Commentary: Supreme Court Cases

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

Other Supreme Court Cases

Lozano v. Alvarez,
134 S. Ct. 1224 (2014)

Chafin v. Chafin,
133 S. Ct. 1017 (2013)

Abbott v. Abbott,
560 U.S. 1 (2010)

Habitual Residence: Standards for Initial Determination and Appellate Review

The United States Supreme Court resolved a circuit split on the issue of habitual residence and set forth the standard for appellate review.

Holdings

When making a finding concerning habitual residence under the 1980 Hague Convention, courts must look to the totality of the circumstances specific to the case and not to any actual agreement between the parents concerning where to raise the child. A court's determination of habitual residence under the 1980 Hague Convention is subject to a deferential clear-error standard of review.

Facts

Two years after their marriage in the United States, the mother and father in this case moved to Milan, Italy, for their careers. During their first year in Milan, the couple's relationship deteriorated. The mother became pregnant about one year after they moved to Italy. Shortly thereafter, the father obtained a new job in Lugo, a city about three hours away. The mother remained in Milan. Although she considered returning to the United States, she and the father made preparations to take care of the child in Italy. The couple acquired a larger apartment in Milan, inquired about childcare, and made purchases for the needs of their child in Italy.

The child was born in February 2015; shortly after the birth, the mother informed the father that she wanted a divorce and that she planned to return to the United States. Nevertheless, the mother agreed that she and the child would join the father in Lugo. When the child was six weeks old, an argument between the parents precipitated the mother and child's move to a safe house. The mother's written statement to the police reported that the father had abused her and that she feared for her life. Two weeks later, the mother and child left Italy and relocated to Ohio to live with the mother's parents.

The father obtained an order from the Italian court terminating the mother's parental rights, and he commenced proceedings in federal court in the United States for the return of the child under the 1980 Hague Convention.

Proceedings in the District Court for Northern District of Ohio. The district court granted the father's petition for return of the child to Italy. The court found that the child was too young to become acclimatized and relied on the parents' shared intent to live in Italy. The court noted that the mother had no definite plans to raise the child in the United

States. The Sixth Circuit denied the mother's request for stay, and the infant was returned to Italy, where she was placed in her father's care.

Proceedings in the Sixth Circuit. On appeal, the Sixth Circuit affirmed the district court's return order with a divided three-judge panel and, on rehearing, a divided en banc panel. The en banc decision relied on recent precedent, *Ahmed v. Ahmed*,[1] that found that an infant's habitual residence depended upon shared parental intent. The Sixth Circuit applied the clear-error standard of review.

Discussion

The Supreme Court noted that certiorari was granted to resolve differences between the circuits on how to determine a child's habitual residence, noting the Sixth Circuit's holding in *Taglieri v. Monasky*[2] (acclimatization as the "primary approach"), the Ninth Circuit's approach in *Mozes v. Mozes*[3] (shared parental intent), and the Seventh Circuit's approach in *Redmond v. Redmond* (rejecting "rigid rules, formulas, or presumptions").[4] Certiorari was also granted to resolve a circuit split over the appropriate standard of appellate review; the Court noted the difference between the Sixth Circuit in *Taglieri v. Monasky*[5] and the Ninth Circuit in *Mozes*.[6]

Interpretation. The Court followed previous precedent in its review of cases arising under the 1980 Convention by considering the text of the Convention, the history of the drafting and negotiation of the Convention, and the views of sister-state signatories.[7]

Interpretation: Language of the Treaty. The Court began its analysis of habitual residence by turning to the language of the treaty. The term "habitual residence" is not defined by the treaty, so the Court relied on *Black's Law Dictionary*, which defines *residence* as the place where a child lives, and *habitual* as more than transitory, implying "customary, usual, or the nature of a habit." The term *habitual* suggests a fact-intensive, rather than categorical, inquiry.[8]

Interpretation: Negotiation and Drafting History. The Court reviewed the Pérez-Vera Report[9] accompanying the Convention. The Hague Conference deemed habitual residence "a question of pure fact, differing in that respect from domicile."[10] One

1. 867 F.3d 682 (6th Cir. 2017).
2. 876 F.3d 868 (6th Cir. 2018).
3. 239 F.3d 1067, 1073–81 (9th Cir. 2001).
4. 724 F.3d 729, 746 (7th Cir. 2013).
5. 876 F.3d 868 (6th Cir. 2018).
6. 239 F.3d at 1073–1081.
7. *See* Abbott v. Abbott, 560 U.S. 1, 9–21 (2010) (examining text, executive branch interpretation, sister-state signatories, drafting history, concurrence with objects and purposes of the Convention); Lozano v. Alvarez, 572 U.S. 1, 4, 11–16 (2014) (text and content, drafting history and intent of party-states, sister-state signatories, executive branch interpretation, (in)consistency with purposes of treaty ("We agree, of course, that the Convention reflects a design to discourage child abduction. But the Convention does not pursue that goal at any cost.")).
8. Monasky v. Taglieri, 140 S. Ct. 719, 726 (2020).
9. Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1982) [hereinafter Pérez-Vera Report].
10. *Monasky*, 140 S. Ct. at 727 (citing Pérez-Vera Report, *supra* note 11, at 445, para. 66).

commentator noted that this interpretation affords "courts charged with determining a child's habitual residence 'maximum flexibility' to respond to the particular circumstances of each case."[11] Although U.S. circuit courts crafted different approaches to assessing the meaning of habitual residence, they all agreed that "[t]he place where a child is at home, at the time of removal or retention, ranks as the child's habitual residence."[12]

Interpretation: Views of Sister Signatories. The Court also reviewed decisions from sister-state signatories[13] including authorities from Canada, the United Kingdom, the European Union, Hong Kong, New Zealand, and Australia[14] and found that "[t]he 'clear trend' among our treaty partners is to treat the determination of habitual residence as a fact-driven inquiry into the particular circumstances of the case."[15]

Habitual Residence: Determining a Child's Habitual Residence Is a Fact-Driven Inquiry. Quoting the opinion in *Redmond*, the Court observed the importance of being "sensitive to the unique circumstances of the case and informed by common sense" and emphasized that no single factor is dispositive of all cases.[16] For example, the ages of the children involved may require a different focus of the habitual residence inquiry: facts indicating acclimatization may be "highly" relevant for older children who are capable of acclimating to their surroundings, while the "intentions and circumstances" of caregiving parents are relevant in cases involving children who are unable to acclimatize due to their youth or other reasons.[17]

Habitual Residence: No Categorical Requirements. The Court specifically rejected the existence of categorical requirements for determining a child's habitual residence, even if an actual agreement exists between parents for establishing the habitual residence of an infant.

> There are no categorical requirements for establishing a child's habitual residence—least of all an actual-agreement requirement for infants. Monasky's proposed actual-agreement requirement is not only unsupported by the Convention's text and inconsistent with the leeway and international harmony the Convention demands; her proposal would thwart the Convention's "objects and purposes." An actual-agreement requirement would enable a parent, by withholding agreement, unilaterally to block any finding of habitual residence for an infant. If adopted, the requirement would undermine the Convention's aim to stop unilateral decisions to remove children across international borders. . . . In short, as the Court of Appeals observed below, "Monasky's approach would create a pre-

11. P. Beaumont & P. McEleavy, The Hague Convention on International Child Abduction 89–90 (Oxford 1999).

12. *Monasky*, 140 S. Ct. at 726–27 (citing Karkkainen v. Kovalchuk, 445 F.3d 280, 291 (3d Cir. 2006)).

13. *Id.* at 726.

14. Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R. 398, 421 para. 43 (Can.); *In re* A, [2014] A.C., at para. 54; *In re* OL, 2017 E.C.R. No. C-111/17, para. 42; LCYP v. JEK, [2015] 4 H.K.L.R.D. 798, 809–810, para. 7.7 (H.K.); Punter v. Secretary for Justice, [2007] 1 N.Z.L.R. 40, 71, para. 130 (N.Z.); LK v. Director-General, Dept. of Community Servs., [2009] 237 C. L. R. 582, 596, para. 35.

15. *Monasky*, 140 S. Ct. at 726 (citing Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R. 398, 421 para. 43 (Can.)).

16. *Id.* at 726 (quoting *Redmond*, 724 F.3d at 744).

17. *Id.* at 727 (citing James D. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 67–68 (Federal Judicial Center, 2d ed. 2015)).

> sumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected."[18]

The Court was explicit in rejecting categorical tests for determining a child's habitual residence: "No single fact . . . is dispositive across all cases."[19] A child's habitual residence depends on the *totality* of the circumstances specific to the case.[20] In reviewing the totality of the circumstances, some things lower courts can look to are

- the intentions and circumstances of caregiving parents, especially if the children are very young
- whether the child has lived in one place with its family indefinitely
- whether a caregiving parent was coerced into remaining in a place
- whether the parents have made their home in a particular place[21]

While not comprehensive, other factors to consider include

- a change in geography combined with the passage of an appreciable period of time
- the age of the child
- the immigration status of the child and parents
- academic activities
- social engagements
- participation in sports programs and excursions
- meaningful connections with people and places in the child's new country
- language proficiency
- the location of personal belongings[22]

The Court rejected the mother's argument that a parental-intent test would better deter future abductions and encourage prompt returns of children. If all relevant circumstances are available to the court for consideration, would-be abductors should find it "more . . . difficult to manipulate the reality on the ground, thus impeding them from forgoing 'artificial jurisdictional links . . . with a view to obtaining custody of a child.'"[23]

Standard of Review. The Court characterized the issue of habitual residence as a mixed question of law and fact—albeit barely so.[24] In this context, reviewing the totality of circumstances to make a finding of habitual residence is a factual issue and hence the province of the trial court. Appellate court review of habitual residence determinations is subject to a "clear-error review standard deferential to the factfinding court."[25]

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18. *Id.* at 728 (citations omitted).
19. *Id.* at 727.
20. *Id.* at 723.
21. *Id.* at 727, 729.
22. James D. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 67–68 (Federal Judicial Center, 2d ed. 2015).
23. *Monasky*, 140 S. Ct. at 729 (citing Pérez-Vera Report, *supra* note 11, at 428, para. 11).
24. *Id.*
25. *Id.* at 730.

Domestic Violence. The district court found no alleged abuse directed at the child by the father and no evidence of psychological harm to the child as a result of her separation from her mother and her return to Italy. The Supreme Court did not consider any of the 13(b) issues raised in the district court since the mother did not challenge the district court's rulings on those issues in the Supreme Court. The Court noted the existence of Article 13(b) relating to the child's exposure of a grave risk of physical or psychological harm or placing the child in an intolerable situation. The majority opinion characterized this exception to return as the Convention's "prime" defense, noting, "The Convention recognizes certain exceptions to the return obligation. Prime among them, a child's return is not in order if the return would place her at a 'grave risk' of harm or otherwise in 'an intolerable situation.'"[26] The majority opinion also noted that "[d]omestic violence should be an issue fully explored in the custody adjudication upon the child's return."[27]

Concurring Opinions of Justices Thomas and Alito. Both justices concurred in the majority's conclusions that an actual agreement is not required to establish the habitual residence of an infant and that the habitual residence standard is fact-driven, requiring courts to consider the unique circumstances of each case. Justice Thomas would have decided the case principally on the plain meaning of the text of the treaty. Justice Alito wrote separately and noted that the term *habitual residence* has different dictionary definitions and that the concept of a child's "home" is a complex determination. Justice Alito characterized the term as not being a pure question of fact and accordingly would classify the standard of review as abuse of discretion rather than clear error.

26. *Id.* at 723.
27. *Id.* at 729.