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What Gives *You* the Right?!—Ne Exeat Rights Should Constitute Rights of Custody after *Furnes v. Reeves*

Kathleen A. O'Connor*

I. Introduction

The word “family” has an ever-changing definition in our society and societies around the world. In one moment, a family may consist of a married couple with children or, with more recent frequency, an unmarried couple with children. However, in the blink of an eye, that seemingly strong bond may break and thus completely change the composition. Divorce or separation creates two families in which the children are often caught in the crossfire.¹ Custody battles and arguments among the parents subject children to emotional turmoil and uncertainty.² Children are frequently treated like pawns while their parents engage in ongoing disputes. In some situations, even where a court order grants custody or visitation rights to both parents, one parent prevents the other from seeing or contacting the child or children. An issue that can have even more significant effects on all parties involved is child abduction by parents, specifically international child abduction.

Child abductions, international or not, can negatively affect the psychological and physical well-being of a child.³ Studies reveal that

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1. Hildy Mauzerall et al., *Protecting the Children of High Conflict Divorce: An Analysis of the Idaho Bench/Bar Committee to Protect Children of High Conflict Divorce's Report to the Idaho Supreme Court*, 33 IDAHO L. REV. 291, 292 (1997).

2. Children of divorce are at an increased risk for disruptive disorders, anxiety disorders, and attention deficit hyperactivity disorders compared to children from intact families. Additionally, children over the age of ten who have divorced or separated parents are at an increased risk of substance abuse. Amy L. Stewart, Note, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509, 518-19 (1999).

3. Deprivation of parental relationships can lead to later anti-social behavior, such as drug addiction and delinquency. It can also lead to, among others, mistrust and

children who have been internationally abducted by a parent are at risk for a multitude of harmful emotional and psychological effects.⁴ These include anxiety, grief, rage, difficulty sleeping, rejection of the abducting parent, and a sense of guilt for not trying to contact the left-behind parent.⁵ International child abduction can also cause distress and other harmful effects to the parent from whom the child was taken.⁶

In order to deal with the growing concern in the international community about child abduction by a parent or guardian,⁷ in 1980 The Hague Convention on the Civil Aspects of International Child Abduction (“the Convention”) was adopted and signed.⁸ The signatory countries sought to protect children from the harmful effects of international abduction and to create uniform procedures for their return to the State of their “habitual residence.”⁹ Since the original signing,¹⁰ seventy-five countries have signed on to the Convention.¹¹

Each year, the signatory countries handle many cases involving the international abduction of children. The U.S. is at the top of the charts for the number of applications it receives for either the return of children to the U.S. or the return of children to their State of habitual residence from the U.S.¹² Recently, a handful of Convention cases have made their

depression. See Copertino, Monica Marie, Comment, *Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of Its Efficacy*, 6 CONN. J. INT’L L. 715 (citing S. Abrahms, *Children in the Crossfire* 76 (Atheneum, 1983)).

4. Marilyn Freeman, *The Effects and Consequences of International Child Abduction*, 32 FAM. L.Q. 603 (1998).

5. *Id.* at 608-14.

6. Parents often suffer from anxiety, depression, fear, loss of appetite, and rage. These reactions can occur regardless of whether the parent was the abductor or left-behind parent. *Id.* at 615-16.

7. See John M. Eekelaar, *International Child Abduction by Parents*, 32 U. TORONTO L.J. 281 (1982).

8. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 51 Fed. Reg. 10,494 (March 26, 1986) [hereinafter Convention].

9. *Id.* at Preamble.

10. On October 25, 1980, four States signed the Convention: Canada, France, Greece, and Switzerland. See Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, 3 Acts and Documents of the Fourteenth Session 426 (1980) [hereinafter Perez-Vera Report].

11. As of August 20, 2004, the number of Contracting States to the Convention was 75. Status Table on the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last visited Sept. 17, 2005). The U.S. signed the Convention on December 23, 1981, see H.R. REP. NO. 100-525, at *5 (1988), reprinted in 1988 U.S.C.C.A.N. 386 [hereinafter House Report], but it did not enter into force until July 1, 1988, following the enactment of the International Child Abduction Remedies Act (ICARA), the U.S.’ Convention implementation statute. See 42 U.S.C. §§ 11601-11611 (2002).

12. In 1999, the U.S. handled almost 400 applications for return, more than any other State. Nigel Lowe, et al., *Country Report: U.S.* (2002), at

way to the U.S. Courts of Appeals over an issue that is not specifically covered in the Convention.¹³ Under the Convention, for the return of a child to be warranted, a parent's "rights of custody" must have been violated.¹⁴ The Convention does not precisely define "rights of custody" but only states what they shall include.¹⁵ The issue in the courts is whether a parent's court-ordered right to give or withhold consent to the child being removed from the State of habitual residence by the other parent (a "ne exeat" right)¹⁶ is a "custody right" under the Convention, thus making removal without consent "wrongful" under the Convention.¹⁷

In November 2004, the U.S. Supreme Court denied certiorari to a case involving this issue.¹⁸ In 2002, Thomas Furnes, a Norwegian citizen, submitted an application in the U.S. for the return of his daughter, Jessica, to Norway, which was her State of habitual residence.¹⁹ Mr. Furnes's ex-wife Pamela Reeves, a U.S. citizen, took their daughter from Norway to the U.S. on what he thought was a vacation. He later discovered, when the pair did not return at the agreed time, that Ms. Reeves intended to stay in the U.S. with Jessica.²⁰ Under a

http://www.missingkids.com/en_US/publications/UnitedStates_E.pdf (last visited Sept. 30, 2005).

13. See, e.g., *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

14. "The removal or the retention of a child is to be considered wrongful where (a) it is in a breach of rights of custody attributed to a person, an institution or any other body . . .; and (b) at the time of removal or retention those rights were actually exercised." Convention, *supra* note 8, art. 3.

15. "Rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention, *supra* note 9, art. 5. The Hague Convention on Private International Law Special Commission reports opine that this non-exhaustive definition of "rights of custody" was purposeful because each legal system has its own language and views of what constitutes custody rights. Looking to the content of the rights and not their name was the intent. See Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, (1989), *reprinted in* 29 I.L.M. 219, 222 (1990) [hereinafter Hague Commission Overall Conclusions]; see also Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, (1993), *reprinted in* 33 I.L.M. 225, 233 (1994) [hereinafter Second Commission Meeting].

16. "Ne Exeat" or "that he not depart" (Latin) is an "equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction. BLACK'S LAW DICTIONARY 1060 (8th ed. 2004).

17. See *Croll*, 229 F.3d at 136.

18. The Supreme Court denied Pamela Reeves's petition for certiorari on November 8, 2004. *Reeves v. Furnes*, 125 S. Ct. 478 (2004).

19. *Furnes v. Reeves*, 362 F.3d 702, 709 (11th Cir. 2004), *cert. denied*, *Reeves v. Furnes*, 125 S. Ct. 478 (2004).

20. *Id.* at 708.

settlement agreement approved by the Norwegian courts, Ms. Reeves was not to move abroad with Jessica without the consent of Mr. Furnes.²¹ Mr. Furnes's petition for his daughter's return alleged that Ms. Reeves had violated his custody rights, making Jessica's removal to the U.S. wrongful under the language of the Convention.²² The district court in Atlanta, Georgia denied Mr. Furnes's petition, but the Eleventh Circuit Court of Appeals held that Mr. Furnes's *ne exeat* right was a "right of custody" under the Convention, and Ms. Reeves violated those rights.²³

This decision by the Eleventh Circuit represents one half of the split amongst the Circuit Courts of Appeals that have addressed the *ne exeat* right issue.²⁴ Ms. Reeves appealed the decision; however, the Supreme Court denied her petition for certiorari. The Supreme Court's decision in *Furnes v. Reeves* would have had a significant impact on the way that the U.S., and possibly the way other Contracting States, implements the objectives of the Convention.

This Comment discusses the recent history of the "*ne exeat* right as a custody right" issue, and offers an analysis of why the Court should have heard *Furnes v. Reeves* and ruled in favor of "rights of custody" as including *ne exeat* rights. Part II of this Comment presents a brief overview of the Convention, from the reasons for its adoption almost twenty-five years ago to how it is viewed by the international community today. Part II will also examine, in short, the Convention's implementing legislation in the U.S., the International Child Abduction Remedies Act (ICARA). Part III will then explore the circuit split in the U.S. Courts of Appeals and how it compares to the views of the courts of sister signatories. Finally, Part IV explains why the Court should have heard the case and decided that a *ne exeat* right, or a right to determine whether the child or children may relocate outside the State of habitual residence, is a "right of custody" under the Convention, thus making removal without consent grounds for return.

II. Hague Convention

At the time of the Convention's inception, there was evidence that

21. Under a settlement agreement approved by the Norwegian courts, Mr. Furnes and Ms. Reeves had "joint parental responsibility" over Jessica. Because Jessica lived with her mother, Ms. Reeves had decision-making authority over important aspects of the child's care. However, under Norwegian law, a parent with "joint parental responsibility" has decision-making authority over whether the child lives outside Norway. *See id.* at 708 (citing Norwegian Children Act, No. 3, §§ 35(b), 40).

22. *Id.* at 709.

23. *Id.* at 724.

24. *See, e.g., Croll*, 229 F.3d at 135 ("access" or visitation rights coupled with a *ne exeat* right do not constitute rights of custody); *Furnes*, 362 F.3d at 724 (*ne exeat* rights amount to custody rights under the Convention).

international child abduction by parents was on the rise.²⁵ Several countries and the Hague Conference on Private International Law recognized the deficiencies in the law.²⁶ A device was needed to correct these problems and to protect the interests of children. Thus, the Convention was drafted and adopted to create a cooperative effort to provide for the timely return of children wrongfully removed or retained and to ensure that rights of custody and access in one Contracting State were respected in other Contracting States.²⁷

Essentially, the Convention attempts to provide a uniform international mechanism by which a child who is removed to or retained in any Contracting State in violation of rights of custody will be promptly returned to the child's state of habitual residence.²⁸ Although the Convention's title includes the term "abduction," and the term "custody" is used throughout the text of the Convention, the Convention neither seeks to cover the criminal aspects of child abduction nor to regulate custody issues.²⁹ It merely seeks to create a system of cooperation to ensure that its objectives, to restore the status quo, are fulfilled.³⁰

A. Major Provisions of the Convention

1. General Scope of the Convention

The first of the Convention's six chapters is devoted to the objectives and scope of the Convention. Securing the prompt return of children wrongfully removed to or retained in a Contracting State and ensuring the respect of custody and access rights under the laws of Contracting States are the objectives enumerated in Article 1.³¹ With these objectives in mind, the remainder of the first chapter seeks to define who and what these objectives encompass. To ensure the prompt return of wrongfully removed or retained children, Article 2 charges

25. See John M. Eekelaar, *International Child Abduction by Parents*, 32 U. TORONTO L.J. 281, 306 (1982).

26. The United Kingdom recognized a lack of mutual enforcement arrangements between countries, a lack of mechanisms to locate abducted children, and a lack of legal aid in proceedings overseas. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l & Comp. L.Q. 537-38 (1981).

27. Perez-Vera Report, *supra* note 10, at 435. See also House Report, *supra* note 11 at 5 (explaining Convention reflects worldwide concern about harmful effects of parental abductions and need for effective deterrent to such conduct.).

28. Convention, *supra* note 8, at art. 1, 3. In addition, the Convention protects rights of access, generally described as visitation rights.

29. Perez-Vera Report, *supra* note 10, at 430, 441.

30. *Id.* at 435.

31. Convention, *supra* note 8, at art. 1.

Contracting States to act expeditiously in their efforts by employing all appropriate measures available to them.³²

However, before the Contracting States can put these speedy procedures into action to secure the return of the child, a judicial or administrative authority in the Contracting State must determine that the removal or retention was “wrongful”³³ and that the Convention applies to the child at issue.³⁴ The chapter concludes with what “rights of custody”³⁵ and “rights of access”³⁶ may include, serving as a guide for Contracting States to ensure that the two rights are respected as intended by the Convention.

2. Central Authorities

Close cooperation among the Contracting States is an essential element in the success of the Convention. Therefore, to channel that cooperation, each Contracting State must designate a Central Authority to implement the expeditious procedures emphasized in Article 2.³⁷ The Central Authorities must cooperate with each other and promote cooperation amongst the authorities in their respective Contracting States to fulfill the objectives of the Convention.³⁸ Persons or institutions claiming the wrongful removal or retention of a child may apply to either the Contracting State of the child’s habitual residence or to any other Contracting State for assistance in obtaining the return of the child.³⁹ Once the application is received, the requested Central Authority is

32. *Id.* at art. 2.

33. *Id.* at art. 3. The removal or retention is wrongful if it violates joint or sole custody rights under the laws of the child’s State of habitual residence and the holder of such rights was actually exercising or would have been exercising them but for the removal or retention. The custody rights may arise by operation of law, by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

34. *Id.* at art. 4. The Convention only applies to a child or children under the age of 16 who were habitually residing in a Contracting State immediately prior to the violation.

35. *Id.* at art. 5. Defining rights of custody, at the heart of this Comment, has proved to be a difficult task for many judicial and administrative authorities that have attempted to do so. The Convention merely provides a starting point for Contracting States because it only provides what “rights of custody” shall include.

36. *Id.* See also Chapter 4. Although securing and maintaining rights of access is an integral part of the Convention, it will not be addressed at length in this Comment. Because the case in which this Comment seeks to analyze deals with whether a certain right is a “right of custody” within the meaning of the Convention, the focus will remain on the “custody” concept.

37. Convention, *supra* note 8, at art. 6. The Office of Citizens’ and Consular Affairs of the Bureau of Consular Affairs within the Department of State is the Central Authority of the U.S. The list of Central Authorities is available at http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=24 (last visited Sept. 17, 2005).

38. *Id.* at art. 7.

39. *Id.* at art. 8.

charged with acting expeditiously to achieve the objectives of the Convention. It does so by implementing appropriate measures to, amongst other things, discover the whereabouts of the child, prevent further harm to the child, and to initiate or facilitate the institution of judicial or administrative proceedings.⁴⁰

Once proceedings are initiated in the judicial or administrative authorities within the Contracting State, those authorities are to act expeditiously to determine the disposition of the issue.⁴¹ Any decision of a judicial or administrative authority is not to be considered a determination on the merits of any custody issue,⁴² and no decision shall be made on the merits of custody until the tribunal determines that the child is not to be returned.⁴³

3. Exceptions to Return of the Child

If a judicial or administrative authority within a Contracting State determines that the child was wrongfully removed or retained in breach of rights of custody, the authority shall order the return of the child.⁴⁴ However, the Convention lists several exceptions that may prevent the return of the child regardless of the wrongfulness of the removal or retention. It is important to bear in mind that, although the Convention offers these exceptions to the return of a wrongfully removed or retained child, the judicial or administrative authority retains the power and discretion to order return at any time.⁴⁵

First, if the proceedings were commenced more than one year after the removal or retention and the abductor is able to show that the child is settled in its new environment, the authority may withhold return of the child.⁴⁶ Second, if the abductor is able to show that the petitioner was

40. *Id.* at art. 7(a)-(i). The Central Authorities shall also take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues, to exchange information relating to the social background of the child and to the general character of the law of their State, to provide or facilitate legal aid and advice, to provide arrangements for the safe return of the child, and to keep each other informed with respect to the operation of the Convention.

41. *Id.* at art. 11.

42. Convention, *supra* note 8, at art. 19.

43. *Id.* at art. 16.

44. *Id.* at art. 12.

45. Convention, *supra* note 8, at art. 18.

46. *See id.* The judicial or administrative authority is not bound to refuse the return of the child under these circumstances. The burden of proof is on the abductor to show that the child has settled in his or her new environment. It has been determined that nothing less than substantial evidence of settlement will suffice. *See* Public Notice 957: Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10509 (March 26, 1986) [hereinafter Public Notice 957]. Additionally, there has been much debate over when the one-year period begins within which the petitioner must

not actually exercising the custody rights at the time of the removal or retention, had consented to or acquiesced in the removal or retention, or that there is a grave risk that return would subject the child to physical or psychological harm, the tribunal is not bound to order return of the child.⁴⁷ Third, return of the child may be refused if to do so “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”⁴⁸

B. *International Child Abduction Remedies Act*

The Convention is only the fourth Hague Convention and the first family law Convention to which the U.S. has become a party.⁴⁹ Although the Convention is thorough and self-executing,⁵⁰ the House Advisory Committee and the Department of State felt that implementation would prove more operative through legislation that would give full effect to certain provisions of the Convention.⁵¹ Therefore, the provisions of the International Child Abduction Remedies Act (ICARA)⁵² established judicial and administrative procedures for the implementation of the Convention in the U.S.⁵³

Before delineating any procedures, ICARA reemphasizes the

commence proceedings. The position of the Hague Conference on Private International Law seems to be that the period begins when the petitioner discovers that the removal or retention is wrongful. See Second Commission Meeting, *supra* note 15 at 239. However, with regard to the case in which the abductor secretes the child from the petitioner, some American courts have held that the one-year period is tolled until the petitioner discovers the whereabouts of the child. See, e.g., *Furnes*, 362 F.3d at 723; *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362-63 (M.D. Fla. 2002).

47. Convention, *supra* note 8, at art. 13. Here again, the burden of proof is on the abductor to show the exceptions enumerated in this article. See Public Notice 957, *supra* note 46 at 10510.

48. Convention, *supra* note 8, at art. 20. To invoke this exception, the abducting parent must show that the fundamental principles of the requested State concerning the Convention do not permit return of the child. See Perez-Vera Report, *supra* note 10 at 462. This clause seems to have been included to deal with the views of those who felt that the Convention should have a public policy clause. Richard D. Kearney, *Developments in Private International Law*, 81 AM. J. INT'L L. 724, 731 (1987). In addition, the reports of the Hague Conference on Private International Law advise against use of the exception under Article 20 because it gives rise to problems and suggest that Article 20 is covered by Article 13. See Second Commission Meeting, *supra* note 15 at 243.

49. Nigel Lowe, et al., *Country Report: U.S.* (2002), at http://www.missingkids.com/en_US/publications/UnitedStates_E.pdf (last visited Sept. 30, 2005).

50. Richard D. Kearney, *Developments in Private International Law*, 81 AM. J. INT'L L. 724, 734 (1987).

51. House Report, *supra* note 11 at *6.

52. The provisions of ICARA are in addition to and not in lieu of the provisions of the Convention. 42 U.S.C. § 11601(b)(2).

53. 42 U.S.C. § 11601(b)(1).

Convention's premise that the judicial and administrative authorities are to determine only the rights under the Convention and "not the merits of any underlying child custody claims."⁵⁴ Once the procedures under the Convention are completed, the courts may then proceed to adjudicate the merits of underlying custody claims.⁵⁵ After defining certain key terms,⁵⁶ ICARA grants concurrent original jurisdiction to both State courts and the U.S. district courts over Convention actions.⁵⁷ A petitioner must file a Convention claim in either the State court or U.S. district court that may exercise its jurisdiction "in the place where the child is located at the time the petition is filed."⁵⁸

ICARA clearly defines the burdens of proof on both the petitioner and respondent in Convention actions.⁵⁹ The petitioner, or left-behind parent, must establish by a preponderance of the evidence that in an action for return of the child, the child was wrongfully removed or retained under the Convention.⁶⁰ In such an action, the respondent, or the alleged abducting parent, must prove: "(A) by clear and convincing evidence that one of the exceptions set forth in Article 13b or 20 of the Convention applies; and (B) by a preponderance of the evidence that any other exception set forth in Article 12 or 13 of the Convention applies."⁶¹ Thus, the respondent parent has a higher burden of proof, under certain circumstances, to prevent the return of the child to the State of habitual residence.⁶² These provisions seem to level the playing field for the petitioner parent who will often have to bring the action on the abducting parent's "home court."⁶³

A few additional provisions warrant recognition. In particular, once a court orders or denies the return of a child, the decision shall be given full faith and credit by the state and federal courts.⁶⁴ Additionally, ICARA establishes that the functions of the Central Authority are those outlined in the Convention⁶⁵ and authorizes the Central Authority to

54. 42 U.S.C. § 11601(b)(4).

55. House Report, *supra* note 11, at *10.

56. 42 U.S.C. § 11602.

57. 42 U.S.C. § 11603(a).

58. 42 U.S.C. § 11603(b).

59. 42 U.S.C. § 11603(e).

60. 42 U.S.C. § 11603(e)(1)(A). In an action to organize or secure access rights, an issue not emphasized in this Comment, the petitioner must establish by a preponderance of the evidence that he or she has such rights. 42 U.S.C. § 11603(e)(1)(B).

61. 42 U.S.C. § 11603(e)(2)(A)-(B).

62. See House Report, *supra* note 11, at *12.

63. Copertino, Monica Marie, Comment, *Hague Convention on the Civil Aspects of International Child Abduction: An Analysis of its Efficacy*, 6 CONN. J. INT'L L. 715, 728 (1991).

64. 42 U.S.C. § 11603(g).

65. 42 U.S.C. § 11606(b).

issue regulations⁶⁶ and enter into agreements as may be necessary to carry out its responsibilities.⁶⁷

III. The Circuit Split and Other Contracting States' Views

As noted previously, the U.S. is the Contracting State with the highest number of applications for either the return of a child to the U.S. or return of a child to another Contracting State.⁶⁸ Within the past eight years, a handful of the applications have made their way to the U.S. Circuit Courts of Appeals on the issue of whether a *ne exeat* right constitutes a "right of custody" under the Convention.⁶⁹ Unfortunately, the Circuit Courts do not completely agree on the answer to this question. Most of the Circuit Courts that have weighed in on the issue hold that a *ne exeat* right is not a custody right,⁷⁰ while the Eleventh Circuit recently held that it is.⁷¹

This discrepancy also exists internationally. Courts in the United Kingdom, Australia, and South Africa have ordered the return of children where the removal was in violation of a *ne exeat* right.⁷² However, courts in Canada have held that violation of a *ne exeat* right does not constitute wrongful removal under the Convention.⁷³

A. Circuit Cases

1. Ne Exeat Rights Do Not Constitute Custody Rights

The Second, Fourth, and Ninth Circuit Courts of Appeals have all held that a parent's possession of a *ne exeat* right is not synonymous with a "right of custody." Therefore, violation of a *ne exeat* right does not constitute wrongful removal under the Convention.⁷⁴ All three courts concluded that a *ne exeat* right serves only as a limitation on the custodial parent's right to remove the child from the State of habitual

66. 42 U.S.C. § 11606(c).

67. 42 U.S.C. § 11606(e).

68. *Supra* note 10.

69. *See, e.g., Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

70. *See, e.g., Croll*, 229 F.3d at 143; *Gonzalez*, 311 F.3d at 954 (9th Cir. 2002).

71. *Furnes v. Reeves*, 362 F.3d 702, 714 (11th Cir. 2004).

72. *See, e.g., C v. C.*, 1 W.L.R. 654,658 (Eng. C.A. 1989); *In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife*, [No. 52] (1991) (Austl. Fam.), P 26; *Sonderup v. Tondelli*, 2000(1) Constitutional Court of South Africa 1171 (CC).

73. *See, e.g., Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.); *D.S. v. V.W.* [1996] 2 S.C.R. 108 (Can.).

74. *See Fawcett*, 326 F.3d 491; *Gonzalez*, 311 F.3d 942; *Croll*, 229 F.3d 133.

residence.⁷⁵

a. *Croll v. Croll*

The leading case in support of this conclusion is *Croll v. Croll*.⁷⁶ In *Croll*, the mother removed the child from Hong Kong to the U.S.⁷⁷ Under a custody order, the mother had custody, care, and control of the child, while the father had rights of “reasonable” access.⁷⁸ In addition, the child was not to be removed from Hong Kong until she attained majority without leave of court or consent from the other parent.⁷⁹ The father argued that this *ne exeat* clause granted him the right to “determine the child’s place of residence” under the Convention, thus creating a “right of custody” and making the child’s removal “wrongful.”⁸⁰ The court disagreed and held that the *ne exeat* clause of the custody order is merely a veto power that may be exercised against the mother’s right to determine the child’s place of residence.⁸¹ The court felt that “determining” a child’s place of residence indicated an active power to choose such things as whether the child lives in a city or suburb, at home, or in a boarding school.⁸² Thus, the *ne exeat* right falls short of conferring a custody right because it does not include these “active” responsibilities.⁸³

b. *Gonzalez v. Gutierrez*

The Ninth Circuit Court of Appeal used the reasoning in *Croll* to

75. *Croll*, 229 F.3d at 139; *Gonzalez*, 311 F.3d at 949; *Fawcett*, 326 F.3d at 500.

76. 229 F.3d 133 (2d Cir. 2000).

77. *Id.* at 135.

78. *Id.*

79. *Id.*

80. *Id.* at 139. Under Article 5(a) of the Convention, “rights of custody” shall include “the right to determine the child’s place of residence.” Convention, *supra* note 8, at art. 5(a).

81. *Croll*, 229 F.3d at 139-40.

82. *Id.* at 139.

83. *Id.* The court arrived at this decision by consulting the language and purpose of the Convention and the intent of the drafters. *Id.* at 136. Because the remedy of return is only available to those individuals with “rights of custody” under the Convention, the court turned to several dictionaries to find the ordinary meaning of “custody.” *Id.* at 138. The definitions reflected a duty of care, maintenance, to choose and give shelter, guidance, education, etc. *Id.* Based on this, the court concluded that a *ne exeat* right, or a mere veto power, falls short of these rights. *Id.* at 139. The court felt this conclusion was consistent with the intent of the drafters of the Convention because the chair of the Hague Conference Commission that drafted the Convention wrote that the power to prohibit exit did not rise to the level of the custodial “bundle of rights” and because the official reporter to the Convention noted the importance of separate remedies to enforce access rights versus custodial rights. *Id.* at 141-42.

come to the same conclusion regarding *ne exeat* rights.⁸⁴ In *Gonzalez v. Gutierrez*, the mother removed her two children from Mexico to the U.S. after suffering physical, emotional, and sexual abuse at the hands of the children's father.⁸⁵ Under the divorce agreement, the mother had custody and care of both children, while the father had visitation and *ne exeat* rights.⁸⁶ Just as the father argued in *Croll*, Mr. Gonzalez argued that the *ne exeat* clause granted him a right of custody because it constituted the right to determine his children's place of residence.⁸⁷ However, the court in *Gonzalez* followed a similar line of reasoning as in *Croll* in holding that a *ne exeat* clause does not amount to a "right of custody" under the Convention but is, at most, a veto power that merely imposes a limitation on the custodial parent's right to remove the child from the State of habitual residence.⁸⁸ As in *Croll*, the court concluded that a *ne exeat* clause does not include an active or affirmative right to determine a child's residence.⁸⁹ It is merely a "condition to protect [the non-custodial parent's] access rights, and no more."⁹⁰

c. *Fawcett v. McRoberts*

The Fourth Circuit Court of Appeals came to the same conclusion with regard to this issue. In *Fawcett v. McRoberts*,⁹¹ the father removed

84. *Fawcett*, 326 F.3d 491; *Gonzalez*, 311 F.3d 942.

85. *Gonzalez*, 311 F.3d at 946 (abuse occurred both before and after mother obtained divorce from a Jalisco family court).

86. Under the agreement, Mr. Gonzalez was able to see his children every week on Mondays, Wednesdays, and Fridays for three hours each. In addition, he had visitation rights every other weekend and could take them on vacation for two weeks per year. The parties agreed that Mr. Gonzalez's *ne exeat* rights were to be construed as prohibiting Ms. Gutierrez from taking the children out of Mexico without Mr. Gonzalez's permission. *Id.* at 947.

87. *Id.* at 949.

88. *Id.*

89. *Id.*

90. *Id.* at 950. The court went through a similar analysis of the language and purpose of the Convention, its drafting history, and post-ratification understanding. *Id.* at 948. As described above, the court concluded that to read a *ne exeat* clause as amounting to a right of custody would be inconsistent with the text because it does not *affirmatively* determine a child's place of residence. *Id.* at 949. The court felt its conclusion fulfilled the purposes of the Convention (to protect children from the harmful effects of removal and to secure their return, as well as to protect access rights) because it was consistent with the distinction the Convention recognizes between custody and access rights. *Id.* at 950. In other words, because the return remedy is only available when a child is wrongfully removed in violation of custody rights, and because a *ne exeat* clause does not amount to a custody right, return of a child is not the appropriate remedy. *Id.* The court did not find substantial guidance from case law subsequent to the ratification of the Convention; therefore, it relied on the aforementioned tools of guidance. *Id.* at 954.

91. *Fawcett*, 326 F.3d 491.

the child to the U.S. from Scotland.⁹² Under the divorce decree between Mr. McRoberts and Ms. Fawcett, Mr. McRoberts had custody of the couple's son, and Ms. Fawcett had contact and visitation rights.⁹³ Ms. Fawcett also had *ne exeat* rights that were statutorily granted under the Children Scotland Act.⁹⁴ As the petitioners did in *Croll and Gonzalez*, Ms. Fawcett argued that the statute gave her the right to determine her son's place of residence, thus granting her "rights of custody" under the Convention.⁹⁵ Persuaded by the reasoning from *Croll and Gonzalez* that a *ne exeat* clause only grants a veto power, the court held that the Children Scotland Act did not confer "rights of custody."⁹⁶

2. *Ne Exeat* Rights Do Constitute Custody Rights

Thus far, the only U.S. Circuit Court of Appeals that has held contrary to the Second, Fourth, and Ninth Circuits' holdings is the Eleventh Circuit. In March of 2004, the Eleventh Circuit held that a parent with *ne exeat* rights does have custody rights as they are defined in the Hague Convention.⁹⁷ Therefore, when a child is removed from a parent with such rights, the removal is "wrongful" under the terms of the Convention, and the child must be returned to the state of habitual residence.⁹⁸

Tom Furnes, a citizen and resident of Norway, and Pamela Reeves, a citizen and resident of the U.S., were married in 1994 and resided in Norway.⁹⁹ Their only child, Jessica, born in 1998, was the child removed in this case.¹⁰⁰ A little over a year after Jessica was born, the parties separated, and in 2001 they came to an agreement regarding custody.¹⁰¹ The agreement stipulated that the parties would have "joint

92. *Id.* at 492.

93. Ms. Fawcett was allowed contact with the child on weekends and at other specified times. She was also granted contact for two weeks during the summer and one week during each of the October, Christmas, and Easter holidays. *Id.*

94. Under Section 2(3) of the Children Scotland Act, "no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6)." *Id.* at 499. Subsection (6) applied to Ms. Fawcett because she was a person who was exercising the right to maintain personal relations and direct contact with the child on a regular basis. *Id.*

95. *Id.* at 499.

96. The court concluded that the Children Scotland Act served only as a limitation on the custodial parent's rights. *Id.* at 500.

97. *Furnes*, 362 F.3d at 710.

98. *Id.*

99. *Id.* at 704.

100. *Id.*

101. The parties separated in 1999. After the separation, they were unable to agree on custody. Pamela Reeves retained custody of Jessica. The separation was riddled with conflict. Ms. Reeves thwarted Tom Furnes's attempts to visit Jessica on several

parental responsibility” for Jessica under Norwegian law; Jessica would live with Ms. Reeves; and Mr. Furnes would have access to Jessica on certain days and times.¹⁰² Later that year, Ms. Reeves asked for Mr. Furnes’s permission to take Jessica to the U.S. for the summer. Mr. Furnes agreed with the understanding and expectation that Jessica would return to Norway at the end of the summer.¹⁰³ When Jessica did not return, Mr. Furnes began relentless efforts to determine the whereabouts of his daughter.¹⁰⁴

In November of 2002, Mr. Furnes filed a Petition for Return of Child to Petitioner under ICARA in the district court in Atlanta, Georgia.¹⁰⁵ The district court concluded that Mr. Furnes did not have custody rights, only access rights coupled with a *ne exeat* right; therefore, the court was not authorized to return Jessica to Norway.¹⁰⁶ In reviewing the district court’s decision and in holding that a *ne exeat* right is a custody right entitling Mr. Furnes to the return of his daughter, the

occasions and made allegations that Mr. Furnes abused Ms. Reeves and poisoned Jessica. These allegations were later found to be groundless. Ms. Reeves was later charged with arson and insurance fraud after there was a fire in her home (the former joint home). In August of 1999, a Norwegian court granted custody of Jessica to Mr. Furnes, finding that Ms. Reeves was the primary contributor to the conflict and that this had a negative effect on her ability to care for Jessica. The court found Mr. Reeves to be the best suited person to care for Jessica. Ms. Reeves appealed the decision, but the parties reached the aforementioned agreement and the appeal was dismissed. *Id.* at 704-05.

102. *Furnes*, 362 F.3d at 706. Because Mr. Furnes and Ms. Reeves had “joint parental responsibility,” Mr. Furnes had *ne exeat* rights. Under Norwegian law, if the parents have joint parental responsibility, “both of them must consent to the child moving abroad.” *Id.* at 708 (citing Norwegian Children Act, No. 3, § 43).

103. *Id.* at 708.

104. Mr. Furnes’s search began in Bergen and Oslo, Norway. He made repeated attempts to telephone and write Ms. Reeves, but received no response. He contacted Ms. Reeves’s sister and brother-in-law in Oslo, but they were of no assistance. In March of 2002, Mr. Furnes filed a police report with the Bergen Police. When the Norwegian authorities informed Mr. Furnes that it was probable that Jessica was no longer in Norway and that there was not much more they could do, he filed a petition for Jessica’s return with the Norwegian Ministry of Justice. In August of that year, Mr. Furnes traveled to Tampa, Florida and Atlanta, Georgia to search for Jessica because he was informed that Ms. Reeves might be living in or around these locations. *Id.* at 708.

105. The petition alleged that Ms. Reeves wrongfully removed Jessica from Norway, violating Mr. Furnes’s joint custody rights. It sought Jessica’s return under Article 12 of the Hague Convention. *Id.* at 709. Article 12 specifies that where a child has been wrongfully removed or retained in terms of Article 3, Convention, *supra* note 9 at art. 3, and “at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.” *Id.* at art. 12. Although more than a year had elapsed between Jessica’s removal and the date the proceedings commenced, both the district court and the Eleventh Circuit held that the limitation period was equitably tolled until Mr. Furnes located Jessica because Ms. Reeves had secreted Jessica’s whereabouts. *Furnes*, 362 F.3d at 723.

106. *Id.* at 709.

Eleventh Circuit considered Norwegian law as it related to the Convention,¹⁰⁷ international cases,¹⁰⁸ and the conclusions of the Second Circuit in *Croll v. Croll*.¹⁰⁹

Under Norwegian law, individuals with joint parental responsibility have the right and duty to make decisions for the child in personal matters.¹¹⁰ Therefore, Mr. Furnes would have custody rights, or rights that relate to the care of the person of the child, as they are defined in the Convention.¹¹¹ However, where the child lives with one parent, the other parent may not object to the parent with whom the child lives making decisions relating to *important* aspects of the child's care, including where in Norway the child will live (emphasis added).¹¹² Despite this limiting language, the court determined that Mr. Furnes retained the right to make certain "decisions for the child in personal matters," and that some of these rights included rights "relating to the care of the person of the child" under the Convention.¹¹³

Separate and apart from having custody rights within the meaning of the Convention through Section 30 of the Children Act, the court held that Mr. Furnes had the requisite type of custody rights within the meaning of the Convention through his *ne exeat* rights.¹¹⁴ Because one of the purposes of the Convention is to curtail international parental child abduction, a right to give or withhold consent to the child living outside of Norway is a right to "determine the child's place of residence" under the Convention.¹¹⁵ The Convention is "intended to restore the status

107. *Id.* at 710.

108. *Id.* at 717. The international cases will be discussed in Section IIIB of this Comment.

109. *Id.* at 719.

110. Norwegian Children Act, No. 3, § 30 [hereinafter Children Act].

111. *See* Convention, *supra* note 8, art. 5(a).

112. Children Act, *supra* note 110, § 35(b).

113. The court focused on the difference in language between sections 30 and 35(b) of the Children Act. *Furnes*, 362 F.3d at 714. If the Norwegian legislature intended to do away with all of the rights of the parent with whom the child does not live through section 35(b), it would have used the same language as used in section 30. *Id.* Instead, the legislature chose to only specify that the parent with whom the child does not live could not object to decisions regarding *important* aspects of the child's care. *Id.* Thus, because Mr. Furnes had the right, under Norwegian law, to make certain decisions for the child in personal matters, he had the ability to make decisions relating to the care of the person of the child under Article 5 of the Convention. *Id.*

114. *Id.* As stated previously, Mr. Furnes's *ne exeat* rights stemmed from his "joint parental responsibilities" via his custody agreement with Ms. Reeves. Section 43 of the Children Act provides that if the parents have joint parental responsibility, both of them must consent to the child moving abroad. Children Act, *supra* note 110, § 43.

115. *Furnes*, 362 F.3d at 715. The court noted that Mr. Furnes's right whether or not to consent to Jessica living outside of Norway also bestows on him the authority to ensure, should he desire, that Jessica speak Norwegian, go to school in Norway, and participate in the Norwegian culture. These all significantly relate to the care of the

quo.”¹¹⁶ The court concluded that its decision to return Jessica to Norway best served this purpose because it respected the parties’ rights and the agreement approved by the Norwegian courts.¹¹⁷

The Eleventh Circuit recognized that its decision was in direct contrast to the decisions of the Second, Fourth, and Ninth Circuits.¹¹⁸ In disagreeing with the majority opinion, the court focused on the conclusions and reasoning of the Second Circuit in *Croll v. Croll*.¹¹⁹ The court in *Furnes* argued that the court in *Croll* incorrectly concluded that the *ne exeat* right was only a limitation on the custodial parent’s right to determine the child’s place of residence.¹²⁰ In *Croll*, the mother was given sole custody, care, and control of the child; thus, the court concluded she had the sole ability to determine the child’s place of residence.¹²¹ However, the *Furnes* court pointed out, this conclusion ignored the fact that the Convention states that custody rights may be exercised jointly or alone.¹²²

The *Furnes* court found additional flaws in the *Croll* court’s reasoning—it mistakenly assumed both that a *ne exeat* right could only be exercised to prevent a wrongful removal¹²³ and that conferring “rights of custody” in a *ne exeat* right could compel a court to return a child to an irresponsible or unfit parent.¹²⁴ However, the *Furnes* court concluded, a *ne exeat* right may be exercised in the absence of wrongful removal, especially where the custodial parent actually requests permission from

person of the child. *Id.* at 716.

116. *Id.* at 717 (citing *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996)).

117. *Id.*

118. *Id.* at 719.

119. *Id.* As stated previously, in *Croll* the Second Circuit held that the father’s *ne exeat* rights were not custody rights within the meaning of the Convention, but only a veto power on the mother’s right to determine the child’s place of residence. *Croll v. Croll*, 229 F.3d 133, 139 (2d Cir. 2000). The Eleventh Circuit acknowledged that the Fourth and Ninth Circuits had essentially adopted the reasoning of the Second Circuit. *Furnes*, 362 F.3d at 719.

120. *Furnes*, 362 F.3d at 719.

121. *Croll*, 229 F.3d at 139-40.

122. Mr. Furnes’s rights were even stronger than the father’s in *Croll*. Unlike the father in *Croll*, Mr. Furnes had “joint parental responsibility” for decisions relating to personal matters. The court interpreted the agreement between Mr. Furnes and Ms. Reeves as granting Mr. Furnes the right to share decision-making authority with Ms. Reeves. *Furnes*, 362 F.3d at 720.

123. *Id.* The *ne exeat* right was not “actually exercised,” as required by the Convention in order for the removal to be wrongful, nor was it something that could have been exercised but for the child’s removal, because a *ne exeat* right deals with nothing but removal. *Croll*, 229 F.3d at 140.

124. *Id.* The *Croll* court held that conferring such rights on a non-custodial parent with a *ne exeat* right could conceivably compel return of a child to either a parent with no previous duty to give care to the child or to a parent with access rights who has been found unfit to have custody. *Id.* at 141.

the non-custodial parent to move abroad with the child.¹²⁵ Additionally, creating “rights of custody” in a *ne exeat* right does not compel return of a child to a parent without previous responsibility or to an unfit parent because custody agreements or rights are not altered by return of the child.¹²⁶ Ultimately, the Eleventh Circuit opined that, because the Convention is intended to prevent international child abduction, the *Croll* court’s interpretation of a *ne exeat* right would have the opposite effect and thwart that intent.¹²⁷ Thus, the court concluded that Ms. Reeves wrongfully removed Jessica from Norway in violation of Mr. Furnes’s rights of custody under the Convention.¹²⁸

B. *International Cases*

The majority of signatory countries that have addressed the *ne exeat* right issue have concluded that such rights constitute custody rights within the meaning of the Convention.¹²⁹ The Eleventh Circuit recognized that its reasoning and conclusions were in harmony with these decisions.¹³⁰ A leading case that several subsequent cases have followed is *C. v. C.* in which the mother removed the child to England from Australia.¹³¹ The Court of Appeals of England concluded that the father’s right to give or withhold consent to removal was a right of custody within the meaning of the Convention because it was a right to determine the child’s place of residence.¹³² The court determined that this interpretation was in harmony with the Convention’s stated

125. *Furnes*, 362 F.3d at 720.

126. *Id.* at 721. Once back in the state of habitual residence, the custodial parent may petition the court to remove the *ne exeat* clause from the agreement. Additionally, where there is a risk that return of the child would be damaging, the Convention provides for an exception to return. Even so, in this case, Jessica would not be returned to a parent without previous responsibility to care for her or to an unfit parent. Mr. Furnes had existing duties under the agreement and Norwegian law and was found to be better able to care and provide for Jessica than Ms. Reeves. *Id.* at 721-22.

127. *Id.* at 721.

128. The court ordered the district court to grant Mr. Furnes’s ICARA petition and to order Ms. Reeves to return Jessica to Norway. *Id.* at 724.

129. *See e.g.*, *C v. C.*, 1 W.L.R. 654 (Eng. C.A. 1989); *Sonderup v. Tondelli*, 2000(1) Constitutional Court of South Africa 1171 (CC); *In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife*, [No. 52] (1991) (Austl. Fam.); *C.C. (T.A.) 2898/92*.

130. “The U.S. Supreme Court has established that in interpreting the language of treaties, ‘we find the opinions of our sister signatories to be entitled to considerable weight.’” *Furnes*, 362 F.3d at 717 (citing *Air France v. Saks*, 470 U.S. 392, 404 (1985)).

131. The mother and father had joint guardianship under Australian law, however the mother had physical custody. The Australian consent order provided that neither parent could remove the child from Australia without the other’s consent. In other words, both parents had *ne exeat* rights. *C v. C.*, 1 W.L.R. 654 (Eng. C.A. 1989).

132. *Id.*

purposes.¹³³

Australia and South Africa followed suit with cases that also conclude that *ne exeat* rights constitute rights of custody under the Convention.¹³⁴ In *Resina*, the court essentially adopted the rule from *C. v. C.*¹³⁵ and gave its own reasons for adopting such an interpretation of rights of custody.¹³⁶ In *Sonderup*, the court similarly held that the mother's removal of the child breached the father's *ne exeat* rights, making removal wrongful.¹³⁷ The court noted that several other jurisdictions had also held that non-removal or *ne exeat* provisions could confer a right of custody.¹³⁸

Canada, on the other hand, takes a different view. The Supreme Court of Canada in *Thomson v. Thomson*¹³⁹ addressed the issue of whether the mother wrongfully removed the child from Scotland to Canada in violation of rights of custody under the Convention.¹⁴⁰ The court answered yes and concluded that a non-removal clause could be placed in an interim order of custody to preserve jurisdiction, and in the course of exercising that jurisdiction, the court was exercising rights of

133. *Id.*

134. *Resina*, [No. 52] (1991) (Austl. Fam.); *Sonderup*, 2000(1) Constitutional Court of South Africa 1171 (CC).

135. The parties in this case were born in France but lived and acquired citizenship in Australia. *Resina* [No. 52] (1991) (Austl. Fam.), P 3. There were two children that were the subject of the dispute. However, the older child was not one of the marriage. Nonetheless, the *ne exeat* clause of the relevant custody order regarded both children. *Id.* at PP 2, 4. The children's maternal grandparents took them to France, and the mother soon after joined them. *Id.* at P 5.

136. The court adopted the rule that a *ne exeat* clause constituted rights of custody within the meaning of the Convention because doing so provided uniformity of interpretation and was in conformity with the "spirit" of the Convention to ensure that wrongfully removed children are promptly returned to the state of habitual residence so that "their future can properly be determined within that society." *Id.* at P 26.

137. The mother in this case removed the child from Canada to South Africa after she and her husband separated. *Sonderup*, 2000(1) Constitutional Court of South Africa 1171, P 8 (CC). Under an order of the Supreme Court of British Columbia, the parties shared joint guardianship with the mother having sole custody and the father having rights of access. In addition, the order provided that neither the mother nor the father could remove the child from British Columbia without a court order or written agreement of the parties. *Id.* at P 6.

138. The court also remarked that the majority opinion in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000) was against the weight of authority with regard to this issue. *Sonderup*, 2000(1) Constitutional Court of South Africa 1171 P 22 (CC).

139. *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (Can.).

140. The parties were married and lived in Scotland with the father's parents. After the parties separated, they both sought custody of their only child, Matthew. While the custody hearing was pending, the Stranraer Sheriff Court granted interim custody to the mother, interim access to the father, and ordered that Matthew remain in Scotland pending the further court order. Before the court entered the final order of custody, the mother left Scotland to live with her parents in Manitoba, Canada. *Id.* at 561.

custody within the meaning of the Convention.¹⁴¹ However, in dicta, the court indicated that it would not treat a non-removal clause in a final order in the same way because such clauses are usually intended to secure only rights of access that are not afforded as much protection as rights of custody.¹⁴² Therefore, Canada would not adhere to the decisions of its sister signatories.¹⁴³

IV. Why the Supreme Court Should Have Granted Certiorari to Affirm the Decision of the Eleventh Circuit

Ms. Reeves appealed the decision of the Eleventh Circuit to the Supreme Court of the U.S.; however, the Court denied her petition for certiorari.¹⁴⁴ One can only speculate as to why the Court denied Ms. Reeves's petition, but it may have had something to do with the Court's reluctance to hear domestic relations cases.¹⁴⁵ Despite the Court's reasons for denying Ms. Reeves's petition, the decision not to hear the case significantly affected the status of the Convention and will most certainly have an effect on the way in which the U.S., and possibly some of its sister signatories, interpret the Convention in the future. It will also impact the lives of both abducting and "left-behind" parents who will face Hague Convention litigation. To alleviate some of these potential problems, the Supreme Court should have granted the petition for certiorari and should ultimately have decided that a *ne exeat* right constitutes a right of custody within the meaning of the Convention.

141. The court concluded that because the court had before it the issue of child custody and because it awarded interim custody to one of the parents, in the course of dealing with the issue of custody, the court had rights "relating to the care and control of the child" under the Convention. Specifically, the court had the right to determine the child's place of residence. *Id.* at 588. Thus, a court is an "institution or any other body" that may hold rights of custody within the meaning of Article 3 of the Convention. Convention, *supra* note 9, at art. 3.

142. *Thomson*, [1994] 3 S.C.R. at 589.

143. At least one French court determined that a custody order requiring the mother to raise her children in England and Wales did not constitute custody rights for the father because it would infringe on the mother's right to expatriate. This court did not specifically address the meaning of "right to determine the child's place of residence" under Article 5 of the Convention. It focused more on the right to expatriate under the European Convention for the Protection of Human Rights and Fundamental Freedoms. See T.G.I. Perigues, Mar. 17, 1992, *Ministere Public v. Mme. Y.*, D.S. Jur. 1992 (Fr.).

144. *Reeves v. Furnes*, 125 S. Ct. 478 (2004).

145. Federal courts have a rule of abstention in domestic relations cases. The Court determined that such a rule exists as a matter of statutory construction of the Judiciary Act of 1789. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). Federal courts are out of their realm when asked to adjudicate a Hague Convention case. They are essentially family law disputes, an area of law usually reserved for state courts. Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need For Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 282 (2002) [hereinafter Weiner Article].

A. *Uniformity of Interpretation*

Although the decision of the Eleventh Circuit diverges from the weight of authority in the U.S.,¹⁴⁶ it conforms to the majority of decisions from other signatory courts addressing the *ne exeat* clause issue directly.¹⁴⁷ One of the reasons that the Supreme Court should have both granted certiorari and concluded that a *ne exeat* right constitutes a right of custody within the meaning of the Convention is that doing so would have helped fulfill a desire for uniformity that exists with regard to treaty interpretation.¹⁴⁸ Uniformity of interpretation provides guidance for not only Contracting States' judicial or administrative systems that adjudicate Convention litigation, but also to individuals who are faced with a custody situation that has the potential for coming under the ambit of the Convention.¹⁴⁹ Affirming the decision of the Eleventh Circuit would have been in accord with the weight of majority among other signatories and thus would have contributed to the effectiveness and strength of the Convention.

Support for the argument that the Supreme Court should have affirmed the decision of the Eleventh Circuit to provide uniformity comes from many angles. Commentators, courts of sister signatories, and even the U.S. Congress agree that only with uniformity of interpretation can the Convention achieve significant success.¹⁵⁰ To achieve this much needed uniformity, the judicial and administrative authorities responsible for adjudicating Convention cases must look to prior case law that addresses the issue at hand. This is especially true with respect to the U.S. federal courts.¹⁵¹ Considering and giving

146. See e.g., *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

147. "Our reasoning and conclusions are in harmony with the majority of the courts of our sister signatories that have addressed this treaty issue." *Furnes*, 362 F.3d at 717. See e.g., *C v. C.*, 1 W.L.R. 654 (Eng. C.A. 1989); *Sonderup v. Tondelli*, 2000(1) Constitutional Court of South Africa 1171 (CC); *In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife*, [No. 52] (1991) (Austl. Fam.); C.C. (T.A.) 2898/92.

148. *Croll*, 229 F.3d at 150 (Sotomayor, J., dissenting).

149. Individuals need stable rules to structure their family relationships. They need a uniform Hague Convention so that they know whether they can move abroad with a child or children without the consent of the other parent or whether they would have access to the return remedy should their child be taken without consent. See *Weiner* Article, *supra* note 145 at 291.

150. See e.g., *id.* at 282-91; *C v. C.*, 1 W.L.R. 654 (Eng. C.A. 1989) (Lord Donaldson of Lynton, Mr., concurring) (noting that the whole purpose of such a code "is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways"); ICARA, 42 U.S.C. § 11601(b)(3)(B) ("in enacting this chapter the Congress recognizes the need for uniform international interpretation of the Convention").

151. As stated previously, the U.S. federal courts are "fish out of water" with respect

deference to case law of sister signatories when they have addressed the relevant issue constitutes a thorough Convention case opinion.¹⁵² The Eleventh Circuit recognized the need to afford deference to the conclusions of courts of other signatories;¹⁵³ therefore, theirs is the decision that the Supreme Court should have upheld.

The Supreme Court, had they granted certiorari, should not have reversed the decision of the Eleventh Circuit in favor of following the *Croll* majority's decision because such a conclusion would exacerbate the problems associated with a lack of uniformity. Contrary to the Eleventh Circuit, the Second Circuit conducted only a cursory review of foreign case law because it could not find a consensus among the foreign courts regarding the *ne exeat* right issue.¹⁵⁴ However, the courts of signatories taking the opposite position from the Eleventh Circuit either did so in dicta or did not squarely address the issue.¹⁵⁵ Therefore, a clear majority emerges from foreign case law. The *Croll* majority's unwillingness to follow the weight of authority amongst its sister signatories weakens the Convention¹⁵⁶ and aggravates the problems related to a deficiency of uniformity. For example, without a uniform interpretation of the Convention, abductors may be encouraged to abduct, believing that they can take the child to a jurisdiction with a more favorable interpretation thereby avoiding sanction.¹⁵⁷ Ultimately, the Supreme Court would have strengthened the Convention and resolved the split of authority in the U.S. by affirming the harmonious decisions of the Eleventh Circuit and foreign case law.

B. Fulfilling the Purposes of the Convention

Another reason the Supreme Court should have decided that *ne exeat* rights constitute rights of custody is because such a decision would fulfill the purposes of the Convention. The first stated objective of the

to domestic relations issues. Usually, such cases are referred to the state courts because of their expertise in that area of law. This inexperience suggests a need to look elsewhere for guidance in interpreting the Convention. Weiner Article, *supra* note 145, at 282-84.

152. *Id.* at 281. It can even serve as a canon of construction. *Id.* at 287. Uniform and sophisticated interpretation will evolve only with the exchange and consideration of other views. PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 238 (P.B. Carter ed., Oxford University Press 1999).

153. "In interpreting the language of treaties, 'we find the opinions of our sister signatories to be entitled to considerable weight.'" *Furnes*, 362 F.3d at 717.

154. "Foreign courts are split on the issue presented in this case." *Croll*, 229 F.3d at 143.

155. *See, e.g., Thomson*, [1994] 3 S.C.R. at 589 (Can.); T.G.I. Perigueux, Mar. 17, 1992, *Ministere Public v. Mme. Y.*, D.S. Jur. 1992 (Fr.).

156. Weiner Article, *supra* note 145, at 279.

157. *Id.* at 289.

Convention is listed in the preamble—to protect children internationally from the harmful effects of their wrongful removal or retention.¹⁵⁸ This objective has been described as both a desire to restore the status quo¹⁵⁹ and to prevent the international removal of children “to secure a more favorable forum for the adjudication of custody rights.”¹⁶⁰ The terms and provisions of the Convention must be read to give effect to these purposes.¹⁶¹ Interpreting *ne exeat* rights as conferring rights of custody within the meaning of the Convention gives effect to restoring the status quo and protecting children from international removal. If a non-custodial parent’s right to give or withhold consent to the child moving abroad was not viewed as a right of custody, the abducting parent would easily be able to upset the status quo without any threat of repercussions.

Some argue that rights of custody are not to be read so broadly to include *ne exeat* rights.¹⁶² However, the terms of the Convention favor a flexible interpretation to allow “the greatest possible number of cases to be brought into consideration”¹⁶³ and to “protect *all* the ways in which custody can be exercised.”¹⁶⁴ This is reflected in the open-ended nature of the definition of “rights of custody” in Article 5 of the Convention.¹⁶⁵ Using this broad and flexible interpretation, a *ne exeat* right, or a right to give or withhold consent to the child moving abroad, is a right of custody. In particular, it is the right to “determine the child’s place of residence” within the meaning of Article 5 of the Convention.¹⁶⁶ To read the Convention narrowly, and thus conclude that the return remedy is unavailable to an individual with a *ne exeat* right, would “allow abducting parents to undermine the very purpose of the Convention.”¹⁶⁷

158. Convention, *supra* note 8, at preamble.

159. Perez-Vera Report, *supra* note 10, at 429.

160. *Croll*, 229 F.3d at 137 (citing *Blondin v. DuBois*, 189 F.3d 240, 246 (2d Cir. 1999)).

161. *See C. v. C.*, 1 W.L.R. 654 (Eng. C.A. 1989) (noting that “the Convention must be interpreted so that within its scope it is to be effective”).

162. “The definition of ‘rights of custody’ in Article 5 at least suggests that the breach of a right simply to give or to withhold consent to changes in a child’s place of residence is not to be construed as a breach of rights of custody in the sense of Article 3.” A.E. Anton, *International Child Abduction*, 30 INT’L & COMP. L. Q. 537, 546 (1981).

163. Perez-Vera Report, *supra* note 10, at 446.

164. *Id.* at 447.

165. *See e.g.*, John M. Eekelaar, *International Child Abduction by Parents*, 32 U. TORONTO L.J. 281, 309 (1982); Perez-Vera Report, *supra* note 11, at 446. *See* Convention, *supra* note 8, at art. 5.

166. Convention, *supra* note 8, at art. 5. *See* Eekelaar, *supra* note 165, at 310 (when a court specifically stated that a child should not be removed from the jurisdiction without the consent of one parent, a parent’s removal of the child would be wrongful because it would violate the other parent’s right to determine the child’s place of residence).

167. *Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting). Additionally, a *ne exeat* right creates more power than a mere veto power. It gives an otherwise non-custodial access parent the power, and hence the right to impose specific conditions. Christopher B.

The Supreme Court should have committed to protecting children from international removal and restoring the status quo by holding that *ne exeat* rights are rights of custody.

The other main objective of the Convention is to “ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”¹⁶⁸ Especially with regard to the rights of the parties in *Furnes v. Reeves*, it follows that in order to carry out this objective, *ne exeat* rights must be interpreted as granting rights of custody within the meaning of the Convention.

Under the agreement that Mr. Furnes and Ms. Reeves reached, they would both maintain “joint parental responsibility” for Jessica under Norwegian Law.¹⁶⁹ Section 30 of the Norwegian Children Act provides that individuals with such responsibility “have the right and the duty to make decisions for the child in personal matters.”¹⁷⁰ However, because the agreement granted Ms. Reeves physical custody of Jessica, Mr. Furnes’s rights were limited. As the “non-custodial” parent, Mr. Furnes could not interfere with any of Ms. Reeves’s decisions relating to *important* aspects of Jessica’s care (emphasis added).¹⁷¹ This did not mean that Mr. Furnes gave up all of his rights. Because the parties had joint parental responsibility of Jessica, both of them had to consent to the child moving abroad.¹⁷² Therefore, Mr. Furnes’s right to give or withhold consent to Jessica moving abroad was a right to make a decision for the child in personal matters under Norwegian law. These rights can be equated with the Convention’s definition of “rights of custody” or “rights relating to the care of the person of the child.”¹⁷³ Thus, the U.S. must respect Mr. Furnes’s rights of custody under Norwegian law.¹⁷⁴ Unfortunately, this would not have been the case had Mr. Furnes’s petition been heard in the Second, Fourth, or Ninth Circuit

Whitman, *Croll v. Croll: The Second Circuit Limits “Custody Rights” Under the Hague Convention on the Civil Aspects of International Child Abduction*, 9 TUL. J. INT’L & COMP. L. 605, 625 (2001). A *ne exeat* right grants an individual the decision making authority to ensure that the child speak the language of the state of habitual residence, learn and participate in its culture, and attend its schools. *Furnes*, 362 F.3d at 716.

168. Convention, *supra* note 8, at art. 1. The remaining stated objective of the Convention, “to secure the prompt return of children wrongfully removed to or retained in any Contracting State,” relates more to the procedures that the Convention and Contracting States have implemented.

169. *Furnes*, 362 F.3d at 706.

170. Norwegian Children Act, No. 3, § 30.

171. These decisions include whether the child shall attend a day-care center, where in Norway the child shall live and other major decisions concerning everyday life. Norwegian Children Act, § 35b.

172. Norwegian Children Act, § 43.

173. Convention, *supra* note 8, at art. 5.

174. This analysis and reasoning was also put forth by the Eleventh Circuit. See *Furnes*, 362 F.3d at 713-14.

Courts of Appeals. The Supreme Court should have granted certiorari and resolved the circuit split in favor of the decision of the Eleventh Circuit so that parents like Ms. Reeves cannot attempt to “[circumvent] the home country’s custody law” by removing the child to a jurisdiction with more favorable laws.¹⁷⁵

Even though this may seem like an “as applied” analysis,¹⁷⁶ ne exeat rights should be interpreted as granting rights of custody as a general rule. This is because ne exeat clauses arise out of either a “judicial or administrative decision” or an “agreement having legal effect” under the law of the home state.¹⁷⁷ If a court were to interpret a ne exeat clause as not conferring rights of custody, the decision would essentially disrespect the law of a sister signatory by denying the “left-behind” parent’s right to determine the child’s place of residence.

V. Conclusion

There is currently a split amongst the U.S. Circuit Courts of Appeals over an issue that has been addressed with increasing frequency over the past five years¹⁷⁸—whether a ne exeat clause, or a clause granting the right to give or withhold consent to a child moving abroad, grants an individual “rights of custody” within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction.¹⁷⁹ The U.S. Supreme Court had the chance to resolve the split, but it unfortunately chose not to hear the case.¹⁸⁰ The most recent U.S. decision, from the Eleventh Circuit in *Furnes v. Reeves*, concluded that ne exeat rights constitute rights of custody, making Ms. Reeves’s removal of the parties’ daughter to the U.S. from Norway wrongful within the meaning of the Convention.¹⁸¹ This decision accords with

175. *Croll*, 229 F.3d at 149 (Sotomayor, J., dissenting).

176. “As applied” meaning that the analysis looks specifically at the *Furnes v. Reeves* fact scenario as opposed to a more general analysis.

177. These are two ways under the Convention in which rights of custody arise. Convention, *supra* note 8, at art. 3b. See also *Furnes*, 362 F.3d at 706 (ne exeat right arose out of the agreement the parties reached which was approved by a Norwegian court that granted the parties “joint parental responsibilities” under Norwegian law); *Croll*, 229 F.3d at 135 (ne exeat right arose out of a custody order issued by the Hong Kong court); *C. v. C.*, 1 W.L.R. 654 (Eng. C.A. 1989) (ne exeat right arose out of a consent order made by the deputy registrar in Sydney, Australia, the state of habitual residence).

178. See, e.g., *Furnes*, 362 F.3d 702; *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

179. See *Croll*, 229 F.3d at 135.

180. *Reeves v. Furnes*, docket no. 04-157, cert. denied, available at <http://www.supremecourtus.gov/orders/courtorders/110804pzor.pdf> (last visited Sept. 17, 2005).

181. *Furnes*, 362 F.3d at 724.

those from courts of sister signatories to the Convention.¹⁸²

After brief overviews of the texts of the Convention and International Child Abduction Remedies Act, the U.S.' Convention-implementing legislation,¹⁸³ this Comment has proposed that the U.S. Supreme Court should have granted Ms. Reeves's petition for certiorari to settle the law regarding *ne exeat* rights in the U.S. Additionally, the Court should have resolved the split of authority by concluding that *ne exeat* rights grant the individual holding them with rights of custody under the terms of the Convention. This would have been the just and right decision for the Court to make for two reasons.

First, it would have been harmonious with the majority of foreign case law, leading to a uniform interpretation of the Convention. Uniformity is needed to guide both the judicial and administrative authorities charged with adjudicating Convention cases and individuals who are affected by the terms of the Convention by being either an abducting or "left-behind" parent. Second, such a conclusion would have fulfilled the purposes of the Convention.¹⁸⁴ Recognizing a *ne exeat* right as a right of custody, thus affording the "left-behind" parent the return remedy under the Convention, would restore the status quo and prevent the international abduction of children.¹⁸⁵ Additionally, this interpretation is in conformity with the Convention's flexible interpretation of "rights of custody,"¹⁸⁶ ensuring that rights of custody under the law of one Contracting State are respected in other Contracting States.¹⁸⁷

Ultimately, the fate of the *ne exeat* clause in the U.S. is still unstable. Until the Supreme Court grants certiorari on this issue, "left-behind" parents with *ne exeat* rights will be at the mercy of the abducting parent. He or she will ultimately decide whether the abducted child will have to return to the state of habitual residence by removing the child to either a U.S. jurisdiction that does or does not recognize *ne exeat* rights as rights of custody.

182. See *e.g.*, *C. v. C.*, 1 W.L.R. 654 (Eng. C.A. 1989); *Sonderup v. Tondelli*, 2000(1) Constitutional Court of South Africa 1171 (CC); *In the Marriage of: Jose Garcia Resina Appellant/Husband and Muriel Ghislaine Henriette Resina Respondent/Wife*, [No. 52] (1991) (Austl. Fam.); C.C. (T.A.) 2898/92.

183. 42 U.S.C. §§ 11601-11611 (2002).

184. See Convention, *supra* note 8, at preamble, art. 1.

185. See Perez-Vera Report, *supra* note 10, at 429, 435.

186. *Id.* at 446.

187. Convention, *supra* note 8, at art. 1b.

