CASE COMMENTS AND PERSPECTIVES

ABBOTT V. ABBOTT (2010), SUPREME COURT OF THE UNITED STATES OF AMERICA

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The issue in *Abbott v. Abbott*, decided May 17, 2010, was whether a *ne exeat* right was a right of custody under the Hague Convention on International Child Abduction. The British father and American mother moved to Chile with their son in 2002. In 2003, the parties separated and the Chilean court granted the mother sole custody and the father visitation. Under Chilean law, once visitation was awarded, the father's authorization was automatically required before the child could be taken out of the country.

In 2005, while litigation was pending, the mother took her son to Texas, where she filed for divorce in state Court. The father filed suit in federal Court, seeking the return of his son under the Convention and the implementing legislation. The District Court denied relief, holding that a ne exeat right was not a right of custody and the Fifth Circuit Court of Appeals affirmed. Three other Circuit Courts agreed, but the Eleventh Circuit did not. The Supreme Court granted certiorari to resolve the issue.

The Court looked to the text of the Convention, the views of the State Department, decisions of foreign courts, and the purposes of the Convention to conclude that a ne exeat right constituted a right of custody. Since custody, as defined under the Convention, includes the right to determine the child's place of residence, the Court reasoned that the ne exeat right, which gave the father a veto, amounted to "decision-making authority regarding a child's relocation" and was thus a right of custody.

International lawyers were pleased with the decision. In an ASIL *Insight*, Paul Stephan noted with approval that, "the majority […] emphasizes the systemic interests of treaty partners, as expressed through foreign court decisions, scholarly work organized by international bodies, and the views of the U.S. Department of State."

Family lawyers, however, were dismayed. As set out in the Amicus Brief of Eleven Law Professors (Amicus Brief), the majority conflated a right of visitation, which is all the father had, with a right of custody, which is required before return is possible under the Convention. By holding that a parent with the right of visitation had a right of return, the Court ordered the return of the child to a country where he had no custodial parent.

Professor Stephan characterized the dispute between the Abbott majority and the dissent as a conflict between "international cooperation" and "national sovereignty." The family law professors characterized it as a dispute between a father and a mother.

THE UNITED STATES SUPREME COURT RULES IN ITS FIRST CASE INTERPRETING THE 1980 CONVENTION

The Honourable Justice James GARBOLINO
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The conference room was in a small, aging hotel just one block from the White House. The room was filled with judges and Central Authority representatives engaged in lively discussion concerning the 1980 Convention. The names of some of the participants included those whose work became iconic: Thorpe, Butler-Sloss, Nicholls, Kay, Chamberland, Diamond, McGuiness, Mahony, Bonomy, Lowe, Hilton, Silberman, Duncan, and Dyer. In addition to the common law country participants,[1] observers from twenty other nations were also in attendance. The date was September 20, 2000.

[1] The event was the Common Law Judicial Conference on International Child Custody, hosted by the U.S. Department of State, September 17-21, 2000, Washington, D.C.

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News of the 2nd Circuit Court of Appeals decision in *Croll v. Croll*[2] swept through the room. The court had - that day - held that a ne exeat order issued by a Hong Kong court did not confer rights of custody on a father who also had liberal rights of visitation. I overheard one distinguished jurist speaking to another in a stage whisper, "The Americans got it wrong."

The only bright light in the news was that there was a spirited dissent to the Croll decision by a well-respected jurist, Judge Sonia Sotomayor. Her dissent noted that:

> *"In light of the Convention's broad purpose, the concept of 'wrongful removal' clearly must encompass violations of* ne exeat *rights. When a parent takes a child abroad in violation of* ne exeat *rights granted to the other parent by an order from the country of habitual residence, she nullifies that country's custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child. Moreover, where, as here, the parent seeks a custody order in the new country, she seeks to legitimize the very action -removal of the child- that the home country, through its custody order, sought to prevent. To read the Convention so narrowly as to exclude the return remedy in such a situation would allow such parents to undermine the very purpose of the Convention."*[3]

The Croll decision gained traction among a number, but not all of the federal and state courts in the United States.[4] But on June 29, 2009, the U.S. Supreme Court granted certiorari to hear a decision out of the 5th U.S. Circuit Court of appeals in Texas, in *Abbott v. Abbott*[5] which followed Croll's treatment of a ne exeat order.

Five weeks later, the U.S. Senate voted to confirm President Obama's nomination of Judge Sonia Sotomayor to the U.S. Supreme Court.

On May 17, 2010, in a 6-3 decision, the United States Supreme Court in Abbott[6] held that a ne exeat order confers a right of custody for a left behind parent, entitling that parent to maintain an action under the 1980 Convention.[7] In reaching their decision, the court looked for guidance not only to the purposes and text of the Convention itself, but gave significance to the interpretation of the Convention by the U.S. State Department, Office of Children's Issues, which acts as the U.S. Central Authority. In its Amicus Curiae brief, the State Department argued that it "has long understood the Convention as including ne exeat rights among the protected 'rights of custody'."[8]

Significantly, the Supreme Court focused upon the decisions of Hague partner countries, and found that there was "broad acceptance" of the principle that ne exeat rights conferred rights of custody enforceable under the Convention. Citing decisions on both sides of the question from the United Kingdom,[9] Israel,[10] Austria,[11] South Africa,[12] Germany,[13] Australia,[14] Scotland,[15] Canada[16] and France,[17] the court found that there was an

[2] *Croll v. Croll*, 229 F.3d 133 (2nd Cir. 2000).
[3] *Id*. at 147.
[4] The Croll rationale was followed in Fawcett v. McRoberts, 326 F.3d 491 (4th Cir 2003), Gonzales v. Gutierrez, 311 F.3d 942 (9th Cir. 2002), Ish-Shalom v. Wittman, 797 N.Y.S.2d 111, N.Y.A.D. 2 Dept., 2005; Welsh v. Lewis 740 N.Y.S.3d 3355, N.Y.A.D. 2 Dept., 2002. However, the U.S. 11th Circuit came to a contrary conclusion in Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004).
[5] Abbott v. Abbott, 542 F.3d 1081 (5th Cir. 2008).
[6] Abbott v. Abbott, 560 U.S. (2010), 130 S.Ct. 1983.
[7] The majority opinion was written by Justice Anthony Kennedy, in which five other justices joined, including, of course, Justice Sonia Sotomayor.
[8] *Id*., 130 S.Ct. 1983, at 1993.
[9] In re D (A Child), [2007] 1 A.C. 619, 628, 633, 635 (2006).
[10] CA 5271/92 Foxman v. Foxman, [1992], §§ 3(D), 4.
[11] Oberster Gerichtshof [O.G.H.] [Supreme Court] Feb. 5, 1992, 2 Ob 596/91.
[12] Sonderup v. Tondelli, 2001(1) SA 1171, 1183 (Constitutional Ct. of South Africa 2000).
[13] 2 BvR 1126/97.
[14] In the Marriage of Resina [1991] FamCA 33 (Austl., May 22, 1991).
[15] A.J. v. F. J., [2005] CSIH 36, 2005 1 S.C. 428, 435-436.
[16] Thomson v. Thomson, [1994] 3 S.C.R. 551, 589-590, 119 D.L.R. (4th) 253.
[17] Public Ministry v. M. B., [CA] Aix-en-Provence, 6e ch., Mar. 23, 1989; Attorney for the Republic at Périgueux v. Mrs. S., [T.G.I.] Périgueux, Mar. 17, 1992.

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"emerging international consensus that ne exeat rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980".[18]

The court reasoned that requiring the return of a child where a parent has a ne exeat right reflects the Convention's purpose in deterring future abductions.

Reaching back ten years into the past, the opinion then quoted from Judge Sotomayor's prescient dissent in Croll, that:

> *"Denying a return remedy for the violation of such rights would 'legitimize the very action -removal of the child- that the home country, through its custody order . . . sought to prevent' and would allow 'parents to undermine the very purpose of the Convention'."*

It may have taken a few years, but it now appears that "The Americans got it right."

ABBOTT V. ABBOTT **(2010), SUPREME COURT OF THE UNITED STATES OF AMERICA**

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The drafters of the Hague Convention over 30 years ago could scarcely have envisaged the complexities which have come to bedevil 'rights of custody', the legal concept upon which the instrument's summary return mechanism is built. At that time the Convention remedy was expected to benefit applicants who were primary carers and who therefore enjoyed the full range of custodial rights. Passing reference was made to the potential consequences for the instrument where an applicant possessed merely a right to control residence, but this was not recorded as having been subjected to detailed scrutiny. And so courts in the ever increasing network of Contracting States were left to resolve the issue for themselves, an issue which acquired increasing significance as courts, as well as legislators, made greater use of ne exeat or veto clauses in the construction of custody orders and family law statutes.

Creditable reasons can be advanced on both sides of the argument as to how a bare right of veto should be classified, and whether it should suffice for the purposes of activating the Convention's return remedy. The prospect of applicants with limited rights being entitled to secure the return of children and in this be supported, often generously so, in their endeavours, will be considered objectionable by some. Nevertheless there is a principled and irreproachable rationale underpinning the stream of appellate case law from the decision of the English Court of Appeal in *C. v. C.* (*Abduction: Rights of Custody*) [1989] 1 W.L.R. 654 to the United States Supreme Court in *Abbott v. Abbott* 130 S. Ct. 1983 (2010) in which a ne exeat clause has been deemed to amount to an actionable right of custody for Convention purposes. That rationale is centred on the child and his right not to be subjected to a unilateral removal or retention where a court or a legislator has so provided, whether in a court order or more generally in a statute.

A unilateral removal or retention from a home environment will ordinarily produce harmful effects for the child concerned. It is entirely appropriate therefore that such actions should be deterred and made subject to an effective judicial remedy in as broad a spectrum of family situations as possible. Each element of Article 3, the enabling clause for the summary return mechanism, is drafted in the widest possible terms in its reliance on custody rights, whether as regards who might possess such rights, allowing for *renvoi*, or the unlimited sources of origin for such rights. The partial definition of custody rights, with the specific reference to the right to determine the child's place of residence, must be seen against this background. A right of veto is ultimately protecting the child's interests and seeks to ensure that there is judicial supervision of any decision concerning international relocation. For this reason, in the context of the concept's material scope, there should be a broad interpretation of Convention custody rights. And in this the decision of the Supreme Court to follow the overwhelming body of international appellate case law on the issue is to be warmly welcomed.

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[18] Abbott, *supra*, at 1994.

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