in Illinois in 2011, but two years later, they moved to Italy to pursue their careers. At first, they lived in Milan and began working. Their marriage had problems, including physical abuse, then Monasky became pregnant. Taglieri took a job at a hospital in Lugo, about 170 miles to the southeast, while Monasky stayed in Milan.

During the pregnancy, their marriage further deteriorated. Monasky gave birth in Italy and needed an emergency cesarean section. She couldn't return home during her recovery, and the child lacked a U.S. passport, but she applied for jobs, investigated health care and child care options in the United States, and also started looking for an American divorce lawyer.

In March 2015, Monasky told her husband she intended to divorce and return home; however, she then left to live with him in Lugo. Later that month, they had another argument, and Monasky moved into a safe house with the child. When Taglieri found his wife and daughter were missing, he went to the police and revoked his permission for their daughter's American passport. Two weeks later, Monasky flew with their eight-week-old daughter to the United States.

Taglieri filed a custody action in Italy to terminate Monasky's parental rights — which the Italian court granted — and a return petition in Ohio pursuant to the Hague Convention. The District Court in Ohio denied Taglieri's motion for summary judgment, yet eventually ordered the child's return after a four-day trial. Monasky appealed.

The Sixth Circuit Court of Appeals and the U.S. Supreme Court denied her motions for a stay pending appeal, and Monasky returned their child to Italy. On appeal, a divided en banc panel of the Sixth Circuit affirmed the trial court after a rehearing by a 10-8 vote. The U.S. Supreme Court then granted certiorari to clarify the standard for habitual residence and to resolve the split among circuit courts over the appropriate standard of appellate review.

• *Habitual Residence* — The Supreme Court began its analysis of the meaning of "habitual residence" with the text of the treaty. Recognizing the Hague Convention does not define the term, the Court reasoned a child "resides" where he or she lives. A child's residence in a particular country can be deemed "habitual" only when his or her residence there is more than transitory.[28]

Common sense suggests that some cases are straightforward, such as when a child has only lived in one country. In other cases, however, and especially for older children capable of acclimating to their surroundings, the facts and circumstances weighing on acclimatization are highly relevant. However, with cases involving children too young or otherwise unable to acclimate, the intentions and circumstances of caregiving parents are the relevant considerations.

The Court reasoned that a child's habitual residence is so fact-driven an inquiry that there is no single fact dispositive across all cases to create one standard. In order to give courts in child abduction cases "maximum flexibility" to respond to each case at bar, the Court held there would be no categorical requirements for establishing a child's habitual residence. Habitual residence, instead, will depend on the totality of the circumstances in each case.[29]

• *Standard of Review* — The next critical question resolved in *Monasky*

was the appropriate appellate standard of review for a trial court's habitual-residence determination. Neither the convention nor ICARA lists modes of appellate review other than the directive to act "expeditiously."[30]

The *Monasky* Court determined that the "clear error" standard of review was particularly useful in Hague Convention cases because it is considered a more deferential standard of review, would speed up appeals, and serve the convention's premium on expedition.

Justices Thomas and Alito both concurred in the majority's conclusions that the habitual residence standard is a fact-driven inquiry, requiring courts to consider the unique circumstances of each case. Justice Thomas decided the case principally on the plain meaning of the text of the treaty. Justice Alito wrote separately and characterized the term habitual residence as not being a pure question of fact and classified the standard of review as abuse of discretion rather than clear error.

Let the Green Girl Go![31]

Normally, the Supreme Court might remand a Hague Convention decision to the lower courts for further proceedings. In the *Monasky* case, however, a remand could have been a wicked undermining of one of the main objectives of the Hague Convention: speed.

International child abduction cases can take weeks, months, and sometimes years. In *Monasky*, the mother moved with the child when the child was eight weeks old, and the father filed his petition shortly afterwards. The child was returned to Italy when she was about two years old, and by the time the Supreme Court decided the case, the child had turned five.

The Hague Convention has set out a six-week time frame for concluding cases.[32] The more than four-and-a-half-years it took the *Monasky* case to be concluded, dwarfed the convention's six-week goal for resolving a return petition. Compounding the problem, the child custody proceedings can still be pending while cases are being heard before the U.S. Supreme Court. In Michelle Monasky's case, she lost custody completely after the Italian family court ruling and has been trying to get an Italian court to take jurisdiction and reconsider the custody matter after her parental rights were completely terminated in absentia. Given the exhaustive record, the absence of any reason to expect that the trial court's judgment would change after remand, the length of the litigation, and the convention's objective of a six-week resolution, the Supreme Court ordered the child's immediate return to Italy.❑

[1] *The Wizard of Oz*, Metro-Goldwyn-Mayer (1939).

[2] The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S 97, *available at* https://www.hcch.net/en/instruments/conventions [hereinafter Hague Child Abduction Convention].

[3] *Id.* at preamble.

[4] *Id.* at art. 19 ("A decision under this [c]onvention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.").

[5] 22 U.S.C. §9001 *et seq*. (formerly 42 U.S.C. §11601 *et seq*.).

[6] 22 U.S.C. §9003(a).

[7] 22 U.S.C. §9001(a)(1).

[8] 22 U.S.C. §9001 *et seq*.

[9] 22 U.S.C. §9003(e)(1)(A).

[10] *Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998).

[11] *Id*.

[12] Hague Child Abduction Convention at art. 5(a).

[13] *Abbott v. Abbott*, 560 U.S. 1, 25 (2010).

[14] *Baran v. Beaty*, 526 F.3d 1340, 1345 (11th Cir. 2008).

[15] Hague Child Abduction Convention at arts. 12-13, 20.

[16] *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996).

[17] Fla. Stat. §61.503(7) (2020) ("Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child younger than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.").

[18] *Holder v. Holder*, 392 F.3d 1009, 1015 (9th Cir. 2004) ("The strength of habitual residence in the context of family law is derived from the flexibility it has to respond to the demands of a modern, mobile society....To preserve this versatility, the Hague Conference has continually declined to countenance the incorporation of a definition.").

[19] *Grau v. Grau*, 780 Fed. App'x 787, 794 (11th Cir. 2019) (In order for a child's habitual residence to change, the parents must share an intent to abandon the previous residence.)

[20] *Mozes v. Mozes*, 239 F.3d 1067, 1075 (9th Cir. 2001), *abrogated by Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

[21] *Pfeiffer v. Bachotet*, 913 F.3d 1018, 1024 (11th Cir. 2019).

[22] *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.) *See also Feder v. Evans-Feder,* 63 F.3d 217 (3d Cir. 1995) (finding a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective.).

[23] *Jenkins v. Jenkins*, 569 F.3d 549, 556 (6th Cir. 2009).

[24] *Taglieri v. Monasky*, 907 F.3d 404, 407-08 (6th Cir. 2018).

[25] *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005).

[26] *Id.* at 134.

[27] *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

[28] *Id.* at 726.

[29] *Id.* at 723.

[30] Hague Child Abduction Convention at art. 11 (judicial or administrative authorities of contracting states shall act expeditiously in proceedings for the return of children).

[31] Stephen Schwartz, *Wicked,* Universal Stage Productions (2003).

[32] Hague Child Abduction Convention at art. 11 (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.) *See also Internal Operating Procedures of the United States District Court for the Southern District of Florida,* I.O.P 2.18.00 (2020) (establishing a policy goal of a six-week timeframe from the initial filing of the petition to a decision regarding return of the child in the Southern District of Florida).

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The author thanks Andrew Zashin, who represented Michelle Monasky, for his valuable comments.

This column is submitted on behalf of the Family Law Section, Douglas A. Greenbaum, chair, and Krystine Cardona, editor.