

Mediation and the Voice of the Child

Mr Justice MacDonald
19 September 2024

Introduction

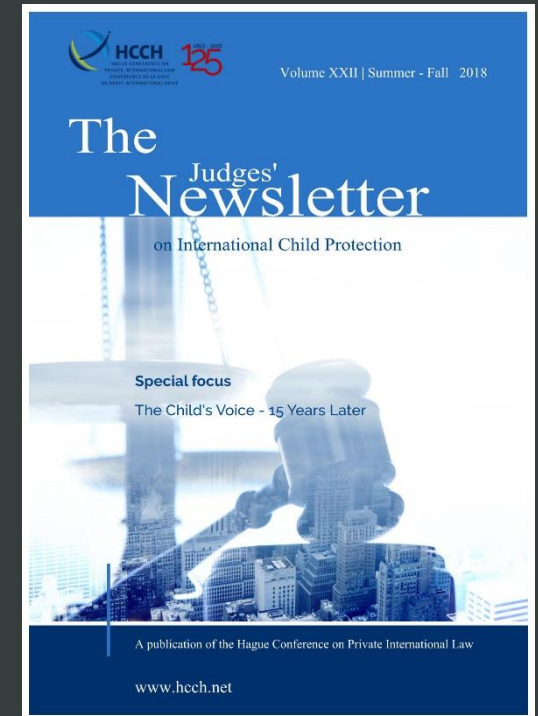
- As highlighted by the recent updated version of the Family Mediation Council and Family Justice Council's Mediation Guidance, published last week, family mediation has been available in England and Wales for **40 years**.
- The High Court of England and Wales has introduced a **Child Abduction Mediation Scheme** is run by Reunite International.
- The Scheme followed a pilot that indicated that there is a **clear and important role for mediation** in resolving cases of alleged child abduction, that parents were willing to embrace the use of mediation and that a large proportion of cases that proceeded to mediation resulted in agreement.
- As set out in the country report for the United Kingdom, the UK's Foreign, Commonwealth and Development Office has worked with Reunite International to **promote mediation** in other jurisdictions.

Mediation in England and Wales

- The rules of procedure in England and Wales includes a requirement for the court to encourage the parties to use a **non-court dispute resolution** procedure if the court considers that appropriate and facilitating the use of such procedure.
- Participation in the Child Abduction Mediation Scheme is **voluntary** and without prejudice to the parties' right to invite the court to determine the issues between them.
- The first case management step taken in proceedings under the 1980 Hague Convention in England and Wales is, where appropriate, to **encourage** the parties to engage in mediation of their dispute through participation in the Child Abduction Mediation Scheme.
- Where mediation occurs, the court will still make directions for evidence, reports and a final to **avoid delay** in cases where the mediation is not successful.
- Where the mediation is successful, the resulting **Memorandum of Understanding** will be drawn up into a consent order for approval by the court.
- If the mediation is not successful, the court will **proceed** to determine the application.

Participation of the Child

- **Art 13 of the 1980 Hague Convention** provides an exception to return where the court “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.”
- In addition, **Art 12 of the UNCRC** requires States Parties to 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 him or her, the views of the child being given due weight in accordance with the age and maturity of the child.
- Therefore, whilst of most relevance in cases where the ‘child’s objection’ exception under Art 13 is relied on, the importance of the principles governing the hearing of the child in proceedings under the 1980 Convention are **not** limited to those cases.
- It is important to consider in **every application** under the 1980 Convention whether and to what extent the child should participate.
- In England and Wales it has become a matter of **routine** for children as young as six to have their views investigated.
- This gives rise to the question of how to ensure that the voice of the child is heard in the context of **mediation**.



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- In circumstances where children and young people have the right to be heard in all matters concerning their needs, interests and futures, it is important that children can have **input** into the mediation process.
- The Family Mediation Council Code of Practice requires that all children and young people **aged 10 and older** be offered the opportunity to have their voices heard directly during mediation.
- The concept of **child inclusive mediation** provides an opportunity for the child or young person to be heard and for the child's parents to hear feedback.
- Anything the child or young person says is available only to the parents, and then only with the **child's permission**. Feedback to the parents will consist only of what the child or young person wants to share with the parents.
- Where a child or young person is invited to become involved in the mediation, they can choose **not** to accept that invitation.

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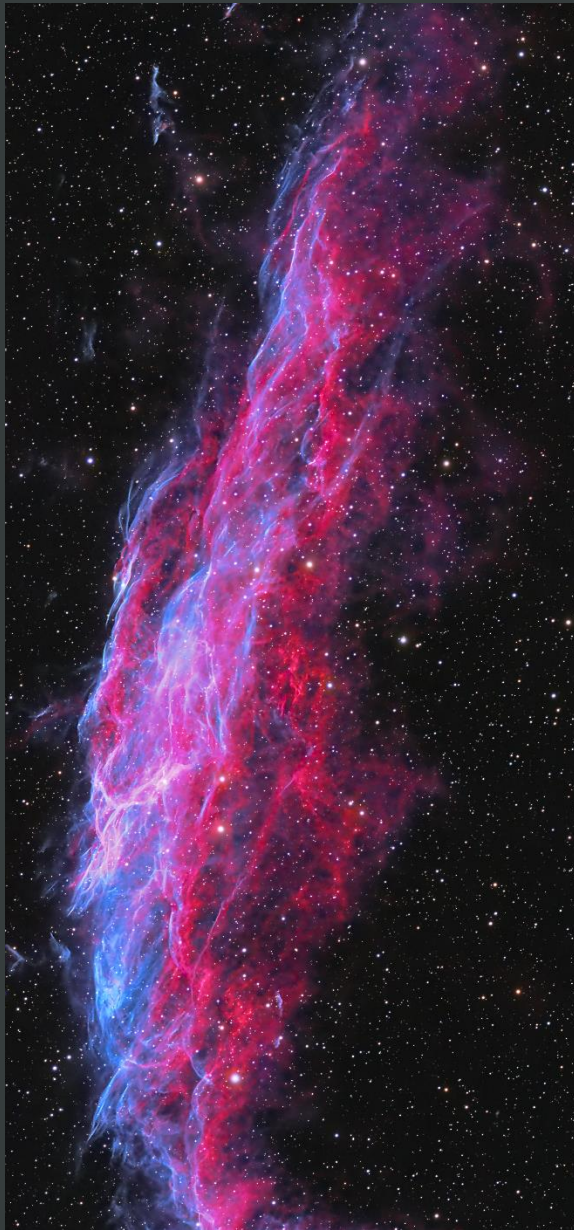
- The Child Abduction Mediation Scheme also expressly provides during the screening interview the mediator will consider whether the subject child is of an **age and level of maturity** at which their voice should be heard.
- The mediator usually speak with children from the **age of 10 years upwards**. It is rare that a child who is younger than 10 years of age is spoken to by the mediator.
- Both parents need to **consent** to the child speaking with a mediator. If one parent consents but the other parent refuses to do so, the mediator cannot speak to the child.
- A mediation session is undertaken with the **parents** to understand their thoughts, wishes, proposals regarding the future arrangements for their child.
- One of the mediators who participated in the mediation session with the parents will contact the **child** to confirm he/she is willing to speak with them and, if so, arranges to speak with the child at a suitable venue.
- The mediator will **share with the child** the parents' thoughts/proposals for the future and will ascertain the child's thoughts and feelings about the proposals. The mediator will also seek generally the child's hopes, wishes and feelings about the current situation and the future.
- The conversation between the mediator and the child is **completely confidential** and it is for the child to decide what they want to be shared with their parents.
- A further mediation session is undertaken with the **parents** and during this session the mediator who spoke with the child provides the child's feedback to the parents which helps inform the mediation process

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- Within England and Wales, a mediator must complete a **specialist training** course in child inclusive mediation before they are permitted to speak with children.
- It is not just about hearing from the child about their own thoughts and wishes but also obtaining the child's **thoughts about the parents' proposals** for the future.
- Everything the child says is **completely confidential** unless the child wishes it to be shared with the parent.
- The child does not participate in mediation with the parents present. The **mediator** conveys the child's voice in the manner the child wishes.

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- Where mediation occurs, the court will still make directions for evidence, reports and a final to **avoid delay** in cases where the mediation is not successful.
- In the circumstances, the mediation process will also be informed by information on the child's wishes and feelings where it has been gathered **within proceedings**.
- In our jurisdiction, we are likely to have the following **evidence** to assist the court in determining whether (a) the child objects and (b) the child is of an age and maturity at which it is appropriate to take account of his or her views:
 - Statements from the **parents** setting out what they contend the child has said.
 - A report from the Officer of the Children and Family Court Advisory and Support Service (**Cafcass**) High Court Team detailing:
 - What the child has **said** on the subject of return.
 - Whether, in the opinion of the Cafcass Officer what the child has said amounts to an **objection to being returned** for the purposes of Art 13 (as opposed to a preference for one parent or country).
 - Whether the child is of an age and maturity such that it is appropriate for the court to take account of his or her views.
 - Whether there is any evidence of **parental influence** on the child's views.
 - In **rare** cases, the child may be joined as a party and will instruct a lawyer to present the child's views.



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