A CLARIFIED STANDARD? A CASE NOTE ON *MONASKY V. TAGLIERI*

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TABLE OF CONTENTS

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INTRODUCTION

In an increasingly globalized world, the rate of international marriages continues to rise.[1] Unfortunately, wedded bliss often gives way to separation and divorce.[2] And with the ending of a relationship comes myriad problems. When children are involved in the disintegration of the relationship, custody over the children can be a complicated issue[3]—particularly when there is an international component to the relationship. Regrettably, some parents may take custody matters into their own hands, and these situations sometimes give way to international parental child abduction, in the form of the removal or retention of a child by one parent, to a different country from where the non-taking parent resides.[4] In the most common situation, two partners, one from Country A and one from Country B,

1 LUKE J. LARSEN & NATHAN P. WALTERS, U.S. CENSUS BUREAU, MARRIED-COUPLE HOUSEHOLDS BY NATIVITY STATUS: 2011 (2013), https://www2.census.gov/library/publications/2013/acs/acsbr11-16.pdf [https://perma.cc/K5JR-EX5V] (finding that in 2011, twenty-one percent of all married-couple households in America had at least one spouse born in another country).

2 Bella DePaulo, *Divorce Rates Around the World: A Love Story*, PSYCH. TODAY (Feb. 3, 2019) (citing Cheng-Tong Lir Wang & Evan Schofer, *Coming out of the Penumbras: World Culture and Cross-National Variation in Divorce Rates*, 97 SOC. FORCES 675 (2018)), https://www.psychologytoday.com/us/blog/living-single/201902/divorce-rates-around-the-world-love-story [perma.cc/2H2S-Y6SP] ("Globally, in the nearly four decades between 1970 and 2008, the divorce rate has more than doubled, from 2.6 divorces for every 1,000 married people to 5.5. Those results are averaged across all the regions of the world . . . .").

3 Amy Cynkar, *Cooperating for Kids' Sake*, AM. PSYCH. ASS'N (June 2007), https://www.apa.org/monitor/jun07/cooperating [https://perma.cc/7EB4-XQVR] ("Bitter child custody battles can drain parents' nerves, wallets and time. In addition, research shows that parental conflict often takes a profound emotional toll on children caught in the middle, leading to increased school drop-out rates, behavior problems and mental health issues."); Jane Anderson, *The Impact of Family Structure on the Health of Children: Effects of Divorce*, 81 LINACRE Q. 378, 379 (2014) ("[O]nly 45.8 percent of children reach age 17 years while still living with their biologic parents who were married before or around the time of the child's birth.").

4 U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 2020 1 (2020).

live in Country A with their children. Following the dissolution of their romantic relationship, the partner from Country B takes the children back to his or her home country.[5]

This issue became common enough that four decades ago, the Hague Convention on the Civil Aspects of International Child Abduction was created.[6] The Hague Convention was created with the intention that it would both protect the child from the harmful effects of abduction and provide the left-behind parent with a remedy for the speedy return of his or her child.[7] However, the landscape surrounding Hague Convention cases has changed dramatically in the years following its implementation, and many cases involve complexities not initially considered by the Hague Convention's drafters.[8]

Adding to this complexity is the Hague Convention's lack of definitions for key terms. Under the Convention, a non-taking parent can only seek the return of their child if they can prove the child has been wrongfully removed from his or her "habitual residence."[9] The determination of habitual residence is thus paramount to a Hague Convention case.[10] However, the term was left undefined by the drafters

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5 JANET CHIANCONE, LINDA GIRDNER & PATRICIA HOFF, U.S. DEP'T OF JUST., ISSUES IN RESOLVING CASES OF INTERNATIONAL CHILD ABDUCTION BY PARENTS 4 (2001), https://www.ojp.gov/pdffiles1/ojjdp/190105.pdf [https://perma.cc/MEC7-45TU] ("Most left-behind parents reported that abductors had connections to the country to which the child was abducted . . . . The greatest number of abductors had family in the destination country and grew up there, and more than one-half had close friends living there. . . . It is likely that these abducting parents perceived the abduction as a return 'home,' where they would receive positive emotional support and perhaps have greater economic and employment opportunities. In addition, they would have help in caring for the abducted child.").

6 Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11,670 (entered into force Dec. 1, 1983) [hereinafter Hague Convention]; *see also* Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief—Can Something More Be Done?*, 8 N.Y. INT'L L. REV. 95, 100 (1995) ("On October 25, 1980, twenty-nine states met in The Hague, Netherlands, to address the issue of international child abduction in an attempt 'to reconcile the competing policies of national jurisdictional discretion and the deterrence of parental abduction.'" (internal citation omitted)).

7 Hague Convention, *supra* note 6, at pmbl.

8 *See infra* Section I.A.

9 Hague Convention, *supra* note 6, at art. 8.

10 Caroline Hamilton, *Who Says You Can't Go Home: Determining the Habitual Residence of Infants Under the Hague Convention*, 10 WAKE FOREST L. REV. ONLINE 1, 4 (2020) ("The Hague Convention 'places the child's habitual residence front and center.' On a practical level, habitual residence is necessary to determine whether there was wrongful conduct. On a deeper level, however, the establishment of the habitual residence of a child is the basis upon which a child gains access to the protections of the Hague Convention. The Hague Convention explicitly makes habitual residence a threshold inquiry." (internal citations omitted)).

of the Convention.[11] As a result, courts throughout the United States, and other Convention countries, have provided their own definition of habitual residence.[12] Unfortunately, in the United States, this led to a split among the circuit courts regarding the definition of habitual residence and the method for making habitual residence determinations.[13] The courts typically utilize a method emphasizing either the country in which the parents last shared an intention for the child to live or how acclimatized the child was to the last place he or she resided prior to the taking.[14]

Recently, the United States Supreme Court provided color to the habitual residence definition in the case of *Monasky v. Taglieri*.[15] In *Monasky*, discussed in detail throughout this Case Note, the Supreme Court ruled there is no categorical requirement for establishing habitual residence.[16] Rather, the Court held that no single factor is dispositive for determining a child's habitual residence and each case is a fact-sensitive inquiry that requires a "totality of the circumstances" analysis to be used.[17] This Note addresses the impact of *Monasky* on Hague Convention cases. While the Court's holding intended to end the circuits' split,[18] it is unclear whether this "totality of the circumstances" analysis will have any meaningful impact on the lower courts. Additionally, and unfortunately, to the extent that the Supreme Court's "totality of the circumstances" analysis affects lower courts' interpretation of habitual residence, one already disadvantaged group—domestic violence survivors—may be harmed further.

The Supreme Court's holding provides no meaningful guidance for how courts should weigh any factor within its analysis.[19]

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11 Morgan McDonald, *Home Sweet Home? Determining Habitual Residence Within the Meaning of the Hague Convention*, 59 B.C. L. REV. 427, 431 (2018) ("Yet the Convention does not expressly define the term 'habitual residence.'").

12 *See id.* at 429 (noting that since the adoption of the Hague Convention, courts both domestic and abroad have wrestled with defining habitual residence).

13 *See* Chantal Choi, *It Is More than Custody: The Balance Between Parental Intention and the Child's Perspective in Hague Convention Cases*, 52 SUFFOLK U. L. REV. 297, 299 (2019) ("[T]he lack of definitional guidance has caused a split within the United States courts on how to properly determine a child's habitual residence.").

14 *See infra* Section I.C.2.

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

16 *Id.* at 726.

17 *Id.* at 723, 727–28.

18 *Id.* at 725 ("We granted certiorari to clarify the standard for habitual residence, an important question of federal and international law, in view of differences in emphasis among the Courts of Appeals.").

19 *See id.* at 727 ("Because locating a child's home is a fact-driven inquiry, courts must be 'sensitive to the unique circumstances of the case and informed by common sense.'") (internal citation omitted).

Additionally, post-*Monasky* cases appear to indicate that lower courts are still applying their pre-*Monasky* framework of emphasis and analysis, continuing the pattern of inconsistency that has plagued courts in the United States since the Hague Convention was implemented.[20]

Inconsistency has also plagued the circuits in the courts' varying approaches to adjudicating cases involving domestic violence.[21] Many Hague Convention cases involve intimate partner abuse or other types of domestic violence.[22] The courts in the United States have responded in a multitude of ways to the presence of domestic violence in a Hague Convention case. In some instances, courts have determined that habitual residence may not be established if the removing spouse, and therefore the child, was coerced into a living arrangement.[23] In other cases, courts have relied on one of the Hague Convention's enumerated return defenses, the grave risk exception.[24]

Once a child has been determined to have been wrongfully removed, the child must be returned unless the respondent parent can establish one of the Hague Convention's return defenses.[25] One of these is the "grave risk" defense, which states that children cannot be returned

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20 *See, e.g.*, Farr v. Kendrick, 824 F. App'x 480 (9th Cir. 2020); Chambers v. Russell, No. 20-CV-498, 2020 WL 5044036 (M.D.N.C. Aug. 26, 2020); Rodriguez v. Lujan Fernandez, 500 F. Supp. 3d 674 (M.D. Tenn. 2020); Berenguela-Alvarado v. Castanos. 820 F. App'x 870 (11th Cir. 2020); Gallegos v. Garcia Soto, No. 20-CV-92, 2020 WL 2086554 (W.D. Tex. Apr. 30, 2020).

21 *See infra* Section I.D.2.

22 TARYN LINDHORST & JEFFREY L. EDLESON, BATTERED WOMEN, THEIR CHILDREN, AND INTERNATIONAL LAW: THE UNINTENDED CONSEQUENCES OF THE HAGUE CHILD ABDUCTION CONVENTION 105 (2012) ("[A] survey of 368 parents and three grandparents in 45 states and six countries is one of the largest and most frequently cited . . . . Overall, the majority (54%) of all the marriages in which abductions occurred involved parent-to-parent domestic violence, and 30% of the left-behind parents either admitted to being violent toward other family members or had been accused of it."); *see also* Merle Weiner, *A Note from the Guest Editor*, 25 DOMESTIC VIOLENCE REP. 1 (Oct./Nov. 2019) ("One cannot talk about international child abduction without also discussing domestic violence. The topics go hand in hand. Perpetrators of domestic violence abduct their victim's children as a way to abuse the parent. In addition, domestic violence victims 'abduct' their children when they flee for safety.").

23 *See infra* Section I.D.1.

24 *See infra* Section I.D.2.

25 Besides the grave risk defense discussed throughout this Note, there are several other defenses that may be presented and enable a court to deny the return of a child. The "mature child objection" defense allows denial of return if the child objects to being returned and has reached such an age and degree of maturity that the court takes the child's view into account. The "well-settled" defense allows a court to deny return if more than one year has passed since the wrongful removal or retention occurred and the child has become settled in his or her new environment. The "consent or acquiescence" defense permits a court to deny a child's return if the party seeking return consented to, or afterwards agreed to, the child's removal or retention. Lastly, the "public policy" defense permits a court to prevent return if such return would violate the fundamental principles of human rights and fundamental freedoms in the country where the child is being held. *See* Hague Convention, *supra* note 6, at arts. 12–13, 20.

when doing so would expose them to harm.[26] The grave risk defense is frequently invoked by parents fleeing domestic violence but it is often interpreted narrowly by the courts.[27] Many courts deny use of the grave risk defense when the abuse has only been directed at the parent and not the child.[28] However, there is a possible safeguard available to domestic violence survivors litigating Hague Convention cases. In cases that involve domestic violence, creating a definition of habitual residence that emphasizes shared parental intent would provide a safety net to survivors, forcing the courts to examine whether parents truly shared a desire to have their child habitually reside in a country or whether it was the result of an abusive and controlling partner's wishes.[29]

This Case Note argues that the Supreme Court's *Monasky* "totality of the circumstances" habitual residence definition does little to resolve the discrepancies between the circuits' interpretations of habitual residence and will leave the circuit split in largely the same position as before. This Case Note further argues that domestic violence survivors are often at a disadvantage in Hague Convention cases, and therefore proposes that shared parental intent should be a critical factor in Hague Convention cases involving domestic violence, rather than one of many factors.

This Case Note proceeds in five Parts. Part I provides background on the Hague Convention, its creation and goals, and the process by which a parent initiates a Hague Convention case.[30] Part I further explains the crucial term "habitual residence" and the role it plays in a Hague Convention case, and it discusses defenses available to a taking parent, most notably the "grave risk" defense.[31] Part II provides the facts and procedural history of *Monasky*.[32] Part III of this Case Note explains the Supreme Court's reason for hearing *Monasky*, its holding, and the new standard for habitual residence that emerged from the case.[33] Part IV discusses the failure of the *Monasky* holding to resolve the circuits'

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26 *Id.* at art. 13.

27 *See infra* Section I.D.2.

28 Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 651–52 (2000) ("At first blush, the [grave risk] defense appears useful for domestic violence victims because domestic violence between a child's parents can harm the child. While such an argument occasionally works, and it seems to be working with increasing frequency, the defense typically succeeds only in cases where there is more direct abuse of the children by the left-behind parent.").

29 *See infra* Part V.

30 *See infra* Part I.

31 *See infra* Sections I.C–I.D.

32 *See infra* Part II.

33 *See infra* Part III.

split and the impact it has had on Hague Convention litigation to date.[34] Finally, Part V explores the implication of *Monasky*'s new standard in cases involving domestic violence, and it proposes an exception to the determination of habitual residence in domestic violence-related cases.[35]

I. BACKGROUND

A. *History and Purpose of the Hague Convention on Civil Aspects of International Child Abduction*

The United States became a signatory, or Contracting State, to the Hague Convention on December 23, 1981.[36] On April 29, 1988, the United States passed the International Child Abduction Remedies Act (ICARA), which codified and implemented all provisions of the Convention.[37] ICARA is typically held to be a procedural mechanism, allowing access to the remedies provided in the Convention.[38] The Hague Convention provides assistance to a parent when the other parent unilaterally removes the child to another country.[39] The Convention was created specifically to address "the problem of international child abductions during domestic disputes."[40] The Hague Convention does not make any custody determinations, but rather allows contracting countries to adjudicate international jurisdictional disputes in the context of custody cases.[41]

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34 *See infra* Part IV.

35 *See infra* Part V.

36 Hague Convention, *supra* note 6, at Status Tbl.

37 International Child Abduction Remedies Act, Pub. L. No. 100-300, §§ 2–12, 102 Stat. 437 (1988) (codified as amended at 22 U.S.C. §§ 9001–9011) (formerly cited as 42 U.S.C. § 11601).

38 Mohsen v. Mohsen, 715 F. Supp. 1063, 1065 (D. Wyo. 1989).

39 Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L.J. 1193, 1196 (2011); Timothy L. Arcaro, *Creating a Legal Society in the Western Hemisphere to Support the Hague Convention on Civil Aspects of International Child Abduction*, 40 U. MIA. INTER-AM. L. REV. 109, 111–13 (2008).

40 Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020) (quoting Lozano v. Montoya Alvarez, 572 U.S. 1, 4 (2014)).

41 Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 L. & CONTEMP. PROBS. 209, 210–11 (1994) ("The Convention procedures do not purport to provide custody or visitation standards or to investigate the merits of custody disputes, but only to assure the return of children to their habitual residences."); Robert D. Arenstein, *How to Prosecute an International Child Abduction Case Under the Hague Convention*, 30 J. AM. ACAD. MATRIM. LAWS. 1, 1, 1 n.3 (2017) (noting that the Hague Convention has become "an

The chief purpose of the Hague Convention is to "protect children internationally from the harmful effects of their wrongful removal or retention" and it is intended to provide parents with an efficient and simplified process for the return of the abducted child.[42] Therefore, one of the Convention's primary objectives is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State," and contracting countries are usually required to swiftly return the child if the non-taking parent requests return within one year of removal.[43] The Convention stipulates that contracting countries must make an "expeditious[]" determination, with the goal being a determination within six weeks of a proceeding's initiation.[44]

The Hague Convention's swift return goal is designed to further several objectives.[45] First and foremost, any psychological trauma abducted children may experience is alleviated by their quick return.[46] Second, it acknowledges that the country of a child's habitual residence is the best forum for making custody determinations.[47] Lastly, the speedy return of a removed child is intended to discourage future abductions by ensuring the parent's removal of the child does not result in a new forum for custody or a lengthy period of removal.[48]

When signatory countries negotiated the Hague Convention, there was a clear presupposition about the kind of child abduction cases it would be used to combat.[49] The premise was that most abductions were

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indispensable tool" for resolving jurisdictional disputes about child custody between foreign countries, but is not designed to resolve custody disputes, only to solve issues of jurisdiction).

42 Hague Convention, *supra* note 6, at pmbl; William Thomas Worster, *Contracting out of* Non-Refoulement *Protections*, 27 TRANSNAT'L L. & CONTEMP. PROBS. 77, 98 (2017) ("[T]he Convention on the Civil Aspects of International Child Abduction provides simplified rules on the return of abducted children . . . .").

43 Hague Convention, *supra* note 6, at arts. 1, 11–12.

44 *See id.* at art. 11; JAMES D. GARBOLINO, FED. JUD. CTR., THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES 12 (2d ed. 2015).

45 Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1054 (2005); *see also* GARBOLINO, *supra* note 44, at ix ("The 1980 Convention serves two primary purposes: first, to deter future child abductions; and second, to provide a prompt and efficient process for the return of the child to the status quo that existed before the abduction. . . . The merits of the child custody case—what a parent's custody and visitation rights should be—are questions that are reserved for the courts of the habitual residence.").

46 Silberman, *supra* note 45, at 1054.

47 Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3336 (2009).

48 Silberman, *supra* note 45, at 1054.

49 Brenda Hale, *Taking Flight—Domestic Violence and Child Abduction*, 70 CURRENT LEGAL PROBS. 3, 4 (2017).

committed by the non-primary caretaking parent—typically a non-primary parent worried about losing custody or contact with their child following a collapse of their relationship with the primary caretaking parent.[50] In this imagined scenario, the Hague Convention's mechanisms are far more sensical. In this scenario, a child has been separated from their primary caretaker and home, and so the immediate return of the child is essential for maintaining stability and the child's well-being. However, the "typical" cases envisioned by the Hague Convention largely do not correspond to the current cases litigated under it.[51]

B. *The Hague Convention Process*

Following the removal of a child, the Convention allows the non-removing parent to file a petition in any court having jurisdiction.[52] In the United States, both state courts and federal district courts have jurisdiction.[53] This Case Note will focus primarily on federal courts' interpretation of the Hague Convention.[54]

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50 *Id.*; *see also* Weiner, *supra* note 28, at 602 (discussing "the stereotypical image" of an international child abductor as "a male non-custodial parent, usually a foreign national, who removed the child from the child's mother and primary caretaker, typically an American national").

51 NIGEL LOWE & VICTORIA STEPHENS, PART I—A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2015 UNDER THE *HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION* 3 (2018) ("[T]he large majority (80%) of taking persons were the 'primary carer' or 'joint-primary carer' of the child. Where the taking person was the mother, this figure was 91% but only 61% where the taking person was the father.").

52 22 U.S.C. § 9003(b).

53 § 9003(a).

54 Filing Hague Convention petitions in federal court is largely seen as preferable to state court and recommended by majority of practitioners. Jennifer Baum, *Ready, Set, Go to Federal Court: The Hague Child Abduction Treaty, Demystified*, A.B.A. (July 14, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/ready-set-go-fed-court-hague-child-abduction-treaty-demystified (last visited Sept. 8, 2021) (noting that while both state and federal courts have jurisdiction in Hague Convention cases, most practitioners file in federal court); *see also* KILPATRICK TOWNSEND & STOCKTON LLP & NAT'L CTR. FOR MISSING & EXPLOITED CHILD., LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 68–69 (2012), https://www.missingkids.org/content/dam/missingkids/pdfs/publications/pdf3a.pdf [https://perma.cc/5U65-2NY5] ("Many practitioners recommend that Hague Convention return cases be filed in federal district court, not state court, for the simple reason that a Hague Convention return case is not supposed to focus on the best interests of the child but on the proper forum in which such a decision should be made. Federal judges are considered by many to be better equipped to analyze that issue, as opposed to state court judges, who are accustomed to making best interests of the child determinations and who may be more inclined to do so in Hague Convention cases."); Julie A. Auerbach & Elaine Smith, *Determining Jurisdiction: Hague Convention Decides Which Country Takes Custody Cases in International Child Abductions*, 75 PHILA. LAW. 10, 10 (2012) ("[A]

The non-removing parent must show, by a preponderance of the evidence, that a child under the age of sixteen was wrongfully removed or retained from the child's place of habitual residence and that the non-removing parent has parental rights to the child.[55] A child is only wrongfully removed if the child was removed from his or her place of habitual residence.[56] If the court finds that the country the removing parent took the child from is not the child's country of habitual residence, the court will deny the Hague Convention petition and the return of the child.[57] Therefore, the determination of a child's place of habitual residence is critical to both the petitioning and responding parent.[58]

C. *Habitual Residence*

1. The Undefined Term

The Hague Convention does not provide a formal definition of habitual residence.[59] The drafters of the Convention intentionally left the term undefined, wishing to avoid a "precise, fixed definition."[60] While habitual residence is a term of art used in connection with many Hague Conferences, its use in the Convention was the first time it was used in the international child abduction context.[61] The intent was that the lack of definition would allow courts flexibility to apply appropriate solutions in a variety of cases.[62] The drafters wished to avoid a technical and rule-based definition to be sensitive to the fact-specific nature of

potential risk of filing a Hague Petition in state court is that the state courts, which routinely handle child custody cases, will not be sensitive to the distinction between a Hague case, which deals with a jurisdictional issue, and a best interests determination required in a typical custody case. Federal courts, which do not routinely handle custody cases, may consequently be more inclined to follow the letter of The Hague Convention law and not slip into a best interests determination.").

55 § 9003(e).

56 Hague Convention, *supra* note 6, at art. 3.

57 § 9003(e).

58 Tristan Medlin, Comment, *Habitually Problematic: The Hague Convention and the Many Definitions of Habitual Residence in the United States*, 30 J. AM. ACAD. MATRIM. LAWS. 241, 242 (2017); *see also* Vivatvaraphol, *supra* note 47, at 3327.

59 Jeff Atkinson, *The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 OKLA. L. REV. 647, 648 (2011).

60 *Id.* at 648–49.

61 Vivatvaraphol, *supra* note 47, at 3338–39.

62 *Id.*

parental abduction cases.[63] However, as a result, signatory countries, and the courts within them, grapple with defining habitual residence.[64] While the lack of definition has "helped courts avoid formalistic determinations," it has also unfortunately "caused considerable confusion as to how courts should interpret 'habitual residence.'"[65]

2. The Varying Circuit Approaches to Habitual Residence

Contracting countries to the Hague Convention, and different courts within the United States, utilize a varying range of habitual residence definitions.[66] The circuit courts apply one of three general approaches.[67] These approaches are typically referred to by the keystone cases that defined them and will be referenced as such throughout the entirety of this Case Note. The approaches each circuit follows are differentiated by which factors a court chooses to emphasize in its determination and analysis.[68] The Supreme Court, in its *Monasky* holding, intended to resolve this decades-long split.[69]

The most common of the three approaches to habitual residence is the *Mozes* approach, which originated from the Ninth Circuit and is used by a majority of the circuits: the First, Second, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits.[70] The *Mozes* approach focuses

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63 *Id.*; *see also* Atkinson, *supra* note 59, at 649.

64 Ann Laquer Estin, *The Hague Abduction Convention and the United States Supreme Court*, 48 FAM. L.Q. 235, 247 (2014) ("The Convention question that has seen the most appellate litigation and petitions for certiorari concerns the definition of habitual residence under the Abduction Convention. This has been a subject of ongoing debate among the federal courts of appeal and in other Convention countries as well.").

65 Holder v. Holder, 392 F.3d 1009, 1015 (9th Cir. 2004); *see also* McDonald, *supra* note 11, at 431 ("The omission of a singular definition was intentional, designed in part to help courts avoid formalistic determinations, but the lack of clarity has resulted in diverging views among United States courts about the proper way to determine a child's habitual residence.").

66 Gregory A. Splagounias, *Habitual Residence Under Hague Convention Equated with Ordinary Residence,* Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993), 18 SUFFOLK TRANSNAT'L L. REV. 823, 827–28 (1995).

67 Erin Gallagher, *A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence*, 47 N.Y.U. J. INT'L L. & POL. 463, 477 (2015) ("[There is] a three-way split between the U.S. Circuit Courts of Appeals, with nearly every Circuit offering an opinion on how to determine a child's habitual residence in Convention cases.").

68 Joe Digirolamo & Manal Cheema, Monasky v. Taglieri*: The (International) Case for a "True" Hybrid Approach*, 60 VA. J. INT'L L. ONLINE 1, 5–12 (2020).

69 Monasky v. Taglieri, 140 S. Ct. 719, 725 (2020) ("We granted certiorari to clarify the standard for habitual residence, an important question of federal and international law, in view of differences in emphasis among the Courts of Appeals.").

70 Mozes v. Mozes, 239 F.3d 1067, 1074–81 (9th Cir. 2001); *see* Nicolson v. Pappalardo, 605 F.3d 100, 103–04 (1st Cir. 2010); Gitter v. Gitter, 396 F.3d 124, 134 (2d Cir. 2005); Maxwell v. Maxwell, 588 F.3d 245, 251 (4th Cir. 2009); Larbie v. Larbie, 690 F.3d 295, 310–11 (5th Cir. 2012);

first on shared parental intent and then on acclimatization.[71] Courts that follow *Mozes* typically utilize a two-pronged approach.[72] The first prong seeks to establish the last shared intentions of the parents as to the child's residence.[73] The court then turns to the second prong, which seeks to determine whether there was an actual change in geography for a significant amount of time, specifically a period significant enough for a child to acclimatize to a new environment.[74] Under the *Mozes* approach, the emphasis is on shared parental intent and the first prong largely controls the determination of habitual residence.[75] Therefore, typically, in order for a habitual residence to be determined that is in conflict with the shared parental intent, or in the absence of shared parental intent, sufficient facts must exist that demonstrate a child has acclimatized to a new country.[76]

The *Feder* approach focuses chiefly on acclimatization, although some degree of consideration is given to shared parental intent.[77] The Third and Eighth Circuits follow the *Feder* approach.[78] *Feder* courts tend to place an emphasis on the child's age and maturity in their analyses. When the child in question is very young, the courts tend to deemphasize acclimatization, and conversely, when the child is older and therefore able to form meaningful connections with his or her environment, tend to emphasize acclimatization.[79]

Lastly, the *Friedrich* approach focuses on child-centric factors, with no inquiry into parental intent.[80] This approach is used solely by the Sixth Circuit, which has expressly disavowed the *Mozes* approach.[81] Under the *Friedrich* approach, the court looks at connections the child had with the environment he or she was physically present in and the inquiry "focus[es] on the child, not the parents, and examine[s] past experience, not future intentions."[82] Although only child-focused factors are considered under the *Friedrich* standard, the Sixth Circuit has recognized "that a very young or developmentally disabled child

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Koch v. Koch, 450 F.3d 703, 715 (7th Cir. 2006); Ruiz v. Tenorio, 392 F.3d 1247, 1252–53 (11th Cir. 2004).

71 *Mozes*, 239 F.3d at 1075–78.

72 *Id.*; *see also Gitter*, 396 F.3d at 134; *Ruiz*, 392 F.3d at 1252–53.

73 Gallagher, *supra* note 67, at 477–78.

74 *Id.*

75 Digirolamo & Cheema, *supra* note 68, at 6–7.

76 *Id.*

77 Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995).

78 *Id.*; Sorenson v. Sorenson, 559 F.3d 871, 873–74 (8th Cir. 2009).

79 *See, e.g.*, Whiting v. Krassner, 391 F.3d 540, 550–51 (3d Cir. 2004).

80 Friedrich v. Friedrich, 983 F.2d 1396, 1401–03 (6th Cir. 1993).

81 Gallagher, *supra* note 67, at 484.

82 *Friedrich*, 983 F.2d at 1401.

may lack cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose."[83]

There are instances in which a child may be found not to have a country of habitual residence.[84] In these instances, the Hague Convention protections and retrievals are not applicable since the child has not been wrongfully removed from their habitual residence.[85] These cases commonly involve instances in which the child was born in a country where the mother was temporarily present and was not the country of habitual residence for either parent, or cases in which the parents' relationship was in conflict prior to or at the child's birth.[86] While the absence of a habitual residence leaves a child outside the protection of the Hague Convention, it is, on rare occasions, unavoidable. As the Ninth Circuit has succinctly stated, "[I]f an attachment to a State does not exist, it should hardly be invented."[87]

D. *The Impact of Domestic Violence in Hague Convention Cases*

Over half of Hague Convention cases involve a partner who has fled due to the presence of domestic violence in their home or relationship.[88] In these cases, domestic violence may play a part, either as a factor in the court's determination of habitual residence or as a defense to the return of a child, or both.

1. A Controlling Partner's Effect on Habitual Residence

In courts that do consider parental intent in their habitual residence determination, one factor that has raised concern is when one

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83 Robert v. Tesson, 507 F.3d 981, 992 n.4 (6th Cir. 2007) (citing *Whiting*, 391 F.3d at 550).

84 *See* sources cited *infra* note 86.

85 Hamilton, *supra* note 10, at 22–23.

86 *See* E.R.S.C. v. Carlwig (*In re* A.L.C.), 607 F. App'x 658, 662–63 (9th Cir. 2015) (finding an infant child had no habitual residence because the child was born during the mother's temporary stay in the United States and the parents had no shared intention to reside in the United States beyond the mother's recovery period from the birth); Holmes v. Holmes, 887 F. Supp. 2d 755, 758–59 (E.D. Mich. 2012) (finding that the child had no habitual residence at time of removal because the parents had only traveled to the country of the child's birth to receive health care during the birth, and there was no intention for the stay in the country to be permanent); Delvoye v. Lee, 329 F.3d 330, 333 (3d Cir. 2003) ("[W]here the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence.").

87 *In re* A.L.C., 607 F. App'x at 662 (quoting Holder v. Holder, 392 F.3d 1009, 1020 (9th Cir. 2004)).

88 *See* LINDHORST & EDLESON, *supra* note 22, at 105.

parent has "dominated decisions and controlled information" in the relationship.[89] In a number of these cases, courts have held that parental intent is not present due to the abuse and coercion of the controlling parent.

For example, in *Tsarbopoulos v. Tsarbopoulos*—perhaps the leading case on coercive control and habitual residence[90]—the court found the parents did not share a settled intent as to the habitual residence of their children, due to the controlling and abusive nature of the father toward the mother.[91] In this case, the Tsarbopoulos family moved from the United States to Greece for the husband's employment.[92] The court found that the husband "so dominated decisions and controlled information in the marriage" that the wife lacked key information about the family's situation in Greece, and this, coupled with the husband's physical abuse and financially controlling nature, prevented the children from having a habitual residence in Greece.[93]

Similarly, in *In re Ponath*, the court found the child did not have a habitual residence in Germany, as the child's presence in the country was the result of the father's coercive control and abuse of the mother.[94] The family (the child was sixteen weeks old at the time) had originally traveled to Germany for a three-month visit with the husband's family. Although the mother wished to return to the United States, the father did not allow them to do so, employing a combination of physical, verbal, and emotional abuse to keep them there.[95]

Finally, in *Maxwell v. Maxwell*, the family moved to Australia from the United States and, approximately two months later, the mother removed the children back to the United States.[96] The court found that the children's habitual residence had not been changed to Australia by the move, in part because the husband, despite the wife's desire to leave Australia, withheld the children's passports and threatened the wife

89 Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1055 (E.D. Wash. 2001); *accord* Chafin v. Chafin, No. CV-11-J-1461, 2011 WL 13233206, at *3 (N.D. Ala. Oct. 13, 2011); Koch v. Koch, 450 F.3d 703, 709 (7th Cir. 2006).

90 *See* Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115, 131 (2005) (noting the idea that "coerced residence is not habitual residence" is clearly illustrated in *Tsarbopoulos*).

91 *Tsarbopoulos*, 176 F. Supp. 2d at 1056–57.

92 *Id.* at 1051.

93 *Id.* at 1055.

94 *In re* Ponath, 829 F. Supp. 363, 367–68 (D. Utah 1993).

95 *Id.* at 366.

96 Maxwell v. Maxwell, No. 08-CV-254, 2008 WL 4129507, at *4–5 (W.D.N.C. Sept. 2, 2008).

with kicking her out of the house or having her arrested if she left with the children.[97]

2. Grave Risk Exception

If a child is determined to have been wrongfully removed, the child must be returned unless the removing parent can establish one of the Hague Convention's enumerated defenses.[98] One of these defenses is the Article 13(b) "grave risk" exception. The grave risk defense permits the refusal of a return order if "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."[99]

Since there is no defense for removal due to domestic violence, the grave risk exception is commonly invoked in cases involving domestic violence.[100] However, grave risk, like habitual residence, is an undefined term that requires the courts to provide their own definitions.[101] Additionally, the grave risk defense is historically interpreted narrowly.[102] The respondent also carries the burden of proof to establish an affirmative defense of grave risk.[103]

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97 *Id.* at *9.

98 Hague Convention, *supra* note 6, at arts. 12–13, 20.

99 *Id.* at art. 13(b).

100 Kyle Simpson, *What Constitutes a "Grave Risk of Harm?": Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 GEO. MASON L. REV. 841, 850 (2017) ("When petitioned under the Convention to return their children, victims of domestic violence frequently utilize the Article 13(b) 'grave risk of harm' defense. There is evidence that the drafters of the Convention intended for Article 13(b) to be utilized in such situations.").

101 Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J. MARSHALL L.J. 39, 62 (2011).

102 Elisa Pérez-Vera, *Explanatory Report on the 1980 HCCH Child Abduction Convention*, *in* 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 426, 434 (1980) ("[I]t would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter."); Public Notice 957, 51 Fed. Reg. 10494-01, 10509 (Mar. 26, 1986) ("In drafting Articles 13 and 20, the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly . . . . [I]t was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions . . . .").

103 *See* Williams, *supra* note 101, at 64.

3. The Grave Risk Exception Is Insufficient in Domestic Violence Situations

In cases involving domestic violence, the courts have largely been guided by the definition of grave risk put forth by the Sixth Circuit in *Friedrich v. Friedrich*: "[T]here is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."[104] In interpreting this standard, courts have come to differing approaches regarding grave risk in domestic violence situations.[105] Some courts refuse to recognize a grave risk defense when the domestic violence is limited to abuse between the parents and does not extend to the children.[106] Other courts view intimate partner domestic violence as creating a grave risk of harm to the children in the home.[107]

In courts that have taken the former stance, domestic violence only fulfills the grave risk defense where there is evidence of a "pattern of physical abuse and/or a propensity for violent abuse. . . . [toward the child, as opposed to] [e]vidence of sporadic or isolated incidents of abuse, or of some limited incidents aimed at persons other than the child at issue."[108] Many courts also require that the abuse not be "relatively minor" and "demonstrate a connection between the grave

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104 Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

105 There is also an existing split among the circuits about whether a determination of "grave risk" in a case of abuse also requires an examination of whether the courts in the country of habitual residence may be capable of providing adequate protection to the child upon return, which is outside the scope of this Note. *See* Van De Sande v. Van De Sande, 431 F.3d 567, 570–72 (7th Cir. 2005); *Friedrich*, 78 F.3d at 1068; Blondin v. Dubois, 238 F.3d 153, 162 (2d Cir. 2001); *In re* Adan, 437 F.3d 381, 388 (3d Cir. 2006); Acosta v. Acosta, 725 F.3d 868, 877 (8th Cir. 2013).

106 *See* Rial v. Rijo, No. 10-CV-01578, 2010 WL 1643995, at *2–3 (S.D.N.Y. Apr. 23, 2010) (holding that no grave risk was present, despite evidence of verbal and some physical abuse, occurring sometimes in front of the child, because the petitioner agreed to rent an apartment and provide financial support to the respondent in the habitual residence country); Gaudin v. Remis, 415 F.3d 1028, 1037 (9th Cir. 2005) ("[E]ven a living situation capable of causing grave psychological harm over the full course of a child's development is not necessarily likely to do so during the period necessary to obtain a custody determination."); Kevin Wayne Puckett, Comment, *Hague Convention on International Child Abduction: Can Domestic Violence Establish the Grave Risk Defense Under Article 13*, 30 J. AM. ACAD. MATRIM. LAWS. 259, 266–69 (2017).

107 *See* Ermini v. Vittori, 758 F.3d 153, 164 (2d Cir. 2014) ("Spousal violence, in certain circumstances, can also establish a grave risk of harm to the child, particularly when it occurs in the presence of the child."); Gomez v. Fuenmayor, 812 F.3d 1005, 1014 (11th Cir. 2016) (holding that "a child's proximity to actual or threatened violence may pose a grave risk to the child" and that "sufficiently serious threats to a parent can pose a grave risk of harm to a child"); *see also* Puckett, *supra* note 106, at 264–66.

108 Laguna v. Avila, No. 07-CV-5136, 2008 WL 1986253, at *8 (E.D.N.Y. May 7, 2008).

risk to [the parent] and the grave risk to the child."[109] Additionally, some courts require an imminentness of harm for a grave risk defense.[110]

These demanding standards often result in great difficulty for domestic violence survivors seeking to use the grave risk defense. For instance, in *Neumann v. Neumann*, the Sixth Circuit remanded the case for a determination of grave risk, despite credible testimony that the husband threatened the wife with a knife, holding it to her neck in the presence of their children.[111] Similarly, in *Norinder v. Fuentes*, the court held the mother failed to prove a grave risk defense, even after demonstrating that the father had a history of violence and drug addiction.[112]

While the Hague Convention drafters' intention to leave habitual residence as a loose term was well intentioned, it has created a multitude of problems for the courts and a lack of clarity for litigants. It is these concerns that motivated the Supreme Court to grant certiorari in *Monasky v. Taglieri*.

II. FACTS AND PROCEDURAL HISTORY OF *MONASKY V. TAGLIERI*

A. *Background*

Michelle Monasky and Domenico Taglieri met and married in the United States, Monasky's home country.[113] In 2013, they moved to Italy, Taglieri's home country, to pursue career opportunities.[114] During this time, issues of abuse began to arise in their relationship.[115] Taglieri became physically and sexually abusive, slapped or hit Monasky frequently, and became increasingly aggressive with sex.[116] Taglieri forced sex upon her on multiple occasions, one of which resulted in her

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109 *See* Puckett, *supra* note 106, at 266–67; *accord Acosta*, 725 F.3d at 876–77.

110 *Gaudin*, 415 F.3d at 1037 ("[B]ecause the Hague Convention provides only a provisional, short-term remedy in order to permit long-term custody proceedings to take place in the home jurisdiction, the grave-risk inquiry should be concerned only with the degree of harm that could occur in the immediate future. . . . [E]ven a living situation capable of causing grave psychological harm over the full course of a child's development is not necessarily likely to do so during the period necessary to obtain a custody determination.").

111 Neumann v. Neumann, 684 F. App'x 471, 474–75, 484 (6th Cir. 2017).

112 Norinder v. Fuentes, 657 F.3d 526, 535 (7th Cir. 2011).

113 Monasky v. Taglieri, 140 S. Ct. 719, 724 (2020).

114 Taglieri v. Monasky, 876 F.3d 868, 871 (6th Cir. 2017).

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

116 *Id.* at 729 ("[T]he District Court credited Monasky's 'deeply troubling' allegations of her exposure to Taglieri's physical abuse."); *Taglieri*, 876 F.3d at 871–74.

pregnancy with their daughter.[117] The abuse continued up to and following the birth of their daughter, referred to as A.M.T., in February 2015.[118] After one particularly heated argument, Monasky fled the home with A.M.T. and went to the police.[119] She told officers that Taglieri was abusive and that she feared for her life, and she was subsequently placed in a safe house.[120] Following this incident, Monasky left Italy with A.M.T., then eight weeks old, for the United States.[121] While Taglieri acknowledged only "smacking" Monasky on one occasion, the district court found Monasky's testimony regarding Taglieri's domestic abuse to be credible.[122]

Following Monasky's departure from Italy, Taglieri began proceedings in an Italian court.[123] The Italian court, with Monasky absent from the country, terminated Monasky's parental rights.[124]

B. *Procedural History*

On May 15, 2015, Taglieri petitioned for the return of A.M.T. under the Hague Convention, on the ground that Italy was his daughter's habitual residence.[125] The district court case turned on whether A.M.T. ever acquired a habitual residence in any country, given that she was only eight weeks old at the time Monasky departed Italy with her and the significant breakdown of Monasky and Taglieri's relationship before and after A.M.T.'s birth.[126] Taglieri argued Italy was his daughter's place of habitual residence as both he and Monasky had decided to move to and start a life there.[127] Monasky attempted to refute Taglieri's petition by arguing that A.M.T. had no habitual residence at the time they left Italy because the couple's life in Italy was not settled, their marriage had irrevocably broken down, and, more significantly,

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117 Taglieri v. Monasky, 907 F.3d 404, 406–08 (6th Cir. 2018) (en banc) (noting both Monasky's testimony about Taglieri's abuse and that the court leaves "fact finding to the district court").

118 Taglieri v. Monasky, No. 15-CV-947, 2016 WL 10951269, at *1–3 (N.D. Ohio Sept. 14, 2016).

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

120 *Id.*

121 *Id.*

122 Taglieri v. Monasky, 876 F.3d 868, 871, 878 (6th Cir. 2017).

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

124 *Id.*

125 *Id.*

126 Taglieri v. Monasky, No. 15-CV-947, 2016 WL 10951269, at *7–8 (N.D. Ohio Sept. 14, 2016).

127 *Id.* at *7.

because she and Taglieri had no agreement or shared intent to raise A.M.T. there.[128] The district court rejected Monasky's argument and determined Italy to be A.M.T.'s habitual residence, granting Taglieri's petition and ordering the return of A.M.T. to Italy within forty-five days of the decision.[129] The court noted that Monasky and Taglieri had "established a marital home in Italy," that Monasky had planned to live in Italy indefinitely, and that the conflicts between Monasky and Taglieri did not prevent the finding of a habitual residence.[130]

Monasky appealed the district court decision.[131] The Sixth Circuit, in both a divided judicial panel opinion and a divided en banc court, affirmed.[132] The dissenting en banc judges noted that a precedential Sixth Circuit opinion published after the district court decided Monasky's case, *Ahmed v. Ahmed*,[133] established that an infant's habitual residence depends on shared parental intent.[134] These judges noted that they would have remanded the case to reconsider A.M.T.'s habitual residence following the *Ahmed* decision.[135] Monasky appealed to the Supreme Court.[136]

C. *Monasky's "Actual Agreement" Argument*

One of Monasky's main arguments—throughout the entirety of the case, including at the Supreme Court—was that actual agreement between both parents on where to raise a child is necessary to determine an infant child's habitual residence.[137] The actual agreement standard deployed and advocated for by Monasky involves a step further than the "shared parental intent" standard that most courts have previously adhered to.[138] Notably, Monasky's actual agreement standard would

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128 *Id.* at *7–8.

129 *Id.* at *14.

130 *Id.* at *10.

131 Taglieri v. Monasky, 907 F.3d 404 (6th Cir. 2018).

132 *Id.*; Taglieri v. Monasky, 876 F.3d 868 (6th Cir. 2017).

133 Ahmed v. Ahmed, 867 F.3d 682 (6th Cir. 2017).

134 *Taglieri*, 907 F.3d at 417 (Moore, J., dissenting) ("[W]hen a child is so young, or developmentally disabled, as to 'lack the cognizance to acclimate to any residence,' the acclimatization standard is unworkable. If that is the case, then we instead use the shared parental intent standard." (quoting *Ahmed*, 867 F.3d at 690)).

135 *Id.* at 416 (Moore, J., dissenting); *id.* at 422 (Gibbons, J., dissenting); *id.* at 423 (Stranch, J., dissenting).

136 Monasky v. Taglieri, 140 S. Ct. 719, 725 (2020).

137 *Id.* at 729.

138 Ann Laquer Estin, *Where Is the Child at Home? Determining Habitual Residence After* Monasky, 54 FAM. L.Q. 127, 133 (2020) ("[N]one of the 18 judges who heard the case on appeal

require expressed actual agreement between the parents to establish an infant's habitual residence.[139] The shared parental intent used by most courts involves an analysis of objective factors to determine whether there was a shared intent between the parents to raise their child in one country.[140]

Monasky asserted that an actual agreement requirement would help ensure proper application of habitual residence, promote prompt return of children, and protect children born into homes where domestic violence is present.[141] Monasky argued that an actual agreement standard provides a distinct protection in cases involving domestic violence.[142] Specifically, an actual agreement would ensure that an abusive parent is not able to create a child's habitual residence by way of coercing or forcing the other parent to reside, give birth, or raise a child in another country.[143] Additionally, Monasky argued that a lack of an actual agreement requirement would deter domestic violence survivors from leaving their abusive partners "out of fear that the children would be returned under the Hague Convention and that, like Monasky, the abused parents would lose all custody rights under the laws of the country to which the children were returned."[144]

An actual agreement standard would be stricter than the shared parental intent standard, which does not require present mutual agreement between the parents.[145] However, Monasky's argument about the unique protection parental agreement affords domestic violence survivors is applicable to the shared parental intent standard. As discussed above,[146] a number of cases have utilized shared parental intent to deny Hague Convention petitions when one parent is found

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agreed with the argument that establishing the habitual residence of an infant should require proof of an 'actual agreement' between the parents.").

139 *Id.* (noting that Monasky's actual agreement argument "require[ed] proof that the parents had reached a subjective agreement, or 'meeting of the minds,' about the child's future home"); *Monasky*, 140 S. Ct. at 728–29.

140 *See supra* Section I.C.2.

141 *Monasky*, 140 S. Ct. at 729.

142 Brief for Petitioner at 43–44, *Monasky*, 140 S. Ct. 719 (No. 18-935); *see also* Olivia Claire Dobard, Comment, *The Supreme Court Addresses International Child Abduction Under the Hague Convention*, 32 J. AM. ACAD. MATRIM. LAWS. 435, 457 (2020) ("Monasky believed the actual agreement would protect children in instances of domestic violence, who are highly vulnerable to forum shopping. Support groups for Monasky, such as Sanctuary for Families, raised concerns that domestic violence often occurs in international abduction cases and children should not be ordered to return to abusive situations.").

143 Brief for Petitioner, *supra* note 142, at 43–44.

144 *Id.* at 44.

145 Gitter v. Gitter, 369 F.3d 124, 133 (2d Cir. 2005).

146 *See supra* Section I.D.1.

to be abusive and controlling or when a child is too young for a determination of habitual residence to be made.[147]

III. THE SUPREME COURT'S HOLDING AND THE "TOTALITY OF THE CIRCUMSTANCES" STANDARD

On June 10, 2019, the United States Supreme Court granted Monasky's writ of certiorari to determine whether actual agreement between parents is necessary to determine habitual residence for an infant.[148] Additionally, and more significantly, the Court granted certiorari to end the longstanding split among the circuit courts and to establish a standard for habitual residence.[149] The Court found that actual agreement between parents is not required and that habitual residence depends on the totality of the circumstances in each case, with no one factor being dispositive.[150]

The Court's "totality of the circumstances" standard provided sparse direction on how lower courts should view, weigh, and balance factors within a Hague Convention case for young children.[151] The Court identified factors to be considered for older children, principally factors related to acclimatization, such as:

> "a change in geography combined with the passage of an appreciable period of time," "age of the child," "immigration status of child and parent," "academic activities," "social engagements," "participation in sports programs and excursions," "meaningful connections with the people and places in the child's new country," "language proficiency," and "location of personal belongings."[152]

The Court acknowledged that almost none of these factors are relevant to or helpful in making habitual residence determinations for infant children.[153] While the Court did categorize the "intentions and circumstances of caregiving parents" as "relevant considerations" for young children, the Court assigned them no particular weight and did

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147 *See* Ahmed v. Ahmed, 867 F.3d 682, 690 (6th Cir. 2017); Delvoye v. Lee, 329 F.3d 330, 333 (3d Cir. 2003).

148 Monasky v. Taglieri, 139 S. Ct. 2691 (2019) (granting Monasky's petition for writ of certiorari); Monasky v. Taglieri, 140 S. Ct. 719, 725–26 (2020).

149 *Monasky*, 140 S. Ct. at 725–26; *see also supra* Section II.B.

150 *Monasky*, 140 S. Ct. at 726–27.

151 Melissa A. Kucinski, *The Future of Litigating an International Child Abduction Case in the United States*, 33 J. AM. ACAD. MATRIM. LAWS. 31, 38 (2020) (noting that the Court's habitual residence analysis allows judges to use "their 'common sense' and discretion on how to weigh any given fact in the family's situation").

152 *Monasky*, 140 S. Ct. at 727 n.3 (quoting GARBOLINO, *supra* note 44, at 67–68).

153 *Id.* at 727 (noting that "children, especially those too young," are unable to acclimate).

not identify any further factors.[154] The Court noted that some cases would be "straightforward" to determine, but provided no assessment for how factors should be weighed in complicated cases such as *Monasky*.[155]

The Court's opinion touched on the troubling nature of domestic violence in Hague Convention cases.[156] However, the Court dismissed the need to work protection for children of domestic violence fleeing parents into the definition of habitual residence.[157] The Court noted domestic violence was an issue best left to custody adjudications, as Hague Convention petition proceedings are explicitly not meant to make custody determinations,[158] and it noted that the Article 13(b) defense already provides recourse in domestic violence situations.[159]

IV. ANALYSIS

A. *The "Totality of the Circumstances" Standard Provides Lower Courts with No Guidance*

While the Supreme Court explicitly granted certiorari in *Monasky* to resolve the definition of habitual residence, the Court's "totality of the circumstances" analysis will likely not create a uniform standard across the courts. While the Court made it clear that parental intent should continue to be a factor in a court's determination of an infant's habitual residence, it made equally clear that parental intent, or any other factor, was not a dispositive element.[160] This analysis provides sparse assistance to lower courts in determining which factors are consistently most significant in a habitual residence determination.[161] Unfortunately, particularly in cases involving young children, this lack

154 *Id.*

155 *See id.*

156 *Id.* at 729.

157 *Id.* ("Monasky and amici curiae raise a troublesome matter: An actual-agreement requirement, they say, is necessary to protect children born into domestic violence. Domestic violence poses an 'intractable' problem in Hague Convention cases involving caregiving parents fleeing with their children from abuse. We 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." (internal citations omitted)).

158 Hague Convention, *supra* note 6, at arts. 16, 19.

159 *Monasky*, 140 S. Ct. at 729.

160 *Id.* at 728.

161 *See* Abou-Haidar v. Sanin Vazquez, 945 F.3d 1208, 1220 (D.C. Cir. 2019) (describing a totality of the circumstances approach as "relatively unguided").

of any directive about which factors to weigh most heavily may frustrate one of the Supreme Court's goals in deciding *Monasky*.[162]

In the absence of a more defined standard, lower federal courts will likely continue to analyze Hague Convention cases under their pre-*Monasky* framework. To date, *Monasky* has been cited in over twenty-five federal cases.[163] In a number of these cases, the courts have directly applied their pre-*Monasky* analysis despite the new totality of the circumstances standard.

For example, in *Berenguela-Alvarado v. Castanos*, the Eleventh Circuit maintained that the district court's pre-*Monasky* determination conformed to a "totality of the circumstances" analysis.[164] In *Berenguela-Alvarado*, the court of appeals examined an appeal from the father, following a district court decision granting the mother's Hague Convention petition and finding that their young daughter had been wrongfully retained in the United States.[165] The father's appeal partially rested upon the fact that the district court's decision was issued the same day as *Monasky v. Taglieri*.[166] The father thus argued that the district court's habitual residence determination was not based on a "totality of circumstances" analysis.[167] The court of appeals held that the Eleventh Circuit's pre-*Monasky* precedent complied with a *Monasky* totality of the circumstances approach.[168] The court specifically noted that Eleventh Circuit precedent did not "rely on any sort of 'actual agreement' requirement" and "focus[ed] on the existence or non-existence of a settled intention to abandon the former residence in favor of a new residence, coupled with an actual change in geography and the passage of a sufficient length of time for the child to have become acclimatized."[169]

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162 Kucinski, *supra* note 151, at 39 ("The concern about the new, very flexible, very discretionary standard is that it will no doubt lead to new and additional litigation, may lengthen and complicate the case that both parties need to present to a court, and may prolong resolutions for minor children, working against the goal of a prompt resolution under the 1980 Convention.").

163 *Monasky v. Taglieri Citing References*, WESTLAW, https://1.next.westlaw.com (search "Monasky v. Taglieri 140 S. Ct. 719" in the search bar; then choose the top result; then choose "citing references"); *Shepard's Monasky v. Taglieri, 140 S. CT. 719: Citing Decisions*, LEXIS+, https://plus.lexis.com (type "Monasky v. Taglieri 140 S. Ct 719" into the search bar; then choose "Citing Decisions") (last visited Sept. 28, 2021) (listing *Monasky v. Taglieri* as being cited sixty-three times).

164 Berenguela-Alvarado v. Castanos, 820 F. App'x 870, 873 (11th Cir. 2020).

165 *Id.* at 871–72.

166 *Id.* at 872.

167 *Id.* at 872–73.

168 *Id.* at 873.

169 *Id.*

Relatedly, in *Chambers v. Russell*, although the case was decided post-*Monasky*, the court applied the same analysis to a Hague Convention case it had pre-*Monasky*.[170] *Chambers* is a case from the Middle District of North Carolina, which is part of the Fourth Circuit.[171] In *Chambers*, the parties were coparents of a thirteen-year-old boy.[172] The son lived in Jamaica and the father lived in the United States.[173] In 2019, the father retained him in the United States following a summer visitation trip.[174] The court based their habitual residence analysis on the two-part framework that the Fourth Circuit had established.[175] The two-pronged approach of the Fourth Circuit first analyzes "whether the parents shared a settled intention to abandon the former country of residence," and then determines "whether there was 'an actual change in geography' coupled with the 'passage of an appreciable period of time, one sufficient for acclimatization by the [child] to the new environment.'"[176] The court held that *Monasky* did not overturn the two-pronged approach and thus the court would still apply it.[177] The court then engaged in an analysis of: (i) shared parental intent and (ii) actual change in geography, and it based its determination of habitual residence principally on those two factors.[178]

Similarly, in *Rodriguez v. Lujan Fernandez*, the trial court continued to analyze a Hague Convention case under its pre-*Monasky* framework.[179] *Rodriguez* arises from the Middle District of Tennessee, which is part of the Sixth Circuit.[180] In *Rodriguez*, the mother and father lived together in Mexico and the United States at varying times.[181] After several periods of on-and-off separation, the mother remained with the child in the United States and the father filed a Hague Convention petition seeking the child's return to Mexico.[182] While the court noted that *Monasky* requires a totality of the circumstances examination, it then immediately applied the Sixth Circuit's acclimatization test.[183] The

170 *See* Chambers v. Russell, No. 20-CV-498, 2020 WL 5044036 (M.D.N.C. Aug. 26, 2020).

171 *Id.*

172 *Id.* at *1.

173 *Id.*

174 *Id.* at *2–3.

175 *Id.* at *4; *see* Maxwell v. Maxwell, 588 F.3d 245, 251 (4th Cir. 2009).

176 *Maxwell*, 588 F.3d at 251 (quoting Papakosmas v. Papakosmas, 483 F.3d 617, 622 (9th Cir. 2007)).

177 *Chambers*, 2020 WL 5044036, at *5.

178 *Id.* at *5–7.

179 Rodriguez v. Lujan Fernandez, 500 F. Supp. 3d 674 (M.D. Tenn. 2020).

180 *Id.*

181 *Id.* at 680–81.

182 *Id.*

183 *Id.* at 700–01.

court additionally listed the Sixth Circuit's pre-*Monasky* five enumerated principles for determining habitual residence and noted at several instances that the court does not focus on parents' shared intent.[184] This lack of emphasis on shared parental intent is a touchstone of the Sixth Circuit's pre-*Monasky* habitual residence framework.

Lastly, *Gallegos v. Garcia Soto* is a case from the Western District of Texas, which is part of the Fifth Circuit.[185] In *Gallegos*, the father sought the return of his five-year-old child to Mexico, following the child's removal by the mother to Texas.[186] The mother testified that the father had repeatedly sexually assaulted her over the course of a year.[187] Additionally, she testified that the father and his family controlled her movements and ability to leave the house and neighborhood where she resided in Mexico.[188] The district court held that *Monasky* complemented existing Fifth Circuit precedent, finding that the Fifth Circuit's "habitual residence" determination "balances the interests of the child" and "the intentions of the child's parents."[189] The court further explained that a Fifth Circuit habitual residence determination begins with a focus on "'the parents' shared intent or settled purpose regarding their child's residence' and gives greater weight to the parents' intentions when the child is young."[190]

Prior to *Monasky*, the chief difference among the courts was the emphasis that each court placed on different factors, primarily whether a court chose to place more emphasis on shared parental intent or the child's acclimatization.[191] As demonstrated by the cases decided thus far, courts have continued to apply these varying standards of emphasis.[192] The courts are likely to continue in this methodology, creating the same lack of uniformity issues as before.[193] Without more

184 *Id.* at 702.

185 Gallegos v. Garcia Soto, No. 20-CV-92, 2020 WL 2086554 (W.D. Tex. Apr. 30, 2020).

186 *Id.* at *1.

187 *Id.* at *2.

188 *Id.*

189 *Id.* at *3.

190 *Id.* (quoting Larbie v. Larbie, 690 F.3d 295, 310 (5th Cir. 2012)).

191 *See supra* Section I.C.2.

192 *See supra* text accompanying notes 164–90; *see also* Farr v. Kendrick, 824 F. App'x 480, 481–82 (9th Cir. 2020) (matching lower court's pre-*Monasky* analysis almost precisely).

193 Estin, *supra* note 138, at 139 ("But in many cases, in all of the circuits, the evidence and analysis will not change significantly as courts embrace the new standard."); *see also* Valentina Shaknes & Justine Stringer, *SCOTUS "Clarifies" "Habitual Residence" Under the Hague Convention*, N.Y.L.J. (July 24, 2020, 3:04 PM), https://www.law.com/newyorklawjournal/2020/07/24/scotus-clarifies-habitual-residence-under-the-hague-convention (last visited Sept. 6, 2021) (arguing that the totality of the circumstances standard "does nothing to resolve the existing differences in emphasis among the Courts of Appeals" and that the expectation is that

direction as to which factors should be held in higher regard than others, courts will continue in their prior analyses and simply label the framework as one done under the totality of circumstances analysis, thereby defeating the clarity and consistency *Monasky* sought to achieve.

V. PROPOSAL

A. *Shared Intent Should Be a Critical Factor in Cases Involving Domestic Violence*

The greatest effect of the Supreme Court's totality of the circumstances analysis may be on courts that previously prioritized shared parental intent.[194] Unfortunately, shared parental intent is a factor that provides great support and security to parents who fled with their children to escape abusive and controlling spouses and unsafe environments.[195] As noted above, in these cases, "[i]ssues of acquiescence and consent to the habitual state of residence become more complex as courts attempt to determine whether the living arrangements of the parties are the actual choice of both parties, or only the choice of the abuser."[196]

The *Monasky* opinion largely avoided the topic of domestic violence, only briefly mentioning the 13(b) grave risk defense as a remedy.[197] Given the relatively narrow interpretation and varying circuit approaches to the grave risk defense,[198] an emphasis on shared parental intent for domestic violence cases could function as a protective layer for survivors of abuse. Therefore, shared parental intent should be adopted as a dispositive factor in Hague Convention cases involving domestic violence.

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courts "will continue their practice of emphasizing different factors in determining a child's country of habitual residence").

194 Estin, *supra* note 138, at 138 ("*Monasky* seems likely to have its greatest impact in those circuits that have relied heavily on shared parental intent. . . . [I]t may be less likely that a child's habitual residence will be deemed to have shifted based on mixed evidence of parental intentions in cases in which the child has lived for only a few months in a new place.").

195 *See* Williams, *supra* note 101, at 56 ("In cases in which the parent serves as the focus of the habitual residence determination, the uncertainty is further complicated in domestic violence abductions.").

196 *Id.*

197 Dobard, *supra* note 142, at 463 ("[T]he Court's holding has essentially avoided answering the issue of domestic violence in Hague cases . . . .").

198 *See supra* Section I.D.2.

Courts' prior examinations of a partner's coercive control when analyzing shared parental intent highlight instances when the habitual residence determination can be used to protect domestic violence survivors.[199] Although the Supreme Court mentioned coercive control as a factor to be considered, it listed it as one among many.[200] However, an insisted emphasis on shared parental intent when a case involves domestic violence could prevent a court from decreasing the significance of coercive control in a habitual residence determination, particularly if the case is being heard in a court whose pre-*Monasky* precedent did not include a focus on shared parental intent.

Given that the holding of *Monasky v. Taglieri* is still relatively new, a limited number of courts have heard cases involving Hague Convention petitions and the troubling factor of coercive control. However, at least one case—*Grano v. Martin*—embodies some of the struggles domestic violence survivors face in our post-*Monasky* landscape.

In *Grano v. Martin*, a case from the Southern District of New York, the father filed a return petition for his three-year-old son.[201] The wife had removed and retained the child in the United States from Spain.[202] The wife provided testimony detailing a long history of coercive control and emotional and physical abuse by her husband.[203] The court found this testimony credible, noting that the husband "exerted coercive control over [the wife]—even during the hearing it at times looked like he was trying to influence her while she was on the witness stand" and "[b]ased on the evidence presented in this case, [the husband] did coercively control [the wife]."[204] The wife asserted that as a result of this coercive control and her victimization, she could not have had a shared intent to live in Spain and argued that coerced residence does not create a place of habitual residence under the terms of the Hague Convention.[205] The district court, after observing that the husband did not refute or even address this issue, noted that an argument about coercive control negating habitual residence was persuasive.[206] However, the court distinguished this argument, explaining that it is only persuasive with regard to establishing shared parental intent,

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199 *See supra* Section I.D.1.

200 Monasky v. Taglieri, 140 S. Ct. 719, 727 (2020).

201 Grano v. Martin, 443 F. Supp. 3d 510, 515, 520 (S.D.N.Y. 2020), *aff'd*, 821 F. App'x 26 (2d Cir. 2020).

202 *Id.* at 531.

203 *Id.* at 516–33.

204 *Id.* at 532.

205 *Id.* at 540.

206 *Id.*

which the court then noted was no longer dispositive in habitual residence determinations.[207] The Second Circuit's, and the Southern District of New York's, pre-*Monasky* precedent dictated not only looking at shared intent, but shared intent as typically controlling the habitual residence of a child.[208]

The analysis in *Grano* is indicative of problems that may result in many cases involving removing parents who are domestic violence survivors.[209] Previously, the clear lack of shared parental intent due to coercive control would have sufficed and may have protected a domestic violence survivor regardless of his or her grave risk defense.[210] However, now the same coercive control may no longer be elevated to that level. This could be the result of a court striving to fully apply the totality of the circumstances framework, as in *Grano*, or a case being heard in a court that did not emphasize parental intent prior to *Monasky*.[211] An open and directed emphasis on shared parental intent in domestic violence cases could remedy either of these situations.

CONCLUSION

The Supreme Court's holding in *Monasky* does little to alleviate the preexisting differences between each circuit's interpretation of habitual residence. While the Court's "totality of the circumstances" standard attempts to straddle the line between solving the circuit split and being sensitive to the fact-based nature of Hague Convention habitual residence inquiries, the freehanded standard fails to provide enough direction to harmonize the courts of appeals' habitual residence adjudications. Without more guidance about which factors to weigh heavily or lightly—particularly in complicated cases or cases involving young children—the courts will continue to apply their differing pre-*Monasky* patterns of emphasis to the factors within a case. This leaves parents at an extreme disadvantage, with cases faring better or worse

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207 *Id.*

208 *Id.* at 541; *see also* Gitter v. Gitter, 396 F.3d 124, 133 (2d Cir. 2005) (holding that parents' last shared intent should generally control the habitual residence of a child).

209 A 2010 study of Hague Convention cases involving mothers who fled due to domestic violence found that forty percent of mothers reported that their choice of country residence was coerced, forced, or the result of deception by their husbands. JEFFREY L. EDLESON & TARYN LINDHORST, MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES viii (2010).

210 *See supra* note 89.

211 *See* Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376–79 (8th Cir. 1995) (finding that neither husband's physical, sexual, and verbal abuse nor husband and father-in-law's refusal to allow mother to leave the family home were sufficient to deny father's return petition).

depending on which court hears their case. Additionally, parents who flee abusive relationships and refuse to leave their children with the abusive partner continue to be a disenfranchised group within Hague Convention cases.

Unfortunately, the Supreme Court's *Monasky* decision sidestepped the issue of domestic violence and provided sparse assistance for how courts should handle these cases. As such, those parents whose cases are complicated by incidents of domestic violence will continue to find themselves hindered, either as a result of a court that does not place an emphasis on shared parental intent or a court that is genuinely attempting to apply a totality of the circumstances approach. Habitual residence determinations should not be based on a totality of the circumstances, leaving the courts largely unguided, and should, when cases involve instances of domestic violence, require that shared parental intent be a critical factor in the analysis.