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Abbott v. Abbott: A New Take on Treaty Interpretation by the Supreme Court

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Introduction

The Supreme Court's recent decision in *Abbott v. Abbott*[1] resolved an important issue about the scope of the Hague Convention on Civil Aspects of International Child Abduction (Child Abduction Convention).[2] A six-vote majority ruled in favor of an expansive reading of the Convention that increases the power of an objecting parent in cases where a child is brought to the United States against that parent's wishes. Even more significantly, the majority indicated a disposition toward interpreting multilateral private law treaties in a manner that emphasizes the systemic interests of treaty partners, as expressed through foreign court decisions, scholarly work organized by international bodies, and the views of the U.S. Department of State.

Abbott Overview

The Child Abduction Convention provides relief to a parent whose child has been moved across an international border in violation of that parent's rights in the country from which the child was removed. The extent of the relief depends on the nature of the parent's rights. If the transborder abduction violated the parent's "rights of custody," the parent may ask a court to compel return of the child to the jurisdiction from which he or she was taken. If instead the parent had only a right of access to the child, then the parent can ask a court to take steps to enable the "effective exercise" of access rights, but not the return of the child to the place of abduction.

Child abduction cases typically involve a family breakup in which the local courts in the place where the marriage falls apart allocate parental rights in a way that one of the parents finds unsatisfactory. The disgruntled parent then moves the child to another jurisdiction, usually but not inevitably that parent's home, to get a second, presumably friendlier judicial determination of parental rights. The Child Abduction Convention limits the power of one parent to pursue a second bite at the judicial apple. How much it limits that power, however, depends on how broadly the category of "rights of custody" is defined.

The United States implemented the Child Abduction Convention in 1988 through an act of Congress, the International Child Abduction Remedies Act.[3] The Act permits a person seeking to enforce rights under the Convention to sue in either federal or state court, and it directs that court to "decide the case in accordance with the Convention."[4] This legislation eliminates the issue that has bedeviled the Court for years, namely determining whether a treaty is "self-executing" and thereby of its own force supplies a rule of decision for cases.[5]

a. The Decision

In *Abbott*, six justices determined that a parent's right to veto a change in a child's country of residence amounts to a "right of custody" protected by the Child Abduction Convention. Justice Kennedy's opinion for the majority based this decision on a close reading of the Convention, but also emphasized the support of the State Department, the preponderance of foreign judicial decisions reaching the same result, the work of scholars

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organized by the Hague Conference on Private International Law in favor of a broad reading of the Convention, and the overall object and purpose of the Convention. Justice Stevens' dissent, in which Justices Thomas and Breyer joined, argued that a more precise and careful reading of the Convention limited custodial rights to those involving the day-to-day life of the child. The dissent disparaged the other sources on which the majority relied.

The father in *Abbott* possessed a right under Chilean law to bar his wife from taking their child to another country. This power is called a *ne exeat* right. Otherwise the father enjoyed only visitation, or access rights in Chile. The mother took the child to Texas without seeking his permission, filed for divorce there, and sought to reduce her husband's rights regarding their son. The father sued in federal court to have the child returned to Chile (but not to obtain custody himself).

No U.S. case considering this question had reached the courts of appeals until 2000, but a British court had addressed the issue as early as 1989. Subsequently, courts in Australia, Austria, France, Ireland, Israel, New Zealand, South Africa, and Switzerland all had endorsed the proposition that the Convention regarded *ne exeat* rights as custodial rights. Some of those decisions were distinguishable because the objecting parent had additional rights beside the power to veto departure to another country, and some Canadian and French judicial decisions were muddy on this point. Yet, among foreign courts, reasonably strong agreement seemed to exist that the Convention did more than protect the parent with primary custody. Moreover, the Permanent Bureau of the Hague Conference on Private International Law, the international body that organized the negotiation of the Convention, had sponsored several conferences of government-selected experts, styled Special Commissions, that argued in favor of treating a *ne exeat* right as a type of custody right. A brief submitted by the State Department and the Solicitor General also supported this interpretation.

For the majority, the evidence of an emerging international consensus in favor of extending the scope of the Convention was persuasive. Justice Kennedy conceded that at the time of the Convention's negotiation, many states did not have much experience with shared custody and thus assumed that, in cases of divorce, only one parent would have custody and thus enjoy strong rights under the Convention. But, as societies developed increasingly sophisticated means of allowing both parents to share in decision-making regarding their children, it made sense to recognize that each enjoyed the Convention's protection. The logical conclusion was that if a parent had any significant power over the child's location, including a veto right with regard to changing countries, that parent enjoyed a "right of custody."

One reason why the lower courts divided on this issue, and why three Justices dissented from the majority opinion, is that the text of the Convention is not completely clear. It states that "rights of custody" include "the right to determine the child's place of residence." Does the "right to determine" mean only the power to pick a particular place, or does it extend to a power to veto? Does "place of residence" refer to a particular location, or can it take on the looser meaning of the country of residence, even if a parent cannot choose where in that country a child resides? The majority maintained that the power to limit is an element of the power to determine, and that a country is a "place." Justice Stevens argued for a narrower construction that would limit the "right to determine" to the power to select the child's exact residence.

Stevens' dissent also relied on a structural argument. The drafters of the Convention drew a distinction between rights of custody, which enjoy strong protection, and rights of access, which do not. Yet many jurisdictions, apparently including Chile, automatically back up a visitation right with a *ne exeat* right. The majority's decision in effect limits the "access" component of the Convention to the rare instances where a local court reserves to itself alone a veto over moving the child out of the country.

b. Broader Implications

One way of viewing the difference between the *Abbott* majority and the dissent is to consider the relative merits of international cooperation and of national sovereignty. The majority observed that the Convention was intended to suppress forum-shopping by a disgruntled parent. Giving a broad meaning to the concept of custody means increasing the number of instances in which the Convention would give an effective remedy to a

parent whose rights in the country of origin, however categorized, had been violated. Correspondingly, giving a narrow reading to the "custody" concept in the Convention would mean that national courts would have a freer rein to decide for themselves what arrangements meet the best interest of a child, without having to defer to any earlier rulings of a foreign court. Kennedy's majority opinion emphasized the value of international cooperation; Stevens's dissent would have buttressed national sovereignty. An additional consideration, however, is that a narrow reading of "custody" also might encourage other states to shift to this position. If other states made it harder for victims of abduction to obtain effective relief, U.S. parents would find it harder to retrieve children abducted elsewhere.

Conclusion

When the Senate and Congress consent to U.S. accession to a treaty, what should they expect the courts to do down the road? This question, present behind every decision to approve a treaty, takes on added complexity when the treaty has many parties and seeks to promote a broad common legal regime. For the project to succeed, it may be necessary to adjust the details of the treaty obligations to reflect changes in society, such as increased use of joint custody. However, greater flexibility means allowing the international regime to operate something like a domestic administrative agency, with at least limited lawmaking powers vested in its various parts. It also means giving the Executive branch, through which the United States interacts with other countries, a greater role in shaping the evolving meaning of the international obligation.

The *Abbott* majority seemed comfortable with the delegated lawmaking implied by its approach to treaty interpretation. To be sure, the Court first determined that the interpretation it embraced conformed to the text of the treaty. But rather than arguing that this interpretation was the best reading of the treaty text or one strongly supported by the negotiating record, it moved on to what the participants currently understood the Convention to mean. As a result, the Court favored the evolving consensus of treaty parties over the original understanding of the treaty makers.

Especially noteworthy is the deference that the majority gave to the views of the State Department. In its brief, the government conceded that the State Department had never formalized its position that a *ne exeat* right qualified as a right of custody until this case arose. "But," the Solicitor General reported, "the State Department has informed this Office that the position set forth in [this case] has long been its view."[6] For the majority, this sufficed to trigger the Court's obligation to give "great weight" to the U.S. interpretation. The dissent, in contrast, lamented that earlier decisions had not discussed "precisely why" the Court should give deference to the views of the State Department, and argued that none was due here. Rather than describing its practice in detail, Justice Stevens complained, "the Department offers us little more than its own reading of the treaty's text."[7] At least for multilateral private law treaties, then, *Abbott* indicates that the Court will accept dynamic interpretation worked out by the various treaty parties and endorsed by the Executive branch.

About the Author

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Endnotes

[1] Abbott v. Abbott, No. 08-645 (U.S. May 17, 2010), *available at* http://www.supremecourt.gov/opinions/09pdf/08-645.pdf.

[2] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11.

[3] International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437, *codified at* 42 U.S.C. §§ 11601 *et seq.*

[4] *Id.* § 11603(d).

[5] Most recently, the Court in *Medellin v. Texas*, 552 U.S. 491 (2008), ruled that neither the Optional Protocol to the Vienna Convention on Consular Relations nor the United Nations Charter gave either the President or persons covered by a judgment of the International Court of Justice any right to domestic judicial enforcement of that judgment. *See* Margaret E. McGuinness, Medellin v. Texas: *Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings*, ASIL INSIGHTS, Apr. 17, 2008, http://www.asil.org/insights080418.cfm.

[6] Brief of the United States as Amicus Curiae Supporting Petitioner at 21 n.13, Abbott v. Abbott, No. 80-645, *available at* http://www.justice.gov /osg/briefs/2009/3mer/1ami/2008-0645.mer.ami.pdf.

[7] *Abbott*, No. 08-645, at 21-22 (Stevens, J., dissenting). Similarly, the majority found support for its position in the Special Commission reports, which supported “an emerging international consensus that *ne exeat* rights are rights of custody.” *Id.* at 14 (majority opinion). The dissent dismissed the Special Commissions as “a voluntary *post hoc* collective body with no treaty-making authority.” *Id.*at 21 n.13 (Stevens, J., dissenting). On the issue of deference to the Executive’s interpretation of treaties, Justice Stevens might have cited, but did not, his plurality opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), which gave short shrift to the Executive’s interpretation of the Geneva Conventions on the laws of war.