

Wading into Deep Water:

The U.S. Supreme Court Addresses International Family Law- *Abbot v. Abbot*, 560 U.S. ___, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010)

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In May 2010 the U.S. Supreme Court for the first time addressed the 1980 Hague Convention on the Civil Aspects of Parental Child Abduction ("Convention"). This case examined the key issue of what constitutes a "right of custody" under Article 5 of the Convention.

In so doing the Supreme Court resolved a conflict between the Circuit Courts, expanded the right to return of a child under the Convention, recognized rising Justice Sotomayor, and added to the debate on how much weight should be accorded foreign court decisions. It also highlighted the increasing importance and frequency of Convention issues in family law cases.

The case in question is *Abbott v. Abbott*, 560 U.S. ___, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010). This case stemmed from a mother's removal of a child from Chile, where the father's only relevant legal right was to consent before the mother could take the child out of the country. The family had been living in Chile for approximately three years when the mother took the child to Texas, without permission of the father or the Chilean family court. The father started an action in U.S. District Court in Texas for return of the child to Chile under the Convention and ICARA (the implementing legislation in the United States).

The single legal question presented by this case was whether under the Convention the father's *ne exeat* right was a "right of custody," or merely a "right of access." The Convention protects parents who have a "right of custody" from wrongful removal or retention of a child in a contracting state by the other parent. The remedy for such a wrongful removal or retention generally is return of the child to the country of habitual residence. This remedy, though, is unavailable for breach of a mere "right of access." Thus, in this case, return of the child was not required under the Convention unless a "right of custody" included the father's *ne exeat* rights.

This legal question made it to the U.S. Supreme Court because the federal circuit courts in the United States had split in their response to this issue. The prevailing view at the U.S. District Court and on appeal to the Fifth Circuit Court of Appeals in this case followed *Croll v. Croll*, 229 F.3d 133 (2000), which held that *ne exeat* rights are not rights of custody under the Convention. At the time, this was the accepted interpretation in the Second, Fourth, and Ninth Circuits. Only the Eleventh Circuit had followed the view espoused by the dissent in *Croll*, written by Judge Sotomayor, that *ne exeat* rights were within the rights of custody protected by the Convention.

The U.S. Supreme Court majority opinion, delivered by Justice Kennedy, relied on a number of bases for finding that *ne exeat*

rights qualify as rights of custody under the Convention. First, the Court looked at the wording of the Convention and at the content of *ne exeat* rights under Chilean law. It determined that the Chilean *ne exeat* right included the right to decide the child's country of residence, since the legal provision meant that neither parent could unilaterally establish the child's place of residence. The Court compared this favorably with the Convention definition of "right of custody," which explicitly includes "in particular, the right to determine the child's place of residence." The Court dismissed the argument that a *ne exeat* right does not fit within traditional notions of physical custody by noting that the Convention contains a specific definition for "right of custody" as used in the Convention. It similarly dismissed the argument that since a *ne exeat* right cannot be "exercised" as that term is used in the Convention, that it thus cannot be a "right of custody." The Court reasoned that the exercise of the right is in the refusal to consent to removal of the child. It also concluded that to rule otherwise would render the Convention meaningless in just those cases where it was most needed.

The Court next relied on the view of the U.S. Department of State, expressed in its amicus brief, that *ne exeat* rights are rights of custody. It noted that the Executive Branch's view of a treaty historically is entitled to "great weight." It further stated that the Department of State, as the central authority under the Convention, was uniquely positioned to understand the consequences of different treaty interpretations on other contracting states and on the ability to obtain the return of children wrongfully removed from the United States.

The Court then noted the views of other Hague Convention countries and of international law scholars on the issue. It found that the majority of foreign courts, especially from common-law countries, had adopted the view that *ne exeat* rights were rights of custody. It cited cases from England, Israel, Australia, Scotland, South Africa, Austria, and Germany. Interestingly, the Court also noted that joint custodial arrangements were largely unknown at the time the Convention was drafted, and that the status of *ne exeat* rights was not well understood. In that context, it found the views of the majority of subsequent scholarly articles informative. These supported the observation that joint custody has become common in the time since the Convention was first drafted, and that within this joint custody framework most scholars recognize *ne exeat* rights as being rights of custody under the definition used by the Convention.

Finally, the majority decision concluded that its interpretation of rights of custody was consistent with the objects and purposes of the Convention. It specifically cited the dissenting opinion

(continued on page 28)

Wading into Deep Water...

(continued from page 27)

by Judge Sotomayor in *Croll* to support the view that a different interpretation would allow parents to undermine the purpose of the Convention. It also relied on psychological opinions of the harm caused from wrongful abduction of children by parents to illustrate how deterrence of such abductions was a goal furthered by including *ne exeat* rights within rights of custody.

This case is noteworthy for a number of reasons. First, of course, it definitively decides in U.S. jurisprudence that a right of *ne exeat* qualifies as a protected "right of custody" under the Convention. As such, practitioners will surely add petitions for writs of *ne exeat* to the domestic violence petitions already in their Hague Convention arsenals. And in turn, courts throughout the United States likely will face an increased demand for these esoteric writs. More jurisprudence likely will result also from efforts to refine whether a simple award of joint legal custody, without more, provides the right to veto a change of residence.

The case also is noteworthy because the Court demonstrated an understanding for how family law is developing. The

opinion shows the nation's highest Court considering the evolution of joint custody, and relying on psychological input in custody matters.

The case furthermore will surely add to the debate on the appropriate weight judges should give international law and the judicial opinions of courts from other countries when interpreting U.S. law in the international arena.

And the case illustrates the growing importance and frequency of international issues in family law cases. As such, this first opinion from the Supreme Court interpreting the Hague Convention provides a good introduction for family law practitioners who have only passing knowledge of this essential text.

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