

08-645

IN THE
Supreme Court of the United States

TIMOTHY MARK CAMERON ABBOTT, *Petitioner*,

v.

JACQUELYN VAYE ABBOTT, *Respondent*.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF OF THE UNIVERSITY OF CINCINNATI
COLLEGE OF LAW DOMESTIC VIOLENCE
AND CIVIL PROTECTION ORDER CLINIC AS
AMICUS CURIAE SUPPORTING RESPONDENT**

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QUESTION PRESENTED

A *ne exeat* statute or court order requires a custodial parent to seek judicial permission or the non-custodial parent's consent prior to removing a minor child from the country or other jurisdiction where the child resides.

Whether a *ne exeat* court order creates a "right of custody" in the noncustodial parent where the country of the child's habitual residence previously denied custodial rights to the petitioner based on the best interest of the child following a hearing where the parties and their witnesses had an opportunity to be heard.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE OVERARCHING PURPOSE OF THE HAGUE CONVENTION ON PARENTAL REMOVAL OF A CHILD FROM THE COUNTRY OF HABITUAL RESIDENCE IS THE BEST INTEREST OF THE CHILD.....	6
II. THE BEST INTEREST OF THE CHILD IS ACCEPTED BEST PRACTICE IN BOTH THE UNITED STATES AND IN COUNTRIES THAT ARE SIGNATORIES TO THE HAGUE <i>CONVENTION</i>	8
A. United States Federal and State Laws Employ the Best Interest of the Child Standard.....	8
B. The Best Interest of the Child Standard Is Applied Internationally in the Determination of Child Custody Rights.	10
C. Chile Employs the Best Interest of the Child Standard in Making Determinations on Child Access Issues.	11
III. THE DETERMINATION MADE BY THE CHILEAN COURT SHOULD BE RESPECTED AND NOT DISTURBED BECAUSE THE CHILEAN COURT ALREADY DECIDED THE LEGAL ISSUE OF CUSTODIAL RIGHTS.....	12

A. The Judgment of the Chilean Court Made Prior to Removal of the Child Should be Honored.	12
B. The Ability of the Petitioned Court to Re-Try Custody is Limited. Any Such Ability is Based Exclusively on the Best Interest of the Child.....	13
IV. THE CHILEAN COURT FOUND THAT THE MOTHER WAS THE APPROPRIATE CUSTODIAL PARENT AND LIMITED THE FATHER TO VISITATION ONLY.	15
V. CONVERTING <i>NE EXEAT</i> OR SIMILAR STATUTORY SCHEMES INTO RIGHTS OF CUSTODY WOULD VITIATE THE WORK OF THE ORIGINAL COURT THAT HAS DETERMINED THE CUSTODIAL BEST INTEREST OF THE CHILD.	17
A. When the Chilean Court Determined that Mrs. Abbott was the Appropriate Custodial Parent, a Statutory Prohibition on the Removal of the Child Already Existed.	17
B. The Conversion of a <i>Ne Exeat</i> Prohibition into a Custody Right Undermines the Convention’s Statutory Scheme in Providing Different Remedies for Parents with Rights of Access and Those with Rights of Custody.	18
C. Conversion of <i>Ne Exeat</i> Orders into Rights of Custody Accomplishes Adult Goals of Punishment at the Expense of the Best Interest of the Child.	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES

<i>Air France v. Saks</i> , 470 U.S. 392 (1985)	12
<i>Blondin v. Dubois</i> , 1889 F.3d 240 (2d Cir. 1999).....	12
<i>D.C. v. J.S.</i> , 790 N.E.2d 686 (Mass. App. 2003)	14
<i>Friedrich v. Friedrich</i> , 78 F.3d 1060 (6th Cir. 1996)	13
<i>Friedrich v. Friedrich</i> , 983 F.2d 1396 (6th Cir. 1993).....	14
<i>March v. Levine</i> , 136 F. Supp. 2d 831 (M.D. Tenn. 2000).....	13
<i>Tehan v. Duquette</i> , 613 A.2d 486 (N.J. Super. App. Div. 1992)	13
<i>Villegas Duran v. Arribada Beaumont</i> , 534 F.3d 142 (2d Cir. 2008).....	12,13

U.S. STATUTES

28 U.S.C. § 1738A(c) (2006).....	8
42 U.S.C. §§ 11601 et seq. (2006)	6

Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).....	9
Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).....	9
ALASKA STAT. § 25.24.150 (2006).....	7
Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. §§ 5101, 5111 et seq. (2006)	9
CONN. GEN. STAT. § 46b-56(c)(9) (2009)	7
Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978).....	9
MASS. GEN. LAWS ch. 208, §§ 28, 31,31A (2009) ..	16,17
Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3566 (1980).....	9

OTHER AUTHORITIES

Carol S. Bruch, <i>Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law</i> , 40 FAM. L.Q. 281 (2006).....	15
Lynne Marie Kohm, <i>Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence</i> , 10 J.L. & FAM. STUD. 337, 337,370 (2008)	8

- Mary Ann Dutton and Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 *SEX ROLES* 743 (2005) 17
- Merle Weiner, *Navigating the Road Between Uniformity and Progress: The Need for a Purposive Analysis of the Hague Convention on the civil Aspects of International Abduction*, 33 *COLUM. HUM. RTS. L. REV.* 275, 293-294 (2002)..... 7,8,12
- Report of Roundtable 3, Model Rules of Procedure for the International Return of Children, art. 2. (Sept. 2007) 7,10

TREATIES

- Inter-American Convention on The International Return of the Child*..... 10
- The African Charter on the Rights and Welfare of the Child* 1990 10
- The European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children* (1980) 10
- The Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980, T.I.A.S. No. 11670 passim

FORIEGN STATUTES

- CÓDIGO CIVIL DE CHILE 11, 16,17

Minors Law, No. 16,618, art. 45 (Chile)..... 18

INTEREST OF AMICI CURIAE¹

Amici are family law practitioners and law professors who have experience in family law matters involving children and who recognize the importance of employing the best interests of the child standard when determining custodial and non-custodial rights.

Margaret Drew is Professor of Clinical Law, University of Cincinnati College of Law. She directs the Domestic Violence and Civil Protection Order Clinic (“Clinic”) and is a long time family law practitioner. Professor Drew, individually, and the students and lawyers who comprise the Clinic represent family members who have experienced violence in their intimate relationships. The best interest of the child standard is nearly universally accepted as the basis for entering child-centered decisions in family law matters. Counsel and the Clinic are committed to preserving the best interests of the child, even when a parent might have violated a court order. While a non-custodial parent might remove a child without court approval, the needs of the child must be paramount and separate from any legal or personal desire to punish the offending parent.

¹ The parties’ letters of consent are on file with the clerk. No counsel for either party has authored any portion of this brief, nor has any person or entity, other than amici and its counsel, made a monetary contribution to the preparation or submission of this brief.

Interest of Amici Curiae
(continued)

Professor Carrie Hagan-Gray is a Clinical Associate Professor of Law at the Indiana University School of Law – Indianapolis. She is one of two professors directing and supervising the Civil Practice Clinic, having previously directed a family law and domestic violence clinic at Roger Williams University College of Law. A former Urban Morgan Human Rights Fellow at the University of Cincinnati College of Law, she has practiced in family law, domestic violence and guardian ad litem settings, as well as advocated on behalf of clients in federal and state litigation involving the Hague Convention on the Civil Aspects of International Child Abduction. She is committed individually, and via her clinic work, to protecting the best interests of children. She looks to protect the best interest standard used in decision making on children's issues. Professor Hagan-Gray espouses that the best interests of a child for whose benefit a custodial arrangement was identified should not be altered merely because a parent violates a court order. To do so would go against the very nature of a best interest determination and could inadvertently punish a child for the actions of a parent.

Christine L. Butler is a family law attorney who has been in practice in Massachusetts since 1978. Her practice has focused on family law and domestic violence. She currently is a Practitioner in Residence for the Family Advocacy Clinic at Suffolk University Law School and the Director of the

Interest of Amici Curiae
(continued)

Battered Women's Advocacy Project at the law school.

Ilene Seidman is Clinical Professor of Law at Suffolk University School of Law. She directs the Family Advocacy Clinic. Students in these Suffolk University School of Law clinics regularly represent family members in domestic violence and family law circumstances seeking court intervention. The protection they seek is often on behalf of their children as well as themselves. Preserving the best interest standard in family law cases is crucial in order to protect children and establish their needs as primary in all circumstances. While sanctions are permissible when one parent has violated a court order, this must never overshadow the best interests and needs of the child who is the subject matter of the litigation. To alter custody in order to punish the parent would undercut best interest decisions.

SUMMARY OF ARGUMENT

The goal of the *Hague Convention on the Civil Aspects of International Child Abduction* (“*Convention*”) is to protect the welfare of the child that was wrongly removed from the home country. At all times the *Convention* is concerned with the best interests of the child. The signatories to the *Convention*, which include the United States and Chile, most commonly employ the best interest of the child standard in determining in the first instance which parent is to be awarded custodial rights. In particular, the courts of both the United States and Chile employ the best interests of the child standard in determining the custodial and visitation rights of the parents. The welfare of the child is paramount in the relevant *Hague Convention* provisions as well as in the Abbott’s Chilean custody determination.

When a court employs the best interests of the child standard in determining custody, typically that court has made its decision after a disputed proceeding in which consideration of the child’s needs was paramount. In a case where the non-custodial parent has a history of abuse, the need to make all determinations based on the child’s best interest, particularly regarding safety, becomes even more compelling.

Conversion of a *ne exeat* privilege into a right of custody would defeat the home court’s decision based upon the best interest of the child. To disturb the underlying Chilean court decision in this instance would defeat and vitiate the court’s finding that the

child is best served being in the custody of his mother and that the father have rights of access only.

As here, if a court has determined that one parent, for whatever reason, is inappropriate to be the custodial parent, then the removal of the child from a country by the custodial parent does not make the non-custodial parent any more suited to be the child's primary caregiver or decision maker. Interpreting a *ne exeat* statute or order as carrying custodial rights may be attractive when the remedy sought is punishment of the custodial parent who removed the child. However, the reality is that a conversion of *ne exeat* into rights of custody in order to achieve a desired result, in this case return of the child, is not appropriate under the *Convention* because that remedy is not in the best interest of the child. Absent enumerated exceptions, the decision of the original court that decided custody is best left undisturbed out of comity and also in the best interest of the child.

ARGUMENT

I. THE OVERARCHING PURPOSE OF THE HAGUE CONVENTION ON PARENTAL REMOVAL OF A CHILD FROM THE COUNTRY OF HABITUAL RESIDENCE IS THE BEST INTEREST OF THE CHILD.

The *Hague Convention on the Civil Aspects of International Child Abduction*² (“Convention”) provides for the needs of a child who was removed from the child’s country of habitual residence. *The Hague Convention on the Civil Aspects of International Child Abduction*, Preamble, Oct. 25, 1980, T.I.A.S. No. 11670. The remedies provided are child-centered. The court in the country to which the child is removed is not charged with re-hearing child custody issues. Indeed, the preferred result is that custody not be re-litigated. *Convention*, arts. 16, 17, 19.

Convention remedies are limited and clearly defined. The best interest of the child is the governing rule. *Convention*, art. 12. If one year or more has elapsed, then the courts are permitted to consider a best interest factor, i.e., whether the child has acclimated to the country to which he or she was removed. *Id.* The petitioned court may hold best interest hearings on other narrow issues. For example, at any stage of the legal proceedings, the petitioned court may weigh whether or not return of the child to the home country will place the child at

² Congress enacted the *International Child Abduction Remedies Act* to implement the *Hague Convention*. See 42 U.S.C. §§ 11601 et seq. (2006).

grave risk. If the court determines the presence of a grave risk, then the court is instructed by the *Convention* to deny return. *Convention*, art. 13(b). Finally, the court may hold a hearing to decide return of the child if the child is of suitable age to state an opinion on return. *Id.* The current status of the child's well being, the age, and adjustment of the child are traditional best interest standards. *See, e.g.*, CONN. GEN. STAT. § 46b-56(c)(9) (2009); and ALASKA STAT. § 25.24.150 (2006).

Clearly, the best interest analysis is a paramount purpose of the *Hague Convention* articles concerning the removal of a child as the enumerated examples of factors the petitioned court may consider demonstrates. The *Convention's* purpose is protecting the welfare of the child. "The best interest of the child shall be a guiding principle of interpretation...." Report of Roundtable 3, Model Rules of Procedure for the International Return of Children, art. 2. (Sept. 2007). When viewed through what legal expert Merle Weiner calls the "purposive" lens, respect for the best interest of the child standard is accomplished by the petitioned court's respecting the custody decision made by the jurisdiction of habitual residence. Merle Weiner, *Navigating the Road Between Uniformity and Progress: The Need for a Purposive Analysis of the Hague Convention on the civil Aspects of International Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 293-294 (2002). The *Convention's* goal of avoiding re-litigation of custody disputes can be achieved by honoring the custody determination entered prior to the child's removal. That original custody decision should remain undisturbed absent a

circumstance that falls within one of the exceptions referenced above. *Id.*

Despite the temptation to be parent focused, the concern for the welfare of the child must be the determining factor when considering the remedy applied under Hague petitions.

II. THE BEST INTEREST OF THE CHILD IS ACCEPTED BEST PRACTICE IN BOTH THE UNITED STATES AND IN COUNTRIES THAT ARE SIGNATORIES TO THE HAGUE CONVENTION.

A. United States Federal and State Laws Employ the Best Interest of the Child Standard.

The best interest standard is “central to American family law”: each of the United States employs the best interest of the child standard when making child custody determinations. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 337 and 370 (2008). At the federal level, several statutes contain the best interest standard. For example, the Parental Kidnapping Prevention Act (PKPA) incorporates the best interest of the child. 28 U.S.C. § 1738A(c) (2006). Congress expressed clear statutory intent that the PKPA should resolve custody and visitation conflicts in the best interests of the child. The Congressional Findings and Declaration of Purpose for the Act states that “[t]he general purpose [of the Act is to]

promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child.” Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7, 94 Stat. 3566 (1980) (codified as amended at 28 U.S.C. § 1738A (2006)). The PKPA, which applies only to disputes between U.S. states, favors giving full faith and credit to the child custody determination made in the child’s home state.

In addition to the use of the standard in the PKPA, the standard is found in many other federal laws. For example, the standard appears at least a dozen times in the Federal Adoption Assistance and Child Welfare Act. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980). The best interest standard is also found in the Adoption and Safe Families Act of 1997, Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 673 (2008)), the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C.A §§ 1912(b), 1916(a) (1989)), and the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C.A. §§ 5101 et seq., 5111 et seq. (1996) (as amended by the Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800 (2003) (codified at 42 U.S.C. § 5106 (2006))).

B. The Best Interest of the Child Standard Is Applied Internationally in the Determination of Child Custody Rights.

Internationally, the best interest standard has been adopted by many countries and expressed in several acts and treaties. The *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children* (1980) recognizes the standard in its preamble. The *African Charter on the Rights and Welfare of the Child* (1990) views the best interests of the child standard as paramount: “In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.” *Id.* art. 4. The best interest of the child standard appears in Article 11 of the *Inter-American Convention on The International Return of the Child*. The best interest of the child standard is employed as a safeguard procedure which can override requirements for return. *ICARA*, art.11.

The *Hague Convention* itself incorporates the best interest standard through its child focused doctrine and terms. “[T]he interests of children are of paramount importance in matters relating to their custody....” *Convention*, preamble. The model rules for procedures for returning children internationally support reliance on the decision of the court of the child’s habitual residence as being in the child’s best interest. This reliance is predicated on the best interest of the child being the guiding principal of the Convention. Report of Roundtable 3, Model Rules of

Procedure for the International Return of Children, art. 2 (Sept. 2007). Likewise, the petitioned court's decision on whether the child has integrated into the new location is to be determined by reference to the child's best interest. *Id.* art. 18.3.

C. Chile Employs the Best Interest of the Child Standard in Making Determinations on Child Access Issues.

When a Chilean Court determines how much access a non-custodial parent has to a child, it does so in consideration of the best interests of the child. CÓDIGO CIVIL DE CHILE art. 229. Similarly, when one parent has engaged in abusive behavior, it is in the interest of the child that custody be awarded to the other parent. *Id.* art. 225. “The main concern of the parents is the best interest of the child...” *Id.* art. 222. When the Chilean court awarded custody to the mother of A.J.A., the child in this case, it did so under its legal obligation to consider the best interest of the child.

III. THE DETERMINATION MADE BY THE CHILEAN COURT SHOULD BE RESPECTED AND NOT DISTURBED BECAUSE THE CHILEAN COURT ALREADY DECIDED THE LEGAL ISSUE OF CUSTODIAL RIGHTS.

A. The Judgment of the Chilean Court Made Prior to Removal of the Child Should be Honored.

The judgments of foreign courts are entitled to respect from the Courts of the United States. While foreign judgments are not entitled to full faith and credit, they are to be given due weight when considered by U.S. Courts. *Villegas Duran v. Arribada Beaumont*, 534 F.3d 142, 148-49 (2d Cir. 2008). When interpreting international conventions, the decisions of foreign courts should be given considerable weight. *Air France v. Saks*, 470 U.S. 392, 404 (1985). Indeed, when a foreign court has determined the same legal issue, such as custody, particularly in matters involving treaty interpretation, the decision of the foreign court is to be given preference. *Blondin v. Dubois*, 1889 F.3d 240, 248-49 (2d Cir. 1999). “While comity typically refers to how courts of one country should treat the decisions by courts of another country in the same matter, comity can also function as a canon of construction when a foreign court has already decided the same legal issue in a different case.” Weiner, 33 COLUM. HUM. RTS. L. REV. at 287.

Whether or not a prior determination of custody exists is an initial and pivotal consideration in a Hague determination of whether or not the child is

required to be returned to the country determined to be the child's habitual residence. *See Villegas Duran*, 534 F.3d at 147 (second factor petitioner must establish by preponderance of the evidence is that the removal was in breach of custody rights under the law of the country of habitual residence). In this case, a prior determination of custody exists. The child in this case, A.J.A., was a habitual resident of Chile. His parents' rights of custody and visitation were determined by the Chilean court prior to A.J.A.'s removal.

The petitioned courts are instructed not to re-litigate custody issues. *Convention*, art. 16; *see also March v. Levine*, 136 F. Supp. 2d 831, 843-844 (M.D. Tenn. 2000) (citing *Tehan v. Duquette*, 613 A.2d 486, 489 (N.J. Super. App. Div. 1992)). Therefore, respect must be accorded to the Chilean court's allocation of parental custody and visitation.

B. The Ability of the Petitioned Court to Re-Try Custody is Limited. Any Such Ability is Based Exclusively on the Best Interest of the Child.

The ability of the petitioned court to revisit the issue of where the child may reside, what the habitual residence of the child is, and the allocation of custodial rights is strictly limited. *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996).

The petitioned court may entertain new evidence only under very limited circumstances. *Id.* Where the child has resided in the removed-to country for

more than one year prior to filing of the petition and where a court has determined that removal is an appropriate remedy, the petitioned court may consider the best interests of the child in narrow circumstances. This determination may include consideration of whether the child has acclimated to his or her new country of residence. *Convention*, art. 16. Other factors that the petitioned court may consider are the welfare and safety of the child should the child return to the country of habitual residence. The preference of a child mature enough to voice an opinion may also be considered by the petitioned court. *Convention*, art. 13. Therefore, although a court may deny a petition to return a removed child only in narrow circumstances, all those circumstances strongly favor the best interest of the child.

The reason the law favors returning the child to the residential country is to return the status quo and so that the left-behind parent may enjoy the child. *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993). The return remedy presumes that the country of habitual residence had previously made a determination that the left-behind parent was an appropriate custodian of the child. *Convention*, art. 1(b).

Many factors can influence a parent's removal of a child to a distant location. Removal of the child does not per se warrant a change in the custodial arrangement. *See, e.g., D.C. v. J.S.*, 790 N.E.2d 686 (Mass. App. 2003). As here, when a parent has been found to be the proper custodian in the best interest of the child, the petitioned court should not disturb

the prior family court's custody order merely because the removing parent violated a statute or order. Modifying custodial privileges to accommodate return of the child is a tempting remedy in the hope of discouraging future contemptuous child removal. That remedy may provide some satisfaction as punishment of the violating parent whom the court does not want to reward for a statutory or court order violation. Such a judgment, however, whether made to punish the removing parent or to encourage the child's return, accommodates the desires of the left-behind parent, but does not consider the best interests of the child. "[P]unitive custody transfers-whether in relocation settings or otherwise-cannot present sensible results. Although this conclusion may be intuitively obvious only when domestic hostility or violence is present, it is also the logically inescapable result of a child-centered inquiry." Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281 (2006).

IV. THE CHILEAN COURT FOUND THAT THE MOTHER WAS THE APPROPRIATE CUSTODIAL PARENT AND LIMITED THE FATHER TO VISITATION ONLY.

In this case, a prior determination of custody and visitation rights exists. The decision is supported by an extensive record. J.A. 9-40. The father and mother called witnesses on their behalf and on behalf of the child. The Chilean Court was very clear that

it fully considered the factors affecting the welfare and best interests of the child.³

The court records reflect that the court considered the following evidence:

The father was verbally and physically abusive toward the mother; the father was abusive with the son as supported by testimony; the father did not tend to the boy's particular needs. JA 12. It was the mother who saw that the son obtained counseling to deal with the trauma of the abuse and the divorce. JA 10. The mother cared for the child's needs since his birth. The mother was able to put the son's needs ahead of her own, although she had suffered throughout the marriage from her husband's abuse as well. The mother was best suited to tend to the child and was found to have done a capable job of rearing the son prior to and after the parties' separation. JA 28-29.

The record shows that the father continued his coercive tactics following the divorce, as well. The father was over \$23,000.00 in support arrears when the mother left Chile, a country in which she was unable to work due to visa restrictions. Chilean law is quite clear on the obligation of parents to support their children. CÓDIGO CIVIL DE CHILE art. 222. Yet the father failed to do so. The father's depriving the child of adequate support was not in the child's best interest. His failure to support A.J.A., if he had the means to do so, would fall within the realm of

³ The factors considered by the Chilean Court in resolving the custody dispute are comparable to those used in the United States. *See, e.g.*, MASS. GEN. LAWS ch. 208, §§ 28, 31, 31A (2009).

abusive tactics. Mary Ann Dutton and Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743 (2005). The father's failure to support his child while A.J.A. was under the mother's care is grounds under the Chilean Civil Code to deny the father the personal care of A.J.A. CÓDIGO CIVIL DE CHILE art. 225.

The consideration of abuse, as well as the failure of a parent to place his or her own needs before those of the child, can be factors considered in the United States under the best interest of the child standard, as well. The history of violence, and well a failure to provide support, are often considered in determining the extent of custodial rights and the terms of access. See for example, Mass. Gen. Laws. Ch. 208 §§ 28, 31,31A (2009)

V. CONVERTING *NE EXEAT* OR SIMILAR STATUTORY SCHEMES INTO RIGHTS OF CUSTODY WOULD VITIATE THE WORK OF THE ORIGINAL COURT THAT HAS DETERMINED THE CUSTODIAL BEST INTEREST OF THE CHILD.

A. When the Chilean Court Determined that Mrs. Abbott was the Appropriate Custodial Parent, a Statutory Prohibition on the Removal of the Child Already Existed.

The parties agree that under Chilean law, the statutory equivalent of a *ne exeat* order was in place.

This prohibition was in place at the time that the Chilean court awarded custody of A.J.A. to his mother. Minors Law, No. 16,618 art. 45 (Chile); JA 55-56. Despite this prohibition on removal, nowhere in the judgment of the Chilean court is there an exception carved out for A.J.A.'s father to be awarded rights of custody, even in this narrow circumstance. Similarly, when the *ne exeat* order entered, there was no adjustment to the original custody order either diminishing the rights of A.J.A.'s mother or in awarding his father any custodial rights. A plain reading of the orders of the Chilean court clarifies that at no time was the father awarded rights of custody.

B. The Conversion of a *Ne Exeat* Prohibition into a Custody Right Undermines the Convention's Statutory Scheme in Providing Different Remedies for Parents with Rights of Access and Those with Rights of Custody.

The *Convention* provides very different remedies for those parents with custody rights and those with rights of access (visitation). The custodial parent whose child was removed enjoys the remedy of the return. *Convention*, art. 12. Parents with rights of access do not. *Convention*, art. 26. Many might be unhappy with the failure of the *Convention* to provide the remedy of return to all parents. Public sentiment or the emotional plea of an abandoned parent is insufficient to defeat the enforcement of a convention whose terms are clear. It is understandable why a non-custodial parent might offer any argument to

convert rights of access into rights of custody for the purpose of restoring easier access to the child. The transformation of a statutory prohibition on removal or the limitation of a *ne exeat* order cannot be permitted to undermine the previously determined best interest of the child. Nor should unhappiness with a statutory framework be sufficient grounds for avoiding the obvious remedy of amending that framework.

At the time of divorce, the parties can determine the best interest of the child. Absent agreement, a court may enter its judgment on the best interest of the child. The Chilean court did just that. The determination of child custody at the time of divorce, or at a subsequent hearing, when decided prior to the removal, is the appropriate judgment to be honored by the petitioned court. Assuming none of the exceptions to removal are raised by the defending parent, there are sound reasons for leaving the original custody judgment undisturbed without the artificial overlay of a purported and strained right of custody.

C. Conversion of *Ne Exeat* Orders into Rights of Custody Accomplishes Adult Goals of Punishment at the Expense of the Best Interest of the Child.

The original order of custody in this matter was entered at a time when the best interest of the child was assessed without the emotional overlay of removal. The Court looked at the parenting history

of the parties as well as the quality of the environment and nurturing the parents could provide to the child. The Court's decision was framed in the best interest of the child. This more dispassionate assessment, made when neither parent was claiming violation of any of his or her "rights" relative to removal, provides a better guide to the child's best interest.

Despite the language of best interest statutes and best interest language as promoted under the *Convention*, the emotional plight of the left behind parent often is sufficient to shift our focus to the alleged "rights" of that parent. Empathy may be with the left behind parent but empathy should not shift our focus from the child. The expected legal response toward a contemptuous parent may be punishment of the contemtor. The instinctual response of those concerned with parental "rights" might be to punish the contemtor by depriving that parent of custody, or by diminishing his or her custodial rights. The fact remains, however, that the perceived or real rights of parents are secondary to the best interest of the child. A change in custodial rights in order to accommodate the legal desire to punish or a parental need for vindication cannot be permitted. Children have needs that are unrelated to removal. Attachment to a custodial parent and a parent's ability to tend to the emotional and physical needs of the child are but a few of the child centered considerations in determining custody. Access to both parents is certainly a factor to be considered, but the *Hague Convention* already provides a remedy for access. *Id.* The Chilean court made its assessment of A.J.A.'s needs. To disturb those

findings would be to ignore the best interest of the child.

CONCLUSION

The judgment in this matter as entered by the Fifth Circuit should be affirmed.

Respectfully Submitted,

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