

Monasky v. Taglieri, a Guest Post by Melissa Kucinski

On February 25, 2020, the U.S. Supreme Court affirmed the opinion of the U.S. Court of Appeals for the Sixth Circuit, which concluded that Italy was the habitual residence of an infant that was brought from Italy to Ohio by her mother in 2015, shortly after the child was born. This opinion resolved a circuit split over the definition of habitual residence. The 1980 Hague Child Abduction Convention is the private international law instrument that seeks to secure the prompt return of a child removed from or retained out of its habitual residence. It is not a child custody or jurisdictional determination, and not a means of enforcing existing custody orders. Instead it is designed to restore some type of status quo so that the child's parents can pursue a custody order from the court in the appropriate jurisdiction. It discourages forum shopping and gives the child some consistency during the parents' custody litigation. The threshold question that a court must resolve in determining whether to return a child is that child's habitual residence, with the treaty being premised on the fact that a child cannot be returned to a location that is not her habitual residence. The U.S. circuits have had a long-standing split on the definition of this undefined treaty term, used in numerous Hague family law conventions.

In the *Monasky v. Taglieri* case, the U.S. Supreme Court unanimously concluded that a child's habitual residence is a flexible fact-based determination that should focus on "[t]he place where a child is at home, at the time of removal or retention...". This standard gives a trial judge significant deference, with a caution to be informed by "common sense" in reviewing the unique circumstances of the case in front of her. The Supreme Court gave little guidance on how best to weigh the different facts that will be presented to the trial judge but left that to the discretion of the judge, with the view that "[n]o single fact ... is dispositive across all cases." The Court further rejected Ms. Monasky's argument that habitual residence requires the parents to have an actual agreement, which she, and amici curiae argued is necessary for any child born into a situation of domestic violence. In rejecting that argument, Justice Ginsburg wrote both that the 1980 Convention has mechanisms to help children who would be subjected to a grave risk of harm if returned to situations where domestic violence is an issue,

and that the domestic violence itself should be more fully examined in the custody case after the child is returned. She further expressed concern that this argument would leave children, many who are vulnerable, without the ability to use the 1980 Convention because a parent could easily manipulate the facts to argue that the parents lacked an agreement.

The Court also held that the question of a child's habitual residence is a mixed question of law and fact, but only "barely so," and with the legal standard now clear, with the trial judge reviewing a totality of the circumstances when determining a child's habitual residence, the court is left with a completely factual analysis in determining "[w]as the child at home in a particular country at issue?" Therefore, on appeal, the appropriate standard of review is clear-error.