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NOTE

# Abbott v. Abbott: An Overly Broad Conclusion as to Whether Ne Exeat Provisions Create Rights of Custody Under the Hague Convention on the Civil Aspects of International Child Abduction

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In *Abbott v. Abbott*,<sup>1</sup> the Supreme Court of the United States considered whether a non-custodial father's *ne exeat* right,<sup>2</sup> granted by the Chilean family court, constituted a "right of custody," as defined under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention).<sup>3</sup> The Court ultimately held that the father's *ne exeat* right amounted to a "right of custody."<sup>4</sup> Therefore, the mother's wrongful removal of the son violated the Hague Convention,<sup>5</sup> allowing the father to seek the treaty's right of return remedy.<sup>6</sup> Furthermore, the Court held that *ne* 

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<sup>1. 130</sup> S. Ct. 1983 (2010).

<sup>2.</sup> A *ne exeat* writ restrains a person from leaving a court's jurisdiction. BLACK'S LAW DICTIONARY 1061 (8th ed. 2004). A *ne exeat* writ is often used to prohibit a person from removing a child or property from the jurisdiction. *Id*.

<sup>3.</sup> *Abbott*, 130 S. Ct. at 1987. The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Hague Convention on the Civil Aspects of International Child Abduction art. 5(a), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

<sup>4.</sup> Abbott, 130 S. Ct. at 1993.

<sup>5.</sup> See id. at 1990.

<sup>6.</sup> Hague Convention, *supra* note 3, art. 12 (requiring the judicial or administrative authority of a state party to order the return of a child abducted in violation of a parent's rights of custody).

*exeat* rights always constitute "rights of custody" under the Hague Convention.<sup>7</sup>

Although the Court purported to render a judgment that aligned with the underlying objectives of the Hague Convention, the majority opinion improperly generalized the question presented<sup>8</sup> and failed to consider the varying contexts in which international courts have applied *ne exeat* rights.<sup>9</sup> By doing so, the Court reached a conclusion that is overly broad and runs counter to the objectives of the Hague Convention.<sup>10</sup>

#### I. THE CASE

Petitioner, Timothy Abbott, and respondent, Jacquelyn Abbott, married in 1992.<sup>11</sup> The couple's son, A.J.A. was born in Hawaii in 1995.<sup>12</sup> In 2002, the Abbotts moved to La Serena, Chile.<sup>13</sup> Subsequently, the couple separated in March of 2003, and sought child custody arrangements in the Chilean family court.<sup>14</sup> The court granted Ms. Abbott with sole custody rights of A.J.A and awarded Mr. Abbott specific "direct" and "regular" visitation rights.<sup>15</sup>

Under Chilean law, once a parent is granted visitation rights, a *ne exeat* right automatically follows.<sup>16</sup> Yet, even with this statutory provision in place, Ms. Abbott sought an additional *ne exeat* order from the court.<sup>17</sup> On January 13, 2004, the court granted Ms.

16. James D. Garbolino, *The United States Supreme Court Settles the* Ne Exeat *Controversy in America*: Abbott v. Abbott, 59 INT'L & COMP. L. QUART. 1158, 1159 (2010) (citing Minors Law 16, 618, art. 49 (Chile)). The Chilean Minors Law prohibits a parent from permanently removing a child from Chile without the consent of the parent with visitation rights. *Id.* 

17. *Id*.

<sup>7.</sup> See Abbott, 130 S. Ct. at 1993, 1995.

<sup>8.</sup> See infra Part IV.A.

<sup>9.</sup> See infra Part IV.B.

<sup>10.</sup> See infra Part IV.C.

<sup>11.</sup> Abbott v. Abbott, 495 F. Supp. 2d 635, 637 (W.D. Tex. 2007), *aff'd* 542 F.3d 1081 (5th Cir. 2008), *rev'd* 130 S. Ct. 1983 (2010).

<sup>12.</sup> *Id*.

<sup>13.</sup> Id.

<sup>14.</sup> *Id*.

<sup>15.</sup> *Id.* The district court noted that, "careful review of the record reveals that the Chilean family court granted all care and custody rights to Ms. Abbott, despite Mr. Abbott's petitions to the courts for custody of his son." *Id.* at 637 n.2.

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Abbott's request, prohibiting either parent from removing the child from Chile without their mutual consent.<sup>18</sup>

In August of 2005, Ms. Abbott removed A.J.A. from Chile without the permission of Mr. Abbott or the Chilean Family Court, while custody proceedings before the court were still pending.<sup>19</sup> Ms. Abbott and A.J.A. were eventually located in Texas where Mr. Abbott filed an action claiming that A.J.A. was wrongfully removed from Chile in violation of the Hague Convention.<sup>20</sup>

The United States District Court for the Western District of Texas denied Mr. Abbott the return remedy that he sought under the Hague Convention.<sup>21</sup> In doing so, the court held that Mr. Abbott's *ne exeat* right did not constitute a right of custody under the Hague Convention and, therefore, Ms. Abbott's removal of A.J.A. from Chile was not "wrongful" as defined by the treaty.<sup>22</sup> The United States Court of Appeals for the Fifth Circuit affirmed the lower court's decision, also focusing on the Hague Convention's clear distinction between rights of access and rights of custody.<sup>23</sup>

#### II. LEGAL BACKGROUND

#### A. Overview of the Convention

The issue of international child abduction did not garner significant attention from the international community until the late 1970s when international travel became more frequent and, consequently, the number of international marriages increased.<sup>24</sup> This

<sup>18.</sup> Abbott, 495 F. Supp. 2d at 637.

<sup>19.</sup> *Id*.

<sup>20.</sup> Id.

<sup>21.</sup> Id. at 641.

<sup>22.</sup> *Id.* ("The Hague Convention explicitly creates a different set of remedies for those parents whose rights of access are frustrated by the custodial parent's removal of a child from the child's country of habitual residence"). *Compare* Hague Convention, *supra* note 3, art. 5(a) (defining "rights of custody" to include "the right to determine the child's place of residence) *with id.* art. 5(b) (defining "rights of access," to include the "right to take a child for a limited period of time to place other than the child's habitual residence").

<sup>23.</sup> Abbott v. Abbott, 542 F.3d 1081, 1088 (5th Cir. 2008), *rev'd* 130 S. Ct. 1983 (2010). "Mr. Abbott's rights of access, however enhanced and protected by the *ne exeat* order, is simply not sufficient to create rights of custody that warrant the greater protection intended under the Hague Convention." *Id.* at 1087.

<sup>24.</sup> Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3330–31 (2009).

development, in conjunction with the rising rate of divorces and separations, resulted in a noticeable increase in international child custody disputes.<sup>25</sup> In attempting to handle cases of this nature, a number of problems became evident such as locating the child, the high costs associated with international disputes, and the unwillingness of foreign and local authorities to provide assistance.<sup>26</sup>

Complications were further compounded by the fact that some courts adjudicating international child abduction cases applied the standard.<sup>27</sup> best-interests-of-the-child This amorphous and individualized standard resulted in unpredictable outcomes,<sup>28</sup> which were, at times, influenced by the particular country's societal mores regarding child rearing.<sup>29</sup> Those courts that chose to utilize a different mode of analysis still posed problems for parents involved in international child abduction disputes, since many of these courts exhibited a gender bias.<sup>30</sup> Moreover, the left-behind parent was typically obligated to seek a judicial remedy in the country in which the abducted child was located.<sup>31</sup> Often the laws of this country differed from the laws of the left-behind parent's own country.<sup>32</sup> The resulting phenomenon included inconsistent and non-uniform judgments handed down by international courts.<sup>33</sup> Furthermore, the situation provided a perverse incentive for parents to remove a child to another country in order to obtain a more favorable legal custody judgment than they would have received in their own country.<sup>34</sup>

In March of 1979, a Special Commission was convened to examine these problems relating to international child abduction.<sup>35</sup> The Hague Convention was adopted by a unanimous vote on October

<sup>25.</sup> Id. at 3331.

<sup>26.</sup> Id.

<sup>27.</sup> Id. at 3332.

<sup>28.</sup> Id.

<sup>29.</sup> *Id.* (citing Paul R. Beumont & Peter E. McEleavy, The HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 2 (1999)).

<sup>30.</sup> *Id*.

<sup>31.</sup> *Id*.

<sup>32.</sup> Id.

<sup>33.</sup> Id. at 3333.

<sup>34.</sup> See *id.* at 3336 ("[T]he Child Abduction Convention discourages parents from unilaterally removing their children in order to use them as instruments to obtain a convenient and favorable forum in which to air their custody disputes.").

<sup>35.</sup> Thompson v. Thompson, [1994] 10 W.W.R. 513, 531 (S.C.C.) (Can.).

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25, 1980.<sup>36</sup> Its stated purpose is "to protect children internationally from the harmful effects of their removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."<sup>37</sup> Thus, the framers of the Hague Convention intended to deter the practice of international child abductions.<sup>38</sup>

The Hague Convention mandates that a child's return occur when a "wrongful removal" or retention is found.<sup>39</sup> According to the Hague Convention, a "wrongful removal" occurs where:

- a) [I]t is in breach of rights of custody attributed to a person, institution or another body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.<sup>40</sup>

The Hague Convention further defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."<sup>41</sup> On the other hand, rights of access, which, if violated, do not constitute a wrongful removal under the Hague Convention, include the "right to

<sup>36.</sup> Vivatvaraphol, *supra* note 24, at 3334. The United States became a signatory to the Hague Convention on December 23, 1981. *Id.* at 3339. On April 29, 1988, the United States implemented the Hague Convention when Congress enacted International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 42 U.S.C. §§ 11601–11 (2006)). The act requires that in any action brought under the Hague Convention for the return of a child, the petitioner must prove by a preponderance of the evidence that the child has been wrongfully removed or retained. 42 U.S.C. § 11603(e) (2006).

<sup>37.</sup> Hague Convention, *supra* note 3, pmbl.

<sup>38.</sup> Merle H. 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, 289 (2002).

<sup>39.</sup> Hague Convention, *supra* note 3, arts. 3, 12.

<sup>40.</sup> Id. art. 3.

<sup>41.</sup> Id. art. 5(a).

take a child for a limited period of time to a place other than the child's habitual residence."<sup>42</sup>

Importantly, the Hague Convention does not address, nor does it seek to address, which party is legally entitled to custody of the abducted child.<sup>43</sup> Rather, the Hague Convention solely addresses in what jurisdiction the custody dispute should be adjudicated.<sup>44</sup> For this reason, courts deciding a case under the Hague Convention may only consider the claim of wrongful removal and not the merits of the underlying case.<sup>45</sup>

While the historical problems leading to the Hague Convention's ratification are clear, the context in which remedies under the Hague Convention are now being sought have significantly changed since the Hague Convention's initial ratification.<sup>46</sup> In particular, many of the recent U.S. cases decided pursuant to the Hague Convention involved situations of domestic violence.<sup>47</sup> These cases typically entail a mother who is the primary caretaker abducting the child and alleging she was a victim of domestic violence.<sup>48</sup>

Significantly, the Hague Convention was not drafted with such scenarios in mind.<sup>49</sup> The Hague Convention was originally introduced "to discourage abductions by parents who had lost, or would lose, a custody contest" from removing their children to other countries in the hope of obtaining a more favorable judgment.<sup>50</sup> Therefore, "the abductor was not traditionally thought to be the

Hague Convention, *supra* note 3, art. 13(b).

50. Weiner, supra note 37, at 278.

<sup>42.</sup> *Id.* art. 5(b). "[T]he Convention leaves the enforcement of access rights to the administrative channels of Central Authorities designated by the state parties to the Convention." Thomson v. Thomson, [1994] 10 W.W.R. 513, 533 (Can.).

<sup>43.</sup> Vivatvaraphol, supra note 24, at 3335.

<sup>44.</sup> *Id*.

<sup>45.</sup> Id.

<sup>46.</sup> See Weiner, supra note 37, at 278–80.

<sup>47.</sup> *Id.* at 277 ("Seven of the nine cases decided by the United States courts of appeals between July 2000 and January 2001 involved an abductor who alleged that she was a victim of domestic violence.").

<sup>48.</sup> *Id*.

<sup>49.</sup> *Id.* at 278. Although the context in which the Hague Convention is now being applied has shifted, the treaty does contain a provision maintaining that:

the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

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primary caretaker.<sup>51</sup> This contextual shift has, in effect, required that the Hague Convention operate in the inverse function of the originally intended applicable scenario.<sup>52</sup> Although this contextual modification may appear minor, the variation has impacted many courts charged with the task of interpreting the Convention.<sup>53</sup> Specifically, "while the return remedy works well if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the child from the other parent's violence."<sup>54</sup>

### III. U.S. CASE LAW EXAMINING WHETHER A *NE EXEAT* RIGHT CONSTITUTES A RIGHT OF CUSTODY UNDER THE CONVENTION

Abbott v. Abbott was the first United States Supreme Court case to interpret the Hague Convention since the underlying issue is a family law dispute, an area of law traditionally reserved for state courts.<sup>55</sup> Moreover, United States Circuit Courts were equally divided on the issue of whether a *ne exeat* provision constituted a right of custody under the Hague Convention.<sup>56</sup> Therefore, the Supreme Court granted certiorari in an attempt to resolve the circuit court split on the issue.<sup>57</sup>

Four federal circuit courts, other than the circuit court in *Abbott*, have ruled on the issue of whether a *ne exeat* right creates a right of custody under the Hague Convention.<sup>58</sup> In *Croll v. Croll*,<sup>59</sup> the Second Circuit held that a *ne exeat* right "does not transmute access rights into rights of custody under the Convention."<sup>60</sup> A family court in Hong Kong had granted Mrs. Croll with "sole custody, care, and

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<sup>51.</sup> Id.

<sup>52.</sup> See id. at 278–79.

<sup>53.</sup> *Id.* at 279 ("In some of the recent decisions, courts have adopted novel legal interpretations in an effort to avoid applying the Convention to these abductors.").

<sup>54.</sup> Id.

<sup>55.</sup> Id. at 282.

<sup>56.</sup> See infra notes 58-62 and accompanying text.

<sup>57.</sup> Martha Bailey, Abbott v. Abbott: Do Ne Exeat Provisions Create Rights of Custody?, 29 CAN. FAM L.Q. 171, 177 (2010).

<sup>58.</sup> Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004); Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010); Gonzalez v. Gutierrez, 311 F.3d 942 (9th Cir. 2002), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010); Croll v. Croll, 229 F.3d 133 (2d Cir. 2000), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010).

<sup>59. 229</sup> F.3d 133 (2d Cir. 2000), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010). 60. *Id.* at 143.

control" of the child and granted the father a right of "reasonable access."<sup>61</sup> Based on these facts, the Second Circuit denied Mr. Croll's request for his daughter's return to Hong Kong, finding that Mr. Croll's rights, even including the *ne exeat* clause, did not include the powers of a custodial parent.<sup>62</sup>

The Ninth Circuit held similarly in *Gonzalez v. Gutierrez*<sup>63</sup> when it concluded that "a *ne exeat* right serves only to allow a parent with access rights to impose a limitation on the custodial parent's right to expatriate the child."<sup>64</sup> In *Gonzalez*, Rosa Teresa Gutierrez and Eduardo Arce Gonzalez sought to obtain a divorce in Mexico.<sup>65</sup> Gutierrez alleged that Eduardo repeatedly physically and verbally abused her during their marriage.<sup>66</sup> In August 2000, the divorce was granted. According to the divorce agreement, Gutierrez and Arce's minor children were to "remain under the sole custody and care of their mother."<sup>67</sup> Arce, on the other hand, was granted visitation rights.<sup>68</sup> The divorce agreement also stipulated that Arce "must grant full authorization . . . on every occasion that his minor children . . . seek to leave the country."<sup>69</sup>

In holding that the *ne exeat* clause in the custody agreement failed to constitute a right of custody under the Hague Convention, the court focused on the fact that the explicit terms of the divorce agreement, which was approved by the Mexican family court, granted sole custody to Ms. Gutierrez.<sup>70</sup> The court also determined that Arce's ability to deny permission for his children to leave Mexico did not amount to a right of custody because Arce could not determine, with any specificity, where the children would reside within Mexico or even outside of Mexico.<sup>71</sup>

<sup>61.</sup> *Id.* at 135.

<sup>62.</sup> *Id.* at 143–44. "The right granted under a *ne exeat* clause is, at most, a veto power." *Id.* at 140.

<sup>63. 311</sup> F.3d 942 (9th Cir. 2002), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010).

<sup>64.</sup> Id. at 949.

<sup>65.</sup> Id. at 946.

<sup>66.</sup> *Id.* 67. *Id.* 

<sup>68.</sup> *Id.* at 947.

<sup>69.</sup> *Id*.

<sup>70.</sup> *Id.* at 950.

<sup>71.</sup> Id. at 949.

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Although examining the issue in a slightly different context, the Fourth Circuit in *Fawcett v. McRoberts* echoed the conclusions in *Croll* and *Gonzalez*, holding that a *ne exeat* right does not constitute a right of custody under the Hague Convention.<sup>72</sup> In *Fawcett*, the parties had married in Scotland in 1986.<sup>73</sup> While married, the couple had two children, although custody regarding only one of the children was in dispute.<sup>74</sup> In 1998, a Scottish Court issued a divorce decree requiring that the child live with Mr. McRoberts and providing visitation rights to Ms. Fawcett.<sup>75</sup> Ms. Fawcett became increasingly concerned that Mr. McRoberts might take their son to the United States.<sup>76</sup> Therefore, she sought an order from the court preventing Mr. McRoberts from removing the child from Scotland, which the court granted.<sup>77</sup>

Like in *Gonzalez*, the court's holding in *Fawcett* also rested upon an examination of the actual language in the couple's divorce decree. Specifically, the "Residence Order" in the decree gave "Mr. McRoberts the exclusive power to determine [the child's] residence."<sup>78</sup> The court also found the reasoning of the courts in *Gonzalez* and *Croll* to be sufficiently persuasive.<sup>79</sup>

By contrast, the Eleventh Circuit reached the opposite conclusion in *Furnes v. Reeves*<sup>80</sup> when it held that a non-custodial parent's *ne exeat* right does establish a right of custody.<sup>81</sup> The court based much of its decision on the fact that the Hague Convention does not specifically define the phrase "place of residence."<sup>82</sup> Therefore, a parent's *ne exeat* right to determine whether the child lives inside or outside the state can conceivably constitute the right to determine a child's place of residence.<sup>83</sup> Based on this interpretation,

- 75. Id.
- 76. *Id.* at 493.
- 77. Id.
- 78. Id. at 499.
- 79. Id. at 500.
- 80. 362 F.3d 702 (11th Cir. 2004).
- 81. *Id.* at 716.
- 82. Id. at 715–16.
- 83. See id. at 715.

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<sup>72.</sup> Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir. 2003), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010) (holding that Scottish family law that permits non-custodial parents to maintain relations and direct contact with the child did not create rights of custody under the Hague Convention).

<sup>73.</sup> Id. at 492.

<sup>74.</sup> Id.

the court concluded that the parent did have "rights of custody" in accordance with the Hague Convention.  $^{84}$ 

# B. Foreign Case Law Examining Whether a Ne Exeat Right Constitutes a Right of Custody Under the Convention

Despite the lack of United States Supreme Court precedent involving the Hague Convention, many high courts in foreign countries have previously interpreted the treaty.<sup>85</sup> Moreover, a number of these courts have been faced with the specific issue of whether a *ne exeat* provision constitutes a "right of custody" under the Hague Convention.<sup>86</sup>

Canada was one of the first countries ratify the Hague Convention.<sup>87</sup> For this reason, the Supreme Court of Canada's opinions were persuasive value for many other signatory countries to the treaty.<sup>88</sup> In *Thomson v. Thomson*,<sup>89</sup> the Supreme Court of Canada was required to examine the effect of an interim custody order prohibiting the mother from removing her child from Scotland.<sup>90</sup> The parties in *Thomson* were involved in a custody dispute in Scotland.<sup>91</sup> A report produced during the dispute indicated that the mother was the more suitable parent.<sup>92</sup> Consequently, the Sheriff granted the mother interim custody of the child and granted the father with interim access to the child.<sup>93</sup> The Sheriff also ordered that the child "remain in Scotland pending a further court order." <sup>94</sup> Despite the order, the mother took the child to Manitoba where she filed a petition seeking custody of the child.<sup>95</sup>

89. [1994] 10 W.W.R. 513 (S.C.C.).

<sup>84.</sup> Id.

<sup>85.</sup> See infra notes 87–105 and accompanying text.

<sup>86.</sup> See infra notes 87-105 and accompanying text.

<sup>87.</sup> Martha Bailey, *Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 N.Y.U. J. INT'L L. & POL. 17, 17 (2000).

<sup>88.</sup> The case of *Thomson v. Thomson*, [1994] 10 W.W.R. 513 (S.C.C.), in particular, is referenced by numerous U.S. courts determining whether a *ne exeat* provision confers a right of custody under the Child Abduction Convention. *E.g.*, Croll v. Croll, 229 F.3d 133, 143 (2d Cir. 2000), *abrogated by* Abbott v. Abbott.

<sup>90.</sup> Id. at 518.

<sup>91.</sup> Id. at 519.

<sup>92.</sup> Id.

<sup>93.</sup> Id.

<sup>94.</sup> *Id.* The Scottish Court inserted the non-removal clause in the interim custody order to preserve its jurisdiction to decide the issue of custody on its merits later. *Id.* at 514.

<sup>95.</sup> Id. at 519.

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As in many of the cases involving the Hague Convention, the Supreme Court of Canada was required to determine whether the removal of Matthew from Scotland constituted a breach of the father's custody rights.<sup>96</sup> Ultimately, the Court held that "[t]he appellant's removal of Matthew . . . constituted a breach of the custody right of the Scottish court within the meaning of Article 3 of the Hague Convention."<sup>97</sup> In doing so, the Court recognized the significance in Canadian law of a non-removal clause contained in an interim custody order.<sup>98</sup> The significance being that such a provision is specifically included in order to preserve the court's jurisdiction to determine the parent's final custody arrangement.<sup>99</sup> Notably, in dicta, the court stated that a *ne exeat* clause in a permanent custody order may be construed differently than a non-removal clause in an interim custody order.<sup>100</sup>

Other foreign courts have been forced to examine the issue of whether *ne exeat* rights constitute rights of custody, although in different contexts. In *C. v. C.*,<sup>101</sup> the English Court of Appeals ruled on a case involving a couple from Australia.<sup>102</sup> Upon the couple's separation, the deputy registrar of the Family Court in Sydney made a consent order that gave the mother custody of the child, but kept both parents as joint guardians.<sup>103</sup> Clause two of the Consent Order provided that neither party should remove the child from Australia without the consent of the other.<sup>104</sup> However, approximately two years later, the mother took the child to England without obtaining the father's consent.<sup>105</sup>

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<sup>96.</sup> Id. at 536.

<sup>97.</sup> See *id.* at 540. "[I]t seems clear that the non-removal clause was inserted into the custody order of November 27, 1992 to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date." *Id.* 

<sup>98.</sup> Id. at 540.

<sup>99.</sup> Id.

<sup>100.</sup> *Id.* at 540–41. Justice La Forest elaborated:

It will be observed that I have underlined the purely interim nature of the mother's custody in the present case. I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody. Such a clause raises quite different issues.

Id. at 540.

<sup>101. [1989] 1</sup> W.L.R. 654 (A.C.).

<sup>102.</sup> Id. at 656.

<sup>103.</sup> Id.

<sup>104.</sup> Id.

<sup>105.</sup> Id.

The Court of Appeals found that under the Hague Convention the father possessed a right of custody, which was breached by the mother's wrongful removal of the child from Australia to England.<sup>106</sup> Therefore, the court ordered the child's return to Australia in order to allow the Australian court to decide with which parent the child should live.<sup>107</sup> In reaching this conclusion, the court held that "the father does not have the right to determine the child's place of residence within Australia but has the right to ensure that the child remains in Australia, or lives anywhere outside Australia only with his approval."<sup>108</sup> The court further determined that this right fell within the purview of the Hague Convention's "right of custody," because "the [Hague] Convention must be interpreted so that within its scope it is to be effective."<sup>109</sup>

Other foreign courts have agreed with the English Court of Appeals decision in *C v. C.* For example, the Constitutional Court of South Africa in *Sonderup v. Tondelli*,<sup>110</sup> held that a mother's removal of her daughter from Canada, and retention in South Africa, was wrongful under the Hague Convention.<sup>111</sup> *Sonderup* involved a couple that had married in South Africa, but subsequently filed for divorce in Canada.<sup>112</sup> The Supreme Court of British Columbia granted a consent order, the terms of which provided that the mother would have full custody of the child and the father have rights of access.<sup>113</sup> Moreover, the consent order provided that, "neither the plaintiff (the father) nor the defendant (the mother) shall remove the child from the Province of British Columbia without further Court order or the written agreement of the parties."<sup>114</sup> Approximately a year later, the father sought an urgent order from the court stipulating

<sup>106.</sup> Id. at 658.

<sup>107.</sup> Id. at 659-60.

<sup>108.</sup> Id. at 658.

<sup>109.</sup> Id.

<sup>110. 2001 (1)</sup> SA 1171 (CC) (S. Afr.).

<sup>111.</sup> Id. at 1183.

<sup>112.</sup> Id. at 1177.

<sup>113.</sup> Id.

<sup>114.</sup> *Id.* The consent order also provided that neither parent would remove the child from Canada without a court order or written agreement "except that either party will be permitted to travel outside of British Columbia with the child once per year for a period not to exceed 30 days." Furthermore, "[I]f the child is taken out of Canada for a period exceeding 30 days, without further Court order or written consent of both parties . . . the child have been [sic] wrongfully removed . . . in contravention of the [Hague] Convention . . . ." *Id.* 

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that the mother refrain from removing the child from Canada.<sup>115</sup> Despite this order, the mother removed the child from Canada to South Africa, where they moved in with the mother's family.<sup>116</sup>

The Constitutional Court found that the mother wrongfully removed the child in violation of the Hague Convention because the parties had entered into an interim agreement stipulating that the child would be returned to Canada on a specific date.<sup>117</sup> Therefore, the court was not "dealing only with a non-removal provision in a final custody agreement," such as the agreement present before the court in *Croll*.<sup>118</sup> For these reasons, the Court ordered that the child be returned to Canada.<sup>119</sup>

#### C. Summary of Court's Reasoning

In *Abbott v. Abbott*, the U.S. Supreme Court interpreted the Hague Convention for the first time.<sup>120</sup> The question before the Court was whether a non-custodial parent's *ne exeat* right conferred a "right of custody" within the meaning of the Hague Convention, thus allowing Mr. Abbott to bring a cause of action against Ms. Abbott for "wrongful removal of the child."<sup>121</sup> Ultimately, the Court held that Mr. Abbott's *ne exeat* right did, in fact, constitute a "right of custody" under the Hague Convention, and therefore, Ms. Abbott "wrongfully removed" A.J.A. in violation of the treaty.<sup>122</sup>

In reaching its decision, the Court first examined the text of the treaty.<sup>123</sup> Specifically, the Court analyzed Article 5 of the Hague Convention, which defines rights of custody 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.<sup>124</sup> The underlying question presented for the Court was under what context a parent

<sup>115.</sup> *Id.* at 1178. The order responding to the father's request stated that "[t]he defendant (the mother) be allowed to travel to South Africa with the child, for a one-month period . . . returning July 14, 2000." *Id.* 

<sup>116.</sup> *Id.* 117. *Id.* at 1182.

<sup>117.</sup> *Id.* at 1182 118. *Id*.

<sup>119.</sup> *Id.* at 1191.

<sup>119.</sup> *10*. at 1191.

<sup>120.</sup> Garbolino, supra note 16, at 1158.

<sup>121.</sup> Abbott, 130 S. Ct. at 1987.

<sup>122.</sup> Id. at 1990.

<sup>123.</sup> Id. at 1989.

<sup>124.</sup> Id. (citing Hague Convention, supra note 3, art. 5).

determines the child's place of residence.<sup>125</sup> The Court concluded that Mr. Abbott's *ne exeat* right conferred a right to determine A.J.A's place of residence since Mr. Abbott's approval was needed before the child was allowed to leave the country.<sup>126</sup> In exercising this right, Mr. Abbott jointly participated in deciding the country in which A.J.A. must reside.<sup>127</sup> Hence, a determination by Mr. Abbott that his son had to reside in the country of Chile stood for a determination as to the child's residence.<sup>128</sup> More generally, the Court concluded that "*ne exeat* rights are rights of custody."<sup>129</sup>

In support of this conclusion, the Court offered the State Department's Office of Children's Issues' interpretation that *ne exeat* clauses confer rights of custody within the meaning of the Hague Convention.<sup>130</sup> The Court emphasized the role of the Executive branch in this matter, explaining that the Executive has valuable information and experience in treaty interpretation.<sup>131</sup> For this reason, the Court found it appropriate to defer to the Executive branch's expertise when analyzing the particular issues presented by the case. <sup>132</sup>

Next, the Court turned its attention to support from other signatory countries to the Hague Convention.<sup>133</sup> The Court justified this analysis by noting that the "Congress has directed that 'uniform international interpretation of the Convention' is part of its framework."<sup>134</sup> The Court then specified that other countries have accepted the rule that *ne exeat* rights confer rights of custody within the Hague Convention's meaning.<sup>135</sup> The Court further noted that there is even great scholarship and academic support on this position

<sup>125.</sup> *See Abbott*, 130 S. Ct. at 1990–91. "The phrase place of residence" encompasses the child's country of residence, especially in light of the Convention's explicit purpose to prevent wrongful removal across international borders." *Id.* 

<sup>126.</sup> Id. at 1990.

<sup>127.</sup> Id.

<sup>128.</sup> Id. at 1991.

<sup>129.</sup> See *id.* at 1993. "This Court's conclusion that *ne exeat* rights are rights of custody is further informed by the views of other contracting states." *Id.* "A review of the international case law confirms broad acceptance of the rule that *ne exeat* rights are rights of custody." *Id.* 

<sup>130.</sup> Id.

<sup>131.</sup> *Id*.

<sup>132.</sup> Id.

<sup>133.</sup> Id. at 1993–94.

<sup>134.</sup> Id. (citing 42 U.S.C. § 11601(b)(3)(B) (2006)).

<sup>135.</sup> Id. The Court specifically mentioned England, Israel, Austria, South Africa, Germany and Scotland. Id.

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regarding whether *ne exeat* provisions can elicit the powerful return remedy under the Hague Convention.<sup>136</sup>

Lastly, the Court focused on the Hague Convention's objectives and concluded that its holding remained true to the treaty's objects and purposes.<sup>137</sup> In fact, the Court noted that denying the father's request for the child's return under the Hague Convention "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."<sup>138</sup> And, finally, the Court maintained that the Perez-Vera Report<sup>139</sup> supported the conclusion that the Hague Convention contemplated *ne exeat* rights conferring rights of custody, by virtue of the framers' intention that the term "rights of custody" be interpreted in a manner as expansive as possible.<sup>140</sup>

Justice Stevens, writing for the dissent, focused on defining the true meaning of custody rights in addition to drawing a clear and demarcated distinction between rights of custody and rights of access.<sup>141</sup> In particular, he emphasized the fact that the Hague Convention provides for different remedies depending on which right the abducting parent violates.<sup>142</sup>

The dissent also focused much of its opinion on the underlying purpose of the Hague Convention by, in a similar manner to the majority, carefully scrutinizing the treaty's text.<sup>143</sup> The dissent began by providing a historical context for the Hague Convention.<sup>144</sup> Specifically, Justice Stevens noted that the drafters convened to determine "an international solution to an emerging problem: transborder child abductions perpetrated by noncustodial parents to establish artificial jurisdictional links ... with a view to obtain

<sup>136.</sup> Id. at 1994.

<sup>137.</sup> Id. at 1995.

<sup>138.</sup> Id. at 1996.

<sup>139.</sup> The Perez-Vera Report contains the legislative history of the Convention. ELISA PEREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION 426 (1982), *available at* http://www.hcch.net/upload/expl28.pdf [hereinafter PEREZ-VERA REPORT].

<sup>140.</sup> See Abbott, 130 S. Ct. at 1995 (citing PEREZ-VERA REPORT, supra note 139, at 447–48).

<sup>141.</sup> Id. at 1998 (Stevens, J., dissenting).

<sup>142.</sup> Id.

<sup>143.</sup> Id.

<sup>144.</sup> *Id*.

custody of the child."<sup>145</sup> With this setting in mind, the dissent stated that the Hague Convention's purpose was to "protect children from wrongful international removals or retention by persons bent on obtaining their physical and/or legal custody."<sup>146</sup> Based on this purpose, the dissent articulated the change in context where the custodial parent was removing the child from his country of habitual residence—an instance not intended to be covered by the Hague Convention.<sup>147</sup> In light of this analysis, the dissent concluded that Mr. Abbott's right to "veto the other parent's decision to remove the child from the country" did not amount to a right of custody as defined under the Hague Convention.<sup>148</sup>

### IV. ANALYSIS

The Court in *Abbott v. Abbott* improperly generalized the question presented.<sup>149</sup> In doing so, the Court reached an overly broad conclusion that failed to take into account the varying contexts in which *ne exeat* rights are applied.<sup>150</sup> Ultimately, the Court's decision does not comport with the objects and purposes of the Hague Convention.<sup>151</sup> The Court should have limited the scope of its decision solely to whether Mr. Abbott's rights of custody, solely in this case, were violated under the Hague Convention, rather than holding that *ne exeat* rights always constitute "rights of custody."<sup>152</sup>

# A. The Court Improperly Framed the Issue by Posing an Overly General Question Presented

In *Abbott*, the Court inappropriately framed the issue by overgeneralizing the question presented. The Court initially posed the question as "whether a parent has a 'right of custody' by reason of that parent's *ne exeat* right: the authority to consent before the other parent may take the child to another country?"<sup>153</sup> Thus, the Court posed the question in a more universal, rather than case-specific, manner.

<sup>145.</sup> Id. (citing PEREZ-VERA REPORT, supra note 139, at 426) (internal citations omitted).

<sup>146.</sup> Id.

<sup>147.</sup> See supra notes 48–54 and accompanying text.

<sup>148.</sup> Id. at 1999.

<sup>149.</sup> See infra Part IV.A.

<sup>150.</sup> See infra Part IV.B.

<sup>151.</sup> See infra Part IV.C.

<sup>152.</sup> See infra Part IV.A.

<sup>153.</sup> Abbott, 130 S. Ct. at 1987.

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The Court later narrowed the issue when it stated: "The question is whether A.J.A. was 'wrongfully removed' from Chile, in other words, whether he was removed in violation of a right of custody?"<sup>154</sup> Yet, the Court ultimately concluded not only that "Mr. Abbott possesse[d] a right of custody under the Hague Convention," but also that "*ne exeat* rights are rights of custody."<sup>155</sup> Additionally, the Court held that "the joint right to decide a child's country of residence is not even arguably a . . . visitation right."<sup>156</sup> The Court, consequently, did not merely render a decision as to whether Mr. Abbott's *ne exeat* right constituted a "right of custody" under the Hague Convention, but declared that all *ne exeat* rights amount to a "right of custody."

Courts in other countries faced with cases brought under the Hague Convention have more appropriately narrowed the question presented and, therefore, rendered a decision based on the specific facts contained in the dispute. In *Sonderup*, for example, the Constitutional Court of South Africa stated that the issues before the Court were the following: "1) whether the provisions of the Convention apply in the present case; 2) if so, whether, as incorporated by the Act, they are consistent with the Constitution, and; 3) whether these provisions require the return of [the child]."<sup>157</sup> Similarly, in *C v. C*, the Court of Appeal stated that the specific question is "whether under Australian law clause 2 was capable of constituting a right of custody within the Convention."<sup>158</sup> Finally, in *Thomson*, the Court articulated the principal question as whether "the child should be returned to Scotland under the terms of the Convention."<sup>159</sup>

By posing the question presented in such a universal manner, the Court in *Abbott* failed to properly narrow its analysis to the facts specific to the case at hand. As a result, the Court engaged in a general analysis of whether *ne exeat* rights constitute rights of custody under the Hague Convention rather than appropriately analyzing whether Mr. Abbott's rights, alone, constituted rights of custody under the Hague Convention.

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<sup>154.</sup> Id. at 1990.

<sup>155.</sup> Id. at 1993.

<sup>156.</sup> Id. at 1992.

<sup>157. 2001 (1)</sup> SA 1171, 1181 (CC). (S. Afr.).

<sup>158. [1989] 1</sup> W.L.R. 654, 657–58 (A.C.).

<sup>159. [1994] 10</sup> W.W.R. 513, 518 (Can.).

#### B. Foreign Courts Have Applied Ne Exeat Rights in Various Contexts

By examining the issue generally, the Court failed to take into account the differing contexts in which *ne exeat* provisions can be applied. Even a superficial examination of the cases referenced in the *Abbott* decision indicates that *ne exeat* rights are utilized by foreign courts in a variety of circumstances. For example, in the leading case of *Thomson*, the Supreme Court of Canada examined an interim custody order, which specified non-removal of the child from Scotland pending a further court order.<sup>160</sup> As previously noted, under Canadian law, this non-removal provision has the effect of preserving the court's jurisdiction to determine the final custody arrangement.<sup>161</sup> The Supreme Court of Canada explained that it was forced to compare the non-removal provision to Canadian law because no evidence was put forth regarding the legal effect of this provision under Scottish law.<sup>162</sup>

On the other hand, in *Sonderup*, the Constitutional Court of South Africa examined a final custody order as well as an interim agreement.<sup>163</sup> Specifically, the Court noted that "[h]ere, we are not dealing only with a non-removal provision in a final custody agreement . . . [i]n this case we have an interim agreement between the parties that [the child] would be returned to her country of habitual residence by a particular date."<sup>164</sup>

Finally, in C v. C, the Court of Appeal in England examined a final consent order.<sup>165</sup> Specifically, the order stipulated that:

(1) The mother . . . have custody of . . . the child of the marriage and [that both] the [father] and the [mother] . . . remain joint guardians of the said child. (2) [Neither] the [father] nor the [mother] shall remove the child from Australia without the consent of the other.<sup>166</sup>

<sup>160.</sup> Id. at 540.

<sup>161.</sup> *Id*.

<sup>162.</sup> *Id*.

<sup>163. 2001 (1)</sup> SA 1171, 1177-78 (CC) (S. Afr.).

<sup>164.</sup> Id. at 1182.

<sup>165.</sup> See [1989] 1 W.L.R. 654, 657 (A.C.).

<sup>166.</sup> Id. at 656.

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Therefore, the situation in *C v*. *C* differed markedly from the cases of *Thomson* and *Sonderup* in that the final consent order explicitly stated that the parents were to remain joint guardians of the child.

These courts have even noted the varying contexts in which *ne exeat* rights are applied. In particular, the South African Constitutional Court in *Sonderup* stated that, "[i]t has been held by courts in several jurisdictions that such a non-removal provision can, *depending on the circumstances*, confer a right of custody within the meaning of the Convention."<sup>167</sup> The Canadian Supreme Court in *Thomson* further clarified what these differing circumstances may entail when it emphasized "the purely interim nature of the mother's custody in the present case,"<sup>168</sup> and explained that the Court's approach would differ if the facts involved a non-removal clause in a permanent custody order.<sup>169</sup> The Court clarified the distinction further by stipulating that a non-removal clause in a permanent access to the non-custodial parent," but "not intended to be given the same level of protection by the Convention as custody."<sup>170</sup>

The Court in *Abbott* failed to truly consider the varying contexts in which *ne exeat* rights may be applied. However, the Court briefly referenced this reality when it noted that "[t]his Court need not decide the status of *ne exeat* orders lacking parent consent provisions."<sup>171</sup> Although it seems that the Court accepted that *ne exeat* rights might be included in custody dispute orders for a variety of different reasons, the Court failed to take this fact into account and instead broadly concluded that *ne exeat* rights always constitute rights of custody under the Hague Convention.

<sup>167. 2001 (1)</sup> SA at 1182 (S. Afr.) (emphasis added).

<sup>168. [1994] 10</sup> W.W.R. 513, 540 (Can.).

<sup>169.</sup> Id. at 540-41.

<sup>170.</sup> *Id.* "I agree that the insertion of a non-removal clause in a permanent order of custody does not result in a right of custody being retained by the court and therefore does not result in a wrongful removal, as defined in the Convention, in circumstances where the custodial parent moves with the child to a new jurisdiction." *Id.* at 553.

<sup>171.</sup> Abbott, 130 S. Ct. at 1992.

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### C. The Interpretation of Ne Exeat Rights Requires a Context Specific Analysis in All Cases

The U.S. Supreme Court in *Abbott*, along with other high courts in other countries,<sup>172</sup> stressed the importance of uniformly interpreting whether *ne exeat* rights constitute rights of custody under the Hague Convention.<sup>173</sup> This emphasis on uniformity is not unwarranted, as there is a recognized notion that "uniformity of interpretation is inherent in the design of treaties."<sup>174</sup> The necessity for judicial uniformity in treaty interpretation naturally follows from the fact that a treaty is founded upon "a single, uniform content shaped by the mutual design of the treaty parties."<sup>175</sup>

In an effort to facilitate uniformity in treaty interpretation, the Vienna Convention on the Law of Treaties (Vienna Convention) prescribes methods for treaty construction.<sup>176</sup> Specifically, the Vienna Convention states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>177</sup> It also provides that in determining the context for the purpose of interpretation of a treaty, certain other documents may also be considered.<sup>178</sup>

Based on these foundational principles of treaty interpretation, a court must first look to the text of the Hague Convention to construe the meaning of custody rights and access rights. The treaty's definitions provide little clarity on the scope of these terms.<sup>179</sup> In fact, as the Court in *Abbott* noted, the Hague Convention specifically failed to define custody in precise terms or refer to the laws of

Id.

<sup>172.</sup> E.g., In re Marriage of Resina [1991] FamCA 33, ¶ 22 (Austl.), available at http://www.austlii.edu.au/au/cases/cth/family\_ct/1991/33.html.

<sup>173.</sup> *Abbott*, 130 S. Ct. at 1991 ("This uniform, text-based approach ensures international consistency in interpreting the Convention.").

<sup>174.</sup> Michael Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L. J. 1885, 1937 (2005).

<sup>175.</sup> Id.

<sup>176.</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

<sup>177.</sup> Id. art. 31.

<sup>178.</sup> Id. Such documents include:

<sup>(</sup>a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

<sup>179.</sup> See Hague Convention, supra note 3, art. 5.

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different nations pertaining to parental rights.<sup>180</sup> Other important terms, such as habitual residence, are not defined in the Hague Convention at all.<sup>181</sup> Therefore, the Hague Convention's text lacks guidance, which has "important implications for certain terms."<sup>182</sup>

Looking then to the objects and purpose of the Hague Convention, Article 1 states that the Convention's objects are: "a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."<sup>183</sup> To give effect to these purposes, Article 7 of the Convention provides that "[c]entral Authorities shall *co-operate* with each other and promote *co-operation* amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention."<sup>184</sup> Article 21, which concerns rights of access, also notes that, "[t]he Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing *respect* for the conditions to which the exercise of these rights may be subject."<sup>185</sup> The Perez-Vera Report further underlies the Hague Convention's objectives of co-operation, stating that it "is above all a convention which seeks to prevent the international removal of children by creating a system of close co-operation among the judicial and administrative authorities of the Contracting States."186

There is a common theme of co-operation and respect between Contracting States. This notion does not lead to a conclusion that *ne exeat* rights *always* constitute rights of custody. As previously indicated, *ne exeat* rights have been granted by courts in different contexts for a variety reasons. This explicit theme of respect and the uncertainty about the scope of the rights of custody lends itself to the conclusion that there need not be a general international acceptance of whether *ne exeat* rights constitute rights of custody under the

<sup>180.</sup> Abbott, 130 S. Ct. at 1995 (citing the Perez-Vera Report, supra note 139, at 446-48.

<sup>181.</sup> Vivatvaraphol, *supra* note 4, at 3340.

<sup>182.</sup> *Id.* 

<sup>183.</sup> Hague Convention, *supra* note 3, art. 1 (emphasis added).

<sup>184.</sup> Id. art. 7 (emphasis added).

<sup>185.</sup> Id. art. 21 (emphasis added).

<sup>186.</sup> PEREZ-VERA REPORT, *supra* note 139, at 435 (emphasis added).

Hague Convention. Rather, it appears that based on the Hague Convention's text, courts must take into account the varying contexts in which the clause was included in the custody agreement when determining whether a parent's *ne exeat* right constituted a right of custody.

# V. CONCLUSION

In *Abbott v. Abbott*, rather than framing the issue in a casespecific manner, the Court posed the underlying issue as whether *ne exeat* rights constitute "rights of custody" under the Hague Convention.<sup>187</sup> While the Court focused on creating a uniform and consistent standard to apply in Hague Convention cases involving *ne exeat* rights, it misconstrued the Convention's objectives and ultimately rendered an overly broad decision that contradicts the text of the treaty itself.<sup>188</sup>

<sup>187.</sup> See supra Part IV.A.

<sup>188.</sup> See supra Part IV.C.