



Graves 601 hotel
601 First Avenue North
Minneapolis, MN 55403

HAGUE SYMPOSIUM

JUNE 11 – 12, 2012

BALLROOM I

MONDAY, JUNE 11, 2012

8:00 AM – 9:00 AM

BREAKFAST, REGISTRATION & INTRODUCTIONS

9:00 AM – 9:30 AM

THE HAGUE PROCEEDING: NOT A CUSTODY
PROCEEDING

ROBERT ARENSTEIN, NEW YORK

9:30 AM – 10:30 AM

HAGUE CONVENTION PROCEDURE IN FEDERAL AND
STATE COURTS

- PROCEDURAL FLOW AND SCHEDULING
- EX PARTE AND INTERIM ORDERS
- EVIDENTIARY GUIDELINES
- INTERPRETER SERVICES

FEDERAL DISTRICT COURT JUDGES:

CHIEF MICHAEL DAVIS AND JUDGE ANN MONTGOMERY

STATE DISTRICT COURT JUDICIAL OFFICERS:

RET. JUDGE TANJA MANRIQUE, REFEREE MARY MADDEN AND

RET. REFEREE ANN LEPPANEN

10:30 AM – 10:45 AM

BREAK

MONDAY, JUNE 11, 2012 – CON'T

10:45 AM – 11:30 AM

ROLE OF THE LAWYERS: REPRESENTING THE ALLEGED ABDUCTOR

- RESPONDING TO THE INITIATION OF A HAGUE PROCEEDING
- PREPARING EVIDENCE FOR TRIAL
- DEFENSES
- CONSIDERATION OF THE OBJECTION OF THE CHILD
- CONCLUSION OF HAGUE PROCEEDING

ENFORCEMENT OF THE RETURN ORDER

- CIVIL REMEDIES
- CRIMINAL REMEDIES
- SUPPORTING THE PARENT-CHILD RELATIONSHIP ACROSS BORDERS
- CHILD SUPPORT

ETHICAL AND CULTURAL DIVERSITY ISSUES

LAWRENCE KATZ, FLORIDA

11:30 AM – 12:00 PM

FACILITATED DISCUSSION

CAROLINE LANGLEY, HONG KONG

12:00 PM – 1:30 PM

LUNCH (AT HOTEL)

1:30 PM – 2:00 PM

INTERNATIONAL RELOCATION ISSUES; THE WASHINGTON DECLARATION

NANCY ZALUSKY BERG, MINNESOTA

2:00 PM – 2:45 PM

ROLE OF GUARDIANS *AD LITEM* AND CHILDREN'S COUNSEL

MARIAN E. SAKSENA, MINNESOTA

2:45 PM – 3:00 PM

BREAK

3:00 PM – 4:30 PM

FACILITATED DISCUSSION

CAROLINE LANGLEY, HONG KONG



Graves 601 hotel
601 First Avenue North
Minneapolis, MN 55403

TUESDAY, JUNE 12, 2012

- | | |
|---------------------|---|
| 7:00 AM – 8:00 AM | BREAKFAST |
| 8:00 AM – 8:30 AM | BEST INTEREST STANDARDS THROUGHOUT THE USA
NANCY ZALUSKY BERG, MINNESOTA |
| 8:30 AM – 10:00 AM | MENTAL HEALTH EVALUATION OF THE BEST INTEREST OF THE CHILD
MINDY MITNICK, M.A. |
| 10:00 AM – 10:15 AM | BREAK |
| 10:15 AM – 11:30 AM | ROLE OF THE LAWYERS: REPRESENTING THE LEFT-BEHIND PARENT: <ul style="list-style-type: none">• APPLICATION CONTENTS AND PROCESS• INITIATION OF A HAGUE PROCEEDING• EMERGENCY REMEDIES• PREPARING EVIDENCE FOR TRIAL• DECLARATION OF WRONGFULNESS ENFORCEMENT OF THE RETURN ORDER <ul style="list-style-type: none">• CIVIL REMEDIES• CRIMINAL REMEDIES• SUPPORTING THE PARENT-CHILD RELATIONSHIP ACROSS BORDERS• CHILD SUPPORT ETHICAL AND CULTURAL DIVERSITY ISSUES
ALLISON MAXIM, MINNESOTA |
| 11:30 AM – 12:00 PM | FACILITATED DISCUSSION
CAROLINE LANGLEY, HONG KONG |
| 12:00 PM – 1:30 PM | LUNCH (AT HOTEL) |

TUESDAY, JUNE 12, 2012 – CON'T

1:30 PM – 2:15 PM

INITIAL CUSTODY DETERMINATIONS ACROSS
JURISDICTIONS: INTERNATIONAL PANEL OF LAWYERS
AND MENTAL HEALTH PRACTITIONERS DISCUSS CURRENT
APPROACHES TO THE DETERMINATION OF CHILD
CUSTODY AND THE IMPACT OF A HAGUE PROCEEDING

DAVID SALTER, ENGLAND

MIA REICH-SJÖGREN, SWEDEN

ESTHER LENKINSKI, CANADA

ANNE-MARIE HUTCHINSON OBE, ENGLAND

VALERIE ARNOLD, MINNESOTA

NANCY ZALUSKY BERG, MINNESOTA

2:15 PM – 2:45 PM

OPTIONS FOR DISPUTE RESOLUTION IN
PARENTING CHILD ABDUCTION CASES

LARRY KATZ, FLORIDA

2:45 PM – 3:00 PM

BREAK

3:00 PM – 4:30 PM

FACILITATED DISCUSSION

CAROLINE LANGLEY, HONG KONG

REGISTRATION FEES OF \$250/PER PARTICIPANT WILL BE COLLECTED DURING
REGISTRATION ON MONDAY, JUNE 11, WHICH COVER MEETING ROOM EXPENSES,
BREAKFASTS, LUNCHES, PROGRAM MATERIALS AND AUDIO VISUAL NEEDS.

*~~INTERPRETING SERVICES DONATED BY INTERNATIONAL ACADEMY OF MATRIMONIAL
LAWYERS – USA CHAPTER, AND TEMBUA THE PRECISION LANGUAGE SOLUTION~~*

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(800) 347-9739
LAKEVILLE, MINNESOTA



CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (Concluded 25 October 1980)	国際的な子の奪取の民事上の側面に関する条約
The States signatory to the present Convention,	この条約の署名国は、
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,	子の監護に関する事項において子の利益が最も重要であることを深く確信し、
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,	不法な連れ去り又は留置によって生ずる有害な影響から子を国際的に保護すること並びに子が常居所を有していた国への当該子の迅速な返還を確保する手続及び接触の権利の保護を確保する手続を定めることを希望し、
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -	このための条約を締結することを決定して、次のとおり協定した。
CHAPTER I - SCOPE OF THE CONVENTION	第1章 条約の適用範囲
Article 1	第1条
The objects of the present Convention are -	この条約の目的は、次のことを目的とする。
a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and	a いずれかの締約国に不法に連れ去られ、又はいずれかの締約国において留置されている子の迅速な返還を確保すること。
b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.	b 一の締約国の法令に基づく監護の権利又は接触の権利が他の締約国において効果的に尊重されることを確保すること。
Article 2	第2条
Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.	締約国は、自国の領域内においてこの条約の目的の実現を確保するため、全ての適当な措置をとる。このため、締約国は、利用可能な手続のうち最も迅速なものを用いる。
Article 3	第3条
The removal or the retention of a child is to be considered wrongful where -	①子の連れ去り又は留置は、次のa及びbに該当する場合には、不法とする。
a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and	a 当該連れ去り又は当該留置の直前に当該子が常居所を有していた国の法令に基づいて個人、施設その他の機関が共同又は単独で有する監護の権利を侵害していること。
b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.	b 連れ去り若しくは留置の時にaに規定する監護の権利が共同若しくは単独で現実に行使されていたこと又は当該連れ去り若しくは当該留置がなかったならば当該権利が共同若しくは単独で現実に行使されていたであろうこと。
The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.	②aに規定する監護の権利は、特に、法令の適用により、司法上若しくは行政上の決定により、又はaに規定する国の法令に基づいて法的効果を有する合意により生ずるものとする。
Article 4	第4条
The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.	この条約は、監護の権利又は接触の権利が侵害される直前にいずれかの締約国に常居所を有していた子について適用する。この条約は、子が十六歳に達した場合には、適用しない。
Article 5	第5条
For the purposes of this Convention -	この条約の適用上、
a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;	a) 「監護の権利」には、子の監護に関する権利、特に、子の居所を決定する権利を含む。
b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.	b) 「接触の権利」には、一定の期間子をその常居所以外の場所に連れて行く権利を含む。

CHAPTER II - CENTRAL AUTHORITIES	第2章 中央当局
Article 6	第6条
A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.	①締約国は、この条約により中央当局に対して課される義務を履行するため、一の中央当局を指定する。 ②連邦制の国、二以上の法制を有する国並びに自治権及び領域的管轄を有する組織を有する国は、二以上の中央当局を指定し、その権限が及ぶ領域の範囲を定めることができる。二以上の中央当局を指定した国は、申請が自国内の適当な中央当局に転達されるよう、申請の送付先となる一の中央当局を指定する。
Article 7	第7条
Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.	①中央当局は、子の迅速な返還を確保し、及びこの条約の他の目的を達成するため、相互に協力し、及びそれぞれの国内における権限のある当局の間の協力を促進する。
In particular, either directly or through any intermediary, they shall take all appropriate measures -	②特に、中央当局は、直接に又は仲介者を通じて、次のことのため、全ての適当な措置をとる。
a) to discover the whereabouts of a child who has been wrongfully removed or retained;	a 不法に連れ去られ、又は留置されている子の所在を特定すること。
b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;	b 暫定措置をとり、又はとらせることによって、子に対する更なる害又は利害関係者に対する不利益を防止すること。
c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;	c 子の任意の返還を確保し、又は問題の友好的な解決をもたらすこと。
d) to exchange, where desirable, information relating to the social background of the child;	d 望ましい場合には、子の社会的背景に関する情報を交換すること。
e) to provide information of a general character as to the law of their State in connection with the application of the Convention;	e この条約の適用に関連する自国の国内法につき一般的な情報を提供すること。
f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;	f 子の返還を得るための司法上若しくは行政上の手続を開始し、又は当該手続の開始について便宜を与えること及び適当な場合には接触の権利の内容を定め、又はその効果的な行使を確保するように取り計らうこと。
g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;	g 状況により必要とされる場合には、法律に関する援助及び助言（弁護士その他法律に関する助言者の参加を含む。）を提供し、又はこれらの提供について便宜を与えること。
h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;	h 子の安全な返還を確保するための必要かつ適当な行政上の措置をとること。
i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.	I この条約の実施に関する情報を常に相互に通報し、及びこの条約の適用に対する障害を可能な限り除去すること。

CHAPTER III - RETURN OF CHILDREN	第3章 子の返還
Article 8	第8条
Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.	①監護の権利を侵害して子が連れ去られ、又は留置されたと主張する個人、施設その他の機関は、当該子の常居所の中央当局又は他の締約国の中央当局に対し、当該子の返還を確保するための援助の申請を行うことができる。
The application shall contain -	②当該申請には、次のものを含める。
a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;	a 申請者、子及び当該子を連れ去り、又は留置しているとされる者の特定に関する事項
b) where available, the date of birth of the child;	b 可能な場合には、子の生年月日
c) the grounds on which the applicant's claim for return of the child is based;	c 申請者が子の返還を請求する根拠
d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.	d 子の所在及び子と共に所在すると推定される者の特定に関する全ての入手可能な情報
The application may be accompanied or supplemented by -	③当該申請に次のものを添付し、又は当該申請を次のものにより補足することができる。
e) an authenticated copy of any relevant decision or agreement;	e 関係する決定又は合意の写しであって、証明を受けたもの
f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;	f 子が常居所を有していた国の関係法令に関する証明書又は宣誓供述書であって、当該国の中央当局その他の権限のある当局又は資格を有する者が発行したもの
g) any other relevant document.	g) その他の関係文書
Article 9	第9条
If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.	前条に規定する申請を受領した中央当局は、子が他の締約国に現に所在すると信ずるに足りる理由がある場合には、当該申請を当該他の締約国の中央当局に直接かつ遅滞なく転達し、要請を行った中央当局又は申請者に対しその旨を通知する。
Article 10	第10条
The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.	子が現に所在する国の中央当局は、当該子が任意に返還されるよう全ての適当な措置をとり、又はとらせる。

Article 11	第 1 1 条
The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.	①締約国の司法当局又は行政当局は、子の返還のための手続を迅速に行う。
If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.	②関係する司法当局又は行政当局が当該手続の開始の日から六週間以内に決定を行うことができない場合には、申請者は遅延の理由を明らかにするよう要求する権利を有するものとし、要請を受けた国の中央当局は、自己の職権により又は要請を行った国の中央当局が求めるときは、遅延の理由を明らかにするよう要求する権利を有する。要請を受けた国の中央当局は、その要求への回答を受領したときは、当該回答を要請を行った国の中央当局又は申請者に転達する。
Article 12	第 1 2 条
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.	①子が第三条に規定するところにより不法に連れ去られ、又は留置され、かつ、当該子が現に所在する締約国の司法当局又は行政当局が手続を開始した日において当該子の不法な連れ去り又は留置の日から一年が経過していない場合には、当該司法当局又は当該行政当局は、当該子の返還を直ちに命ずる。
The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of 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.	②司法当局又は行政当局は、前項に規定する一年が経過した後手続を開始した場合においても、子が新たな環境に適応していることが証明されない限り、当該子の返還を命ずる。
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.	③要請を受けた国の司法当局又は行政当局は、子が他の国に連れ出されたと信ずるに足りる理由がある場合には、当該子の返還のための手続を中止し、又は当該子の返還の申請を却下することができる。
Article 13	第 1 3 条
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -	①前条の規定にかかわらず、要請を受けた国の司法当局又は行政当局は、子の返還に異議を申し立てる個人、施設その他の機関が次のいずれかのことを証明する場合には、当該子の返還を命ずる義務を負わない。
a) the person, institution or other body 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	a 子を監護していた個人、施設その他の機関が連れ去り若しくは留置の時に現実に監護の権利を行使していなかったこと、当該連れ去り若しくは当該留置の前にこれに同意していたこと又は当該連れ去り若しくは当該留置の後にこれを黙認したこと。
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.	b 返還することによって子が身体的若しくは精神的な害を受け、又は他の耐え難い状態に置かれることとなる重大な危険があること。
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 its views.	②司法当局又は行政当局は、また、子が返還されることを拒み、かつ、その意見を考慮に入れることが適当である年齢及び成熟度に達していると認める場合には、当該子の返還を命ずることを拒むことができる。
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.	③司法当局又は行政当局は、この条に規定する状況について検討するに当たり、子の社会的背景に関する情報であって当該子の常居所の中央当局その他の権限のある当局により提供されるものを考慮に入れる。

<p>Article 14</p> <p>In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.</p>	<p>第 1 4 条</p> <p>要請を受けた国の司法当局又は行政当局は、第三条に規定する不法な連れ去り又は留置があったか否かを確認するに当たり、子が常居所を有していた国の法令及び司法上又は行政上の決定（当該国において正式に承認されたものであるか否かを問わない。）を、当該法令に関する証明のため又は外国の決定の承認のために適用され得る特別の手續によることなく、直接に考慮することができる。</p>
<p>Article 15</p> <p>The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.</p>	<p>第 1 5 条</p> <p>締約国の司法当局又は行政当局は、子の連れ去り又は留置が第三条に規定する不法なものであるとの決定その他の判断を申請者が当該子が常居所を有していた国において得ることができる場合には、当該子の返還を命ずる前に、当該申請者に対し当該決定その他の判断を得るよう要請することができる。締約国の中央当局は、申請者が当該決定その他の判断を得ることをできる限り援助する。</p>
<p>Article 16</p> <p>After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.</p>	<p>第 1 6 条</p> <p>子が自国に連れ去られ、又は自国において留置されている締約国の司法当局又は行政当局は、当該子が第三条に規定するところにより不法に連れ去られ、又は留置されている旨の通知を受領した後は、この条約に基づいて子が返還されないことが決定されるまで又はこの条約に基づく申請が当該通知を受領した後合理的な期間内に行われない場合を除くほか、監護の権利の本案についての決定を行わない。</p>
<p>Article 17</p> <p>The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.</p>	<p>第 1 7 条</p> <p>要請を受けた国において監護に関する決定が行われたという事実又は当該国において当該決定が承認され得るという事実のみをもって、この条約に基づく子の返還を拒む根拠としてはならない。もっとも、要請を受けた国の司法当局又は行政当局は、この条約の適用に当たり、当該決定の理由を考慮することができる。</p>
<p>Article 18</p> <p>The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.</p>	<p>第 1 8 条</p> <p>この章の規定は、司法当局又は行政当局が有するいつでも子の返還を命ずる権限を制限するものではない。</p>
<p>Article 19</p> <p>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.</p>	<p>第 1 9 条</p> <p>この条約に基づく子の返還に関する決定は、監護に関する問題の本案についての判断としてはならない。</p>
<p>Article 20</p> <p>The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.</p>	<p>第 2 0 条</p> <p>第十二条の規定に基づく子の返還については、要請を受けた国における人権及び基本的自由の保護に関する基本原則により認められないものである場合には、拒むことができる。</p>

CHAPTER IV - RIGHTS OF ACCESS	第4章 接触の権利
Article 21	第21条
An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.	①接触の権利の内容を定め、又はその効果的な行使を確保するように取り計らうことを求める申請は、締約国の中央当局に対して、子の返還を求める申請と同様の方法によって行うことができる。
The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.	②中央当局は、接触の権利が平穏に享受されること及び接触の権利の行使に当たり従うべき条件が満たされることを促進するため、第七条に定める協力の義務を負う。中央当局は、接触の権利の行使に対するあらゆる障害を可能な限り除去するための措置をとる。
The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject	③中央当局は、接触の権利の内容を定め、又は保護するため及び接触の権利の行使に当たり従うべき条件が尊重されることを確保するため、直接に又は仲介者を通じて、手続を開始し、又はその開始について援助することができる。
CHAPTER V - GENERAL PROVISIONS	第5章 一般規定
Article 22	第22条
No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.	いかなる保証、担保及び供託（その名称のいかんを問わない。）も、この条約の適用を受ける司法上又は行政上の手続に要する経費及び費用の支払を保証するために要求してはならない。
Article 23	第23条
No legalization or similar formality may be required in the context of this Convention.	認証その他これに類する手続は、この条約との関係において要求することができない。
Article 24	第24条
Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.	①要請を受ける国の中央当局に送付される申請、連絡その他の文書は、原語によるものとし、当該国の公用語又はこれが実現不可能な場合にはフランス語若しくは英語による翻訳を添付する。
However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.	②ただし、締約国は、第四十二条の規定に従って留保を付することにより、自国の中央当局に送付される申請、連絡その他の文書におけるフランス語又は英語のいずれか一方の使用を拒むことができる。
Article 25	第25条
Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.	締約国の国民及び締約国に常居所を有する者は、この条約の適用に関係のある事項に関し、他の締約国において当該他の締約国の国民及び当該他の締約国に常居所を有する者と同一の条件で法律に関する援助及び助言を受けることができる。

Article 26	第 2 6 条
Each Central Authority shall bear its own costs in applying this Convention.	①各中央当局は、この条約を適用するに当たり要する自己の費用を負担する。
Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.	②中央当局その他締約国の公の当局は、この条約に基づいて行われた申請に係るいかなる手数料も徴収してはならない。これらの当局は、特に、手続の経費及び費用並びに弁護士その他法律に関する助言者が参加した場合には当該参加により生ずる経費及び費用の支払を申請者に要求することができない。ただし、これらの当局は、子の返還の実施のために要した費用又は将来要する費用の支払については、要求することができる。
However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.	③前項の規定にかかわらず、締約国は、第四十二条の規定に従って留保を付することにより、前項に規定する経費であって弁護士その他法律に関する助言者の参加又は裁判所における手続により生ずるものを自国の法律に関する援助及び助言に係る制度によって負担することができる場合を除くほか負担する義務を負わない旨を宣言することができる。
Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.	④司法当局又は行政当局は、この条約に基づいて子の返還を命じ、又は接触の権利に関する命令を発する際に、適当な場合には、子を連れ去り、若しくは留置した者又は接触の権利の行使を妨げた者に対し、申請者により又は申請者のために支払われた必要な費用（旅費、子の所在を特定するために要した経費又は支払、申請者の法律上の代理人に係る経費及び子の返還に要する経費を含む。）を支払うよう命ずることができる。
Article 27	第 2 7 条
When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.	申請がこの条約に定める要件を満たしていないこと又は申請に十分な根拠がないことが明白である場合には、中央当局は、当該申請を受理する義務を負わない。この場合において、中央当局は、その理由を申請者又は当該申請を転達した中央当局に対して直ちに通知する。
Article 28	第 2 8 条
A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.	中央当局は、申請者のために行動し、又は申請者のために行動する代理人を指名する権限を当該中央当局に委任する書面を申請に添付するよう要求することができる。
Article 29	第 2 9 条
This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.	この条約は、第三条又は第二十一条に定めるところにより監護の権利又は接触の権利の侵害があったと主張する個人、施設その他の機関が、締約国の司法当局又は行政当局に直接に申請（この条約に基づくものであるか否かを問わない。）を行うことを妨げるものではない。
Article 30	第 3 0 条
Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.	この条約に従い締約国の中央当局に対して行われた全ての申請又はこの条約に従い直接司法当局若しくは行政当局に対して行われた全ての申請は、これに添付され、又はいずれかの中央当局によって提供された文書その他の情報と共に、締約国の裁判所又は行政当局において受理されるものとする。

Article 31	第 3 1 条
In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -	子の監護に関して異なる領域内の地域に適用される二以上の法制を有する国に関し、
a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State:	a 当該国における「常居所」というときは、当該国のいずれかの領域内の地域における常居所をいうものとする。
b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.	b 「常居所を有していた国の法令」というときは、当該国の領域内の地域であって子が常居所を有していたものの法令をいうものとする。
Article 32	第 3 2 条
In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.	子の監護に関して異なる範疇の者に適用される二以上の法制を有する国に関し、「国の法令」というときは、当該国の法令において特定する法制をいうものとする。
Article 33	第 3 3 条
A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.	子の監護に関する法令を領域内の地域ごとに異にする国は、単一の法制を有する国がこの条約を適用する義務を負わない場合には、この条約を適用する義務を負わない。
Article 34	第 3 4 条
This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.	この条約及び千九百六十一年十月五日の未成年者の保護に関する当局の権限及び準拠法に関する条約の双方の締約国の間においては、この条約の適用範囲内の事項については、この条約が優先して適用される。この条約は、不法に連れ去られ、若しくは留置された子の返還を得ること又は接触の権利の内容を定めることを目的として、要請を行う国と要請を受ける国との間で効力を有する他の国際文書又は要請を受ける国の他の法令を適用することを制限するものではない。
Article 35	第 3 5 条
This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.	①この条約は、締約国の間において、この条約が当該締約国について効力を生じた後に行われた不法な連れ去り又は留置についてのみ適用する。
Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.	②第三十九条又は第四十条の規定に基づく宣言が行われた場合には、前項に規定する「締約国」とは、この条約が適用される地域をいうものとする。
Article 36	第 3 6 条
Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction	この条約のいかなる規定も、二以上の締約国が、子の返還に関して受ける制約を限定するため、この条約の規定であってこのような制約を伴い得るものの適用を排除することをこれらの締約国の間において合意することを妨げるものではない。

CHAPTER VI - FINAL CLAUSES	第6章 最終条項
Article 37	第37条
The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.	①この条約は、ハーグ国際私法会議の第十四回会期の時に同会議の構成国であった国による署名のために開放しておく。
It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.	②この条約は、批准され、受諾され、又は承認されなければならない。批准書、受諾書又は承認書は、オランダ王国外務省に寄託する。
Article 38	第38条
Any other State may accede to the Convention.	①その他の国は、この条約に加入することができる。
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.	②加入書は、オランダ王国外務省に寄託する。
The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.	③この条約は、この条約に加入する国については、加入書の寄託の後三番目の月の初日に効力を生ずる。
The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.	④加入は、加入国とその加入を受け入れる旨を宣言した締約国との間においてのみ効力を生ずる。いずれかの国の加入の後この条約を批准し、受諾し、又は承認する構成国は、その旨の宣言を行わなければならない。これらの宣言はオランダ王国外務省に寄託するものとし、同省はその認証謄本を外交上の経路を通じて各締約国に送付する。
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.	⑤この条約は、加入国とその加入を受け入れる旨を宣言した国との間においては、受け入れる旨の宣言の寄託の後三番目の月の初日に効力を生ずる。
Article 39	第39条
Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.	①いずれの国も、署名、批准、受諾、承認又は加入の際に、自国が国際関係について責任を有する領域の全部又は一部についてこの条約を適用することを宣言することができる。この宣言は、この条約が当該国について効力を生ずる時に効力を生ずる。
Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.	②この宣言及びその後の適用領域の拡大は、オランダ王国外務省に通告する。
Article 40	第40条
If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.	①この条約が対象とする事項に関して異なる法制が適用される二以上の地域をその領域内に有する締約国は、署名、批准、受諾、承認又は加入の際に、この条約を自国の領域内の全ての地域に適用するか又は一若しくは二以上の地域についてのみ適用するかを宣言することができるものとし、別の宣言を行うことによりその後いつでもこの宣言を変更することができる。
Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.	②これらの宣言は、オランダ王国外務省に通告するものとし、この条約が適用される領域内の地域を明示する。

<p>Article 41</p> <p>Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.</p>	<p>第 4 1 条</p> <p>締約国が国内において行政上、司法上及び立法上の権限が中央の当局とその他の当局とに配分された統治体制を有する場合には、当該締約国がこの条約に署名すること、この条約を批准し、受諾し、若しくは承認すること若しくはこの条約に加入すること又は前条の規定に基づき宣言を行うことは、当該締約国内における権限の配分に何ら影響を及ぼすものではない。</p>
<p>Article 42</p> <p>Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.</p>	<p>第 4 2 条</p> <p>①いずれの国も、批准、受諾、承認若しくは加入の時までに又は第三十九条若しくは第四十条の規定に基づく宣言を行う時に、第二十四条又は第二十六条第三項に規定する留保の一方又は双方を付することができる。その他のいかなる留保も、認められない。</p>
<p>Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.</p>	<p>②いずれの国も、いつでも、自国が付した留保を撤回することができる。撤回は、オランダ王国外務省に通告する。</p>
<p>The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.</p>	<p>③留保は、前項の通告の後三番目の月の初日に効力を失う。</p>
<p>Article 43</p> <p>The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.</p>	<p>第 4 3 条</p> <p>①この条約は、第三十七条及び第三十八条に規定する批准書、受諾書、承認書又は加入書のうち三番目に寄託されるものの寄託の後三番目の月の初日に効力を生ずる。</p>
<p>Thereafter the Convention shall enter into force -</p>	<p>②その後は、この条約は、次の日に効力を生ずる。</p>
<p>(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;</p>	<p>1 その後にこの条約を批准し、受諾し、若しくは承認し、又はこの条約に加入する国については、その批准書、受諾書、承認書又は加入書の寄託の後三番目の月の初日</p>
<p>(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.</p>	<p>2 第三十九条又は第四十条の規定に従ってこの条約が適用される領域又は領域内の地域については、これらの規定による通告の後三番目の月の初日</p>
<p>Article 44</p> <p>The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.</p>	<p>第 4 4 条</p> <p>①この条約は、前条第一項の規定に従って効力を生じた日から五年間効力を有する。その日以後にこの条約を批准し、受諾し、若しくは承認し、又はこの条約に加入する国についても、同様とする。</p>
<p>If there has been no denunciation, it shall be renewed tacitly every five years.</p>	<p>②この条約は、廃棄されない限り、五年ごとに黙示的に更新される。</p>
<p>Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies</p>	<p>③廃棄は、当該五年の期間が満了する少なくとも六箇月前にオランダ王国外務省に通告する。廃棄は、この条約が適用される領域又は領域内の地域のうち特定のものに限定して行うことができる。</p>
<p>The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.</p>	<p>④廃棄は、これを通告した国についてのみ効力を生ずるものとし、その他の締約国については、この条約は、引き続き効力を有する。廃</p>

Article 45	第 4 5 条
The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following -	オランダ王国外務省は、ハーグ国際私法会議の構成国及び第三十八条の規定に従って加入した国に対し、次の事項を通報する。
(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;	(1) 第三十七条に規定する署名、批准、受諾及び承認
(2) the accessions referred to in Article 38;	(2) 第三十八条に規定する加入
(3) the date on which the Convention enters into force in accordance with Article 43;	(3) 第四十三条の規定に従ってこの条約が効力を生ずる日
(4) the extensions referred to in Article 39;	(4) 第三十九条に規定する適用宣言
(5) the declarations referred to in Articles 38 and 40;	(5) 第三十八条及び第四十条に規定する宣言
(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;	(6) 第二十四条及び第二十六条第三項に規定する留保並びに第四十二条に規定する留保の撤回
(7) the denunciations referred to in Article 44.	(7) 前条に規定する廃棄
In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.	以上の証拠として、下名は、正当に委任を受けてこの条約に署名した。
Done at the Hague, on the 25th day of October 1980 in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Forteenth Session.	千九百八十年十月二十五日にハーグで、ひとしく正文である英語及びフランス語により本書一通を作成した。本書は、オランダ王国政府に寄託するものとし、その認証謄本は、外交上の経路を通じて、ハーグ国際私法会議の第十四回会期の時の各構成国に送付する。

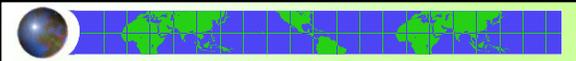
Argentina Australia Austria Belgium Bahamas Belarus
 Belize Bosnia & Herzegovina Brazil Burkina
 Faso Canada Chile Colombia Costa Rica Croatia
 Cyprus Czech Republic Denmark Ecuador El Salvador
 Estonia Fiji Finland Former Yugoslav Republic of
 Macedonia France Georgia Germany Greece Honduras
 Hong Kong Special Administrative Region Hungary
 Iceland Ireland Israel Italy Luxembourg Macau
 Special Administrative Region Malta Mauritius
 Moldova Mexico Monaco Netherlands New Zealand
 Nicaragua Norway Panama Paraguay Peru Poland
 Portugal Romania Saint Kitts and Nevis Slovakia Slovenia
 Spain Sweden Switzerland South Africa Trinidad and
 Tobago Turkmenistan Turkey United Kingdom
 United States Uruguay Uzbekistan Venezuela
 Yugoslavia Zimbabwe



The Hague Convention

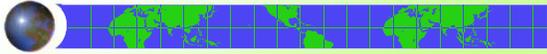


- ✦ Overview
- ✦ Common Problems
- ✦ Setting Up the Best Case for Return
- ✦ Issues on the Forefront



Overview – Signatory Nations

- ✦ 67 as of February 16, 2001
- ✦ New Additions
 - ▣ El Salvador
 - ▣ Slovakia
 - ▣ Nicaragua
- ✦ Ratifications vs. Accessions
- ✦ <http://www.hcch.net/e/status/abdshte.html>



Overview – Case in chief:

✦ The Hague Convention provides for the prompt return between signatory nations, of a child under the age of 16 who was wrongfully removed from his or her habitual residence in violation of the custody rights of a parent.



Overview – Case in Chief

- ✦ Prompt = six weeks
- ✦ Signatory Nations = 67 at this time
- ✦ Wrongful removal = no acquiescence, consent – in violation of custody rights
- ✦ Habitual Residence = where the child has settled
- ✦ Custody rights = more than visitation only



Overview – Defenses

- ✦ Preponderance Issues
 - ❑ Consent or Acquiescence
 - ❑ Delay: more than year + child settled
- ✦ Clear and Convincing Issues
 - ❑ Return = grave risk of physical or psychological harm
 - ❑ Denial of Fundamental Rights and Freedoms



Common Problems - Infant abducted by Primary Custodial Parent

- ✦ Origin and Underpinnings of Convention
- ✦ Grave Risk Issues
 - ❑ Interruption of bonding
 - ❑ Return to country without support system



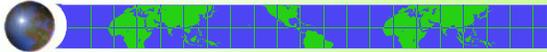
Common Problems – Domestic Violence

- ✦ Ability / Willingness of authorities to afford protections
- ✦ Existence of restraining orders



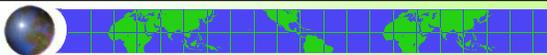
Common Problems – Criminal Charges Pending against Abductor

- ✦ Perception by other foreign states
- ✦ States where victim decides whether to seek charges



Setting Up the Best Case For Return

- ✦ Application & supporting documents are the case in chief
- ✦ Problem – Abducting Parent is personally in front of the foreign court
- ✦ Fam. Code §3110



Issues on the Forefront

- ✦ Communication between courts
- ✦ Reduction in Number of Judges Available to try cases
- ✦ Dealing with diverse systems of law and societal values



Reducing the Number of Judges Hearing Cases

Type of Court	Number of Judges	May Hear Hague Cases
United States District Court	646	Yes
United States Courts of Appeals	167	Yes
State Appellate Courts	1243	Yes
State General Jurisdiction Courts	10,163	Yes
State Limited Jurisdiction Courts	18,630	Some possible
Total	30849	



Argentina Australia Austria Belgium Bahamas Belarus
Belize Bosnia & Herzegovina Brazil Burkina
Faso Canada Chile Colombia Costa Rica Croatia
Cyprus Czech Republic Denmark Ecuador El Salvador
Estonia Fiji Finland Former Yugoslav Republic of
Macedonia France Georgia Germany Greece Honduras
Hong Kong Special Administrative Region Hungary
Iceland Ireland Israel Italy Luxembourg Macau Special
Administrative Region Malta Mauritius Moldova
Mexico Monaco Netherlands New Zealand Nicaragua
Norway Panama Paraguay Peru Poland Portugal
Romania Saint Kitts and Nevis Slovakia Spain Sweden
Switzerland South Africa Sri Lanka Trinidad and
Tobago Turkmenistan Turkey United Kingdom
United States of America Uruguay Uzbekistan Venezuela
Yugoslavia Zimbabwe

The Concept of Promptness

Returning Children under the Provisions of the 1980 Hague Convention

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children

Expeditious = 6 weeks

- “If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.” Art. 11.

Two facets of Promptness

- 1. Use of the most speedy procedures known to the legal system**
- 2. Applications given priority over other cases**

- Perez-Vera Report ¶¶ 104-105

Case Management -

- **The Special Commission calls for firm management by judges, both at trial and appellate levels, of the progress of return proceedings**

Case Management -

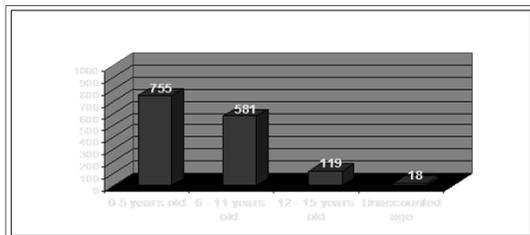
First Hearing - Dealing with Immediate Issues:

- Applicability of Convention
- Scheduling -
- Need for Counsel
 - For Child -
 - For Party -
 - Security of the Child -

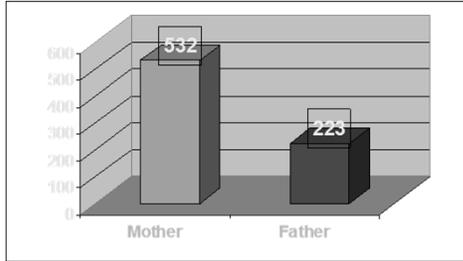
Does the Convention Apply to this case?

- Signatory Nations -69 Nations have signed, ratified, or acceded to the Convention
- Age of Child - The treaty applies only to children under the age of sixteen years

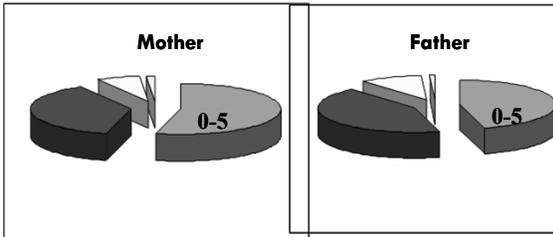
Total Abductions (1473) by Age 1996-2000
Abductions to the United States



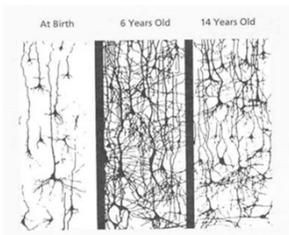
Total Abductions 1996 - 2000 by Gender Children 5 and under



Gender of Abductor / Age of Child



Brain Development



- **Synaptic density:** Synapses are created with astonishing speed in the first three years of life
- **For the rest of the first decade,** children's brains have twice as many synapses as adult's brains
- **Brain development** is a "use it or lose it" process: the experiences - positive or negative - that young children have in the first years of life influence how their brains will be wired as adults

Scheduling the Case

- **Standard for Promptness – 6 Weeks to resolve the case**
- **Involvement of Foreign Court**
- **Using Most Expeditious Procedures**

Representation by Counsel

- **U.S. takes Article 26 Reservation - no right to court appointed counsel**
- **Bar Associations**
- **Pro Bono Appointments**
- **Counsel for Child**
- **Cases involving domestic violence**
 - Where an existing order is sought to be enforced

Preventing Re-Abduction

- **Non - removal orders**
- **Supervised Visitation**
- **Secure Passport**
 - Parent
 - Children
 - Notification of Passport Agency
- **Bond or Cash in lieu**
- **Placement of child in Foster home**

**Dealing with Potential Abductions -
Identifying the High Risk Cases**

- **Wealthy Parents -**
- **Poor Parents -Transferable skills -**
- **Perception of valueless parent**
- **Support system in foreign country**
- **Previous abductions or threats –**
- **Effect of Orders or Lack of Orders**
 - **Men: More likely to abduct before order is made**
 - **Women: More likely to abduct after an order is made**

Difficult Cases

- **Difficult cases get more difficult with the passage of time**
 - **Child becomes estranged from absent parent**
 - **Alienation of child made more possible**
 - **Time is on the side of the abductor**

Trends and Emerging Issues -

- **Promptness**
 - **Trial Level**
 - **Appellate Level**

- **Grave Risk – Finding must be supported by examining full range of options which might allow safe return of child.**

Communication with Foreign Courts

Hello? Hello?
What the..



Hallo. Hallo.
Mit wem
spreche ich?



INTERNATIONAL RELOCATION: U.S. CONSTITUTIONAL CHALLENGES TO
HEARING THE VOICE OF A CHILD

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WALLING, BERG & DEBELE, P.A.
MINNEAPOLIS, MINNESOTA

“A child's voice, however honest and true, is meaningless to those who've forgotten how to listen.”

— J.K. Rowling, *Harry Potter and the Prisoner of Azkaban*

The pressure for recognition of children having their own, independent of their custodian, point of view is spreading in the global community. There is, perhaps, no more compelling occasion in which a child will wish to be heard than when they may be subject to international relocation. The Washington Declaration establishes certain best practices for the courts in addressing international relocation proceedings. An essential element of the Declaration requires that judicial discretion be guided in particular, but not exclusively, by factors which include “the views of the child having regard to the child’s age and maturity”. Judicial consideration of a child’s view is not an uncommon statutory factor for United States’ court judges to consider in child custody and relocation cases. Information regarding a child’s view is provided to most U.S. courts through the reports of a Guardian *ad Litem* expressing his or her opinion of what is in the child’s best interests. A report of a child’s overall best interests does not necessarily reflect the child’s wishes with regard to the preservation of their family relationships. In fact, in most U.S. courts children have no right to participate in decisions regarding their own care and control or relocation to another state or country. Deeply rooted values about children’s place in a family imbue our law and policy on children’s rights. This article explores those values as they are expressed in various U.S. Supreme Court rulings and summarizes how different states address a child’s view.

CONSTITUTIONAL CHALLENGE: COMPETING RIGHTS

The United States’ Constitutional jurisprudence concerning children is, at best, convoluted and strained. The U.S. Supreme Court has held that children have the right of free speech¹, the right to counsel², and the right to privacy in the form of birth control.³ The right of children to be heard on matters concerning their familial relations, however, has never been addressed nor specifically recognized.

Constitutional due process requires procedural protection of a parent’s interest in the care, companionship, and custody of his or her children.⁴ No justifiable reason exists in the law to assume that family relationships are less important to a child than to a parent. In fact, such relationships should be presumed to be of far greater significance to a child, because of a child’s unique vulnerability.

Following the logic of *Prince v. Massachusetts*,⁵ *Wisconsin v. Yoder*,⁶ and the progeny of the U.S. Supreme Court, it has been consistently recognized that strict scrutiny must be applied

when the state seeks to stand in the place of a parent to a child. This broad authority arises from the concept of *parens patriae*.

The doctrine of *parens patriae*, or ‘parent of the country,’⁷ is defined in Black’s Law Dictionary to be [the] role of [the] state as sovereign and guardian of persons under legal disability.⁸ Conceptually, the doctrine is derived from the common law notion of a king’s royal prerogative as “the general guardian of all infants, idiots and lunatics”⁹ An individual’s inability to protect his or her own interests was, historically, the central justification for recognizing the sovereign’s prerogative to act on an individual’s behalf.¹⁰ The doctrine became the catalyst for formation of the juvenile courts in the United States in the latter part of the 19th century.¹¹ The wide sweep of the doctrine has spread despite the cogent criticism found in the landmark decision of the United States Supreme Court in *Gault*, which discussed the history of denying children basic rights of due process in the juvenile court system as excused by the doctrine.¹² .

“These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky, and its historic credentials are of dubious relevance.”¹³

Today, in many of the U.S. states, the doctrine is similarly applied to the imposition of presumptions and burdens on parents who apply for geographic relocation while retaining custody of their children. The use of *parens patriae*, however, is subject to constitutional scrutiny. "Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."¹⁴

State governments may not override parental decisions or terminate custody, unless: (1) parents delegate their authority to the state voluntarily and knowingly, or (2) the state demonstrates through appropriate due process that there is clear and convincing evidence that the parents have triggered state *parens patriae* interests by placing their children in clear and present danger.¹⁵ None of these strictures have been applied to states where custodial parental choice to relocate has been subsumed by the application of the *parens patriae* theory to law, which imposes presumptions and burdens on the parent requesting the move. *Parens patriae* permits the state to stand in the place of the parent, clearly avoiding consideration of the right of the child to be heard in matters concerning family relationships. For example, the state of Minnesota has held that a parent’s custody of a child may be geographically restricted by impinging on the constitutional right to travel by elevating the child’s welfare and opportunity to have a relationship with the other “parent” vis-a-vis *parens patriae* to a compelling state interest.¹⁶

The right to travel between states is well established in the United States.¹⁷ It encompasses the right to "migrate, resettle, find a new job, and start a new life."¹⁸ Additionally, "[i]t makes no

difference that the parent who wishes to relocate is not prohibited outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether.”¹⁹

U.S. courts that have considered the relocation question have acknowledged that the right to travel is implicated when a child’s majority time parent seeks to remove the child from the state.²⁰ These courts, however, have not been able to agree on how to balance the right to travel with the rights of the minority-time parent in a best interests of the child analysis. This uncertainty has resulted in the development of three distinct approaches to this issue. The first, the state of Wyoming’s, elevates the relocating parent’s right to travel over the other competing interests.²¹ The second approach, adopted in the state of Minnesota, eliminates the need to balance the parents’ competing constitutional rights in favor of elevating the child’s welfare to a compelling state interest.²² The third approach, adopted by the state of New Mexico’s, treats all the competing interests as equal, holding that both parents’ constitutional interests, as well as the best interests of the child, will be best protected if each parent shares equally in the burden of demonstrating how the child’s best interests will be impacted by the proposed relocation.²³ These three approaches beg the question of the opportunistic use of the *parens patriae* theory to invade basic constitutional rights while ignoring the voice of the child in the consideration of the relocation. Is it not possible that the swelling recognition of the rights of a child to be heard so evident in the rest of the world will be established in the United States?

HEARING CHILDREN’S VOICES THROUGH INTERNATIONAL LAW

The United Nations Convention on the Rights of the Child, September 1990,²⁴ Article 13 gives children the right to be heard on matters concerning them. The European Convention of the Exercise of Children’s Rights, 2000,²⁵ Chapter II, A, Article 3 gives children the right to be informed and express their views in all proceedings which affect them. Only the United States and Somalia have not joined the UN Convention on the Rights of the Child.

Globalization, with the attendant commercial pressures and political influences may soon influence United States constitutional examination of the question of recognition of a child’s right to be heard on matters concerning his or her familial relationships. “[I]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage and freedom.”²⁶

It is well-established by the international community that children must be treated with respect, humanity and dignity.²⁷ These standards indicate consensus within the world community regarding the treatment of children. International law has a growing importance in domestic courtrooms.²⁸ Although the U.S. has ratified some international covenants that mandate treatment of youth with respect and humanity,²⁹ even when international law does not place binding authority on U.S. law, it remains an influential force when considering constitutional and

human rights questions. The Supreme Court has twice stated that international authority and foreign laws are “instructive” and embody the “opinion of the world community” and therefore serve as a source of “respected and significant confirmation for the court’s own conclusions.”³⁰

While there is no right attributed to children to maintain a familial relationship, the U.S., as does the rest of the world, largely determines relocation cases by using the best interest analysis on a case by case, fact-specific approach, utilizing varying burdens of proof and presumptions, in which the views of the child are usually heard and represented to the fact finder by a surrogate.³¹ However, a child’s preferences are often inferred by observation and interviewing everyone but the child who is the subject to the proceedings. Only in international relocation cases which arise under The Hague Convention on Child Abduction does the court have an opportunity to hear the child voice an objection to return in the Article 13 defense.

The tide seems to be turning on our parochial body of law that children’s interests are best protected through exercise of parental rights. The dissent of Justice Stevens in *Troxel v. Granville*, suggests a future for children to assert their right to a familial relationship³²:

A parent's rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae*, see, e. g., *Reno v. Flores*, 507 U. S. 292, 303-304 (1993); *Santosky v. Kramer*, 455 U. S., at 766; *Parham*, 442 U. S., at 605; *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944), and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection, *Santosky*, 455 U. S., at 760.

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, *Michael H. v. Gerald D.*, 491 U.S. 110, at 130, 109 S. Ct. 2333, 104 L.Ed.2d 91 (1989) (reserving the question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattels. See *ante*, at 64-65 (opinion of O'Connor, J.) (describing States' recognition of "an independent third-party interest in a child"). The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child. (citations omitted)

Increasingly, around the globe, the children are being afforded the right to be heard in legal proceedings which affect their welfare and familial relationships. The Washington Declaration establishes certain best practices for the courts in addressing international relocation proceedings.³³ An essential element of the Declaration requires, at paragraph 4, that judicial discretion be guided in particular, but not exclusively, by factors which include, at ii), “the views of the child having regard to the child’s age and maturity”.

Any consideration of how the voice of the child is conveyed to the court must be precise in language and procedure. As stated above, most of the states in the U.S. have adopted a best interests analysis which includes the child’s preferences or desires. In almost every instance, however, the determination of those preferences is made by a Guardian ad Litem (GAL) whose job is to represent the best interests of the child, which may not be the child’s preferences or wishes. Except in cases where parental or paternity rights are being established, or are being terminated, the children are rarely represented by counsel.

HEARING A CHILD’S VOICE: VARIATION AMONG STATES

The American Bar Association Steering Committee on the Unmet Needs of Children concluded in 2001 that “[c]hildren should have competent counsel representing their interests in all significant judicial proceedings that affect their lives”.³⁴ The ABA went on in 2003 to establish and define the standards for counsel representing children, which include the following:³⁵

1. The “Child’s Attorney,” who provides independent legal counsel for the child and owes the same duties of undivided loyalty, confidentiality, and competent representation as are due and adult client, pursuant to state rules of professional responsibility; and
2. The “Best Interests Attorney,” who provides independent legal services for the purpose of protecting the child’s best interests, but is not necessarily bound by the child’s directive or objectives.

In many states, the “Best Interests Attorney” role, when assumed by an attorney, may violate state attorney rules of professional conduct.³⁶ More commonly, a court appointed GAL or law guardian who is not an attorney will assume this role. The appointment of a GAL for children in proceedings governing their custody and protection began in the U.S. with the federal Child Abuse Prevention and Treatment Act (CAPTA) which requires the appointment of a “guardian *ad litem*” for every child involved in an abuse or neglect case as a condition for receiving federal CAPTA funding.³⁷

According to CAPTA, a guardian *ad litem*, who may be an attorney or a court appointed special advocate, is someone who:

has received training appropriate to that role (or both), shall be appointed to represent the child . . . (I) to obtain first-hand, a clear understanding of the

situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.

In proceedings outside CAPTA, or ordinary child protection proceedings, wide variation exists from state to state in the function and utility of the GAL. Typically, the issue of advocacy for the child is left to the discretion of the court.³⁸

This preference for hearing the child's voice by proxy may be coming to an end. Commencing in January 2012 California Family Code sec 3042 mandates that the child's actual voice be heard³⁹:

(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation.

(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.

(c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record.

(d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interests.

(e) If the court precludes the calling of any child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences.

(f) To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

(g) Nothing in this section shall be construed to require the child to express to the court his or her preference or to provide other input regarding custody or visitation. (emphasis supplied)

There is considerable concern among family law professionals in California about how this law will be implemented in a family court system that is already overburdened and ill equipped to handle children participating in custodial determinations.⁴⁰ Whether the voice of the child continues to be filtered by the above described various child representatives or whether the child will be given an actual voice is unknown at this time. Given the barren fiscal landscape in California and other U.S. jurisdictions, it is likely that the child's voice will be heard in an *ad hoc* manner, arising out of the unique facts and financial resources specific to each family. The following is a sample of various states' laws governing relocation and the means by which a child will be permitted to express his or her opinion.

Minnesota

Recently enacted legislation, M.S.A. § 518.175, subd.3, dramatically shifted the burden of proof in relocation cases from the non-custodial parent to the custodial parent wishing to make the move.⁴¹ Imposing the best interests standard found in M.S.A. § 518.17, which includes the reasonable preference of the child, at subdivision 2, if the court deems the child to be of sufficient age to express preference. Minnesota has defined the circumstances under which a child may be interviewed by the court to ascertain preferences in M.S.A. § 518.166:

The court may interview the child in chambers to ascertain the child's reasonable preference as to custodian, if the court deems the child to be of sufficient age to express preference. The court shall permit counsel to be present at the interview and shall permit counsel to propound reasonable questions to the child either directly or through the court. The court shall cause a record of the interview to be made and to be made part of the record in the case unless waived by the parties.

In contested custody proceedings, and in other custody proceedings, if a parent or the child's custodian requests, the court may seek the recommendations of professional personnel whether or not they are employed on a regular basis by the court. The recommendations given shall be in writing and shall be made available by the court to counsel upon request. Counsel may call for cross-examination of professional personnel consulted by the court.

In the prior twenty years, the preference of the child was a viable element of the best interests' analysis.⁴² Contrary decisions in the same decade illuminate the fact specific nature of the inquiry.⁴³

The conclusion that a child is of sufficient age to express a preference in Minnesota is fact specific to each case regardless of age and has generally fallen into disfavor in recent years. Minnesota cases which recognize the child's preference are largely from before 2000. Only in the *Goldman* case, later reversed for other reasons, was consideration of the child preference discussed.⁴⁴ The appellate court took note that the mother's affidavits stated a *prima facie* case of 11-year-old child's preference to move from Minnesota to New York City such that mother, who

filed motion for removal, was entitled to a determination of the child's best interests at a hearing. On remand the trial court was required to examine the needs and the preferences of the child as well as the impact of the proposed change, including enhancements to child's general quality of life; affidavits stated that child had been enveloped in the Orthodox Judaism way of life and that the Orthodox tradition had become a way of life for the child, that child had expressed a passion for New York City, and that New York City offered a greater opportunity for advanced Jewish studies.

New York⁴⁵

Relocation proceedings in New York are governed by the *Tropea* case decided in 1996.⁴⁶ Under *Tropea* the party seeking relocation has the burden of establishing, by a preponderance of the evidence, that the proposed relocation is in the child's best interests, with reference made to the following list of nonexclusive factors: (1) each parent's reasons for seeking or opposing the move, (2) the quality of the relationships between the child and the custodial and noncustodial parents, (3) the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, (4) the degree to which the custodial parents and child's life may be enhanced economically, emotionally, and educationally by the move, and (5) the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.⁴⁷ In general, while courts consider a child's preference when determining the outcome of relocation cases, a child's preference is almost never determinative. It is considered only as a factor in conjunction with the other factors that the court must take into account in the majority of the states in the U.S.⁴⁸ New York courts' reason that the child's preference is closely scrutinized when the child is not of a sufficient age is to understand the consequences of relocation.⁴⁹

In New York, the Article 13 Defense, objection of the child, is controlled by *Croll v. Croll*,⁵⁰ which held that while one of the defenses that can be raised is the child's desire not to be returned after wrongful removal under Article 13, courts have not placed great emphasis on the child's preferences. In *Sheikh v. Cahill*, the court found that a nine year old boy had been wrongfully removed from his mother's custody in London despite the boy's wishes to stay with his father in the United States, as determined by an *in camera* interview. The court ruled that the boy did not possess sufficient age or maturity to warrant a finding of non-return based on his preference alone.⁵¹ Likewise, in *Daniel H. v. Catherine Ann O.H.*, the court found that based on an *in camera* interview, though the parties' ten year old son was sufficiently mature and capable of forming a preference to remain in the United States after having been wrongfully removed from his country of habitual residence, Cyprus, because his seven year old brother lacked the maturity to make the same determination.⁵² The court found that both children were returnable, because there were no overwhelming circumstances to justify their separation as brothers or to allow the ten year olds' preference govern the outcome of the case.⁵³

Texas

Texas, like most of the United States in relocation cases, applies the best interest analysis which includes the “desires or preferences” of the child. *Holley v. Adams*, remains the law outlining the best interests standards.⁵⁴

In the context of relocation, the expression of the child’s preference does not appear to be a factor. In *Lenz v. Lenz*,⁵⁵ the Texas Supreme Court dealt with two German citizen parents, one of whom wanted to move back to Germany. The Texas Supreme Court stressed that old standards of relocation which place a burden on the parent choosing to move may not be feasible or appropriate in our society today since there is “[i]ncreasing geographic mobility and the availability of easier, faster and cheaper communication.” The Court then looked at other states to discuss the following factors now deemed more relevant in today’s society: (1) reasons for or against the move; (2) comparison of health, education and leisure opportunities; (3) whether special needs and talents of the children can be accommodated; (4) the effect on extended family relationships; (5) the effect on visitation and communication with the non-custodial parent to maintain a full and continuous relationship with the child; and (6) whether the non-custodial parent has resources to relocate. The preference of the child is nowhere mentioned.

In *Echols v. Olivarez*, the Texas court expanded the factors discussed in *Lenz* to include the “context of the custodial parent’s happiness.”⁵⁶ The idea is that the custodial parent’s happiness can influence the child’s happiness. Since the Texas Supreme Court in *Lenz* left the list of factors open, this seems a legitimate factor to consider in the relocation context, though the weight that should be assigned this factor is certainly not determinative of the relocation issue.

The Rest of the World

As a member of the International Academy of Matrimonial Lawyers I enjoy the remarkable ability to inquire of over 500 lawyers all over the world on how their jurisdictions treat the child’s right to be heard in legal proceedings that have an effect on their familial relationships. Below is a summary of some of their responses.

United Kingdom

In the United Kingdom, it is generally accepted that in family court matters, such as relocation, the child will be interviewed by a CAFCASS (Children and Family Court Advisory and Support Service) officer and then that officer will report their findings to the court.⁵⁷

Re W [2010] 1 FLR 1485 discussed at length by Barbara Mills in her paper, The Voice of the Child in Family Law Proceedings in England and Wales⁵⁸ in the Summer 2011 IAML Journal, the test to be applied when considering whether a child should be called to give oral evidence in family proceedings. The paper states that for some, this new approach, which essentially removes the presumption that a child should rarely be asked to enter the fray and give evidence, is a natural progression of the continuing “voice of the child” debate. The court in Re W held:

The current law, whereby there is a presumption or starting point that a child will not give evidence, is at odds with the approach of the European Courts of Human Rights. In family proceedings, a balance needs to be struck between the Article 6 rights for fair trial which must include the ability to challenge evidence and Article 8 rights to respect family life.

Primarily considering cases in which allegations of neglect or abuse are addressed, the question remains open as to when the child's voice will be heard in relocation matters.

In response to *In Re W*, The Working Party of the Family Justice Council (2011)⁵⁹ developed guidelines relevant to the consideration of whether or not a child should be further questioned or give evidence in family proceedings. In carrying out the balancing exercise the Court should have regard to:

- (a) the child's wishes and feelings; in particular their willingness to give evidence; as an unwilling child should rarely if ever be obliged to give evidence;
- (b) the child's particular needs and abilities;
- (c) the issues that need to be determined;
- (d) the nature and gravity of the allegations;
- (e) the source of the allegations;
- (f) whether the case depends on the child's allegations alone;
- (g) corroborative evidence;
- (h) the quality and reliability of the existing evidence;
- (i) the quality and reliability of any ABE interview;
- (j) whether the child has retracted allegations;
- (k) the nature of any challenge a party wishes to make;
- (l) the age of the child; generally the older the child the better;
- (m) the maturity, vulnerability and understanding, capacity and competence of the child;
- (n) the length of time since the events in question;
- (o) the support or lack of support the child has;
- (p) the quality and importance of the child's evidence;
- (q) the right to challenge evidence;
- (r) whether justice can be done without further questioning;
- (s) the risk of further delay;
- (t) the views of the guardian;
- (u) specific risks from the child giving evidence twice in criminal or other and family proceedings;
- (v) the serious consequences of the allegations ie whether the findings impact upon care and contact decisions.

On a practical level, it is suggested that apart from cases involving allegations of sexual abuse, it is likely to remain unusual for children to give oral evidence in family proceedings.⁶⁰

However, in the context of Hague proceedings and the child objection defense, greater weight

has been given the child's expressed preferences albeit largely through the same CAFCASS officers.⁶¹ The actual consideration of the child's wishes remains unclear. For example in *WF v FJ, BF & RF* [2010] EWHC 2909 (Fam), [2011] 1 FLR 1153, the court concluded that in abduction proceedings a child's wishes and feelings and objections to summary return are central to proceedings. In *Re W (Abduction: Child's Objections)* [2010] EWCA Civ 520, [2010] 2 FLR 1165 Wilson LJ, as he then was, made the following observation (at para.17):

"Over the last thirty years the need to take decisions about much younger children not necessarily in accordance with their wishes but at any rate in the light of their wishes has taken hold: see Article 12 of the UN Convention on the Rights of the Child and note, for EU states, the subtle shift of emphasis given to Article 13 of the Hague Convention by Article 11(2) ... of Brussels II Revised. Fortunately Article 13 was drawn in terms sufficiently flexible to accommodate this development in international thinking; and although her comment was obiter, I am clear that, in the context, the observation of Baroness Hale of Richmond in *Re D (Abduction: Rights of Custody)* [above] at para 59 that "children should be heard far more frequently in Hague Convention cases than has been the practice hitherto" related to the defence of a child's objections."⁶²

Canada

In Canada, the objection of the child must be more than a mere expression of preference in Hague proceedings.⁶³ To prove that a child objects, it must be shown that (1) the child "displayed a strong sense of disagreement to returning to the jurisdiction of his habitual residence; (2)The child was adamant in expressing his objection; and (3)the objection cannot be ascertained by simply weighing the pros and cons of the competing jurisdictions, such as in a best interests analysis. It must be something stronger than a mere expression of preference.⁶⁴

Phyllis Brodtkin and Michael Stangarone have also recently published an article in the *IAML Journal*⁶⁵ entitled *Ascertaining the "Voice" of the Child in the International Context – The 'Objection Exception' under Article 13 of the Hague Convention* in which the weight of the child's objections under the Article 13 defense is considered. Greater consideration for the child's preference seems to be considered regardless of the relocation issue, national or international. Privately, Ms. Brodtkin expressed that children are appointed lawyers at no charge in relocation cases.⁶⁶ Private mental health workers generally present the children's views and wishes to the court. Trudie Brown of British Columbia reports that the "BC Hear the Child Society" is currently training lawyers and others to talk to children and present a report to the court and has recently passed legislation to give children a voice in cases involving their health and welfare.⁶⁷ Bear in mind that in the U.S. very little, if any, resources are made available to the children in family court proceedings.

Finally there is a decision from Yukon which explicitly addresses the need to hear from children in cases involving their custody, a copy of which is attached,⁶⁸ which clearly states the importance of the child being heard:

More than just lip service must be paid to children's legal rights to be heard. Because of the importance of children's participation to the quality of the decision and to their short and long term best interests, the participation must be meaningful; children should:

1. be informed, at the beginning of the process, of their legal rights to be heard;
2. be given the opportunity to fully participate early and throughout the process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials;
3. have a say in the manner in which they participate so that they do so in a way that works effectively for them;
4. have their views considered in a substantive way; and
5. be informed of both the result reached and the way in which their views have been taken into account.

Separate legal representation for children is an effective way of making sure that the participation of children is meaningful. The Yukon has the benefit of an official guardian who has the right to decide, in custody proceedings, whether any child requires publicly funded separate representation by a lawyer or other person: s.168, *Children's Law Act*.

An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there should be a determination of the method by which the child will participate. While the views of parents about participation are relevant, they are not determinative.⁶⁹

*Israel*⁷⁰

Israel does not have a vehicle for the child's views to be expressed beyond the appointment of a mental health professional to interview the child and report to the court. This approach extends to Article 13 Objection defenses as well.⁷¹

Ireland

In Ireland, the welfare of a child is paramount and includes not only physical and social welfare but also religious, moral and intellectual welfare as well. The child's opinion may be reported to the court by a child specialist. The child is also generally interviewed by a Child Specialist when Article 13 Defense of Objection is addressed.⁷²

Scotland

In Scotland, all proceedings involving children require that the sheriff or judge take into account the child's views. A curator *ad litem* may be appointed to represent and report the child's best interests and views to the court. A child has the right to be a party, and there is a presumption at age twelve that a child has the capacity to instruct their solicitor. Failure to give weight to the views of the child is a basis for reversal.⁷³

*New Zealand*⁷⁴

Issues relating to both relocation and Hague Convention matters in New Zealand are governed by the provisions of the Care of Children Act 2004, sections 6 and 7, which have quite deliberately been placed at the forefront of the statute to emphasize their importance.

6. Child's views

(1) This subsection applies to proceedings involving

(a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or (b) the administration of property belonging to, or held in trust for, a child; or (c) the application of the income of property of that kind.

(2) In proceedings to which subsection (1) applies

(a) a child must be given reasonable opportunities to express views on matters affecting the child; and (b) any views the child expresses (either directly or through a representative) must be taken into account.

7. Lawyer to act for child

(1) A court may appoint, or direct the Registrar of the court to appoint, a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.

(2) However, unless it is satisfied the appointment would serve no useful purpose, the court must make an appointment or a direction under subsection (1) if the proceedings

(a) involve the role of providing day-to-day care for the child, or contact with the child; and (b) appear likely to proceed to a hearing.

(3) To facilitate performance of the lawyer's duties and compliance with section 6 (child's views), the lawyer must, unless he or she considers it inappropriate to do so because of exceptional circumstances, meet with the child.

(4) The lawyer may call any person as a witness in the proceedings, and may cross-examine witnesses called by a party to the proceedings or by the court.

It must be noted that it is not the general practice in New Zealand to appoint a lawyer for child in Hague Convention proceedings unless a defense is raised under Article 13 (grave risk or child objects) or the defense is raised under Article 12 that the child has been in his or her new environment for a period in excess of one year and is settled. Otherwise, New Zealand considers

that the provisions of the Convention are jurisdictional rather than substantive. Accordingly children's views are not otherwise relevant.

In relocation cases, however, the child's views must be ascertained and appointment of a lawyer to act for the child is mandatory under section 7. Views expressed by the child however are not determinative, but simply have to be "taken into account" with a Judicial assessment normally following as to the weight to be given to the child's views. Consideration is given not only to the child's age and stage of maturity but also the child's knowledge of the consequences of relocation. This means that if a child is not familiar with the new proposed environment this lack of familiarity will be a salient factor in assessing weight.⁷⁵

*Spain*⁷⁶

Spanish civil law provides that children have the right to be heard by the judge if they are at least twelve years old. If they are younger than twelve, between the ages of four and eleven, then it depends on the judge's discretion. Once the child has been heard by the judge, the parties generally do not have the right to know the substance of that conversation: however disclosing this information with within the discretion of the court.

*Germany*⁷⁷

Children have a constitutional right to be heard in any proceeding which affects their familial relationships. BVerG FamRZ2007, 105; BVerfG FamRZ 2007, 1078 Children fourteen years old and over must be heard, and those younger may be heard as to their wishes even as young as 4 within the discretion of the court. The court may abstain from hearing the child's views only if there is special and relevant reasons to not do so.

*Greece*⁷⁸

In relocation cases, the personal opinion of the child must be sought and taken into consideration by the court in making its decision.⁷⁹

*Sweden*⁸⁰

In Sweden, divorcing parents engage in "cooperation talks" with the assistance of social workers designed to produce an agreement which later becomes a court order. Failure to participate in the talks can be construed against the resisting parent as against the child's best interests. If the views of the child are to be heard, then they are conveyed via the investigator's report which includes the child's views and the investigator's objective recommendations.

*South Africa*⁸¹

All matters concerning children are addressed in the Constitution of the Republic of South Africa of 1996. The best interests of the child has always been the analysis utilized, however, recently S.A. has adopted the Children's Act No. 38 of 2005 (The Act) which provides in its preamble

that every child has the rights set out in Section 28 of the Constitution and the State must respect, protect, promote and fulfill those rights. The Act goes on to provide at Section 6(5) that a child, having regard to their age, maturity and stage of development, must be informed of any action or decision taken in a matter concerning the child and which significantly affects the child.

*Australia*⁸²

The focus as of late has been on the methods for maintenance of the parent child relationship if a relocation were to occur. It is in this examination where the views of the child may be considered. In these cases the children will have their own separate representations.

CONCLUSION

Many organizations in the U.S. have published standards for the representation of children⁸³; however, consensus has yet to be reached on the right of a child to be heard. The Washington Declaration makes it clear, along with an increasing number of nations other than the United States, that children have the right to be heard on matters so serious to their future well-being as relocation. Before that right is established, however, clarity is needed regarding the implementation of that right. The muddle in the U.S. between the best interests' representation by a law guardian or guardian *ad litem* and actual representation will have to be made uniform.

¹ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1963).

² *In re Gault*, 387 U.S. 1 (1967)

³ *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) in which the court specifically held; "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights".

⁴ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

⁵ *Prince v. Massachusetts*, 321 U.S. 158, 64 (1944).

⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁷ *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 600 (1982) (quoting Black's Law Dictionary 1003 (5th ed. 1979).

⁸ Black's Law Dictionary, page 1144, 2004 West Group

⁹ *Rivers v. Katz*, 67 N.Y.2d 485, 496, 504 N.Y.S.2d 74, 80 (1968).

¹⁰ *Late Corp. of Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890).

¹¹ F.Faust & P.Brantingham (eds.). *The Invention of the Juvenile Courts Juvenile Justice Philosophy* 550-557 (1974)

¹² *In re Gault*, 387 U.S. 1 (1967).

¹³ *Id.* at 16.

¹⁴ *Meyer v. Nebraska*, 262 U.S. 390, 290 (1923). Applying due process principles and strict scrutiny analysis to limit state invocations of its *parens patriae* power. The court held liberty in "matters relating to marriage, procreation, . . . family relationships, and child rearing and education" are "fundamental" and "implicit in the concept of ordered liberty" as described in *Palko v. Connecticut*, 302 U.S. 319 (1937)." *Paul v. Davis*, 424 U.S. 693, 713 (1976). "In these areas . . . there are limits on the state's power to substantively regulate conduct." *Id.*

"[T]he admonition to function in a 'parental' relationship [of standing] is not an invitation to procedural arbitrariness." *Kent v. United States*, 383 U.S. 541, 555 (1965). States may not exercise such power in a manner that

has “all-encompassing scope and . . . sweeping potential for broad and unforeseeable application.” *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972). With respect to school teachers, they have only such portion of parental authority as a parent may choose to temporarily commit to the teacher's charge, in order to answer the purposes for which the parent has initiated the employment. *Vernonia School District 47J v. Action*, 515 U.S. 646, 654-55 (1995).

¹⁵ *C.f. Croft v. Westmoreland County Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997).

¹⁶ See *LaChapelle v. Mitten (In re L.M.K.O.)*, 607 N.W.2d 151, 163–64 (Minn. Ct. App. 2000).

¹⁷ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969) overruled on other grounds by *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

¹⁸ *Id.* at 629.

¹⁹ *Jaramillo v. Jaramillo*, 823 P.2d 299, 306 (N.M. 1991) (citing *Shapiro*, 394 U.S. 618 at 631).

²⁰ Some courts have held that removal cases do not implicate a parent's right to travel because removal statutes do not prohibit outright a parent's right to travel, but rather prohibit only a parent's right to travel with a child. See, e.g., *Lenz v. Lenz*, 40 S.W.3d 111, 118 n.3 (Tex. App. 2000) rev'd on other grounds by *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002). In contrast it has been held that “a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether.” *Jaramillo*, 823 P.2d at 306.

²¹ See *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999); at 615-616

²² See *LaChappelle*, 607 N.W.2d at 163–64.

²³ See *Jaramillo*, 823 P.2d at 307-09.

²⁴ <http://www2.ohchr.org/english/law/crc.htm>

²⁵ <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=160&CM=8&DF=3/19/2007&CL=ENG>

²⁶ *Roper v. Simmons*, 543 U.S. 551, 574-78 (2005).

²⁷ See International Covenant on Civil and Political Rights

²⁸ Stark, Barbara, The Internationalization of American Family Law, *J of the AAML*, Vol. 24, No. 2, 2012, page 467-487.

²⁹ See, e.g., International Covenant on Civil and Political Rights.

³⁰ *Roper*, 543 U.S. at 578; *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

³¹ A surrogate is a child custody evaluator, law guardian or Guardian ad Litem (GAL) who reports the child's best interests to the court.

³² *Troxel v. Granville*, 530 U.S. 57, 72, 120 S.Ct. 2054, 2072, 147 L.Ed.2d 49, 67 (2000)

³³ http://www.icmec.org/en_X1/icmec_publications/Washington_Declaration_English_.pdf

³⁴ American Bar Association Steering Committee on the Unmet Needs of Children, *America's Children Still at Risk*, 19, 209 (2001); See attached copy of the report, available at: http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf; also reprinted in 37 *Fam. L.Q.* 129 (2).

³⁵ *Id.*

³⁶ Rule 1.14 ABA Model Rules of Professional Conduct; see also Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, 13 *J.A. Acad. Matrim. Law.* 57, 65-67 (1995).

³⁷ See 42 U.S.C. § 5106(a)(b)(2)(A)(xiii) (2000).

³⁸ For a detailed analysis of the various roles played by advocates for children in the United States see Barbara Anne Atwood's article *Representing Children: The Ongoing Search for Clear and Workable Standards* available at: http://www.aaml.org/sites/default/files/representing%20children-article_0.pdf

³⁹ Email from Peter Walzer,

http://www.iaml.org/members_data/profile/peterwalzer/index.html?refer=/members/index.html, January 4, 2012, 11:26 am CST (on file with author)

⁴⁰ Leslie Ellen Shear, *Dude, I'm 14 years old and I'm here to address the court...Now What, California Prepares for Teenagers in Family Court*; *International Academy of Matrimonial Lawyers Journal*, Vol. 4, Summer 2011, available at: http://www.iaml.org/iaml_law_journal/current_issue/index.html.

⁴¹ Until the enactment of this legislation in 2006 relocations were governed by *Auge v. Auge*, 334 N.W.2d 393 (1983) in which the burden of preventing the move fell to the non-custodial parent to prove the move was intended to disrupt the parenting relationship and that permission to move must be granted unless there was otherwise a basis to change custody.

⁴² See, *Mowers v. Mowers*, App.1987, 406 N.W.2d 60,(the court acted within its discretion in finding that child, who was seven years and ten months old at time of hearing on former wife's motion to transfer custody, was of sufficient age to express her preference to remain with her father and did so without prior coaching and persuading). *Steinke v. Steinke*, App.1988, 428 N.W.2d 579, (trial court in custody matter should have considered of great significance strongly expressed preference of ten-year-old child to live with his mother).

⁴³ *Sucher v. Sucher*, 416 N.W.2d 182, (Minn. Ct. App.1987)(review denied; the court expressed preferences of children, aged four, six and seven years, was not to be considered by trial court in making custody determination in dissolution proceedings; oldest child did not exhibit significant maturity, and it appeared that father may have coached children before interviews); *Hoffa v. Hoffa*, 382 N.W.2d 522 (Minn. Ct. App.1986) (determination that it was in best interests of teenaged daughters to be placed in custody of wife, despite daughters' preference, was supported by evidence in dissolution proceeding that wife was able to provide better food, clothing, and parenting responsibilities than husband, that wife was in good health, whereas husband suffered from severe physical ailments, and that wife's character and experience was better suited to day-to-day task of raising daughters than husband).

⁴⁴ *In re Marriage of Goldman*, 725 N.W.2d 747 (Minn. Ct. App. 2007);review granted, rev'd, 748 N.W.2d 279 (Minn. 2008); rehearing denied

⁴⁵ Email from John Pappalardo,

http://www.iaml.org/members_data/profile/john_pappalardo/index.html?refer=/members/index.html, and his law clerk, Judith Murphy, January 9, 2012, 9:26 am CST)(on file with author)

⁴⁶ *Tropea v. Tropea*, 87 N.Y.2d 727, 739 (N.Y. 1996); Wisloh–Silverman, 834 N.Y.S.2d 539 (2d Dep't 2007).

⁴⁷ *Id.* at 740-41.

⁴⁸ *Elkus v. Elkus*, 588 N.Y.S.2d 138 (1st Dep't 1992); *Strahl v. Strahl*, 414 N.Y.S.2d 184 (2d Dep't 1979).

⁴⁹ *Clark v. Dunn*, 600 N.Y.S.2d 376 (3d Dep't 1993).

⁵⁰ *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

⁵¹ *Sheikh v. Cahill*, 546 N.Y.S.2d 517 (Sup. Ct. 1989).

⁵² *Daniel H. v. Catherine Ann O.H.*, N.Y.L.J (Sup. Ct. 1996).

⁵³ *Id.*

⁵⁴ *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976).

⁵⁵ *Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002).

⁵⁶ *Echols v. Olivarez*, 85 S.W.3d 475 (Tex. App. 2002).

⁵⁷ Email from Nigel Shepherd,

http://www.iaml.org/members_data/profile/nigel_shepherd/index.html?refer=/members/index.html, January 4, 2012 12:39 pm CST)(on file with author)

⁵⁸ Barbara Mills, *The Voice of the Child in Family Law Proceedings in England and Wales*, 2010, available at: http://www.iaml.org/cms_media/files/the_voice_of_the_child_in_family_proceedings_in_england_and_wales_revised.pdf

⁵⁹

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⁶⁰ <http://www.familylawweek.co.uk/site.aspx?i=ed96057>

⁶¹ Re W(Children) [2010] 1 FLR 1485 in which the views of children aged 6 and 8 objecting to return were considered though not found to be controlling.

⁶² *Ibid* at footnote 58

⁶³ *Crnkovich v. Hortensius*, [2009] W.D.F.L. 337, 62 R.F.L. (6th) 351, 2008, [INCADAT cite: HC/E/CA 1028].

⁶⁴ *Id.*

⁶⁵ http://www.iaml.org/cms_media/files/voice_of_child_in_hague_cases.pdf

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⁷⁷ Family Law, Jurisdictional Comparisons, First Edition 2011, page 127-142; at 128 and 140.

⁷⁸ *Ibid.* pages 159-172, at 171.

⁷⁹ Kounougeri-Manoledaki, The New Family Law II, Sakoulas Editions, Athens-Thessaloniki, 2003, at page 269.

⁸⁰ See endnote 71.

⁸¹ Email from Advocate B K Pincus

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⁸³ See AAML Custody Standards, *supra* note 112; American Bar Association, Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, 29 FAM. L.Q. 375 (1995) [hereinafter ABA Abuse and Neglect Standards]; National Association of Counsel for Children, American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version) (1996) [hereinafter NACC Revised Version]; American Bar Association, Standards of Practice for Lawyers Representing Children in Custody Cases, 37 FAM. L.Q. 126, 129 (2003) (ABA Custody Standards); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter ALI PRINCIPLES].

American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases

August 2003

I. INTRODUCTION

Children deserve to have custody proceedings conducted in the manner least harmful to them and most likely to provide judges with the facts needed to decide the case. By adopting these Standards, the American Bar Association sets a standard for good practice and consistency in the appointment and performance of lawyers for children in custody cases.

Unfortunately, few jurisdictions have clear standards to tell courts and lawyers when or why a lawyer for a child should be appointed, or precisely what the appointee should do. Too little has been done to make the public, litigants, domestic relations attorneys, the judiciary, or children's lawyers themselves understand children's lawyers' roles, duties and powers. Children's lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator, and surrogate decision maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system. These Standards distinguish two distinct types of lawyers for children: (1) The Child's Attorney, who provides independent legal representation in a traditional attorney-client relationship, giving the child a strong voice in the proceedings; and (2) The Best Interests Attorney, who independently investigates, assesses and advocates the child's best interests as a lawyer. While some courts in the past have appointed a lawyer, often called a guardian ad litem, to report or testify on the child's best interests and/or related information, this is not a lawyer's role under these Standards.

These Standards seek to keep the best interests of children at the center of courts' attention, and to build public confidence in a just and fair court system that works to promote the best interests of children. These Standards promote quality control, professionalism, clarity, uniformity and predictability. They require that: (1) all participants in a case know the duties, powers and limitations of the appointed role; and (2) lawyers have sufficient training, qualifications, compensation, time, and authority to do their jobs properly with the support and cooperation of the courts and other institutions. The American Bar Association commends these Standards to all jurisdictions, and to individual lawyers, courts, and child representation programs.

II. SCOPE AND DEFINITIONS

A. Scope

These Standards apply to the appointment and performance of lawyers serving as advocates for children or their interests in any case where temporary or permanent legal custody, physical custody, parenting plans, parenting time, access, or visitation are adjudicated, including but not limited to divorce, parentage, domestic violence, contested adoptions, and contested private guardianship cases. Lawyers representing children in abuse and neglect cases should follow the ABA Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996).

B. Definitions

- 1. “Child’s Attorney”:** A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.
- 2. “Best Interests Attorney”:** A lawyer who provides independent legal services for the purpose of protecting a child’s best interests, without being bound by the child’s directives or objectives.

Commentary

These Standards and these definitions apply to lawyers fitting these descriptions regardless of the different titles used in various states, and regardless of whether the lawyer is appointed by the court or retained by the child.

A lawyer should be either a Child’s Attorney or a Best Interests Attorney. The duties common to both roles are found in Part III of these Standards. The unique duties of each are described separately in Parts IV and V. The essential distinction between the two lawyer roles is that the Best Interests Attorney investigates and advocates the best interests of the child as a lawyer in the litigation, while the Child’s Attorney is a lawyer who represents the child as a client. Neither kind of lawyer is a witness. Form should follow function in deciding which kind of lawyer to appoint. The role and duties of the lawyer should be tailored to the reasons for the appointment and the needs of the child.

These Standards do not use the term “Guardian Ad Litem.” The role of “guardian ad litem” has become too muddled through different usages in different states, with varying connotations. It is a venerable legal concept that has often been stretched beyond recognition to serve fundamentally new functions, such as parenting coordinator, referee, facilitator, arbitrator, evaluator, mediator and advocate. Asking one Guardian Ad Litem to perform several roles at once, to be all things to all people, is a messy, ineffective expedient. A court seeking expert or lay opinion testimony, written reports, or other non-traditional services should appoint an individual for that purpose, and make clear that that person is not serving as a lawyer, and is not a party. This person can be either a non-lawyer, or a lawyer who chooses to serve in a volunteer non-lawyer capacity.

III. DUTIES OF ALL LAWYERS FOR CHILDREN

In addition to their general ethical duties as lawyers, and the specific duties set out in Parts IV and V, Child’s Attorneys and Best Interests Attorneys also have the duties outlined in this section.

A. Accepting Appointment

The lawyer should accept an appointment only with a full understanding of the issues and the functions to be performed. If the appointed lawyer considers parts of the appointment order confusing or incompatible with his or her ethical duties, the lawyer should (1) decline the appointment, or (2) inform the court of the conflict and ask the court to clarify or change the terms of the order, or (3) both.

B. Lawyer’s Roles

A lawyer appointed as a Child’s Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations.

Commentary

Neither kind of lawyer should be a witness, which means that the lawyer should not be cross-examined, and more importantly should neither testify nor make a written or oral report or recommendation to the court, but instead should offer traditional evidence-based legal arguments such as other lawyers make. However, explaining what result a client wants, or proffering what one hopes to prove, is not testifying; those are things all lawyers do.

If these Standards are properly applied, it will not be possible for courts to make a dual appointment, but there may be cases in which such an appointment was made before these Standards were adopted. The Child’s Attorney role involves a confidential relationship with privileged communications. Because the child has a right to confidentiality and advocacy of his or her position, the Child’s Attorney can never abandon this role while remaining involved in the case in any way. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as Best Interests Attorney or as a witness who investigates and makes a recommendation.

C. Independence

The lawyer should be independent from the court and other participants in the litigation, and unprejudiced and uncompromised in his or her independent action. The lawyer has the right and the responsibility to exercise independent professional judgment in carrying out the duties assigned by the court, and to participate in the case as fully and freely as a lawyer for a party.

Commentary

The lawyer should not prejudge the case. A lawyer may receive payment from a court, a government entity, or even from a parent, relative, or other adult so long as the lawyer retains the full authority for independent action.

D. Initial Tasks

Immediately after being appointed, the lawyer should review the file. The lawyer should inform other parties or counsel of the appointment, and that as counsel of record he or she should receive copies of pleadings and discovery exchanges, and reasonable notification of hearings and of major changes of circumstances affecting the child.

E. Meeting With the Child

The lawyer should meet with the child, adapting all communications to the child's age, level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer's responsibilities. The lawyer should elicit and assess the child's views.

Commentary

Establishing and maintaining a relationship with a child is the foundation of representation. Competent representation requires a child-centered approach and developmentally appropriate communication. All appointed lawyers should meet with the child and focus on the needs and circumstances of the individual child. Even nonverbal children can reveal much about their needs and interests through their behaviors and developmental levels. Meeting with the child also allows the lawyer to assess the child's circumstances, often leading to a greater understanding of the case, which may lead to creative solutions in the child's interest.

The nature of the legal proceeding or issue should be explained to the child in a developmentally appropriate manner. The lawyer must speak clearly, precisely, and in terms the child can understand. A child may not understand legal terminology. Also, because of a particular child's developmental limitations, the lawyer may not completely understand what the child says. Therefore, the lawyer must learn how to ask developmentally appropriate, non-suggestive questions and how to interpret the child's responses. The lawyer may work with social workers or other professionals to assess a child's developmental abilities and to facilitate communication.

While the lawyer should always take the child's point of view into account, caution should be used because the child's stated views and desires may vary over time or may be the

result of fear, intimidation and manipulation. Lawyers may need to collaborate with other professionals to gain a full understanding of the child's needs and wishes.

F. Pretrial Responsibilities

The lawyer should:

- 1. Conduct thorough, continuing, and independent discovery and investigations.**
- 2. Develop a theory and strategy of the case to implement at hearings, including presentation of factual and legal issues.**
- 3. Stay apprised of other court proceedings affecting the child, the parties and other household members.**
- 4. Attend meetings involving issues within the scope of the appointment.**
- 5. Take any necessary and appropriate action to expedite the proceedings.**
- 6. Participate in, and, when appropriate, initiate, negotiations and mediation. The lawyer should clarify, when necessary, that she or he is not acting as a mediator; and a lawyer who participates in a mediation should be bound by the confidentiality and privilege rules governing the mediation.**
- 7. Participate in depositions, pretrial conferences, and hearings.**
- 8. File or make petitions, motions, responses or objections when necessary.**
- 9. Where appropriate and not prohibited by law, request authority from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment.**

Commentary

The lawyer should investigate the facts of the case to get a sense of the people involved and the real issues in the case, just as any other lawyer would. This is necessary even for a Child's Attorney, whose ultimate task is to seek the client's objectives. Best Interests Attorneys have additional investigation duties described in Standard V-E.

By attending relevant meetings, the lawyer can present the child's perspective, gather information, and sometimes help negotiate a full or partial settlement. The lawyer may not need to attend if another person involved in the case, such as a social worker, can obtain information or present the child's perspective, or when the meeting will not be materially relevant to any issues in the case.

The lawyer is in a pivotal position in negotiations. The lawyer should attempt to resolve the case in the least adversarial manner possible, considering whether therapeutic

intervention, parenting or co-parenting education, mediation, or other dispute resolution methods are appropriate. The lawyer may effectively assist negotiations of the parties and their lawyers by focusing on the needs of the child, including where appropriate the impact of domestic violence. Settlement frequently obtains at least short-term relief for all parties involved and is often the best way to resolve a case. The lawyer's role is to advocate the child's interests and point of view in the negotiation process. If a party is legally represented, it is unethical for a lawyer to negotiate with the party directly without the consent of the party's lawyer.

Unless state law explicitly precludes filing pleadings, the lawyer should file any appropriate pleadings on behalf of the child, including responses to the pleadings of other parties, to ensure that appropriate issues are properly before the court and expedite the court's consideration of issues important to the child's interests. Where available to litigants under state laws or court rules or by permission of the court, relief requested may include, but is not limited to: (1) A mental or physical examination of a party or the child; (2) A parenting, custody or visitation evaluation; (3) An increase, decrease, or termination of parenting time; (4) Services for the child or family; (5) Contempt for non-compliance with a court order; (6) A protective order concerning the child's privileged communications; (7) Dismissal of petitions or motions.

The child's interests may be served through proceedings not connected with the case in which the lawyer is participating. For example, issues to be addressed may include: (1) Child support; (2) Delinquency or status offender matters; (3) SSI and other public benefits access; (4) Mental health proceedings; (5) Visitation, access or parenting time with parents, siblings; or third parties, (6) Paternity; (7) Personal injury actions; (8) School/education issues, especially for a child with disabilities; (9) Guardianship; (10) Termination of parental rights; (11) Adoption; or (12) A protective order concerning the child's tangible or intangible property.

G. Hearings

The lawyer should participate actively in all hearings and conferences with the court on issues within the scope of the appointment. Specifically, the lawyer should:

- 1. Introduce herself or himself to the court as the Child's Attorney or Best Interests Attorney at the beginning of any hearing.**
- 2. Make appropriate motions, including motions in limine and evidentiary objections, file briefs and preserve issues for appeal, as appropriate.**
- 3. Present and cross-examine witnesses and offer exhibits as necessary.**
- 4. If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.**

- 5. Seek to ensure that questions to the child are phrased in a syntactically and linguistically appropriate manner and that testimony is presented in a manner that is admissible.**
- 6. Where appropriate, introduce evidence and make arguments on the child's competency to testify, or the reliability of the child's testimony or out-of-court statements. The lawyer should be familiar with the current law and empirical knowledge about children's competency, memory, and suggestibility.**
- 7. Make a closing argument, proposing specific findings of fact and conclusions of law.**
- 8. Ensure that a written order is made, and that it conforms to the court's oral rulings and statutorily required findings and notices.**

Commentary

Although the lawyer's position may overlap with the position of one or more parties, the lawyer should be prepared to participate fully in any proceedings and not merely defer to the other parties. The lawyer should address the child's interests, describe the issues from the child's perspective, keep the case focused on the child's needs, discuss the effect of various dispositions on the child, and, when appropriate, present creative alternative solutions to the court.

A brief formal introduction should not be omitted, because in order to make an informed decision on the merits, the court must be mindful of the lawyer's exact role, with its specific duties and constraints. Even though the appointment order states the nature of the appointment, judges should be reminded, at each hearing, which role the lawyer is playing. If there is a jury, a brief explanation of the role will be needed.

The lawyer's preparation of the child should include attention to the child's developmental needs and abilities. The lawyer should also prepare the child for the possibility that the judge may render a decision against the child's wishes, explaining that such a result would not be the child's fault.

If the child does not wish to testify or would be harmed by testifying, the lawyer should seek a stipulation of the parties not to call the child as a witness, or seek a protective order from the court. The lawyer should seek to minimize the adverse consequences by seeking any appropriate accommodations permitted by law so that the child's views are presented to the court in the manner least harmful to the child, such as having the testimony taken informally, in chambers, without the parents present. The lawyer should seek any necessary assistance from the court, including location of the testimony, determination of who will be present, and restrictions on the manner and phrasing of questions posed to the child. The child should be told beforehand whether in-chambers testimony will be shared with others, such as parents who might be excluded from chambers.

Questions to the child should be phrased consistently with the law and research regarding children's testimony, memory, and suggestibility. The information a child gives is often misleading, especially if adults have not understood how to ask children developmentally appropriate questions and how to interpret their answers properly. The lawyer must become skilled at recognizing the child's developmental limitations. It may be appropriate to present expert testimony on the issue, or have an expert present when a young child is directly involved in the litigation, to point out any developmentally inappropriate phrasing of questions.

The competency issue may arise in the unusual circumstance of the child being called as a live witness, as well as when the child's input is sought by other means such as in-chambers meetings, closed-circuit television testimony, etc. Many jurisdictions have abolished presumptive ages of competency and replaced them with more flexible, case-by-case analyses. Competency to testify involves the abilities to perceive and relate. If necessary and appropriate, the lawyer should present expert testimony to establish competency or reliability or to rehabilitate any impeachment of the child on those bases.

H. Appeals

- 1. If appeals on behalf of the child are allowed by state law, and if it has been decided pursuant to Standard IV-D or V-G that such an appeal is necessary, the lawyer should take all steps necessary to perfect the appeal and seek appropriate temporary orders or extraordinary writs necessary to protect the interests of the child during the pendency of the appeal.**
- 2. The lawyer should participate in any appeal filed by another party, concerning issues relevant to the child and within the scope of the appointment, unless discharged.**
- 3. When the appeals court's decision is received, the lawyer should explain it to the child.**

Commentary

The lawyer should take a position in any appeal filed by a party or agency. In some jurisdictions, the lawyer's appointment does not include representation on appeal, but if the child's interests are affected by the issues raised in the appeal, the lawyer should seek an appointment on appeal or seek appointment of appellate counsel.

As with other court decisions, the lawyer should explain in terms the child can understand the nature and consequences of the appeals court's decision, whether there are further appellate remedies, and what more, if anything, will be done in the trial court following the decision.

I. Enforcement

The lawyer should monitor the implementation of the court's orders and address any non-compliance.

J. End of Representation

When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.

IV. CHILD'S ATTORNEYS

A. Ethics and Confidentiality

- 1. Child's Attorneys are bound by their states' ethics rules in all matters.**
- 2. A Child's Attorney appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.**

Commentary

The child is an individual with independent views. To ensure that the child's independent voice is heard, the Child's Attorney should advocate the child's articulated position, and owes traditional duties to the child as client, subject to Rules 1.2(a) and 1.14 of the Model Rules of Professional Conduct (2002).

The Model Rules of Professional Conduct (2002) (which in their amended form may not yet have been adopted in a particular state) impose a broad duty of confidentiality concerning all "information relating to the representation of a client", but they also modify the traditional exceptions to confidentiality. Under Model Rule 1.6 (2002), a lawyer may reveal information without the client's informed consent "to the extent the lawyer reasonably believes necessary ... to prevent reasonably certain death or substantial bodily harm", or "to comply with other law or a court order", or when "the disclosure is impliedly authorized in order to carry out the representation". Also, according to Model Rule 1.14(c) (2002), "the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests" when acting under Rule 1.14 to protect a client with "diminished capacity" who "is at risk of substantial physical, financial or other harm."

Model Rule 1.7 (1)(1) (2002) provides that "a lawyer shall not represent a client if ... the representation of one client will be directly adverse to another client" Some diversity between siblings' views and priorities does not pose a direct conflict. But when two siblings aim to achieve fundamentally incompatible outcomes in the case as a whole, they are "directly adverse." Comment [8] to Model Rule 1.7 (2002) states: "... a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited ... a lawyer asked to represent several individuals ... is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. ... The critical questions are the likelihood that a difference in

interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

B. Informing and Counseling the Client

In a developmentally appropriate manner, the Child's Attorney should:

- 1. Meet with the child upon appointment, before court hearings, when apprised of emergencies or significant events affecting the child, and at other times as needed.**
- 2. Explain to the child what is expected to happen before, during and after each hearing.**
- 3. Advise the child and provide guidance, communicating in a way that maximizes the child's ability to direct the representation.**
- 4. Discuss each substantive order, and its consequences, with the child.**

Commentary

Meeting with the child is important before court hearings and case reviews. Such in-person meetings allow the lawyer to explain to the child what is happening, what alternatives might be available, and what will happen next.

The Child's Attorney has an obligation to explain clearly, precisely, and in terms the client can understand, the meaning and consequences of the client's choices. A child may not understand the implications of a particular course of action. The lawyer has a duty to explain in a developmentally appropriate way such information as will assist the child in having maximum input in decision-making. The lawyer should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings. The lawyer may express an opinion concerning the likelihood of the court or other parties accepting particular positions. The lawyer may inform the child of an expert's recommendations germane to the issue.

As in any other lawyer/client relationship, the lawyer may express his or her assessment of the case, and of the best position for the child to take, and the reasons underlying such recommendation, and may counsel against the pursuit of particular goals sought by the client. However, a child may agree with the lawyer for inappropriate reasons. A lawyer must remain aware of the power dynamics inherent in adult/child relationships, recognize that the child may be more susceptible to intimidation and manipulation than some adult clients, and strive to detect and neutralize those factors. The lawyer should carefully choose the best time to express his or her assessment of the case. The lawyer needs to understand what the child

knows, and what factors are influencing the child's decision. The lawyer should attempt to determine from the child's opinion and reasoning what factors have been most influential or have been confusing or glided over by the child.

The lawyer for the child has dual fiduciary duties to the child which must be balanced. On the one hand, the lawyer has a duty to ensure that the client is given the information necessary to make an informed decision, including advice and guidance. On the other hand, the lawyer has a duty not to overbear the will of the client. While the lawyer may attempt to persuade the child to accept a particular position, the lawyer may not advocate a position contrary to the child's expressed position except as provided by the applicable ethical standards.

Consistent with the rules of confidentiality and with sensitivity to the child's privacy, the lawyer should consult with the child's therapist and other experts and obtain appropriate records. For example, a child's therapist may help the child to understand why an expressed position is dangerous, foolish, or not in the child's best interests. The therapist might also assist the lawyer in understanding the child's perspective, priorities, and individual needs. Similarly, significant persons in the child's life may educate the lawyer about the child's needs, priorities, and previous experiences.

As developmentally appropriate, the Child's Attorney should consult the child prior to any settlement becoming binding.

The child is entitled to understand what the court has done and what that means to the child, at least with respect to those portions of the order that directly affect the child. Children sometimes assume that orders are final and not subject to change. Therefore, the lawyer should explain whether the order may be modified at another hearing, or whether the actions of the parties may affect how the order is carried out.

C. Client Decisions

The Child's Attorney should abide by the client's decisions about the objectives of the representation with respect to each issue on which the child is competent to direct the lawyer, and does so. The Child's Attorney should pursue the child's expressed objectives, unless the child requests otherwise, and follow the child's direction, throughout the case.

Commentary

The child is entitled to determine the overall objectives to be pursued. The Child's Attorney may make certain decisions about the manner of achieving those objectives, particularly on procedural matters, as any adult's lawyer would. These Standards do not require the lawyer to consult with the child on matters which would not require consultation with an adult client, nor to discuss with the child issues for which the child's developmental limitations make it not feasible to obtain the child's direction, as with an infant or preverbal child.

- 1. The Child’s Attorney should make a separate determination whether the child has “diminished capacity” pursuant to Model Rule 1.14 (2000) with respect to each issue in which the child is called upon to direct the representation.**

Commentary

These Standards do not presume that children of certain ages are “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation. Disability is contextual, incremental, and may be intermittent. The child’s ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some positions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another.

- 2. If the child does not express objectives of representation, the Child’s Attorney should make a good faith effort to determine the child’s wishes, and advocate according to those wishes if they are expressed. If a child does not or will not express objectives regarding a particular issue or issues, the Child’s Attorney should determine and advocate the child’s legal interests or request the appointment of a Best Interests Attorney.**

Commentary

There are circumstances in which a child is unable to express any positions, as in the case of a preverbal child. Under such circumstances, the Child’s Attorney should represent the child’s legal interests or request appointment of a Best Interests Attorney. “Legal interests” are distinct from “best interests” and from the child’s objectives. Legal interests are interests of the child that are specifically recognized in law and that can be protected through the courts. A child’s legal interests could include, for example, depending on the nature of the case, a special needs child’s right to appropriate educational, medical, or mental health services; helping assure that children needing residential placement are placed in the least restrictive setting consistent with their needs; a child’s child support, governmental and other financial benefits; visitation with siblings, family members, or others the child wishes to maintain contact with; and a child’s due process or other procedural rights.

The child’s failure to express a position is different from being unable to do so, and from directing the lawyer not to take a position on certain issues. The child may **have no** opinion with respect to a particular issue, or may delegate the decision-making authority. The child may not want to assume the responsibility of expressing a position because of loyalty conflicts or the desire not to hurt one of the parties. In that case, the lawyer is free to pursue the objective that appears to be in the client’s legal interests based on information the lawyer has, and positions the child has already expressed. A position chosen by the lawyer should not contradict or undermine other issues about which the child has expressed a viewpoint. However, before reaching that point the lawyer should clarify with the child whether the child wants the lawyer to take a position, or to remain silent with respect to that issue, or

wants the point of view expressed only if the party is out of the room. The lawyer is then bound by the child's directive.

- 3. If the Child's Attorney determines that pursuing the child's expressed objective would put the child at risk of substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of the child's interests, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child's expressed position, unless the child's position is prohibited by law or without any factual foundation. The Child's Attorney should not reveal the reason for the request for a Best Interests Attorney, which would compromise the child's position, unless such disclosure is authorized by the ethics rule on confidentiality that is in force in the state.**

Commentary

One of the most difficult ethical issues for lawyers representing children occurs when the child is able to express a position and does so, but the lawyer believes that the position chosen is wholly inappropriate or could result in serious injury to the child. This is particularly likely to happen with respect to an abused child whose home is unsafe, but who desires to remain or return home. A child may desire to live in a dangerous situation because it is all he or she knows, because of a feeling of blame or of responsibility to take care of a parent, or because of threats or other reasons to fear the parent. The child may choose to deal with a known situation rather than risk the unknown.

It should be remembered in this context that the lawyer is bound to pursue the client's objectives only through means permitted by law and ethical rules. The lawyer may be subject personally to sanctions for taking positions that are not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

In most cases the ethical conflict involved in asserting a position which would seriously endanger the child, especially by disclosure of privileged information, can be resolved through the lawyer's counseling function, if the lawyer has taken the time to establish rapport with the child and gain that child's trust. While the lawyer should be careful not to apply undue pressure to a child, the lawyer's advice and guidance can often persuade the child to change a dangerous or imprudent position or at least identify alternative choices in case the court denies the child's first choice.

If the child cannot be persuaded, the lawyer has a duty to safeguard the child's interests by requesting appointment of a Best Interests Attorney. As a practical matter, this may not adequately protect the child if the danger to the child was revealed only in a confidential disclosure to the lawyer, because the Best Interests Attorney may never learn of the disclosed danger.

Model Rule 1.14 (2002) provides that "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may

take reasonably necessary protective action ... the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."

If there is a substantial danger of serious injury or death, the lawyer must take the minimum steps which would be necessary to ensure the child's safety, respecting and following the child's direction to the greatest extent possible consistent with the child's safety and ethical rules. States that do not abrogate the lawyer-client privilege or confidentiality, or mandate reporting in cases of child abuse, may permit reports notwithstanding privilege.

- 4. The Child's Attorney should discuss with the child whether to ask the judge to meet with the child, and whether to call the child as a witness. The decision should include consideration of the child's needs and desires to do either of these, any potential repercussions of such a decision or harm to the child from testifying or being involved in case, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may substitute for direct testimony by the child, and the child's developmental ability to provide direct testimony and withstand cross-examination. Ultimately, the Child's Attorney is bound by the child's direction concerning testifying.**

Commentary

Decisions about the child's testifying should be made individually, based on the circumstances. If the child has a therapist, the attorney should consult the therapist about the decision and for help in preparing the child. In the absence of compelling reasons, a child who has a strong desire to testify should be called to do so.

D. Appeals

Where appeals on behalf of the child are permitted by state law, the Child's Attorney should consider and discuss with the child, as developmentally appropriate, the possibility of an appeal. If the child, after consultation, wishes to appeal the order, and the appeal has merit, the Child's Attorney should appeal. If the Child's Attorney determines that an appeal would be frivolous or that he or she lacks the expertise necessary to handle the appeal, he or she should notify the court and seek to be discharged or replaced.

Commentary

The lawyer should explain not only any legal possibility of an appeal, but also the ramifications of filing an appeal, including delaying conclusion of the case, and what will happen pending a final decision.

E. Obligations after Initial Disposition

The Child's Attorney should perform, or when discharged, seek to ensure, continued representation of the child at all further hearings, including at administrative or judicial actions that result in changes to the child's placement or services, so long as the court maintains its jurisdiction.

Commentary

Representing a child continually presents new tasks and challenges due to the passage of time and the changing needs of the child. The bulk of the Child's Attorney's work often comes after the initial hearing. The Child's Attorney should stay in touch with the child, with the parties or their counsel, and any other caretakers, case workers, and service providers throughout the term of appointment to attempt to ensure that the child's needs are met and that the case moves quickly to an appropriate resolution.

F. End of Representation

The Child's Attorney should discuss the end of the legal representation with the child, what contacts, if any, the Child's Attorney and the child will continue to have, and how the child can obtain assistance in the future, if necessary.

V. BEST INTERESTS ATTORNEYS

A. Ethics

Best Interests Attorneys are bound by their states' ethics rules in all matters except as dictated by the absence of a traditional attorney-client relationship with the child and the particular requirements of their appointed tasks. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the court, parties in a case, the justice system, and the public.

Commentary

Siblings with conflicting views do not pose a conflict of interest for a Best Interests Attorney, because such a lawyer is not bound to advocate a client's objective. A Best Interests Attorney in such a case should report the relevant views of all the children in accordance with Standard V-F-3, and advocate the children's best interests in accordance with Standard V-F-1.

B. Confidentiality

A child's communications with the Best Interests Attorney are subject to state ethics rules on lawyer-client confidentiality, except that the lawyer may also use the child's confidences for the purposes of the representation without disclosing them.

Commentary

ABA Model Rule 1.6(a) bars any release of information “except for disclosures that are impliedly authorized in order to carry out the representation.” Under DR 4-101(C)(2), a lawyer may reveal confidences when “required by law or court order”. As for communications that are not subject to disclosure under these or other applicable ethics rules, a Best Interests Attorney may use them to further the child’s best interests, without disclosing them. The distinction between use and disclosure means, for example, that if a child tells the lawyer that a parent takes drugs; the lawyer may seek and present other evidence of the drug use, but may not reveal that the initial information came from the child. For more discussion of exceptions to confidentiality, see the Commentary to Standard IV-A.

C. Limited Appointments

If the court appoints the Best Interests Attorney to handle only a specific issue, the Best Interests Attorney’s tasks may be reduced as the court may direct.

D. Explaining Role to the Child

In a developmentally appropriate manner, the Best Interests Attorney should explain to the child that the Best Interests Attorney will (1) investigate and advocate the child’s best interests, (2) will investigate the child’s views relating to the case and will report them to the court unless the child requests that they not be reported, and (3) will use information from the child for those purposes, but (4) will not necessarily advocate what the child wants as a lawyer for a client would.

E. Investigations

The Best Interests Attorney should conduct thorough, continuing, and independent investigations, including:

- 1. Reviewing any court files of the child, and of siblings who are minors or are still in the home, potentially relevant court files of parties and other household members, and case-related records of any social service agency and other service providers;**
- 2. Reviewing child’s social services records, if any, mental health records (except as otherwise provided in Standard VI-A-4), drug and alcohol-related records, medical records, law enforcement records, school records, and other records relevant to the case;**
- 3. Contacting lawyers for the parties, and nonlawyer representatives or court-appointed special advocates (CASAs);**
- 4. Contacting and meeting with the parties, with permission of their lawyers;**
- 5. Interviewing individuals significantly involved with the child, who may in the lawyer’s discretion include, if appropriate, case workers, caretakers,**

neighbors, relatives, school personnel, coaches, clergy, mental health professionals, physicians, law enforcement officers, and other potential witnesses;

- 6. Reviewing the relevant evidence personally, rather than relying on other parties' or counsel's descriptions and characterizations of it;**
- 7. Staying apprised of other court proceedings affecting the child, the parties and other household members.**

Commentary

Relevant files to review include those concerning child protective services, developmental disabilities, juvenile delinquency, mental health, and educational agencies. These records can provide a more complete context for the current problems of the child and family. Information in the files may suggest additional professionals and lay witnesses who should be contacted.

Though courts should order automatic access to records, the lawyer may still need to use subpoenas or other discovery or motion procedures to obtain the relevant records, especially those which pertain to the parties.

Meetings with the children and all parties are among the most important elements of a competent investigation. However, there may be a few cases where a party's lawyer will not allow the Best-Interests Attorney to communicate with the party. Model Rule 4.2 prohibits such contact without consent of the party's lawyer. In some such cases, the Best-Interests Attorney may be able to obtain permission for a meeting with the party's lawyer present. When the party has no lawyer, Model Rule 4.3 allows contact but requires reasonable efforts to correct any apparent misunderstanding of the Best-Interests Attorney's role.

The parties' lawyers may have information not included in any of the available records. They can provide information on their clients' perspectives.

Volunteer CASAs can often provide a great deal of information. The CASA is typically charged with performing an independent factual investigation, getting to know the child, and reporting on the child's best interests. Where there appears to be role conflict or confusion over the involvement of both a lawyer and a CASA in the same case, there should be joint efforts to clarify and define the responsibilities of both.

F. Advocating the Child's Best Interests

- 1. Any assessment of, or argument on, the child's best interests should be based on objective criteria as set forth in the law related to the purposes of the proceedings.**
- 2. Best Interests Attorneys should bring to the attention of the court any facts which, when considered in context, seriously call into question the advisability of any agreed settlement.**

- 3. At hearings on custody or parenting time, Best Interests Attorneys should present the child's expressed desires (if any) to the court, except for those that the child expressly does not want presented.**

Commentary

Determining a child's best interests is a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them. Factors in determining a child's interests will generally be stated in a state's statutes and case law, and Best Interests Attorneys must be familiar with them and how courts apply them. A child's desires are usually one of many factors in deciding custody and parenting time cases, and the weight given them varies with age and circumstances.

A Best Interests Attorney is functioning in a nontraditional role by determining the position to be advocated independently of the client. The Best Interests Attorney should base this determination, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. A best-interests case should be based on the state's governing statutes and case law, or a good faith argument for modification of case law. The lawyer should not use any other theory, doctrine, model, technique, ideology, or personal rule of thumb without explicitly arguing for it in terms of governing law on the best interests of the child. The trier of fact needs to understand any such theory in order to make an informed decision in the case.

The lawyer must consider the child's individual needs. The child's various needs and interests may be in conflict and must be weighed against each other. The child's developmental level, including his or her sense of time, is relevant to an assessment of needs. The lawyer may seek the advice and consultation of experts and other knowledgeable people in determining and weighing such needs and interests.

As a general rule Best Interests Attorneys should encourage, not undermine, settlements. However, in exceptional cases where the Best Interests Attorney reasonably believes that the settlement would endanger the child and that the court would not approve the settlement were it aware of certain facts, the Best Interests Attorney should bring those facts to the court's attention. This should not be done by *ex parte* communication. The Best Interests Attorney should ordinarily discuss her or his concerns with the parties and counsel in an attempt to change the settlement, before involving the judge.

G. Appeals

Where appeals on behalf of the child are permitted by state law, the Best Interests Attorney should appeal when he or she believes that (1) the trial court's decision is significantly detrimental to the child's welfare, (2) an appeal could be successful considering the law, the standard of review, and the evidence that can be presented to the appellate court, and (3) the probability and degree of benefit to the child outweighs the probability and degree of detriment to the child from extending the litigation and expense that the parties will undergo.

VI. COURTS

A. Appointment of Lawyers

A court should appoint a lawyer as a Child’s Attorney or Best Interests Attorney as soon as practicable if such an appointment is necessary in order for the court to decide the case.

1. Mandatory Appointment

A court should appoint a lawyer whenever such an appointment is mandated by state law. A court should also appoint a lawyer in accordance with the A.B.A. Standards of Practice for Representing a Child in Abuse and Neglect Cases (1996) when considering allegations of child abuse or neglect that warrant state intervention.

Commentary

Whether in a divorce, custody or child protection case, issues such as abuse, neglect or other dangers to the child create an especially compelling need for lawyers to protect the interests of children. Lawyers in these cases must take appropriate steps to ensure that harm to the child is minimized while the custody case is being litigated. Appointing a lawyer is no substitute for a child protective services investigation or other law enforcement investigation, where appropriate. The situation may call for referrals to or joinder of child protection officials, transfer of the case to the juvenile dependency court, or steps to coordinate the case with a related ongoing child protection proceeding, which may be in a different court. Any question of child maltreatment should be a critical factor in the court’s resolution of custody and parenting time proceedings, and should be factually resolved before permanent custody and parenting time are addressed. A serious forensic investigation to find out what happened should come before, and not be diluted by, a more general investigation into the best interests of the child.

2. Discretionary Appointment

In deciding whether to appoint a lawyer, the court should consider the nature and adequacy of the evidence to be presented by the parties; other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals; and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations or concerns:

- a. **Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;**
- b. **Relocation that could substantially reduce the child’s time with a parent or sibling;**
- c. **The child’s concerns or views;**

- d. Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;**
- e. Disputed paternity;**
- f. Past or present child abduction or risk of future abduction;**
- g. Past or present family violence;**
- h. Past or present mental health problems of the child or a party;**
- i. Special physical, educational, or mental health needs of a child that require investigation or advocacy;**
- j. A high level of acrimony;**
- k. Inappropriate adult influence or manipulation;**
- l. Interference with custody or parenting time;**
- m. A need for more evidence relevant to the best interests of the child;**
- n. A need to minimize the harm to the child from the processes of family separation and litigation; or**
- o. Specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.**

Commentary

In some cases the court's capacity to decide the case properly will be jeopardized without a more child-focused framing of the issues, or without the opportunity for providing additional information concerning the child's best interests. Often, because of a lack of effective counsel for some or all parties, or insufficient investigation, courts are deprived of important information, to the detriment of the children. A lawyer building and arguing the child's case, or a case for the child's best interests, places additional perspectives, concerns, and relevant, material information before the court so it can make a more informed decision.

An important reason to appoint a lawyer is to ensure that the court is made aware of any views the child wishes to express concerning various aspects of the case, and that those views will be given the proper weight that substantive law attaches to them. This must be done in the least harmful manner — that which is least likely to make the child think that he or she is deciding the case and passing judgment on the parents. Courts and lawyers should strive to implement procedures that give children opportunities to be meaningfully heard when they have something they want to say, rather than simply giving the parents another vehicle with which to make their case.

The purpose of child representation is not only to advocate a particular outcome, but also to protect children from collateral damage from litigation. While the case is pending, conditions that deny the children a minimum level of security and stability may need to be remedied or prevented.

Appointment of a lawyer is a tool to protect the child and provide information to help assist courts in deciding a case in accordance with the child's best interests. A decision not to appoint should not be regarded as actionably denying a child's procedural or substantive rights under these Standards, except as provided by state law. Likewise, these Standards are not intended to diminish state laws or practices which afford children standing or the right to

more broad representation than provided by these Standards. Similarly, these Standards do not limit any right or opportunity of a child to engage a lawyer or to initiate an action, where such actions or rights are recognized by law or practice.

3. Appointment Orders

Courts should make written appointment orders on standardized forms, in plain language understandable to non-lawyers, and send copies to the parties as well as to counsel. Orders should specify the lawyer’s role as either Child’s Attorney or Best Interests Attorney, and the reasons for and duration of the appointment.

Commentary

Appointment orders should articulate as precisely as possible the reasons for the appointment and the tasks to be performed. Clarity is needed to inform all parties of the role and authority of the lawyer; to help the court make an informed decision and exercise effective oversight; and to facilitate understanding, acceptance and compliance. A Model Appointment Order is at the end of these Standards.

When the lawyer is appointed for a narrow, specific purpose with reduced duties under Standard VI-A-2(o), the lawyer may need to ask the court to clarify or change the role or tasks as needed to serve the child’s interests at any time during the course of the case. This should be done with notice to the parties, who should also receive copies of any new order.

4. Information Access Orders

An accompanying, separate order should authorize the lawyer’s reasonable access to the child, and to all otherwise privileged or confidential information about the child, without the necessity of any further order or release, including, but not limited to, social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case; except that health and mental health records that would otherwise be privileged or confidential under state or federal laws should be released to the lawyer only in accordance with those laws.

Commentary

A model Order for Access to Confidential Information appears at the end of these Standards. It is separate from the appointment order so that the facts or allegations cited as reasons for the appointment are not revealed to everyone from whom information is sought. Use of the term “privileged” in this Standard does not include the attorney-client privilege, which is not affected by it.

5. Independence

The court must assure that the lawyer is independent of the court, court services, the parties, and the state.

6. Duration of Appointments

Appointments should last, and require active representation, as long as the issues for which the lawyer was appointed are pending.

Commentary

The Child's Attorney or Best Interests Attorney may be the only source of continuity in the court system for the family, providing a stable point of contact for the child and institutional memory for the court and agencies. Courts should maintain continuity of representation whenever possible, re-appointing the lawyer when one is needed again, unless inconsistent with the child's needs. The lawyer should ordinarily accept reappointment. If replaced, the lawyer should inform and cooperate with the successor.

7. Whom to Appoint

Courts should appoint only lawyers who have agreed to serve in child custody cases in the assigned role, and have been trained as provided in Standard VI-B or are qualified by appropriate experience in custody cases.

Commentary

Courts should appoint from the ranks of qualified lawyers. Appointments should not be made without regard to prior training or practice. Competence requires relevant training and experience. Lawyers should be allowed to specify if they are only willing to serve as Child's Attorney, or only as Best Interests Attorney.

8. Privately-Retained Attorneys

An attorney privately retained by or for a child, whether paid or not, (a) is subject to these Standards, (b) should have all the rights and responsibilities of a lawyer appointed by a court pursuant to these Standards, (c) should be expressly retained as either a Child's Attorney or a Best Interests Attorney, and (d) should vigilantly guard the client-lawyer relationship from interference as provided in Model Rule 1.8(f).

B. Training

Training for lawyers representing children in custody cases should cover:

- 1. Relevant state and federal laws, agency regulations, court decisions and court rules;**

- 2. The legal standards applicable in each kind of case in which the lawyer may be appointed, including child custody and visitation law;**
- 3. Applicable representation guidelines and standards;**
- 4. The court process and key personnel in child-related litigation, including custody evaluations and mediation;**
- 5. Children’s development, needs and abilities at different ages;**
- 6. Communicating with children;**
- 7. Preparing and presenting a child’s viewpoints, including child testimony and alternatives to direct testimony;**
- 8. Recognizing, evaluating and understanding evidence of child abuse and neglect;**
- 9. Family dynamics and dysfunction, domestic violence and substance abuse;**
- 10. The multidisciplinary input required in child-related cases, including information on local experts who can provide evaluation, consultation and testimony;**
- 11. Available services for child welfare, family preservation, medical, mental health, educational, and special needs, including placement, evaluation/diagnostic, and treatment services, and provisions and constraints related to agency payment for services;**
- 12. Basic information about state and federal laws and treaties on child custody jurisdiction, enforcement, and child abduction.**

Commentary

Courts, bar associations, and other organizations should sponsor, fund and participate in training. They should also offer advanced and new-developments training, and provide mentors for lawyers who are new to child representation. Training in custody law is especially important because not everyone seeking to represent children will have a family law background. Lawyers must be trained to distinguish between the different kinds of cases in which they may be appointed, and the different legal standards to be applied.

Training should address the impact of spousal or domestic partner violence on custody and parenting time, and any statutes or case law regarding how allegations or findings of domestic violence should affect custody or parenting time determinations. Training should also sensitize lawyers to the dangers that domestic violence victims and their children face in attempting to flee abusive situations, and how that may affect custody awards to victims.

C. Compensation

Lawyers for children are entitled to and should receive adequate and predictable compensation that is based on legal standards generally used for determining the reasonableness of privately-retained lawyers' hourly fees in family law cases.

1. Compensation Aspects of Appointment Orders

The court should make clear to all parties, orally and in writing, how fees will be determined, including the hourly rate or other computation system used, and the fact that both in-court and out-of-court work will be paid for; and how and by whom the fees and expenses are to be paid, in what shares. If the parties are to pay for the lawyer's services, then at the time of appointment the court should order the parties to deposit specific amounts of money for fees and costs.

2. Sources of Payment

Courts should look to the following sources, in the following order, to pay for the lawyer's services: (a) The incomes and assets of the parties; (b) Targeted filing fees assessed against litigants in similar cases, and reserved in a fund for child representation; (c) Government funding; (d) Voluntary pro bono service. States and localities should provide sufficient funding to reimburse private attorneys, to contract with lawyers or firms specializing in children's law, and to support pro bono and legal aid programs. Courts should eliminate involuntary "pro bono" appointments, and should not expect all or most representation to be pro bono.

3. Timeliness of Claims and Payment

Lawyers should regularly bill for their time and receive adequate and timely compensation. Periodically and after certain events, such as hearings or orders, they should be allowed to request payment. States should set a maximum number of days for any required court review of these bills, and for any governmental payment process to be completed.

4. Costs

Attorneys should have reasonable and necessary access to, or reimbursement for, experts, investigative services, paralegals, research, and other services, such as copying medical records, long distance phone calls, service of process, and transcripts of hearings.

5. Enforcement

Courts should vigorously enforce orders for payment by all available means.

Commentary

These Standards call for paying lawyers in accordance with prevailing legal standards of reasonableness for lawyers' fees in general. Currently, state-set uniform rates tend to be lower than what competent, experienced lawyers should be paid, creating an impression that this is second-class work. In some places it has become customary for the work of child representation to be minimal and pro forma, or for it to be performed by lawyers whose services are not in much demand.

Lawyers and parties need to understand how the lawyer will be paid. The requirement to state the lawyer's hourly rate in the appointment order will help make litigants aware of the costs being incurred. It is not meant to set a uniform rate, nor to pre-empt a court's determination of the overall reasonableness of fees. The court should keep information on eligible lawyers' hourly rates and pro bono availability on file, or ascertain it when making the appointment order. Judges should not arbitrarily reduce properly requested compensation, except in accordance with legal standards of reasonableness.

Many children go unrepresented because of a lack of resources. A three-fold solution is appropriate: hold more parents responsible for the costs of representation, increase public funding, and increase the number of qualified pro bono and legal service attorneys. All of these steps will increase the professionalism of children's lawyers generally.

As much as possible, those whose decisions impose costs on others and on society should bear such costs at the time that they make the decisions, so that the decisions will be more fully informed and socially conscious. Thus direct payment of lawyer's fees by litigants is best, where possible. Nonetheless, states and localities ultimately have the obligation to protect children in their court systems whose needs cannot otherwise be met.

Courts are encouraged to seek high-quality child representation through contracting with special children's law offices, law firms, and other programs. However, the motive should not be a lower level of compensation. Courts should assure that payment is commensurate with the fees paid to equivalently experienced individual lawyers who have similar qualifications and responsibilities.

Courts and bar associations should establish or cooperate with voluntary pro bono and/or legal services programs to adequately train and support pro bono and legal services lawyers in representing children in custody cases.

In jurisdictions where more than one court system deals with child custody, the availability, continuity and payment of lawyers should not vary depending on which court is used, nor on the type of appointment.

D. Caseloads

Courts should control the size of court-appointed caseloads, so that lawyers do not have so many cases that they are unable to meet these Standards. If caseloads of individual lawyers approach or exceed acceptable limits, courts should take one or more of the following steps: (1) work with bar and children's advocacy groups to

increase the availability of lawyers; (2) make formal arrangements for child representation with law firms or programs providing representation; (3) renegotiate existing court contracts for child representation; (4) alert agency administrators that their lawyers have excessive caseloads and order them to establish procedures or a plan to solve the problem; (5) alert state judicial, executive, and legislative branch leaders that excessive caseloads jeopardize the ability of lawyers to competently represent children; and (6) seek additional funding.

E. Physical accommodations

Courts should provide lawyers representing children with seating and work space comparable to that of other lawyers, sufficient to facilitate the work of in-court representation, and consistent with the dignity, importance, independence, and impartiality that they ought to have.

F. Immunity

Courts should take steps to protect all lawyers representing children from frivolous lawsuits and harassment by adult litigants. Best Interests Attorneys should have qualified, quasi-judicial immunity for civil damages when performing actions consistent with their appointed roles, except for actions that are: (1) willfully wrongful; (2) done with conscious indifference or reckless disregard to the safety of another; (3) done in bad faith or with malice; or (4) grossly negligent. Only the child should have any right of action against a Child's Attorney or Best Interests Attorney.

Commentary

Lawyers and Guardians Ad Litem for children are too often sued by custody litigants. Courts, legislatures, bar organizations and insurers should help protect all children's lawyers from frivolous lawsuits. Immunity should be extended to protect lawyers' ability to fully investigate and advocate, without harassment or intimidation. In determining immunity, the proper inquiry is into the duties at issue and not the title of the appointment. Other mechanisms still exist to prevent or address lawyer misconduct: (1) attorneys are bound by their state bars' rules of professional conduct; (2) the court oversees their conduct and can remove or admonish them for obvious misconduct; (3) the court is the ultimate custody decision-maker and should not give deference to a best-interests argument based on an inadequate or biased investigation.

APPENDIX A

IN THE _____ COURT OF _____

Petitioner,
v.

Case No. _____

Respondent.

In Re: _____, D.O.B. _____

CHILD REPRESENTATION APPOINTMENT ORDER

I. REASONS FOR APPOINTMENT

This case came on this _____, 20____, and it appearing to the Court that appointing a Child’s Attorney or Best Interests Attorney is necessary to help the Court decide the case properly, because of the following factors or allegations:

A. Mandatory appointment grounds:

- The Court is considering child abuse or neglect allegations that warrant state intervention.
- Appointment is mandated by state law.

B. Discretionary grounds warranting appointment:

- Consideration of extraordinary remedies such as supervised visitation, terminating or suspending visitation with a parent, or awarding custody or visitation to a non-parent
- Relocation that could substantially reduce of the child’s time with a parent or sibling
- The child’s concerns or views
- Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party
- Disputed paternity
- Past or present child abduction, or risk of future abduction
- Past or present family violence
- Past or present mental health problems of the child or a party
- Special physical, educational, or mental health needs requiring investigation or advocacy
- A high level of acrimony
- Inappropriate adult influence or manipulation
- Interference with custody or parenting time
- A need for more evidence relevant to the best interests of the child
- A need to minimize the harm to the child from family separation and litigation
- Specific issue(s) to be addressed: _____

II. NATURE OF APPOINTMENT

_____, a lawyer who has been trained in child representation in custody cases and is willing to serve in such cases in this Court, is hereby appointed as Child's Attorney Best Interests Attorney, for the the child or children named above the child(ren) _____, to represent the child(ren) in accordance with the Standards of Practice for Lawyers Representing Children in Custody Cases, a copy of which is attached has been furnished to the appointee. A Child's Attorney represents the child in a normal attorney-client relationship. A Best Interests Attorney investigates and advocates the child's best interests as a lawyer. Neither kind of lawyer testifies or submits a report. Both have duties of confidentiality as lawyers, but the Best Interests Attorney may use information from the child for the purposes of the representation.

III. FEES AND COSTS

The hourly rate of the lawyer appointed is \$ _____, for both in-court and out-of-court work.

The parties shall be responsible for paying the fees and costs. The parties shall deposit \$ _____ with the Court, the appointed lawyer. _____ shall deposit \$ _____, and _____ shall deposit \$ _____. The parties' individual shares of the responsibility for the fees and costs as between the parties are to be determined later are as follows: _____ to pay _____ %; _____ to pay _____ %.

The State shall be responsible for paying the fees and costs.

The lawyer has agreed to serve without payment. However, the lawyer's expenses will be reimbursed by the parties the state.

IV. ACCESS TO CONFIDENTIAL INFORMATION

The lawyer appointed shall have access to confidential information about the child as provided in the Standards of Practice for Lawyers Representing Children in Custody Cases and in an Order for Access to Confidential Information that will be signed at the same time as this Order.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _____, 20____

JUDGE

APPENDIX B

IN THE _____ COURT OF _____

Petitioner,
v.

Respondent.

Case No. _____

In Re: _____, D.O.B. _____

ORDER FOR ACCESS TO CONFIDENTIAL INFORMATION

_____ has been appointed as Best Interests Attorney Child's Attorney for the child or children named above the child _____, and so shall have immediate access to such child or children, and to all otherwise privileged or confidential information regarding such child or children, without the necessity of any further order or release. Such information includes but is not limited to social services, drug and alcohol treatment, medical, evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case, including court records of parties to this case or their household members.

Mental health records that are privileged or confidential under state or federal laws shall be released to the Child's Attorney or Best Interests Attorney only in accordance with such laws.

THE CLERK IS HEREBY ORDERED TO MAIL COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL.

DATE: _____, 20____

JUDGE



G. (B.J.) v. G. (D.L.)

B.J.G. (Plaintiff) and D.L.G. (Defendant)

Yukon Territory Supreme Court

D. Martinson J.

Judgment: August 26, **2010**

Docket: Whitehorse S.C. 99-D3183

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Counsel: Kathleen Kinchen, for Plaintiff

Carrie Burbidge, for Defendant

Subject: Family

Family law --- Custody and access — Variation of custody order — Factors to be considered — Wishes of child

Father applied to vary existing custody order granted under Divorce Act, relating to 12-year-old child — Evidence with respect to custody did not include information about child's views, or whether he wished to express them — Court raised issue of whether court should hear from child and heard submissions from lawyers for parents — Application dismissed — Child's view was that he wanted existing alternating week schedule to continue — It was recent change that was made at his request — Had he wanted to change it again, he would have spoken to mother about it — He did not do that — Had he wanted to have views conveyed to court, he would have told parents — It was likely that he did not want to get caught in middle of what was in essence dispute between parents about money — Ultimately court decided that father did not have genuine desire to change custody arrangement in way that was in child's best interests.

Cases considered by D. Martinson J.:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — considered

G. (B.J.) v. G. (D.L.) (2010), 2010 CarswellYukon 112, 2010 YKSC 33 (Y.T. S.C.) — referred to

G. (L.E.) v. G. (A.) (2002), 2002 BCSC 1455, 2002 CarswellBC 2643 (B.C. S.C.) — considered

2010 CarswellYukon 108, 2010 YKSC 44, 324 D.L.R. (4th) 367, [2011] W.D.F.L. 993, 89 R.F.L. (6th) 103

Gordon v. Goertz (1996), 1996 CarswellSask 199, [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321, 141 Sask. R. 241, 114 W.A.C. 241, [1996] 2 S.C.R. 27, (sub nom. *Goertz c. Gordon*) [1996] R.D.F. 209, 1996 CarswellSask 199F (S.C.C.) — considered

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

Statutes considered:

Children's Act, R.S.Y. 2002, c. 31

Generally — referred to

s. 30(1)(c) — referred to

s. 168 — referred to

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

s. 16(8) — considered

Treaties considered:

Convention on the Rights of the Child, 1989, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25

Generally — referred to

Article 1 — considered

Article 2 — referred to

Article 2(1) — referred to

Article 3(1) — referred to

Article 4 — referred to

Article 12 — considered

Article 42 — referred to

Article 43 — referred to

Article 44 — referred to

Article 49 — referred to

APPLICATION by mother to vary existing child support and custody order, court raised issue of whether court

should hear from child.

D. Martinson J.:

I. Summary

1 In this hearing to consider applications by Ms. R. and Mr. G to vary an existing custody and child support order granted under the *Divorce Act*, relating to K., their 12 year old child, the evidence with respect to custody did not include information about K's views, or whether he wished to express them. The Court raised the issue of whether the Court should hear from K. and heard submissions from the lawyers for the parents.

2 I did so because in my respectful view all children in Canada have legal rights to be heard in all matters affecting them, including custody cases. Decisions should not be made without ensuring that those legal rights have been considered. These legal rights are based on the *United Nations Convention on the Rights of the Child*, ("the *Convention*"), and Canadian domestic law.

3 The *Convention*, which was ratified by Canada, with the support of the provinces and territories, in 1991, says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. There is no ambiguity in the language used. The *Convention* is very clear; *all* children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.

4 A key premise of the legal rights to be heard found in the *Convention* is that hearing from children is in their best interests. Many children want to be heard and they understand the difference between having a say and making the decision. Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them. While concerns are raised by some, they can be dealt with within the flexible legal framework found in the *Convention*.

5 Canada has chosen not to incorporate the provisions of the *Convention* directly into domestic law because it takes the position that Canadian domestic law complies with the *Convention*. That is because Canadian jurisprudence provides that in interpreting domestic statutes, Parliament and provincial legislatures are presumed to respect the rights and values set out in the *Convention*. The broad, child focused best interests of children test found in the *Divorce Act* includes children's legal rights to be heard found in the *Convention*. Provincial legislation should also be interpreted to reflect the values and principles found in the *Convention*. The Yukon's *Children's Act* specifically requires the Court to consider the views and preferences of children in determining their best interests.

6 Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there must be a determination of the method by which the child will participate.

7 In this case I concluded, on June 24, 2010, that K. was capable of forming his own views, had a view about the custody claim, but did not wish to express his view to the Court. I will now explain the relevant legal principles in more detail by considering the provisions of the *Convention* and their application to Canadian law. I will then explain how they apply to this case.

II. International Law

A. The Provisions of the Convention

8 The *Convention* is a comprehensive international instrument which reinforces the fact that children are people with human rights. (The *Convention* was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990 in accordance with article 49.)

9 While many of those rights existed in other international instruments, the United Nations recognized the importance of singling out children in this way. The *Convention* provides that in all actions concerning children the best interests of the child shall be a primary consideration: Article 3(1).

10 Under the *Convention* all children have two separate though related legal rights to be heard in all matters affecting them, including judicial proceedings. The first is the right to express their views so long as they are capable of forming their own views. The second is the right to have those views given due weight in accordance with their age and maturity. A child's evolving capacity will be relevant to how the views are expressed, and the weight or importance to be attached to them.

11 In this respect Article 12 of the *Convention* says that:

1. State 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 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.

12 The *Convention* applies to all children. It states that for the purposes of the *Convention* a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier: Article 1. It specifically provides that countries that have ratified the *Convention* shall respect and ensure the rights set forth in the *Convention* to each child within their jurisdiction without discrimination of any kind...: Article 2(1).

13 There is no ambiguity in the language used. The *Convention* is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.

14 The legal rights to be heard are not isolated rights. A key premise of Article 12 is that hearing from children is an integral part of a determination of their best interests.

15 There is still some discussion and debate about the wisdom of hearing from children, particularly in complex cases such as those involving high conflict, including those in which there are allegations of alienation. Some of the concerns raised are that: it is harmful to children and an unfair burden on them to place them in the middle of the conflict; they can be easily manipulated; there could be serious repercussions if a parent does not like what they say; and what they say may not be reliable or useful.

16 The terms of the *Convention* creating the legal rights to be heard for all children resulted from a critical policy decision. That is, the choice was made by the international lawmakers that there are compelling reasons for affording these legal rights to be heard to all children as part of the determination of what is in their best interests. The concerns raised can be dealt with appropriately for all children, including those involved high conflict cases, within the flexible legal framework provided by the *Convention*.

17 I will consider both the reasons for affording children these legal rights, and why the concerns raised can be dealt with within the *Convention's* flexible legal framework.

B. Reasons Underlying the Legal Rights to be Heard

18 I will summarize many of the reasons underlying the legal rights to be heard found in the social science literature by referring to what children want, the benefits of their input to the decision making process, and the adverse consequences for them of excluding their participation. (For details see Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediations and Other Alternative Dispute Resolution Processes: A Literature Review*, June 2009, prepared for the Canadian Department of Justice; Joan B. Kelly, *Child Participation in Divorce Processes: The Structured Child-Focused Interview Process*, prepared for a joint conference, Hear the Child, sponsored by the British Columbia Continuing Legal Education Society and the International Institute for Child Rights and Development, Vancouver, British Columbia, November 19-20, 2009; and Birnbaum, R., Fidler, B.J., & Kavassalis, K., "Children's Views and Preferences", in *Child Custody Assessments: A Resource Guide for Legal and Mental Health Professionals*. 2008, Toronto, Canada: Thomson Carswell.)

1. What Children Want

19 Most children are not informed about their parent's separation, how the separation will affect them, or given a chance to ask questions. The majority of children have a parenting plan imposed on them without any discussion. They are not asked for suggestions regarding living arrangements or subsequent changes in the schedule.

20 Yet, most children are clear. They want to be involved and heard in some way in matters that affect them. They think that being heard leads to better outcomes. They understand the difference between providing input and making decisions. They prefer voluntary input and want the right not to be heard. Many wish they could talk with family members rather than professionals.

2. The Benefits to the Decision Making Process

21 Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities and lessons, vacations, schools, and exchanges between their two homes and how these work best. They can also speak about what their life is like from their point of

view, including the impact of the separation on them as well as the impact of the conduct of their parents.

22 Receiving children's input early in the process, and throughout as appropriate, can reduce conflict by focusing or refocusing matters on the children and what is important to them. It can reduce the intensity and duration of the conflict and enhance conciliation between parents so that they can communicate more effectively for the benefit of their child. When children are actively involved in problem solving and given recognition that their ideas are important and are being heard, they are empowered and their confidence and self esteem grow. They feel that they have been treated with dignity. In addition, children's participation in the decision making process correlates positively with their ability to adapt to a newly reconfigured family.

3. Short and Long Term Adverse Consequences of Exclusion for Children

23 Excluding children and adolescents may have immediate adverse effects such as: feeling ignored, isolated and lonely; experiencing anxiety and fear; being sad, depressed, and withdrawn; being confused; being angry at being left out; and having difficulty coping with stress.

24 Further, longer-term adverse effects of not consulting children and adolescents may include: loss of closeness in parent-child relationships; continuing resentment if living arrangements don't meet their needs in time or structure; less satisfaction with parenting plans, less compliance, more "voting with their feet"; and longing for more or less time with the non-resident parent.

C. Flexibility within the Convention's Legal Framework

25 There is no doubt that children's safety must be a paramount consideration. The United Nations legal framework addresses this concern and provides the flexibility to deal appropriately with all cases for several reasons.

26 First, children have a legal right to express their views. There is not a legal requirement to do so. They can choose not to participate.

27 Second, there must be a determination of whether a child is *capable* of forming his or her *own* views before the child has the legal right to express his or her views. The thrust of this provision is to ensure that children are capable in the sense that they have the cognitive capacity to form their own views and to communicate them. In alienation cases, for example, the issue of parental conduct that may amount to alienation should generally not be considered at this stage, but rather at the stage dealing with the second legal right, the right to have a child's views given due weight in accordance with the child's age and maturity. However in some cases the alienating conduct of a parent may be such that the child is not really capable of forming his or her *own* views.

28 Third, decision makers can deal with all of the circumstances of the case when deciding what weight should be given to a child's views. This second legal right of children is based on the best interests of children principle. It gives children a voice, not the choice, as others have put it; they are *not* required to make the decision.

29 Fourth, views can be obtained on a wide variety of issues. As noted above, children have important information to offer relating not only to what their life is like generally, from their point of view, but also to specific matters relating to their day to day lives.

30 Fifth, there are many different ways in which children's views can be obtained, depending on the family

circumstances and the age and maturity of the child. The method does not have to be intrusive. Each approach can deal sensitively with the child's emotional well-being.

III. Canadian Domestic Law

A. Ratification of the Convention

31 The federal government, with the support of the provinces and territories, ratified the *Convention* in 1991. The *Convention* requires countries that ratify it to give effect to children's rights contained in it. Among other things, Canada:

- must respect and ensure the rights set forth in the present *Convention* to each child within its jurisdiction without discrimination of any kind... Article 2;
- shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the *Convention*: Article 4; and
- undertake to make the principles and provisions of the *Convention* widely known, by appropriate and active means, to adults and children alike: Article 42.

32 The *Convention* creates a Committee on the Rights of the Child which monitors compliance with the *Convention*: Article 43. Countries that ratify the *Convention* undertake to submit to the Committee reports on the measures they have adopted which give effect to the rights recognized in the *Convention*: Article 44.

33 Canada demonstrated its view that the *Convention* is a very important international legal instrument by acting as a key player in ensuring that it was enacted in the first place. There are two ways in which countries ratify *Conventions*. The first is the monist model, where, as in the United States, once a *Convention* is ratified it becomes part of the domestic law. The second is the dualist model, in which the ratifying country specifically incorporates the *Convention* into domestic law. Canada uses the dualist model.

34 Canada has not directly incorporated the *Convention* into domestic law. It takes the position that it is not necessary to do because it has complied with its international obligations under the *Convention* by determining that existing domestic laws, including provincial and territorial laws, comply with the *Convention*. The manner in which the *Convention* was implemented in Canada is described in some detail in the Final Report of the Standing Committee on Human Rights, *Children; The Silenced Citizens, Effective Implementation of Canada's Obligations With Respect to the Rights of Children*, April 2007.

35 Before this *Convention* was ratified, the federal government consulted with the provinces and territories to determine whether their laws complied. The government of Canada advised the Senate Committee that it does not ratify a *Convention* until all jurisdictions indicate they support ratification and are in compliance with the obligations contained in it. In the case of this *Convention*, though it was signed in May 1990, it was not ratified until December 1991, when all the provinces and territories sent letters of support to the federal government.

36 The federal government and the provinces and territories continue to say that Canadian domestic law complies with the *Convention* in their periodic reports to the United Nations Committee on the Rights of the Child.

B. Application of the Convention to Domestic Law

1. A Contextual Approach

37 International treaties and *Conventions* are not part of Canadian law unless they have been implemented by statute: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 69. Nevertheless, the values reflected in international human rights law may inform the contextual approach to statutory interpretation: *Baker*, at para. 70.

38 In interpreting domestic statutes, Parliament and provincial legislatures are presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible interpretations that reflect these values and principles are preferred: *Baker*, at para. 70.

39 In *Baker*, at para. 71, the Supreme Court of Canada dealt specifically with the *Convention on the Rights of the Child* and concluded that the values and principles of the *Convention* recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future.

40 It may be that the provisions of the *Convention* should, for clarity, be incorporated directly into domestic law. But, it by no means follows that it now has little or no legal effect. To the contrary, there is a presumption that domestic family law legislation respects the rights and values set out in the *Convention*; such legislation should be interpreted to reflect those values and principles.

41 It is worthy of note that the government of Canada and the governments of the provinces and territories themselves rely on this presumption when they take the position that their domestic laws comply with the *Convention* without the need to directly incorporate it.

2. Application to the Divorce Act

42 The provisions of the *Divorce Act* are presumed to reflect the values and principles found in the *Convention*. The *Divorce Act* provides that in making custody and access decisions the court "shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child." s. 16 (8). It has as its focus the best interests of children.

43 Canadian jurisprudence, in cases such as *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) and *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.), favours a broad and flexible approach to the best interests test which is child centred, focusing on the child's perspective, not that of the adults involved. Taking a broad and flexible child centred approach, the best interests provisions should be interpreted to reflect the fact that, by virtue of international law, the rights to participate in the decision making process are an integral part of the determination of a child's best interests.

44 The Yukon's *Children's Law Act*, R.S.Y. 2002, c. 31, amended by: S.Y. 2003, c. 21, s. 6; S.Y. 2008, c. 1, s. 199, specifically requires the Court to consider the views and preferences of the child in determining the child's best interests, if those views and preferences can be reasonably determined: s. 30(1)(c). This provision, and the ones found in other provincial and territorial statutes, will be interpreted to reflect the values and principles found in the *Convention*.

45 While the *Divorce Act* does not specifically refer to children's legal rights to be heard, judges in divorce proceedings do take into consideration the views of the child as one of the relevant factors in determining a

child's best interests. As noted by the British Columbia Supreme Court in *G. (L.E.) v. G. (A.)*, 2002 BCSC 1455 (B.C. S.C.), a case decided under the *Divorce Act*, Canada has an obligation to ensure that children have the chance to make their views known:

[17] Canada also has an international obligation to make sure that children have an opportunity to make their views known in custody decisions affecting them. Article 12 of the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992, No. 3, which has been ratified by Canada, requires that children be given opportunities to participate in legal proceedings:

(Article 12 of the *Convention* is quoted)

46 As Suzanne Williams, Deputy and Legal Director, International Institute for Child Rights and Development, puts it, hearing from children informs their conditions, means, needs or circumstances; children are the best people to provide information about their lived experiences: Suzanne Williams, *Perspective of the Child in Custody and Access Decisions: Implementing a Best Interests and Rights of the Child Test*, [2007] 86 CBR 633. I agree with her that it "is difficult to imagine not seeking the views of the person from whose perspective a child's best interests are to be determined": Suzanne Williams, *Bringing a Child-Perspective Lens to Canadian Family Justice Processes*, 2008 Federation of Law Societies Family Law Program, Huntsville, Ontario, at p. 8.

3. Implementation

a. Generally

47 More than just lip service must be paid to children's legal rights to be heard. Because of the importance of children's participation to the quality of the decision and to their short and long term best interests, the participation must be meaningful; children should:

1. be informed, at the beginning of the process, of their legal rights to be heard;
2. be given the opportunity to fully participate early and throughout the process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials;
3. have a say in the manner in which they participate so that they do so in a way that works effectively for them;
4. have their views considered in a substantive way; and
5. be informed of both the result reached and the way in which their views have been taken into account.

48 Separate legal representation for children is an effective way of making sure that the participation of children is meaningful. The Yukon has the benefit of an official guardian who has the right to decide, in custody proceedings, whether any child requires publicly funded separate representation by a lawyer or other person: s. 168, *Children's Law Act*.

49 An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there should be a determination of the method by which the child will participate. While the views of parents about participation are relevant, they are not determinative.

50 Alfred Mamo and Joanna Harris, in their recently published book chapter called "Children's Evidence", agree that lawyers and judges should, early in the process, be considering how the child's voice will be brought into the process. In their opinion lawyers have an obligation to discuss the matter with their clients. They say that the Court can raise the issue on its own. They point out that time is of the essence in making decisions as to the appropriate method in any particular case for the child to be heard. They note that many of the options available to the court require time for implementation and it is often not desirable to have a final adjudication postponed until that process unfolds. See Alfred A. Mamo and Joanna E. R. Harris, c. 4, "Children's Evidence", in *Evidence in Family Law*, edited by Harold Niman and Anita Volikis, July 2010 Canada Law Book, at 4 — 16.

51 There are many different ways in which children's views can be presented to the Court. The evidence can be presented by or through a neutral third party; this type of participation is generally ordered by the Court. That person is often a psychologist, psychiatrist or social worker. For example, it may be done by way of a comprehensive assessment, or a "views of the child" report. Specially trained lawyers can prepare and present the views of a child. Children can meet with a judge in what is referred to as a judicial interview.

52 Evidence can be presented about children's views by either parent, or by a lawyer or other representative of the child. That evidence may be in the form of an affidavit of the child, "in court" testimony of the child, letters written by the child, audio tapes or videos of the child, evidence of the parent or another witness as to what the child has said to the person about his or her wishes, or an expert report presented on behalf of one parent.

53 For a comprehensive and very helpful analysis of the various ways to obtain information from children, see Mamo and Harris, c. 4, "Children's Evidence", referred to above.

b. Judicial Interviews

54 While there are many different ways in which children can participate in the process, there are cases in which judicial interviews are necessary and appropriate. Judicial interviews can take place both at the more informal judicial dispute resolution stage, such as at a family case conference or a settlement conference, and during more formal court hearings and trials.

55 Three broad purposes of a judicial interview have been identified: obtaining the wishes of children; making sure children have a say in decisions affecting their lives; and providing the judge with information about the child: *G. (L.E.) v. G. (A.)*, cited above. A judicial interview can be useful for all or any one of these purposes. For example, though a judge may have information about a child's wishes through an assessment by an expert, the judicial interview may provide the judge with more general information about the child.

56 Giving children the opportunity to speak directly to the judge who will be making a decision that could profoundly affect their lives provides meaningful participation, consistent with the values and principles found in the *Convention*. Judges who have to make decisions that have such a significant impact on a child's life should have the benefit of spending the time necessary to get to know that child.

57 Dr. Rachel Birnbaum and Professor Nicholas Bala have recently prepared an extensive and very helpful analysis of the issues relating to judicial interviews by doing a comparison between the situation in Ontario and Ohio. They conclude that "all children should be regarded as having the *right* to decide whether they want to meet with the person who may be making very important decisions about their future." They say that judges will often benefit from meeting with children, though the meeting can never be the only basis of the judge's information about the child. In their opinion judicial interviews, unless the case is urgent, should not be viewed as re-

placements for child legal representation or an assessment by a mental health professional, but should be viewed as supplements. See R. Birnbaum & N. Bala, *Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio*, (forthcoming 2010), International Journal of Law, Policy and the Family, at p. 38.

58 Dr. Joan Kelly, when summarizing the research on interviewing children, makes the important point that some children want to speak directly to judges. She notes that in cases with a history of violence, abuse and high conflict, children more often want to talk directly with a judge to make sure that their views are heard correctly. What is said can sometimes be lost in the translation. See Joan B. Kelly, *Child Participation in Divorce Processes: The Structured Child-Focused Interview Process*, referred to above.

59 There will also be cases in which the only way the Judge will be able to hear the child's views is by the use of a judicial interview because of the lack of financial and other resources. Other methods, such as mediation services that involve the participation of children, reports from professionals, and separate legal representation for children, are simply not available.

60 In *G. (L.E.) v. G. (A.)*, the Court reviewed some of the benefits of and concerns relating to judicial interviews that had been advanced and concluded that the benefits could be significant in some cases and the concerns raised could be addressed through the use of procedural safeguards. The interview takes place in a courtroom, with a court clerk present, though the judge does not sit at the bench. It is recorded and though generally confidential, is available for the purposes of an appeal. The judge will normally summarize the contents of the interview in Court after the interview, after discussing doing so with the child. The parents or their lawyers have an opportunity to advance arguments about the significance of what was said, and if appropriate, to call evidence relating to it.

61 Judges, lawyers and others involved in child custody cases, should be, and in some cases are, provided with education programming, both with respect to child development issues and interviewing skills. Canada's National Judicial Institute has developed and presented such programs for judges.

62 Dr. Birnbaum and Professor Bala are of the opinion that, "training and education is an ongoing process for all professionals involved in family law disputes, and would greatly assist all judges in any jurisdiction in regard to judicial interviews with children." They also suggest that there must be government policies in place to ensure that there are appropriate resources in terms of judicial time and court facilities to allow judges to meet with children in a comfortable and supportive environment. See Birnbaum and Bala, *Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio*, cited above, at p. 38.

IV. Application of the Legal Principles to This Case

63 As noted at the outset, the Court raised the question of K.'s participation in the process during the hearing, which was the first time the case was dealt with by a judge. Both lawyers said that they thought it would be inappropriate to involve K. as doing so would place him in the middle of the dispute. Counsel for Ms. R. submitted that the evidence showed that if K. wanted a change, or if he wanted to speak to the judge, he would tell her, based on the relationship they have, and their past experience in dealing with issues of this sort.

64 By way of background, Ms. R. and Mr. G. were divorced in 2000. At that time they consented to an order that Ms. R. would have sole custody of K. with primary residency with Ms. R., and they would share joint guardianship. Guardianship was specifically defined and included the requirement that Ms. R. consult with Mr.

G. before making decisions. In 2009 K. asked his mother if they could change the schedule so that he would spend alternating weeks with each parent, and she agreed. That schedule started in September 2009, less than a year ago.

65 Because Mr. G applied to vary (change) an existing custody order and an agreement that was made by consent and at K.'s request, the Court had an obligation to consider K.'s legal rights to be heard. He is 12 years old and is capable of forming his own views. When considering his rights to be heard, the questions are whether he has views, and if he does, whether he wishes to express them.

66 I am satisfied that his view is that he wants the existing alternating week schedule to continue. It is a recent change that was made at his request. Had he wanted to change it again, he would have spoken to his mother about it. He did not do that. I am also satisfied that had he wanted to have his views conveyed to the Court, he would have told his parents, or at least one of them. It is likely that he did not want to get caught in the middle of what is in essence a dispute between his parents about money.

67 In reaching this conclusion, I took into account the fact that neither Mr. G. nor Ms. R. thought that involving K. in the process was in his best interests, and the reasons they gave in support of their views.

68 I note that ultimately the Court decided that Mr. G did not have a genuine desire to change the custody arrangement in a way that was in K.'s best interests. Rather, he was following through on the threats he previously made to make a claim for custody if Ms. R pursued her claim to increase the child support being paid: [2010 YKSC 33](#) (Y.T. S.C.).

Application dismissed.

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State	Statute	Code	Factors used or inferred from statute to define "best interests of the child"	Notes on related statutes
Alabama	Juvenile Justice Act	Ala. Code § 12-15-1.1	No specific definition, inferred factors: Preservation of family integrity; ensure family accountability; secure necessary treatment, care, guidance, & discipline for child; necessary measures for protection of child and State; timely permanency determinations.	.
	Child Custody & Support (Family Abuse)	Ala. Code § 30-3-132	No specific definition, inferred factors: Safety & well-being of the child & (victim) parent; perpetrator's history of causing physical harm or fear of physical harm	.
	Alabama Adoption Code	Ala. Code § 26-10A-5	No specific definition, but mentions "child's best interests."	
	Alabama Probate Code	Ala. Code § 43-8-2	No specific definition.	
Alaska	Welfare, Social Services; Legislative findings relating to children	AS § 47.05.065	Factors: (1) Parents' ability to provide child w/food, clothing, shelter, education, and medical care; (2) protect, nurture, train and discipline child (including child's right to medical care); (3) ability to make decisions of legal & financial significance concerning child; (4) responsibility to provide special safeguards & care, including appropriate prenatal & postnatal protection for child; (5) child's placement in secure, safe, and stable environment; (6) psychological attachment between adult caregiver & child; (7) frequent, regular & reasonable visitation with parent/guardian/other family members; (8) degree of emotional damage child suffers as a result of separation with adult caregiver.	* Not definition of "best interests" rather parental rights/responsibilities & factors to consider in removing child from home.
	Marital & Domestic Relations; Custody	AS § 25.24.150	Factors: (1) Physical, emotional, mental, religious & social needs of child; capability and desire of each parent to meet needs; (2) child's preference (if sufficient age & capacity to form preference); (3) love & affection between child & both parents; (4) length of time child has lived in stable home environment; (5) parent's support of child's relationship with other parent (unless there is evidence of sexual assault or domestic violence against the child or parent); (6) evidence of domestic violence or sexual assault between one parent and the other parent or with the child; (7) evidence of parental substance abuse; (8) any other factors the court deems relevant.	.
	Alaska Probate Code	AS § 13.16.001	No specific definition.	
	Marital & Domestic Relations; Adoption	AS § 25.23.005	No specific definition.	
Arizona	Marital & Domestic Relations; Custody	A.R.S. § 25-403	Factors: (1) Child's & parents' wishes; (2) interaction & relationship between parent, child, siblings & any other person significantly affecting child; (3) child's adjustment to home, school & community; (4) mental & physical health of all persons involved; (5) past care of child; (6) ensure meaningful contact with both parents; (7) nature/extent of coercion/duress by parent against the other parent in the custody agreement.	.
	Children; Adoption	A.R.S. § 8-100	No specific definition.	
	Children; Child Welfare & Placement	A.R.S. § 8-533	No specific definition, inferred factors: (1) Parent has abandoned child; (2) parent has neglected or wilfully abused child (including serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing/neglecting a child); (3) parent is unable to discharge parental responsibilities because of mental illness, mental deficiency or a history of chronic abuse of dangerous drugs, controlled substances or alcohol & there are reasonable grounds to believe that the condition will continue for a prolonged indeterminate period; (4) parent is deprived of civil liberties due to felony conviction (thus conviction proves parental unfitness to have future custody/control of child including murder/manslaughter of another child of parent, aiding/abetting/attempting/conspiring/soliciting to commit murder or manslaughter of another child of the parent); (5) potential father failed to file paternity action within 30 days of completion of service in §8-106(g); (6) child is being cared for in out-of-home placement under authority of juvenile court for more than 9 months (6 months if under 3 yrs); (7) parent has had parental rights to another child terminated within preceding 2 years for same cause and is currently unable to discharge parental responsibilities due to same cause; (8) identity of parent is unknown and continues to be unknown following 3 months of diligent efforts to identify parent.	* Inferred factors reference the statutory provision for removing a child from their residence
	Trusts, Estates; Adult Adoption	A.R.S. § 14-8101	No specific definition, but mentions "adult's best interests."	

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Arkansas	Family Law; Domestic Relations; Custody	A.C.A. § 9-13-101 & 103	Factors: (1) Preferences of parents (and child, if child is of sufficient capacity); (2) evidence that parent has engaged in domestic violence or other abuse; (3) parents' status as a sex offender; (4) parent ability to care for child; (5) possibility of loss of relationship with one parent; (6) custody agreement's overall harm to child.	
	Family Law; Domestic Relations;	A.C.A. § 9-9-201	No specific definition.	
	Family law; Minors; Child Welfare	A.C.A. § 9-32-202	No specific definition.	
	Arkansas Probate Code	A.C.A. § 28-65-104	No specific definition.	
California	Cal. Family Code; Custody	Cal. Fam. Code § 3011	Factors: (1) Health, safety & welfare of child; (2) history of abuse by parent/other person seeking custody; (3) nature & amount of contact with both parents; (4) habitual/continual use of controlled substances or alcohol.	
	Cal. Family Code; Adoption	Cal. Fam. Code § 8709	No specific definition, inferred factors: (1) consideration of child's religious background in placing a child; (2) will not delay/deny placement of child on basis of race, color, or national origin.	
	Cal. Probate Code	Cal. Prob. Code § 1514.5	No specific definition, but mentions the best interests standard in Cal. Fam. Code § 3011.	
	Cal. Child Welfare & Institutions Code	Cal. Welf. & Inst. Code § 224.71	No specific definition, inferred factors: "Youth Bill of Rights" in a juvenile detention facility: to live in a safe, healthy, and clean environment conducive to treatment & rehabilitation & where they are treated w/dignity and respect; to be free from physical, sexual, emotional, or other abuse, or corporal punishment; to receive adequate and health food and water, sufficient personal hygiene items, and clothing that is adequate & clean; to receive adequate & appropriate medical, dental, vision, and mental health services; to refuse the administration of psychotropic & other medications consistent w/applicable law or unless immediately necessary for the preservation of life or the prevention of serious bodily harm; to not be searched for the purpose of harassment or humiliation or as a form of discipline or punishment; to maintain frequent & continuing contact w/parents, guardians, siblings, children & extended family members, through visits, telephone calls, and mail; to make & receive confidential phone calls/mail/visits with attorneys & authorized representatives, ombudspersons & other advocates, holders of public office, state & federal court personnel & legal service organizations; to have fair/equal access to all available service, placement, treatment, care, and benefits, and to not be subject to discrimination or harassment on the basis of actual/perceived race, ethnic group ID, ancestry, national origin, color, religion, sex. orientation, gender ID, mental or physical disability or HIV status; to have regular opportunity for age-appropriate physical exercise and recreation, incl. time spent outdoors; to contact attorneys, ombudspersons & other advocates, and representatives of state or local agencies, regarding conditions of confinement or violations of rights, and to be free from retaliation for making these contacts or complaints; to participate in religious services & activities of their choice; to not be deprived of any of the following as a disciplinary measure: food, contact w/parents, guardians, or attorneys, sleep, exercise, education, bedding, access to religious services, a daily shower, a drinking fountain, a toilet, medical services, reading material, or the right to send/receive mail; to receive quality education that complies w/state law, to attend age appropriate school class & vocational training, and to continue to receive edu services while on disciplinary or medical status; to attend all court hearings pertaining to them; to have counsel & a prompt probable cause hearing when detained on probation or parole violations; to make at least 2 free telephone calls w/in an hour after initially being placed in a facility of the Division of Juvenile Facilities following an arrest.	
Colorado	Uniform Dissolution of Marriage Act; Custody	C.R.S.A. § 14-10-124	Factors: (1) Wishes of sufficiently mature child & parents; (2) interaction & interrelationship of child with parents, siblings, and others who significantly affect the child's best interests; (3) child's adjustment to home, school, and community; (4) mental and physical health of all persons involved; (5) ability of parties to encourage the sharing of love, affection, and contact between the child & other parent; (6) past pattern of involvement of parties with the child which reflects a system of values, time commitment & mutual support; (7) physical proximity of the parties & practical considerations of parenting time; (8) evidence of parent as a perpetrator of domestic violence or child abuse/neglect; (9) "best interests" are determined irrespective of gender/sex of parent.	
	Col. Children's Code	C.R.S.A. § 19-1-104	No specific definition, but mentions "child's best interests."	
	Col. Probate Code	C.R.S.A. § 15-10-101	No specific definition.	

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	Col. Children's Code; Adoption	C.R.S.A. § 19-5-206	No specific definition, but mentions "child's best interests."	See C.R.S.A. § 19-5-104
Connecticut	Dissolution of Marriage; Custody	C.G.S.A. § 46b-56	Factors: (1) Temperament and developmental needs of child; (2) capacity of parents to fulfill child's needs; (3) preferences of child; (4) interaction and relationship with parents; (5) support for other parent to continue relationship with child; (6) manipulation/coercion by a parent to involve child in dispute; (7) ability of each parent to be actively involved in each child's life; (8) length of time child has been in a stable environment; (9) stability of existing and proposed residences; (10) mental and physical health of individuals involved; (11) child's cultural background; (12) evidence of domestic abuse against child or other parent or evidence of other abuse in home; (13) parent participation in	.
	Probate Courts & Procedure; Adoption	C.G.S.A. § 45a-719	Factors: Best interests of child (in context of reopening judgment terminating parental rights) includes but not limited to (1) a consideration of the age of the child; (2) the nature of the relationship of child with the caretaker; (3) length of time child has been in custody of birth parent; (4) any relationship that may exist between child & siblings/other children in caretaker's household; (5) psychological and medical needs of child; (6) there will be no consideration of the socio-economic status of the birth-parent or caretaker in determining whether to terminate parental rights.	C.G.S.A. § 45a-132 mentions B.I. but not definition.
	Probate Courts & Procedure; Adoption	C.G.S.A. § 45a-727a	Factors: Best interests of child are promoted by: (1) having persons in child's life who manifest a deep concern for the child's growth & development; (2) when a child has as many persons loving & caring for the child as possible; (3) when child is part of a loving, supportive & stable family; (4) whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family.	* Statute also makes note that current public policy is that marriage is limited to be btn. One man & one woman.
	Social & Human Services & Resources; Child Welfare	C.G.S.A. § 17a-90	No specific definition.	
Delaware	Domestic Relations; Custody	13 Del.C. § 722	Factors: (1) Parents' & child's preferences; (2) child's interactions & relationships with parents, siblings, and extended family cohabiting with child; (3) child's adjustment to the residence; (4) mental and physical health of all individuals involved; (5) compliance with §701 (statute section regarding parents' & children's rights); (6) evidence of domestic violence or abuse against child or other parent; (7) criminal history of parents or others cohabiting w/child; (8) a "best interests" determination shall be made irrespective of sex of parent.	.
	Domestic Relations; Adoption	13 Del.C. § 901	No specific definition.	13 Del.C. § 2330
	Welfare; Child Welfare	13 Del.C. § 301	No specific definition.	
	Decedents' Estates & Fiduciary Relations; Guardianship (Probate)	12 Del.C. § 3921	No specific definition.	
D.C.	Domestic Relations; Divorce; Custody	DC ST § 16-914	Factors: (1) Parents' & child's preferences; (2) child's interactions & relationships with parents, siblings, and extended family cohabiting w/child; (3) child's adjustment to residence; (4) mental and physical health of all individuals involved; (5) prior involvement of parent in child's life; (6) potential disruption of child's social & school life; (7) geographic proximity of parental homes & practical considerations for child's residential schedule; (8) demands of parental employment; (9) age & number of children; (10) sincerity of each parent's request; (11) parent's ability to financially support a joint custody agreement; (12) benefit to parents; (13) impact on TANF or other welfare programs.	.
	Decedent's Estates & Fiduciary Relations;	DC ST § 21-107	No specific definition, inferred: (1) preference given to parents or spouse if child is married to a person 18 yrs or older.	

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	Adoption	DC ST § 16-309	No specific definition, inferred: (1) Prospective adoptee is physically, mentally, and otherwise suitable for adoption by petitioner; (2) petitioner is fit & able to give prospective adoptee a proper home & education.	
	Public Care Systems; Placement of Children in Family Homes (Child Welfare)	DC ST § 4-1401	No specific definition, inferred: (1) Care and guidance of child; (2) general welfare of child; (3) best interests of the state; (4) speedy process in placing child.	
Florida	Dissolution of Marriage; support; time-sharing (Custody)	F.S.A. § 61.13 (3)	Factors: (1) Provision of health care for minor; (2) frequent and continuing contact with both parents; (3) court WILL order that parental responsibility for a minor child be shared by both parents unless detrimental to child; (4) evidence/conviction of domestic violence or [child] abuse against other parent or child; (5) desires of parents to grant one party ultimate responsibility for child; (6) geographic viability of parenting plans; (7) moral fitness of the parents; (8) mental and physical health of parents; (9) home, school, and community record of the child; (10) reasonable preferences of a sufficiently capable child; (11) ability of each parent to provide a consistent routine & discipline for the child; (12) ability to communicate with the other parent; (13) demonstrated capacity and disposition of each parent to maintain a substance-abuse-free environment; (14) capacity and disposition of each parent to protect child from litigation; (15) evidence of false information from either parent; (16) ability of parent to care for child in his developmental stages.	
	Estates & Trusts; Probate Code	F.S.A. § 733	No specific definition.	
	Social Welfare; Social & Economic Assistance; Care of children	F.S.A. § 409.145	No specific definition, inferred: Statute lists goals of the Department: (1) prevention of separation of children from their families; (2) reunification of families who have had children placed in foster homes or institutions; (3) permanent placement of children who cannot be reunited with families or reunification is not in child's best interests; (4) protection of children; (5) transition to self-sufficiency for older children in foster care; (6) guidance, care and supervision of the child.	* Child Welfare Act repealed
	Civil Practice & Procedure; Florida Adoption Act	F.S.A. § 63.012	No specific definition.	
Georgia	Domestic Relations; Custody of Child	Ga. Code Ann., § 19-9-3	Factors: (1) Each parent's and sibling's love, affection, and bonding with child; (2) capacity and disposition of each parent to provide child with love, affection guidance, education, food, clothing, medical care, day-to-day needs, and basic care; (3) home environment of each parent; (4) continuity in the child's life and the length of time the child has lived in a stable environment; (5) stability of family unit; (6) each parent's employment; (7) each parent's involvement in child's educational, social & extra-curricular activities; (8) mental and physical health of all individuals involved; (9) home, school, and community record of child; (10) each parent's past and relative abilities for future performance in parental responsibilities; (11) willingness of each parent to encourage a continuing relationship with the other parent; (12) recommendation by a court appointed guardian or guardian ad litem; (13) evidence of domestic violence or abuse against other parent or child.	
	Domestic Relations;	Ga. Code Ann., § 19-9-3	No specific definition.	
	Wills, Trusts & Estates	Ga. Code Ann., § 53-2-1	No specific definition.	
	Social Services; Children & Youth Services (Child Welfare)	Ga. Code Ann., § 49-5-2	No specific definition, inferred: Statute states purpose of statute is to (1) promote, safeguard, and protect well-being and general welfare of children through public child welfare services, incl: social services & facilities for children & youth who require care, control, protection, treatment, or rehabilitation & for parents of such children; (2) setting standards for social services, facilities, and youth; (3) cooperation with public & voluntary organizations/agencies; (4) promotion of community conditions & resources that help parents to discharge their responsibilities for the care, development, and well-being of their children.	

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Hawaii	Family; Custody	HRS § 571-46	Factors: (1) History of sexual/physical, emotional abuse or neglect of child by parent; (2) quality of parent-child relationship; (3) history of caregiving by each parent prior to separation; (4) physical and emotional health, safety, and educational needs of child; (5) each parent's cooperation in developing & implementing a plan to meet the child's ongoing needs, interests, and schedule; (6) each parent's actions demonstrating that they separate the child's needs from the parent's needs; (7) evidence of past/current substance abuse by parent; (8) mental health of parent; (9) areas & levels of conflict present within family; (10) parent's prior willful misuses of the protection from abuse to gain tactical advantage in custody determination.	
	Uniform Probate Code	HRS § 560:5-207	No specific definition, inferred: "Duties of Guardian" section; A guardian shall: (1) become/remain personally acquainted w/the ward & maintain sufficient contact w/the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health; (2) take reasonable care of ward's personal effects & bring a protective proceeding if necessary to protect other property of the ward; (3) expend wealth of the ward that has been received by the guardian, for the ward's current needs for support, care, education, health, and welfare; (4) conserve any excess wealth of the ward for the ward's future needs; provided that if a conservator has been appointed for the estate of the ward, the guardian shall pay the money at least quarterly to the conservator to be conserved for the ward's future needs; (5) report the condition of the ward & account for \$ and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule; and (6) inform the court of any change in the ward's custodial dwelling or address.	
	Family; Adoption	HRS § 578-1.5	No specific definition.	
	Family; Children Protective Act; Foster Children (Child Welfare)	HRS § 587-1	No specific definition, inferred: Guiding principles (of statute) to ensure that foster children (1) live in a safe/healthy home, free from physical, psychological, sexual & other abuse; (2) have adequate nutritious & healthy food, clothing, medical/dental/orthodontic/corrective vision care, mental health services; (3) have supervised in-person contact & telephone/mail correspondence with the child's parents & siblings while the child is in foster care unless prohibited by court order; (4) have direct contact with a social worker, guardian ad litem, and probation officer; (5) may freely exercise their own religious beliefs, including refusal to attend any religious activities & services; (6) have a personal bank account & assistance managing their personal income, consistent w/child's age/development unless prohibited due to safety/health concerns; (7) have right to attend school and participate in appropriate extra-curricular activities, & if child is moving during school year, complete the school year at the same school if practicable; and (8) provided with life skills training & a transition plan starting at 12 yrs of age to provide adequate transitioning for kids aging out of foster care system.	
Idaho	Domestic Relations; Custody of Children	I.C. § 32-717	Factors: (1) Preference of parent & child; (2) interaction & interrelationship of child with parents & siblings; (3) child's adjustment to home, school, & community; (4) character & circumstances of all individuals involved; (5) need to promote continuity & stability in the life of child; (6) domestic violence in home or against child.	
	Uniform Probate Code	I.C. § 15-3-703	No specific definition, but mentions "child's best interests."	
	Public Assistance & Welfare; Children	I.C. § 56-204A	No specific definition.	
	Juvenile Proceedings; Adoption of Children	I.C. § 16-1501A	No specific definition, inferred: (1) stability and permanence of prospective home; (2) prospective parents' ability to meet the needs of child.	
Illinois	Illinois Marriage & Dissolution of Marriage Act	750 ILCS 5/602	Factors: (1) Preference of parent & child; (2) interaction & interrelationship of child with parents, siblings & others who significantly affect child's best interests; (3) child's adjustment to his home, school & community; (4) mental & physical health of all individuals involved; (5) domestic violence or other physical abuse in home; (6) occurrence of repeated abuse against child or other person; (7) willingness & ability of each parent to facilitate and encourage an ongoing relationship between child & other parent; (8) parents' sex offender status.	
	Families; The Adoption Act	750 ILCS 50/15	No specific definition, inferred: (1) preference to petitioners of the same religious belief as the child.	
	Estates; The Probate Act of 1975	755 ILCS 5/11-5	No specific definition, but mentions "child's best interests."	

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	Illinois Administrative Code	Il. Admin. Code tit. 89, §	No specific definition, but mentions "child's best interests."	
Indiana	Domestic Relations; Child Custody	IC 31-17-2-13	No specific definition.	
	Probate Code	IC 29-1-1-1	No specific definition.	
	Family Law; Adoption	IC 31-19-2-2	No specific definition.	
	Juvenile Law; Child in need of services (Child Welfare)	IC 31-34-1-1	No specific definition.	
Iowa	Domestic Relations; Custody of Children	I.C.A. § 598.41	Factors: (1) Whether parent is a suitable custodian; (2) whether psychological and emotional needs & development of child will suffer due to lack of active contact with and attention from both parents; (3) parent's ability to communicate with other parent; (4) whether both parents have actively cared for the child before & since separation; (5) ability of each parent to support the other parent's relationship with child; (6) child's preference; (7) whether one or both parents agree or are opposed to joint custody; (8) geographic proximity of parents; (9) safety of child and parent; (10) parents' history of domestic violence.	
	Children & Families; Child Welfare	I.C.A. § 235	No specific definition.	
	Domestic Relations; Adoption	I.C.A. §600.1	No specific definition, but mentions "child's best interests" and considers the interests of the adopting parents as well.	
	Domestic Relations; Probate Code	I.C.A. §633.1	No specific definition.	
Kansas	Domestic Relations; Child Custody	K.S.A. 60-160	Factors: (1) Parenting plan between parents is presumed in child's best interests; (2) length of time that child has been under actual care & control of any person other than parent; (3) parent & child preferences; (4) interaction & interrelationship of the child with parents, siblings & any other person who affect child's best interests; (5) child's adjustment to home, school & community; (6) willingness & ability of each parent to respect bond between child & the other parent (ability to allow that relationship); (7) evidence of domestic violence or sex abuse of child or other parent; (8) parent sex offender status.	
	Minors; Child Welfare	K.S.A. 38-2243	No specific definition, inferred: Court may enter an order of temporary custody after determining there is probable cause to believe that the (1) child is dangerous to self or to others; (2) child is not likely to be available within the jurisdiction of the court for future proceedings; or (3) health or welfare of the child may be endangered without further care.	K.S.A. 38-2202
	Probate Code &	Ch. 59 of	No specific definition.	
	Juvenile Justice Code	Ch. 38, art. 16	No specific definition.	

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Kentucky	Dissolution of Marriage; Custody	KRS § 403.270	Factors: (1) Wishes of parent & child; (2) interaction & interrelationship of child with parent, siblings & other person that may affect child's best interests; (3) child's adjustment to his home, school, & community; (4) mental & physical health of all individuals involved; (5) evidence of domestic violence in home; (6) extent to which child has been cared for, nurtured & supported by de facto custodian; (7) intent of parent or parents in placing child with de facto custodian; (8) circumstances under which child was placed in custody of de facto custodian.	
	Descent, Wills (Probate)	KRS § 391.010	No specific definition.	
	Economic Security & Public Welfare; Adoption	KRS § 199.470	No specific definition.	
	Assistance to Children (Child Welfare)	KRS § 200.080	No specific definition.	
Louisiana	Civil Code; Divorce; Child Custody	LSA-C.C. Art. 134	Factors: (1) Love, affection & other emotional ties between each party & child; (2) capacity & disposition of each party to give child love, affection, and spiritual guidance and to continue the education & rearing of the child; (3) capacity & disposition of each party to provide child with food, clothing, medical care, and other material needs; (4) length of time child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment; (5) permanence, as a family unit, of existing and proposed custodial home(s); (6) moral fitness of each party, insofar as it affects the welfare of child; (7) mental and physical health of each party; (8) home, school & community history of child; (9) reasonable preference of child (if sufficient age to express it); (10) willingness & ability of each party to facilitate & encourage a close and continuing relationship between child & other party; (11) distance between respective parties' residences; (12) responsibility for the care and rearing of the child previously exercised by each party.	
	Children's Code; Child Welfare	LSA-Ch.C. Art. 606	No specific definition, inferred: (1) conduct of the parent constitutes a crime against the child or any other child of that parent; (2) parent has been convicted of a crime against the child who is the subject of the proceeding, or against another child of the parent, and the parent is now unable to retain custody/control of the child's welfare is otherwise endangered if left within the parent's custody/control; (3) child is without necessary food, clothing, shelter, medical care, or supervision because of the disappearance or prolonged absence of his parent or when, for any other reason, the child is placed at substantial risk of imminent harm because of the continuing absence of the parent; (4) child is victim of neglect; (5) child is victim of abuse perpetrated, aided, or tolerated by parent/caretaker, by a person who maintains an interpersonal dating or engagement relationship with parent/caretaker or by person living in the same residence with parent/caretaker as a spouse (married or not) & child's welfare is seriously endangered.	
	Children's Code;	LSA-Ch.C. Art.	No specific definition.	
	Uniform Probate Code	(-)	No specific definition.	

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Maine	Domestic Relations; Parent & Children; Parental Rights & Responsibilities	19-A M.R.S.A. §1653(3)	Factors: (1) Age of child; (2) relationship of child with child's parents & other persons who may significantly affect child's welfare; (3) preference of child, if child is old enough to express a meaningful preference; (4) duration & adequacy of child's current living arrangements & desirability of maintaining continuity; (5) stability of any proposed living arrangement for child; (6) motivation of parents involved & their capacities to give child love, affection & guidance; (7) child's adjustment to present home, school & community; (8) capacity of each parent to allow & encourage frequent and continuing contact between child & other parent, including physical access; (9) capacity of each parent to cooperate or learn to cooperate in child care; (10) methods for assisting parental cooperation & resolving disputes & each parent's willingness to use those methods; (11) effect on the child if one parent has sole authority over child's upbringing; (12) existence of domestic violence between parents & how abuse affects child emotionally & his safety; (13) existence or history of child abuse by a parent; (14) all other factors having a reasonable bearing on the physical & psychological well-being of child; (15) parent's prior willful misuse of the protection from abuse to gain tactical advantage in a proceeding determining parental rights/responsibilities; (16) if child under 1 yr. old then whether child is being breast-fed; (17) existence of parent's conviction for a sex offense or sexually violent offense; (18) whether there is a person residing with the parent & whether that person has been convicted of a crime under Title 17-A chapter 11 or 12, adjudicated of a juvenile offense that if the person had been an adult at the time of the offense would have been a violation of Title 17-A, chapter 11 or 12, has been adjudicated in a proceeding, in which the person was a party as having committed a sexual offense.	
	The Adoption Act	18-A M.R.S.A.	No specific definition.	
	Probate Code	18-A M.R.S.A.	No specific definition, but mentions "best interests standard for guardian ad litem" in Title 19-A § 1653(3).	
	Health & Welfare	22 M.R.S.A. §	No specific definition.	
Maryland	Family Law; Child Custody	MD Code, Family Law, § 5-203	No specific definition, inferred: (1) child's support, care, nurture, welfare, and education; (2) geographic proximity of parents; (3) evidence of domestic violence or child abuse (see § 9-101.1); (4) parent (or any other family member residing in household) guilty of first or second degree murder.	
	Family Law; Adoption; Consideration	MD Code, Family Law, §5-3A-34	No specific definition, but mentions "child's best interests."	
	Family Law; Child Abuse & Neglect (Child Welfare)	MD Code, Family Law, §5-700	No specific definition.	
	Estates & Trusts (Probate Code)	MD Code, Estates and	No specific definition.	
Massachusetts	Domestic Relations; Child Custody	M.G.L.A. 208 § 28	No specific definition, inferred: (1) whether parents have been convicted of first degree murder; (2) parents' ability to provide for child financially; (3) parents' ability to provide health insurance for child; (4) education of child.	
	Domestic Relations;	M.G.L.A. 210 §	Factors: (1) All factors relevant to the physical, mental & moral health of child; (2) religious designation as expressed by surrendering parents.	
	General Probate Court Rules	M.G.L.A. General Probate	No specific definition.	
	Juvenile Court Rules	M.G.L.A. Juvenile Court Rules for the Care &	No specific definition.	
Michigan	Custody & Support	M.C.L.A.	No specific definition, inferred: (1) Age of child; (2) physical environment of custodial residence; (3) permanency of custodial relationship with	

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	Children; Child Welfare	M.C.L.A. 722.4c	No specific definition, inferred: Best interests of minor for emancipation order: Minor must establish all of the following --> (a) that the minor's parent/guardian does not object to the petition; or if a parent/guardian objects to petition, that the objecting parent/guardian is not providing the minor with support; (b) that the minor is at least 16 years of age; (c) that the minor is a resident of the state; (d) that the minor has demonstrated the ability to manage his or her financial affairs, including proof of employment/other means of support (not including general assistance/aid to families w/dependent children administered under the Social Welfare Act); (e) that minor has ability to manage her personal & social affairs incl. but not limited to proof of housing; (f) that minor understands her rights/responsibilities under this Act as an emancipated.	
	Probate	M.C.L.A. 720	No specific definition.	
	Foster Care &	M.C.L.A.	No specific definition, inferred: (1) Prospective parent's ability to care for child's developmental and emotional needs.	
Minnesota	Domestic Relations; Custody of Children	M.S.A. § 518.17	Factors: (1) Wishes of parent; (2) reasonable preference of child if court deems child is of sufficient age to express it; (3) child's primary caretaker; (4) intimacy of the relationship between each parent & the child; (5) interaction & interrelationship of the child with parent, sibling, or other person affecting child's best interests; (6) child's adjustment to home, school & community; (7) length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (8) permanence of existing or proposed custodial home; (9) mental and physical health of all individuals involved (irrespective of parent/child physical or mental disability); (10) capacity and disposition of parties to give the child love, affection and guidance ~ continue child's education and raising the child in the child's culture, religion, and creed; (11) child's cultural background; (12) evidence of domestic violence or sexual abuse in home; (13) false allegations of child abuse by one parent against the other.	
	Public Welfare; Adoption	M.S.A. § 259.20	No specific definition, but mentions best interests standard in M.S.A. § 260C.193	
	Public Welfare; Child Protection	M.S.A. § 260C.193	Factors: (1) individual determinations of the needs of the child & how the selected placement will serve the needs of the child in foster care placements; (2) if the child's birth parent(s) explicitly request that a relative or important friend not be considered, then the court shall honor that request if it is in the child's best interests; (3) if a child's birth parent(s) express a preference that child be placed in a home of similar/same religious background to birth parent, then court shall order that preference; (4) siblings should be placed together unless the placement is not in best interests of siblings.	
	Estates of Decedents; Uniform Probate Code	M.S.A. § 524.5-204	No specific definition, but mentions "child's best interests."	
Mississippi	Domestic Relations; Child Custody	Miss. Code Ann. § 93-5-24	No specific definition, inferred: (1) parent's ability to communicate with the other parent regarding the health, education, and welfare of child; (2) evidence of domestic violence or sexual abuse of child or parent.	
	Public Welfare;	Miss. Code	No specific definition, but mentions "child's best interests."	
	Domestic Relations;	Miss. Code	No specific definition, but mentions "child's best interests."	
	Trusts & Estates	Miss. Code	No specific definition.	
Missouri	Domestic Relations; Custody of children	V.A.M.S. 452.375	Factors: (1) Wishes of parents & proposed parenting plan; (2) needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability & willingness of parents to actively perform their functions as parents to the child; (3) interaction and interrelationship of the child with parents, siblings, and any other person that affects the child's best interests; (4) which parent is more likely to allow the child frequent, continuing and meaningful contact w/ the other parent; (5) the child's adjustment to the child's home, school, and community; (6) mental and physical health of all individuals involved (including history of abuse of any individuals involved); (7) intention of either parent to relocate the principal residence of the child; (8) wishes of child.	* Statute notes that one parent's decision to home school child should not be a sole factor (leaves the possibility that it is a factor though).
	Domestic Relations; Adoption	V.A.M.S. 453.005	No specific definition, but mentions "child's best interests."	
	Health & Welfare; Child Protection	V.A.M.S. 210.001	No specific definition, but mentions "child's best interests."	

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	Trusts & Estates; Probate Code	V.A.M.S. 475.010	No specific definition.	
Montana	Family Law; Custody	MT ST 40-4- 212	Factors: (1) Wishes of the child & parents; (2) interaction & interrelationship of the child with parent, sibling or any other person that affects child's best interests; (3) child's adjustment to home, school & community; (4) mental & physical health of all individuals involved; (5) physical abuse (or threat of) by one parent against other parent or child; (6) parent's chemical dependency (substance abuse); (7) continuity and stability of care for the child; (8) developmental needs of the child; (9) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay; (10) whether parent has knowingly failed to financially support a child that the parent is able to support; (11) whether the child has frequent & continuing contact with both parents (unless court makes different determination that frequent contact is not in child's best interests); (12) adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions.	
	Adoption; Placements By A Foster Care Agency	MT ST 42-4- 201	No specific definition, inferred: Prospective Parent factors: (1) Age, as it relates to health, earning capacity, provisions for the support of a child, or other relevant circumstances; (2) marital status, as it relates to the ability to serve as a parent in particularized circumstances; (3) religion, as it relates to the ability to provide the child with an opportunity for religious/spiritual/ethical development & as it relates to the express preference of birth parent(s) or a child to be placed with an adoptive parent of a particular religious faith/denomination.	
	Estates, Trusts & Fiduciary Relationships - Uniform Probate Code	MT ST 72-5- 223	No specific definition, but mentions "child's best interests."	
	Family Services; Children Services (Welfare)	MT ST 52-2- 102	No specific definition, but mentions "child's best interests."	
Nebraska	Family Law; the Parenting Act	NE ST § 43- 2923	Factors: (1) Parenting arrangement/agreement or other court-ordered arrangement that provides for a child's safety, emotional growth, health, stability, and physical care; (2) evidence of domestic violence in the home; (3) parental visitation agreement that provides for the safety of a victim parent (domestic violence); (4) child's families and parents remain appropriately active & involved with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child; (5) absence or relocation of the child's residence; (6) court's determination that parenting plan is in child's best interests; (7) preference of the child; (8) minimize potentially negative impact of parental conflict on children; (9) ability of parents to make decisions that are in the best interests of the child.	* NE ST § 42-364 - "best interests" is defined by the Parenting Act
	Decedents' Estates; Probate of Wills/Administration	NE ST § 30- 2444	No specific definition.	
	Nebraska Admin. Code; Child Welfare	390 NE ADC Ch. 1, § 003	No specific definition, inferred: (1) preservation of family unit; (2) safety of child.	
	Nebraska Admin. Code; Adoption	390 NE ADC Ch. 6, § 002	No specific definition, inferred: Prospective family factors: (1) Child's best interests & needs (including special needs); (2) preference of an adult relative instead of a non-related caregiver provided that the relative is appropriate & can meet child's needs; (3) siblings will be placed together unless the placement would be detrimental to 1(+) sibling; (4) biological parents' requests regarding religion of adoptive parents; (5) accessibility of services needed by child; (6) child's own preferences; (7) prospective family's ability to parent and meet the child's needs, accept & share with the child his/her family background, handle child's special need (i.e. disability or behavior problems), and accept openness of adoption; (8) child's attachment to potential adoptive family; (9) whether the child has been living with a foster family and the family requests the adoption.	

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Nevada	Domestic Relations; Custody	N.R.S. 125.480	Factors: (1) Wishes of child if the child is of a sufficient age & capacity to form an intelligent preference as to his custody; (2) any nomination by a parent/guardian for the child; (3) which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent; (4) level of conflict between the parents; (5) mental and physical health of parents; (6) ability of the parents to cooperate to meet the needs of the child; (7) physical, developmental and emotional needs of the child; (8) the nature of the relationship of the child with each parent; (9) ability of the child to maintain a relationship with any sibling; (10) any history of parental abuse or neglect of the child or a sibling of the child; (11) whether either parent or any other person seeking custody has engaged in domestic violence against child, other parent, or any other person residing with the child.	
	Domestic Relations; Adoption of Children	N.R.S. 127.003	No specific definition, but mentions "child's best interests."	
	Guardianship; Appointment (Probate)	N.R.S. 159.061	No specific definition, inferred: Factors considered for a suitable guardian: (1) Any request contained in a written instrument written by the incompetent while competent; (2) any nomination of a guardian for incompetent/minor/person of limited capacity contained in a will or other written instrument executed by a parent/spouse of the proposed ward; (3) any request for the appointment as guardian for a minor 14 years of age or older made by the minor; (4) the relationship by blood, adoption or marriage of the proposed guardian to the proposed ward; (5) any request made by a master/special master of the court; (6) any request made by any other interested person that the court deems appropriate.	
	Public Welfare; Public Services for Children	N.R.S. 432.011	No specific definition, inferred: (1) providing children with the necessary care, welfare, and mental health services.	
New Hampshire	Domestic Relations; Parental Rights & Responsibilities	N.H. Rev. Stat. § 461-A:6	Factors: (1) Child's relationship with each parent and the ability of each parent to provide the child with nurture, love, affection, and guidance; (2) ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment, child's developmental needs and the ability of each parent to meet them, both in the present & future; (3) quality of the child's adjustment to the child's school and community & the potential effect of any change; (4) ability and disposition of each parent to foster a positive relationship and frequent and continuing physical, written, and telephonic contact with the other parent, except where the contact will result in harm to the child or to a parent; (5) the support of each parent for the child's contact with the other parent as shown by allowing and promoting such contact; (6) relationship of the child with any other person who may significantly affect the child; (7) the ability of the parents to communicate, cooperate with each other, and make joint decisions concerning the children; (8) any evidence of domestic violence & the impact of abuse on relationship between the child & abusing parent; (9) if parent is incarcerated, the reason for and the length of the incarceration, and any unique issues that arise as a result of incarceration; (10) any other factors that the court deems relevant.	
	Guardianship of Minors & Estates of Minors	N.H. Rev. Stat. § 463:1	No specific definition, but mentions "child's best interests."	
	Domestic Relations; Custody	N.H. Rev. Stat. § 458:17	No specific definition.	Statute notes this from case law: qualifications and fitness of respective parties, their ability to control and direct children, age, sex and health of children and environment of proposed home and its likely influence on children (Del Pozzo v. Del Pozzo (1973) 113 N.H. 436, 309 A.2d 151).
	Public Safety &	N.H. Rev. Stat.	No specific definition, but mentions "child's best interests."	

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	Probate Courts & Decedents' Estates; Probate ~ Public Guardianship	N.H. Rev. Stat. § 547-B:3	No specific definition.	
New Jersey	Juvenile & Domestic Relations Courts; Custody	N.J.S.A. 9:2-4(a)	Factors: (1) The parents' ability to agree, communicate and cooperate in matters relating to the child; (2) the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; (3) the interaction and relationship of the child with its parents and siblings; (4) the history of domestic violence in home; (5) safety of the child and the safety of either parent from domestic violence by the other parent; (6) preference of child (if sufficient age & capacity); (7) needs of child; (8) stability of the home environment offered; (9) quality and continuity of child's education; (10) fitness of the parents; (11) geographical proximity of the parents' homes; (12) extent and quality of the time spent with the child prior to or subsequent to the separation; (13) the parents' employment responsibilities; (14) age & number of children; (15) parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.	
	Juvenile & Domestic Relations Courts; Adoption	N.J.S.A. 9:3-40	No specific definition, but mentions "child's best interests."	Statute states: In the selection of adoptive parents the standard shall be the best interests of the child; and an approved agency shall not discriminate with regard to the selection of adoptive parents for any child on the basis of age, sex, race, national origin, religion or marital status provided, however, that these factors may be considered in determining whether the best interests of a child would be served by a particular placement for adoption or adoption.
	Juvenile & Domestic Relations Courts; Protective Welfare Laws	N.J.S.A. 9:6-8.8	No specific definition, inferred: (1) child's health and safety.	
	Administration of Estates; Minors & Incapacitated Persons	N.J.S.A. 3B:12-3	No specific definition.	Statute mentions the interests of dependents & creditors in determining whether protective guardianship is needed.
New Mexico	Domestic Affairs; Dissolution of Marriage; Standards	N.M.S.A. 1978, § 40-4-9	Factors: (1) Wishes of parents & child; (2) interaction & interrelationship of the child with parents, siblings, and any other person affecting child's best interests; (3) child's adjustment to home, school and community; (4) mental and physical health of all individuals involved.	

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	Children's Code; Adoptions (The Adoption Act)	N.M.S.A. 1978, § 32A-5-15	No specific definition, inferred: Primary consideration for termination of parental rights: (1) the physical, mental and emotional welfare and needs of the child.	
	Uniform Probate Code; Court appointment of guardian of minor	N.M.S.A. 1978, § 45-5-206	No specific definition, but mentions "child's best interests."	
	Children's Code; Child Abuse & Neglect (Welfare)	N.M.S.A. 1978, § 32A-4-28	No specific definition, inferred: In terminating parental rights, the court shall give primary consideration to the (1) physical, mental and emotional welfare; (2) needs of the child, including the likelihood of the child being adopted if parental rights are terminated.	
New York	Domestic Relations; Child custody	McKinney's DRL § 240	No specific definition, inferred: (1) evidence of domestic violence in home & impact of that domestic violence on child's best interests; (2) ability of parent to provide health insurance for child; (3) status of parent as sex offender; (4) ability of parent to provide financial support for child; (5) needs of the child; (6) prior conviction or incarceration of parent.	
	Domestic Relations;	McKinney's	No specific definition.	
	Social Services Law; Child Welfare	McKinney's Social Services	No specific definition, but mentions "child's best interests."	
	Estates, Powers and Trusts Law; Fiduciaries	McKinney's EPTL § 11-1.1	No specific definition.	
North Carolina	Domestic Relations; Divorce, Alimony and Child Support	N.C.G.S.A. § 50-13.2	No specific definition.	
	Juvenile Code; Determination of Best Interests (Child Welfare)	N.C.G.S.A. § 7B-1110	No specific definition, inferred: Determining whether to terminate parental rights, courts consider: (1) age of the juvenile; (2) likelihood of adoption of juvenile; (3) whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile; (4) bond between juvenile and parent; (5) quality of relationship between juvenile & proposed adoptive parent, guardian, custodian, or other permanent placement; (6) any other relevant consideration.	
	Adoptions; Content of Pre-placement Assessment	N.C.G.S.A. § 48-3-303	No specific definition, inferred: Suitability of Prospective Parent Assessment factors: (1) Age & date of birth, nationality, race/ethnicity, and any religious preference; (2) marital/family status & history, including presence of any children born to or adopted by the individual & any other children in the household; (3) physical & mental health, including any addiction to alcohol or drugs; (4) educational/employment history & any special skills; (5) property, income, and current financial information provided by the individual; (6) reason for wanting to adopt; (7) any previous request for an assessment or involvement in an adoptive placement and the outcome of the assessment or placement; (8) whether the individual has ever been a respondent in a domestic violence proceeding or a proceeding concerning a minor who was allegedly abused, dependent, neglected, abandoned, or delinquent, and the outcome of the proceeding; (9) whether the individual has ever been convicted of a crime other than a minor traffic violation; (10) whether the individual has located a parent interested in placing a child with the individual for adoption and a brief, nonidentifying description of the parent and the child; (11) and any other relevant fact or circumstance to determine an individual's suitability (including the quality of the environment in the home and the functioning of any children in the household).	
	Incompetency &	N.C.G.S.A. §	No specific definition, but mentions "child's best interests."	
	Administration of	N.C.G.S.A. §	No specific definition.	

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North Dakota	Domestic Relations; Custody	NDCC, 14-09-06.2	Factors: (1) Love, affection, and other emotional ties existing between parents and the child; (2) capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child; (3) the disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs; (4) length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity; (5) permanence as a family unit of the existing or proposed custodial home; (6) moral fitness of parents; (7) mental and physical health of parents; (8) home, school and community record of the child; (9) reasonable preference of child if court deems child to be of sufficient intelligence, understanding & experience; (10) evidence of domestic violence; (11) interaction, interrelationship, or the potential for interaction & interrelationship of the child with any person who resides in, is present, or frequents the household of a parent who may significantly affect the child's best interests; (12) making false allegations not made in good faith, by one parent against the other, of harm to a child; (13) any other factors the court deems relevant.	
	Uniform Probate Code; Probate of Wills; Personal Representative	NDCC, 30.1-17-01	No specific definition.	
	Domestic Relations; Revised Uniform Adoption Act	NDCC, 14-15-03	No specific definition.	
	Public Welfare; Aid to Dependent Children	NDCC, 50-09-01	No specific definition.	
Ohio	Domestic Relations; Custody	R.C. § 3109.04	Factors: (1) Wishes of the child's parents; (2) if the court has interviewed the child regarding child's wishes & concerns; (3) child's interaction & interrelationship with parents, siblings, and any other person who may significantly affect child's best interests; (4) child's adjustment to home, school, and community; (5) mental and physical health of all persons involved; (6) the parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights; (7) whether either parent has failed to make all child support payments including all arre ages required of that parent pursuant to child support order; (8) criminal history of parent; (9) history of domestic violence or neglect or abuse of child; (10) sex offender status of parent; (11) whether the residential parent (or one of the parents subject to a shared parent decree) has continuously willfully denied the other parent's right to parenting time in accordance with a court order; (12) whether one parent has established a residence outside of the state; (13) ability of parents to cooperate & make decisions jointly with respect to children; (14) ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent; (15) recommendation of guardian ad litem or other guardian; (16) geographic proximity of parents to one another.	
	Courts-Probate-Juvenile; Parents as Natural Guardians	R.C. § 2111.08	No specific definition, inferred: (1) parents are the natural guardians of minor and are equally responsible for the child's care, nurture, welfare, and education and the care and management of their estates.	
	Domestic Relations; Adoptions	R.C. § 3107.031	No specific definition.	
	Public Welfare; Care & Placement of Children	R.C. § 5103.15	No specific definition, but mentions "child's best interests."	
Oklahoma	Divorce & Alimony; Care & Custody of children	43 Okl. St. Ann. §112	No specific definition, inferred: (1) frequent and continuing contact with each parent; (2) continuing education of child; (3) ability to support child financially.	
	Children; Oklahoma Adoption Code	10 Okl.St. Ann. § 7505-5.3	No specific definition, inferred: (1) home is a healthy, safe environment in which to raise a minor; (2) marital status, employment, income, access to medical care, physical health and history of parent; (3) evidence of past child abuse or neglect by prospective parent(s).	

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	Guardian & Ward; Oklahoma Guardianship & Conservatorship Act	30 Okl.St. Ann. § 2-101	No specific definition, but mentions "child's best interests."	
	Children; Oklahoma Children's Code	10 Okl.St. Ann. § 7001-1.2	No specific definition, inferred: (Legislative Intent) "The paramount consideration in all proceedings concerning a child alleged or found to be deprived is the health and safety and the best interests of the child. The purpose of the laws relating to children alleged or found to be deprived is to: 1. Secure for each such child, the permanency, care and guidance as will best serve the spiritual, emotional, mental and physical health, safety and welfare of the child; 2. Provide expeditious and timely judicial and agency procedures which protect the health, safety and welfare of the child; 3. Preserve, unify and strengthen the child's family ties whenever possible in the child's best interests and for the health and safety of the child; 4. Except as otherwise specified by the Oklahoma Children's Code, provide that reasonable efforts are made to prevent or eliminate the need for removing the child from the home, or to make it possible for the child to safely return to the family's home; 5. Recognize that the right to family integrity, preservation or reunification is limited by the right of children to be protected from abuse and neglect; 6. Remove the child from the custody of the parents of the child when the child's health, safety or welfare is in danger or the child's safety cannot be adequately safeguarded without removal; 7. Recognize that permanency is in the best interests of the child; 8. Ensure that, in the best interests of the child, when family rehabilitation and reunification are not possible or are determined not to be necessary pursuant to the Oklahoma Children's Code, the child will be expeditiously placed with an adoptive family or in another permanent living arrangement; and 9. Assure adequate and appropriate care and treatment for the child, with the use of the least restrictive method of treatment or placement consistent with the treatment or placement needs of the child."	
Oregon	Domestic Relations; Care & Custody of children	O.R.S. § 107.105	No specific definition.	
	Probate Law; General Provisions	O.R.S. § 111.005	No specific definition.	
	Human Services; Juvenile Code (Child Welfare)	O.R.S. § 419B.090	No specific definition, inferred: (1) permanency with a safe family; (2) freedom from physical, sexual or emotional abuse or exploitation; (3) freedom from substantial neglect of basic needs.	
	Human Services; Juvenile Code (Placement preferences)	O.R.S. § 419B.192	No specific definition, inferred: Placement factors: (1) The ability of the person being considered to provide safety for the child or ward, including a willingness to cooperate with any restrictions placed on contact between the child or ward and others, and to prevent anyone from influencing the child or ward in regard to the allegations of the case; (2) The ability of the person being considered to support the efforts of the department to implement the permanent plan for the child or ward; (3) The ability of the person being considered to meet the child or ward's physical, emotional and educational needs, including the child or ward's need to continue in the same school or educational placement; (4) Which person has the closest existing personal relationship with the child or ward if more than one person requests to have the child or ward placed with them pursuant to this section; (5) The ability of the person being considered to provide a placement for the child's or ward's sibling who is also in need of placement or continuation in substitute care .	
	Domestic Relations; Parent/Child Relationship; Adoption	O.R.S. § 109.305	No specific definition, but mentions "child's best interests."	

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Pennsylvania	Domestic Relations; Custody	23 Pa.C.S.A. § 5303	Factors: (1) Preference of the child as well as any other factor which legitimately impacts the child's physical, intellectual and emotional well-being; (2) which parent is more likely to encourage, permit and allow frequent & continuing contact and physical access between the noncustodial parent & the child; (3) each parent's and adult household member's present and past violent or abusive conduct; (4) parent's criminal history relating to murder, criminal homicide, kidnapping, unlawful restraint, rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, incest, endangering welfare of children, prostitution & related offenses, sexual abuse of children, aggravated assault, terroristic threats, stalking, false imprisonment, arson & related offenses, contempt for violation of order/agreement; (5) if parent has committed a lesser offense (than the above named offenses), then whether the parent has participated in counseling.	
	Domestic Relations; Adoption	23 Pa.C.S.A. § 2101	No specific definition.	
	Juvenile Act	42 Pa.C.S.A. § 6001	No specific definition.	
	Probate, Estates & Fiduciaries Code	20 Pa.C.S.A. § 5111	No specific definition, inferred: (1) person of same religious persuasion as the parent of the minor shall be preferred as guardian of his person; (2) a person nominated by a minor (14 years old or older) if found by court to be qualified & suitable, shall be preferred as guardian of his person/estate (See § 5113).	
Rhode	Divorce & Custody of Children	Gen.Laws 1956, § 15-7-1	No specific definition.	
	Domestic Relations; Adoption of Children	Gen.Laws 1956, § 15-7-2	No specific definition, inferred: (1) preference of biological parents to place child in a home with prospective parents of the same religious or spiritual background (See Gen.Laws 1956, § 15-7-13).	
	Probate Practice & Procedure; Guardianship of Minors	Gen.Laws 1956, § 33-15.1-1	No specific definition, inferred: (1) parents are natural guardians of child and are equally responsible for the care, nurture, welfare and education of the child.	
	Delinquent & Dependent Children	Gen.Laws 1956, § 14-1-2	No specific definition, inferred: (1) best interests of the child balanced with the best interests of the state.	
South Carolina	Domestic Relations; Divorce; Care/Custody of Children	Code S.C. 1976 § 20-3-160	No specific definition, inferred: (1) preservation of child's spiritual interests.	
	Domestic Relations; Children Code	Code 1976 § 63-5-30	No specific definition, inferred: (1) maintaining educational & medical records of child, parental right to participate in child's school activities; (2) neither parent's attempt to forcibly take a child from the guardianship of the other parent legally entitled to custody; (3) education and care of the child; (4) ability to financially provide for child (See § 63-5-10).	Code 1976 § 63-1-20
	South Carolina Probate Code	Code 1976 § 62	No specific definition.	
	South Carolina Children's Code;	Code 1976 § 63-	No specific definition.	
		Code 1976 § 63-	No specific definition.	
South Dakota	Domestic Relations; Child Custody provisions	SDCL § 25-4-45	No specific definition, inferred: (1) the child's wishes and preferences if the child is of a sufficient age to form an intelligent preference.	
	Domestic Relations; Adoption of Children	SDCL § 25-6-2	No specific definition, but mentions "child's best interests."	

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	Uniform Probate Code; South Dakota Guardianship &	SDCL § 29A-5-208	Factors: (1) the suitability of the proposed guardian or conservator; (2) the minor's current or proposed living arrangements; (3) the extent to which the minor has money or other property requiring management or protection; (4) the availability of less restrictive alternatives; (5) the extent to which it is necessary to protect the minor from neglect, exploitation, or abuse; (6) if applicable, the minor's need for habilitation or	
	Minors; Contributing to Delinquency & Dependency	SDCL § 26-9-1	No specific definition.	
Tennessee	Domestic Relations; Child Custody & Visitation	T. C. A. §36-6-106	Factors: (1) Love, affection, and emotional ties existing between parents/caregivers & child; (2) disposition of parents/caregivers to provide the child with food, clothing, medical care, education, and other necessary care and the degree to which a parent/caregiver has been the primary caregiver; (3) importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; (4) stability of the family unit of the parents/caregivers; (5) mental and physical health of the parents/caregivers; (6) home, school and community record of the child; (7) reasonable preference of the child (age 12(+)); (8) each parents'/caregivers' past or potential for future performance of parenting responsibilities; (9) character and behavior of any other person who resides in or frequents the home of a parent/caregiver and the person's interactions with the child; (10) evidence of domestic violence, emotional abuse or sexual abuse of the child.	
	Domestic Relations;	T. C. A. § 36-1-101	No specific definition, but mentions "child's best interests."	
	Welfare; Programs & Services for Children; Families First Act of 1996	T. C. A. § 71-3-151	No specific definition.	
	Guardianship;	T. C. A. § 34-2-	No specific definition, but mentions "person's best interests."	
Texas	Family Code; Parent-Child Relationship	V.T.C.A., Family Code § 153.002	No specific definition, inferred: (1) Child's preference of residence if 12(+) years old (See V.T.C.A., Family Code § 153.008); (2) assure that children will have frequent & continuing contact with parents who have shown the ability to act in the best interests of the child; (3) safe, stable, and nonviolent environment for the child (see V.T.C.A., Family Code § 153.001).	
	Family Code; Adoption	V.T.C.A., Family Code § 162	No specific definition.	
	Family Code; Juvenile Justice	V.T.C.A., Family Code § 51	No specific definition, inferred: (1) agency's or state's ability to give the child the care that should be provided by parents; (2) separating the child from the child's parent only when necessary for the child's welfare and preservation of public safety.	
	Texas Probate Code	V.A.T.S. Probate Code, § 602	No specific definition.	V.A.T.S. Probate Code, § 680
Utah	Husband & Wife; Child Custody	U.C.A. 1953 § 30-3-10.2	Factors: (1) Whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal or physical custody; (2) ability of parents to give first priority to the welfare of the child and reach shared decisions in the child's best interests; (3) whether each parent is capable of encouraging and accepting a positive relationship between the child & other parent including sharing of love, affection, and contact between the child & other parent; (4) whether both parents participated in raising the child before the divorce; (5) geographical proximity of parents' homes; (6) preference of child if child is of sufficient age and capacity to make an intelligent preference; (7) maturity of the parents and their willingness and ability to protect the child from conflict that may arise between the parents; (8) past and present ability of parents to cooperate with each other and make decisions jointly; (9) any history or potential for a parent's domestic violence, child abuse, or kidnapping; (10) any other factors the court finds relevant.	

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	Utah Human Services Code; Child Welfare Services	U.C.A. 1953 § 62A-4a-201	No specific definition, inferred: (1) child should be raised under the care and supervision of the child's natural parents; (2) a child's need for a normal family life in a permanent home, and for positive, nurturing family relationships; (3) the integrity of the family unit while also preserving the child's safety.	
	Utah Human Services Code; Child Welfare Services	U.C.A. 1953 § 62A-4a-601	No specific definition.	
	Utah Uniform	U.C.A. 1953 §	No specific definition.	
Vermont	Domestic Relations; Child Custody & Support	15 V.S.A. §665	Factors: (1) Relationship of child with each parent & the ability and disposition of each parent to provide the child with love, affection and guidance; (2) ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, and other material needs and a safe environment; (3) ability and disposition of each parent to meet the child's present and future developmental needs; (4) quality of the child's adjustment to the child's present home, school & community and the potential effect on the child of any change; (5) ability and disposition of each parent to allow the child to foster a positive relationship and frequent continuing contact with the other parent, including physical contact (except where it may result in harm to parent or child); (6) quality of child's relationship with primary care provider, if appropriate given the child's age and development; (7) relationship of the child with any other person who may significantly affect the child; (8) ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning children where parental rights & responsibilities are to be shared or divided; (9) evidence of domestic violence and its impact on the abusing parent's relationship with the child.	
	The Vermont Adoption Act	15A V.S.A. § 2-203	No specific definition, inferred: A preplacement evaluation shall contain the following information about the person being evaluated: (1) age and date of birth, nationality, racial or ethnic background, and any religious affiliation; (2) marital status and family history, including the age and location of any child of the person and the identity of and relationship to anyone else living in the person's household; (3) parenting experience; (4) physical and mental health, and any history of abuse of alcohol or drugs; (5) educational and employment history and any special skills; (6) property and income, including outstanding financial obligations as indicated in a current credit report or financial statement furnished by the person; (7) any previous request for an evaluation or involvement in an adoptive placement and the outcome of the evaluation or placement as confirmed by the department; (8) evidence of domestic violence or is the subject of a substantiated complaint filed with the department, or subject to a court order restricting the person's right to parental rights and responsibilities or parent-child contact with a child; (9) whether the person has been convicted of a crime other than a minor traffic violation; (10) whether the person has located a parent interested in placing a minor with the person for adoption and, if so, a brief description of the parent and the minor; (11) reason for and attitude about adoption; (12) whether the person is in noncompliance with a child support order; and (13) any other fact or circumstance that may be relevant in determining whether the person is suited to be an adoptive parent, including the quality of the environment in the home, and the functioning of other children in the person's household.	
	Human Services; Programs/Services for Children & Youth (Child Welfare)	33 V.S.A. § 4903	No specific definition, but mentions "child's best interests."	
	Decedents' Estates & Administration; Fiduciary Relations; Guardianship	14 V.S.A. § 2662	No specific definition, inferred: (1) healthy and safe living environment and daily care of child; (2) child's continuing education; (3) necessary and appropriate health care, including medical, dental and mental health care.	

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Virginia	Domestic Relations; Guardian & Ward	Va. Code Ann.	No specific definition.	
	Welfare; Social Services; Adoptions	Va. Code Ann. § 63.2-1205	No specific definition, inferred: (1) biological parents' efforts to obtain or maintain legal and physical custody of the child; (2) whether the birth parent(s) are currently willing and able to assume full custody of the child; (3) whether the birth parent(s)' efforts to assert parental rights were thwarted by other people; (4) the birth parent(s)' ability to care for the child; (5) the age of the child; (6) the quality of any previous relationship between the birth parent(s) and the child and between the birth parent(s) and any other minor children; (6) the duration and suitability of the child's present custodial environment; (7) the effect of a change of physical custody on the child.	
	Wills & Decedents' Estates	Va. Code Ann. T. 64.1, Refs &	No specific definition.	
Washington	Domestic Relations; Dissolution of Marriage - Policy	West's RCWA 26.09.002	Factors: (1) Parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care; (2) continuing pattern of frequent interaction between a parent and child & altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.	
	Probate & Trust Law; Guardianship	West's RCWA 11.92.040	No specific definition, inferred: (1) care and maintenance of the incompetent or disabled person; (2) ability of [child] to assert his or her rights and best interests; (3) ability of [child] provide timely, informed consent to necessary medical procedures; (4) and if the incompetent or disabled person is a minor, to see that the incompetent or disabled person is properly trained and educated and that the incompetent or disabled person has the opportunity to learn a trade, occupation, or profession.	
	Domestic Relations; Adoption	West's RCWA 26.33.045	No specific definition, inferred: (1) cultural, ethnic, or racial background of the child; (2) capacity of prospective adoptive parents to meet the needs of a child of this background.	
	Public Assistance; Child Welfare Services	West's RCWA 74.13.010	No specific definition.	
West Virginia	Domestic Relations; Custody	W. Va. Code, § 48-9-207	Factors: (1) allocation of custodial responsibility; (2) level of each parent's participation in past decision-making on behalf of the child; (3) wishes of parents; (4) level of ability and cooperation the parents have demonstrated in decision-making on behalf of child; (5) prior agreements of the parties; (6) existence of any limiting factors (evidence of domestic violence, sex assault or abuse of child); (7) abused/neglected/abandoned child; (8) persistent interference with other parent's access to the child [except when acting to protect child or interfering parent or another family member]; (9) parent who made repeated fraudulent reports of domestic violence or child abuse --> WV ST. § 48-9-209).	W. Va. Code, § 48-9-101
	Child Welfare; Purposes & Definitions	W. Va. Code, § 49-1-1	No specific definition, inferred: the legislature's goals are as follows: (1) Assure each child care, safety and guidance; (2) Serve the mental and physical welfare of the child; (3) Preserve and strengthen the child's family ties; (4) Recognize the fundamental rights of children and parents; (5) Adopt procedures and establish programs that are family-focused rather than focused on specific family members, except where the best interests of the child or the safety of the community are at risk; (6) Involve the child and his or her family or caregiver in the planning and delivery of programs and services; (7) Provide services that are community-based, in the least restrictive settings that are consonant with the needs and potentials of the child and his or her family; (8) Provide for early identification of the problems of children and their families, and respond appropriately with measures and services to prevent abuse and neglect or delinquency; (9) Provide a system for the rehabilitation of status offenders and juvenile delinquents; (10) Provide a system for the secure detention of certain juveniles alleged or adjudicated delinquent; (11) Provide a system for the secure incarceration of juveniles adjudicated delinquent and committed to the custody of the director of the division of juvenile services; (12) Protect the welfare of the general public.	

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	Administration of Estates & Trusts; Guardianship	W. Va. Code, § 44-10-7	No specific definition, but mentions "child's best interests."	
	Domestic Relations; Adoptions	W. Va. Code, § 48-22-701	No specific definition, inferred: (1) medical and employment history of prospective parents; (2) adequacy of prospective home and surroundings; (3) child's adjustment to family; (4) criminal background of prospective parents; (5) other information deemed necessary by the court.	
Wisconsin	Marriage & Family; Actions Affecting The Family; Child Custody & Placement	W.S.A. 767.41	Factors: (1) Wishes of the child (possibly communicated through guardian ad litem or other appropriate professional); (2) wishes of parents; (3) proposed parenting plan; (4) interaction & interrelationship of the child with parents, siblings & any other person who may significantly affect the child's best interests; (5) amount and quality of time each parent has spent with child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future; (6) child's adjustment to home, school, religion & community; (7) age of child and the child's developmental & educational needs at different ages; (8) whether the mental and physical health of a party, child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being; (9) the need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for child; (10) availability of public or private child care services; (11) cooperation & communication between the parties and whether either party unreasonably refuses to cooperate or communicate with other party; (12) whether each party can support the other party's relationship with the child, including encouraging & facilitating frequent & continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party; (13) evidence of domestic violence in home; (14) parent's past criminal, domestic violence, or child abuse/neglect history; (15) whether parent's significant other (or person parent is dating) or a person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household has a criminal record or engaged in abuse of child or neglect of child or any other child; (16) evidence of interspousal battery; (17) reports of professionals (i.e. social workers), if admitted into evidence; (18) parents' substance abuse.	
	Probate; General	W.S.A. Ch. 851, Refs &	No specific definition.	
	Social Services; Children's Code; Adoptions	W.S.A. 48.81	No specific definition.	
	Social Services; Children's Code; Child Welfare Agencies	W.S.A. 48.61	No specific definition.	
Wyoming	Domestic Relations; Disposition/Maintenance of Children	W.S. 1977 § 20-2-201	Factors: (1) Quality of the relationship each child has with each parent; (2) ability of each parent to provide adequate care for each child throughout each period of responsibility, including arranging for each child's care by others as needed; (3) relative competency and fitness of each parent; (4) each parent's willingness to accept all responsibilities of parenting including a willingness to accept care for each child at specified times and to relinquish care to the other parent at specified times; (5) how the parents and each child can best maintain and strengthen a relationship with each other; (6) child's interaction & communication with parent and how that interaction/communication may be improved; (7) geographic distance between parents' residences; (8) ability and willingness of each parent to allow the other to provide care without intrusion; (9) ability to respect the other parent's rights and responsibilities, including right to privacy; (10) current mental and physical ability of each parent to care for each child.	
	Wills, Decedents'	W.S. 1977 § 2-1-	No specific definition.	
	Guardian & Ward	W.S. 1977 § 3-2-	No specific definition.	
	Code of Civil Procedure; Adoption	W.S. 1977 § 1-22-102	No specific definition.	* Most of Wyoming's adoption statutes have been red-flagged as bad law.

The Best Interests of the Child



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Best Interests

- "What combination of factors this child needs in a custody and/or access [visitation] arrangement that will sustain his or her adjustment and development."

Joan Kelly, 1997

Best Interests Through History

- By the early 20th century, the "tender years" doctrine prevailed.
- In 1916, the Washington Supreme Court wrote: "Mother love...surpasses paternal affection" and "a child needs a mother's care more than a father's."

Best Interests Through History

- Between the 1920's and the 1970's, the social order typically involved fathers at work and mothers at home.
- Child support was awarded to assist mothers in staying out of the work force.
- In the beginning, "best interests" still was equated with children staying with mothers after divorce.

Best Interests Through History

- In the 1970's when mothers went into the workforce in large numbers, they were no longer economically dependent and the divorce rate rose.
- While shared custody was first considered beneficial to children in the 1970's, there was slow acceptance of the importance of fathers in children's lives.

Best Interests Through History

- By the 1990's professionals recognized that fathers make unique and important contributions to their children's development:

Good Parenting Includes:

- Emotional involvement
- Social, moral, and behavioral guidance
- Intellectual stimulation
- Interest in the child's learning and school experience
- Involvement with the child's play and recreation
- Sharing pleasurable experiences.
- Modeling problem-solving skills

The Basis for Best Interests

- Maintaining and promoting relationships with both parents so that children have access to their strengths and resources, to extended family members, and to the parents' differences that can benefit the child.

"You get different things from moms and dads. . . . They're both important."
13-year-old boy



The Importance of Fathers

- Father absence has been shown by 30 years of research to be associated with a wide range of social, behavioral, health, and academic outcomes for children, regardless of the child's gender.



Social Development

- Children with active fathers are:
 - More likely to be emotionally secure
 - Less likely to get into trouble at home, school or in the community
 - More likely too be sociable and popular with peers

Emotional Development

- Children with active fathers are:
 - Less likely to be depressed
 - Girls have higher self-esteem

Behavior Issues

- Children without active fathers are more likely to show disruptive behavior
- Adolescents, particularly boys, without fathers in their lives are at higher risk of getting into trouble with the law

Anderson, 2002

Chemical Use

- Children with close relationships with their fathers are less likely to use alcohol, cigarettes, and hard drugs.
- Children with close relationships with their fathers are less likely to have friends who smoke, drink, and smoke marijuana.

National Fatherhood Initiative, 2004

Health Issues

- Research in the U.S. and New Zealand found strong evidence that father absence has an effect on early sexual activity and teenage pregnancy. Teens without fathers were twice as likely to be involved in early sexual activity and seven times more likely to get pregnant as an adolescent.

Ellis, 2003

Health Issues

- Obese children are more likely to live in father-absent homes than are non-obese children.

National Longitudinal Survey of Youth, 1997

Academic Achievement

- Children whose fathers share meals, spend leisure time with them, or help them with reading or homework do significantly better academically than those children whose fathers do not.

Cooksey and Fondell, 1996

Academic Achievement

- Children whose fathers were highly involved in their schools were more likely to do well academically, to participate in extracurricular activities, and to enjoy school, and were less likely to have ever repeated a grade or been expelled.

Nord, 1998

Academic Achievement

- Half of students get mostly A's and enjoy school, according to their parents, when their fathers are highly involved in their schools compared to about one-third of students when their fathers have low levels of involvement.

Nord and West, 2001

Best Interests Vary by State



Common Factors

- Parents' preferences
- Child's preference
- Interaction with parents, siblings and extended family
- Child's adjustment to home, school & community
- Mental health of parents and child
- Physical health of parents and child

Common Factors

- Ability of parent to provide love, affection and guidance
- Support for child's religion and culture
- Ability and willingness to promote relationship with the other parent
- Evidence of domestic violence against a parent and the impact on the child

Wishes of the Parents

- Parents are also encouraged to understand that parenting time schedules that are best for their children may not be best for the parents. For the best interests of their children, parents may need to tolerate disruption of their own schedules and more or less parenting time than they might otherwise choose.

A Parental Guide to Making Child-Focused Parenting Time Decisions (2001, Minnesota Supreme Court).

Child's Preference

- There is no age at which children automatically have the right to choose
- The child's preference must not stem from undue influence
- The child must be old enough and mature enough to understand the consequences of the stated preference
- Even teenagers' preferences may be based on short-term gain rather than the arrangement that will facilitate healthy development.

Child's Preference

- Children may be interviewed about their preference but that may carry little weight given other factors in the case.
- Few cases involve real dynamics of "alienation" while more involve "alignment" with a parent due to age, gender or interests.

Interaction with Parents, Siblings and Extended Family

- Closeness of the relationships with parents
- Whether parent meets the child's needs or uses the child to meet their needs
- Sensitivity of the parents to the child's developmental stage
- Parents' willingness and ability to be involved directly in the child's life
- Parents' support for relationships with grandparents and other family members

Child's Adjustment to Home, School & Community

- Likelihood that the new family arrangements will maintain or disrupt the child's connections, for instance by having to move
- Whether the parent will provide a stable environment for the child

Mental Health of Parents and Child

- Whether there are any serious problems that impair parenting
- Whether the parent can meet a child's special needs such as depression, attention problems, autism
- Whether the parent is cooperating with needed treatment for themselves and/or the child

Physical Health of Parents and Child

- Whether the parent has any health problem that interferes with the ability to parent
- Whether a parent can meet the special needs presented by the child's health problems such as asthma, diabetes, hearing impairment
- Whether the parent is cooperating with needed treatment for themselves and/or the child

Ability of Parent to Provide Love, Affection and Guidance

- Whether and how the parents shows their love and affection
- How the parent teaches the child about right & wrong, how to treat other people, caring about others' feelings, etc.
- How the parent disciplines the child

Support for Child's Religion and Culture

- Whether the parent supports religious worship, religious education and participation in important religious events
- Whether the parent teaches the child about his/her culture and encourages pride in that culture

Ability and Willingness to Promote Relationship With the Other Parent

- "The ability to move beyond their personal conflicts and make decisions that serve their children's best interests."
- Providing information about the child's health, education and activities
- Allowing the child access to the other parent for holidays and vacations
- Not undermining the child's relationship with the other parent
- Following the schedule agreed to or ordered by the Court

List of questions from Japanese participants

1. Hague proceedings for incoming cases in the US courts

(1) Case management

- Please describe the standard case management for the typical Hague proceedings. How many hearings with how long intervals are generally conducted? How is the first hearing date scheduled? How many days are generally placed between the filing of the application and the first hearing? What kind of factors is taken into consideration in scheduling the first hearing? What kind of proceedings or decisions is actually made in the each hearing? How do the parties need to prepare for the each hearing?
- How does the court proceed if the parties inform the court that it takes time to submit evidences? Does the court limit submission of evidences in such cases because of expedient nature of the Hague proceedings?

(2) Role of lawyers

- Please explain how US lawyers generally act in the Hague proceedings in the following respective positions:
 - 1) As a lawyer representing a left-behind parent in an incoming case;
 - 2) As a lawyer representing a taking parent in an incoming case.

(3) Custody right

- How is the custody right of the left behind parent under the law of the country of habitual residence confirmed? What kind of evidence is required to establish the custody right? How are these evidences collected? Is there any sort of list of typical written evidences required to establish the custody right for each country?

(4) Objection of a child

- How does the court confirm the objection of a child?
- What kind of support is provided to a child? Please describe the details of the support provided to a child. What would be cost of such support and who would bear the cost?
- Please provide the examples of the cases where the objection of child was established and the return was rejected. If there are statistics, please also provide the number of such cases.

(5) Undertaking

- Does the US court suggest undertaking to the parties? Or is undertaking always proposed by the parties?

(6) Return of a child

- Please provide the rate of return order and the rate of actual return of a child as the outcome of the Hague proceedings in the US courts.
- How is a child going to be treated if the taking parent is restrained for contempt?
- How is a child going to be returned if the taking parent cannot accompany the child?

(7) UCCJEA

- What is the relation between the Hague Convention and UCCJEA? When and how do the US lawyers use the Hague Convention and UCCJEA in the case where there is a custody order of a foreign court?

(8) Legal cost

- How much attorney fee should the parties assume for the Hague proceedings in the US courts? Are there any other costs and expenses the parties should assume and how much if any?

2. Visitation cases in the US

- Please describe support for visitation available in the US.
- What is the assessment of the Parental Alienation Syndrome?
- How are the cases handled if the child clearly refuses visitation?
- How are the cases handled if visitation is considered to be against the child's interest?
- How is visitation supported for the high conflict parents?

3. Outgoing cases from the US and custody cases in the US courts after return of the child to the US

(1) Role of lawyers

- Please explain how US lawyers generally act in the Hague proceedings in the following respective positions:
 - 1) As a lawyer representing a left-behind parent in an outgoing case;
 - 2) As a lawyer representing a taking parent in an outgoing case.

(2) Support for the taking parent

- What kinds of support are available to the taking parent who returns to the US accompanying the child for the custody case in the US court?
- When a taking parent does not have financial means or accommodation to stay in the US during the custody proceedings in the US court after return of the child to the US, is there any support or facility available to the taking parent to stay in the US? What are the processes for the taking parent to get such support? Is it possible for the taking parent to apply before return to the US or the application can be made only after return to the US?

(3) Custody cases in the US courts after return of a child to the US

- In the custody cases in the US court after return of the child and the taking parent, how much and what kind of evidence is required to establish the fact of domestic violence to be considered in the custody decision? Please provide the examples of the cases where the fact of domestic violence is found and taken into consideration in the custody decision.
- In the custody cases in the US court after return of the child and the taking parent, in what kind of cases is custody given to the taking parent? Please provide the examples of the cases where custody is given to the taking parents.
- In the custody cases in the US court after return of the child and the taking parent, how is the fact of abduction by the taking parent considered in the custody decision? Doesn't that fact negatively affect the custody decision against the taking parent? Please provide the examples of the cases that show how the US court deals with the fact of abduction in the custody decision in the post abduction custody cases after return of the child to the US.
- Does the fact that the taking parent depends on the public assistance in the US negatively affect the custody decision in the US court?
- What would happen to her immigration status in case she stays in the US given custody of a child after divorce?
- In the custody cases in the US court after return of the child and the taking parent, is the taking parent allowed to stay with the child?
- When a child is returned to the US according to the return order of the foreign court, are there the cases where the child is taken over to the left behind parent even if the taking parent accompanies the child return? When and in what kind of circumstances does such case happen? Does that happen if the left behind parent

has obtained a return order from the US court before the return of the child to the US?

- What would happen to the custody decision after the return of the child to the US if there was a custody order by the US court before wrongful removal? Is there reopening the custody case to review the previous custody order or does the existing custody order simply remain effective?

(4) Criminal prosecution

- We read somewhere that the IPKCA is rarely applied. What is the real possibility that the taking parent is prosecuted under the IPKCA upon return to the US accompanying the child? What is the rate for prosecution, judgment of guilty and success in defense based on domestic violence? Please provide us with statistics or reports if available.
- Except for the IPKCA which is a federal law, are there any statutes at state or county level, which criminalize the parental child abduction? Please provide the provisions of such laws and information on their actual applications.
- If not to prosecute the taking parent in the US is included in the undertaking or requested as a condition of voluntarily return of the child, how is that ensured to be actually achieved in the US?

4. How to separate and how to settle the child disputes properly

- If a Japanese mother wants to deal with custody issues properly under the US law, what steps should she take when she separates from the husband? Is it illegal or a crime if she leaves the house with a child without the consent of the husband even moving within the state? Can she leave the house with a child and then inform the husband of whereabouts of the child and file a custody case immediately after moving? Is her act still considered illegal or a crime in this case? Does she need to give the husband a notice of leaving with the child in advance if she wants to avoid criminal prosecution?
- If a parent takes the child to Japan from the US in violation of the custody order or the parenting plan made by the US court and the left behind parent files a case seeking a return of the child in the US court, how does the US court proceed for such a case? If the taking parent in Japan is served but does not appear in the hearing in the US court, what would be the consequences? Is there any way for the taking parent to obtain an order from the US court to modify the existing custody order or the parenting plan without going back to the US? Are there any mediation

services available to the parties seeking for negotiation toward amicable settlement?

5. International relocation

- We are aware that it is hard for relocation to Japan to be permitted since Japan is not a signatory country of the Hague child abduction convention. Is it easy to be allowed to relocate child to the Hague signatory countries? Or is it still difficult to get permission from the US court to the international relocation even to a country which is signatory to the Hague convention?
- What are the criteria and conditions for granting relocation? How much of visitation should be offered to the left behind parent for the international relocation to be granted?
- In the international relocation cases, is it common for the US court to grant relocation on the condition that a mirror order is obtained in the court of the country of destination? What are the processes to obtain a mirror order in a foreign court and how are the US court and the lawyer of the relocating parent involved in such processes?
- If obtaining a mirror order in the US court is requested by a foreign court as a condition for international relocation from a foreign country to the US, what are the processes to obtain a mirror order in the US court and how are the US court and the lawyer of the relocating parent involved in such processes?

- END

**Role of the Lawyer – Representing the Left-Behind Parent in Hague
Convention Cases**

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Introduction

I. HOW TO OBTAIN RELIEF UNDER THE HAGUE CONVENTION

A proceeding under the Hague Convention is initiated by: (1) filing an Application for the Return of a Child (hereinafter “Application”) with the Central Authority in the child’s place of habitual residence or with the Central Authority where the child is located; and (2) initiating a judicial/administrative proceeding for the return of the child in the Contracting State where the child is located.

A. Application to Central Authority

The Application to the Central Authority may be made with the Central Authority where the applicant-parent is located or directly with Central Authority of the state where the child is located. Hague Convention, Art. 8. In submitting the Application and supporting documents to the Central Authority, the Application must be in the language of the requesting party and accompanied by a translation in the official language of the “Requested State” or translated in French or English. Hague Convention, Art. 24. The Application must contain:

- a. information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b. where available, the date of birth of the child;
- c. the grounds on which the applicant’s claim for return of the child is based;
- d. all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

Hague Convention, Art. 8. In addition, the Application may be accompanied or supplemented by:

- e. an authenticated copy of any relevant decision or agreement;

- f. a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g. any other relevant document.

Hague Convention, Art. 8. A Central Authority may also require that the Application be accompanied by a power of attorney to allow the Central Authority to act on behalf of the applicant. Hague Convention, Art. 28.

The U.S. State Department Website offers instructions and forms for completing the Hague Application process. This information can be accessed at: http://www.travel.state.gov/abduction/resources/hagueinstruct/hagueinstruct_3857.html.

The general instructions, as contained on the U.S. State Department Website, include:

1. TWO completed applications must be submitted for EACH child. The application form may be photocopied.
2. Type or print all information in black or blue ink.
3. Furnish as much of the information called for as possible, using an additional sheet of paper if you need more space.
4. Translation of the supporting documents into the official language of the receiving country may be necessary. Translations can speed up the overall process. Foreign attorneys and judges tend to respond more favorably with such documents. Ask CA/OCS/CI for more information about supporting documents.

The U.S. State Department Website provides a checklist for supporting materials for Applications at http://www.travel.state.gov/abduction/incoming/incoming_4184.html, which include, marriage certificates, birth certificates, divorce decree, evidence of rights of custody, photographs of the child, a statement regarding the circumstances of the removal or retention, whether the parenting would like to pursue a voluntary return, and an application for legal assistance.

B. Initiation of Judicial Proceeding in the United States

Once the application to the Central Authority has been submitted, the applicant-parent must commence a judicial proceeding for the return of the child in the United States. The state and federal courts have concurrent jurisdiction over Hague proceedings and therefore the petitioner may file the Hague Petition for the Return of the Child in either state or federal court. 42 U.S.C. § 11603(a). The Hague proceeding is commenced by filing the Summons and Petition in the appropriate court and by personal service of the Summons and Petition on the responding party. 42 U.S.C. 11603.

The National Center for Missing and Exploited Children (NCMEC) has model forms available for proceedings under the Hague Convention, which can be accessed at: http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=671. The NCMEC model forms provide that the following information be included in a Petition for the Return of a Child in addition to information already contained in the Application:

- a) Preamble which recites the objectives of the Hague Convention;
- b) Recitation of jurisdictional basis for Petition under the Hague Convention and ICARA¹;
- c) Recitation of status of the Petitioner and child including, but not limited to all information contained in the Application regarding rights of custody, habitual residence and the wrongful removal;
- d) Recitation of facts relating to the wrongful removal or retention;
- e) Whether there has been a child custody determination and if so, provide details related to the date(s) of the determination, the issuing court, the parties, etc.;
- f) Provisional remedies sought including a request for a stay of any child custody proceedings in the Requested State and/or a Warrant² for the child if it

¹ 42 U.S.C.11603.

² If a warrant for the emergency pick-up of the child is requested, UCCJEA procedures for the Warrant to take Physical Custody of a Child should be followed. See Minn. Stat. §518D.311.

- is believed that the child would be further abducted and/or secreted upon being informed of these proceedings; and
- g) Relief sought including the return of the child, temporary orders for the care of the child pending the return;
 - h) Notice requirements regarding hearing pursuant to 42 U.S.C. 11604(c) and applicable state law;
 - i) Prayer for relief sought including the returning of the child and fees and costs pursuant to 42 U.S.C. 11607.

In drafting the Petition and any subsequent pleadings for the Hague proceeding, it is important to remember that the judicial officer hearing the case may not be familiar with the Hague Convention. Therefore, the Petition should provide information not only as to the prayer for relief and underlying factual support, but also as to the legal authority and process in Hague proceedings.

Under the Hague Convention, the removal or retention of a child is considered wrongful where:

- a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b. at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Hague Convention, Art. 3. The child must be under the age of 16 and have been habitually residing in a Contracting State immediately before the wrongful removal or retention. Hague Convention, Art. 4.

The following is a summary of the sources of law applicable to Hague Proceedings in the United States:

- The Hague Convention on the Civil Aspects of International Parental Child Abduction (Hague Convention): Requires member states to return children who are unlawfully removed or retained to their country of habitual residence. A list of signatory countries to the Hague Convention can be accessed at: http://travel.state.gov/family/adoption_hague_list.html.
- International Child Abductions Remedy Act, 42 U.S.C. §§ 11601-11610. (“ICARA”): The legislation that implements the Hague Convention in the United States.
- Public Notice 957. Hague International Child Abduction Convention; Text and Legal Analysis. 51 Fed. Reg. 10494. The U.S. State Department’s analysis of the Hague Convention.
- Explanatory Report by E. Perez-Vera. Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, vol. I11, 1980. Considered an official interpretation of the Hague Convention.
- State and federal case law. Hague proceedings may be brought in both state and federal courts. Both state and federal case law may be cited in presenting or responding to a Hague Petition.

These sources of law should be used to interpret and establish each element of the Hague Petition for the Return of the Child.

C. Emergency Remedies

In emergency cases, the Applicant may apply for ex parte emergency relief as allowed under the Rules of Civil Procedure to prevent re-abduction or secreting of the child and related issues. The Court may order the U.S. Marshalls to serve the Hague Petition, take custody of the child, and execute additional injunctive relief. ICARA explicitly provides that the court acting in a Hague proceeding may “take or cause to be taken any measures under Federal or State law, as appropriate, to protect the well-being of the child involved or the prevent the child’s further removal or concealment before the final disposition of the petition.” 42 U.S.C. 11604.

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) is an additional source of law for addressing emergency situations in Hague cases. The UCCJEA is a state statute, adopted in all U.S. states with the exception of Massachusetts, which governs subject matter jurisdiction over child custody and parenting time determinations and which provides for interstate enforcement mechanisms for child custody and parenting time determinations. The enforcement provisions of the UCCJEA apply to all custody and parenting time determinations including temporary emergency orders, foreign orders, orders issued under the Hague Convention on the Civil Aspects of International Child Abduction, tribal orders and custody and parenting time portions of orders for protection. However, enforcement under the UCCJEA is only available if the custody determination substantially conforms with UCCJEA jurisdictional and notice requirements.

UCCJEA enforcement remedies, which may be applicable in wrongful removal or retention cases include:

i. Petition for Expedited Enforcement

Under the UCCJEA, an expedited enforcement action may be initiated by the service and filing of a petition for enforcement. The petition must be verified and contain the following information:

1. The jurisdictional basis for the issuing court's exercise of jurisdiction;
2. Whether the determination sought to be enforced has been vacated, stayed or modified;
3. Whether there is a simultaneous proceeding that could affect the current enforcement proceeding;
4. The physical address of the child and the respondent if known;

5. Whether the relief in addition to the immediate physical custody of the child and fees is sought, including requests for assistance from law enforcement officials, and, if so, the relief sought; and
6. Whether the child custody determination has been registered in the enforcing state.

Upon the filing of the petition, the court must issue an order directing the respondent to appear in person on the next judicial day for a hearing, if possible. The order may specify whether the party should appear with or without the child. *Id.* The order issued under this section must state the date, time and place of the hearing and advise the respondent that the court may take immediate custody of the child and order the payment of fees and costs. If the enforcing court learns that there is a simultaneous proceeding for modification, the enforcing court must immediately communicate with the modifying court to determine whether to proceed with the enforcement proceeding.

ii. Warrant to Take Physical Custody of a Child

In an emergency situation where a child is immediately likely to suffer serious physical harm or be removed from this state, the court may, in its discretion, issue a warrant to take physical custody of a child pending the determination of an enforcement proceeding. In addition, the court may “impose conditions upon placement of a child to ensure the appearance of the child and the child’s custodian.” The court may use its discretion to order any conditions available under state law such as surrender of passports or may authorize law enforcement to make a forcible entry at any hour to secure the return of the child.

To obtain a warrant to take physical custody of a child, an enforcement petition must be filed along with a verified application for a warrant to take physical custody of the child. The petition must be verified and must contain the information required

for an enforcement petition. In addition, the applicant must provide the court with a factual basis from which the court may conclude that there is a risk of imminent serious physical harm to the child or removal from the jurisdiction. The application process must include testimony from the applicant. To expedite the warrant process, the testimony may be made in person or by telephone. If the court finds upon the testimony of the petitioner or other witnesses that the child is likely to suffer imminent serious physical harm or be removed from the state, it may issue a warrant. The warrant may authorize law enforcement to enter private property to take custody of the child and in extreme circumstances, may authorize law enforcement to make a forcible entry at any hour to recover the child. The court is afforded broad discretion to impose additional conditions upon the placement of a child to ensure the appearance of the child and the child's custodian.

iii. Role of Prosecutor

The UCCJEA also gives prosecutors the authority to enforce custody or visitation determinations, which includes taking action to locate a child or enforce a custody determination.

D. Preparing Evidence for Trial

Much of the evidence to be submitted at trial will be prepared in advance of the filing of the Hague Application and will be included in support of the Hague Application and Petition. Documents included with the Application or Petition shall not be subject to authentication requirements to be admissible in court. 42 U.S.C. 11605.

While case schedules are often established

E. Declaration of Wrongfulness

In cases where the child has been wrongfully removed or retained in Contracting State, counsel located in the place of habitual residence of the child may assist in the recovery of the minor child in several areas:

- Assist in filing the Hague Application. While the Hague Application may be filed either in the place of habitual residence or the signatory country where the child is located, it is generally recommended to file in the U.S. so that the U.S. State Department is better able to monitor the progress of the case.
- Obtain a custody determination. If a custody determination does not already exist, the left-behind parent may want to obtain a custody determination if the United States is the place of habitual residence of the child. The stay provision of Article 16 of the Hague Convention applies only to the jurisdiction of the state in which the child is being wrongfully retained. Hague Convention at art. 16.
- Obtain a Declaration of Wrongfulness. The place of habitual residence may issue a Declaration of Wrongfulness pursuant to Article 15 of the Hague Convention, which then can be transmitted to the Central Authority in the foreign state and submitted in the Hague Proceeding. While this Declaration is not binding on the judicial authority, it may be considered persuasive.
- Provide Evidence of Rights of Custody. Rights of custody may be established by operation of law or by determination. An affidavit as to rights of custody in the left-behind jurisdiction may be used to establish rights of custody.
- Offer technical assistance. Counsel and the left-behind parent play a critical role in compiling a wide range of evidence for the Hague proceeding ranging from collecting witness statements to school records and medical records.
- Offer analysis of applicable U.S. law. In presenting legal arguments in the foreign state, it may be helpful to present information about the United States' history of compliance and enforcement in Hague matters.

In many cases, the majority of information and evidence supporting the Hague Petition will be found in the place of habitual residence of the child. Therefore, the attorney in the left-behind country can play a critical role in obtaining a successful return of the child.

II. ENFORCEMENT OF THE RETURN ORDERS

A. Civil Remedies

- Sanctions
- Contempt
- UCCJEA
- Alien Exclusion Act. 8 U.S.C. (a)(9)(C)(I): This law provides that a non-United States citizen who, in violation of a custody order issued by a United States court, takes or retains a child out of the United States may be excluded from the United States.

B. Criminal Remedies

- Extradition Treaties Interpretation Act of 1998. Title II, Public Law 105-323; *Federal Register*, Vol. 64, No. 15, January 25, 1999, pp. 3735-36.: This law authorizes the United States to interpret extradition treaties, which cover the offense of “kidnapping,” to include parental abduction cases.
- International Parental Kidnapping Crime Act of 1993 18 U.S.C. 1204. (IPKCA). The IPKCA makes international child abduction a federal felony and imposes criminal fines and/or imprisonment on anyone who removes a child from the United States unlawfully or unlawfully retains a child in a foreign country.
- State criminal laws

C. Supporting the Parent-Child Relationship Across Borders

D. Child Support

E. Ethical and Cultural Diversity Issues

Conclusions and Recommendations
adopted by the Special Commission
June 2011

New Contracting States

1. The Special Commission welcomes the increase since the 2006 meeting of the Special Commission in the number of Contracting States to the 1980¹ (from 76 to 85) and 1996² (from 13 to 32) Conventions, and the number of States that have signed the 1996 Convention (7). The Special Commission calls for further efforts by Contracting States and by the Permanent Bureau, through the provision of advice and assistance, to extend the numbers of Contracting States.
2. The Special Commission suggests that an informal network of experts be arranged to discuss strategies and challenges in the implementation of the 1996 Convention, for example, with discussion carried out through a “listserv” (a closed electronic list).

Central Authority co-operation and communication under the 1980 Convention

3. Efforts should be made to ensure that Central Authorities act as a focal point for the provision of services or the carrying out of functions contemplated under Article 7 of the 1980 Convention. When the Central Authority does not itself provide a particular service or carry out a particular function, it should preferably itself engage the body which provides that service or carries out that function. Alternatively, the Central Authority should at least make available information regarding the body, including how to make contact with the body.
4. The Special Commission re-emphasises the crucial importance of the Central Authorities' active role in locating the child who has been wrongfully removed or retained. Where the measures to discover the whereabouts of the child within a Contracting State are not taken directly by the Central Authority but are taken by an intermediary, the Central Authority should remain responsible for expediting communications with the intermediary and informing the requesting State of the progress of efforts to locate the child, and should continue to be the central channel for communication in this regard.
5. Contracting States that have not already done so are asked to provide their Central Authorities with sufficient powers to request, where needed for the purpose of locating the child, information from other governmental agencies and authorities, including the police and, subject to law, to communicate such information to the requesting Central Authority.

¹ *The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, the “1980 Convention”).

² *The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, the “1996 Convention”).

6. The Special Commission draws attention to the serious consequences for the operation of the 1980 Convention of failure to inform the Permanent Bureau promptly of changes in the contact details of Central Authorities. In addition, the Permanent Bureau should undertake to remind Central Authorities of their duty in this respect once a year.

7. The Special Commission re-emphasises the need for close co-operation between Central Authorities in the processing of applications and the exchange of information under the 1980 Convention, and draws attention to the principles of “prompt responses” and “rapid communication” set out in the *Guide to Good Practice under the 1980 Convention – Part I – Central Authority Practice*.

8. The Special Commission welcomes the increasing co-operation within States between the member(s) of the International Hague Network of Judges and the relevant Central Authority resulting in the enhanced operation of the Convention.

9. Central Authorities are encouraged to continue to provide information about and facilitate direct judicial communications including, where there are language difficulties, through the provision of translation services where appropriate and feasible.

10. The Special Commission encourages the Permanent Bureau to continue its work (described in Info. Doc. No 4) to modernise the recommended Request for Return model form and to create a form that can be completed electronically. The Special Commission also requests that the Permanent Bureau continue its work to develop a standardised Request for Access form. The Special Commission requests that different language versions of the forms should be made available on the Hague Conference website. For this purpose, States are encouraged to provide the Permanent Bureau with translations.

11. The Special Commission encourages the use of information technology with a view to increasing the speed of communication and improving networking between Central Authorities.

12. The requesting Central Authority should ensure that the application is complete. In addition to the essential supporting documents, it is recommended that any other complementary information that may facilitate the assessment and resolution of the case accompany the application.

13. The Special Commission re-emphasises that –

(a)

in exercising their functions with regard to the acceptance of applications, Central Authorities should respect the fact that evaluation of factual and legal issues (such as habitual residence, the existence of rights of custody, or allegations of domestic violence) is, in general, a matter for the court or other competent authority deciding upon the return application;

(b)

the discretion of a Central Authority under Article 27 to reject an application when it is manifest that the requirements of the Convention are not fulfilled or that the application is otherwise not well founded should be exercised with extreme caution. The requested Central Authority should not reject an application solely on the basis that additional documents or information are needed. Close co-operation between the Central Authorities involved to ensure that relevant documentation is made available and to avoid undue delay in processing applications is strongly encouraged. The requested Central Authority may ask the requestor to provide these additional documents or information. If the requestor does not do so within a reasonable

period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application.

14. Central Authorities are reminded of the valuable role that the Country Profile for the 1980 Convention is expected to play in enabling States to exchange information on the requirements for making an application in the requested State.

15. The Special Commission welcomes the increasingly important role played by Central Authorities in international child abduction cases to bring about an amicable resolution of the issues including through mediation. At the same time, the Special Commission recognises that the use of measures to this end should not result in delay. Annex 1 iii

16. The requested Central Authority should, as far as possible, keep the requesting Central Authority informed about the progress of proceedings and respond to reasonable requests for information from the requesting Central Authority. When the requested Central Authority has knowledge of a judgment or decision made in return or access proceedings, it should promptly communicate the judgment or decision to the requesting Central Authority, together with general information on timelines for any appeal, where appropriate.

Rights of access / contact cases in the context of the 1980 Convention and / or 1996 Convention

17. The Special Commission notes that in many Contracting States to the 1980 Convention applications concerning access under Article 21 are now processed in the same way as applications for return.

18. Central Authorities designated under the 1980 and / or 1996 Conventions are encouraged to take a pro-active and hands-on approach in carrying out their respective functions in international access / contact cases.

19. The Special Commission reaffirms the principles set out in the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* and strongly encourages Contracting States to the 1980 and 1996 Conventions to review their practice in international access cases in light of these principles, where necessary.

20. The Special Commission recognises that, pursuant to Articles 7(2) b) and 21 of the 1980 Convention, during pending return proceedings a requested Contracting State may provide for the applicant in the return proceedings to have contact with the subject child(ren) in an appropriate case.

Statistics relating to the 1980 Convention

21. The Special Commission acknowledges the great value of the "Statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*" (Prel. Doc. No 8) carried out by Nigel Lowe and Victoria Stephens, and notes the increase in the number of Hague return applications, the marginally lower proportion of returns and the apparent increase in the time taken to conclude Hague return proceedings.

22. The Special Commission reaffirms Recommendation No 1.14 of the 2001 meeting of the Special Commission and Recommendation No 1.1.16 of the 2006 meeting of the Special Commission –

“Central Authorities are encouraged to maintain accurate statistics concerning the cases dealt with by them under the Convention, and to make annual returns of statistics to the Permanent Bureau in accordance with the standard forms established by the Permanent Bureau in consultation with Central Authorities.”

23. The Special Commission recommends that one statistical questionnaire be developed that is capable of being completed online, and that combines the data currently sought for INCASTAT (the International Child Abduction Statistical Database) with the data last sought for the statistical analysis of cases arising in 2008. The Special Commission recommends that the Permanent Bureau, in conjunction with certain interested States Parties, explore the possibility of automated data migration to INCASTAT.

Country Profile for the 1980 Convention

24. The Special Commission welcomes the development of the Country Profile for the 1980 Convention and the important improvement it makes to the exchange of information between Central Authorities.

25. All Contracting States that have not yet completed the Country Profile are strongly encouraged to do so as soon as possible.

26. The Special Commission recommends that Contracting States regularly update their Country Profile to ensure that the information remains current. The Permanent Bureau will send an annual reminder to Contracting States in this regard.

27. The Country Profile does not replace the Standard Questionnaire for Newly Acceding States. However, all newly acceding and ratifying States are encouraged to complete the Country Profile as soon as possible following their accession to or ratification of the 1980 Convention.

Information and training visits for newly acceding / ratifying States and States considering accession to or ratification of the 1980 Convention

28. Immediately following a State becoming Party to the 1980 Convention (or, in an appropriate case, where a State is preparing to do so or has expressed a strong interest in doing so), the State in question should be offered, by way of a standard letter from the Permanent Bureau, the opportunity to visit an experienced Contracting State to the 1980 Convention for the purpose of gaining knowledge and understanding regarding the effective practical operation of the 1980 Convention.

29. The Permanent Bureau will maintain a list of all experienced Contracting States willing to accept such a visit and, when a newly acceding / ratifying (or interested) State responds positively to an offer, will provide details of Contracting States prepared to receive the newly acceding / ratifying (or interested) State for the two States concerned to organise and arrange the visit.

Immigration issues in the context of the 1980 Convention

30. In order to prevent immigration issues from obstructing the return of the child, Central Authorities and other competent authorities should where possible clarify the child's nationality and whether the child is in possession of the necessary travel documents as early as possible during the return procedure. When making a contact order, judges should bear in mind that there might be immigration issues that need to be resolved before contact can take place as ordered.

31. Where there is any indication of immigration difficulties which may affect the ability of a (non-citizen) child or taking parent to return to the requesting State or for a person to exercise contact or rights of access, the Central Authority should respond promptly to requests for information to assist a person in obtaining from the appropriate authorities within its jurisdiction without delay such clearances or permissions (visas) as are necessary. States should act as expeditiously as possible when issuing clearances or visas for this purpose and should impress upon their national immigration authorities the essential role that they play in the fulfilment of the objectives of the 1980 Convention.

Access to justice in the context of the 1980 Convention

32. The Special Commission highlights the importance of ensuring effective access to justice for both parties in return and access proceedings, as well as for the child where appropriate, while recognising that the means of ensuring such effective access may vary from State to State, particularly for Contracting States that have made a reservation under Article 26 of the Convention. Annex 1 v

33. The Special Commission emphasises that the difficulty in obtaining legal aid at first instance or an appeal, or of finding an experienced lawyer for the parties, may result in delays and may produce adverse effects for the child as well as for the parties. The important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find experienced legal representatives is recognised.

34. The Special Commission acknowledges the importance of ensuring effective access to justice for both parties, as well as the child where appropriate, in custody proceedings following the return of the child, while recognising that the means of ensuring such effective access may vary from State to State.

Domestic and family violence in the context of the 1980 Convention

35. The Special Commission notes that a large number of jurisdictions are addressing issues of domestic and family violence as a matter of high priority including through awareness raising and training.

36. Where Article 13(1) *b*) of the 1980 Convention is raised concerning domestic or family violence, the allegation of domestic or family violence and the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of this exception.

37. The Special Commission affirms its support for promoting greater consistency in dealing with domestic and family violence allegations in the application of Article 13(1) *b*) of the 1980 Convention.

38. The Special Commission considered three proposals for future work with a view to promoting consistency in the interpretation and application of Article 13(1) *b*) of the 1980 Convention, and in the treatment of issues of domestic and family violence raised in return proceedings under the Convention. These were –

(a) a proposal that includes, among others, the drafting of a Guide to Good Practice on the implementation of Article 13(1) *b*) (Work. Doc. No 1);

(b) a proposal to establish a working group, drawn in particular from the International Hague Network of Judges, to consider the feasibility of developing an appropriate tool to assist in the consideration of the grave risk of harm exception (Work. Doc. No 2);

(c) a proposal to establish a group of experts, including in particular judges, Central Authority experts and experts in the dynamics of domestic violence, to develop principles or a practice guide on the management of domestic violence allegations in Hague return proceedings (Prel. Doc. No 9, para. 151).

Further consideration of these proposals was deferred until Part II of the meeting of the Special Commission.

Facilitating the safe return of the child and the accompanying parent, where relevant (1980 and 1996 Conventions)

39. The Special Commission recognises the value of the assistance provided by the Central Authorities and other relevant authorities, under Articles 7(2) *d*), *e*) and *h*) and 13(3), in obtaining information from the requesting State, such as police, medical and social workers' reports and information on measures of protection and arrangements available in the State of return.

40. The Special Commission also recognises the value of direct judicial communications, in particular through judicial networks, in ascertaining whether protective measures are available for the child and the accompanying parent in the State to which the child is to be returned.

Annex 1 vi

41. It was noted that the 1996 Convention provides a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be declared enforceable or registered for enforcement in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention.

42. In considering the protection of the child under the 1980 and 1996 Conventions regard should be given to the impact on a child of violence committed by one parent against the other.

43. The Special Commission welcomes the decision of the 2011 Council on General Affairs and Policy of the Hague Conference “to add to the Agenda of the Conference the topic of the recognition of foreign civil protection orders made, for example, in the context of domestic violence cases, and ... [to instruct] the Permanent Bureau to prepare a short note on the subject to assist the Council in deciding whether further work on this subject is warranted.” The Special

Commission recommends that account should be taken of the possible use of such orders in the context of the 1980 Convention.

Rights of custody (1980 Convention)

44. The Special Commission reaffirms that Convention terms such as “rights of custody” should be interpreted having regard to the autonomous nature of the Convention and in the light of its objectives.

45. In relation to the autonomous Convention meaning of the term “rights of custody”, the Special Commission takes notice of *Abbott v. Abbott*, 130 S.Ct. 1983 (2010), which supports the view that a right of access combined with a right to determine the residence of the child constitutes a “right of custody” for the purposes of the Convention and acknowledges that it is a significant contribution towards achieving consistency on an international level regarding its interpretation.

46. The Special Commission recognises the considerable utility of the Country Profile and direct judicial communications in helping to determine the law of the State of the child’s habitual residence for the purpose of establishing whether an applicant in return proceedings has “rights of custody” within the meaning of the Convention.

Jurisprudence of the European Court of Human Rights (1980 Convention)

47. The Special Commission notes that the European Court of Human Rights has in decisions taken over many years expressed strong support for the 1980 Convention, typified by a statement made in the case of *Maumousseau and Washington v. France* (No 39388/05, ECHR 2007 XIII) that the Court was “entirely in agreement with the philosophy underlying the Hague Convention”.

48. The Special Commission notes the serious concerns which have been expressed in relation to language used by the court in its recent judgments in *Neulinger and Shuruk v. Switzerland* (Grand Chamber, No 41615/07, 6 July 2010) and *Raban v. Romania* (No 25437/08, 26 October 2010) in so far as it might be read “as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages, and to move away from a restrictive interpretation of the Article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation” (per the President of the European Court of Human Rights, extra-judicially (Info. Doc. No 5)). Annex 1 vii

49. The Special Commission notes the recent extrajudicial statement made by the President of the European Court of Human Rights (see above) in which he states that the decision in *Neulinger and Shuruk v. Switzerland* does not signal a change of direction for the court in the area of child abduction, and that the logic of the Hague Convention is that a child who has been abducted should be returned to the State of his / her habitual residence and it is only there that his / her situation should be reviewed in full.

The child's voice / opinions in return and other proceedings (1980 and 1996 Conventions)

50. The Special Commission welcomes the overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether an Article 13(2) defense has been raised. The Special Commission notes that States follow different approaches in their national law as to the way in which the child's views may be obtained and introduced into the proceedings. At the same time the Special Commission emphasises the importance of ensuring that the person who interviews the child, be it the judge, an independent expert or any other person, should have appropriate training for this task where at all possible. The Special Commission recognises the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity.

51. The Special Commission notes that an increasing number of States provide for the possibility of separate legal representation of a child in abduction cases.

Guides to Good Practice (1980 and 1996 Conventions)

52. The Special Commission recognises the value of all parts of the Guide to Good Practice under the 1980 Convention and the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* under the 1980 and 1996 Conventions. It encourages the wide dissemination of the Guides. The Special Commission encourages States to consider how best to disseminate the Guides within their States and, in particular, to the persons involved in implementing and operating the Conventions.

The Practical Handbook on the 1996 Convention

53. The Special Commission welcomes the revised Draft Practical Handbook on the 1996 Convention (Prel. Doc. No 4) as a valuable document which provides beneficial guidance to persons involved in implementing and operating the Convention.

54. The Special Commission recommends that the Permanent Bureau, in consultation with experts, make amendments to the revised Draft Practical Handbook, in light of the comments provided at the Special Commission meeting.

55. The Special Commission looks forward to the publication of the Practical Handbook on the 1996 Convention following this final revision process.

INCADAT (the International Child Abduction Database) and INCASTAT: extension to the 1996 Convention

56. The Special Commission recognises the great value of INCADAT and welcomes further exploration of the extension of INCADAT to the 1996 Convention. The Special Commission suggests further exploration of the desirability and feasibility of the extension of INCASTAT to the 1996 Convention.

The Judges' Newsletter on International Child Protection

73. The Special Commission supports the continued publication of *The Judges' Newsletter on International Child Protection* and expresses its appreciation to LexisNexis for its support in publishing and distributing the Newsletter.

74. The Special Commission urges that every effort should be made to make the Newsletter available in Spanish and encourages States to consider providing support for this purpose.

Conferences

75. The Special Commission re-emphasises the importance of inter-disciplinary judicial conferences and seminars and the contribution they make to the effective functioning of the 1980 and 1996 Conventions. The Special Commission encourages States to support and provide continued funding for such meetings and other meetings in support of the consistent application of the Conventions.

Conclusions and Recommendations (Part II)
adopted by the Special Commission
January 2012

Recognition and enforcement of agreements

76. Recognising that, in the course of international child disputes, the parties may enter into agreements settling their dispute, the Special Commission recommends that exploratory work be undertaken to identify legal and practical problems that may exist in the recognition and enforcement abroad of such agreements, taking into account the implementation and use of the 1996 Convention.

77. To this end, the Special Commission recommends that the Council on General Affairs and Policy consider authorising the establishment of an Expert Group to carry out further exploratory research, which would include identification of the nature and extent of the legal and practical problems in this area, including, specifically, jurisdictional issues and would evaluate the benefit of a new instrument in this area, whether binding or not.

Direct judicial communications

78. The Special Commission supports that consideration be given to the inclusion of a legal basis for direct judicial communications in the development of any relevant future Hague Convention.

79. In relation to future work, the Special Commission recommends that the Permanent Bureau:

- (a) promote the use of the *Emerging Guidance and General Principles on Judicial Communications*;
- (b) continue to encourage the strengthening and expansion of the International Hague Network of Judges; and
- (c) maintain an inventory of domestic legal bases relating to direct judicial communications.

Article 13(1) b) of the 1980 Convention, including allegations of domestic and family violence

80. The Special Commission notes that the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) b)), including allegations of domestic violence, are an exclusive matter for the

authority competent to decide on the return, having due regard to the aim of the 1980 Convention to secure the prompt and safe return of the child.

81. The Special Commission recommends that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) *b*) including, but not limited to, allegations of domestic and family violence.

82. The Special Commission recommends that the Council on General Affairs and Policy authorize the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) *b*), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice.

International family relocation

83. The Special Commission recognises that the Washington Declaration¹ provides a valuable basis for further work and reflection.

84. The Special Commission notes support for further work being undertaken to study and gather information concerning the different approaches adopted in various legal systems to international family relocation, in relation to private international law issues and the application of the 1996 Convention.

85. Recognising the value of the 1996 Convention to international family relocation, States that have not yet done so are encouraged to consider ratification of or accession to the Convention.

The Malta Process

86. The Special Commission supports the general continuation of the Malta Process and a Fourth Malta Conference and suggests that future emphasis be placed on the involvement of government representatives in the Process.

The services and strategies provided by the Hague Conference on Private International Law in relation to the 1980 and 1996 Conventions

¹ Resulting from the International Judicial Conference on Cross-Border Family Relocation held in Washington, D.C., United States of America from 23 to 25 March 2010, co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, with the support of the United States Department of State.

87. The Special Commission recommends that the Hague Conference on Private International Law, through its Permanent Bureau, continue its current work to support the effective practical operation of the 1980 and 1996 Conventions and, in this regard, the Permanent Bureau should:

- (a) focus on the promotion, implementation and effective practical operation of the 1980 and 1996 Conventions;
- (b) encourage regional activities including conferences, seminars and training;
- (c) where requests for assistance are received from individuals, provide general information concerning the relevant competent authority(ies); and
- (d) consider ways to enhance further the effectiveness of Special Commission meetings to review the practical operation of the 1980 and 1996 Conventions.

88. The Special Commission notes the strong support for the continuing work in strengthening the Latin American Regional Office and in developing a Regional Office in the Asia Pacific region.

89. The Special Commission takes note of the report of Professor McEleavy (INCADAT Legal Consultant) which, in answering concerns expressed as to the quality of the database, stressed that continued enhancements are being made to INCADAT but that future improvements are subject to available resources.

90. The Special Commission takes note of Information Document No 7 on the expansion of INCASTAT and acknowledges that work should continue subject to supplementary funding.

91. The Special Commission welcomes the continuing work on iChild carried out by the Hague Conference and WorldReach Canada.

92. The Special Commission agrees that the Hague Conference will not continue its work on the model consent to travel form (Prel. Doc. No 15) and that the Permanent Bureau should inform ICAO of this decision.

9 March 2012

INTERNATIONAL HAGUE NETWORK OF JUDGES

ARGENTINA

Judge Graciela TAGLE, Judge of the City of Cordoba (*Juez de la Ciudad de Córdoba*), Córdoba

AUSTRALIA

The Honourable Chief Justice Diana BRYANT, Appeal Division, Family Court of Australia, Melbourne (alternate contact)

The Honourable Justice Victoria BENNETT, Family Court of Australia, Commonwealth Law Courts, Melbourne (primary contact)

AUSTRIA

Dr. Andrea ERTL, Judge at the District Court of Linz (*Bezirksgericht Linz*), Linz

BELGIUM

Ms Myriam DE HEMPTINNE, Magistrate of the Court of Appeals of Brussels (*Conseiller à la Cour d'appel de Bruxelles*), Brussels

BRAZIL

Judge Mônica Jacqueline SIFUENTES PACHECO DE MEDEIROS, Federal Judge – Federal Court of Appeals (*Juiz Federal – Tribunal Federal de Apelações*), Brasília

With geographical responsibility for: the Federal District of Brasilia and the Federal States of Acre, Amapá, Amazonas, Bahia, Goiás, Maranhão, Mato Grosso, Minas Gerais, Pará, Piauí, Rondônia, Roraima, Tocantins, São Paulo and Mato Grosso do Sul.

Judge Jorge Antonio MAURIQUE, Federal Judge – Regional Federal Court of the Fourth Region (*Juiz Federal – Tribunal Regional Federal da 4ª Região*), Porto Alegre, Rio Grande do Sul

With geographical responsibility for: Rio Grande do Sul, Santa Catarina and Paraná.

BULGARIA

Judge Bogdana JELIAVSKA, Vice President of the Sofia City Court, Sofia

CANADA

The Honourable Justice Jacques CHAMBERLAND, Court of Appeal of Quebec (*Cour d'appel du Québec*), Montreal (Civil Law)

The Honourable Justice Robyn M. DIAMOND, Court of Queen's Bench of Manitoba, Winnipeg (Common Law)

CHILE

Judge Hernán Gonzalo LÓPEZ BARRIENTOS, Judge of the Family Court of Pudahuel (*Juez titular del Juzgado de Familia de Pudahuel*), Santiago de Chile

CHINA (Hong Kong, Special Administrative Region)

The Honorable Mr Michael HARTMANN, Justice of Appeal of the Court of Appeal of the High Court, High Court, Hong Kong Special Administrative Region

The Honourable Judge Bebe Pui Ying CHU, Principal Family Court Judge, Family Court - Wanchai Law Courts, Hong Kong Special Administrative Region

COLOMBIA

Doctor José Guillermo CORAL CHAVES, Magistrate of the Civil Family Chamber of the Superior Court for the Judicial District of Pasto (*Magistrado de la Sala Civil Familia del Tribunal Superior del Distrito Judicial de Pasto*), Pasto

COSTA RICA

Mag. Diego BENAVIDES SANTOS, Judge of the Family Tribunal, First Judicial Circuit (*Juez del Tribunal de Familia, Primer Circuito Judicial*), San José

CYPRUS

The Honourable Justice George A. SERGHIDES, Doctor at law, President of the Family Court of Nicosia-Kyrenia, Nicosia

CZECH REPUBLIC

Judge Lubomir PTÁČEK, Regional Court *Ústí nad Labem*, Branch Office in Liberec, Liberec

DENMARK

Judge Bodil TOFTEMANN, City Court of Copenhagen (*Københavns Byret*), Copenhagen

DOMINICAN REPUBLIC

Judge Antonia Josefina GRULLÓN BLANDINO, Court of Children and Adolescents, National District, Civil Chamber (*Tribunal de Niños, Niñas y Adolescentes, Distrito Nacional Sala Civil*), Santo Domingo

ECUADOR

Dr Arturo MÁRQUEZ MATAMOROS, Provincial Judge of the Court of Appeal of El Oro (*Juez Provincial de la Corte de Apelaciones de Justicia de El Oro*), Machala

EL SALVADOR

Lic. Evelyn Roxana NUÑEZ FRANCO, Magistrate of the Administrative Litigation Chamber of the Supreme Court of Justice (*Magistrada de la Sala de lo Contencioso Administrativo de la Corte Suprema de Justicia*), San Salvador

Lic. Ana Guadalupe ZELEDON VILLALTA, Fourth Family Court of San Salvador, Integrated Judicial Centre of Private and Social Law (*Juzgado 4 de Familia de San Salvador, Centro Judicial Integrado de Derecho Privado y Social*), San Salvador

FINLAND

Justice Elisabeth BYGGLIN, Helsinki Court of Appeal (*Helsingin Hovioikeus*), Helsinki

FRANCE

Ms Bénédicte VASSALLO, Deputy Judge of the First Chamber of the Court of Cassation (*conseiller référendaire à la première chambre de la Cour de cassation*), Paris

GABON

Judge Jean-Pierre SOBOTCHOU, Presiding Judge, *Cour de Cassation du Gabon*, Libreville

GERMANY

Judge Martina ERB-KLÜNEMANN, Judge of the Family Court, District Court of Hamm (*Richterin am Amtsgericht, Amtsgericht Hamm*), Hamm

Judge Sabine BRIEGER, Judge of the Family Court, District Court of Pankow-Weißensee (*Richterin am Amtsgericht, Amtsgericht Pankow-Weißensee*), Berlin

GUATEMALA

Judge Rony Eulalio LÓPEZ CONTRERAS, First Magistrate of the Court of Appeals for Children and Adolescents (*Magistrado Vocal Primero de la Sala de la Corte de Apelaciones de la Niñez y Adolescencia*)

HONDURAS

Judge Belia Olmeda TORRES MERLO, Judge of First Instance for Children, Children's Court of First Instance of San Pedro Sula (*Jueza de Letras de la Niñez, Juzgado de Letras Primero de la*

Niñez San Pedro Sula), San Pedro Sula

Judge Anny Belinda OCHOA MEDRANO, Judge of First Instance for Children, Second Children's Court of First Instance for the Department of Francisco Morazán (*Jueza de Letras de la Niñez, Juzgado de Letras Segundo de la Niñez, del Departamento de Francisco Morazán*), Tegucigalpa

ICELAND – NEW DESIGNATION PENDING

IRELAND

The Honourable Ms Justice Mary FINLAY GEOGHEGAN, The High Court, Dublin

ISRAEL

The Honourable Judge Neal HENDEL, Supreme Court of Israel, Jerusalem

KENYA (Non-State Party to the 1980 Convention)

The Honourable Lady Justice Martha KOOME, The High Court, Nairobi

LUXEMBOURG

Mr Serge WAGNER, Advocate-General (*Avocat général*), General Prosecutor's Office of Luxembourg (*Parquet général du Grand-duché de Luxembourg*), Luxembourg

MALTA

The Hon. Mr Justice Noel CUSCHIERI, President, Family Section of the Civil Court, Courts of Justice, Valletta

MEXICO

Lic. Adriana CANALES PÉREZ, Magistrate of the Third Family Chamber, Superior Court of Justice of the Federal District (*Magistrada de la Tercera Sala Familiar, Tribunal Superior de Justicia del Distrito Federal*), Mexico D.F.

Lic. Dionisio NÚÑEZ VERDIN, Judge of First Instance in Family Law (*Juez de Primera Instancia en materia familiar*), Jalisco

Dr Lázaro TENORIO GODÍNEZ, Judge of the First Family Chamber, Superior Court of Justice of the Federal District (*Magistrado de la Primera Sala Familiar, Tribunal Superior de Justicia del Distrito Federal*), Mexico D.F.

Lic. Oscar Gregorio CERVERA RIVERO, President of the Second Family Chamber, Superior Court of Justice of the Federal District (*Presidente de la Segunda Sala Familiar, Tribunal Superior de Justicia del Distrito Federal*), Mexico D.F.

NETHERLANDS

Judge Robine DE LANGE-TEGELAAR, Vice-President, District Court of The Hague, The Hague (primary contact)

Judge Jacques M.J. KELTJENS, Vice-President, District Court of The Hague, The Hague (alternate contact)

NEW ZEALAND

His Honour Judge Peter BOSHIER, Principal Family Court Judge, Chief Judge's Chambers, Wellington

NICARAGUA

Mag. María José ARÁUZ HENRÍQUEZ, First Family District Judge (Juez Primero de Distrito de Familia), Managua

NORWAY

Judge Anne Marie SELVAAG, Trondheim District Court, Trondheim

Judge Torunn Elise KVISBERG, PhD, Sør – Gudbrandsdal District Court, Lillehammer

PANAMA

Lic. Edgar TORRES SAMUDIO, Court of Children and Adolescents of the Chiriquí Judicial Circuit (Juzgado de Niñez y Adolescencia del Circuito Judicial de Chiriquí), Chiriquí

Lic. Delia CEDEÑO P., Judge of Children and Adolescents of the First Judicial Circuit of Panama (Jueza de Niñez y Adolescencia del Primer Circuito Judicial de Panamá), Panama City

PARAGUAY

Professor Dr. Irma ALFONSO DE BOGARÍN, Magistrate of the Criminal Court of Appeals for Adolescents, Capital District (*Magistrada del Tribunal de Apelaciones en lo Penal de la Adolescencia de la Capital*), Asunción

Abg. María Eugenia GIMÉNEZ DE ALLEN, Judge of the Court of Appeals for Children and Adolescents, Central Department (Miembro de Tribunal de Apelación de Niñez y Adolescencia del Departamento de Central), Asunción

PERU

Dra. Luz María CAPUÑAY CHÁVEZ, Superior Judge, First Family Chamber of the Superior Court of Justice (Vocal Superior de la Corte Superior de Justicia, Sala de Familia, Poder Judicial), Lima

ROMANIA

Judge Andreea Florina MATEESCU, Bucharest Tribunal, Vth Civil Section, Bucharest (primary contact)

Judge Anca Magda VLAICU, Bucharest Tribunal, IVth Civil Section, Bucharest (alternate contact)

SINGAPORE

Senior District Judge FOO Tuat Yien, Family and Juvenile Justice Division, Subordinate Court, Singapore

SOUTH AFRICA

The Honourable Mrs Justice Belinda VAN HEERDEN, Supreme Court of Appeal, Bloemfontein

SPAIN

The Honourable Judge Francisco Javier FORCADA MIRANDA, Family Court of First Instance No 6 (*Juzgado de Primera Instancia N° 6 de Zaragoza*), Saragossa

SWEDEN

The Honourable Judge Ann-Sofie BROQVIST, Stockholm District Court (*Stockholms Tingsrätt*), Stockholm

TRINIDAD AND TOBAGO

The Honourable Madam Justice Allyson RAMKERRYSINGH, Family Court of Trinidad and Tobago, Port of Spain

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

For England and Wales

The Right Honourable Lord Justice Mathew THORPE, Judge of the Court of Appeal, Head of International Family Justice, The Royal Courts of Justice, London

For Northern Ireland

The Honourable Mr Justice Ben STEPHENS, The Royal Courts of Justice, Belfast

For Scotland

The Honourable Lord WOOLMAN (Stephen), Supreme Court, Edinburgh

Sheriff Deirdre MACNEILL, Sheriff Court House, Edinburgh

For British Overseas Territories

Cayman Islands

The Honourable Judge Anthony SMELLIE, Chief Justice of the Cayman Islands, Chief Justice's Chambers, Grand Cayman

UNITED STATES OF AMERICA

The Honourable Justice James GARBOLINO, Former Presiding Judge, Superior Court of California, Roseville

The Honourable Judith L. KREEGER, Circuit Judge, Eleventh Judicial Circuit of Florida, Miami

The Honourable Peter J. MESSITTE, United States Federal District Judge, US District Court for the District of Maryland, Greenbelt

The Honourable Mary W. SHEFFIELD, Presiding Judge, Circuit Court, Rolla

URUGUAY

The Honourable Judge Ricardo C. PÉREZ MANRIQUE, Magistrate of the Second Session of the Court of Appeal of Family Affairs (*Ministro del Tribunal de Apelaciones de Familia de 2º Turno de Montevideo*), Montevideo

VENEZUELA

Dra. Rosa Isabel REYES REBOLLEDO, President of the Judicial Circuit of for the Protection of Children and Adolescents for the Judicial District of the Caracas Metropolitan Area and National Co-ordinator of International Adoption (*Presidente del Circuito de Protección de Niños, Niñas y Adolescentes de la Circunscripción Judicial del Área Metropolitana de Caracas y Coordinador Nacional de Adopción Internacional*), Caracas

**LIGNES DE CONDUITE ÉMERGENTES RELATIVES AU DÉVELOPPEMENT
DU RÉSEAU INTERNATIONAL DE JUGES DE LA HAYE ET
PRINCIPES GÉNÉRAUX RELATIFS AUX COMMUNICATIONS JUDICIAIRES,
Y COMPRIS LES GARANTIES COMMUNÉMENT ACCEPTÉES POUR LES COMMUNICATIONS
JUDICIAIRES DIRECTES DANS DES AFFAIRES PARTICULIÈRES,
DANS LE CONTEXTE DU RÉSEAU INTERNATIONAL DE JUGES DE LA HAYE**

document établi par le Bureau Permanent

* * *

**EMERGING GUIDANCE REGARDING THE DEVELOPMENT
OF THE INTERNATIONAL HAGUE NETWORK OF JUDGES AND
GENERAL PRINCIPLES FOR JUDICIAL COMMUNICATIONS,
INCLUDING COMMONLY ACCEPTED SAFEGUARDS FOR
DIRECT JUDICIAL COMMUNICATIONS IN SPECIFIC CASES,
WITHIN THE CONTEXT OF THE INTERNATIONAL HAGUE NETWORK OF JUDGES**

document drawn up by the Permanent Bureau

*Document préliminaire No 3 A révisé d'avril 2012 à l'intention de la
Commission spéciale de juin 2011 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la
Convention Protection des enfants de 1996*

*Preliminary Document No 3 A Revised of April 2012 for the attention of the
Special Commission of June 2011 on the practical operation of the
1980 Hague Child Abduction Convention and the
1996 Hague Child Protection Convention*

**LIGNES DE CONDUITE ÉMERGENTES RELATIVES AU DÉVELOPPEMENT
DU RÉSEAU INTERNATIONAL DE JUGES DE LA HAYE ET
PRINCIPES GÉNÉRAUX RELATIFS AUX COMMUNICATIONS JUDICIAIRES,
Y COMPRIS LES GARANTIES COMMUNÉMENT ACCEPTÉES POUR LES
COMMUNICATIONS JUDICIAIRES DIRECTES DANS DES AFFAIRES PARTICULIÈRES,
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document établi par le Bureau Permanent

* * *

**EMERGING GUIDANCE REGARDING THE DEVELOPMENT
OF THE INTERNATIONAL HAGUE NETWORK OF JUDGES AND
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document drawn up by the Permanent Bureau

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Background

This document represents the latest version of emerging guidance regarding the development of the International Hague Network of Judges and a set of General Principles for Judicial Communications within the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter “the 1980 Hague Child Abduction Convention”) and the International Hague Network of Judges, including commonly accepted safeguards for direct judicial communications in specific cases. The drawing up of these principles began following the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006).¹ Among the Conclusions and Recommendations of this meeting, the section relating to judicial communications contains the recommendation that the future work of the Permanent Bureau would include exploring the value of drawing up principles concerning direct judicial communications, which could serve as a model for the development of good practice, with the advice of a consultative group of experts drawn primarily from the judiciary.²

With this in mind, the Permanent Bureau gathered together a group of experts in July 2008 to discuss a preliminary draft.³ The draft was improved in the light of comments made by the experts to provide a basis for further discussion and consultation at the Joint Conference of the European Commission-Hague Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks (hereinafter “the Joint EC-HCCH Conference”), which took place in Brussels in January 2009.⁴ The Joint EC-HCCH Conference underlined the continued development and refinement of the Draft General Principles for Judicial Communications in consultation

¹ “Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (30 October-9 November 2006)”, adopted by the Special Commission (hereinafter, “Conclusions and Recommendations of the Fifth Meeting of the Special Commission”). Available on the website of the Hague Conference at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention”.

² Conclusion and Recommendation No 1.6.7 e). This follows a suggestion for a recommendation contained in P. Lortie, “Report on Judicial Communications in relation to international child protection”, Prel. Doc. No 8 of October 2006 drawn up for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (hereinafter, “Prel. Doc. No 8/2006 on Judicial Communications”), at para. 73 under 7 w). Available on the website of the Hague Conference at < www.hcch.net > under “Child Abduction Section” then “Special Commission meetings on the practical operation of the Convention” and “Preliminary Documents”.

³ The following experts met at the Permanent Bureau: The Honourable Justice Victoria Bennett (Australia), Judge Eberhard Carl (Germany), Senior Judge Francisco Javier Forcada Miranda (Spain), Judge Myriam de Hemptinne (Belgium), Judge Jónas Johannsson (Iceland), the Honourable Justice Judith Kreeger (United States of America), Judge Robine de Lange-Tegelaar (Netherlands), Judge Jorge Antonio Maurique (Brazil), the Honourable Justice Dionisio Núñez Verdín (Mexico), Judge Annette C. Olland (Netherlands), the Honourable Judge Ricardo C. Pérez Manrique (Uruguay), Judge Lubomir Ptáček (Czech Republic), Kathy Ruckman (United States of America), Andrea Schulz (Germany), Judge Mônica Jacqueline Sifuentes Pacheco de Medeiros (Brazil), Judge Graciela Tagle (Argentina), François Thomas (European Union), the Right Honourable Lord Justice Mathew Thorpe (United Kingdom, England and Wales) and Markus Zalewski (European Union).

⁴ The Conclusions and Recommendations of the 15 to 16 January 2009 Joint EC-HCCH Judicial Conference are available on the website of the Hague Conference at < www.hcch.net > under “Child Abduction Section” then “Judicial Communications”. These Conclusions and Recommendations were adopted by consensus by more than 140 judges from more than 55 jurisdictions representing all continents.

with judges from all regions of the world and different legal traditions.⁵ The draft was the subject of discussion at a number of judicial conferences which took place thereafter.⁶

On 28 June 2010, the Permanent Bureau gathered together a group of experts drawn from the judiciary⁷ to develop further the emerging guidance for the development of the International Hague Network of Judges and the Draft General Principles for Judicial Communications. With a view to facilitate the work of the group of experts, a list of policy issues regarding these matters, prepared by the Permanent Bureau, was distributed to experts in advance of the meeting.

An earlier version of this document, prepared by the Permanent Bureau in light of the consultations carried out thus far, was submitted formally in March 2011 to Contracting States to the 1980 Hague Child Abduction Convention and to the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter "the 1996 Hague Child Protection Convention") for their comments and suggestions prior to the meeting of the Special Commission to review the operation of those two Conventions, which took place from 1 to 10 June 2011. The Special Commission gave its general endorsement to the Emerging Guidance and General Principles for Judicial Communications contained in Preliminary Document No 3 A. The current version of Preliminary Document No 3 A has been revised taking into account the discussions within the Special Commission. The document is now subject to a final distribution.

This document and the General Principles for Judicial Communications are work in progress. Comments and suggestions from States, interested organisations, or judges, especially members of the International Hague Network of Judges, are welcome.

Introduction

The creation of the International Hague Network of Judges specialising in family matters was first proposed at the 1998 De Ruwenberg Seminar for Judges on the international protection of children.⁸ It was recommended that the relevant authorities (*e.g.*, court presidents or other officials as is appropriate within the different legal cultures) in the different jurisdictions designate one or more members of the judiciary to act as a channel

⁵ See, *ibid.*, Conclusion and Recommendation No 16.

⁶ The Third Judicial Conference on Cross-Frontier Family Law Issues, St. Julian's, 24-26 March 2009; the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, Cumberland Lodge, England, 4-8 August 2009; the International Hague Network of Judges Latin American Judges' Meeting, Montevideo, 4 December 2009; the International Judicial Conference on Cross-border Family Relocation, Washington D.C., 23-25 March 2010; and, the Inter-American Meeting of International Hague Network Judges and Central Authorities on International Child Abduction, Mexico, 23-25 February 2011.

⁷ The following experts met at the Permanent Bureau: The Honourable Judge Peter Boshier (New Zealand), the Honourable Justice Jacques Chamberland (Canada, Civil Law), Judge Martina Erb-Klunemann (Germany), Senior Judge Francisco Javier Forcada Miranda (Spain), Judge Myriam de Hemptinne (Belgium), Judge Jacques M.J. Keltjens (Netherlands), the Honourable Justice Judith Kreeger (United States of America), the Honourable Justice Dionisio Núñez Verdín (Mexico), the Honourable Judge Ricardo C. Pérez Manrique (Uruguay), Judge Lubomir Ptáček (Czech Republic), Judge Mônica Jacqueline Sifuentes Pacheco de Medeiros (Brazil) and the Right Honourable Lord Justice Mathew Thorpe (United Kingdom, England and Wales). Jenny Clift (United Nations Commission on International Trade Law (UNCITRAL)) joined the group as the officer responsible at the UNCITRAL Secretariat for judicial communications in insolvency matters.

⁸ Information on the 1998 De Ruwenberg Judicial Seminar is available on the website of the Hague Conference at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children" and "Other Judicial Seminars".

of communication and liaison with their national Central Authorities, with other judges within their jurisdictions and with judges in other Contracting States, in respect, at least initially, of issues relevant to the 1980 Hague Child Abduction Convention. It was felt that the development of such a network would facilitate communications and co-operation between judges at the international level and would assist in ensuring the effective operation of the 1980 Hague Convention. More than 10 years later, it is now recognised that there is a broad range of international instruments, both regional and multilateral, in relation to which direct judicial communications can play a role beyond the 1980 Hague Convention.⁹

Since its inception, a number of judicial conferences have supported the expansion of the International Hague Network of Judges. The Fourth,¹⁰ Fifth¹¹ and Sixth¹² Meetings of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* discussed these developments and the Conclusions and Recommendations from both demonstrate support for the International Hague Network and the continuation of work aimed at further development. In January 2009, the Joint EC-HCCH Conference emphasised the value of direct judicial communications in international child protection cases, as well as the development of international, regional and national judicial networks to support such communications.¹³ On that latter point, the Joint Conference invited the different networks to operate in a complementary and co-ordinated manner in order to achieve synergies, and, as far as possible, to observe the same safeguards in relation to direct judicial communications.¹⁴ The International Hague Network currently includes almost 70 judges from 48 States¹⁵ in all continents.

The role of a member of the International Hague Network of Judges is to be a link between his or her colleagues at the domestic level and other members of the Network at the international level. There are two main communication functions exercised by members of the Network. The first communication function is of a general nature (*i.e.*, not case specific). It includes the sharing of general information from the International Hague Network or the Permanent Bureau with his or her colleagues in the jurisdiction and assisting with the reverse flow of information. It may also encompass participation in

⁹ See Conclusion and Recommendation No 17, *supra*, note 4. See, for example, the 1996 Hague Child Protection Convention and instruments of a regional nature within the European Union and the Organization of American States.

¹⁰ "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001)", drawn up by the Permanent Bureau (hereinafter, "Conclusions and Recommendations of the Fourth Meeting of the Special Commission"), see Conclusions and Recommendations Nos 5.5, 5.6 and 5.7. Available on the website of the Hague Conference at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings on the practical operation of the Convention" and "Preliminary Documents".

¹¹ Conclusions and Recommendations of the Fifth Meeting of the Special Commission, *supra*, note 1, see Part VI.

¹² Conclusions and Recommendations of Part I and Part II of the Sixth Meeting of the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, which took place in The Hague respectively from 1 to 10 June 2011 and from 25 to 31 January 2012.

¹³ See Conclusion and Recommendation No 1, *supra*, note 4.

¹⁴ See, *ibid.*, Conclusion and Recommendation No 6.

¹⁵ Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China (Hong Kong, Special Administrative Region), Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Gabon, Germany, Guatemala, Honduras, Iceland (vacancy – pending designation), Ireland, Israel, Kenya, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Romania, Serbia, Singapore, South Africa, Spain, Sweden, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland (England and Wales, Northern Ireland, Scotland and the Cayman Islands (B.O.T.)), United States of America, Uruguay, and Venezuela. A list of members of the International Hague Network of Judges is available on the website of the Hague Conference at < www.hcch.net > under "Child Abduction Section" then "The International Hague Network of Judges".

international judicial seminars. The second communication function consists of direct judicial communications with regard to specific cases, the objective of such communications being to address any lack of information that the competent judge has about the situation and legal implications in the State of the habitual residence of the child. In this context, members of the Network may be involved in facilitating arrangements for the prompt and safe return of the child, including the establishment of urgent and / or provisional measures of protection and the provision of information about custody or access issues or possible measures for addressing domestic violence or abuse allegations. These communications will often result in considerable time savings and better use of available resources, all in the best interests of the child.

The Principles for Judicial Communications will provide transparency, certainty and predictability to such communications for both judges involved as well as for the parties and their representatives. Such Principles are meant to ensure that direct judicial communications are carried out in a way which respects the legal requirements in the respective jurisdictions and the fundamental principle of judicial independence in carrying out Network functions. The Principles are drafted in a flexible way to meet the various procedural requirements found in different legal systems and legal traditions.

Where there is concern in any State as to the proper legal basis for direct judicial communications, whether under domestic law or procedure, or under relevant international instruments, the necessary steps should be taken to ensure within the State that such legal basis exists.¹⁶

Efforts should be made within States to promote the appropriate use of direct judicial communications in the international protection of children, to increase awareness of the existence and role of Network judges¹⁷ and to ensure, where appropriate, that necessary support and resources are provided to enable them to function effectively.

Emerging guidance regarding the development of the International Hague Network of Judges

Over the years, a number of rules have emerged regarding the appointment and designation of members of the International Hague Network of Judges as well as information about members of the Network and its dissemination. The Joint EC-HCCH Conference recognised that adequate resources, including administrative and legal resources, should be made available to support the work of Network judges as their workload increases.¹⁸ Furthermore, States experiencing a high volume of international child protection cases were invited to consider setting up an office to support the work of the Network judge or judges.¹⁹ Finally, the Joint EC-HCCH Conference recommended to advance the development of national networks in support of the international and regional networks.²⁰

1. Appointment and designation of members of the International Hague Network of Judges

1.1 States that have not designated Network judges are strongly encouraged to do so.²¹

¹⁶ See Conclusion and Recommendation No 15, *supra*, note 4.

¹⁷ See, *ibid.*, Conclusion and Recommendation No 11.

¹⁸ See, *ibid.*, Conclusion and Recommendation No 13.

¹⁹ See, *ibid.*, Conclusion and Recommendation No 14.

²⁰ See, *ibid.*, Conclusion and Recommendation No 10.

²¹ See, *ibid.*, Conclusion and Recommendation No 2.

- 1.2 Judges designated to the Network with responsibility for international child protection matters should be sitting judges²² with authority and present experience in that area.²³ Competent authorities responsible for making such designations vary from State to State. Examples of these competent authorities include judicial councils, supreme courts, chief justices, assemblies of judges or, sometimes, the Ministry of Justice or other relevant government department.²⁴
- 1.3 The process for the designation of Network judges should respect the independence of the judiciary.²⁵
- 1.4 Designation of Network judges in States that are not Parties to the Hague Children's Conventions is also encouraged.²⁶
- 1.5 States that have designated a judge specialised in child protection matters in the context of other networks are invited to do the same within the context of the International Hague Network of Judges and vice versa.²⁷
- 1.6 Where possible, designations should be for as long a period as possible in order to provide stability to the Network while recognising the need to have new members join the Network on a regular basis. It is established practice that judges who are no longer active should resign from the Network to be replaced by sitting judges with authority and present experience in that area.
- 1.7 Designations should be made by way of a signed letter or the transmission of any official document from the competent authority responsible for the designation.
- 1.8 Where two or more members are designated for a State, it is established practice that designation should identify the territorial units or systems of law for which each judge has responsibility, and should also indicate the judge who is the primary contact and the judge who is the alternate contact.

2. Information about members of the Network

- 2.1 Details of the individual members of the Network should be forwarded to the Permanent Bureau for inclusion in a list of members available in both English and French.
- 2.2 The information to be provided for inclusion in the list of members of the Network should consist of the name of the judge and, if possible, in order to assist the Permanent Bureau of the Hague Conference with translation, the position of the judge and the name of the court where the judge sits in both French and English, in addition to the position and the name in the original language(s). Other information to be provided includes the official contact details of the judge, including postal and e-mail addresses, telephone and fax numbers, as well as the judge's preferred method of communication. Finally, members should indicate the languages in which they are able to communicate in writing and orally.
- 2.3 This information will be kept by the Permanent Bureau and should be updated as necessary.

²² These are judges that are currently carrying out judicial functions.

²³ See Conclusion and Recommendation No 3, *supra*, note 4.

²⁴ Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 2, paras 19-21.

²⁵ See Conclusion and Recommendation No 5, *supra*, note 4.

²⁶ Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 2, para. 73 under 3 k).

²⁷ *Ibid.*, para. 73 under 4 l).

- 2.4 A copy of the list of judges, including their contact details, will be made available for distribution only to members of the Network. However, names and positions of the members are available to the public through the Hague Conference website and *The Judges' Newsletter on International Child Protection*.
- 2.5 When a judge has been designated to the Hague Network of judges appropriate steps should be taken for other judges or Central Authorities dealing with international child protection matters to be informed of the designation.
- 2.6 It is recommended to Central Authorities that applications under the 1980 Hague Child Abduction Convention should contain the name of the Hague Network judge in the requesting State.

Principles for General Judicial Communications

The responsibilities of the Hague Network judge include the collecting of information and news relevant to the implementation of the Hague Conventions and other international child protection matters, both nationally and internationally. He or she will then ensure that this information is disseminated both internally to other judges within his or her State, and internationally amongst members of the Network.

3. Internally – within the domestic court system

- 3.1 The Hague Network judge should make his or her colleagues in the jurisdiction aware of legislation and Conventions on child protection in general and inform them as to their application in practice. Initiation of and participation in internal training seminars for judges and legal professionals as well as writing articles for publication is also part of this role.
- 3.2 The Hague Network judge makes certain that other judges within his or her jurisdiction who hear international child protection cases receive their issue of *The Judges' Newsletter on International Child Protection*, published by the Permanent Bureau of the Hague Conference, and are aware of any other information, such as on the International Child Abduction Database (INCADAT) of the Hague Conference,²⁸ that might contribute to the development of the expertise of the individual judge.

4. Internally – relationship with Central Authorities

Another function of a Network judge is to promote effective working relationships between all those involved in international child protection matters so as to ensure the most effective application of the relevant rules and procedures.

- 4.1 It is recognised that the relationship between judges and Central Authorities can take different forms.²⁹
- 4.2 Central Authorities may play an important role in giving support to judicial networks and in facilitating direct judicial communications.³⁰
- 4.3 Successful working relationships depend on the development of mutual trust and confidence between judges and Central Authorities.

²⁸ Accessible at < www.incadat.com >.

²⁹ Conclusions and Recommendations of the Fifth Meeting of the Special Commission, *supra*, note 1, Conclusion and Recommendation No 1.6.4; Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 2, paras 27-29 and para. 73 under 2 b).

³⁰ See Conclusion and Recommendation No 12, *supra*, note 4.

- 4.4 Meetings involving judges and Central Authorities at a national, bilateral, regional or multilateral level are a necessary part of building this trust and confidence and can assist in the exchange of information, ideas and good practice.³¹
- 4.5 The Hague Network judge will promote within his / her jurisdiction international child protection collaboration generally.

5. Internationally – with foreign judges and the Permanent Bureau

- 5.1 The Hague Network judge will encourage members of the judiciary in his / her jurisdiction to engage, where appropriate, in direct judicial communications.
- 5.2 The Hague Network judge may provide, or facilitate the provision of, responses to focussed enquiries from foreign judges concerning legislation and Conventions on international child protection and their operation in his / her jurisdiction.³²
- 5.3 The Hague Network judge is responsible for ensuring that important judgments dealing with direct judicial communications, among other matters, are sent to the editors of the International Child Abduction Database (INCADAT).
- 5.4 The Hague Network judge may be invited to contribute to the Permanent Bureau's *Judges' Newsletter*.
- 5.5 The Hague Network judge is encouraged to participate in international judicial seminars on child protection in so far as it is relevant and possible.

Principles for Direct Judicial Communications in specific cases including commonly accepted safeguards

Direct judicial communications refer to communications that take place between sitting judges concerning a specific case. Current practice shows that these communications mostly take place in child abduction cases under the 1980 Hague Child Abduction Convention. These cases show that these communications can be very useful for resolving some of the practical issues, for example, surrounding return and they may result in immediate decisions or settlements between the parents before the court in the requested State.

The role of the Hague Network judge is to receive and, where necessary, channel incoming judicial communications and initiate or facilitate outgoing communications. The Hague Network judge may be the judge involved in the communication itself, or he or she may facilitate the communication between the judges seized with the specific case. Such communications are different from Letters of Request. The taking of evidence should follow the channels prescribed by law. When a judge is not in a position to provide assistance he or she may invite the other judge to contact the relevant authority.

³¹ Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 2, para. 73 under 2 g).

³² It is important to note that Central Authorities under Art. 7 e) of the 1980 Hague Child Abduction Convention shall, in particular, either directly or through any intermediary, take all appropriate measures "to provide information of a general character as to the law of their State in connection with the application of the Convention".

Matters that may be the subject of direct judicial communications include, for example:

- a) scheduling the case in the foreign jurisdiction
 - i) to make interim orders, *e.g.*, support, measure of protection;
 - ii) to ensure the availability of expedited hearings;
- b) establishing whether protective measures are available for the child or other parent in the State to which the child would be returned and, in an appropriate case, ensuring the available protective measures are in place in that State before a return is ordered;
- c) ascertaining whether the foreign court can accept and enforce undertakings offered by the parties in the initiating jurisdiction;
- d) ascertaining whether the foreign court can issue a mirror order (*i.e.*, same order in both jurisdictions);
- e) confirming whether orders were made by the foreign court;
- f) verifying whether findings about domestic violence were made by the foreign court;
- g) verifying whether a transfer of jurisdiction is appropriate.

6. Communication safeguards

Overarching principles

- 6.1 Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction.³³
- 6.2 When communicating, each judge seized should maintain his or her independence in reaching his or her own decision on the matter at issue.
- 6.3 Communications must not compromise the independence of the judge seized in reaching his or her own decision on the matter at issue.

Commonly accepted procedural safeguards

- 6.4 In Contracting States in which direct judicial communications are practised, the following are commonly accepted procedural safeguards:³⁴
 - except in special circumstances, parties are to be notified of the nature of the proposed communication;
 - a record is to be kept of communications and it is to be made available to the parties;³⁵
 - any conclusions reached should be in writing;
 - parties or their representatives should have the opportunity to be present in certain cases, for example via conference call facilities.

³³ Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 2, para. 73 under 5 m). For example, the taking of evidence should follow the channels prescribed by law.

³⁴ The text of Principle 6.4 follows from the views of experts consulted that consideration should be given to amend Recommendation No 5.6 of the Fourth Meeting of the Special Commission (22-28 March 2001), which originally stated:

"In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:

- communications to be limited to logistical issues and the exchange of information;
- parties to be notified in advance of the nature of proposed communication;
- record to be kept of communications;
- confirmation of any agreement reached in writing;
- parties or their representatives to be present in certain cases, for example via conference call facilities."

³⁵ It is to be noted that records can be kept in different forms such as, for example, a transcription, an exchange of correspondence, a note to file.

- 6.5 Nothing in these commonly accepted procedural safeguards prevents a judge from following rules of domestic law or practices which allow greater latitude.

7. Initiating the communication

Necessity

- 7.1 In considering whether the use of direct judicial communications is appropriate, the judge should have regard to speed, efficiency and cost-effectiveness.

Timing – before or after the decision is taken

- 7.2 Judges should consider the benefit of direct judicial communications and when in the procedure it should occur.
- 7.3 The timing of the communication is a matter for the judge initiating the communication.³⁶

Making contact with a judge in the other jurisdiction

- 7.4 The initial communication should ordinarily take place between two Hague Network judges in order to ascertain the identity of the judge seized in the other jurisdiction.³⁷
- 7.5 When making contact with a judge in another jurisdiction, the initial communication should normally be in writing (see Principle No 8 below) and should in particular identify:
- a) the name and contact details of the initiating judge;
 - b) the nature of the case (with due regard to confidentiality concerns);
 - c) the issue on which communication is sought;
 - d) whether the parties before the judge initiating the communication have consented to this communication taking place;
 - e) when the communication may occur (with due regard to time differences);
 - f) any specific questions which the judge initiating the communication would like answered;
 - g) any other pertinent matters.

- 7.6 The time and place for communications between the courts should be to the satisfaction of both courts. Personnel other than judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation of counsel unless otherwise ordered by either of the courts.³⁸

8. The form of communications and language difficulties

- 8.1 Judges should use the most appropriate technological facilities in order to communicate as efficiently and as swiftly as possible.³⁹

³⁶ Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 2, para. 73 under 5 n).

³⁷ *Ibid.*, under 5 o).

³⁸ See American Law Institute, "Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases", appearing as Annex K in Prel. Doc. No 8/2006 on Judicial Communications, *supra*, note 2, Guideline 7 d).

³⁹ 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, Art. 8, *OJ L 174, 27/06/2001*, pp. 25-31.

- 8.2 The initial method and language of communication should, as far as possible, respect the preferences, if any, indicated by the intended recipient in the list of members of the Hague Network. Further communications should be carried out using the initial method and language of communication unless otherwise agreed by the judges concerned.
- 8.3 Where two judges do not understand a common language, and translation or interpretation services are required, such services could be provided either by the court or the Central Authority in the country from which the communication is initiated.
- 8.4 Hague Network judges are encouraged to improve their foreign language skills.

Written communications

- 8.5 Written communications, particularly in initiating the contact, are valuable as they provide for a record of the communication and help alleviate language and time zone barriers.
- 8.6 Where the written communication is provided through translation, it is good practice also to provide the message in its original language.
- 8.7 Communications should always include the name, title and contact details of the sender.
- 8.8 Communications should be written in simple terms, taking into account the language skills of the recipient.
- 8.9 As far as possible, appropriate measures should be taken for the personal information of the parties to be kept confidential.
- 8.10 Written communications should be transmitted using the most rapid and efficient means of communication and, in those cases where it is necessary for confidential data to be transmitted, secured means of communication should be employed.
- 8.11 Written communications should always be acknowledged as soon as possible with an indication as to when a response will be provided.
- 8.12 All communications should be typewritten.
- 8.13 Ordinarily, communications should be in writing, save where the judges concerned are from jurisdictions with proceedings conducted in the same language.

Oral communications

- 8.14 Oral communications are encouraged where judges involved come from jurisdictions which share the same language.
- 8.15 Where the judges do not speak the same language, one or both of them, subject to an agreement between the two judges concerned, should have at their disposal a competent and neutral interpreter who can interpret to and from their language.
- 8.16 Where necessary, personal information concerning the parties should be anonymised for the purposes of oral communication.
- 8.17 Oral communications can take place either by telephone or videoconference and, in those cases where it is necessary that they deal with confidential information, such communications should be carried out using secured means of communication.

9. Keeping the Central Authority informed of judicial communications

- 9.1 Where appropriate, the judge engaged in direct judicial communications may consider informing his or her Central Authority that a judicial communication will take place.

Additional information and examples of direct judicial communication can be found in the "Report on Judicial Communications in Relation to International Child Protection".⁴⁰

⁴⁰ Prel. Doc. No 8/2006 concerning judicial communications, *supra*, note 2, paras 35-42, and Prel. Doc. No 8/2006, Annexes, pp. 23-26.



International Centre
FOR MISSING & EXPLOITED CHILDREN



**INTERNATIONAL JUDICIAL CONFERENCE ON
CROSS-BORDER FAMILY RELOCATION**

**WASHINGTON, D.C., UNITED STATES OF AMERICA
23-25 MARCH 2010**

co-organised by

**Hague Conference on Private International Law
International Centre for Missing and Exploited Children**

with the support of

United States Department of State

**WASHINGTON DECLARATION ON
INTERNATIONAL FAMILY RELOCATION**

On 23-25 March 2010, more than 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, met in Washington, D.C. to discuss cross-border family relocation. They agreed on the following:

Availability of Legal Procedures Concerning International Relocation

1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.

Reasonable Notice of International Relocation

2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.

Factors Relevant to Decisions on International Relocation

3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.
4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:
 - i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;
 - ii) the views of the child having regard to the child's age and maturity;
 - iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
 - iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
 - v) any history of family violence or abuse, whether physical or psychological;
 - vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

- vii) pre-existing custody and access determinations;
- viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
- ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
- x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;
- xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
- xii) issues of mobility for family members; and
- xiii) any other circumstances deemed to be relevant by the judge.

5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.

6. The factors reflect research findings concerning children's needs and development in the context of relocation.

The Hague Conventions of 1980 on International Child Abduction and 1996 on International Child Protection

7. It is recognised that the Hague Conventions of 1980 and 1996 provide a global framework for international co-operation in respect of cross-border family relocations. The 1980 Convention provides the principal remedy (the order for the return of the child) for unlawful relocations. The 1996 Convention allows for the establishment and (advance) recognition and enforcement of relocation orders and the conditions attached to them. It facilitates direct co-operation

between administrative and judicial authorities between the two States concerned, as well as the exchange of information relevant to the child's protection. With due regard to the domestic laws of the States, this framework should be seen as an integral part of the global system for the protection of children's rights. States that have not already done so are urged to join these Conventions.

Promoting Agreement

8. The voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings. The views of the child should be considered, having regard to the child's age and maturity, within the various processes.

Enforcement of Relocation Orders

9. Orders for relocation and the conditions attached to them should be able to be enforced in the State of destination. Accordingly States of destination should consider making orders that reflect those made in the State of origin. Where such authority does not exist, States should consider the desirability of introducing appropriate enabling provisions in their domestic law to allow for the making of orders that reflect those made in the State of origin.

Modification of Contact Provisions

10. Authorities in the State of destination should not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred.

Direct Judicial Communications

11. Direct judicial communications between judges in the affected jurisdictions are encouraged to help establish, recognise and enforce, replicate and modify, where necessary, relocation orders.

Research

12. It is recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.

Further Development and Promotion of Principles

13. The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.

RECOMMENDED PRACTICES FOR COURT-TO-COURT JUDICIAL COMMUNICATIONS

Background

The Canadian Judicial Council, which has approved the establishment of the Canadian Network of Contact Judges, has given the Network the mandate to explore the concept of judicial networking and collaboration in cases of child abduction and custody. The following checklist sets out the Network's recommendations for such practices.

Checklist¹

INITIATING CONTACT WITH FOREIGN COURTS

A. Due process and transparency

1. Every judge engaging in direct judicial communication must respect the law in his or her jurisdiction.
2. Notification of the Parties about communication
 - a) The parties and/or counsel involved should be notified in advance if possible of the nature of the proposed communication provided that such notice does not unduly delay the process.
3. Record of the communication
 - a) Judges involved in a particular communication should keep a record of what was discussed preferably using a recording device or court reporter.
 - b) The record should be available to the parties and the judge in the other jurisdiction if requested.
 - c) Any correspondence, emails or other written communication between judges should be preserved for the record.
4. Participation of the parties
 - a) If both judges involved in the communication agree, the parties or

¹ It is acknowledged with appreciation that James Garbolino's Hague Convention website which includes a checklist formed the basis for this checklist along with the Ontario Superior Court's "Protocol for Direct Judicial Communication and Justice Martinson's decision in *Hoole v Hoole* 2008 BCSC 1248.

their representative may be permitted to be present during the communication.

- b) If both judges involved in the communication agree to permit one party or representative to be present, then the other party or representative should be permitted to be present.
- c) Unless it would unduly delay the process, parties or their representative would be encouraged to be present for example via conference call facility.
- d) If both judges involved in the communication agree, the parties or their representative may be permitted to speak during the communication.
- e) If the judges involved in the communication agree to permit one party or representative to speak, then the other party or representative should be permitted a chance to answer.
- f) Consideration may be given to allow counsel to submit a question or provide information relating to the proposed communication.

5. Language

- a) Because of the necessity for clarity and precision, where there are language differences, and where interpretation is needed, professional interpreters are preferred.

6. Consensus or Arrangement

- a) Confirmation of any consensus or arrangements reached as between judges should be confirmed in writing and made available to the parties.

B. Nature of the request to communicate

- 1. Is there a question of foreign (interprovincial or international) law or procedure to discuss with a judge in the foreign jurisdiction?
 - a) Is there a case pending before the foreign court?
 - b) If so, is there a need to speak with the judge who actually handled portions of the case, or will any judge in the foreign jurisdiction suffice?
 - c) If no case is pending, consider the difficulty in finding a judge with whom to communicate in the foreign jurisdiction. In this instance, if there is a Network judge consider contacting that judge.

2. **Avoid** discussions with the foreign judge about the merits of the case.
3. Can the question be answered or dealt with by the Central Authority in your jurisdiction or the Central Authority in the foreign jurisdiction? If it can, consider having the Central Authority address the issue or obtain the information.
4. Specific examples of questions of foreign law or procedure that may arise include:
 - a) scheduling of the case in the foreign jurisdiction:
 - i) making of interim orders, e.g. support, protection orders;
 - ii) availability of expedited hearings;
 - b) availability of protective orders for the child or other parent;
 - c) can the foreign court accept and enforce undertakings offered by the parties in your jurisdiction;
 - d) is the foreign court willing to entertain a mirror order (same order in both jurisdictions) if the parties are in agreement;
 - e) are criminal charges pending in the foreign jurisdiction against an abducting parent;
 - f) can the abducting parent return to the foreign jurisdiction if an order is made returning the child;
 - g) what services are available to the family or the child upon the return of the child;
 - h) logistics of returning the child.

C. Setting up the communication and initiating the contact

1. Where appropriate, invite the parties or their representative to make submissions as to whether there should be court-to-court communications and the nature of the communications;
2. If the initiating judge decides such communication should be made in interprovincial or territorial matters they may do so by:
 - a) contacting the judge directly; or
 - b) contacting the Network judge in their jurisdiction who will assist in facilitating communication between the initiating judge and the appropriate judge in the other jurisdiction.
3. If it is an international matter, the initiating judge should consider contacting either their local Network judge or one of the two Canadian

International Liaison judges who will assist in facilitating communication between the initiating judge and the appropriate judge in the other country.

4. The initial communication should be in writing (fax or e-mail) and should identify:
 - a) the initiating judge;
 - b) the nature of the case (with due regard to confidentiality concerns);
 - c) the issue on which communication is sought;
 - d) whether further documents should be exchanged;
 - e) when the communication should occur (with due regard to time differences);
 - f) any specific questions which the initiating judge would like answered;
 - g) any other pertinent matters.
5. Unless the initiating judge decides otherwise, all written communications should be copied to the parties or their representative.
6. If the other jurisdiction is not English/French speaking, the initiating judge should make their best efforts to have the initial communication appropriately translated.

**How to Communicate with a Judge in Another Jurisdiction – Canadian Network of
Contact Judges Recommendations
– April 2011**

How to communicate with a Judge in Another Jurisdiction

This document explains the system of Canadian Network Judges and Liaison Judges who oversee cross-border child abduction cases. It then recommends a step by step procedure to be followed, involving the Network and Liaison Judges, to facilitate a judicial communication between: a Canadian Judge and a Judge in the United States, (using Arizona as an example); a Judge in another country that is a Hague signatory, (using Australia as an example); and a Judge in one Canadian Province or Territory and a Judge in another Canadian Province or Territory (using Manitoba and British Columbia as examples).

1. Network and Liaison Judges

For federally appointed judges, each province and territory has a Network Judge, a judge designated to be responsible for overseeing cross-border child abduction cases. The Network Judge is part of the Canadian Network of Contact Judges. The Canadian Network is chaired by Manitoba Court of Queen's Bench Justice Robyn Diamond.

For provincially appointed judges, there is a similar Network, and many provinces and territories have appointed Network Judges. The Ontario Court of Justice has appointed Network Judges in a number of regions.

Canada also has two international liaison judges who are part of the International Network of Contact Judges. They are responsible for liaising between Canada and other countries. Justice Diamond is responsible for the common law provinces and territories, and Justice Jacques Chamberland, a judge of the Quebec Court of Appeal, is responsible for Quebec.

2. Method of Communication

Initial requests for communications should be made by email.

The request should provide:

- the name of the presiding Canadian Judge;
- the Canadian Court, and its location;
- the email address of the presiding Canadian Judge;
- the name of the parties;
- the action number;
- the nature of the case;
- any information the presiding Canadian Judge has about the proceedings in the other jurisdiction; and
- the purpose of the request for judicial communication.

3. Outgoing Calls – A Canadian Judge Contacting a Judge in Another Jurisdiction

a. Canadian Judge to an Arizona Judge

- i. The Judge should send the email request to the Court's Network Judge.
- ii. The Network Judge will forward the request to the International Liaison Judge, (Justice Robyn Diamond for common law provinces and territories and Justice Jacques Chamberland for Quebec)
- iii. The International Liaison Judge will contact the American Network Judges, and one of them will communicate with Arizona and locate the Court and Judge.
- iv. If there is no file yet, the American Network Judge will determine who, in Arizona, should respond to the call.
- v. The Arizona Judge will then contact the Canadian Judge.

b. Canadian Judge to an Australian Judge

- i. The Judge should send the email request to the Court's Network Judge.
- ii. The Network Judge will forward the request to the International Liaison Judge, (Justice Robyn Diamond for common law provinces and territories and Justice Jacques Chamberland for Quebec.)
- iii. Justice Diamond will contact the Australian International Liaison Judge, Chief Justice Diana Bryant, who will locate the Court and Judge.
- iv. If there is no file yet, Chief Justice Bryant will determine who, in Australia, should respond to the call.
- v. The Australian Judge will then contact the Canadian Judge.

c. Manitoba Judge to a British Columbia Judge

- i. The Manitoba Judge should email the Court's Network Judge.
- ii. If the Court in British Columbia is known, the Manitoba Network Judge will forward the email request to that Court's Network Judge, who will forward it to the British Columbia judge hearing the case.
- iii. If the Court in British Columbia is not known, the Manitoba Network Judge will contact his/her equivalent in British Columbia, who will determine which Court is the correct court and who is dealing with the case, and direct the email accordingly.
- iv. If there is no file yet, the Network Judge in British Columbia, will determine who should respond to the call.
- v. The British Columbia Judge will then contact the Manitoba Judge.

4. Incoming Calls – A Judge in another Jurisdiction Wanting to Communicate with a Manitoba Judge

All incoming requests, whether from another province or territory, or another country, should come to a judge of a court in a Canadian province or territory through that Court's Network Judge. Once the judge receives such a request, he or she can contact the judge in the other jurisdiction directly.

refused to talk to him any further.

Marlin makes a without notice application in Manitoba Court of Queen's Bench for:

- a) sole custody of the children, Nathan Blando, and Jill Blando;
- b) primary residential care of the children;
- c) immediate return of the children from Germany or wherever the children may be located;
- d) a police enforcement clause; and
- e) an order for substitutional service *ex juris* in Frankfurt on the father of Misty.

BLANDO V. BLANDO (2)

Scenario 2 – Incoming Cases:

Both parents and their children are originally resident in Frankfurt, Germany. The mother unilaterally removes the children from Frankfurt to Manitoba, Canada.

Using the same fact situation except in reverse, imagine that Marlin and Misty met and married in Frankfurt. Marlin had grown up there. Misty grew up in Winnipeg, Canada. She had difficulty making friends in Frankfurt and decided to return to Winnipeg with her children where her family lived. Marlin agreed to a holiday but not to a permanent relocation to Winnipeg. Misty does not return, making the same allegations as in Scenario 1, and when Marlin learns of this he makes an ex parte (without notice) application in a court in Frankfurt, Germany, which is granted by the court, for sole custody of the children, primary residential care and immediate return of the children to Frankfurt. The order has in it a police enforcement clause. It has been served on Misty at her parent's residence in Winnipeg.

Marlin subsequently applies in Frankfurt for return of the children to

Germany, and Misty applies for custody. Both applications are in the court of first instance in Frankfurt.

Misty says it is in the children's best interests to stay in Canada and argues that the children will be at risk of serious harm if they are returned to Frankfurt. She raises several concerns about a return: she has no place to live in Frankfurt; the children have started school in Winnipeg; she understands that she probably could not get a no contact order in Frankfurt quickly because there are long delays. She cannot afford a lawyer in Frankfurt. Her most significant concern is that she is afraid of Marlin, and he, because of his anger and his attitude, would not obey any court orders that the court might make. She has been told that unless she was able to pay \$15,000 for a custody assessment, none could be done in Frankfurt. She has also been told that here are no counseling services available, without cost, for her and the children.

She points out that Nathan has told her he wants a chance to tell the court why he is afraid of his father and does not want to go back. He would like a chance to speak to the Judge.

Marlin argues that the allegations are absolutely untrue and slanderous, and just a tactic she is using so she can move to Winnipeg and be with her new boyfriend.

Marlin is adamantly opposed to getting Nathan involved in the dispute. He says it would not be fair to place Nathan in the middle of the dispute. Besides, Misty has been alienating Nathan from his father. Marlin says he would happily obey any court orders made by a German judge. He would help her pay her legal expenses and help her find a place where she could live.

**LES « PRINCIPES POUR LA MISE EN ŒUVRE DE STRUCTURES DE MÉDIATION
DANS LE CADRE DU PROCESSUS DE MALTE » ET LE MÉMOIRE EXPLICATIF**

établis par le Bureau Permanent

* * *

**THE 'PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE
CONTEXT OF THE MALTA PROCESS' AND THE EXPLANATORY MEMORANDUM**

drawn up by the Permanent Bureau

*Document préliminaire No 6 de mai 2011 à l'intention de la
Commission spéciale de juin 2011 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la
Convention Protection des enfants de 1996*

*Preliminary Document No 6 of May 2011 for the attention of the
Special Commission of June 2011 on the practical operation of the
1980 Hague Child Abduction Convention and the
1996 Hague Child Protection Convention*

**PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES
IN THE CONTEXT OF THE MALTA PROCESS**

A. CENTRAL CONTACT POINT

States should establish / designate a Central Contact Point for international family mediation which should undertake, either directly or through an intermediary, the following tasks,

- Serve as contact point for individuals and at the same time as network point for mediators working in cross-border family disputes.
- Provide information about family mediation services available in that country, such as:
 - List of family mediators, including contact details and information about their training, language skills and experiences;
 - List of organisations providing mediation services in international family disputes;
 - Information on costs of mediation;
 - Information on the mediation models used / available; and
 - Information on how mediation is conducted and what topics may be covered in mediation.
- Provide information to assist with locating the other parent / the child within the country concerned.
- Provide information on where to obtain advice on family law and legal procedures.
- Provide information on how to give the mediated agreement binding effect.
- Provide information on the enforcement of the mediated agreement.
- Provide information about any support available to ensure the long-term viability of the mediated agreement.
- Promote cooperation between various experts by promoting networking, training programmes and the exchange of best practices.
- Subject to the principle of confidentiality, gather and make publicly available on a periodic basis information on the number and nature of cases dealt with by central contact points, actions taken and outcomes including results of mediation where known.

The information should be provided in the official language of that State as well as in either English or French.

The Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone-number, e-mail address and names of responsible person(s) as well as information on what languages they speak.

Requests for information or assistance addressed to the Central Contact Point should be processed expeditiously.

Where feasible, the Central Contact Point should display relevant information on mediation services on a website in the official language and in either English or French. Where a Contact Point cannot provide this service, the Permanent Bureau could make the information received by the Central Contact Point available online.

B. MEDIATION

1. Characteristics of Mediators / Mediation Organisations identified by Central Contact Points

The following are among the characteristics the Central Contact Point should take into account when identifying and listing international family mediators or mediation organisations:

- A professional approach to and suitable training in family mediation (including international family mediation)
- Significant experience in cross-cultural international family disputes
- Knowledge and understanding of relevant international and regional legal instruments
- Access to a relevant network of contacts (both domestic and international)
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions
- Access to administrative and professional support
- A structured and professional approach to administration, record keeping, and evaluation of services
- Access to the relevant resources (material / communications, etc) in the context of international family mediation
- The mediation service is legally recognized by the State in which it operates, *i.e.* if there is such a system
- Language competency

It is recognized that, in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and can not, at this point, be realistically insisted upon.

2. Mediation Process

It is recognised that a great variety of procedures and methodology are used in different countries in family mediation. However, there are general principles, which, subject to the laws applicable to the mediation process, should inform mediation:

- Screening for suitability of mediation in the particular case
- Informed consent

- Voluntary participation
- Helping the parents to reach agreement that takes into consideration the interests and welfare of the child
- Neutrality
- Fairness
- Use of mother tongue or language(s) with which the participants are comfortable
- Confidentiality
- Impartiality
- Intercultural competence
- Informed decision making and appropriate access to legal advice

3. Mediated Agreement

When assisting the drafting of the agreements the mediators in cross-border family disputes, should always have the actual exercise of the agreement in mind. The agreement needs to be compatible with the relevant legal systems. Agreements concerning custody and contact should be as concrete as possible and take into consideration the relevant practicalities. Where the agreement is connected to two jurisdictions with different languages, the agreement should be drafted in the two languages, if that simplifies the process of rendering it legally binding.

C. RENDERING MEDIATED AGREEMENT BINDING

Mediators dealing with international family disputes over custody and contact should work closely together with the legal representatives of the parties.

Before starting the implementation of the agreement, the agreement should be made enforceable or binding in the relevant jurisdictions.

The Central Contact Points in the jurisdictions concerned should assist the parties with information on the relevant procedures.

Where needed, countries may examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements.

International Family Law

Special Issue in Honour of William Duncan

Features

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Cross-border family mediation: challenges, experience, perspectives: a report from Germany



Cross-border family mediation: challenges, experience, perspectives: a report from Germany

Eberhard Carl, *Federal Ministry of Justice, Berlin, Germany; Judge at the Higher Regional Court at Frankfurt, Germany (retired); Mediator*

Cross-border family mediation: a challenge

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the 1980 Hague Convention) pursues the primary objective – as the *rapporteur* Pérez-Vera already stated with regard to the Draft Convention of securing the prompt return of children to their home State in all disputed cases where the children have been wrongfully removed to, or retained in, any Contracting State, except in a few narrowly defined cases. The priority assigned by the Convention to the child's return also has the important preventive effect of deterring a parent from going with the child to another country without the consent of the other parent.

Conflict dynamics are often particularly pronounced in cross-border custody and access disputes. When the parents are nationals of different states and are living in different countries, fear and distrust may grow considerably. Different cultural and social backgrounds lead to the situation where the parents interpret their conflict in different ways, leading to greater misunderstandings and further escalation. Whilst a partner's different cultural origin is found to be interesting and exciting when the relationship is intact, these differences take on a disturbing or even threatening character when the couple separate. To this may be added language problems and failure to comprehend, or inaccurate visualisation of, the cultural, social and legal principles of the other country. When proceedings are pending in court, the foreign parent often has the feeling that his or her interests are not being properly represented or taken into account. Also, special difficulties are encountered by the courts involved in adjudicating the conflict, as well as by the professionals participating in the case.

In this situation, it is clear that consideration has to be given to other methods of conflict resolution offering a prospect of success. In this respect, mediation offers a broader spectrum regarding the decisions that can be made, because for the children and parents involved – in contradistinction to proceedings for the return of the child – solutions can be created that are also geared to the individual case. Here, however, it must constantly be ensured that the mediation does not entail any appreciable delay in proceedings for the child's return. In an optimum case, a lasting solution might be found by means of mediation, making superfluous the legal disputes that may follow in the country of origin regarding

parental custody and perhaps also parental access. In numerous cases this can mean avoidance of ruinous litigation, with its substantial costs and with the repeated residential changes that entail even more damage to the children affected. In practical experience, after mediation has taken place – even in those cases where it has (not) yet led to an agreement – the parents evidently succeed in taking greater account, in their own considerations, of the needs and interests of their joint child, and in doing so they become more responsive towards each other.

Development of bi-national mediation projects in Germany

In Germany, too, this experience has led to increased endeavours to use mediation to resolve cross-border conflicts in parent and child matters.

The German-French Mediation Project was based on an initiative started by the Ministers of Justice of Germany and France in 1999. When the project began, parliamentary mediator groups became active in a number of cases, on each occasion with one French and one German parliamentarian. In 2003, German-French conflicts in parent and child matters were entrusted to professional mediators from Germany and France. The bi-national mediation project, which was financed by the ministries of justice, included regular meetings at the political level and joint further training seminars for French and German mediators.

In the context of this German-French project the concept evolved of a professional bi-national mediation in cross-border cases of conflicts in parent and child matters. Amongst the essential elements of this concept was the requirement that the parents first declare their willingness to take part in mediation and then choose their mediators from a list of mediators. Each time there would be a male and a female mediator, one with a legal background and the other with a psychosocial professional background; one mediator was French, the other German; so both parents could speak in their mother tongues if they wished to do so. Initially, a controversial point in this project was the question whether the children ought to be included in the mediation. Mediators agreed that the children's perspective should be introduced into the mediation process in an appropriate way, if the parents were in agreement with this. Inclusion of the children was adapted to take account of their age. Hence mediators explained to the children, particularly to the younger children, that their

pinion was very important but that in the end it was their parents who had to decide the important questions.

The evaluation of the project by an independent research institute showed that both the participants themselves and the mediators took an overwhelmingly positive view of the system of bi-national co-mediation. The willingness of both parents to become involved in mediation had increased, as had acceptance of the process itself. At the same time, chances had improved of the parties actually abiding by the results – an outcome achieved with the assistance of mediators coming from both cultural and legal systems. It also became quite clear that a mediation process where both parents could speak their mother tongues considerably facilitated and furthered the endeavours of the mediators. Inclusion of the children was found to be positive and useful, without exception, by parents and mediators, and, in several cases, it was described as the ‘turning point’ in the mediation. Another useful aspect in optimising the mediation process was mediator knowledge of the competent institutions and of their powers and mediator knowledge of when there were opportunities for bringing influence to bear on the parents (see www.mikk-ev.de/wp-content/uploads/arpos_bericht1.pdf).

On the initiative of US President Clinton and German Federal Chancellor Schröder, a German-American Expert Commission was established in 2000 to help clarify and solve difficult German-American conflicts in parent and child matters. The Expert Commission comprises representatives of the US State Department and of the German Federal Ministry of Justice; the Central Authorities, and experts from both countries. In 2006, at a conference convened in Berlin by the departments involved, American and German mediators laid the foundations for the project of international co-mediation in German-American cross-border conflicts in parent and child matters. Since then American and German mediators in Germany have jointly been assisting parents in a substantial number of very contentious and sometimes spectacular cases to work out viable solutions in abduction cases and in custody and access conflicts. A mediator network has also been established within the framework of this project, undergoing further development, constant updating and expansion by the German registered association led ‘Mediation bei internationalen Konfliktfällen MiKK e.V.’ (‘Association for Mediation in International Conflicts in Parent and Child Matters’).

The German-Polish Project of bi-national mediation started in 2007 and, from the beginning, was notable for its inclusion and active collaboration of all professions concerned in cross-border family conflicts: judges, ministries, diplomatic missions, Central Authorities; youth welfare offices and in particular also the Polish and German mediation associations. The members of the

project group have held regular meetings once a year, alternately in Poland and in Germany. An important joint initiative undertaken by this group culminated in the Wrocław Declaration on Mediation of Bi-national Disputes over Parents’ and Children’s Issues of October 2007, which affirmed the principles of bi-national, bi-cultural, bilingual, bi-professional co-mediation in cross-border family conflicts (www.mikk-ev.de/englisch/codex-end-declarations/wroclaw-declaration/). This Declaration was endorsed by 40 Polish and German family court judges in the Wustrau Declaration of January 2008.

On the political level, these manifold activities led to the German-Polish memorandum of understanding, signed by the Ministers of Justice of Poland and Germany in Warsaw on 21 June 2011. This memorandum of understanding sets out to promote co-mediation by Polish and German mediators in German-Polish cross-border conflicts in parent and child matters (http://www.bmj.de/DE/Recht/Rechtspflege/MediationSchlichtung/InternationaleKonflikteKindschaftssachen/_node.html).

Further training for judges, mediators and other professions participating in cases. Since 2003, further training seminars have been held twice a year for those German family court judges who are themselves specialists and with whom exclusive jurisdiction lies particularly with regard to proceedings for the return of the child under the 1980 Hague Child Abduction Convention, under the Brussels II bis Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003), and under the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996 Hague Child Protection Convention). The number of these judges amounts to about 180 out of the total of approximately 2,000 German family court judges. These seminars serve the purpose of providing information on recent developments and of providing a forum for an exchange of views between German judges, other professionals participating in the cases concerned and foreign judges. Here attention regularly focuses on the subject of integrating mediation into court proceedings through bringing in experienced mediators.

In addition to this, there have been several further training seminars organised by the Federal Ministry of Justice for youth welfare office staff members and family court judges. Also, two functions were held where information was presented to the Professional Association of Court Bailiffs in order to familiarise them with specific problems arising in these cases in connection with the execution of surrender and return decisions.

The Mediation Project in Hague child abduction cases heard before the German courts

Set up in 2006, a Working Party that had originated in the further training seminars organised for specialist German family court judges elaborated the fundamental principles for introducing mediation into child abduction cases pending before the German courts. In comparison with a 'normal' mediation process, there has been adjustment here of the respective procedural sequences, having regard to the particular need for expeditious handling of the cases concerned and in order to avoid any delay being caused by the mediation in the conduct of proceedings for the return of the child. The project has been conceived as work in progress, so that in a number of cases there has been successful testing, and continual evolution, of its provisional bi-national mediation model for child abduction proceedings. We are now seeing an increasing number of cases where mediation has been integrated into child abduction cases. Based on experience to date, the following rules have been developed for including bi-national mediation in abduction cases under the 1980 Hague Convention:

- (1) Upon presentation of an application, the Central Authority shall provide the parties and the lawyers with information regarding the possibility of bi-national mediation. These information sheets should be translated into the most common languages, so that proceedings can be expedited. In the application to the court, the Central Authority shall draw attention to the possibility of initiating mediation.
- (2) Judges exercising jurisdiction shall be given detailed information regarding the opportunities and conditions for carrying out mediation during a pending abduction case.
- (3) Upon commencement of the court proceedings, information can also be given to the parents by the court in an appropriate manner, using for instance prepared information sheets, regarding the possibility of initiating a mediation process. The relevant information also goes to the participating lawyers, to the youth welfare office and to any person appointed to assist a party in the proceedings, so as to bring about an understanding and acceptance on their part for the mediation process and to enhance competence for participation.
- (4) The parent left behind and residing abroad must not be discouraged from exercising his or her right to conduct proceedings with a view to obtaining the return of the child. It must be made clear to the parent affected that mediation will constitute a realistic chance not only of resolving, by mutual agreement, the issues connected with the application for the return of the child but also of clearing up many other family matters such as the future care of the child, questions concerning access and similar issues.
- (5) As far as possible, mediation will be carried out in the form of so-called bi-national co-mediation. To act as mediators, there should be a man and a woman, and one representative each from the psychological or pedagogical professions on the one hand and from the legal professions on the other. Furthermore, and this is particularly important – the mediators should whenever possible come from the respective cultural environments of the parties as well. In a British-German abduction case, one mediator should come from England and one mediator from Germany. This way both mediators will reflect the very different cultural backgrounds from which the parents come. It is also an advantage when mediators have undergone further training regarding the distinctive legal and cultural aspects of international child abduction cases, on top of their training as mediators. Regarding their availability, both mediators should be prepared upon appointment to carry out the mediation whenever possible within the space of 1–2 weeks.
- (6) A mediation process can be introduced at any stage of the proceedings, and the sooner this happens, the better. Experience shows that the parties attach special importance to a mediation recommendation given by the judge. Moreover, initiation of the court proceedings increases the pressure on the parties to reach an agreement within a reasonable time. Mediation should not, as far as possible, lead to any delay in the court proceedings. For this reason, the judge can make his grant of consent to a stay in the proceedings contingent on the parents carrying out the mediation process within a short space of time.
- (7) Mediators need to carry out precise preparation of the mediation process at very short notice, and the process itself needs to undergo a high degree of mediator structuring. The mediators can request the parties to fill in prepared questionnaires in order to have prior knowledge of important basic information in good time. As a precautionary step, they can also request clarification from the advising lawyers or from the court where redress is being sought as to whether relative to German court decisions regarding the application for the return of the child it is possible to obtain, from the court exercising jurisdiction in the country of the child's habitual residence, decisions corresponding in content in terms of the law applicable there, and especially as to whether mirror orders or safe harbour orders can be made in that country. In this connection, bringing in liaison judges is particularly helpful in order to avoid causing delays in the course of proceedings.

- (8) Mediation should normally take place in the presence of both parties and the mediators, and it should be carried out in the state where the parent is currently residing with the child. This way, and also at short notice, contact can take place during the mediation process with the parent who has come from abroad. In many cases this leads to an easing of tensions and of the strain experienced by the parents. At the same time, this also means keeping the strain on the child to the absolute minimum, because after the child has had contact with the parent left behind, he or she can remain in his/her current environment. Also, the mediators are then able, in suitable cases and in agreement with the parents, to bring the child into the mediation process in a manner that does justice to the child's age. If necessary, further mediation meetings can also be held at the place where the other parent resides in cases where a video or telephone conference, or further negotiations by e-mail, prove not to be sufficient.
- (9) Assuming approval and support from the lawyers of all parties, care must be taken to ensure that the mediation leads to a result acceptable not only to the court seized of the proceedings for the return of the child but also, whenever possible, to the court of the child's habitual residence. In cases of a suitable nature, it will thus be possible for mediators to request the parties' lawyers to propose issuance of a mirror order or a safe harbour order² by the court with jurisdiction and/or the competent public prosecutor in the home State should also be requested to ensure the granting of safe conduct, for instance by suspending enforcement of a warrant of arrest. Taking the step of bringing in a liaison judge is helpful in this constellation as well.
- (10) All parties must ensure that agreements, and any agreement-related orders made by the court seized of the proceedings for the return of the child, are formulated with sufficient precision, are comprehensible and embrace content that is enforceable to the extent necessary.
- (11) Mediators and parents ought to be prepared for the situation where there might be a subsequent need for further clarification arising after conclusion of a mediation agreement. Hence, in the mediation agreement, provision can be made by the parents for a mediation clause, in order thus to cater for eventual future negotiations.
- (12) A mediator working in international conflicts in parent and child matters ought to have special training as a family mediator. It will also be beneficial if he or she can speak the language of the other parent and has knowledge of the legal provisions applying in the other country. Of special importance is his or her willingness to become acquainted with the cultural particularities of the other country.

Necessity of special further training for mediators working in the domain of cross-border family mediation

Court proceedings in cross-border conflicts in parent and child matters are notable for their high level of conflict dynamics and are frequently experienced by the parents as presenting an existential threat. In this crisis situation, in order to find reasonable solutions for the children as well as for the parental partnership in the process of dissolution, the parents caught up in existential strife will initially have to regain a certain level in their powers of communication as well as in their capacity to act. This means that mediators need to have not just general communicative skills but also sound competence in the field of intercultural communication and conflict management. Such skills do not subsist, without more, in the case of a mediator with a purely legal background. At the same time, mediation in cases falling under the 1980 Hague Convention occurs always 'within the shadow of the law'. In addition to compliance with the specific features of the 1980 Hague Convention, there has to be observance of the often diverse legal rules applying in the State of refuge on the one hand and in the home State on the other. Hence, the law represents an important reference point in these cases, the significance of which can easily be underestimated by mediators coming from non-legal professional origins.

A particular challenge for these mediation processes is presented by the aspect of specific conflict perception, in bi-national and bi-cultural conflicts, against the backdrop of the mediators' own cultural predispositions and experiences, involving the risk of mediators not taking, or of only inadequately taking, account of the view of the party from the other culture in the process of finding a solution. In child abduction cases, though touched by fate and drama and in spite of application of the principle enjoining expedition of proceedings, another challenge for the mediators consists in not succumbing to pressure and in never losing sight both of the substantive and of the procedural level of the mediation process.

The special challenges outlined in relation to mediation in international conflicts in parent and child matters were the original springboard for developing the concept of bi-national co-mediation. But even where on grounds dictated by practical necessity, or on theoretical grounds, cross-border family mediation is carried out by just one or two mediators from the same cultural environment, there is widespread consensus on the need to develop mediation standards applicable in international conflicts on parent and child matters, as well as regarding the need both for a joint concept for the further training of family mediators and for setting up an international family mediators network.

Hence, in Germany, the registered association called MiKK e.V. has the objective to assist in mediation in international conflicts in parent and child matters for the benefit of families concerned. There is a network of mediators specialised in bi-national mediation, and this network is being constantly updated and

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expanded. At present, it comprises 60 mediators, covering 17 languages (see <http://www.mikk-ev.de/deutsch/mediatorenliste/>). Inclusion on the list requires, in addition to practical experience, at least 160 hours of family mediation training, as well as further training and specialisation in international mediation in parent and child matters. In individual cases, the MiKK Association will also provide assistance in the endeavour to find a specific pair of mediators. The MiKK Association is also taking part in the EU Training Project called 'Training in International Family Mediation' (TIM), which, with the support of the European Commission, is busy developing a further training scheme in a German-Belgian-Dutch Co-operation Project for international family mediators.

Furthermore, the *Guide to Good Practice on Mediation* under the 1980 Hague Convention, developed under the guidance of Professor William Duncan and the team at the Hague Conference on Private International Law, stresses the need to develop mediation standards in international conflicts in parent and child matters as well as the need both to provide further training for international family mediators and to develop a worldwide network for international family mediation (see the *Draft Guide to Good Practice on Mediation*, considered by Part I of the Sixth meeting of the Special Commission on the practical operation of the 1980 and 1996 Hague Conventions in June 2011 – available to readers at www.hcch.net/upload/wop/abduct2011pd05e.pdf).

Prospects

Many of the international cases in parent and child matters are distinctive for their high level of conflict potential. Whilst the 1980 Hague Convention and the Brussels II bis Regulation stipulate the alternative of

'return, or refusal of return' as their decision point, in the mediation framework parents can carve out their actual needs and work out individual solutions oriented towards the best interests of the child. Through suitable measures in the mediation process it must constantly be ensured that the mediation does not entail any appreciable delay in proceedings for the child's return. In a mediation process, agreements can be worked out for a transitional phase, until the court in the country of origin has decided the questions of custody and access. But long-term solutions can also evolve, making subsequent home State proceedings as well as further follow-on proceedings superfluous. This shows how mediation offers the chance of clarifying, and restructuring, family relationships, whereby the mediators are there to assist the parties *en route* being neither their counsellors nor their lawyers.

In this manner, cross-border family mediation makes its contribution towards creating a situation where the two parents and the extended families in both countries can constitute a 'sustained entity' (*erhalten*) for the children, in spite of there having been a separation. This strengthens the cultural roots and the identity of the children affected, and it underlines the positive importance of their origins within different countries and cultures.

In future, too, the Hague Conference on Private International Law will certainly continue keeping track of the tasks shouldered by professional groups – judges, lawyers, mediators and other professionals – who are active in the field of international conflicts in parent and child matters. And I feel confident that in future we will continue to have William Duncan's support – true friend that he is, and a man of wise counsels, too. *Ad multos annos!*

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 2201/2003

of 27 November 2003

concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

..... (Art. 1 - Art. 9)

Article 10

Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Article 11

Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority.

relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

... (Art. 17 - Art. 20) ...

CHAPTER III

RECOGNITION AND ENFORCEMENT

SECTION 1

Recognition

Article 21

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

... (Art. 22) ...

Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

- (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
- (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;
- (c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;
- (d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

- (e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;
- (f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

- (g) if the procedure laid down in Article 56 has not been complied with.

Article 24

Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

Article 25

Differences in applicable law

The recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 26

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

SECTION 4

Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child

Article 40

Scope

- (a) rights of access;

and

- (b) the return of a child entailed by a judgment given pursuant to Article 11(8).

... (Art. 42) ...

Article 42

Return of the child

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

- (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
- (b) the parties were given an opportunity to be heard; and
- (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

Practice Guide

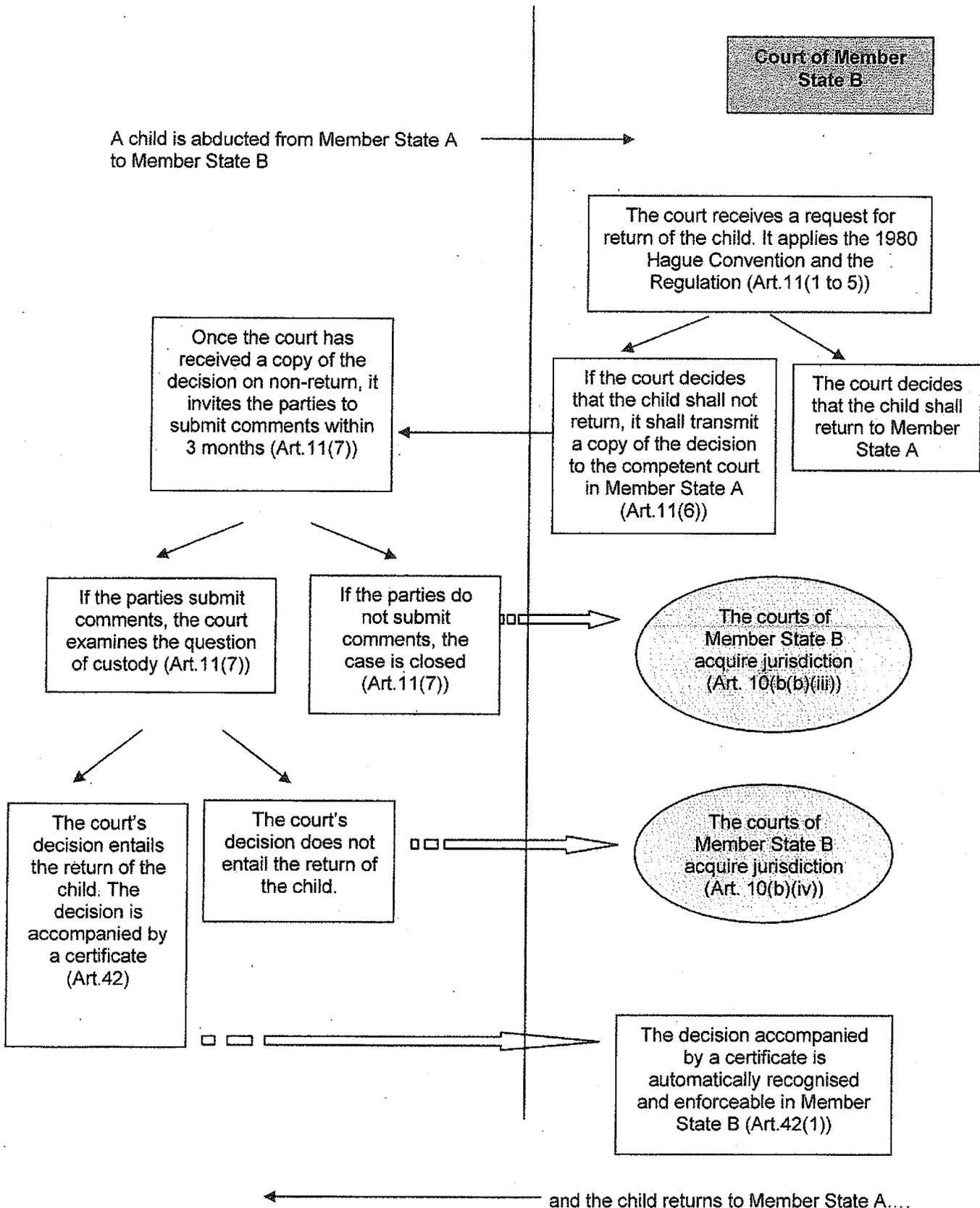
for the application of the new Brussels II Regulation

(Council Regulation (EC) No 2201/2003 of 27 November 2003
concerning jurisdiction and the recognition and enforcement of
judgments in matrimonial matters and the matters of parental
responsibility, repealing Regulation (EC) No 1347/2000)

(Extract)

This document has been drawn up by the Commission services in consultation with the European Judicial Network in civil and commercial matters.

Procedure in child abduction cases



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On 29 August 2006, following a hearing, the Lausanne District Justice of the Peace dismissed the father's application for the return of N on the grounds that, whilst the child's removal had been wrongful within the meaning of Article 3, there was a grave risk under Article 13(b) that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation. The mother had argued that return posed a grave risk to the child under Article 13(b) on the basis that the mother could not return to Israel with the child as she would run the risk of prosecution and conviction for child abduction. Thus, if the child were ordered to be returned, the child would return alone to live with a father whom he had not seen for two years and whose relationship with the child was 'problematic.'¹ (The father was part of a radical ultra-orthodox Jewish movement and prior to the abduction had had only two hours of supervised contact with the child each week.)

The father appealed against that decision before the Guardianship Division of the Vaud Cantonal Court which dismissed the father's appeal, confirming that the case fell within the Article 13(b) exception. The Vaud Court appointed a paediatrician and child psychologist who gave evidence that the child's return to Israel with his mother would expose him to a risk of psychological harm, the intensity of which could not be assessed without ascertaining the conditions of that return. The paediatrician and child psychologist gave further evidence that maintaining the status quo would also represent a risk of major psychological harm to the child in the long term.

In making out the Article 13(b) exception, the Vaud Cantonal Court found that "a return [would] entail a grave risk of exposure to psychological harm, whether or not [N] is accompanied by his mother, [and] it would also place him in an intolerable situation." Considering the situation whereby N was returned to Israel with his mother, the court noted: the evidence of the psychiatric expert that the child would be exposed to psychological harm; the fact that the father earned only 300 francs per month and thus the mother would be required to find a job in Israel, undermining the child's economic security; and the fact that a return would preserve the father's right of contact, which right had been exercised before the abduction for only two supervised hours per week. The Court found that:

To require a mother to uproot herself in order to permit the exercise of such a restricted right of access, when the child's return certainly entails a risk of grave psychological harm, in view of the conditions of insecurity in which the return will take place, constitutes an intolerable situation for the child within the meaning of Article 13, sub-paragraph (b) of the Hague Convention.

Considering the scenario whereby N would be returned to Israel without his mother, the court noted that:

...the expert is of the opinion that it would be psychologically highly traumatic, involving extreme separation anxiety and a major risk of severe depression, which can be explained by his young age and his total lack of recollection of his first years in Israel, including of his father. That element is sufficient for a finding that the condition laid down in Article 13, sub-paragraph (b), is satisfied.

¹ Details of the mother's position have been described with reference to: Vincent A De Gaetano, 'Cross-Border Family Law Issues: A View from Strasbourg' [November 2011] *International Family Law* 292; Judge Jean Paul Costa, 'The Best Interests of the Child: Recent Case-Law from the European Court of Human Rights' [September 2011] *International Family Law* 183.

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In addition, the Court noted that, prior to the abduction, the father had had contact with S for two supervised hours per week, but, according to the Central Authority, should the mother not return with the child, the father was proposing to take his son home (without any guarantee that the father would then have his own flat) and thus exercise *de facto* custody. Moreover, the father proposed to then seek to have this arrangement validated by Israeli judicial authorities on the basis of the mother's implied consent. The Court described that the purpose of the Hague Convention was to return a child to the status quo ante, which would not be the case in these circumstances.

The father then appealed to the Federal Court seeking to quash the Cantonal Court's judgment and seeking the return of the child to Israel on the basis, inter alia, that the court had misapplied Article 13(b) of the Convention. The Federal Court allowed the appeal, holding that Article 13(b) must be "interpreted restrictively" and had been wrongly applied. The mother was ordered to secure the return of the child to Israel by the end of September 2007.

The mother then submitted to the Strasbourg Court (European Court of Human Rights) a medical certificate issued on 23 February 2009 which stated that "an abrupt return to Israel without his mother would constitute a significant trauma and a serious psychological disturbance for this child." On 29 June 2009 in a provisional measure the President of the Lausanne District Court, at the request of the mother, decided that N should live at his mother's address in Lausanne, suspended the father's right of access in respect of his son, and granted parental authority to the mother to allow her to renew the child's identity papers.

The Strasbourg Court thus heard the matter over two years after the return order had been made, and more than four years after the initial abduction, the final two of those years as a result of the Strasbourg Court's stay of the return of the subsequent proceedings in the two chambers.²

The mother's argument against return at the Strasbourg Court was, in particular, that the return order was a violation of her right to respect for her family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The mother argued that her removal of the child from Israel had not been 'wrongful' under Article 3 of the 1980 Convention. The Grand Chamber, however, agreed with the findings of the Chamber (and the three domestic courts) that the mother's removal of the child from Israel to Switzerland was "wrongful" within the meaning of Article 3 of the Convention, and thus the order for return had a sufficient legal basis. The Grand Chamber further agreed with the Chamber that the Federal Court's decision to return the child pursued the legitimate aim of protecting the rights and freedoms of the child and the father.

The mother submitted that the Court must bear in mind, inter alia: that the father had had only a limited right of access to the child, under supervision, prior to the removal;

² Linda Silberman, 'Recent US and European Decisions on the 1980 Hague Convention on Child Abduction: a perspective from the US in tribute to William Duncan' [March 2012] *International Family Law* 53, 54.

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that the mother could not reasonably be expected to give up her job in Switzerland to return with the child; the mother alleged that she would be imprisoned on her return due to the abduction; the father had remarried and proceedings had been brought against him for defaulting on maintenance payments for the child of that marriage; and the father adopted a radical position with respect to the child's education.

The Grand Chamber noted that the Chamber had emphasised that it was "in the 'best interests' of every child to grow up in an environment that allowed him or her to maintain regular contact with both parents. The Grand Chamber stated:

...the decisive issue is whether a fair balance between competing interests at stake – those of the child, of the two parents, and of public order – has been struck ... bearing in mind ... that the child's best interests must be the primary consideration ... as is indeed apparent from the Preamble to the Hague Convention...

The Grand Chamber further found that "the concept of the child's best interests is ... an underlying principle of the Hague Convention" and noted that "certain domestic courts have expressly incorporated that concept into the application of the term 'grave risk' under Article 13, sub-paragraph (b) of that convention." The Grand Chamber further stated that:

138. It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences... For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities...

139. In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully ... To that end the court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin...

While noting that the domestic courts in the case had not been unanimous and that a number of experts' reports had concluded that there would be a risk to the child were he returned to Israel, the Grand Chamber concluded that the order to return was "within the margin of appreciation afforded to national authorities in such matters." However, noting the developments since the order for return, including that N had "settled well" in Switzerland, and further noting that even before the abduction the father's right of access had been limited, and that the father had failed to pay maintenance with respect to a daughter from a subsequent marriage, and noting further the possibility that the mother may be exposed to criminal sanctions on her return, the Grand Chamber held that:

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...in the light of all the foregoing considerations, particularly the subsequent developments in the applicants' situation ... the Court is not convinced that it would be in the child's best interests for him to return to Israel...

and that enforcing the decision to return the child would constitute a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the mother and child. In reaching this conclusion it appears that the significant delay between the initial abduction and the final decision may have been a factor which weighed significantly against the return of the child to Israel.

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B *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144;
4 All ER 517

In re E concerned the abduction of two children from Norway to England. The mother was English, and had moved from England to Norway with her daughter from a previous marriage to set up home with the father, who was Norwegian. The mother and father then had two daughters together, born in 2004 and in 2007. The mother and father married soon after the birth of their first daughter. In 2010 the mother's daughter from her previous marriage returned to England to live with her grandparents, and a few weeks later the mother also returned to England with the two younger daughters of her relationship with the father, without the father's consent and intending to live there permanently.

The father applied under the 1980 Convention for the immediate return of the younger two children. The mother opposed return in reliance on Article 13(b) of the Convention "on the grounds that the father had subjected her to psychological abuse and that to order the immediate return of the children would put them at a grave risk of being exposed to physical or psychological harm or otherwise placed in an intolerable situation." The mother's eldest daughter was also joined as a party and gave permission for a psychiatrist to evaluate the mother's mental state. The psychiatrist's evidence was that there was a high risk that the mother's mental condition would deteriorate on her return to Norway unless protective measures were put in place. Although the father denied the mother's allegations of psychological abuse, he did allow for appropriate protective measures to be put in place and also made undertakings. The trial judge accepted the father's undertakings and made an order for return of the two children of the relationship to Norway. The mother's appeal to the Court of Appeal was dismissed.

The mother's case opposing return was three-pronged: first, that Article 3.1 of the United Nations Convention on the Rights of the Child of 1989 applies to the decision to return a child to the place of habitual residence under the Hague Convention and the current approach to Article 13(b) in England and Wales did not adequately consider the best interests of the child as a primary consideration; second, that "that argument is supported by the decision of the Grand Chamber in the *Neulinger* case ... which is the principal authority on the primacy of the best interests of the child in the interpretation and application of the Convention rights"; and third, that Article 13(b) is narrow enough as it stands and does not need "additional glosses" of interpretation.

The Supreme Court stated that "the assumption ... is that if there is a dispute about any aspect of the future upbringing of the child the interest of the child should be of paramount importance in resolving that dispute" and that the Hague Convention 1980 did promote the best interests of the child by creating an assumption that it is in the best interests of the child to be promptly returned to the country of habitual residence so that the unilateral action of the abducting parent does not "pre-empt or delay" resolution of the parenting issues in that forum. Article 13(b) is an exception to the assumption that return is in the best interests of the child.

The Supreme Court further held that:

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...since by its very terms article 13 was of restricted application there was no need for it to be narrowly construed; that its words were quite plain and needed no further elaboration or gloss...

Having quoted paragraphs 138 and 139 of the *Neulinger* decision and described them to be “the two paragraphs which have caused such concern” the Supreme Court stressed that the Grand Chamber in *Neulinger* had concluded that the decision to return had been “within the margin of appreciation afforded to national authorities” and that return was not ordered in that case because of the significant time (five years) that had elapsed since the abduction had taken place. The Supreme Court stressed that the *Neulinger* case “does not therefore signal a change of direction at Strasbourg in the area of child abduction” and that that most that can be said of the decision is that:

...The guarantees in article 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Convention; but that is not the same as a full blown examination of the child’s future; and that it is, to say the least, unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the article 8 rights of the child or either of the parents. The violation in *Neulinger* arose, not from the proper application of the Hague Convention, but from the effects of subsequent delay.

The Supreme Court further stated, in relation to reliance on Article 13(b) in cases of alleged abuse:

There is obviously a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true. ... [T]here is a sensible and pragmatic solution. Where allegations of domestic abuse are made, the court should first ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues.

Applying this reasoning to the case at hand, the Supreme Court dismissed the appeal on the basis that the trial judge had considered the risks of return, and it was not the task of the appellate court to disagree with the judge’s assessment.

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C *In the matter of S (a Child)* [2012] UKSC 10; [2012] All ER 603

Following the decision in *In re E* was the decision *In the matter of S*. The case concerned a mother and father who were never married. The father was Australian and the mother was British but also had Australian citizenship.

The parties lived with their child, W, in Sydney until, on 2 February 2011, the mother removed W to England without the consent of the father or the permission of an Australian court.

The father applied for the return of the child under the 1980 Convention. Charles J made an order in the High Court, Family Division dated 30 August 2011 dismissing the father's application.

The father appealed this decision, which appeal was upheld by the Court of Appeal (Thorpe, Longmore and McFarlane LJ) which made an order setting aside the order of Charles J and ordering that the mother forthwith return W to Australia.

The Supreme Court (comprising Lord Phillips, President, Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) heard the mother's appeal against the order of the Court of Appeal that the child W be returned to Australia. The mother opposed the return of the child on the basis of the exception under Article 13(b), arguing that there was an 'unacceptable risk' to the child due to the father's history of alcohol and drug abuse and his alleged relapse in 2011, which the mother linked with "important evidence about the state of her psychological health while she had been living in Australia" in order to demonstrate that her life in Sydney had been "intolerable."

The Supreme Court, in upholding the decision of Charles J, noted that he had followed the guidance of *In re E* in assessing whether there was a grave risk under Article 13(b) on the grounds of alleged abuse by the father and the mother's pre-existing mental illness. The Supreme Court described that:

- (a) he began by *assuming* that the mother's allegations against the father were true;
- (b) he concluded that, on that *assumption*, and in light of the fragility of the mother's psychological health, the protective measures offered by the father would not obviate the grave risk that, if returned to Australia, W would be placed in an intolerable situation; so
- (c) he proceeded to consider, as best he could in the light of the absence of oral evidence and the summary character of the inquiry, whether the mother's allegations *were* indeed true; and
- (d) following a careful appraisal of the documental evidence, including the mass of emails between the parents, he concluded that, as counsel for the father had been constrained to acknowledge, the mother had "made out a good prima facie case that she *was* the victim of significant abuse at the hands of the father.

The Supreme Court stressed that the Court of Appeal, by contrast, had made little reference to the history of the parties and had "treated the foundation of [the mother's] ... defence as being merely her subjective perception of the risks which might lack

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any foundation in reality.” The Supreme Court found that the decision in *In re E* “did recognise the possibility that a respondent’s merely subjective perception of risks could, as a matter of logic, found the defence,” but that the “Court of Appeal found difficulty in accepting that part of the decision.” Moreover, the “overarching...” error of the Court of Appeal was the failure to

...recognise that the judgement about the level of risk which was required to be made by article 13(b) was one which fell to be made by [the trial judge] and that it should not overturn his judgement unless, whether by reference to the law or to the evidence, it had not been open to him to make it.

In a postscript to the decision, the Supreme Court went on to discuss the role of the best interests of the child and the need for “an in-depth examination of the child’s future” in relation to cases under the 1980 Convention and stated:

...we reiterate our conviction ... that neither the Hague Convention nor, surely, article 8 of the European Convention requires the court which determines an application under the former to conduct an in-depth examination of the sort described. Indeed it would be highly inappropriate.

This decision has prompted consternation within the Hague community, where some jurists and commentators now say that there is uncertainty as to the nature of the inquiry into the best interests of the child that is necessary to a determination as to whether an order to return should be refused under Article 13(b). On the one hand *Neulinger* is arguably authority that a detailed consideration of the best interests of the child is relevant to decisions under the 1980 Convention. An alternative approach would be to recognise that the best interests of the child do underpin the 1980 Convention, insofar as the Convention applies a presumption that it is in the best interests of the child that parenting issues be determined in the country of habitual residence, but to also recognise that the decisions not to return in *Neulinger* and *In the matter of S* turned on the specific facts of those cases, in particular, the long delay in the case of *Neulinger* and the mother’s pre-existing mental health issues in *In the matter of S*. If the alternative approach is adopted, there is no significant change in jurisprudence and courts are in the same position as always. That is, they are required to carefully scrutinise the relevant facts of the case which falls for determination.

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II RIGHT OF CUSTODY (*ABBOTT*)

A *Abbott v Abbott* (Supreme Court, No 08-645, 17 May 2010) slip op

The parents, Mr and Ms Abbott, married in England in 1992. The father was a citizen of Britain, and the mother was a citizen of the United States. The couple moved to Hawaii for the father's astronomy profession, and their son, AJA, was born there in 1995.

In 2002 the parents moved with AJA to Chile, where there was marital discord, and in March 2003 the parents separated. The Chilean courts granted daily care and control of the child to the mother, and granted "direct and regular" visitation to the father, which time included alternate weekends and the whole month of February each year.

Under Chilean law, the father was also given a *ne exeat* right: a right to consent before the mother could take AJA out of Chile.

When the father then obtained a British passport for AJA the mother became concerned that the father would abduct the child to the UK. The mother therefore sought and obtained a '*ne exeat* of the minor' order from the Chilean court which prevented the child being removed from Chile.

While proceedings were pending before the Chilean court, the mother, in August 2005, took AJA to Chile without permission from the father or the court. The mother was subsequently located by a private detective. She was with the child in Texas.

In February 2006 the mother applied for divorce in the Texas state court seeking, inter alia, to modify the father's rights such that she had full power to determine the child's place of residence and limiting the father to supervised visitation with AJA in Texas, which litigation remained pending at the time of the decision of the Supreme Court in 2010.

The father applied to the Texas state court for visitation rights and an order requiring the mother to demonstrate why the father should not be permitted to return to Chile with the child. Mr Abbott's requested relief was denied in February 2006, however the court did grant him "liberal periods of possession" of the child throughout 2006 provided that the father remained in Texas.

In May 2006 the father sought instant action in the United States District Court for the Western District of Texas. He sought an order that the child be returned to Chile pursuant to the 1980 Convention and the enforcement provisions of the International Child Abduction Remedies Act (ICARA), 42, USC 11601 *et seq.* After a bench trial at which only the father testified, the District Court denied relief, holding that the father's *ne exeat* right did not constitute a right of custody under the Convention and thus that a return order was not authorised.

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court for the Western District of Texas, holding that the father's *ne exeat* right was only "a veto right over his son's departure from Chile," and affirming the

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decision of the Court of Appeals for the Second Circuit in *Croll & Croll* 229 F 3d 133 (2000). Justice Sotomayor, then a judge of that court, had filed a dissenting opinion in *Croll*, arguing that the *ne exeat* right was a right of custody because it “provides a parent with decision-making authority regarding a child’s international relocation.” In *Abbott*’s case the Supreme Court was comprised of Roberts CJ with Kennedy, Scalia, Ginsburg, Alito and Sotomayor JJ in the majority, and Stevens, Thomas and Breyer JJ in dissent.

For a removal or retention of a child to be wrongful under Article 3 of the 1980 Convention, the removal or retention must be in breach of “rights of custody” which were being exercised at that time, or would have been exercised but for the removal.

The Supreme Court considered that under Article 5(a) of the 1980 Convention there are two elements to “rights of custody”: first, “rights relating to the care of the person of the child”; and second, “the [particular] right to determine the child’s place or residence.” In relation to the first of these elements, “the care of the person of the child,” the Supreme Court held that:

Few decisions are as significant as the language the child speaks, the identity he finds, or the culture and traditions she will come to absorb. These factors, so essential to self-definition, are linked in an inextricable way to the child’s country of residence. One need only consider the different childhoods an adolescent will experience if he or she grows up in the United States, Chile, Germany, or North Korea, to understand how choosing a child’s country of residence is a right “relating to the care of the person of the child.”

The Supreme Court further held that a *ne exeat* right is also a “right to determine the child’s place of residence” under Article 5(a) as the phrase “place of residence” should be interpreted as encompassing the country of residence, and even if it were construed to refer only to a street address within a country, the *ne exeat* right gave the father the right to “determine” that address by “set[ing] bounds or limits to” that street address such that the child did not live at any street address outside Chile.

The Supreme Court further noted that the fact that a *ne exeat* right does not fit within the “traditional notions of physical custody” was not a matter that argued against the right falling within the scope of “rights of custody” under Article 5(a). The language of the 1980 Convention was designed to ensure international consistency in interpretation and to prevent courts from relying on any local or national definitions of custody, and thus to capture concepts of custody that may not be traditional in all contracting states.

The requirement under Article 3 that the right of custody must be being exercised at the time of removal, or would have been exercised but for the removal, was also discussed. The Supreme Court held that “a *ne exeat* right is by its nature inchoate and so has no operative force except when the other parent seeks to remove the child from the country,” and thus that the *ne exeat* right would have been exercised by the father but for the removal of the child from Chile.

The Supreme Court also made clear that a *ne exeat* right is not a right of access, and that even in cases where the *ne exeat* right is granted merely to protect a court’s

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jurisdiction pending further decrees, the right still allows a parent to object to the removal of the child from the country, and is a “right of custody.”

The United States, in a brief before the Supreme Court, had stated that the Central Authority for the United States “has long understood the Convention as including *ne exeat* rights among the protected ‘rights of custody’,” which position was noted by the Supreme Court. The Court further noted that other contracting states, including England, Israel, Austria, South Africa and Germany had interpreted the 1980 Convention such that *ne exeat* rights fell within the scope of “rights of custody,” and the Court noted further that there was a body of international scholarly opinion that also supported that position. The Supreme Court stated that “[a]dopting the view that the Convention provides a return remedy for violations of *ne exeat* rights accords with its objects and purposes” as the Convention rests on the presumption that it is in the best interests of the child for decisions as to custody to be made in the country of habitual residence.

In conclusion, the Supreme Court stated that:

While a parent possessing a *ne exeat* right has a right of custody and may seek a return remedy, a return order is not automatic.

The Court thus reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with the decision.

AFCC PRE-CONFERENCE INSTITUTE
1980 PARENTAL CHILD ABDUCTION CONVENTION

June 6, 2012

International Child Abduction Scenarios

The following fact patterns form the basis for small group discussions concerning family law international child abduction situations in both outgoing and incoming cases:

Outgoing Case

1. Children are taken from Manitoba, Canada to another country by one parent and there is an application in Manitoba for custody and return by the other parent, and

Incoming Case

2. Children have been brought to Manitoba, Canada from another country by one parent, and there are applications in Manitoba for return of the children by the other parent and for custody of the children by the parent who brought them to Manitoba.

BLANDO V. BLANDO (1)

Scenario 1 – Outgoing Cases

Both parents and their children are originally resident in Manitoba, Canada. The mother takes the children to Frankfurt, Germany, for a vacation and does not return to Manitoba.

When Misty Drifter met Marlin Blando, it was not exactly love at first sight. They met on a street in Winnipeg in Manitoba when Misty accidentally scratched Blando's brand new Range Rover as she backed out of the parking lot. Initially enraged, Marlin felt his fury evaporate when Misty took off her sunglasses and shook out her fiery red hair. After examining the

damage, they decided to meet later that evening at a coffee shop to discuss the repairs. The conversation quickly changed direction and instead of car repairs, they were soon talking about spending the rest of their lives together.

The next few years were a blur. After a whirlwind romance, Misty and Marlin married at the Delta Beausejour Hotel in Winnipeg in front of 600 of their closest and dearest friends. The couple settled into married life, moving to Fredericton, Canada, when Marlin was accepted into the training program of the Fredericton Fire Services. Children quickly followed: Nathan, born October 31, 1998, (13 years old), and Jill, born September 10, 1999 (11 years old). They attended Park Street Elementary School.

Marlin was well-regarded in the fire department, working long hours and on the fast track for promotion to a leadership position. Misty, on the other hand, found it difficult to make new friends in the new community. She did not work outside the home as she and Marlin had agreed that she would be at home for the children until Jill graduated from high school.

Problems arose in their relationship. She felt increasingly isolated and, to deal with her isolation, she started playing an online virtual reality game when the children were at school. It was through the game that Misty reconnected with Daniel Steele, her high school sweetheart who still lived in her old hometown of Frankfurt, Germany.

Summer was quickly approaching. In one of the rare moments when Marlin and Misty exchanged more than 10 words with each other, Misty asked Marlin if she could take the children to Frankfurt to visit her parents in August. Marlin quickly agreed. Fire Services was hoping to unveil a major initiative in October; with the children away, he could spend all of August laying down the groundwork for the project without any family distractions.

On August 1, Misty and the children travelled to Frankfurt to stay with her parents. When she arrived she told her parents that Marlin had problems

controlling his temper, with both her and the children. He would shout and swear at the children when he felt they did not listen to them, and when she tried to intervene, he told her to "stay the f... out of it" and then storm off. She said he was often jealous when she even talked to other men, and tried to prevent her from going out socially with her friends. If she tried to argue with him, he would push her and speak to her disrespectfully, even when the children were there. She also told her parents that recently, when she got home 15 minutes late—at 9:30 at night, from having a drink with the mother of a friend of Nathan's—Marlin questioned her about where she had been and who she was with, and when she refused to answer him, he slapped her on the face. She told him she was going to see a lawyer about a separation and to get him to stop treating her like that and he said, "I don't care what any lawyer says, I will do whatever I want to do." She said he also told her that if she ever tried to leave him, she would be very sorry. She said she is afraid of him, because of what he has done in the past, his inability to control his anger, and his threat. She said the children have told her that they are afraid of him too and don't want to go back.

While in Frankfurt, Misty also made plans to see Daniel, who had become her virtual boyfriend in the online game. Sparks also flew in real life.

Misty decided that she would not return to Marlin in Fredericton. She took steps to register the children in school in Germany, and started looking for a new place to live with Daniel.

Meanwhile, on September 1, Marlin received a call from the children's school, inquiring whether the children were planning to enrol for the upcoming school year. He had not realized that they were not yet registered, as Misty had always taken care of school matters. He called her parents' house in Frankfurt, and was told by her father that he would not let Marlin speak to Misty or the children because Marlin had assaulted her and both she and the children were afraid of him. Marlin adamantly denied that he had assaulted Misty, or that the children were afraid of him, and said he was going to court to make her bring the children back. Misty's father

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Institute 4

Judicial Officers Institute: New Developments for the 1980 Parental Child Abduction Convention: The Sixth Special Commission

Hon. Robyn Diamond
Hon. Eberhard Carl (ret.)
Miguel Firpi, PhD
Hon. Victoria Bennett

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OVERVIEW:

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

1. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (“the 1980 Convention”) is accepted as one of the most successful international treaties to have been produced by the Hague Conference on Private International Law (“HccH”): the World Organisation for Cross-border Co-operation in Civil and Commercial Matters. The text of the 1980 Convention is found at http://www.hcch.net/index_en.php?act=conventions.text&cid=24
2. The 1980 Convention is a civil law treaty which depends of reciprocity and respect for the rule of law amongst Contracting States of which there are currently 87. A status table of party states, called ‘Contracting States’ is maintained by the Hague Conference, on its website, and can be found at http://www.hcch.net/index_en.php?act=conventions.status&cid=24. Some Contracting States adopt the 1980 Convention through ratifying it, whereas others write it into domestic law.
3. It is a multilateral treaty, seeking to protect children from the harmful effects of abduction and retention across international borders by providing a procedure to bring about their prompt return of abducted children to their state of habitual residence.
4. The Permanent Bureau of the HccH is located at The Hague, Netherlands. It concerns itself with overseeing the operation of all conventions including convening regular Special Commissions to review the operation of conventions and is otherwise responsible for accepting new contracting states, education in some regions and taking initiatives such as publication of guides to good practice formulating protocols or processes with the support of working parties drawn from Contracting States. The "Child Abduction Section" part of the HccH website provides valuable information about the operation of the 1980 Convention and the work of the HccH in monitoring its implementation and promoting international co-operation in the area of child abduction.
5. The 1980 Convention operates as a forum selection treaty, the underlying premise of which is that it is in the best interests of a child to have his or her parenting arrangements resolved in the jurisdiction to which he or she is most closely related, that is, the state of “habitual residence.” The concept of habitual residence is central to the operation of the 1980 Convention but is not defined. Its meaning has been the subject of a lot of jurisprudence the upshot of which is to confirm that there is no definition but there are various ways in which it may be recognized or identified. Essentially, it means the place where the child belonged immediately prior to the unilateral act of a person (usually a parent) to remove or retain a child across an international border.
6. A purpose of the 1980 Convention is to protect children from the harmful effects of being removed or retained across international borders, unilaterally, by one parent, to the detriment or extinguishment of the child’s relationship with the

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other parent and to establish procedures to ensure their prompt return to their country of habitual residence. The paradigm to which it was directed was the removal or retention of a child out of their habitual residence by a disgruntled or disentitled parent to a legal forum of the abductor's choice. The intention is to return the children as quickly as possible to their primary carer so that the parents could access the courts or administrative bodies in the jurisdiction where the child belonged and where most of the evidence relevant to the child and parenting issues was located.

7. The 1980 Convention also seeks to secure protection for **rights of access** between Contracting States. The access provisions of the 1980 Convention are discrete from the provisions which deal with the return of children or international child abduction. By comparison with the return of children provisions (Chapter III), the access provisions (Chapter IV) have not operated very successfully. The access provisions are now overtaken to a large extent by the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children signed at The Hague on 19 October 1996 ("the 1996 Convention") providing, of course, that it is in operation between Contracting States.
8. The 1980 Convention applies only to children who have not attained the age of 16 years (Article 4). It applies to removals or retentions of a child which occur after the Convention has come into operation between the Contracting State of habitual residence and the Contracting State in which the child is newly located. An application for relief, by way of return, under the 1980 Convention must be supported by a **right of custody**.
9. There is no distinction to be drawn between a **wrongful removal** and a **wrongful retention**. A removal occurs when the child is taken across an international border without the consent of a person who has rights of custody of the child. A retention occurs when the removal was consensual, such as for a planned holiday, but the child is not returned by the time that it was agreed that the child would be returned.
10. The person who takes the child is often referred to as the "taking parent" or "the abductor". The person whose rights of custody have been breached is called the "left behind parent" or the "requesting parent", the latter reflecting the fact that the dispossessed parent usually makes application to the Central Authority in their country which requests the Central Authority in the Contracting State in which the child is located to directly or indirectly take action to recover the child and return the child to the home country.
11. A key component of the operation of the 1980 Convention is the **Central Authority**. These are concerned with the day to day operation of the 1980 Convention and their principal function is to accept and process individual applications. A country must designate the body which will be its Central Authority before it can become a Contracting State. The role of the Central authorities is to co-operate with each other and promote co-operation amongst

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the competent authorities in their respective states to secure the prompt return of children and to achieve the other objects of this Convention (Article 7). In particular, either directly or through any intermediary, they shall take all appropriate measures--

- a* to discover the whereabouts of a child who has been wrongfully removed or retained;
- b* to prevent further harm to the child or prejudice to interested parties by taking provisional measures or causing such measures to be taken;
- c* to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d* to exchange, where desirable, information relating to the social background of the child;
- e* to provide information of a general character as to the law of their state in connection with the application of the Convention;
- f* to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g* where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h* to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i* to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.”

12. Unfortunately, some Contracting States have treated the provisions of Article 7 as aspirational rather than obligatory and have not constituted a Central Authority or have set up a Central Authority with insufficient powers, autonomy or resources with the effect that the designated tasks are not performed directly or indirectly through an intermediary. Where there is no Central Authority or no properly functioning Central Authority, the 1980 Convention does not operate in any practical way.
13. In practical terms, where the 1980 Convention applies between Contracting States, an abducting parent will be precluded from obtaining an order or determination to legitimise his or her position in the jurisdiction which they have removed the child to, or retained the child in (Article 16). Therefore, the 1980 Convention preserves jurisdiction over the child (and parents) to the habitual residence of the child and, for that purpose, does not consider the welfare or best interests of the child as a pre-requisite to return. Likewise, a decision or determination to return a child is not to be taken as a determination on the merits of any custody issue or the best interests of the particular child (Article 19).

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14. Nothing in the 1980 Convention precludes a judicial or administrative authority in a Contracting State to which a child has been removed or retained from returning the child to his/her country of habitual residence on any other basis (Article 18). Accordingly, if the return application fails, the parents are in the same position as if the 1980 Convention did not operate between the Contracting States and they can then pursue what other remedies they have by way of merit based or best interest of the child adjudication or a recognition of foreign orders or the like.

15. The aim of the 1980 Convention is to return the child to his/her habitual residence as quickly as possible so that parenting arrangements can be made in that country. That said, however:-
 - a. There is no requirement that proceedings of a judicial or administrative nature be taken in the country of habitual residence before or after the return;
 - b. The child must merely be returned to the country of habitual residence and not to the place at which the child resided last resided prior to the retention or removal;
 - c. There is no requirement that the child be handed over to the left behind parent or that the left behind parent even be apprised of the child's whereabouts within the country of habitual residence.
 - d. There is no requirement for parents or parties to mediate (although some Contracting States provide otherwise).
 - e. There is no express requirement for the child to be heard directly or indirectly (although many Contracting States provide otherwise). However, it is difficult to envisage how a case involving a child's objection to return could be determined in any jurisdiction without hearing the voice of the child in some manner.

16. The 1980 Convention will not apply to a removal or retention of a child unless it is **"wrongful"** within the meaning of the 1980 Convention. The indicia of wrongfulness are some of the constituent elements of an application for return under the 1980 Convention. The removal or retention will be considered wrongful where the removal or retention of the child:-
 - a. occurred after the 1980 Convention has entered into force for both relevant Contracting States (Article 35).
 - b. was in breach of rights of custody attributable to a person or institution under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention (Article 3).
 - c. was at a time when the rights of custody were actually exercised, either jointly or alone, or would have been exercised but for the removal or retention (Article 3);
 - d. was habitually resident in the requesting Contracting State immediately before any breach of rights of custody (Article 4)

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17. It is to be noted that the “**rights of custody**” are the parenting rights which accrue or inure to a person or institution in the Contracting State of habitual residence. They can arise by operation of law or by agreement having force in the habitual residence by reason of a judicial or administrative decision (Article 3). Article 5 provides that “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence. That is to be compared with rights of access which are to include the right to take the child for a limited period. Whether rights amount to “rights of custody” in the Contracting State which is requested to order the return, is to be judged according to the laws of the requested state. For instance, a (*ne exeat*) right to withhold permission for the child to leave the country might be regarded as a right of custody by the country of habitual residence but not, absent an entitlement to also have the child live or stay with the requesting parent, be regarded as a right of custody according to the law of the requested Contracting State.
18. **Habitual residence** is not defined and there is no simple test to determine the habitual residence of a child. Practically, the courts in the requested state must determine whether the child was habitually resident in the requesting state immediately prior to the removal or retention. There is no uniform approach to determining the existence of habitual residence but it is usually referred to as a fact based enquiry which involves some assessment of shared (as opposed to unilateral) parental intention and an assessment of the quality of the connection which the child has with the state.
19. Articles 2 and 11 oblige the courts of the Contracting State in which the child is located to deal with return proceedings by **the most expeditious procedures** available. Article 11 assumes duration of court proceedings of not more than six weeks.
20. The procedures to be followed in return proceedings will accord with the law of the requested State. That includes whether the left behind parent and the abductor can be cross-examined or have his or her evidence tested. The requested state, in which the child is located, also determines whether the Central Authority in the requested state will represent the applicant in court proceedings (as in Australia) or whether another body or person does this and whether a lawyer needs to be designated (as is the case in the majority of Contracting States). The level of court which is competent to determine the application for return and the avenues for appeal from any such determination are all matters for requested state. However, it is generally accepted that a concentration of jurisdiction works well in that it produces more consistent results and, in common law countries, informative jurisprudence.
21. The judicial or administrative authorities in the requested state may take notice of the law of the habitual residence (Article 14). Article 15 provides a mechanism whereby the judicial or administrative authority of the Contracting State to which the child has been removed may, before making an order for return, request the applicant to obtain from the Contracting State of habitual residence ‘a decision or other determination that the removal or retention was

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wrongful within the meaning of Article 3 of the Convention” and that Central Authorities of both Contracting States “shall so far as practicable assist applicants to obtain such a decision of determination.” Article 15 requests, as they have become known, are regarded by some as being more trouble than they are worth. Making an Article 15 request invariably results in delay not in the least because all relevant persons usually have a right to put their case. The decision or determination on an Article 15 request is also not binding on the judicial or administrative body in the Contracting State where the child is located and which has to determine the application for a return order.

22. Once the judicial or administrative authority which has to determine the application for return has found that the removal or retention is wrongful, it **may exceptionally** refuse the return of the child if the party opposing return, usually the abducting parent, establishes that:-
- a. the person or institution with rights of custody was **not actually exercising the custody rights** at the time of the removal or retention (Article 13(a)). This exception does not feature significantly in jurisprudence because a person is regarded as actually exercising rights of custody if he/she maintains the stance and attitude of a parent. It is not required that he or she must be exercising day to day care or control over the child. Accordingly, a parent who consents to a child travelling abroad is exercising his/her right of custody when they grant permission for the child to go and continues to exercise his or her right up until the taking parent acts inconsistently with that right by, say, wrongfully retaining the child. Likewise, a parent who places a child to live with friends or relatives, is exercising rights of custody whilst the child remains so placed.
 - b. the person or institution with rights of custody consented or subsequently acquiesced in the removal or the retention (Article 13(a)). **Consent and acquiescence** must be clear, informed, unambiguous and unequivocal. It will not be inferred lightly. It must be to a permanent removal or retention. It must not be based on fraud or a misunderstanding
 - c. 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 (Article 13(b)). It is the risk rather than the harm which must be qualitatively described as “grave”. The harm or situation must equate to, or be, intolerable. The judicial and administrative authorities must take into account information relating to the social background of the child provided by the Central Authority of the child’s habitual residence.
 - d. the **child objects** to being returned to the place of habitual residence and has attained an age and degree of maturity at which it is appropriate to take account of the child’s views (Article 13).
 - e. the return would not be permitted by the fundamental principles of the requested Contracting State relating to the **protection of human rights an fundamental freedoms** (Article 20).

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23. Where there are a number of children to whom the 1980 Convention applies, the exception must be contended for in relation to each child individually.
24. Article 12 provides that, where the judicial or administrative proceedings are commenced in the Contracting State where the child is, **more than one year after the alleged wrongful removal or retention**, the child should still be returned “unless it is demonstrated that the child is now **settled in** its new environment.” In some jurisdictions, such as Australia and Hong Kong Special Administrative Region, Article 12 or its equivalent in domestic law is interpreted so that the 1980 Convention ceases to operate if legal proceedings for the return of the child are instituted more than one year after the child’s removal or retention *and* the child is found to be settled in the new country. Other jurisdictions, including the USA and UK, hold that Article 12 or its equivalent is akin to an Article 13 exception so that a return may still be ordered even if proceedings are instituted more than a year after the removal or retention *and* the child is found to have become settled. Various jurisdictions have also invoked the concept of “tolling” so that the one year does not commence to run until after the child has been located. If the proceedings are instituted more than a year after the removal or retention *and* the child is not found to be settled, the child will be returned.
25. The Article 13(b) grave risk exception is the most contentious and most litigated exception to return and has been found to apply, and thereby give rise to a discretion to refuse return, to various circumstances including the following:-
 - a. Where siblings would be separated;
 - b. Where the abductor will not be permitted to re-enter the state of habitual residence;
 - c. Where there is insufficient protection against domestic violence having regard to all of the circumstances such as the history of the relationship, complaints, the state’s ability to give adequate protection by virtue of domestic violence laws generally and by the making of complimentary orders in the particular case;
 - d. Where the necessary journey may prove fatal for the child or there was inadequate medical care for the child in the state of habitual residence;
 - e. Where the return of the child, with or without the abducting parent, would lead to the psychological or psychiatric decompensation or suicide of the primary carer so that the child would be left without a primary carer or parent
26. The wilful refusal of an abductor to return with the child to the state of habitual residence, thereby bringing about a separation between the child and the primary carer, is not usually regarded as a grave risk of harm. This is because the harm is considered to be referable to the abductor’s refusal to return and not to the return itself.
27. The harm associated with the return is to be measured in the very short term and not to the more far reaching consequences. Accordingly, the separation of a child from its primary carer by virtue of the assured immediate incarceration or

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punishment of the abductor, may qualify as a intolerable but the possibility that the abducting parent will lose the eventual parenting case in the state of habitual residence will not.

28. The assessment of risk of harm or the intolerable situation is to be done having regard to the ability of Contracting States to accept undertakings, make safe harbour orders and mirror or complimentary orders. There is an inherent difficulty with the harm or intolerable situation being ameliorated by undertakings given to the court or administrative tribunal in the requested state rather than the state of habitual residence. Safe harbour orders and mirror or complimentary orders often require cooperation between Contracting States for which the International Hague Network of Judges has proved extremely helpful.
29. The circumstances in which the Article 13(b) grave risk exception can be invoked as between certain European states is restricted. Since March 2005, **the Brussels 11 a-Regulation** applies as member states of the European Union (with the exception of Denmark). That is, for Austria, Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. On 1 January 2007, Bulgaria and Romania joined as well. Uniform provision within the European Union has been made for cross-border matrimonial and parenting matters regarding which country will have jurisdiction. Determinations will be recognised and, where necessary, enforced between states in the European Union without undue formality and delay. There is an exchange of information between the central authorities of the member European Union states which gather information about the situation of the child and about any proceedings that may be pending and exchange that information between themselves.
30. The 1980 Convention continues to apply to obtaining a return of the child from other member states of the European Union. Since 1 March 2005, however, it is complemented and arguably made more effective by the Brussels Ila-Regulation. This Regulation reinforces the principle contained in the 1980 Convention that the court shall order the immediate return of the child. Apropos the grave risk of harm exception in Article 13(b) which, if made out, may lead to the return of the child being refused, a court cannot refuse to return a child if it is established that adequate measures have been taken to protect the child after his or her return to the habitual residence. It is intended that this provision encourages courts in the requested state to contact with courts in the state of habitual residence, either directly or with the assistance of Central Authorities, the parties (normally the parents) or international networks of judges, with a view to securing the protection of the child following return if necessary.
31. Additionally, the Brussels Ila-Regulation reinforces the right of the child to be heard during the proceedings by requiring the court to give the child the opportunity to be heard unless this appears inappropriate having regard to his or her age or degree of maturity (Article 11 para. 2 Brussels Ila-Regulation). The Regulation leaves it to the domestic law of the requested state whether hearing the child will be undertaken by the judge or by other persons, for example a

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welfare officer or child advocate who then is, in turn, heard by the court. Furthermore, the court in the requested state cannot refuse to return the child, under Article 13(b) or its equivalent, unless the left behind parent has been given an opportunity to be heard (Article 11 para. 5 Brussels II a-Regulation).

32. The return of an abducted child need not be obtained exclusively through the 1980 Hague Convention. The return of the child can also be obtained by cross-border recognition and declaration of enforceability/registration for enforcement of a decision under the Regulation. The Brussels II a-Regulation governs the general obligation to recognise and enforce custody and contact orders given in one member state of the European Union in another member state (Article 21). Grounds for refusal are set out in Article 23.
33. In certain specific cases, the Brussels II a-Regulation provides an enforcement mechanism so that, if the return of the child has been refused in another European Union member state pursuant to the 1980 Convention, the Regulation provides for the prompt institution of parenting proceedings in the country from which the child was removed or retained. If those proceedings resulted in an order that the child be returned, then that return order, accompanied by a particular certificate (Article 42 of the Regulation), can be enforced. This is notwithstanding that the return had earlier been refused under the 1980 Convention (Article 11 paras 6-8 Brussels II a-Regulation).
34. The practical implication of making out an exception to return is to give rise to a discretion in the court to refuse to return a child. Where there are a number of children to whom the 1980 Convention applies, and an exception (like an objection to return) applies only in relation to some of the children, then a discretion to refuse return arises only in relation to the child(ren) in respect of whom the exception is made out.
35. The 1980 Convention is silent about the matters which ought to inform the exercise of the discretion to refuse to return a child. Notably, the best interest of the child does become a relevant consideration in the exercise of the discretion. Some of the matters which are taken into account in UK and Australian cases include the following:-
 - a. The comparative suitability of the forum in the competing jurisdictions to determine the child's future in the substantive proceedings. This will include a parent's standing, the availability of legal assistance, the access to relevant witnesses for the purpose of cross examination and the availability of evidence generally;
 - b. The likely outcome (in whichever forum they be heard) of the substantive proceedings. This is very hard to predict but, it is fair to say that, if it were to be accepted that an abducting parent would be automatically entitled to relocate with the child back to the requested state, this would mitigate against a return.
 - c. What has occurred for the child since the wrongful removal or retention or consent or acquiescence, with particular reference to the possibility that the child may have become settled in the requested

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- State. It ought not be forgotten that the 1980 Convention was conceived and is intended to be implemented as a **hot pursuit remedy**.
- d. The circumstances awaiting the abducting and the child if they compelled to return to the state of habitual residence. This encompasses criminal penalty, pre-existing rights under orders in force in the state of habitual residence and the practicalities of day to day financial support for the child.
 - e. The anticipated psychological effect upon the child of a return order both directly and indirectly by virtue of any likely adverse effects on the primary carer.
 - f. The extent to which the purpose and underlying philosophy of the 1980 Convention would be at risk of frustration if a return order were to be refused. In this context, there is extensive authority for the proposition that the exceptions to return are as much a part of the underlying philosophy of the 1980 Convention as the concept of immediate return.
36. In relation to costs:-
- a. Subject to a Contracting State making a reservation under Article 42, Article 26 provides that Central Authorities and other public services of Contracting States shall not impose any charges, including legal costs or expenses, in relation to applications under the 1980 Convention but may require that others, including the left behind parent, pay for expenses incurred or to be incurred in returning the child.
 - b. Article 42 provides that a Contracting State may, by reservation, declare that it shall not be bound to assume legal or court costs save to the extent that those costs may be covered by its system of legal aid and advice.
 - c. Article 26 also provides that the judicial or administrative authority which orders the return of a child may require the party who removed or retained the child to pay expenses incurred by the applicant including travel expenses, costs of locating and returning the child and legal expenses.
37. Documents sent to the Central Authority in the Contracting State where the child is located must be sent in an official language of the requested Contracting State or, if that is not feasible, into English or French (Article 24).
38. This overview is intended to be a summary only. Please consult the resources listed on the following page for further detail.

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LIST OF RESOURCES

BOOKS

- Paul R Beaumont and Peter E McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999)
- Nigel Lowe, Mark Everall and Michael Nicholls, *International Movement of Children* (Jordan Publishing, 2005)

EXPLANATORY REPORTS

- Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention* (1982) available at:
http://www.hcch.net/index_en.php?act=publications.details&pid=2779

GOOD PRACTICE GUIDES

- HccH, *Guide to Good Practice Child Abduction Convention: Part I – Central Authority Practice* (2003) available at:
http://www.hcch.net/index_en.php?act=publications.details&pid=2780
- HccH, *Guide to Good Practice Child Abduction Convention: Part II – Implementing Measures* (2003) available at:
http://www.hcch.net/index_en.php?act=publications.details&pid=2781
- HccH, *Guide to Good Practice Child Abduction Convention: Part III – Preventative Measures* (2005) available at:
http://www.hcch.net/index_en.php?act=publications.details&pid=3639
- HccH, *Guide to Good Practice Child Abduction Convention: Part IV – Enforcement* (2010) available at:
http://www.hcch.net/index_en.php?act=publications.details&pid=5208

WEBSITES

- HccH: *Hague Conference on Private International Law – the World Organisation for Cross-border Co-operation in Civil and Commercial Matters* <www.hcch.net>
- Hague Judicial Resources: Handling Cases Arising Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction* <www.haguejudicialresources.org> (logon = network; password = carnegie)

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SOME RECENT DEVELOPMENTS IN THE CASE LAW

I GRAVE RISK OF HARM (NEULINGER; IN RE E; IN THE MATTER OF S)

A *Neulinger & Shuruk v Switzerland* [2011] 1 FLR 122

On 6 July 2010 the Grand Chamber of the European Court of Human Rights handed down the decision of *Neulinger & Shuruk v Switzerland* which, according to the Supreme court in *In re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144, “was greeted with concern, nay even consternation in some quarters, because of its possible impact upon the application of the Hague Convention on the Civil Aspects of International Child Abduction” of 1980 (the 1980 Convention).

The 1980 Convention has been construed as an instrument for determining the appropriate forum for cross-boarder parenting disputes between contracting states. It provides for the return of a wrongfully removed or retained child to his or her country of habitual residence in order to determine parenting issues. As such, detailed inquiry into the matters relevant to the best interests of the child is to be reserved for determination at any parenting case which may be brought in the appropriate jurisdiction.

The decision of the European Court of Human Rights in *Neulinger*, however, raised concern in the international community that, in cases where the “grave risk” exception to return under Article 13(b) is relied upon, there needs to be greater consideration of the best interests of the child.

Neulinger concerned an applicant mother of Swiss nationality, but who referred to herself as Jewish and who had settled in Israel in 1999. There she met and married the father, an Israeli national. Their son, N, was born in Tel Aviv on 10 June 2003 and had dual Israeli and Swiss nationality. According to the mother, in 2003 the father joined an ultra-orthodox Jewish movement, the ‘Lubavitch’, and marital difficulties arose. The mother became concerned that the father would take the child, N, to a Chabad-Lubavitch community abroad for religious indoctrination. She therefore applied to the Tel Aviv Family Court for an order to prevent N’s removal from Israel, which was made on 20 June 2004 to expire when the child attained his majority. In an interim decision on 27 June 2004 the mother was granted ‘temporary custody’ of the child with ‘guardianship’ to be exercised jointly by both parents. On 10 January 2005 the Israeli social services intervened and instructed the parties to live apart, and on 12 January 2005 a judge of the Tel Aviv Family Court placed restrictions on the father in relation to his contact with the child and mother, including limiting his access to the child which was now supervised contact at a contact centre twice a week. The parties divorced on 10 February 2005.

On 24 June 2005 the mother secretly left Israel for Switzerland with the child N. Following an application by the child’s father, the Tel Aviv Family Court delivered a decision of 30 May 2006: that the child was habitually resident in Tel Aviv; that as of the day of the mother’s departure with the child the parents had been joint guardians of their son; and that the child’s removal from Israel without the father’s consent was wrongful within the meaning of Article 3 of the Convention.

Curriculum Vitae of.
ROBERT D. ARENSTEIN, ESQ.

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New York, NY 10017
212/679-3999

NEW JERSEY OFFICE

691 Cedar Lane
Teaneck, NJ 07666
201/836-9648

EDUCATION

Ithaca College (B.S., *cum laude*, 1968)
St. John's University (J.D., 1972)
Certified Public Accountant (NY 1973)
New York University (LL.M., Taxation, 1976)

COURT ADMISSION

1973 -- Admitted to Bar, New York and U.S. Tax Court
1974 -- U.S. District Courts, Southern and Eastern Districts of New York
-- U.S. Court of Appeals, Second Circuit
1976 -- U.S. Supreme Court and District of Columbia
1979 -- New Jersey and Florida

PUBLISHED ARTICLES

The Hague Convention - Understanding & Litigating Under the Treaty
The Hague Convention - Educating the State Court Judge
Distribution of Military Benefits - The Need for Reform
Distribution of Military Benefits - Congressional Reform
Interjurisdictional Enforcement of Matrimonial Orders - A Proposal
Divorce Law in China - Domestic Relations Tax Reform Act, 1984
How to try a Hague Case.
Made a Tape for Students studying for certification to American Academy of Matrimonial Lawyers

EXPERTISE

Expert Witness on various court cases throughout the nation on Interstate and International Child Abduction Cases

Liaison to International Child Abduction Project sponsored by the ABA Center on Children and the Law - Department of Justice OJJDP, (1993-96)

Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAN), funded by the Dept. of Justice OJJDP in conjunction with ABA Center on Children and the Law and the National Center for Missing and Exploited Children (NCMEC)

Consultant to the United States State Department, Bureau of Consular Affairs, Children's Issues Department and National Center for Missing and Exploited Children (MCMEC) on International Child Abductions

Certificate of Appreciation from the United States Department of State- March 1996

Participant in Hague Convention Meetings on Implementation of Treaty, Hague Convention on Civil Aspects of International Child Abduction, Netherlands, 1993, 1996, 1999, 2003, 2007

Member of United States delegation to the Hague-1996

Expert Witness before U.S. House of Representatives; House Ways and Means Committee, Child Support Amendments, 1984, 1988, Social Security Amendments, 1989

Expert Witness before Senate and Assembly Judiciary Committee of New York on Hearings of Surrogate Parent Bill, 1986

Expert Witness before U.S. Senate, Committee on Armed Services, Uniform Services Former Spouses Protection Act, 1982

Speaker/Lecturer on Interstate and/or International Child Custody, at various Institutes, including:

- Second World Congress on the Rights of Children (1997)
- American Bar Association's annual winter and spring meetings
- International Academy of Matrimonial Lawyers (1997; 1992)
- American Family Conciliation Courts National Conferences
- American Association of Trial Lawyers
- Hispanic Bar Association
- New Jersey Continuing Legal Education Institute
- COURT TV
- American Academy of Matrimonial Lawyers 2002, 2006
- International Academy of Matrimonial Lawyers 2004
- Hague Convention Delegate on the Implementation of the Treaty on Child Abduction September, 2007
- Fairfield County Bar Association, Connecticut , 2007
- Cross Border Mediation and the Hague Convention on International Parental Child Abduction, University of Miami School of Law, February, 2008
- How to try a Hague Convention Case- International Academy of Matrimonial Layers June, 2008 Boston, Mass
-

I have been continuously active in the practice of law for the past thirty nine (39) years, and for the last thirty six (36) years have devoted my practice, almost entirely, to that of matrimonial and family law. I am a Fellow of the American Academy of Matrimonial Lawyers and Secretary of the New York Chapter and a previous chair of the National Legislation Committee. I have chaired many committees in that organization. I am a Fellow of the International Academy of Matrimonial Lawyers and Vice President and Former Secretary of the American Chapter of that organization. I am a member of the National Panel of Marital Arbitrators of the American Arbitration Association. I am also a member of the Executive Committee of the Family Law Section of the New York Bar Association. In addition, I was a member of the Executive Council of the American Bar Association's Family Law Section, and a member of various matrimonial law committees both in New York State and American Bar Associations. I chaired the Federal Kidnapping Committee of the Academy of Matrimonial Lawyers and I was liaison to ABA Parental Abduction Project. I was the Chairman of the Mentoring Committee of the International Child Abduction Attorneys Network (ICAAAN), funded by the Dept. of Justice OJJDP in conjunction with ABA Center on Children and the Law and the National Center for Missing and Exploited Children. I have been an expert witness before the United States Senate Armed Services Committee on issues relating to military pension, the House Ways and Means Committee on issues relating to child support, and before the New York State and New Jersey State Assembly's Judiciary Committees on the subject of surrogate parenting and have advised the U.S. State Department on various occasions including speaking in the North American Symposium on International Child Abduction. My experience in the matrimonial field is extensive and varied and includes the handling of all types of matrimonial actions and proceedings in the trial and appellate courts of the State of New York and elsewhere including almost four hundred (400) cases under the Hague Convention. I have been a Lecturer at Various Institutes on Interstate and International Child Custody, including American Family Conciliation Courts National Conferences, American Bar Association's annual winter and spring meetings, American Academy of Matrimonial Lawyers, International Academy of Matrimonial Lawyers, American Association of Trial Lawyers, Hispanic Bar Association, New Jersey Continuing Legal Education Institute, COURT TV, and various other bar associations. My firm has handled many international custody actions and many interstate custody actions involving the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act.

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS - New York Chapter

Fellow (1984-present)
Chairman/Member, Kidnapping Committee (1994-6), (1996-present)
Chairman, Meeting Committee (1986-1998)
Member, Legislation Committee (1991-1998)
Parliamentarian (1995-96; 1991-92)
Member, National Budget and Finance Committee (1994-95)
Co-Chairman, National Legislation Committee (1990-91)
Chairman, Committee on Surrogate Parenting (1986)
Board of Managers, New York Chapter (1986-90) (1993-1996) (1999-2002)
Specialization Committee (1985)
Secretary (1999- Present)

AMERICAN BAR ASSOCIATION - Member (1972-present)

Family Law Section --

Council Member (1996-99; 1985-91)
International Law and Procedures (1991-present)
Chairman/Member, Federal Legislation & Procedures (1989-present)
Vice Chair/Member, Federal Task Force on Legislation (1992-present)
Parliamentarian (1995-96)
Liaison to International Child Abduction Project (1993-96)
Co-Chairman, Bankruptcy Committee, (1992-94)
Advisory Committee (1991-94)
Chairman, By-Laws Committee (1990-91; 1982-84)
Law and the Fifty States (1985-94)
Chairman/Member, Scope & Correlations Committee (1987-90)
Ad hoc Committee on Surrogacy (1987-88)
Editorial Board, Family Law Quarterly (1987)
Chairman, Research Committee Member (1986)
Member, Annual Meeting Coordination Committee (1985-86)
Chairman, Policy & Procedures Handbook Committee (1982-86)
Membership Chairman (1983-85)
Chairman, Interstate/Federal Support Laws & Procedures Committee (1981-85)
Vice Chairman Divorce Laws and Procedures Committee (1980-82)
Alimony, Support and Maintenance Committee (1977-80)

Young Lawyers Division

Member, Liaison with Other Professions and Organizations (1981-82)
Member, Child Advocacy and Protection Committee (1980-82)
Delegate (1974-81)

INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS - Member (1988-present)

Vice President, American Chapter (2010- present)
Board of Managers, American Chapter (1996-present)
Secretary, American Chapter (1994-95)
Counsel to the President (2006-2008)

NEW YORK STATE BAR ASSOCIATION - Member (1972-present)

Chairman, International Custody Committee (1995-1998)
Executive Committee (1979-2009)
Program Chairman, Annual Meeting (1985-91)
Co-chairman, Committee on Surrogate Parenting (1986-87)
Program Chairman, Young Lawyers Section (1985)
Chairman, Long Range Planning, Family Law Section (1979-85)
Liaison, Executive Committee, Young Lawyers Section (1979-82)
At Large Delegate- 2006-present

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK - 1973

Member, Committee on Matrimonial Law (1991-1996)
Liaison to Committee on Matrimonial Law (1985)

NEW JERSEY BAR ASSOCIATION -

Co-chairman, Specialization Committee Member (1983-84)
Legislation Committee (1984)

Westchester County Bar Association - 1973

Bergen County Bar - 1979

Essex County Bar Association - 1979

District of Columbia Bar Association

Florida Bar Association

American Association of Attorneys-CPA's - 1973

American Arbitration Association - 1973

National Panel of Marital Arbitrators (1978-present)

Commercial Panel Arbitrators (1975)

Employment

Law Offices of Robert D. Arenstein (New York & New Jersey) (1984 to present)

Arenstein & Huston, P.C., President (1980-84)

Self-Employed (1975-80)

Shapiro, Weiden & Mortman, P.C. (1974-75)

Hofheimer, Gartlir, Gottlieb & Gross (1973-74)

Born: January 16, 1947
 New York, New York

UNITED STATES DISTRICT COURT JUDGE ANN MONTGOMERY

Judge Montgomery was nominated to be a United States District Judge in November of 1995. Her nomination was confirmed by the United States Senate on August 2, 1996. She began her duties as a District Court Judge on August 6, 1996.

Ann Montgomery received her undergraduate degree from Kansas University and her law degree from the University of Minnesota. She served as a law clerk to the District of Columbia Court of Appeals and was an Assistant United States Attorney in Minnesota from 1976 - 1983.

Judge Montgomery served on the Hennepin County State District Court bench from 1983 to 1994. While a state court judge, she served as a member of the Board of Judicial Standards. Ann Montgomery was appointed to the position of Magistrate Judge by the Federal District Judges of the District of Minnesota in 1994.

Judge Montgomery was a member of the United States Delegation to the 2001 Conference on the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the Netherlands. In 2006 Judge Montgomery lectured on the Child Abduction Hague Convention in Chile at the invitation of the United States State Department. In 2007 she was a lecturer and instructor on Alternatives to Incarceration in Montevideo, Uruguay. In 2010 she taught trial skills in Arusha, Tanzania to the attorneys at the International Criminal Tribunal for Rwanda. In 2012 she lectured and participated as a member of the U.S. Delegation to an International Commercial Arbitration Conference in Guangzhou and Beijing, China.

She is a past President of the Federal Bar Association of Minnesota. She has served as a member of both the State of Minnesota and the Eighth Circuit Jury Instruction Committees. Together with Judge Myron Bright and Professor Ronald Carlson, Judge Montgomery was a co-author of the Minnesota edition

of Objections At Trial. She is a past President of the 8th Circuit District Judges Association, a former member of the Judicial Resources Committee and a current member of the Judicial Branch Committee of the Judicial Conference of the United States.

She is the recipient of the Hennepin County Bar Association 1993 Professionalism Award, the American Board of Trial Advocates 1996 Trial Judge of the Year Award, the Minnesota Women Lawyers 2000 Myra Bradwell Award, and the 2006 Rosalie Wahl Award of Judicial Excellence.

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Tanja K. Manrique was appointed to Minnesota's 4th judicial district in 1998. On November 1, 2010, she retired from the bench and established Tanja K. Manrique LLC to provide alternative dispute resolution and case management services.

Ms. Manrique served as the Presiding Judge of the family court, where more than 10,000 cases are resolved annually by 14 judicial officers. From 2006 until her retirement, she was the lead judge on the judicial branch initiative to expand implementation of Early Case Management and Early Neutral Evaluation in family law cases. She was instrumental in the establishment of ECM/ENE pilot projects in Minnesota's ten judicial districts. The Ash Institute at the Harvard University Kennedy School of Government designated the Social ENE component in the 4th district as a "Top 50 Innovation in American Government."

As chair of the budget committee for the 4th district, Judge Manrique had oversight responsibility for more than \$50 million. She served as a member of the executive committee for the district. As a member of the legislative advisory workgroup for the Minnesota Judicial Council, Judge Manrique was integrally involved with the Guardian ad Litem reform bill enacted during the 2010 legislative session.

Prior to joining the family court bench, Judge Manrique served in criminal court, drug court, and juvenile court. She also co-chaired the Hennepin County Family Violence Coordinating Council for 5 years, and in that capacity led the initiative to develop the State's first domestic violence court.

Judge Manrique assisted with establishment of the Minnesota Chapter of the Association of Family and Conciliation Courts. She served for several years as a member of the planning committee for Divorce Camp, sponsored by the Minnesota chapter of the American Academy of Matrimonial Lawyers. She served on the board of directors for the Volunteer Lawyers Network. She was a long-standing member of the advisory board of *Minnesota Lawyer*. She is a past congregation moderator of the Wayzata Community Church.

Ms. Manrique is a frequent speaker at bar association meetings, continuing judicial education conferences, and continuing legal education seminars. She has trained more than 600 judges and attorneys on the best practices for managing and settling cases involving children and families. In 2010, she chaired the Family Law for the Minnesota Judiciary conference, received the Access to Justice Award from the Minnesota Hispanic Bar Association, and presented in California at the Spring Conference for the American Bar Association's section on Alternative Dispute Resolution. In 2011, she presented in Florida at the Spring Conference of the ABA's section on Family Law. In 2012, she presented in Costa Rica at the mid-year conference of the American Academy of Matrimonial Lawyers, and once again co-chaired the Family Law for the Minnesota Judiciary conference.

Before her appointment to the bench, Tanja specialized in environmental law with Popham, Haik, Schnobrich & Kaufman, Ltd. and Greene Espel, PLLP. She also served as general counsel and deputy chief of staff for Minnesota Governor Arne H. Carlson. She is a graduate of the Georgetown University Law Center and Cornell College (Phi Beta Kappa, *magna cum laude*). She received her mediation training through the Harvard Negotiation Institute in Cambridge, Massachusetts.

By appointment of the Chief Justice of the Minnesota Supreme Court, Ms. Manrique is a Senior Judge and adjudicates cases for the branch upon request.

Mary Madden was appointed as a Family Court Referee in Hennepin County in December 2010, after serving as a Family Court Referee in Ramsey County for the previous two years. Before joining the bench, she practiced exclusively family law for 19 years, and served as a Child Support Magistrate for 11 years. She was co-chair of the ECM/ENE Steering Committee in the Second Judicial District and remains a member of the State ECM/ENE Steering Committee. She is also president-elect of the board of Association of Family & Conciliation Courts – Minnesota Chapter.

Ann K. Leppanen

Ann K. Leppanen was appointed as a Family Court Referee in Ramsey County in 2005 and retired from that position in October 2011. Before joining the bench, she was employed both at Southern Minnesota Regional Services and in private practice for approximately 16 years. She began serving as an Administrative Law Judge at the Office of Administrative Hearings - Child Support Division in 1996, and then began serving as a child support magistrate in Ramsey County, Minnesota in 1999. She was the co-chair of the ECM/ENE Steering Committee in the Second Judicial District, currently is active with the statewide initiative for early case management, and is a board member of the Association of Family and Conciliation Courts Minnesota Chapter. Ms. Leppanen is now focusing on private alternative dispute resolution for families.

Lawrence S. Katz, P.A.
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Lawrence S. Katz is a Fellow in The International Academy of Matrimonial Lawyers (IAML)¹. He focuses his practice on family law, complex jurisdictional issues, interstate and international family law as well as child abduction. He has practiced law for over four decades.

He has been counsel of record, mentored or consulted in over 250 Hague Convention and child abduction cases. Mr. Katz was the first and in the majority of cases, the only U.S. attorney to recover children from: Turkey, (non-Hague) Iran, Saudi Arabia and Japan (using "Special Family Circumstances") as well as to return children to Haiti, Jamaica, the Bahamas and Russia. Mr. Katz also conducted the first mediation in a Hague case in a pilot program for NCMEC and the U.S. Dept of State in November 2005.

Mr. Katz has lectured and published on international relocation. In 2008, he successfully represented 3 clients in international relocation cases and served as a Guardian ad Litem in a fourth case where he was responsible for drafting the relevant portions of the agreement and final decree with respect to relocation, jurisdiction and enforcement. The 4 mothers were authorized to relocate with their young children to: Germany, Belgium and Israel. In 2009, he represented mothers who were authorized to relocate with their children to the United Kingdom and France. In 2010-11, he represented a Foreign Service Officer of the U.S. Dept. of State who was permitted to relocate with her child to France. He frequently represents clients in interstate relocation cases.

Mr. Katz has testified on numerous occasions as an expert witness in international matters especially concerning relocation and abduction factors/profiles. He has been requested by various courts to do so and retained by private parties to testify.

EDUCATION

J.D., University of Miami, 1968 Phi Alpha Delta
Law Fraternity

B.B.A., University of Miami 1965
Phi Epsilon Pi Fraternity, President

¹ "The IAML is a worldwide association of practicing lawyers who are recognized by their peers as the most experienced and expert family law specialists in their respective countries" www.iaml.org

ADMISSIONS

Mr. Katz was admitted to the Florida Bar in 1968 and to the Florida Supreme Court, U.S. District Court, Southern District of Florida and the U.S. Court of Appeals, 5th Circuit; 1971, U.S. Supreme Court; 1980, U.S. District Court, Middle District of Florida; 1981, U.S. Court of Appeals, 11th Circuit; and, 1996, U.S. Court of Appeals 3rd Circuit.

ACTIVITIES AND LECTURES

Lecturer, "Records and the Abducted Child," Children's Records Law in Florida, 1999, 2000, 2001.

Lecturer, Twelfth Annual Nuts and Bolts of Divorce, DCBA Family Courts Committee (2005). "Economic Injunctions/Freeze Orders Domestic and Foreign."

Lecturer, "Abduction Factors and Fla. Stat. §61.45 as it Concerns International Visitation and Child Custody," First Family American Inn of Court (2006).

Lecturer, Family Law Update 19th Judicial Circuit in St. Lucie County, Florida (2007), "Int'l Child Abduction: Returning Kids Home & Making the Abductor Pay Through Hague or UCCJEA."

Lecturer, "Cross-Border Family Mediation with an Emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction" sponsored by the University of Miami School of Law and the National Center for Missing and Exploited Children (NCMEC) (February 2008)

Participant, ICARA 15 Symposium. Office of Children's Issues, Department of State, 2003.

Attended the Fifth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction held at the Hague, Netherlands 2006.

Member of Study Group of the Secretary of State Advisory Committee of Private International Law considering the 1996 Hague Protection of Children Convention, 2007.

Lecturer, "From Ferreting to Fetching: How to Find, Freeze and Retrieve Marital Assets Hidden Abroad," ABA Section of Family Law, 2009 Spring CLE Conference.

Lecturer, "Moving from Kansas to Oz: Competing Paradigms and Practical Issues in International Child Custody Relocation Cases," Association of Family and Conciliation Courts (AFCC), 46th Annual Conference, May 2009.

Lecturer, "Transnational Families: Where International Law and Family Law Intersect," 2009 Florida College of Advanced Judicial Studies.

Lecturer, "Mediating International Child Abduction Cases and Other High Conflict Cross-Border Custody Disputes," ABA Section of International Law, 2009 Fall CLE Conference.

Lecturer, "Alternative to the Hague by Returning Kids Home and Making the Abductor Pay Through the UCCJEA", U.S. Chapter of the IAML, 2011 Annual General Meeting.

Observer/attendee on behalf of IAML (NGO) at the Sixth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19

October 1996 on Jurisdiction, Applicable Law, Recognition, Enforceability and Measures for the Protection of Children held at the Hague, Netherlands, June, 2011.

Lecturer, "Case Study: Application to Remove a Child From the Jurisdiction", IAML, 2011 Annual General Meeting held at Harrogate, U.K., September 2011.

Lecturer, "1980 Hague Convention", Lunch and Learn Seminar Sponsored by Family Court Services, October 2011.

Observer/attendee on behalf of IAML (NGO) at the Sixth meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforceability and Measures for the Protection of Children held at the Hague, Netherlands, January, 2012.

PUBLICATION

Author, "When the? Involves an International Move, The Answer May Lie in Retaining U.S. Jurisdiction," ABA Section Family Law, Family Advocate Spring 2006.

AWARDS AND RECOGNITIONS

Super Lawyers 2010, 2011 and 2112 (Top Attorneys in Florida). Florida Trend, the State's Legal Leaders. Florida Legal Elite 2009-2011. The First Family Law American Inns of Court Awards for Service (2008-10). Awards of Merit from the National Center for Missing and Exploited Children and the U.S Department of State Certificate of Appreciation for Extraordinary Assistance to Hague Convention Applicants. "AV" rated by Martindale Hubbell since 1976. Certificate of Recognition from ABA, Section of Family Law for Service as Chair of the International Law Committee. Listed in the Bar Register of Preeminent Lawyers. Supreme Court Certified Family Mediator. Listed in "Who's Who in America, World and Law".

MEMBERSHIPS

Fellow, International Academy of Matrimonial Lawyers (IAML): U.S. Chapter of the IAML, Board of Managers 2010-2013, Chairman of the Committee on Hague Conventions (2010-2012) and member of the Admissions Committee: First Family Law American Inn of Court, President (2009-10): American Bar Association: Family Law Section, International Law Committee, Chairman (2007-9) and Immediate Past Chairman (2009-2011), Domestic Violence Committee, Vice Chairman (2009-2011); International Law Section, Family Law Committee, member of Steering Committee; Florida Bar Association: former member; Continuing Legal Education, Children's Issues Committees, Legislation, Mental Health in Litigation, and Domestic Violence Committees; Mentor, International Child Abduction Attorney's Network (ICAAAN) and the U.S. Department of State, Office of Children's Issues Attorney Network; Member, International Society of Family Law; and, Member, Association of Family and Conciliation Courts.

REPORTED FAMILY CASES

Hanley v. Roy, 485 F.3rd 641 (11th Cir. 2007) (return to Ireland and held that district court made a "mockery" of Convention refusing to order the return of children to grandparents/guardians).

Dallemagne v Dallemagne, 440 F. Supp. 2d 1283 (M.D. Fla. 2006) (return to France and provides an excellent analysis of burden of proof and defenses).

Angulo Garcia v. Fernandez Angarita, 440 F. Supp. 2d 1364 (S.D. Fla. 2006) (return to Colombia and held, in part, that consent to travel is invalid if procured by fraud).

Leslie v. Noble, 377 F.Supp. 2d 1232 (S.D. Fla. 2005) (held that father had rights of custody before, during and after paternity court proceedings in Belize).

In Re Cabrera, 323 F.Supp.2d 1303 (S.D. Fla. 2004) (return to Argentina the court found equitable tolling and held that a child should be returned rather than threatened with possible deportation).

In Re Arison-Dorsman, U.S. Dist. Lexis 9861, 32 Media L. Rep. 1699 (S.D. Fla. 2004) (return ordered to Israel: record should not be sealed).

Marcos v. Haecker, 915 So.2d 703 (Fla. 3rd DCA 2005) (international paternity case involving Spain, Mexico and Florida where a motion to quash service of process was affirmed on appeal).

Dyce v. Christie, 17 So.3rd 892 (Fla. 4th DCA 2009) (expedited enforcement of final decree from Jamaica, child abduction, collateral attack of foreign judgment and due process of law).

Abdo v. Ichai, 34 So.3rd 13 (Fla. 4th DCA 2010) (PCA affirmed order permitting mother to relocate to France, retaining habitual residence in the United States and transferring jurisdiction to California).

Sarpel v. Eflanli, 65 So.3rd 1080 (Fla. 4th DCA 2011) (Temporary absence and the establishment of "home state" subject matter jurisdiction pursuant to the U.C.C.J.E.A. and anti-suit injunction preventing the former wife from attempting to modify the final judgment from Florida and "mirror orders" entered in Turkey).

Nancy Zalusky Berg

Nancy Zalusky Berg is a founding partner of Walling, Berg & Debele, P.A., a thirteen lawyer firm limiting its practice to family, juvenile and adoption law. Ms. Berg has limited her practice to family law since 1985. She is certified by the National Board of Trial Examiners as a Family Law Litigation Specialist. She is a member of the American Academy of Matrimonial Lawyers, (www.aaml.org) International Academy of Matrimonial Lawyers (www.iaml.org) and President of the IAML – USA Chapter and a member of the International Bar Association. She sits on the Minnesota Lawyers Board of Professional Responsibility; she has been listed in the “Best Lawyers in America” and has been identified as one of Minnesota’s “Super Lawyers” of *Law & Politics*, *Minnesota Monthly* and *Mpls-St. Paul* magazines since 1993. She has been listed as one of the top 100 lawyers in Minnesota for several years and is one of the top 40 lawyers in the Family Law practice area by *Law & Politics*. Ms. Berg has received a peer review rating of AV Preeminent by American Registry since 1995. Ms. Berg has also served on a variety of community non-profit boards and is an active glass and mosaic artist.

Walling, Berg & Debele, P.A., 121 South 8th Street, Suite 1100, Minneapolis, MN 55402 Phone: (612)340-1150 Fax: (612)340-1154 Email: nancy.berg@wbdlaw.com

Marian E. Saksena
Walling, Berg & Debele, P.A.
Minneapolis

Marian Saksena is an attorney and shareholder with Walling, Berg & Debele, P.A. where she represents children and adults in a wide variety of family and juvenile law matters in both state and tribal courts. Prior to entering private practice, Ms. Saksena served as a guardian ad litem and worked as a staff attorney with Children's Law Center of Minnesota, representing children in foster care. Ms. Saksena has served as the Chair of the Minnesota State Bar Association Children and the Law Section and is a member of the National Association of Counsel for Children. By appointment, Ms. Saksena also served on the Minnesota Supreme Court Juvenile Protection Rules Committee. Ms. Saksena received her J.D. from the University of Minnesota, where she also studied social work and received a Certificate in Child Abuse Prevention Studies.

Mindy F. Mitnick is a Licensed Psychologist practicing in Minneapolis. She received a Master of Education from Harvard University and a Master of Arts from the University of Minnesota. She specializes in complex custody cases, working as an evaluator, therapist and parenting consultant. Ms. Mitnick has trained professionals throughout the country and internationally about developmental issues in parenting schedules, effective interventions in high-conflict divorce, assessing allegations of sexual abuse during divorce disputes, and the use of expert witnesses in divorce cases. She has been a speaker for the National Association of Counsel for Children, the Association of Family and Conciliation Courts, the American Academy of Matrimonial Lawyers, and the National Center for Prosecution of Child Abuse. Ms. Mitnick served on the Minnesota Supreme Court Task Force on Parental Cooperation, as a consultant to the Minnesota Supreme Court Task Force on Visitation, and as a member of the ABA Criminal Justice Section Task Force on Child Witnesses. She served as a member of the AFCC Task Force on Court-Involved Therapy and is one of the authors of the Guidelines for Court-Involved Therapy. She has been elected to the Board of Directors of AFCC and to the Board of Directors of the Minnesota Chapter of AFCC.

PROFESSIONAL EXPERIENCE

Walling, Berg & Debele, P.A., Minneapolis, Minnesota

Attorney, May 2006 to Present

Law Clerk, May 2004 to May 2006

- Represent individuals in all aspects of family law, with emphasis on complex financial and child custody matters related to divorce; third party custody; international custody disputes pursuant to the Hague Convention; paternity and establishment of custody, parenting time and child support; domestic abuse orders for protection and harassment restraining orders; adoption; child protection and juvenile matters; and related appeals.
- Provide representation focused on negotiating a settlement through creative problem solving from case inception through trial.
- Notable Cases: *Hubbard County Health and Human Services v. Zacher*, 742 N.W.2d 223 (Minn. App. 2007); *Redleaf v. Redleaf*, A09-1805, 2010 WL 3543458 (Minn. Ct. App. Sept. 14, 2010); *Scala v. Pearson*, A09-709, 2010 WL 606967 (Minn. Ct. App. Feb. 23, 2010)
- Accolades: Named a Minnesota Rising Star for 2011.

Hennepin County Family Court Self-Help Center, Minneapolis, Minnesota

Minnesota Justice Foundation Clerkship

Law Clerk, May 2003 to August 2004

Volunteer Facilitator, September 2004 to May 2004

- Assisted *pro se* family court litigants navigate the legal system by reviewing pleadings, directing litigants to appropriate social service or legal resources, and educating them on the rules and procedures of family court.
- After clerkship ended, continued as bi-weekly volunteer facilitator, providing the same assistance to *pro se* litigants as described above.

Minnesota Indian Women's Resource Center, Minneapolis, Minnesota

Volunteer Law Clerk, January 2003 to May 2003

- Conducted legal research regarding child custody and child support issues that affected Native American families.

United Health Group, Golden Valley, Minnesota

Information and Referral Specialist, June 2000 to July 2001

- Interviewed individuals and assessed their needs for legal assistance, mental health counseling, and social service or community referrals.

Courage Center, Golden Valley, Minnesota

Clinical Neuropsychology Intern, September 1998 to June 1999

- Conducted neuropsychological testing with individuals suspected of having traumatic brain injury.
- Analyzed testing results, provided written report of test results, summarized results to the individual, and presented case summaries at weekly staff meetings.

National Institutes of Health, Bethesda, Maryland

Research Fellow, National Institute of Child Health and Human Development, October 1994 to October 1995

- Assisted with all aspects of research projects involving the emotional and cognitive development of infants and children, including background literature research, data collection, data analysis, and summarizing data into written findings and conclusions.

Institute for Mental Health Initiatives, Washington, D.C.

Research Intern, August 1993 to May 1994

- Conducted research regarding the impact of violence on children and childhood resiliency.

VOLUNTEER ACTIVITIES

Tubman/Chrysalis: A Center for Women, Minneapolis, Minnesota

Volunteer Attorney, Winter 2006 to Present

Volunteer Law Clinic Advocate, 2003 to 2005

- Provide advice and legal counsel to women with family law issues through Tubman's LAW Clinic
- Provide limited legal representation to women with family law issues through Tubman's Limited Legal Services Clinic (LLSC)
- Represent low income clients with family law issues on a pro bono basis

Volunteer Lawyers Network (VLN), Minneapolis, Minnesota

Volunteer Attorney, 2008 to Present

- Provide advice and legal counsel to individuals with family law issues at VLN Family Law Clinic
- Represent low income clients with family law issues on a pro bono basis

Children's Law Center, St. Paul, Minnesota

Volunteer Attorney, 2009 to Present

- Represent children involved in child protection proceedings

Crisis Connection, Minneapolis, Minnesota

Volunteer Phone Counselor, 1995-1996

Sasha Bruce House, Washington D.C.

Volunteer Youth Worker, Summer 1994

PROFESSIONAL AFFILIATIONS

- Hennepin County Bar Association, Family Law Section, Program Co-Chair
- Association of Family and Conciliation Courts, Communications Committee
- Board Member of Advisory Committee that oversees Hennepin County Bar Association (HCBA), Hennepin County Bar Foundation (HCBF), and Volunteer Lawyers Network (VLN)
- Minnesota State Bar Association
- Minnesota Women Lawyers

PUBLICATIONS AND PRESENTATIONS

Negotiating and Litigating International Child Abduction Cases, 2011 Family Law Institute Presentation.

International Family Law, Panel Member, International Academy of Matrimonial Lawyers (IAML), U.S. Chapter Annual Conference, Miami, Florida, February 19, 2011.

Child Support: An Overview of Law and Procedure, one-hour presentation at VLN Annual Family Law CLE on June 23, 2009.

Cooperative Practice: A Framework for Working with Opposing Counsel in Family Law Cases, *Family Law Forum*, A Publication of the Minnesota State Bar Association Family Law Section, Spring 2009.

I Have a Family Law Client, Now What?, 2008 Family Law Institute Presentation.

Minnesota's New Child Support Law: An Overview, *Hennepin Lawyer*, a publication of the Hennepin County Bar Association. May/June 2007.

Minnesota's New Child Support Law: The Basics, *Hearsay*, a publication of the Minnesota State Bar Association New Lawyers Section, Winter 2007 Edition.

EDUCATION

University of St. Thomas School of Law, Minneapolis, Minnesota

Juris Doctorate, May 2005

- Certified Student Attorney, Family Law Practice Group, University of St. Thomas Interprofessional Center for Counseling and Legal Services.

Minnesota School of Professional Psychology, Minneapolis, Minnesota

Master's Degree in Clinical Psychology, *Magna Cum Laude*, September 2001

Ohio University, Honors Tutorial College, Athens, Ohio

Bachelor's Degree in Psychology, *Summa Cum Laude*, June 1993

BAR ADMISSIONS

State of Minnesota, May 2006, #0353784

United States District Court, District of Minnesota, May 2008

David Salter

Short Biography

David Salter is Joint National Head of Family Law in Mills & Reeve LLP, one of Europe's largest family law team. He is a family law specialist and is well known for his expertise in the pensions issues arising on relationship breakdown. He sits as a Recorder and as a deputy High Court judge. He is a former National Chairman of Resolution (the English equivalent of AAML) and is the current President of the International Academy of Matrimonial Lawyers. He is a contributor to many family law texts including the Family Law Practice and Butterworths' Family Law Service. He is a member of the Family Procedure Rule Committee, the body responsible for family law delegated legislation.

Advokaterna
Sverker och Mia Reich Sjögren AB
i samarbete med
Advokatfirman Ljung

Mia Reich Sjögren

Member of the Swedish Bar Association since 1984

Partner , Sverker Sjögren Advokatbyrå AB, 1984- 2004

Partner , Advokaterna Sverker och Mia Reich Sjögren AB, 2004-

The Law Firm cooperates with Advokatfirman Ljung AB, Gothenburg since 2006

Address : Advokatfirman Ljung AB, Södra Hamngatan 23, 400 13 Gothenburg ,
Sweden.

Branch office in Båstad, Adress Ängelholmsvägen 1, 269 21 Båstad, Sweden.

Member of the IBA , family Law division

Fellow of the IAML since 1994,

Admissions Committee IAML

Counsel IAML

President of the European Chapter of the IAML 2008-2010

Vice President IAML 2011-

Lectured in Swedish International Family Law and Swedish Family Law

Lectured in Bruxelles for the European Parliament as an expert appointed by the
Swedish Bar Association

Experienced Hague Convention Counsel

Göteborg 2012-05-21

Mia Reich Sjögren

CURRICULUM VITAE

ESTHER L. LENKINSKI

400 Glencairn Avenue

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M5N 1V1

Business Tel: (416) 924-1970

Residence Tel: (416) 480-0787

PERSONAL DATA:

Date of Birth: July 11, 1949, Landskrona, Sweden

Marital Status: Married with two children. Alexandra and Maxwell

SUMMARY OF EXPERIENCE:

Private practice of family law since 1975 in a general practice including all branches of civil and estates litigation; Certified specialist in family law; Partner at Fasken Martineau DuMoulin LLP from 1984 to 2003; Partner at Appell, Lenkinski from 1975 to 1983; Member of Executive of Family Law section, Canadian Bar Association – Ontario; President of The Canadian Chapter of the International Academy of the Matrimonial Lawyers; former Secretary-Treasurer of the IAML Canadian Chapter; Former Head of Family Law section, Advocates' Society; Board of Directors of Advocates' Society; Instructor, Bar Admissions Course; Frequent appearances as a panelist and lecturer at various legal education programs in family law; Certified Mediator; Presenter for Law Society of Upper Canada and Ontario Bar Association, Continuing Legal Education Department.

EDUCATION:

1974 to present	Numerous and ongoing continuing legal education.
1998	Harvard Mediation Programme.
1974 - 1975	Bar admission course. Admitted to the bar in March 1975.
1970 - 1973	Osgoode Hall Law School, York University Bachelor of Laws degree
1966 - 1970	University of Toronto, Toronto, Ontario Honours Arts Program

LEGAL EXPERIENCE:

1993 to present	E. Lenkinski and Lenkinski Family Law & Mediation Professional Corporation
1984 - 1992	Partner, Fasken Martineau DuMoulin LLP
1984	Head of Family Law Section at Fasken Campbell Godfrey
1983 - 1984	Associate, Fasken & Calvin
1975 - 1983	Partner, Appell, Lenkinski
1973 - 1974	Articled at Stitt, Baker & Mackenzie
1972 - 1973	Student at Parkdale Community Services

LEGAL APPOINTMENTS AND POSITIONS

2011	Presenter, International Academy of Matrimonial Lawyers, Family Law presentation
2010	Presenter, Ontario Bar Association, "Operation Update"
2010	Presenter, Ontario Bar Association, "What's So Hard About Spousal Support"
2009	Presenter, Ontario Bar Association, "Conduct of the Family Law Trial"
2008	Presenter, Ontario Bar Association, "Remedies for Unfair Tactics in Family Law"
2007	Presenter, Ontario Bar Association, "Constructive and Resulting Trust"
2007	Presenter, CLE Family Law Summit
2006	Presenter, Law Society of Upper Canada, "Child Support and Shared Custody"
2004	Presenter, Law Society of Upper Canada, "Factoring in the Older Child, the III child, The Child Who Can't Withdraw"
2002	Presenter, The Canadian Institute, "Tactics and Strategy on Examinations and Motions in Matrimonial Cases"
2002	Presenter, The Law Society of Upper Canada, "Dealing With Family Law Issues in the Context of Incapacity"
2001	Reviewer of Articles for Canadian Journal of Family Law
2001	Presenter, Ontario Bar Association, "Operation Update 2001"
2001	Presenter, Canadian Bar Association, "New Trends and Protective Strategies in Family Law Constructive Trust Cases"
2001	Occasional Lecturer, Queens Law School, Trial Advocacy
2001	Presenter, Canadian Bar Association, "New Trends In Child Support Or How I Learned To Ignore The Tables And Love the Law"
2000	Presenter, Canadian Bar Association, "Bulls, Bears and Family Law"
2000	Presenter, Canadian Bar Association, The Six-Minute Family Lawyer, "Double-Dipping and Pensions"
1999-2000	Member, Executive of the Family Law Section, Canadian Bar Association - Ontario
1999	Member of International Academy of Matrimonial Lawyers
1999	Mentor, 1999 Articling Student Mentor Program

1998 Member, Toronto Ad Hoc Family Mediation Advisory Committee
1997 - 1998 Chairman of the Family Law Committee, The Advocates' Society
1998 Lecturer, Canadian Bar Association - Ontario, "Limitations"
1997 Presenter, Canadian Bar Association, "Limitations and Notice Period
Issues in Family Law"
1997 Member, External Committee, Child Support Guidelines Project,
Ministry of Attorney General
1996 Presenter, Canadian Institute "What is Past is Prologue to Future - Civil
Justice Review"
1996 Presenter, Continuing Legal Education "Six Minute Lawyer"
1996 Family Law Sub-Committee, The Advocates' Society regarding Child
Support Guidelines
1996 Presenter and Panelist, Annual Institute, "Civil Justice Review"
1994 to 1996 Member of Executive Committee, Family Law Section, Canadian Bar
Association - Ontario
1995 Member of Special Gifts Division, Opening Windows on the Future of
Women's Health Campaign, Women's College Hospital Foundation
1995 to 1998 Director of The Advocates' Society
1995 to present Mediator selected by Bench and Bar Committee of the Family Law
Division as a Dispute Resolution Officer.
1995 Presenter, The Law Society of Upper Canada, Continuing Legal
Education Department, "Building Up and Breaking Down : Family Law
and the Family Business"
1995 Chairman, Canadian Bar Association - Ontario, "Independent Legal
Advice, Guarantees and Bankruptcy - The Practice and Its Pitfalls"
1995 Lecturer, Canadian Bar Association - Ontario, 1995 Annual Institute,
"Alternative Dispute Resolution in Estate Matters"
1994 Lecturer, The Advocates' Society Fall Convention, 1994, "Leading
Evidence in Arbitration: Is There A Difference?"
1994 Lecturer, The Advocates' Society Fall Convention, 1995, "The
Arbitration Process"
1994 Certification as Mediator - Harvard Law School
1993 Lecturer, The Advocates' Society Fall Convention, "Circumventing the
Family Law Act"
1993 Lecturer at Canadian Bar Association - Ontario
1991 - Present Certified specialist in Family Law by the Law Society of Upper Canada
1991 Lecturer and Panelist, American Psychiatric Association, "Cross-
Examinations and the Clinician"
1990 - Present Family Law Subcommittee, The Advocates' Society, reviewing child
support guidelines
1988 - 1991 Instructor, Bar Admission Family Law Course
1988 Lecturer, Insight Seminar, Toronto, Ontario, "Guarantees"
1988 Lecturer, CBAO, "Professional Clients and their Practices: Issues on
Separation and Divorce Cross-Examinations"
1987 - Present Member, American Bar Association

1987 - 1992	Lecturer on Family Law topics, Toronto Jewish Congress, United Jewish Welfare Fund, United Jewish Congress Women's Endowment Fund
1985	Supervisor, Osgoode Hall Law School, Clinical Training Programme in Family Law
1985	Insight Seminar, "The Equalizer, <i>The Family Law Act</i> "
1979 - 1985	Judge of Moots held at Osgoode Hall Law School and University of Toronto
1975 - Present	Member, Canadian Bar Association, Family Law Section

PAPERS AND PUBLICATIONS:

- Ontario Family Law Practice, 2002 to present Co-author, published by LexisNexis Butterworths
- Legal Bullying: Abusive Litigation within Family Law Proceedings, Co-author, 2004
- Child Support - Factoring In The Older Child, The III Child and The Child Who Can't Withdraw, 2004
- Operation Update 2003, published by Ontario Bar Association, 2003
- Preservation Orders and Mareva Injunctions 2002, Co-author published by Ontario Bar Association, 2002
- Family and Estate Law Issues for the Power of Attorney 2002, Co-author published by The Law Society of Upper Canada, 2002
- For The Record: Leading Family Law Decisions for 2001 published by the Ontario Bar Association, 2001
- *New Trends In Child Support Or How I Learned To Ignore The Tables And Love the Law*, published by Canadian Bar Association - Ontario, 2001
- *Pensions. The Six Minute Lawyer* published by Canadian Bar Association - Ontario, 2000
- *Arbitration in Estates*, published by the Canadian Bar Association - Ontario, 1995
- *The Arbitration Process in Family Law*, published by The Advocates Society, 1994
- *Circumventing The Family Law Act*, 1993
- *Guarantees*, published by Insight Seminars, 1988
- *Pitfalls in The Family Law Act After One Year*, published by Insight, 1987
- *Practical Guide to the Family Law Act*, 1986, Carswell
- *The Equalizer, The Family Law Act*, published by Insight, 1985
- Editor, Canadian Current Law, 1974 to 1978
- Editor, Canadian Encyclopedic Digest, 1978
- Contributor, Halsbury's Laws of Canada, published by LexisNexis, 2010

CLUBS AND ACTIVITIES:

Past member Board of Directors, Amadeus Ensemble
Past member B'Nai Brith, Anti-Defamation League
Ontario Bar Association
The Advocates' Society
County of York Law Association

International Academy of Matrimonial Lawyers
Past member North York Symphony Orchestra
Past member Etobicoke Symphony Orchestra
Trenoty Chamber Ensemble

ANNE-MARIE HUTCHINSON OBE



Anne-Marie was admitted in 1985 and joined Dawson Cornwell, one of the UK's leading family law firms, as Head of the Children Department, in 1988. She is consistently named as a leading family lawyer in both Chambers and The Legal 500 and was singled out by Chambers as the sole "star individual" for cross-border disputes.

Anne-Marie is a specialist in surrogacy arrangements and surrogacy with an international element. She advises in respect of complex domestic and international adoption applications and legal issues arising from the creation and implementation of surrogacy arrangements and the Human Fertilisation and Embryology Act 2008.

Anne-Marie is accredited by Resolution as a specialist family lawyer with particular specialisms in child abduction, children law, forced marriage and honour based violence. She was awarded the inaugural UNICEF Child Rights Lawyer award in 1999. She received an OBE for her services to international child abduction and adoption in the 2002 Queen's New Year's Honours List. In 2010 she received the International Bar Association's Outstanding International Woman Lawyer award. In 2012 she was awarded an "Albert" by the Albert Kennedy Trust in recognition of her work on an international level in defending the human rights of young lesbian, gay, bi-sexual and trans people.

Anne-Marie is Chair of the Women Lawyers' Interest Group of the International Bar Association, Chair of the Trustees of Reunite: International Child Abduction Centre, a member of the International Issues Committee of The Law Society and Governor at Large of the International Academy of Matrimonial Lawyers. She is also a member of numerous associations and committees including the International Society of Family Law, the Institute of Advanced Legal Studies Working Group on the Cross Border Movement for Children and The Law Society International Issues Committee.

She is a regular speaker and lecturer both within the United Kingdom and abroad and has made numerous television appearances. She is consultant editor of "Children Law and Practice" by Hershman and McFarlane published by Family Law and an international correspondent for "International Family Law" published by Jordans. She is joint author of the text book "International Parental Child Abduction". She sits on the Editorial Board of the Child and Family Law Quarterly, published by Jordans.

Anne-Marie is a Founding Fellow of the International Surrogacy Forum: for the purpose of creating a forum of experts in the field of international surrogacy, working towards a multi-lateral convention for international surrogacy arrangements.

Dawson Cornwell the family law firm

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