Newly Born Issues for Habitual Residence: Determining a U.S.-Born Infant’s Habitual Residence Under the Hague Abduction Convention Post-Monasky

The Hague Convention on the Civil Aspects of International Child Abduction aims to restore the “status quo” for children who were wrongfully removed or retained by a parent in another country. The Convention achieves this by returning the child to their original home, referred to as their “habitual residence.” The Convention did not define habitual residence, but the U.S. Supreme Court case Monasky v. Taglieri clarified the habitual residence analysis in 2020. Monasky standardized an open-ended “totality of the circumstances” test. This guidance concerned family law lawyers who believed that it gave district courts too much discretion and could result in inconsistent outcomes in cases with similar facts. This Note identifies one such instance: when a pregnant parent travels to the United States to give birth and is subsequently petitioned by their partner for the return of the newborn child.

This Note proposes a method of analysis for this circumstance. Previously, an infant’s habitual residence has been largely based on the parents’ intentions for the child’s location. This Note argues that those intentions should imbue at the time of the child’s birth and that parental intentions that only existed prenatally should not weigh heavily in the analysis. It also calls on the Special Commission on the Practical Operation of the 1980 Child Abduction Convention to provide guidance on similar cases.

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INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction1 (the Convention) provides an elegant solution to a complex problem: What should a country do when a child is held across international borders by a parent or close family member, in

1. The Convention does not regulate the potential criminal facet of international abductions, only the civil aspect. Additionally, the term “abduction” only appears in the Convention’s title. The drafters “felt [it] desirable to keep the term ‘abduction’ in the title of the Convention [because of] its habitual use by the ‘mass media’ and its resonance in the public mind.” ELISA PEREZ-VERA, EXPLANATORY REPORT ¶ 53, at 441 (offprt. ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION (1980)) (1982), https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf [https://perma.cc/HJH5-9FLJ].
violation of the left-behind parent’s (LBP) custody rights? The issue of close family members taking children across country borders became more prevalent through the twentieth century as global travel became easier. More travel led to more international relationships, divorces, and consequently, unilateral takings of children back to one parent’s homeland. Such seizures violate the rights of the LBP and can have intense psychological effects on the child.

Before the Convention’s enactment, many courts reacted to these takings by applying their country’s version of a “best interests” analysis to the displaced child. This led to drawn-out, fact-intensive proceedings with pragmatic obstacles, such as high costs and difficulty acquiring discovery. Further, different countries’ legal systems had unique best interests analyses which weighed various factors differently, resulting in decisions that lacked uniformity and encouraging savvy parents to remove their children to jurisdictions where the law favored their custody determination.

The Convention sought to resolve these issues, not by weighing in on the custody determination, but by restoring the “status quo” in returning the child to the location from which they were wrongfully removed or retained. Under the Convention, the child’s custody proceeding should occur in the country they are returned to.

“Habitual residence” is the Convention’s term for this status quo location, and it is “the central concept on which the entire system is based.” The Convention does not define habitual residence, and both Contracting States and U.S. courts initially applied different tests to determine the habitual residence of a child. In 2020, the U.S.

4. See generally Schuz, supra note 2, ch. 6, § III, ch. 3, § II.
6. Id. at 3.
7. Id. at 2 (“The indeterminacy of the best interests concept has been well documented.”); see also Perez-Vera, supra note 1, ¶ 22, at 431 (claiming that recourse through a nation’s best interests analysis “involves the risk of their expressing particular cultural, social, etc. attitudes which themselves derive from a given national community and thus basically impos[e] their own subjective value judgments upon the national community from which the child has recently been snatched.”).
8. Perez-Vera, supra note 1, ¶ 16, at 429.
10. See discussion infra Section I.B.1.
Supreme Court clarified the method U.S. federal courts should use in Monasky v. Taglieri, which concerned a baby born in Italy and taken to the United States at two months old. The Court held that no single fact is dispositive: “[A] child’s habitual residence depends on the totality of the circumstances specific to [each] case.” Relevant factors include “the child’s schooling, activities, community engagement, immigration status, and language abilities,” as well as “the intentions and circumstances of caregiving parents.”

This guidance followed the intentions of the Convention’s drafters and aligned U.S. courts with the global habitual residence trend. However, the open-ended analysis lacks clarity when used in fringe cases. By adopting this approach, the U.S. moved toward global uniformity—as many nations use similar tests—but increased the risk of inconsistent outcomes across similar cases since individual judges have broad discretion in prioritizing factors, resulting in less uniformity in application.

The worries about potentially disparate outcomes have been validated in at least one line of cases: where a child is born outside the country where the parents were living. One scholar referred to this as “[o]ne of the most difficult situations in which to determine the habitual residence of the child.” This Note calls this situation the “newborn question.” The difficulty of the newborn question is compounded when the pregnant parent travels on their own and without the consent of the LBP. While it is not disputed that the Convention applies to newborns, courts disagree on how to determine the habitual residence of a child in such cases.

12. Id. at 727 (“No single fact, however, is dispositive across all cases.”).
13. Id. at 719 (emphasis added).
14. Id. at 727 n.3.
15. Id. at 727.
16. See discussion infra Section I.B.3.
17. SCHUZ, supra note 2, at 201.
18. At the time of this Note’s publication, no term for this situation could be found in previous scholarship. This phrase is meant to encompass the general instance where a pregnant parent crosses a nation’s border and gives birth away from their former residence. The phrase encompasses both situations where the child is born away from the location where the parents intend the child to be habitually resident and situations where the parents’ intentions are split at the time of the birth.
19. See infra text accompanying note 148.
Monasky held that “facts indicating that the parents have made their home in a particular place” and “the intentions and circumstances of caregiving parents” were relevant factors in determining an infant’s habitual residence, but the Court did not address newborns in their opinion. This guidance in Monasky is insufficient to resolve the newborn question uniformly, as demonstrated through three post-Monasky U.S. cases.

When considering the last shared parental intent component of the habitual residence analysis, this Note argues that shared parental intentions should be measured starting at the time of a child’s birth. The text of the Convention is clear that it does not apply to children before they are born, and prenatally there is no child onto which a parent can imbue intentions. If, at the time of the baby’s birth, the parents do not share an intention, their last shared intentions should not weigh heavily in the analysis. Last shared intentions that existed solely before birth should not be greatly considered because they disregard any development that occurred between agreement and birth. When the parents do not share an intent from the time of the child’s birth, a child will typically not immediately acquire, and thus will be without, a habitual residence. However, where there is a shared intention about the baby’s habitual residence at the time of birth, the shared intention factor should be given appropriate weight. This is true even if a parent’s intent changes soon after birth. An exception to this analysis is where there is an older sibling along with the baby in the newborn question; then, shared parental intention should be given weight, even if the intent only existed prenatally. With an older sibling, there is a clearer status quo for the family dynamic to return to and there are uniformity considerations of having separate custody disputes in different countries for the same family. Both status quo and uniformity are heavily prioritized by the Convention.

In reality, the newborn question is present in the minority of cases heard under the Convention. Most cases involve children at least

21. Id. at 727.
22. The focus on parents is necessary because infants’ connections to their environment are minimal.
23. See discussion infra Section II. The three cases are Pope v. Lunday, 835 F. App’x 968 (10th Cir. 2020); De Carvalho v. Pereira, 308 So. 3d 1078 (Fla. Dist. Ct. App. 2020); and Ascanio v. Crespo, No. 21-23396-Civ, 2021 U.S. Dist. LEXIS 257067 (S.D. Fla. Nov. 4, 2021).
24. See Perez-Vera, supra note 1, ¶ 16, at 429; see also discussion infra notes 55–58.
a few years old.\textsuperscript{25} The cases involving infants that are brought to trial likely reflect a fact pattern similar to Monasky where the parents shared an intent immediately after the birth of the child.\textsuperscript{26} In the rare instance where the pregnant parent is in a different country and the parents do not share an intention regarding the newborn’s location at birth, this Note argues that this factor should weigh in favor of a finding of no habitual residence.\textsuperscript{27}

Due to the lack of guidance from the Convention, and since courts have not coalesced around an answer to the newborn question, the United States should raise the newborn question at the next Special Commission on the Practical Operation of the 1980 Child Abduction Convention.\textsuperscript{28} The Special Commission would allow Member States to acknowledge and discuss the issue, as well as produce guidance that could be applied uniformly.

Part I will provide an overview of the Convention, including its purpose, drafting, keywords, and initial understanding, that will demonstrate that the Convention was not drafted with the newborn question in mind. Part I will also review the Convention’s application in U.S. courts and summarize the new guidance handed down to U.S. federal courts through Monasky. Part II will examine the three U.S. cases post-Monasky that dealt with the newborn question. These cases emphasized different policy priorities and modes of analysis, but this Note attempts to synthesize their holdings under a common framework. Part III will outline the proposed approach that courts should use when confronted with the newborn question. This Part argues that the solution fills in the gap left by the Convention and comports with domestic and international case law. This method should be used until the Special Commission reviews the issue.

I. THE ABDUCTION CONVENTION’S HISTORY AND APPLICATION IN THE


\textsuperscript{26} Information compiled by Author on January 30, 2023, after reviewing the 132 cases on LexisNexis that cited Monasky.

\textsuperscript{27} See, e.g., Pope, 835 F. App’x 968; see also discussion infra Section III.A.

\textsuperscript{28} Special Commissions are the Hague Convention on Private International Law’s method of resolving contentious questions and determining a uniform approach. See infra text accompanying note 304.
The Abduction Convention is one of the most widely-endorsed conventions put forth by the Hague Conference on Private International Law (HCCH). Finalized in 1980, the Convention is premised on the “assumption that the abduction of a child will generally be prejudicial to its welfare.” Its drafting stems from a desire “to protect children internationally from the harmful effects” of child abduction by family members or their proxy. The Convention achieves this by authorizing courts of Contracting States to return children who were “wrongfully removed or retained” back to their habitual residence.

Importantly, “[t]he Convention does not require a district court to determine where a child habitually resides.” The court’s job is not to consider every possible location; its job is to simply “determine whether the child habitually resides in the location where the petitioner claims.” If so, the child is generally returned there. If not, the child generally remains where they are.

The overarching goal of the Convention is the “restoration of the status quo.” The Convention strives to reduce “the possibility of...
individuals establishing legal and jurisdictional links which are more or less artificial.\textsuperscript{37} In returning the child to their habitual residence, the Convention reverses their removal or retention to prevent “an individual [from] chang[ing] the applicable law and obtain[ing] a judicial decision favourable to” the abducting parent.\textsuperscript{38} This is intended to deter parents from abducting the child.\textsuperscript{39} “By placing emphasis on the immediate return of abducted children, the Convention incidentally makes it clear to potential abductors . . . that the removal of a child to another Contracting State is likely to avail them little.”\textsuperscript{40}

Two objectives serve as mechanisms to support the status quo-restoration goal: promptness and consistency. Article 1(a) states the first objective of the Convention is “to secure the prompt return of children wrongfully removed to or retained in any Contracting State.”\textsuperscript{41} By quickly returning children to their habitual residence, the Convention aims “to prevent the consolidation in law of initially unlawful factual situations, brought about by the removal or retention of a child.”\textsuperscript{42} Expediency in restoring the status quo avoids the creation of artificial jurisdictional ties while efficiently minimizing the harmful effects on the child.\textsuperscript{43} The prioritization of expedient proceedings is supported by multiple articles, including Articles 2,\textsuperscript{44} 7,\textsuperscript{45} 9,\textsuperscript{46} and 11.\textsuperscript{47}

The second objective, as stated in Article 1(b), is “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”\textsuperscript{48} This aims to prevent parents from forum shopping for the jurisdiction of

\textsuperscript{37} Id. ¶ 15, at 429.

\textsuperscript{38} Id.

\textsuperscript{39} Id. ¶ 16, at 429 (describing an effective way to deter potential abductors as “to deprive his actions of any practical or juridical consequences”).

\textsuperscript{40} Anton, supra note 30, at 543.

\textsuperscript{41} Hague Convention, supra note 31, art. 1(a).

\textsuperscript{42} PEREZ-VERA, supra note 1, ¶ 40, at 436.

\textsuperscript{43} Id. ¶ 11, at 428.

\textsuperscript{44} Hague Convention, supra note 31, art. 2 (calling for the “most expeditious procedures available”).

\textsuperscript{45} Id. art. 7 (aiming “to secure the prompt return of children”).

\textsuperscript{46} Id. art. 9 (mandating action “directly and without delay”).

\textsuperscript{47} Id. art. 11 (requiring Contracting States to “act expeditiously in proceedings” and allowing applicants to request a statement explaining the court’s delay if it “has not reached a decision within six weeks”).

\textsuperscript{48} Id. art. 1(b).
their custody hearing. The Convention seeks to ensure that the custody hearing is not “influenced by a change of circumstances brought about through unilateral action by one of the parties.”

To that end, the Convention does not determine custody. The Convention is centered around the belief that the “interests of children are of paramount importance in matters relating to their custody,” so the process is specifically designed to “allow a final decision on custody to be taken by the authorities of the child’s habitual residence.” The Convention strikes a balance between deciding where the custody hearing will be held and not determining custody itself.

Inherent in these goals is the prioritization of international cooperation. HCCH’s mandate is the “unification of the rules of private international law.” Returning a retained child cannot be resolved through one nation’s justice system. Therefore, the drafters wanted the Convention to “be interpreted and applied uniformly.” Uniformity in the understanding of the Convention is necessary because it “increases predictability in the Convention’s application on an international level and protects the best interests of children through international cooperation.”

In crafting these goals, the Convention’s drafters did not consider the newborn question. Before writing the Convention, the drafters gathered information from countries who are part of the International Social Service (ISS) via the “Questionnaire on the international

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49. PEREZ-VERA, supra note 1, ¶ 17, at 430 (stating that the “effective respect for rights of custody and of access belongs on the preventive level”).
50. Id. ¶ 71, at 448.
51. Hague Convention, supra note 31, art. 19 (“A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.”).
52. Id. Preamble.
53. PEREZ-VERA, supra note 1, ¶ 16, at 429.
56. PEREZ-VERA, supra note 1, ¶ 18, at 430.
57. MORLEY, supra note 9, at 75.
abduction of children by a parent.” This questionnaire did not attempt to “formulate[e] a comprehensive formal definition of child abduction,” but rather referred to five situations that respondents were to focus on. The five hypotheticals could only occur after the child was born. None of those hypotheticals touched on the newborn question, and none involved newborns or infants. Therefore, the baseline information the drafters referenced did not consider these groups.

The text of the Convention provides further evidence that the drafters did not consider the newborn question. Article 4 limits the application of the Convention “to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.” For the Convention to apply to the newborn question, a baby would have to have a habitual residence in utero, which courts have generally rejected. Articles 1, 3, and 12 emphasize that the Convention empowers Contracting States to order the return of wrongfully removed or retained children, but removal and retention do not apply neatly to babies born in other nations.

59. 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 130 (Permanent Bureau of the Conference ed., 1982).
60. Id. at 9.
61. Id. The exact text of the questionnaire was:

The five types of situations which are considered to constitute ‘child abduction’ for the purposes of this questionnaire are described below:

(A) The child was removed by a parent from the country of the child’s habitual residence to another country without the consent of the other parent, at a time when no custody decision had yet been handed down but serious problems between the parents already existed;

(B) The child was abducted by a parent from the judicially determined custodian in one country and removed to another, where no conflicting custody decision had been handed down;

(C) The child was retained by the non-custodial parent or other relatives beyond a legal visitation period, in a country other than that in which the child habitually resided;

(D) The child was abducted by a parent from the legal custodian in one country and removed to another, where the abductor had been granted custody under a conflicting order in that other country or in a third country;

(E) The child was removed by a parent from one country to another in violation of a court order which expressly prohibited such removal.

Id.

63. See infra note 84.
64. Hague Convention, supra note 31, arts. 1, 3, and 12.
65. See discussion infra notes 81–88.
Convention’s Explanatory Report specifies that the Convention is focused on the child who “is taken out of the family and social environment in which its life has developed.”

The fact that the Convention’s drafters did not consider the newborn question does not mean that the Convention does not apply to newborns. It is clear that the Convention applies to newborns under Articles 3 and 5. However, the newborn question falls through the cracks of habitual residence, and because habitual residence is central to the operation of the Convention, the Convention does not apply where there is no habitual residence. Additionally, there are no express provisions or suggestive materials from the Convention that provide guidance on the newborn question.

A. Original Understanding of Key Terms

1. Habitual Residence

The term “habitual residence” plays a vital role in the Convention system since the outcome of a petition to remove a child often will hinge on a court’s determination of whether the child’s habitual residence is where the petitioner claims it is. Habitual residence has never been defined in any Hague Convention, despite being used in several Conventions relating to family law that refer to adults and children. Leaving the term undefined allows courts to apply the concept flexibly without the baggage an entrenched legal term such as “domicile,”

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66. PEREZ-VERA, supra note 1, ¶ 11, at 428 (emphasis added) (In the context of the Explanatory Report, this line refers to postnatal children who were removed or retained from their preexisting habitual environment: “Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed.”).

67. See infra note 89.

68. PEREZ-VERA, supra note 1, ¶ 53, at 441 (“[A] long-established tradition of the Hague Conference” is to “[avoid] defining its terms”); Brigitte M. Bodenheimer, The Hague Draft Convention on International Child Abduction, 14 Fam. L. Q. 99, 104 n.25 (1980) (Habitual residence “has never been defined.”); SCHUZ, supra note 2, at 175–76 (Habitual residence “has been used in all the Hague Conventions relating to family matters.”).
“residence,” or “nationality” would carry. Using any of those terms could have led to an uneven application of the Convention since those words have been interpreted and applied differently across civil and common law jurisdictions. For instance, “nationality” was widely used in Europe while “domicile” was more popular in common law systems. Had the Convention used domicile, European courts would have had to adopt the common law definitions, equate nationality to domicile, or reinterpret the word altogether. Habitual residence avoided this confusion since it was a new term that allowed all legal systems to develop a meaning simultaneously, contributing to the uniformity objective.

Creating a legal term from scratch has obstacles. While a novel term allows for the formation of a uniformly synthesized definition, it brushes well-litigated concepts away in favor of the unknown. A newborn may have had a recognized domicile, residence, or nationality if they were born in the United States, but the courts analyzing habitual residence were not bound by any of these. The courts were instead free to develop the term.

Despite the lack of a formal definition, the drafters originally understood the habitual residence inquiry as “a question of pure fact.” At the time of the Convention’s drafting, Black’s Law Dictionary defined “habitual” as “customary, usual, of the nature of a habit.” It defined “residence” as “personal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period.” Taken together,

69. Perez-Vera, supra note 1, ¶ 66, at 445 (explaining why habitual residence differs from domicile); Bodenheimer, supra note 68, at 104 n.25 (habitual residence “is understood to approximate the meaning of ‘domicile’ without embracing all technical implications of that term in English or American law”); Beaumont & McEleavey, supra note 3, at 9 (“The strength of habitual residence in the context of family law is derived from the flexibility it has to respond to the demands of a modern, mobile society; a characteristic which neither domicile nor nationality can provide.”).

70. Schuz, supra note 2, at 176 (“The main reason for the adoption of the concept of habitual residence in international conventions seems to have been the need to find a connecting factor that was acceptable to both Continental and common law legal systems.”).

71. Id.

72. Perez-Vera, supra note 1, ¶ 66; see also Beaumont & McEleavey, supra note 3, at 90 (“The ability of habitual residence to identify the most appropriate forum . . . has traditionally emanated from its largely factual emphasis.”).

73. Habitual, BLACK’S LAW DICTIONARY (5th ed. 1979).

habitual residence was similar to a person’s usual presence at a stable place of abode.

Two articles and one statutory recommendation illustrate family law scholars’ common understanding of habitual residence at the time of the Convention’s drafting. Note that the habitual residence analyses put forth by these sources focus on factors that a newborn cannot adequately demonstrate, such as length of time in and ties to a specific place.

The first article is a comment by Willis L.M. Reese on the 1965 Hague Draft Convention on the Recognition of Foreign Divorces. Reese noted that habitual residence

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\text{[u]}\text{ndoubtedly . . . requires physical presence in a place for a period of time, together presumably with the maintenance there of a place of abode. In the great majority of instances, at least, a person’s habitual residence would be in the place where he has his domicile in the American sense.}^{75}
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In a comment on the 1975 Hague Draft Convention on Matrimonial Property, Allan Philip also remarked that habitual residence is similar to domicile. He maintained that habitual residence is “the Hague Conference[’s] terminology for domicile” while “avoiding the special meaning of the word ‘domicile’ in English law.”\(^76\) He further noted that “habitual residence is somewhat more than residence. Mere change of residence does not constitute habitual residence.”\(^77\)

Finally, the Council of Europe passed a resolution in 1972 clarifying the related concepts of “domicile,” “residence,” and “habitual residence.”\(^78\) It maintained that important factors to consider when determining habitual residence were “the duration and the continuity of the residence, as well as other facts of personal or professional nature which point to durable ties between a person and his residence.”\(^79\) The resolution noted that “[t]he voluntary establishment of a residence and a person’s intent to maintain it are not conditions”

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\(^{77}\) *Id.* at 313.


\(^{79}\) *Id.* no. 9, at 2.
of a habitual residence, though one’s intentions “may be taken into account in determining . . . the character of that residence.”

These descriptions all outline factors that are challenging to apply to newborns. Measuring a newborn’s customary actions, intentions, ties to a location, or length of time somewhere presents obvious challenges, so the attempts to define habitual residence further illustrate that the term was not created to encompass the newborn question.

2. Wrongful Removal or Retention

As with habitual residence, the Convention seems to have not considered the newborn question when outlining what it means to wrongfully remove or retain a child. Removal and retention are best understood as actions that “change[] the family relationships which existed before or after any judicial decision.” Removal is when “the child was taken out of the country of habitual residence.” Retention covers “where the child, with the consent of the person who normally has custody, is in a place other than its place of habitual residence and is not returned by the person with whom it was staying.” Retention is more suitable for the newborn question since applying wrongful removal would imply the wrongful removal applied in utero, and it is largely recognized that the Convention does not apply to prenatal removal.

Article 3 outlines when removal or retention is considered wrongful. The child’s habitual residence is marked “immediately before the removal or retention.” Wrongful removal starts “when [the child] crossed the border out of” their habitual residence. The exact

80. Id. no. 10, at 2.
81. Pérez-Vera, supra note 1, ¶ 57, at 442.
82. Schuz, supra note 2, at 142.
83. Pérez-Vera, supra note 1, ¶ 57, at 442.
85. Hague Convention, supra note 31, art. 3(a).
86. Schuz, supra note 2, at 142.
timing of wrongful retention can be less clear for multiple reasons, including concealed intentions, hazy or changing return deadlines, conditional moves, or temporary relocations. At the time of drafting, the date for wrongful retention was understood to be when “the child ought to have been returned to its custodians or [when a] holder of the right of custody refused to agree to an extension of the child’s stay in a place other than that of its habitual residence.”\textsuperscript{87} The retention or removal is not considered wrongful when the left-behind parent (LBP) gives consent to the other parent.\textsuperscript{88} When dealing with the newborn question where the parents do not agree on the child’s habitual residence at the time of birth, the date of the wrongful retention could be the moment the child is born. At that date, the LBP—who would hold a right of custody over the baby—did not consent to the child’s place of residence.\textsuperscript{89} With parental intentions split from the moment the child is born, the habitual residence analysis becomes trickier, and courts have yet to settle on a uniform analysis to determine where the child’s habitual residence is.

B. The Abduction Convention in the United States

The Convention was ratified by the U.S. Senate in October 1986.\textsuperscript{90} In 1988, Congress passed the International Child Abduction Remedies Act (ICARA), which implemented the Convention.\textsuperscript{91} When U.S. courts began to hear Convention cases, the circuits split over how to determine a child’s habitual residence. Three different approaches, each of which emphasized different factors and policy preferences,
emerged. Under these three methods, the issue of how to determine a newborn’s habitual residence was litigated but never definitively settled.

The habitual residence split was largely resolved for non-newborns in Monasky v. Taglieri, which held that courts should consider the “totality of the circumstances” when determining a child’s habitual residence. While Monasky offers general guidance, it yielded no definite answer to the newborn question.

1. Pre-Monasky Circuit Split

In the United States, a successful ICARA petitioner must demonstrate that “(1) the child was habitually resident in a given state at the time of the removal or retention; (2) the removal or retention was in breach of petitioner’s rights under the laws of that state; and (3) petitioner was exercising those rights at the time of removal or retention.” Most cases revolve around the issue of habitual residence. Each of the three pre-Monasky approaches included related, but distinct, ways of determining a newborn child’s habitual residence.

The first approach was the parental intent model, which determined habitual residence based on the “intentions of the parents as of the last time that their intentions were shared.” For a child’s habitual residence to change, both parents must agree to the move. This approach ensures that one parent is not able to “unilaterally . . . alter the status quo with regard to the primary locus of the child’s life.” This strict approach offered an exception where a court found that a child had acclimated to their surroundings so as “to render a return order unfair or seriously damaging.” The parental intent approach was

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94. Many cases referenced in this Section will reappear in Section III.A’s analysis. See discussion infra Section III.A.
96. Schuz, supra note 2, at 175 (claiming that “habitual residence is one of the most litigated issues under the Convention” because the term was left undefined).
98. Mozes v. Mozes, 239 F.3d 1067, 1079 (9th Cir. 2001).
99. Morley, supra note 9, at 84.
employed by the First, Second, Fourth, Seventh, Ninth, and Eleventh Circuits, making it the most common of the three approaches.  

This model yielded mixed results when applied to the newborn question. In a straightforward application of the parental intent model, a child would be considered a “habitual[] resident in the country where the parents had last been habitually resident together, even though he has never set foot in that country.” This was complicated when the parents no longer shared an intention for habitual residence at the time of birth and the birth was outside of the parents’ habitual residence. In those cases, courts often held that the child had no habitual residence. The parental intent model would find there to be no habitual residence to which the child may be returned. Since the parents never shared an intent, the Convention would be of no assistance. This does not necessarily run counter to the goals of the Convention if the child does not have a home location or “status quo.” Notably, even a finding of no habitual residence only alters the location of the custody determination.

In the leading parental intent case of Delvoye v. Lee, the Third Circuit considered the habitual residence of a baby born in Belgium to a U.S. mother and Belgian father. The parents traveled to Belgium to give birth to avoid U.S. medical expenses. The court noted that the trip was meant to be temporary: The mother only had a “three-month [Belgian] tourist visa” which she did not renew, brought “one or two suitcases,” packed only maternity clothes, and kept her New York apartment. The parents’ relationship deteriorated soon after birth, and the mother moved back to the United States with the child. In a suit initiated by the father for the return of the child to Belgium, the court held that “[w]here a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem . . . that the child will normally have no habitual

100. Id.
101. SCHUZ, supra note 2, at 201–02.
102. MORLEY, supra note 9, at 119 (“If the parents never shared an intent for the child to reside in the United States and were themselves living in different countries and in conflict as to where to reside, the child is not habitually resident in the United States and will have no habitual residence.”).
104. Id.
105. Id.
106. Id.
residence until living in a country on a footing of some stability.”

This determination did not mean that the United States was the child’s habitual residence; however, the effect of the judgment—that the child remained in the United States—was the same as if the court had found that the child’s habitual residence was in the United States.

The second pre-Monasky approach to determining habitual residence was the child-centered model. This approach “focus[ed] on the child, not the parents, and examine[d] past experience, not future intentions.” By focusing on the child’s perspective, the court would weigh factors that measure acclimatization, such as when the child moved, how long the child had been there, and what level of involvement the child had with their community.

The child-centered model was not particularly useful when applied to children too young to form connections with a nation. Very young children have little to no meaningful connections to a country, making their acclimatization hard to judge. Courts that subscribed to the child-centered model navigated this issue in two ways. One solution was to give greater weight to parental intentions in this situation, thereby creating a special rule for infants. The second way was embracing the only connections the infant had to a location. “Since the child has only ever lived in the country where he is born, he must be habitually resident there.” Under this argument, it was not necessary to prove that the newborn had acclimated. The approach maintains that the acclimatization “requirement [in the child-centered model] relates to a situation where a person has lived in one place and needs time to get used to another.”

Rejecting this version of

107. Id. at 334 (citing E.M. Clive, The Concept of Habitual Residence, 3 JURID. REV. 138, 146 (1997)).
110. See, e.g., Robert v. Tesson, 507 F.3d 981, 992 n.4 (6th Cir. 2007) (“[W]e recognize that a very young or developmentally disabled child may lack cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose.”).
112. SCHUZ, supra note 2, at 203.
113. Id.
acclimatization under a child-centered model “would logically lead to the absurd result that no child has a habitual residence at birth,” leaving all newborns without the protection of the Convention regardless of the stability of the circumstances surrounding their birth.

The third pre-Monasky method to determine habitual residence was the hybrid model, which approached the habitual residence analysis as “fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions.” As the name suggests, this approach “require[d] a mixed inquiry into both the child’s circumstances and the shared intention of the child’s parents.” The exact balance between the factors varied based on age. “When the child in question [was] very young, the courts tend[ed] to deemphasize acclimatization, and conversely, when the child [was] older and therefore able to form meaningful connections with his or her environment, tend[ed] to emphasize acclimatization.” Whiting v. Krassner supports this notion. That case maintained that in situations involving “a very young child, . . . the shared intent of the parents in determining the residence of their children was of paramount importance.” For this reason, this approach yielded similar results to the parental intent model when applied to newborns.

The three approaches provided little uniform guidance on the habitual residence of newborns. The overarching principles were that a baby cannot meaningfully acclimate to their surroundings, that shared parental intent should be given greater weight when the child is unable to acclimate, and that in certain instances, the child may not have a habitual residence.

2. Monasky v. Taglieri

Monasky largely resolved the circuit split over how to determine habitual residence in U.S. federal courts. Michelle Monasky and

114. Id.
115. Redmond v. Redmond, 724 F.3d 729, 746 (7th Cir. 2013).
116. MORLEY, supra note 9, at 85.
118. 391 F.3d 540, 550 (3d Cir. 2004).
119. See McKie v. Jude, No. 10-103-DLB, 2011 U.S. Dist. LEXIS 1834, at *28 (E.D. Ky. Jan. 7, 2011) (“Few courts in the United States have squarely addressed the issue of habitual residence in the case of a newborn, but those that have, have concluded that shared parental intent prior to the wrongful removal or retention is central to the determination.”).
Domenico Taglieri, a married couple, lived in Italy when Monasky became pregnant. They planned to care for the child together in Italy, but after Taglieri abused Monasky, Monasky privately looked into returning to the United States. However, she did not make any moves to do so. About a month after their daughter was born, Monasky took their daughter to an Italian safe house claiming that she “feared for her life” due to Taglieri’s abuse. Two weeks later, Monasky and the two-month-old daughter relocated to Ohio.

Taglieri started ICARA proceedings for the return of his daughter in the U.S. District Court for the Northern District of Ohio. The district court found that an infant who is “too young to acclimate to her surroundings” develops a habitual residence based on “the shared intent of the parents.” Because the last shared intention of the parents was to live in Italy, the district court determined that her habitual residence was Italy. A three-judge Sixth Circuit panel, then the circuit en banc, affirmed this ruling under a clear-error standard of appellate review. Monasky appealed to the Supreme Court asking, in part, if Italy could be her daughter’s habitual residence “in the absence of an actual agreement by her parents to raise her there.”

In 2019, the Supreme Court “granted certiorari to clarify the standard for habitual residence” and to “resolve a division in Courts of Appeals over the appropriate standard of appellate review.” The Court held “that a child’s habitual residence depends on the totality of the circumstances specific to the case.” Despite the fact that the

120. Monasky, 140 S. Ct. at 724.
121. Id.
122. Id. Note that there is a “grave risk” exception under Article 13(b) of the Convention that applies to situations of domestic violence, and the Court considered that issue separately. See id. at 729. However, abuse may still be factored into the habitual residence analysis under some circumstances. “[S]uppose, for instance, that an infant lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus.” Id. at 727.
123. Id. at 724.
124. Id.
125. Id.
126. Id. at 725.
127. Id.
128. Id. at 723. Note the distinction between the last shared intentions of the parents and an actual agreement between the parents.
129. Id. at 725–26.
130. Id. at 723.
lower courts heavily weighed parental intent, the Court affirmed the district court’s judgment, stating that the district court “had before it all the facts relevant to the dispute” and indicating that the District Court would not have decided the matter differently under a totality of the circumstances analysis.\footnote{131}

The Court considered the text and context of the treaty. Citing Black’s Law Dictionary, the Court indicated that “a child ‘resides’ where she lives” and that residence is habitual when it is “customary, usual, of the nature of a habit.”\footnote{132} In general, “[t]he place where a child is at home, at the time of removal or retention, ranks as the child’s habitual residence.”\footnote{133} The inclusion of “habitual” in the phrase implies a “fact-sensitive inquiry, not a categorical one.”\footnote{134} Therefore, no categorical fact—like the lack of an actual agreement, last shared intentions, or an infant’s “mere physical presence” in a location—will be determinative.\footnote{135} Indeed, “[n]o single fact ... is dispositive across all cases.”\footnote{136} Instead, “courts must be ‘sensitive to the unique circumstances of the case and informed by common sense’” in their analysis.\footnote{137} “[A] wide range of facts other than an actual agreement, including facts indicating that the parents have made their home in a particular place” can be used to determine an infant’s habitual residence.\footnote{138}

\textit{Monasky} acknowledges that some factors are due greater weight in particular circumstances. “Where a child has lived in one place with her family indefinitely,” that country “is likely to be her habitual residence.”\footnote{139} In other cases, factors that the courts should consider vary depending on age. “For older children capable of acclimating to their surroundings ... facts indicating acclimatization will be highly relevant.”\footnote{140} Relevant facts include the child’s schooling, activities, community engagement, immigration status, and language abilities, as well as where their possessions are located.\footnote{141} For children

\begin{footnotes}
\item[131] Id. at 731.
\item[132] Id. at 726.
\item[133] Id.
\item[134] Id.
\item[135] Id. at 729.
\item[136] Id. at 727.
\item[137] Id. (quoting Redmond v. Redmond, 724 F.3d 729, 744 (7th Cir. 2013)).
\item[138] Id. at 729.
\item[139] Id. at 727.
\item[140] Id.
\item[141] Id. at 727 n.3.
\end{footnotes}
“too young or otherwise unable to acclimate . . . the intentions and circumstances of caregiving parents are relevant considerations.”

The Court in *Monasky* noted that the totality of the circumstances analysis was “[i]n accord with decisions of the courts of other countries party to the Convention,” and that the Convention and ICARA prioritize uniformity in application. Using a “fact-driven inquiry into the particular circumstances of the case” is a “‘clear trend’ among our treaty partners,” which supports the analysis.

Three specific points are worth underscoring. First, in clarifying that there is no “actual-agreement” requirement, the *Monasky* Court prioritized a particular goal of the Convention: “stop[ping] unilateral decisions to remove children across international borders.” Where actual agreement is required, a parent could withhold their agreement and individually “block any finding of habitual residence for an infant.” The Court expressly refused to grant that power. This cuts both ways regarding the newborn question. It promotes the Convention’s application in the newborn question since the pregnant parent would otherwise be able to unilaterally decide where the child’s custody hearings would be held. Conversely, *Monasky* can also be understood to assert that the LBP does not have the power to unilaterally “block” a finding of habitual residence for an infant. Requiring an actual agreement would mean that a pregnant parent could never withdraw from a prenatal agreement, regardless of what circumstances change between the agreement and the birth.

Second, the Court dismissed the possibility of leaving every infant without a habitual residence. The Court mentioned that if it adopted Monasky’s actual agreement requirement, it would “create a presumption of no habitual residence for infants, leaving the

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142. *Id.* at 727.

143. *Id.* at 723, 727; see 22 U.S.C. § 9001(b)(3)(B); see also *supra* text accompanying notes 55–58.


145. *Id.* Note that this quote only references unilateral decisions to remove children, not retain children. As previously discussed, wrongful retention, not removal, is a neater fit for the newborn question. See *supra* text accompanying note 84. Regardless, the Court likely meant both retention and removal in its statement of one of the Convention’s prongs but only mentioned removal because of its applicability to the case at hand.

146. *Id.*

147. *Id.* (“An actual-agreement requirement would enable a parent, by withholding agreement, unilaterally to block any finding of habitual residence for an infant.”).
population most vulnerable to abduction the least protected.”

This is not to say that some infants cannot be without a habitual residence in certain circumstances. Rather, it asserts that no across-the-board rule can be used to hold that every infant is without a habitual residence. By not requiring that every infant have a habitual residence, Monasky suggests that there may be some situations in which an infant can be without a habitual residence.

Third, Monasky left many details unanswered about the newborn question. The child in dispute was two months old at the time of her removal, so Monasky illuminated how to analyze an infant’s habitual residence. And while the case provided considerations for resolving the newborn question—including looking to where parents have made their home and the intentions of the caregiving parents—the case did not address what to do when these factors are split.

The other issue the Court was asked to resolve was “a division in Courts of Appeals over the appropriate standard of appellate review.” The Court held that the deferential “clear-error” standard is appropriate since a goal of the Convention is promptness, and a “clear-error review speeds up appeals and thus serves the Convention’s premium on expedition.” An additional reason to use a deferential standard is that other signatory nations review habitual residence appeals using a deferential standard.

3. Post-Monasky Concerns

Monasky conformed with the originally intended “totality of the circumstances” approach for habitual residence and aligned U.S. courts with those of many other Member States. Many family lawyers supported this approach because it “deter[red] international parental

148. Id.
149. Id. at 724.
150. Id. at 727, 729.
151. Id. at 726.
152. Id. at 723. Justice Alito authored a concurrence to disagree with this point. He noted that because “‘habitual residence’ is not a pure question of fact,” he would list the standard of review as abuse of discretion instead of clear error. Id. at 735 (Alito, J., concurring in part and concurring in the judgment). He noted that “the difference may be no more than minimal” since both are deferential standards. Id.
153. See generally supra text accompanying notes 41–47.
154. Monasky, 140 S. Ct. at 730.
155. Id.; see generally supra text accompanying notes 48–50, 55–58.
child abduction” by “prevent[ing] forum shopping, promot[ing] parents’ mutual intentions, [and] treat[ing] children appropriately depending on their age.” But other advocates and scholars published concerns about Monasky’s loose guidance which, paired with an appellate review standard that gives courts broad discretion, led some to worry about the domestic uniformity of the Convention’s application.

Since Monasky did not create a “uniform standard,” one scholar predicted that “the courts will continue to apply their differing pre-Monasky patterns of emphasis,” particularly in complicated cases or cases involving young children. With “little guidance for the lower courts,” “[t]he same case with the same facts decided in one jurisdiction could have a different result if heard in another jurisdiction.” The highly contextual approach could also create disparities at a more granular level: Monasky’s ruling could “make[] it more likely that cases with similar facts will have disparate outcomes driven by the proclivities of the particular judge.” The disparate outcomes are at odds with the Convention’s goal of consistency, as well as deterrence, since the judgment will be less predictable, meaning a parent may be more willing to take their chances in court.

Appellate review would not save the day in these instances. Appellate courts would review the decision for clear error, a very deferential standard. Generally, “deferential review would be more likely to lead to affirmance of the lower court than non-deferential

158. Id. at 372.
159. Sabrina Salvi, Monasky’s Totality of Circumstances is Vague – The Child’s Perspective Should Be the Main Test, 38 TOURO L. REV. 725, 727, 751 (2022); see also Jacobson, supra note 92, at 372–73 (arguing that Monasky “leaves parents at an extreme disadvantage, with cases faring better or worse depending on which court hears their case”).
161. See supra text accompanying notes 55–58.
162. See supra text accompanying notes 39–40.
review.”¹⁶³ This is particularly worrisome when dealing with “the well-being of children,” as children are especially vulnerable and susceptible to long-term harm.¹⁶⁴

One international family lawyer remarked that there “remain no answers” to important questions, such as whether the “fact intensive totality-of-the-circumstances analysis” will “lead to more litigation” given the “more flexible definition of habitual residence”; if the deferential review will “lead to fewer appeals, with trial opinions that are exceptionally fact sensitive”; or if particularly savvy parents will pick a jurisdiction to move to “where judges may have a predisposition towards one or the other outcome.”¹⁶⁵ She questioned if a “child may have no habitual residence or whether a child can have more than one habitual residence” based on Monasky’s holding.¹⁶⁶ These concerns require additional analysis as more cases are heard post-Monasky.

II. POST-MONASKY OUTCOME DISPARITIES

It did not take long to prove the academic worries about inconsistent judgments under Monasky correct. In three cases, a pregnant parent crossed into the United States, which was at that time not their habitual residence, and gave birth. The newborn child never left the United States, and the LBP commenced litigation. In one case, Pope v. Lunday,¹⁶⁷ the court held that the country the mother came from was not the child’s habitual residence. The appellate court affirmed, meaning the child remained in the United States. In the other two, de Carvalho v. Pereira¹⁶⁸ and Ascanio v. Crespo,¹⁶⁹ the trial courts held that the child was a habitual resident of where the mother came from. Even though the child had never been to that country, they were sent “back.” Only de Carvalho was appealed, and the appellate court affirmed. As of the publication of this Note, these are the only three post-Monasky

¹⁶⁴. Keating & Reynolds, supra note 160 (critiquing the court’s “apparent trade-off of expediency over other considerations” and noting that “‘prompt but wrong’ is not a generally accepted legal norm”).
¹⁶⁵. Kucinski, supra note 54, at 40.
¹⁶⁶. Id. at 37.
¹⁶⁷. 835 F. App’x 968 (10th Cir. 2020).
cases identified where a pregnant parent crossed into the United States to give birth, leading to a dispute.

A. Pope v. Lunday

Pope was decided before Monasky, but the appeal was heard after and the appellate court affirmed the district court’s judgment. Kenneth Pope and Lauren Lunday lived together in Brazil in 2018. Lunday became pregnant in 2019, and around twenty weeks into her pregnancy, she moved to the United States. Pope claimed to have been deceived by the trip, stating that he thought it was “for only a few weeks, to attend social and business events.” Lunday gave birth to twins in November 2019 in the United States and remained in the country with the children.

Pope filed an action in the U.S. District Court for the Western District of Oklahoma under ICARA. Pope made clear that he was not alleging “wrongful removal of the children in utero.” This was a strategic decision since the Convention has not been extended to the removal of unborn children. He argued instead that it was a wrongful retention case: The children immediately “became ‘habitual residents’ of Brazil because [Pope] and Lunday’s ‘last shared intent’ was

170. Pope, 835 F. App’x at 969.
171. Id.
172. Id. at 969–70; see also Pope v. Lunday, No. CIV-19-01122-PRW, 2019 U.S. Dist. LEXIS 220406, at *3 n.10 (W.D. Okla. Dec. 23, 2019) (referencing Pope’s description of Lunday’s “deception in sneaking away from the marital home, lying to her husband regarding her intentions, and secreting herself and the unborn children from him until she gave birth and thereafter”), aff’d, 835 F. App’x 968 (10th Cir. 2020).
173. Pope, 835 F. App’x at 970.
175. Id. at *3.
to reside in Brazil and raise the children there."\textsuperscript{177} Pope asserted that Lunday’s “unilateral, secretive and deceptive conduct [was] precisely the type of behavior that the Hague Convention was designed to remedy.”\textsuperscript{178}

Lunday countered, claiming that physical presence was a requirement for habitual residence.\textsuperscript{179} She said that there was no agreement between her and Pope regarding the children’s residence while the child was in utero, and even if there was, “such an agreement is not sufficient to establish the habitual residency of the subsequently-born children.”\textsuperscript{180}

The district court denied Pope’s petition,\textsuperscript{181} ultimately considering this to be a custody dispute “with an international element,” not an international abduction case.\textsuperscript{182} To reach its conclusion, the court relied heavily on the text of the Convention. According to the court, the Convention’s text rejects Pope’s claims that the birth of a child, the establishment of habitual residence in another country, and the immediate retention of the child away from that country can occur simultaneously. This scenario runs counter to the structure of the Convention, which implies that a child “cannot be wrongfully ‘retained’ away from a place unless they were first a habitual resident of that place.”\textsuperscript{183} The court also emphasized the word “return” in its analysis.\textsuperscript{184} “[A] child can hardly be ‘returned’ to a place the child has never been.”\textsuperscript{185}

Next, the court questioned if a newborn could even have a habitual residence. The Convention’s focus on retention away from a habitual residence and emphasis on habitual residence before the retention “indicates that [the Convention] does not apply to all child-custody disputes with an international element.”\textsuperscript{186} Instead, the focus of the Convention is on preserving the status quo by undoing the “unilateral severing of established ties” of children who have already

\textsuperscript{177} Id. at *3.
\textsuperscript{178} Id. at *3 n.10.
\textsuperscript{179} Id. at *4.
\textsuperscript{180} Id.
\textsuperscript{181} Id. at *5.
\textsuperscript{182} Id. at *5, *8.
\textsuperscript{183} Id. at *8.
\textsuperscript{184} Id. at *6; see Hague Convention, pmbl. (The Convention aims “to establish procedures to ensure [children’s] prompt return to the State of their habitual residence.”).
\textsuperscript{185} Pope, 2019 U.S. Dist. LEXIS 220406, at *6.
\textsuperscript{186} Id. at *8.
“assimilated” to a country.\textsuperscript{187} The court mused that it “is not convinced that a newborn is capable, at the moment of birth, of having a place of ‘habitual residence’” because any other determination would “render ‘habitual’ meaningless.”\textsuperscript{188}

Assuming a newborn is capable of or required to have a habitual residence, the court held that the twins’ residence would not be Brazil since they were U.S. citizens, were “born in the United States to parents who are United States Citizens,” and had never been to Brazil.\textsuperscript{189} The court claimed that it is illogical to conclude that “Brazil could be considered the place they usually reside.”\textsuperscript{190}

Third, the court took aim at the mutual agreement standard posed by Pope. \textit{Monasky} ultimately decided that last shared agreements do not control a child’s habitual residence, but the Supreme Court generally stated that “the intentions and circumstances of caregiving parents are relevant considerations” in determining a young child’s habitual residence.\textsuperscript{191} The district court considered a slightly different issue: \textit{when} the shared intention on the child’s habitual residence starts, and whether it could start while the child is in utero. The court held that “there was never shared parental intent with respect to the children because the children did not yet exist at the time of the alleged agreement.”\textsuperscript{192} Because the parents “never during the children’s short lifetimes agreed on a place of residency,” there could be no mutual agreement.\textsuperscript{193} Focusing on shared intent before the child is born implied that any former agreement was “irrevocable unless superseded by a new agreement”\textsuperscript{194} and ignored factual circumstances that occurred after the “\textit{in utero} agreement.”\textsuperscript{195}

According to this court, parents’ mutual intent is irrelevant until the baby is born. In a footnote, the court offered that prenatal agreement may weigh more heavily where there is an older sibling since the

\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.} at *9. This was explicitly denied in \textit{Monasky}. \textit{See Monasky}, 140 S. Ct. at 728.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Monasky}, 140 S. Ct. at 727.
\textsuperscript{193} \textit{Id.} at *11–12.
\textsuperscript{194} \textit{Id.} at *10.
\textsuperscript{195} \textit{Id.} at *11.
parents have a shared intent on where to raise that child, but the court
did not explore that point further.196

The court emphasized Lunday’s autonomy in other facets of
her pregnancy. At the time she came to the United States, “Lunday
could have unilaterally terminated her pregnancy” under American
law,197 so it is inconsistent that she would still be beholden to an in
utero agreement about the residence of the children.

This holding was affirmed by the Tenth Circuit under clear-
error review post-Monasky.198 The appellate court determined that the
lower court abided by Monasky’s reasoning even though the trial court
opinion was decided before Monasky came down.199 Monasky re-
jected that both physical presence (counter to Lunday’s argument) and
last shared actual parental agreement (counter to Pope’s position) are
dispositive.200 These are just factors that the court can weigh, as the
lower court did.201 The appellate court emphasized that “[t]he Con-
vention does not require a district court to determine where a child
habitually resides. Instead, the Convention requires a district court to
determine whether the child habitually resides in the location that the
petitioner claims.”202 Since the district court’s “findings [had] support
in the record” and there was no “firm conviction of a mistake,” the
appeals court “affirm[ed] the district court’s determinations that the
infants were not habitual residents of Brazil.”203

B. De Carvalho v. Pereira

In 2010, Niva de Carvalho and Leonardo Pereira were married
and living together in Brazil.204 They had their first child together in

196. Id. at *10 n.34.
197. Id. at *10 n.35. Note that while Dobbs v. Jackson Women’s Health Org.,
142 S. Ct. 2228 (2022) altered the landscape of abortion law, this fact holds true
since the mother could elect to travel to a state where abortion is accessible.
198. Pope v. Lunday, 835 F. App’x 968, 969–70 (10th Cir. 2020).
199. Id. at 972 (“The district court’s ruling was consistent with Monasky’s ‘total-
ity of the circumstances’ approach.”).
200. Id. at 971.
201. Id. at 972 (“Rather than considering any factor to be dispositive, the court
considered a wide range of factors.”).
202. Id. at 971 (quoting Watts v. Watts, 935 F.3d 1138, 1147–48 (10th Cir.
2019)).
203. Id. at 972.
Brazil two years later, and De Carvalho became pregnant in 2015 with a second child. 205 “In January 2016, the parents [and] Child 1 . . . traveled to the United States for two agreed-upon purposes: first, for Child 2 to be born in the United States and thus acquire citizenship; and second, for [Pereira] to” participate in an American medical fellowship. 206 In the following months, the medical fellowship deteriorated, and Pereira planned to move back to Brazil. 207 Child 2 was born in March, then Pereira left for Brazil by himself a few days later. 208 By April, de Carvalho decided to remain in the United States with the children instead of returning to be with Pereira. 209

Pereira filed suit in Florida state court for the return of the children under ICARA. 210 “The trial court found that [de Carvalho] wrongfully retained the children as of April 5, 2016, when she notified [Pereira] that she wanted to dissolve their marriage and she intended to remain in the United States with the children.” 211 The court held that both children were habitual residents of Brazil, despite the second never having been there. 212 This finding was based on “the shared intent of the parents until April 2016 to visit the United States only temporarily for” the second child’s birth. 213 After the establishment of the parent’s shared intention, “neither parent intended to permanently relocate the family residence from Brazil to the United States until April 2016 when [de Carvalho] informed [Pereira] of her plans.” 214

A divided Florida Court of Appeals affirmed the ruling. 215 Applying Monasky, the court considered shared prior intent and where the parents made a home before the child was born. 216 Both factors pointed in the direction of Brazil. The appellate court agreed with Monasky’s holding that physical presence is not dispositive. 217
court noted that the trial court’s determination of the second child’s habitual residence was not clearly erroneous even though “another court might have weighed the evidence and determined the credibility of the witnesses differently.”\textsuperscript{218}

The dissent agreed with the majority regarding the first child but disagreed regarding the second child, who had only ever been in the United States.\textsuperscript{219} The dissent argued that the second child did not have a habitual residence. Citing\textit{ Pope}, the dissent maintained that it is artificial and illogical to return a child to a “residence” they have never lived in.\textsuperscript{220} The court cited\textit{ In re A.L.C.}, a factually similar pre-\textit{Monasky} case where a mother came into the United States pregnant, gave birth, and never left. There, the appellate court held that the child had no habitual residence\textsuperscript{221} and that the lower court “clearly erred in finding [the child] could be a habitual resident of a nation in which she never resided.”\textsuperscript{222} In response, the\textit{ de Carvalho} majority claimed that\textit{ In re A.L.C.} was indirectly abrogated by\textit{ Monasky}.

C. Ascanio v. Crespo

Jose Ascanio and Mery Crespo were married in 2011 and had their first child in 2013.\textsuperscript{225} The family moved internationally every few years and settled in Portugal in 2018.\textsuperscript{226} Crespo became pregnant

\begin{itemize}
  \item \textsuperscript{218} Id. at 1085; see also id. (“The possibility that we could have ‘gone the other way had it been our call’ does not constitute a clear error of judgment by the trial court.” (quoting Fernandez v. Bailey, 909 F.3d 353, 363 (11th Cir. 2018))).
  \item \textsuperscript{219} Id. at 1086 (Jay, J. dissenting).
  \item \textsuperscript{220} Id.; see supra text accompanying note 37.
  \item \textsuperscript{221} De Carvalho, 308 So. 3d at 1087 (Jay, J. dissenting).
  \item \textsuperscript{222} Id. (quoting E.R.S.C. v. Carlwig (\textit{In re A.L.C.}), 607 F. App’x 658, 662 (9th Cir. 2015)).
  \item \textsuperscript{223} See Monasky, 140 S. Ct. at 729 (“An infant’s ‘mere physical presence,’ we agree, is not a dispositive indicator of an infant’s habitual residence.”); De Carvalho, 308 So. 3d at 1084 n.5.
  \item \textsuperscript{224} De Carvalho, 308 So. 3d at 1084 n.5.
  \item \textsuperscript{226} Id. at *2--*3.
\end{itemize}
in 2020, but in early 2021, she moved with the first child to a shelter for victims of domestic violence.\textsuperscript{227} Crespo and her child eventually left Portugal altogether, arriving in the United States in April 2021.\textsuperscript{228} The second child was born in the United States in June 2021.\textsuperscript{229}

In 2022, Ascanio filed an action in the U.S. District Court for the Southern District of Florida under ICARA for the return of both children.\textsuperscript{230} The court determined that the first child was habitually resident in Portugal at the time of removal, which was measured from the moment that Crespo removed her to come to the United States.\textsuperscript{231} The court held that the second child’s habitual residence was also Portugal. The court gave weight to the fact that the parents had made their home in Portugal and used that fact to illustrate the parent’s intentions.\textsuperscript{232} Other factors analyzed included financial records, moving into a new apartment while pregnant, and doctor visits in Portugal.\textsuperscript{233} These factors, the court found, supported a finding that Portugal was the children’s habitual residence. The court “acknowledge[d] the oddity of a conclusion that a child born in the United States is a habitual resident of a country she has never been in.”\textsuperscript{234} However, the court said that under the totality of the circumstances approach, “a new-born’s place of birth does not automatically bestow upon that child a habitual residence.”\textsuperscript{235}

\textbf{D. Newborn Question Case Law Synthesis}

\textit{Monasky} established a framework for analyzing the newborn question but did not resolve the issue. The only three newborn question cases post-\textit{Monasky} yielded dissimilar results because they focused on different Convention goals and differed in how they weighed various factors. Take citizenship, for instance. The \textit{Pope} court considered that “both parents and children were United States citizens.”\textsuperscript{236}

\begin{flushleft}
\textsuperscript{227} \textit{Id}. at *3, *6. The “grave risk” exception was considered and rejected by the court. \textit{See id}. at *16--*20.
\textsuperscript{228} \textit{Id}. at *7.
\textsuperscript{229} \textit{Id}.
\textsuperscript{230} \textit{Id}. at *1.
\textsuperscript{231} \textit{Id}. at *10.
\textsuperscript{232} \textit{Id}. at *12--*13.
\textsuperscript{233} \textit{Id}. at *13.
\textsuperscript{234} \textit{Id}.
\textsuperscript{235} \textit{Id}.
\textsuperscript{236} \textit{Pope v. Lunday}, 835 F. App’x 968, 972 (10th Cir. 2020).
\end{flushleft}
In *de Carvalho*, both parents intended for the child to have U.S. citizenship, but the court did not mention the child’s citizenship in its analysis, only the parents’ intent. The *Ascanio* court did not analyze the child or parents’ citizenship at all. This is just one factor that the courts weighed differently when evaluating the “totality of the circumstances,” leading to inconsistencies.

However, there are common threads running through these cases. While *Monasky* clarified that habitual residence should not be reduced to strict legal rules, analyzing these cases lends helpful practical guidance on how to handle close questions of habitual residence.

The first similarity is that the courts leaned toward a finding of no habitual residence where intent was not shared at the time of birth. As the *de Carvalho* court noted, there “may be circumstances under the totality of a case where a newborn has no habitual residence based on a prenatal disagreement among the parents.” This was illustrated in *Pope*. The *Pope* court held that the parents never had a shared intent on where to raise the children “because the children did not yet exist at the time of the alleged agreement.” Applying parental intent that only happened in utero “ignores everything that has happened since the alleged *in utero* agreement.”

The second similarity is the courts prioritized a finding of habitual residence in the location where the parents mutually intended to stay when the intent was shared postnatal. *De Carvalho* illustrated that shared intent postnatal should be weighed heavily in the habitual residence analysis. The trial court found that “neither parent intended to permanently relocate the family residence from Brazil to the United States until” after the child’s birth. Therefore, Brazil was the habitual residence.

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237. *De Carvalho* v. Pereira, 308 So. 3d 1078, 1084 (Fla. Dist. Ct. App. 2020). It can be assumed the parents were not U.S. citizens. If they were, their child would likely have been a citizen even if born outside of the United States under 8 U.S.C. § 1401. However, the court does not mention their citizenship and does not seem to weigh it.


239. *De Carvalho*, 308 So. 3d at 1084 n.5 (emphasis added).


241. *Id.* at *11.

242. *De Carvalho*, 308 So. 3d at 1083.

243. *Id.* at 1081.
An exception to this analysis is where there is an older sibling. In that case, the parental intent shared for the older sibling and the child in utero should be given greater weight, even if that intent is not still shared at the time of birth. This is noted in a footnote in Pope. The Pope court stated that an older sibling allows for there to have been “shared parental intent with respect to a child, even if the other child was in utero when that agreement last existed.” This allows the court to find shared intent even if the child in question was prenatal at the time the intent was last shared, as demonstrated in Ascanio. When Crespo gave birth, she had separate intentions for the child from Ascanio, which could have leaned toward a finding of no habitual residence. However, the court found that the younger child who was born in the United States was habitually resident in Portugal, as was the older sibling, because of the parent’s prenatal shared intent for their family. The factors cited to determine parental intent exclusively included details that existed before the child was born to conclude that “the Parties made Portugal their home.”

III. PROPOSAL FOR THE NEWBORN QUESTION’S HABITUAL RESIDENCE ANALYSIS

The analysis in the two preceding sections reveals that the Convention was not drafted with the newborn question in mind and that habitual residence was not developed to adequately accommodate it. This Note’s proposed solution to this situation is based on Monasky, a synthesis of the case law that followed Monasky, a textual understanding of the Convention, and reference to the leading Abduction Convention scholars. The proposed approach is as follows: When dealing with the newborn question, the parental intent factor that courts consider should be postnatal parental intent. While some factors that originated prenatally can be used (such as where the parents made their home, why they moved there, or how long they planned to remain in that location), the intentions of the parents about where to raise the child should not be considered until the baby is born. If the parents disagree at the time of birth, the baby has no meaningful connection to

244. Pope, 2019 U.S. Dist. LEXIS 220406, at *10 n.34.
245. See Ascanio v. Crespo, No. 21-23396-Civ, 2021 U.S. Dist. LEXIS 257067, at *7 (S.D. Fla. Nov. 4, 2021) (Crespo left Portugal to escape from Ascanio, filed for a restraining order, and did not list him as the father on the birth certificate).
246. Id. at *12–*14.
247. Id. at *13.
any environment and the parents have no shared intention on where to raise them. This would often lead to a determination of no habitual residence since parental intent is given greater weight when dealing with an infant.\textsuperscript{248} The analysis is pragmatic: In this circumstance, the baby is actually the most at “home” wherever the caregiving parent is located.

However, when the parents do share an intention as to where to raise the child at the time of birth, even if the pregnant parent traveled by themselves and it is shared only temporarily, then that should weigh heavily in the habitual residence analysis. This will generally result in a finding of habitual residence where the parents shared their intent.

There should be an exception to this approach. If the parents had a child before the newborn, then parental intent is expressed through the sibling, and that shared prenatal parental intent should weigh in the analysis. Parents who have a child together have a more defined status quo to return to even if the newborn child never experienced the status quo. A sibling strengthens the assertion that the “parents have made their home in a particular place,” pointing to a finding of habitual residence in that place.\textsuperscript{249} Further, there is a uniformity policy consideration in keeping children together for custody litigation. Separate countries pursuing independent custody litigations for each sibling in a close situation such as the newborn question could complicate the cases and lead to disparate results. This would cut against the Convention’s policy motive of disallowing one parent to alter the legal landscape of a custody hearing since the infant would receive an entirely separate custody hearing only because of the actions of the pregnant parent.\textsuperscript{250} This policy motive is especially emphasized in these situations since there will already be a custody determination in the older sibling’s habitual residence.

An example might clarify this proposal. Say there is a mixed-nationality family living in Ireland, which is a Contracting Party to the Convention. Six months into the pregnancy, the pregnant parent travels to the United States and stays there after giving birth. Following the approach, the newborn’s habitual residence should depend on two primary factors. First, did the parents share an intent at the time of

\textsuperscript{248} Monasky, 140 S. Ct. at 722 (“Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations.”  Note, however, that “[n]o single fact . . . is dispositive across all cases.”).

\textsuperscript{249} Id. at 729.

\textsuperscript{250} See discussion supra notes 36–40.
birth about where they wanted the child to be raised? This will consider factors such as if the LBP knew of and consented to the pregnant parent’s travels and if there was a mutual understanding between the parents that the pregnant parent would return shortly after giving birth. If there was no shared intent, this weighs towards a finding of no habitual residence. If there was shared intent, this favors a finding of habitual residence in the location of the shared intent. Considering the exception to the rule, the second factor is if the parents already have a child. If there is another child, regardless of whether that child traveled with the pregnant parent or remained with the LBP, that sibling strengthens the assertion that the parents have made their home in a particular place, and the parents’ shared intent concerning that child serves as a proxy for their shared intent for the family. These factors should weigh heavily in the habitual residence analysis, even if the shared intention only existed before the birth of the second child.

There are considerable counterarguments to the proposed approach. Under Monasky’s totality of the circumstances analysis, one pertinent fact that the court has at its disposal is prenatal parental intentions. Considering the limited ties that a newborn has to any location, it may seem counterproductive to exclude any evidence that connects a baby to a “home.” Additionally, it could provide a workaround to a central goal of the Convention, allowing pregnant parents in some instances to unilaterally influence a finding of no habitual residence. This, in effect, gives the pregnant parent the power to decide where the custody proceedings will take place because the proceeding will default to where the infant is located. This deference to the pregnant parent possesses an inescapable gendered dynamic. Most often, the pregnant parents will be future mothers who unilaterally decided to end their relationship. The Convention is against granting any parent, regardless of their role, the power to unilaterally dictate a child’s location.251 Since the Convention treats the “rights of custody” of both parents as equivalent, giving priority to the pregnant parent seems inappropriate and may violate a central goal of the Convention, which is to disincentivize unilateral parental action.252

The proposal is not perfect, but it is the most comprehensive and pragmatic solution to a difficult question. The discretionary habitual residence analysis has created a lack of uniformity in the application of the Convention, as demonstrated in Section II. This extreme

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251. See discussion supra notes 55–57. Note that the Convention puts forth escape valves for situations such as fleeing domestic violence in the “grave risk” exception in Article 13.
252. Hague Convention, supra note 31, art. 3(a).
discretion runs counter to the Convention’s uniformity motivation. Additionally, a baby does not have substantial ties to any location; a newborn has no “status quo” immediately upon exiting the womb. A court’s finding of no habitual residence does not necessarily circumvent the Convention’s goals if no place can be considered the child’s home. Even though place of birth does not automatically confer habitual residence, in the event of disagreement between the parents, the baby should most likely be considered “home” where their caretaking parent is located. That is the most substantial connection a newborn has. Conversely, it is conceivable that a baby in this unstable situation has no “home” at all. Returning the newborn to an unknown jurisdiction against the will of the birthing parent could violate a different goal of the Convention: restricting the “use of force to establish artificial jurisdictional links on an international level . . . to obtain[] custody of a child.”

Allowing the LBP to relocate a newborn baby to a new country due to an abandoned parental agreement—an agreement that was made and discarded before the baby was born—about where the child would grow up constitutes using force to enforce artificial jurisdictional ties. Finally, it is salient to note that the habitual residence determination does not necessarily impact custody long-term, only the location of the custody hearing.

The methods proposed here do not extend beyond the newborn question. It is an accepted principle that a child’s place of birth is not automatically their habitual residence. Additionally, siblings should not always weigh heavily in each other’s habitual residence analysis, and one sibling’s habitual residence is never determinative for another sibling. Two children of the same parents could have different habitual residences depending on the circumstances. The newborn question presents a limited circumstance where these considerations are given greater weight since the traditional evidence used in the habitual residence analysis is weak or nonexistent.

253. PEREZ-VERA, supra note 1, ¶11, at 428. Usually, this goal would be used against the pregnant parent unilaterally taking the child, but this interpretation shows that the argument can be flipped on its head.

254. See, e.g., Holder v. Holder, 392 F.3d 1009, 1020 (9th Cir. 2004) (“The place of birth is not automatically the child’s habitual residence.”); see also Monasky, 140 S. Ct. at 729 (“An infant’s ‘mere physical presence,’ we agree, is not a dispositive indicator of an infant’s habitual residence.”).
A. Consistent with the Pre-Monasky Understanding of the Factors

The proposed method of analysis for the newborn question comports with many pre-Monasky cases. While Monasky now controls the habitual residence analysis in the United States, these cases demonstrate how courts once viewed the factors that comprise the habitual residence analysis, which is persuasive in demonstrating how courts should view the factors now.

The respected case of Delvoye v. Lee highlights the weight (or lack thereof) courts formerly ascribed to prenatal intent. It stated that “where [a] conflict [between the parents] is contemporaneous with the birth of the child, no habitual residence may ever come into existence.” Further, “[w]here a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem . . . that the child will normally have no habitual residence until living in a country on a footing of some stability.” A later case, In re A.L.C., affirmed this while citing Delvoye:

When a child is born under a cloud of disagreement between parents over the child’s habitual residence, and a child remains of a tender age in which contacts outside the immediate home cannot practically develop into deep-rooted ties, a child remains without a habitual residence because “if an attachment to a State does not exist, it should hardly be invented.”

Pre-Monasky cases illustrated that even when the parents did not share intent prenatally, where the parents shared intent postnatally, an infant possessed a habitual residence in the shared location. In Nicolson v. Pappalardo, the pregnant mother and father began having marriage difficulties. The mother informed the father that “she wanted to move back to the United States [alone] as soon as she and the child were medically cleared to travel.” However, after the child was born, the mother demonstrated an external intent to remain with

255. See discussion supra notes 103–107.
256. Delvoye, 329 F.3d at 333.
257. Id. (citing E.M. Clive, The Concept of Habitual Residence, 3 JURID. REV. 137, 146 (1997)).
259. Nicolson v. Pappalardo, 605 F.3d 100, 101 (1st Cir. 2010).
260. Id.
the father. The court determined that the habitual residence was accordingly Australia due to postnatal intent.

However, there are a series of cases that emphasize prenatal intent in furtherance of the policy goal of preventing unilateral decisions from dictating a child’s habitual residence. In *Uzoh v. Uzoh*, a father and mother agreed that the mother should give birth in the United States for citizenship purposes. Instead of returning to England a few months after birth, the mother unilaterally decided to remain in the United States. The court emphasized that the mother’s individual decision does not alter the habitual residence of the child, which was England due to the parents’ family home being there and their joint intention at the time of his birth. What distinguished *Uzoh* was that “[t]he mother’s reluctance to return to England was not disclosed to the father until she was due to return, several months after the son was born.”

This difference is illustrated in *Ahmed v. Ahmed*. A mother moved to the United States from the United Kingdom. The father and mother disputed whether this was to be a permanent or temporary change. Either way, the dispute demonstrated that their future was in

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261. *Id.* at 102 (“In exchange for Nicolson’s signing for the child’s passport, Pappalardo agreed to give the marriage another chance.”); *id.* at 104 (The parents had “numerous conversations about the viability of the marriage, both before and after S.G.N. was born.”); The parents “lived together as a married couple” and “shared responsibilities for S.G.N.”; The court ultimately rejected Pappalardo’s position that “rests centrally on her earlier pre-birth declaration” and testimony about “her subjective intent at the time of birth.”); *id.* at 105 (“Pappalardo’s behavior even after the birth remained equivocal as to her ultimate plans.”; “By her own testimony, it was after she returned to the United States . . . that she reached an ‘epiphany’ that the marriage was over.”).

262. *Id.* at 105.


264. *Id.* at *5.

265. *Id.* at *11 (“[A]t the time of the son’s birth, the established family home was in Bristol, England. The father consented to the son’s birth in the United States with the joint understanding that his wife would return to England with their children within several months. He purchased round trip airline tickets. The parents’ joint intent for the son to live with the family in England has been established by a preponderance of the evidence.”).

266. *Id.* at *12 (emphasis added).

The mother gave birth soon after, and the court held that “the parties . . . had no shared intent as to the children’s residence” after she moved to the United States. “The fact that the parties did, at one time, share an intent to live in the U.K., does not bind them to that intent indefinitely.” The Ahmed court noted:

[T]he key distinction between Uzoh and the instant case is that the Uzoh parents had a shared intent for the children, including the newborn, to reside in England. The mother changed her mind after the children were retained in the U.S. In the instant case, there was no shared intent as to the parties’ habitual residence as of May 2014, prior to the children’s birth. Mother changed her mind about where she intended to live well before the date of retention.

The court ultimately held “that the U.K. was not the children’s habitual residence,” so “their retention in the U.S. was not ‘wrongful’ within the meaning of the Hague Convention.”

The pre-Monasky case law demonstrates that courts had largely coalesced around a standard as to when parental intent should imbue. Where parents disagree at the time of birth, Delvoye and In re A.L.C. suggested there should be no habitual residence for the newborn. The differences between Uzoh and Ahmed further highlighted that outcomes turn upon when the parents presented outwardly separate intentions for the infants. If a parent’s diverging intention is presented after birth and retention, then prior intention matters (Uzoh); if their intention is presented before birth, then there is no shared intent (Ahmed). Notably, Uzoh had the added fact of involving a family with an older siblings, which (according to the proposed analysis) strengthens the parental intent and the “made a home” factor. And this analysis is not static—if the parents end up agreeing on where to raise the child after birth, Nicolson held that this later intent is relevant. While Monasky altered the weight that intent receives when determining habitual residence, these cases help to illustrate how courts viewed the intent factor and show that the proposed approach is not disconnected from how courts have understood it.

268. Id. at *5–*8.
269. Id. at *8.
270. Id. at *35–*36.
271. Id.
272. Id. at *35.
273. Id. at *37–*38.
B. In Accord with International Cases

As Monasky noted, the “decisions of the courts of other countries party to the Convention” should weigh into the Convention’s domestic application in furtherance of the uniformity goal. Numerous international cases demonstrate that parental intent should imbue postnatally, which supports the proposed approach.

English case law acknowledges the principle that the Convention does not apply to in utero abductions. “[I]t is not possible in law to abduct a foetus so as to constitute a wrongful removal within the terms of Art 3 of the Hague Convention.”

Multiple cases note that special consideration should be given to the caregiving parent’s—usually the mother’s—habitual residence when dealing with newborns. An influential case from the Court of Justice of the European Union (CJEU), Mercredi v. Chaffe, held that a court’s habitual residence inquiry should analyze a child’s “family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of,” and upon “whom he or she is dependent.” The court maintained that this analysis is especially true when dealing with an infant. Where an “infant is in fact looked after by her mother, it is necessary to assess the mother’s integration in her . . . environment,” including “the reasons for the move by the child’s mother to another Member State, the languages known to the mother [and] her geographic and family origins.” This is a pragmatic and typically gendered approach to the habitual residence analysis that prioritizes one parent over another.

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274. Monasky, 140 S. Ct. at 723; see also supra text accompanying notes 55–58.
277. Id. ¶ 55.
278. Id.
279. Id.
280. When dealing with newborn children, the caregiving parent will often be the mother. See Marc H. Bornstein et al., Gender in Low- and Middle-Income Countries, 81 MONOGRAPHS SOC’Y FOR RSCH. CHILD DEV. 1, 70 (2016) (Mothers are “generally more likely than fathers to engage in caregiving practices” based on an analysis of thirty-nine countries); see also Lyn Craig & Killian Mullan, How Mothers and Fathers Share Childcare: A Cross-National Time-Use Comparison, 76 AM. SOCIO. REV. 834, 852–55 (2011) (finding that mothers in every studied country did more childcare than fathers, with gender being “the strongest influence on the composition and share of childcare”).
Yet the analysis comports with common sense—when considering the textual understanding of "habitual" and "residence," it is hard to understand how an infant can meet those standards outside of references to their caregiver. The primary ties an infant has are not to a location but to an individual: their parent(s). Mercredi effectively suggested that, where the mother is the caregiver, an infant’s habitual residence should mirror hers.

Some courts differ in their application of the intent factor, pointing to a greater need for clarification from the HCCH. Three cases from different countries present three different analyses. A recent French case demonstrated that parental intentions matter at the time of birth. In this case, a French mother and American father lived in Michigan when the pregnant mother "traveled to France with the daughter to visit [their] ill grandfather." The stay was extended with the father’s consent, and the mother gave birth to the second child in France. The mother applied for divorce in France soon after the birth. The father petitioned for the children’s return under the Hague Convention. The French court held that "the habitual residence of a newborn child is the place in which he has his intended residence at birth." At the time of birth, the plan was for the family to reunite in the United States: The father expected the mother to return with both children, and the mother did not indicate any intent to remain in France until the divorce proceedings, which were filed after birth. The brief shared intention between birth and the divorce petition was sufficient for the court to find that the newborn’s habitual residence was the United States.

The Canadian case McIntosh v. Kim yielded a similar result but prioritized the parents’ intent from a different time. There, the parents’ third child was born and raised in Canada under an agreement that the mother and children would reside there temporarily and then move back to Australia. The mother subsequently kept the children in Canada.

282. Id. at 533.
283. Id.
284. Id.
285. Id. at 537.
286. Id. ("[T]here was no reason to consider that the parents had planned for the baby to live in a country other than that in which the family, as a whole, was established.").
Canada and commenced a custody application for the kids. The father brought a claim for their return under the Convention. The court analyzed the “shared actions and intent of the parents before the” child’s birth to determine that the parents planned on Australia being the habitual residence. The court found that all three children’s habitual residence was Australia since there was “no ‘shared’ intention to reside in Canada”—the father only consented to stay for “a limited time and purpose.”

In the CJEU case OL v. PQ, the court weighed parental intentions a third way. A mother and father were living in Italy. A month before the birth, the parents agreed that the mother should give birth in Greece and return to Italy shortly afterward. After giving birth, when the time came for the mother and child to return, the mother unilaterally disregarded the agreement and remained in Greece with the child. In the subsequent lawsuit, the court nominally considered factors that occurred before and after the child’s birth when analyzing habitual residence. However, because habitual residence is a question of fact, the court stated that it “would be difficult to reconcile” the position that “the initial intention of the parents that a child should reside in one given place should take precedence over the fact that the child has continuously resided since birth in another State.” Therefore, the court ultimately held that the child is habitually resident in Greece, the country they were born in, despite the agreement after the child’s birth that the mother will return to Italy.
Despite differences in the reasoning, these cases mostly comport with the proposed approach. The French case is a clear application of the proposed analysis since the habitual residence was the location the parents briefly agreed upon post-birth. The latter two cases claimed to weigh the parent’s prenatal intentions and actions, but these considerations were either disregarded or nonessential. In *McIntosh v. Kim*, the court did not need to look at the intentions of the parents before the child’s birth to come to the same conclusion: The parents intended to return to Australia after the birth of the child at issue, and the two older siblings were habitual residents in Australia. Under the proposed approach, these factors weighed heavily in favor of a habitual residence determination in Australia even though the child had never been there. In *OL v. PQ*, the court ignored the factors it laid out to determine habitual residence, instead opting to prioritize where the child had spent its life and its connection to the caregiving parent. While this case does not comport with the proposed approach, it directly contradicts the Convention’s goals to a greater extent than the Note’s proposal. The proposal allows for a child to be born outside of one country to still be habitually resident there; *OL v. PQ*, if followed, would transform the habitual residence analysis into a birthplace inquiry, which has been rejected. The Note’s proposal would present a more streamlined and standardized method of determining habitual residence in this rare factual pattern.

**C. Compatible with Hague Convention Scholars and Goals**

The proposed approach comports with leading Convention and habitual residence scholars. In a 1997 article that has been widely referenced in American case law, Eric Clive stated, “Where a child is born while his or her mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a determination. “Consequently, in such a situation, the refusal of the mother to return to the latter Member State together with the child cannot be considered to be a ‘wrongful removal or retention’ of the child, within the meaning of that Article 11(1).”

298. See, e.g., *Holder*, 392 F.3d at 1020 (“The place of birth is not automatically the child’s habitual residence.”).
footing of some stability.” This line was incorporated into American case law before Monasky.\(^{300}\)

Separately, some scholars at the time of drafting suggested that habitual residence was intended to mirror domicile,\(^{301}\) and in that instance the child’s habitual residence would be the domicile of the mother.\(^{302}\) This suggests that the original understanding of habitual residence would support the proposed approach despite how habitual residence has developed in the courts.

Some of the policy goals of the Convention cut toward recognizing its application in the newborn question and against the proposed approach. If the Convention was not applied, the pregnant parent would likely be able to unilaterally decide the forum of their custody hearing. Further, it would not lead to uniform respect for the LBP’s right of custody. But the courts already are not uniformly respecting the LBP’s right of custody since their solution to the newborn question is varied and often based on the proclivities of the judge deciding the case. The proposal offers uniformity in the decision-making process and more consistency in the outcomes—both of which are important Convention goals. The fact that the suggested remedy runs counter to some of the Convention’s goals is not reason to impart meaning upon the Convention that the text does not communicate;\(^{303}\) however, it is motivation for the Special Commission on the Practical Operation of the 1980 Child Abduction Convention to review this question and issue advice. Since the text of the Convention, the goals of the Convention, and the case law’s development of habitual residence diverge in their application here, it will be difficult for courts to permanently resolve this issue. The Special Commission remains HCCH’s method.


\(^{300}\) See, e.g., Delvoye, 329 F.3d at 334.

\(^{301}\) See discussion supra notes 75–80.

\(^{302}\) This point is persuasive at best. A child can “have no domicile before birth.” Gomez v. Snyder Ranch, 1983-NMCA-146, ¶ 11, 101 N.M. 44, 45, cert. denied, 101 N.M. 77 (1984). Infant domicile is “determined by that of their parents,” which is “established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.” Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989). When a father is not domiciled in the child’s place of birth, the child’s domicile “will be the domicil which the mother had at that time.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14 cmt. c (AM. L. INST. 1988).

\(^{303}\) The Convention’s text states that, for it to apply, a child must be “habitually resident in a Contracting State immediately before” they were removed or retained. Hague Convention, supra note 31, art. 4 (emphasis added).
of discussing difficult questions and providing uniform guidance to the Member States, such as when it weighed in on the Convention’s application on unaccompanied and separated children.\(^{304}\)

**CONCLUSION**

The last shared intentions of the parents are often the most important component of a newborn’s habitual residence analysis, but this factor should only imbue postnatally when there is a child to ascribe their intentions onto. This caveat applies to the parental intent consideration; a court analyzing other factors as part of the “totality of the circumstances” approach may consider factors that occurred before a child’s birth. Yet if any situation is unstable enough to merit a finding of no habitual residence, it should be the newborn question where the parents’ intentions toward the newly born child are split. The proposal forwards this: Where intentions are split at the time of birth, this points toward no habitual residence; where intentions are shared at the time of birth, this points toward a habitual residence wherever that location is, even if it is not the birthplace; but where there is an older sibling, the parent’s prior intentions and established home location should weigh into the analysis. While the proposal is in line with the text of the Convention and the subsequent case law, and is supported by some of the most important goals of the Convention, its application runs counter to other significant goals. To resolve this tension, the Special Commission on the Practical Operation of the 1980 Child Abduction Convention should address the newborn question during its next session. The newborn question’s resolution is necessary to guarantee the Convention’s uniform application and protect the most vulnerable children.

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