Commentary: Supreme Court Cases

Abbott v. Abbott, 560 U.S. 1 (2010)[1]

Other Supreme Court Cases

Lozano v. Montoya Alvarez,
134 S. Ct. 1224 (2014)

Chafin v. Chafin,
133 S. Ct. 1017 (2013)

Interpreting the Convention | Custody Rights | Ne Exeat Clauses

In *Abbott v. Abbott*[2] the Supreme Court held that a ne exeat[3] order confers a right of custody upon the left-behind parent, entitling that parent to maintain an action under the Convention. This decision resolved a circuit split over the implications of ne exeat orders.[4]

Facts

Father and mother engaged in custody litigation in Chile. Pursuant to a Chilean decree, mother was awarded daily care and control of the child and father was granted visitation. Under Chilean law, once a request for a visitation order is granted, a ne exeat order requiring father's consent for removal of the child from Chile enters into force. In violation of the ne exeat order, mother took the child to Texas and commenced divorce and child custody proceedings there. Father's petition for return of the child was denied by the district court. On appeal, the Fifth Circuit affirmed the district court's decision.

Discussion

In reaching its decision, the Supreme Court examined several factors.

The Text. The Court first focused upon the language of the Convention in Article 5: "'rights of custody' shall include 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 ne exeat provision in Chilean law conferred a joint right to determine the child's country of residence. The Court found this to be "a right of custody under the Convention."[5]

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1. For a more detailed analysis of the *Abbott* decision, see James D. Garbolino, *The United States Supreme Court Settles the Ne Exeat Controversy in America:* Abbott v. Abbott, 59 Int'l & Comp. L.Q., Oct. 2010, at 1158–67.

2. 560 U.S. 1 (2010).

3. A ne exeat order typically restrains a parent, or both parents, from removing a child from the court's jurisdiction or from transporting a child across an international frontier. However, this prohibition is not absolute: if permission to remove the child is unreasonably withheld, or a court determines that good cause for continued restraint no longer exists, the ne exeat order may be vacated by a court of competent jurisdiction.

The Fourth and Ninth Circuits followed the Second Circuit decision in Croll v. Croll, 229 F.3d 133 (2d Cir. 2000); *see* Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003); Gonzales v. Gutierrez, 311 F.3d 942 (9th Cir. 2002). The Eleventh Circuit, in contrast, held that a ne exeat provision in a Norwegian custody agreement conferred a right that would satisfy the Convention's definition of "custody rights." Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004).

5. *Abbott*, 560 U.S. at 7.

Treaty Interpretation by Central Authority. The Court observed that the State Department has long interpreted a ne exeat clause to confer "rights of custody" within the meaning of Article 5. The interpretive opinion of the executive branch is entitled "great weight"[6] and "[t]here is no reason to doubt that this well-established canon of deference is appropriate here."[7]

Reliance upon Sister State Interpretation. The Court accorded "considerable weight"[8] to opinions of other signatory nations on this issue. The acceptance of ne exeat clauses establishing custody rights found broad acceptance in international case law, including decisions from the English High Court of Justice, the House of Lords, Israel, Austria, South Africa, and Germany.[9]

Purposes of the Convention. The Hague Convention was intended to protect the custody rights of the left-behind parent and discourage the abducting parent from engaging in international forum shopping. The Court quoted the dissenting opinion in *Croll*, where then-Second Circuit Judge Sonia Sotomayor made this observation:

> 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. 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 [or other provision of law], sought to prevent" and would allow "parents to undermine the very purpose of the Convention." *Croll*, 229 F. 3d, at 147 (Sotomayor, J., dissenting).[10]

Need for Consistency of Interpretation. The Supreme Court also advised that the Convention should be interpreted with a view toward establishing consistency among

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6. Citing Sumitomo Shoji America, Inc., v. Avagliano, 457 U.S. 176, 184–85 n. 10 (1982).

7. *Id.* at 12.

8. *Abbot*, 560 U.S. at 16 (citing El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 176 (1999) (quoting Air France v. Saks, 470 U.S. 392, 404 (1985))).

9. The Court continued,

> It is true that some courts have stated a contrary view, or at least a more restrictive one. The Canadian Supreme Court has said ne exeat orders are "usually intended" to protect access rights. Thomson v. Thomson, [1994] 3 S.C.R. 551, 589–590, 119 D.L.R. (4th) 253, 281; *see* D.S. v. V. W. [sic], [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481. But the Canadian cases are not precisely on point here. *Thomson* ordered a return remedy based on an interim ne exeat order, and only noted in dicta that it may not order such a remedy pursuant to a permanent ne exeat order. *See* [1994] 3 S.C. R. [sic], at 589–590, 119 D.L.R. (4th), at 281. D.S. involved a parent's claim based on an implicit ne exeat right and, in any event, the court ordered a return remedy on a different basis. *See* [1996] 2 S.C. R. [sic], at 140–141, 142, 134 D.L.R. (4th), at 503–504, 505.

Abbott, 560 U.S. at 17.

10. *Abbott*, 560 U.S. at 21.

signatory states.[11] This is especially true now that ninety-three countries have adopted the Hague Convention.[12]

The Court observed that the interpretation of the Convention on a

> 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.[13]

11. *See* Silberman, Linda J., Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence, 38 U.C. Davis L. Rev. 1049 (2005). The expansion of signatories to the Convention has resulted in a mixture of legal systems based upon common-law, civil-law, Islamic, Judaic and various other combinations of the foregoing.

12. Ninety-three countries have ratified, acceded, or succeeded to the Convention. Of those, the treaty is "in force" between the United States and seventy-three other countries. The last country to have ratified the Convention was Japan, when their ratification become effective April 1, 2014.

13. *Abbot*, 560 U.S. at 12.