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Abstract

The most common form of kidnapping is when a child is taken by a parent from a co-parent. When the kidnapping parent is native to another country, navigating the international family courts can be more than challenging. Because of this, the Hague Convention on the Civil Aspects of International Child Abduction created an order that all signatory countries must return an abducted child to their location of habitual residency. However, the Hague Convention declined to define what habitual residency meant, leaving it up to the determination of the Courts.

Recently, the U.S. Supreme Court confronted this issue in the landmark case of *Monasky v. Taglieri.* Based on precedent from other countries and the drafter's intent of the international agreement, habitual residency is based on a factual inquiry as to where the child is "more than just transitory and it is customary, usual, and of the nature of a habit." This decision does not encompass the many challenges that are faced with international familial relationships. Particularly the Court failed to fully consider instances of domestic violence and how this decision forces many families to be returned to their abusers.

This note will focus on this decision and its impact on the hundreds of thousands of families attempting to recover a wrongly taken child across international borders and the parents who flee from unsafe circumstances with their children. The first section will discuss the legal background of the Hague Convention and its previous interpretation in the U.S. courts, leading up to the decision in Monasky. The second section will discuss the holding in Monasky and how the Supreme Court arrived at this decision. Next, it will discuss the Court's reasoning for this decision. Finally, the fourth section will discuss the impact of this decision on international custody issues and how this will affect children who are victims of international child abduction and the parents that are fighting international custodial disputes.

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I. Introduction

The term *kidnapping* typically invokes an image of a child being taken by someone they do not know. However, each year, hundreds of children are victims of international kidnapping, taken by someone they likely know quite well – their parent.[1] International parental kidnapping occurs when a non-custodial parent or a parent involved in a tumultuous marital dispute takes the child out of the country of which it is a resident.[2] This not only devastates the family left behind, but also can have an adverse effect on the dislocated child that is taken from their familiar environment.[3] When children are wrongfully taken abroad, they often face many challenges that can be traumatizing, such as language barriers, differences in customs, separation from friends and family, and difficulties completing education in an unfamiliar environment.[4] Because of the negative effect that in-

[1] *International Parental Kidnapping*, U.S. DEP'T OF JUST. (last updated May 5, 2021), https://www.justice.gov/criminal-ceos/international-parental-kidnapping; *see also* Smita Aiyar, *International Child Abductions Involving Non-Hague Convention States: The Need for a Uniform Approach*, 21 EMORY INT'L L. REV. 277, 277 (2007).

[2] U.S. DEP'T OF JUST., *supra* note 1.

[3] *Id.*; Jeffrey L. Edleson, Ph.D. et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the United States for Safety: A Study of Hague Convention Cases*, NAT'L CRIM. JUSTICE REFERENCE SERVS. (Dec. 2010), https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf (site funded by the U.S. Department of Justice but not published by the U.S. Department of Justice and does not represent their points of view that are expressed by the authors and does not reflect U.S. policies or positions).

[4] *A Law Enforcement Guide on International Parental Kidnapping*, U.S. DEPARTMENT OF JUSTICE 1, 3 (July 2018), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/250606.pdf.

ternational child abduction causes, experts consider it to be a form of child abuse.[5]

In 1999, it was estimated that 203,900 children were victims of a familial kidnapping that year.[6] Of this reported number, 53 percent were reported to be abducted by their biological father, and 25 percent of these children were abducted by their biological mother.[7] Given this information, parental kidnapping is substantially the most common type of familial kidnapping.[8]

In these cases, because the child's kidnapper is a parent, locating the child can be easier than in a case of abduction where the perpetrator's identity is unknown. However, this does not correlate to the success rate of returning the child to its resident country. In most cases, the abductor takes the child to a country that is easily reached by airline and the courts in that country are unwilling to enforce foreign custody orders. Commonly, this is a country where they may have previously resided and where they have family to support them.[9] These elements provide legal obstacles for the custodial parent to have their child returned to them.

The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") offers an opportunity of relief for these families of internationally abducted children.[10] The Hague Convention provides that any member country must judicially order an abducted child that is being kept in their county back to the country in which the child has habitual residence, if invoked by a custodial parent within the first year of the child's abduction.[11] A monumental decision regarding the Hague Convention was recently decided by the Supreme Court of the United States on February 25th, 2020 in the landmark case of *Monasky v. Taglieri*.[12] In this case, the Supreme Court created a test for determining habitual residence for children who were victims of international abduction, but too young to testify about their life prior to their kidnapping.[13] The Court held that the habitual residence of a child is determined by a totality of the circumstances and not categorical elements.[14] The Hague Convention does not define how to determine habitual residency, but instead dictates that habitual residence is where a child is 'at home.' This was the first instance that the U.S.

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[5] *International Parental Child Abduction*, Comm'n on Sec. & Cooperation in Eur. (2016), https://www.csce.gov/issue/international-parental-child-abduction.

[6] H. Hammer et al., U.S. Dep't of Justice, Children Abducted by Family Members: National Estimates and Characteristics 2 (2002).

[7] *Id.*

[8] *Id.*

[9] Janet Chiancone et al., *Issues in Resolving Cases of International Child Abduction by Parents*, Juvenile Just. Bull. 1, 2 (Dec. 2001), https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf.

[10] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M, 1501 [hereinafter Hague Convention].

[11] *Id*. at art. 10. *See also* Hammer et al., supra note 6.

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

[13] *Id.*

[14] *Id.*

Supreme Court expressly provided a test for determining what 'at home' means.[15]

II. Analyzing the Legal Landscape of International Parental Kidnapping

In 1993, Congress first enacted the International Parental Kidnapping Crime Act, making it a federal crime for a parent to remove or attempt to remove a child from the U.S. or retain a child from outside the U.S. with obstruction of another's custodial rights.[16] This, however, only provided a remedy to families in the U.S. The issue becomes much more drastic when dealing with other countries' familial laws. When the child crosses international borders, many countries do not want to attempt to enforce a U.S. parental agreement or custody order, or even accept them as binding. For example, in *Ahmed v. Naviwala*, the mother had been awarded sole custody of her children by a U.S. Court but allowed their father to take the children to Saudi Arabia for a vacation.[17] Once in international territory, the father refused to return the children to the U.S. and he would not let their mother contact them.[18] Eventually, the father retained a court order from a Saudi Arabian court granting him sole custody, despite the previous order from the U.S. court and without notifying the mother of the proceedings, depriving her the opportunity to represent herself.[19] This conflict of court orders was able to happen because Sadia Arabia is not a member to the Hague Convention and did not have an obligation to enforce a U.S. custody agreement.[20] Often, in circumstances such as these where one parent holds a child hostage in another country, the other parent's only chance to get their child back is to invoke the Hague Convention if possible, forcing a government in a foreign jurisdiction to take judicial action.

A. The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention was adopted in 1980 at the fourteenth session of the Hague Conference on Private International Law with the purpose of providing a procedure for the return of children that have been abducted and retained across

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[15] Hague Convention, *supra* note 10; *see also* Elisa Perez-Vera, *Explanatory Report on the 1980 HCCH Child Abduction Convention*, HCCH 1, 32. https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf; *see also* Elizabeth Slattery, *Monasky v. Taglieri*, A.B.A. (Feb. 25, 2020), https://www.americanbar.org/groups/public_education/publications/preview_home/volume/47/issue-3/article-11/.

[16] International Parental Kidnapping, 18 U.S.C. § 1204 (2003).

[17] *Matter of Ahmad v. Naviwala*, 306 A.D.2d 588, 589 (N.Y.App.Div. 2003) (wherein the mother testified that she was in communication with the children while they were abroad over a three-month period and then suddenly the father terminated all contact between the two parties).

[18] *Id*.

[19] *Id.* at 590.

[20] Enforcing custody agreements in countries that are not signatories to the Hague Convention will not be discussed in depth in this note, but many of the same issues of enforcement still overlap. *See* Aiyar, *supra* note 1, at 319.

international borders.[21] As international travel began to increase, so did international relationships, presenting new issues such as children who possessed citizenship in multiple countries because of international parents.[22]

Due to the prevalence of international relationships, the United States ("U.S."), joining approximately 75 other countries, signed the Convention on December 23, 1981.[23] However, the Convention did not go into effect in the U.S. until Congress enacted the International Child Abduction Remedies Act ("ICARA") on July 1, 1988.[24]

If a party invokes the Hague Convention within one year of the child's abduction, the judge in a Convention party country must order the child be returned to its country of habitual residence.[25] However, if more than one year has passed, the child's return is discretionary and the judge can deny the Hague Convention because it is arguable that the child's new 'habitual residence' is the country where it has resided for the past year.[26] Additionally, if the child is of a certain age and maturity, the Court can take into account which country in which it would prefer to be.[27]

To have a case fall under the protection of the Hague Convention, the child must have been a habitual resident of a country that is a party to the Convention and is now being wrongfully retained in a country that *also* is a party to the Convention; the removal of the child was wrongful and a violation of a parent's custodial rights; and, the child is under the age of 16.[28] The purpose of the Con-

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[21] Hague Convention, *supra* note 10; *see also* Perez-Vera, *supra* note 15 (stating that a custody battle should occur in a location that is most comfortable for the child, making a need for a jurisdictional determination and the matter of custody is not one for international courts).

[22] Ericka A. Schnitzer-Reese, *International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court*, 2 NW. J. INT'L HUM. RTS. 1, 4 (2004); *see* Aiyar, *supra* note 1, at 277.

[23] Letter of Submittal fr. George P. Shultz, Secretary of State, to President Ronald Reagan, 51 Fed. Reg. 10,496 (Mar. 26, 1986). *U.S. Hague Convention Treaty Partners*, U.S. DEP'T OF STATE- BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (listing signatories to the 1980 Hague Convention on the Civil Aspects of International Child Abduction to include Andorra, Argentina, Armenia, Australia, Austria, the Bahamas, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China, Columbia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Jamaica, Japan, Latvia, Lithuania, Luxembourg, Republic of Macedonia, Malta, Mauritius, Mexico, Monaco, Montenegro, Morocco, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Saint Kitts and Nevis, San Marino, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Ukraine, territories of the United Kingdom, United States, Uruguay, Venezuela, and Zimbabwe) [hereinafter Letter to Ronald Reagan].

[24] International Child Abduction Remedies Act, 22 U.S.C. § 9001 (1988).

[25] *Important Features of the Hague Abduction Convention- Why the Hague Convention Matters*, U.S. DEP'T OF STATE- BUREAU OF CONSULAR AFFS., https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html.

[26] *Id.*

[27] *Id.*

[28] *Id.*; s*ee also* Letter to Ronald Reagan, *supra* note 23 (noting that two or more countries can choose to extend the coverage past the age of 16 and can use discretion to determine to implement the convention retroactively).

vention is not to adjudicate the best interests of the child, but instead to ensure that the child is returned to the country that has jurisdiction over the child, so a custody matter can be properly heard.[29] Because of this, the abducting parent does not have a great number of available defenses.[30] This can be particularly difficult for the abductor in cases where they took the child when fleeing from abuse, or when the abductor believes they are acting in the best interest of the child for other reasons.[31] Determining a child's habitual residence for the purposes of appropriate jurisdiction over custody claims is crucial under the Hague Convention.[32]

The recent decision in *Monasky v. Taglieri* is monumental to Hague Convention jurisprudence because the Supreme Court has only decided a limited number of cases in relation to the Convention.[33] Prior to this decision, the Court had not expressly defined what 'habitual residence' meant.[34] The Court has only discussed habitual residence in the case of *Abbot v. Abbot*, where it reiterated the importance of determining where the child is acclimated but did not give a definition.[35] Lower courts have used the 'shared intent' standard to look at the facts of the case and determine what the shared intent of the parents was regarding where they would raise their child, in order to determine the child's habitual residence.[36] The absence of a steadfast definition left great deference to U.S. courts to interpret how to determine habitual residence for a young child that could not testify as to where it felt acclimated, and where the parents' shared intent could not be deciphered.

III. Monasky v. Taglieri

This section will discuss the Supreme Court's recent decision in *Monasky v. Taglieri*. First, this section will provide a factual background of the case. Second, it will discuss the procedural history of the case and the opinions of the lower courts before the case reached the Supreme Court. Finally, it will discuss the holding of the Supreme Court and how the Justices reached their decision.

Michelle Monasky, a U.S. citizen, and Domenico Taglieri, an Italian native, were both residing in the U.S. when they began a relationship and eventually

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[29] Chiancone et al., *supra* note 9.

[30] *Id.*

[31] Edleson et al., *supra* note 3, at 24 (finding that most parents who abduct their children internationally are fleeing volatile situations from a partner or co-parent).

[32] *Id.*

[33] *Monasky*, 140 S.Ct. at 724; Slattery, *supra* note 15.

[34] Slattery, *supra* note 15. (Some critiques claim that too explicit of a definition would be too harmful to this area of jurisprudence as it would create too strict of an analysis that may not give judges enough deference).

[35] *See Abbot v. Abbot*, 560 U.S. 1 (2010).

[36] *See Mozes v. Mozes*, 239 F.3d 1067 (2001) (holding that there must be given significant weight to the intent of the parents when determining habitual residence); *Ahmed v. Ahmed*, 867 F.3d 682 (2017) (holding that the abducting parent has the burden to prove the shared intent of the parents or where the child is more acclimatized).

married in 2011.[37] Two years after they wed, the couple relocated to Milan, Italy, where they both found work and appeared to intend to reside indefinitely based on their actions.[38] Shortly after this, Monasky alleged that Taglieri began to become physically abusive towards her, causing her to be fearful for her life, and that he would force himself onto her.[39] After one of these incidents, Monasky discovered that she was pregnant.[40] Taglieri subsequently moved from Milan by himself and the couple were effectively separated for the duration of her pregnancy.[41] During this period of time, Monasky made plans to return to the U.S. by looking for new employment, divorce lawyers, and logistical arrangements for moving.[42] However, she did not inform Taglieri of her plans to move and allowed preparations for them to raise the child in Italy together to continue.[43] By the time that Monasky went into labor with their child, the relationship was so deteriorated that Taglieri refused to take her to the hospital to give birth.[44] Their baby, referred to as A.M.T, was born in February 2015 and in the effort of raising the child, the two attempted to reconcile.[45] However, in late March, after another physical argument, Monasky left Taglieri and went to an Italian police station to report the incident.[46] After reporting, Monasky then fled to the U.S. with A.M.T. and went to her mother's residence in Ohio, fearing for the safety of her eight-week-old newborn.[47]

After discovering that his wife and child were missing from Italy, Taglieri filed a petition with the Italian courts to grant him sole custody of A.M.T.[48] Because Monasky was unaware of these proceedings and thus unable to represent herself, Taglieri was awarded his request by the Italian court.[49] Subsequently, Taglieri filed an action with the U.S. District Court for the Northern District of Ohio for the return of A.M.T. to Italy under the Hague Convention pursuant to U.S.C. § 9003 (b).[50] In analyzing the Hague Convention claim, the District Court applied the standard that a child is a habitual resident where it has become "acclimatized" to its surroundings; however, when a child is too young to testify where it is acclimatized, the court must look to the evidence on the record to determine

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[37] *Monasky*, 140 S.Ct. at 724.

[38] *Id.*

[39] *Monasky*, 140 S.Ct. at 724.; *see also Monasky v. Taglieri*, 907 F.3d 404, 406 (6th Cir. 2018).

[40] *Monasky*, 140 S.Ct. at 724.

[41] *Id.*

[42] *Id*.

[43] *Id.*

[44] *Monasky*, 907 F.3d at 406.

[45] *Id.*

[46] *Id.*

[47] *Monasky*, 140 S.Ct. at 724 (Monasky testified that she feared for her daughter's safety after Taglieri made explicit threats towards A.M.T. when she would not stop crying and refusing to allow Monasky to change her diaper when needed).

[48] *Id.*

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

[50] *Id.*; U.S.C. § 9003 (b).

the "shared intent" of the parent's choice of location to raise the child.[51] The District Court found that Monasky and Taglieri had a shared intent to raise A.M.T. in Italy and that Monasky made no definite plan to return to the U.S., ordering A.M.T.'s return to Italy in accordance with the Hague Convention.[52]

Monasky appealed this decision, and the U.S. Sixth Circuit Court of Appeals granted a petition for a rehearing en banc and held that the District Court applied the correct legal standard and made no clear errors in determining A.M.T.'s habitual residence, affirming the judgment.[53] Monasky then appealed to the Supreme Court.[54]

A. How The Supreme Court defines habitual residency

Certiorari was granted by the Supreme Court for the purpose of clarifying the standard of habitual residence.[55] Habitual residence is not explicitly defined by the Hague Convention.[56] However, the Convention's explanatory report stated that this phrase was chosen intentionally to instruct the use of a factual inquiry, while also reserving the ability of courts to have "maximum flexibility" when making this determination.[57] One of the purposes of the Hague Convention is to have uniformity in making these determinations.[58] Because of this, the Supreme Court looked to what other treaty signatories had done, the consensus being those signatories applied a fact-driven inquiry into the particular circumstances of each case.[59] The Supreme Court cited the United Kingdom's Supreme Court determination that a child's habitual residence "depends on numerous factors. . . with the purposes and intentions of the parents being merely one of the relevant factors. . . the essentially factual and individual nature of the inquiry."[60] The highest courts of the European Union, Canada, and Australia also used similar tests for determining habitual residence.[61] Monasky argued that the Court should look to the

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[51] *Taglieri v. Monasky*, 2016 WL 10951269 6 (2016) (using the "shared intent" standard to determine A.M.T.'s habitual residency was proper in Italy).

[52] *Taglieri v. Monasky*, 2016 WL 10951269 6 (2016)

[53] *Monasky v. Taglieri*, 907 F.3d 404, 411 (6th Cir. 2018).

[54] *Monasky*, 140 S.Ct. at 728.

[55] *Monasky*, 140 S.Ct. at 728.

[56] *Id*. at 726; *see also* S. Treaty. Doc. No. 11, 99th Cong., 1st Sess., 19 I.L.M, 1501 (1980) [hereinafter S. Treaty].

[57] *Id.* at 727; *see also* Elisa Perez-Vera, *Explanatory Report on the 1980 HCCH Child Abduction Convention*, HCCH, 1, 32 https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf; *see also* Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L. Q. 537, 544 (1981); *see also* P. Beaumont & P. McEleavy, *The Hague Convention on International Child Abduction* 89, 89-90 (1999).

[58] U.S. Dept. of State – Bureau of Consular Affs., *Important Features of the Hague Abduction Convention - Why the Hague Convention Matters*, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/legain-info-for-parents/why-the-hague-convention-matters.html (last accessed Dec. 23, 2021).

[59] *Monasky*, 140 S.Ct. at 727-728.

[60] *Id.* at 728 (citing *A*, [2014] A. C., at ¶ 54).

[61] S. Treaty, *supra* note 56; *see also OL v.PQ*, 2017 E. C. R. No. C-111/17, ¶ 42 (holding that the habitual residence of a child must be established, taking account all of the circumstances of the case*);*

actual agreement between the parties; however, she was unsuccessful in citing to a single country that adopted her "actual-agreement proposal."[62]

Accordingly, the Supreme Court found that to not "thwart the objectives and purposes of the Convention," they would adopt a factual inquiry approach similar to the other signatory countries.[63] The Court held that the proper approach was to look at "a wide range of facts other than an actual agreement, including facts indicating that the parents have made their home in a particular place, can enable a trier to determine whether an infant's residence in that place has the quality of being habitual."[64] They defined the standard for habitual residence is present when the residence is "more than just transitory" and it is "customary, usual, and of the nature of a habit."[65] The Court found that to make a determination of habitual residency courts must look to extrinsic evidence, inducing a fact-sensitive inquiry, not one that is categorical.[66]

The Court also held that appeals of habitual residence determinations were to be reviewed on a clear-error basis to further promote the purposes of the Convention of a swift resolution so that a proper custody dispute can be fought in the proper jurisdiction.[67] Because of this, the lower court's judgment was to be given great deference.[68] Accordingly, because the District Court looked at all the facts relevant to the dispute, the Supreme Court found this sufficient to affirm their judgment.[69]

The District Court looked at the totality of the circumstances to determine that A.M.T. was born into a marital home in Italy and that there was no definitive plan to return to the U.S.[70] Monasky argued that there was both an "absence of settled ties in Italy" and that there were "unstable" conditions for A.M.T. in Italy.[71] However, the court found the circumstances of the marriage, as unstable as they were, to be insufficient evidence to find that Italy was not A.M.T's habitual residence.[72] The district court thus found that Italy was the best location for

Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R., at 421, 423-430, ¶¶ 43, 48-71, 424 D. L. R. (4th), at 410-417, ¶¶ 43, 48-71 (holding that a determination of habitual residence must look to all relevant considerations); *LK v. Director-General, Dept. of Community Servs.*, [2009] 237 C.L.R. 582, 596, ¶35 (Austl.) (holding that an attempt to identify a set list of criteria that bear upon where a child is habitually resident would deny the simple observation that the question of habitual residence will fall for decision in a very wide range of circumstances); *LCYP v. JEK*, [2015] 4 H.K.L.R.D. 798, 809-810, ¶ 7.7; *Punter v. Secretary for Justice*, [2007] 1 N. Z. L. R. 40, 71, ¶ 130 (N.Z.).

62 *Monasky*, 140 S.Ct. at 727-728.

63 *Id.* at 728.

64 *Id.* at 729.

65 *Id.* at 726 (citing *Black's Law Dictionary* 1176 (5th ed. 1979)).

66 *Id* at. 726.

67 *Id.* at 730.

68 *Id.* at 731.

69 *Id.*

70 *Id.*

71 *Monasky*, 140 S.Ct. at 731.

72 *Id.*

A.M.T to return to continue custody proceedings based on the Hague Convention.[73]

The decision to affirm was unanimous, with two separate concurring opinions.[74] Justice Thomas wrote a concurring opinion stating that he agreed with the Court's determination regarding habitual residence as a fact-driven inquiry that requires taking all the circumstances into account.[75] However, Thomas believes that the Court should have reached this decision by looking at the plain meaning of the text as opposed to the precedent that the other signatory countries set forth.[76] Because other countries have only recently agreed on this approach in the past ten years, Thomas believes the Court may be relying on this reasoning too heavily.[77] He states that, by relying on other countries precedent, the Court risks being "persuaded to reach the popular answer, but possibly not the correct one."[78] He proposes that a more uniform approach that better conforms to the Convention's purposes would be to follow the Hague Convention text's intention, such as the Convention's preamble and explanatory report, that also results in the same conclusion.[79]

Justice Alito also wrote a concurring opinion, agreeing that the question of habitual residence should be a factual inquiry, which can be determined without a parental agreement, and that the District Court's decision should be upheld because it deserves deference.[80] However, Justice Alito disagrees with Justice Thomas – that the U.S. should not align our definition of habitual residence with our fellow Hague Convention signatories, and rather that this should be used as a guidepost for the Supreme Court to create its own definition of 'habitual residence' that is more satisfying for addressing future Hague Convention issues.[81] Due to the broad range of definitions of 'habitual residency,' Alito finds that this is a factual inquiry, where the standard of review should look at abuse of discretion, not clear error.[82]

IV. Analyzing the Effects of International Parental Abduction and *Monasky v. Taglieri's* Impact

This section will analyze the Supreme Court's decision in *Monasky v. Taglieri*. First, it will discuss the defenses that can be raised under the Hague Convention and how the Court's decision impacts their application in future cases. Second, it

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[73] *Monasky*, 140 S.Ct. at 731.

[74] *Id.* Justice Ginsburg wrote the majority opinion joined by Justice Roberts, Justice Breyer, Justice Sotomayor, Justice Kagan, Justice Gorsuch, and Justice Kavanaugh. Concurring opinions written by Justice Thomas and Justice Alito.

[75] *Id.* at 732.

[76] *Id.* at 733.

[77] *Id.* at 719, 733.

[78] *Id.* at 734.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 735.

will discuss the grave risk defense and why it is so closely intertwined with Hague Convention petitions. Third, it will discuss how the Court reached its decision and the goals of this decision. Finally, this section will discuss how the Court could have analyzed this case in a different way based on Justice Thomas's concurring opinion.

The effects of abduction to a child can be devastating. Extensive research has shown that the result of being taken from a parent has long-term effects on the child, and the length of separation and location of where the child was taken can impact how severe these effects are.[83] Victims who are abducted for an extended period of time, which in some cases is long enough for the child to lose memory of the parent from whom they were abducted, results in increased rage and grief which manifests in anxiety, aggressive behavior, poor peer relations, distrust, and resentment.[84]

Additionally, in cases where children were relocated to countries where they were not familiar with the language or culture, these children often experienced developmental delays.[85] In many instances, a kidnapping parent takes their child back to the country that parent considers home but is also a location that their child has never been. In a recent study, left-behind parents that were victims of international parental kidnapping reported that the abducting parent usually took the child to a country that spoke the parent's native language (reported by 83 percent), had family that resided there (reported by 76 percent), lived in that country as a child (reported by 69 percent), or considered that their primary place of residence while growing up (reported by 68 percent).[86] Situations where a parent abducted their child to a country with which the abducting parent was familiar, but the co-parent was not, could present disadvantages to both the left-behind parent and the abducted child.

Because of the severity of the damage that abduction can cause a child in their formative years, child abduction is viewed by some to be a form of child abuse.[87] Additionally, the parents that are left behind when their child is abducted can be dealing with monumental grief caused by the loss of their child.

A. Defenses under the Hague Convention for parental child abduction

There may be certain circumstances where abduction is justified. A parent may find a large array of reasons to relocate internationally with their child, particularly when they fear for their own safety or the safety of their child. Because of this, the Convention allocated three defenses that can be raised in a petition that can prevent the child from being returned to the left-behind parent when the

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[83] Chiancone et al., *supra* note 9.

[84] Chiancone et al., *supra* note 9, at 4.

[85] U.S. Dept. of Justice, *A Law Enforcement Guide on International Parental Kidnapping* (July 2018), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/250606.pdf.

[86] Chiancone et al, *supra* note 9, at 4.

[87] Commission on Security and Cooperation, *International Parental Child Abduction*, https://www.csce.gov/issue/international-parental-child-abduction (last visited Dec 26, 2021).

case is adjudicated.[88] First, if the child has "attained an age and degree of maturity at which it is appropriate to take account of its views," then the child can testify as to which parent it would prefer to live with.[89] The child's choice is not conclusive but it is highly instructive to a court making the discretionary determination of what is best for the child.[90] Second, if over a year has elapsed after the child has been abducted the court is encouraged to look at if it would be beneficial to uproot the child yet again or allow the child to establish roots in where they have been relocated.[91]

Finally, the third defense involves the 'grave risk' provision in Article 13(b) of the Hague Convention that allows the court to consider whether there is a grave risk that, if returned, the child would be exposed to physical or psychological harm, or place the child in an intolerable situation that the child should not be returned to their habitual residence.[92] This defense has instigated the most litigation surrounding its application due to the difficulty of determining what constitutes grave harm, and there has been considerable inconsistency of this determination between state, district, and federal courts.[93]

In *Blondin v. Dubois*, the Second Circuit expressed that neither inconvenience, economic hardship, nor a child's preference constitute grave harm that could prevent repatriation of a child; however, evidence of physical or psychological harm would constitute such risk of grave harm. The court described this dichotomy with the goal of encapsulating the protection from abuse by custodial parents.[94] *Blandin* instructs that courts may look to factors such as where the child is settled and where it would experience the least amount of unsettling activity, to determine if psychological harm would occur in a new environment.[95] The Ninth Circuit has also weighed in on this analysis and described that grave risk exists only if the child will personally suffer serious abuse if returned.[96] Meanwhile, one District Court has held that a history of abuse to the petitioner is not sufficient to meet this standard and that the abuse must be suffered, prior to abduction, by the

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[88] Jennifer Baum, *Ready, Set, Go to Federal Court: The Hague Child Abduction Treaty, Demystified*, AMERICAN BAR ASS'N (July 14, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/ready-set-go-fed-court-hague-child-abduction-treaty-demystified/; *see also* Hague Convention, *supra* note 10.

[89] Hague Convention, *supra* note 10.

[90] *Id.*

[91] *Id*. art. 12; *see also Lozano v. Alvarez*, 572 U.S. 1, 18-19 (2014) (Alito, J., concurring) (discussing "why courts have equitable discretion under the Hague Convention to order a child's return even after the child has become settled").

[92] Hague Convention, *supra* note 10; *see also* Sara Ainsworth, *The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence*, *in* DOMESTIC VIOLENCE MANUAL FOR JUDGES 2015, (Oct. 2014), https://www.courts.wa.gov/content/manuals/domViol/appendixG.pdf (discussing that courts have traditionally found the grave risk of harm must be directed at the child and they must have experienced it prior to abduction).

[93] Ainsworth, *supra* note 92.

[94] *Blondin v. Dubois*, 238 F.3d 153, 167-68 (2nd Cir. 2001) (holding that the lower court properly applied Article 13(b), as repatriation of children would subject them to a 'grave risk of psychological harm' due to previous abuse by a parent).

[95] *Id.* at 156.

[96] *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005).

child.[97] In contrast, another District Court held the opposite, that spousal abuse is a factor in determining whether there is a grave risk to the child upon return.[98] Consequently, there is no clear test for determining the proper standard to prove grave harm, and thus its application is not trustworthy.

B. The intersection between domestic abuse and Hague Convention petitions

A history of abuse is common in Hague Convention cases, and often is the instigating factor as to why a parent flees a country with their child without the other parent's consent.[99] A recent study funded by the U.S. Department of Justice that examined over 300 Hague Convention cases found that a significant number of the abducting parents were mothers fleeing violence from the child's father.[100] Additionally, from this survey, out of 30% of left behind parents admitted to being accused of abuse by their spouse or family prior to having their child taken from them.[101] As seen in the *Monasky v. Taglieri* decision, under the Court's current analysis, an abused parent may be ordered to return their children to their abusers.[102] This approach neglects the fact that batterers who abuse their partners often abuse their children as well.[103] Essentially, the mothers in these cases are being ordered to place their children in situations that have the potential to be dangerous.[104] The decision ordered that an abducting parent who had reported abuse to authorities return her child to their abuser.[105] In making its determination, the Court ruled that habitual residency was not an inquiry that considered surrounding circumstances to be analyzed as circumstantial evidence leading up to the abduction, such as abuse of the fleeing parent.[106]

In *Monasky*, A.M.T.'s mother fled because she feared for her safety based on the abuse that she had faced for years, making her attempted defense of the Article 13(b) protection viable.[107] However, the Court held that because A.M.T. had not previously experienced any physical abuse at the hands of her father, she was

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[97] *Tabacchi v. Harrsion*, No. 99 C 4130, 2000 WL 190576, at *12-13 (N.D. Ill. Feb. 10, 2000).

[98] *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045, 1057-58 (E.D. Wash. 2001).

[99] *Litigating International Child Abduction Cases Under the Hague Convention*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN & KILPATRICK TOWNSEND 53 (2012) https://www.missingkids.org/content/dam/missingkids/pdfs/publications/pdf3a.pdf.

[100] Edleson et al., *supra* note 3, at 9.

[101] *Id.* at 22.

[102] *Monasky*, 140 S.Ct. at 729 (Taglieri testified that she experienced abuse at the hands of Monasky, yet the Supreme Court reasoned that under the habitual residency test A.M.T. was to be returned to Italy).

[103] Misha Valencia, *When Protecting Your Children is a Crime*, DAME MAGAZINE (Feb. 10, 2020) https://www.damemagazine.com/2020/02/10/when-protecting-your-children-is-a-crime/.

[104] *Id.*

[105] *Monasky*, 140 S.Ct. at 729.

[106] *Id.* (The Court stating, "[w]e doubt, however, that imposing a categorical actual-agreement requirement is an appropriate solution, for it would leave many infants without a habitual residence, and therefore outside the Convention's domain. Settling the forum for adjudication of a dispute over a child's custody, of course, does not dispose of the merits of the controversy over custody. Domestic violence should be an issue fully explored in the custody adjudication upon the child's return.").

[107] *Monasky*, 140 S.Ct. at 729.

not in danger of grave harm by being returned to her father in Italy, and thus Monasky could not be protected by Article 13(b).[108] The Supreme Court declined to consider Monasky's history of abuse by Taglieri as meeting the standard of danger of grave harm that would apply to A.M.T. because A.M.T. *herself* had not experienced it, despite verbal threats that Taglieri made referencing physically harming A.M.T.[109] In its decision, the Supreme Court acknowledged that A.M.T.'s familial situation was "tumultuous" but determined that this did not impact a determination of her habitual residence.[110] While this decision was in accordance with the Hague Convention's purpose of returning the child to its habitual residence to continue custody proceedings if necessary, this objective can be problematic when a child's safety is of concern, as it was for Monasky here.

Monasky was even successful in reporting this abuse to Italian police, which resulted in Taglieri being held accountable in court, where he was found liable for assault and battery and subsequently ordered to pay $100,000 in damages.[111] Despite this conviction, the Supreme Court ruled that this shouldn't be a factor in determining where A.M.T. should live.[112] In a study of Hague Convention cases, 85.7% of the women fleeing from abuse party to a Hague Convention petition had reported the abuse to at least one resource.[113] Reporting these incidents of abuse is already difficult for women living with a co-parent in a country foreign to them because these reports are often met with skepticism and, in some cultures, abuse is accepted behavior.[114] Even if such reports are taken seriously and acted upon, they do not have a significant effect on a Hague Convention analysis, according to the Supreme Court, because this does not pose a "grave risk" specifically to the child.[115]

The biggest issue with the Supreme Court's conclusion is that there is evidence that abusers who batter their partners often abuse their children as well.[116] Sarah Gundle, a psychotherapist who specializes in treating trauma survivors stated she has found that "if a parent has abused their partner, the risk increases significantly to the child. . . if the [father] can no longer control the mother, their anger and rage is very often displaced on the children."[117] The complexities of

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[108] *Monasky*, 140 S.Ct. at 729.

[109] *Id.* at 731.

[110] *Id.*

[111] Valencia, *supra* note 103.

[112] *Monasky,* 140 S.Ct. at 731.

[113] Edleson et al., *supra* note 3.

[114] Edleson et al., *supra* note 3, at 127.

[115] *See Monasky*, 140 S.Ct. at 723 (holding that grave risk to a child is present if that child has personally suffered abuse at the hands of the left behind parent, but not if only witnessed the abuse to another family member).

[116] Edleson et al., *supra* note 3; Valencia, *supra* note 103.

[117] Valencia, *supra* note 103; *see generally* SARAH GUNDLE, PSY.D., https://www.sarahgundlepsyd.com (Sarah Gundle is an Israeli Immigrant that focuses her trauma recovery work on international cases and has worked with the United Nations, Burma Border Projects, the 9-11 Trauma Commission Therapists Network, and Physicians for Human Rights).

custodial battles often do not adequately protect children from an abusive parent. Even in domestic custody disputes, a study by the Center for Judicial Excellence found that in the short period between June 2009 and January 2010, there were 75 children murdered by an abusive father involved in custody proceedings.[118] Furthermore, many of the countries where the U.S. repatriates children lack comprehensive domestic violence legislation or otherwise have ineffective legal enforcement of these laws when they are present.[119]

The Supreme Court's recent interpretation of how a court is to determine habitual residency of a child fails to fully encompass the evidence of what could constitute grave harm to a child. By neglecting the father's history of abusing the mother, ostensibly because it does not directly impact A.M.T., the Court is ignoring the statistical evidence of how these patterns of abuse overlap. Ordering A.M.T.'s return to Italy despite awareness of the father's abusive behavior likely puts her at risk of grave harm. The ability of Courts to step in to save children from potentially dangerous situations should not be undervalued. U.S. courts need to look at the issue of habitual residency more broadly and should incorporate the use of extrinsic evidence to properly determine where a child is most safe. Doing so would not frustrate the purposes of the Convention as it would fall under the grave harm defense that exists to help ensure safety when undergoing Hague Convention analyses.

Another difficulty presented by the Supreme Court's interpretation of the Hague Convention is that there is no guarantee that, once returned to the child's location of habitual residence, the custodial parent will comply with subsequent proceedings as purported.[120] Even if the disobeying parent is held in contempt of court, courts may find difficulty enforcing such court orders across international borders.[121] It was found that many mothers who were engaged in an international custody battle lost contact with their children when fathers refused to comply with visitation orders from foreign courts.[122] Concerningly, the abducting parent may not have standing in foreign court systems where they are not citizens. The visiting parent is often at a disadvantage due to customary and language barriers that are presented when attempting to litigate in a foreign court system.

V. Impact

The determination of a child's habitual residency is particularly important in cases where the child itself cannot testify because it is too young. While the

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[118] Cara Tabachnick, *Failure to Protect: The Crisis in America's Family Courts*, THE CRIME REPORT (May 6, 2010), https://thecrimereport.org/2010/05/06/failure-to-protect-the-crisis-in-americae28099s-family-courts/.

[119] Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 624 (2000) (citing the Bureau of Democracy, Human Rights, and Labor, United States Dep't of State, Country Reports on Human Rights (1999)).

[120] Christine Powers Leatherberry, *International Custody 101: Helpful Tips for Parents*, CONNATSER FAM. L. (Apr. 25, 2017), https://connatserfamilylaw.com/international-custody-101-helpful-tips-for-parents/.

[121] *Id.*

[122] Edleson et al., *supra* note 3, at 178.

recent *Monasky* decision is narrowly applied to children abducted by a parent when they were too young to discern their place of residency, this issue is nevertheless widespread among Hague Convention petitions.[123] International parental abduction is one of the only crimes against children that is more likely to occur the younger the child is.[124] A 1999 study found that 44 percent of children abducted by a family member were younger than six years old.[125] At this age, children are not able to properly identify or testify to their surroundings prior to abduction, creating the need for an unbiased court to make the determination for the family.[126] Based on these statistics, the Supreme Court's decision will have an implication on many future U.S. Hague Convention petitions.

Additionally, the Supreme Court's decision to make a factual inquiry of a child's location of habitual residency, and not to look just to what the parents purport to be the agreement of where they had previously decided to raise the child, is monumental – such was the precedent in the U.S. prior to *Monasky*.[127] This may positively impact cases where the intent is difficult to discern or shared intent by the parents is not possible as they could not have a meeting of the minds. However, the change of precedent can negatively impact cases where an explicit agreement is made between parents that is later broken by one party. While a court would still be obligated to look at explicit agreement as a factor of the case, it would not be dispositive but rather included alongside other relevant evidence.

Overall, this recent decision will have a large impact on litigation surrounding Hague Convention petitions adjudicated in U.S. court systems. The new framework for determining a child's habitual residence is now to be looked at using a more holistic approach in an effort to follow the Convention's purposes by objectively finding where the child should return. However, this approach is still not perfect. There is room for error in many cases where there may be reasons that the abducting parent fled, such as abuse, and where the parents may have had an agreement on where the child should be raised that was breached in abduction.

A. International Uniformity of Application in the Hague Convention

The purpose of the Convention was to create a uniform approach of application among signatory countries, which, as a member, the U.S. must strive to achieve.[128] As mentioned above, uniformity is particularly important in international kidnapping cases because of the high risk of returning children to an abusive parent. Additionally, compliance with these purposes promotes other

123 Hammer et al., *supra* note 6, at 9.

124 *Id.*

125 *Id.* at 4.

126 Hammer et al., *supra* note 6, at 5.

127 *See Mozes*, 239 F.3d at 1084 (2001) (holding that there must be given significant weight to the intent of the parents when determining habitual residence); *see also Ahmed*, 867 F.3d at 690 (2017) (holding that the abducting parent has the burden to prove the shared intent of the parents or where the child is more acclimatized).

128 Letter of Submittal from George P. Shultz, *supra* note 23.

countries to follow suit and avoid international disputes, keeping these disputes in the respective custodial courts of each country. This idea is based in the value of comity, the voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another for the purpose of international harmony.[129]

In *Monasky*, the Supreme Court indicated that it approached the case with a main goal of comity, achieving this by giving the opinions of other signatory country "considerable weight."[130] The Supreme Court cited precedent from the United Kingdom, Canada, Australia, Hong Kong, and New Zealand, all of whom indicated that determining habitual residence is a factual inquiry in which the Court is entitled to look at all relevant circumstances, and that an actual agreement between the parents is not dispositive.[131] Following this analysis, the U.S. Supreme Court agreed that, in order to avoid thwarting the purposes of the Convention, it would apply the same approach.[132]

This attempt of complying with speculation of how other signatories would approach this issue is beneficial in pursuing the goal of comity. However, as Justice Thomas expressed in his concurrence, the Supreme Court could have reached the same conclusion based on its own judgment.[133] By not following other countries' precedent, the Court could have created a test for habitual residency using the explanatory materials and the language of the Convention itself to reach a conclusion that better follows the purposes of the treaty itself. Additionally, the Court could have tailored the test to better fit the unique position of the U.S. regarding the adjudication of these petitions. The U.S. government submitted an amicus curiae brief in support of neither party, advocating that the Convention used the phrase habitual residence intentionally because it was different than both the terms domicile and nationality- which would have resulted in too rigid of an application.[134] The term habitual residence instead allows for the flexibility of familial circumstances.[135] The Supreme Court, nevertheless, attempted to create a narrower definition despite this opinion. By creating too narrow of an exception for the habitual residency rule, it appears as though the Court placed higher value on comity with other nations over the safety of children that go through U.S. court systems.

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[129] *Comity*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/comity (last visited Jan. 9, 2022); *Comity*, BLACK'S LAW DICTIONARY, (ONLINE LEGAL DICTIONARY 2DED.) (last visited Jan. 9, 2022).

[130] *Monasky*, 140 S.Ct. at 727.

[131] *Id.* at 728 (indicating these were just some of the other signatories' decisions, and there were other countries with conflicting legislatures).

[132] *Id.* (stating that it is important to look towards other signatories' opinions on the same issue for the purpose of uniform application).

[133] *Id.* at 733 (Thomas, J., concurring).

[134] Brief for the United States as Amicus Curiae Supporting Neither Party, *Monasky v. Taglieri*, 140 S. Ct. 719 (2020) (No. 18-935).

[135] *Id.*

VI. Conclusion

Every year, a significant number of children are wrongfully taken across international borders by a family member, leaving another family member behind.[136] While there are various reasons why this happens, the child's safety is what is most important when adjudicating these cases – something the 1980 Hague Convention of International Kidnapping strives to ensure by mandating that signatories return children to the location of the child's habitual residency. The instability already present in the child victim's life is clear, but can be further aggravated by other factors, such as the duration of relocation or familiarity with the culture in which they are forcibly immersed. This situation can become even more grievous if the child is suffering abuse at the hands of a parent.

In *Monasky v. Taglieri*, the Supreme Court held that habitual residency is not only established solely by an agreement between a child's parents, but by looking at the totality of the circumstances to include discerning where the parents intended to raise the child. By doing this, however, the Supreme Court neglected to consider certain evidence such as the kidnapper fleeing an abusive family member, holding that this did not constitute grave risk to the child unless abuse happened directly to the child—an enumerated defense for international kidnapping that would have allowed the child to stay in the U.S. This decision was made in accordance with the goal of comity through adhering to precedent established by other signatory nations while simultaneously neglecting possible indicators of what constitutes grave risk to a child.

This decision will likely have a large impact on families involved in international relationships hoping to invoke the Hague Convention, but where an implicated child is too young to testify as to its place of habitual residency This change will likely be positive for those who hope to get a wrongfully taken child returned, but could negatively impact those who are fleeing abusive partners.

[136] Hammer et al., *supra* note 6, at 2.