No. 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 ELEVEN LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Does a travel restriction that prohibits a custodial parent from moving a child abroad without judicial consent confer custody rights on a noncustodial parent who otherwise has only visitation rights so that, if the travel restriction is violated, the noncustodial parent can demand the child's return under the 1980 Hague Child Abduction Convention? Is the answer different if the restriction permits consent by either the court or a visiting parent?

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We write as academics with no financial interest in the outcome of this case.[1] We teach in the fields of conflict of laws, family law, comparative law, and international law. Our sole concern is for the correct interpretation of the Convention.

SUMMARY OF ARGUMENT

The 1980 Convention on the Civil Aspects of International Child Abduction[2] (the Convention) is the first international family law treaty this country joined. It applies to wrongful international removals or retentions of children between Contracting States.

When a noncustodial parent removes a child from the custodial parent,[3] absent narrow defenses, the

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[1] Pursuant to Supreme Court Rule 37.6 counsel for the *amici* certify that no counsel for a party authored any part of this brief, and no person or entity other than counsel for the *amici* has made a monetary contribution to the preparation or submission of this brief. The parties' consents have been filed.

[2] T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 (references to "Article" is to this Convention, unless otherwise stated). The Hague Conference published the Convention's legislative history in III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION (hereafter ACTES).

[3] For ease of comprehension, we will use terminology common in this country's family law. The parties will be called Mother and Father, and "visitation" is used in place of "access". Parents who hold any form of joint custody will be identified specifically. What have come to be known as *ne exeat* orders or provisions will be called travel restrictions unless specificity requires otherwise.

Convention returns the child to the caregiver.[4] There is no dispute (apart from the limited question of travel restrictions) that when it is a custodial parent who removes the child from a noncustodial parent, the Convention does not provide for return, but rather such remedies as are available in the new location.[5]

This dramatic distinction in the remedies for custodial and noncustodial parents requires that custody and visitation be clearly delineated, as a blurring of the distinction would have unintended and potentially grave consequences. The Convention therefore separately defines "rights of custody" and

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[4] Because only a removal is involved in this case, in this discussion we will omit references to wrongful retentions, which concern refusals to return a child after visits abroad. Every time we refer to a removal, however, the Convention treats retention in the same fashion. We shall also limit discussion to matters that involve two countries that have reciprocal treaty obligations. We note, however, that the Convention permits ratification only by countries or their successors who were members at the time of promulgation; all others must accede, and as to these countries, the treaty is in force only for other States Parties that accept the accession. For the explanation for these rules, *see* Carol S. Bruch, *Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, 33 NYU J. Int'l L. & Politics 49, 49-51 (2000).

[5] *See* Art. 21 (providing Central Authority assistance "to promote the peaceful enjoyment of access" and "remove obstacles" to it; permitting assistance in filing proceedings). *See also* Art. 7; Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994).

"rights of access" as distinct and non-overlapping categories.

The normal meaning of the treaty language, as well as its context and purpose, makes clear that a visiting parent remains a visiting parent even when travel restrictions from any source (also known as *ne exeat* provisions) are breached by the child's removal. The clear negotiating history, including a 19-3 vote that expressly rejected a proposal to provide returns for visitation cases, including those that contain travel restrictions, confirm this conclusion: travel restrictions protect visitation rights and do not import custody rights into a visitation order. The Convention was not intended to, and does not, provide a "right of return" remedy for a parent who takes a child away from a parent with sole custody, for breach of a travel restriction.

Contrary to assertions in some of the briefs, the weight of persuasive foreign law does not support interpreting travel restrictions as conferring custody rights under the Convention. Several of the cited decisions about violations of travel restrictions merely hold that a visiting parent with joint custody has a right to return, a rule set forth in the express language of Article 3, and therefore are not relevant. The remaining decisions come primarily from countries that apply common law methodology to Convention litigation and often defer to decisions of the English courts, but the Canadian Supreme Court disagrees, as does the majority of U.S. lower court

opinion – two countries which, taken together, have a roughly equal Convention caseload.[6]

There is thus at present no "weight of common law authority" that favors granting custody rights when travel restrictions are present in what is otherwise a straightforward visitation case. Rather, there is a genuine disagreement among the common law courts that have addressed the question. Once corrected for misinformation and lacunae in the foreign law materials that have been cited to this and other courts, moreover, the civil law authorities on point are similarly divided. Taken as a whole, the foreign caselaw fails to provide a consistent view that deserves this Court's deference. What is essentially bean-counting, however denominated, and whether invoked by those supporting Petitioner or those, like ourselves, who support Respondent, surely should not dictate this country's international commitments.

What is at issue in this case, we submit, is an effort to amend the 1980 Convention under the guise of interpretation. As is evident from the State Department's own change of position,[7] the view that

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[6] *See* Appendix A.

[7] The State Department's own legal analysis accompanying submission of the Convention to the Senate takes it as "given" that the Convention is aimed at protecting those who actually care for the child against those who use abduction as a means of modifying custody arrangements. *See* 51 Fed. Reg. 10494, 10504 (a fundamental purpose is to prevent child abductions by persons as a means of "obtaining their physical and/or legal custody"); 51 Fed. Reg. 10505 ("it is up to the person who actually exercised custody prior to the abduction . . . to invoke the Convention to secure the child's return"); 51 Fed. Reg. 10507

travel restrictions confer "custody rights" is of relatively modern origin, and was not the view when the Convention was drafted. The question of protecting visitation rights is particularly complex and nuanced. The "interpretation" urged upon the Court would address only one small aspect – travel restrictions – by itself, and without consideration of the whole subject matter. This isolated alteration is not only juridically impermissible, but also unwise as a practical matter. Travel restrictions are, for example, increasingly used to protect convenient visitation, and several of the cases where they were treated as conferring custody rights reveal sobering facts that call them into question as persuasive authority. Amendment should be therefore be sought through legislative means: a new document promulgated by a plenary diplomatic session of the Hague Conference on Private International Law. That avenue is available, as consideration of such a protocol was placed on that body's work schedule earlier this year.[8]

Only if a revision is considered in the appropriate diplomatic venue, will it be possible for the United States, in concert with other nations, to review experience under the 1980 Convention (including cases ordering return that have resulted in great harm), to consider the needs of women and children in abuse cases – a topic not addressed when the 1980 Convention was drafted, and to make a full

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("in the scheme of the Convention it is presumed that the person who has custody actually exercised it").

[8] *See* http://www.hcch.net/upload/wop/genaff_concl09e.pdf.

examination of the best scientific information now available on the needs of children when their parents live apart and dispute custody. Such inquiries are impossible in the expedited, truncated consideration of an individual parent's return petition in a case such as this one.

In conclusion, the clear language of the Convention, when read in good faith and taken in context, given the structure and purposes of the treaty, as well as the negotiating history, dictates the correct result: a holding that the presence of a travel restriction does not confer rights of custody on a party who otherwise holds only visitation rights. Because of deficiencies in the record that we identify throughout this brief, we also conclude that dismissal of certiorari as improvidently granted would be an appropriate alternative disposition.

ARGUMENT

I. The Nature and Effect of the Travel Restrictions in this Case are Debatable and Uncertain.

Under Article 3 of the Convention, the removal of a child is considered wrongful if it is in breach of custody rights under the law of the place "in which the child was habitually resident immediately before the removal or retention."[9] In this case, the reference

[9] The Convention's official Explanatory Report states that this reference implicitly includes "the rules of private international law", i.e., choice-of-law rules, so that all possible sources of law are available.

is to Chile, where the family had lived for three years when the mother took the child to Texas.[10]

Father claims that two Chilean travel restrictions confer custody rights on him and, therefore, entitle him to the child's return:

a. A court's "stay-put" order that was entered in Chile to thwart Father's possible abduction of the child from Mother that also prevented anyone else from removing him, and that Father claims now authorizes him to remove the child from Mother, who has held sole custody throughout, and
b. The Chilean Minors Law, which, if it applies, requires content to the child's removal by its custodial parent from Chile from either a court or a parent who has court-ordered visitation.

It is at best uncertain whether either of the travel restrictions, one a court order and the other a statutory provision, confers any rights on the father, much less rights of custody.

The Chilean court's order was entered to restrain Father, not to confer rights on him. On January 13, 2004, Mother told the court that she sought the order because her husband, whose visits with their son were supervised, had obtained a British passport for their son, had not returned him as required some days before, and planned to leave the country soon –

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[10] The family members were expatriates: the father was a U.K. national, the mother a U.S. citizen, and the child held both citizenships.

she feared he would take the child with him. Mother had been advised that an "orden de arraigo" would ensure that the country's international police could take action. This writ, a stay-put order, restrains a person (here, the child) from leaving Chile and can only be lifted by a subsequent court order.[11]

Because Mother sought the order to protect her own sole custody, she may not have realized that it also bound her when, some 19 months later, she brought her son to Texas. Whether she did or not, however, is irrelevant for purposes of interpreting the Convention.[12]

The applicability of the Chilean Minors Law 16,618 art. 49 is apparently even more uncertain.[13] Because it does not authorize Father to affirmatively decide where the child will live, either within Chile or

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[11] Email from Cristián Fabres, Guerrero, Olivos, Novoa y Errázuriz, to Professor Bruch (Nov. 2, 2009 at 6:39 a.m.) (noting conflicting statutory and choice-of-law rules). Mr. Fabres is a Chilean lawyer who holds an LL.M. from the University of California, Davis. We realize that Mother may have acquiesced in the application of the Minor's Law, rendering the point moot in this case. We nevertheless bring to the Court's attention that, because travel restrictions are more varied than custody and visitation laws, holding them to confer custody rights and thereby importing choice-of-law analysis as to their possible application, could considerably complicate and protract return proceedings.

[12] *See infra* n.23.

[13] The materials provided by Petitioner predate a 2001 amendment. The change, however, appears not to concern this case. Fabres, *supra* n.11, at 11:22 a.m. *See* Appendix B for the current language.

abroad, it does not satisfy the Article 5*a* definition of custody rights in any event.

Also uncertain is the view of the Chilean authorities on the applicability of either travel restrictions; they apparently allowed the mother and child to depart without difficulty, although both passports must have included visas reflecting their local residence. These would have alerted them to ask for the father's consent, had they understood the Minors Law to apply to foreign residents, and to determine whether the stay-put order had expired or, if not, bound Mother.

Whatever the answers to these factual questions and however opaque the legal analysis in this specific case, we are here concerned with the broader, and more fundamental question of treaty interpretation: whether the Convention provides a right of return for a parent who has neither sole nor joint custody, but only visitation rights and a *ne exeat* order.

II. The Convention Does Not Provide a "Right of Return" for Violation of Travel Restrictions if the Applicant Holds Only Visitation Rights.

A. Article 5 of the Convention Establishes a Clear Distinction between Rights of Access and Rights of Custody.

The Convention should be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and

in light of its object and purpose."[14] The analysis begins with the definition of "custody rights" under Article 5(a) of the Convention.

While the determination of residence figures prominently in Article 5(a), the concept of "rights of custody" is much broader. It is, moreover, a unified concept, pertaining to care of the child, and not a bundle of separate rights that are severable and unrelated.

This is first of all clear from the structure of the subparagraph. The conjunction in part *a* is "and", not "or" ("*and* in particular, the right to determine the child's place of residence"). Thus, the determination of residence is only part of the overall concept of custody, and not a separate and independent feature or right of custody for purposes of the Convention.

This understanding is reinforced by the words "in particular," which make sense only if what follows them is an example of the controlling concept, that custody consists of "rights *relating to the care of the person* of the child") (emphases added). Father's claim would require that the words "in particular" be rendered nugatory.

This reading is also consistent with the family law context in which the Convention was drafted. Notwithstanding the variations of differing legal systems, there were still, generally speaking, three basic types of "custody" under discussion, as a reading of the *procès verbaux* clearly demonstrates:

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[14] 1969 Vienna Convention on the Law of Treaties art. 31.

sole custody, joint custody, and (in some situations) physical custody without strict legal custody (e.g., grandparents).

The contrary interpretation urged by Father depends on a strained and highly artificial view of custody – not as an ordinary and common-sense concept, but rather as a mere bundling of separate, individual rights that can be severed asunder and conferred in varying directions and assortments, somewhat akin to financial "derivatives". It also depends on a strained reading of the concept of determining residence. The veto right of a visiting parent that is conferred by a travel restriction imposes no custodial responsibility for the child's personal care and is unrelated to making a home for the child; it merely limits, absent court approval, the possibilities of living in a foreign country.

As his sole custodian, the mother provided the child's daily care in Chile, was responsible for his welfare, and made a home for him. The father had in fact no power to determine where the child would live,[15] and his asserted power to veto the child's relocation outside Chile is unrelated to the child's personal care that is the essence of custody.

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[15] In the instant case, the order can be lifted only by the Court; by its terms, it does not confer rights on Father, either to authorize or veto the child's relocation. The Chilean statute, in contrast, requires that either the visiting parent or a court consent to the child's departure. Fabres, *supra* n.11. If it applies, Father's potential veto is subject to the power of a court to say otherwise.

Thus, under the normal and ordinary meaning of Article 5, custody is a unitary concept, pertaining to the care of a child for whom one is fundamentally responsible. A travel restriction (*ne exeat* provision) in this context does not amount to a right of custody. It neither grants any responsibility for personal care, nor does it grant the authority to determine the child's caretaker and residence.

B. The Structure and Purpose of the Convention Envisions a Right of Return Only for a Person with Sole, Joint or (in Exceptional Cases) De Facto Custody.

The structure and purpose of the Convention also support the view that there is no right of return for a noncustodial parent.

The Convention has a limited, precise and specific focus: to prevent the removal of a child from a sole or joint (or sometimes de facto) custodian. The only remedy provided in the Convention is return of the child and in the case of a noncustodial parent, this is a manifestly inappropriate remedy. A return to the country of the child's habitual residence, based on the violation of a travel restriction, effectively transfers the child's custody to the visiting parent, either for the duration of pending litigation or permanently.[16]

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[16] Because the law generally prefers stability in custodial arrangements, even a "temporary" custody award to the visiting parent dramatically increases the likelihood that the noncustodial parent will obtain a permanent custody award once the case is decided, simply because by then the child will have

It thus turns the Convention on its head, removing the child from the parent with whom he or she is supposed to live and effectively changing the terms of custody.

As is implicit in the word "return," the point of the return remedy is to restore the *custodial status quo ante*.[17] The focus on preserving custody, pending a contrary court determination on the merits, is reflected in the overall structure of the Convention. Apart from the question of travel restrictions, there is no dispute that children who were removed by their custodial parents in breach of the other parent's access rights will not be returned; they will remain with the caregivers while any visitation or custody issues are addressed, until the court which is responsible for custody arrangements reaches a different determination. Similarly, even if the "left-behind parent" holds a theoretical right to custody, if

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lived in that person's household for an extended period. *See infra* n.52.

[17] Those who argue that the Convention prescribes a jurisdictional status quo ante have confused this country's uniform state law for custody jurisdiction, the Uniform Child Custody Jurisdiction and Enforcement Act. This is the successor Act to the Uniform Child Custody Jurisdiction Act for which Professor Bodenheimer was the Reporter. She had already identified serious problems when the former home state entered punitive decrees – custody transfers that ignored the child's best interests in order to punish the custodial parent. In this case, although the court in Chile affirmed its continuing jurisdiction, we are not told whether Father sought custody.

he or she has not actually been exercising custody, the child will remain with the de facto custodian.[18]

The court that orders the return is not supposed to be deciding or changing custody rights; the return order is not supposed to change the de jure or de facto responsibilities for the child's custody. As Perez-Vera notes in her report, the drafters of the Convention believed that the "right of return" *to a custodial parent* was consistent with the child's best interests, because the child needs, whenever possible, a certain stability of home life and caregiver. The Convention, the Explanatory Report states, aims to remedy a child's "traumatic loss of contact with the parent who has been in charge of his upbringing."[19]

Even where there is manifestly an abduction by a noncustodial parent, in violation of custody rights, therefore, and even if the child has been concealed, if the application is not filed within one year and the child has, in the meantime, become settled in its new environment, return may not be ordered.[20] In each of these situations, the child remains with the established caregiver, notwithstanding the removal, and custody litigation – if any – will take place where the child now lives. There may be (and often are)

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[18] Art. 13*a*.

[19] One objection to authorizing return orders for breaches of access rights was in fact the fear that this would result in transfers of custody to visiting parents. ACTES 432 ¶25, 444-45 ¶¶ 65-66.

[20] Art. 12.

other issues that need to be addressed, but the Convention itself does not address them.[21]

In light of some of the arguments made in this case, it seems important to stress that the Convention is different from the United States domestic law, as reflected in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[22]. The UCCJEA, in contrast to the Convention, restores the *jurisdictional* (as opposed to custodial) status quo ante in all but exceptional circumstances. The Convention's drafters knew of the original version of this uniform state law and of problems its Reporter, the late Professor Brigitte Bodenheimer, had already identified in its operation.[23] On behalf of this country, she and the other family law expert on the US delegation, Lawrence Stotter, Esq., played an influential role in shaping different, more finely tuned, rules for the Convention.[24] The "unclean hands" of a removing

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[21] As discussed in section IV below, the drafters' solicitude for the child's relationship with its primary caretaker and their caution about a simplistic one-size-fits-all response to breaches of visitation rights was wise when the Convention was drafted, and 30 years later an increasing body of scientific knowledge that reports the needs of children whose parents do not live together confirms their insight. *See infra* n.52.

[22] 9 U.L.A. 649 (updated to 2009).

[23] Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978 (1977) (discussing the UCCJA, 9 U.L.A. 261 (updated to 2009)).

[24] *See* Adair Dyer, *To Celebrate a Score of Years*, 33 NYU J. INT'L L. & POL. 1, 10-11 (2000).

parent, although relevant in state UCCJEA proceedings, are completely irrelevant, *and deliberately so*, in Convention proceedings.[25]

It could be argued that, in lieu of returning the child to a noncustodial parent, the child could be "returned" to some institution, pending a new custody determination. This is even less desirable in terms of the purpose and intent of the Convention. It is again not a true "return," as the institution never had custody initially. Relegating a child to institutional care, moreover, can hardly be considered "in the best interests of the child," as compared to the care of a competent parent. Far from maintaining the stability of the child's parental, educational, and social relationships, placing a child in an institution is wholly novel and disruptive. To consign a child to a wholly unfamiliar situation for an indefinite time, lacking any normal home life and deprived of both parents, in order to vindicate some presumed fractional custody right, is completely inconsistent with the welfare of the child and the purpose of the Convention.[26] Moreover, the concept of care "pending a new custody determination" is also inconsistent with the concept underlying the Convention – to preserve the custody of the primary custodial parent, pending a contrary determination on the merits.

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[25]A change in custody to punish a custodial parent wholly ignores the guiding principle of best interests of the child and is anathema to the Convention. Professor Bodenheimer termed such orders punitive orders, because their aim is to punish the abductor while ignoring the child's interests, and was on record as criticizing the approach taken by the UCCJEA.

[26] ACTES, 431-32 ¶24.

In conclusion, interpreting the Convention to provide a right of return that takes a child away from a sole caregiver is contrary to the structure and purpose of the Convention. It turns the Convention on its head, making it a vehicle for reversing custody arrangements, and places children in harm's way rather than protecting them.

C. The Preparatory Works Support this Interpretation.

If ambiguity exists in treaty language, Article 32 of the Vienna Convention permits recourse to the preparatory works of the Convention. Although we do not consider this step necessary, as the language and context are clear, the legislative materials confirm the analysis we have already set forth.

The record of Convention negotiations establishes that the Convention was not intended to provide a right of return for violation of travel restrictions,[27] and an amicus brief for two distinguished delegates to the Special Commissions that wrote the Convention, one of whom served on the Drafting Committee, confirms this understanding.[28]

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[27] ACTES, *passim*.

[28] Their brief is consistent with Professor Bruch's published summary of her contemporaneous discussion with the late Professor Brigitte M. Bodenheimer, the lead spokesperson for the U.S. delegation until too ill to participate. *See* Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529. 539 n.33 (2004) (abridged at GPSolo 14 (Sept. 2005)) (Best Articles Published by the ABA).

When the Convention was drafted there was relatively little experience with such travel restrictions. A background study for the drafters reported a dearth of knowledge on the topic at the international level, but mentioned that restrictions on relocation were used by US courts "from time to time," particularly to prevent moves by custodial parents back to their families of origin in sister states or foreign countries. After listing a range of theories and potential problems in visitation cases (but never mentioning abuse), the report concludes, "The best answer to this dilemma [of facilitating abduction opportunities by granting visitation, but, conversely, also prompting abductions if visitation is denied or is too severely curtailed] may well consist of a mechanism for cooperation among legal authorities . . . ," the very solution later included in the Convention.[29]

Travel restrictions were discussed only briefly, when the delegates considered and defeated 19-3 a Canadian proposal that would have given breaches of visitation (including breaches of travel restrictions) the same remedy as breaches of custody – return orders.[30] This discussion makes clear that, with the possible exception of the delegate from the

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[29] *See* ACTES, 50-51 (discussing the possible functions of Central Authorities, none of which includes treaty interpretation). The functions of Central Authorities, which are consistent with that preparatory report, are set forth in Articles 6-10.

[30] *See* ACTES, 262 (Working Document No 5 – Proposal of the Canadian Delegation (to add "or access" after "breach of rights of custody" in Art. 3)).

Netherlands, the drafters -- including even the Canadian delegate -- regarded violations of travel restrictions as pertaining to rights of access, not rights of custody.[31]

One delegate noted that to permit a return remedy for a visiting parent would run counter to the Convention's purpose, which is to protect custodial parents.[32] Others noted that this approach would make it possible for a visiting parent to become a custodial parent and would therefore contravene the Convention's purpose – the very issue in this case.[33] When the vote was taken, 19 (including the United States) voted against the Canadian proposal, and 3 voted in favor (Canada, Ireland and Israel).

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[31] *See* ACTES, 266. H.A. Leal of Canada, who was also Chairman of the Drafting Committee, said that at times rights of access could have "almost the same importance as rights of custody," and gave the following example: "Custody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent. If the mother nevertheless leaves the jurisdiction without such consent, that [would constitute] wrongful removal [under his proposal]." Jenard (Belgium) said the convention would not help a visiting father if a mother moved away.

[32] *See* ACTES, 266 (Holub (Czechoslovakia)). An observer for the Commonwealth (Eekelaar), who – as is the rule for observers – was permitted to speak but had no vote, mentioned joint custody cases, which are specifically recognized as custody rights by the Convention, and said possibly Leal's hypothetical might be included in Article 5. This ambiguous comment by a nonparticipant cannot be given significance.

[33] *See* ACTES, 266-27 (Chatin (France); Jenard (Belgium) (second intervention)).

There was no further discussion of providing a right of return for violation of travel restrictions; the topic was thereafter completely abandoned.

D. Post-Promulgation Discussions at the Special Commissions, Many Years Later, Cannot Be Considered.

Post-promulgation discussions at Special Commission meetings, especially those taking place many years after the Convention was adopted, are not an authoritative guide to the Convention's interpretation. Because the Convention confers no special authority on these Commissions, the views of those present do not constitute "agreements of the Parties" for purposes of treaty interpretation. What is envisioned here is formal agreement by the States Parties to a particular Convention, not simply the views of a number of delegates who attend a meeting on implementation. Nor does such Special Commission discussion amount to "subsequent practice." [34]

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[34] Relevant "practice" includes caselaw and similar acts of State authorities, not mere statements of meeting participants. Such practice, moreover, must evidence the agreement of the parties *as a whole* regarding the interpretation of a Convention; the views of only some of them, even a majority, are not sufficient. *See* Art. 31(3)(b); Vienna Convention on the Law of Treaties, International Law Commission Commentary, 2 ILC Yearbook 1066 ¶¶ 14-15, at 221-22. The Commission reports, moreover, are not necessarily an accurate guide to relevant caselaw; for example, the United States is referenced as a country that regards *ne exeat* orders as constituting joint custody. Permanent Bureau Amicus Br., 13. The Permanent Bureau does not represent the States Parties but is rather a

The central function of Special Commissions is to enhance cooperation between administrative bodies' (Central Authorities), improvements in Convention operations, especially by facilitating the services mandated by Articles 6-10.[35] Because many Central Authorities are not staffed by lawyers or do not take part in return proceedings, and parties are not required to route their Convention claims through any Central Authority, delegates at Special Commission meetings may even be unaware of their courts' decisions.

Further, there are differing forms of Convention membership that render any general legal effect beyond educational value to discussions or resolutions at Special Commission meeting quite implausible.[36] The Convention contains an innovative provision that permits accession to it by countries that were not yet members of the Hague Conference when the Convention was promulgated and by those that remain nonmembers.[37] In such cases, existing parties to the Convention may choose whether to accept such accessions as creating treaty relations. A large percentage of those now parties to the Convention consists of states that, therefore, do not belong to the original multilateral treaty, but

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staff secretariat. STATUTE OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW arts. 4(1)-(2), 6.

[35] *See supra* n.5 (Bruch, *Central Authority*).

[36] Recognizing this, the Permanent Bureau has undertaken judicial education activities.

[37] *See* Arts. 37 (ratification), 38 (accession).

rather to bilateral treaties with countries that have accepted their accession.[38]

The Special Commission discussions therefore are not an authoritative aid to interpretation of the "right of return" and "rights of custody."

III. The Weight of Persuasive Foreign Law Does Not Support Interpreting Travel Restrictions as Custody Rights under the Convention.

We are troubled by inaccurate descriptions of much of the foreign law invoked in several briefs and in many Convention opinions. In many cases, the accurate assessment of foreign caselaw is difficult or debatable. As best we can determine, however, the picture is much more nuanced than has been claimed – one that is far from uniform or compelling.[39]

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[38] Of the current 81 contracting parties, 26 ratified, 49 acceded (27 Conference members; 22 others), 5 are successors to the previous memberships of Yugoslavia and Czechoslovakia, and China is listed as a continuation member. *See* Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Status Table, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24.

[39] Some of the materials cited by Petitioner are unavailable in English, and it is unclear whose analysis supports the representations (often mistaken) as to their content. Others are cited incorrectly, and we could locate only some of them. To secure trustworthy information on foreign sources and legal analysis, therefore, in addition to employing our own linguistic skills, we have consulted law professors and practitioners with bilingual or specialized knowledge and training, each of whom is also trained in the common law tradition. Whenever possible, we secured two independent readings of foreign language

Because there is ready availability to most of the English language materials, and ample analysis of most of them exists in the briefs already before the Court and in the caselaw, we focus on the foreign language materials.

Many of the foreign cases cited for the proposition that a *ne exeat* provision confers a right of custody on a parent who otherwise has only visitation rights, contain no such holding. Many involve joint custody rights instead, which are expressly recognized as rights of custody in Article 3 of the Convention. One, a case from the South African Constitutional Court, involves a contingent custody transfer.[40] The two French cases appear to disagree, not adding anything to a search for consistency.[41]

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materials. The International Child Abduction Database (INCADAT), operated by the Hague Conference's staff, makes leading Convention decisions accessible. Although English language summaries are also given, we noted many serious discrepancies with information received from our foreign experts.

[40] *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC) (miscited as 2000). *See also* E-mails from Carina DuToit, Attorney, Centre for Child Law, Univ. of Pretoria, to Prof. Bruch (Nov. 5, 6, 2009).

[41] *Proc. Rép. c. Mme. Y*, T.G.I. Pèrigueux, Mar. 17, 1992, D. 1992, p. 315 (Fr.), held that a *ne exeat* right conferred no custody right and, accordingly, that return was unavailable. The court noted the negative impact on a custodial parent's mobility if a *ne exeat* order were to confer a right of custody. An earlier French case cited by Petitioner, *Proc. Rép. c. M.B.*, Cour d'Appel d' Aix-en-Provence (6e Ch.) 23 March 1989, 79 Rev. crit. 1990, 529 note Y. Lequette (Fr.) provided so little analysis in reaching its result that it is impossible to determine what factors influenced the court; indeed, given the few facts that the opinion discloses, it

A German Constitutional Court decision, BVerfG, NJW 1997, 3301 (2BvR 1126/97), is an example. A three-judge panel of the court returned the children because the Convention recognizes joint custody even if a parent has some but not all custodial rights, and, in this case, important questions of education and the children's upbringing had to be decided jointly. An earlier German decision in a case that was erroneously cited [42] also involved a joint legal custody order that expressly required joint decisions on important questions.[43] Similarly, in two decisions, the Israeli High Court (Supreme Court is the name of Israel's trial courts), *Turner v. Meshulam*[44] (which

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appears the court was most concerned with ensuring that the mother (the visiting parent) who sought their return was not deprived of her children.

[42] The cited case, OLG Dresden FamRZ 2003, 468, involves only the enforcement of an earlier decision that can be found at OLG Dresden FamRZ 2002, 1136 (cited incorrectly as 1163, however, in the enforcement case). Our statement of the facts is drawn from the controlling 2002 decision. Family law is federal law in Germany, so these state court decisions could have been appealed to the Federal Supreme Court (BGH), but apparently were not. *See* E-mails from Prof. Dr. Michael Coester, Ludwig-Maximilians-Universität München (Univ. of Munich) to Prof. Bruch (Nov. 5 and 8, 2009) (hereafter Coester).

[43] *See* NJW 1996, 1402 (15 Feb.1996); NJW 1996, 3145 (1 Aug. 1996) In none of these cases had the foreign court imposed a travel restriction. The latter decision held that a restriction on a parent's right to determine a child's residence in a joint custody case does not violate the country's constitutional freedom of movement when weighed against the country's constitutionally imposed parental responsibilities. *See supra* n.42 (Coester, Nov. 5, 2009).

[44] Miscellaneous Civil Application 1648/92 *Turner v. Meshulam* D.46(3) 38. *See* E-mails from Dr. Rhona Schuz, Senior Lecturer and Co-Director, The Centre for the Rights of

Father cites as *Tournai v. Mechoulam*) and *Foxman v. Foxman*, enforced travel restrictions.[45] But because each father held joint custody rights that the court said necessitated their consent, neither case illuminates the question before this Court – whether a travel restriction confers custody rights under Article 5 on a party who otherwise holds only visitation rights.[46]

Most of these foreign language cases are relied upon by Petitioner as supporting his arguments in this Court.[47] In fact, however, most of their descriptions are misleading, as a careful comparison with the descriptions set forth here reveals.

Other cases, although correctly cited, illustrate potential problems in attributing custody rights to a parent who otherwise has only visitation. These cases demonstrate that the "right of return" under the Convention is ill-suited to address the problems of custody and access. It may be that travel

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the Child and the Family, Sha'anei Mishpat College to Professor Bruch (Nov. 3 and 19, 2009).

[45] *Turner* states expressly that it follows *C v. C* [1989] 1 WLR 654; *Foxman* follows *Turner* and cites Article 5; *see also* E-mail from Edwin Freedman to Elisabeth McKechnie (Nov. 4, 2009).

[46] *Cf. Thomson v. Thomson* [1994] 3 S.C.R. 551 (Can.), which recognized a custody right in a Scottish court that had granted interim custody to the mother pending the court's decision on the merits. *Thomson* held that the father could rely on the court's custody rights, but also made clear that it would recognize no custody rights once the proceedings were concluded.

[47] Pet.'s Br. 35-36.

restrictions, and international litigation if they are breached, occur disproportionately in situations of high parental conflict. Although the following cases are merely anecdotal, early studies suggest this is the case.[48]

An example is OGH May 2, 1992 2Ob596.91, where the Austrian Supreme Court held the father had a right to a return order when the mother violated a travel restriction in an English sole custody order that expressly required his consent to a move abroad. This is a case that supports Father's claim in *Abbott*. The Austrian court, however, refused to return the children, holding that a valid defense was established under Article 13*b*, which allows the court to refuse a return if "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."

Travel restrictions are increasingly used to protect convenient visitation.[49] Their negative implications for women's mobility were identified in a Canadian Supreme Court decision, where the court

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[48] *See infra* n.55, n.56; *see also* J. Edleson et al., *Multiple Perspectives on Battered Mothers and Their Children Fleeing to the U.S. for Safety: A Study of Hague Convention Cases*, (Draft Final Report to the National Institute of Justice) (Univ. of Minn. 2009) (Ninety-two percent of Convention cases with abuse allegations involved American mothers returning to the US. Eighty percent of the fathers who sought return orders were foreign citizens. More than half of these children were returned, and their abusive fathers received custody pending trial of all but one).

[49] The Austrian and South African cases are examples.

made clear that it will not treat travel restrictions as custody rights if no custody action is currently pending.[50]

Retired Canadian Supreme Court Justice Claire L'Heureux-Dubé points out a particular concern with orders that restrict relocation for women:

> [they] can be used by abusers in order to maintain continued control over estranged spouses and children.[51]

The same problems, including similar efforts by abusers to control their former partners, also exist around the world, and scholarly articles now address their implications for the welfare of children and the women who care for them. Some also expose the flaws in pseudo-scientific doctrines that are often said to necessitate travel restrictions.[52]

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[50] "The Convention does not give access the same protection as custody because of possible disruption to the child and the implications for the custodial parent's mobility." *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.) (LaForest, J.) (L'Heureux-Dubé, J.) (concurring to emphasize the point).

[51] Justice Claire L'Heureux-Dubé, "Cherishing Our Children," (2001), 8, *available at* http://www.childjustice.org/docs/dube2001.pdf; *see also* Weiner, Merle, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000).

[52] *See*, *e.g.*, Carol S. Bruch, *Sound Research or Wishful Thinking? Lessons from Relocation Law,* 40 FAM. L.Q. (2006) (collecting recent scholarly research on children's needs and distinguishing unscientific doctrines).

The cases cited, moreover, represent only a small fraction of the Convention Parties. The cases from countries that apply common law methodology to provide custody rights from travel restrictions arise in only seven of the 81 countries that now belong to the Convention. These decisions come almost exclusively from countries that apply common law methodology to Convention litigation and often defer to decisions of the English courts.

In these cases, an opinion from the Court of Appeal and a later one in the House of Lords, come to a conclusion sharply different from that of the Canadian Supreme Court and the uniform holding of this country's Circuit Courts of Appeal that have considered the question in sole custody cases. We agree with the reasoning of the Canadian Supreme Court, which carefully compares custody and visitation, considers the matter from the standpoint of the Convention's child-protection goals, and notes concerns for the gender-based implications of travel restrictions.

Because the countries whose decisions have been offered vary greatly in size and the number of Convention cases they confront, the current relative significance of their decisions, in practical terms, is revealed by Convention caseloads. They show that England and the six countries that follow its view, taken together, deal with roughly the same number of Convention cases as do the common law countries that hold a contrary view, Canada and the United States.[53] It may also be noted that courts in the

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[53] *See* Appendix A.

countries that wanted visitation rights to provide a right to return of the child (and lost soundly on that point) during the negotiations of the Convention are prominent among those that have, after ratifying the Convention, interpreted travel restrictions orders as granting rights of custody.

There is thus a genuine disagreement among the common law courts that have dealt with the question. Once corrected for misinformation and lacunae in the foreign law materials that have been cited to this and other courts, the civil law authorities on point are similarly divided.

We conclude that there is at present no persuasive "weight of common law authority" that favors granting custody rights when travel restrictions are present in what is otherwise a straightforward visitation case. There is instead a mélange of opinions from trial courts, intermediate courts, and supreme courts, most of them not on point, and many of them sadly lacking in analysis. In contrast are the uniform, carefully reasoned opinions of all the Circuit Courts of Appeal that have dealt with the issue in *sole* custody cases, and determined – correctly in our view – that the Convention does not provide a right of return for breach of *ne exeat* orders.

IV. Remedies for Violations of Travel Restrictions and Rights of Visitation Should Be Dealt with by Amendment or Protocol.

As a general rule, significant changes to treaties, however desirable, should be accomplished by

subsequent treaty or amendment, and not by reinterpretation. That is all the more true here, where the subject at issue – enforcement of rights of access – is complex, fraught with difficulties, and cannot adequately be addressed in a one-time, "one-size-fits-all" reinterpretation of the original Convention.[54] Because families come in many "sizes," a range of solutions should be made available.

The problems of enforcing visitation are real, and the desire to provide more relief to noncustodial parents is understandable and admirable. To seek an amendment of the Convention by a court decision that is contrary to its language and history, however, is both unwise and unnecessary.

It is unwise because travel restrictions are only a small part of the overall picture, and there are many other factors that must be considered. A decision to provide a right of return for violation of travel restrictions, standing alone, does not fit into any intelligible policy structure and harms important child-centered values. Moreover, it can only serve to complicate future negotiations to address coherently the larger problem. As law professors, many of us are active in law reform and, in our experience, when a complex area of law must be reworked, it is far easier to move forward if many options are still open than it

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[54] Professor Silberman agrees, arguing that a new protocol is necessary because of "confusion" regarding when, if ever, a *ne exeat* order creates a right of custody. Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 48 (2003).

is if it is necessary to "take back" gains one interest group or another believes it has already won, however counterproductive that intransigence may be.

One problem, for example, that needs to be confronted is that of continuing jurisdiction over the custodial parent.[55] Early research indicates that most abducting mothers do return with their children, even if they report that they are victims of domestic violence, while fathers (although making no allegations of domestic violence) do not.[56] Some children have therefore been sent back in their mother's care to await trial secreted in a battered women's shelter.[57] In other cases, the caregiver may

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[55] A California study reveals that, as a group, mothers who take their children are poor and without access to lawyers and mental health professionals who might assist them. Further, perhaps because they often belong to cultural groups that do not turn to the courts to resolve disputes, they often do not know that moving away with their children is against the law. Professor Weiner believed that the increasing number of cases in which a primary caretaker leaves with the children and alleges domestic violence may reflect the desperation of women who flee with criminal and civil consequences far from their minds, sometimes to hide from the abuser -- an insight borne out by the California study. *See* Janet R. Johnston et al., *Early Identification of Risk Factors for Parental Abduction*, JUVENILE JUSTICE BULLETIN 1, 4-5 (Mar. 2001) *available at* http://www.ncjrs.org/pdffiles1/ojjdp/185026.pdf.

[56] Reunite Research Unit, *The Outcomes for Children Returned Following an Abduction* (Sept. 2003).

[57] *See Murray v. Director of Family Service ACT*, (1993) F.L.C. 92-416 (Austl.); *Re M* (Abduction: Intolerable Situation) [2000] 1 F.L.R. 930 (22 March 2000) (Fam. Div.) (Eng.) (children returned; mothers under death threat).

not be able to return with the child for any number of reasons (visa or work permit problems, the needs of other children who live abroad, or personal danger to her).[58]

A host of other issues have also emerged in the thirty years since the Convention was drafted, including an increased understanding of children's needs in separated households, new custody and family forms, greater attention to gender-based disparities in family law, increasing sensitivity to the challenges of parenting as a visiting parent, fewer abductions between Convention countries by noncustodial parents and more by custodial parents, heightened concern for domestic violence cases, a burgeoning use of travel restrictions outside the Middle East, a loosening of international borders, and the development of the European Union, with new rules for custody jurisdiction and a uniform family law for its member states.

Any requirement to send the child to a non-custodial parent must also address in depth and with sensitivity such questions as what to do about "supervised visitation" and perceived risks to the child. Studies completed since 1980 reveal a surprisingly high incidence of serious problems such as substance abuse, child or sexual abuse and

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[58] If the child in this case is returned to Chile, for example, it is perhaps unlikely that the court that twice refused even joint custody to Father would now grant custody to him. We do not know, however, whether Mother, who filed for divorce in Texas and is probably no longer married to Father, still holds a valid visa or would qualify for a new one to accompany their child and, if so, how she and the child could support themselves there.

domestic violence in disputed custody cases,[59] and even risks to children arising from visitation in some cases. An expert opinion solicited by the English Court of Appeal from two leading psychiatrists is particularly illuminating, as it identifies the advantages and disadvantages of visitation for children in a wide range of situations.[60]

Two recent cases illustrate that things can go very wrong if a focus on children's needs is lost. One entailed 17 months in foster care for children who were returned to their visiting father's community. Their mother, who stayed away because of criminal charges, was ultimately granted custody.[61] In the second, an abused woman who accompanied her young children when they were ordered returned feared for her life. Having begged police for a ride to a shelter, she was killed in front of her mother and sons as they were about to drive there by themselves.[62]

Thus, notwithstanding the importance of visitation as a general rule, there are a number of

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[59] *See supra* n.28 (Bruch, *Unmet Needs*, *passim*).

[60] It is difficult to locate in this country, but important in order to illustrate the greater complications of enforcing access rights. We have therefore sent a letter requesting permission to lodge a copy of the opinion with the Court, as it was later published. Sturge & Glaser, *Contact and Domestic Violence* (2000) FAM LAW 615 (2000), *available at* http://www.law.ucdavis.edu/faculty/Bruch/files/AppendixD.pdf.

[61] *Available at* http://fathersforlife.org/cps/apprehension3.htm.

[62] *Available at* http://www.brisbanetimes.com.au/world/young-mother-fled-to-sydney-to-save-her-life-20090501-aq5z.html.

caveats, issues and questions, which call for the kind of more detailed consideration and drafting that is only possible in the context of a negotiation.

The question of amending or replacing the Convention has been discussed at The Hague during official meetings, and last spring at a Council meeting, staff were directed to move forward with a feasibility study.[63] Such instruments hold a better promise of adequately addressing the myriad problems of enforcing rights of access; a reinterpretation of the Convention that establishes a blanket rule for travel restrictions is not a wise or adequate substitute.

CONCLUSION

We conclude that the clear language of the Convention instead, when read in good faith and taken in context, given the structure and purposes of the treaty as well as the negotiating history, dictates the correct result: a holding that the presence of a *ne exeat* provision does not confer rights of custody on a party who otherwise holds only visitation rights.

This conclusion is also supported by the record of the negotiations and the amicus brief submitted by two of the original drafters. The foreign caselaw, taken as a whole, fails to provide a consistent weight of authority that deserves this Court's deference. The contrary interpretation urged by the Petitioner is neither wise nor necessary. Given the many complexities surrounding the important question of

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[63] *See supra* n.8.

enforcing access rights, the enforcement of travel restrictions for noncustodial parents should be considered not by reinterpretation of the Convention, but in the broader context of considering a protocol or revised treaty to addresses the larger questions.

Because of deficiencies in the record that we identify throughout this brief, we also conclude that dismissal as improvidently granted would be an appropriate alternative disposition.

Respectfully submitted,

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APPENDIX A

Cases Addressed to the Central Authorities in 2003[1]

COUNTRY	INC. RETN	INC. ACCSS	OUT. RETN	OUT. ACCSS	TOTAL APPS.
U.S.	286	59	85	21	451
CANADA	56	11	55	14	136
SUBTOTAL	**342**	**70**	**140**	**35**	**587**
AUSTRALIA	43	19	91	14	167
ENG & WALES	142	17	148	43	350
SCOTLAND	12	0	3	0	15
IRELAND	33	2	23	0	58
ISREAL.	13	2	25	3	43
N.Z.	27	6	25	10	68
SO AFRICA	11	3	12	4	30
SUBTOTAL	**281**	**49**	**327**	**74**	**731**
TOTAL	**623**	**119**	**467**	**109**	**1318**

Inc. = Incoming cases; Out.= Outgoing cases; Retn.= Return applications; Accss=Access cases

[1] Numbers are drawn from NIGEL STOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, NATIONAL REPORTS (2007), *available at* www.hcch.net/index_en.php?act=publications.details&pid=4866&dtid=32. They are only approximations. Because parties are not required to route petitions through any Central Authority, may file return petitions directly in the Central Authority of the country in which they believe the child may be located, or may file directly in a competent authority in that country, there is no way to know how many cases overall were brought in any of these states during 2003. It is possible, for example, that in this table, an incoming case in the US will also be listed as an outgoing case in Australia. If the incoming case came instead from the Central Authority of a state not listed here (for example, the Central Authority of Hungary), or came directly to the US Central Authority from someone abroad who chose not to approach the home Central Authority, the chart does not reveal it.

APPENDIX B

BCN Legislación chilena

emita en la sentencia un pronunciamiento sobre cada una de ellas, aunque no hubieren sido incluidas sido incluidas in la demanda respectiva o deducidas por vía reconvencional. El tribunal hará lugar a esa solicitud, a menos que no se den los presupuestos que justifican su regulación.

Para estos efectos, las acciones que hubieren dado lugar a la interposición de la demanda se tramitarán conforme al procedimiento que corresponda, mientras que las demás se sustanciarán por vía incidental, a menos que el tribunal, de oficio o a petición de parte, resuelva tramitarlas en forma conjunta.

NOTA:

El artículo final de la LEY 19947, publicada el 17.05.2004, dispone que las modificaciones efectuadas a la presente norma, entrarán en vigencia seis meses después de su publicación.

Art. 49. La salida de

menores desde Chilen deberá sujeterse a las normas a que en este artículo se señalan, sin perjuicio de lo dispuesto en la Ley Nº 18.703. Si la tuición del hijo no ha sido confiada por el juez a alguno de sus padres ni a un tercero, aquél no podrá salir sin la autorización de ambos padres, o de aquel que lo hubiere reconocido, en su caso. Confiada por el juez la tuición a uno de de los padres o a un tercero, el hijo no podrá salir sino con la autorización de aquel a quien se hubiere confiado. Regulado el derecho a que se refiere el artículo 229 del Código Civil por sentencia judicial o avenimiento aprobado por el tribunal, se requerirá también la autorización del padre o madre a cuyo favor se estableció.

L.19.585
Art. 5º, Nº 5
letra a)
L.19.585
Art. 5º, Nº 5
letra b)

L 19.585
LEY 19711
Art. unìco Nº 3
D.O. 18.01.2001

El permiso a que se refieren los incisos anteriores deberá prestarse por escritura pública o por escritura privada autorizada por un Notario Público. Dicho permiso no será necesario si el menor sale del país en compañia de la persona o personas que deben prestarlo.

En caso de no pudiere

otorgase o sin motivo plausible se negare la autorización por uno de aquellos que en virtud de este artículo debe prestarla, podrá ser otorgada por el juez de letras de menores del lugar en que tenga su residencia el menor. El juez, para autorizar la salida del menor en estos casos, tomará en consideración el beneficio que le pudiere reportar y señalará el tiempo por el que concede la autorización.

Expirado el plazo a que se refiere el inciso anterior sin que el menor, injustificadamente, vuelva al país, podrá el juez decretar la suspension de las pensiones alimenticias que se hubieren decretado.

En los demás casos para que un menor se ausente del país requerirá la autorización del juzgado de letras de menores de su residencia.

Artículo 49 bis. – En la sentencia el juez podrá decretar que la autorización a que se refiere el inciso sexton del artículo anterior habilita al padre o madre que la haya requerido y que tenga al menor a su cuidado para salir del

país siguientes, siempre que se acredite que el otro progenitor, injustificadamente, ha dejado de cumplir el deber, reguulado judicial o convencionalmente, de mantener una relación directa y regular con su hijo. El plazo de permanencia del menor de edad en el extranjero no podrá ser superior a quince días en cada ocasión.

Ley 20303
Art. UNICO
D.O. 24.09.2009
L. 18.802