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## The Future of the Habitual Residence Analysis in the United States Post-*Monasky*

Katherine A. Fleming

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## The Future of the Habitual Residence Analysis in the United States Post-*Monasky*

KATHERINE A. FLEMING†

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#### INTRODUCTION

The recent Supreme Court case *Monasky v. Taglieri* sets a uniform approach for determining the habitual residence of children for the purposes of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.<sup>1</sup> Prior to the Court's decision, American courts took varying approaches to habitual residence, applying the

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1. *Monasky v. Taglieri*, 140 S. Ct. 719 (2020); Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 11343 U.N.T.S. 89 [hereinafter *Convention*]. The Convention entered into force for the United States on July 1, 1988. *Status Table*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24> (last visited Apr. 11, 2022).

parental intent approach, the child-centered approach, and the mixed approach. The Court clarified that the habitual residence analysis includes more than express parental agreement, but this Comment argues that the totality-of-the-circumstances inquiry must take a sufficiently narrow approach to avoid frustrating the aims of the Convention. While the analysis requires more than parental intent or agreement, factual inquiries into the child's acclimatization must not cross into substantive custody determinations.

The Convention seeks “to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>2</sup> This international treaty creates a civil mechanism for the prompt return of children who “have been removed from or retained outside of their country of habitual residence in violation of custodial rights.”<sup>3</sup> According to the Convention's philosophy, the summary return mechanism allows the most appropriate courts—the courts in the country of the child's habitual residence—to determine custody issues. The legal framework provides a remedy for the violation of the left-behind parent's custody rights, and the prompt return of the child deters child abduction by preventing abductors from profiting from their wrongdoing. Since entering into force, “the Convention has proven to be one of the most effective tools available for parents or legal guardians to seek the

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2. Convention, *supra* note 1. The International Child Abduction Remedies Act (ICARA) implements the Convention in the United States and grants both federal and state courts jurisdiction over international child abduction cases. 22 U.S.C. § 9003(a). The Convention only applies between Contracting States. See Convention, *supra* note 1. For information on the United States' contracting partners as of 2020 as well as on the Convention generally, see U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 6 (2020). Additionally, “parents can also seek access to their children across international borders under the Convention.” *Id.* at 5.

3. U.S. DEP'T OF STATE, *supra* note 2, at 5.

return of their abducted children.”<sup>4</sup> In 2015, the United States Department of State reported parents abducted over six hundred children from the United States to another country, so the Convention remains an important mechanism for safeguarding the best interests of children.<sup>5</sup>

Since the Convention does not define habitual residence, the analysis has evolved over time. Originally, the drafters of the Convention envisaged a remedy for custodial parents in abductions by noncustodial parents, so a child’s habitual residence appeared obvious: a child’s habitual residence was just their home.<sup>6</sup> The Convention would protect children after the abductor removed them from their primary caretaker. The drafters intended to prevent the noncustodial parent from uprooting the child from where the parents decided the child would live. Over time, courts have found that, in addition to parental intent, a child may become habitually resident in a country due to his or her ties and acclimatization, with the caveat that courts should avoid the kind of complicated analyses used for domicile.<sup>7</sup> Lower

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4. *Id.* The Convention seeks to return children quickly, but unfortunately, a prompt return is not always possible. See Eric Lesh, *Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should Be Heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 174 (2011) (discussing “the slowness of the American system” in Convention cases).

5. Rachel Koehn, Comment, *Family Law Frustrations: Addressing Hague Convention Issues in Federal Courts*, 69 BAYLOR L. REV. 636, 637 (2017). According to the 2020 Annual Report, 220 abducted children were returned to the United States in 2019, the majority (160) coming from Convention countries. U.S. DEP’T OF STATE, *supra* note 2, at 8 (2020).

6. See generally Adair Dyer, *Report on International Child Abduction By One Parent (Legal Kidnapping)*, in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 10, 23 (1982) [hereinafter Dyer Report]. Dyer prepared his report as part of the preparatory work for the Convention (the “travaux préparatoires”). The Travaux Préparatoires are official documents recording the negotiations, drafting, and discussions during the process of creating a treaty. These documents may be consulted and taken into consideration when interpreting treaties. See *Collected Travaux Préparatoires*, LILLIAN GOLDMAN LAW LIBRARY, YALE L. SCH., <https://library.law.yale.edu/collected-travaux-preparatoires> (last visited Apr. 11, 2022).

7. Rhona Schuz, *Policy Considerations in Determining the Habitual*

courts' divergent approaches to habitual residence created a tension between focusing on parental intent versus the child's integration that existed until the Court harmonized the analysis in *Monasky*.

This Comment focuses on *Monasky*'s uniform approach for determining the habitual residence of children and advocates for a mixed approach. The Court found that habitual residence does not require an actual agreement about where a child lives, but rather depends on the factual circumstances.<sup>8</sup> While the Court clarified that parental intent is only one factor in the habitual residence analysis and that no one factor is dispositive under the mixed approach, lower courts must be careful not to turn the analysis into a domicile-like inquiry or stray into substantive custody determinations. This Comment considers how courts have applied *Monasky* and whether or not the case law requires further clarification.

Part I puts the case into context by explaining the origin and policies of the Convention before turning to the pre-*Monasky* case law in the United States. Next, Part II addresses the background to and decision in *Monasky*, along with the application of the totality-of-the-circumstances test in subsequent case law. Finally, Part III addresses the status of the habitual residence analysis post-*Monasky* by

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*Residence of a Child and the Relevance of Context*, 11 J. TRANSNAT'L L. & POL'Y 101, 105–06 (2001); see PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 89 (1999) (comparing the simplicity and flexibility of habitual residence as opposed to domicile); Tai Vivatvaraphol, Note, *Back to Basics: Determining A Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3338–39 (2009) (discussing the decision not to define “habitual residence” in order to ensure flexibility in its application). For information on domicile in conflict of laws in the United States, see generally Mo Zhang, *Habitual Residence v. Domicile: A Challenge Facing American Conflict of Laws*, 70 ME. L. REV. 161 (2018). Domicile is the principal connecting factor for conflict of laws in the United States, involving “an enduring and persistent relationship” between a person and a place. *Id.* at 189. It requires presence and intent to remain.

8. *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020).

discussing the best approach to habitual residence, the merits of the totality-of-the-circumstances test and its subsequent application, and the habitual residence analysis moving forward.

## I. BACKGROUND TO THE 1980 HAGUE ABDUCTION CONVENTION

Section I.A addresses the origins and policy behind the Convention. Section I.B outlines the three approaches to habitual residence in the United States prior to *Monasky*: the child-centered, parental intent, and mixed approaches.

### A. *The Origins and Policy Behind the 1980 Hague Abduction Convention*

Several factors led to the increase in international child abductions in the late twentieth century that necessitated drafting the Convention, including improved international transportation and communication, relaxed visa restrictions in some regions, and increased mobility in labor internationally.<sup>9</sup> Additionally, most international child abductions occur in “international” families, and in the lead up to the Convention, the Dyer Report noted an increase in marriages between persons from different countries as well as a general trend in countries granting divorces.<sup>10</sup> Certain circumstances create the perfect storm for international child abduction, such as the breakdown of the parents’ relationship, cultural differences, fear or frustration, and opportunity.<sup>11</sup> Frustration may come from a lack of control, and a parent might fear losing their child due to the other parent’s “home court” advantage, the other parent’s financial

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9. Dyer Report, *supra* note 6, at 18. In private international law, “child abduction” refers to “the unilateral removal or retention of children by parents, guardians or close family members” as distinct from “classic kidnapping” by third parties. BEAUMONT & MCELEAVY, *supra* note 7, at 1.

10. Dyer Report, *supra* note 6, at 19; *see, e.g.*, BEAUMONT & MCELEAVY, *supra* note 7, at 2 n.10 (discussing the increase in divorces in the United Kingdom).

11. Dyer Report, *supra* note 6, at 20.

security, or fears that the other parent will take away the child. In any case, the abductor must believe that they will profit from their wrongdoing.<sup>12</sup> The Convention aimed to combat the growing problem of international child abduction through “concerted cooperation pursuant to an international agreement.”<sup>13</sup>

Dyer noted that a key factor in international child abduction is the frustration of a non-custodial parent “when unjustifiably deprived of the right of visitation with the child” in addition to “the slowness, expense and inefficacy of legal proceedings concerning custody of the child.”<sup>14</sup> In the 1970’s, children lived in the matrimonial home or, after a marriage broke down, with the parent who had custody, so habitual residence was a clear question of fact for the drafters.<sup>15</sup> The prevailing view at the time indicated that

12. *Id.*

13. See 22 U.S.C. § 9001(a)(3) (“International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.”).

14. Dyer Report, *supra* note 6, at 19; see Melissa A. Kucinski, *The Future of Litigating an International Child Abduction Case in the United States*, 33 J. AM. ACAD. MATRIMONIAL LAW. 31, 65 (2020) (noting the “original view that child abductions were going to be a situation of non-custodial fathers ferreting away their children overseas”). An abductor may believe they are doing what is best for the child to protect them or to give them a better life, but the left-behind parent may see it as some kind of retaliation for the failed relationship. See BEAUMONT & MCELEAVY, *supra* note 7, at 11.

15. Elisa Pérez-Vera, *Explanatory Report*, in HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 426, 445 (1982) [hereinafter Pérez-Vera Report] (noting that a child’s habitual residence is “a question of pure fact, differing in that respect from domicile.”); C v. S [1990] 2 All ER 961, 965 (Eng. HL) (suggesting courts should interpret a child’s habitual residence according to “the ordinary and natural meaning of the two words . . . is a question of fact to be decided by reference to all the circumstances of any particular case.”); BEAUMONT & MCELEAVY, *supra* note 7, at 3; see also Dyer Report, *supra* note 6, at 46 (referencing a newspaper article describing an “organised effort by divorced and unmarried Danish fathers to enable them to kidnap their children and remove them abroad, for the purpose of obtaining custody”); Pérez-Vera Report, *supra*, at 451. The Pérez-Vera Report is the Explanatory Report to the Convention. The Explanatory Reports on each of the HCCH instruments are aimed at providing information to the public as to the sense intended by the Diplomatic representatives for a particular instrument.

“children were primarily abducted by the non-custodial parent,” and findings that more men abducted children than women supported the stereotype at the time that noncustodial parents abducted children.<sup>16</sup> The *travaux préparatoires* for the Convention repeatedly refer to the abductor as the non-custodial parent.<sup>17</sup> For example, the Dyer Report describes the simplest format for an international child abduction: the custodial parent sends the child to the country where the “would-be abductor” lives for a temporary visit.<sup>18</sup>

The Convention presumes that children need stability in their lives and that the legal standard for deciding cases should be the “best interests of the child.”<sup>19</sup> In most cases, wrongfully removing or retaining a child in a new jurisdiction detrimentally effects the child.<sup>20</sup> The “true victim of the ‘childnapping’ is the child himself” since the abduction suddenly upsets the child’s stability, cuts off contact with the primary caretaker, creates uncertainty and frustration when the child must adapt to a new language and culture, and introduces previously unknown relatives.<sup>21</sup> Some

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*See generally* Pérez-Vera Report, *supra*.

16. *See* BEAUMONT & MCELEAVY, *supra* note 7, at 8–9 (regarding statistics in abduction cases). Despite the belief that the perpetrators in international child abduction cases were fathers dissatisfied with the custody arrangement at the time of the abduction, cases show “[w]rongful removals and retention are now more likely to be brought about by mothers who may have moved abroad with the father of their children but who subsequently wish to return to their country of origin.” *Id.* at 3–4. For example, from 1989–1998, out of forty-five cases in the United States, only fifteen abductions (33 percent) were carried out by fathers. *Id.* at 9. However, in 1994, fathers accounted for sixty-eight percent of abductors in non-Convention cases in the United States. *Id.* at 10. Today, the majority belief is that children benefit from having contact with both parents. *Id.*

17. Dyer Report, *supra* note 6, at 41.

18. *Id.*

19. *Id.* at 22. It is not always clear what is in the best interests of the child, and, in practice, courts have great discretion in deciding such cases based on moral and social values. BEAUMONT & MCELEAVY, *supra* note 7, at 2.

20. *See generally* BEAUMONT & MCELEAVY, *supra* note 7.

21. Dyer Report, *supra* note 6, at 21.

commentators compare child abduction to child abuse, even in the absence of actual physical abuse or neglect, so the longer a parent wrongfully retains a child, the greater the risk of causing the child psychological harm.<sup>22</sup> As a result, wrongfully removing or retaining a child presumptively goes against that child's best interests, and the Convention promotes the best interests of children by returning them to their habitual residence as quickly as possible to avoid uprooting the child twice.<sup>23</sup> Essentially, the longer it takes courts to decide whether to return the child, the more likely it will be that the child has adjusted to their new environment. Instead of focusing on the welfare of individual children, the Convention promotes the best interests of children generally by promptly returning to the pre-abduction status quo, which also deters potential abductors.<sup>24</sup>

In addition to promoting the best interests of the child, the prompt return of the child serves other policy goals. First, sending children back as quickly as possible as a general rule discourages would-be abductors from unilaterally removing a child as a form of forum shopping to get the best outcome in custody cases.<sup>25</sup> If an abductor knows courts will order the

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22. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 617 (2000); Dyer Report, *supra* note 6, at 23 ("The length of time which elapses between the abduction and the ultimate resolution of the custody dispute has a strong influence on the nature and the persistence of the effects on the child.").

23. Pérez-Vera Report, *supra* note 15, at 432; see *Lozano v. Montoya Alvarez*, 572 U.S. 1, 5 (2014); *Chafin v. Chafin*, 568 U.S. 165, 180 (2013) (Ginsburg, J., concurring) ("The driving objective of the [Convention] is to facilitate custody adjudications, promptly and exclusively, in the place where the child habitually resides.").

24. Schuz, *supra* note 7, at 111; see Vivatvaraphol, *supra* note 7, at 3334 ("The deliberate wording of Article 1 ('prompt') ensured that courts in international child abduction proceedings no longer engaged in lengthy and detailed investigations into the best interests of the child.").

25. Vivatvaraphol, *supra* note 7, at 3336; *Friedrich v. Friedrich (Friedrich II)*, 78 F.3d 1060, 1064 (6th Cir. 1996) ("The . . . Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.").

return of the child as a general rule, then the abductor will not attempt to unilaterally change the custody arrangement by choosing a sympathetic forum. Second, promptly returning children to their place of habitual residence promotes certainty and predictability in the application of the Convention.<sup>26</sup> To achieve its aims, courts in Contracting States must uniformly interpret and apply the Convention.<sup>27</sup>

With these policy goals in mind, the drafters decided on certain guiding provisions in the Convention. To order a child's return under the Convention, the removal or retention must be wrongful.<sup>28</sup> Under Article 3 of the Convention, a removal or retention of a child is wrongful when it is "in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident."<sup>29</sup> The Convention thus requires that an abductor remove or retain a child from their State of habitual residence and that the removal or retention breach the left-behind parent's custody rights under the law of that State. If a removal or retention is wrongful, Article 12 of the Convention provides that when "a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith," unless one of the Convention's narrow exceptions applies.<sup>30</sup> If more than a year has passed, the relevant authority "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."<sup>31</sup>

In its application, the Convention focuses on jurisdiction instead of substantive issues of law to ensure the best-placed

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26. BEAUMONT & MCELEAVY, *supra* note 7, at 30.

27. *Id.* at 226.

28. *See Redmond v. Redmond*, 724 F.3d 729, 742 (7th Cir. 2013).

29. Convention, *supra* note 1, art. 3.

30. *Id.* art. 12.

31. *Id.*

courts determine custody.<sup>32</sup> Courts in the place of the child's habitual residence determine the best interests of the child, and the decision to return the child under the Convention does not alter the existing allocation of custody rights.<sup>33</sup> Since courts in the place of the child's habitual residence have better knowledge of the facts and circumstances of the case as well as the substantive law, those courts determine the merits of custody arrangements.<sup>34</sup> Equally, courts in Contracting States respect the rights of custody and of access under the laws of other Contracting States by not getting into substantive custody disputes.<sup>35</sup> The need to adjudicate substantive child custody issues in the most appropriate forum explains using the child's habitual residence as the "main connecting factor" under the Convention.<sup>36</sup> Unfortunately, courts have struggled to avoid crossing into "custody-type considerations," particularly when considering whether a child is "well-settled" and should not be returned.<sup>37</sup>

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32. *Id.* art. 19; *Redmond*, 724 F.3d at 739 ("The Convention's procedures are not designed to settle international custody disputes, but rather to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international forum shopping in custody cases."); *Friedrich II*, 78 F.3d 1060, 1063 (6th Cir. 1996) ("[A] court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute."); Pérez-Vera Report, *supra* note 15, at 429.

33. *Abbott v. Abbott*, 560 U.S. 1, 20 (2010) ("[T]he best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence.").

34. Pérez-Vera Report, *supra* note 15, at 430.

35. Courts have more knowledge and experience regarding their own domestic law. Deferring to a foreign court's custody determinations instead of going into substantive custody issues helps ensure international cooperation and the prompt return of the child.

36. *Schuz*, *supra* note 7, at 111.

37. *Berezowsky v. Rendon Ojeda*, 652 F. App'x 249, 255 (5th Cir. 2016) (Elrod, J., concurring); see *Koehn*, *supra* note 5, at 643 ("[S]everal courts have acknowledged the fact-intensive nature of Hague Convention cases or the careful dance associated with avoiding the underlying custody dispute."). At the federal level, such struggles come from courts' lack of family law expertise and familiarity with the Convention's provisions. *Id.* at 644. Since federal courts lack expertise, it "often results in inconsistent resolution of Hague Convention cases."

B. *The Different Habitual Residence Approaches Within the United States*

There are three approaches to habitual residence: the child-centered approach, the parental intent approach, and the mixed approach.

1. The Child-Centered Approach

Under the child-centered approach, a child's habitual residence "depends on the child's connections with the country in question and not the parent's connections or intentions."<sup>38</sup> For example, in *Friedrich v. Friedrich*, after the German father evicted the American mother and the child, they went to live on a U.S. army base in Germany before the mother took the child to the United States.<sup>39</sup> The Sixth Circuit determined that because the child was born in Germany and had lived in Germany until his American mother removed him to the United States, the child was habitually resident in Germany.<sup>40</sup> The court did not consider the mother's intent to return with the child to the United States and instead focused on the child's past experiences.<sup>41</sup> The court noted that the facts and circumstances of the case should determine habitual residence instead of the detailed and technical rules governing domicile.<sup>42</sup> To determine a child's habitual residence, "[a] court must focus on the child, not the parents, and examine past experience, not future

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*Id.* at 645.

38. Rhona Schuz, *Habitual Residence of Children Under the Hague Child Abduction Convention*, 13 CHILD & FAM. L. Q. 1, 13 (2001).

39. *Friedrich v. Friedrich* (*Friedrich I*), 983 F.2d 1396, 1398–99 (6th Cir. 1993); Schuz, *supra* note 38, at 13.

40. *Friedrich I*, 983 F.2d at 1402.

41. *Id.* at 1401; *see* *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) ("[H]abitual residence is the place where [a child] 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.").

42. *Friedrich I*, 983 F.2d at 1401.

intentions.”<sup>43</sup> Additionally, a child may have only one habitual residence, and a change in habitual residence requires “a change in geography and the passage of time.”<sup>44</sup> Since the child in *Friedrich* was born in Germany and had always resided in Germany prior to his removal, the court found the child’s habitual residence to be Germany.<sup>45</sup>

The Sixth Circuit elaborated on this approach in *Robert v. Tesson*, holding “a child’s habitual residence is a nation where the child has been present long enough to allow ‘acclimatization,’ and where this presence has a ‘degree of settled purpose from the child’s perspective.’”<sup>46</sup> The mother in *Robert* removed twins from France to the United States. Although the children had lived in both the United States and France for substantial periods of time, the court focused on the children’s “degree of acclimatization” in the United States, finding the United States was where their presence had “a degree of settled purpose.”<sup>47</sup>

## 2. The Parental Intent Approach

Under the parental intent approach, children are habitually resident where shared parental intent reflects a settled purpose, and unilateral intent is insufficient to change a child’s habitual residence.<sup>48</sup> If one parent has the

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43. *Id.*

44. *Id.* at 1402.

45. *Id.*

46. 507 F.3d 981, 993 (6th Cir. 2007).

47. *Id.* at 998.

48. *Grau v. Grau*, 780 F. App’x 787, 794 (11th Cir. 2019). Before *Monasky*, courts generally followed the parental intent approach in the Ninth, Eleventh, and Fifth circuits. Ronald H. Kauffman, *Like Home: The New Definition of Habitual Residence*, 95 FLA. BAR J., no. 2, Mar./Apr. 2021, at 50, 52. The parental intent approach to the habitual residence analysis considers “the present, shared intentions of both [parents]” regarding their child’s presence in a country. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) (concluding that a four-year-old child was habitually resident in Australia after living there for six months and starting school where the parents had agreed to move to that country and to live there with their son). The parental intent approach is “the most widely accepted framework” and is sometimes known as the “*Mozes* framework.” See Joe

right to decide where the child lives, then that parent's intent controls the child's habitual residence, "irrespective of where the child is actually living."<sup>49</sup> When both parents have that right, "neither may change the child's place of habitual residence without the consent of the other."<sup>50</sup> For example, in *Grau v. Grau*, the Eleventh Circuit found that four-year-old twins were habitually resident in the United States based on their parents' shared intent to realize "their mutual 'dream' of raising the twins in the United States" since it reflected a "settled purpose."<sup>51</sup> The family moved to the United States for the father's work shortly after the children were born, and the move turned into a long-term plan.<sup>52</sup> The parents agreed that the mother would start a business in Florida and the father would return to Germany to work to support the family. In Florida, "the children attended school, participated in activities, and made friends," but the mother filed for divorce and moved the children to an undisclosed address before the father sought the return of the children to Germany.<sup>53</sup> Although the parents disagreed about their intent, the district court had credited the mother's testimony that she "never intended for her or the children to move back to Germany," so the appellate court found the parents did not share a mutual intent for their children to abandon their habitual residence in the United States.<sup>54</sup>

In *Mozes v. Mozes*, the Ninth Circuit cautioned that the intentions of "the person or persons entitled to fix the place of the child's residence" should be considered instead of the

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Digirolamo & Manal Cheema, Monasky v. Taglieri: *The (International) Case for A "True" Hybrid Approach*, 60 VA. J. INT'L L. ONLINE 1, 5–6 (2020).

49. Schuz, *supra* note 38, at 10.

50. *Id.*

51. *Grau*, 780 F. App'x at 793–94.

52. *Id.* at 790.

53. *Id.*

54. *Id.* at 794; see Kauffman, *supra* note 48, at 53 n.19 (noting in the Eleventh Circuit, for a child's habitual residence to change, "the parents must share an intent to abandon the previous residence").

intentions of the child.<sup>55</sup> The parents were Israeli citizens and had always lived in Israel with their four children when, with the father's consent, the mother and the children moved to Los Angeles for a temporary stay.<sup>56</sup> The mother leased a home in Beverly Hills, enrolled the children in school, and purchased automobiles.<sup>57</sup> The father consented to the mother and the children living in the United States for fifteen months, but the parties disagreed about any subsequent understanding.<sup>58</sup> The mother filed an action to dissolve the marriage and sought custody of the children after a year in the United States, but then the father petitioned for the return of the children.<sup>59</sup> The court noted that having a "settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one."<sup>60</sup> A child can become habitually resident in a new country through time and contacts, but "courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."<sup>61</sup> The shared settled purpose requirement protects the aims of the Convention by making it more difficult for "would-be abductor[s] to seek unilateral custody over a child in another country."<sup>62</sup> The Convention's drafters

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55. 239 F.3d 1067, 1076 (9th Cir. 2001), *abrogated by* *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

56. *Id.* at 1069.

57. *Id.* The court compared the stay in the United States to an academic year abroad, "in which thousands of families across the globe participate every year." *Id.* at 1083. The year abroad allows children to experience other cultures and to form personal ties with other countries before returning to their home countries. *Id.*

58. *Id.* at 1069.

59. *Id.*

60. *Id.* at 1076; *see Pfeiffer v. Bachotet*, 913 F.3d 1018, 1024 (11th Cir. 2019) ("We have set forth two requirements to alter a child's habitual residence: (1) the parents must share a 'settled intention' to leave the old habitual residence behind; and (2) an 'actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized' must occur.").

61. *Mozes*, 239 F.3d at 1079.

62. *Id.* Courts should not "determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status

sought to disincentivize child abduction, but “[t]he greater the ease with which habitual residence may be shifted without the consent of both parents, the greater the incentive to try.”<sup>63</sup> Looking at whether a child is settled is too vague because it can “allow findings of habitual residence based on virtually any indication that the child has generally adjusted to life there.”<sup>64</sup> Moreover, children adapt quickly, forming intense attachments in short periods of time.<sup>65</sup> Since the mother and children in *Mozes* moved to the United States with the expectation that they would return home to Israel after their stay abroad, the court found the district court had given “insufficient weight to the importance of shared parental intent under the Convention.”<sup>66</sup> The appellate court remanded the case for the district court to consider whether the children’s habitual residence had changed to the United States due to shared intent to abandon Israel as their habitual residence.<sup>67</sup>

### 3. The Mixed Approach

The mixed approach refers to mixing parental intent with a child’s ties and acclimatization.<sup>68</sup> While the mixed approach considers a child’s ties and acclimatization, parental intent still plays an important role, particularly in cases involving young children. For example, in *Whiting v. Krassner*, a custody agreement provided that the mother and young child would return to the United States from Canada after two years.<sup>69</sup> Without the mother’s knowledge, the

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quo with regard to the primary locus of the child’s life.” *Id.*

63. *Id.*

64. *Mozes*, 239 F.3d at 1079.

65. *See, e.g.*, *Brooke v. Willis*, 907 F. Supp. 57, 61 (S.D.N.Y. 1995) (finding that a six-year-old child had acquired habitual residence in England after a summer because she was “well accustomed to her surroundings”).

66. *Mozes*, 239 F.3d at 1084.

67. *Id.*

68. *See, e.g.*, *Yaman v. Yaman*, 730 F.3d 1, 9 (1st Cir. 2013).

69. 391 F.3d 540, 542 (3d Cir. 2004).

father removed the child to New York.<sup>70</sup> The Third Circuit noted that, unlike a formula, habitual residence “is a fact-intensive determination that necessarily varies with the circumstances of each case.”<sup>71</sup> Nevertheless, the court agreed with the Ninth Circuit’s approach and focused on parental intent where “the child whose habitual residence is being determined is of such a young age that he or she cannot possibly decide the issue of residency for himself or herself.”<sup>72</sup> In such cases, “acclimatization is not nearly as important as the settled purpose and shared intent of the child’s parents in choosing a particular habitual residence.”<sup>73</sup> The court found the agreement to live in Canada for two years demonstrated a degree of settled purpose as well as intent to abandon the United States as the child’s habitual residence even though the agreement was temporary and subject to conditions.<sup>74</sup>

Under the Second Circuit’s approach in *Gitter v. Gitter*, habitual residence first considers shared parental intent before turning to “whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents’ latest shared intent.”<sup>75</sup> Although the parents in *Gitter* did not intend for the child to become habitually resident in Israel, the appellate court remanded the case to determine whether the child’s habitual residence had changed from the United States.<sup>76</sup> The petitioner father had convinced the mother to move to Israel for a year to try it, but after eleven months, she said she wanted to remain in the United States during a

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70. *Id.* at 543.

71. *Id.* at 546.

72. *Id.* at 548–49.

73. *Id.* at 550.

74. *Id.* at 549–50.

75. 396 F.3d 124, 134 (2d Cir. 2005).

76. *Id.* at 136.

family visit back in New York.<sup>77</sup> The father convinced her to return to Israel, promising “that if she were still unhappy in six months, she could return to the United States.”<sup>78</sup> A few months later, purportedly on a vacation, the mother and the child travelled to the United States, but the child did not return to Israel.<sup>79</sup> In determining the child’s habitual residence, the court looked to the Ninth Circuit’s opinion in *Mozes*, recognizing the importance of parental intent in determining habitual residence.<sup>80</sup> The court agreed that the analysis should start with parental intent but observed that “[i]n nearly all of the cases that arise under the Convention, however, the parents have come to disagree as to the place of the child’s habitual residence.”<sup>81</sup> Next, courts must consider “whether, notwithstanding the intent of those entitled to fix the child’s habitual residence, the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings and that his habitual residence has consequently shifted.”<sup>82</sup> In reaching its decision, the court considered the Convention’s aim to “dissuade parents and guardians from engaging in gamesmanship with a child’s upbringing in order to secure an advantage in an anticipated custody battle.”<sup>83</sup> Giving too much weight to evidence of acclimatization over parental agreement could result in manipulation where one parent seeks to create ties during what the other parent considered a temporary visit.<sup>84</sup> On the other hand, a child’s acclimatization may be so complete that forcing the child to return to the family’s intended residence will cause serious

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77. *Id.* at 128–29.

78. *Id.* at 129.

79. *Id.*

80. *Id.* at 131; *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001).

81. *Gitter*, 396 F.3d at 133.

82. *Id.*

83. *Id.* at 134.

84. *Id.*

harm.<sup>85</sup> The court concluded the district court did not clearly err in finding that the parents did not mutually intend to make Israel the child's permanent home because the move was temporary and contingent on the mother's happiness.<sup>86</sup> The court held that parental intent alone cannot establish a child's habitual residence.<sup>87</sup> Then, the court remanded the case for the district court to consider whether the child was habitually resident in Israel based on his ties.<sup>88</sup>

## II. *MONASKY V. TAGLIERI*:

### THE TOTALITY-OF-THE-CIRCUMSTANCES TEST FOR HABITUAL RESIDENCE AND ITS APPLICATION IN SUBSEQUENT CASE LAW

As the pre-*Monasky* case law in the United States demonstrates, habitual residence “is the central—often outcome-determinative—concept on which the entire [Convention] is founded.”<sup>89</sup> In *Monasky*, the Supreme Court clarified that the appropriate test to determine a child's habitual residence is the totality-of-the-circumstances test, harmonizing the different approaches. Section II.A considers the facts and procedural history of *Monasky* by way of background before turning to Supreme Court's unanimous adoption of the totality-of-the-circumstances test.<sup>90</sup> Section II.B explores the application of the totality-of-the-circumstances test in subsequent case law.

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85. *Id.*

86. *Id.* at 135.

87. *Id.* at 133.

88. *Id.* at 136.

89. *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001); Koehn, *supra* note 5, at 651 (“[T]he ultimate disposition of a Hague Convention return petition hinges on this finding.”).

90. *See Monasky v. Taglieri*, 140 S. Ct. 719, 732 (2020). Justice Thomas concurred in part and concurred in the judgment because he would have reached the same result based on the text of the Convention. *Id.* at 732 (Thomas, J., concurring). Justice Alito concurred in part and concurred in the judgment because he reached the same result based on an independent interpretation of the meaning of “habitual residence.” *Id.* at 734 (Alito, J., concurring).

A. Monasky v. Taglieri: *The Totality-of-the-Circumstances Test*

1. Background: Key Facts and Procedural History

Michelle Monasky and Domenico Taglieri married in the United States in 2011 before later relocating to Italy in 2013.<sup>91</sup> After the couple found work in Italy, neither intended to return to the United States.<sup>92</sup> Unfortunately, the marriage deteriorated, and Taglieri became physically abusive, allegedly forcing himself upon Monasky multiple times.<sup>93</sup> Monasky became pregnant with A.M.T. about a year after the couple moved to Italy.<sup>94</sup> After the move, Monasky still did not speak Italian and struggled with basic tasks.<sup>95</sup> While Monasky began exploring returning to the United States, applying for jobs in the United States, and looking into U.S. divorce lawyers; she and Taglieri planned on caring for their child in Italy.<sup>96</sup> After a disputed reconciliation, Monasky fled with A.M.T. to the Italian police in 2015 and sought shelter in a safe house, citing abuse by Taglieri and fears for her life.<sup>97</sup> Two weeks later, Monasky took A.M.T, then two months old, to her parent's home in Ohio.<sup>98</sup>

After her flight, an Italian court terminated Monasky's parental rights, and Taglieri petitioned for the return of A.M.T. to Italy on the ground that Italy was the child's habitual residence.<sup>99</sup> The District Court for the Northern

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91. *Id.* at 727 (majority opinion).

92. *Id.*

93. *Id.*

94. *Id.*

95. Taglieri v. Monasky, No. 1:15-cv-947, 2016 U.S. Dist. LEXIS 195225, at \*4 (N.D. Ohio Sept. 14, 2016), *aff'd*, 876 F.3d 868 (6th Cir. 2017), *reh'g en banc granted, opinion vacated* (Mar. 2), *aff'd en banc on reh'g*, 907 F.3d 404 (6th Cir. 2018), *aff'd*, 140 S. Ct. 719 (2020).

96. *Monasky*, 140 S. Ct. at 724.

97. *Id.*

98. *Id.*

99. *Id.*

District of Ohio found it implicit in Sixth Circuit precedent that an infant will normally be habitually resident where the matrimonial home is.<sup>100</sup> The court looked at evidence supporting shared parental intent to raise A.M.T. in Italy.<sup>101</sup> First, Monasky and Taglieri moved to Italy for career opportunities and to “live as a family.”<sup>102</sup> Second, even though Monasky “contend[ed] that she never understood the move to Italy to be permanent, it [was] undisputed that the parties agreed to live in Italy for an undetermined period of time.”<sup>103</sup> Nevertheless, Monasky argued that the “parties’ marriage irrevocably broke down in February 2015, before A.M.T.’s birth, and afterward, there was no degree of ‘common purpose’ or ‘shared intent’ for the child to reside in Italy.”<sup>104</sup> The court looked to the “nature and extent of any such breakdown and whether the facts and circumstances surrounding it [were] consistent” with cases in which “courts have held that no habitual residence for the child came into existence.”<sup>105</sup> For example, prior to A.M.T.’s birth, “Monasky indicated to Taglieri that she wanted to divorce and return to the United States with [their] daughter,” and Monasky looked at quotes for moving from Italy to the United States that same day.<sup>106</sup> Yet, despite wanting to leave Italy, Monasky bought items for A.M.T. to use in Italy, including a “rocking chair, stroller, car seat, and bassinet.”<sup>107</sup> Additionally, Monasky pursued an Italian driver’s license and set up routine medical appointments for A.M.T.<sup>108</sup> Monasky took no concrete steps for her return with A.M.T.

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100. *Taglieri*, 2016 U.S. Dist. LEXIS 195225, at \*24.

101. *Id.* at \*24–25.

102. *Id.* at \*24.

103. *Id.* at \*24–25.

104. *Id.* at \*26.

105. *Id.* at \*26–27.

106. *Id.* at \*27.

107. *Id.* at \*28.

108. *Id.*

to the United States besides emailing moving companies about rates.<sup>109</sup> Overall, Monasky had no “crystalized plan in place” to return to the United States until “Taglieri raised his hand as if to hit Monasky” on March 31, 2015.<sup>110</sup> The district court found that the parties’ shared intent was for A.M.T. to live in Italy, where the parties had shared a marital home without any definitive plan to return to the United States.<sup>111</sup> Consequently, since Monasky had continued to live in Italy following A.M.T.’s birth and had no plans to bring A.M.T. to the United States until the final altercation, A.M.T.’s habitual residence was Italy at the time of removal.<sup>112</sup> The district court directed Monasky to take appropriate steps for A.M.T.’s return to Italy.<sup>113</sup>

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109. *Id.* at \*29–30.

110. *Id.* at \*29.

111. *Id.* at \*34.

112. *Id.* at \*35.

113. *Id.* at \*47. Although it is outside the scope of this Comment, Monasky asserted the grave risk of harm defense under Article 13(b) of the Convention, claiming that because she could not return to Italy due to pending criminal charges against her, separating A.M.T. from her primary caregiver would place A.M.T. in grave risk of harm. *Id.* at \*38–40. The grave risk of harm defense under Article 13(b) is that “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” *See* Convention, *supra* note 1, art. 13(b). The Convention does not define “grave risk of harm” or “intolerable situation.” In *Simcox*, the Sixth Circuit stated that the exception “is to be interpreted narrowly, lest it swallow the rule” as the summary return of the child was “designed to protect the interests of the state of habitual residence in determining any custody dispute, and to deter parents from unilaterally removing children in search of a more sympathetic forum.” *Simcox v. Simcox*, 511 F.3d 594, 604 (6th Cir. 2007) (finding the nature of the verbal and physical abuse by the father, the frequency of the abuse, and the likelihood it would happen again without sufficient protection justified not returning four children from the United States to Mexico since their mother could not be compelled to return to Mexico). Despite the presumption that the summary return of the child is in the child’s best interests, the purposes of the Convention should defer to “the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation . . . by forcing the return of children who were the direct or indirect victims of domestic violence.” *Id.* at 604–05. Although the *Monasky* district court was “loathe to see the separation of a child from either of its parents,” the court could not “factor this impact into its determination, as the Sixth Circuit and several other courts have declined to find a ‘grave risk’ where

On appeal, the Sixth Circuit treated “the habitual residence of a child as a question of fact” in line with the language in the Pérez-Vera Report.<sup>114</sup> The court concluded A.M.T. was not “in a position to acclimate to any one country during her two months in this world.”<sup>115</sup> The court noted that the habitual residence of the child will normally be the country where the matrimonial home exists as “a fact of life that we cannot change.”<sup>116</sup> In doing so, the court also rejected the argument that infants should not have a habitual residence as “the worst of all possible worlds” by depriving infants of protection and “creating the risk of ‘abduction ping pong’ at best, or making possession 100% of the law at worst.”<sup>117</sup> In international child abduction cases, “[s]ometimes the only way to resolve a complicated problem is to recognize that there is no single solution.”<sup>118</sup> Since Italy was the matrimonial home and A.M.T. was an infant at the time of removal, the appellate court affirmed the district

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the respondent claims that a return order separating the abducting parent from the child would result in psychological damage to the child.” *Taglieri*, 2016 U.S. Dist. LEXIS 195225, at \*40–41. No evidence indicated that Taglieri was ever “physically violent towards A.M.T.” *Id.* at \*44. Without clear and convincing evidence that returning A.M.T. would place the child at a grave risk of harm, the defense did not apply. *Id.* at \*45. Courts are split over “the correct course of action a court should take once it determines that a ‘grave risk of harm’ or an ‘intolerable situation’ exists” in a case. Lauren Cleary, Note, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations*, 88 *FORDHAM L. REV.* 2619, 2635 (2020). For more information on the grave risk of harm and intolerable situation defenses, see generally *id.* For further analysis of domestic violence concerns in Convention cases, see generally Andrew A. Zashin, *Domestic Violence by Proxy: A Framework for Considering a Child’s Return Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction’s Article 13(b) Grave Risk of Harm Cases Post Monasky*, 33 *J. AM. ACAD. MATRIMONIAL L.* 571 (2021).

114. *Taglieri v. Monasky*, 907 F.3d 404, 408 (6th Cir. 2018), *aff’d*, 140 S. Ct. 719 (2020); see Pérez-Vera Report, *supra* note 15, at 445 (describing a child’s habitual residence as a “question of pure fact”); see, e.g., *Robert v. Tesson*, 507 F.3d 981, 988 (6th Cir. 2007).

115. *Taglieri*, 907 F.3d at 408.

116. *Id.* at 410.

117. *Id.* at 411 (citation omitted).

118. *Id.*

court's order and did not disturb the district court's finding that A.M.T. was habitually resident in Italy.<sup>119</sup>

## 2. The Totality-of-the-Circumstances Test

Noting that the Convention does not define “habitual residence,” the Supreme Court started its analysis by determining “habitual” suggests a fact-sensitive inquiry rather than a categorical one.<sup>120</sup> Looking to the intentions of the drafters, the Convention’s “negotiation and drafting history” corroborates that a child’s habitual residence depends on the specific circumstances of the particular case.<sup>121</sup> The drafters’ decision not to base habitual residence on “formal legal concepts like domicile and nationality” provides courts with “maximum flexibility” to respond to the circumstances of the case and “to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home.”<sup>122</sup> The Court also considered “the need for uniform international interpretation of the Convention” and the “clear trend” among treaty partners to take a fact-driven approach to habitual residence based on the particular circumstances of the case.<sup>123</sup>

The Court held that the habitual residence determination “does not turn on the existence of an actual

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119. *Id.*

120. *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020).

121. *Id.* at 727.

122. *Id.*; see BEAUMONT & MCELEAVY, *supra* note 7, at 89–90.

123. *Monasky*, 140 S. Ct. at 727–28 (citing, among others, 22 U.S.C. § 9001(b)(3)(B)); see *Off. of the Children’s Law. v. Balev*, [2018] 1 S.C.R. 398, 421, ¶ 50 (Can.) (“In recent years, many *Hague Convention* states have adopted a hybrid approach. Absolute consensus has not yet emerged. But the clear trend is to rejection of the parental intention approach and to adoption of the hybrid approach. Recent decisions from the European Union, the United Kingdom, Australia, New Zealand, and the United States endorse the hybrid approach.”); *In re A*, [2013] UKSC 60, ¶ 54 (The court states that habitual residence “depends upon 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 should not be glossed with legal concepts . . .”).

agreement” based on the text of the Convention and on the Pérez-Vera Report.<sup>124</sup> Instead, “a child’s habitual residence depends on the totality of the circumstances specific to the case.”<sup>125</sup> Consequently, Italy could “qualify as A.M.T.’s ‘habitual residence’ in the absence of an actual agreement by her parents to raise her there[.]”<sup>126</sup> In clarifying how lower courts should interpret the totality-of-the-circumstances standard, the majority explained that “[t]he inquiry begins with a legal question: What is the appropriate standard for habitual residence?”<sup>127</sup> After identifying the totality-of-the-circumstances test, the lower court should “answer a factual question: Was the child at home in the particular country at issue?”<sup>128</sup> In cases involving children too young to acclimatize, “the intentions and circumstances of caregiving parents are relevant considerations,” but “[n]o single fact, however, is dispositive across all cases.”<sup>129</sup> Despite different approaches by lower courts, the standards they use to determine a child’s habitual residence “share a ‘common’ understanding: The place where a child is at home, at the time of removal or retention, ranks as the child’s habitual residence.”<sup>130</sup> The Court rejected Monasky’s “actual-agreement” argument as such a requirement would allow a parent to unilaterally “block any finding of habitual residence for an infant,” and it would “undermine the Convention’s aim to stop unilateral decisions to remove children across international borders.”<sup>131</sup> The Court also rejected the argument that a bright-line rule would promote

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124. See *Monasky*, 140 S. Ct. at 726; Convention, *supra* note 1; Pérez-Vera Report, *supra* note 15, at 445.

125. *Monasky*, 140 S. Ct. at 723.

126. See *id.*

127. *Id.* at 730.

128. *Id.*

129. *Id.* at 727.

130. *Id.* at 726.

131. *Id.* at 728.

the prompt return of the child and deter would-be abductors because it would involve a “winner-takes-all evidentiary dispute over whether an agreement existed[.]”<sup>132</sup> In a fact-driven inquiry, “courts must be ‘sensitive to the unique circumstances of the case and informed by common sense.’”<sup>133</sup> The Supreme Court affirmed the Sixth Circuit’s judgment and declined to remand the case since the district court had considered the totality of the circumstances.<sup>134</sup>

Turning to the domestic violence concerns raised in the case, the Court addressed Monasky’s argument that an actual-agreement requirement would “protect children born into domestic violence.”<sup>135</sup> Rather than imposing a categorical requirement to combat domestic violence concerns, the Court believed that “domestic violence should be an issue fully explored in the custody adjudication upon the child’s return.”<sup>136</sup> A categorical approach could exclude certain children from the scope of the Convention, leaving infants without a habitual residence.<sup>137</sup> As Monasky did not challenge the district court’s findings that returning A.M.T. would not put her at a grave risk of harm, the Court did not address the domestic violence issues in the case.<sup>138</sup>

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132. *Id.* at 729.

133. *Id.* at 727 (quoting *Redmond v. Redmond*, 724 F.3d 729, 744 (7th Cir. 2013)).

134. *Id.* at 731 (“Nothing in the record suggests that the District Court would appraise the facts differently on remand.”).

135. *Id.* at 729.

136. *Id.*

137. *Id.*

138. *Id.* Domestic violence is a serious problem, and the grave risk of harm defense asserted in *Monasky* is one of the most litigated exceptions to the summary return of the child in Convention cases. See Kucinski, *supra* note 14, at 40–41. For purposes of length and scope, this Comment does not address the domestic violence implications of the Court’s decision. For purposes of length and scope, this Comment does not address the domestic violence implications of the Court’s decision.

B. *The Application of the Totality-of-the-Circumstances Test in Subsequent Case Law*

While habitual residence does not require actual agreement between parents, “[p]hysical presence in a country is not a dispositive indicator of an infant’s habitual residence.”<sup>139</sup> In *Grano v. Martin*, the Second Circuit followed *Monasky* and applied the totality-of-the-circumstances test.<sup>140</sup> The mother took the child from Spain to the United States without the father’s consent, and the Second Circuit concluded the district court did not clearly err in finding the child’s habitual residence was Spain.<sup>141</sup> The court also reiterated the Convention’s philosophy that “the interests of the child are usually best served when custody decisions are made in the courts of the home country.”<sup>142</sup> When determining the child’s habitual residence, the court listed the factors from *Monasky* that courts may consider, including “where a child has lived, the length of time there, acclimatization, and the ‘purposes and intentions of the parents.’”<sup>143</sup> As the parents in *Grano* had bought a one-way ticket to Spain, did not keep bank accounts in the United States, found a school for the child, and bought a house together, the facts on the record supported the district court’s finding of habitual residence in Spain; the court affirmed accordingly.<sup>144</sup>

Since no categorical requirements exist for habitual residence, past parental agreement does not control when other relevant factual circumstances exist.<sup>145</sup> In *Pope v. Lunday*, the mother became pregnant with twins when living

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139. 821 F. App’x 26, 27 (2d Cir. 2020) (summary order) (citing *Monasky*, 140 S. Ct. at 729).

140. *Id.*

141. *Id.* at 28.

142. *Id.* at 27 (citing *Monasky*, 140 S. Ct. at 723).

143. *Id.* (quoting *Monasky*, 140 S. Ct. at 728).

144. *Id.* at 28.

145. *Pope v. Lunday*, 835 F. App’x 968, 971–72 (10th Cir. 2020).

in Brazil with the father, but she returned to the United States at nineteen-to-twenty-weeks pregnant.<sup>146</sup> The father understood the trip would last only a few weeks “to attend social and business events,” but the mother took her pet cat and did not return to Brazil.<sup>147</sup> The children were born in and had lived their entire lives in Oklahoma when the father petitioned for their return.<sup>148</sup> The father argued that he and the mother had agreed the children would live in Brazil, so Brazil was their place of habitual residence.<sup>149</sup> The court cited evidence supporting shared parental intent to remain in Brazil: the couple had “held a ceremony in Mexico and obtained the public deed of stable union in Brazil,” the mother had begun the process of getting a professional license, she had obtained Brazilian health insurance and a social security card, she had begun learning Portuguese, and the couple had purchased a house.<sup>150</sup> The father asserted the mother could not unilaterally change their agreement that the then-unborn twins would live in Brazil.<sup>151</sup> Despite an *in utero* agreement, the court rejected “the proposition that any particular circumstance controls.”<sup>152</sup> The court believed the parents’ intentions and circumstances were relevant but recognized that “nothing requires an actual agreement between the parties.”<sup>153</sup> The mother argued that the twins had never even been to Brazil, and only in rare cases can a court find an infant is habitually resident in a country where the infant has never been.<sup>154</sup> As with actual agreement, the court reasoned that an infant’s physical presence does not

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146. *Id.* at 969.

147. *Id.* at 969–70.

148. *Id.* at 970.

149. *Id.* at 971.

150. *Id.*

151. *Id.*

152. *Id.* (citing *Monasky v. Taglieri*, 140 S. Ct. 719, 728–29 (2020)).

153. *Id.* (citing *Monasky*, 140 S. Ct. at 726).

154. *Id.*

control since there are no categorical requirements for habitual residence.<sup>155</sup> While there had been shared parental intent when the twins were “19 to 20 weeks *in utero*,” the court affirmed the district court’s assessment that the agreement at that time did not bind the mother forever.<sup>156</sup> The past agreement was “not sufficient to override every other undisputed fact in [the] case, all of which point[ed] in one direction: away from Brazil as the place of habitual residence.”<sup>157</sup> Finding the children were habitually resident in the United States, the appellate court affirmed the district court’s determination that the mother did not wrongfully retain the twins.<sup>158</sup>

The totality-of-the-circumstances test treats parental intent as just another factor post-*Monasky*.<sup>159</sup> In *Smith v. Smith*, the Fifth Circuit overruled its prior emphasis on shared parental intent over other factors.<sup>160</sup> Prior to *Monasky*, the Fifth Circuit “looked to the parents’ ‘shared intent’ as a threshold test for determining a child’s habitual residence.”<sup>161</sup> Now, courts must determine if the abductor wrongfully removed the child from his or her habitual residence based on the totality of the circumstances instead of parental intent alone.<sup>162</sup> *Smith* involved children wrongfully removed from Argentina to Texas. Evidence demonstrated that the family viewed the United States as the children’s habitual residence: both parties were United States citizens, the father’s work contract referenced home leave to San Francisco, and the mother continued to own

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155. *Id.*

156. *Id.* at 972.

157. *Id.*

158. *Id.*

159. 976 F.3d 558, 561 (5th Cir. 2020).

160. *Id.* at 561 n.1.

161. *Id.* at 561 (quoting *Larbie v. Larbie*, 690 F.3d 295, 310–11 (5th Cir. 2012)).

162. *Id.*

land in Texas.<sup>163</sup> Additionally, the children had gone to an “American style” school in Argentina, and the family never purchased a home in Argentina.<sup>164</sup> Although the lower court found the children were habitually resident in Texas based on parental intent, the Fifth Circuit affirmed based on the totality-of-the-circumstances test.<sup>165</sup>

III. POST-MONASKY:  
THE FUTURE OF THE TOTALITY-OF-THE-CIRCUMSTANCES TEST

Section III.A endorses the mixed approach to habitual residence while critiquing the different approaches. Next, Section III.B considers the application of the totality-of-the-circumstances test in subsequent case law. Finally, Section III.C addresses where the habitual residence analysis currently stands moving forward.

A. *The Mixed Approach Best Serves the Aims of the Convention Through Maximum Flexibility Based on the Circumstances of the Individual Cases*

1. While Flexible, the Child-Centered Approach Risks Trespassing into Substantive Custody Matters or Creating Artificial Ties and Only Works in Cases Involving Older Children

Without parental intent, the child-centered approach risks crossing into substantive custody matters. The child-centered approach looks at a child’s ties and other objective factors based on the factual nature of habitual residence.<sup>166</sup> While habitual residence is a question of fact based on the circumstances of the case, courts must not engage in a domicile-like approach to acclimatization to avoid crossing into substantive custody disputes. A pure child-centered approach makes it too tempting for courts to turn what the

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163. *Id.* at 560.

164. *Id.*

165. *Id.* at 563.

166. Schuz, *supra* note 38, at 15.

Convention's drafters intended to be a question of jurisdiction into a custody determination. The summary return mechanism sends children back to their place of habitual residence, so the most appropriate court—the court in the place of the child's habitual residence—can decide custody matters. Children may develop meaningful ties during short stays, but those ties require a settled purpose to avoid children becoming habitually resident after a temporary visit.<sup>167</sup> When courts weigh factors without considering parental intent, it may create absurd results.<sup>168</sup> To avoid crediting artificial ties, weighing factors should include parental intent.<sup>169</sup> Though courts should strive to not uproot a child twice, the settled purpose should include the parents' perspective to avoid a custody or domicile-like inquiry. Equally, as the court stated in *Gitter*, giving too much weight to evidence of acclimatization over parental agreement could allow manipulation when one parent seeks to create ties during what one parent intended as a temporary visit.<sup>170</sup> Overall, the approach correctly considers the factual circumstances, but parental intent steers the analysis away from a custody or domicile-like determination

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167. *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007) (holding “a child’s habitual residence is the nation where, at the time of their removal, the child has been present long enough to allow acclimatization, and where this presence has a ‘degree of settled purpose from the child’s perspective’” (quoting *Feder v. Evans-Feder*, 63 F.3d 217, 244 (3d Cir. 1995))). Instead of looking at settled purpose from the parents’ perspective, the approach flips the inquiry, focusing on the child’s perspective.

168. In *Mozes*, the court compared the children’s visit to the United States to an academic year abroad. *Mozes v. Mozes*, 239 F.3d 1067, 1083 (9th Cir. 2001). Children study abroad to experience other cultures and to form personal ties with other countries, but it would be an undue expansion of habitual residence to hold a child could become habitually resident in another country after what a family intended to be a temporary trip. See, e.g., *Brooke v. Willis*, 907 F. Supp. 57, 61 (S.D.N.Y. 1995) (finding that a six-year-old child had acquired habitual residence in England after a summer because she was “well accustomed to her surroundings”).

169. The easier a parent can unilaterally create artificial ties, the greater incentive to remove or retain a child. See *Mozes*, 239 F.3d at 1079.

170. *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005).

based on acclimatization.

The child-centered approach best suits cases involving older children or where courts lack objective evidence of parental intent, but cases involving young children require more emphasis on parental intent.<sup>171</sup> A fact-intensive approach to habitual residence favors objective criteria, and no guidance instructs courts how much weight to give each factor in the analysis.<sup>172</sup> The Convention itself recognizes and gives weight to the objections of sufficiently mature children.<sup>173</sup> Where a child can form real attachments, it may be in the child's best interests to find that their habitual residence has changed through the passage of time, making a child-centered approach more appropriate. Despite a lack of predictability and certainty, weighing factors without any one factor being dispositive allows for flexibility depending on the facts and circumstances of individual cases.<sup>174</sup> Older children have sufficient maturity to form meaningful attachments and sufficient intent to acquire a new habitual residence, so a child-centered approach respects their autonomy.<sup>175</sup> By contrast, only focusing on a child's ties risks leaving young children without a habitual residence, so any complete analysis must consider parental intent.<sup>176</sup> As the Court stated in *Monasky*, “[b]ecause children, especially those too young or otherwise unable to acclimate, depend on

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171. Digirolamo & Cheema, *supra* note 48, at 8–9.

172. Schuz, *supra* note 38, at 16. Factors include, for example, participation in academic activities, social engagements, and whether the child formed “meaningful connections” in the country. *Ahmed v. Ahmed*, 867 F.3d 682, 689 (6th Cir. 2017).

173. Convention, *supra* note 1, art. 13.

174. See *Monasky v. Taglieri*, 140 S. Ct. 719, 727 (2020) (discussing habitual residence as a connecting factor and the need for “maximum flexibility” to “ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home”); BEAUMONT & MCELEAVY, *supra* note 7, at 89–90.

175. Schuz, *supra* note 38, at 17.

176. See *Ahmed*, 867 F.3d at 687 (noting that young children cannot acclimatize to their surroundings).

their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations.”<sup>177</sup>

2. The Parental Intent Approach Fails to Adequately Take a Child’s Acclimatization into Account and May Lead to Winner-Takes-All Credibility Determinations

On the other side of the spectrum, the parental intent approach “contradicts the physical factual nature of habitual residence” and fails to give appropriate weight to a child’s acclimatization.<sup>178</sup> Focusing on parental intent can block a well-settled child from acquiring a new habitual residence in the absence of actual agreement.<sup>179</sup> The parental intent approach narrowly fixes a child’s habitual residence based on parental agreement and settled purpose, and it limits situations in which a child’s habitual residence can change without shared parental intent or a settled intention to abandon a habitual residence. At first glance, a heavy emphasis on shared parental intent makes sense since children do not decide where they live. Back in Part I, we explored the more straightforward reality in the 1970s that children lived in the marital home or with the custodial parent, so a child’s habitual residence was the marital home or with the custodial parent.<sup>180</sup> Although the narrow parental intent approach might appear to “fit in best with the approach” of the Convention, “it is now widely accepted that parental rights exist only insofar as they are necessary for the welfare of the child.”<sup>181</sup> Simply returning the child expedites proceedings and deters would-be abductors, but other factors, including the objections of sufficiently mature children, deserve consideration.<sup>182</sup> Returning a child with

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177. *Monasky*, 140 S. Ct. at 727.

178. *Schuz*, *supra* note 7, at 137.

179. *Digirolamo & Cheema*, *supra* note 48, at 7.

180. *See* discussion *supra* Section I.A.

181. *Schuz*, *supra* note 38, at 11.

182. Convention, *supra* note 1, art. 13 (recognizing that the objections of

strong attachments risks uprooting the child twice when they have genuinely acclimatized to their new environment, leading to further distress. Specifically, “it is possible that the child’s acclimatization to the location abroad will be so complete that serious harm to the child can be expected to result from compelling his return to the family’s intended residence.”<sup>183</sup> The summary return mechanism sends a child back to their place of habitual residence for the most appropriate courts to decide child custody disputes,<sup>184</sup> but looking at a child’s ties and acclimatization does not amount to a substantive custody determination.

A heavy emphasis on parental intent also leads to winner-takes-all credibility determinations based on subjective intent. As a starting point, courts should give effect to shared parental intent regarding habitual residence.<sup>185</sup> Yet, to determine whether shared intent existed, courts must sometimes decide which parent’s version of events to believe. With conflicting evidence on both sides, a court must “decide which evidence is weightier.”<sup>186</sup> When a relationship breaks down, many parents do “not see eye to eye on much of anything by the end.”<sup>187</sup> Looking to disputed intent opens the doors to large amounts of evidence even though shared parental intent alone does not control a child’s habitual residence.<sup>188</sup> These side-show debates about

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children who are sufficiently mature may be taken into consideration); Schuz, *supra* note 38, at 11. Schuz notes that “under the parental rights model” a mature child’s views “will not be relevant in determining his habitual residence.” *Id.*

183. *Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005).

184. *See, e.g., Redmond v. Redmond*, 724 F.3d 729, 739 (7th Cir. 2013) (“The Convention’s procedures are not designed to settle international custody disputes, but rather to restore the status quo prior to any wrongful removal or retention, and to deter parents from engaging in international forum shopping in custody cases.”).

185. Schuz, *supra* note 7, at 135.

186. Schuz, *supra* note 38, at 12.

187. *Taglieri v. Monasky*, 907 F.3d 404, 410 (6th Cir. 2018), *aff’d*, 140 S. Ct. 719 (2020).

188. *See* Schuz, *supra* note 7, at 138 (recommending shared intent only be

parental agreements prolong returning children.<sup>189</sup> Courts should factor objective, undisputed evidence of parental intent or agreement into the habitual residence analysis, but relying on credibility determinations might lead to forum shopping for a jurisdiction that might be more sympathetic to the abductor or left-behind parent's version of events. By creating an incentive for would-be abductors, winner-takes-all battles fail to protect young children who cannot acclimatize to their environments.<sup>190</sup>

### 3. The Mixed Approach Provides Flexibility Based on the Circumstances of the Case and Follows a Clear International Trend

The mixed approach to habitual residence best achieves the aims of the Convention by avoiding categorical distinctions and adapting to a wider range of factual scenarios.<sup>191</sup> Both the text of the Convention and the intentions of the drafters support the fact-heavy analysis advocated by the mixed approach in *Monasky*.<sup>192</sup> The approach considers both parental intent and the child's acclimatization as factors, and no one factor controls the

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relevant “(i) in ‘borderline’ cases” where the child’s habitual residence matches the agreement; “(ii) where it is very clear on the facts that an agreement existed; and (iii) there is no serious suggestion that the agreement was not made voluntarily”).

189. *See id.* at 137 (discussing power imbalances, agreements against public policy, and agreements inconsistent with the welfare of the child).

190. *See Taglieri*, 907 F.3d at 410.

191. *See Off. of the Children’s Law. v. Balev*, [2018] 1 S.C.R. 398, 421, ¶ 62 (Can.) (noting a “hybrid approach . . . promotes prompt custody and access decisions in the most appropriate forum, and thus offers the best hope of *prompt* return of the child. The parental intention and child-centered approaches may, on their face, seem less complex and hence more likely to lead to speedy determination of the habitual residence of the child. But the reality is different. The parental intention approach in practice often leads to detailed and conflicting evidence as to the intentions of the parents.”).

192. The text of the Convention and the intentions of the drafters both support a heavy factual inquiry without categorical requirements. *See Pérez-Vera Report*, *supra* note 15, at 445.

analysis.<sup>193</sup> Looking at the totality of the circumstances under *Monasky*, a court weights parental intent and a child's acclimatization to "answer a factual question: Was the child at home in the particular country at issue?"<sup>194</sup> In cases, like *Monasky*, involving young children, the flexibility ensures parental intent receives sufficient weight when children are too young to acclimatize.<sup>195</sup> Taking a more holistic approach to habitual residence walks the line between a strict approach to deter abduction and a broad approach focused on individual children's interests. Whereas the parental intent approach ignores the objections of older, mature children, the mixed approach takes such objections into account.<sup>196</sup> In addition, where the child-centered approach risks crossing into substantive custody issues, the mixed approach gives more weight to parental intent depending on the circumstances. Nevertheless, courts may give too much weight to either parental intent or acclimatization in their analysis. Despite the risk of inappropriate weighing in some cases, the approach gives courts the flexibility to truly take into account all of the facts and circumstances of a case. Since no set formula exists for habitual residence, a fact-heavy analysis avoids abstract legal concepts and categorical requirements.<sup>197</sup>

Additionally, a "clear trend" exists among treaty partners to take a fact-driven approach to habitual residence based on the particular circumstances of the case.<sup>198</sup> The mixed approach brings the United States into international consensus with other Contracting States. By joining the clear

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193. Digirolamo & Cheema, *supra* note 48, at 10.

194. *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020).

195. *Id.* at 727.

196. *See Gitter v. Gitter*, 396 F.3d 124, 134 (2d Cir. 2005).

197. *See Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013) ("[W]e think it unwise to set in stone the relative weights of parental intent and the child's acclimatization. The habitual-residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.").

198. *Monasky*, 140 S. Ct. at 727–28.

trend among Contracting States, the mixed approach serves “the need for uniform international interpretation of the Convention.”<sup>199</sup> Encouraging uniform interpretation and application of the Convention increases predictability in the Convention’s application on an international level and protects the best interests of children through international cooperation.<sup>200</sup> Moreover, if all Contracting States adopted the mixed-approach, then this uniformity would discourage forum shopping. Since habitual residence serves as a threshold determination under the Convention, different approaches lead to different overall outcomes. The Convention aimed to combat international child abduction through international cooperation, and an international standard facilitates that cooperation.

In sum, the mixed approach takes the best of both worlds and allows for greater flexibility in Convention cases while still maintaining a separation between jurisdiction and substantive custody determinations. An international standard clarifies the analysis for all Contracting States and facilitates international cooperation.

B. *The Totality-of-the-Circumstances Test in Monasky Harmonized the Habitual Residence Analysis in the United States*

Ensuring flexibility post-*Monasky*, courts have avoided overly narrow categorical requirements.<sup>201</sup> In *Grano*, the Second Circuit repeated that habitual residence does not require an actual agreement between the parents but that

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199. *Monasky*, 140 S. Ct. at 727.

200. *Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001) (“Without intelligibility and consistency in its application, parents are deprived of crucial information they need to make decisions, and children are more likely to suffer the harms the Convention seeks to prevent.”); see 22 U.S.C. § 9001(a)(3).

201. One court described the post-*Monasky* framework for determining habitual residence as “less rigid,” balancing parental intent and acclimatization in applying the totality-of-the-circumstances test. See *Chambers v. Russell*, No. 1:20CV498, 2020 WL 5044036, at \*4 (M.D.N.C. Aug. 26, 2020).

“physical presence in a country is not a dispositive indicator of an infant’s habitual residence.”<sup>202</sup> Factfinding courts decide habitual residence as courts of first instance, so the court deferred to the district court based on the circumstances of the case.<sup>203</sup> The interpretation of the totality-of-the-circumstances test in *Grano* toes the line between giving too much weight to the child’s acclimatization and geography or to parental intent. The facts showed the child in *Grano* was at home in Spain: the parents had bought a one-way ticket to Spain, did not keep bank accounts in the United States, found a school for the child, and bought a house together.<sup>204</sup> The court weighed the factors at play in the case and respected clear parental intent backed up by objective evidence.

*Smith* demonstrates that the totality-of-the-circumstances test does not radically change the habitual residence analysis by including objective evidence of acclimatization. As noted above, the Fifth Circuit overruled its prior emphasis on “parents’ shared intent over other factors” in favour of the totality-of-the-circumstances test post-*Monasky*.<sup>205</sup> In *Smith*, the Fifth Circuit considered parental intent along with objective evidence: both parties were United States citizens, the father’s work contact referenced home leave to San Francisco, the mother continued to own land in Texas, the children had gone to an “American style” school in Argentina, and the family had never purchased a home in Argentina.<sup>206</sup> The family intended to temporarily live in Argentina, and the children did not acclimatize to life in Argentina. Even though the lower court had applied the parental intent approach, the

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202. *Grano v. Martin*, 821 F. App’x 26, 27 (2d Cir. 2020) (summary order) (citing *Monasky v. Taglieri*, 140 S. Ct. 719, 729 (2020)).

203. *Id.* at 27–28.

204. *Id.* at 28.

205. *Smith v. Smith*, 976 F.3d 558, 561 n.1 (5th Cir. 2020).

206. *Id.* at 560.

Fifth Circuit reached the same result on appeal. Based on objective evidence, the children were not settled in Argentina, and the court correctly considered clear evidence indicating the children were habitually resident in the United States.

*Pope* serves as a reminder that the Convention does not apply to all child-custody disputes just because they have an international element.<sup>207</sup> The Convention looks at whether an abductor wrongfully removed a child from or retained them away from their place of habitual residence immediately before the wrongful removal or retention. *Pope* turned on the fact that there was no wrongful removal or retention from a place of habitual residence. When the then-pregnant mother returned to the United States, the children did not exist yet. The reasoning in the district court's opinion illustrates the difference between habitual residence and a custody dispute. At the district court level, the father never argued that the children were habitually resident in Brazil while they were *in utero*.<sup>208</sup> Since the children had never been to Brazil, the district court rejected the father's argument that the children became habitually resident in Brazil when they were born due to shared parental intent.<sup>209</sup> The case might have been different had the mother removed new-born children from Brazil, the place of the parties' marital home. Then, shared intent might have controlled, and the twins would have then been habitually resident in Brazil. As the district court noted, "a child cannot be wrongfully 'retained' away from a place unless they were first a habitual resident of that place."<sup>210</sup> The district court

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207. See *Pope v. Lunday*, No. CIV-19-01122-PRW, 2019 U.S. Dist. LEXIS 220406, at \*8 (W.D. Okla. Dec. 23, 2019) ("[B]y limiting its application to cases involving retention of a child away from the child's place of *habitual* residence, . . . the Convention's text indicates that it does not apply to all child-custody disputes with an international element."), *aff'd*, 835 F. App'x 968 (10th Cir. 2020).

208. *Id.* at \*7.

209. *Id.* at \*7–8.

210. *Id.* at \*8.

recognized that the case did not involve a wrongful removal or retention,<sup>211</sup> and the Tenth Circuit affirmed based on the totality-of-the-circumstances test.<sup>212</sup> The appellate court also correctly rejected the petitioner father's actual agreement argument.<sup>213</sup> In cases involving infants and young children, parental intent requires more weight in the habitual residence analysis since the children are too young to form meaningful ties, but giving weight to parental intent does not create an actual agreement requirement. *Pope* reiterates both that the Convention only deals with jurisdiction to ensure concerted cooperation among Contracting States to benefit children generally and that the courts in the place of the child's habitual residence make substantive custody determinations in the best interests of that individual child.

C. *The Future of the Habitual Residence Analysis in the United States*

The totality-of-the-circumstances test follows the clear international trend in favor of a mixed approach, ensuring uniform application and interpretation of the Convention and preventing forum shopping.<sup>214</sup> *Monasky* harmonized the habitual residence analysis in the United States, resolving the circuit split between the parental intent, child-centered, and mixed approaches. As this Comment argued, the mixed approach best serves the aims of the Convention moving forward through its flexibility. The drafters intended habitual residence to involve a heavy factual inquiry, and the totality-of-the-circumstances test avoids categorical requirements in favor of objective factual evidence. Since *Monasky*, lower courts have refused to impose artificial requirements in Convention cases, moving the United States into international consensus. In most cases, the result seems

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211. *Id.* at \*3–5.

212. *Pope v. Lunday*, 835 F. App'x 968, 972–73 (10th Cir. 2020).

213. *Id.* at 972.

214. See Digirolamo & Cheema, *supra* note 48, at 4.

to be the same under the new test because no one factor is dispositive, so courts need only weight the factors before making a call based on the facts of the case. For example, the lower court in *Smith* had determined the children were habitually resident in the United States based on the parental intent approach. On appeal, the Fifth Circuit affirmed under the totality-of-the-circumstances test since the children were not settled in Argentina.<sup>215</sup> While the court overruled its previous precedent, the analysis did not change the outcome and the importance of parental intent in that case because it focused on all objective criteria.

Moving forward, courts should refrain from taking the totality-of-the-circumstances test too far and turning Convention cases into substantive custody disputes.<sup>216</sup> As the district court pointed out in *Pope*, the Convention deals with wrongful removals and retentions from a child's habitual residence and not custody disputes that have an international element. With these concerns in mind, a more flexible and holistic approach can benefit individual children while still safeguarding the best interests of children generally.

#### CONCLUSION

As a threshold determination, habitual residence controls the outcomes in Convention cases, and case law underscores its importance as a connecting factor. As Part I discussed, the Convention does not define habitual residence, and courts in the United States took divergent approaches in their analyses prior to *Monasky*, applying the

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215. *Smith v. Smith*, 976 F.3d 558, 563 (5th Cir. 2020).

216. *Aluker v. Simin Yan*, No. 1:20-cv-1117, 2021 U.S. Dist. LEXIS 51495, at \*19 (E.D. Va. Mar. 4, 2021) (“The Court is mindful that the Hague Convention seeks to grant courts of the receiving jurisdiction the circumscribed authority to determine the merits of an abduction claim, and that the treaty is not designed as a vehicle to dispose of an underlying custody dispute.”); see Convention, *supra* note 1, art. 19; 22 U.S.C. § 9001(b)(4); *Friedrich I*, 983 F.2d 1396, 1400 (6th Cir. 1993).

parental intent, child-centered, and mixed approaches. By laying down the new totality-of-the-circumstances test in *Monasky*, the Supreme Court harmonized the habitual residence analysis. The totality-of-the-circumstances test clarified that courts should take a mixed approach to habitual residence, treating parental intent and acclimatization as factors for a court to consider without giving any one factor undue weight. Increased flexibility allows the mixed approach to adapt to cases involving both young and sufficiently mature children. This Comment argues that a mixed approach best achieves the aims of the Convention by avoiding categorical requirements and keeping habitual residence as a fact-based analysis. Although it advocated including a child's ties and acclimatization in the analysis, this Comment also cautions against unduly expanding the analysis into a domicile-like inquiry or substantive custody determination and emphasized the importance of parental intent. Under *Monasky*, habitual residence has no categorical requirements, and, post-*Monasky*, courts have applied the totality-of-the-circumstances test based on the facts and circumstances of the cases before them without making any one factor outcome determinative. *Pope* serves as a welcome reminder that Convention cases only deal with jurisdiction to allow the most appropriate court to determine custody for individual children. Overall, the new standard modernizes the habitual residence analysis under the Convention and ensures maximum flexibility to meet the various challenges and changes in modern society moving forward.