Reducing the Trauma of Child Abduction Proceedings for Children

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Background

The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* seeks to protect children from the harmful effects of abduction and retention across international boundaries though the court process is often very traumatic for the children that the Convention seeks to protect.

In this paper we look at the purpose of the Convention and the practices and innovations in Canada and the UK (where the authors practice in this specialist field of family law) designed to reduce trauma to children.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the 1980 Hague Convention")

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, ("The 1980 Hague Convention") is probably the most successful piece of international family law. There are currently 98 contracting states[1] which include the USA, Canada and the UK.

It was signed at The Hague on 25 October 1980.

The purpose of the 1980 Hague Convention was to tackle the problem of children being removed or retained across international borders without the requisite consent(s) by seeking to ensure the prompt return of children who have been wrongfully removed/abducted or wrongfully retained from their country of habitual residence in a contracting state. There was a perception amongst the international community at the time (the late 1970s) that disgruntled parents were taking or retaining their children across international borders with increased prevalence in order to secure a perceived judicial advantage.

[1] As at 1 May 2018

Each contracting state agrees that if a child is abducted to or wrongfully retained in its country that it will not enter into a full welfare investigation of custody, contact/access or other parenting arrangements in respect of the child, which will be left to the court in the country where the child was last habitually resident. Instead the requested state is required to merely secure the child's early and safe return. It is designed to encourage a child's prompt return through administrative and judicial procedures so parents do not resort to self-help and abduction. This is not a departure from the principle that the welfare of the child is paramount as it is in a child's best interests not to be abducted and for decisions about the child to be made by the courts in the country where the child is or was habitually resident.

References to Articles in this paper are to the 1980 Hague Convention

As set out in Article 4 of the 1980 Hague Convention, "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights." and only applies to a child up to the age of 16, but not after.

The main goal of the 1980 Hague Convention is "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 …"[2]

Justice Donna Martinson Q.C., LLM (retired) notes in *Justice Not Just Access: Effective Outcomes for Children*, that there is a concern that access to justice focus primarily on access to justice for adults and fails to meet the obligations when considering the needs of children. As we will note further, the very real effects on the child following abduction, and the ways in which they interact with the justice system are deeply linked.

The Identity of the Abductor/Taking Parent and the Subject Child

A statistical analysis has been undertaken of applications made in 2015 under the 1980 Hague Convention. At least 2,997 children were involved in the 2,270 return applications documented in the study.

The study confirmed that 73% of taking persons were mothers, 24% of the taking persons were fathers and the remaining 3% comprised grandparents, institutions or other relatives.[3]

[2] *Convention on the Civil Aspects of Child Abduction*
[3] https://www.hcch.net/en/publications-and-studies/details4/?pid=6598&dtid=32

Where the information was available, and contrary to the perception of those who had conceived the 1980 Hague Convention the large majority (80%) of taking persons were the "primary carer" or "joint-primary carer" of the child.

58% of taking persons travelled to a State of which they were a national.

A large majority of applications (70%) involved a single child and there were close to equal numbers of boys and girls with 53% of children being male and 47% female.

The average age of the child involved was 6.8 years.

Impact of Abduction

"The harms the *Hague Convention* seeks to remedy are evident. International child abductions have serious consequences for the children abducted and the parents left behind. The children are removed from their home environments and often from contact with the other parents. They may be transplanted into a culture with which they have no prior ties, with different social structures, school systems, and sometimes languages. Dueling custody battles waged in different countries may follow, delaying resolution of custody issues. None of this is good for children or parents."[4]

Following Edelson and Lindhort as well as Professor Carol Bruch's study in 2012, Donna Martinson, Q.C., LLM and Melissa Gregg, LL.B[5] set out some of the concerns following the abduction of a child. The Short-term effects noted nightmares, anxiety, fear, sleeplessness, and difficulties reintegrating into their peer group. The 2006 Reunite study also set out the physical changes that seemed to be wrought from that anxiety, including headaches, stomach cramps and high temperatures. The long-term effects, Bruch postulates, could be linked to both physical and psychological concerns. The generalised anxiety may manifest into depression, substance abuse, and suicide, or in the physical realm, a decreased life span, heart disease or cancer.

Martinson further notes that PTSD was a symptom experienced by the majority of abductees, and an increased inability to establish trust or connect with others.

[4] The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon and Brown JJ. delivered by The Chief Justice in Office of the Children's Lawyer *v.* Balev, 2018 SCC 16 at para 23

[5] D. Martinson, M. Gregg, "Cross Border Parental Child Abduction – Social Context Issues" at p. 21

In a recent Keynote address given by the Alberta Family Wellness Initiative, they described "toxic stress", the excessive and prolonged activation of the stress response systems in the body, can directly affect the brain's architecture, leading to the same symptoms as described above. [6]

The devastating impact of parental child abduction is explained powerfully by Sarah Cecilie, herself the victim of parental child abduction.
https://www.youtube.com/watch?v=SLuMJEqStUc

When the Court Process Compounds or is the Source of Trauma

Though the trauma of parental abduction may never be undone, in an ideal world the court process designed to secure the child's return should not compound or become the source of trauma but to what extent are our national courts achieving this aim?

The 1980 Hague Convention is intended to support not only the interests of children in general but those of the individual child that is the subject of the Hague Convention court process. All too often child abduction proceedings can be very traumatic for children. Sadly, children frequently experience trauma caused by the various stages of the court process itself.

While we investigate the mechanisms, which contribute to the trauma, we must consider the court's response. While the judiciary may receive training, or through personal experience feel confident to engage with the child, in Alberta, as has been noted in the United States, Federal judges, not used to listening to children, hear most international abduction cases[7].

The methods in which children begin to process trauma after events such as child abduction, commonly, is that they seek to establish understanding and control. As we've noted, their development can be altered – socially and physically. As lawmakers, judges, lawyers, and mental health practitioners, we must continue to advocate for the best possible outcome for the child, which extends even beyond the final affidavit's filing, long past closing arguments.
As urged by Dr. Louis Sas, "There is an urgent need to modify the complexity and nature of questions put to children on the stand, and the need to treat child witnesses in a more sensitive and enlightened manner, so that they can share their experiences with the court"[8]

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[6] E. Wotherspoon, R. Mychasiuk, "Keeping the Baby in Mind – Infants in Family Court" as presented at the Symposium on Children's Participation in Justice Processes, September 14-16, 2017
[7] L. Eldrod, "Hearing the Voice of the Child in Hague Abduction Cases", pg. 970
[8] L. Sas, Ph.D.C. Psych, "The Interaction Between Children's Developmental Capabilities and the Courtroom Environment: The Impact on Testimonial Competency", Pg. viii

There are several important factors that must be considered to ensure that the outcome of the trial or hearing respects the autonomy of the child, and the impact that the circumstances may have had on them.

The Court Process

The removal or retention

The first stage of the process that the child will experience is the removal or retention itself, which may take many forms.

In some instances the child has gone on holiday (with all of the excitement that engenders in a child) to a very familiar annual holiday destination in the taking parent's national country and the child's holiday merged seamlessly into "living" in that country.

In other instances the child will have left a toxic family home in haste with the taking parent and in circumstances that mean even a young child will understand they have fled to another country for perceived sanctuary.

In other instances, a child will have been taken in haste and without explanation from an otherwise entirely happy and settled home life where they spent plenty of time with both parents and taken to an entirely alien country and situation where they are told that they must now hide.

All three scenarios are caught by the 1980 Hague Convention. Each involves a very different experience for the child in question. Different types of trauma, different levels of trauma.

Should the same approach be taken by the court and the legal profession to each of these scenarios?

Location of the Child/Protective Measures

Our various national courts approach the location of an abducted child in very different ways.

It has hitherto been the established practice of the English High Court (which has exclusive jurisdiction to hear 1980 Hague Convention cases in England and Wales) to make ex parte/without notice orders designed to formally "locate" an abducted child (even when their whereabouts was well known as they were staying with family or had been attending school for

many months) and "secure" their location by the service of injunction, the seizure of passports and travel documents and the implementation of a port alert. Essentially the court and specialist legal practitioners in this field were inclined to take no chances and to treat every taking parent as a profound flight risk. From the child's perspective this meant that the police would come to the address where they were staying, often in the middle of the night (as this is when children are invariably at home) and locate the child within the address (the police are required to see the child and confirm that it is physically at the address). In the most serious cases where there was clear and unequivocal evidence that the taking parent was a profound flight risk, the court would contemplate whether a without notice Collection Order should be made essentially removing the child from the taking parent with the assistance of the police and placing the child either in the care of the local authority or in the left behind parent's care.

Both orders would inevitably cause a child trauma. The trauma of the police arrival, the trauma of observing the taking parent's shock, fear, distress, the trauma of being discovered (if you had been told that you had to hide to remain "safe"), the trauma of uncertainty and, in the worst cases the trauma of being suddenly separated from the taking parent's care who might have been the child's primary carer from birth.

What is the alternative? If abduction is recognised as traumatic and harmful for children should this be guarded against at all costs and with little thought of the trauma that is caused to a child by the very steps that are implemented to protect the child from onward abduction?

In England there has been a recent wholescale review of our practice and procedure in child abduction cases.

One of the practices that came under particular scrutiny was the hitherto established practice of without notice orders at the commencement of the Court process. As a consequence of a new practice guidance issued by the President of the Family Division in England and Wales in March 2018[9] concerning the case management of international child abduction cases without notice orders are no longer to be automatically made at the commencement of child abductions proceedings. Without notice applications will in future be justified *only* where (a) the case is one of exceptional urgency or (b) there is a compelling case that the child's welfare will be compromised if the other party is alerted in advance or (c) where the whereabouts of the child and the proposed respondent/i.e. the taking parent are unknown.

[9] https://www.judiciary.gov.uk/publications/practice-guidance-case-management-and-mediation-of-international-child-abduction-proceedings/

Not every taking parent is a flight risk. Many taking parents are where they want to be and want to remain and they have little appreciation for the fact that they have done anything wrong by their actions and would never intentionally break the law. Port alerts, injunctions and orders for the seizure of passports and travel documents will now be reserved for cases when the taking parent is a proven flight risk who is likely to frustrate the court process. Applications for such orders have to be supported by a statement which explains, in detail, the need for such orders with reference to the facts of the particular case in question. The English court recognises that Passport orders and location orders constitute an interference with the child's and the proposed respondent's fundamental rights. Accordingly, the overriding principle is that parties should only seek, and the court can only be expected to grant such orders as are necessary and proportionate having regard to the risks assessed to exist on the evidence in the particular case.

In addition the court has always been reluctant to separate children from their primary carer parents and therefore although it is always possible for the court to order the collection of a child in the most serious of cases there is an established practice in England and Wales of inviting the taking parent (who is a proven flight risk) to submit to being voluntarily tagged and subject to a curfew so that the child can then continue to reside with them pending the outcome of the proceedings. An electronic tag is secured to one of their legs and a curfew monitoring box is installed in their home and if they are away from the home between say 8pm and 6am (of whatever their curfew is) people are notified. It is the same gear used when people are released from prison on licence.

In *Re C (Abduction: Interim Directions: Accommodation by Local Authority)* [2003] EWHC 3065 (Fam), [2004] 1 FLR 653 where the taking parent, the child's mother had gone to extraordinary lengths to conceal her daughter's whereabouts in an attempt to willfully prevent location, Mr. Justice Singer said:

> "[Para.45] An innovation in this case was the mother's suggestion that the package of protective measures should include a direction, pursuant to s.5 of the Child Abduction and Custody Act 1985, that she undergo electronic tagging. I take the view that such a direction may be made under that provision if it is necessary 'for the purpose of securing the welfare of the child' and/or 'to prevent changes in the circumstances relevant to the determination of the application'".
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> "[Para.46] Although in future cases there may be funding issues to be resolved, in principle arrangements for electronic tagging can be made if the court so orders, which I assume it would ordinarily only do with the consent of the individual concerned (or perhaps as a condition, non-compliance with which might bring about alternative

safeguards against the perceived risk). I emphasise that such requirements are unlikely to be appropriate save in very few cases."

In the co-author's experience most, primary care-taking parents are willing to voluntarily submit to being tagged and their liberty being curtailed in this manner if it means that their child remains in their care pending the outcome of the proceedings, and it is a very helpful and sensible way of seeking to reduce the trauma of the proceedings for the child.

Recently the English court has also used tagging orders to prevent parents taking their children to Syria to join ISIS.

Habitual Residence

The forum of preference often falls to Habitual Residence, a house in which much scholarship is built.

Although a child's habitual residence is an essential component and prerequisite of any application pursuant to the 1980 Hague Convention, it is not defined within the convention which has led to courts around the world establishing their own tests to determine habitual residence and huge international disparity.

The predominant models which interpret the Hague Convention are the Parental Intention Model, and the Child Centric Model, and a Hybridised model - Rhona Schuz opines that in light of continued uncertainty regarding a protocol which could provide a definition of habitual residence, "the best solution would seem to be for the Hague Conference to procure a Guide to Good Practice recommending adoption of the combined approach and explaining how it will be applied in common situations." (221)

In Canada, we tended to follow the parental/settled intent model, with no rigid definition, which as Erin Gallagher laments, "combines an extremely flexible standard with unfortunately rigid rules"[10] However the Supreme Court of Canada's recent decision in Office of the Children's Lawyer v. Balev (supra. [4]) the majority of the Court opted for hybridised model. The Court stated that such an approach would harmonize with other countries.

In the UK, it is settled law that the same definition of habitual residence applies in all children cases (Hague Convention cases and domestic cases) and accords with that adopted by the

[10] E. Gallagher, "A House is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence", at pg. 475

ECJ/CJEU. Instead of focusing primarily on either parental intention or the child's acclimatization, the judge determining habitual residence must look to all relevant considerations arising from the facts of the case:

A) The child's links to and circumstances in country A;

b) The circumstances of the child's move from country A to country B;

c) And the child's links to and circumstances in country B.

d) Considerations include: duration, regularity, conditions, and reasons for the child's stay in a member state and the child's nationality.

e) The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children. But, there is no rule that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances.

Furthermore, the hybrid approach best fulfills the goals of prompt return: (1) deterring parents from abducting the child in an attempt to establish links with a country that may award them custody, (2) encouraging the speedy adjudication of custody or access disputes in the forum of the child's habitual residence, and (3) protecting the child from the harmful effects of wrongful removal or retention. Under the hybrid approach, a child's habitual residence can change while he or she is staying with one parent under the time-limited consent of the other. The application judge considers the intention of the parents that the move would be temporary, and the reasons for that agreement but also considers all other evidence relevant to the child's habitual residence. (supra 4, Per McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon and Brown JJ)

The European test for the determination of the habitual residence of a child was first propounded in ***Proceedings brought by A*** (Case C-523/07) [2010] Fam 42, [2009] 2 FLR 1, as follows:

> "[44]…(habitual residence) must be interpreted as meaning that ***it corresponds to the place which reflects some degree of integration by the child in a social and family environment***."

A short while later, in the case of ***Mercredi v Chaffe*** (Case C-497/10 PPU) [2012] Fam 22, [2011] 1 FLR 1293, the ECJ/CJEU clarified that habitual residence must, as a general rule, have a certain duration which reflects an adequate degree of stability. However, there is no minimum duration before which a child can be considered to be habitually resident in a particular country.

> "[47] To ensure that the best interests of the child are given the utmost consideration, the Court has previously ruled that ***the concept of 'habitual residence' under Article 8(1) of the Regulation corresponds to the place which reflects some degree of integration by***

> ***the child in a social and family environment***. That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case (see A, paragraph 44)."

The UK Supreme court has confirmed in its subsequent decisions[11] that the way in which the concept of habitual residence had been overlaid with legal constructs is inconsistent with the essentially factual nature of the enquiry. Moreover, the CJEU approach is preferable because it concentrates on the situation of the child, with the parents' intentions being only one of the relevant factors[12]. This can be seen in the case of C (Children), Re (Rev 1) [2018] UKSC 8 (14 February 2018) (Emphasis added):

> "After reviewing the body of evidence from the Mother, relatives, neighbours and the playschool manager, to the effect that the children were, by the Summer of 2016, **firmly integrated into the social and family environment** of the part of England in which they had lived for a year, and, in the case of the younger child, for somewhat longer than he had lived in Australia. By reference to the decision of Hayden J in In re B (A Child) (Custody Rights: Habitual Residence) [2016] EWHC 2174 (Fam); [2016] 4 WLR 156, he directed himself correctly as to the test of habitual residence and the factors relevant to the integration necessary to establish it..."

In Re LC (Reunite: International Child Abduction Centre Intervening) [2014] UKSC 1 ("Re LC") the UK Supreme Court determined that when considering the question of the habitual residence of an adolescent child and his or her integration, the child's own state of mind can be a relevant consideration. Nowadays children are as active on social media as their parents if not more so.

One of the most readily accessible ways in which to secure contemporaneous information about a child's state of mind is via the messages that they exchange with friends. In **Re LC** one of the co-authors of this paper acted for T, the adolescent child in question and the elder of the four siblings who was the subject of a Hague Convention application. Lord Wilson opined that "T's assertions [regarding her habitual residence] were made after she had left Spain and may not

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[11] Re A (Jurisdiction: Return of Child) [2013] UKSC 60 [2014] 1 FLR 111;
Re KL (Abduction: Habitual Residence: Inherent Jurisdiction) [2013] UKSC 75 [2014] 1 FLR 772;
Re LC (Reunite: International Child Abduction Centre Intervening) [2014] UKSC 1; [2014] 1 FLR 1486
In re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] UKSC 35, [2016] AC 76, sub nom AR v RN (Habitual Residence) [2015] 2 FLR 503;
Re B (A child) (Habitual Residence: Inherent Jurisdiction) *[2016] UKSC 4, [2016] 2 WLR 557*

[12] In re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] UKSC 35, [2016] AC 76, sub nom AR v RN (Habitual Residence) [2015] 2 FLR 503; R. Schuz, "Habitual Residence of the Child Revisited: a Trilogy of Cases in the UK Supreme Court" at pg. 346

deserve the weight which might attach, for example, to any emails or letters which she might have sent or to any statements which she might have made on social networking sites while she was there." When the case was remitted for rehearing the co-author assisted T in collating information that she had sent in emails and posted on social networking sites which detailed her wishes and feelings accurately and contemporaneously.

By placing the emphasis on the child, and in seeking to harmonise the approach to the determination of a child's habitual residence internationally, we will see that the anxiety around the situation may decrease, as children learn that they will not be pulled away from a community they have fully integrated into, regardless of their parent's intentions. It remains to be seen whether the harmonised approach will achieve this result in Canada now that the SCC has issued its ruling on this very issue of Habitual Residence (Office of the Children's Lawyer v. Balev, [2016] S.C.C.A. No. 477).

The Voice of the Child in the Proceedings

Children must be allowed to have a voice in the proceedings if they are to feel as if they have been heard, and their preferences given weight. Children are not automatons, but complex individuals, and as can be the case in these situations, they are dealing with adult problems.
"*…. there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides"*[13]

Justice Donna Martinson, Q.C, LLM[14] (Justice not Just Access) notes that Article 13 of the Hague Convention is connected to all other articles of the 1980 Hague Convention, and that "*the right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention*." It is up to the judiciary to place the proper emphasis on their words, but regardless of the outcome, the child must feel heard, acknowledged and understood. We must at all stages, use compassion as a tool for justice. In using this tool, we must turn to the child, and give weight to their voice.

The ways in which the child's voice can be conveyed in child abduction proceedings are multiple and in England & Wales are helpfully summarised by Lord Justice Moore-Bick at para 53 of his judgment in the court of appeal decision in Re KP (A Child) [2014] EWCA Civ 554, CA:

[13] Baroness Hale of Richmond; Re D (A Child)(Abduction: Custody Rights) [2006] UKHL 51, [2007] 1 FLR 961
[14] D. Martinson, "Justice, not Just Access: Effective Outcomes for Children" at pg. 18

a) There is a presumption that a child will be heard during Hague Convention proceedings, unless this appears inappropriate;

b) In this context, 'hearing' the child involves listening to the child's point of view and hearing what they have to say;

c) The means of conveying a child's views to the court must be independent of the abducting parent;

d) There are three possible channels through which a child may be heard:
   i) Report by a CAFCASS officer or other professional;
   ii) Face to face interview with the judge;
   iii) Child being afforded full party status with legal representation.

e) In most cases an interview with the child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary;

f) Where a meeting takes place it is an opportunity:
   i) for the judge to hear what the child may wish to say; and
   ii) for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome

g) a meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process

Ensuring that a child is 'heard' may on occasion necessitate the child being separately represented. The perception of separate representation for a child is that their voice has parity with the voices of their parents and it allows the child to feel that they have done all they can in respect of the important decisions before the court, the outcome of which arguably effects them the most. This perception must not be underestimated. A mature and elder child, in particular, will arguably feel no differently about such an issue than an aggrieved parent. Although there may be a desire to shield children from litigation, by the time a child is in a position to request separate representation they are usually already embroiled in the litigation.

The statutory test for joinder[15] in proceedings in England and Wales stipulates that "The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so."

In the UK an application for the separate representation of a subject child in Hague proceedings is most likely to succeed when:

i. the child does not have a parent who can represent their views;
ii. the child is advancing a defence which is not being advanced by an existing respondent to the proceedings;
iii. the case is quasi-public law (i.e. it is proposed that the subject child will return not to the left behind parent but to state care or the applicant is a state authority (social services or court) rather than the left behind parent);
iv. the child has their own evidence that is relevant to the issues in the case (*Re LC);*
v. the abducting parent's conduct might prejudice the child's objections;
vi. the child may have views that conflict with the abducting parent; and
vii. the child may have a burning desire to have their voice heard and to participate in the proceedings and would feel a real sense of injustice if they were ordered to return without having been given the opportunity to present their case independently.

When the settlement exception pursuant to Article 12 is relevant and pleaded it is now established practice in the UK for all subject children to be joined as a matter of course, irrespective of their age.[16]

The Canadian court also enables the subject child's voice to be heard in various ways.

In JS v RM [2013] A.J. No. 1390 the co-author, Max Blitt, QC represented the child. Under Article 13 of the Hague Convention, the purpose in this hearing was to ensure that the child's wishes were brought to the attention of the court and for them to determine if he was of an age and degree of maturity for his wishes to be considered by the court. Art 13 of The Hague Convention and Art 12 of the UNCRC were argued on appeal, and in support. The practice of the UK court was relied on to argue that "there has been a significant trend in taking into account *younger* children's views than had previously been the case."[17] The Alberta Court of Appeal took into consideration the child's development, and whether the child was old enough and mature enough. The Court ruled that the wishes of the child were to be determined by a mental health

[15] Rule 16.2(1) of Family Procedure Rules 2010
[16] *Re M (Zimbabwe)*
[17] M. Blitt, "Anatomy of the Child's Objection Defence in Hague Abduction Cases", at pg. 5

expert. However, it is critical to note that government funding (legal aid) is not available to fund the use of a therapist in every case.

Concerns about finances by the adults can filter down to children. They are able to perceive the concern, even if this anxiety is never communicated directly to them. When facing a lengthy legal process and the associated financial costs a child may feel pressured either directly or indirectly, which is counterproductive to their well-being during an event which is already highly stressful.

The UN set a guideline for the Voice of Child report which states that:

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

We must consider then who may advocate for the Child, and how to best convey those express opinions. By providing the courts with a transcript of the child's wishes, we provide the child with the knowledge that they have been heard. We can further see this adopted in Canada in the Court of Queen's Bench of Alberta's Practice Note 7 which provides:

- 1. Interventions are appropriate in the context of family law case management for a small minority of separated and divorcing families where decisions concerning children are before the Court and where:
  - i. the families are experiencing a state of high conflict;
  - ii. the intervention of the Court is required; and
  - iii. the Court requires assistance from Parenting Experts.
- 2. It is in the best interests of children who are members of conflicted families that there be early, quick and effective intervention by the Courts and Parenting Experts.
- 3. Under this Practice Note a Parenting Expert **will not provide an opinion or recommendations** as to the best interests of the children, including opinions or recommendations regarding parenting time/responsibilities, custody, access or relocation.
- 4. Where a parent refuses to provide his/her consent to the Parenting Expert for an Intervention or consent to allow the Parenting Expert to speak to the children

alone or with the other parent, the Court may dispense with that parent's consent and order the Intervention to proceed without that parent's involvement.

However, we must go even a step further in providing a child a voice in the court. As Schuz argues, there should be separate representation for a child as is mandated by law in Switzerland and South Africa.

By providing separate representation, the child not only has a voice in the court, but a method to make their words and best interests actionable. By empowering the child, we may be able to save them from such intolerable situations such as when the Hague Convention may require a child to be placed in foster care, pending a hearing, when it is not explicitly in their best interests.

As we have already explained in the context of the consideration of a child's habitual residence Social media is used extensively by children and adolescent children in particular as a medium for expression. It is becoming increasingly common that children and teenagers who feel they have been denied a voice in court proceedings to resort to using social media to convey their thoughts and opinions. The danger of such a forum, of course, arises from the absolute subjectivity of the communication, and we would strongly warn that this discourse should only be considered by the court, but with variable degrees of weight when making determinations, as social media has the potential to be an unfiltered mouthpiece for the child's desires. Due to its nature, social media platforms are easier to influence, hack, or otherwise alter, and should serve more as a way to inform, as it is still a medium where it can be impossible to tell influence, interference, or intent, and if it differs from the child whose account it was posted from.

The belief of course is that if their opinions cannot be heard in court then they may have better luck in the court of public opinion.

When considering the wishes of the child, we must also focus on the mental health of the individual. Following a recent trial or hearing, the need for therapy – immediate and consistent- became overwhelmingly obvious. The Trial was held in Dec. 2017 in the Alberta Court of the Queen's Bench between the parties El Husseini v Khalifeh.

During the El Husseini trial, it became apparent that the need for consistent therapy for the child with the goal of reintegration loomed large over the issues at trial or hearing. While the child clearly stated that he loved his father, and wished to spend time with him, he still had difficulties dealing with his abduction. The fear of re-abduction was only exacerbated in the lead-up time to trial or hearing when he was brought in for an initial consultation and follow-up with a therapist. The child, prior to trial had spoken to a school counsellor, and one other therapist, however, the

anxiety, distress, and fear of his father was not addressed with the Father himself, Mr. El Husseini. After hearing from the therapist on the stand, Mr. El Husseini was enlightened about the distress the Child felt, and advocated to be included in therapy with the Child to try to mend the divide his actions had caused.

Mr. El Husseini's realization may not be one that others in his situation may feel, however it brought to light the necessity of reintegration within the family structure, and, using appropriate therapy when the child is ready, to address the emotions and concerns of the child and the abducting parent. The Child of Mr. El Husseini claimed to suffer from nightmares and had questions regarding his treatment during his abduction that were left unanswered and unaccounted for. To allow the Child to be heard, and address his abductor in a safe environment, would be invaluable to his continued emotional growth. In a similar vein, we must look at extending therapy options to other children that have suffered.

The Arrangement for Court Ordered Return/Use of Undertakings

In the event that the left behind parent's application is successful the subject child(ren) must return to the country of their habitual residence.

There is enormous international disparity in the manner in which children are returned home.

In some states the court does not afford the taking parent the opportunity of escorting the child home but state that the terms of the convention require them (the court) to order the child's return in the case of the left behind parent. When the left behind parent has never been the child's primary carer or was the alleged cause of flight the prospect of a child being separated from their primary carer and returned in this manner can be the cause of immense trauma. In addition when the taking parent wishes to escort the child home there have been plenty of instances when they have been arrested on return or the children forcibly removed from their care as soon as they land. Whilst the trauma of return in these circumstances may not reach the high threshold of an Article 13 (b) exception it can nevertheless be traumatic for the child in question.

In order to ameliorate concerns about the child's wellbeing on return or in relation to the mode of return, the English court has an established practice and expectation that the taking parent may be afforded the opportunity to escort the child home and that undertakings will be provided by the left behind parent to ensure a calm period of judicial and physical transition until the matter comes 'inter partes' before a competent court in the requesting state. This is be no means a uniform practice internationally in fact many countries deplore the use of undertakings.

However, in the co-author's experience undertakings of this nature are extremely useful and can help to alleviate the trauma of a court ordered return

They are not intended to delay the proceedings but a return may be delayed, or in some rare circumstances refused, unless and until it is known that the undertakings are implemented and/or properly in place. It is only right to record that these undertakings have caused some problems with foreign courts that can, on occasion, regard them as intruding on their jurisdiction and therefore may not have any regard to them or to any subsequent breach.

At the first directions hearing in child abduction proceedings heard by the English High Court, parties are asked to state what undertakings are sought and what are offered in order to focus attention on the issues and ascertain areas of difference. The giving of undertakings by the left behind parent, especially if the taking parent was the primary carer, is an essential part of the court process.

English High Court Judges tend to accept, in good faith, undertakings given by left behind parents. Nevertheless, the court will not necessarily require the left behind parent to provide all the undertakings that are sought by the taking parent and some countries still do not give effect or weight to undertakings given by a party to the English court which is extremely disappointing and risks a child being harmed in the transition.

Protective measures can also be directed by the court of the requested state pursuant to Art 11 of the 1996 Hague Convention or EU Regulation 606/2013 dated 12 June 2013 on the Mutual Recognition of Protective measures in Civil Matters. In *RB v DB [2015] EWHC 1817 (Fam).* Mostyn J issued orders under both provisions to render protective measures 'doubly enforceable' in Austria. The 1996 Hague Convention has not yet been adopted in Canada.

Undertakings frequently sought from a left behind parent in proceedings heard in England

- they will not pursue, commence or encourage the commencement of criminal or civil proceedings designed to punish the abducting parent for the child's abduction.
- they will seek the withdrawal of any criminal charges before the child's return.
- The child and taking parent may return to live in the former matrimonial home or be provided with reasonable alternate accommodation.
- they will live apart from them, often in alternative accommodation and will not come to the home save for the purposes of agreed visitation/contact.
- they will pay the expenses of their return including airfares.
- they will support them financially subject to a consideration of the means of both parents.
- they will not be violent to them.

- They will ensure that there are no court hearings within an unduly short time of the child's return but the matter will thereafter be dealt with expeditiously and on notice.
- they will not be at the airport on arrival, in order to avoid immediate friction.

The Courts in Canada impose similar undertakings, in many cases. One of the authors, however; in a Hague Convention trial in August, 2017 could not persuade the Court to Order any undertakings.

Where to Go From Here

There can be no question that the strongest form of harm reduction is prevention. In this instance, we must consider Mediation. In Justice Victoria Starr's article, *Preventing Parental Child Abduction*, she recommends mediation or counselling to reduce the risk of abduction in the first place, as it may help to smooth the transition, when risk is at its peak. She opines later that enough still has not been achieved to mitigate the risk of abduction, an issue that we will not discuss, but which would serve the greatest harm reduction available – to not cause it at all.

There are 10 recommendations based upon the above comments from prior experience, and inquiry in the judicial system.

1. We must encourage Legal reform regarding the manner in which children participate in the judicial system
2. Early therapeutic intervention for children that have been abducted: As considered in El Husseini, the Child would have benefited from consistent therapy, as well as therapy with an aim at reconciliation, between father and son.
3. Do we need to reframe the question "children have a vote but not a veto? How do we ensure that the "objection" defence is given its due weight so that we can provide children with a vote that matters, where it is not easily overruled by paternalistic intent?
4. Best Practices guide for the interpretation of the Hague Convention as it relates to the article 13 defence.
5. Appropriate training for the judiciary and legal counsel when it comes to interviewing children. When engaging with young children, there should be a fundamental understanding about how to interview and engage with children in the court, beyond mental health professionals. This would serve to supplement and not replace qualified therapist practitioners, so that there is a much more child friendly court room. This would decease anxiety as well as improve the interviewing skills of legal professionals.

6. Consider the use of electronic tags and other means of preventing re-abduction whilst enabling children to remain with their primary carer.
7. Consider the Swiss and Japanese approach to the 'Intolerable Risk of Harm' defense as a lower threshold. This could prevent harmful situations such as separating a child from a competent caretaker to be placed in foster care, pending being reunited with the abuser.
8. Proper representation for the Child – even going so far as to make the Children parties to the trial or hearing.
9. We must consider the universal use of undertakings and render them enforceable in the requesting state
10. Contribute and promote the Hague (Netherlands) in its research in the area of Child Abduction and advocate for further studies regarding trauma in the Hague context.

Reducing the trauma experienced by children that are the subject of child abduction proceedings is a necessity.

With the law in flux as it is, rigid yet undefined in areas, with changes on the horizon due to political devices such as Brexit, it's important to continue to listen. The voice of a child has been minimized for too long. We must amplify it and protect it as much as we are able. As legal professionals, the sharpest tool we have is compassion and understanding, and where that tool is applied, we will see the results. A child may not have the same intellectual grasp as an adult, but they will remember when they have been acknowledged, empowered, and that they could mould the shape of their own future.

The Presenters

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Helen Blackburn is a solicitor and partner at The International Family Law Group LLP (iFLG) in London, England. She specialises in family law concerning children and has a particular expertise in child abduction law and other children cases with an international dimension or involving the cross border movement of children. Helen has extensive experience dealing with the Hague Convention on the Civil Aspects of International Child Abductions and she was Chair of CALA – the Child Abduction Lawyers Association in England & Wales from Autumn 2015 until Spring 2018. She has extensive experience of cases involving arrangements for children, custody/residence, contact/access (domestic and international), adoption (domestic and inter country), the reciprocal enforcement of foreign orders, international relocation/ leave to remove applications and jurisdiction disputes. Helen appears in Legal 500 and is listed as a specialist in "Children: Cross-Border Disputes" in Chambers UK. Helen is accredited by Resolution as a Specialist Family lawyer with a particular specialism in Child Abduction and Private Children Law. Helen has written for various legal journals and publications and is a frequent lecturer on family law. She has been interviewed by the BBC regarding child abduction issues. She is the author of three chapters (Child abduction, International adoption and legal aid) in "The International Family Law Practice" (LexisNexis) and is the author of the chapter entitled "The Global Child" in Resolution's publication "The Modern Family".

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Max Blitt was admitted to the Alberta Bar in 1975 and is currently an associate of the law firm of Spier Harben. He practices primarily in Family Law, Real Estate, Wills and Estates.

Max has also had extensive experience dealing with the Hague Convention on the Civil Aspects of International Child Abductions. He has personally been involved in assisting clients and legal counsel to recover children that have been abducted by parents and relatives to other Provinces in Canada, the United States, Poland, France, Germany, Latvia, Hungary, Bulgaria, Mexico, Brazil, Sweden, Italy, South Africa, Lebanon, Jordan, Turkey, Japan, Australia, Bangladesh, Ecuador and the United Kingdom.

In addition to International Children's issues, Max works with counsel in foreign countries in dealing with support and property issues involving Canada and foreign jurisdictions, such as the United States, UK, and the Middle East.

Max is a member of Canada Family Mediation, Association of Family and Conciliation Courts (International), Alberta Civil Trial Lawyers Association, International Bar Association, American

Bar Association, Law Society of England and Wales and the International Academy of Family Lawyers. He is a Court Appointed Dispute Resolution Officer with the Court of Queen's Bench of Alberta (2006 to present), a Negotiations / Advocacy Assessment Instructor for the Canadian Centre for Professional Legal Education 2008-to the present (Bar Admission Course), and was appointed Queen's Counsel in December 2013.

Max has spoken to search agencies, law enforcement, lawyers, government representatives, and Judges, at Conferences in Las Vegas, Nevada, Coeur d'Alene, Idaho, Calgary, Washington D.C., Ottawa, Vancouver, Quebec City, and Tokyo, Japan (2009 / 2010) dealing with Missing and Abducted Children's issues. Max was involved at the Federal Government level with developing an International Protocol for mediating cross-border family disputes. Max has also lectured at the Federal / Provincial Canadian Judge's Conference (National Judicial Institute) in February 2011 in the area of Inter-Provincial Child Abductions. Max was a guest lecturer in Cape Town, South Africa in March 2011 dealing with the Canadian Experience in International Child Abductions, in Dubai in November 2011 speaking on Sharia Law in Canada, at various Canadian Bar Association Conferences in 2012, lectured on the "Objection to Return Defense of Children Under the Hague Convention" in Sydney, Australia at the 6th World Congress on Family Law and Children's Rights, March 2013, lectured on the operation of the Hague Convention, at Bow Valley College, Calgary, March 2014, Hague Convention Recent Case Trends in Quebec City, June 2015.

Max's interests include martial arts (former Karate / Kung Fu Instructor), skiing, physical fitness, reading, and travel.

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Kristy Kalin graduated from the University of Calgary in 2011 with a BA in English with a concentration in writing and received her LLB from Cardiff University in 2015. She completed her NCA accreditation in November of 2016.
During her law school experience, Kristy was the firm head of her Pro Bono team for the NHS Continuing Health Care project. The NHS CHC scheme was initiated to help vulnerable individuals with Alzheimer's, Dementia, and other extreme health concerns apply for and receive NHS funding that may have been erroneously denied to them.
Kristy has had the opportunity to assist Max Blitt, Q.C in a civil case in December of 2017, by attending the trial and compiling notes on the witness evidence, as well as conducting research in both case files and surrounding secondary sources. Kristy also assisted with the written argument and contributed to the cross-exam strategy.
Kristy is a regular attendee to Loft 112, a community writing co-op that seeks to develop the voices of Calgary writers and talents. During her time in Cardiff, was Vice President and Secretary of the Canadian Students Association, as well as a member of the Rowing team, and the Creative Writing Society.