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## *Smedley v. Smedley*, 772 F.3D 184 (4th Cir. 2014). The Effect of International Comity on the Hague Convention

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*SMEDLEY V. SMEDLEY*, 772 F.3D 184  
(4TH CIR. 2014).  
THE EFFECT OF INTERNATIONAL COMITY  
ON THE HAGUE CONVENTION

*Mary Rose Pritchard*\*

INTRODUCTION

Germany and the U.S. are two of the original signatories to the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention).<sup>1</sup> The purposes of the Hague Convention and its implementing statute, the International Child Abduction Remedies Act, are to secure “the prompt return of children who have been wrongfully removed or retained” in any contracting state by one parent.<sup>2</sup> In addition, they seek to ensure that countries respect the “rights of custody and of access under the law of” other countries.<sup>3</sup> In implementing the Hague Convention, Congress recognized “the need for uniform international interpretation” among contracting states.<sup>4</sup> The comity of nations

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<sup>1</sup> See Hague Conference on Private International Law: Final Act, Oct. 25, 1980, 19 I.L.M. 1501 (1980). As of February 2015, seventy-three states and territories have ratified or acceded to the Hague Convention. See U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFAIRS, *U.S. Hague Convention Treaty Partners*, <http://travel.state.gov/content/childabduction/english/country/hague-party-countries.html> (last visited June 17, 2015).

<sup>2</sup> International Child Abduction Remedies Act § 2 et seq., 22 U.S.C. § 9001(a)(4) (2012).

<sup>3</sup> Convention on the Civil Aspects of International Child Abduction, art. 1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

<sup>4</sup> § 9001(b)(3)(B).

governs the extent to which the U.S. honors the judicial decree of a foreign country.<sup>5</sup>

This case comment will discuss and evaluate the Fourth Circuit's opinion in *Smedley v. Smedley*.<sup>6</sup> This case involves an international comity decision under the Hague Convention reviewing a German court's denial of a Hague petition filed by a father for the return of his two children to the U.S. after their mother wrongfully removed them to Germany, and later wrongfully retained by their father in the U.S.<sup>7</sup> The German appellate court denied the father's Hague petition, ruling that the defense to wrongful removal (grave risk of harm and consent) applied under the circumstances.<sup>8</sup> In *Smedley*, the Fourth Circuit did not find the German appellate court's decision unreasonable.<sup>9</sup> After a methodical review of the German court's path to denial of the father's Hague petition, the Fourth Circuit affirmed the lower court's decision, which bestowed comity to the foreign court, and ordered the return of the children to Germany with their mother.<sup>10</sup>

## I. HISTORY

The Hague Convention represents a policy-based attempt by the U.S. and other joined countries to preserve international comity by trying cases involving child abduction in the country where they arise.<sup>11</sup> As the Pérez Vera Report states, "the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e., of custody rights, should take place before the competent authorities in the State where the child had its habitual

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<sup>5</sup> Comity is "[a] practice among political entities (as countries, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." BLACK'S LAW DICTIONARY 324 (10th ed. 2014); *Asvesta v. Petroutsas*, 580 F.3d 1000, 1010 (9th Cir. 2009).

<sup>6</sup> 772 F.3d 184 (4th Cir. 2014).

<sup>7</sup> *Id.* at 187.

<sup>8</sup> *Id.* at 187, 190.

<sup>9</sup> *Id.* at 191.

<sup>10</sup> *Id.*

<sup>11</sup> See Hague Convention, *supra* note 3, art. 1, 1343 U.N.T.S. at 98.

THE EFFECT OF INTERNATIONAL COMITY  
ON THE HAGUE CONVENTION

residence prior to its removal.”<sup>12</sup> When a court “[o]rder[s] a return remedy . . . [it] allows the courts of the home country to decide what is in the child's best interests.”<sup>13</sup> Further, “[i]t is the [Hague] Convention's premise that courts in contracting states will make this determination in a responsible manner.”<sup>14</sup>

The Hague Convention often comes into play when one parent abducts a child from the child's habitual residence, taking the child to the abducting parent's home country in order to gain a more favorable custody ruling.<sup>15</sup> When determining a child's habitual residence, U.S. courts take into account whether the parents share an intent to make a particular country the child's home, and whether enough time has passed for the child to acclimate to the residence.<sup>16</sup> If a removal or retention is found wrongful, Article 12 provides that the parent must return the child unless certain defenses apply.<sup>17</sup> If a defense applies, return is discretionary.<sup>18</sup> Defenses include: (1) the person who had care of the child “was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention”; (2) there is a grave risk that “return would expose the child to physical or psychological harm”; and (3) “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.”<sup>19</sup>

The U.S. Supreme Court cautioned that “[t]he merits of [a foreign] case should not, in an action brought in this country upon the

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<sup>12</sup> See Elisa Pérez Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 426, 430 (Permanent Bureau trans., 1982), available at <http://www.hcch.net/upload/expl28.pdf> [hereinafter Pérez Vera Report].

<sup>13</sup> *Abbott v. Abbott*, 560 U.S. 1, 20 (2010).

<sup>14</sup> *Id.*

<sup>15</sup> See *U.S. Interpretation of “Rights of Custody” Under the Hague Child-Abduction Convention*, 97 AM. J. INT’L L. 207, 207 (2003); Hague Convention *supra* note 3, art.1–6, 1343 U.N.T.S. at 98–99.

<sup>16</sup> See *Maxwell v. Maxwell*, 588 F.3d 245, 251 (4th Cir. 2009).

<sup>17</sup> See Hague Convention, *supra* note 3, art. 12–13, 1343 U.N.T.S. at 100–01.

<sup>18</sup> *Id.* art. 13, 1343 U.N.T.S. at 101.

<sup>19</sup> *Id.*

judgment, be tried afresh.”<sup>20</sup> However, U.S. federal appellate courts look closely at the merits of the foreign court’s decision in deciding whether comity can properly be extended to their judgment.<sup>21</sup> The Ninth Circuit indicated that “[e]xtension of comity to a foreign judgment ‘is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.’”<sup>22</sup> Likewise, the Second Circuit stated that the foreign court’s holding deserves some “deference, but, in order to determine how much deference,” it is “appropriate to give some consideration to the subsidiary determinations that underlie the holding.”<sup>23</sup>

## II. FACTS

Mark Smedley married his wife, Daniela, while he was in the military stationed overseas.<sup>24</sup> They married in 2000, and had two children while living in Germany.<sup>25</sup> Mark was then transferred back to North Carolina, where he and his family moved in 2010.<sup>26</sup> During a period of marital difficulties while living in the U.S., Daniela told Mark she wished “to separate and move with the children.”<sup>27</sup> Subsequently, “Mark bought . . . round-trip plane tickets” to Germany for Daniela and the children “with a return date of August 11, 2011.”<sup>28</sup> However, Mark claimed he only consented to a one-month vacation, while Daniela maintained that he agreed to an indefinite period of time in which she could reconsider their

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<sup>20</sup> *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895).

<sup>21</sup> *See Asvesta v. Petroutsas*, 580 F.3d 1000, 1011 (9th Cir. 2009).

<sup>22</sup> *Id.* (quoting *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007)).

<sup>23</sup> *Diorinou v. Mezitis*, 237 F.3d 133, 143 (2d Cir. 2001).

<sup>24</sup> *Smedley v. Smedley*, 772 F.3d 184, 187 (4th Cir. 2014).

<sup>25</sup> *Id.* The “children, A.H.S. and G.A.S., were born in 2000 and 2005, respectively[,]” making A.H.S. about fourteen and G.A.S. about nine years old during litigation in the Fourth Circuit. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Brief of Petitioner-Appellee at 6, *Smedley v. Smedley*, 772 F.3d 184 (2014) (No. 14-1414), 2014 WL 3572731, at \*6.

<sup>28</sup> *Smedley*, 772 F.3d at 187.

## THE EFFECT OF INTERNATIONAL COMITY

## ON THE HAGUE CONVENTION

separation and think things over.<sup>29</sup> Soon after, Daniela informed Mark that she would remain in Germany with the children, despite his objections.<sup>30</sup>

Mark immediately filed a petition in Germany under the Hague Convention for the return of the children to the U.S.<sup>31</sup> The District Court of Bamberg denied the petition, finding that Daniela established one of the four Article 13 defenses,<sup>32</sup> specifically, the grave-risk exception.<sup>33</sup> The court relied on a report from a court-appointed family advocate who stated that sending the children back to the U.S. would expose them to a serious risk of physical or psychological harm.<sup>34</sup> Upon Mark's appeal, the German appellate court found that he agreed to a permanent move and stated Daniela's testimony was more credible.<sup>35</sup> "As consent is another of the Article 13 defenses, the court held that" determining the children's habitual residence was unnecessary.<sup>36</sup>

On May 7, 2012, Mark and Daniela obtained a divorce declaration in Germany.<sup>37</sup> The court ordered that both parties share custody of their children, but directed that the children were to live

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<sup>29</sup> *Id.* According to Daniela, "Mark told her that should she fail to change her mind, he would try to relocate to Germany to be close to his children." Brief of Petitioner-Appellee, *supra* note 27, at 7.

<sup>30</sup> *Smedley*, 772 F.3d at 187.

<sup>31</sup> *Id.*

<sup>32</sup> See 22 U.S.C. § 9003(e)(2)(A) (2012) (requiring proof, by clear and convincing evidence, that one of the exceptions set forth in Article 13(b) or 20 of the Hague Convention applies); 22 U.S.C. § 9003(e)(2)(B) (demanding proof by a preponderance of the evidence that some exception set forth in Article 12 or 13 of the Hague Convention applies).

<sup>33</sup> *Smedley*, 772 F.3d at 187.

<sup>34</sup> Brief of Petitioner-Appellee, *supra* note 27, at 6. Mark allegedly beat both children with his hands, and at times beat the older one with a belt. *Id.*

<sup>35</sup> *Smedley*, 772 F.3d at 187. The German court held that Daniela's testimony was consistent, detailed, coherent, and corroborated by the older child. *Id.* at 190.

<sup>36</sup> *Id.* at 187–88.

<sup>37</sup> Brief of Petitioner-Appellee, *supra* note 27, at 11.

with Daniela in Germany.<sup>38</sup> After almost two years living in Germany, Daniela agreed to let the children visit Mark in the U.S.; however, he failed to return them on the agreed upon date.<sup>39</sup> Daniela filed a Hague petition in a district court in North Carolina on April 7, 2014.<sup>40</sup> Acting on that petition, the U.S. district court accorded comity to the decision of the German appellate court and found that the “German court’s failure to determine the children’s habitual residence” based on Mark’s consent was reasonable.<sup>41</sup> The U.S. district court also found the German court’s determination that Daniela was more credible was at least minimally reasonable, and “that Germany was the children’s habitual residence” when they visited Mark in North Carolina.<sup>42</sup> On May 2, 2014, pursuant to the district court’s order, Daniela returned to Germany with both children.<sup>43</sup> Mark appealed to the Fourth Circuit, arguing “the district court erred in according comity”<sup>44</sup> because the German court misinterpreted the Hague Convention and its “decision did not meet a minimum standard of reasonableness.”<sup>45</sup>

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<sup>38</sup> *Id.* at 12. Mark never tried to change this order, dispute its validity, or argue that the German court lacked power to enter the custody order. *Id.*

<sup>39</sup> *Smedley*, 772 F.3d at 188. Mark signed a notarized document stating that he would pick up the children on or about August 6, 2013, and that the children would be returning on or about August 26, 2013, unless Daniela was otherwise notified. Brief of Petitioner-Appellee, *supra* note 27, at 1. Mark did not return the children during the designated time, and sent Daniela a Facebook message stating that he would be keeping the children with him in North Carolina. *Id.*

<sup>40</sup> Brief of Petitioner-Appellee, *supra* note 27, at 14.

<sup>41</sup> *Smedley*, 772 F.3d at 188.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 188.

<sup>44</sup> *Id.* at 186.

<sup>45</sup> *Id.* at 190.

THE EFFECT OF INTERNATIONAL COMITY  
ON THE HAGUE CONVENTION

## III. DISCUSSION

## A. REPORT

The Fourth Circuit delivered its decision in November of 2014, which affirmed the lower court's grant of comity to the foreign judgment.<sup>46</sup> The court disagreed with Mark's contention that the German court misinterpreted the Hague Convention by failing to make a habitual residence determination before addressing consent, stating that it was "pure conjecture."<sup>47</sup> The court noted a habitual-residence determination "was not dispositive or even helpful"<sup>48</sup> in *Smedley*, as the foreign court found Mark had consented to the move—one of the four defenses to wrongful removal of a child under the Hague Convention.<sup>49</sup>

The court also found the German court's decision was at least minimally reasonable concerning Daniela's testimony being more credible than Mark's based on the facts for two reasons.<sup>50</sup> First, one of the children corroborated Daniela's testimony.<sup>51</sup> Second, Mark's credibility was further undermined when evidence was produced showing that he lied to the court about his knowledge of Daniela's decision to stay in Germany.<sup>52</sup>

Next, the court compared the consent determination in *Asvesta v. Petroutsas*, where the father wrote an email consenting only to the temporary travel of his wife and their children, with the present case and found that no comparable evidence rendered the

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<sup>46</sup> *Id.* at 191.

<sup>47</sup> *Id.* at 189.

<sup>48</sup> *Id.* at 190.

<sup>49</sup> *Id.* at 189–90.

<sup>50</sup> *Id.* at 190.

<sup>51</sup> *Id.* at 191.

<sup>52</sup> *See id.* at 190. Mark initially told the German court that he first learned of Daniela's decision to stay in Germany the day before their scheduled return flight. *Id.* Nine days earlier he wrote a Facebook post that read in part, "Please come back to me. I am really taking this hard right now." *Id.* Additionally, the German court found that Mark's testimony through his lawyer was unreliable and inaccurate. *Id.*



German court's finding of consent unreasonable.<sup>53</sup> The court rightfully found the German court's decision met the requisite standard of reasonableness, and therefore it properly extended comity to the foreign adjudication.<sup>54</sup> The Fourth Circuit noted that decisions rendered in a foreign nation are not entitled to the protection of full faith and credit, but the court will accord considerable deference to foreign judgments as a matter of comity.<sup>55</sup>

*B. ANALYSIS*

Although the Fourth Circuit reached the appropriate result in *Smedley*, its strict adherence to the principles of comity could create a situation in which a court would grant comity despite the fact that a foreign court fails to meet the necessary standard of reasonableness. As uniform interpretation is the chief objective of the Hague Convention,<sup>56</sup> situations may arise when courts in other contracting states misinterpret its provisions. U.S. courts do not have an established boundary at which to disallow international judicial deference. The circuit courts have interpreted the law differently—the Second Circuit accorded comity even though it considered a foreign court's judgment “troubling,” yet the Ninth Circuit declined to extend comity when it found that the foreign court misapplied the Hague Convention.<sup>57</sup> Moreover, if a court applies the wrong standard, then the Hague Convention provides neither an enforcement mechanism nor an oversight body to ensure its proper implementation.<sup>58</sup> Nevertheless, judges in the U.S. courts successfully support the principle that “comity is at the heart of the

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<sup>53</sup> *Id.* at 191.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 189.

<sup>56</sup> See 22 U.S.C. §9001(b)(3)(B) (2012).

<sup>57</sup> Compare *Diorinou v. Meztis*, 237 F.3d 133, 146 (2d Cir. 2001), with *Asvesta v. Petroutsas*, 580 F.3d 1000, 1021 (9th Cir. 2009).

<sup>58</sup> See PAUL R. BEAUMONT & PETER E. MCELEAVY, *THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION* 2, 241–42 (P.B. Carter ed., Oxford 1999).

## THE EFFECT OF INTERNATIONAL COMITY

## ON THE HAGUE CONVENTION

Hague Convention”<sup>59</sup> by citing and relying on the reasoning of foreign cases.<sup>60</sup>

One of the purposes of the Hague Convention is to deter parents from crossing international boundaries in search of a more sympathetic court.<sup>61</sup> When considering this obligation of impartiality, however, it is questionable whether the German district court fairly conducted the Hague petition proceedings. Mark was present only through his attorney when the German court found the testimony of Daniela, a German citizen, more credible, and that Mark consented to her move to Germany with the children.<sup>62</sup> She claimed Mark told her that he would try and relocate to Germany to remain close to the children should she refuse to change her mind during the conditional move.<sup>63</sup> Accepting this assertion as true, Mark did not consent to a *permanent* move, but only to a conditional one. Further, Mark testified that he merely agreed to a one-month vacation, which is evidenced by the round-trip plane tickets he purchased for Daniela and the children.<sup>64</sup> However, under Article 13(a), courts decide the issue of consent only by a preponderance of the evidence standard.<sup>65</sup> Therefore, after contemplating the corroboration of Daniela’s testimony by one of the children and the evidence of Mark’s inconsistency, the German court likely came to the accurate conclusion that Mark consented to the move.<sup>66</sup> Consequently, the Fourth Circuit correctly found the German court’s finding of consent at least minimally reasonable. Nevertheless, courts should avoid conducting such proceedings without both parents present, as well as

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<sup>59</sup> *Diorinou*, 237 F.3d at 142.

<sup>60</sup> See Karin Wolfe, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT’L L. & POL. 285, 370 (2000). This shift is not as visible in Germany because Germany is a civil law country and judges are not prone to citing cases. *Id.*

<sup>61</sup> See *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996); *Blondin v. Dubois*, 189 F.3d 240, 246 (2d Cir. 1999). See also Pub. Notice 957, 51 Fed. Reg. 10,494, 10,505 (Mar. 26, 1986).

<sup>62</sup> *Smedley v. Smedley*, 772 F.3d 184, 187 (4th Cir. 2014).

<sup>63</sup> Brief of Petitioner-Appellee, *supra* note 27, at 7.

<sup>64</sup> *Smedley*, 772 F.3d at 187.

<sup>65</sup> Hague Convention, *supra* note 3, art. 13, 1343 U.N.T.S. at 101.

<sup>66</sup> *Smedley*, 772 F.3d at 190.

prejudicially ruling in favor of its nation's citizens in order to comport with the Hague Convention's standards of fairness.<sup>67</sup>

The implementing body of the Hague Convention recognizes the extreme importance of each signatory member to view all other contracting nations as having competent courts for custody and family dissolution determinations.<sup>68</sup> The Fourth Circuit's decision to accord comity to the German court clearly supports this policy. Thus, the court established the appropriate precedent to allow U.S. courts to work with courts of other countries to remedy the wrongful taking of children across international borders.

### C. PRACTICAL IMPACT

#### 1. CHILDREN'S RIGHT TO BE HEARD

When considering the functional impact of *Smedley*, it is noteworthy that neither the German courts nor the U.S. courts discussed the best interests of the children. Although concerns of international comity are significant, they should "be weighed against the best interests and safety of" children in Hague Convention proceedings.<sup>69</sup> Courts analogize the Article 13 exception to wrongful removal or retention—"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"<sup>70</sup>—with a best interests analysis in which the child's preference would not necessarily be given dispositive weight.<sup>71</sup> The Hague Convention does not state the necessary age for

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<sup>67</sup> *But see* Wolfe, *supra* note 60, at 295 ("The definition of habitual residence applied by German courts often favors the parent who left a marital residence in another state and returned to Germany.").

<sup>68</sup> *See* Hague Convention, *supra* note 3, art. 1, 1343 U.N.T.S. at 98.

<sup>69</sup> *See* Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 671 (2001).

<sup>70</sup> *See* Hague Convention, *supra* note 3, art. 13, 1343 U.N.T.S. at 101.

<sup>71</sup> *See* Wolfe, *supra* note 60, at 337.

## THE EFFECT OF INTERNATIONAL COMITY

## ON THE HAGUE CONVENTION

objection, and seems to defer to the judge to make that determination.<sup>72</sup>

U.S. courts are divided on the requisite age of maturity. Some have found an eight-year-old to be of the necessary age,<sup>73</sup> while another court returned a mature nine-year-old over his strong objections.<sup>74</sup> Although courts have considered this factor, one researcher found that no case in the U.S. relied exclusively on a child's objection to deny a return order.<sup>75</sup> Unlike courts in the U.S., German courts “do not recognize a minimum age at which a child's objections gain conclusive weight.”<sup>76</sup> However, in practice, “German courts have given more weight to the objections of young children,” unless “the court finds the child is too young” or has been

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<sup>72</sup> See Hague Convention, *supra* note 3, art. 13, 1343 U.N.T.S. at 101 (“The judicial or administrative authorities may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”). See also Pérez-Vera Report, *supra* note 12, at 460 (“[T]he very nature of these exceptions gives judges a discretion—and does not impose upon them a duty—to refuse to return a child in certain circumstances.”).

<sup>73</sup> See *Anderson v. Acree*, 250 F. Supp. 2d 876, 883 (S.D. Ohio 2002) (considering views of an eight-year-old child who was composed, calmly and readily answered questions, pointed to New Zealand on a globe, and indicated her understanding of the difference between truth and falsehood and of her obligation to tell the truth). *But see In re Zarate*, 1996 WL 734613 (N.D. Ill. 1996) (finding an eight-year-old lacked maturity when she did not know her birth year or classes and confused her natural father with her stepfather).

<sup>74</sup> See *Mendez Lynch v. Mendez Lynch*, 220 F. Supp. 2d 1347, 1362 (M.D. Fl. 2002) (returning both a mature nine-year-old, whose undisputed testimony showed he desired to remain in America, and his younger brother to Argentina).

<sup>75</sup> See Wolfe, *supra* note 60 at 335–36.

<sup>76</sup> *Id.* at 335. Although the views of the child are not dispositive, “[u]nder German Family law, children's views are required to be taken into account and it is normal for children, even quite young, to appear in court.” *The Justice Department's Response to International Parental Child Kidnaping: Hearing before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106 Cong. 34 (1999) (statement of Catherine I. Meyer).

unduly influenced.<sup>77</sup> In *Smedley*, the German courts disregarded the children's wishes in deciding not to return them to the U.S. during the Hague petition proceedings. However, the children were approximately seven-years-old and twelve-years-old at the time of the litigation,<sup>78</sup> thus, it is unclear whether they were of the appropriate age and possessed the requisite degree of maturity for a U.S. court to consider their views.

While the child's age is important, his or her "emotional and psychological bonds . . . are also important."<sup>79</sup> Either the judge or the parties may appoint a psychologist as an expert to help determine if a child is of sufficient maturity to influence this determination,<sup>80</sup> however, only a small number of cases address the appropriate weight to apply to such an expert's testimony.<sup>81</sup> Many courts have completely rejected psychologists' testimony by finding it to be "appropriate in a custody proceeding, not in a Hague Convention case,"<sup>82</sup> while others rely heavily upon it when deciding whether to apply this exception.<sup>83</sup> Although the German court in *Smedley*

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<sup>77</sup> Wolfe, *supra* note 60, at 335–36.

<sup>78</sup> *Smedley v. Smedley*, 772 F.3d 184, 187 (4th Cir. 2014). The "children, A.H.S. and G.A.S., were born in 2000 and 2005, respectively." *Id.* Mark filed the Hague petition in 2011. *Id.*

<sup>79</sup> Linda D. Elrod, "Please Let Me Stay": *Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663, 679 (2011).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Morrison v. Dietz*, No. 07-1398, 2008 WL 4280030, at \*12 (W.D. La. Sept. 17, 2008) (failing to accept the psychologist's determination on whether the mature child or grave-risk exceptions should apply); *Tahan v. Duquette*, 613 A.2d 486, 489 (1992) ("Psychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships all bear upon the ultimate issue [of custody] to the appropriate tribunal in the place of habitual residence.").

<sup>83</sup> *See, e.g., Garcia v. Angarita*, 440 F. Supp. 2d 1364, 1381 (S.D. Fla. 2006) (agreeing with the psychologist's opinion that the child was not old enough or mature enough for the court to consider the child's objection in determining whether to return the child, even though the court considered the child to be an impressive eleven-year-old); *Ostevoll v. Ostevoll*, No. C-99-961, 2000 WL 1611123 (S.D. Ohio Aug. 16, 2000) (allowing two psychologists to provide

## THE EFFECT OF INTERNATIONAL COMITY

## ON THE HAGUE CONVENTION

appointed a family advocate, the court did not articulate the advocate's opinion about whether the children wished to live with their father in the U.S. or remain in Germany.<sup>84</sup>

## 2. THE GRAVE-RISK EXCEPTION

Although the Article 13 grave-risk exception was not dispositive in *Smedley*, its interpretation is likely the most debated subject of the Hague Convention. The concept of comity among nations argues for very limited use of this exception.<sup>85</sup> Accordingly, in *Friedrich v. Friedrich*,<sup>86</sup> the Sixth Circuit stated that the provision implies much more than serious risk.<sup>87</sup> In *Friedrich*, a mother made no allegations of abuse, but instead raised concerns that her child would have adjustment problems if forced to return to Germany.<sup>88</sup> The court held the grave-risk exception did not apply, but found it would apply in situations such as returning a child to a nation gripped by “war, famine, or disease”, as well as in circumstances of returning a child to a place of “serious abuse or neglect.”<sup>89</sup> In addition, the court stated that the exception should not be an easily satisfied test that would allow parental child abduction to continue.<sup>90</sup> In *Smedley*, the

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testimony regarding the maturity and age of the children involved in the case).

<sup>84</sup> One may infer that the children wished to remain in Germany since the allegations of the court-appointed family advocate stated Mark physically abused one of the children and that returning them to North Carolina would expose them to a serious risk of harm. *Smedley v. Smedley*, 772 F.3d 184, 187 (4th Cir. 2014).

<sup>85</sup> See *Van De Sande v. Van De Sande*, 431 F.3d 567 (7th Cir. 2005).

<sup>86</sup> 78 F.3d 1060, 1068–69 (6th Cir. 1996).

<sup>87</sup> *Id.* at 1068. The court stated that a grave-risk of harm could exist only in two situations. *Id.* at 1069. First, when returning the child before a court can resolve the custody dispute puts the child in danger. *Id.* Second, there is a grave-risk of harm when there is a previous act of abuse or neglect, when the child has an extraordinary emotional dependence on the accused parent, or when the court in the country of habitual residence, for whatever reason, is incapable or unwilling to adequately protect the child. *Id.*

<sup>88</sup> *Id.* at 1067.

<sup>89</sup> *Id.* at 1069.

<sup>90</sup> See *id.*

court-appointed family advocate alleged Mark physically abused the children,<sup>91</sup> but it is unclear whether these allegations were serious enough to satisfy the grave-risk exception.

On the other hand, the U.S. Central Authority for the Hague Convention maintains that in order to establish the grave-risk defense, the respondent must demonstrate that the court in the country of “habitual residence is unwilling or unable to protect” that parent and child.<sup>92</sup> Accordingly, when mothers are granted asylum in the U.S. for physical abuse, which is derivative to children, many courts find that the abuse still does not meet the threshold for the grave-risk defense.<sup>93</sup> Consequently, a parent “who has been granted asylum based on domestic violence . . . cannot be forced to return to that country.”<sup>94</sup> If the court grants a Hague petition and orders the child returned to its habitual residence, however, the parent must make the extremely difficult choice between returning to the country of her abuser or living apart from the child.<sup>95</sup>

However, many courts in the U.S. are following a “further analysis” approach to the grave-risk defense.<sup>96</sup> The Second Circuit held that a court could return a child to his place of habitual residence even if there was a grave-risk of physical or psychological harm, as long as that country had protocols in place to protect the child from that risk.<sup>97</sup> Similarly, the First Circuit credited the further analysis approach in allowing courts to examine the “placement options and legal safeguards in the country of habitual residence to preserve the child's safety while the courts of that country have the opportunity to determine custody of the children within the physical boundaries of their jurisdiction.”<sup>98</sup> However, the Eighth Circuit followed a contrary

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<sup>91</sup> *Smedley v. Smedley*, 772 F.3d 184, 187 (4th Cir. 2014).

<sup>92</sup> See Catherine Norris, Comment, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159, 186 (2010). However, the Hague Convention does not impose this requirement. *Id.*

<sup>93</sup> *Id.* at 169.

<sup>94</sup> *Id.* at 189.

<sup>95</sup> *Id.*

<sup>96</sup> See *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000); *Croll v. Croll*, 66 F. Supp. 2d 554, 562 (S.D.N.Y. 1999); *Turner v. Frowein*, 752 A.2d 955, 969 (Conn. 2000).

<sup>97</sup> See *Blondin v. Dubois*, 189 F.3d 240, 246–47 (2d Cir. 1999).

<sup>98</sup> See *Walsh*, 221 F.3d at 219.

## THE EFFECT OF INTERNATIONAL COMITY

## ON THE HAGUE CONVENTION

approach in *Nunez-Escudero v. Tice-Menley*,<sup>99</sup> noting the grave-risk exception is not based on an inquiry of whether the courts of the child's habitual residence can offer protection.<sup>100</sup> Cases maintaining the past interpretation of returning the child without further analysis still exist, but the trend towards further analysis following a finding of the grave-risk exception is expanding.<sup>101</sup>

## IV. CONCLUSION

Both the U.S. and Germany face the issue of international child abduction by parents. The Hague Convention proves to be an effective multilateral treaty by allowing children wrongfully removed to, or retained in one member state to be returned to their country of habitual residence so that a court of competent jurisdiction can properly determine the issue of custody. Its vague provisions present challenges in interpretation, particularly the objection of the child and the grave-risk exception, which are being construed inconsistently by courts of different countries. Further, though the primary objective of the Hague Convention is securing cooperation among nations, not all courts are so compliant. Nevertheless, in *Smedley*, the Fourth Circuit rigidly applied principles of comity to the German court's judgment by finding that its decision was at least minimally reasonable, thus providing useful precedent for other courts to do the same.

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<sup>99</sup> 58 F.3d 374, 378 (8th Cir. 1995).

<sup>100</sup> *See id.* at 377.

<sup>101</sup> Nelson, *supra* note 69, at 687–88. *See* *Blondin v. Dubois*, 19 F. Supp. 2d 123, 129 (S.D.N.Y. 1998), *vacated*, 189 F.3d 240 (2d Cir. 1999).



