A *Ne Exeat* Right is a "Right of Custody" for the Purposes of the Hague Convention: *Abbott v. Abbott*  

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A Ne Exeat Right is a “Right of Custody” for the Purposes of the Hague Convention: Abbott v. Abbott

UNITED STATES—INTERNATIONAL LAW—THE HAGUE CONVENTION—RIGHTS OF CUSTODY: The United States Supreme Court held that a father’s grant of a ne exeat right by the Chilean government was a “right of custody” under the Hague Convention and the father was entitled to seek a return remedy of the child. 


I. THE FACTS OF ABBOTT .................................................. 523
II. THE PROCEDURAL HISTORY OF ABBOTT ....................... 524
III. THE UNITED STATES SUPREME COURT OPINIONS IN ABBOTT ................................................................. 526
   A. Justice Kennedy’s Majority Opinion.......................... 526
   B. Justice Stevens’s Dissent .............................................. 531
IV. PRECEDENT LEADING TO THE ABBOTT DECISION ....... 533
   A. The Second Circuit: Croll v. Croll ............................... 534
   B. The Ninth Circuit: Gonzalez v. Gutierrez ..................... 536
   C. The Fourth Circuit: Fawcett v. McRoberts ................... 537
   D. The Eleventh Circuit Furnes v. Reeves ..................... 538
V. THE SUPREME COURT CORRECTLY INTERPRETED NE EXEAT RIGHTS ....................................................... 540

I. THE FACTS OF ABBOTT

The facts of this case surround the dissolution of the Abbott marriage and the subsequent custody dispute over their young son, A.J.A.1 The Abbots, Timothy and Jacquelyn Vaye, were married in 1992 and had their son in 1995.2 The Abbots moved to Chile and, while in Chile, separated in March 2003.3 Following their divorce, Ms. Abbott received custody of their child, while Mr.

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2. Abbott, 130 S. Ct. at 1988. Mr. Abbott is a British citizen and Ms. Abbott is a citizen of the United States. Id.
3. Id. Mr. Abbott worked in the field of astronomy and before moving to Chile, the couple lived in Hawaii, where their son was born. Id.
Abbott maintained visitation rights. In addition to visitation rights, Mr. Abbott obtained a *ne exeat* right, under the Chilean Minors Law, which required that he consent to Ms. Abbott’s removal of A.J.A. from Chile. Ms. Abbott grew concerned that Mr. Abbott intended to abduct their son because during the custody battle, Mr. Abbott filed for a British passport for their son. Thus, Ms. Abbott removed the child to the United States and was found residing in Texas by a private investigator hired by Mr. Abbott. Ms. Abbott filed for divorce, and following the removal of A.J.A. from Chile, Mr. Abbott filed suit.

II. THE PROCEDURAL HISTORY OF ABBOTT

The petitioner, Mr. Abbott, filed suit in Texas state court, seeking visitation rights and the return of A.J.A. to Chile. In February 2006, the court denied the return request, but granted Mr. Abbott visitation rights. Three months later, Mr. Abbott filed another suit in the United States District Court for the Western District of Texas, and requested the return of A.J.A. to Chile under the provisions of the Hague Convention on Civil Aspects of International Child Abduction. Mr. Abbott argued that his *ne exeat* right included visits every other weekend and for the entire month of February. Ms. Abbott also had a *ne exeat* right, and both parents had to consent before the boy was taken out of Chile. Ms. Abbott requested that she should be the one to determine where the boy lived, and that her ex-husband should only be entitled to supervised visitation rights.

Part of the ICARA reads:

(a) Findings
The Congress makes the following findings:
(1) The international abduction or wrongful retention of children is harmful to their well-being.
(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as


Therefore, his child was wrongfully removed from Chile and a return remedy was necessary.\textsuperscript{13} Ms. Abbott agreed that she violated Chilean law by removing the child, but argued that she did not violate the Hague Convention.\textsuperscript{14} The district court, in July of 2007, denied Mr. Abbott’s request.\textsuperscript{15} Mr. Abbott appealed to the United States Court of Appeals for the Fifth Circuit.\textsuperscript{16} The Fifth Circuit affirmed the decision of the district court, which resulted in a circuit split.\textsuperscript{17} This prompted the Supreme Court to grant certiorari to determine whether a parent with a \textit{ne exeat} right has a “right of custody” under the Hague Convention.\textsuperscript{18}
III. THE UNITED STATES SUPREME COURT OPINIONS IN *ABBOTT*

The United States Supreme Court, in a six to three vote, reversed the decision of the Fifth Circuit, resolved the circuit split, and held that a *ne exeat* right is a "right of custody" under the Hague Convention.\(^{19}\) Therefore, the Supreme Court remanded the case to determine whether the child met one of the exceptions of the Hague Convention that would allow him to remain in the United States.\(^{20}\)

A. *Justice Kennedy's Majority Opinion*

Justice Kennedy wrote the majority opinion.\(^{21}\) His opinion first reviewed the pertinent sections of the Act, specifically, sections providing when removal is wrongful, defining "rights of custody" and "rights of access," and setting forth the return remedy.\(^{22}\) A child removed from a country in violation of the parent's "rights of custody," is found to be removed wrongfully.\(^{23}\) If a child is re-


\(^{20}\) *Id.* at 1997. Specifically, the Hague Convention provides that a child will not be returned to his home country if:

- the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.


\(^{21}\) *Abbott*, 130 S. Ct. at 1987.

\(^{22}\) *Id.* at 1989-97.

The removal or the retention of a child is to be considered wrongful where –

- it is in breach of rights of custody attributed to a person, an institution or any other 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
- 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.

Hague Convention, *supra* note 20, at art. 3.

\(^{23}\) *Abbott*, 130 S. Ct. at 1989. In order for the child to be removed wrongfully from the country, the parent must have "rights of custody" which have been specifically defined by the Hague Convention. For the purposes of this Convention –
moved wrongfully, he is to be returned to the country of origin unless an exception applies.24

Both the Abbotts and the Court agreed that A.J A.'s case fell within the realm of the Hague Convention because both Chile and the United States were contracting states and the child was within the suitable age interval.25 Consequently, the Supreme Court considered Chilean law to determine the type of custody granted to Mr. Abbott.26 Chilean courts issued Mr. Abbott a ne exeat right, along with "direct and regular" visitation with his son.27 A ne exeat right under Chilean law requires that both parents give consent for the child to leave the country.28 Justice Kennedy classified Mr. Abbott's parental right as a joint right of custody because Mr. Abbott could exercise his ne exeat right and determine the child's country of habitual residence.29 A parent who has "rights of custody," is able to determine (a) the rights regarding the child's habitual residence, and (b) the rights regarding the safekeeping of the child.30 The Court found that the child's "place of residence" described in the language of the Convention included the child's country of residence.31 In addition, the Court held that Mr. Abbott had the ability to determine the safekeeping of the child by choosing his home country.32 The Court recognized that the safekeep-

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25. Abbott, 130 S. Ct. at 1990. "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."
27. Id.
28. Id. Chilean Law provides that:
Should the custody of a child have not been granted by the judge to either parent or to a third party, the minor may not exit the country without the authorization of both parents, or from the one who had recognized him . . . . If such authorization cannot be granted or if, without reasonable grounds, is refused by the person from whom it is required, it may be granted by the juvenile judge having jurisdiction over the place of residence of the minor.
32. Id. at 1991.
ing of the child, his native language, and his upbringing were all linked to the country in which he lived for the beginning part of his life. Justice Kennedy further reinforced that although other contracting states may have different definitions of custody, it is the Convention's definition of custody that was controlling in the case.

The majority next rejected Ms. Abbott's arguments. First, Ms. Abbott argued that Mr. Abbott did not have a "right of custody" because Mr. Abbott was not able to execute his right as mandated by the Hague Convention. The Hague Convention required that at the time of the child's abduction, the parent was exercising his custody rights. The Court found that if Mr. Abbott had the opportunity, he would have exercised his ne exeat right. In fact, the Court stated that this right was an automatic right that was created the instant the child was removed from the country without the other parent's consent. Additionally, the Supreme Court disagreed with the court of appeal's statement that the child should not be returned because a ne exeat right could only be executed when the child was in his home country. Second, the majority refuted the argument that Mr. Abbott's rights were solely "rights of access." The Court found that a ne exeat right could not be honored if Mr. Abbott had periods of visitation in the United States and, in fact, it could only be honored by the return of the

33. Id. at 1991. The Court found that "[f]ew decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self-definition, are linked in an inextricable way to the child's country of residence." Id.

34. Id. at 1991. Using the uniform definition of custody "forecloses courts from relying on definitions of custody confined by local law usage, definitions that may undermine recognition of custodial arrangements in other countries or in different legal traditions, including the civil-law tradition." Id.; see supra note 23, defining "custody."

35. Id. at 1992.

36. Abbott, 130 S. Ct. at 1992. "The Convention protects rights of custody when '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.'" Id. at 1991-92 (citing Hague Convention, supra note 20, at art. 3(b)).

37. Id.

38. Id. Mr. Abbott would not have given consent had he have known Ms. Abbott was taking the child from Chile. Id. at 1992.

39. Id. at 1992.

40. Id. The Supreme Court found that "[t]he Court of Appeals' conclusion that a breach of a ne exeat right does not give rise to a return remedy would render the Convention meaningless in many cases where it is most needed." Id.

41. Abbott, 130 S. Ct. at 1992. The Court noted that "[t]he joint right to decide a child's country of residence is not even arguably a 'right to take a child for a limited period of time' or a 'visitation right.'" Id.
child.\textsuperscript{42} Finally, the Supreme Court denied Ms. Abbott’s argument that the *ne exeat* right was solely for the preservation of jurisdiction over the child and it did not give Mr. Abbott any consent conditions, because the Court found Mr. Abbott, under the Minors Law, had to consent to the child leaving the country.\textsuperscript{43}

Moreover, the Court noted that the State Department agreed that a *ne exeat* right was a “right of custody.”\textsuperscript{44} The Executive Branch’s understanding of the Convention was important when determining interpretations of the Hague Convention because it had a broad understanding of the Act and the repercussions concerning improper interpretation.\textsuperscript{45} The majority noted that this decision, and thus the Court’s definition of “rights of custody,” was also important for instances where a parent was reclaiming children that were taken from this country in violation of the Hague Convention.\textsuperscript{46}

Furthermore, other contracting states have also found that a *ne exeat* right is a “right of custody” under the Hague Convention.\textsuperscript{47} Congress required a consistent interpretation of the Hague Convention among those states.\textsuperscript{48} The Supreme Court noted that contracting states such as Australia, United Kingdom, Israel, Austria, South Africa, and Germany agreed that *ne exeat* rights were “rights of custody” for the purposes of the Hague Convention.\textsuperscript{49} However, some contracting states have disagreed with this interpretation and found that *ne exeat* rights applied to “rights of access” and not “rights of custody.”\textsuperscript{50} For example, the Supreme Court referenced a 1994 case, where a Canadian court stated in dicta that *ne exeat* rights do not require the return of the child to his or her home country.\textsuperscript{51} The majority all cited to two French

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 1993.
\textsuperscript{45} Id. at 1993. The Court noted that “[i]t is well settled that the Executive Branch’s interpretation of a treaty ‘is entitled to great weight.’” \textit{Id.} (citing \textit{Sumitomo Shoji Am., Inc. v. Avagliano}, 457 U.S. 176 (1982)).
\textsuperscript{46} \textit{Abbott}, 130 S. Ct. at 1993.
\textsuperscript{47} Id. “In interpreting any treaty, [t]he “opinions of our sister signatories” . . . are “entitled to considerable weight.”” \textit{Id.} (citing \textit{El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng}, 525 U.S. 155, 176 (1999)).
\textsuperscript{48} Id. “(3) In enacting this Act the Congress recognizes- (A) the international character of the Convention; and (B) the need for uniform international interpretation of the Convention.” 42 U.S.C. § 11601(b)(3)(B) (emphasis added).
\textsuperscript{49} \textit{Abbott}, 130 S. Ct. at 1993-94.
\textsuperscript{50} Id. at 1994; \textit{see supra} note 23.
\textsuperscript{51} Id. However, the Court found that “the Canadian cases are not precisely on point here” and the child was returned to his country of origin for other reasons. \textit{Id.} (citing \textit{Thompson v. Thompson}, [1994] 3 S.C.R. 551, 589-90 (Can.)).
cases which added to the discrepancy because these French courts disagreed within their own country. However, as indicated by the Court, many scholars agreed that *ne exeat* rights are "rights of custody." The scholars noted that the Hague Convention was implemented over thirty years ago, before the more modern custody arrangements were common.

In addition, the Court referred to a report, known as the Perez-Vera Report, which outlined the history of the Hague Convention. This Report is in accord with the Court’s view that *ne exeat* rights were "rights of custody." The Report stated that the term "rights of custody" in the Hague Convention referred to numerous ways in which courts could interpret custody arrangements and, therefore, courts should refrain from a rigid interpretation.

Finally, the majority discussed the Convention's purpose of preventing international child abduction, and found that Mr. Abbott's situation was the fact pattern that the Hague Convention was designed to prevent. Therefore, the Court found Mr. Abbott's *ne exeat* right was a "right of custody."

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53. *Id.*

54. *Abbott*, 130 S. Ct. at 1994. More modern custody arrangements have developed in the thirty years since the meeting of the Hague Convention. The Court stated that "[s]ince 1980, however, joint custodial arrangements have become more common. And, within this framework, most contracting states and scholars now recognize that *ne exeat* rights are rights of custody." *Id.*

55. *Id.* at 1995. The court noted that there were conflicting views regarding whether the Report was the official history of the Convention. *Id.* (citing 1980 Conference de La Haye de droit international prive, Enlévement d’enfants, E. Perez-Vera, Explanatory Report, in 3 Actes et Documents de la Quatorzième session, pp. 426 (1982)).

56. *Id.*

57. *Id.* Specifically, the Court cited to the Perez Report which showed that "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.'" *Id.* (citing Perez-Vera Report, supra note 55).

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

B. Justice Stevens's Dissent

Justice Stevens wrote the dissenting opinion in which two other justices joined. Justice Stevens argued that Ms. Abbott maintained custody of A.J.A., while Mr. Abbott only retained visitation rights and a veto power regarding where his son could live. However, the dissent recognized that this veto power was given to all parents under Chilean law by default. Justice Stevens used the word "custodial parent" when referring to the "rights of custody" and explained that the purpose of the Convention was to protect custodial parents when a noncustodial parent abducted the child. The dissent argued that Ms. Abbott was the custodial parent and thus already protected. Justice Stevens distinguished between the wrongful removal of the child that required his return to his country of residence and the wrongful removal because it violated a local law or the parent's "rights of access." He acknowledged that although Ms. Abbott violated Chilean law by taking the child to another country, other remedies were available for Mr. Abbott when his "rights of access" were violated that did not include the return of the child.

Justice Stevens argued that Mr. Abbott only had "rights of access" for the purposes of the Hague Convention for several reasons. First, Justice Stevens noted that Mr. Abbott did not have any rights relating to the daily care of A.J.A. Justice Stevens argued that along with Mr. Abbott's access rights, Mr. Abbott's

60. Id. at 1997 (Stevens, J., dissenting).
61. Id. at 1998.
62. Id. at 1998. Justice Stevens demonstrated that "[t]he drafters determined that when a noncustodial parent abducts a child across international borders, the best remedy is return of that child to his or her country of habitual residence or, in other words, the best remedy is return of the child to his or her custodial parent." Id. (citing Perez-Vera Report, supra note 55, at 430 (emphasis in original)).
64. Id.
65. Id. at 1999. The dissent, citing to the Hague Convention, illustrated the remedies available for a noncustodial parent. "For those removals that frustrate a noncustodial parent's 'rights of access,' the Convention provides that the noncustodial parent may file an application 'to make arrangements for organizing or securing the effective exercise of rights of access;' but he may not force the child's return." Id. (citing Hague Convention, supra note 20, at art. 21).
66. Id.
67. Id. at 2000. Justice Stevens showed that "[t]he travel restriction does not confer upon Mr. Abbott affirmative power to make any number of decisions that are vital to A.J. A.'s physical, psychological, and cultural development." Id. (emphasis in original).
only other right was a limited veto power. Justice Stevens found that the phrase the “right to determine the child’s place of residence,” located in the definition of “rights of custody,” was just one example of the rights the parent may or may not possess. This language in the Act, as the dissent concluded, referred to the right to choose the child’s home and not the right to keep him in the country.

Additionally, the dissent stated that the majority’s understanding of the Act was improper because it replaced the word “place” with the word “country” in the phrase “place of residence.” Justice Stevens noted that the drafters of the Act included “country” when they wanted to refer to it and purposely omitted “country” when they did not want to refer to it. Furthermore, Justice Stevens emphasized that the majority’s decision assigned any parent with any visitation rights in Chile, “rights of custody” because of the default clause granting a ne exeat right. The dissent feared that the majority opinion abolished any distinction between “rights of custody” and “rights of access” as deliberately created by the Hague Convention.

Additionally, the dissent addressed the majority opinion’s arguments regarding the opinions of the State Department and of other contracting states. Justice Stevens believed that the State Department’s opinion should be given lesser weight than the majority proposed because the State Department’s view today is different.

69. Abbott, 130 S. Ct. at 2000 (Stevens, J., dissenting). Justice Stevens found that “just because rights of custody can be shared by two parents, it does not follow that the drafters intended this limited veto power to be a right of custody.” Id.
70. Id. at 2001.
71. Id.
72. Id. That specific language in the Act led Justice Stevens “to conclude that the ‘right to determine the child’s place of residence’ means the power to set or fix the location of the child’s home. It does not refer to the more abstract power to keep a child within one nation’s borders.” Id.
73. Id. at 2002.
74. Abbott, 130 S. Ct. at 2002 (Stevens, J., dissenting). The dissent noted that “[i]n interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning.” Id. at 2003 (citing Russello v. United States, 464 U.S. 16, 23 (1983)).
75. Id. at 2006. The default clause provides that “once the court has decreed that one of the parents has visitation rights, that parent’s ‘authorization ... shall also be required’ before the child may be taken out of the country, subject to court override only where authorization ‘cannot be granted or is denied without good reason.” Id. at 1990.
76. Id. at 2006.
77. Id. at 2007.
Abbott v. Abbott

ficient than when the Act was signed. Justice Stevens explained that when originally drafted, the State Department believed the purpose of the Hague Convention was to prevent wrongful abduction of children by parents attempting to get custody, while today, the view is broader finding that a ne exeat right is a "right of custody." In addition, the dissenting opinion distinguished the cases cited by the majority regarding other contracting states, which held that ne exeat rights are "rights of custody." For example, as Justice Stevens highlighted, most of the cases cited by the majority involved situations where both parents had joint custody rights and one parent took the child to another contracting state against the other parent's ne exeat right. Justice Stevens argued that Mr. Abbott did not have a joint custody right and therefore, his suit could be distinguished from the cases relied upon by the majority.

IV. PRECEDENT LEADING TO THE ABBOTT DECISION

Abbott clarified the numerous conflicting decisions among the circuits regarding the Hague Convention and ne exeat rights as "rights of custody." A meeting of the Fourteenth Hague Conference discussed remedies for international child abduction during a Convention on the Civil Aspects of International Child Abduction. This Conference took place on October 24 and 25, 1980. However, the United States did not become a member of the Hague Convention until it enacted the International Child Abduction Remedies Act in 1988. Currently, the Hague Convention has been adopted by eighty-two nations, mainly throughout Europe and the Americas. The main objectives of the Hague Convention were to determine a uniform procedure for children who were taken wrongfully from their home country to be returned to

78. Id. Justice Stevens found that "[t]he Department of State's position, which supports the Court's conclusion, is newly memorialized, and is possibly inconsistent with the Department's earlier position." Id. (citation omitted).
80. Id. at 2008-10.
81. Id.
82. Id.
83. Id. at 1983.
85. Perez-Vera Report, supra note 55.
87. G. M. Filisko, When Global families Fail: As family law takes on global dimensions, international treaties may hold the key to resolving disputes, 96 A.B.A. J. 56, 60 (July 2010).
such home country, and to prevent parents from traveling to a different country to find a more suitable custody arrangement.\textsuperscript{88}

Several guidelines must be met before a child falls under the provisions of the Hague Convention.\textsuperscript{89} First, the child must be removed from the home country in violation of the other parent’s “rights of custody.”\textsuperscript{90} Second, the rights must have been in effect during the wrongful removal.\textsuperscript{91} Third, both states must be contracting parties to the Hague Convention.\textsuperscript{92} Finally, if the situation does not meet any of the four exceptions that would allow the child to remain in the current country, he must be returned.\textsuperscript{93} For example, the Hague Convention allows the child to remain in the country if he will be in danger if returned to his habitual country, or if the child is of a suitable age to determine that he wants to remain in the current country.\textsuperscript{94}

Two different outlooks developed among the circuits regarding the interpretation of \textit{ne exeat} rights as “rights of custody” under the Hague Convention.\textsuperscript{95} The Eleventh Circuit defined \textit{ne exeat} rights as “rights of custody.”\textsuperscript{96} However, courts sitting in the Fourth, Fifth, and Ninth Circuits followed the ruling of the Second Circuit in \textit{Croll v. Croll}\textsuperscript{97} and found that \textit{ne exeat} rights were not “rights of custody.”\textsuperscript{98} The court in \textit{Croll} found that a \textit{ne exeat} right only grants the parent “rights of access” under the convention and not “rights of custody.”\textsuperscript{99}

\textbf{A. The Second Circuit: \textit{Croll v. Croll}}

In \textit{Croll}, the parents of a minor child living in Hong Kong separated.\textsuperscript{100} A custody order granted the mother sole custody and the father visitation rights.\textsuperscript{101} In addition, the father was given a \textit{ne}
exeat right. The mother took the child to the United States without the father's consent. After the father sued and won in district court, the mother appealed to the Second Circuit, which reversed the lower court's decision.

Judge Jacobs, writing for the majority on the Second Circuit, held that a ne exeat right is not a "right of custody." The court analyzed the word "custody" using several sources including Black's Law Dictionary, Webster's Third Dictionary, and the Random House Dictionary of the English Language, and found that the custodial parent was the primary caregiver. The court disagreed with the father's argument that he had a "right of custody" because he could determine the child's place of residence. Judge Jacobs reasoned that determining the child's country of residence was different from choosing the place of residence within that country. He also found that the word "determine" in "right to determine" required the parent to select a child's address, school district, and whether he or she lived in a house or apartment, not just the country in which the child lived. In addition, the court stated that Mr. Croll did not actually exercise his right pursuant to the requirements of the Hague Convention.

102. Id.
103. Id. Mr. Croll was on a business trip away from Hong Kong, and when he returned, he learned his daughter was gone. Id.
104. Croll, 229 F.3d at 135. The father sued for the return of the child pursuant to ICARA in the Southern District of New York. Id. The court of appeals granted the petition and ordered the return of the child to Hong Kong. Id. The court found that because the father had to consent to the child leaving Hong Kong, he had a "right of custody" under the Hague Convention. Id. The court also found that because Mr. Croll had an order that provided that "Christina not be removed from Hong Kong before her 18th birthday without either leave of court of both parents' consent," Mr. Croll had a "right of custody." Id. at 136.
105. Croll, 229 F.3d at 143. Justices Jacobs and Michel held that a ne exeat right was not a right of custody. Id. at 134. Justice Sotomayor dissented. Id. (Sotomayor, J., dissenting).
106. Id. at 138. The Court found that "Black's Law Dictionary defines custody generally as 'the care and control of a thing or person for inspection, preservation or security'; parental custody as 'the care, control, and maintenance of a child awarded by a court.'" Id. The court continued by stating "[t]aking these definitions together, custody of a child entails primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc." Id.
107. Id. at 139. Specifically, the court found that "[i]t 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." Id.
108. Id.
109. Croll, 229 F.3d at 139.
110. Id. at 140. The right conferred by the ne exeat clause is not one that Mr. Croll 'actually exercised,' and it is circular to say that he would have exercised it but for Christina's removal, because the right itself concerns nothing but removal itself, and would never
phasized that had the child returned to Hong Kong, Mr. Croll would not be required to care for her on a daily basis because Mr. Croll was only entitled to visitation rights. Under this reasoning, the court of appeals found that a *ne exeat* right was not a “right of custody.” Judge Sotomayor dissented and found that a *ne exeat* right was indeed a “right of custody.” Similar to the reasoning in *Abbott*, Judge Sotomayor believed the purposes behind the convention required a reading of the treaty to include *ne exeat* rights as “rights of custody.”

B. The Ninth Circuit: Gonzalez v. Gutierrez

The Ninth Circuit followed *Croll* in *Gonzalez v. Gutierrez* and held that *ne exeat* rights were not “rights of custody.” *Gonzalez* involved Mexican citizens, Rosa Teresa Gutierrez and Eduardo Arce Gonzalez, who had two children together. The couple had a volatile marriage and after the dissolution of that marriage, Ms. Gutierrez took the children to the United States without Mr. Gonzalez’s permission. Mr. Gonzalez, pursuant to a custody agreement, had a *ne exeat* right, which required that he give permission for the minor children to leave Mexico. Mr. Gonzalez petitioned for the return of the children under the Hague Convention, and on appeal, the Ninth Circuit agreed with the ruling in *Croll* and found that the children were not wrongfully removed.

The Ninth Circuit held that Mr. Gonzalez had “rights of access,” and that his *ne exeat* right was a mere veto power protecting those rights. Similar to the Second Circuit, the Ninth Circuit stated that because Mr. Gonzalez could not determine the children’s res-
idence within Mexico, he did not have "rights of custody." The court acknowledged that Mr. Gonzalez's "rights of access" were violated and he may be entitled to a remedy for those rights, however, that remedy was not the return of the children. The court researched the drafting history of the Hague Convention and found that the drafters clarified that a non-custodial parent was not entitled to a return remedy. Finally, the Ninth Circuit highlighted that in 1996 there was an attempt to reform the Hague Convention without the discussion of ne exeat rights. The court found that this reform movement retained the original definitions of "rights of custody" and "rights of access," refusing to allow for a return remedy when "rights of access" were violated. Therefore, the Ninth Circuit held that ne exeat rights were not "rights of custody."

C. The Fourth Circuit: Fawcett v. McRoberts

Three years after Croll, Judge Motz, writing for the Fourth Circuit in Fawcett v. McRoberts agreed with Croll and Gonzalez and held that ne exeat rights were not "rights of custody." This case involved a couple, Mr. McRoberts and Ms. Fawcett, from Scotland. The couple married and had two children, however, only one child's custody was in dispute. Following their divorce, Mr. McRoberts obtained custody of their son, Travis. Ms. Fawcett, fearing Mr. McRoberts would take the child to the United

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122. Gonzalez, 311 F.3d at 949. Mr. Gonzalez cannot "direct with any specificity where the children will reside either within the borders of Mexico or within any other country. This, in our view, hardly amounts to a right of custody, in the plainest sense of the term." Id.
123. Id. at 950.
124. Id. at 952. The court found that the drafters' view "was that the mandatory remedy of return ought not be available to the left-behind non-custodial parent." Id.
125. Id. at 953. Although the Hague Convention sought to allow the "greatest possible number of cases to be brought into consideration," the Court reasoned that this issue was raised during the drafting session and the drafters determined that these rights were not "rights of custody." Id. at 951.
126. Id.
127. Gonzalez, 311 F.3d at 954.
128. 326 F.3d 491 (4th Cir. 2003).
129. Fawcett, 326 F.3d at 491.
130. Id. at 492.
131. Id. The custody dispute involved the couple's son, Travis. Id. Melody, their daughter, was not involved with this suit. Id.
132. Id. Ms. Fawcett maintained visitation rights on weekends, during the summer, and on holidays. Id.
States, obtained a court-ordered *ne exeat* right.\textsuperscript{133} After this *ne exeat* right was ordered, Mr. McRoberts took Travis to the United States where a petition was filed for his return.\textsuperscript{134}

On appeal, the Fourth Circuit found that pursuant to Section 2 of Scotland's Children Act, Ms. Fawcett had a *ne exeat* right.\textsuperscript{135} However, the court, similar to the reasoning of the Second and Ninth Circuits, found that Ms. Fawcett only obtained "rights of access" because she could not determine where Travis lived within the country of Scotland.\textsuperscript{136} The court stated that Ms. Fawcett only had a veto power to protect her "rights of access."\textsuperscript{137} Therefore, she did not have "rights of custody" and the return of the child to Scotland was incorrect.\textsuperscript{138}

\textbf{D. The Eleventh Circuit Furnes v. Reeves}

Disagreeing with the Croll, Gonzalez, and Fawcett cases, the Eleventh Circuit, in Furnes v. Reeves, held that *ne exeat* rights were "rights of custody."\textsuperscript{139} Mr. Furnes and Ms. Reeves, living in Norway, married and had a daughter, Jessica.\textsuperscript{140} Following the couple's divorce, the court granted the couple "joint parental responsibility" of Jessica.\textsuperscript{141} The court ordered Jessica to live with Ms. Reeves, but Mr. Furnes retained visitation rights and a *ne exeat* right.\textsuperscript{142}

\textsuperscript{133} Id. at 493. The Sheriff Court (Scotland) granted Ms. Fawcett's order that "Mr. McRoberts . . . gave an undertaking to the Court that he will not remove the aforementioned children from Scotland to the United States." \textit{Id.}

\textsuperscript{134} Id. Mr. McRoberts took the child with his second wife. \textit{Id.} He attempted to hide Travis' whereabouts from Ms. Fawcett. \textit{Id.} Scotland's Sheriff Court found that Mr. McRoberts wrongfully removed Travis from Scotland. \textit{Id.} Ms. Fawcett filed a petition in district court for the return of Travis to Scotland, which was granted. \textit{Fawcett,} 326 F.3d at 493. Mr. McRoberts complied with that order, returned Travis to Scotland, and then appealed the order. \textit{Id.}

\textsuperscript{135} Fawcett, 326 F.3d at 498. "Section 2 of the Children (Scotland) Act provides that a parent has the right, \textit{inter alia,} 'to have the child living with him or otherwise to regulate the child's residence.'" \textit{Id.} (emphasis in original).

\textsuperscript{136} Id. at 499-500.

\textsuperscript{137} \textit{Id.} The court found that the Children (Scotland) Act "serve[d] only to allow a parent with access rights to impose a limitation on the custodial parent's right to expatriate his child." \textit{Id.}

\textsuperscript{138} Id. at 501.

\textsuperscript{139} Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004).

\textsuperscript{140} \textit{Furnes,} 362 F.3d at 704.

\textsuperscript{141} \textit{Id.} at 706. Ms. Reeves accused Mr. Furnes of abuse, which proved to be unfounded. \textit{Id.} Custody was taken away from Ms. Reeves, but the couple worked out an agreement so she would receive custody. \textit{Id.} at 705.

\textsuperscript{142} \textit{Id.} at 707-08. Mr. Furnes received the *ne exeat* right pursuant to Norway's Children Act. \textit{Id.} The Act provided that "[i]f one of the parents has sole parental responsibility, the other parent may not object to the child moving abroad. \textit{If the parents have joint paren-
During the summer of 2001, Ms. Reeves took Jessica to the United States with Mr. Furnes's permission, conditioned upon Jessica returning in the fall of 2001. However, Ms. Reeves did not comply with this condition and remained in the United States. On appeal, the Eleventh Circuit reversed the ruling of the district court and found that Mr. Furnes had "rights of custody" and therefore, he was entitled to the return of his daughter.

Justice Hull wrote the unanimous opinion. The court found that Mr. Furnes only needed one "right of custody" to demand the return of Jessica, and determined that Mr. Furnes' ne exeat right was such a right. Similar to the reasoning of Abbott, the Eleventh Circuit ruled that although Mr. Furnes could not decide where his daughter lived within Norway, he could determine whether she was able to move outside of the country, and therefore had a right to determine Jessica's place of residence pursuant to the definition of "rights of custody." Justice Hull focused on the purpose of the Hague Convention to "deter international [child] abduction," which led to the conclusion that a ne exeat right fulfilled this purpose. The Eleventh Circuit, similar to the Abbott opinion, found that because Mr. Furnes was able to determine what language Jessica spoke, the culture she grew up in, and her specific group of friends she surrounded herself with Mr. Furnes had rights regarding Jessica's care.

\[tal responsibility, both of them must consent to the child moving abroad." Id. (emphasis in original) (citing Norway's Act No. 7 of 8 Apr. 1981, relating to Children and Parents §43).\]
\[143. Id. at 708.\]
\[144. Id. In addition, Ms. Reeves attempted to conceal Jessica’s whereabouts. Id. Mr. Furnes petitioned for the return of Jessica in the district court in Atlanta, Georgia. Id. The district court agreed the removal was wrongful, however, Mr. Furnes only had "rights of access" and therefore the child would not be returned. Id.\]
\[145. Furnes, 362 F.3d at 725.\]
\[146. Id. at 704.\]
\[147. Id. at 714.\]

In analyzing whether a parent has custodial rights under the Hague Convention, it is crucial to note that the violation of a single custody right suffices to make removal of a child wrongful. That is, a parent need not have 'custody' of the child to be entitled to return of his child under the Convention; rather, he need only have one right of custody.

\[148. Id. at 715.\]
\[149. Id. The Court illustrated that because"the goal of the Hague Convention is to deter international abduction, we readily interpret the ne exeat right as including the right to determine the child's place of residence because the ne exeat right provides a parent with decision-making authority regarding the child's international relocation." Id.\]
\[150. Furnes, 362 F.3d. at 716.\]
The Eleventh Circuit also disputed the *Croll* opinion.\textsuperscript{151} The court found that a *ne exeat* right was not a mere veto power, but a shared right to determine the child's place of residence.\textsuperscript{152} In addition, the court dismissed the *Croll* reasoning that a *ne exeat* right could only be exercised when the child was wrongfully removed and therefore was not a "right of custody."\textsuperscript{153} In fact, the Eleventh Circuit reasoned that Mr. Furnes could have exercised his *ne exeat* right before the wrongful removal if Ms. Reeves complied with the agreement and asked permission to take the child.\textsuperscript{154} When Mr. Furnes granted or denied permission, he would have exercised his *ne exeat* right.\textsuperscript{155} In addition, the court disagreed with the analysis that if a child were returned to a parent with a *ne exeat* right who did not have a right to care for the child, this would frustrate the custodial arrangement.\textsuperscript{156} The court stated that the custodial parent could return with the child to the habitual country, which may be a nuisance, but would allow for the compliance with the custody arrangement.\textsuperscript{157} Therefore, the court found that generally a *ne exeat* right was a "right of custody," however, situations, similar to the *Croll* case may arise to warrant otherwise.\textsuperscript{158}

V. THE SUPREME COURT CORRECTLY INTERPRETED *NE EXEAT* RIGHTS

After ten years of conflicting decisions among the circuit courts concerning international child abductions with similar facts, the dispute was finally settled by the Supreme Court which expanded the Hague Convention.\textsuperscript{159} Courts throughout the circuits interpreted *ne exeat* rights differently until the correct interpretation was reached in *Abbott v. Abbott*.\textsuperscript{160} The United States Supreme Court was confronted with the difficult task of interpreting an almost thirty-year old treaty regarding international custody in a world that is constantly creating new custody arrangements as a

\begin{footnotes}
\item[151] Id. at 719.
\item[152] Id.
\item[153] Id.
\item[154] Id. at 720.
\item[155] *Furnes*, 362 F.3d. at 720.
\item[156] Id. at 720-21.
\item[157] Id. at 721.
\item[158] Id. at 722.
\item[159] *Abbott*, 130 S. Ct. at 1983.
\item[160] See *Croll*, 229 F.3d at 133; *Gonzalez*, 311 F.3d at 942; *Fawcett*, 326 F.3d at 491; *Furnes*, 362 F.3d at 702.
\end{footnotes}
result of the ease of international travel and the higher likelihood of international couples and families.

The decision in Abbott required an in-depth look into the history of the Hague Convention and the purposes behind the ICARA.\(^\text{161}\) The Court properly used common sense and everyday interpretations, in addition to consulting Chilean law and international cases, to reach its conclusion.\(^\text{162}\) The purpose of the Hague Convention was to prevent a child’s abduction and avoid forum shopping in search of a custody arrangement more suitable for the abducting parent.\(^\text{163}\) Although the dissent made valid points in an attempt to classify ne exeat rights as “rights of access,”\(^\text{164}\) the Abbott majority succeeded in maintaining this purpose.

Following this decision, a parent can no longer take his or her child to the United States in violation of a ne exeat right.\(^\text{165}\) The dissent argued that this decision granted a parent with a mere veto power “rights of custody” when in fact he should have “rights of access,” however, this argument was unconvincing in the eyes of the Court.\(^\text{166}\) Without this decision, a parent’s ne exeat right would be completely meaningless. A parent that takes the initiative to obtain a court ordered custody arrangement requiring the child to remain in the country unless otherwise permitted to leave, would essentially be wasting his or her time if the Supreme Court decided that a ne exeat right was not a “right of custody,” as the dissent preferred. This decision allows a parent to exercise the rights he or she is already entitled to under the laws of the parent’s home country. In fact, the abducting parent is not without a remedy. The parent can appeal to the court of his or her home country to request the ne exeat right be lifted if the parent can show good cause why the child should be permitted to leave the country.\(^\text{167}\) Abbott emphasizes that this is the means the parent should pursue, if he or she wants to leave the country with the child.\(^\text{168}\)

The Abbott decision showed the importance of determining a uniform interpretation of language in a treaty and how more modern custody agreements make this difficult.\(^\text{169}\) A treaty that is

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\(^{160}\) See Abbott, 130 S. Ct. at 1989-97.
\(^{161}\) Id.
\(^{162}\) Id. at 1989.
\(^{163}\) Id. at 1999 (Stevens, J., dissenting).
\(^{164}\) Id. at 1997.
\(^{165}\) Id. at 1998-99.
\(^{166}\) Id. at 1996-97.
\(^{167}\) Id. at 1992-93.
\(^{168}\) Abbott, 130 S. Ct. at 1990-91.
interpreted differently in various countries is almost meaningless. However, interpreting a meaning of a word, as \textit{Abbott} showed, is much more difficult than anticipated. Everyday terminology like "custody" and "right to determine" could have horrible consequences if interpreted incorrectly. The majority correctly interpreted a "right of custody" to include a \textit{ne exeat} right.\textsuperscript{170} Specfically, a parent who has a "right of custody" has a "right to determine the child's place of residence."\textsuperscript{171} The dissent's argument that the right to determine the child's place of residence did not include the country of residence goes against commonsense interpretations.\textsuperscript{172} A parent given a court ordered right to keep his or her child in a specific country determines the child's place of residence. Although the parent may not be able to determine the exact location of the house the child lives, he or she can still determine the borders that the house will fall within. The majority properly relied on dictionary definitions and rational reasoning to determine that a \textit{ne exeat} right was a "right of custody."

\textit{Abbott} expanded the treaty's grasp and allowed more cases to come before the courts.\textsuperscript{173} Although this decision was the correct one, there was still one major flaw in the \textit{Abbott} decision. This broad interpretation failed to take into account a problem that already existed with the Hague Convention. Currently, domestic violence is not an expressed exception which would allow a child to remain in the country because the mother, not the child, is experiencing the abuse.\textsuperscript{174} Although some courts have recognized a connection between domestic violence and the child's safety, others have not.\textsuperscript{175} Thus, this decision may be giving a father, without physical custody, but with a \textit{ne exeat} right, the power to have the child returned to his country.\textsuperscript{176} This would force the mother to choose between returning to the abuse to be with her child and

\begin{footnotes}
\item[170.] \textit{Id.} at 1997.
\item[171.] \textit{Id.} at 1990-91.
\item[172.] \textit{Id.} at 1999 (Stevens, J., dissenting).
\item[173.] \textit{See Abbott}, 130 S. Ct. at 1995-96.
\item[176.] Brief of the Domestic Violence Legal Empowerment & Appeals Project, the Battered Women's Justice Project-Domestic Abuse Intervention Programs, Inc., the National Coalition against Domestic Violence, Legal Momentum, and the National Network to End Domestic Violence as \textit{Amici Curie} in Support of Respondent \textit{at 3 Abbott}, 130 S. Ct. at 1983 (No. 08-645) 2008 U.S. Briefs 645 at 30-40.
\end{footnotes}
allowing the child to live with a father who never actually had physical custody.

Although domestic violence is an issue, the *Abbott* case represents the best decision, in most cases, for both the children and families. A parent that is accused of wrongfully removing the child will still have judicial options to prove that the child was not abducted. The treaty allows for other remedies to keep the child in the foreign country if the child falls within one of the exceptions defined by the Hague Convention. However, this decision encourages parents to appeal to their home country’s courts to change the custodial rights if needed. With today’s changing world and new custody arrangements, the courts must be prepared to come up with more creative interpretations to ensure a parent receives the parental custody he or she is entitled to exercise.

*Tracy Jones*

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177. *Id.* at 1997. The Court found that “[w]hile a parent possessing a *ne exeat* right has a right of custody and may seek a return remedy, a return order is not automatic.” *Id.* There are several exceptions available to that parent including if the child is in danger if returned or if the child is of a suitable age to make his or her own decision. *Id.*