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## HEARING THE VOICE OF THE CHILD IN HAGUE ABDUCTION CASES

### INTRODUCTION

*Being heard and having one's views taken into account ... is one of the main determinants of the perception that the decision making process is fair, even if the outcome is not the one that is wanted.*<sup>1</sup>

A child's voice should be heard when judges are making decisions about with whom a child should live, including whether the child should be returned to the country from which he or she was abducted. That statement is not controversial in the 193 countries which have adopted the United Nations Convention on the Rights of the Child (CRC). The CRC requires hearing the voice of the child in *all* matters relating to the child's custody.<sup>2</sup> In addition, eighty-five countries have adopted the Hague Convention on the Civil Aspects of International Child Ab-

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<sup>1</sup> Patrick Parkinson & Judith Cashmore, *The Voice of a Child in Family Law Disputes* 20 (Oxford U. Press 2009).

<sup>2</sup> U.N. Convention on the Rights of the Child, art.12, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc.A/Res/44/25 (1989) [hereinafter CRC], available at 28 I.L.M. 1448, 1461 (1989).

duction. The Hague Abduction Convention incorporates the objections of a mature child as an exception to returning the child.<sup>3</sup>

The issue of hearing a child's voice remains controversial, especially in the United States which has not adopted the CRC. Federal judges, not used to listening to children, hear most international abduction cases. In addition, huge debates have raged for decades over the when and how to hear the voice of the child in domestic custody proceedings.<sup>4</sup>

#### BRIEF HISTORY OF HEARING A CHILD'S VOICE

*Hearing what children say must ... lie at the root of any elaboration of children's rights.*<sup>5</sup>

In the United States, children have not had standing in their parents' divorces or other proceedings when their custody was in issue. Among the justifications for excluding children are the belief that parents will do what is in their child's best interests, a desire to protect the child from taking sides in the parents' dispute, and the notion that children have interests, not "rights."<sup>6</sup> The quest for rights for children in the United States is hampered by the lack of an express Constitutional grant of positive rights; the lack of ratification of the CRC; the difficulties inherent in defining "rights;" the perceived incapacity of some children; and the fear that parental rights will be diminished.<sup>7</sup>

<sup>3</sup> Art. 13b, para. 2, Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Abduction Convention]; International Child Abduction Remedies Act (ICARA) of 1988, 42 U.S.C. § 11601 - 11611; 22 CFR 94.1 to 94.8 (2008).

<sup>4</sup> See Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 Pace L. Rev. 869, n. 1, 2 (2007); Mark Henaghan, *What Does a Child's Right to be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do Not Go Far Enough*, 42 Fam. L. Q. 117 (2008).

<sup>5</sup> John Eekelaar, *The Importance of Thinking That Children Have Rights*, in *Children, Rights and the Law* 220, 228 (P. Alston et al. eds., 1992).

<sup>6</sup> Martin Guggenheim, *What's Wrong With Children's Rights* (2005). See Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 Fam. L. Q. 381, 404-5 (2008); Rachel Birnbaum & Nicholas Bala, *The Child's Perspective on Legal Representation: Young Adults Report on Their Experiences With Lawyers*, 25 Can. J. Fam. L. 11, 11-13 (2009). See also Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 Ind. Int'l & Comp. L. Rev. 175, 192 (2010) (stating that "children's voices have been stifled, diluted or ignored in the court system ... partly due to the dominant paradigm ... focusing upon 'best interests' ...").

<sup>7</sup> See Elrod, *Client-Directed Lawyers for Children*, *supra* note 5, at 875.

The last thirty years has seen increasingly strident calls to recognize children as rights' holders and to hear their voices in judicial proceedings.<sup>8</sup> Social science research reveals that not listening to children may do more harm than giving them a voice and that children want to be heard on matters affecting them.<sup>9</sup> Children often feel powerless and betrayed by the adults in their lives and the legal system when their views are not taken into consideration and given some weight.<sup>10</sup>

Requiring that children's voices be heard can affect the treatment of children by showing them respect, empowering them and improving their experience of the decision-making process. It also adds value to the outcome and credibility to the process.<sup>11</sup>

Although many states include the wishes of a child as one factor for determining child custody in disputes between parents, only a couple of states give children of certain ages (usually over twelve or fourteen) the right to determine with whom they will live.<sup>12</sup> Age, however, is only one measure of competency which is not an all or nothing proposition. Children's competencies are affected not only by chronological age and maturity, but also by intelligence, education, socio-economic status, geographical location, birth order, culture and life experiences.<sup>13</sup> As a general rule, children need more protection when they are young and more guidance as they age.

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<sup>8</sup> See Howard A. Davidson, *The Child's Right to be Heard in Judicial Proceedings*, 18 Pepp. L. Rev. 255 (1991); Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 Fam. L. Q. 105 (2002). See also Michael D.A. Freeman, *Taking Children's Rights More Seriously*, in Int'l Library of Essays on Child. Rts. 175 (M. Freeman ed. 2004), available at <http://law-fam.oxfordjournals.org/cgi/contentabstract/6/1/52>.

<sup>9</sup> See Joan B. Kelly, *Listening to Children's Views in Disputed Custody and Access Cases*, AFCC Compendium 179 (2008); Patrick Parkinson, Judy Cashmore & Judi Single, *Adolescents' Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 Fam. Ct. Rev. 429 (2005); Virginia Morrow, *We are People Too: Children's and Young People's Perspectives on Children's Rights and Decision-Making in England*, 7 Int'l J. Child. Rts. 455 (1999). See also Anne B. Smith, Meghan M. Gollop & Nicola J. Taylor, *Children's Perspectives of their Parents' Separation*, 12 Child & Fam. L. Q. 34 (2000).

<sup>10</sup> Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 Ariz. L. Rev. 127, 145-6 (2008); Marilyn Freeman & Ann-Marie Hutchinson, *The Voice of the Child in International Child Abduction*, Int'l Fam. L. 177 (2007).

<sup>11</sup> Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 Temple L. Rev. 1585 (1995).

<sup>12</sup> See Ga. Code Ann. § 19-9-3 (a)(5); W. Va. Rev. Code § 44-10-4 (a) (2010); N.M. Stat. § 32A-4-10(C)(E).

<sup>13</sup> Elrod, *Client-Directed Lawyers for Children*, *supra* note 5, at 879; Barbara Bennett Woodhouse, *Children's Rights* 377, 398, in *Handbook of Youth and Justice* (White, ed. 2001).

To determine if the child has sufficient age and maturity, some judges find the most direct way to hear a child's voice is to interview the child, usually in chambers and sometimes making a record.<sup>14</sup> Many judges, however, lack training in both child development and interviewing children. These concerns are even more true of federal judges who hear most of the Hague Abduction Convention return petitions but do not hear child custody cases generally. It is difficult to predict which children will have their views solicited, let alone heeded.<sup>15</sup> In the United States, there have been increased calls for judges to appoint a specially-trained lawyer to represent the child, especially in high conflict cases, to give a child an advocate and an effective voice.<sup>16</sup>

#### UN CONVENTION ON THE RIGHTS OF THE CHILD

*The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention.*<sup>17</sup>

The United Nations Convention on the Rights of the Child (CRC) contains 54 "Articles" specifying rights for children and obligates state parties to draft legislation and procedures to protect children and to assure that their voices are heard. It has been called the "most important children's rights document in history"<sup>18</sup> because it provides a comprehensive framework for recognizing and protecting children's rights. Although the United States has not ratified it, its widespread international acceptance makes it customary law. Art. 12 provides:

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<sup>14</sup> *In re* H.R.C., 781 N.W.2d 105 (Mich. Ct. App. 2009); *In re* Compton, 2010 WL 5129541 (Mich. App. Dec. 16, 2010) (unpublished).

<sup>15</sup> See Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 Ariz. L. Rev. 629, 634 (2003) (reporting that 80% of judges responding considered the preferences of older teenagers; forty percent considered those of children 11-13 years); Birnbaum & Bala, *The Child's Perspective*, *supra* note 7, at n. 17.

<sup>16</sup> See Elrod, *Client-Directed Lawyers for Children*, *supra* note 5, at 869 n. 2; Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 Wm. Mitchell L. Rev. 495, 525 (2001).

<sup>17</sup> UN Committee on the Rights of the Child. The Right of the Child to Be Heard, General Comment No. 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, [www2.ohchr.org/enligh/bodies/crc/docs](http://www2.ohchr.org/enligh/bodies/crc/docs).

<sup>18</sup> Woodhouse, *Talking about Children's Rights*, *supra* note 9, at 108. See also Ursula Kilkelly, *Relocation: A Children's Rights Perspective*, 1(1) J. Fam. L. & Practice 23 (2010); Alastair Nicholson, *The United Nations Convention on the Rights of the Child and the Need for Its Incorporation into a Bill of Rights*, 44 Fam. Ct. Rev. 5 (2006).

1. States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. ... the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 “is significant ... because it recognizes the child as a full human being, with integrity and personality, and with the ability to participate fully in society.”<sup>19</sup> The CRC sets no minimum age for a child to be able to express his or her views.

The United Nations Committee on the Rights of the Child, the monitoring body, discourages States from introducing age limits either in law or in practice that would restrict the child’s right to be heard.<sup>20</sup> States should presume that a child has the capacity to form his or her own views and recognize that the child has the right to express them. It is not up to the child to prove his or her capacity.<sup>21</sup> The Committee suggests that even young children have a right to be heard. Full implementation of Article 12 requires

recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choice and preferences.<sup>22</sup>

The CRC does not limit the contexts in which children can express their views. Therefore, children should be “heard” in all cases. The weight to be given the child’s preference would depend on the age and maturity of the child. The CRC remains the standard against which countries gauge their progress in recognizing and providing rights for children.

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<sup>19</sup> Freeman, *Taking Children’s Rights More Seriously*, *supra* note 9, at 175.

<sup>20</sup> CRC General Comment 2009, para. 21. The European Convention on the Exercise of Children’s Rights, ch. 2, Art. 3 provides that the child shall be considered as having sufficient understanding and have a right to be consulted and express his or her views in proceedings before a judicial authority.

<sup>21</sup> *Id.* at para. 20 (noting the phrase “capable of forming his or her own views” should be “an obligation for States parties to assess the capacity of the child.”).

<sup>22</sup> *Id.* at para.21 (also noting that States must ensure that children with disabilities are equipped with proper modes of communication).

CHILD'S OBJECTION AS AN EXCEPTION  
TO RETURN AFTER ABDUCTION

*Children's objections raise many complex, social, psychological, and legal issues and judges are asked to weigh a finely balanced mix of policy issues both for and against these objections.*<sup>23</sup>

The Hague Abduction Convention allows a court to refuse to order the return of the child solely on the basis "that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."<sup>24</sup> In the United States, the party opposing the child's return must prove by a preponderance of the evidence through testimony or otherwise that the minor child is of an age and maturity level for their views to be taken into account.<sup>25</sup> In European Community Member State abductions, Article 11(2) of the revised *Brussels II* changes the burden. It requires the court to which an application has been made to hear the voice of the child unless it is inappropriate because of his or her age and maturity.<sup>26</sup>

The child's objection exception relates to an individual child's best interests,<sup>27</sup> which creates a tension with the speedy, return remedy to deter abductions which is also usually in the child's best interests. The goal of the Hague Abduction Convention is to return wrongfully retained children to their country of habitual residence to allow that country to make any custody determination on the merits, depriving the abducting parent of any practical or legal advantage from the abduction. As the Official Report of the Convention indicates, "[T]wo objects of the Convention – [to deter abductions and] to secure the immediate reintegration of

<sup>23</sup> Anastacia M. Greene, *Seen and Not Heard? Children's Objections Under the Hague Convention on International Child Abduction*, 13 U. Miami Int'l & Comp. L. Rev. 105, 155 (2005).

<sup>24</sup> Hague Abduction Convention, art. 13, para. 2. See *Blondin v. Dubois*, 238 F.3d 153, 166 (2d Cir. 2001); *Gaudin v. Remis*, 415 F.3d 1028, 1037 (9th Cir. 2005).

<sup>25</sup> 42 U.S.C. § 11603(e)(2)(B). See *Nelson v. Petterle*, 2011 WL 1048107 (E.D. Cal. Mar. 18, 2011); *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 207 (E.D.N.Y. 2010); *England v. England*, 234 F.3d 268, 272 n. 5 (5th Cir. 2000).

<sup>26</sup> European Union Council Reg. 2201/2203, 2001 O.J. (L. 338), referred to as *Brussels II bis* or *Brussels IIa*.

<sup>27</sup> Elisa Pérez-Vera, *Explanatory Report*, in 3 Hague Conference on Private International Law: Actes et documents de la Quatorzième session, 6 au 25 octobre 1980, Tome III, Enlèvement d'enfants 460, para. 113 (1982), available at <http://www.hcch.net/e/conventions/expl28e.html> [hereinafter *Perez-Vera Report*] (noting that these two exceptions do not apply automatically; "...the very nature of these exceptions gives judges discretion . . . and does not impose on them a duty . . . to return a child in certain circumstances.").

the child into the habitual environment – both correspond to a specific idea of what constitutes the “best interest of the child.”<sup>28</sup> The Convention authorizes only a few narrow exceptions to returning the child. One of those exceptions is the objection of a child of sufficient age and maturity.<sup>29</sup>

### *A. History of Child’s Objection Exception*

The drafters of the Hague Abduction Convention intended that the mature child’s objection to return to be a separate and independent ground for a judicial refusal to return the child. It is not dependent on a grave risk of harm or an intolerable situation existing in the habitual residence. In the Official Report, Elisa Pérez-Vera offers the following commentary with respect to the views of the child exception:

[The Convention] provides that the child’s views concerning the essential question of its return or retention *may be conclusive*, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention *gives children the possibility of interpreting their own interests*. Of course this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will.<sup>30</sup>

The first part of the exception requires the judge to ascertain if the child objects to return to the country of habitual residence. If so, the judge must determine if the child of sufficient age and maturity that is appropriate for the court to take account of those objections. If the two “gateway” questions are answered in the affirmative, the judge must then decide whether to exercise its discretion in favor of retention or return over a mature child’s objections.<sup>31</sup> The Convention con-

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<sup>28</sup> Pérez-Vera Report, *supra* note 28, at 426, 432 para. 25. The Convention aims to remedy a child’s traumatic loss of contact with the parent who has been in charge of his upbringing. *Id.* at 432, para. 24.

<sup>29</sup> Nigel V. Lowe with Katarina Horosova, *The Operation of the 1980 Hague Abduction Convention - A Global View*, 41 Fam. L. Q. 59, 83 (2007) (finding child’s wishes as factor in 18% of cases in 1999 but only 13% in 2003).

<sup>30</sup> Pérez-Vera Report, *supra* note 28, at 433, para. 30.

<sup>31</sup> *Re M (Abduction Zimbabwe)*, [2007] UICHL 55 [20080 AC 1288 at para. 43,44, 46.

templates that if the child is not of an age and degree of maturity, then the child must be returned despite his or her objections.<sup>32</sup> The exception requires judges, often federal judges unused to children's issues, to resolve complex cases involving children.

### B. Age and Maturity

As with the UN Convention on the Rights of the Child (CRC), there is no defined age at which the Hague Abduction Convention considers children sufficiently mature enough for their views to be taken into account.<sup>33</sup> The Official Report stated:

... all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities.<sup>34</sup>

The Hague Abduction Convention makes no specific reference to how the judge should determine if an individual child is of sufficient age and maturity. Older children are distinguishable from immature children who should not "choose between parents."<sup>35</sup> One scholar indicates that the drafters "essentially had in mind 15 year olds and certainly not children below the age of 12."<sup>36</sup> But it is not so clear. While one federal court made a blanket statement that children under nine were not of sufficient age and maturity,<sup>37</sup> most courts have not approved a minimum age below which they will not interview a child. Because there are no objective criteria

<sup>32</sup> *Re R* (Child Abduction: Acquiescence), 1 Fam. 716, 734 (Eng. C.A. 1995). *But see* *Mendez Lynch v. Pizzutello*, 2008 WL 416934 (N.D. Ga. Feb. 13, 2008).

<sup>33</sup> *De Vasconcelos v. De Paula Batista*, 2011 WL 806096 \*6 (E.D. Tex. 2011) (stating that no age is too old or young as a matter of law for the exception to apply, but must be determined on a case by case basis, citing *England v. England*, 234 F.3d 268, 272 (5<sup>th</sup> Cir. 2000)); *Falk v. Sinclair*, 692 F. Supp. 2d 147, 165 (D. Me. 2010); *Blondin v. Dubois*, 238 F.3d 153, 166-67 (2<sup>nd</sup> Cir. 2001).

<sup>34</sup> Pérez-Vera Report, *supra* note 28, at 433, para. 30.

<sup>35</sup> *But see* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *Cardozo L. Rev.* 1747, 1840 - 41(1993) (noting that "Asking the child question, listening to children's authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide."); Ann O'Quigley, *Listening to Children's Views: The Findings and Recommendation of Recent Research* (York 2000) (indicating that children understand the difference between providing input into the decision-making process and making the final decision).

<sup>36</sup> *Lowe & Horosova*, *supra* note 30, at 85.

<sup>37</sup> *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992). *See also* *Sheikh v. Cahill*, 546 N.Y.S.2d 517 (Sup. Ct. 1989).

or tests to determine maturity,<sup>38</sup> however, subjective and inconsistent decisions often result because the judge is making a factual finding in light of the specific circumstances of each case.<sup>39</sup>

While the child's chronological age may be one indicator, someone must assess the child's emotional, cognitive, and developmental level and the child's emotional and psychological bonds. Because the child becomes the single most important witness, the child's ability to articulate a preference with cogent reasons may be a strong indicator of the child's maturity.<sup>40</sup>

Many judges rely on their own examination of the child, often in camera. If a psychologist is used, few cases address the weight to be accorded to the psychologist's testimony.

### 1. Age of Children

The Hague Abduction Convention only applies to children under age sixteen. The drafters assumed that older adolescents would have more independence and a "mind of their own."<sup>41</sup>

Additionally, some countries and a few states allow children under the age of sixteen to choose their residence.

Therefore, the closer a child is to sixteen, the more likely the court will find their objections persuasive.<sup>42</sup> Empirical studies indicate that teenagers are more likely to be found to be of sufficient age and maturity and their objections are more likely to be weighed heavily than younger children.<sup>43</sup> In most of the cases denying

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<sup>38</sup> *Blondin v. Dubois*, 238 F.3d 153, 166-7 (2d Cir. 2001).

<sup>39</sup> *Simcox v. Simcox*, 511 F.3d 594, 603 (6th Cir. 2007); *de Silva v. Pitts*, 481 F.3d 1279, 1287 (10th Cir. 2007); *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super.Ct. 1992).

<sup>40</sup> *Laguna v. Avila*, 2008 WL 1986253 \*9 (E.D.N.Y. May 7, 2008). See also Paul K. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* 180 (P.B. Carter QC ed. 1999).

<sup>41</sup> Perez Vera Report, *supra* note 28, at 450 para. 77, 78. Hague Abduction Convention, art. 4.

<sup>42</sup> *Johnson v. Johnson*, 2011 WL 569876 (S.D.N.Y. Feb. 10, 2011); *Etienne v. Zuniga*, 2010 WL 2262341 (W.D. Wash. June 2, 2010).

<sup>43</sup> Elizabeth Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 Ga. L. Rev. 1035, 1037 (1988) (suggesting that judicial deference to the older child's wishes stems from social norms that respect adolescent autonomy and awareness of the practical difficulties in forcing an adolescent to live with a parent against her choosing). *Id.* at 1050-51. See also Atwood, *The Child's Voice*, *supra* note 16; Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 Fam. L. Q. 75, 79 (1989).

return, the children have been older (14–15 year old) teenagers.<sup>44</sup> Thirteen year olds have had mixed results.<sup>45</sup>

As a general rule, the younger the child, the less likely the judge is to find the child of sufficient age and maturity. There needs to be at the least some discovery or inquiry regarding the child's age and maturity before granting summary judgment on the exception not being met.<sup>46</sup> While some courts have found some eight year olds to be of sufficient age and maturity,<sup>47</sup> others have returned "mature" nine year olds over strong objections.<sup>48</sup> Ten year old children have not fared well in convincing courts that they have the sufficient age and maturity.<sup>49</sup> While eleven year olds are getting closer to the age at which their views and objections will be weighed more heavily, there is no certainty their views will be heeded.<sup>50</sup>

An English court provided the following analytical framework for determining whether the child is of sufficient age and maturity:

(a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is importance because it is her views which have to be judged appropriate.

(b) To what extent, if at all, are the reasons for objection rooted in reality or might reasonably appear to the child to be so grounded?

(c) To what extent have those views been shaped or even coloured by undue influence and pressure, directly or indirectly exerted by the abducting parent?

<sup>44</sup> *McManus v. McManus*, 354 F. Supp. 2d 62 (D. Mass. 2005); *de Silva v. Pitts*, 481 F.3d 1279 (10<sup>th</sup> Cir. 2007); *Laguna v. Avila*, 2008 WL 1986253 \*10 (E.D. N.Y. May 7, 2008); *Kofler v. Kofler*, 2007 WL 208712 \*9 (W.D. Ark. July 18, 2007); *Leites v. Mendiburu*, 2008 WL 114954 \*5-6 (M.D. Fla., Jan. 9, 2008); *Di Giuseppe v. Di Giuseppe*, 2008 WL 1743079 \*7 (E.D. Mich. Apr. 11, 2008). *See Andreopoulos v. NickolaosKoutroulos*, 2009 WL 1850928 (D. Colo. June 29, 2009); *Etienne v. Zuniga*, 2010 WL 2262341 (W.D. Wash. June 2, 2010); *Ago v. Odu*, 2009 WL 2169857 (M.D. Fla. July 20, 2009).

<sup>45</sup> *de Silva v. Pitts*, 481 F.3d 1279 (10<sup>th</sup> Cir. 2007); *Ostevoll v. Ostevoll*, 2000 WL 1611123, at \*19 (S.D. Ohio Aug. 16, 2000). *But see England v. England*, 234 F.3d 268, 272-73 (5<sup>th</sup> Cir. 2000); *HazbunEscaf v. Rodriguez*, 200 F. Supp. 2d 603 (E.D. Va. 2002), *aff'd* 52 Appx 207 (4<sup>th</sup> Cir. 2002).

<sup>46</sup> *Raijmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953, 957 (E.D. Mich. 2001).

<sup>47</sup> *Anderson v. Acree*, 250 F. Supp. 2d 876, 883 (S.D. Ohio 2002). *But see In re Zarate*, 1996 WL 734613 (N.D. Ill. 1996).

<sup>48</sup> *See Mendez-Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362 (M.D. Fl. 2002); *ReS (Abduction: Return into Care)* [1999] 1 Fam. 843 (Fam. Div. 1998) (Eng.).

<sup>49</sup> *See Lopez v. Alcala*, 547 F. Supp. 2d 1255 (M.D. Fla. 2008); *In re Nicholson*, 1997 WL 446432 (D. Kan. Jul. 7, 1997); *Mendoza v. Miranda*, 525 F. Supp. 2d 1182, 1199 (C.D. Cal. 2007); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 229 (3<sup>rd</sup> Cir. 2007). *But see Silverman v. Silverman*, 2002 WL 971808 at \*10 (D. Minn. 2002), *aff'd*, 312 F.3d 914 (8<sup>th</sup> Cir. 2002).

<sup>50</sup> *Compare Castillo v. Castillo*, 597 F. Supp. 2d 432 (D. Del. 2009) with *Garcia v. Angarita*, 440 F. Supp. 2d 1364 (S.D. Fla. 2006).

(d) To what extent will the objections be mollified on return and, where it is the case, on removal from any pernicious influence from the abducting parent?<sup>51</sup>

One of the reasons for talking to a child, even a very young child, is to try to understand the child's perspective on the situation. The judge can learn much from discovering the child's self-perception of his or her interests and the reasons given for the objection. The judge must have enough evidence to see if the child's objection is rooted in a present reality based on good information or fantasy. The judge can see if the child's view is a long term or short term view of the situation.

## 2. Siblings

Siblings pose difficult issues because one or more children may be of sufficient age and maturity and others not. In one case, the trial court concluded that two of the three children were of sufficient age and maturity that they did not have to return to Switzerland against their wishes. Therefore, the youngest child would not be returned either because the children should not be separated.<sup>52</sup> In another case, the court determined that the objection of the older child to being returned to England was based mainly on his desire not to be separated from his younger brother who was too young to have his views considered. The court found that the older child's preference could be followed by returning both boys to England.<sup>53</sup> Some courts, however, have considered returning one child and not others.<sup>54</sup>

### *C. Weight to be Given Objection*

Even if the child is found to be of sufficient age and maturity, the exception to return is not mandatory. Courts have wide discretion as to what weight to give the objection.<sup>55</sup> As one court noted, "The notion of objections ... is far stronger and

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<sup>51</sup> *Re T (Abduction: Child's Objections to Return)*, [2000] 2 F.L.R. 192, 204.

<sup>52</sup> *Smyth v. Blatt*, 2009 WL 3786244 (E.D. N.Y. Nov. 12, 2009); *Ostevoll v. Ostevoll*, 2000 WL 1611123 \*20 (S.D. Ohio Aug. 16, 2000). See also *B. v. K. (Child Abduction)*, 1 Fam. Ct. Rep. 382, 387-88 (Eng. Fam. 1993); *Re T (Abduction: Child's Objection to Return)*, 2 Fam. Ct. Rep. 159 (Eng. Fam. 2000).

<sup>53</sup> *Haimdas v. Haimdas*, 72 F. Supp. 2d 183 (E.D. N.Y. 2010). See also *England v. England*, 234 F.3d 268 (5<sup>th</sup> Cir. 2000).

<sup>54</sup> *Raijmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953, 957 (E.D. Mich. 2001).

<sup>55</sup> See Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,509(1986) (. . .the application of [the age and

more restrictive than that of wishes in a custody case.”<sup>56</sup> If the goal to return children swiftly was based on the assumption that the abduction harms children,<sup>57</sup> courts should narrowly construe the child’s objection exception and refuse to return a child only in exceptional circumstances.<sup>58</sup>

In some instances, however, the abductor may a victim of abuse and may be protecting the child by fleeing domestic violence. The child may be more closely aligned with the abductor than the left-behind parent and be safer.<sup>59</sup> Judges must weigh the strength, soundness and validity of the reasons for the child’s objections against the overall purpose of the Hague Abduction Convention.<sup>60</sup>

Because judicial discretion is so broad, critics argue that there are instances of inappropriate attention to the wishes of young children<sup>61</sup> and refusals to consider the wishes of older children not to return, even in face of child abuse.<sup>62</sup> The judge should ascertain the child’s view of whether there was domestic violence or abuse in the home prior to the abduction.

The judge can inquire as to the child’s life before and after the abduction to determine how the act of abduction has changed the child’s perceptions of and emotional dependency upon each parent. From the child’s answers, a judge may be able to gauge whether there is evidence of psychological control of the abducting parent over the child.

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maturity] exception is not mandatory.... A child’s objection to being returned may be accorded little if any weight if [for example] the court believes that the child’s preference is the product of the abductor parent’s undue influence over the child.” See

<sup>56</sup> Haimdas v. Haimdas, 720 F. Supp. 2d 183, 206 (E.D.N.Y. 2010), quoting Morrison v. Dietz, 2008 WL 4280030, at \*13 (W.D. La. Sept. 17, 2008).

<sup>57</sup> Perez-Vera Report, *supra* note 28, at 182. See also Marilyn Freeman, *The Effects and Consequences of International Child Abduction*, 32 Fam. L. Q. 603 (1998).

<sup>58</sup> See Falk v. Sinclair, 692 F. Supp. 2d 147, 165 (D. Me. 2010); Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 279 (3rd Cir. 2007); Locicero v. Lurashi, 321 F. Supp. 2d 295, 298 (D.P.R. 2004); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M. D. Fla. 2002); Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 462 (D. Md. 1999).

<sup>59</sup> See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593 (2000); Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 Fam. L. Q. 529 (2004).

<sup>60</sup> De L v. H., [2010] 1 F.L.R. 1229, 2009 WL 4113906 (Eng. 2009).

<sup>61</sup> Nigel V. Lowe, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: An English Viewpoint*, 33 N.Y.U. J. Int’l L. & Politics 179, 189-90 (2000) (noting that courts have sometimes refused return when children as young as seven or eight have raised objections).

<sup>62</sup> See Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland’s Example in Hague Abduction Cases*, 58 Am. U. L. Rev. 335, 382-83 (2008); Bruch, *supra* note 60, at 536.

Courts will consider the extent to which the “child[ren]’s views have been influenced by an abductor, or if the objection is simply that the child wishes to remain with the abductor.”<sup>63</sup> There is a recognized tendency for a child to be influenced by the preferences of the parent with whom he or she lives. Courts do not want to reward a parent for wrongfully retaining the child for an extensive period of time.<sup>64</sup> If the child’s objection appears to be the result of parental indoctrination or undue influence, the court may order return over the child’s objections.<sup>65</sup> At least one court has noted, however, that coaching is not the equivalent of undue influence.<sup>66</sup>

The undue influence concern is a valid one because it raises the parental alienation debate.<sup>67</sup> Some psychologists feel that putting too much emphasis on the child’s objection “creates a gross psychological invitation to vindictive and disturbed parents in international custody disputes to engage in blatant child brainwashing and parental alienation.”<sup>68</sup> The risk of undue influence in a child’s testimony, however, does not justify “judicial paralysis.” The child’s testimony should be taken, considered, and, where appropriate, can support an exception to return.<sup>69</sup> One the other hand, where the objections to return are the product of undue influence, the court can order return over the child’s objections.<sup>70</sup>

If the child’s reasons are not sound, or amount to mere wishes to remain, the trial judge may find the wishes do not rise to the level of a serious objection and or-

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<sup>63</sup> *Nicholson v. Nicholson*, No. 97-1273-JTM, 1997 WL 446432 (D. Kan. July 7, 1997); *HazbunEscaf v. Rodriguez*, 200 F. Supp. 2d 603, 615 (E.D. Va. 2002).

<sup>64</sup> *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 280 (3rd Cir. 2007); *Giampaolo v. Ermeta*, 390 F. Supp. 2d 1269 (N.D. Ga. 2004); *HazbunEscaf v. Rodriguez*, 200 F. Supp. 2d 603, 615 (E.D. Va. 2002).

<sup>65</sup> *See In re Robinson*, 983 F. Supp. 1339 (D. Colo. 1997); *In re B. De C.S..B.*, 25 F. Supp. 2d 1182, 1199 (C.D. Cal. 2007). *Lieberman v. Tabachnik*, 2008 WL 1744353, \*15 (D. Colo. Apr. 10, 2008); *Wasniewski v. Grzelak-Johannsen*, 2007 WL 2344760 (N.D. Ohio Aug. 15, 2007).

<sup>66</sup> *Blondin v. Dubois*, 78 F. Supp. 2d 283, 296 (S.D. N.Y. 2000).

<sup>67</sup> *See Elrod & Dale, Paradigm Shifts, supra note 7*, at 396-397.

<sup>68</sup> Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 *Fam. L. Q.* 557, 562 (1998) (noting that a person in a cross-cultural marriage who is going through an unwanted or acrimonious divorce and who abducts a child is at significantly increased risk or likelihood to hold adamant but inaccurate convictions regarding the potential “harm” the other parent poses and to engage in alienating behaviors to influence their “preferences” and “objection” to return). *Id.* at 566-7.

<sup>69</sup> *See, e.g., Matovski v. Matovski*, 2007 WL 2600862, at \*14 (S.D.N.Y. Aug. 31, 2007); *Diaz Arboleda v. Arenas*, 311 F. Supp. 2d 336, 343-44 (E.D.N.Y. 2004); *de Silva v. Pitts*, 481 F.3d 1279, 1287 (10th Cir. 2007); *Leites v. Mendiburu*, 2008 WL 114954, at \*6 (M.D. Fla. Jan. 9, 2008).

<sup>70</sup> *Haimdas v. Haimdas*, 720 F. Supp. 2d 183, 193-195 (E.D.N.Y. 2010).

der return.<sup>71</sup> A child's generalized expression of a preference to remain in the United States rather than a particularized objection to repatriation may provide a basis for a court to find the mature child exception inapplicable.<sup>72</sup> Courts are more willing to take a child's views into account where the child makes a particularized objection that the child's desire to remain in the country to which the child is abducted has rational comparisons between his or her life here and life in habitual residence.<sup>73</sup>

## CONCLUSION

*[T]here is now a growing understanding of the importance of listening to the children involved in children's case. It is the child, more than anyone else, who will have to live with what the court decides. . . . they [children] often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right.....*<sup>74</sup>

The child's voice should be added whenever the child's interests and the parent's interests are not aligned - when the child is endangered, when the parents cannot agree (the high conflict case), and when the child's views differ from his or her parents. Because the child's interests are at stake and the parents' interests may not be the same as the child's, a lawyer for the child offers the best chance of ensuring that the child's views are presented to the court. Giving the child a voice does not necessarily "conflict" with the purpose of the Hague to return the child. The key is to add the child's voice to the voices of the parents and others. Even if the United States does not adopt the CRC, courts should incorporate the principles of CRC Article 12 to ensure that the child's voice is heard.

<sup>71</sup> *In re Skrodski*, 2007 WL 1965391 (E.D.N.Y. July 2, 2007); *Trudrung v. Trudrung*, 686 F. Supp. 2d 570 (M.D. N.C. 2010); *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1361 (M.D. Fla. 2002); *Norden-Powers Beveridge*, 125 F. Supp. 2d 634, 641 (E.D.N.Y. 2000); *In re Nicholson*, 1997 WL 446432 (D. Kan. Jul. 7, 1997).

<sup>72</sup> *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259, 279 (3<sup>rd</sup> Cir. 2007); *Haimidas v. Haimidas*, 720 F. Supp. 2d 183 (E.D. N.Y. 2010); *Falk v. Sinclair*, 692 F. Supp. 2d 147, 165 (D. Me. 2010); *Trudrung v. Trudrung*, 686 F. Supp. 2d 570, 577-79 (M.D.N.C. 2010); *Locicero v. Lurashi*, 321 F. Supp. 2d 295, 298 (D.P.R. 2004).

<sup>73</sup> See *Castillo v. Castillo*, 597 F. Supp. 2d 432, 441 (D. Del. 2009); *Ago v. Odu*, 2009 WL 2169857, at \*14 (M.D. Fla. July 20, 2009).

<sup>74</sup> *In re D (A Child (Abduction: Rights of Custody))* [2006] UKHL 51, [2007] 1 A.C. 619, 641 (H.L.) (appeal taken from Eng.) (U.K.).

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SASLUŠANJE DETETA U SLUČAJEVIMA PREDVIĐENIM  
HAŠKOM KONVENCIJOM O GRAĐANSKOPRAVNIM  
ASPEKTIMA MEĐUNARODNE OTMICE DETETA

Rezime

Međunarodno, zemlje su priznale važnost saslušanja deteta kada sudije ili administrativne službe donose odluke o tome sa kim dete treba da živi. To uključuje saslušanje deteta povodom toga da li dete treba da bude vraćeno u zemlju iz koje je oteto.

Konvencija UN o pravima deteta zahteva saslušanje deteta u svim pitanjima koja se odnose na starateljstvo deteta. Haška konvencija o građanskopravnim aspektima međunarodne otmice dece uključuje prigovore odraslog deteta kao izuzetak u slučajevima vraćanja deteta u mesto uobičajenog prebivališta. Kada da se utvrdi mišljenje deteta i značaj koji mu treba dati zavise od diskrecione ocene suda. Sjedinjene Američke države zaostaju za ostakom sveta u pogledu saslušanja deteta.

Članak se zalaže za to da treba čuti glas deteta i da je najbolji način da se čuje glas deteta imenovanje advokata za zastupanje deteta.