A legal note from Marshal Willick about a United States Supreme Court decision altering the meaning of "custody rights" in international child abduction cases

In *Abbott v. Abbott*, ___ U.S. ___ (No. 08-645, May 17, 2010), the United States Supreme Court resolved a split among the circuits and found a parent awarded a *ne exeat* right had a sufficient "right of custody" to trigger application of the Hague Convention when a child is removed from another country in contravention of such a provision.

I. LEGAL BACKGROUND

A proceeding seeking the return of a child from one signatory country to another is governed by the "The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980" [commonly referred to as "the Hague Convention"], and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610. The United States of America has been a Contracting State under the Convention since July 1, 1988.

While most people – including many lawyers – don't know it, Hague Convention cases are ***not*** custody cases. Rather, they are concerned with return of children to their countries of habitual residence upon allegations that they have been wrongfully removed or wrongfully retained. The country from which a child was removed or retained is where any custody proceedings should be held.

There are only a few legal issues to decide in a Hague case (for those interested in following up, flowcharts detailing both the substantive legal tests, and the procedural steps, along with a fairly comprehensive set of CLE materials, a summary article, and a set of forms to use in such cases, is posted at http://www.willicklawgroup.com/published_works (about halfway down the page). These flowcharts have been adopted by the National Center for Missing and Exploited Children as part of the "legal resources" available to assist attorneys nationally in such cases. *See* http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=213.

The question of "wrongful removal" asks whether one parent's act of removing or retaining the child is in breach of the other parent's rights of custody under the law of the State of the child's habitual residence.

The inquiry made in a Hague proceeding therefore splits into three questions: Where was the child's habitual residence? Did the parent who had the child in the other contracting state have a right of custody under the law of the State of the child's habitual residence, which was actually being exercised (or would have been but for the removal or retention)? If so, did the removing or retaining parent's actions violate those rights?

It is the second of these questions (did the left-behind parent have a right of custody) that provided the backdrop for the *Abbott* case.

II. FACTUAL BACKGROUND LEADING TO THIS CASE

This thoroughly international case involved a British father and American mother who married in England and had a son born in Hawaii before moving to Chile, where they divorced. The Chilean divorce court awarded the mother primary custody (termed "daily care and control") and provided the father with "direct and regular" visitation rights, every other weekend, and for a month each February.

Chilean law automatically provided the father with a *ne exeat* right by virtue of the award of visitation; when a court has decreed that a parent has visitation rights, that parent's "authorization" generally is required before the subject child may be removed from the country.

Concerned that the father would take the child to Britain, the mother first obtained an order prohibiting the child from being removed from Chile, and then violated the very order she had obtained by taking the child to Texas without the father's or the court's consent. Despite the ongoing Chilean divorce proceedings, the mother filed for divorce in Texas. The Texas courts granted the father visitation (in Texas) but denied his show-cause request to return the child to Chile.

So the father tried again, this time in federal court, and expressly under the Convention and ICARA. The federal judge, however, found that the father's visitation and *ne exeat* rights were those of "access," not "custody," and therefore found that return was not authorized under the Convention. The Fifth Circuit affirmed, using a dictionary definition of "custody" and finding that a *ne exeat* right could not be "actually exercised" within the meaning of the Convention. Noting a split in the federal Circuits, the United States Supreme Court granted certiorari.

III. THE APPELLATE ANALYSIS AND DECISION

While the *Opinion* goes on for 19 pages, the reversal boiled down to the simple conclusion that since a *ne exeat* right is to "determine a child's country of residence," it necessarily is a right of joint custody, triggering the Convention and ICARA's return mechanism if violated. The Court considered it "beside the point" that a *ne exeat* right does not fit within traditional "notions of physical custody," finding that the text-based uniform approach serves the purpose of international consistency and prevents courts from parochially looking to the terminology of local law.

In reaching its conclusion, the Court looked to the State Department's view of the issue, finding the interpretation of a treaty by the Executive Branch to be entitled to "great weight," because of the "diplomatic consequences" of the Court's decision on the ability to recover American children removed to other countries. Further the Court looked to the view of the highest courts of other countries, siding with England, Israel, Austria, South Africa, Germany, Australia, and Scotland, while noting that the Canadian courts have found differently, and the French courts are divided. It found the general scholarship in the field to be in accord.

The dissent – in 26 pages – viewed the allocation to the mother of "daily care and control" to be an award of "sole custody," and reasoned that if one parent had sole custody, the other parent

definitionally had none.

The dissent would have drawn the line for when a Hague return was triggered by the fundamental determination of whether the it was a custodial, or non-custodial parent who took the child and left a country, ordering a return in the latter, but not the former, circumstance. By the dissent's analysis, the removal of a child from a country by a custodial parent simply is not "wrongful," and the left-behind non-custodian is not entitled to return of the child, but only assistance in securing access for visitation.

The dissent was also much less than impressed by the State Department view (which it labeled "newly memorialized and changing") and considered the majority's examination of the decisions of foreign jurisdictions "substituting the judgment of other courts for our own." Nevertheless parsing the foreign opinions, the dissent pulled from them individual words describing differently in other places the descriptions of parental rights and duties.

Curiously, the dissent contains a glaring error – the statement in its introductory paragraph that the return of the child to Chile was necessarily an order turning the child over to the ***father***. Since a Hague return only determines the place where custody is determined, and not how custody is to be resolved there, that error is curious.

IV. IMPLICATIONS AND MINUTIA

If anything, this opinion is likely to increase the number of cases in which return of children is sought under the Convention, because many countries have some variation of the *ne exeat* provisions here at issue in their law codes. While the dissent's conclusion labeled the majority's "bright-line rule . . . particularly unwise in the context of a treaty intended to govern disputes affecting the welfare of children," the opposite is probably true. Having the courts of the country of habitual residence decide custodial disputes seems far likelier to promote substantial justice than to frustrate it.

While a 6-3 split is hardly unprecedented, Court-watchers found the particular line-up of Justices remarkable for how it cut across traditional ideological affiliations. The majority opinion was written by Justice Kennedy, and joined by Justices Roberts, Scalia, Ginsburg, Alito, and Sotomayor. The dissent was written by Justice Stevens, and joined by Justices Thomas and Breyer. If anything, that is a cheerful departure from the "conservative versus liberal" camps that many believe the Justices occupy. And it's nice when a Family Law case is thought to be of sufficient importance to command the time and attention of the highest court in the land.

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practice and practitioners, see http://www.iaml.org.

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