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How New York Courts Determine a Child's Habitual Residence Between Two Countries

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How New York Courts Determine a Child’s Habitual Residence Between Two Countries

By Diana Mohyi

Overview

The Hague Conference on Private International Law adopted the Hague Convention in 1980 “[t]o address the problem of international child abductions during domestic disputes.”¹ It was ratified by the United States Congress in 1988 as the International Child Abduction Remedies Act, 22 U.S.C. § 9001.² This law governs child abduction and has been applied by United States courts when a custody dispute crosses international borders. This kind of case is typically brought before a United States court when one parent wants the child returned to a foreign country, while the other parent wants to keep the child in the United States.

How can a court use the Hague Convention to determine a child’s habitual residence between two countries? In 2020, the U.S. Supreme Court resolved that issue by clarifying the part of the Hague Convention analysis which determines where a child’s habitual residence is. In the event of an international dispute between parents residing in two countries, federal courts would apply this analysis in determining a petition for return of the child in United States. The following article explores how New York State and federal courts have resolved international custody disputes since the U.S. Supreme Court’s 2020 *Monasky v. Taglieri* decision.

Background

United States courts regularly interpret and apply the Hague Convention in cases where a parent alleges that child abduction has occurred. The U.S. Supreme Court recently provided greater clarity in how to analyze where the proper residence of the child in question should be. According to the Supreme Court, to make a finding about a child’s habitual residence under the Hague Convention, U.S. courts must look to the “totality of the circumstances.”³ An existing parental agreement which chooses the child’s residence is not the final arbiter.⁴ Further, “[n]o single fact . . . is dispositive across all cases”⁵ and “[a] child’s habitual residence depends on the totality of the circumstances specific to the case.”⁶ In reviewing the totality of the circumstances, some factors a courts can look at include:⁷

- the intentions and circumstances of caregiving parents, especially if the children are very young
- whether the child has lived in one place with its family indefinitely

- whether a caregiving parent was coerced into remaining in a place
- whether the parents have made their home in a particular place

Other factors may include:⁸

- “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”
- “location of personal belongings”

The Supreme Court’s review of the lower court’s decision on habitual residence was made using a deferential clear-error standard of review.⁹ In *Monasky*, the U.S. Supreme Court looked at a case involving two parties who were married in the United States and then moved to Italy.¹⁰ The parents’ marriage deteriorated while in Italy, leading to the mother’s allegations of domestic violence.¹¹ The mother took the infant child back to the United States without the father’s consent.¹² The father obtained an order in Italy terminating the mother’s rights.¹³ The father was able to enforce the order in an Ohio court.¹⁴ A finding of domestic violence that places the child in danger is an exemption from the Hague Convention’s mandate to return a child, but it must be raised pursuant to Article 13.¹⁵ The court found no evidence of domestic violence, but the mother failed to appeal that finding.¹⁶

Implications in New York

The *Monasky* decision has important implications for cross-border custody disputes in New York courts. New York federal courts apply decisions issued by the U.S. Supreme Court in a Hague Convention petition, where such a petition is properly brought as a controversy between a U.S. citizen



and foreign citizen.¹⁷ New York State courts must comply with federal law and apply New York laws set in place by statute and caselaw in custody cases over which the State of New York has jurisdiction.¹⁸ If a parent seeks redress under the Hague Convention, a parent may file in either a state or federal court.¹⁹

New York State Courts' Treatment of International Custody Issues

In *B.E. v T.C.*,²⁰ a British father sought the New York State Supreme Court's permission to immediately return to the United Kingdom with his child—rather than taking action and asking permission later. The court denied his petition, recognizing that the father had filed a divorce action in California and there was evidence that the parties intended that New York would be the child's habitual residence.²¹ The father had sought the court's permission under both New York Domestic Relations Law §§ 75-a(7), and 76-c and the Hague Convention on the Civil Aspects of International Child Abduction, 22 U.S.C.S. § 9001.²² The court declined the father's UCCJEA petition because there was a prior pending California action and that court declined to relinquish jurisdiction.²³

Pursuant to the Hague Convention analysis, the court indicated that “[a] petitioner, must demonstrate by a preponderance of the evidence: (1) the child was habitually resident in one State and has been removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner's custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention.”²⁴ Also,

the court must also inquire into the shared intent of those entitled to fix the child's home

(usually the parents) at “the latest time that they had the same interests.” The court must consider intent, actions, and declaration. And the court should inquire whether the evidence unequivocally concludes 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.²⁵

The court noted certain key acts that signified the parties' intention as to the child's habitual residence. For example, the court reviewed text messages between the parties which indicated the parties had considered enrolling the child in New York schools and the father had indicated he could work from New York.²⁶ The court considered the fact that the father had resided with the child in the United Kingdom during the COVID-19 lockdown, but stayed with his parents and never procured a permanent living situation.²⁷ The court took special note that the father had filed actions in California and New York instead of relying on the Hague Convention from the start.²⁸

New York Federal Courts' Treatment of Hague Convention Defenses

In *Saada v. Golan*, the federal Court of Appeals agreed with the conclusion that the habitual residence of the child was Italy, but objected to the lower court's failure to recognize the legitimate domestic violence defense set forth by the mother.²⁹ The Court stated in regard to the lower court's ruling that “the most important protective measures it imposed [we]re unenforceable and not otherwise accompanied by sufficient guarantees of performance.”³⁰ In subsequent proceedings, the mother was able to obtain a stay away order of pro-

tection in an Italian court, but insisted that the father's use of a private investigator hired by his counsel to follow her was a violation of that order of protection.³¹ The Court agreed with the lower court that there was insufficient evidence that the father had violated that order.³² The willingness of the federal court since *Monasky* to delve into domestic violence issues in such depth is an improvement upon the prior case that sent the case back to Italy without further investigation into the mother's defense that the child would be put at "grave risk of harm" due to exposure to domestic violence by the father against the mother.³³

In *Grano v. Martin*, the Court investigated the mother's claims that the child would be put in "grave risk of harm: due to exposure to father's domestic violence against the mother.³⁴ The Court concluded that the parties intended that their child's habitual residence would be in Spain based on some key facts, including that the mother flew to Spain on a one-way ticket, did not retain any U.S. bank accounts, and the parties set up a home together and found a school for their child, registered him as a resident of their own in Spain and signed a deed to a house.³⁵ The Court affirmed the lower court's ruling that there was no clear and convincing evidence of "grave risk of harm" to the child by exposure to domestic violence where the father psychologically abused the mother and grabbed her arm.³⁶ In a New York State court, the ruling may have been different because New York State recognizes that domestic violence is not just physical violence but also emotional or verbal abuse can constitute domestic violence.³⁷

In *Poix v. Santana*, the Court made clear that a Hague Convention case could not usurp the authority of the foreign court to determine issues of custody.³⁸ The Court ruled that the mother had not met the burden for her two affirmative defenses—that the petitioner was not exercising his custody rights at the time of the removal of the children from their home country and that the children would be put at a "grave risk of harm" if returned to their home country, which was the Dominican Republic.³⁹ The Court concluded that respondent mother did not meet her burden when she testified that the petitioner had used his own hands to beat her and that she had photographs of said injuries from the petitioner.⁴⁰ The "grave risk of harm" defense can be used where the children may have observed domestic violence that would be harmful to them, and presumably the burden was not met in this case because there was no indication that the children observed the alleged domestic violence. Although the respondent was granted temporary guardianship of the children by the Dominican divorce court, the Court recognized that this did not terminate the petitioner's parental rights, since the respondent was required to obtain the petitioner's written permission to take the children outside the country,

and therefore the respondent's removal of the children was deemed unlawful.⁴¹

Practice Pointers

The practitioner must be aware of the apparent difference in attitude of the New York State and federal courts as to the issue of domestic violence. Federal courts seem to have a stricter view of what constitutes domestic violence, i.e., physical acts are weighed more heavily than psychological abuse. It is encouraging that the New York federal courts appear more likely to delve into issues of domestic violence as it relates to the "grave risk of harm" affirmative defense than what occurred in the *Monasky* decision. In that case, the Court appeared more focused on the habitual residence analysis than in addressing the mother's domestic violence concerns.⁴²

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Endnotes

1. *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).
2. *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 726-729.
8. *Monasky v. Taglieri*, 140 S. Ct. 719, fn 3 (2020).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. U.S. Const, Art. III, § 2.
18. NY DRL § 76-a; FCT § 652.
19. *Monasky v. Taglieri*, 140 S. Ct. 719, 732 (2020).
20. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 164 N.Y.S.3d 374, 2022 N.Y. Misc. LEXIS 543, 2022 N.Y. Slip Op 22044, 2022 WL 497517.
21. *Id.*
22. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 779, 164 N.Y.S.3d 374, 376, 2022 N.Y. Misc. LEXIS 543, *1, 2022 N.Y. Slip Op. 22044, 1, 2022 WL 497517.

23. The court questioned whether San Francisco had UCCJA jurisdiction since neither party resided in San Francisco for the past six months. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 164 N.Y.S.3d 374, 2022 N.Y. Misc. LEXIS 543, 2022 N.Y. Slip Op. 22044, 2022 WL 49751.7.
24. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 783, 164 N.Y.S.3d 374, 379, 2022 N.Y. Misc. LEXIS 543, *8, 2022 N.Y. Slip Op 22044, 3, 2022 WL 497517, *citing*, *Gitter v. Gitter* 396 F.3d 124 [2d Cir. 2005].
25. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 783-784, 164 N.Y.S.3d 374, 379, 2022 N.Y. Misc. LEXIS 543, *8, 2022 N.Y. Slip Op 22044, 3, 2022 WL 497517, *citing*, *Matter of E.Z.*, 2021 U.S. Dist. LEXIS 212008, 2021 WL 5106637 [SDNY 2021]).
26. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 785, 164 N.Y.S.3d 374, 380, 2022 N.Y. Misc. LEXIS 543, *12, 2022 N.Y. Slip Op 22044, 4, 2022 WL 497517.
27. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 785, 164 N.Y.S.3d 374, 380, 2022 N.Y. Misc. LEXIS 543, *11, 2022 N.Y. Slip Op 22044, 4, 2022 WL 497517.
28. *New York ex rel. B.E. v. T.C.*, 74 Misc. 3d 778, 785, 164 N.Y.S.3d 374, 380, 2022 N.Y. Misc. LEXIS 543, *11-12, 2022 N.Y. Slip Op 22044, 4, 2022 WL 497517.
29. *Saada v. Golan*, 2021 U.S. App. LEXIS 31090.
30. *Saada v. Golan*, 2021 U.S. App. LEXIS 31090, *3, 2021 WL 4824129.
31. *Saada v. Golan*, 2021 U.S. App. LEXIS 31090, *5.
32. *Saada v. Golan*, 2021 U.S. App. LEXIS 31090, *10.
33. *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).
34. *Grano v. Martin*, 821 Fed. Appx. 26.
35. *Grano v. Martin*, 821 Fed. Appx. 26, 28.
36. *Grano v. Martin*, 821 Fed. Appx. 26, 29.
37. *LML v. HTN*, 2017 N.Y. Slip Op. 51333, *citing* *Adam E. v. Heather F.*, 151 A.D.3d 1212 (3rd Dep't, 2017); *Matter of Robert K.S. (John S.)*, 121 A.D.3d 908 (2nd Dep't, 2014) ("engaged in a pattern of verbal abuse and intimidation of the mother in the children's presence as a factor in neglect"); *D.D. v A.D.*, 56 Misc 3d 1201 (A) (Sup.Ct., Richmond Cty. 2017) ("husband asserted power and control over the wife, frequently yelled at his wife, degraded the wife in front of the children and wife feared for her safety as aspects of domestic violence, even though no evidence of a physical altercation").
38. *Poix v. Santana*, 2022 U.S. Dist. LEXIS 189263, *1, *citing*, 22 U.S.C. § 9001(b)(4).
39. *Poix v. Santana*, 2022 U.S. Dist. LEXIS 189263, *4.
40. *Poix v. Santana*, 2022 U.S. Dist. LEXIS 189263, *17-18.
41. *Poix v. Santana*, 2022 U.S. Dist. LEXIS 189263, *25.
42. *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020).

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