



The United States Law Week

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Family Law—Custody

'Rights of Custody' Under Hague Convention Include Ne Exeat Rights, Supreme Court Says

A parent has a "right of custody" for purposes of the Hague Convention on the Civil Aspects of International Child Abduction if the law of his or her child's country of habitual residence confers ne exeat powers on parents, the U.S. Supreme Court ruled May 17 (*Abbott v. Abbott*, U.S., No. 08-645, 5/17/10).

Ne exeat powers refer to one parent's authority to consent before the other parent takes the child out of the country.

The court's ruling means that a parent with ne exeat rights may seek the child's return to the country that was the child's former habitual residence.

In this case specifically, the court in a 6-3 decision reversed a Fifth Circuit holding and ruled that the ne exeat rights under Chilean law of a father whose child was taken by his mother from Chile without the father's consent were violated and that the father may seek the child's return, provided one of the exceptions to the Hague Convention does not apply.

The court took the position that has been adopted by only one out of five circuits that have addressed it (as well as the view espoused a decade ago by then-Judge, now Justice Sonia Sotomayor), but that is shared by courts in several other countries that are parties to the convention.

In an opinion by Justice Anthony Kennedy, the court held that a father whose ex-wife removed their child from Chile to Texas without his approval had "rights of custody" under the convention by virtue of Chilean law, which prohibits a parent from taking a child out of the country without the consent of the other parent or a court.

A Hague Convention attorney called the case the "most important case in years" for international family law. Nevertheless, a women's rights advocate said that the holding ignores the reality that most women using the Hague Convention today are escaping abusive relationships.

Guidance on Hague Convention. Stephen J. Cullen, Miles & Stockbridge PC, Towson, Md., who filed a brief supporting the petitioner for the Permanent Bureau of the Hague Conference on Private International Law, told BNA May 17 that this was the first time a Hague Convention case was before the Supreme Court. He also said that the opinion puts U.S. courts in line with

most of the courts from other countries to address ne exeat rights, and also gives guidance to other signatory countries on how to interpret the Hague Convention.

Cullen, who has argued many Hague Convention cases throughout the United States, said that before the *Abbott* opinion was handed down, there was great injustice in this country concerning ne exeat rights. He called a circuit split on how to treat the rights "bizarre," and said that had the case come out the other way, "it would have been an absolute disaster."

Cullen agrees with the Supreme Court's broad view of the treaty. He said that interpreting the treaty requires looking at its whole purpose, and not just parsing its terms and phrases. Moreover, he said that the purpose behind the treaty is "the return of the child," so the right place—the child's place of residence—can make the custody decision.

As a judge on the Second Circuit, Justice Sotomayor wrote a dissent in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), in which she argued that a ne exeat right is a right of custody because it "provides a parent with decisionmaking authority regarding a child's international relocation." Cullen said that having Sotomayor on the Supreme Court when *Abbott* was argued was good fortune for those who advocate a broad reading of the treaty. He also noted that the court's opinion agreed with the federal government's amicus brief, which was filed in support of the petitioner.

Escaping Abuse. Professor of Clinical Law at the George Washington University Law School Joan S. Meier told BNA May 17 that the Supreme Court's decision demonstrates a superficial view of the law. The court doesn't know what's in the best interest of children in the real world, she said. Meier is director of the Domestic Violence Legal Empowerment & Appeals Project, which filed an amicus brief supporting the wife in this case.

According to Meier, the norm in Hague Convention cases today, and in this case as well, involves custodial moms who are fleeing abusive spouses. In essence, the court's opinion stretches the interpretation of the convention to send these women and their children back to an abusive situation, she said. Access parents do not have right of return under the convention, she said.

The lesson from this case is that any lawyer with a Hague Convention case must bring up the abuse issue right from the beginning, Meier said. She noted, however, that in many cases that may be difficult because the woman may, for many reasons, be reluctant to do so.

As for the State Department's position supporting the father in this case, Meier said that the government's brief supports the father's rights movement at the expense of the abuse issue. Although the government may want to empower men, the convention does not compel that result, she said.

'Rights of Custody.' Subject to narrow exceptions, the convention requires that a child who has been wrongfully removed from his or her country of habitual residence be returned there, and provides that a removal is "wrongful" where it is in breach of the "rights of custody" of a person under the law of such country. The mother had been granted custody of her child in Chile, where the family lived, and the father received visitation ("rights of access" under the convention).

The father had sought the child's return in federal court, arguing that his *ne exeat* rights under Chilean law conferred on him "rights of custody," which the convention defines as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." The federal district court disagreed, thus rejecting his petition, as did the Fifth Circuit on appeal.

Three other circuits have also held that *ne exeat* rights are not "rights of custody" under the convention: *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003), *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), and *Croll*. However, the 11th Circuit reached the opposite conclusion in *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004), and thus "[c]ertiorari was granted to resolve this conflict."

The parties agreed that the convention applied to the instant case, and that the only issue was whether the child's removal was "wrongful"—that is, in breach of the father's rights of custody.

The court first examined the applicable Chilean statute, which requires the approval of a child's removal from the country from a parent who has visitation rights. It cited a declaration from a Chilean agency in another Hague case still pending before the court, that the statute means that neither parent may unilaterally establish their child's place of residence.

"It follows that the Convention's protection of a parent's custodial 'right to determine the child's place of residence' includes a *ne exeat* right," the court said. That such a right "does not fit within traditional notions of physical custody is beside the point," it said.

The court explained that "[t]he Convention defines 'rights of custody,' and it is that definition that a court must consult. This uniform, text-based approach ensures international consistency in interpreting the Convention. It forecloses courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions, including the civil-law tradition."

Ne Exeat Right Can Be Exercised. The court rejected the mother's contention that a *ne exeat* right is not covered by the convention because it cannot be exercised. It said that in cases like this one, "a *ne exeat* right is by its nature inchoate and so has no operative force except when the other parent seeks to remove the child from the country. If that occurs, the parent can exercise the *ne exeat* right by declining consent to the exit or placing conditions to ensure the move will be in the child's best interests. When one parent removes the child without seeking the *ne exeat* holder's consent, it is an instance where the right would have been 'exercised but for the removal or retention.'"

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Moreover, the court said that the Fifth Circuit's conclusion that a breach of a *ne exeat* right does not give rise to a return remedy "would render the Convention meaningless in many cases where it is most needed." Unlike rights of access, it explained, "*ne exeat* rights can only be honored with a return remedy because these rights depend on the child's location being the country of habitual residence."

the majority of the court found further support for its holding in the fact that the State Department, which oversees the operation of the convention in the United States, declared in its brief in this case that it "has long understood the Convention as including *ne exeat* rights among the protected 'rights of custody.'"

The court also found that "[a] review of the international case law confirms broad acceptance of the rule that *ne exeat* rights are rights of custody." Only courts in Canada and France have held otherwise, but it emphasized that "most contracting states and scholars now recognize that *ne exeat* rights are rights of custody." In addition, it said that the legislative history of the convention (known as the Pérez-Vera Report) "rejects the notion that because *ne exeat* rights do not encompass the right to make medical or some other important decisions about a child's life they cannot be rights of custody."

The court emphasized that "[o]rdering a return remedy does not alter the existing allocation of custody rights . . . but does allow the courts of the home country to decide what is in the child's best interests." To interpret the convention to permit an abducting parent to

avoid a return remedy, even when the other parent holds a *ne exeat* right, "would run counter to the Convention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes. . . . The Convention should not be interpreted to permit a parent to select which country will adjudicate these questions by bringing the child to a different country, in violation of a *ne exeat* right," it said.

Dissent. Justice John Paul Stevens, in a dissent joined by Justices Clarence Thomas and Stephen Breyer, viewed the *ne exeat* right conferred by the Chilean statute as a mere "travel restriction" that does not rise to the level of a "right of custody" under the convention. In light of the majority's ruling, he suggested, "absent a finding of an exception to the Convention's powerful return remedy, . . . and even if the return is contrary to the child's best interests, an American court must now order the return of A. J. A. to Mr. Abbott, who has no legal authority over A. J. A., based solely on his possessing a limited veto power over Ms. Abbott's ability to take A. J. A. from Chile." Use of the return remedy under these circumstances, he added, "is contrary to the Convention's text and purpose."

Karl E. Hays, Austin, Texas, argued for the mother. Amy Howe, Howe & Russell, Bethesda, Md., argued for the father. Assistant to the Solicitor General Ginger D. Anders argued for the United States as *amicus curiae*.

By BERNARD J. PAZANOWSKI AND DAVID JACKSON

Full text at <http://pub.bna.com/lw/08645.pdf> and 78 U.S.L.W. 4373.