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# THE VIEWS OF A CHILD: EMERGING INTERPRETATION AND SIGNIFICANCE OF THE CHILD'S OBJECTION DEFENSE UNDER THE HAGUE CHILD ABDUCTION CONVENTION

## I. THE PROBLEM OF INTERNATIONAL CHILD ABDUCTION AND ADOPTION OF THE HAGUE CONVENTION

The ever-increasing phenomenon of snatching a child across international borders<sup>1</sup> to an unknown destination engages deep human emotions.<sup>2</sup> The child, involuntarily

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1. Incidents of transborder parental child abduction have soared in recent years. In 1994 alone, the United States Department of State's Office of Children's Issues reported more than 1050 active international child abduction cases. OFFICE OF CHILDREN'S ISSUES, U.S. DEP'T OF STATE, LEAFLET NO. 2691, HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: OPERATION/IMPLEMENTATION IN THE UNITED STATES 1 (1994) [hereinafter OPERATION/IMPLEMENTATION LEAFLET]. Statistics indicate that approximately 35 children are abducted each month from the United States and brought across international borders. Caroline LeGette, Note, *International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT'L L.J. 287, 297-304 (1990) (citing Letter from J. Edward Fox, Assistant Secretary, Legislative and Governmental Affairs, to Hon. James C. Wright, Jr., reprinted in H.R. REP. NO. 525, 100th Cong., 2d Sess. 18 (1988)); Eric S. Horstmeyer, Note, *The Hague Convention On the Civil Aspects of International Child Abduction: An Analysis of Tahan and Viragh and Their Impact On Its Efficacy*, 33 U. LOUISVILLE J. FAM. L. 125, 125 (1995). Three factors have been identified as contributing to this deplorable conduct. First, emerging advances in international transportation and communications have facilitated child abduction. Adair Dyer, *Report on International Child Abduction by One Parent*, in 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION: CHILD ABDUCTION 12, 18 (Permanent Bureau of the Hague Conference on Private Int'l Law ed., 1982) [hereinafter ACTS & DOCUMENTS]. Second, binational marriages, which have become increasingly popular, often suffer from cultural and religious friction. Philip Schwartz, *Introduction to INTERNATIONAL CHILD ABDUCTIONS* 1, 1 (Gloria Dehart ed., 2d ed. 1993). Finally, the decreasing rigor of passport supervision, Dyer, *supra*, at 18, and the "vulnerability of dual national children with two passports," Schwartz, *supra*, at 1, have created even greater dangers of child abduction.

2. Dyer, *supra* note 1, at 20; Lynda R. Herring, Comment, *Taking Away the Pawns: International Parental Abduction & The Hague Convention*, 20 N.C. J. INT'L L. & COM. REG. 137, 138 (1994); Brenda J. Shirman, Note, *International Treatment of Child Abduction and the 1980 Hague Convention*, 15 SUFFOLK TRANSNAT'L L.J. 188 (1991); see also Schwartz, *supra* note 1, at 1 (discussing long-term effects of abduction on the child victim).

transformed into a pawn in the bitter divorce and custody battles between his or her parents,<sup>3</sup> suffers the most destructive effects of the abduction.<sup>4</sup> Consequently, the abducted child, haunted by frustration, fear and "the sudden upsetting of his [or her] stability,"<sup>5</sup> is likely traumatized and scarred for life.<sup>6</sup>

Inspired by the desire to minimize the devastating effects of child abduction and to protect the interests of children<sup>7</sup> while simultaneously struggling against the tragic increase in international child abduction,<sup>8</sup> the fourteenth session of the Hague Conference on Private International Law<sup>9</sup> unanimously

3. Herring, *supra* note 2, at 141; Dana R. Rivers, Comment, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 TRANSNAT'L LAW. 589, 591 (1989). Parents who resort to child abduction often fear losing a court battle or are dissatisfied with a custody decision. *Id.* The abducting parent also "hopes to obtain a right of custody from the authorities of the country to which the child [is] taken." Elisa Pérez-Vera, *Explanatory Report*, in ACTS & DOCUMENTS, *supra* note 1, at 426, 429. Ms. Pérez-Vera is the official Conference reporter for the Hague Convention. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503 (1986). "Her explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." *Id.*

4. Rivers, *supra* note 3, at 591.

5. Dyer, *supra* note 1, at 21 (emphasizing that the true victim of child abduction is the child, who "suffers from . . . the traumatic loss of contact with the parent who has been in charge of his [or her] upbringing, [and also from] the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.").

6. Herring, *supra* note 2, at 138.

7. Elisa Pérez-Vera, *Report of the Special Commission*, in ACTS & DOCUMENTS, *supra* note 1, at 172, 182. "[A]mong the most objective aspects of [the] general interest of the child, there is the right not to be removed or retained in the name of a more or less questionable right over his person." *Id.*

8. Pérez-Vera, *supra* note 3, at 431. The Convention also reaches the more personal and immediate needs of left-behind parents who endure severe anguish from being unjustifiably stripped of visitation rights with their children, and who are often left with little or no financial resources. See Dyer, *supra* note 1, at 19-20.

9. The countries present at the fourteenth session for the Hague Conference on Private International Law were: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, West Germany, and Yugoslavia. Representatives from Brazil, Hungary, Monaco, Morocco, the Soviet Union, Uruguay, and the Vatican participated by invitation or as observers. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, pmbl., T.I.A.S. No. 11,670, at 4, 19 I.L.M. 1501, 1501 [hereinafter Hague

adopted the Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention)<sup>10</sup> on October 24, 1980.<sup>11</sup> The Convention is a mechanism by which aggrieved parents may seek the immediate return<sup>12</sup> of their abducted children.<sup>13</sup>

This Note examines the "Child's Objection" exception<sup>14</sup> to the Convention's general requirement of compulsory return.<sup>15</sup> The Child's Objection Clause empowers a child to voice objections to being returned to his or her country of habitual residence. Indeed, the essential question of the child's return may be conclusive, provided that the child, according to the competent authorities, has "attained an age and degree of maturity" sufficient for his or her views to be taken into account.<sup>16</sup>

Convention]. Observers from the Council of Europe, the Commonwealth Secretariat, and the International Social Service also assisted the First Commission. Pérez-Vera, *supra* note 3, at 426 n.1.

10. Hague Convention, *supra* note 9, T.I.A.S. No. 11,670, at 1, 19 I.L.M. at 1501. The Convention is the "final legislative step designed to impede and deter parents from resolving family disputes concerning the care, custody, and control of minor children by means of self-help, in violation and indifference to customary legal or non-adversary methods of dispute resolution, usually accomplished by fleeing to a distant state or country." Lawrence N. Stotter, *History, in INTERNATIONAL CHILD ABDUCTIONS*, *supra* note 1, at 3, 3.

11. Pérez-Vera, *supra* note 3, at 426. "The Convention entered into force on December 1, 1983, when its ratification by Canada, France and Portugal went into effect." Schwartz, *supra* note 1, at 1. As of June 1995, the Contracting States of the Hague Convention are: Argentina, Australia, Austria, the Bahamas, Belize, Bosnia-Herzegovina, Burkina Faso, Canada, Chile, Croatia, Cyprus, Denmark, Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, Ireland, Israel, Italy, Luxembourg, Mauritius, Mexico, Monaco, the Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, Spain, St. Kitts and Nevis, Switzerland, Sweden, United Kingdom, the United States, and one of the former republics of Yugoslavia. OFFICE OF CHILDREN'S ISSUES, U.S. DEP'T OF STATE, LEAFLET NO. 171, HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: PARTY COUNTRIES AND EFFECTIVE DATES WITH U.S. 1 (1995). The United States became a party to the Convention on July 1, 1988. OPERATION/IMPLEMENTATION LEAFLET, *supra* note 1, at 1; see Susan L. Barone, *International Child Abduction: A Global Dilemma with Limited Relief—Can Something Be Done?*, 8 N.Y. INT'L L. REV. 95, 95 n.8 (1995).

12. See *infra* note 23 and accompanying text.

13. But see *infra* notes 21-22 and accompanying text (discussing the procedural prerequisites for applicability of the Hague Convention and the defenses which an abducting parent may invoke to contest and potentially defeat a petition for the return of a child).

14. Hague Convention, *supra* note 9, art. 13, para. 2, T.I.A.S. No. 11,670, at 8, 19 I.L.M. at 1502. See discussion *infra* Part II.B.1.

15. See *infra* notes 18-19 and accompanying text.

16. Pérez-Vera, *supra* note 3, at 433; Legal Analysis of the Hague Convention

Part II provides background information regarding the Hague Convention. The first section addresses the Convention's principal objective—to secure the return of wrongfully abducted children—and enumerates the limited defenses that abducting parents may invoke to contest and perhaps defeat Hague petitions. The next section examines the legislative history of the Child's Objection Clause and addresses scholars' criticisms and concerns that it will be applied arbitrarily. Part III provides an in-depth examination of emerging judicial interpretations of the provision by the tribunals of the United States, England, Northern Ireland, and Scotland. This analysis will demonstrate that, contrary to critics' apprehensions, courts have not arbitrarily construed the Child's Objection Clause as a basis for denying Hague petitions for the immediate return of abducted children. Indeed, the provision reinforces the fundamental concept underlying the Convention: that the interests of children are of "paramount importance."<sup>17</sup> This Note concludes with suggestions as to how the Child's Objection Clause may be implemented effectively to optimize the strength of the Convention and alleviate concerns that the provision poses an obstacle to enforcement.

## II. BACKGROUND

### A. *The Hague Convention*

The Convention's principal objective is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State"<sup>18</sup> under the most expeditious

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on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,510 (1986).

17. Hague Convention, *supra* note 9, pmb., T.I.A.S. No. 11,670, at 4, 19 I.L.M. at 1501.

18. *Id.* art. 1, para. 1(a). Article 3 of the Convention provides that the removal or the retention of a child is considered wrongful when: (a) it is in breach of a parent's custody rights under the law of the state in which the child was habitually resident prior to the removal; and (b) at the time of removal or retention the parent was exercising those custody rights, either jointly or alone, or would have been exercising them but for the child's removal. *Id.* art. 3, para. 1(a)-(b). The Convention does not define the term "habitually resident," but commentators suggest that the omission was intentional so as to permit courts to interpret the phrase "without the unnecessary constraints of a standardized meaning." Herring, *supra* note 2, at 152-53; see Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 20-24 (1994) (discussing cases in which the identity of

procedures possible.<sup>19</sup> As time is a crucial factor,<sup>20</sup> subject to enumerated prerequisites<sup>21</sup> and affirmative defenses,<sup>22</sup> the return of a child is mandatory.<sup>23</sup>

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the child's state of habitual residence was disputed).

19. See Dyer, *supra* note 1, at 23 ("[T]he length of time which elapses between the abduction and the ultimate resolution of the custody dispute has a strong influence on the nature and the persistence of the effects on the child."). The Explanatory Report indicates that "it is appropriate to approach the Convention . . . from a negative viewpoint, i.e., what it does not purport to accomplish." Stotter, *supra* note 10, at 12. For example, the Convention is not concerned with child custody laws, penal legislation, extradition or recognition and enforcement of custody decisions. *Id.*

20. See Dyer, *supra* note 1, at 23.

21. For the Convention to apply, certain objective temporal qualifications must be established. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,509 (1986). First, article 12 requires that return proceedings be commenced within one year of the wrongful removal or retention. See *id.* Also, the Convention is not retroactive. Article 35 "limits application of the Convention to wrongful removals or retentions occurring after its entry into force between the two relevant Contracting States." *Id.* Finally, under article 4, the Convention does not apply once the child attains sixteen years of age, "regardless of when return proceedings are commenced and irrespective of [the child's] status at the time of his or her sixteenth birthday." *Id.* For a discussion of the age limitation, see *infra* Part II.B.1.

22. The inclusion of defenses in the Convention "represents a compromise to accommodate the different legal systems and tenets of family law in effect in the countries negotiating the Convention." 51 Fed. Reg. 10,503, 10,509-10. The defenses are also "an attempt to balance the wariness of signatories to relinquish autonomy against their commitment to deter international parental abductions . . ." Rivers, *supra* note 3, at 624. Thus, if return proceedings are not commenced within the statutorily prescribed period and the respondent demonstrates "that the child is now settled in its new environment," the judicial authority of the requested State is not obligated to direct the child's return. Hague Convention, *supra* note 9, art. 12, para. 2, T.I.A.S. No. 11,670, at 7-8, 19 I.L.M. at 1502. Pursuant to article 20, the court need not mandate the return of a child if to do so "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." *Id.* art. 20, T.I.A.S. No. 11,670, at 9, 19 I.L.M. at 1503. Article 13 provides affirmative defenses which a party opposing the child's return may invoke to defeat a petitioner's efforts. *Id.* art. 13, T.I.A.S. No. 11,670, at 8, 19 I.L.M. at 1502. See *infra* note 26 and accompanying text.

23. The mandatory nature of the Convention is set forth in article 12. The full text of article 12 provides:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned *shall* order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of

Although the Convention proved to be an effective weapon in the struggle against international child abduction,<sup>24</sup> family law scholars and practitioners have criticized the Convention because under courts are not obligated absolutely to order a child's return under its provisions.<sup>25</sup>

Specifically, article 13 of the Convention enumerates three defenses which the abducting parent may invoke potentially to defeat a petition for the return of a child:

[T]he judicial or administrative authority of the requested State [reviewing a Hague petition] is not bound to order the return of the child if the person . . . [who] opposes [his or her] return establishes that —

*a* the person . . . having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

*b* there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds 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 [his or her] views.<sup>26</sup>

one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Hague Convention, *supra* note 9, art. 12, T.I.A.S. No. 11,670, at 7-8, 19 I.L.M. at 1502 (emphasis added). For a discussion of the article 12 provisions, see Thomas O. Harper, III, Comment, *The Limitations of the Hague Convention and Alternative Remedies For a Parent Including Re-Abduction*, 9 EMORY INT'L L. REV. 257, 263 (1995) (discussing the exception to the one-year statute of limitations and noting that "[s]howing that the child has settled into a new environment . . . leaves vast opportunities for discretion. . . . A judge could use many subjective criteria to make this determination.").

24. Herring, *supra* note 2, at 174.

25. See, e.g., Rivers, *supra* note 3, at 620-21; Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,509 (1986).

26. Hague Convention, *supra* note 9, art. 13, para. 1(a)-(b), T.I.A.S. No. 11,670, at 8, 19 I.L.M. at 1502. For a discussion of the paragraph 1(a) defense to mandatory return of a child, see Herring, *supra* note 2, at 166-67; Pérez-Vera,

If the abducting parent establishes any one of the three defenses to the court's satisfaction, the court may, in its discretion, refuse to order the return of the child to his or her country of habitual residence.

### B. Child's Objection Clause

#### 1. Legislative History

The legislative history of the Child's Objection Clause indicates that the provision must be examined in conjunction with the specified age limit for application of the Convention.<sup>27</sup> Because the Convention applies *ratione personae*<sup>28</sup> to all children under the age of sixteen,<sup>29</sup> the inclusion of the Child's Objection Clause represents a compromise of two significant competing interests—the desire to expand the scope and application of the Convention versus the situation of children under sixteen who have the right to choose their own place of

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*supra* note 3, at 460-61. The legislative history of the paragraph 1(a) defense is provided in the Pérez-Vera Report. *Id.* at 432-33. For an in-depth examination of the paragraph 1(b) defense, see LeGette, *supra* note 1, at 297-304 (analyzing judicial interpretations of the paragraph 1(b) defense in the United States, Australia, England, and Scotland); Horstmeyer, *supra* note 1, at 127 ("The cases analyzing Article 13b reflect a tension between the traditional child's best interests analysis, which applies to custody hearings, and the Convention's desired approach, which mandates the immediate return of a wrongfully removed child without addressing the parents' conflicting claims."). The "grave risk of harm" exception is the Convention's most litigated provision, *id.*, because it "creates the largest amount of judicial discretion." Harper, *supra* note 23, at 259.

27. Pérez-Vera, *supra* note 3, at 450.

28. *Id.* at 433. Black's Law Dictionary provides the following definition for the term "*ratione personae*": "By reason of the person concerned; from the character of the person." BLACK'S LAW DICTIONARY 1263 (6th ed. 1990).

29. Pérez-Vera, *supra* note 3, at 433. Consequently, no action may be taken based upon the Convention, with regard to a child after his or her sixteenth birthday. *Id.* at 450. Because "the child's age is of great significance in determining the effects [of] an abduction," Dyer, *supra* note 1, at 24, the age issue was an important consideration and the subject of considerable attention during the preliminary stages of the Convention. Pérez-Vera, *supra* note 7, at 184, 193; see also *Conclusions Drawn from the Discussions of the Special Commission of March 1979 on Legal Kidnapping*, in ACTS & DOCUMENTS, *supra* note 1, at 162, 165 [hereinafter *Conclusions*] (noting that the age limit "might be set lower."). The drafters established the age limit at sixteen years acknowledging that a child over sixteen "has in general a will of [his or her] own which cannot be ignored by either of the parents." Pérez-Vera, *supra* note 7, at 184. This holds true "even if [the child] has not reached the age of full legal capacity under the internal law of [his or her] nationality or of the State of [his or her] habitual residence." *Id.*



residence.<sup>30</sup>

To reconcile these competing interests, the drafters concluded, albeit apprehensively,<sup>31</sup> that a reservation enabling courts to consider the views of the child was "absolutely necessary."<sup>32</sup> However, all efforts to agree on a minimum age at which to consider the views of the child failed,<sup>33</sup> and as a result, the drafters were unanimous in bestowing discretion in the application of the Child's Objection Clause to the competent authorities.<sup>34</sup> Accordingly, whenever a tribunal confronts the possibility of returning a child legally entitled to decide his or her place of residence, the Convention permits the judge to decide whether the child's opinion should be the decisive factor.<sup>35</sup> The drafters concluded that granting judicial discretion was preferable to a lowering of the overall age which would reduce the Convention's scope.<sup>36</sup>

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30. See Pérez-Vera, *supra* note 3, at 450. Legislation in a number of countries requires that the child be heard, to the fullest extent possible, prior to a determination of custody. Dyer, *supra* note 1, at 24 (citing article 167 of the Netherlands Civil Code). Although "[t]he general trend is towards greater emphasis on the child's consent," *id.*, the drafters rejected an outright proposal in part because the child's right to choose his or her residence is an intricate part of the right to custody. Pérez-Vera, *supra* note 3, at 450.

31. The drafters recognized that the stipulation essentially grants a child "the possibility of interpreting [his or her] own interests." Pérez-Vera, *supra* note 3, at 433. Furthermore, "this provision could prove dangerous if it were implemented 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." *Id.*

32. *Id.* (recognizing the difficulty of accepting that a child, for example, a 15-year old, should be returned against his or her will); see also Pérez-Vera, *supra* note 7, at 193; *Conclusions*, *supra* note 29, at 164. Initially, the Convention drafters recommended an overall age limit of 14. This would have eliminated the need for the Child's Objection Clause and would have also provided children with leeway so that they would have enough insight and understanding to comprehend the consequences of a change of residence. See *Comments of the Governments on Preliminary Document No. 6*, in ACTS & DOCUMENTS, *supra* note 1, at 215, 215. However, the Assembly opted to preserve the Child's Objection Clause.

33. Pérez-Vera, *supra* note 3, at 433 ("[A]ll the ages suggested seemed artificial, even arbitrary."). The Special Commission rejected a proposal which would have required that the opinions of children over 12 be taken into account. Pérez-Vera, *supra* note 7, at 204.

34. Pérez-Vera, *supra* note 3, at 433. When the Child's Objection Clause was presented, no delegation objected to the proposed formulation of the defense. *Procès-verbal No. 16*, in ACTS & DOCUMENTS, *supra* note 1, at 363, 366 (comments of the Chairman).

35. Pérez-Vera, *supra* note 3, at 450.

36. *Id.* at 450; Pérez-Vera, *supra* note 7, at 184. Indeed, recent efforts of the Special Commission to standardize the age limit at which it is appropriate for a

Nevertheless, because the Convention fails to specify a threshold age at which it is appropriate for the authorities to consider the child's views, it invites potential subjective and arbitrary decision making. The inherent, discretionary nature of the Child's Objection Clause is aggravated further by the Convention's failure to delineate objective criteria for the courts to assess when exercising discretion. Thus, judicial discretion is twofold: first, the court must determine whether or not to consider a child's views; and second, based on the court's perception, whether or not to order the child's return.

The Convention does, however, offer some guidance when an article 13 defense<sup>37</sup> is asserted. Perhaps the most significant consideration for a court to assess is that the mere assertion of an affirmative defense by the abducting parent does not limit the court's power to order the return of the child at any time.<sup>38</sup> Indeed, even when more than one defense is established, the court may order the child's immediate return, although the Convention does not mandate return.<sup>39</sup>

In addition, pursuant to paragraph 3 of article 13, the court must consider information relating to the child's social background,<sup>40</sup> provided by the Central Authority<sup>41</sup> or other

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court to take into account the child's views also proved futile. Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, Jan. 18-21, 1993, 33 I.L.M. 225, 242 (response to Question 23).

37. See *supra* note 26 and accompanying text.

38. Hague Convention, *supra* note 9, art. 18, T.I.A.S. No. 11,670, at 9, 19 I.L.M. at 1503. "A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child." Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,510 (1986).

39. See Peter H. Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 FAM. L.Q. 35, 40 (1990).

40. Hague Convention, *supra* note 9, art. 13, para. 3, T.I.A.S. No. 11,670, at 8, 19 I.L.M. at 1502. This requirement serves a dual purpose: it ensures "that the court has a balanced record upon which to determine whether the child is to be returned" when an objection is asserted, and it "prevent[s] the abductor from obtaining an unfair advantage through his or her own forum selection with resulting ready access to evidence of the child's living conditions in that forum." Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,510 (1986).

41. Each state that ratifies the Convention is obligated to establish a "Central Authority" which carries out two primary functions. First, a Central Authority receives and transmits petitions for the return of children to the Central Authori-

competent agency of the child's habitual residence, "to verify the existence of the circumstances which form the bases of the article 13 defenses to the child's return."<sup>42</sup> Finally, in interpreting the article 13 defenses, the tribunals must always acknowledge that a restrictive interpretation is required in order to avoid a hearing on the merits of the underlying custody dispute<sup>43</sup> and to prevent the Convention from becoming a dead letter.<sup>44</sup>

## 2. Criticism of the Child's Objection Defense

Family law scholars and practitioners criticize several aspects of the Child's Objection defense. First, scholars maintain that the provision contravenes article 19 of the Convention<sup>45</sup> by enabling a tribunal to determine the merits of a custody dispute rather than leaving this resolution to the courts of

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ties of other contracting states. Second, a Central Authority attempts to locate children alleged to have been wrongfully removed from or retained in their country of origin, and to investigate their well-being. Schwartz, *supra* note 1, at 1. Articles 7 through 11 of the Convention discuss the creation and obligations of the Central Authority. Hague Convention, *supra* note 9, arts. 7-11, T.I.A.S. No. 11,670, at 5-7, 19 I.L.M. at 1501-02. For the official history of the Central Authority, see Pérez-Vera, *supra* note 3, at 437-39. In the United States, the designated Central Authority is the Department of State's Office of Children's Issues. OPERATION/IMPLEMENTATION LEAFLET, *supra* note 1, at 1. For an in-depth examination of the operations of the Central Authority, see Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994).

42. See Pérez-Vera, *supra* note 7, at 205.

43. Significant to the Convention's principal goal is the requirement that a decision rendered pursuant to the Convention must not resolve any issue relevant to a parent's custody of the child. Article 19 provides that "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Hague Convention, *supra* note 9, art. 19, T.I.A.S. No. 11,670, at 9, 19 I.L.M. at 1503; see Dyer, *supra* note 1, at 48; see also Pérez-Vera, *supra* note 3, at 430 ("[T]he Convention rests implicitly upon the principle that any debate on the merits . . . of custody rights should take place before the competent authorities in the State where the child had its habitual residence prior to its removal . . ."). Once the child returns and the status quo is restored, litigation concerning custody or visitation issues may proceed in the child's state of habitual residence. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,511 (1986).

44. Pérez-Vera, *supra* note 3, at 434. Moreover, "[S]ystematic invocation of the . . . exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration." *Id.* at 435.

45. See *supra* note 43 and accompanying text.

the child's country of habitual residence.<sup>46</sup> Second, it is argued, if the exception is construed too liberally, the child and not the judge would, in effect, be making a return determination.<sup>47</sup> This concern is exaggerated by the apprehension that a child's objection to being returned potentially may be the product of "brainwashing" by the abducting parent.<sup>48</sup> The third and harshest criticism of the Child's Objection Clause is the contention that the provision is susceptible to judicial abuse<sup>49</sup> because it grants broad discretion<sup>50</sup> to a tribunal reviewing a Hague petition. Because the Convention fails to specify a threshold age, the judge may decide subjectively whether the child is mature enough to be choosing the abducting parent over the aggrieved parent.<sup>51</sup> Also, judges may employ partial tactics and bias when deciding how much deference to accord a child's emotional, materialistic or educational preferences.<sup>52</sup> For instance, the abducting parent asserting the defense may be a national of the requested State and, as a result, might receive favored treatment by the court. Moreover, a judge deciding whether to order the child's return may be tempted to favor the social conditions or cultural lifestyle in the requested State. These possibilities blur the already obscure divide at which the child's preference should take precedence over that of the judge and the aggrieved parent.<sup>53</sup> This inherent subjectivity may lead to inconsistent application and arbitrary interpretation of the Convention.

To avoid this potential for judicial abuse, one author,

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46. See Shirman, *supra* note 2, at 219 ("[T]he court in the state of the child's habitual residence is better suited to hear the child's views and to weigh them along with other considerations.").

47. Rivers, *supra* note 3, at 627; see also Harper, *supra* note 23, at 262-63 (examining cases where courts considered the child's views in reaching their determination of whether or not to order the return of the child).

48. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,510 (1986); see Rivers, *supra* note 3, at 627.

49. Lynn A. Starr, Recent Development, *United States Implementation of the Hague Convention on the Civil Aspects of International Child Abduction*, 24 STAN. J. INT'L L. 289, 299 (1987); Harper, *supra* note 23, at 262; Rivers, *supra* note 3, at 624.

50. Starr, *supra* note 49, at 298; see Harper, *supra* note 23, at 262; Rivers, *supra* note 3, at 625.

51. Harper, *supra* note 23, at 262.

52. See Rivers, *supra* note 3, at 627.

53. *Id.*

Brenda J. Shirman, advocates the complete elimination of the Child's Objection defense from the text of the Convention.<sup>54</sup> This proposal rests primarily on two assumptions. First, Ms. Shirman presumes that any deference to the child's wishes would have been made during the initial custody disputes on the merits.<sup>55</sup> Second, she asserts that if there has not been a hearing on the merits, the courts in the state of the child's habitual residence are better suited to hear the child's views and weigh them along with other considerations.<sup>56</sup> While the concerns expressed are valid, they presuppose that the municipal laws of the child's state of habitual residence authorize a court to consider the child's convictions in a custody proceeding. Unfortunately, not all countries' laws do so.<sup>57</sup> In any event, an analysis of decisions interpreting the Child's Objection Clause reveals that inquiry into a child's views can be accomplished without necessarily transforming the Hague proceeding into a substantive custody hearing.

### III. JUDICIAL INTERPRETATION

The emerging judicial interpretation of the Child's Objection Clause discussed in this section indicates that in most instances, courts have not interpreted the provision subjectively or arbitrarily, and generally, interpretation of the provision is consistent. Indeed, although the case law that follows illustrates judicial willingness to display a heightened sensitivity toward children's views, there is a demonstrated disinclination by tribunals to defer to the child's objection as a basis for denying a Hague petition.

#### A. *United States*

Although not specifically interpreting the Child's Objection Clause, U.S. courts address issues concerning the child's views within the framework of the "grave risk of harm" exception

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54. Shirman, *supra* note 2, at 219 ("The exception permitting deference to the child's wishes should be eliminated from the Convention" to ensure "the positive affect [sic] of removing the possibilities of undue influence by an abducting parent.").

55. *Id.*

56. *Id.* This conclusion is consistent with article 19 as well as the primary objective of the Convention. See *supra* notes 43-46 and accompanying text.

57. See Dyer, *supra* note 1, at 24.

embodied in paragraph 1(b) of article 13.<sup>58</sup> In *Sheikh v. Cahill*,<sup>59</sup> the child's mother filed a Hague petition for the return of her nine-year-old son, Nadeem, to England after the child's father wrongfully retained the child at the end of a summer visit in the United States. The father, invoking two of the article 13 defenses, opposed the petition,<sup>60</sup> contending first, that there was a grave risk that the child's return to England would expose him to physical and psychological harm,<sup>61</sup> and second, that the child objected to being returned.<sup>62</sup>

After conducting an in camera interview of the child, the New York State Supreme Court of Kings County refused to utilize article 13 as a basis for retaining the abducted child in the United States.<sup>63</sup> The court concluded that the evidence did not support a finding that return of the child created a risk of harm sufficient to warrant application of paragraph 1(b) of article 13.<sup>64</sup> Further, the court stated that although the child expressed a preference to remain in the United States, his desire was likely the reaction of being wooed by his father during a summer vacation.<sup>65</sup> As a result, the court concluded that the child was not sufficiently mature to warrant consideration of his views so as to avoid return.<sup>66</sup>

Similarly, in *Navarro v. Bullock*,<sup>67</sup> the custodial father of two children commenced Hague proceedings in the California Superior Court seeking the children's return to Spain after

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58. See *supra* note 26 and accompanying text.

59. 145 Misc. 2d 171, 546 N.Y.S.2d 517 (Sup. Ct. Kings County 1989).

60. *Id.* at 177, 546 N.Y.S.2d at 521.

61. *Id.*

62. *Sheikh*, 145 Misc. 2d at 177, 546 N.Y.S.2d at 521.

63. *Id.* at 177, 546 N.Y.S.2d at 521-22.

64. *Id.* at 177, 546 N.Y.S.2d at 521. In the United States, a finding that a paragraph 1(b) "grave risk of harm" exception exists must be based upon clear and convincing evidence. International Child Abduction Remedies Act § 4(e)(2)(A), 42 U.S.C. § 11603(e)(2)(A) (1994). Although the Hague Convention was self-executing in form, and thus required no federal implementing legislation to bring it into force, Congress enacted the International Child Abduction Remedies Act (ICARA) "to fit this unique treaty smoothly into our legal system." Pfund, *supra* note 39, at 42. ICARA "deals with questions of jurisdiction, burden of proof, costs and fees, admissibility of documents, and locating and assisting an abducted child in the United States." Schwartz, *supra* note 1, at 1-2. ICARA was enacted in 1988. Stotter, *supra* note 10, at 15.

65. *Sheikh*, 145 Misc. 2d at 177, 546 N.Y.S.2d at 522.

66. *Id.* at 177, 546 N.Y.S.2d at 521-22.

67. 15 Fam. L. Rep. (BNA) 1576 (Super. Ct. Cal. 1989).

their mother refused to return them at the end of a visitation period. On the basis of the testimony of the abducted children and the court-appointed psychiatrist, the court noted that the children were confused and determined that the children's reluctance to return to their father in Spain was a consequence of their mother's actions.<sup>68</sup> The court concluded that the evidence adduced failed to support the abducting parent's claim that the requirements of paragraph 1(b) of article 13 were met.<sup>69</sup>

### B. England

The English courts furnish the most extensive analysis of the Child's Objection Clause. In *In re R*,<sup>70</sup> the court concluded that before a court may consider exercising discretion, the child must express more than a mere preference for remaining in a particular country, and declared that "[t]he word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute."<sup>71</sup> Although this textual interpretation of the word "objects" was subsequently overturned by the court in *In re S*,<sup>72</sup> the prominent case involving the Child's Objection defense, other English courts still require a manifestation of behavior demonstrating a heightened objection by the child.<sup>73</sup>

*In re S* consummated the marathon litigation between the French father and English mother of a nine-year-old girl with long-standing psychological problems.<sup>74</sup> After the parents' divorce, the parties agreed that the mother and child would live in Paris and that the father would pay maintenance and have

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68. *Id.* at 1577.

69. *Id.*

70. [1992] 1 Fam. 105 (Eng. Fam. Div. 1991).

71. *Id.* at 108.

72. [1993] 2 All E.R. 683, 690 (C.A. 1992), *aff'g* S v. S, [1992] 2 Fam. 31 (Eng. Fam. Div.). The case represents an appeal from an order of the lower court, Family Division, dismissing the father's application for the child's return under the Hague Convention. See S v. S, [1992] 2 Fam. at 31.

73. See, e.g., *In re M*, [1994] 1 Fam. 390, 395-96 (Eng. C.A. 1993).

74. *In re S*, [1993] 2 All E.R. at 683. The opinion indicates that the problems manifested themselves in speech difficulties and behavioral problems resulting from frequent relocation and language confusion. *Id.* Neurologists and psychologists advised the parents that the child should be educated in English, her native tongue. *Id.* at 685.

unimpeded access to the child.<sup>75</sup> Claiming she feared violence and cessation of payments by the father, the mother brought the child to England.<sup>76</sup> Thereafter, the father commenced Hague proceedings in the Family Division of England<sup>77</sup> seeking the girl's return to France, which the mother opposed on two of the three article 13 grounds: the "grave risk of harm" defense<sup>78</sup> and the Child's Objection defense.<sup>79</sup>

During the Family Division proceedings, the judge did not interview the child.<sup>80</sup> Instead, a court-appointed welfare officer examined her and presented the court with an oral report.<sup>81</sup> The welfare officer's testimony indicated that the child, who dreaded returning to France, represented an impassioned view which was not influenced by the abducting mother, and that although the child was very emotionally fragile, intellectually she was mature enough to comprehend her situation.<sup>82</sup> Based upon this testimony, the Family Division refused to order the child's return.<sup>83</sup>

The Court of Appeal affirmed the Family Division's order and declared that the exceptional circumstances required for a court to refuse to order the immediate return of a child who has been wrongfully removed were established.<sup>84</sup> In its analysis of the Child's Objection Clause, the court enunciated the facts "necessary to open the door" under paragraph 2 of article 13.<sup>85</sup> The court emphasized two procedural points. First, while noting that the Convention is designed to secure a speedy return to the country from which the child has been abduc-

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75. *Id.* at 686.

76. *See id.*

77. *Id.* at 686. The parties conceded that the child's habitual residence was in France. *See id.* at 685-86.

78. Hague Convention, *supra* note 9, art. 13, para. 1(b), T.I.A.S. No. 11,670, at 8, 19 I.L.M. at 1502; *see supra* note 26 and accompanying text.

79. Hague Convention, *supra* note 9, art. 13, para. 2, T.I.A.S. No. 11,670, at 8, 19 I.L.M. at 1502; *see In re S*, [1993] 2 All E.R. at 686.

80. *S v. S*, [1992] 2 Fam. 31, 36 (Eng. Fam. Div.).

81. *Id.*

82. *Id.*

83. *Id.* The father subsequently appealed this decision to the Court of Appeal, Civil Division. *See In re S*, [1993] 2 All E.R. at 683.

84. *In re S*, [1993] 2 All E.R. at 692.

85. *Id.* at 690. First, the court rejected the construction of the word "objects" set forth by the court in *In re R. Id.*; *see supra* notes 70-73 and accompanying text.



ted,<sup>86</sup> the court announced that the questions of whether a child objects to being returned and has attained an age and degree of maturity at which it is appropriate to consider his or her views are questions of fact within the province of the Family Division judge. Second, the court emphasized that even if the abducted child asserts a valid objection to returning to his or her country of habitual residence, the court is not prevented from ordering the child's return.<sup>87</sup> By reiterating this essential power, which underlies the existence of the article 13 defenses, the court reminded other tribunals that courts are never prohibited from returning the child.

In deciding how much deference to give the child's views, the *In re S* court's focus on the source of the child's objection provides lower courts with substantial guidance.<sup>88</sup> If the lower court concludes that the child's views are influenced by some other person, such as the abducting parent, or that the objection to being returned is that the child wishes to remain with the abducting parent, then little or no weight should be given to the child's views.<sup>89</sup> Conversely, if the lower court finds that the child has valid reasons for his or her objection, then it may refuse to mandate return.<sup>90</sup>

Perhaps the most significant portion of *In re S* was the court's differentiation between the "grave risk of harm" and Child's Objection defenses. The court concluded that the construction of article 13 demanded a strict interpretation wherein the two defenses are distinct and considered separately.<sup>91</sup>

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86. *In re S*, [1993] 2 All E.R. at 690.

87. *See id.* at 691.

88. Specifically, the court stated:

It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because [he or she] wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

*Id.* at 690-91.

89. *Id.* at 691.

90. *Id.* Because the Convention does not specify a minimum age under which a court may not consider the child's objection, the Court of Appeal refused to enumerate an age. *Id.*

91. *Id.* at 690. The court declared:

It will be seen that the part of [article] 13 which relates to the child's objections to being returned is completely separate from [paragraph 1(b) of article 13], and we can see no reason to interpret this part of the article, as we were invited to do by [counsel], as importing a re-

Specifically, refusal pursuant to paragraph 2 of article 13 to grant the child's wishes to stay in the country to which it has been abducted may not be the cause for the psychological harm contemplated by paragraph 1(b) of article 13.<sup>92</sup>

Finally, the Court of Appeal justified the Family Division's inquiry into the child's views by noting the relevance and significance of the United Nations Convention on the Rights of the Child.<sup>93</sup> Article 12 of this convention confers upon a child the right to express his or her views,<sup>94</sup> providing that:

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. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administra-

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quirement to establish a grave risk that the return of the child would expose her to psychological harm, or otherwise place her in an intolerable situation.

*Id.*

92. *Id.* A liberal construction of article 13 would enable an abducting parent to intermingle the various defenses. Arguably, then, the existence of a particular defense would supply the foundation for another. For example, an abducting parent could argue as follows: By denying the child's wish to stay despite paragraph 2, forcing her to return against her will to the country of habitual residence, the court would be placing the child in grave risk of psychological harm, and thus exposing her to an intolerable situation under paragraph 1(b). This "piling on" of defenses will likely result in inaccurate portrayals of the child's mental and emotional health and also of her life in the country of habitual residence. Consequently, a court may be deceived into believing that because all the exceptions have been "established," preventing the child's return would be justified. On the other hand, the *In re S* court's strict textual interpretation of article 13, requiring that the defenses be distinct from one another and that they be proved individually, serves as one method of ensuring that abducting parents are not overstating the child's situation.

93. *Id.* at 691; see Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg., Agenda Item 108, at 1, U.N. Doc. A/RES/44/736 (1989) [hereinafter U.N. Convention]. Other courts have also utilized the U.N. Convention to justify considering the child's views. See *In re M*, [1994] 1 Fam. 390, 395 (Eng. Fam. Div. 1993) (a court's refusal to interview a child would "fail to take into account [article] 12 of the United Nations Convention on the Rights of the Child 1989").

94. "The Convention on the Rights of the Child is a unique human rights treaty in that it protects not only the child's civil and political rights but that it also extends protection to the child's economic, social and cultural rights and humanitarian rights." Cynthia P. Cohen, *Introductory Note* to United Nations: Convention on the Rights of the Child, 28 I.L.M. 1448, 1448 (1989).

tive 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.<sup>95</sup>

Based upon a review of the Family Division record and an examination of the whole circumstances of the child's life, the Court of Appeal determined that the Family Division had sufficient evidence before it to conclude that the child was intelligent and capable of conveying a rational, cogent, and mature view of her situation based on genuine concerns. Accordingly, the Court of Appeal affirmed the Family Division's order refusing to order the child's return.<sup>96</sup>

### C. Scotland

In *Urness v. Minto*,<sup>97</sup> the Scottish Court of Session refused to order the return of two children, John, age twelve, and his nine-year-old brother Kevin, to the United States after it agreed with the lower court that to return one sibling, whose views were not mature enough to warrant consideration, to the country of habitual residence effectively would expose the older sibling, whose views were deemed mature, to an intolerable situation.<sup>98</sup>

The parents, John Arthur Urness (an American) and Jacqueline McDonald Minto (a native Scot) initiated divorce proceedings after two unsuccessful attempts to salvage their marriage.<sup>99</sup> Although the California courts awarded custody of John and Kevin Urness to their father, Mrs. Minto subsequently removed the children to Scotland.<sup>100</sup> Mrs. Minto opposed Mr. Urness' Hague petition seeking the return of the two children to the United States, on the grounds, *inter alia*, that the children objected to being returned<sup>101</sup> and that there was a

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95. U.N. Convention, *supra* note 93, art. 12, at 8.

96. *In re S*, [1993] 2 All E.R. 683, 692 (C.A. 1992).

97. 1994 Scots L.T.R. 996 (2d Div. 1993), *aff'g In re Urness*, 1994 Scots L.T.R. 989 (1993) (Penrose, Lord Ordinary).

98. *Urness v. Minto*, 1994 Scots L.T.R. at 999.

99. *In re Urness*, 1993 Scots L.T.R. at 990.

100. *Id.* Lord Penrose, the Lord Ordinary reviewing the petition, determined that Mrs. Minto deliberately and intentionally abducted the children to Scotland, intending to deny Mr. Urness contact with them. *Id.* at 991.

101. The children's objection to being returned to the United States was the most substantial issue in this case. *Id.* at 993.

grave risk that the older child would suffer psychological harm if he was forced to remain in Scotland without his mother and younger brother.<sup>102</sup>

During the initial proceedings, the judge heard evidence from the children in open court as well as oral and written evidence from a psychologist.<sup>103</sup> Based upon its assessment of the children's demeanor and statements, the court determined that the views of the older child, John, should be accorded significant deference based upon the genuine and heartfelt character of his objection to returning.<sup>104</sup> However, the court took a different view of the objections of the younger son, Kevin, noting that Kevin's assessment of his position and expression of his views were less reliable than those of John.<sup>105</sup> Although the court found that Kevin reflected, to a far greater extent than John, the influences of family discussion, the court was convinced that there was no attempt to coach or influence Kevin in the objections he advanced.<sup>106</sup> Conversely, the psychologist who examined Kevin admitted that the child's views were very much influenced by lack of knowledge and uncertainty as to the situation in which he would be placed should he be returned to the United States.<sup>107</sup> Based on this conflicting evidence, the court made dissimilar findings with respect to each child's maturity level and the veracity of their views.

Nevertheless, despite these disparate conclusions, the court reasoned that to order Kevin's return to the United States over his objection, while allowing John to remain in Scotland, would create an intolerable situation that would

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102. *See id.* at 991; *see supra* note 26 and accompanying text.

103. *In re Urness*, 1994 Scots L.T.R. at 991.

104. *Id.* at 994. Based on John's well-adjusted appearance, intelligence, and acceptance of the formal judicial structure, the court concluded that the child was "relatively mature." *Id.* The court noted that the only difficulty John encountered during the court examination was when he was pressed on the question of his objection to returning to America coupled with the possibility that, despite his views, he might be ordered to return. *Id.* "The implied threat that the court might override his wishes was the only factor that undermined [John's] self-control throughout the proceedings." *Id.* Additionally, the court indicated that John considered and formed a firm view that his attachment to his stepfather and mother should have priority over contact with his father. *Id.*

105. *Id.* ("[Kevin] was inclined to be more openly critical of [his father] and to express his disinclination to be associated with him in terms of his recollection of experiences of visitation in the past.").

106. *Id.*

107. *Id.* at 995.

inevitably produce extreme distress and difficulty for both Kevin and Mrs. Minto.<sup>108</sup> As a result of its determination, the court refused to order the return of either child.<sup>109</sup>

In *In re Matznick*,<sup>110</sup> the Scottish court considered the wishes of an eleven-year-old boy, Daniel, and his nine-year-old sister, Lisa Marie, but despite their objections, ordered that the children immediately be returned to the United States.<sup>111</sup> In ascertaining the children's views, the court proceeded with an in camera interview of both children.<sup>112</sup> Relying on the children's testimony, the court found that the children were satisfied with their lives in the United States, they were well-settled in school, and enjoyed the company of many friends.<sup>113</sup> Indeed, the court deduced that the children's objections to being returned to the United States had little to do with their dislike of the country.<sup>114</sup> Instead, the court realized that the only basis for the children's objections to returning was the haunting fear that their mother would remain in Scotland.<sup>115</sup> These apprehensions, however, quickly disappeared with the mother's willingness to accompany the children to the United States if the court ordered their return.<sup>116</sup> Because the court concluded that there was no merit to the children's objections, it ordered their immediate return.<sup>117</sup>

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108. *Id.* The court was concerned that Mrs. Minto would have been faced with a choice that she had never contemplated—staying in Scotland with John or returning to the United States with Kevin. *Id.*

109. *Id.* at 996. The appellate court upheld the decision, concluding that there was sufficient evidence of a grave risk of harm to both children. *Urness v. Minto*, 1994 Scots L.T.R. (2d Div. 1993).

110. 1995 Sess. Cas. (Outer House Nov. 9, 1994) (LEXIS, Intlaw Library, Scocas File) (Cameron, Lord Ordinary).

111. *Id.* at screen 32. In response to the father's Hague petition, the mother opposed the children's return on the "grave risk of harm" exception as well as the Child's Objection Clause. The court dismissed the mother's first defense, concluding that she had grossly exaggerated allegations of physical violence against her by her husband. *Id.* at screens 15-20.

112. *See id.* at screens 20-22.

113. *Id.* at screens 30-32.

114. *Id.*

115. *See id.*

116. *Id.*

117. *Id.*

*D. Northern Ireland*

*Foster v. Foster*<sup>118</sup> involved a father's petition for the return of his three children—Jeffrey, age twelve, Jason, age eleven, and Sean, age one—to Australia from Northern Ireland, where they were wrongfully removed by their mother.<sup>119</sup> Here, too, the children's mother defended the petition on two article 13 grounds, claiming that return of the children would expose them to a "grave risk of harm" and that the children objected to returning to Australia.<sup>120</sup>

In contrast with the children's objections in other cases, the Foster children protested return to Australia because of the hot climate, intense sunlight, and high incidence of skin cancer.<sup>121</sup> The Family Division's in camera interview revealed that the Foster children suffered from a hereditary disease that exposed them to a great risk of developing malignant melanoma cancer.<sup>122</sup> As a result of their physical condition, the children were forced to remain indoors during the hottest months of the year (their vacation period from school), they had to apply protective sunscreen continuously whenever they exposed their skin to sun, and they constantly were required to wear hooded caps, long shorts, and long-sleeved T-shirts.<sup>123</sup> If the children forgot to bring sunscreen to school, they were not permitted to play outside with their classmates during recess.<sup>124</sup>

Aside from the medical and social arguments asserted, the Family Division's in camera interview revealed the more personal reasons underlying the Foster children's objections to returning to Australia. Although Jeffrey asserted that he pre-

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118. 1993 N. Ir. (Fam. Div. May 24, 1993) (LEXIS, Intlaw Library, Nircas File) (Higgins, J.).

119. *Id.* at screens 1-2. The social worker reported that the children's mother went to Ireland to prevent the children from having unsupervised interactions with their father. *Id.* at screen 7.

120. *Id.* at screen 11.

121. *See id.* at screens 14-19.

122. The children suffered from Dysplastic Naevus Syndrome, a hereditary disorder in which family members have multiple irregularly shaped and pigmented naevi (moles), and had a positive history of melanoma, "a dangerous and aggressive form of skin cancer which has a high mortality rate." *Id.* at screen 15.

123. *Id.* at screen 17.

124. *Id.* On previous occasions, the children suffered severe episodes of blistering sunburn, although five-and-a-half years had elapsed from the last such episode. *Id.* at screens 17-18.

ferred Ireland because of the cool climate and because he had many friends and was happy in school,<sup>125</sup> he admitted that he did not want to return to Australia because he had no desire to resume contact with his father, whom he did not like. Jason revealed similar reasons for wanting to remain in Ireland and also expressed his preference to remain with his mother, although he claimed he did not mind if his father visited.<sup>126</sup> The psychologist who examined the children reported that the children deliberately repressed feelings, thoughts, and memories about some of the aspects of contact with their father which they found depressing or unpleasant.<sup>127</sup>

Relying upon the evidence adduced, the court made specific findings that the children objected to returning on the grounds that: (1) they did not wish to have contact with their father; (2) they disliked the Australian climate and the continuing need to apply sunscreen; and (3) they preferred to remain in Northern Ireland with their mother.<sup>128</sup> Considering the children's testimony, the court concluded that Jeffrey's views were sufficiently mature to be considered seriously by the court and, although Jason was less mature, he was not less well informed and thus, his views should also be taken seriously.<sup>129</sup>

Following the lead of the *In re S* court,<sup>130</sup> the *Foster* court determined that the children should be returned to Australia despite their legitimate objections.<sup>131</sup> In reaching its conclusion, the court balanced the various considerations adverse to the children's return against the considerations supporting their return.<sup>132</sup> Nevertheless, the court was not persuaded that Jeffrey and Jason possessed all the information necessary to make a balanced and informed decision about returning to Australia.<sup>133</sup> Particularly, the court articulated that the children's desire to sever contact with their father was not an adequate objection, partially because even if they were ordered returned, in Australia they would remain in their mother's

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125. *Id.* at screen 36.

126. *Id.* at screen 36-37.

127. *Id.* at 37.

128. *Id.* at screen 50.

129. *Id.* at screen 38.

130. *See supra* notes 72-96 and accompanying text.

131. *Foster*, 1993 N. Ir. at screens 59-60.

132. *Id.* at screens 54-59.

133. *Id.* at screen 52.

custody and the father would not have visitation rights unless and until an Australian court so ordered.<sup>134</sup> Next, the judge determined that the children's dislike and intolerance of the Australian climate was a substantial and legitimate complaint.<sup>135</sup> Finally, the court accorded no weight to the children's preference to stay in Northern Ireland with their mother because "children are inclined to be supportive of the parent who had care and custody of them."<sup>136</sup>

Having weighed these various considerations, the court emphasized that it was in the "best interests" of the children to be returned to Australia where the appropriate Family Court of Western Australia could make the long-term decisions as to the children's future.<sup>137</sup>

#### IV. ANALYSIS OF THE COURTS' INTERPRETATION

A court's thoughtful and thorough analysis of testimonial, sociological and other evidence, coupled with a narrow interpretation of the Child's Objection Clause, can assist in promoting stable familial relationships and reducing psychological trauma which results when parents abruptly uproot children and remove them to foreign lands.<sup>138</sup> The decisions of the English courts, especially the Court of Appeal's *In re S* decision,<sup>139</sup> enumerate useful precedent for future litigation involving the Child's Objection defense. The opinions tend to maintain the narrow interpretation of the Child's Objection defense as contemplated and encouraged by the framers of the Convention. Furthermore, the Court's strict textual construction of article 13 requires an abducting parent to establish independently the existence and validity of alleged defenses to the mandatory return of the child.<sup>140</sup> As a result, the decision may ensure an accurate portrayal of the child's situation in his

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134. *Id.* at screen 50.

135. *Id.* at screens 51, 55-56.

136. *Id.* at screen 52.

137. *Id.* at screen 59. The court emphasized the importance "for the sake of the children that the parents . . . not delay in applying to that Court so that those decisions [could] be reached as soon as possible." *Id.*

138. Horstmeyer, *supra* note 1, at 141.

139. [1993] 2 All E.R. 683 (C.A. 1992), *aff'g* S v. S, [1992] 2 Fam. 31 (Eng. Fam. Div.); see *supra* notes 84-96 and accompanying text.

140. See *supra* notes 91-92 and accompanying text.



or her country of habitual residence.<sup>141</sup> The most profound development of the English courts, however, is that while courts are urged to abstain from hearing substantive issues that should be reserved for custody determinations, they afford a child capable of forming a mature opinion the right to be heard.<sup>142</sup>

Similarly, U.S. courts increasingly are willing to conduct in camera interviews with children and hear testimony from psychiatrists during Hague proceedings to assess whether a relevant defense should preclude mandatory return. This mechanism appears successful in exposing coercion of the child by the abducting parent and ascertaining a sincere understanding of the child's objections.<sup>143</sup>

Conversely, the Scottish courts have misconstrued the construction of article 13. By relating the Child's Objection defense to the "grave risk of harm" defense and construing the two defenses as being dependent upon one another (two separate defenses which must be analyzed separately),<sup>144</sup> the Scottish courts are imposing a liberal construction of article 13—an interpretation against which the framers of the Convention and the *In re S* court cautioned.<sup>145</sup> Relying on this misguided interpretation, the *In re Urness* court assumed that it had only two options: It could either send back the younger child (whose mother would accompany him) while the older child remained in Scotland alone (which the court concluded would effect psychological harm on the older child); or the court could deny the Hague petition and refuse to order both children's return. However, the court ignored a third possible option: it could order that both children return to the United States where the competent court could make a determination of custody.

Consequently, the Scottish courts' interpretation of the

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141. See *supra* notes 88-96 and accompanying text.

142. See, e.g., *In re S*, [1993] 2 All E.R. at 691 (discussing the U.N. Convention, *supra* note 93).

143. See *supra* notes 63-69 and accompanying text.

144. See, e.g., *In re Urness*, 1994 Scots L.T.R. 989 (1993) (Penrose, Lord Ordinary), *aff'd*, 1994 Scots L.T.R. 996 (2d Div. 1993); see discussion *supra* Part III.C.

145. The English court's construction of article 13 in *In re S* declared that the article 13 defenses are distinct and must be established and analyzed separately. *In re S*, [1993] 2 All E.R. 683, 690 (C.A. 1992); see *supra* notes 91-92 and accompanying text.

Child's Objection Clause creates great potential for a parent abductor to petition a court for an analysis of the parties' parental capabilities and the dangerous risk that parents will litigate the merits of the underlying custody dispute during the Hague proceedings. Moreover, the *Urness v. Minto* court's analysis supporting the ultimate decision, which refused to order the children's return,<sup>146</sup> potentially undermined the efficacy of the Convention. In this particular scenario, the court confronted complex legal and social issues which were intricately interwoven with the ultimate child custody determination. The evidence adduced indicated that the children suffered severe emotional trauma and, as the court asserted, the children did not altogether express their views freely.<sup>147</sup> Certainly, the proper forum in which to resolve these types of issues pertaining to custody is the child's state of habitual residence.<sup>148</sup>

With the exception of the Scottish court's interpretation in *In re Urness*, the Child's Objection Clause has not been the subject of arbitrary, ethnocentric judicial interpretation and critics' contentions of abuse are generally unsubstantiated. Although judicial authorities are increasingly willing to consider the particular facts of each case to determine whether the child is expressing an uncoerced objection,<sup>149</sup> the consensus appears to be that if the court concludes that the child's expressed views are influenced by the abducting parent, or that the objection to return is based on a wish to remain with the abducting parent, little or no weight is given to the child's opinion.<sup>150</sup> It is only in extraordinary circumstances that

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146. *Urness v. Minto*, 1994 Scots L.T.R. 996, 1000 (2d Div. 1993).

147. See *In re Urness*, 1994 Scots L.T.R. 989, 994 (1993) (Penrose, Lord Ordinary). For instance, John maintained that he wished to remain in Scotland in part because of his close attachments to his mother, stepfather, and half-brother. *Id.* Additionally, both children asserted that they wished to maintain minimal contact, if any, with their father. Indeed, the most detailed opinion John related was his preference for the Scottish educational system. *Id.* The court's reliance on John's testimony to justify its refusal to order John's return amounted to nothing more than a pretense for ethnocentrism.

148. Article 19 of the Convention expressly prohibits courts from deciding the merits of the underlying custody dispute when reviewing Hague petitions for the return of a child. Hague Convention, *supra* note 9, art. 19, T.I.A.S. No. 11,670, at 9, 19 I.L.M. at 1503; see *supra* note 46.

149. Herring, *supra* note 2, at 164 (citing *In re R*, [1992] 2 Fam. 475, 475 (Eng. Fam. Ct. 1991)).

150. *Id.* at 164-65 (citing *Sheikh v. Cahill*, 145 Misc. 2d 171, 177, 546 N.Y.S.2d 517, 521-22 (Sup. Ct. Kings County 1989)).

courts accord the child's opinion deference and refuse to order his or her return.<sup>151</sup> Before deferring to a child's wishes, courts usually conduct in camera interviews of the child taking into account information regarding the child's social background<sup>152</sup> and often, the child is examined by an objective health professional who prepares oral and written reports for the court.

Further, in light of the restrictive interpretation demanded, absolute elimination of the Child's Objection defense<sup>153</sup> raises consequential issues. For instance, if the abduction occurred prior to a legal custody determination, then the child's wishes would not have been considered by any tribunal. Even assuming a custody hearing was held in the child's state of habitual residence, it does not necessarily follow ipso facto that the child's views were considered, because not all jurisdictions accord deference to children's opinions as to residence.<sup>154</sup> Thus, if a child was abducted from a contracting state whose municipal laws do not furnish children with the opportunity to pronounce their wishes during custody determinations, then elimination of the Child's Objection defense effectively will rob that child of the opportunity to communicate his or her wishes in matters which directly affect the child's welfare—a fundamental right conferred to all children by the U.N. Convention on the Rights of the Child.<sup>155</sup>

Accordingly, the Child's Objection defense is an indispensable feature of the Hague Convention and its complete deletion may effect profound and devastating consequences on a child capable of forming a mature view about matters affecting his or her welfare. A child who is deemed mature should be permitted to make an assessment, based on his or her own experiences, as to where he or she wishes to reside. The exception is an important asset to all children, not only in countries where

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151. Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,509 (1986); *In re S*, [1993] 2 All E.R. 683, 692 (C.A. 1992). Use of the exception is generally permitted only in clearly meritorious cases and only when the party opposing the child's return meets the burden of proof. 51 Fed. Reg. 10,509.

152. See *supra* notes 40-42 and accompanying text.

153. The suggestion has been raised. See Shirman, *supra* note 2, at 219.

154. See Dyer, *supra* note 1, at 24; William M. Hilton, *Handling a Hague Trial*, 6 AM. J. FAM. L. 211 (1992).

155. U.N. Convention, *supra* note 93, art. 12(2), at 8.

a child under sixteen years is allowed to express an opinion and, perhaps, determine his or her residence,<sup>156</sup> but also in jurisdictions where the child's view is stifled because municipal laws do not accord the child an occasion to speak.

Nevertheless, the clause must be safeguarded from judicial abuse resulting from the inherent subjectivity of the provision.<sup>157</sup> A court reviewing a Hague petition for the return of a child may take several precautions to promote and ensure the accurate portrayal of the true nature of the child's objections while simultaneously minimizing the woeful and destructive effects of bitter custody disputes and abductions. First, because of the unfortunate and often inevitable potential for brainwashing and undue influence over the child by the abducting parent, a child's objection may not be asserted freely. Thus, in order to avoid thwarting the Convention's return mechanism, courts should limit invocation of the provision to extraordinary circumstances. Second, courts must adhere steadfastly to the strict interpretation contemplated by the drafters. Third, precautions may be undertaken to prevent the complexities of coercion from occurring. Most significant are the requirements that the court utilize sociological reports available from the Central Authority<sup>158</sup> and balance the child's opinion against the fear that the abducting parent would brainwash and turn the child against the left-behind parent who has no opportunity to exert influence.<sup>159</sup>

Fourth, when a child asserts an objection to being returned, an impartial, competent mental health professional or social worker may conduct a comprehensive psychological, mental, and emotional evaluation of the child and present oral or written reports before the court to insure that the child is able to convey legitimately his or her individual beliefs.<sup>160</sup> Also, a tribunal should conduct an independent inquiry<sup>161</sup> to as-

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156. See Starr, *supra* note 49, at 299; see discussion *supra* Part II.B.1.

157. See *supra* notes 49-52 and accompanying text.

158. See *supra* note 41 and accompanying text.

159. See Adair Dyer, *Checklist of Issues to be Considered at the Second Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, in *INTERNATIONAL CHILD ABDUCTIONS*, *supra* note 1, at 98, 112.

160. See Hilton, *supra* note 154, at 213. Mr. Hilton is a certified family law specialist in California, and a recognized expert in the field of interstate and international child custody jurisdiction.

161. Conducting an inquiry into the child's objections does not necessarily con-

certain and verify the true disposition of the child's objections through an in camera hearing and by explicitly instructing the child that he or she is not being forced to choose a particular parent.<sup>162</sup> Moreover, a reviewing court may appoint independent counsel for the child to ensure the child's objection is asserted freely. Of course, the court must always remember that because the Hague Convention is an emergency measure, proceedings must be expeditious.<sup>163</sup>

Finally, when analyzing article 13, it is imperative that courts recognize that each provision constitutes an independent defense, as the English Court of Appeal advised.<sup>164</sup> Thus, when any article 13 defense is asserted, the party opposing the child's return must establish the existence and validity of each exception independent of other claimed defenses. In turn, the court must distinctly observe and analyze the circumstances pertinent to each defense and determine their legitimacy. Most significantly, however, courts should not permit non-custodial parents to transform the Hague proceeding from an evidentiary hearing into a substantive legal proceeding which addresses custody issues, such as psychological make-ups, parental fitness, and life experiences.<sup>165</sup>

## V. CONCLUSION

The struggle against the abduction of children overseas "must always be inspired by a desire to protect children and should be based upon an interpretation of their true interests."<sup>166</sup> Contrary to critics' apprehensions of the Child's Objection defense, the emerging interpretation of the provision demonstrates that, although judges are willing to afford chil-

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stitute an adjudication on the merits of the underlying custody dispute if the child merely expresses a preference as to which country it wishes to remain in, not which parent it chooses to live with.

162. By informing the child that he or she is not being asked to choose between parents, the method of the interview alleviates the framer's concerns discussed in the Explanatory Report to the Hague Convention. See Pérez-Vera, *supra* note 3, at 433.

163. Hague Convention, *supra* note 9, T.I.A.S. No. 11,670, at 4, 19 I.L.M. at 1501; Pérez-Vera, *supra* note 3, at 457-58.

164. See *supra* notes 91-92 and accompanying text. For an example of the potential inaccuracy that a liberal interpretation of article 13 may yield, see *supra* note 92.

165. Horstmeyer, *supra* note 1, at 140.

166. Pérez-Vera, *supra* note 3, at 431.

dren the opportunity to verbalize their views, the courts infrequently invoke the objection as grounds for refusal to return the child. Through prudent examinations, courts are cautious to avoid determination of the merits of the underlying custody dispute and, except in rare circumstances, adhere to the Convention's rule of compulsory, expeditious return. While strict interpretation of all article 13 defenses is imperative to preserve the Convention's aspirations, the availability of the Child's Objection defense constitutes an essential feature of the Convention and manifests unique significance to society's most cherished asset: children.

*Rania Nanos*

