THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: AN UPDATE AFTER *ABBOTT*

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I. INTRODUCTION

The Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention") establishes the legal framework to prevent and remedy the growing phenomenon of trans-border abduction of children. [1]To achieve these goals, contracting states to the Convention undertake, among other things, to return wrongfully abducted children to their country of habitual residence. [2] Recent U.S. Supreme Court jurisprudence suggests that, in the United States, relief under the Hague Convention may be more easily accessible to abducted children and their parents.

This paper is divided into three sections. Section I introduces the legal framework of the Hague Convention. Section II provides an overview of the U.S. statute implementing the Hague Convention with an aim toward aiding practitioners in Hague cases. Section III reviews a recent Supreme Court decision and its impact on Hague Convention cases litigated in U.S. courts.

II. THE HAGUE CONVENTION

The Hague Convention was signed on October 25, 1980, as a result of the Fourteenth Session of the Hague Conference on Private International Law. [3] It has two primary objectives: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and (2) "to ensure that

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1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 11343 U.N.T.S. 89, *available at* http://hcch.e-vision.nl/upload/conventions/txt28en.pdf [hereinafter Hague Convention]; *see also* U.S. Dep't of State, Office of Children's Issues, The Hague Convention on the Civil Aspects of International Child Abduction: Legal Analysis, http://travel.state.gov/pdf/Legal_Analysis_of_the_Convention.pdf (last visited Oct. 3, 2010) [hereinafter Hague Convention Legal Analysis]; U.S. Department of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (2010), *available at* http://travel.state.gov/pdf/2010ComplianceReport.pdf [hereinafter Report on Compliance].

2. Hague Convention Legal Analysis, *supra* note 1, at 6.

3. Hague Convention, *supra* note 1, at pmbl., art. 37.

rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[4]

The Convention's forty-five articles establish the contracting states' various obligations. Among other things, the Convention seeks to safeguard "rights of custody" and "rights of access" over children wrongfully removed from one contracting state to another.[5] Under the Convention, "'rights of custody' shall include rights relating to the care of the person of the child," while "'rights of access shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."[6] The removal or retention of a child is "wrongful" within the meaning of the Convention if (1) it is in breach of rights of custody[7] (2) under the law of the country where the child was habitually resident,[8] (3) those rights were being exercised at the time of removal,[9] and (4) the child is under the age of sixteen.[10]

Articles 6 and 7 provide that each contracting state shall establish a "Central Authority" to assist with fulfilling the objectives of the Hague Convention.[11] In the United States, for example, the State Department's Office of Children's Issues serves as the central authority.[12] When a child is wrongfully removed or retained, the person who has rights of custody (frequently a so-called "left-behind parent") can apply to the central authority of the country where the child habitually resided for assistance in securing the return of the child.[13] Article 8 of the Convention specifies what information must be

4. *Id.* at art. 1.

5. *Id.* at art. 1(b).

6. *Id.* at art. 5.

7. *Id.* at art. 3(a).

8. *Id.*

9. *Id.* at art. 3(b).

10. *Id.* at art. 4.

11. *Id.* at arts. 6–7.

12. Exec. Order No. 12,648, 53 C.F.R. 30,637 (1988), *reprinted in* 42 U.S.C. § 11606 (2006).

13. Nat'l Ctr for Missing & Exploited Children, LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 3 (2007), *available at* http://www.missingkids.com/en_US/training_manual/NCMEC_Training_Manual.pdf [hereinafter LITIGATING INTERNATIONAL CHILD ABDUCTION].

included in the application.[14] Upon receiving an application, the local central authority forwards it to the central authority of the country where the child is located.[15] Local organizations or attorneys may then be contacted to assist with initiating administrative or judicial proceedings to secure the return of the child.[16]

Articles 8 to 20 of the Convention address issues related to the administrative and judicial procedures for the return of wrongfully removed children to their country of habitual residence. If a petitioner establishes that the removal of a child was wrongful within the meaning of the Convention, a competent authority (e.g., a court) in a contracting state "shall order the return of the child forthwith."[17] A petition for removal should be filed within one year of the date of removal.[18] However, even when a petition is filed more than one year after the date of removal, a competent authority "shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."[19]

The two principal defenses against removal are (1) that custody rights were not being exercised at the time of removal, or that the person having those rights consented to the child's removal,[20] and (2) 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."[21] An authority faced with a petition for return of a child also has discretion to consider any objection by the child, if it finds the child has attained an age and level of maturity that justify such consideration.[22] Article 20 also gives competent authorities

14. Hague Convention, *supra* note 1, at art. 8.

15. *Id.* at art. 9. If the location of the child is not known, the central authority "shall take appropriate measures . . . to discover the whereabouts of a child who has been wrongfully removed or retained." *Id.* at art. 7(a).

16. LITIGATING INTERNATIONAL CHILD ABDUCTION, *supra* note 13, at 4.

17. Hague Convention, *supra* note 1, at art. 12.

18. *Id.*

19. *Id.*

20. *Id.* at art. 13(a).

21. *Id.* at art. 13(b).

22. *Id.* at art. 13.

discretion to refuse a petition to return a child if the removal would be contrary to principles of human rights and fundamental freedoms.[23] Importantly, Article 19 provides that a "decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."[24] The local courts of the country where the child was abducted from remain free to determine any underlying custody dispute.[25]

The Convention also addresses rights of access,[26] cost bearing in Convention-related proceedings,[27] application of the Convention in federal countries,[28] and other aspects of its own procedure.

III. THE HAGUE CONVENTION IN THE UNITED STATES

The Convention is only in force for the contracting states that have ratified or acceded to it.[29] To date, the Hague Convention is in force for eighty-two countries, including the United States.[30] Notable exceptions include: India, Japan, Russia, mainland China, and a number of African and Middle Eastern countries.[31] In the United States, the Convention has been in force since July 1, 1988, codified as the International Child Abduction Remedies Act ("ICARA").[32]

A. Jurisdiction

Among other things, ICARA grants federal district courts and state courts concurrent jurisdiction over actions arising

23. *Id.* at art. 20.

24. *Id.* at art. 19.

25. LITIGATING INTERNATIONAL CHILD ABDUCTION, *supra* note 13, at 5.

26. Hague Convention, *supra* note 1, at art. 21.

27. *Id.* at art. 26.

28. *Id.* at arts. 31–33.

29. *Id.* at arts. 37, 38.

30. *Hague Status Table*, Hague Conference on Private International Law, June 6, 2010, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (listing the contracting states).

31. *See id.*

32. 42 U.S.C. §§ 11601–11611 (2006).

under the Hague Convention.[33] Nonetheless, some practitioners recommend filing cases in federal court.[34] This is because state courts may be more accustomed to analyzing the best interest of the child, which is typically not a relevant determination in cases brought under the Hague Convention.[35] Consistent with Article 19 of the Convention, ICARA empowers U.S. courts "to determine *only* the rights under the Convention *and not the merits of any underlying child custody claims*."[36] Accordingly, courts hearing Hague cases should only decide whether the child should be returned to his country of habitual residence, and should decline to examine custody determinations or the best interest of the child.[37] Those determinations are to be made, if at all, by the courts in the country of the child's habitual residence.[38]

B. Burdens of Proof

ICARA also establishes the burdens of proof required in U.S. courts considering Hague Convention petitions: A petitioner seeking the return of a child pursuant to the Convention must establish, by a preponderance of the evidence, that the child was wrongfully removed or retained within the meaning of the

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33. *Id.* § 11603(a).

34. *See, e.g.*, LITIGATING INTERNATIONAL CHILD ABDUCTION, *supra* note 13, at 64.

35. *Id.*

36. 42 U.S.C. § 11601(b)(4) (emphasis added).

37. *See* Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 344 (5th Cir. 2004) ("Courts charged with deciding [relief] under the Convention must not cross the line into a consideration of the underlying custody dispute."). While a U.S. court can consider certain factors affecting the wellbeing of the child (e.g., whether returning the child would expose him or her to physical or psychological harm, under Article 13(b) of the Convention), the court should not focus on traditional domestic court custody considerations, such as the "best interest of the child" analysis.

38. Abbott v. Abbott, 130 S. Ct. 1983, 1989 (2010). ("A return remedy [under the Convention] does not alter the pre-abduction allocation of custody rights but leaves custodial decisions to the courts of the country of habitual residence."). *Abbott* also recognizes a public policy reason to prevent courts in the receiving country from deciding the underlying custody dispute: Allowing the practice would implicitly condone forum-shopping by the abducting parent. *Id.* at 1996 ("The Convention should not be interpreted to permit a parent to select which country will adjudicate these [custody] questions by bringing the child to a different country. . . .").

Convention.[39] Similarly, a petitioner seeking arrangements to exercise rights of access must show by a preponderance of the evidence that he or she has those rights.[40]

Depending on the grounds claimed for opposing the return, the respondent can also bear the burden of proof.[41] The defenses set forth in Articles 13(b) (i.e., grave risk that returning the child would expose him to physical or psychological harm) and 20 (i.e., returning the child would be contrary to the principles of human rights and fundamental freedoms) must be established by clear and convincing evidence.[42] The other defenses set forth in Articles 13 (i.e., custody rights were not being exercised at the time of removal; the person having custody consented or acquiesced to the removal; a sufficiently old and mature child objects to being returned) and 12 (i.e., more than one year has passed since the removal and the child has settled in a new environment) require only a preponderance of the evidence.[43] Moreover, Congress defines all defenses or exceptions under the Convention to be "narrow," and courts have construed them so.[44]

Figure 1. Burdens of Proof in Hague Cases under ICARA. [45]

Petitioner's Burden of Proof	
Claim	***Standard***
Seeking return of a wrongfully removed child	Preponderance of the evidence: Removal was "wrongful" within the meaning of the Hague Convention (Article 3: rights of

39. 42 U.S.C. § 11603(e)(1)(A); *see also* Hague Convention, *supra* note 1, at art. 3 (laying out the factors of a wrongful removal).

40. 42 U.S.C. § 11603(e)(1)(B); *see also* Hague Convention, *supra* note 1, at art. 5(b) (defining "rights of access").

41. 42 U.S.C. § 11603(e)(2).

42. *Id.* § 11603(e)(2)(A); *see also* Hague Convention, *supra* note 1, at arts. 13(b), 20.

43. 42 U.S.C. § 11603(e)(2)(B); *see also* Hague Convention, *supra* note 1, at arts. 12, 13.

44. 42 U.S.C. § 11601(a)(4); *see e.g.*, Friedrich v. Friedrich, 78 F.2d 1060, 1067 (6th Cir. 1996) ("All of these four exceptions [under the Hague Convention] are narrow."); Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995) ("We believe, however, that a court applying the Hague Convention should construe these exceptions narrowly.").

45. 42 U.S.C. § 11603(e)(1)–(2).

	custody being exercised, child removed from country of habitual residence; Article 4: child is under 16 years of age)
Seeking arrangements for organizing or securing the effective exercise of rights of access	Preponderance of the evidence: Petitioner has rights of access within the meaning of the Hague Convention (Article 5)
Respondent's Burden of Proof	
Defense	***Standard***
Custody rights were not being exercised (Convention Article 13(a))	Preponderance of the evidence
Person with custody consented or acquiesced to the removal of the child (Convention Article 13(a))	Preponderance of the evidence
Child is old and mature enough for the court to consider his views, and child objects to being returned (Convention Article 13)	Preponderance of the evidence
More than one year has passed since removal and child is settled in new environment (Convention Article 12)	Preponderance of the evidence
There is a grave risk that returning the child would expose him to physical or psychological harm or an otherwise intolerable situation (Convention Article 13(b))	Clear and convincing evidence
Returning the child would be contrary to the fundamental principles of the protection of human rights and fundamental freedoms (Convention Article 20)	Clear and convincing evidence

C. Emergency Injunctive Relief

Expedited and injunctive relief may also be available in certain circumstances. Article 2 of the Hague Convention provides that "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available."[46] ICARA, in turn, provides that U.S. courts may take appropriate measures "to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition."[47] Pursuant to these provisions, some courts have granted temporary restraining orders—including *ex parte* orders—when the circumstances have warranted it.[48] In more extreme cases where, for example, a court is petitioned to remove a child from a person with physical custody of the child, the applicable requirements of state law must be satisfied.[49]

D. Venue, Costs, and Administrative Aspects

ICARA also addresses other procedural issues. For instance, under Section 11603(b), venue is proper in the judicial district where the child is located when the petition is filed.[50] Section 11605 provides that no authentication is required in order for a Convention application or other related document to be

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46. Hague Convention, *supra* note 1, at art. 2.

47. 42 U.S.C. § 11604(a).

48. *See, e.g.*, Alvarez Ortiz v. Gonzalez Cantu, No. H-09-2913, slip op. (S.D. Tex. Dec. 15, 2009); Robles Antonio v. Barrios Bello, No. 1:2004-CV-1555-T, 2004 WL 1895125, at *1 (N.D. Ga. June 2, 2004); Morgan v. Morgan, 289 F. Supp. 2d 1067, 1070 (N.D. Iowa 2003). Although security is typically required to grant injunctive relief, in Hague cases, courts may require only a nominal amount. *Morgan*, 289 F. Supp. 2d at 1070 (requiring only nominal security to grant a temporary restraining order in Hague Convention case).

49. 42 U.S.C. § 11604(b) ("No court exercising jurisdiction of an action brought under [ICARA] . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."); *see also Morgan*, 289 F. Supp. 2d at 1070 (verifying that the requirements of the Iowa Uniform Child Custody Jurisdiction and Enforcement Act were met in order to grant a temporary restraining order).

50. 42 U.S.C. § 11603(b).

admissible in court.[51] Section 11607 addresses costs and fees, and provides that no fees may be assessed to an applicant under the Convention.[52] In civil actions, the petitioner bears court costs and the cost of legal counsel, although legal assistance sometimes may be available.[53] If the court orders the return of a child, it may also order the respondent to pay necessary expenses, including transportation and legal costs, unless the respondent establishes that such order would be clearly inappropriate.[54]

Sections 11606 and 11608–10 of ICARA deal with administrative issues related to the Office of Children's Issues, as the U.S. central authority under the Convention: its organization, funding, and functioning.[55] Section 11611 requires the U.S. Secretary of State to prepare an annual report regarding compliance with the Hague Convention.[56]

IV. *ABBOTT V. ABBOTT*: MORE HAGUE CONVENTION CASES COMING TO U.S. COURTS?

On May 17, 2010, the U.S. Supreme Court's decision in *Abbott v. Abbott* resolved a split among the federal circuits and held that a parent's right to object to his child being taken out of the country amounts to a "right of custody" within the meaning of the Hague Convention and thus allows the parent to seek the return of the child under the Convention.[57] This ruling will likely increase the number of Convention cases in U.S. courts.[58]

Mr. Abbott, a British citizen, and Ms. Abbott, a U.S. citizen, had lived in Chile with their son, A.J.A.[59] After the couple divorced, Chilean courts awarded daily care and control of the

51. *Id.* § 11605.

52. *Id.* § 11607(a).

53. *Id.* § 11607(b). For additional information regarding legal aid programs, see the State Department's Web site, at http://travel.state.gov/abduction/incoming/legalaid/legalaid_4309.html (last visited Oct. 3, 2010).

54. 42 U.S.C. § 11607(b)(3).

55. *Id.* §§ 11606, 11608–10.

56. *Id.* § 11611; *see, e.g.*, Report on Compliance, *supra* note 1.

57. Abbott, 130 S. Ct. at 1990.

58. *Id.* at 1995.

59. *Id.* at 1988.

child to the mother, and direct and regular visitation rights to the father.[60] Pursuant to Chilean law, the father also had what is commonly known as a *ne exeat* right, i.e., the right to object to the child being removed from the country.[61] A Chilean family court also issued a "*ne exeat* of the minor" order prohibiting A.J.A. from being taken out of Chile.[62]

In August 2005, Ms. Abbott removed her son from Chile without permission from Mr. Abbott or the Chilean court.[63] In May 2006, after locating his son in Texas, Mr. Abbott filed an action in the U.S. District Court for the Western District of Texas, seeking an order requiring that A.J.A. be returned to Chile pursuant to the Hague Convention and ICARA.[64] The district court denied the request, finding that the *ne exeat* right did not constitute a right of custody under the Convention, and thus the return remedy was not available (i.e., the child's removal had not been "wrongful" within the meaning of the Convention because the left-behind parent did not have "rights of custody").[65] The Fifth Circuit affirmed on the same basis.[66] Noting a circuit split on the question of whether a *ne exeat* right constitutes a right of custody within the meaning of the Hague Convention. The Supreme Court granted certiorari.[67]

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60. *Id.*

61. *Id.* As summarized by the Court, the relevant Chilean statute provides that "'[o]nce the court has decreed' that one of the parents has visitation rights, that parent's 'authorization . . . shall also be required' before the child may be taken out of the country, subject to court override only where authorization 'cannot be granted or is denied without good reason.'" *Id.* at 1990.

62. *Id.* at 1988.

63. *Id.*

64. *Id.*

65. *Id.*; *see also* Abbott v. Abbott, 495 F. Supp. 2d 635, 641 (W.D. Tex. 2007).

66. *See* Abbott v. Abbott, 542 F.3d 1081, 1087–88 (5th Cir. 2008).

67. *Abbott*, 130 S. Ct. at 1988–89. In addition to the Fifth Circuit Court of Appeals in *Abbott*, Courts of Appeals in the Second, Fourth, and Ninth Circuits had held that *ne exeat* rights were not rights of custody. *See* Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir. 2003); Gonzalez v. Gutierrez, 311 F.3d 942, 949 (9th Cir. 2002); Croll v. Croll, 229 F.3d 133, 138–41 (2d Cir. 2000). The Eleventh Circuit, by contrast, had held that *ne exeat* rights were rights of custody. Furnes v. Reeves, 362 F.3d 702, 720 n.15 (2004). In *Croll*, then-judge Sotomayor dissented from the decision holding that *ne exeat* rights were not rights of custody. In *Abbott*, she joined the majority opinion holding that they were.

The Court reversed and remanded the case to the district court.[68] In the Court's view, the *ne exeat* right "granted Mr. Abbott a joint right to decide his child's country of residence."[69] From this it followed that Mr. Abbott had "rights of custody" under Article 5 of the Convention, which defines the term 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."[70] The Court reasoned that even if "place of residence" refers to the child's street address, the *ne exeat* right allowed Mr. Abbott to ensure that the child does not live at any street address outside of Chile.[71] In interpreting the Convention, the Court relied in part on an *amicus curiae* brief submitted by the U.S. government.[72] The Court also cited decisions by a number of foreign courts, holding that a *ne exeat* right amounts to a right of custody under the Convention.[73] Further, the Court explained that the Convention's objects and purposes were best served by considering *ne exeat* rights to be rights of custody.[74]

Justice Stevens filed a dissent, joined by Justices Thomas and Breyer, in which he argued that the Convention clearly distinguishes between "rights of custody" and "rights of access."[75] In the dissent's view, the *ne exeat* right—a "travel restriction"—is part of the rights of access, and the Convention does not provide a return remedy for a violation of a parent's

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68. *Abbott*, 130 S. Ct. at 1997.

69. *Id.* at 1990.

70. *Id.* at 1990–91; *see also* Hague Convention, *supra* note 1, at art. 5 (defining "rights of custody").

71. *Abbott*, 130 S. Ct. at 1991.

72. *Id.* at 1993 (citing Brief for United States as *Amicus Curiae* 21 ("[T]he Department of State, whose Office of Children's Issues serves as the Central Authority for the United States under the Convention, has long understood the Convention as including *ne exeat* rights among the protected 'rights of custody.'")).

73. *See id.* (citing decisions from Australia, Austria, England, Germany, Israel, Scotland, and South Africa, and differentiated court decisions from Canada and France, but not any Chilean decisions on the issue).

74. *See id.* at 1996 ("To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would run counter to the Convention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes.").

75. *Id.* at 1999 (Stevens, J., dissenting).

rights of access.[76] The dissent highlighted that Mr. Abbott had no other right "relating to the care of the child" other than to object to his being removed from Chile.[77] Even then, Mr. Abbott's objection could be overridden by a court in some cases. He had no right to decide where in Chile A.J.A. should live, what school he should attend, or what religion he should be raised under.[78] In these circumstances, he could not be said to have "rights of custody" over his son.[79] The dissent criticized the majority for "upend[ing] the considered judgment of the Convention drafters in favor of protecting the rights of noncustodial parents."[80]

The *Abbott* decision appears to make Convention remedies more accessible in U.S. courts. The Court quoted a report frequently regarded as the Convention's *travaux préparatoires* as advocating for "a flexible interpretation of the terms used [in the Convention], which allows *the greatest possible number of cases to be brought* into consideration."[81] The dissent, on the other hand, argued that, under the majority's reasoning, "*any* decision on behalf of a child could be construed as a right 'relating to' the care of the child," and thus potentially justifying a return remedy under the Convention.[82] Whether more cases will in fact come to U.S. courts after *Abbott* remains to be seen, but it is now clear that "left-behind" parents who have only a *ne exeat* right may bring Convention cases in U.S. courts.

V. CONCLUSION

The Hague Convention is an important legal tool to deter and remedy international child abductions. After *Abbott*,

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76. *Id.* at 1998–99 ("Unfortunately, . . . the Court's preoccupation with deterring parental misconduct—even, potentially, at the sake of the best interests of the child—has caused it to minimize this important distinction.").

77. *Id.* at 1999–2000.

78. *Id.*

79. *Id.* at 2004.

80. *Id.* at 2010.

81. *Id.* at 1995 (emphasis added); *see also* E. Perez–Vera, Explanatory Report, in 3 Actes et Documents de la Quatorzième session, 425–73 (1982), http://hcch.e-vision.nl/upload/expl28.pdf.

82. *Abbott*, 130 S. Ct. at 2000.

abductions to the United States from other contracting states will be more easily remedied. Victims of international abductions, as well as practitioners in the field, will benefit from this recent development.