Abbott v. Abbott: A Ne Exeat Right is a "Right of Custody" Under the Hague Abduction Convention

In a 6-3 decision announced yesterday morning, the United States Supreme Court reversed the decision of the United States Court of Appeals for the Fifth Circuit, and held that a ne exeat right—which typically allows a non-custodial parent to resist a child's move out of his country of habitual residence—constitutes a right of custody under the Hague Abduction Convention, requiring a prompt return of the child. This settles a long-running split among the federal courts in the United States, and (though the parties and even the Court disagree on this to some extent) it also signals an emerging consensus among the courts of the various contracting states on this issue. You can get the decision here. Early commentary is also available from the SCOTUSBlog, Opinio Juris and the National Law Journal.

Aside from the holding, though, this decision was interesting for other reasons. As foreshadowed by the transcript of the oral argument, there was an interesting line-up of the justices, not at all following along the usual ideological lines. The exchange between the majority and the dissent sparred over big topics like the primacy of the Treaty's text over its intent, the importance of the Executive's view of a Treaty, and the effect of judicial decisions of foreign courts; they also sparred over some smaller things, too, like how to read Webster's dictionary.

As we've discussed before on this site, this case concerns a custodial mother who removed a child from his habitual residence in Chile to the United States against the wishes of a non-custodial father. The mother clearly had a "right of custody" under the Hague Convention; the father clearly had a "right of access"—or visitation rights—under the same Convention. Chilean law, however, gives all parents with such visitation rights an automatic ne exeat right as well. The question is whether that statutory entitlement gives the father a "right of custody," or whether he retains a mere "right of access," under the Convention. This classification is important: under the text of the Convention, the child must be returned to Chile if he was taken in violation of the former, but not if he is taken in violation of the latter.

The Convention defines a "right of custody" as "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 majority concluded that Mr. Abbott had both. Citing Webster's dictionary, the Court held that he could "set bounds or limit" the child's country of residence by virtue of the right he was given under Chilean law, thus giving him right to "determine" that place of residence. He also had rights "relating to the care of the person of the child" because, in its view:

> *Few decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self definition, are linked in an inextricable way to the child's country of residence. One need only consider the different childhoods an adolescent will experience if he or she grows up in the United States, Chile, Germany, or North Korea, to understand how choosing a child's country of residence is a right "relating to the care of the person of the child."*

The majority then moved quickly into supporting its textual holding with evidence of intent and broader, systemic concerns. Though notably avoiding much discussion of the travaux preparatoires, it held that:

> *Only this conclusion will "ensure[] international consistency [by] foreclose[ing] 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."*
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> *Only this conclusion will "accord[s] with the Treaty's object and purpose . . . of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes"; and*
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> *Only this conclusion "is supported . . . by the State Department's view on the issue" and "the views of other contracting states."*

Justice Stevens, joined by Justices Thomas and Breyer, stated their disagreement in a lengthy dissent. They contended that "the Court's analysis is atextual—at least as far as the Convention's text goes." In their view, the majority's conclusion that Mr. Abbott has rights "relating to the care" of his son depends on an overly-

broad reading of the phrase "relating to." Under the Court's formulation of it, "any decision on behalf of a child could be construed as a right 'relating to' the care of a child"—a position which is unhelpful to precisely defining the right at issue. The majority's reading of the "right to determine the child's place of residence," too, "depends upon its substitution of the word 'country' for the word 'place.'" This is especially troubling in the minds of the dissenting Justices because "[w]hen the drafters wanted to refer to country, they did; indeed, the phrase "State of habitual residence" appears no fewer than four other times elsewhere within the Convention's text. Thus, the mere right to prevent foreign travel does not equate with the right to determine "where a child's home will be." That decision, like nearly all others that directly relate to the care of the child (like what he will eat and where he will go to school), is left to the custodial parent, with no input from a non-custodial parent who possess only visitation rights.

The majority's "preoccupation with deterring parental misconduct," the Justice Stevens wrote, "has caused it to minimize important distinction[s]" in the Convention's text. The crux of the dissent is how this case "eviscerates the distinction" between rights of custody and rights of access in the Convention. "[A]s a result of this Court's decision, all [Chilean] parents—so long as they have the barest of visitation rights—now also have joint custody within the meaning of the Convention and the right to utilize the return remedy." The majority opinion, Justice Stevens found, allows a Chilean statute to "essentially void[] the Convention's Article 21, which provides a separate remedy for breaches of rights of access."

The dissent found no support for the majority's "atextual" reading in the State Department's views. For starters, the dissent saw no need to resort to "supplementary means of interpretation" when a clear answer lies in the text of the Convention. And, even it were to consider these sources, it would give the Executive's position little weight because that position has been inconsistent and is here unsubstantiated by relevant conduct. "Instead, the Department offers us little more than its own reading of the treaty's text. Its view is informed by no unique vantage it has, whether as the entity responsible for enforcing the Convention in this country or as a participating drafter." The dissent also eschewed any reliance on foreign court decisions, stating that "we should not substitute the judgment of other courts for our own" (which is an interesting

position for Justice Breyer to take).

As has already been noted by commentators, this decision will be cited more often—at least in the United States—for its Treaty-interpretation guidance than its precedent for custody cases. On this front, the dissent puts forward a very convincing case when the issue is strictly confined to the text of the Convention. But when you factor in secondary interpretive aids—like the treaty's object and purpose, state practice, the negotiating history, and the views of publicists—the majority approach tends to emerge as the right one. The winner of this case prevailed on how the Convention worked in practical operation—not on how it looked in black-and-white—which suggests that the Court may begin to take a more dynamic approach to treaty interpretation issues in the future.

Another interesting undercurrent is flowing here on the degree of deference to give foreign law and foreign courts. The dissent gives little deference to foreign court decisions defining the Convention, and would not allow a peculiar foreign law—like the one at issue here—to blur the categorical line between access and custody rights, expand the scope of the Convention's return remedy, and thus effectively mandate the abdication of U.S. jurisdiction over the matter. The majority purports to follow foreign court decisions defining the Convention, and gives short-shrift to this practical effect of this Chilean statute—barely mentioning it at all. The result is freely abdicating this custody decisions to the Chilean court, allowing the "best interests of the child" to be determined elsewhere. Interestingly though, and in nearly the same breathe as it's stated deference, the majority reminds those foreign courts that: "Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. . . . Judicial neutrality is presumed from the mandate of the Convention, . . . [and] international law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings."