How do I evaluate the assertion that the child objects to return?

Article 13 of the Convention states that a court "may 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." The party resisting return must prove this defense by a preponderance of the evidence.[1]

Proper Characterization of the Defense. Some cases refer to this as the "age and maturity defense." Other decisions refer to this defense as "the wishes of the child"—a mischaracterization of the defense that could lead to results that are not contemplated by the treaty. Hague cases are not custody cases. A child's wishes, expressed in the context of a state custody proceeding, may be properly considered in determining a custody award. But the 1980 Hague Convention refers to the child's objection, not the child's wishes. Illustrating this point, the court in *Hirst v. Tiberghien*[2] cautioned that

> [T]he court must distinguish between a child's objections as defined by the [sic] Hague Convention and the child's wishes as in a typical child custody case, the former being a "stronger and more restrictive" standard than the latter. [citation omitted] Where the particularized objection is "born of rational comparison" between a child's life in the country of wrongful retention and the country of habitual residence, the court may consider the child's objections to be a mature objection worthy of consideration. See Castillo v. Castillo, 597 F. Supp. 2d 432, 441 (D. Del. 2009). The defense does not apply if the "objection is simply that the child wishes to remain with the abductor." Application of *Nicholson v. Nicholson*, 97–1273–JTM, 1997 WL 446432 (D. Kan. July 7, 1997); . . . Giving consideration to such wishes would place the court in the position of deciding custody, which is explicitly not the mandate of a court hearing a wrongful retention case under the Hague Convention.

Sufficient Age and Maturity. The threshold consideration in considering a child's objection is whether the child is of sufficient age and maturity that his or her views should be considered. This finding is a purely factual matter that is entitled to deference on review.[3] Courts have treated the objection of a child to return differently if that objection is the sole basis for refusing return, or if it is combined with other defenses that have been established. If the child's objection is the sole reason for refusing an order of return, courts apply a stricter standard. In *Blondin v. Dubois* (*Blondin II*),[4] the court refused return of the child based upon her youth, but considered her opinion in substantiating an Article 13 "grave risk" defense.

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1. 42 U.S.C. § 11603(e)(2); Karpenko v. Leendertz, 619 F.3d 259, 263n.3 (3d Cir. 2010); Mendoza v. Silva, 987 F. Supp. 2d 883 (N.D. Iowa 2013); Gallardo v. Orozco, 954 F. Supp. 2d 555 (W.D. Tex. 2013).
2. 947 F. Supp. 2d 578 (D.S.C. 2013).
3. England v. England, 234 F.3d 268, 271 (5th Cir. 2000).
4. 238 F.3d 153, 164 (2d Cir. 2001).

The question whether a child is of sufficient age and exhibits maturity for the court to consider the opinion is a question of fact that greatly depends on the child. There are no bright lines in this area. Courts have considered the opinions of eight-year-old children[5] and have rejected the opinions of fourteen- and fifteen-year-old children.[6]

Reasons for the Child's Objections. Beyond the issue of the child's age and degree of maturity are the reasons that the child voices for objecting to return. Consider, for example, a seven-year-old child who expresses an objection to returning to the habitual residence on the basis that the parent in that location has been abusive, the child has difficulty with the language in the habitual residence, and the family lives in needless squalor because the petitioning parent refuses to provide financial support. On the other hand, consider the statements of a thirteen-year-old child who objects to return because a parent promised him an iPhone, the child's friends are "cooler" than those at the habitual residence, and the child is a fan of the Seattle Seahawks. In the former example, the child may have sufficient ability at age seven to articulate good reasons for not wishing to return home. In the latter, a thirteen-year-old youth may lack sufficient maturity to voice a meaningful objection to return.

Particular or General Objections to Return. The following excerpt from the Third Circuit's opinion in *Yang v. Tsui*[7] demonstrates the essence of an analysis of sufficient maturity:

> The District Court found that Raeann's testimony did not include particularized objections to returning to Canada, but rather it indicated that she possessed a more generalized desire to remain in Pittsburgh similar to that of any ten-year-old having to move to a new location. She had reasons to support her preference to remain in the United States, but such reasons were not necessarily sufficient to invoke the exception. . . . . Despite her intelligence and demeanor, the District Court found that Raeann was not of sufficient age or maturity for her views to be appropriately considered.[8]

In *Kufner v. Kufner*,[9] the court affirmed the trial court's refusal to allow a parent to call the child as a witness noting that the district court "properly gave little weight to their wishes because of their young ages, lack of maturity, and susceptibility to parental influence."[10]

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5. *See, e.g.*, Anderson v. Acree, 250 F. Supp. 2d 876 (S.D. Ohio 2002); Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953, 957–58 (E.D. Mich. 2001) (ordering psychological examination to determine degree of maturity of eight year old); *cf.* Kufner v. Kufner, 519 F.3d 33 (1st Cir. 2008) (not allowing an eight year old to testify). *See also* Bonilla-Ruiz v. Bonilla, No. 255772, 2004 WL 2883247 (Mich. App. Dec. 14, 2004) (eight-year-old child sufficiently mature).

6. *See England*, 234 F.3d at 272–73 (finding fourteen-year-old child did not meet standard); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (returning a fifteen-and-a-half year old despite objection); Barrera Casimiro v. Pineda Chavez, No. Civ. A.1:06CV1889-ODE, 2006 WL 2938713 (N.D. Ga. Oct. 13, 2006) (finding fifteen year old failed to appreciate her immigration status as an incident of her non-return).

7. 499 F.3d 259 (3d Cir. 2007).

8. *Id*. at 279.

9. 519 F.3d 33 (1st Cir. 2008).

10. *Id*. at 40.

Methods of Hearing Child's Objections. Many courts take evidence of the child's objections by the judge personally interviewing the child in chambers.[11] Other methods include

- admitting a psychological evaluation of the child;
- appointing an attorney or guardian ad litem to represent the interests of the child;
- allowing the child to testify in open court.[12]

11. *See, e.g.*, de Silva v. Pitts, 481 F.3d 1279 (10th Cir. 2007) (receiving child's objection in camera with court reporter and law clerk present); Haimdas v. Haimdas, 720 F. Supp. 2d 183 (E.D.N.Y. 2010) (hearing child's objection in camera); Trudrung v. Trudrung, 686 F. Supp. 2d 570 (M.D.N.C. 2010) (hearing child's objection in camera); Lieberman v. Tabachnik, 625 F. Supp. 2d 1109 (D. Colo. 2008) (meeting all three children in chambers ex parte); Diaz Arboleda, 311 F. Supp. 2d 336 (E.D.N.Y. 2004) (interviewing children in camera); Andreopoulos v. Nickolaos Koutroulos, No. 09-cv-00996-WTD-KMT, 2009 WL 1850928 (D. Colo. June 29, 2009) (allowing child to testify in chambers and appointing a therapist); Laguna v. Avila, No. 07-CV-5136 (ENV), 2008 WL 1986253 (E.D.N.Y. May 7, 2008) (interviewing child in chambers without parties or counsel); Di Giuseppe v. Di Giuseppe, No. 07-CV-15240, 2008 WL 1743079 (E.D. Mich. Apr. 11, 2008) (interviewing children in camera); McClary v. McClary, No. 3:07-cv-0845, 2007 WL 3023563 (M.D. Tenn. Oct. 12, 2007) (interviewing children in camera without parties or counsel); Kofler v. Kofler, No. 07-5040, 2007 WL 2081712 (W.D. Ark. July 18, 2007) (interviewing three children together in chambers without parties but with counsel present); Yang v. Tsui (*Yang II*), 499 F.3d 259 (3d Cir. 2007) (interviewing child, with, counsel in camera).

12. *Editor's Note:* After many years spent in a family law assignment, I have concluded that allowing a child to testify in open court, with both parents in attendance, is not an effective method for eliciting a child's opinion.