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"Please Let Me Stay": Hearing the Voice of the Child in Hague Abduction Cases

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"PLEASE LET ME STAY": HEARING THE VOICE OF THE CHILD IN HAGUE ABDUCTION CASES

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I. 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.*[1]

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. Internationally, this sentiment is widely accepted. One hundred and ninety three countries have adopted the United Nations Convention on the Rights of the Child (CRC) which requires hearing the voice of the child in all matters relating to the child's custody.[2] In addition, eighty-five countries have adopted the Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention),[3] which incorporates the objections of a mature child as an exception to returning the child.[4] The issue of hearing children's voices remains controversial, however, in the United States where the CRC has not been adopted, where large numbers of Hague cases are heard by federal judges not used to listening to children, and where debates have raged for decades over the when and how to hear the voice of the child.[5]

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1. PATRICK PARKINSON & JUDITH CASHMORE, THE VOICE OF A CHILD IN FAMILY LAW DISPUTES 20 (2009).

2. 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).

3. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Abduction Convention]. The implementing legislation is the International Child Abduction Remedies Act (ICARA) of 1988, 42 U.S.C. §§ 11601 - 11611 and in federal regulations found at 22 CFR 94.1 to 94.8 (2008). For a discussion of the Convention, *see* Linda J. Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994).

4. Hague Abduction Convention, art. 13b, ¶ 2.

5. *See* Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*,

Part II of this article will briefly outline the history of hearing children's voices in judicial proceedings and the movement toward traditional attorney representation for children. Part III will review the mandate for hearing the child's voice under the U.N. Convention on the Rights of the Child. Part IV will explore the history and use of the exception to return for the objection of a mature child under the Hague Abduction Convention. The article concludes that a child's voice should indeed be heard in every Hague return case, preferably through representation by a client-directed lawyer appointed for the child.

II. Hearing Children's Voices and Lawyers for Children

> *[T]here is now a growing understanding of the importance of listening to the children involved in children's cases. 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 . . . .*[6]

A. Brief History of a Child's Right to be Heard

The right to be heard and listened to in determining what happens to a person seems to be among the most fundamental of rights.[7] Traditionally, however, children have not had standing in their parents' divorces or other proceedings when their custody was in issue.[8] Justifications for excluding children stem from

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27 PACE L. REV. 869, n. 1, 2 (2007) (citing numerous articles starting in 1971 calling for hearing the child's voice). *See also* 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). *See infra* notes 29-36.

6. *In re* D (A Child (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 A.C. 619, 641 (H.L.) (appeal taken from Eng.).

7. Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 356-57 (1972). *See also* VIRGINIA COIGNEY, CHILDREN ARE PEOPLE TOO: HOW WE FAIL OUR CHILDREN AND HOW WE CAN LOVE THEM 197 (1975) (suggesting a Child's Bill of Rights, starting with the Right to Self-Determination "because it is the basic right upon which all others depend"); Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 438 (2000) (noting that "the value of rights for children lies in their potential to remedy powerlessness.").

8. *See In re* Marriage of Osborn, 135 P.3d 199, 201 (Kan. Ct. App. 2006) (finding child was not a party and lacked standing to file motion to modify parenting time); Miller v. Miller, 677 A.2d 64 (Me. 1996) (holding that children could not intervene in parents' divorce and have independent representation); Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993)

a belief that parents will do what is in their child's best interests,[9] a desire to protect the child from taking sides in the parents' dispute,[10] or are rooted in the notion that children have interests, not "rights."[11]

The last thirty years has seen increasingly strident calls to recognize children as rights' holders and to hear their voices in judicial proceedings.[12] As John Eekelaar has stated: "hearing what children say must . . . lie at the root of any elaboration of children's rights."[13] Social science research now reveals that not listening to children may do more harm than giving them a voice.[14] Additionally,

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(finding that minor lacked capacity to bring petition to terminate parental rights).

9. *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, 404-05 (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).

10. *See* Robert E. Emery, *Children's Voices: Listening - and Deciding - Is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003) (opining that children can be harmed from having to choose).

11. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005); *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' . . ."); Elrod, *supra* note 5, at 875 (suggesting that the quest for rights for children is hampered by the lack of an express Constitutional grant of positive rights; the lack of ratification of the United Nations Convention on the Rights of the Child; difficulties in defining "rights"; the perceived incapacity of some children; and the fear that parental rights will be diminished).

12. *See* Howard A. Davidson, *The Child's Right to be Heard in Judicial Proceedings*, 18 PEPP. L. REV. 255 (1991); George H. Russ, *Through the Eyes of A Child: "Gregory K": A Child's Right to be Heard,* 27 FAM. L. Q. 365 (1993); 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/contentabstraft/6/1/52; Jane Fortin, *Accommodating Children's Rights in a Post Human Rights Act Era*, 69 MODERN L. REV. 299 (2006) (asserting that "by articulating children's interests as rights and incorporating evidence associated with ideas about their best interests within such rights, the court can develop a more structured and analytical approach to decision making.").

13. John Eekelaar, *The Importance of Thinking That Children Have Rights*, *in* CHILDREN, RIGHTS AND THE LAW 220, 228 (P. Alston et al. eds., 1992).

14. *See* Joan B. Kelly, *Listening to Children's Views in Disputed Custody and Access Cases*, AFCC Compendium 179 (2008); Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 149 (2002) (indicating that children excluded from the divorce process feel isolated and lonely and older children are often frustrated and angry about being left out); Anne

research supports that children want to be heard on matters affecting them.[15] Children often feel betrayed by the adults in their lives and the legal system when their views are not taken into consideration and given some weight.[16]

Requiring that children's voices be heard can affect the treatment of children, both substantively by treating them with respect and by improving their experience of decision-making processes. Taking a child's views into account is good not only because it empowers the child[17] but also because it adds value to the outcome and credibility to the process.

Many states include the wishes of a child, without mentioning age, as one of the factors for determining child custody in disputes between parents.[18] A few state statutes give children of certain ages (usually over twelve or fourteen) the right to consent to their adoption[19] or to determine with whom they will live.[20] These laws presume children of certain ages are "competent" enough to make an

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B. Smith, Meghan M. Gollop & Nicola J. Taylor, *Children's Perspectives of Their Parents' Separation*, 12 CHILD & FAM. L. Q. 34 (2000).

15. *See* Patrick Parkinson, Judy Cashmore, & Judi Single, *Adolescents' Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 FAM. CT. REV. 429 (2005) (reporting half of the young people indicated they had no say at all and the danger of predicating custody arrangements on what is perceived to be fair to parents rather than fair to children); 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); Birnbaum & Bala, *supra* note 9. *See also* Theo Liebmann & Emily Madden, *Hear My Voice - Perspectives of Current and Former Foster Youth*, 48 FAM. CT. REV. 255 (2010).

16. 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) (citing research indicating that children resent their exclusion from the decision-making process resulting in low self-esteem and feelings of powerlessness); Marilyn Freeman & Ann-Marie Hutchinson, *The Voice of the Child in International Child Abduction*, INT'L FAM. L. 177 (2007) (reporting findings of 2006 reunite study).

17. Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMPLE L. REV. 1585 (1995).

18. LINDA D. ELROD, CHILD CUSTODY PRACTICE & PROCEDURE § 4.11 (West-Thompson 2004, Supp. 2011).

19. *See* ABA Child Custody and Adoption Pro Bono Project, *Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings*, 41 FAM. L. Q. 365, 376-78 (2007) (noting that forty-nine jurisdictions require courts to consider a child's preference if the child has attained a certain age, with twenty five using the age of fourteen; eighteen using twelve; and six using ten).

20. *See* GA. CODE ANN. § 19-9-3 (a)(5) (2010) (presuming fourteen-year-old can choose residence); W. VA. REV. CODE § 44-10-4 (a) (2010) (same). *See also* N.M. STAT. § 32A-4-10(C)(E) (providing that children over age fourteen get lawyer representation).

intelligent decision. Competency, however, is not an all-or-nothing proposition where a child is deemed either totally competent or incompetent. As children grow, their competencies increase and are affected by not only chronological age and maturity, but also by intelligence, education, socio-economic status, geographical location, birth order, culture and life experiences.[21] As a general rule, children need more protection when they are young and more guidance as they age. Children are denied a voice when their need for protection is erroneously presumed to denote incompetence.[22] A presumption that the child has capacity would change the discussion as the child would be given an opportunity to be heard absent a showing that the child was unable to comprehend or make an adequately considered decision.[23]

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. In custody cases, the purpose of the interview is to determine the child's preference, reduce the emotional trauma of testifying in open court, and relieve the child of openly having to choose between parents.[24] If the judge interviews the child *in camera*, there are ethical and due process issues.[25] A Michigan appellate court in a termination of parental rights case noted:

> While questioning children in an in camera interview in a child custody proceeding does not constitute a due process violation as

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21. Elrod, *supra* note 5, at 879; Barbara Bennett Woodhouse, *Children's Rights*, *in* HANDBOOK OF YOUTH AND JUSTICE 377, 398 (White, ed. 2001).

22. *See* Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267, 297 (1995) (noting that nothing in rights rhetoric prevents acknowledging that children need some forms of freedoms but also need guidance, support and even control to protect them from harm); Hillary Rodham, *Children Under the Law*, 42 HARV. EDUC. REV. 487, 489 (1973).

23. Elrod, *supra* note 5, at 912-14.

24. McGovern v. McGovern, 870 N.Y.S.2d 618, 622 (App. Div. 2009) (finding that while not determinative, the wishes of an almost 14-year-old child are certainly entitled to great weight, particularly given the legitimate academic, medical and other bases for his view and noting that an in camera interview would have been "far more informative and worthwhile than the traditional procedures of the adversary system - an examination of the child under oath in open court.").

25. Couch v. Couch, 146 S.W.3d 923, 925 (Ky. 2004) (allowing in camera interview if the court makes a record stating that "any procedure whereby the trial court prohibits disclosure of the transcript of a child's interview to the parties raises significant due process questions."). *See generally* ELROD, *supra* note 18, at §§ 4.13 - 4.16 (listing statutes and cases on requirements for judicial interviewing of children, including requirements of the presence of counsel or a tape recording); *see also* Judith Cashmore & Patrick Parkinson, *What Responsibility Do Courts Have to Hear Children's Voices*, 1 INT'L J. CHILD. RTS. 11-13 (2007).

> long as the interview is limited to the child's parental preferences, it is not difficult to see how the use of an in camera interview for fact-finding presents multiple due process problems: should questions or answers arise concerning disputed facts unrelated to the child's preference, there is no opportunity for the opposing party to cross-examine or impeach the witness, or to present contradictory evidence; nor is there created an appellate record that would permit a party to challenge the evidence underlying a court's decision.[26]

In addition to the difficulties involved in ensuring a fair process for parents while hearing the voice of the child, many judges lack the training in child development to determine the child's maturity or the weight to be given a preference. It is difficult to predict which children will have their views solicited, let alone heeded.[27] One psychologist lamented:

> Judges are not trained in child interviewing skills, and generally lack knowledge about developmental differences in cognitive, language, and emotional capacities. Thus, it is hard for even the most experienced judge to place children's responses in an appropriate context and evaluate the weight that should be given to their wishes.[28]

The statement is correct. While some judges choose family court (more so than in the past because some states now have dedicated family courts), other judges are assigned to family court and have no background in the dynamics of divorce and child custody disputes. Many family court judges were not family lawyers. These judges have not been trained in the social sciences nor have they had courses in child development or child interviewing. Even those judges who have some training worry about if, when, and how to interview a child involved in a parental custody dispute or child protection proceeding. Many family court judges

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26. *In re* H.R.C., 781 N.W.2d 105 (Mich. Ct. App. 2009) (reversing termination of parental rights because judge interviewed children in camera without counsel or parties which violated parents' constitutional rights). On appeal the court still terminated parental rights but the judge interviewed the children in chambers with all counsel present, parties watching by video monitor, and parties and counsel able to interrupt and consult at any time. *In re* Compton, 2010 WL 5129541 (Mich. App. Dec. 16, 2010).

27. *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, *supra* note 9, at n. 17.

28. *See* Kelly, *Psychological and Legal Interventions*, *supra* note 14, at 154; *see also* Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996).

are hesitant to interview children either in chambers alone or with counsel or the parties present. 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 or child protection cases on a regular basis. To give children a voice requires a procedure for ensuring that the child's voice gets heard. The best chance for getting the child's voice heard is to appoint a lawyer to represent the child's perspective.

B. Right to Representation

The growing acknowledgment that a child has a right to be heard in proceedings affecting his or her custody has increased calls for judges to appoint a specially-trained lawyer to represent the child, especially in high conflict cases.[29] Numerous national debates have raged over what this lawyer should be called (guardian ad litem, child's attorney, attorney ad litem) and what functions that lawyer should perform (representing the child's wishes or the child's best interests).[30] Since 1995, numerous legal groups have tried to define the role a lawyer should play in representing a child. The American Bar Association has adopted two sets of Standards detailing the ethical duties of lawyers representing children in abuse and neglect cases and in custody cases.[31] Other lawyer groups

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29. *See* Elrod, *supra* note 5, at 869 n. 2 (citing numerous articles calling for lawyers to represent children); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 496, 525 (2001) (indicating the serous harm to children comes not just from the divorce but from "parents whose chronic conflict traps children in a maelstrom of experiences and emotions that can erode the child's relationship with one or both parents").

30. *See* Elrod, *supra* note 5, at 905-11 (favoring client-directed lawyers over best interest lawyers). *Compare* Barbara Ann Atwood, *The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism*, 42 FAM. L. Q. 63 (2008) *with* Katherine Hunt Federle, *Righting Wrongs: A Reply to the Uniform Law Commission's Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act*, 42 FAM. L. Q. 103 (2008) *and* Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 NEV. L. J. 1385 (2006) (criticizing the best interests lawyer approach).

31. American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L. Q. 375 (1995) (preferring appointment of a child's attorney but also allowing a guardian ad litem); American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 129 (2003) (allowing judges to appoint either a child's attorney or a best interest attorney) [hereinafter *ABA Custody Standards]*. For a discussion of the *ABA Custody Standards*, see Linda D. Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and*

also have proffered sets of Standards,[32] Principles,[33] and a uniform law.[34] Two national children's law conferences, ten years apart, thoroughly discussed the role of lawyers for children.[35] The plethora of standards, principles, and acts trying to clarify and improve the role of lawyers for children signifies a paradigm shift; the question is no longer whether a child should have a lawyer, but what the lawyer should do. A growing consensus believes a child should have an independent client-directed lawyer.[36]

Neglect Cases, 64 FORDHAM L. REV. 1999 (1996); Linda D. Elrod, *A Brief Look at The American Bar Association Standards of Practice for Lawyers Who Represent Children in Custody Cases*, *in* 2005 FAMILY LAW UPDATE 177 (Ron Brown & Laura Morgan ed., 2005); Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L. Q. 105 (2003).

32. American Academy of Matrimonial Lawyers, *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAWYERS 1 (1995); Martin Guggenheim, *The AAML's Revised Standards for Representing Children in Custody and Visitation Proceedings*, 22 J.AM. ACAD. MATRI. L. 21 (2009); Nat'l Ass'n of Counsel for Children, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (2001), *available at* http://www.nacc childlaw.org/documents/ naccrecommendations.doc.

33. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.13 (2002).

34. National Conference of Commissioners on Uniform State Laws, Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act (2007), http://www.uniformlaw.org. The ABA Section of Litigation aggressively opposed the Act mainly because it failed to mandate client-driven lawyers. Subsequent discussions between the Uniform Law Commission and representatives of the ABA were unable to resolve whether that the concept of the "best interests" attorney is consistent with provisions of the ABA Model Rules of Professional Responsibility. *See* http://www.uniformlaws.org/Shared/Minutes/ECMin 072208.pdf. Because of the inability to resolve the ethical concerns of best interest lawyering, the Uniform Law Commission re-designated the statute as a Model Act. *See* http://www.uniformlaws.org/Shared/ Minutes/ECMin012309.pdf.

35. I participated in both the Fordham Conference on Ethical Issues in the Legal Representation of Children (1995) and the University of Nevada Las Vegas Law School Conference Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham (2006). *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1301-02 (1996) (endorsing the traditional lawyer-client model for children's lawyers); *Recommendations of the UNLV Conference on Representing Children in Families* IVA.1, 6 NEV. L. J. 592, 594-96 (2006) (recommending placing the child at the center of the representation and suggesting ways to encourage children's participation in proceedings regarding their lives).

36. *In re* H.R.C., 781 N.W.2d 105 (Mich. Ct. App. 2009) (noting that children have a right to appointed counsel in child protective proceedings, and a child's attorney appointed under the

An attorney for the child should be appointed in high conflict cases because one or both parents may lose sight of their child's interests when fighting for their own.[37] A child abduction case, by definition, is a high conflict case. One of the parents has taken the child without the permission of the other parent, and sometimes in defiance of a court order, to another country. The other parent is desperately trying to get the child returned. The child may have been taken by the parent with whom he is most aligned or by an absentee or abusive parent. In any event, the child's interest may or may not be aligned with the abducting parent. o ensure that a child is heard in an abduction case requires the advocacy of independent counsel.[38] Indeed, the *ABA Custody Standards* list several reasons for discretionary appointment of a lawyer for a child, including many that are present in abduction cases: representation of the child's concerns or views; past or present child abduction or risk of future abduction; a high level of acrimony; past or present family violence; inappropriate adult influence or manipulation; and interference with custody or parenting time.[39]

As a general rule, the lawyer representing a child should act as a traditional lawyer. The child's lawyer's duties start with explaining to the child in a developmentally appropriate manner the events of the litigation, offering an assessment of the situation, conducting an independent fact investigation, and

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juvenile code has the same duties that any other client's attorney would fulfill). *See* Elrod, *supra* note 5, at 872-3; Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 HAMLINE J. PUB. L.& POL'Y 177, 177 (2006). In August, 2011, the American Bar Association voted to adopt the ABA Section of Litigation's *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* which requires appointment of a lawyer for children in all abuse and neglect cases. Annual Meeting of American Bar Assoc., August, 2011; *see also* FIRST STAR'S NATIONAL REPORT: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN (2d ed. 2009), *available at* http://www.caichildlaw.org/Misc/Final_2nd Edition_lr.pdf.

37. *See In re* Berg, 886 A.2d 980, 985 (N.H. 2005) (noting that the personal interests of the parents fighting over custody can obliterate that which is in the best interest of the child).

38. *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) (advocating for appointment of counsel for children in all Hague Abduction cases); Rhona Schuz, *The Hague Convention and Children's Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 393, 430 (2002) (indicating that separate representation should be ordered in nearly all abduction cases because there is a potential conflict between the interests of the child and his parents).

39. *ABA Custody Standards*, *supra* note 31, at 152-53, VI.A.2. c, f, g, j, k, l. *See also* Child Attorney Appointment Order *in* ABA CHILD CUSTODY AND ADOPTION PRO BONO PROJECT AND ABA CENTER ON CHILDREN AND THE LAW, A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 211 (2d ed. 2008).

counseling as to options and consequences.[40] The lawyer will ensure that all relevant evidence is presented to the court, including the child's views. The lawyer can help the child present his or her views or can speak for the child who may not be present or may not want to speak. The lawyer can participate in and represent the child's views and objections in mediation, settlement conferences, or hearings. If the child is being interviewed by a judge, the lawyer can advise the child and provide support. The lawyer will provide the child legal information and options and propose child-focused solutions. In other words, the child's lawyer acts as any other lawyer in advising the client of options, recommending courses of action, and advocating for the child's position.

III. U.N. 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.*[41]

The United Nations Convention on the Rights of the Child (CRC) contains 54 "Articles" specifying rights for children.[42] It has been called the "most important children's rights document in history"[43] because it provides a comprehensive framework for recognizing and protecting children's rights. The CRC obligates its parties to draft legislation and programs to protect children, to create procedures assuring fairness in removing children from their homes, and to assure that the child's voice is heard. Although the United States helped draft the CRC and was one of the 200 countries who signed it, the United States has not

40. *See* Section III. Duties of All Lawyers for Children, *ABA Custody Standards*, *supra* note 31, at 134-138.

41. U.N. Comm. on the Rights of the Child, *General Comment No. 12: The Right of the Child to Be Heard*, U.N. Doc. CRC/C/GC/12, 20 July 2009, http://www2.ohchr.org/enligh/bodies/crc/docs [hereinafter CRC General Comment 2009].

42. CRC, *supra* note 2.

43. Woodhouse, *Talking about Children's Rights*, *supra* note 12, at 108. *See also* Ursula Kilkelly, *Relocation: A Children's Rights Perspective*, 1(1) J. FAM. L. & PRACTICE 23 (2010) (stating that CRC is the definitive international instrument in the area of children's rights and most highly ratified document in international law); 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) (noting importance of document granting rights to children).

adopted it.[44] Because of its widespread acceptance, however, many believe it has become international customary law which can be used in American courts.[45]

Article 12 provides:

> 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.
>
> For this purpose, 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.[46]

Article 12 has two parts: the first imposes a general duty on the State to ensure that children have the right to express their views. The age and maturity test determine the weight to be given those views. The second part recognizes that children must be given the opportunity to be heard in any judicial or administrative proceeding affecting them, either directly or through a representative.

Article 12 has both substantive and procedural effects by treating children with respect and by improving their experience with the decision-making process. Substantively, Article 12 has empowering qualities. It "is significant . . . because it recognizes the child as a full human being, with integrity and

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44. When a country signs but does not ratify, the country is still bound not to contravene the treaty's object or purpose. Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331, 336.

45. *See* Sanford Fox, *Beyond the American Legal System for the Protection of Children's Rights*, 31 FAM. L. Q. 237 (1997); Gary B. Melton, *Children, Family, and the Courts of the Twenty-First Century*, 66 S. CAL. L. REV. 1993, 2039-40 (1993); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990); Bernadine Dohrn, *Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, 6 NEV. L. J. 749 (2006) (showing that the European Court of Human Rights and the Inter-American Court of Human Rights have drawn on CRC principles in deciding cases). *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 234 (E.D.N.Y. 2002) (citing the Convention on the Rights of the Child); Roper v. Simmons, 543 U.S. 551, 575 (2005) (noting the U.N. CRC art. 37 contains express prohibition against capital punishment for crimes committed by someone under age 18 and noting that "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'"); Graham v. Florida, 130 S. Ct. 2011 (2010) (Kennedy J. dissenting "while international law is not decisive, it is illuminating. . .").

46. CRC, *supra* note 2, art. 12.

personality, and with the ability to participate fully in society."[47] Article 12 ensures children are heard as part of the decision-making about them and aids in interpreting other CRC sections outlining what is in the best interests of the child.[48]

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 for the CRC, discourages States from introducing age limits either in law or in practice that would restrict the child's right to be heard.[49] It wants states to 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.[50] 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.[51]

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 depends on the age and maturity of the child. The CRC then provides the standard against which countries gauge their progress in recognizing and providing rights for children.

IV. Child's Objection as an Exception to Return

> *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.*[52]

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47. Freeman, *supra* note 12, at 175.

48. Kilkelly, *supra* note 43, at 25.

49. CRC General Comment 2009, *supra* note 41, at ¶ 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.

50. *Id.* ¶ 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.").

51. *Id.* ¶ 21 (noting also that States must ensure that children with disabilities are equipped with proper modes of communication).

52. 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

The Hague Convention on the Civil Aspects of International Child Abduction (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."[53] 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.[54]

The drafters intended the child's objection exception to relate to an individual child's best interests.[55] This, however, creates a tension with the speedy return remedy to deter abductions which is also usually in the child's best interests.[56] 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

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(2005) (noting that the U.S. approach in rarely allowing the child's objections to prevent return contradicts the intended purpose; to always allow such objections to carry weight would also violate the intent). *Id.*

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

54. 42 U.S.C. § 11603(e)(2)(B). *See* Nelson v. Petterle, 782 F. Supp. 2d 1081 (E.D. Cal. Mar. 18, 2011) (finding respondent father failed to prove that child objected to return to Iceland); Haimdas v. Haimdas, 720 F. Supp. 2d 183, 207 (E.D.N.Y. 2010) (finding that respondent father failed to prove by preponderance of evidence that younger child who was shy of his tenth birthday and objected to return was of sufficient maturity to take his views into account); England v. England, 234 F.3d 268, 272 n. 5 (5th Cir. 2000). Note for intra 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 or degree of maturity. European Union Council Reg. 2201/2203, 2001 O.J. (L. 338), referred to as *Brussels II bis*.

55. Elisa Pérez-Vera, *Explanatory Report, in* 3 Hague Conference on Private International Law: Actes et documents de la Quatorziéme session, 6 au 25 octobre 1980, Tome III, Enlévement d'enfants 460, ¶ 113 (1982), *available at* http://www.hcch.net/e/conventions/expl28e.html [hereinafter Pérez -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."). *See* Blondin v. Dubois, 189 F.3d 240, 246 n. 5 (2d Cir. 1999) (noting Pérez-Vera Report is recognized as official commentary to the Convention).

56. I say usually because sometimes the abductor is a mother fleeing abuse - either of herself or the children. Some contend that the Hague Convention's narrow defenses do not adequately protect abuse victims. *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).

custody determination on the merits, depriving the abducting parent of any practical or legal advantage from the abduction.[57] As the Official Report of the Convention indicates, "[T]wo objects of the Convention - [to deter abductions and] to secure the immediate reintegration of the child into the habitual environment - both correspond to a specific idea of what constitutes the "best interest of the child."[58] The Convention authorizes only a few narrow defenses[59] to returning the child: a petitioner was not exercising custody rights;[60] the child has been in the country for a year prior to the initiation of proceedings and is "well-settled" in the environment;[61] the return is not permitted by fundamental principles of the requested state relating to protection of human rights;[62] return is likely to pose an unacceptable "grave" risk of harm to the child;[63] and when a mature child objects to return.[64] These exceptions create the possibility that an abducting parent may retain the child if one of them is proved. The child's

57. Shealy v. Shealy, 295 F.3d 1117, 1121 (10th Cir. 2002) (noting that the scope is limited to the merits of abduction claim, not the underlying custody dispute); Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993) (same).

58. Pérez-Vera Report, *supra* note 55, at 426, 432 ¶ 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, ¶ 24.

59. The affirmative defenses are to be narrowly construed to effectuate the purposes of the Convention and, even if proven, do not automatically preclude an order of return. *See* Hague Int'l Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986); *see also* Baxter v. Baxter, 423 F.3d 363, 368 (3d Cir. 2005); Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996).

60. Hague Abduction Convention, art. 21. The Convention does not protect "access" rights. The United States Supreme Court discussed what constitutes a "right of custody" in Abbott v. Abbott, 130 S. Ct. 1983 (2010) (finding a *ne exeat* clause to be a "right of custody"). Even if the person holds a right of custody, the petitioner must have been exercising that right. *Id.* arts. 3(b), 13(a).

61. *Id.* art. 12.

62. *Id.* art. 20.

63. *Id.* art. 13(b). *See* Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008) (finding that father's violent temper and abuse of alcohol would expose son to a grave risk of harm were he to be returned to Australia and court was not required to find that child had been previously physically or psychologically harmed); *Friedrich*, 78 F.3d at 1069 (defining grave risk of harm as when return would put the child in imminent danger prior to the resolution of the dispute or in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence cannot adequately protect the child).

64. Hague Abduction Convention, art. 13, ¶ 2.

objection defense has been frequently used as a reason for refusal to return children.[65]

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 does not depend 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.[66]

The Report emphasizes that children have the possibility of interpreting their own interests. The intent is that a mature child will be permitted to dictate the return question because of his or her views on the merits. Older children are distinguishable from immature children who should not "choose between parents."[67] The Convention contemplates that if the child is not of an age and

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65. Nigel Lowe, *International Child Abduction - The English Experience*, 48 INT'L & COMP. L. Q. 127, 149 (1999) (finding child's objection to return the most cited reason in 1996). *But see* 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).

66. Pérez-Vera Report, *supra* note 55, at 433, ¶ 30.

67. *Id.* ¶ 30. *But see* 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

degree of maturity that it is appropriate to take into consideration the child's views, the child must be returned despite his or her objections.[68] The exception requires judges, often federal judges unused to children's issues, to resolve complex cases involving children. 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 allowing the child to remain or to return in spite of the mature child's objections.[69]

B. Age and Maturity

As with the United Nations 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.[70] As 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.[71]

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decision); 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 questions, listening to children's authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide.").

68. *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) (returning two children ages fourteen and twelve to Argentina over their strong objections because their preferences could not defeat their "father's rights"). *See* Weiner, *supra* note 38, at 393-98 (discussing long, sad history of this case involving abusive father).

69. *Re* M (Abduction Zimbawe), [2007] UICHL 55 [2008] AC 1288 at ¶¶ 43, 44, 46.

70. 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 (5th Cir. 2000)); Falk v. Sinclair, 692 F. Supp. 2d 147, 165 (D. Me. 2010) (finding it a close question whether eight-year-old had attained sufficient age and maturity); Blondin v. Dubois, 238 F.3d 153, 166-67 (2d Cir. 2001) (declining to hold as a matter of law that eight-year-old girl was too young for her views to be taken into account).

71. Pérez-Vera Report, *supra* note 55, at 433, ¶ 30.

The Hague Abduction Convention makes no specific reference as to how the judge should determine if an individual child is of sufficient age and maturity. One article suggests that the drafters "essentially had in mind 15-year-olds and certainly not children below the age of 12."[72] But this is not so clear. While one federal court made a blanket statement that children under nine were not of sufficient age and maturity,[73] most courts have not established a minimum age below which they will not interview a child.[74] The lack of objective criteria or tests to determine maturity[75] can result in subjective and inconsistent decisions.

Whether a child is of sufficient age and maturity to have his or her views considered is a factual finding that a district court must make in light of the specific circumstances of each case.[76] The subject child becomes the singlemost important witness.[77] Obviously, a child's ability to articulate a preference with cogent reasons is one indicator of the child's maturity.[78] Under the CRC, however, even very young children should be given an opportunity to express their views to the court.[79]

While the child's chronological age may provide some information, the child's emotional, cognitive, and developmental level are significant in assessing maturity. The child's emotional and psychological bonds, past and present, are also important. The question is how to assess these. As mentioned earlier, many

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72. Lowe & Horosova, *supra* note 65, at 85.

73. Tahan v. Duquette, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992) (finding no error in not interview because child's objection clause did not apply to a nine-year-old); *see also* Sheikh v. Cahill, 546 N.Y.S.2d 517 (Sup. Ct. 1989) (finding nine-year-old was not of sufficient age and maturity to have objection heeded).

74. *Blondin*, 238 F.3d at 166-7.

75. Greene, *supra* note 52, at 132. *See Blondin*, 238 F.3d at 166 (declining to conclude that under the Convention, as a matter of law, an eight-year-old is too young for her views to be taken into account ". . . as this would read into the Convention an age limit that its own framers were unwilling to articulate as a general rule.").

76. Simcox v. Simcox, 511 F.3d 594, 603 (6th Cir. 2007); de Silva v. Pitts, 481 F.3d 1279, 1287 (10th Cir. 2007) (noting fact sensitive nature of inquiry leads to disparate results); Tahan v. Duquette, 613 A.2d 486, 490 (N.J. Super. Ct. 1992) (holding, without discussion, that the exception "simply does not apply to a nine-year-old child").

77. Laguna v. Avila, 2008 WL 1986253, at *9 (E.D.N.Y. May 7, 2008) (interviewing the child outside the presence of the parties and their counsel, the judge established that the child understood the difference between telling the truth and a lie; obtained a promise to respond truthfully; and found child to be bright, articulate and mature beyond what would reasonably be expected of a 13 year-old boy, especially his mastery of English in a relatively short time).

78. PAUL K. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 180 (P.B. Carter QC ed.1999).

79. *See supra* notes 49-51 and accompanying text.

judges rely on their own examination of the child, often in camera.[80] Other judges, or one of the parties, may appoint a psychological expert to help determine if a child is of a sufficient age and maturity level. If a psychologist is used, few cases address the weight to be accorded to the psychologist's testimony.[81] A handful of courts have rejected such testimony wholesale, finding it to be "appropriate in a custody proceeding, not in a Hague Convention case."[82] Other courts have relied heavily on psychologists' testimony when deciding whether to apply the mature child exception.[83] In any event, the expert testifying must meet the applicable standards for an expert in the relevant jurisdiction.[84]

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80. I would suggest that the same due process issues arise with federal judges interviewing children in chambers without counsel in Hague return cases as in state courts in custody cases. *See supra* notes 23-25. *See also* Etienne v. Zuniga, 2010 WL 2262341 (W.D. Wash. June 2, 2010) (interviewing children in chambers without counsel and finding fourteen-year-old to be of sufficient age and maturity but seeking a psychologist's report with respect to eight-year-old child); Silverman v. Silverman, 2002 WL 971808, at *10 (D. Minn. 2002) (determining after an ex parte interview in camera, that a ten-year-old boy was of an age and maturity level at which views could be considered in connection with the defense involving a grave risk of harm); England v. England, 234 F.3d 268 (5th Cir. 2000).

81. Morrison v. Dietz, 2008 WL 4280030, at *12 (W.D. La. Sept. 17, 2008); Andreopoulos v. Koutroulos, 2009 WL 1850928 (D. Colo. 2009) (noting that a therapist testified that the boy had demonstrated age-appropriate maturity and morality levels, the child testified twice and once to the judge in chambers expressing his objection to returning to Greece, and his strong desire to remain in the United States).

82. *Morrison*, 2008 WL 4280030, at *12 (declining to accept psychologist's testimony in determining whether either the grave risk of harm or mature child exceptions applied); *Tahan*, 613 A.2d at 489 (noting that the Hague reserves considerations of "[P]sychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships [which] all bear upon the ultimate issue [of custody] to the appropriate tribunal in the place of habitual residence."). *See also* Haimdas v. Haimdas, 720 F. Supp. 2d 183, 207 n. 17 (E.D.N.Y. 2010) (indicating that the court had given no weight to the psychologist's testimony because his opinions regarding the potentially distorting effects of protracted custody battles and parental alienation "confirmed the obvious.").

83. *See, e.g.*, Garcia v. Angarita, 440 F. Supp. 2d 1364, 1381 (S.D. Fla. 2006) (relying on opinion of psychologist that child did not have sufficient age and maturity for the court to not return child based on his objection even though the child was "an impressive, well-mannered and articulate eleven-year old"); Ostevoll v. Ostevoll, 2000 WL 1611123 (S.D. Ohio Aug. 16, 2000) (allowing testimony of two psychologists about children's age and maturity).

84. Haimdas v. Haimdas, 2010 WL 652823 (E.D.N.Y. Feb. 22, 2010) (upholding decision to grant petitioner's motion *in limine* to prevent a marriage and family therapist from offering expert testimony as to the children's age and maturity because he was not a licensed psychologist and did not otherwise qualify as an expert under Fed. R. Evid. 702).

While some courts have appointed a guardian ad litem for a child,[85] the preferable approach from my perspective would be to appoint a lawyer for the child.[86] I agree with the scholar who opined: "If the decision to appoint counsel for children in Hague cases turned solely on whether children had interests affected by the proceeding, children would be appointed counsel in every case."[87]

1. Young Children

While maturity is not based on age, as a general rule, the younger the child, the less likely the judge will find the child to be of sufficient age and maturity to have his or her objections considered seriously. In fact, one study of Hague abduction cases indicated that objections of children under age seven have never been the *sole* reason for a court's refusal to return a child.[88] I contend, however, that judges should try to discover the views of even very young children, either through an interview, an attorney appointed for the child, a psychologist, or a child welfare officer. There needs to be at the least some discovery regarding the child's age and maturity before granting summary judgment on the exception not being met.[89] While some courts have found an eight-year-old to be of sufficient age and maturity,[90] others have returned "mature" nine-year-old children over

85. *See* Danaipour v. McLarey, 286 F.3d 1, 8 (1st Cir. 2002); Lieberman v. Tabachnik, No. 07-02415-WYD, 2007 WL 4548570 (D. Colo. Dec. 19. 2007); McManus v. McManus, 354 F. Supp. 2d 62, 69 (D. Mass. 2005); *see also* Kufner v. Kufner, 519 F.3d 33, 37 (1st Cir. 2008) (appointing an attorney who acted in dual role of guardian ad litem and attorney for the child).

86. Elrod, *supra* note 5.

87. Weiner, *supra* note 38, at 378.

88. Nigel Lowe et al., A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Prelim. Doc. No. 3, Pt. 1, 38 (2006) (finding that of twenty children whose objections were determinative in 2003, five were 8-10, six were 11-12; and nine were 13 or older). *But see* Lowe & Horkava, *supra* note 65, at 85 (indicating that there were judges who relied upon the objections of six-year-old children). *See also* Fernandes v. Connors-Fernandes, 259 F. Supp. 2d 800, 812 (N.D. Iowa 2003) (finding seven- and four-year-old children were not of sufficient age and maturity); Rivera Rivas v. Segovia, 2010 WL 5394778 (W.D. Ark. Dec. 28, 2010) (finding seven-year-old did not have sufficient age and maturity to have views on return to El Salvador considered).

89. Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953, 957 (E.D. Mich. 2001) (refusing to grant a summary judgment that the maturity exception was inapplicable where the father sought consideration of his eight-year old son's alleged objection to returning to the Netherlands).

90. Anderson v. Acree, 250 F. Supp. 2d 876, 883 (S.D. Ohio 2002) (considering views of an eight-year-old child who was composed, calmly and readily answered questions, pointed to New Zealand on a globe, and indicated her understanding of the difference between truth and falsehood and of her obligation to tell the truth). *But see In re* Zarate, 1996 WL 734613 (N.D.

their strong objections.[91] Ten-year-old children have not fared well in convincing courts that they have the sufficient age and maturity.[92] While eleven-year-olds are getting closer to the age at which their views and objections will be weighed more heavily,[93] there is no way to predict how much weight the views will be given.[94]

2. Teenagers

The Hague Abduction Convention only applies to children under age sixteen.[95] The drafters assumed that older adolescents would have more independence and a "mind of their own."[96] Additionally, some countries allow children under the age of sixteen to choose their residence.[97] In the United States, only a few states

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Ill. 1996) (finding eight-year-old lacking maturity when she did not know her birth year or classes and confused natural father and stepfather).

91. *See* Mendez-Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1362 (M.D. Fl. 2002) (returning mature nine-year-old who gave uncontroverted testimony he wanted to stay in the United States and his six-year-old brother to Argentina); ReS (Abduction: Return into Care) [1999] 1 Fam. 843 (Fam. Div. 1998) (Eng.) (returning a nine-and-a-half-year-old girl even though her strong objections appeared to be based on sexual abuse and she might be placed in foster care pending evaluation of mother's home).

92. S*ee* Lopez v. Alcala, 547 F. Supp. 2d 1255 (M.D. Fla. 2008) (discounting ten-year-old's objection to return because he was mainly concerned for his mother's well-being); *In re* Nicholson, 1997 WL 446432 (D. Kan. Jul. 7, 1997) (finding ten-year-old not to be of sufficient age and maturity but also finding she had no real objection to return); Mendoza v. Miranda, 525 F. Supp. 2d 1182, 1199 (C.D. Cal. 2007) (same); Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 229 (3d Cir. 2007) (determining borderline genius ten-year-old not sufficiently mature). *But see* Silverman v. Silverman, 2002 WL 971808, at *10 (D. Minn. 2002) (determining that ten-year-old boy was of sufficient age and maturity level with court being "particularly impressed by his behavior in learning of the upcoming legal proceedings and his desire to express his views in a letter and have them considered), aff'd, 312 F.3d 914 (8th Cir. 2002).

93. Castillo v. Castillo, 597 F. Supp. 2d 432 (D. Del. 2009) (finding an eleven-year-old had strong, unequivocal objections to returning to her mother in Colombia).

94. Garcia v. Angarita, 440 F. Supp. 2d 1364 (S.D. Fla. 2006) (returning eleven-year-old who expressed strong objections and threatened suicide if forced to return).

95. Hague Abduction Convention, art. 4. *See* Mohamud v. Guuleed, 09-C-146, 2009 WL 1229986 (E.D. Wis. May 4, 2009) (noting that since child had turned sixteen during the hearings, the Convention no longer applied but observing child's level of maturity and desire to stay in the United States).

96. Pérez-Vera Report, *supra* note 55, at 450, ¶ 77 (stating that the Convention included the age limit because a person over sixteen "generally has a mind of his own which cannot be easily ignored by either his parents . . . or by a judicial or administrative authority").

97. *Id.* at 450, ¶ 78.

allow older adolescents to choose their residence.[98] Therefore, the closer a child is to sixteen, the more likely the court will find the child's objections persuasive.[99] 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.[100] In most of the cases denying return, the children have been teenagers.[101] Fourteen-year-olds have generally been successful in convincing courts to listen to their objections.[102]

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98. ELROD, *supra* note 18, §§ 4.11- 4.18.

99. Johnson v. Johnson, 2011 WL 569876 (S.D.N.Y. Feb. 10, 2011) (deciding not to return a "mature, intelligent, and independent soon to be fifteen-year-old" who strenuously objected to being returned to Vicenza, Italy); Etienne v. Zuniga, 2010 WL 2262341 (W.D. Wash. June 2, 2010) (finding soon to be fifteen-year-old girl to be of sufficient age and maturity to object to return to Mexico).

100. Elizabeth Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1037, 1050-51 (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). *See also* Carol R. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 PROF. PSYCHOL. 492, 495 (1981); Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1983) (survey of judges from multiple states); Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM L. Q. 75, 79 (1989).

101. McManus v. McManus, 354 F. Supp. 2d 62 (D. Mass. 2005) (finding eleven-, thirteen-, and fourteen-year-olds were sufficiently mature); de Silva v. Pitts, 481 F.3d 1279 (10th Cir. 2007) (denying thirteen-year-old boy's return to Canada based on his "considered decision" to stay with father in Oklahoma where child had friends, was on the football and wrestling teams and thought schools were better); Laguna v. Avila, 2008 WL 1986253, at *10 (E.D.N.Y. May 7, 2008) (granting wishes of thirteen-year-old who had "perceptive understanding of the key issues presented for trial"); Kofler v. Kofler, 2007 WL 208712, at *9 (W.D. Ark. July 18, 2007) (allowing defense for eleven-, thirteen-, and fifteen-year-old children); Leites v. Mendiburu, 2008 WL 114954, at *5-6 (M.D. Fla., Jan. 9, 2008) (honoring thirteen-year-old child's objection to return); Di Giuseppe v. Di Giuseppe, 2008 WL 1743079, at *7 (E.D. Mich. Apr. 11, 2008) (honoring preferences of ten-, eleven-, and twelve-year-old children).

102. *See* Andreopoulos v. Nickolaos Koutroulos, 2009 WL 1850928 (D. Colo. June 29, 2009) (allowing fourteen-year-old to remain with father rather than return to mother in Greece where he had been truant in school in Greece but had friends, activities and good school record in United States and there was no evidence of coaching); Etienne v. Zuniga, 2010 WL 2262341 (W.D. Wash. June 2, 2010) (finding articulate fourteen-year-old to be of sufficient age and maturity to object to return to Mexico); Ago v. Odu, 2009 WL 2169857 (M.D. Fla. July 20, 2009) (allowing fourteen-year-old to stay with father in Florida rather than return to Italy).

Thirteen-year-olds have had mixed results.[103] Although one federal district court had found that a thirteen-year-old was sufficiently old and mature to take account of her desire to stay in Houston where she had friends and a stable home life, the Fifth Circuit disagreed.[104] Another thirteen-year-old was returned because he appeared to have been influenced by the abducting parent, lacked a strong preference to stay, and wanted to split his time between parents.[105] On the other hand, a thirteen-year-old boy's "considered decision" to stay with father in Oklahoma was an appropriate basis to deny a return request where he had friends, was on the football and wrestling teams and wanted to remain in Oklahoma because he thought the school was better than in Canada.[106]

3. Siblings

Siblings pose difficult issues because one or more children may be of sufficient age and maturity and others not. Most judges in custody cases like to keep siblings together because of the perceived benefits of the relationship. Some judges in return cases also look at the sibling bond. In one Hague 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.[107] In another case, the court determined that the objection of the older

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103. Ostevoll v. Ostevoll, 2000 WL 1611123, at *19 (S.D. Ohio Aug. 16, 2000) (finding thirteen- and eleven-year-old children to be of sufficient age and maturity based on two psychologists' testimony).

104. England v. England, 234 F.3d 268, 272-73 (5th Cir. 2000) (reversing district court that had taken a thirteen-year-old child's wishes into account where child had learning disabilities, had had four mothers in twelve years, had attention deficit disorder, took Ritalin, and was scared and confused by the litigation).

105. Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603 (E.D. Va. 2002), aff'd 52 Appx 207 (4th Cir. 2002).

106. *de Silva*, 481 F.3d 1279 (noting that although the judge interviewed the child in camera, without the parents or counsel present, the judge determined that child was mature, had good reasons for staying and there was no showing that he was improperly swayed by his father).

107. Smyth v. Blatt, 2009 WL 3786244 (E.D. N.Y. Nov. 12, 2009); Ostevoll v. Ostevoll, 2000 WL 1611123, at *20 (S.D. Ohio Aug. 16, 2000) (not ordering return where among other reasons the two oldest children, ages 13 and 11, did not wish to go back to Norway). *See also* B. v. K. (Child Abduction), 1 Fam. Ct. Rep. 382, 387-88 (Eng. Fam. 1993) (finding that because nine- and seven-year-old children did not want to be returned to Germany, the youngest child should not be returned either because child would be harmed by separation from two older siblings); *Re* T (Abduction: Child's Objection to Return), 2 Fam. Ct. Rep. 159 (Eng. Fam. 2000) (not returning six-year-old because he would separate him from his eleven-year-old sister who objected to being returned).

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.[108] While a court may discuss the issue, the court may consider returning one child and not another.[109]

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.[110] As one court noted, "The notion of objections . . . is far stronger and more restrictive than that of wishes in a custody case."[111] The goal of the Hague Abduction Convention to return children swiftly was based on the assumption that the abduction harms children.[112] If the assumption is correct, courts should narrowly construe the child's objection exception and refuse to return a child only in exceptional circumstances.[113] In some instances, however,

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108. Haimdas v. Haimdas, 72 F. Supp. 2d 183 (E.D. N.Y. 2010); *see also* England v. England, 234 F.3d 268 (5th Cir. 2000) (returning thirteen-year-old girl and her four-year-old sister).

109. Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953, 957 (E.D. Mich. 2001) (questioning problem of separating siblings, but finding no excuse to not return six-year-old who was not old enough to have her wishes taken into account).

110. *See* Dep't of State, Hague International Child Abduction Convention; Text and Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,509 (1986) (stating "As with the other Article 13 exceptions to the return obligation, the application of [the age and 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."); H*aimdas*, 720 F. Supp. 2d at 204 (emphasizing discretionary nature of exceptions).

111. *Haimdas*, 720 F. Supp. 2d at 206 (quoting Morrison v. Dietz, 2008 WL 4280030, at *13 (W.D. La. Sept. 17, 2008)).

112. Pérez-Vera Report, *supra* note 55, at 182; *see also* Marilyn Freeman, *The Effects and Consequences of International Child Abduction*, 32 FAM. L. Q. 603 (1998).

113. *See* Falk v. Sinclair, 692 F. Supp. 2d 147, 165 (D. Me. 2010) (noting that child's preference to remain in the country was not enough to not return child); Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 279 (3d Cir. 2007) ("[E]xpression of a *preference* to remain in the respondent's country 'is not enough ... to disregard the narrowness of the age and maturity exception to the Convention's rule of mandatory return.'"); Locicero v. Lurashi, 321 F. Supp. 2d 295, 298 (D.P.R. 2004) (noting "The fact that the [13 year-old] child prefers to remain in Puerto Rico, because he has good grades, has friends and enjoys sports activities and outings, is not enough for this Court to disregard the narrowness of the age and maturity exception"); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347 (M. D. Fla. 2002) (returning a mature nine-

the abductor may be fleeing domestic violence, the abductor may be protecting the child, and the child may be more closely aligned with the abductor than the left-behind parent. Therefore, the issue is not so simple. Judges must analyze the evidence on which the child's objections are based to determine and weigh the strength, soundness, and validity of those reasons against the overall purpose of the Abduction Convention.[114]

Because that discretion is so broad, critics argue that there are instances of inappropriate attention to the wishes of young children[115] and refusals to consider the wishes of older children not to return, even in face of child abuse.[116] It is true that courts in the United States have not had a clear and consistent analytical framework for dealing with the child's objection.[117] An English court provided the following framework for analyzing the issues of the whether the child is of sufficient age and maturity to have objections and the weight to be given them:

> (a) What is the child's own perspective of what is in her interests, short, medium and long term? Self-perception is important 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?
>
> (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?[118]

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year-old who had concerns about going back to his father in Argentina); Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 462 (D. Md. 1999) (denying a mature child's objection to return to further the aims of the Convention).

114. De L v. H., [2010] 1 F.L.R. 1229, 2009 WL 4113906 (Eng. 2009) (refusing to return a thirteen-year-old boy with strong objections to returning to Portugal).

115. 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).

116. *See* Weiner, *supra* note 38; Bruch, *supra* note 60, at 536.

117. Greene, *supra* note 52, at 162.

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

1. Child's Perspective

One of the foremost reasons that a judge should talk 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 any 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 is nothing more than a fantasy. The judge can ascertain if the child's view is a realistic long term or short term view of the situation.

The judge can question the child about relationships with both parents. 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. Some questions can try to discover from the child's view whether there was domestic violence or abuse in the home prior to the abduction. 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.

2. Undue Influence

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."[119] There is a recognized tendency for a child to be influenced by the preferences of the parent with whom he or she lives. Judges do not want to reward a parent for wrongfully retaining the child for an extensive period of time.[120] If the child's objection appears to be the result of parental indoctrination or undue influence,[121] the court may order return over the child's

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119. Nicholson v. Nicholson, No. 97-1273-JTM, 1997 WL 446432 (D. Kan. July 7, 1997); Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603, 615 (E.D. Va. 2002) (stating that "[t]he discretionary aspect of this defense is important because of the potential for undue influence by the person who allegedly wrongfully retained the child).

120. Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 280 (3d Cir. 2007) (finding that even if the exception applied, the District Court did not abuse its discretion by refusing to apply it because that would reward respondent for violating petitioner's custody rights, and defeat the purposes of the Convention); Giampaolo v. Erneta, 390 F. Supp. 2d 1269 (N.D. Ga. 2004) (ordering the return of the child where child lived exclusively with the respondent in the United States for over two years); *Hazbun Escaf*, 200 F. Supp. 2d at 615 (finding that thirteen-year-old was echoing preferences of the father).

121. *See In re* Robinson, 983 F. Supp. 1339 (D. Colo. 1997) (finding ten-year-old's wishes were the product of undue influence where child at request of counselor wrote letter to judge and stated that the child was "settled in"); *In re* B. De C.S..B., 25 F. Supp. 2d 1182, 1199 (C.D. Cal. 2007) (discounting ten-year-old child's preference because she used the words "harassed" and "lovable" which suggested adult influence). *But see Tsai-Yi Yang*, 499 F.3d at 280 (noting that a

objections.[122] If the child's reasons are not sound, the trial judge may order return.[123] At least one court, however, has noted that coaching is not the equivalent of undue influence.[124]

The undue influence concern is a valid one because it raises the entire parental alienation debate.[125] At least one psychologist indicates 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."[126] 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.[127] On the other hand, if it is apparent that the objections are

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finding of undue influence is not a prerequisite to a decision not to apply the mature child exception).

122. Lieberman v. Tabachnik, 2008 WL 1744353, at *15 (D. Colo. Apr. 10, 2008) (refusing to honor child's preference because of possibility that child was influenced by the respondent); Wasniewski v. Grzelak-Johannsen, 2007 WL 2344760 (N.D. Ohio Aug. 15, 2007) (finding thirteen-year-old to be less mature and memories were heavily influenced by abductor mother).

123. *In re* Skrodski, 2007 WL 1965391 (E.D.N.Y. July 2, 2007) (returning twelve-year old because his objection was not to returning to Poland but was expressing contentment with living in New York and its luxuries); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D. N.C. 2010) (finding a 15 ½-year-old was unduly influenced by his mother and returned him to his father in Germany); Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1361 (M.D. Fla. 2002) (returning nine-year-old boy who had attained age/maturity for the court to take into account his strong objections to returning to Argentina, because he only remembered Argentina as a six-year-old and was probably influenced by living with his mother who did not want to return).

124. Blondin v. Dubois, 78 F. Supp. 2d 283, 296 (S.D. N.Y. 2000).

125. *See* Elrod & Dale, *supra* note 9, at 396-97.

126. Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L. Q. 557, 562, 566-67 (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 child's "preferences" and "objection" to return).

127. *See, e.g.*, Matovski v. Matovski, 2007 WL 2600862, at *14 (S.D.N.Y. Aug. 31, 2007) (holding that twelve- and eleven-year-old children's objections should be heeded where they testified that they had more family and friends in the United States, enjoyed a more stable life, and were concerned about uncertainties that they would face in home country); Diaz Arboleda v. Arenas, 311 F. Supp. 2d 336, 343-44 (E.D.N.Y. 2004) (finding that twelve- and fourteen-year-old children sufficiently objected to return where they expressed preference of staying with their mother and believed that they would have better opportunities in this country); de Silva v. Pitts, 481 F.3d 1279, 1287 (10th Cir. 2007) (affirming decision that thirteen-year-old had satisfied the objection defense when child stated that he had made friends in the United States, described his

the product of undue influence, the court can order return over the child's objections.[128]

3. Particularized Reasons

The judge may decide that the child's mere wishes to remain do not rise to the level of a serious objection to return.[129] Just because a child has reasons to support his or her preference to remain in the United States does not means that the reasons are sufficient to invoke the mature child exception.[130] 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.[131] 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 United States is born of rational comparison

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house as "really big" and "a great place" where he has a computer and everything he needs for school and indicated that he thought the school was better here); Leites v. Mendiburu, 2008 WL 114954, at *6 (M.D. Fla. Jan. 9, 2008) (refusing repatriation where the court found that thirteen-year-old was extremely bright, mature, and articulate and objected to return because she had been affected by the arguing in her home in Argentina and felt that her home in the United States provided a calmer environment and afforded her better opportunities).

128. Haimdas v. Haimdas, 720 F. Supp. 2d 183, 193-95 (E.D.N.Y. 2010).

129. Norden-Powers Beveridge, 125 F. Supp. 2d 634, 641 (E.D.N.Y. 2000) (ordering three children returned to their father in Australia when their preferences to stay with their mother did not rise to level of an objection); *In re* Nicholson, 1997 WL 446432 (D. Kan. Jul. 7, 1997) (noting that ten-year-old was not of sufficient age and maturity but that she did not really object as she loved both parents).

130. Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 279 (3d Cir. 2007) (affirming district court's determination that exception should not apply to prevent return of ten-year old "borderline genius" because she did not raise "particularized objections to returning to Canada).

131. H*aimdas*, 720 F. Supp. 2d 183 (finding that twelve-year-old boy's stated preference to remain in New York was not a particularized, mature objection but rather a question as a choice of which parent he wanted to live with, not which country); Falk v. Sinclair, 692 F. Supp. 2d 147, 165 (D. Me. 2010) (returning child and noting that despite child's strong negative feelings about her German school and a preference to remain in Maine, she did not object to being returned to Germany); Trudrung v. Trudrung, 686 F. Supp. 2d 570, 577-79 (M.D.N.C. 2010) (finding fifteen-year old sufficiently old and mature, but ordering return because the mere preference to remain in the United States was not a strong objection to returning to Germany); Locicero v. Lurashi, 321 F. Supp. 2d 295, 298 (D.P.R. 2004) (returning thirteen-year-old child even though he preferred to remain in Puerto Rico, noting that just because he had good grades, friends and enjoyed sports activities and outings, was not enough for this Court to disregard the narrowness of the age and maturity exception to the Convention's rule of mandatory return).

between his or her life here and life in habitual residence.[132] The finding that a child does not truly object to being returned to his country of habitual residence, particularly when based in part on a district court's first hand observation of the child "is of the sort peculiarly within the province of the trier of fact."[133] The trial judge who has interviewed the child or otherwise heard testimony as to the child's objection to return, has broad discretion in determining whether to heed the child's objection or to return the child.

V. Conclusion

> *Whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.*[134]

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. The same reasons underlying appointment of a child's attorney in state custody proceedings exist for appointing a child's attorney in Hague Abduction cases - the child's interests are at stake and the parents' interests may not be the same as the child's. In a high conflict case, appointing a lawyer for the child offers the best chance of ensuring that the child's views are presented to the court.[135] Whether the proceeding is in a court room or using

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132. *See* Castillo v. Castillo, 597 F. Supp. 2d 432, 441 (D. Del. 2009) (taking in account an eleven-year-old's expressed particularized objections to returning to Colombia, pointing out that, in Colombia, she received little help with homework, performed poorly in school, was often unable to play outside due to safety concerns, spent much of her time at home alone, and had few friends); Ago v. Odu, 2009 WL 2169857, at *14 (M.D. Fla. July 20, 2009) (applying mature child exception when the fourteen-year old child saw life as better in the United States and he is more comfortable in his surroundings). *But see* Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1362 (M.D. Fla. 2002) (finding nine-year-old boy had attained an age and degree of maturity sufficient to take his opinion into account but returning him and his brother where his main objection was to the country of Argentina, not his father).

133. *Haimdas*, 720 F. Supp. 2d at 207 (finding nine and half-year-old who had been living with abductor father for seventeen months made jumbled, fanciful and unrealistic comments about former life with mother and that his main complaint was the climate).

134. *In re* D (A Child) (Abduction Rights of Custody) [2006] UKHL 51, [2007] 1 A.C. 619, 642 (H.L.)

135. Weiner, *supra* note 38, at 376 (discussing Swiss legislation requiring appointment of a lawyer in all Hague Abduction cases and noting that the Federal Rules of Civil Procedure 17(c)

mediation, a lawyer for the child should be an essential player.[136] 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.[137]

If the United States would ratify the UN Convention on the Rights of the Child, children would reap the benefit of additional protections and rights, including the right to be heard.[138] Even without ratification, state and federal courts could incorporate the principles of CRC Article 12 to ensure that the child's voice is heard. Indeed, the Hague Abduction Convention seems to assume that judges will listen to abducted children of sufficient age and maturity who object to return to the habitual residence. The best way to get the child's voice heard in the current system is to require an attorney to be appointed to represent a child in any case requesting return under the Hague Convention.[139]

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authorizes the appointment of "a guardian ad litem - or issue another appropriate order --to protect a minor or incompetent person who is unrepresented.").

136. Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 INTER. AMER. L. REV. 1 (2009); Reunite International Child Abduction Centre, Report of Mediation Pilot Project on International Child Abduction Cases (Oct. 2006), *available at* www.reunite.org/pages/mediation-pilot-scheme.asp; New Zealand Family Court, Hague Convention Cases: Mediation Process - Removal, Retention and Access, March 24, 2011, available at www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/practice-note-hague-convention-cases-mediation-process-removal-retention-and-access. The lawyer for the child in mediation can meet with the child prior to mediation and provide information about the process, the possible outcomes and consequences; either be with the child who desires to be present in the mediation or represent the child's views and objections; can help the mediator remain neutral; provide the child a role in drafting an agreement which is child-centric rather than adult centric; and if no agreement is reached, vigorously advocate for the child's objections to the judge. *Id.*

137. Gary B. Melton, *Parents and Children: Legal Reforms to Facilitate Children's Participation*, 54 AMER. PSYCH. 935, 936 (1999) (noting ". . . the participation of children (as well as other interested adults) - to help them feel they are heard - will usually bring parents and children together in shared decision making).

138. Elrod, *supra* note 5, at 876; Howard A. Davidson, *Children's Rights and American Law: A Response to What's Wrong with Children's Rights*, 20 EMORY INT'L L. REV. 69 (2006); *Recommendations of the Conference Reports of the Working Groups: Lessons of International Law, Norms and Practice*, 6 NEV. L. J. 656, 659 (2006).

139. Elrod, *supra* note 5, at 919-20; Weiner, *supra* note 38, at 384.