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WHEN CHILD ABDUCTION CROSSES INTERNATIONAL BORDERS

By Peter M. Walzer

The recent U.S. Supreme Court case of *Abbott v. Abbott* (2010 DJDAR 7161) settles conflicting decisions between the federal circuits interpreting a provision of the Hague Convention on the Civil Aspects of International Child Abduction (See HCCH Convention 28 of 25 October 1980). The United States is a contracting state to the Convention, and Congress has implemented its provisions through the International Child Abduction Remedies Act 72 USC Section 11601 et seq. The federal courts have concurrent jurisdiction with the state courts on issues relating to this Convention.

Abbott arises out of an appeal from a decision by the 5th U.S. Circuit Court of Appeal. *Abbott* addresses the provision in the Convention providing that a child abduction in violation of "rights of custody" must be returned to the child's country of habitual residence unless certain exceptions apply. The question is whether a parent has a "right of custody" by reason of that parent's *ne exeat* right, which is the authority to consent before the other parent may take the child to another country. In *Abbott*, both the U.S. District Court and the 5th Circuit held that the father's *ne exeat* right did not constitute a right of custody under the Convention and, as result, that the return remedy was not authorized.

Timothy and Jacqueline Abbott married in England in 1992. Tim is a British citizen. Jackie is a U.S. citizen. Jackie and Tim moved to Hawaii (where he worked as an astronomer.) Their son, Alex, was born in Hawaii in 1995. They moved to Chile in 2002, where Tim worked for Blanco 4-m Telescope at Cerro Tololo Inter-American Observatory. Jackie and Tim separated in 2003. The Chilean courts granted Jackie daily care and control of Alex while awarding Tim "direct and regular" visitation rights, including a visitation every other weekend and for the whole month of February each year. Chilean law conferred upon Tim a *ne exeat* right, granting him the right to consent before Jackie could take Alex out of Chile. Jackie, being afraid that Tim would take Alex out of Chile, obtained a *ne exeat* for the minor order from the Chilean family court, prohibiting Alex from being taken out of Chile. In August 2005, while proceedings were pending, Jackie took Alex to Texas (where she was later located by a private investigator) without the permission of the court or Tim.

In August 2006, Jackie filed for divorce and custody in a Texas state court. Tim filed an action in the Texas court asking for visitation and for Jackie to show cause why Alex should not be returned to Chile. The Texas state court granted Tim visitation, but denied his request to return Alex to Chile. In May 2006, Tim filed for return of Alex in the U.S. District Court for the Western District of Texas. He asked for Alex to be returned pursuant to the Convention and the International Child Abduction Remedies Act.

In July 2007, after a trial, the district court denied relief. The court held that the father's *ne exeat* right did not constitute a right of custody under the Convention and, therefore, the return remedy was not authorized. This decision was consistent with the ruling of the 2nd U.S. Circuit Court of Appeals in *Croll v. Croll*, 229 F.3d 133 (2000), which held that *ne exeat* rights cannot be exercised within the meaning of the Convention and therefore are not custody rights. A dissenting opinion was filed by then Judge Sonia Sotomayor, who is now sitting on the U.S. Supreme Court. The dissent found that a *ne exeat* right is a right of custody because it "provides a parent with decision making authority regarding child international relocation." The 4th Circuit and 9th Circuit agreed with the majority in *Croll*. The 11th Circuit, on the other hand, followed the reasoning of the *Croll* dissent. The Supreme Court granted certiorari to resolve the conflict between the circuits.

The Supreme Court gives considerable weight to how other signatories to the Convention treat *ne exeat* orders. Congress has "directed that 'uniform international interpretation of the Convention is part of the convention's

framework." The Court found support for its position in the English High Court of Justice decision in *C v. C* 1989 1W.L.R. 654, 658(C.A.). See also the House of Lords decision in *In re D (A Child)* 2007 1 A.C. 619, 628, 633,635 (2006). The court also found support in the Supreme Court of Israel, which held that "the term custody should be interpreted in an expansive way, so that it will apply in every case in which there is a need for the consent of one of the parents to remove the children from one country to another." CA 5271/92 *Foxman v. Foxman*, 1992 Sections3(D), 4 (KChagall transl.). The High Courts of Austria, South Africa, Germany, Scotland, and Australia agree. Canadian courts disagree, but the Supreme Court found that those decisions were not exactly on point. The French courts were divided on the issues. The Court also found that there is "an 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." The Court went on to say that at the time the Convention was drafted, joint custodial arrangements were unknown in many of the contracting states and the status of *ne exeat* rights was not well understood.

The court's reliance on the law of foreign countries was criticized in the dissenting opinion written by Justice John Paul Stevens, arguing that the cited cases were not exactly on point. He criticized the majority for misinterpreting the Convention, stating that the Convention was clear on the difference between the enforcement of custody orders and "rights of access." He argued that *ne exeat* orders came within the meaning of rights of access and that the remedy of returning the child was not permitted by the Convention in these cases.

The Court held that the Convention provides for the remedy of the right of return for violations of *ne exeat* orders, and that such a holding is consistent with the Convention's objects and purposes. The Court stated that the Convention is based on the principle that the best interests of the child are well served when decisions regarding custody rights are made in the country of habitual residence. The Convention does not determine custody rights but allows the courts of the home country to decide what is in the child's best interests.

Based on this decision, it can be expected that the United States will be more willing to return children to Hague countries when they are removed in violation of *ne exeat* orders. Of course, the abducting parent can assert an exception to the Convention. One exception is that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The Convention also allows courts to decline to return the child if the child objects, as long as the child has reached a sufficient "age and degree of maturity at which it is appropriate to take account of its views."

It will be interesting to see whether the Supreme Court's decision will influence the courts in other countries under the Convention and the drafting of statutes creating *ne exeat* orders. For attorneys in foreign countries concerned that a parent will abduct a child and flee to the United States, it would be prudent to obtain an order restraining the other parent from removing the child from the jurisdiction. This order will be considered a "right of custody" under the Convention and could result in a return of the abducted child.

Peter M. Walzer is partner at Walzer & Melcher in Southern California. He specializes in family law and was recently named "Family Law Person of the Year" by the Southern California Chapter of the American Academy of Matrimonial Lawyers.