

No. 08-645

**In The
Supreme Court of the United States**

TIMOTHY MARK CAMERON ABBOTT,
Petitioner,

v.

JACQUELYN VAYE ABBOTT,
Respondent.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit*

**MOTION FOR LEAVE TO FILE AMICUS BRIEF AND
BRIEF OF THE PERMANENT BUREAU OF THE HAGUE
CONFERENCE ON PRIVATE INTERNATIONAL LAW
AS AMICUS CURIAE SUPPORTING PETITIONER**

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**MOTION OF THE PERMANENT BUREAU
OF THE HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW FOR LEAVE
TO FILE A BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

Pursuant to Rule 37.2 of the Rules of this Court, the Permanent Bureau of the Hague Conference on Private International Law¹ hereby moves for leave to file the accompanying brief as *amicus curiae* in support of the Petitioner.

The Permanent Bureau is responsible for monitoring and reviewing the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*,² and for promoting its effective implementation in States Parties. This work is carried out at the request and on behalf of Member States of the Hague Conference and States Parties to the Convention.

The Permanent Bureau therefore has an interest in the correct interpretation of the Convention and in securing the prompt return of children unlawfully removed from their country of habitual residence.

The Permanent Bureau submits that the decision of the court of appeals is in error, that it poses an obstacle to the proper operation of the Convention in the United States in light of the wide use of non-

¹ Hereafter referred to as “the Permanent Bureau”.

² Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. Hereafter referred to as “the Convention”.

removal (“*ne exeat*”) provisions to regulate post-separation, divorce and other custodial arrangements, and that, because it is inconsistent with decisions adopted by courts in many other States Parties, it may have adverse effects on the operation of the Convention more generally.

This motion is necessary because Respondent’s counsel has failed to give any answer to the timely written request for consent to the filing of this brief.

Respectfully submitted,

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QUESTION PRESENTED

The Permanent Bureau will address the following question:

Whether a *ne exeat* provision may give rise to “rights of custody” within the meaning of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

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INTEREST OF THE AMICUS CURIAE¹

The Hague Conference on Private International Law is a global, intergovernmental organisation, whose mission as set forth in the implementing international treaty is “to work for the progressive unification of the rules of private international law”.² The principal method used to achieve this end consists of the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law. One of these Conventions is the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*³ to which

¹ Pursuant to Supreme Court Rule 37.2, counsel for the *amicus* certifies that counsel of record for all parties received timely notice of its intention to file an *amicus* brief at least 10 days prior to the due date for the *amicus curiae* brief. Petitioner consented to this filing. Pursuant to Supreme Court Rule 37.6, counsel for the *amicus* certifies that this brief was not authored in whole or in part by counsel for any other party, and that no person or entity other than the *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

² Statute of the Hague Conference on Private International Law (15 July 1955), Article 1, T.I.A.S. No. 5710, 220 U.N.T.S. 123. The Statute was adopted during the Seventh Session of the Hague Conference On Private International Law on 31 October 1951 and entered into force on 15 July 1955. Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act, C), approved by Members on 30 September 2006 and entered into force on 1 January 2007. See for this and other texts and information the website of the Hague Conference <www.hcch.net>.

³ Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. Hereafter referred to as “the Convention”.

there are currently 81 States Parties,⁴ including the United States of America.

The Hague Conference currently consists of 69 members, 68 Member States (including the United States of America) and one Regional Economic Integration Organisation.⁵ It became a permanent intergovernmental organisation following the entry into force of the Statute of the Hague Conference on 15 July 1955. The Permanent Bureau of the Hague Conference on Private International Law⁶ is the secretariat of the Hague Conference and has the role of monitoring and reviewing the operation of the Convention.

STATEMENT

The Permanent Bureau respectfully submits this *amicus curiae* brief in support of the Petitioner. It is argued that the court of appeals erred in its interpretation and application of the Convention, and in particular should have found that a *ne exeat* provision did, in the circumstances, give rise to “rights of custody” within the meaning of the Convention.

A *ne exeat* provision in this context forbids the removal of a child from the jurisdiction by the custodial parent (or primary caregiver) without the consent of the other parent or the court. When a

⁴ This includes 22 States that are not Members of the Hague Conference.

⁵ The European Community.

⁶ Hereafter referred to as “the Permanent Bureau”.

removal occurs in breach of such a provision, the left-behind parent often looks to the Convention and in particular the return remedy under Article 12. In order for the Convention to apply the removal must be in breach of custody rights attributed by the law of the State in which the child was habitually resident immediately before his or her removal. It is for the court in the requested State to determine whether the rights attributed under the law of the State of the child's habitual residence do or do not constitute "rights of custody" within their autonomous Convention meaning.

Article 5 provides that for the purposes of the Convention "rights of custody" include rights relating to the care of the person of the child and, in particular, the right to determine the child's residence. Article 3 shows that custody rights may be attributed to a person, an institution or any other body and states that these rights may arise in particular by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect.

In the case before the Court, the question is whether the *ne exeat* provision in Chilean statute law and in the Chilean court order comes within the meaning of "rights of custody" under the Convention.

This brief has two purposes. The first is to explain why it is important and in the interests of children and their families that courts should, when interpreting the Convention, place a high value on consistency. Both between Contracting States and within Contracting States significant divergences in the interpretation of Convention concepts tend to

undermine the mutual confidence between States Parties upon which the successful operation of the Convention depends. It may also dilute the clear message to parents which has been a characteristic feature of the Convention and which has dissuaded many parents from engaging in the unilateral relocation of children.

The second purpose is to confirm and support the Petitioner's statements concerning the context in which the relevant language of the Convention is used⁷ and to indicate the broad consensus that has developed among Contracting States in relation to the matter in issue. This broad consensus – that *ne exeat* provisions are constitutive of “rights of custody” under the Convention – is evidenced both by case law and by formal discussions that have taken place among representatives of States Parties.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE IMPORTANCE OF CONSISTENCY FOR THE OPERATION OF THE CONVENTION

The case for consistency in interpretation of the Convention falls into two parts. First there are concerns that lack of consistency is damaging to the specific purposes served by the Convention. Second, there are more general arguments which arise from the nature of this and other similar conventions and the international law context in which they operate.

⁷ Part III A, at p. 25 of the Petition.

A principal object of the Convention is to protect children from the harmful effects of their wrongful removal or retention across international boundaries. The Convention fulfils this objective not only by providing a remedy (the return order) for cases where wrongful removal or retention has occurred, but also by creating a firm legal structure which makes it less likely that such cases will occur. One of the great strengths of the Convention is that it gives a clear message to a parent who is considering removing a child to another jurisdiction about what is the right way to proceed, and what is the wrong way. A divergence in the interpretation of the Convention, particularly in the interpretation of a fundamental concept such as "rights of custody" results in a blurring of this message.

This blurring of the message can lead to two undesirable consequences. It may increase the attractiveness of certain jurisdictions as places to which a child is abducted. If a parent is aware that if he or she brings the child to a particular location and the application of the Convention there will not result in the return of the child, the parent is more likely to choose that location, rather than a location where the interpretation of the Convention will result in the return of the child.

One of the major problems that the drafters of the Convention wished to prevent is that of a parent actively forum shopping by removing a child from one jurisdiction to another. In order to ensure that this aim is still achieved, it is necessary, as much as is reasonably possible, to ensure that the response given by the courts in all States Parties to an individual abduction will be the same.

Another undesirable consequence is the effect that uncertainty can have on the swift resolution of applications under the Convention. A key component to the satisfactory operation of the Convention is the use of expeditious procedures and the speedy resolution of cases.⁸ When there is a division in approach to the interpretation of the Convention, such division provides technical legal arguments to the parties involved that they can pursue to a higher appeal level. This prolongs the proceedings and slows down the resolution of the case.

With regard to the more general arguments for consistency, it should be recalled that there is no supranational body to provide a final and binding interpretation of the autonomous terms of the Convention. Instead responsibility rests with the individual courts and judges in each Contracting State to help bring about a consistent approach to the interpretation of key concepts. It is therefore important that national courts take into account the approach that other States' courts are taking with regard to the interpretation of Convention concepts and there is much evidence that this is increasingly the case.⁹ The same is true of many other modern

⁸ See *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures*, Jordan Publishing, 2003, p. 11.

⁹ See *e.g. Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) (INCADAT Cite: HC/E/USf301) where the court referred to cases in Australia, Canada, Sweden and the United Kingdom, as well as the United States of America. In other jurisdictions, the Australian High Court referred to cases from Canada, Ireland,

international conventions under which the courts in the different Contracting States exercise what amounts to a joint responsibility.

Where serious divergences in interpretation do occur as between Contracting States, this can affect the mutuality which is at the heart of treaty relations generally, and of the Convention, which is an international instrument for judicial and administrative co-operation based upon reciprocity, in particular. Under the Convention, if it becomes clear that one Contracting State is not prepared to make the return order available in circumstances where other Contracting States will do so, reciprocity is breached and the mutual trust and confidence on which successful Convention relations depend is affected.

Finally, it should be recalled that States Parties to the Convention do not have a single legislative means of curing problems of divergent interpretation. Any amendment of the Convention will require international negotiations among all the Contracting States involving a long, complex and expensive procedure, followed by an effort to ensure that all

New Zealand, the United Kingdom and the United States of America in *DP v. Commonwealth Central Authority; JLM v. Director-General NSW Department of Community Services* [2001] HCA 39 (INCADAT Cite: HC/E/AU 347), while the Supreme Court of South Africa referred to cases from Australia, Canada, Germany, United Kingdom and United States of America in *Sonderup v. Tondelli* 2001 (1) SA 1171 (INCADAT Cite: HC/E/ZA 309). Note also that the freely accessible electronic International Abduction Database (INCADAT) was established to facilitate judges in their consideration of the case law of other Contracting States. (The database can be found at <www.incadat.com>).

Contracting States accept the changes by ratifying the international instrument amending the Convention.

It is respectfully submitted that this Court will, if the application for certiorari is granted in this case, have an important opportunity to confirm the value and importance among the community of 81 States Parties to the Convention of seeking to achieve convergence in its interpretation.

II. SUBSEQUENT PRACTICE AND AGREEMENT ON THE INTERPRETATION OF THE CONVENTION

The question at issue in this case is one of the interpretation of an international treaty. In this respect the Permanent Bureau expresses support for the Petitioner's statement concerning the interpretation and in particular the context in which the words of the Convention are used.¹⁰

The Permanent Bureau would also emphasize that a broad positive consensus has developed among Contracting State on the question of whether a *ne exeat* provision may give rise to a "right of custody" under the Convention. This consensus is evidenced by the international case law, as well as in formal discussions among, and recommendations made by, representatives of the States Parties in the meetings of Special Commissions convened to review the

¹⁰ Part III A, at p. 25 of the Petition.

practical operation of the Convention and to which all States Parties are invited.¹¹

States Parties have made it clear that they would wish the Convention to be interpreted uniformly and having regard to its autonomous nature, and not in a manner limited to the interpretation applied to phrases in purely domestic cases.¹² Thus the expression “rights of custody”, for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention. While national concepts and national law rules will undoubtedly influence judges’ understanding of the issues at hand, they cannot be seen as decisive in determining the meaning of terms such as “rights of custody” or “rights of access” under the Convention.

¹¹ Subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation may, according to customary international law, be taken into account in interpreting the treaty, see Art. 31(3) *a*) of the Vienna Convention on the Law of Treaties which, according to *Libya v. Chad* ICJ Reports (1994), p.4, at para. 4.1, reflects customary international law.

¹² See, for example, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001), drawn up by the Permanent Bureau (hereinafter, “Conclusions and Recommendations of the Fourth Meeting of the Special Commission”), see para. 4.1. Available on the Hague Conference website < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings” and “Preliminary Documents”.

III. EXAMINATION OF CASE LAW

The case law shows that courts in a great majority of the Contracting States that have addressed the issue have accepted that a *ne exeat* provision may give rise to a right of custody for Convention purposes. The brief submitted by the Petitioner discusses many of these cases in detail and it is not proposed to repeat that analysis here. Instead, attention will be drawn to a few additional cases, not mentioned there, that are also worth noting.

While reference was made in the Petitioner's brief to the case in the United Kingdom of *C v. C (Abduction: Rights of Custody)*,¹³ it should be emphasized that this is not an isolated case, but has been followed by a robust line of cases,¹⁴ most recently the House of Lords decision of *Re D*.¹⁵ While this case centred on the interpretation of Article 15 of the Convention, it also included a detailed discussion of the interpretation of *ne exeat* provisions, or the right to veto a removal from the jurisdiction. Baroness Hale of Richmond, whose view was accepted by the majority of the court, emphasized the importance of consistent practice. Although she acknowledged the force of the arguments against including a person holding a right

¹³ [1989] 1 WLR 654 (INCADAT Cite: HC/E/UKe 34).

¹⁴ Also including in England *C v. C (Minors)(Child Abduction)* [1992] 1 FLR 163 (INCADAT Cite: HC/E/UKe) and in Scotland *McKiver v. McKiver* 1995 SLT 790 (INCADAT Cite: HC/E/UKs 189).

¹⁵ [2007] 1 A.C. 619 (INCADAT Cite: HC/E/UKe 880), mentioned at footnote 2 of the Petitioner's brief.

of veto in the category of persons with rights of custody, she found that it would, at the very least, be an odd result if a Convention designed to secure the summary return of children wrongfully removed from their home countries were not to result in the return of children whose removal had clearly been in breach of the laws, court orders or enforceable agreements in the home country. She was also very careful to indicate that there still remained a clear separation between “rights of custody” and “rights of access” and that the parent had to have more than a right to go to court and ask for an order to prevent, for example, relocation.

Other jurisdictions also have lines of authority accepting the principle that if there is a *ne exeat* provision, and this provision is breached by the abducting parent, this is a wrongful removal within the terms of the Convention. These include Australia,¹⁶ New Zealand,¹⁷ Ireland,¹⁸ Canada¹⁹ and Switzerland.²⁰

¹⁶ Such as, for example, *State Central Authority and Pankhurst* [2007] FamCA 1345; *Secretary, Attorney-General's Department v. T.S.* [2000] Fam.C.A. 1692 (INCADAT Cite: HC/E/AU 823); *Brooke & Director General Department of Community Services* [2002] FamCA 258.

¹⁷ *Gumbrell v. Jones* [2001] N.Z.F.L.R. 593 (INCADAT Cite: HC/E/NZ 446).

¹⁸ *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110 (INCADAT Cite: HC/E/IE 284); *R.C. v. I.S.* [2003] 4 I.R. 431.

¹⁹ *Hewstan v. Hewstan* [2001] BCJ No 590 (BCSC)(QL) (INCADAT Cite: HC/E/CA 753).

²⁰ TR 132/1999, *Tribunal civil de l'Arrondissement de la Sarine*, 17 May 1999 (INCADAT Cite: HC/E/CH 442).

IV. EXAMINATION OF SPECIAL COMMISSION PROCEEDINGS

The States Parties to the Convention meet together periodically in a Special Commission organised by the Permanent Bureau at the request of the Members of the Hague Conference, to review, and make recommendations on, the practical operation of the Convention.²¹ All States Parties to the Convention, Members or non-Members of the Hague Conference are invited to participate in such meetings. So far five of these meetings have taken place, in 1989, 1993, 1997, 2001, and 2006. A variety of issues relating to the practice under the Convention are discussed at these meetings by State representatives and those involved in the abduction procedures, such as Central Authority officials and judges who hear these cases. One recurring issue is the interpretation of key Convention concepts, including the concept of “rights of custody”.

In addition to the First Meeting of the Special Commission in 1989, the report of which is cited in the Petitioner’s brief, the issue has also arisen in several further meetings of the Special Commission. The Report of the Second Meeting of the Special Commission in 1993 states:

Conversely the view expressed by the Tribunal de Grande Instance de Périgueux in the case

²¹ The reports of these Special Commission meetings are available on the website of the Hague Conference on Private International Law <www.hcch.net>, under “Child Abduction Section”, then “Special Commission meetings on the practical operation of the Convention”.

cited in the Checklist, to the effect that an order of the court granting custody which prohibited the custodian from removing the child from the court's jurisdiction without consent of the other parent constituted only a "modality" attached to the right of custody and not a situation of joint custody, gathered no support. This view had been rejected by the Cour d'appel d'Aix-en-Provence,²² as well as by courts in Austria, Australia, the United Kingdom and the United States of America.²³

The issue arose again in 1997 and the Report of the Third Meeting of the Special Commission states:

There have been a number of cases where the return of the child to a parent with custody rights was denied because that parent had not actually been living with the child for a certain period of time. However, some parents might understand their custody rights as mainly allowing them to object to a future change of residence of the child. Under the aforementioned case law such parents would be precluded from requesting the return of the child at the time they intended to exercise their rights of custody. At the time the Convention

²² *Ministere Public c. MB*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence, Mar. 23, 1989, *reprinted in* 79 Rev. crit. 529 (1990).

²³ "Report on the Second Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child* (18-21 January 1993)", drawn up by the Permanent Bureau, pp. 10-11.

was drafted, “rights of custody” under Article 5 were deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child’s place of residence. The requirement of actual exercise of custody rights under Article 3 b of the Convention in effect demands that the parent has maintained some contacts with the child.²⁴

In 2006, the discussion of the issue arose in the context of the preparation of a *Guide to Good Practice on Transfrontier Contact Concerning Children*.²⁵ During the discussion the Permanent Bureau noted that a clear preponderance of case law supported the view that the combination of access rights with a veto on the removal of a child constituted a custody right for the purposes of the Convention. The ensuing discussion can be found in the report:

Some participants emphasized the importance of resolving the conflict in case law regarding this aspect of the definition of custody. Several experts explained that in their States, the meaning of access / contact rights in relation to custody rights was not an issue in itself where parents both exercised their parental authority

²⁴ “Report on the Third Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child* (17-21 March 1997)”, drawn up by the Permanent Bureau, pp. 7.

²⁵ *Guide to Good Practice on Transfrontier Contact Concerning Children*, Jordan Publishing, 2008. Also available on the Hague Conference website <www.hcch.net>, under “Child Abduction Section” and then “Guides to Good Practice”.

over the child, where the child was removed without the permission of the left-behind parent and the latter would ask for the return of the child, based on a right of custody arising from his / her parental authority. One expert underscored that concepts such as “parental responsibility” have evolved since the 1980 Convention was adopted and that it was important to keep these changes in mind in the application of the Convention.²⁶

The Special Commission also approved the publication of the *Guide to Good Practice on Transfrontier Contact Concerning Children*, which contains a statement that:

The preponderance of the case law supports the view that a right of access combined with a veto on the removal of a child from the jurisdiction constitutes a custody right for the purposes of the 1980 Convention.²⁷

²⁶ “Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the Practical Implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006)”, drawn up by the Permanent Bureau, March 2007, para. 212

²⁷ *Guide to Good Practice on Transfrontier Contact Concerning Children*, *supra* note 10, at p. 43.

The guide goes on to explain further that the opposing view does not command widespread support.²⁸

CONCLUSION

In light of the above arguments the Permanent Bureau respectfully requests that the Court grant the petition for a writ of certiorari.

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²⁸ *Ibid.*