From the SelectedWorks of Todd Heine

January 2011

Does a ne exeat provision create rights of custody under the Hague Abduction Convention?: The Supreme Court's elusive quest for a bright line rule in Abbott v. Abbott

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/todd_heine/3

Monday, January 17, 2011

Dear Editor,

I respectfully submit my article, "The Supreme Court's *Ne Exeat* Interpretation Under the Hague Abduction Convention in *Abbott*: No Exit from the Broad Scope of Rights of Custody in International Family Law" for publication in your journal. This article reviews the United States Supreme Court decision in *Abbott v. Abbott*, an international family law case from the 2009 - 2010 term. The article then points out the potential impacts of this decision on future cross-border custody disputes.

I am a joint-J.D./LL.M./Master 2 *Droit* student at Vermont Law School and Université de Cergy-Pontoise in France. I specialize in international family law, with a focus on United States, Canadian, French, English-speaking, and European Union law. I assist attorneys around the world and maintain an international family law blog. I wrote this article while supervised by Professor Gregory Johnson.

This article is important for two reasons. First, it provides a timely and concise critique of the Court's opinion and dissent. The Court decided that a *ne exeat* provision in Chilean law that forbid one parent from removing a child from Chile extended rights of custody under the Hague Convention on the Civil Aspects of International Child Abduction to an otherwise noncustodial parent. This important decision immediately concerns thousands of families in the U.S. and around the world and carries potentially negative effects.

Second, the article poses factual scenarios that reveal the dangers of the Court's reasoning if extended to circumstances not considered by the Court. Most scholars and practitioners advocated for the eventual outcome in *Abbott*. As a result, nothing in the literature surrounding the *ne exeat* issue recognizes the potentially negative effects of the Court's decision. While *Abbott* answers the specific question that the case presented, it creates problems for families and attorneys involved in international child custody disputes.

Thank you in advance for taking the time to review my article. I eagerly look forward to your feedback.

Sincerely,

Todd M. Heine

Does a *ne exeat* provision create rights of custody under the Hague Abduction Convention?: The Supreme Court's elusive quest for a bright line rule in *Abbott v. Abbott*

Todd M. Heine

I. Introduction

II. The facts and legal issue in *Abbott*
   a. The facts in *Abbott*
   b. The legal issue in *Abbott*

III. The Court's Decision
   a. The Convention's text indicated that *ne exeat* provisions were "rights of custody"
      i. The *ne exeat* provision gave the right to determine place of residence
      ii. The *ne exeat* provision related to the care of the child
      iii. Practical and policy arguments for including the *ne exeat* provision as "rights of custody"
      iv. The U.S. State Department's views were entitled to great weight
   b. Foreign court decisions were entitled to substantial weight
   c. The purposes of the Convention support the conclusion that a *ne exeat* provision is "rights of custody"
   d. Conclusion

IV. The Dissent
   a. Purposes of the Convention do not support the conclusion that a *ne exeat* provision is "rights of custody"
   b. The Convention's text does not support the conclusion that a *ne exeat* provision is "rights of custody"
      i. The *ne exeat* provision was not rights relating to the care of the child
      ii. The *ne exeat* provision was not the right to determine the child's place of residence
      iii. The U.S. State Department's views were not entitled to great weight
   c. Foreign court decisions were not entitled to substantial weight
   d. Conclusion

V. Variations on the *Abbott* facts
   a. Four factual situations that will extend *Abbott*'s reasoning beyond *ne exeat* provisions
      i. Passport consent requirements
      ii. Relocation restrictions
      iii. Parental behavior restrictions
      iv. Paternity applications
   b. The expanded scope of "rights of custody" does not serve the best interests of children

VI. Conclusion

I. Introduction

International family lawyers around the world followed Timothy, Jacqueline, and their son A.J. Abbott's story in *Abbott v. Abbott*,[1] the first U.S. Supreme Court case involving international family law under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention").[2] Timothy is English and Jacqueline is a U.S. citizen. A.J. was born in Hawaii. While living Chile, Timothy and Jacqueline decided to separate. A Chilean court granted Jacqueline custody over A.J. and granted Timothy visitation.

Though Jacqueline had custody, a *ne exeat* provision forbade Jacqueline from leaving Chile with A.J., unless Timothy or the court gave consent. Then, in a scene that has replayed countless times for families around the world, Jacqueline violated the *ne exeat* provision by taking A.J. to Texas. In response, Timothy petitioned a U.S. court to order A.J.'s immediate return based on the Convention. The ensuing legal dispute made its way to the U.S. Supreme Court.

The Court sought to settle an internationally contested issue: whether a *ne exeat* provision extends rights of custody under the Convention. Parents with rights of custody can generally rely on the Convention to get a court to order their children's return to the child's previous habitual residence.[3] A *ne exeat* provision is a statutory or court ordered provision that forbids a parent from leaving a jurisdiction with a child without consent from the other parent or a court.[4]

---

[1] *Abbott v. Abbott*, 560 U.S. __ (2010) ("*Abbott*").
[2] 25 October 1980, 1343 U.N.T.S. 49 ("Convention").
[3] The Convention requires countries to "secure the prompt return of children wrongfully removed or retained in any Contracting State." Art. 1. Art. 3 provides that a removal or retention is wrongful if:

> it is in breach of rights of custody attributed to a person, an institution or any other body …under the law of the State in which the child was habitually resident immediately before the removal or retention; and at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention.

[4] Black's Law Dictionary (Brian A. Garner, ed., 7th ed., West 1999) ("*ne exeat*").

The Federal Courts of Appeal[5] and foreign courts in the Convention's signatory countries[6] have differed as to whether a *ne exeat* provision provides rights of custody to otherwise noncustodial parents for Convention purposes.

Timothy was a noncustodial parent who only had rights to visit with A.J., but he argued that the *ne exeat* order extended him rights of custody under the Convention's definition of rights of custody.[7] In the Abbott's case, the U.S. District Court and Federal Circuit Court of Appeals did not order A.J.'s immediate return to Chile under the Convention, holding that the *ne exeat* provision did not give Timothy rights of custody. Section II reviews the decisions below.

The Court reversed the Court of Appeal's decision, announcing with a bright line rule that that the *ne exeat* provision extended rights of custody to Timothy. Section III scrutinizes the 6 -3 majority's opinion, where Justice Kennedy examined the Convention's text, the U.S. Department of State's amicus brief, and foreign court decisions. The Court held that in light of the Convention's purpose, the *ne exeat* provision provided Timothy with rights of custody. Jacqueline's removal thus breached Timothy's rights of custody, which should have prompted the courts below to order A.J.'s immediate return to Chile.

Section IV reviews Justice Stevens' dissent, which provided sound reasoning and showed how courts around the world have reached opposite conclusions on this issue. The dissent argued that the Convention sought to provide returns when noncustodial parents removed children to secure custody in foreign jurisdictions. Jacqueline—a mother with full custody over

---

[5] Cf. *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008); *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000) with *Furnes v. Reeves*, 362 F.3d 702 (11th 2004).

[6] *Cf. e.g.*, *C. v. C.*, [1989] 1 W.L.R. 654 (English High Court of Justice, 1989) with *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Supreme Court of Canada, 1994).

[7] The Convention defines rights of custody at Art. 5 as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

A.J.—did not fit this profile. Further, the Convention's text requires multiple exercisable custody rights, not the singular veto power that Timothy held, despite the State Department's brief and foreign case law. Thus, the dissent rejected the Court's bright line *ne exeat* rule.

At first glance, the Court has provided a certain outcome for cross-border families. Most commentators advocated for this outcome.[8] Indeed, this case's rule will provide a return in most cases when parents violate *ne exeat* provisions by coming to the U.S. More broadly, this case will affect families globally, as foreign courts in over seventy signatory countries will consider the Court's position on *ne exeat* provisions.

However, the reasoning that surrounds this bright line *ne exeat* rule leaves anything but a bright line standard for other Convention cases. Without thoroughly considering this effect, the Court has expanded custody rights for noncustodial parents seeking remedies in U.S. courts. Section V points out four factual scenarios in which *Abbott*'s broad language will create unforeseen outcomes for families and courts that face cross-border custody disputes. These outcomes defy the purpose of the Convention, burden single parents, and run counter to the best interests of children.

---

[8] See, e.g., J. Jackson, "Interpreting Ne Exeat Rights as Rights of Custody: The United States Supreme Court's Chance to Advance the Purposes of the Hague Convention on International Child Abduction," 84 Tul. L. Rev. 195 (2009); E. Lynch, "Villegas Duran v. Arribada Beaumont: The Second Circuit Court's Interpretation of Custody Rights Undermines the Purpose of the Hague Convention on the Civil Aspects of International Child Abduction," 41 U. Miami Inter-American L. R. 221 (2010); K. O'Connor. "What Gives You the Right?—Ne Exeat Orders Should Constitute Rights of Custody After Furnes v. Reeves," 24 Penn. St. Int'l L. Rev. 449 (2005); M. Wills, "Interpreting the Hague Convention on the Civil Aspects of International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, The Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention," 25 *Rev. Litig*. 423, 444 – 446.

II. The facts and legal issue in *Abbott*

a. The facts in *Abbott*

Jacqueline, a U.S. citizen, and Timothy, an English citizen, met and married in England in 1992.[9] Following Timothy's employment opportunity as an astronomer, the Abbott's moved to Hawaii, where Jacqueline gave birth to their son A.J. in 1995.[10] In 2002, the family moved again for Timothy's employment, this time to Chile.[11] In March 2003, the couple separated in Chile.[12] A Chilean court order granted Jacqueline full custody over A.J.[13] The court granted Timothy visitation "every other weekend and the whole month of February each year."[14]

Though Jacqueline was the custodial parent, she needed Timothy's permission to take A.J. out of Chile based on a *ne exeat* provision under Chilean law and a court order providing the same.[15] If Timothy denied permission, Jacqueline could have gone to a Chilean court to get permission to leave Chile with A.J.[16]

Instead, Jacqueline left Chile with A.J. in August 2005 with Chilean court proceedings pending without Timothy's or a court's permission, thus violating the Chilean *ne exeat* provision.[17] She then sought a divorce and custody in a Texas court.[18] In turn, Timothy sought

---

[9] *Abbott v. Abbott*, 560 U.S. __, 1 (2010).
[10] *Id* at 2.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. While Jacqueline petitioned for and received a *ne exeat* order from a Chilean court in addition to the *ne exeat* provision in Chilean law, the Court focused solely on Timothy's rights under the Chilean statute. *See*, *id* at 6.
[16] *Id* at 2.
[17] *Id*.
[18] *Id*.

A.J.'s return to Chile under the Convention from the Federal District Court in the Western District of Texas.[19]

Both the District Court[20] and the Fifth Circuit Federal Court of Appeals[21] decided that the *ne exeat* provision did not confer rights of custody to Timothy. Following decisions of the Second,[22] Fourth,[23] and Ninth[24] Circuits, the Fifth Circuit held that Timothy had "no rights of custody under the Convention because his *ne exeat* right was only 'a veto right over his son's departure from Chile.'" The Eleventh Circuit had reached the opposite conclusion in another case.[25] This split prompted the Supreme Court's grant of certiorari to hear the Abbott's case.

b. The legal issue in *Abbott*

The legal issue in front of the Court was straightforward—whether the *ne exeat* provision conferred "rights of custody" under the Convention. The Convention defines "rights of custody" as "rights related to the care of the child and in particular the right to determine the child's place of residence."[26] That definition is autonomous; it stands independent of national definitions of rights of custody.[27] The definition's scope was crucial to the case, because of the return remedy that the Convention offers parents who hold rights of custody.

Parents with rights of custody can generally successfully petition a court to have their child returned immediately when another parent takes their child out of country. Simply put,

---

[19] *Id*.
[20] *Abbott v. Abbott*, 495 F. Supp. 2d 635 (W.D. Tex. 2007).
[21] *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008).
[22] *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).
[23] *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003).
[24] *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002).
[25] *Furnes v. Reeves*, 362 F.3d 702 (11th 2004).
[26] Hague Abduction Convention, Art. 5.
[27] *Abbott* at 8.

courts in the Convention's signatory countries will order a child's return to its previous habitual residence if someone—most often a parent seeking custody in a foreign jurisdiction—wrongfully removes the child from a signatory country in which the child was habitually resident.[28] A removal is wrongful if it violates a parent's rights of custody.[29] Thus, demonstrating rights of custody is of primary importance in return petitions.

Courts have struggled over whether *ne exeat* provisions confer rights of custody. A law that restricts a child's out-of-country travel does not fit into the general understanding of custody.[30] However, because the Convention defines rights of custody with the example of "the right to determine the child's place of residence," some courts have held that *ne exeat* provisions are rights of custody.[31]

Here, in applying that definition, the Court had to determine whether the *ne exeat* provision gave Timothy rights of custody. If so, then Jacqueline removed A.J. in violation of Timothy's rights of custody, thus requiring A.J.'s return to Chile.

---

[28] Hague Convention, Art. 12.
[29] *Abbott* at 3. See also, Hague Convention Art. 3.
[30] See, e.g., *Random House Dictionary* (2010). ("Also called child custody. *Law*. The right of determining the residence, protection, care, *and* education of a minor child or children, esp. in a divorce or sepraration." (emphasis added). See also *Croll v. Croll*, 229 F. 3d 133, 138 (2d Cir. 2000).
[31] See, e.g., *C. v. C.*, [1989] 1 W.L.R. 654 (English High Court of Justice, 1989).

III. The Court's Decision

Justice Kennedy wrote for the Court, which held that the *ne exeat* provision gave Timothy rights of custody. The Court characterized the *ne exeat* provision as a custodial "*ne exeat* right"[32] and supported this holding in four ways. First, the Court held that the Convention's text indicated that a *ne exeat* provision provided rights of custody. Second, the Court gave considerable weight to foreign court decisions that have held that *ne exeat* provisions provide rights of custody. Finally, the Court found that the purpose of the Convention supported the conclusion that a *ne exeat* provision provided rights of custody.

a. The Convention's text indicated that *ne exeat* provisions were "rights of custody"

The Court began its analysis by pointing to the Chilean law that requires both parents'—including noncustodial parents like Timothy—consent before anyone may take a child out of Chile. Because Timothy had "'direct and regular' visitation rights, … it follow[ed] from Chilean law, that he ha[d] a shared right to determine his son's country of residence."[33] This conclusion followed a Chilean agency's interpretation that has recognized a "'right to authorize the minors' exit."[34] As a baseline, the Court found rights of custody for Timothy in Chilean domestic law.

The Court then analyzed the Convention's text, extracting a two-part definition of rights of custody. According to the Court's interpretation of the Convention, rights of custody must relate to the care of the person of the child.[35] They must also include the right to determine the child's place of residence.[36]

---

[32] *Id* at 1 – 3, 6 – 12, 14 – 18.
[33] *Id* at 6.
[34] *Id*.
[35] Convention, Art. 5(a).
[36] *Id*.

i. The *ne exeat* provision gave the right to determine place of residence

The Court first found that the *ne exeat* provision gave Timothy the right to determine A.J.'s place of residence. To begin, the Court examined the scope of "residence." Timothy argued that the term residence meant country; Jacqueline argued that it meant a specific home. The Court broadly considered that residence encompassed country of residence "in light of the Convention's explicit purpose to prevent wrongful removal across international borders."[37] This reasoning followed then-judge Sotomayor's dissent in *Croll v. Croll*.[38] However, this broad definition ignored the text that reads "place of residence" instead of "country of residence."[39]

Even assuming that residence had a more specific meaning in the Convention—i.e., address—, the Court reasoned that Timothy could still determine A.J.'s address. This reasoning turned to the scope of the word "determine" in the Convention's definition. Referring to the verb "determine" in Webster's Dictionary, the Court held that the *ne exeat* provision allowed Timothy to "'set bounds or limits to'" A.J.'s residence, "which is what Mr. Abbott's *ne exeat* right allow[ed] by ensuring that A. J. A. [could not] live at any street addresses outside of Chile."[40]

Jacqueline argued that the *ne exeat* provision was merely a veto power that did not determine A.J.'s residence; it only limited A.J.'s country of residence. The Court however saw it as more than a veto power because "Mr. Abbott could condition his consent to a change in country[.]"[41] For that reason, the *ne exeat* provision carried some affirmative power to limit or

---

[37] *Abbott* at 7.
[38] *See*, *Croll v. Croll*, 229 F.3d 133 (2d. Cir. 2000) (Sotomayor, J. dissenting). See also, J. Salvatore, Supama Salil, & Michael Whelan, "Sotomayor and the Future of International Law," 45 Texas Int. L. J. 487, 491 – 495.
[39] *See* Convention at Art. 5; *See also*, *infra* at s. IV.
[40] *Id*.
[41] *Id* at 8.

set conditions on A.J.'s potential out-of-county residence, which fit the Convention's definition as a right to determine the child's place of residence.

Under further scrutiny, that conclusion has little support in the law. While Timothy may have been able use his *ne exeat* leverage to influence Jacqueline's move, nothing in the Chilean law expresses this bargaining ability. Nor does the Chilean law provide any mechanism to enforce adherence to such an agreement after leaving Chile. Moreover, once a child leaves Chile, his habitual residence will likely shift within a few months—leaving him under the jurisdiction of new courts under the Convention and the domestic law in many countries.[42] Thus, the Court's conclusion that the *ne exeat* provision determined A.J.'s residence is questionable.

ii. The *ne exeat* provision related to the care of person of the child

The Court then considered the second part of the Convention's definition of rights of custody—rights relating to the care of the person of the child. The Convention requires that the rights relate to the child's care.[43] Very high on the Court's list of factors that contribute to the child's care were "the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb."[44] The Court considered these factors "linked in an inextricable way to the child's country of residence," which the *ne exeat* provision limited.[45] As a result, the Court linked the *ne exeat* provision as related to the care of the person of the child.

Here again, the Court painted with a broad brush despite the case's detailed story. Though A.J.'s parents lived in Chile, neither parent was Chilean or even South American. A.J. could have gone to an English-speaking school and lived in an English-speaking neighborhood.

---

[42] *See generally*, T. Heine, "Habitual Residence, Home State, and Cross-Border Custody Jurisdiction: Time for a Temporal Standard in International Family Law," at http://works.bepress.com/todd_heine/1.
[43] Convention, Art. 5(a).
[44] *Abbott* at 7 – 8.
[45] *Id* at 8.

Instead of wearing a *Chamanto* and playing *fútbol* at *la escuela*, A.J. might have worn Nikes and played baseball at the American School. Nonetheless, the Court assumed that that a child's care depends on his country code instead of dialing into the reality that an address more specifically influences a child's upbringing. By ignoring the case's facts that suggested otherwise, the Court held that the *ne exeat* provision determined A.J.'s place of residence and related to his care.

iii. Practical and policy arguments for including the *ne exeat* provision as "rights of custody"

After reaching that conclusion, the Court addressed Jacqueline's practical and policy arguments. Jacqueline first argued that a *ne exeat* provision was not a typical custodial right. However, the Court saw the *ne exeat* provision as a right of custody under the Convention's definition. In doing so, the Court adhered to "a uniform, text-based approach [to ensure] international consistency in interpreting the Convention" that "forecloses courts from relying on definitions of custody confined by local law usage."[46]

Astonishingly, the Court juxtaposed that approach with a look to domestic trends. The Court considered the *ne exeat* power as a form of "[j]oint legal custody, in which one parent cares for the child while the other has joint decision making authority concerning the child's welfare"[47] that "has become increasingly common" in the U.S.[48] After warning against local law usage, the Court concluded that a *ne exeat* provision is rights of custody based on U.S. national trends.

---

[46] *Id*.
[47] *Id*.
[48] *Id*.

Jacqueline then argued that the *ne exeat* provision was not an exercisable right of custody. The Convention requires rights of custody that "were actually exercised, either jointly or alone, or would have been so exercised but for the [child's] removal or retention."[49]

Jacqueline's argument that the *ne exeat* provision was not an exercisable right did not sway the Court. Instead, the Court said that:

> a *ne exeat* right is by its nature inchoate and so has no operative force except when the other parent seeks to remove the child from the country. If that occurs, the parent can exercise the *ne exeat* right by declining consent to the exit or placing conditions to ensure the move will be in the child's best interests. When one parent removes the child without seeking the *ne exeat* holder's consent, it is an instance where the right would have been 'exercised but for the removal or retention.'[50]

Thus, the Court speculated that Timothy would have exercised his power under the *ne exeat* provision by withholding his consent had Jacqueline sought it.

Moreover, the Court required an immediate return in these kinds of cases for policy reasons. The Court believed that "unlike rights of access, *ne exeat* rights can only be honored with a return remedy because these rights depend on the child's location being the country of habitual residence."[51] Thus for policy reasons, courts should return children whose parents take them across international borders in violation of *ne exeat* provisions. A conclusion to the contrary "would render the Convention meaningless in many cases where it is most needed."[52]

This conclusion is unconvincing—the Convention is most needed when one parent removes a child from a custodial parent. The drafters offered a return remedy only for custodial parents because in those cases the child:

---

[49] Hague Convention at Art. 3(b).
[50] *Abbott* at 9.
[51] *Id* at 10.
[52] *Id*.

> suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.[53]

Here, A.J. moved with his custodial parent to a place that offered familiar language, cultural conditions, and relatives. Though *ne exeat* provisions require a child's presence in country, safeguards for these provisions and access rights lie in domestic action outside the Convention—e.g., exit requirements for children. If the drafters had wanted to protect rights that necessitated close proximity, they would have returned children to parents with rights of access.[54]

Finally, the Court dealt with Jacqueline's argument that by calling a *ne exeat* provision a right of custody, the Court would eliminate the distinction in the Convention between rights of custody and rights of access. The drafters carefully differentiated between custodial and noncustodial parents by fashioning different remedies for each kind of parent.[55]

In response, the Court concluded that the distinction remains because a *ne exeat* order was not a right of access under the Convention's definition. The *ne exeat* provision—"a joint right to decide a child's country of residence"—was "not even arguably a 'right to take a child for a limited period of time' or a 'visitation righ[t],'"[56] as the Convention defines rights of access. This led to "the commonsense conclusion that a *ne exeat* right [did] not fit these definitions of 'rights of access[,]'"[57] which "honor[ed] the Convention's distinction between

---

[53] *Perez-Vera* at para. 24 (citing A. Dyer, *Questionnaire and Report on international child abduction by one parent*, Prel. Doc. No. 1 August 1977, pp. 22-230.
[54] Instead, the Convention at Art. 5 defines rights of access as " the right to take a child for a limited period of time to a place other than the child's habitual residence" and does not provide returns for parents with access rights.
[55] See Convention, Arts. 5, 12, 21.
[56] *Abbott* at 10.
[57] *Id*.

rights of access and rights of custody."[58] Because the *ne exeat* order was not a right of access, the Court differentiated—in theory—between custody and access right holders in Chile.

This reasoning's hollowness becomes quickly apparent. The more logical conclusion is that the Convention does not adequately categorize a *ne exeat* provision. The Court should have concluded that the *ne exeat* provision was neither a right of access nor a right of custody. In this case, the *ne exeat* provision was at best a tool that protected Timothy's ease of access to A.J. However, a *ne exeat* provision is not a right of custody just because it is not a right of access.

In sum, the Court ruled that, based on the Convention's text, a *ne exeat* provision extends rights of custody under the Convention. The *ne exeat* provision in this case extended Timothy the right to determine A.J.'s residence. It also related to A.J.'s care. Regardless of the *ne exeat* provision's unconventional nature, it is a right of custody under the Convention's definition. That conclusion respects the difference between rights of custody and rights of access. Therefore, courts must generally return a child when a child and parent enter the U.S. in violation of a *ne exeat* order, based on the Convention's text.

iv. The U.S. State Department's views were entitled to great weight

The Court followed its textual analysis by spotlighting the State Department's amicus brief in a separate section of the opinion, albeit only a paragraph long. In its brief, the State Department advised the Court that "'as the Central Authority for the United States under the Convention, [the State Department] has long understood the Convention as including *ne exeat* rights among the protected 'rights of custody.'"[59]

---

[58] *Id*.
[59] *Abbott* at 11.

Sumitomo Shoji America, Inc. v. *Avagliano*[60] supported the "great weight" that the Court gave to "the Executive's interpretation of a treaty as memorialized" in a State Department brief.[61] The Court was satisfied here that the State Department was "well informed concerning the diplomatic consequences" of this interpretation of the *ne exeat* issue.[62] Thus, the Court followed the State Department's interpretation of the *ne exeat* provision as a right of custody.

b. Foreign Court Decisions were entitled to substantial weight

With similar deference, the Court followed foreign courts that had previously decided this issue. The Court turned to precedent in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*[63], which held that "[i]n interpreting any treaty, "[t]he 'opinions of [] sister signatories'… are 'entitled to considerable weight.'" Following that precedent, foreign court's *ne exeat* decisions "further informed" the Court's conclusion.[64]

The Court cited cases from five sister signatories' high courts that had decided *ne exeat* cases. The Court concluded that high courts in England, Israel, Austria, South Africa, and Germany were in accord with the *ne exeat* provision's status as a right of custody under the Convention. Without fully examining these cases in the opinion, the Court spent two sentences reviewing an English case and one sentence on an Israeli Supreme Court case, leaving only parenthetical cites for the Austrian, South African, and German high court cases.[65] The Court

---

[60] 457 U. S. 176, 184–185, n. 10 (1982)
[61] *Abbott* at 11.
[62] *Id* at 12.
[63] 525 U. S. 155, 176 (1999) (quoting *Air France* v. *Saks*, 470 U. S. 392, 404 (1985))
[64] *Abbott* at 12.

[65] *Id* at 12 – 13 (citing *C.* v. *C.*, [1989] 1 W. L. R. 654, 658 (English High Court of Justice, 1989); CA 5271/92 *Foxman* v. *Foxman*, [1992] (Supreme Court of Israel), 1992; Oberster Gerichtshof [O. G. H.] [Supreme Court] Feb. 5, 1992, 2 Ob 596/91 (Austria); *Sonderup* v. *Tondelli*, 2001(1) SA 1171, 1183 (Constitutional Ct. of South Africa 2000); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany] July 18, 1997, 2 BvR 1126/97).

briefly mentioned appellate decisions from Australia and Scotland.[66] These cases however begged for further scrutiny.

For example, a brief review of *C. v. C.* reveals a far different set of facts than those in the Abbott's case.[67] In that case involving an English mother and Australian father, the Deputy Registrar in Sydney issued a consent order with two parts. First, the order stated that "[t]he wife was to have custody of … the child of the marriage and the husband and the wife were to remain joint guardians of the said child."[68] Second, the order contained a *ne exeat* provision.[69]

Despite the obvious language in the first clause, the English decision relied on the second clause's *ne exeat* order to set the precedent in the English courts that the *ne exeat* provision gave the father "the right to ensure that the child remains in Australia or lives anywhere outside Australia only with his approval."[70] The Court's misguided reliance on the English court's definition of rights of custody is problematic because the English court had no reason to declare rights of custody stemmed from the *ne exeat* provision. Again, the Australian Registrar's order expressly granted joint guardianship. This ruling set the international precedent that other courts have followed, despite the readily apparent joint guardianship regardless of the *ne exeat* provision. Thus, this case was not persuasive regarding other purely *ne exeat* cases.

Likewise, the South African *Sonderup* case was not persuasive compared to the Abbott's case. Here again, the parents "were granted joint guardianship" in addition to a limit on both parents from traveling "outside of British Columbia with the child once per year for a period not

---

[66] *Id* at 13 (citing *In the Marriage of Resina* [1991] FamCA 33 (Austl., May 22, 1991); *A. J.* v. *F. J.*, [2005] CSIH 36, 2005 1 S. C. 428.)
[67] *C.* v. *C.*, [1989] 1 W. L. R. 654 (English High Court of Justice, 1989).
[68] *Id*.
[69] *Id*.
[70] *Id*.

to exceed 30 days."[71] This was arguably not a *ne exeat* order and it limited travel outside of British Columbia, lacking the "explicit purpose to prevent wrongful removal across *international* borders."[72] Moreover, this case involved parents who, again, had express joint guardianship over the child. Thus, this case strayed from the facts in *Abbott*. Despite these important differences, the Court unconvincingly followed those foreign cases' reasoning.

In contrast to those cases, the Court acknowledged that the *ne exeat* issue lacked uniform consensus among signatories. Canadian and French decisions suggested *ne exeat* provisions were not rights of custody.[73] Nonetheless, these views did not sway the Court. Instead, the Court sided with those foreign courts that viewed *ne exeat* provisions as rights of custody.

Like the previous foreign courts that decided the *ne exeat* issue, the Court also relied on sources outside of the Convention's text, beginning with scholarly commentary. The Court noted that among scholars, "an emerging international consensus that *ne exeat* rights are rights of custody, even if that view was not generally formulated when the Convention was drafted in 1980."[74] The Court found evidence of this consensus by citing only two law journal articles and three Hague Conference Special Commission reports.[75] However, these Special Commission

---

[71] *Sonderup* v. *Tondelli*, 2001(1) SA 1171, 1183 (Constitutional Ct. of South Africa 2000) at para 6.
[72] *Abbott* at 7.

[73] *Id* at 14 (citing *Thomson* v. *Thomson,* [1994] 3S. C. R. 551, 589, 119 D. L. R. (4th) 253; *Attorney for the Republic at Périgueux* v. *Mrs. S.*, [T. G. I.] Périgueux, Mar. 17, 1992, Rev. cr. dr.internat. Privé 82(4) Oct.–Dec. 1993, 650,).
[74] *Id*.

[75] *Id* at 15 (citing Hague Conference on Private International Law: Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice §9.3, p. 43 (2008); Hague Conference on Private International Law: Overall Conclusions of the Special Commission of Oct. 1989 on the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction, reprinted in 29 I. L. M. 219, 222, ¶9 (1990); Hague Conference on Private International Law: Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction 11 (1993), reprinted in 33

Reports carry little weight because "[a]s contrasted with a negotiating or lawmaking session," these sessions have "no formal decision-making mechanism."[76] Further, "the record [did] not even suggest that the Commission reached a controlling interpretive decision."[77] Thus, these post-Convention flimsily buttress the Court's conclusions.

Surprisingly, the Court omitted any reference contemporary to the Convention's completion regarding noncustodial parents. A leading international family law expert and Chairman of the Commission for drafting the Convention wrote about this issue shortly after the Convention's signing. He noted that the drafters did not provide for returns for access rights because "disputes about access are notoriously difficult to unravel" and this would "provide too drastic a remedy" for access rights.[78] Nor did the Court cite the Federal Register that accompanied the Convention's U.S. ratification, which stated that "wrongful retention is not intended by this Convention to cover refusal by the custodial parent to permit visitation by the other parent."[79] Nonetheless, the Court held that noncustodial *ne exeat* holders will enjoy immediate returns under the Convention by relying on post-ratification commentary.

In addition, the Court relied on the views recorded in the Convention's Explanatory Report.[80] The Court observed that:

I.L.M. 225 (1994); L. Silberman, The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues, 33 *N.Y.U. J. Int'l L. & Pol.* 221, 226–232, n. 13 (2000); Whitman, *Croll v. Croll:* The Second Circuit Limits "Custody Rights" Under the Hague Convention on the Civil Aspects of International Child Abduction, 9 Tulane J. Int'l & Comp. L. 605, 611–616 (2001).

[76] C. Bruch & M. Durkin, "The Hague's Online Child Abduction Materials: A Trap for the Unwary," 44 Fam L. Q 65, 70 (2010).

[77] *Id*.

[78] J.M. Eekelaar, *International Child Abduction by Parents* 32 U.T.L.J. 281, 315 (1982).

[79] 51 Fed. Reg. 10503 (1986).

[80] E. Pérez-Vera, Explanatory Report, in 3 *Actes et Documents de la Quatorzième session*, pp. 425–473 (1982).

> rather than defining custody in precise terms or referring to the laws of different nations pertaining to parental rights, the Convention uses the unadorned term 'rights of custody' to recognize '*all* the ways in which custody of children can be exercised' through 'a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.'[81]

This language prompted the Court's reasoning that "the Report is fully consistent with the conclusion that *ne exeat* rights are just one of the many 'ways in which custody of children can be exercised.'"[82] While this excerpt sounds nice, we will see below that the Court quoted it slightly out of context.[83] Overall, the Court found support in post-ratification foreign case law, post-ratification scholarly analysis, and the Convention's official commentary that signatories should recognize *ne exeat* provisions as rights of custody.

c. Purposes of the Convention support the conclusion that a *ne exeat* provision is "rights of custody"

The Court dealt with the Convention's purpose in the final section of the *Abbott* opinion. Over 70 countries have ratified the Convention essentially to provide protection for jurisdiction in cross-border custody disputes. That is, the Convention helps ensure that courts make "decisions regarding custody rights in the country of [the child's] habitual residence"[84] by preventing parents from forum shopping in custody disputes.

By providing an immediate return when a parent absconds with a child, the Convention provides a legal tool with which a court must determine whether to order the child's physical return to the country where the absconding parent took the child from. Upon returning, the courts in that country can then decide custody matters in the child's best interests. When agreeing to abide by the Convention's rules, the signatories agreed to "the Convention's premise

---

[81] *Abbott v. Abbott* at 16 (citing Explanatory Report at 446, 447 – 448) (emphasis in original).
[82] *Id*.
[83] *See infra* at n. 111.
[84] Convention Preamble.

that courts in contracting states will make this determination in a responsible manner,"[85] thus allowing "the courts of the home country to decide what is in the child's best interests."[86]

With that in mind, the Court reasoned:

> 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.[87]

By recognizing *ne exeat* provisions as rights of custody, the court sought to deter child abductions and respect[] the Convention's purpose to prevent harms resulting from abductions."[88] Thus, the Court made its decision with the Convention's purposes in mind—to deter child abductions in the best interests of children.

The best interests of children also came into the opinion when the Court identified authorities on abduction's harms on children. These authorities called child abduction a form of child abuse and noted its psychological repercussions.[89] Countries signed the Convention to avoid these harms. However, the signatories agreed only to provide returns for custodial parents, based on harms to children of separated from custodial parents noted in the research.

Furthermore, while this was a nice nod to social science research, the Court overlooked other studies on the topic. In one of the best-known studies on child development, divorce expert Judith Wallerstein pointed out that "[w]hen courts intervene in ways that disrupt the child's relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent." Immediate returns will separate children from custodial parents, as custodial

---

[85] *Abbott v. Abbott* at 16.
[86] *Id*.
[87] *Id* at 17.
[88] *Id* at 17.
[89] *Id* at 18.

parents have many reasons not to return with the child—e.g., fear of abusive acts by a former partner, criminal abduction proceedings in foreign courts, or economic obstacles. For those cases, the Court has decided to disrupt children's relationships with their custodial parents in favor of noncustodial parents' "*ne exeat* rights." Thus, while portraying its decision as in the best interests of children, the Court really made a decision that was in the best interests of noncustodial parents.

d. Conclusion

The Court reached its decision based on the Convention's text, the State Department's views, foreign court decisions, and the Convention's purpose. The Court left some wiggle room for future *ne exeat* violators in future cases in a final section, noting that courts need not order the return if one of the Convention's exceptions applies.[90] However, the Supreme Court reasoned its way to the conclusion that generally, *ne exeat* violators who enter the U.S. will not avoid their children's immediate returns. This decision was overbroad and went against the Convention's text and purpose, as the dissent pointed out.

[90] *Id* at 18.

IV. The Dissent

The Court's opinion did not garner support from the trio of Justices Stevens, Thomas, and Breyer. In dissent, Justice Stevens would have held that the "use of the Convention's return remedy under these circumstances is contrary to the Convention's text and purpose."[91] Stevens began where the majority ended—by examining the Convention's purpose. The dissent then analyzed the Convention's text to show that *ne exeat* provisions do not extend rights of custody. Further, Stevens rejected the State Department's and foreign courts' positions on the *ne exeat* issue.

a. Purposes of the Convention do not support the conclusion that a *ne exeat* provision is "rights of custody"

Justice Stevens began by examining the Convention's purpose. At heart, the drafters "sought an international solution to an emerging problem: transborder child abductions perpetrated by noncustodial parents 'to establish artificial jurisdictional links . . . with a view to obtaining custody of a child.'"[92] More specifically, the "primary concern was to remedy abuses by noncustodial parents who attempt to circumvent adverse custody decrees (*e.g.*, those granting sole custodial rights to the other parent) by seeking a more favorable judgment in a second nation's family court system."[93] The Convention's official report verifies that one of the elements "invariably present in all cases" is a parent who "hopes to obtain a right of custody from the authorities of the country to which the child has been taken."[94] Thus, the Convention's

---

[91] *Abbott* dissent at 2.
[92] *Id*.
[93] *Id* at 3.
[94] 1980 Conférence de la Haye de droit international privé, E. Perez-Vera, Explanatory Report ("*Perez-Vera* Report") at para. 13.

main purpose was to stop noncustodial parents from snatching their children to another country to secure custody in another venue.

With that in mind, the drafters consciously differentiated between parents with rights of custody and parents with rights of access. Rather than providing an immediate return for every situation in which a parent violated a standing court orders or a custody law, the:

> [immediate return] remedy should not follow, however, when a *custodial* parent takes a child from his or her country of habitual residence in breach of the other parent's visitation rights, or 'rights of access' in the Convention's parlance.[95]

Stevens recognized that "the distinction between rights of custody and rights of access, therefore, [was] critically important to the Convention's scheme and purpose."[96] Stevens contended that Timothy was a parent with only rights of access, whose only remedies under the Convention existed under Article 21, which encourages domestic actors to facilitate visitation.[97] Thus, the dissent asserted that the Abbott's case did not warrant an immediate return because the *ne exeat* provision was not a right of custody.

b. The Convention's text does not support the conclusion that a *ne exeat* provision is "rights of custody"

Stevens relied on the Convention's text to support the view that the *ne exeat* provision was a mere travel restriction and not a right of custody. Notwithstanding, Stevens disapproved Jacqueline's behavior from the outset—she violated Chilean law, an act "[i]ndisputably…

---

[95] *Id*.
[96] *Id*.
[97] *Id* at 4. The Convention at Art. 21 provides that signatories are "bound by the obligations … to promote the peaceful enjoyment of access and the fulfillment of any conditions to which the exercise of those rights may be subject.".

wrongful in the generic sense of the word."[98] However, he soberly distinguished this generically wrongful act from a "wrongful removal" as the Convention defined it. He feared that "the Court's preoccupation with deterring parental misconduct—even, potentially, at the sake of the best interests of the child—ha[d] caused it to minimize this important distinction."[99] Thus, Stevens looked to the Convention's definition of a wrongful removal and found the *ne exeat* provision not to be a right of custody because it did not relate to A.J.'s care and did not give Timothy the power to determine A.J.'s place of residence.

i. Rights relating to the care of the child

Stevens disputed that the *ne exeat* provision in Chilean law related to A.J.'s care. On its face, the travel restriction did not give Timothy "any ability to decide the language A. J. A. speaks or the cultural experiences he will have."[100] Despite A.J.'s presence in Chile, Jacqueline had the sole power to decide A.J.'s schooling, activities, religious experiences, and all other aspects of his upbringing. Directly opposing the Court's reasoning, the dissent narrowly defined the issue and saw no textual evidence relating the *ne exeat* provision to A.J.'s care.

The dissent bridled at the Court's broader reading of the child's care. Fundamentally, equating the travel restriction to "a right 'relating to the care' of that child devalue[d] the great wealth of decisions a custodial parent makes on a daily basis to attend to a child's needs and development."[101] Stevens hypothesized that, following the Court's reasoning, "Mr. Abbott's

---

[98] *Id*, n.2.
[99] *Id*.
[100] *Id* at 6.
[101] *Id*.

ability to decide whether A. J. A. spends the night with one of his friends during a Saturday visit [could] also [be] a 'right relating to the care of the child.'"[102]

In that vein, Stevens asserted that the Court's depiction of child care "[t]aken in the abstract—and to its most absurd" could lead to the conclusion that "*any* decision on behalf of a child could be construed as a right 'relating to' the care of a child."[103] This line of reasoning would "obliterate[] the careful distinction the drafters drew between the rights of custody and the rights of access."[104] Thus, Stevens did not see *ne exeat* provisions as sufficiently related to the care of the child to constitute rights of custody.

Nor did Stevens consider the *ne exeat* provision as providing a measure of joint custody in this case. After all, though the drafters were undoubtedly "aware of the concept of joint custody"[105] and "intended to account for joint custodial arrangements," this did not support the conclusion that "they intended for *this* travel restriction to be joint custody because it could be said, in some abstract sense, to relate to care of the child."[106] Instead, he lamented the Court's decision that effectively "convert[ed] every noncustodial parent with access rights—at least in Chile—into a custodial parent for purposes of the Convention."[107]

The dissent then threw the Webster's definition of care back at the Court. Stevens pointed out the result that any parent with

> no legal authority to exercise "charge," "supervision," or "management" over a child can become a joint custodian of a child merely because he can attempt to

---

[102] *Id*.
[103] *Id*.
[104] *Id* at 7.
[105] *Id*.
[106] *Id*.
[107] *Id*.

> veto one of the countless decisions the child's other parent has sole legal authority to make on the child's behalf.[108]

Therefore, to maintain the distinction between rights of custody and rights of access, and because Timothy had no power to care for A.J., Stevens classified the *ne exeat* provision as unrelated to the care of the person of the child.

ii. Right to determine the child's place of residence

Similarly, Stevens defined the right to determine the child's place of residence with a higher level of specificity than the Court did. Stevens astutely recognized the right to determine the child's absence as just one example of the several kinds of rights that constitute rights of custody under the Convention, rather than a sole indicator of rights of custody. He saw this right as just "one stick in the bundle that may be parsed as a singular "righ[t] of custody[.]" Stevens had a good point—precisely speaking, the Convention's text requires more than one right for a parent to be a holder of the plural *rights* of custody.

Further, determining the child's place of residence was not the end all be all of rights of custody. Rather, the right to determine residence was:

> a shorthand method to assess what types of rights a parent may have. The parent responsible for determining where and with whom a child resides, the drafters assumed, would likely *also* be the parent who has the responsibility to 'care' for the child.[109]

Thus, standing alone, Timothy's "right" to "determine" the child's place of residence did not convince the dissent that Timothy had rights of custody.

---

[108] *Id* (internal citations omitted).
[109] *Id* at 8 – 9 (emphasis in original).

Even assuming that one "stick" would do the trick, Stevens maintained that the *ne exeat* provision did not afford Timothy the right to determine A.J.'s residence. The dissent read the Convention as requiring a right that afforded "the power to set or fix the location of the child's home," not just "the more abstract power to keep a child within one nation's borders."[110] To support that standard, Stevens parsed out three crucial words defining rights of custody.

First, he classified the verb "determine" as "'to fix conclusively or authoritatively' or 'to settle a question or controversy.'"[111] The *ne exeat* provision however was a "limited veto power[,] assur[ing Timothy] relatively easy access to A. J. A. so that he may continue a meaningful relationship with his son."[112] This was not a right of custody, it protected Timothy's access.

Stevens could have further relied on foreign translations of the Convention. The Convention's official French version uses the verb "*décider de*" in place of "determine." The verb and preposition "*décider de*"—notably different from the French word *determiner*—means "to decide on" or "to fix."[113] Thus, the ordinary French meaning sharply points to a right to decide with specificity.

Other Convention Member States have unofficially translated the Convention. Many countries follow the French version (e.g., Spanish—*de decidir*; Polish—*decydowania*) while others follow the English version more closely (e.g., German—*bestimmen*; Dutch—*beslissen*; Russian—определять).[114] Taken together, the usual meaning of "determine" and "*décider de*"

---

[110] *Id* at 9.
[111] *Id* at 10.
[112] *Id* at 14 -15.
[113] *Oxford-Hatchette Pocket French Dictionary* (Oxford University Press, 2001).
[114] Hague Conference on Private International Law, *Publications: Translations*, http://www.hcch.net/index_en.php?act=conventions.publications& dtid=21&cid=24 (last visited January 18, 2011).

suggests an affirmative and authoritative right to fix the child's residence with specificity. For Stevens, the *ne exeat* provision did not determine A.J.'s place of residence with enough specificity.

Second, he defined the noun "place" as "a 'physical environment' or 'a building or locality used for a special purpose.'"[115] Stevens was uncomfortable with the Court's "substitution of the word 'country' for the word 'place,'" further citing a case from earlier in the term defining "principal 'place' of business for diversity jurisdiction purposes [as] a single location '*within* a State' and 'not the State itself.'"[116] Under those definitions, Timothy had no power to decide the specific physical place where A.J. would live.

Third, he defined "residence" as referring "to a particular location—and not, more generally, to a nation or country." Then-judge Sotomayor had previously reached the opposite conclusion, dissenting in *Croll v. Croll*.[117] Possibly responding to what she deemed a colloquial definition from the *Croll* court, Stevens defined residence with several sources. Black's defined residence as "'[t]he act or fact of living in a given place for some time'; '[t]he place where one actually lives'; or, '[a] house or other fixed abode; a dwelling.'"[118] Webster's defined residence as: "'the act or fact of abiding or dwelling in a place for some time'; 'the place where one actually lives or has his home'; or, 'a temporary or permanent dwelling place, abode, or habitation.'"[119] Thus, the Convention's text and purpose convinced Stevens that residence meant "house" and not "country."

---

[115] *Id* at 9.
[116] *Id* at 10.
[117] 229 F.3d 133 (2000).
[118] *Abbott* at 10.
[119] *Id* (internal citations omitted).

Here, Stevens could have looked internationally for more support on his definition of residence. Other countries' translations similarly include the notion of a domicile or physical dwelling (e.g., Spanish—*lugar de residencia*; Polish—*o miejscu pobytu*; German—*Aufenthalt*; Dutch—*verblijfplaats*; Russian—место жительства). Taken in context of the "rights relating to the care of the person of the child," determining a residence means providing a suitable shelter and community—in short, a home.[120] Though the *ne exeat* order potentially limited Jacqueline's choice of country of residence, it did not limit her choices on A.J.'s home.

Stevens applied the Convention's words in context to support that conclusion. He observed that "[w]hen the drafters wanted to refer to country, they did."[121] Recognizing that the Court "presume[s] that the use of different words is purposeful and evinces an intention to convey a different meaning,"[122] Stevens saw a unique and specific meaning in the words "place of residence." Thus, the Convention's text did not call for equating "place of residence" with "country of residence."

Stevens' reading of the Convention's text excluded the *ne exeat* provision as "rights of custody." He chided the Court for relying "on the text of the Chilean law at issue and a single Chilean administrator's alleged interpretation thereof."[123] Though the Convention's terms enjoy interpretation that "'allo[ws] the greatest possible number of cases to be brought into

---

[120] *Croll v. Croll*, 229 F.3d 133, 139 (2d. Cir. 2000) ("It is unhelpful and insufficient to think about the custodial right to designate a child's 'place of residence' in terms of the power to pick her home country or territory.").
[121] *Id*.
[122] *Id* at 11 (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).
[123] *Id* at 16.

consideration[,]'"[124] he concluded that "such breadth should not circumvent the Convention's text in order to sweep a travel restriction under the umbrella of rights of custody."[125]

Stevens could have further discredited the Court's use of that language with the Perez-Vera report. Where the Perez-Vera report speaks of the "greatest number of cases [being] brought into consideration," the Report is not advising courts about how to interpret and apply the words in the Convention. This part of the Report explains that rights of custody can "arise by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect."[126] Thus, the Report merely addressed the "sources from which the custody rights which [the Convention] sought to protect derive"—laws, court decisions, and agreements—without providing guidance on how to interpret the substantive reach of these sources.[127] In *Abbott*, the parties did not dispute whether the *ne exeat* provision arose from a suitable source; they disputed whether the *ne exeat* provision's limited powers constituted rights of custody. This careful reading of the Perez-Vera Report confirms Steven's assertion that the Court went too far in broadly interpreting rights of custody.

After carefully considering the Convention's text, Steven's concluded that the *ne exeat* provision at issue neither extended Timothy the right to determine A.J.'s place of residence nor related to A.J.'s care and was thus not "rights of custody" under the Convention's text.

iii. The U.S. State Department's views

The dissent would have upheld the lower courts' decisions solely on the Convention's text, but Stevens nonetheless seized the opportunity to criticize the Court's reliance on the State

---

[124] *Perez-Vera* at 446.
[125] *Id.*
[126] Convention at Art. 3.
[127] *Perez-Vera* at 446.

Department's amicus brief. Principally, Stevens contended that the State Department's views were "newly memorialized" and did not fully harmonize with the State Department's position during the ratification process.[128] Rather, the Department's brief was "possibly inconsistent with the Department's earlier position" that the Convention's fundamental purpose was "to protect children from wrongful international removals or retentions by persons bent on obtaining their physical and/or legal custody."[129] This position was inconsistent with the State Department's position against Jacqueline, who already had physical and legal custody over A.J. These inconsistencies diminished the Executive's influence in the case.

Furthermore, from a jurisprudential perspective, Stevens felt that the Court shirked its duty to interpret the Convention by deferring to the Executive. The case at bar did not require such deference to "avoid international conflict"[130] or because the State Department had a particularly insightful "understanding of the treaty's drafting history."[131] Further, the State Department offered no practical insight regarding the Convention's functioning.[132] For these reasons, the dissent would have disregarded the State Department's views on the *ne exeat* issue.

b. Foreign Court Decisions

The dissent similarly put little weight on foreign court decisions that held *ne exeat* provisions as custody rights. Stevens warned against "substituting the judgment of other courts for our own."[133] Stevens asserted that

---

[128] *Id* at 19, see also *supra* at n. 64 citing 51 Fed. Reg. 10503, 10504.
[129] *Id* (citing Child Abduction, 51 Fed. Reg. 10503, 10504).
[130] *Id* at 20.
[131] *Id*.
[132] *Id* at 22.
[133] *Id* at 22 (citing *Olympic Airways* v. *Husain*, 540 U. S. 644, 655, n. 9 (2004)).

> the handful of foreign decisions the Court cite[d] provid[ed] insufficient reason to depart from [his] understanding of the meaning of the Convention, an understanding shared by many U. S. Courts of Appeals.[134]

Practically speaking, Stevens posited that U.S. courts' proper interpretations of the Convention "may outweigh the interest in having the *ne exeat* clause issue resolved in the same way that it is resolved in other countries."[135] Thus, the dissent valued reliable treaty interpretation over international conformity.

Moreover, Stevens did not find a compelling level of international agreement among foreign courts. Considering the Canadian and French cases on the matter, Stevens noted that "the various decisions of the international courts [were], at best, in equipoise."[136]

More specifically, factual differences allowed Stevens to further distinguish the Abbotts' situation from the situations leading up to the Court's cited foreign cases. Stevens reviewed five cases that the Court cited, concluding that those cases did "not offer nearly as much support as first meets the eye."[137]

First, Stevens noted that the British case *C. v. C*—the primary case that the Court cited—did not present the English High Court of Justice with the same issue in *Abbott*. Notably, for the parents in *C. v. C.*, "the family court had [] decreed, at the time it awarded 'custody' to the mother, that both parents would remain 'joint guardians' of the child."[138] In addition,

> in the time between the mother's removal of the child and the father's petitioning for his return, the father had returned to the Family Court in Sydney, obtained an order for the child's return, and received immediate custody of the child.[139]

---

[134] *Id*.
[135] *Id* at 22.
[136] *Id* at 23.
[137] *Id*.
[138] *Id* at 23.
[139] *Id*.

In the *Abbott* case however, Jacqueline was the only parent with custody or guardianship, a "'substantial factual distinction[] between' the cases."[140] This factual distinction prompted Stevens' to hesitate from following the English High Court of Justice's decision in *C. v. C.*

Stevens found factual distinctions in four other cases. In the German case 2BvR 1126/97, the Federal Constitutional Court of Germany decided the issue in a case when the noncustodial parent "had joint authority to decide major life decisions for the child."[141] In the Supreme Court of Ireland's decision in *M.S.H. v. L.H.*, the parents "shared 'rights of parental responsibility,' including '"all the rights, duties, powers, responsibilities and authority which, by law, a parent of a child has in relation to a child and his property."'[142] The Supreme Court of South Africa ruled on a case where, similarly, the parents had both been "granted 'joint guardianship' of the minor."[143] Finally, in *Foxman v. Foxman*, the Israeli Supreme Court ordered a return when the parents had broadly agreed in their custody arrangement that "'each parent needs the consent of the other to every significant change in the children's residency.'"[144] These cases did not persuade the dissent enough to follow the five courts of final appeal who had decided on different facts.

The Supreme Court of Canada's attention to the *ne exeat* issue in court opinions did persuade the dissent. Beginning with the *Thomson v. Thomson*[145] case, the Canadian Supreme Court suggested that it would not order a return in cases where a final court order granted full

---

[140] *Id* (citing *Olympic Airways v. Husain*, 540 U.S. 644, 655 n. 9 (2004)).
[141] *Id* at 24, n. 15.
[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] *Thomson v. Thomson*, [1994] 3 S.C.R. 551.

custody to a parent who had violated a *ne exeat* provision.[146] The Canadian Supreme Court affirmed its reasoning in *D.S. v. V.W.*[147], recognizing that ordering a return for a *ne exeat* provision would "'indirectly afford the same protection to access rights as is afforded to custody rights[,]'" which would defy the Convention drafter's intent.[148] Thus, the dissent firmly concluded that foreign case law on the *ne exeat* issue did not call for the Court's conclusion that a *ne exeat* provision extends rights of custody.

c. Conclusion

In sum, the dissent sharply disagreed with the Court's opinion. The three opposing Justices considered that by calling a *ne exeat* provision a right of custody, the Court defied the purposes of the Convention. Based on the Convention's text, the dissent did not classify the *ne exeat* provision as related to A.J.'s or as the right to determine his place of residence. The dissent put little weight on the State Department and foreign courts' interpretations of the issue. For those reasons, the dissent would have upheld the lower Courts' decisions in *Abbott*.

---

[146] *Abbott* at 24.
[147] [1996] 2 S.C.R. 108.
[148] *Abbott* at 25.

V. Variations on the *Abbott* Facts

While the Court's decision has answered the specific *ne exeat* issue with an apparently bright line rule, the broad interpretation that the Court gave to rights of custody provides anything but a bright line rule, which will not serve the best interests of children in future Convention cases. This Section points out four factual scenarios—passport consent requirements, housing restrictions, behavioral restrictions, and paternity applications—that show the potential interpretative results of the Court's broad holdings. Ultimately, this section comments how the Court's opinion in *Abbott* does not serve the best interests of children.

a. Four factual situations that will extend *Abbott*'s reasoning beyond *ne exeat* provisions

i. Passport consent requirements as "rights of custody"

Laws requiring both parents' consent for a child to obtain a passport will now grant rights of custody to noncustodial parents. In many countries, both parents must consent for their child to obtain a passport.[149] In some situations however, one parent will obtain a passport for their child without getting the other parent's consent.[150]

This may occur for many reasons, for example: bureaucratic slip-ups, lies, or forgery. In these cases, one parent can obtain a passport for a child, despite laws requiring both parents' consent. With that passport, the child can then leave the country with one parent.

---

[149] See, e.g., *J.A. v. I.A.*, 2005 WL 3560810 (Del. Fam. Ct., April 28, 2005) (describing the U.S. Department of State's Children's Passport Issuance Alert Program).

[150] Some family courts will order that one parent hold the child's passport, see, e.g., *Klien v. Klien*, 533 N.Y.S.2d 211 (N.Y. Sup. 1988), or the court will hold the child's passport, see, e.g., *In re Marriage of Petersen*, 2010 WL 456887 (Cal. App. 5 Dist., February 10, 2010), or order a parent to hand over the parent's passport when the child is with the parent, see, e.g., *Kelly v. Faizi*, 2009 WL 3116160 (Ariz. App. Div. 1, September 29, 2009). Any of these requirements may also effectively produce a de facto *ne exeat* order.

Now assume that a parent with full custody obtains a passport for her child without the other noncustodial parent's consent in a country that requires both parents' consent. Then, that parent uses the passport to relocate with the child to the U.S., leaving behind a parent with visitation rights.

Could the custodial parent's act trigger an immediate return? Otherwise stated, would the left-behind parent's required consent constitute "rights of custody," as defined by the Supreme Court for Convention purposes?

Applying the Court's decision in *Abbott*, the consent requirement would probably trigger an immediate return. Though the consent requirement "does not fit within traditional notions of physical custody," this may be "beside the point."[151] After all, requiring both parents' consent effectively limits the custodial parents' ability to change the child's country of residence. By giving the non-custodial parent the power "'[t]o set bounds or limits to'" where the other parent can take the child, the passport consent requirement—like "Mr. Abbott's *ne exeat* right"—ensures that a child "cannot live at any street addresses outside of"[152] the child's present country of residence. In short, the Court's opinion supports the conclusion that the passport consent requirement is the right to determine the child's residence.

In addition, the passport consent requirement relates to the care of the person of the child. As much as a *ne exeat* provision, a non-custodial parent who refuses consent will decide "the language the child speaks, the identity he finds, or the culture and traditions [he] will come to absorb"[153] by limiting the custodial parent's ability to expose the child to cultural experiences. As a result, the passport relates to the care of the child and determines the child's place of

---

[151] *Abbott* at 8.
[152] *Id* at 7.
[153] *Id* at 8.

residence. Thus, according to the Court's reasoning in *Abbott*, custodial parents who take children out of country without proper consent for the child's passport violate noncustodial parents' rights of custody.

This result follows the Court's broad framing of the Convention's purpose. Presumably, the passport consent requirement protects children from crossing international borders at one parent's whim. For these reasons, courts will return children from the U.S. if a noncustodial parent withholds consent for a child's passport and a custodial parent leaves the country with the child.

ii. Restricted relocations as "rights of custody"

A noncustodial parent can hold other powers to limit a child's place of residence. In some situations, courts will restrict a custodial parent from relocating homes without court approval.[154] Similarly, courts will limit the child's residence to a set geographical area unless a custodial parent petitions to modify a custody arrangement.[155] These requirements may arise from law, court order, or agreements between the parents.[156] In cross-border cases, the issue will arise as to whether these restrictions constitute "rights of custody."

Imagine that a custodial parent and child move to the U.S. without court approval, violating a Chilean court order limiting their movement within 50 miles of Santiago. While this would violate the foreign court order, would it breach rights of custody? Under the *Abbott*

---

[154] See, e.g., *Haden v. Riou*, 90 S.W.3d 538, 542 (Mo. App. W.D. 2002); *Schisel v. Schisel*, 2010 WL 1966203 (Minn. App., May 18, 2010).
[155] See, e.g., *Pointer v. Bell*, 719 So.2d 222, 223 (Ala. Civ. App. 1998) (limiting child's residence to within 165 miles of Fort Payne, AL).
[156] *Haden v. Riou*, 90 S.W.3d 538, 542 (citing § 452.377.9, RSMo 2000).

reasoning, this action would likely trigger an immediate return by breaching the court or the noncustodial parent's "rights of custody."

The court order or custody agreement gives the court the "right" to determine the child's place of residence more specifically than the *ne exeat* provision in *Abbott*. Here, the court could truly determine the child's specific place of residence by refusing the custodial parent's request to move to a different house, let alone a different country. According to the Convention, the court is an "institution"[157] with rights of custody, which the custodial parent breached by moving.

The move has likewise breached the non-custodial parent's exercisable "rights of custody." Here, the noncustodial parent would have exercised the right to determine the child's residence by presenting evidence in court opposing the move if only the child had remained in Chile. Thus, like the *ne exeat* provision, an in-country restriction "is an instance where the right would have been 'exercised but for the removal or retention.'"[158]

These restrictions on relocating are closely analogous to a *ne exeat* provision. More specifically than a *ne exeat* provision, restricting the custodial parent from changing the child's in-country residence determines the child's residence and relates to the child's care. Here, the 50-mile radius determines a far more specific residential limit than the national *ne exeat* provision. As for care, compared to a *ne exeat* provision that determines "the language the child speaks," which is "linked in an inextricable way to the child's country of residence,"[159] the 50-mile radius restriction could determine the child's accent.

---

[157] See Hague Convention, Art. 3(a).
[158] *Abbott* at 9.
[159] *Abbott* at 8.

Further, like the *ne exeat* provision, a restriction on relocating "is not even arguably a 'right to take a child for a limited period of time' or a 'visitation righ[t].'"[160] According to the Supreme Court's understanding of the drafters' intent, this expanded definition would still respect the difference between rights of custody and access. Because these restrictions relate to the care of the child and determine the place of residence, U.S. courts will likely find that any restriction on a custodial parent's ability to relocate breaches rights of custody. As a result, more cases will call for immediate returns when noncustodial parents petition U.S. courts.

iii. Parental behavior restrictions as "rights of custody"

Stretching *Abbott*'s broad language to its limits, other restrictions could trigger immediate returns in cross-border cases. Some courts order parents to abide by behavioral restrictions when awarding custody. Some courts forbid parents with custody from cohabitating with another adult who is not a new spouse or family member.[161] Courts also prohibit the use of alcohol or tobacco in the home.[162] Parents may also have to undergo counseling and drug screens.[163] Consider three examples of cross-border violations of such restrictions that may trigger immediate returns.

First, think about a custody order restricting a custodial mother from keeping the child in a home with an unrelated cohabitant. This mother legally moves from one country to the U.S., with no worries of a court sending her child back to the previous habitual residence. Two weeks

---

[160] *Abbott* at 10.
[161] See, e.g., *Harper v. Harper*, 777 So.2d 1275, 1277 (La. App. 5 Cir., 2005) (recognizing court order that prohibited both parents "'from exercising overnight custody and/or visitation with the minor children born of their marriage while under the same roof, or in the same home with a person of the opposite sex to whom the parent in question is not related either by marriage or by blood.'"); *Smith v. Smith*, 887 So.2d 257, 265 (Ala. Civ. App. 2003).
[162] See *Smith v. Smith*, 887 So.2d 257, 265; *Lamirande v. Lamirande*, 251 A.D.2d 1071 (N.Y.A.D. 4 Dept., 1998) (tobacco and alcohol).
[163] See, e.g., *Beene v. Beene*, 997 So.2d 169, 171 (La. App. 2 Cir., 2008).

later, she shares her home with a partner—or even a renter, family friend, or in-law—while living in the U.S. Could this trigger a return?

The cohabitant restriction relates to the care of the person of the child by protecting the noncustodial parent's interest in determining the kind of household where the child lives. If the father holds the right to object in court when the mother cohabitates, he has an affirmative power to determine the child's environment. The common sense conclusion is that the people with whom a child resides will almost certainly affect the child's care and upbringing.

This cohabitant restriction may also determine the child's residence. Unlike a *ne exeat* provision, this restriction does not determine the child's country of residence. However, it does pose a limit on the place where the child can live by excluding any residence in which a non-family member lives. The father could go to court over the mother's cohabitation and stop the child from living in a specific home. Thus, the cohabitant restriction could constitute rights of custody, which could trigger an immediate return if the mother cohabitates in the U.S.

Second, consider a court that restricts a mother from smoking cigarettes in the home. She moves to the U.S. and picks up a smoking habit. This behavior could violate the non-custodial father's rights of custody.

Again, this type of restriction affects the care of the child. Children of parents who smoke are more likely to smoke than children whose parents do not smoke.[164] Considering the dangers of smoking, this restriction relates with the child's health.

A smoking restriction also determines the child's place of residence by determining that the child will live in a non-smoking home. If the noncustodial parent knows the custodial parent

---

[164] Seattle Social Development Project at http://www.innovations-report.com/html/reports/statistics/report-49882.html

is smoking, then the noncustodial parent can exercise the affirmative right to bring an action in court. Had the custodial parent remained in country, the noncustodial parent would have exercised that right. Because the smoking restriction "is by its nature inchoate and so has no operative force except when the other parent" violates it, the non-custodial parent would have exercised this right.[165] Thus, a smoking—or alcohol or drug use—restriction determines the child's place of residence. As a result, the *Abbott* reasoning may lead U.S. courts to return children to their previous habitual residence if a custodial parent violates a foreign custody arrangement's smoking restriction after relocating to the U.S.

Third, consider a mother whose full custody is conditioned on attending monthly counseling, which she neglects after moving to the U.S. This requirement may create "rights of custody" for a non-custodial parent.

The non-custodial parent holds the "right" to have the mother in counseling, which he can exercise by notifying a court if the mother neglects her duty. While this requirement does not determine the child's residence, it relates to the child's care. Presumably, courts order counseling—for parents or children—to address mental health issues in the best interests of the child. A court that broadly interprets rights of custody—as the Supreme Court did "to recognize '*all* the ways in which custody of children can be exercised' through 'a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration[]'"[166]—could define court-ordered counseling as a right of custody. Thus, if the custodial parent relocates to the U.S. and shirks this legal responsibility, a non-custodial parent may secure an immediate return in a U.S. court. Considering these three examples, many

---

[165] *Abbott* at 9 (citing Hague Convention, Art. 3).
[166] *Abbott* at 16.

restrictions in custody arrangements could affect immediate returns when a parent comes to the U.S. and violates a foreign custody order.

iv. Paternity applications as "rights of custody"

The Court's expressed support for inchoate rights risks further broadening of the Convention's rights of custody. A recent Supreme Court of Ireland case shows how courts struggle to define inchoate rights as rights of custody. In *J. McB. V. L.E.*,[167] the Supreme Court of Ireland referred a question to the Court of Justice of the European Union ("Court of Justice")[168] involving the Convention and the relevant European Union family law.[169]

In that case, a mother removed a child from Ireland to England.[170] The child's unmarried father sought an English court order returning the child to Ireland.[171] The English court asked for an Irish court opinion on whether the father had rights of custody at the time of removal.[172]

Irish law did not automatically provide unmarried fathers with rights of custody. It did however give an unmarried father the right to apply to an Irish court to "appoint him to be a guardian[.]"[173] At the time of the child's removal, the father had been involved in the child's daily care, but had not applied for guardianship.[174]

---

[167] [2010] IESC 48 (Irish Supreme Court, 2010).
[168] National courts of last resort in European Union Member States must refer questions involving European Union law to the Court of Justice under Article 267 of the Treaty of the Functioning of the European Union.
[169] *Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters of parental responsibility*, [2003] O.J. L 338/1 ("BII*bis*").
[170] *J. McB* at para. 17.
[171] *Id* at para. 19.
[172] *Id*. BII*bis* at Art. 15 allows courts in one Member State to obtain determinations as to whether a removal was wrongful from the courts in the previous Member State of habitual residence.
[173] *Id* at para. 30 (citing Guardianship of Infants Act of 1964, § 6A).
[174] *Id* at para. 17.

Based on these facts, the Irish court had to determine whether this right to apply for paternity extended rights of custody. Courts in Ireland have:

> declined to recognize as amounting to rights of custody under the Hague Convention, the 'inchoate rights' of those who are carrying out duties and enjoying privileges of a custodial or parental character though not yet formally recognized or granted by law.[175]

However, the father asserted that not finding rights of custody would violate his fundamental right to the protection of family life in the Charter of Fundamental Rights of the European Union, posing a question which the Irish Court referred to the Court of Justice.[176] In effect, the Court of Justice will likely decide whether the inchoate right to apply was rights of custody.

Unlike the Irish views on inchoate rights, other courts have willingly expanded rights of custody to inchoate rights. In particular, the U.S. Supreme Court in *Abbott* recognized that a right which "is by its nature inchoate"[177] was rights of custody. Likewise, the European Court of Human Rights has found a *ne exeat* provision to provide rights of custody.[178] Accordingly, the Court of Justice may potentially further expand rights of custody.

Regardless of its legal outcome, this case demonstrates the practical effects of expanding rights of custody. In *J. McB.*, the mother removed the child on July 25, 2009. After more than a year of legal wrangling, this family faces uncertainty while still waiting for the Court of Justice's opinion. In contrast to the Convention's purpose to provide prompt returns, this lengthy separation will undoubtedly affect the parent-child relationship.

---

[175] *J. McB.* At para. 34.
[176] *J. McB.* At para 21.
[177] *Abbott* at 9.
[178] *Case of Neulinger and Shuruk v. Switzerland*, Application no. 41615/07, (July 6, 2010, European Court of Human Rights, Grand Chamber) (misrepresenting the U.S. position on *ne exeat* orders)at para. 105.

Moreover, this delay may affect the father's ability to get a return. The European Court of Human Rights considered that a return, "[i]f it is enforced a certain time after the child's abduction, that may undermine" the best interests of the child.[179] Thus, even if the English court orders the return, the mother may further stall enforcement by petitioning the European Court of Human Rights. When the expanded notion of rights of custody allows parents to draw out legal proceedings, this alters the Convention's ability to protect the best interests of children.

b. The expanded scope of rights of custody does not serve the best interests of children

Because of the future applications of *Abbott*'s reasoning, an expanded definition of rights of custody does not serve the best interests of children. By increasing noncustodial parents' ability to get returns, this decision will limit children's ability to travel and connect with their cultural roots. This decision will burden single parents.

At the outset of this critique, the reader must understand the jurisprudential underpinnings that make this decision risky in U.S. courts. The Convention was the product of negotiations between many nations, most with civil law traditions. Thus, the broad concepts in the Convention reflect the drafting and jurisprudential principles in civil law systems.

Drafters from civil law countries are more apt to draft treaties in broad terms, in contrast with common law legislators' precise style. Contrary to the common law lawyer's perception of civil codes involving detailed laws, "codes in civil law countries contain open-textured provisions, general rules and principles, and they are seldom too detailed even in specific provisions."[180] This "allows applications to situations the drafters could not have even imagined" during

---

[179] *Id* at paras 145 – 148, 151.
[180] O. Moréteau, "The Future of Civil Codes in France and Louisiana," J. of Civil Law Studies at 43.

drafting.[181] Thus, civil law judges have leeway in defining whether, for example, rights of custody exist in any given case.

Jurisprudential differences also exist. Common law lawyers must remember that, strictly speaking, precedence does not exist in civil law systems. For example, Article 5 of the Civil Code forbids French civil judges from basing their decisions outside of any provisions in the Civil Code.[182] While a civil law judge may find rights of custody in a *ne exeat* provision, that judge has no worry that a decision on rights of custody will ever be cited by another French judge and little worry that the decisions will extend to substantially different fact patterns. Further, a higher court's decision on rights of custody will issue a narrow holding.[183]

In U.S. common law, the Supreme Court's holdings are binding on the lower courts and immensely persuasive in analogous situations. In *Abbott*, the Court used dangerously broad reasoning to support what could have been a narrow, one-line decision from a civil law court: the Chilean *ne exeat* provision extended rights of custody to Timothy Abbott. Instead, the Court used broad reasoning that other courts may in turn apply to extend rights of custody. This increases noncustodial parents' margin for argument, which is unfortunate for two reasons.

First, giving noncustodial parents power to restrict travel will limit children's cultural exposure. By making travel more difficult, the elevated status of *ne exeat* provisions reduces children's chances to visit foreign countries. Despite a custodial parent's wishes to expose a child to foreign culture, *Abbott*'s holding allows any non-custodial parent in countries with *ne exeat* laws like Chile's to deny a child's international travel opportunities.

---

[181] *Id* at 44.
[182] French Civil Code, Art. 5.
[183] See, e.g., the brief opinion and narrow holding cited by the Court in *Public Ministry v. M.B.*, [CA] Aix-en-Provence, 6e Ch., Mar. 23, 1989.

In the *Abbott* case, this meant that Timothy could deny A.J. from seeing his grandparents in Texas to absorb his cultural heritage. In turn, Jacqueline could stop Timothy from taking A.J. to explore his English roots. This parental standoff would limit A.J.'s cultural experiences within Chile's borders. For A.J., this would likely have caused "identity formation issues," "loss of community," and this isolation would have "impair[ed] the child's ability to mature."[184] Now, all noncustodial parents in Timothy's situation can manipulate their power to keep kids in country.

If parents have more opportunity to leverage their authority by threatening to block international travel, children have less opportunities to see the world. In today's global age, children should have many opportunities to develop cultural identity and understanding. The Court should have considered the obstacles to children's travel when broadly giving non-custodial parents the right to block the children's travel by ensuring a return under the Convention. True, a single parent may petition a court to lift a travel restriction, but the burden of litigation will likely deter travel for many parents.

Second, this decision burdens single custodial parents. Though the custodial parent is responsible for ensuring the child's care, now at the noncustodial parent's whim, the custodial parent may have to apply to a court to include international travel as part of the child's care. In practice, this burden will fall on many single mothers like Jacqueline. If the mother lives in a country where she faces limited income and free time, she will have to bear the costs of filing for a court order and the subsequent burdens of dealing with the father's challenges in court. Surely, many single mothers will simply not be able to fit court proceedings into their budget and

---

[184] *Abbott* at 18.

schedule, denying the child from visiting grandparents, family, and culture in a different country. This leaves them an unfortunate option: violate *ne exeat* provisions and make the father litigate.

The Court noted that some exceptions exist in the Convention that would allow a parent to avoid a child's return even if the removal breached rights of custody.[185] However, the Court failed to note the Convention's case law and scholarly commentary that indicate the immense difficulties in establishing an exception for a return order.[186] In practice, courts will not apply these exceptions even to protect mothers who recognize threats to their children's well-being and flee in the face of a *ne exeat* provision. While families under *ne exeat* provisions now face these burdens on custodial parents and negative impacts on children, future courts should extend rights of custody no further.

---

[185] *Abbott* at 19.

[186] C. Bruch, "The Unmet Needs of Domestic Violence Victims and their Children in Hague Abduction Convention Cases," *Fam. L. Q.* (Fall 2004) (noting how the Convention, as applied, "imposes unnecessary hardships on domestic violence victims and their children"); N. Lowe, "The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint," 33 *N.Y.U. J. Int'l L. & Pol.* 179, 202 – 203 (2000) (describing the difficulties in establishing "any of the exceptions provided for by Articles 12 and 13"); L. Silberman, "Patching Up the Abduction Convention: A Call for New International Protocol and a Suggestion for Amendments to ICARA," 38 *Tex. Int'l L.J.* 41, 52 – 5 (citing difficulties and questionable practices surrounding exceptions to returns); M. Weiner, "Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction," 33 *Colum Hum. Rts. L. Rev. 275,* 344 – 352 (2002).

VI. Conclusion

For now, the Court has firmly decided the *ne exeat* issue: *ne exeat* provisions constitute rights of custody in the Convention. The Convention's text, the State Department's views, foreign court decisions, and the Convention's purpose supported the Court's conclusion. A parent who violates a *ne exeat* provision and comes to the U.S. will likely see her child returned to his previous habitual residence. Thus, *Abbott* provides certainty in *ne exeat* cases.

For many other cases however, uncertainty remains. Courts will struggle with the confusing concept that non-custodial parents may have rights of custody. Litigants will try to extend *Abbott*'s broad reasoning to situations that the Court failed to foresee. Thus, courts can expect legal jockeying in this emerging area of private international law, where local counsel and judges may not fully appreciate nuances. The only viable solution for now is for courts to show restraint when prompted to extend *Abbott*'s reasoning to other factual scenarios.

Such extension will not serve the best interests of children. This will only afford noncustodial parents undue power to limit children's exposure to foreign travel and cultures. Removing control from custodial parents will hinder children's learning about identity and foreign cultures. This will burden single parents and go against the best interests of children. Therefore, courts around the world should protect children and families by narrowly applying *ne exeat* provisions as rights of custody, despite the Court's broad reasoning in *Abbott*.