

Considered or Merely Heard? The Views of Young Children in Hague Convention Cases in Ireland

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Introduction

As the legal relationship between the states, parents and children has changed, children have come to be seen less as possessions of parents and more as independent human beings, who are subjects of the law, with the rights that this entails. The traditional approach to children in custody and access disputes has been to shield children from the process in an attempt to protect them from such disputes. Arguably the most important consideration has been to prevent them from having to take sides. However, current international research into the experience of children of divorce shows that excluding them from the legal process may in fact harm children by ignoring their views and interests.² Many young children with experience of divorce and the legal system feel alienated when left unconsulted, in comparison to young children who are consulted in such matters.³ Research has also shown that there are better outcomes in cases which require decision-making regarding children (such as care and custody cases), as they have a sense of ownership of the arrangements involved.⁴

Because of the increasing recognition of these aspects of children's experiences, the Convention on the Rights of the Child enshrined the right of children to be heard in international law for the first time in 1989. States must now provide children with "the opportunity to be heard in any judicial and administrative proceedings"⁵ affecting them under art.12 of the Convention on the Rights of the Child. The Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction⁶ also contains a provision relating to the views of children, though it was drafted before the Convention on the Rights of the Child. The Hague Convention stipulates that the judicial or administrative authority of the country to which a child has been wrongfully removed must order the return of the child.⁷ However it also provides that a court may refuse to order the return of a 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

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views.” This provision of the Convention has been strengthened by Council Regulation (EC) No. 2201/2003 (Brussels II Regulation),⁸ which applies where the habitual residence of the child is in an EU state. Article 11(2) of the Brussels II Regulation states that it shall be ensured that children are given the opportunity to be heard during proceedings when applying art.13 of the Hague Convention, unless this appears inappropriate having regard to the age or degree of maturity of the child. This text constitutes stronger language, as it stipulates that the child has a right to be heard in Hague Convention cases, as opposed to language of the Hague Convention itself, which only allows the judge discretion as regards hearing the child. Therefore children who are habitually resident in EU countries have the right to be heard in Hague Convention cases.⁹

Recent case law in Irish courts indicates that the courts are consistently willing to seek the opinions of children in Hague Convention cases. This includes quite young children, as was highlighted by the recent case of *In the Matter of M. N. (A CHILD)*, where it was opined that the starting point in Hague Convention cases is that the child should be heard.¹⁰ However the extent to which the views of young children are actually taken into consideration is the focus of this article. It is proposed that there is a significant difference emerging as regards the consideration of the views of older children (taken in this article to refer to children of 12 years and over) and younger children (those aged 11 and under). The opinions of children of 12 years and over are proving to hold much weight with the Irish courts and are in many cases the determining factor. However recent case law is examined to argue that there is a standard emerging in the Irish courts that discretion is unlikely to be used by judges in favour of the wishes of younger children. The reasoning provided in the judgments is that discretion need not be exercised in favour of the children involved (and against the general rule of peremptory return) as the children are considered to be too young. Developmental theory is cited to argue that this anomaly (between older and younger children) may be unwarranted. Reference is made to art.12 of the Convention on the Rights of the Child and the opinions of the Committee on the Rights of the Child. These international principles are used to indicate

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that further reasoning by judges is necessary (when going against the wishes of children) for practice to meet the standards of international human rights law.

Consulting children in Hague Convention cases

There are an increasing number of cases heard in Ireland (particularly Hague Convention cases) whereby older children are being consulted on matters affecting them. Many of these cases indicate a significant degree of regard on the part of the judges for seeking the views of the children involved. In the recent case of *M.W.P. v T.K.P.*,¹¹ the views of two young people aged 13 and 15 were indicated by McGovern J. as a significant factor in his decision not to order their return to the US. In the High Court case of *F.N., E. B. v C. O., H.O., E. K.*,¹² Finlay Geoghegan J. found that two sisters aged 13 and 14 were to remain in Ireland with their grandparents, despite their father seeking their return. The wishes of the children to remain in Ireland with their grandparents were central to the determination of the case and are described by Power as, “a factor of particular importance in this case and can be seen as the biggest single factual and legal feature behind the decision”.¹³ In *R.W. v C.C.*,¹⁴ Finlay Geoghegan J. decided not to enforce an order which would force two girls (also aged 13 and 14) to see their father in London against their express wishes, as it would be damaging to their welfare. The outcomes in these cases indicate significant regard on the part of the courts for the rights of these children to influence their own situations.

Recent Hague Convention cases also indicate a high level of consultation by the Irish courts of the views of young children,¹⁵ usually through the medium of social reports.¹⁶ An evident trend in seeking the views of younger children was recently consolidated by Finlay Geoghegan J. in *In the Matter of M. N. (A CHILD)*.¹⁷ In this case, a six-year-old boy was removed from his state of residence to Ireland by his mother and his father sought his return. The mother of the boy made an application that the child be interviewed in accordance with art.11(2) of the Brussels II Regulation. She claimed that the child objected to a return and that he was competent and intelligent. The father of the boy opposed an interview and argued that the child was not particularly mature for his

age. Finlay Geoghegan J. ordered that the boy be interviewed and assessed. This case was particularly illuminating as the judge opined for the first time in the Irish context that in Hague Convention cases “the starting point is that the child should be heard. The Court is only relieved of the obligation where it is established that it would be inappropriate...”¹⁸ Finlay Geoghegan J. emphasised that this obligation to seek the views of children was distinct from the level of influence which the views of the child should have on the outcome of the case. Indeed this opinion is also indicative of current practice in the Irish courts as regards younger children. Recent case law indicates that although judges seek the views of children in Hague Convention cases, this does not mean that these views will be determinative. In fact, in the three most recent cases involving younger children, the courts saw fit to rule against the expressed wishes of those children.

In the case of *R. v R.*,¹⁹ heard in May 2008, the father of K., a ten-year-old girl, sought her return to Latvia. He claimed that she had been wrongfully removed in December 2005 by her mother. Both parties were in agreement that there had been an unlawful abduction and that the matter before the High Court turned solely on the objections of the child. A court appointed psychologist stated that K. was a mature child who had a strong wish to remain in Ireland, where she had lived for three and a half years. This desire was based on her friendships at school and the fact that she lived with her 17-year-old brother and her new baby sister. The psychologist stated that a forced return to Latvia would be a painful and unpleasant experience for K. However he also expressed concern that it was possible that K. could become completely separated from her father and that she would adapt if she were returned if the environment was right.

The trial judge, Sheehan J., stated that on the basis of the evidence of the psychologist he held that there were reasonable grounds as to why K. came to object to returning to Latvia. He also believed that K. was expressing her own views. Sheehan J. considered it appropriate that the court take her objections into account. However the judge was mindful of the opinion of Baroness Hale in *Re M.*,²⁰ where she stated that there are general policy considerations in Hague Convention cases which must be balanced with the interests of the child, such as the expedient return of abducted children, to deter such

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abductions and respect for the judicial processes of other contracting states. Sheehan J. then stated that:

“On the face of it, it would appear that the ideal situation for the minor, would be for her to remain in Ireland with every appropriate effort being made to enable her father to re-establish a relationship with her through occasional meetings, either here or in Latvia and with regular telephone access.”

Despite this initial consideration, he decided that although he had taken the views of K. into account, he did not regard them as determinative. He held that if the return to Latvia were properly managed, it “would not be so injurious to the child’s interest that I ought to exercise my discretion in favour of her stated wishes.” The court ordered that K. be returned to Latvia.

A similar case, that of *D. v D.*,²¹ was heard the following month. The case concerned a nine and a half year old boy (“D.”) taken from Poland to Ireland by his mother. They had lived in Ireland for almost two years at the time of proceedings. The applicant maternal grandfather, who had had custody of the child in Poland, sought the return of D. The court appointed psychologist stated that D. displayed immature social and emotional behaviour. He had also been diagnosed as developmentally delayed in Poland. However he had made considerable progress since he came to Ireland and attended school. The teachers stated that, though the nine-year-old had an English-language reading age equivalent to that of a child aged 7.2 years, D. had made huge educational gains. Furthermore a doctor’s report expressed the opinion that D. was capable of functioning in the normal range of development.

The psychologist told the court that D. very specifically expressed a wish not to return to Poland. D. had a negative emotional association with his grandfather’s home and did not want to return there. D. stated that his grandfather shouted, was angry and had locked him in a room. D. expressed the wish to stay with his mother in Ireland, who loved him and was good to him. The psychologist stated that D. must have naturally been influenced by his mother (because of his age and capacities) and that he exhibited a willingness to

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please. However, D. was open and frank and there was no evidence of him having been coerced in any way. The psychologist stated that because of the traumatic experiences of D. up to his departure to Ireland, he was concerned about the effects of a disruptive change (i.e. returning to Poland) on his educational and psychological development.

MacMenamin J. ultimately granted an order for the return of the child to Poland. The judge acknowledged the progress of D. in Ireland. However he also noted his learning difficulties, his willingness to please and the close attachment of D. to this mother. He noted that a change in custody would be likely to have a detrimental effect on the wellbeing of D. However he stated that the views of D. were not so compelling that they would justify an order refusing the return him to Poland. Furthermore, the judge was of the opinion that under both art.13 of the Hague Convention and art.11(2) of the Brussels II Regulation “once the child has been given an opportunity to be heard this obligation is satisfied.”²²

The judge cited *S. v S.*,²³ whereby a nine-year-old girl was considered to have achieved enough maturity to have her views taken account. Furthermore, her objection to return was not solely related to a desire to remain with a particular parent. He stated that the evidence in relation to D. fell short of these tests. However, despite D.’s developmental delay, he had made great intellectual gains in Ireland and could function as a normal nine-year-old, according to the report of a doctor. D. had, according to the psychologist, very clear opinions about why he did not wish to return to Poland, and it was undoubtedly related to his dislike for his grandfather and not simply to a desire to remain with his mother. These facts would seem to be at odds with the reasoning of the trial judge. It is particularly unfortunate that the judge relied on the fact that D.’s reading development in English (his second language) was reported to be equivalent to that of a child aged 7.2 years to decide that D. could not maturely form views. Reading age does not necessarily correlate to decision-making capacity.

A third case, *K. v K.*²⁴ was decided in 2006 and had a similar outcome to the cases of *R. v R.*²⁵ and *D. v D.*²⁶ The mother in this case took children aged nine and five to Ireland

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from England and their father, who had access to the children one day a week, sought their return. A psychiatrist was appointed by the court to assess the eldest child (T.) who found that T. had developed the appropriate level of maturity for her age and that she objected to being returned to England, though she seemed sad at the loss of contact with her father. She wished to stay because she was happy in Ireland, because of school and friends and because overall she had a nicer life in Ireland than she had in London. The judgment outlines that the psychiatrist could not establish that undue influence had been placed on the girl in forming these opinions.

Despite this, Gilligan J. came to the conclusion that the children should be returned. The judge reasoned that he had weighed the nature and basis of the objections advanced by T. regarding a return to England. However he was of the opinion that the long term best interest of T. to have a relationship with her father “far outweighed” the basis of her objections and that he should use his discretion accordingly. Gilligan J. made reference to the need “to bear in mind the view” of T. when coming to his decision. However, apart from a reference to the relationship of T. with her father, there is no further elaboration on the basis of the decision to go against the views of a child he described as bright and mature. The relationship with their father is clearly important. However to give such high priority to this factor in the life of the children and to return them against their wishes on this basis is arguably disproportionate to this consideration.²⁷

An emerging standard?

It is instructive to consider these three recent cases together given that they share such similarities. The children were of similar ages (a 10-year-old and two nine-year-olds). All of the children had been in Ireland for a significant amount of time and there was clear evidence that they were all doing very well in Ireland. All of the children had expressed a strong desire to remain in Ireland. Yet in these three cases, these factors were found not to outweigh the importance of returning the children to their original jurisdictions. It is possible that these three cases indicate a standard emerging at High Court level whereby

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children of 10 and under, although their views will be gathered, are not considered to have the capacity for their views to override the presumption in favour of return.

The opinion of MacMenamin J. in *D. v D.*—that once the child has been given an opportunity to be heard, the obligation regarding the right to be heard is satisfied²⁸—seems to be the accepted approach regarding these types of cases in the High Court.²⁹ However, this is at odds with the standard of the Convention on the Rights of the Child, which states that views of the child must be “given due weight in accordance with the age and maturity of the child.”³⁰ Article 13 of the Hague Convention also instructs consideration of whether the child “has attained an age and degree of maturity at which it is appropriate to take account of its views” when the views of the child are being considered. Likewise, art.2 of the Brussels II Regulation states that under such circumstances, the court will have regard for the “age or degree of maturity” of the child. While the judges in these cases do make reference to having considered the maturity of the children involved, the extent to which they have actually taken account of the strong, clear, and rational opinions of these children about their own futures is unclear. The judgments indicate that the emphasis of the judges is on the young age of the children involved, rather than the clarity of the views that they express.

In the case of *R. v R.*,³¹ 10-year-old K. was deemed by a psychologist to be a mature child who had a strong wish to remain in Ireland, where she had lived for three and a half years. The judge held that there were reasonable grounds why K. objected to returning to Latvia, that K. was expressing her own views and they should be taken into account. In *D. v D.*,³² the psychologist stated that D. displayed immature social and emotional behaviour, however D had made huge educational gains in Ireland. Although D. had a willingness to please, he very specifically expressed a wish not to return to Poland, described his grandfather as “a bad man” and did not seem to have been coerced in any way. The case of *K. v K.*³³ involved a mature nine-year-old, T., who objected to being returned to England. Undue influence on the girl in forming these opinions was not evident.

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Despite the strong objections of all these children, their happy lives in Ireland and the length of their stays, orders were made for all of them to be returned. The views of K. were considered not to be determinative despite her maturity and family connections in Ireland. The judge pointed to D.'s developmental delay to determine that he was not mature enough for his views to carry a large amount of weight. Despite T.'s views and happy life in Ireland and acknowledgment by the judge of the considerable upset of returning her, the judge determined that the long term interest of T. to have a relationship with her father far outweighed her objections. D. stated unequivocally that he had reasons to dislike his grandfather. However the presumptive rule of return was still deemed to override the views of the nine-year-old child. This raises the question as to whether there is simply an assumption that children of this age, regardless of the clarity of their opinions, are not mature enough for their views to be given significant weight.

Competence of the child and “due weight”

Many would argue that the courts have taken a valid approach in assuming that children of the ages of nine and ten are not yet developed enough for judges to exercise discretion in favour of their stated wishes. However, as stated above, it is possible that a standard is emerging at High Court level whereby children of this age will have their views gathered, but are not considered to have the capacity for their views to override the presumption in favour of return. Examination of the psychological research as regards the decision-making capacities of children indicates that this approach may underestimate the abilities of children of this age.

The Stage Theory of Jean Piaget is very accepted within developmental psychology³⁴ and is also well accepted within the field of law.³⁵ According to Piaget,³⁶ children generally start to develop the capacity to think objectively and logically about concrete events at age seven, though they may still be unable to logically consider all outcomes. This more logical thinking means that children at this stage become conscious of cause and effect relationships.³⁷ Children are also able to see themselves much more objectively in comparison with others. This particular stage of development in childhood continues to approximately age 12, at which point abstract thought starts to become sophisticated in

young people.³⁸ The description by Piaget of the capacities of children in this “concrete operational stage” is helpful in determining the consideration their views should be given in cases concerning them. Children at this stage of development potentially have highly developed capacities to think objectively and logically about their living situations. They are possibly very capable of understanding cause and effect relationships, with a significant ability to think about the future and the effects of a particular decision on themselves and their families. The fact that they may still be unable to logically consider all outcomes must, of course, be taken into account. The progression is continuous (i.e. from aged seven to 12 these capacities are increasingly developed) and different children will develop at different speeds.

It does not seem sufficient for courts to simply state that they will not use their discretion in favour of the wishes of a child of this developmental stage because of the age of that child. Further elaboration is necessary. This is the approach required by the Convention on the Rights of the Child. Under art.12 of the Convention, children must now be “provided the opportunity to be heard in any judicial and administrative proceedings” affecting them.³⁹ This provision is a useful tool in determining the issue of the weight the views of children are to be given in the context of Hague Convention cases. Nowhere in art.12 is it stated that the views of children are to be the determining factor, or even the most important factor, in decisions about their future. However it is not sufficient that the views of children simply be heard under art.12. They must also be considered by the decision-maker. This obligation can be deduced from the phrase in art.12 which mentions “the views of the child being given due weight...” This phrase requires that decision-makers determine the value of the views of the child in accordance with the age and maturity of that child.

It could be argued that a decision-maker has the option of according the views of the child no weight. However at the point at which the views of the child have reached the decision-maker, it has already been decided that the child is sufficiently old and mature for his/her views to be heard. Therefore this phrase can be seen as requiring that the decision-maker make the additional determination of *how much* weight the views be

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given, not merely whether the views be given any weight at all. Article 12, then, requires that the views of capable children not only be heard, but be also considered. However, considering the approach of the Irish legal system to the three cases outlined above, the court system is arguably at odds with art.12 of the Convention on the Rights of the Child in that it is questionable whether the facilitation of the right to be heard was effective.⁴⁰

There is no elaboration in art.12 of the Convention as to what constitutes “effective” consideration. A common sense interpretation suggests, however, that the decision-maker would have to be able to demonstrate that the views had been given consideration and give reasons as to why the views were rejected. This interpretation is supported by the fact that in the Day of Discussion recommendations, the Committee indicated that decision makers should explicitly explain the outcome of proceedings to children. Effective consideration therefore, necessitates an element of accountability on the part of the decision-maker, in that he or she would have to demonstrate that the child’s view was considered and provide an explanation (both in the judgment and to the children involved) as to why the court decided to go against the view of the child. However this does not seem to be common practice regarding Hague Convention cases in Ireland. There is no indication that children are given any explanation as to why judges come to the conclusions that they do and judgments often do not provide elaboration on the judges understanding of the capacities of the child, nor why the views of the child cannot be determinative.⁴¹

As stated above, it is not sufficient for courts to simply state that they will not use their discretion in favour of the wishes of a child of this developmental stage because of the age of that child. Therefore a particular standardised assessment would be useful to guide the court in relation to the capacities of the child. To determine whether children are capable of decision-making relating to health, it is considered whether the child can understand and communicate the relevant information, can think and choose with some degree of independence, can assess the potential for benefit, risk and harm and whether the child holds a reasonably stable set of values from which to make a decision.⁴² It seems that it would be useful if the professionals who prepare social reports for the courts

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were requested to give a detailed elaboration to judges on this basis, as a lack of understanding of (or at least engagement with) developmental psychology is evident in the judgments.⁴³

Conclusion

The cases outlined above indicate that there is a need for greater accountability in terms of the consideration given to the views of younger children by the Irish courts. Accepted developmental psychology indicates that children aged seven to 12 years are capable of a high level of logical thinking and understanding of cause and effect relationships. This means that they potentially have significant decision making capacities. However recent case law indicates that there is possibly an assumption by the Irish courts that it is not appropriate to exercise discretion in favour of the wishes of children at this developmental stage. Article 12 of the Convention on the Rights of the Child is a useful standard to guide the application of art.13 of the Hague Convention and art.11 (2) of the Brussels II Regulation. According to the Committee on the Rights of the Child, obligations under the Convention on the Rights of the Child mean that it is not sufficient to reject the wishes of a child on the basis of age—a level of “effective” consideration of their views must be demonstrated. It must be demonstrated that the views had been given consideration and reasons must be given as to why the views were rejected. A proposed solution is that the professionals writing the social report use accepted criteria to determine the level of competence of the individual child and that the court be required to refer to this in the judgment.

There is a need for education of the judiciary and lawyers on the issues regarding children and the right to be heard. The judgments referred to above indicate that such education is necessary. Indeed in the Committee’s Guidelines for Initial and Periodic Reports, it is emphasised that states parties to the Convention on the Rights of the Child are required to outline measures which have been taken to train professionals working with children (including judges generally, family court judges and juvenile court judges).⁴⁴ Reference has frequently been made to education of the judiciary in

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particular.⁴⁵ Such education should include training on the level of accountability necessary for the right of children to be heard to be implemented in line with the interpretation of art.12 of the Committee on the Rights of the Child.⁴⁶

As outlined above, it would also be desirable for judges to receive basic training in developmental psychology to allow them to better understand the decision making capacities of children. Cases such as *D. v D.*⁴⁷ indicate the need for judges to receive such training, particularly in relation to children with developmental delay. Perhaps there is an assumption that judges (particularly those experienced in family law cases) are already experts as regards children and development. There is little doubt that judges have a dearth of experience and knowledge. However without formal education on accepted psychological theories it is doubtful that they are working to their full potential regarding decision making relating to children. The reasoning for conclusions on the maturity of children involved in Hague Convention cases should be better outlined in judgments. When other factors take priority over well-formed views of the child, this too should be explained in more detail. In instances where the court goes against the wishes of children, mechanisms for transmitting the information back to children is necessary. The initial expert who provided the social report could be engaged here to feed back this information in a child-sensitive manner.

In the case of *W.H.B. and W.S. and E.S. v An Bórd Uchtála*,⁴⁸ a 17-year-old young person, L., was expressing her wish to be adopted by her foster parents who were seeking an adoption order to that effect. According to a social worker, L. stated that “she would be really badly upset if the order were not made because it would be as if she was ignored and as if the State did not want to recognise how she felt.” It has to be borne in mind that children and young people will feel like this if their views are sought and then the judgment goes against their wishes. More accountability as regards the decisions of the Irish courts is necessary to minimise this.

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Rights at the Irish Centre for Human Rights, National University of Ireland Galway, and is Vice-Chair of the Executive Committee of Amnesty International, Irish Section. I wish to acknowledge the assistance of Dr Liz Heffernan and Dr Eimear Long. Any errors are the author's own.

² Judith Huddart and Sandra Demson, *Listening to Children in the Collaborative Process* (4th World Congress on Family Law and Children's Rights, 2005).

³ In Marsha Kline Pruett and Kyle Pruett, "'Only God Decides': Young Children's Perceptions of Divorce and the Legal System" (1999) 38 *Journal of the American Academy of Child and Adolescent Psychiatry* 1544.

⁴ Marsha Kline Pruett and Kyle Pruett, "'Only God Decides': Young Children's Perceptions of Divorce and the Legal System" (1999) 38 *Journal of the American Academy of Child and Adolescent Psychiatry* 1544.

⁵ Article 12, Convention on the Rights of the Child, adopted on November 20, 1980 and entered into force on September 2, 1990. The Republic of Ireland signed the Convention on September 30, 1990 and ratified it on September 21, 1992.

⁶ Hereinafter referred to as the "Hague Convention".

⁷ Article 1 of the Hague Convention states that its objects are to secure the return of children wrongfully removed to a Contracting State and to ensure that rights of custody and access under the law of one Contracting State are respected in the other Contracting States. However this general rule of peremptory return is subject to the exceptions listed in art.13.

⁸ Hereinafter referred to as "the Brussels II Regulation".

⁹ The Hague Convention allows for the views of children to be determinative in cases where their return to the state from which they were taken is sought by a parent or guardian who has rights of custody or access. Because it does not necessarily require that the views of children in such cases are sought, it is arguably at odds with international human rights standards. This is because the right of children to be heard in proceedings affecting them is a requirement of art.12 of the Convention on the Rights of the Child. Although Ireland ratified this Convention in 1992, it has not yet been transposed into national law. The Convention does, at the very least, have strong moral force as it has been ratified by 191 states.

¹⁰ *In the Matter of M. N. (A CHILD)* [2008] IEHC 382. In this case, an order was made by Finlay Geoghegan J. that a six-year-old child be interviewed and assessed. The case is outlined in more detail below.

¹¹ *M.W.P. v T.K.P.* [2007] IEHC 145.

¹² *F.N., E. B. v C. O., H.O., E. K.* [2004] IEHC 54.

¹³ Conor Power, "Practice and Procedure" (2004) 7(3) *I.J.F.L.* 29.

¹⁴ *R.W. v C.C.* [2004] IEHC 194; [2004] 3 *I.R.* 108.

¹⁵ See below the recent cases of *R. v R.* [2008] IEHC 162; *D. v D.* [2008] IEHC 176 and *K. v K.* [2006] IEHC 277.

¹⁶ Section 47(1) of the Family Law Act 1995 permits the production of a "report in writing on any question affecting the welfare of a party to the proceedings". It is usually a social worker, psychiatrist or psychologist who prepares the social report.

¹⁷ *In the Matter of M. N. (A CHILD)* [2008] IEHC 382.

¹⁸ At para.19. Finlay Geoghegan J. was referring specifically to cases to which art.11(2) of the Brussels II Regulation apply. However, she quoted with concurrence the opinion of Baroness Hale of Richmond in *Re. D. (Abduction: Rights of Custody)* [2006] U.K.H.L. 51 that there be an assumption that the child be heard, "in any case in which the court is being asked to apply article 12 and direct the summary return of the child - in effect in every Hague Convention case."

¹⁹ *R. v R.* [2008] IEHC 162.

²⁰ *Re M* [2007] UKHL 55, at para.42.

²¹ *D. v D.* [2008] IEHC 176.

²² This point is discussed further below. It must be noted that under the Hague Convention there is no "obligation" to hear the child as such, as it is at the discretion of the judge.

²³ *S. v S. (Child Abduction) (Child's Views)* [1992] 2 *F.L.R.* 492 In *S. v S.*, the English Court of Appeal indicated the standard which it held necessary for the views of children to be taken into account. It held that the child must object to returning immediately to the country in question and to the care of the person with rights of custody. For the child's objection to be of this nature, a court must establish (a) that the child

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objects to being returned and has reached such a level of maturity that it is appropriate to take his/her views into account and; (b) that the objections to being returned are not solely due to a wish to remain with the abducting parent (who also does not wish to return).

²⁴ *K. v K.* [2006] IEHC 277.

²⁵ *R. v R.* [2008] IEHC 162.

²⁶ *D. v D.* [2008] IEHC 176.

²⁷ This in itself does not necessarily run counter to art.12 of the CRC, as art.12 does not stipulate that children's views be determinative. However it may indicate that children's views are not being duly considered.

²⁸ It has been noted above that MacMenamin J. was referring here to art.13 of the Hague Convention (under which there is no "obligation" to hear the child as such, as it is at the discretion of the judge) and art.11(2) of the Brussels II Regulation

²⁹ Considering the judgments in the cases outlined above.

³⁰ Likewise, art.12 of the Convention on the Rights of the Child implies that there is obligation to consider the views of a child. Article 12.1 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."

³¹ *R. v R.* [2008] IEHC 162.

³² *D. v D.* [2008] IEHC 176.

³³ *K. v K.* [2006] IEHC 277.

³⁴ Although many later theorists argued that Piaget's methods actually underestimated the abilities of children at specific ages, because of the use of assessments that were not child appropriate, see e.g. Margaret Donaldson, *Children's Minds* (London : Flamingo 1978).

³⁵ See Quebec Bar Committee, "The Legal Representation of Children: A consultation paper prepared by the Quebec Bar Committee", 13 Can. J. Fam. L. 49, (1996).

³⁶ See Bärbel Inhelder and Jean Piaget, *The Growth of Logical Thinking from Childhood to Adolescence: An Essay on the Construction of Formal Operational Structures* (New York : Basic Books 1958). Piaget theorised that childhood consisted of four main stages. From birth to age two, children are in the "sensorimotor stage" whereby they experience the world through movement and their senses. The "pre-operational" stage continues from age two to seven. Children learn to use symbolic thinking (i.e. representing objects through images and words), however thinking is generally still "egocentric" (i.e. children of this age have difficulty considering the viewpoint of others) although they are increasingly gaining these skills.

³⁷ The "concrete operational stage" lasts from age seven to 11.

³⁸ Children enter the "formal operational stage" after age 11, where between ages 12 and 18 they develop abstract reasoning and logical thinking more fully.

³⁹ Article 12 states that:

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

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

⁴⁰ In its concluding observations on the report of Denmark (UN Doc. CRC/C/129/Add.2, 2005) para.28, the Committee on the Rights of the Child recommends that staff working with children in relation to decision-making procedures ensure that "their views are effectively taken into account."

⁴¹ E.g. see *D. v D.* [2008] IEHC 176.

⁴² See Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research Centre, 2005).

⁴³ Particularly in the case of *D. v D.* [2008] IEHC 176, whereby the judge did not consider the developmental delay of the child when deciding how “settled” the child was and whether return to Poland would constitute a “grave risk” to his welfare.

⁴⁴ Guidelines for Initial and Periodic Reports, UN Docs CRC/C/ 5 (1991) and CRC/C/58 (1996)

⁴⁵ See e.g. Committee on the Rights of the Child, *Concluding Observations: Yemen* (UN Doc. CRC/C/15/Add.266, 2005) para.38.

⁴⁶ Committee on the Rights of the Child, *Concluding Observations: Yemen* (UN Doc. CRC/C/15/Add.266, 2005) para.39.

⁴⁷ *D. v D.* [2008] IEHC 176.

⁴⁸ *W.H.B. and W.S. and E.S. v An Bórd Uchtála* [2004] IEHC 214.