US Supreme Court has granted certiorari in a case concerning the determination of habitual residence under the Child Abduction Convention: Monasky v. Taglieri

On 10 June 2019, the US Supreme Court granted certiorari in the case of Monasky v. Taglieri. By doing so, the US Supreme Court will finally resolve the split in the US Circuits regarding the standard of review and the best approach to follow in determining the habitual residence of a child under the *HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Child Abduction Convention).

The questions presented are:

1. 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.
2. 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.

Regarding the first question, it is important to note that findings of facts are reviewed for clear error and issues of law are reviewed de novo. This is of crucial importance as

this would determine the extent to which the decision of the US district court can be reviewed by the US court of appeals, as these standards confer greater deference for findings of fact. The question then arises as to whether the determination of habitual residence is a mixed question of law and fact or only a question of fact.

The second question deals with the case of newborn or young infants and whether a subjective agreement between the parents is necessary to establish a habitual residence under the Child Abduction Convention. Despite its simplicity, the Court may also take the opportunity to address the current split in the US circuits regarding the extent to which courts can rely on the parents' last shared intent or the child's acclimatization or both in determining the habitual residence of a child.

This is well summed up by the Seventh Circuit Court of Appeals in *Redmond v. Redmond* (2013): "In substance, all circuits – ours included – consider *both* parental intent *and* the child's acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts."

In my personal opinion, the hybrid approach, that is relying on *both* shared parental intent and the child's acclimatization (without placing more emphasis on one or the other, except perhaps for the case of newborns or very young infants), as well as looking to all other relevant considerations arising from the facts of the particular case, is the right approach to follow. This would avoid that parents create artificial jurisdictional links in a State and thus engage in forum shopping. The flip side of this argument is that this would necessarily mean less party autonomy in these matters. By following this approach, the United States would align itself to case law in Canada (*Balev* case – Canadian Supreme Court, see our previous post here), the European Union (*Mercredi v. Chaffe*, confirmed in *O.L.v. P.Q.*) and the United Kingdom (*A. v. A. (Children: Habitual Residence)*).

To conclude with the words of the *Balev* case: “[…] the hybrid approach to habitual residence best conforms to the text, structure, and purpose of the *Hague Convention*. There is no reason to decline to follow the dominant trend in *Hague Convention* jurisprudence. The hybrid approach should be adopted in Canada”.