Abbott v. Abbott Argument Round-Up

The Supreme Court of the United States heard argument in *Abbott v. Abbott* this past week. *Abbott* is the rare family-law case before the Supreme Court involving an American child taken to Texas from his home in Chile by his mother, without his father's consent. Under the 1980 Hague Convention on the Civil Aspects of Child Abduction, children must be automatically returned to the country from which they are taken, so long as the removal was "in breach of rights of custody." The Supreme Court is asked to decide whether the father had a "right of custody" under the treaty, because at the time of the divorce the Chilean family court—and Chilean law as a matter of course—entered a "ne exeat" order prohibiting either parent from removing the child from the country without the consent of the other.

The transcript of the oral argument is available here, and Dahlia Lithwick has a great summary of the argument over at Slate. In her experienced view, "[l]istening to the justices argue over an international child-custody case is a bit like watching them ride the mechanical bull. They aren't experts, but they're ever so willing to go down trying." Justices Ginsburg, Breyer and Roberts were especially active in the argument, positing a wide array of pointed hypotheticals to test the limits of what constitutes a ne exeat right under foreign law. For example, Justice Breyer posited early in the argument:

> *[What if] the woman is 100 percent entitled to every possible bit of custody and the man can see the child . . . on Christmas day at 4:00 in the morning, that's it. Now there's a law like Chile's that says, you cant take the child out of the country without the permission of the of the father. . . . Are you saying that that's custody? . . [Wouldn't that] turn the treaty into a general: return the child, no matter what?*

According to the SCOTUSBlog, another scenario itched at Justice Breyer so that he raised repeatedly during the argument: What if the custodial parent – presumably the one with whom the child would be better off – is the one who moves the child abroad and the non-custodial parent is the one requesting return? In particular, what if that non-custodial parent is akin to a "Frankenstein's

monster" whom the family-law judge denied any rights over the child? If the Convention grants such a parent custody rights, Breyer insisted he could not see the "humane purpose" behind it.

By the end of the petitioner's argument, Chief Justice Roberts and Justices Sotomayor and Ginsburg, at least, seemed satisfied that, in such exceptional circumstances, the Convention would allow a parent to escape abroad with their child. Article 13(b) of the Convention got a bit more attention than the case—or the parties' papers—would have envisioned.

Perhaps prodding the court to issue another *Aerospatialle* -style decision, Karl Hays—the attorney for the Respondent—insisted that a parent left behind could resort to the legal system of the country where the child was taken, using laws such as the Uniform Child Custody Jurisdiction and Enforcement Act in the United States, to seek enforcement of their existing rights of access or custody. Justice Scalia dismissed that argument, scoffing, "If these local remedies were effective, we wouldn't have a treaty."

For his part, Justice Antonin Scalia, whom Lithwick describes as the "sentinel of international law" on the Court and in keeping within his views in Olympic Airways, pointed out that most of the 81 countries that have signed the Hague treaty have agreed that a ne exeat right is also a right of custody. Here is Scalia's exchange with counsel for respondent:

> *Justice Scalia: Most courts in countries signatory of the treaty have come out the other way and agree that a ne exeat right is a right of custody, and those courts include U.K., France, Germany, I believe Canada, very few come out the way you—how many come out your way?*
> *Mr. Hays: Actually, Your Honor, the United States and Canada do, and the analysis—*
> *Justice Scalia: Well, wait … You're writing our opinion for us, are you?*
> *Mr. Hays: … There have only been seven courts of last resort that have heard this issue. There are some 81 countries that belong—*
> *Justice Scalia: Yes, but, still, in all, I mean, they include some biggies, like the House of Lords, right? And … the purpose of a treaty is to have everybody doing the same thing, and … if it's a case of some ambiguity, we should try to go along with what seems to be the consensus in … other countries that are signatories to the treaty.*

> *Mr. Hays: If, in fact, there were a consensus, but … there is not a consensus in this instance….*

Justices Breyer and Ginsburg then entered the fray with Justice Scalia and the three start counting countries, to which Hays made "the point that . . . if you have one or two or even three countries that have gone one way and then you have other countries that have gone the other way, that there's not a clear-cut overwhelming majority of the other jurisdictions that have ruled in favor of establishing ne exeat orders…." To which Scalia responds, "We will have to parse them out, obviously."

As Roger Alford at Opinion Juris has pointed out:

> *[T]his exchange raises a great question of country-splits in treaty interpretation. Several justices appeared willing to interpret an ambiguous treaty provision consistent with the general consensus of signatory nations. But respondent argues that there is no clear consensus and only a handful of countries out of 81 signatories have even addressed the issue. So even assuming the Court takes the approach suggested by Justice Scalia in Olympic Airways and looks for signatory consensus, what's the Court to do when there are few voices from abroad and those voices are not consistent? Is there still a role for comparative interpretive analysis in that context?*

Lithwick concludes that "[t]he most interesting thing about [the] argument in Abbott v. Abbott is that it breaks down all the normal divisions on the court: left versus right, women versus men, pragmatists, internationalists, textualists, idealists … all of it flies out the big ornamental doors as the court grapples with this new problem of international child abduction at the grittiest, most practical level. It feels nice. Less an ideological smack down than a good, old-fashioned family argument. I wouldn't get too used to it. But I enjoy it while I can."

A decision is expected before the end of June. Previous coverage of this case on this site can be found here and here.