

MONASKY V. TAGLIERI: THE (INTERNATIONAL) CASE FOR A “TRUE” HYBRID APPROACH

JOE DIGIROLAMO* & MANAL CHEEMA**

This Essay argues that U.S. courts should employ a “true” hybrid approach for determining the “habitual residence” of a child under the Hague Convention on the Civil Aspects of International Child Abduction. In light of the Court’s consideration of *Monasky v. Taglieri*, this Essay argues that the Court should not follow the Sixth Circuit’s approach in determining habitual residence. It does not, however, take a position on the question of whether an application of the “true” hybrid approach to the facts of *Monasky* would compel a reversal of the Sixth Circuit’s finding that the habitual residence of the child was Italy. Rather, this Essay focuses solely on what test for habitual residence the Supreme Court should adopt.

To do so, this Essay first considers the three standards that circuit courts use to determine “habitual residence”: the shared parental intent, child-centered acclimatization, and hybrid standards. It defends the “true” hybrid approach the Seventh Circuit adopts. Second, this Essay uses the judicial opinions of the European Union countries and the United Kingdom, which also adopt similar “true” hybrid approaches, to bolster its claim, as the U.S. Supreme Court heavily relies on, and even defers to, foreign law when interpreting the Convention.

* J.D. Candidate, University of Virginia School of Law, 2020. Thanks to Sarah Houston and the rest of VJIL for their helpful edits. I am grateful for the support and encouragement of my family and friends throughout my time at UVA.

** J.D. Candidate, University of Virginia School of Law, 2020. Thanks to Jake Rush and the rest of VJIL for their thoughtful edits. I am grateful, too, for the support of my family and many unnamed friends.

I.	INTRODUCTION.....	3
II.	THE THREE U.S. STANDARDS FOR ASSESSING HABITUAL RESIDENCE	5
A.	<i>The Parental Intent Approach</i>	5
B.	<i>The Acclimatization or Child-Centered Approach</i>	8
C.	<i>The “True” Hybrid Approach</i>	10
III.	FOREIGN LAW AND THE SUPREME COURT’S USE OF IT	12
A.	<i>Foreign Law’s Approach to Habitual Residence</i>	13
B.	<i>The U.S. Supreme Court’s Reliance on Foreign Caselaw to Interpret Treaties</i>	15
C.	<i>Adopting the CJEU/UK Test for Habitual Residence</i>	17
IV.	CONCLUSION	18

I. INTRODUCTION

In *Monasky v. Taglieri*, a United States citizen, Michelle Monasky, married an Italian citizen, Domenico Taglieri.¹ They had an abusive relationship in which Taglieri assaulted Monasky before and during her pregnancy.² Monasky returned to the United States with her eight-week-old daughter, and Taglieri asked an Italian court to terminate her parental rights.³

Monasky is governed by the Hague Convention on the Civil Aspects of International Child Abduction (“Child Abduction Convention”),⁴ as implemented by the International Child Abduction Remedies Act (“ICARA”).⁵ Under the Child Abduction Convention, a court considers whether a parent wrongfully removed a child in violation of custodial rights based on “the law of the State in which the child was habitually resident immediately before the removal.”⁶ Here, the child only lived in one location before her alleged wrongful removal: Italy.⁷ She was born in Italy and lived there exclusively before her mother removed her to the United States. One of the core questions in *Monasky* is where Monasky and Taglieri’s child habitually resided.⁸ The District Court for the Northern District of Ohio found that the child’s habitual residence was Italy, and the Sixth Circuit affirmed.⁹

In particular, the Sixth Circuit considered how both parents agreed to live together in Italy, “secured full-time jobs,” and “purchased several items necessary for raising” the child in Italy.¹⁰ It highlighted how Monasky had applied for an Italian driver’s license, registered the family to host an *au pair* in Italy, and scheduled routine checkups for her child there.¹¹ However, the court also looked at the instances where Monasky “expressed a desire to divorce Taglieri and return to the United States, contacted moving companies,” and—

1. *Taglieri v. Monasky*, 907 F.3d 404, 406 (6th Cir. 2018), *cert. granted sub nom.*, *Monasky v. Taglieri*, 139 S. Ct. 2691 (2019).

2. *Id.*

3. *Id.* at 407.

4. Hague Convention on the Civil Aspects of International Child Abduction arts. 3–4, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Child Abduction Convention].

5. 22 U.S.C. § 9001 et seq. (2019).

6. Child Abduction Convention, *supra* note 4, art. 3.

7. *Taglieri*, 907 F.3d at 410 (“[A]n infant will normally be a habitual resident of the country where the matrimonial home exists.”) (quoting *Taglieri v. Monasky*, 2016 WL 10951269, at *7 (N.D. Ohio Sept. 14, 2016), *aff’d en banc*, 907 F.3d 404 (2018)).

8. *Id.* at 407.

9. *Id.* at 405.

10. *Id.* at 409.

11. *Id.*

with Taglieri—applied for a passport for their child.¹² Faced with these facts and a deferential standard of review, the Sixth Circuit ruled against vacating the judgment of the district court.

Monasky appealed her case to the Supreme Court, which granted certiorari on June 10, 2019, and subsequently heard oral arguments for the case.¹³ At the time of this writing, *Monasky* has yet to be decided. Although the Court will also consider the level of deference circuit courts owe to district courts when determining habitual residence under the Hague Convention, this Essay focuses on another question: whether, “where an infant is too young to acclimate to her surroundings, a subjective agreement between the infant’s parents is necessary to establish her habitual residence under the Hague Convention.”¹⁴

This Essay advances a “true” hybrid approach, relying on the Seventh Circuit and foreign judicial opinions to do so. It argues the Supreme Court should reject the Sixth Circuit’s approach in determining habitual residence. It does not, however, take a position on the question of whether an application of the “true” hybrid approach to the facts of *Monasky* would compel a reversal of the Sixth Circuit’s finding that the habitual residence of the child was Italy. Rather, this Essay focuses solely on what test for habitual residence the Supreme Court should adopt.

Part I explores the three standards that circuit courts use to determine “habitual residence.” These approaches are the shared parental intent approach,¹⁵ the child-centered acclimatization approach,¹⁶ and a “true” hybrid standard that considers both acclimatization and shared parental intent but does not presumptively favor one over the other. After describing the different standards circuit courts adopt, Part I defends the “true” hybrid approach that the Seventh Circuit follows and argues the Supreme Court should adopt this approach.¹⁷

Part II argues that the Supreme Court should also adopt the “true” hybrid approach that the Seventh Circuit formulated because courts in European Union (“EU”) countries and the United Kingdom (“UK”) follow a highly similar test. This Part argues that precedent

12. *Id.*

13. *Taglieri v. Monasky*, 907 F.3d 404, 406 (6th Cir. 2018), *petition for cert. filed and granted sub nom.*, 139 S. Ct. 2691 (Jan. 15, 2019) (No. 16-4128).

14. *Id.*

15. *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001) (adopting the shared parental approach).

16. *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) (adopting the acclimatization approach).

17. *Redmond v. Redmond*, 724 F.3d 729, 746 (7th Cir. 2013).

requires this approach, highlighting how in recent cases where the Court needed to interpret a provision of the Convention, it heavily relied on, and even deferred to, foreign law.

II. THE THREE U.S. STANDARDS FOR ASSESSING HABITUAL RESIDENCE

Under the Child Abduction Convention, a parent seeking a return order for his or her child must establish that another person wrongfully removed or retained the child outside the child's country of "habitual residence."¹⁸ Where a court determines a child resides habitually is significant, "as the ultimate disposition of a [Child Abduction Convention] return petition hinges on this finding."¹⁹

Since the Child Abduction Convention does not define "habitual residence," U.S. courts developed different approaches to determining the habitual residence of a child. Most commentators describe these approaches in terms of a circuit split, which the Supreme Court may resolve when it decides *Monasky*. We argue, however, that describing the different approaches as a circuit split obscures the degree of similarity between the three main approaches U.S. courts use to determine "habitual residence."

This Part first summarizes the standards U.S. courts use to determine "habitual residence" under the Child Abduction Convention.²⁰ It explains the shared parental intent approach, which focuses on the intent of both parents as to where the child would reside before a parent removed the child, and the acclimatization or child-centered approach, which asks whether and to what extent a child is acclimated to a certain jurisdiction. It then describes how these standards may combine to form a hybrid approach that uses both the acclimatization and shared parental intent approaches. Ultimately, this Part defends the hybrid approach. Courts should not presumptively favor either parental intent or the acclimatization of the child.

A. *The Parental Intent Approach*

The Ninth Circuit applies the shared parental intent approach, which is known as the "*Mozes* framework."²¹ It is the most widely

18. Child Abduction Convention, *supra* note 4, art. 3–4.

19. Rachel Koehn, Note, *Family Law Frustrations: Addressing Hague Convention Issues in Federal Courts*, 69 BAYLOR L. REV. 636, 651 (2017).

20. Child Abduction Convention, *supra* note 4.

21. *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001).

accepted framework for determining habitual residence, as the Second, Fourth, and Eleventh Circuits also employ it in Child Abduction Convention cases.²² Under this approach, courts look to “the agreement between the parents and the circumstances surrounding . . . to infer a shared intent to abandon the previous habitual residence, such as when there is effective agreement on a stay of indefinite duration.”²³ When focusing on the parent’s last shared subjective intent,²⁴ a court considers the last location where the parents had the mutual intention of raising the child to decide the habitual residence of the child.²⁵

Determining habitual residence is necessarily a fact-intensive inquiry under the *Mozes* framework. The Fourth Circuit²⁶ considers factors such as where the parents are employed,²⁷ whether a home is sold in one country and bought in another,²⁸ the stability of the marriage,²⁹ the location of bank accounts or primary addresses,³⁰ and the stability of the home in the new country.³¹

Although the *Mozes* framework emphasizes parental intent, some courts consider the child’s perspective to a degree. The Second Circuit, for instance, uses a two-step analysis:

First, the court should inquire into the shared intent of those entitled to fix the child’s residence (usually the parents) at the latest time that their intent was shared. In making this determination the court should look, as always in determining intent, at actions as well as declarations. Normally the shared intent of the parents should control the habitual residence of

22. See *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009); *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005); *Ruiz v. Tenorio*, 392 F.3d 1247, 1252 (11th Cir. 2004) (explaining how the court is “persuaded by the reasoning of the court in *Mozes* that a mixed standard of review is appropriate for determining habitual residency”).

23. *Mozes*, 239 F.3d at 1081.

24. *Gitter*, 396 F.3d at 133 (describing that where “parents have come to disagree as to the place of the child’s habitual residence” the court must “determine the intentions of the parents as of the last time that their intentions were shared”).

25. *Id.*

26. *Maxwell*, 588 F.3d at 252.

27. *Evans-Feder*, 63 F.3d at 224 (considering the parents’ pursuit of employment in Australia rather than the U.S.).

28. *Papakosmas v. Papakosmas*, 483 F.3d 617, 627 (9th Cir. 2007) (noting the parents did not attempt to purchase their own home in Greece).

29. *Ruiz*, 392 F.3d at 1255 (finding that the marital problems in the relationship suggest the conditional nature of the move).

30. *Id.* (noting the retention of accounts suggests the conditional nature of the move); see also *Gitter*, 396 F.3d at 135 (considering the father’s decision to close bank accounts in the U.S. and open them in Israel).

31. *Papakosmas*, 483 F.3d at 627 (considering whether the children’s lives were in a “state of flux”).

the child. Second, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent.³²

Under the Second Circuit's conception of habitual residence, the child's acclimatization to a particular country forms a secondary analysis. Accordingly, although the shared parental intent approach emphasizes parental intent, courts may also consider whether the child has experienced one or more geographical change(s) and whether the child acclimatized to a particular environment over time.³³

Advocates of the *Mozes* framework advance two arguments to support it. First, focusing on parental intent is "easier and likely provide[s] more accurate results."³⁴ Second, parental intent informs the court as to whether "a child's presence is meant to be temporary or permanent."³⁵ However, focusing on parental intent is not as helpful when the child is older and "able to form sincere attachments"³⁶ or when the court finds it sufficient that only one parent "express[ed] concerns about a move to a new country."³⁷

A more frequent criticism is that the *Mozes* framework may go so far as to "create[] a paradigm wherein one custodial parent, by claiming intent to remain, can unilaterally block a child from acquiring a new habitual residence to maintain the previous habitual residence."³⁸ For example, a child may acclimate to one country, but the framework "ignores acclimatization in favor of [the] unilateral whim and purported intent" of a single parent.³⁹

The Ninth Circuit addressed this concern by finding that, "in the absence of settled parental intent, courts should be slow to infer from such contacts that an earlier habitual residence has been abandoned."⁴⁰ It also noted the court's role in such cases involves

32. *Gitter*, 396 F.3d at 134.

33. *Mozes*, 239 F.3d at 1078.

34. Erin Gallagher, Note, *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, 479 (2015).

35. *Id.*

36. *Id.*

37. *Id.* at 480.

38. Todd Heine, *Home-State, Cross-Border Custody, and Habitual Residence Jurisdiction: Time for a Temporal Standard in International Family Law*, 17 ANN. SURV. INT'L & COMP. L. 9, 50 (2001).

39. *Id.*; see also Chantal Choi, Note, *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, 315 (2019).

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

determining “whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child’s life.”⁴¹ It is unlikely that a court focusing on parental intent would not consider whether a parent’s actions or statements are merely a pretext to remove the child elsewhere. Courts consider where the parents last mutually intended for the child to reside, not where the first dissenting parent wishes the child to live. Yet, *Mozes* still raises concerns because it requires a judge to place greater weight on shared parental intent than factual evidence indicating a child acclimated to one location more than another.

B. The Acclimatization or Child-Centered Approach

The Third and Eighth Circuits emphasize the child’s acclimatization to a particular country.⁴² Under this approach, courts do not focus on parents or their “future intentions” but rather on the child’s perspective and “past experience.”⁴³ For example, in *Friedrich v. Friedrich*, the Sixth Circuit refused to determine habitual residence based on “the child’s legal residence or the mother’s intent to return” to a particular country.⁴⁴ Instead, the court looked at when and where the child moved, in addition to how long the child stayed in a specific location.⁴⁵ This approach arguably applies best to older children, who can form attachments to and build strong relationships in specific environments, separate from their parents.

Although this approach does consider parental intent, it emphasizes how long a child resides in a particular area and her integration into that community.⁴⁶ This inquiry is particularly problematic when the habitual residence of neonates or infants is before the court. When a child is a neonate, she will most likely not integrate into the environment separately from her parents.⁴⁷

41. *Id.* (citing 42 U.S.C. § 11601(b)(4) (“The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.”)).

42. See *Barzılay v. Barzılay*, 600 F.3d 912, 919 (8th Cir. 2010) (considering how long the children spent in the United States and where they had gone to school); *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995) (finding “a child’s habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a ‘degree of settled purpose’ from the child’s perspective”); see also *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993) (noting “habitual residence can be ‘altered’ only by a change in geography and the passage of time, not by changes in parental affection and responsibility”).

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

44. Heine, *supra* note 38, at 52.

45. *Id.*

46. *Redmond*, 724 F.3d at 745.

47. *Delvoe v. Lee*, 224 F. Supp. 2d 843, 848 (D.N.J. 2002), *aff’d*, 329 F.3d 330 (3d Cir. 2003).

Courts applying the child-centered approach could place more emphasis on shared parental intent, but only “with very young children.”⁴⁸ Proponents of the child-centered approach argue it already does this, “decreas[ing] the deference given to parental intent when the child is old enough to have his or her own intent or form true attachments.”⁴⁹ The Third Circuit factors the child’s age into its analysis, as it did in *Delvoe v. Lee*, arguing that the test “does not always require that the neonate be physically present in the state of habitual residence prior to the removal or retention.”⁵⁰ In line with the Third Circuit’s reasoning, it appears that a court may defer more to parental intent when the child is younger. The Third Circuit defined habitual residence as

the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a “degree of settled purpose” from the child’s perspective. . . . a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child’s circumstances in that place and the parents’ present, shared intentions regarding their child’s presence there.⁵¹

Although this approach does account for the *present* intentions of parents, it does not sufficiently consider the future intentions of the parents as to where the child should live. Parental intent operates as a secondary consideration only, and courts using this approach do not “put[] much weight on either of one parent’s expressed intent at trial.”⁵² In short, the child-centered approach does not give parental intent sufficient weight or assume an infant’s habitual residence is the same as her mother’s.⁵³

The child-centered approach, as applied to neonates or infants, closely tracks the *Mozes* framework. To determine the habitual

48. Gallagher, *supra* note 34, at 481 (citing *Whiting v. Krassner*, 391 F.3d 540, 550 (3d Cir. 2004)).

49. *Id.* at 481–82; see also Stephen E. Schwartz, Note, *The Myth of Habitual Residence: Why American Courts Should Adopt the Delvoe Standard for Habitual Residence Under the Convention on the Civil Aspects of International Child Abduction*, 10 CARDOZO WOMEN’S L.J. 691, 693 (2004) (“A child is a neonate from birth to around six months and an infant from around six months until four years.”).

50. Schwartz, *supra* note 49, at 712.

51. *Evans-Feder*, 63 F.3d at 224.

52. Heine, *supra* note 38, at 54.

53. Choi, *supra* note 39, at 310 (citing *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 379 (8th Cir. 1995) (automatically equating infant’s habitual residence with mother’s inconsistent with Hague Convention)).

residence of a two-month-old child, a court under either approach would need to determine that there is little evidence of the child's acclimatization and then focus on the present and mutual intentions of the parents. Like the child-centered approach, the *Mozes* framework places the most weight on mutual intent. The *Mozes* framework simply considers acclimatization *before* mutual intent.

Courts that emphasize acclimatization may conclude that any amount of time in a particular country will cause a neonate to form an "attachment," even though this seems doubtful. This is the weakest aspect of the acclimatization approach: It places too great a value on the question of whether a child adjusted to a particular place when the child may be too young to acclimate to anywhere at all. Further, if courts first consider acclimatization, it biases the analysis even if the court subsequently considers parental intent because of the priming effect of considering acclimatization first.

These concerns also demonstrate that formalistic tests hinder the ability of courts to determine the best interests of the child. Courts in the United States already use the "best interests of the child" to determine which parent holds custody.⁵⁴ Although the Convention is designed to mediate wrongful removals of children during custody disputes, it is not immediately clear why the best interests of the child should not also be persuasive here.⁵⁵ If courts presumptively value one prong more than another, the outcome of its analysis in particularly difficult habitual residence cases may be that the child is forced to reside in an undesirable environment. It is for these reasons that we advocate a "true" hybrid approach.

C. *The "True" Hybrid Approach*

The *Mozes* framework and the child-centered approach are hybrid insofar as they both consider parental intent and the acclimatization of the child. It is, then, misleading to frame the disagreement as a circuit split between the acclimatization approach, the child-centered approach, and the hybrid approach. In reality, all circuits use a hybrid approach but weigh parental intent and acclimatization differently. "The crux of [the] disagreement is how much weight to give one or the other, especially where the evidence conflicts."⁵⁶ We argue the Court should not favor parental intent over acclimatization or vice

54. 3 FAMILY LAW AND PRACTICE § 32.06 (2019).

55. *Redmond*, 724 F.3d at 742.

56. *Id.* at 746.

versa not only in light of the earlier analysis, but also due to the purposes of the Convention.

Having discussed the merits and shortcomings of these approaches, it is appropriate to consider if any approach is more consistent “with the broad purposes of the Child Abduction Convention,” which can be construed as seeking either to deter abduction or to protect children’s interests.⁵⁷ It is a guiding principle of treaty interpretation to consider the purposes behind the statute after considering its text. Since Congress implemented the Child Abduction Convention through the ICARA, a court should take into account the purposes of the Convention.

According to Justices Ginsburg, Scalia, and Breyer, the goal of the Convention is to “facilitate custody adjudications, promptly and exclusively, in the place where the child habitually resides.”⁵⁸ Where the child habitually resides is not the end of the inquiry, though, as a court’s determination of the child’s habitual residence “is not intended to operate as a substantive decision on the merits of the ongoing custody dispute.”⁵⁹ Instead, the return of the child is necessary to ensure her interests are protected “while [her] parents resolve contested custody questions in the courts of that country.”⁶⁰

It is difficult to argue a parental-focused approach is more consistent with these purposes, or vice versa, because there is too broad a range of factual circumstances in which one or the other of the two approaches would better deter abduction or protect the interests of the child.⁶¹ This is especially true concerning neonates.

Because of the competing purposes of the Convention and the pros and cons of either approach, the Seventh Circuit in *Redmond v. Redmond* deemed “it unwise to set in stone the relative weights of parental intent and the child’s acclimatization.”⁶² Instead, “[t]he [hybrid] habitual-residence inquiry remains essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.”⁶³ We agree.

The Seventh Circuit’s “true” hybrid approach is necessary in habitual-residence cases because such cases are so fact-specific. On

57. Ann Laquer Estin, *The Hague Abduction Convention and the United States Supreme Court*, 48 FAM. L.Q. 235, 249 (2014) (citing *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014); *Chafin v. Chafin*, 133 S. Ct. 1017 (2013); *Abbott v. Abbott*, 130 S. Ct. 1983 (2010)).

58. *Chafin*, 568 U.S. at 180 (Ginsburg, J., concurring) (citing the Child Abduction Convention, *supra* note 4, art. 1, 3).

59. Koehn, *supra* note 19, at 640.

60. *Redmond*, 724 F.3d at 742.

61. Estin, *supra* note 57, at 249.

62. *Redmond*, 724 F.3d at 746.

63. *Id.*

the one hand, if a court adopts a child acclimatization approach, it may unduly emphasize attachments when the child is, in fact, too young to form them. As we argue above, if the court first considers acclimatization, even when the child is older and can form more permanent connections, it biases the court's analysis toward how well the child acclimated to a particular country. On the other hand, if a court adopts a shared parental intent approach, it may overvalue the actions of the parents in a particular country where there was little time for the parents to form any sort of intent as to where the child should reside.⁶⁴

Courts should not emphasize either parental intent or acclimatization at the outset of their inquiry, but rather focus on facts that seem most compelling in light of the specific custody challenge before them. The danger with prioritizing one prong over the other *as a rule* is that a court may not come to a conclusion that is consistent with the purposes of the Convention. The Seventh Circuit's approach avoids this issue, and is consistent with how foreign courts have decided Child Abduction Convention cases.

III. FOREIGN LAW AND THE SUPREME COURT'S USE OF IT

Many signatories to the Child Abduction Convention follow a "true" hybrid approach.⁶⁵ In particular, the Court of Justice of the European Union ("CJEU") and the Supreme Court of the United Kingdom use highly similar tests for determining habitual residence,⁶⁶ each of which is closely aligned with the "true" hybrid approach in *Redmond*. First, this Part analyzes how European countries and the UK use a test of habitual residence that is exceedingly similar to the Seventh Circuit's approach. Second, this Part demonstrates that the U.S. Supreme Court relies heavily on the law of sister signatories to ascertain the meaning of international treaties, especially in the context of the Child Abduction Convention, and should do so again here. Finally, this Part discusses how sister signatories are converging around a test for habitual residence that is highly similar to the "true" hybrid test that the Seventh Circuit formulated.

64. *Id.*

65. See, e.g., Paul Beaumont & Jayne Holliday, *Recent Developments on the Meaning of "Habitual Residence" in Child Abduction Cases*, ABDN.AC.UK (Aug. 26, 2018), https://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases_.pdf (describing in detail how courts in the UK and CJEU follow a hybrid test).

66. See *Mercredi v. Chaffe*, Case C-497/10 PPU, 2010 E.C.R. I-14358; In re A (Children) (AP) [2013] UKSC 60 [20]; In re A (Children) (AP) [2013] UKSC 60 [20].

A. Foreign Law's Approach to Habitual Residence

This Part discusses in detail how European countries and the United Kingdom approach the question of habitual residence. It also argues that the particular form of the “true” hybrid approach that these foreign courts use indicates that, under a “true” hybrid approach, parental intent should emphasize the motivations of the caretaking parent(s) in moving the child from one country to another.⁶⁷

The CJEU cases, *In re A*⁶⁸ and *Mercredi v. Chaffe*,⁶⁹ formulate the CJEU/UK hybrid test. *Mercredi* is the most recent of the two, and its facts are closest to *Monasky*. In *Mercredi*, a mother, who separated from the father of their child in the week following the child’s birth, left England for the island of Réunion with the child.⁷⁰ Like the child in *Monasky*, the child in *Mercredi* was eight weeks old when her mother removed her to France. To decide the habitual residence of the child, the CJEU used a multi-factor test where parental intent was only one factor and a court could weigh parental intent how it chooses.⁷¹

In *Mercredi*, the CJEU first recognized that the social and family environment of the child is “fundamental in determining the place where the child is habitually resident.”⁷² It noted this is especially true when the child is an infant because “an infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent.”⁷³ Further, it explained that where the infant “is in fact looked after by her mother, it is necessary to assess the mother’s integration in her social and family environment.”⁷⁴ This assessment would involve analyzing “the reasons for the move by the child’s mother to another Member State, the languages known to the mother or [] her geographic and family origins.”⁷⁵

The test the court established for habitual residence consisted of several factors relevant to determining “the place which reflects some degree of integration by the child in a social and family environment”⁷⁶ including “. . . the duration, regularity, conditions and

67. *In re L (A Child)* [2013] UKSC 75 [23].

68. *In re A (Children) (AP)* [2013] UKSC 60 [20].

69. *Mercredi v. Chaffe*, Case C-497/10 PPU, 2010 E.C.R. I-14358.

70. *Id.* at 21–22.

71. *Id.* at 56.

72. *Id.* at 53.

73. *Id.* at 55.

74. *Id.*

75. *Mercredi v. Chaffe*, Case C-497/10 PPU, 2010 E.C.R. I-14358.

76. *Id.* at 56.

reasons for the stay in the territory of that Member State and for the mother's move to that State" and, "with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State," which the judge weighs at her discretion.⁷⁷

The CJEU explained its test in more general terms, enabling courts to apply it in cases where either the mother or the father is the primary caregiver. Habitual residence is

the place which reflects some degree of integration by the child in a social and family environment. In particular, duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge, and family and social relationships of the child in that state must be taken into account.⁷⁸

The CJEU test is, therefore, a "true" hybrid approach. It considers both the "reasons" or intentions of the parent as well as the factual circumstances surrounding the acclimatization of the child to the family and broader social environment.

The UK Supreme Court recently articulated a test for habitual residence that mirrors the CJEU's test,⁷⁹ which represented a move away from the habitual residence test UK courts traditionally used. Before, parental intent was dispositive of habitual residence.⁸⁰ In *In re A (Children)*, however, the court declared England and Wales should apply the *Mercredi* test.⁸¹ It subsequently explained in *In re L (A Child)* that the "essential features" of the habitual residence test that both the CJEU and the UK Supreme Court adopted are that "habitual residence is a question of fact which 'should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.'"⁸² Consistent with the "true" hybrid test, parental intent merely "play[s] a part in establishing or changing

77. *Id.*

78. *Id.*

79. *In re A (Children)* (AP) [2013] UKSC 60 [20]; *In re L (A Child)* [2013] UKSC 75 [23].

80. See Tai Vivatvaraphol, *Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 *FORDHAM L. REV.* 3355 (2009) (describing how courts in the UK followed a test of habitual residence that focused solely on parental intent until the Supreme Court decided to adopt the same test as the CJEU).

81. *In re A (Children)* (AP) [2013] UKSC 60 [20].

82. *In re L (A Child)* [2013] UKSC 75 [23].

the habitual residence of a child.”⁸³ The court considers parental intent in order to understand the motivations for moving the child from one country to another.⁸⁴ In short, like the CJEU, the UK Supreme Court treats habitual residence as a question of fact that parental intent can help answer, but cannot fully determine. These decisions should be persuasive to U.S. courts in considering whether to adopt a “true” hybrid approach.

B. The U.S. Supreme Court’s Reliance on Foreign Caselaw to Interpret Treaties

The U.S. Supreme Court does not interpret the Convention exclusively based on U.S. law. In recent cases, it considered foreign interpretations as persuasive evidence.⁸⁵ The Court should adopt the Seventh Circuit’s “true” hybrid approach which does not presumptively weigh a particular prong, as it reflects the test the CJEU and UK now apply in Convention cases. A decision to adopt the Seventh Circuit test, which is analogous to the CJEU/UK test, would comport with customary international analysis of Convention cases while remaining within the bounds of current circuit court practice.

Although there is strong disagreement among the Justices as to the appropriate use of foreign law as persuasive evidence, there is equally strong *agreement* that the Court should align its analysis of international treaties with the courts of foreign signatories.⁸⁶ Justice Breyer has written that “to interpret treaties governing family matters, the Court has had to rely on new and often foreign sources of information.”⁸⁷ And in two recent cases that required the Court to interpret the meaning of parts of the Convention, every Justice at least concurred that the Court should interpret the Convention in a

83. *Id.* at 23.

84. *Id.*

85. See, e.g., *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10–12 (2014); *Abbott v. Abbott*, 560 U.S. 1, 16–19 (2010).

86. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 169 (2016) (“Judges who would hesitate to consider decisions of foreign courts when interpreting the American Constitution do not hesitate to consult such decisions when treaties are in question.”); see also Eric Posner, *The Court and the World: American Law and the New Global Realities*, 126 *YALE L.J.* 504, 520 (2016) (explaining that “the leading critic of [using foreign law as a source of constitutional interpretation] has been Justice Scalia”); Kenneth Jost, *Privacy, Precedents Dominate Roberts Session*, NPR (Sept. 13, 2005), <https://www.npr.org/templates/story/story.php?storyId=4845368> (reporting that Chief Justice Roberts has lamented that “relying on foreign precedents doesn’t confine judges . . . [in] foreign law you can find anything you want”).

87. BREYER, *supra* note 86, at 238.

manner consistent with its foreign signatories. In *Abbott v. Abbott*, the Court considered whether a father's visitation rights provided him with enough of a "custody" interest to mandate the return of a child to Chile after the mother removed the child to the United States.⁸⁸ In *Lozano v. Montoya Alvarez*, the Court considered a father's petition to return a child to England sixteen months after the child's mother removed the child to the United States.⁸⁹

In *Abbott*, both the majority and dissenting opinions relied on foreign court interpretations to ascertain the meaning of "custody" under the Convention.⁹⁰ The Court first looked to the purpose of the Convention and the views of the State Department.⁹¹ It then considered how courts in Britain, Israel, South Africa, Australia, Germany, France, and Canada interpret "custody."⁹² It even highlighted the importance of using the decisions of courts of sister signatories to aid in its interpretation of international treaties.

Writing for the majority, Justice Kennedy quoted from *El Al Israel, Ltd. v. Tsui Yuan Tseng* that "[t]he 'opinions of our sister signatories' . . . are 'entitled to considerable weight'"⁹³ and explained that "[this] principle applies with special force here, for Congress has directed that 'uniform international interpretation of the [Hague Convention on Child Abduction]' is part of the Convention's framework."⁹⁴

Justices Stevens, Thomas, and Breyer dissented but, in doing so, still emphasized foreign court interpretations.⁹⁵ They simply disputed that there was an international consensus on the interpretation of "custody" that the majority favored. In particular, Justice Stevens argued that he "fail[ed] to see the international consensus—let alone the 'broad acceptance,'—that the Court finds among those varied decisions from foreign courts."⁹⁶

In *Lozano*, moreover, a unanimous Court surveyed foreign law to determine whether to permit "equitable tolling" under Article 12 of the Convention, which provides for a mandatory one-year return window.⁹⁷ The Court relied heavily upon, and even deferred to, foreign law to conclude that the parties to the Convention did not

88. *Abbott*, 560 U.S. 1.

89. *Lozano*, 572 U.S. 1.

90. *Abbott*, 560 U.S. 1.

91. *Id.* at 15.

92. *Id.*

93. *Id.* at 16.

94. *Id.*

95. *Id.* at 15–25.

96. *Abbott*, 560 U.S. 15–25.

97. *Lozano*, 572 U.S. at 2–12.

intend for Article 12 to be tolled.⁹⁸ Writing for the majority, Justice Thomas recognized that “foreign courts have failed to adopt equitable tolling.”⁹⁹ Justice Alito used foreign law to find alternative grounds to support the Court’s decision in his concurrence, arguing equitable tolling is not necessary to address fairness concerns under Article 12 because the practice of courts in the UK and Ireland demonstrates it is possible to instead rely on “equitable discretion.”¹⁰⁰

The Court also broadly affirmed the importance of considering foreign law in treaty interpretation.¹⁰¹ Justice Thomas noted it is the Court’s “responsibility” to read treaties “in a manner consistent with the shared expectations of the contracting parties.”¹⁰² Moreover, Justice Alito recognized court interpretations in signatory states “[are] entitled to great weight.”¹⁰³ The Court even suggested it should accord a degree of deference to the decisions of foreign courts in treaty interpretation. Thus, although the Court conceded U.S. law presumptively favors equitable tolling, it refused to read that into Article 12 of the Convention. As Justice Thomas explained, “it is particularly inappropriate to deploy [the background principle of equitable tolling] when interpreting a treaty [because] [a] treaty is in its nature a contract between . . . nations, not a legislative act.”¹⁰⁴ *Lozano* represents the Court’s willingness to not only rely on foreign law to interpret international treaties, but to defer to it if deference would maintain a uniform interpretation among signatories.

The Court should, and likely will, look to foreign law to a similarly extensive degree in *Monasky*. Even if Justices Gorsuch and Kavanaugh do not follow the Court’s treaty interpretation practice, there is no obvious reason why the seven Justices who signed onto *Lozano* would change course.

C. *Adopting the CJEU/UK Test for Habitual Residence*

Because we think the Court will (or, at least, should) look to foreign law when it determines the meaning of habitual residence in *Monasky*, we survey how sister signatories to the Convention interpret that concept in this Section. We conclude there is a growing

98. *Id.* at 12.

99. *Id.*

100. *Id.* at 22.

101. *Id.* at 2–12.

102. *Id.*

103. *Lozano*, 572 U.S. at 2–12.

104. *Id.* at 12.

international consensus around the CJEU/UK habitual residence test.

Before 2012, most signatories to the Convention did not use a hybrid test. Courts in common law countries like England and Scotland focused exclusively on parental intent,¹⁰⁵ whereas courts in civil law countries typically did not consider the subjective intent of parents.¹⁰⁶

The CJEU's decision to formulate a true hybrid test in *Mercredi* changed the landscape. Because the CJEU interprets EU law to ensure its uniform application throughout the EU, by formulating the hybrid test it bridged the divide between civil and common law member countries.¹⁰⁷ And national courts in EU countries must apply EU law in accordance with CJEU interpretations. The CJEU can conduct infringement proceedings against a national government for failing to comply with its rulings.¹⁰⁸

Since the U.S. Supreme Court gives great weight and deference to foreign interpretations of treaties in signatory countries and all EU countries and the UK use a “true” hybrid approach like the Seventh Circuit, the U.S. Supreme Court should adopt the hybrid test for habitual residence that the Seventh Circuit formulated.

IV. CONCLUSION

U.S. circuits differ on the test that they use to determine the meaning of “habitual residence” under the Hague Convention on the Civil Aspects of International Child Abduction. We first argue (in line with the Seventh Circuit) that every approach is “hybrid” in nature. All circuits consider parental intent and acclimatization— they just value these factors differently. We then argue that instead of emphasizing parental intent *or* acclimatization at the outset, the U.S. Supreme Court should adopt the “true” hybrid approach that the Seventh Circuit suggested in *Redmond*, and which courts in all EU nations and the U.K. use in a highly similar way. Given the Court's

105. Vivatvaraphol, *supra* note 80, at 3325, 3355; *see also* Beaumont & Holliday, *supra* note 65.

106. Vivatvaraphol, *supra* note 80, at 3358. Civil Law countries in the EU, such as Sweden and Italy, historically applied factual tests that disregarded the subjective intent of parents. For example, in *Johnson v. Johnson*, the Supreme Administrative Court of Sweden established a test for habitual residence that relies entirely on the factual questions regarding the experience of the child in the countries at issue. *Id.* Similarly, in *Rochford v. Rochford*, the Juvenile Court of Rome formulated a test that exclusively asks which country acts as the center of the child's life and/or is the location where the child usually spends most of her time. *Id.*

107. *Court of Justice of the European Union*, EUROPA.EU, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en (last visited November 10, 2019).

108. *Id.*

practice of relying heavily on, and deferring to, foreign law when interpreting the Convention, this is, in fact, a logical outcome.

We also argue there is a practical reason for following a “true” hybrid test that does not place a finger on the scale for parental intent or acclimatization. Formalistic tests hinder the ability of courts to determine the best interests of the child, and courts in the United States use the “best interests of the child” to determine which parent holds custody.¹⁰⁹

This inquiry presents avenues for further research, as it is unclear how circuit courts treat (or should treat) foreign law. Although circuit courts struggle to define and determine habitual residence under the Convention, no circuit court considered how foreign courts address the term, even in light of the Supreme Court’s clear practice of depending on foreign law to interpret international treaties.¹¹⁰ Future papers could shed light on how frequently circuit courts are willing to engage with foreign law. Avoidance of foreign law in the circuits would likely make it more difficult for the United States to maintain its obligations under international treaties unless a greater proportion of such cases were heard (and corrected) by the Supreme Court. If the Supreme Court does not hear such cases whenever they arise or consider the international issue because circuit courts refrain from considering it—when appropriate—in light of foreign law, the reputation of the United States as a key partner in the creation and adoption of international treaties might be damaged. This would be particularly problematic at a time when the rising forces of populism and provincialism are diminishing the desire of governments around the world to join together in the pursuit of common goals.

109. 3 FAMILY LAW AND PRACTICE § 32.06 (2019).

110. BREYER, *supra* note 86, at 169.