

CorporateLiveWire

# FAMILY LAW 2020 EXPERT GUIDE

[www.corporatelivewire.com](http://www.corporatelivewire.com)





## Magali van Maanen

Netherlands

info@deboorderadvocaten.com

+31 (0) 20 765 27 00

www.deboorderadvocaten.com



## Mindy Mosk

Netherlands

info@deboorderadvocaten.com

+31 (0) 20 765 27 00

www.deboorderadvocaten.com



## Realising the child's right to be heard by a guardian ad litem in Dutch child abduction proceedings

By Magali van Maanen & Mindy Mosk

Many articles have been written on the Hague Convention and its interpretation. The so-called "Dutch model", with a quick and efficient procedure, is proving to be an example for other countries. But even we have our challenges and one is how to ensure the voice of the child is heard. It cannot be denied that in child abduction cases, the child himself is the most important person. However, the child does not have the right to read the procedural documents, nor does he have his own lawyer to provide him with advice. Nevertheless, the child's specific objections can prevent an immediate return. So who states and tests the child's objections? In the Netherlands, we have found a solution in the figure of a guardian ad litem (GAL). In this article, we will explain the duties of the GAL and how the right of the child to give his opinion is guaranteed in the child abduction procedure in the Netherlands.

### The Hague Convention and resistance

The Hague Child Abduction Convention is the most important treaty for the international child abduction practice.<sup>1</sup> The main

1. Others including the Brussel IIbis Regulation, the European Convention on International Child Abduction, the Convention on the Rights of the Child, The Hague Convention of 1996 on the International Protection of Children and the Guide to the International Child Abduction Procedure.

message of this treaty is clear. Besides only a few exceptions, a child who has been wrongfully transferred to another country without the permission of the left behind parent with parental authority, must immediately return to the country of origin. The decision is not based on the substantive judgment whether return is in the best interest of the child. Rather, it is whether decisions on custody and habitual residence should be conducted in the country of origin.

One of the five grounds for refusal relates to situations in which the child resists his return and, given the child's age and maturity, his opinion must be taken into account. The explanatory report states that with this ground for refusal, the Hague Convention wants to offer abducted children an opportunity to interpret and express their own interests in the abduction procedure.<sup>2</sup> The convention doesn't prescribe a minimum age to determine whether the child is mature enough to refuse a return. Choosing an age limit seemed arbitrary. It is up to the authorities in the Contracting States to determine when a child is considered sufficiently competent to take his opinion into account.

2. E.Pérez-Vera, Explanatory Report on the 1980 HCCH Child Abduction Convention, 1981, p. 433.



According to Dutch case law, a child's preference to stay in one country is insufficient.



### Participation possibilities for children in the Netherlands

In the Netherlands, there are several moments where a child can participate in the procedure. Firstly, when parents choose to enter into cross-border mediation. During the cross-border mediation, children from the age of three years old are heard, provided both parents have given permission and the circumstances permit it. The two mediators who conduct the mediation with the parents do not speak with the child. A third cross-border mediator with a behavioural science background (child expert) is asked to talk to the child.

This conversation has two goals. On the one hand, an attempt is made to give the child a voice in the procedure; on the other hand, it is intended to give parents insight into how the child experiences the situation. This can help parents find a solution amongst themselves. It is specifically not intended to make the child choose between the parents or the countries concerned. The report of the child conversation is read to the parents and is only used for mediation.

When parents do not come to an agreement in mediation, the court will appoint a GAL for child from the age of three years and older. This way the opinion of the child is indirectly represented. Subsequently the child can participate during the legal proceedings by being interviewed by the court.

In the Dutch practice, the child of six years and older receives an invitation from the court to be heard by the judge, although separate from the court hearing for the parents. When an appeal is made to a child's refusal to return, children under the age of six are also heard. This interview is not performed by a child expert, but by the three judges hearing the abduction case. The court clerk is also present, as well as the GAL.

The purpose of the conversation is to get a picture of the child and to clarify the child's feelings in that specific situation. The judge tells the parents what the child has said and in some cases the decision shows (a little) what the child has said. The court will not give feedback to the child, nor explain what has been done with his opinion. The GAL informs the child about the decision.

### Ground for refusal: resistance

Because the child is not a litigate party, an appeal is made by the abducting parent by reason of refusal. In many cases judges have to be aware of the fact that the ground for resistance is not the child's authentic opinion, but is influenced by the abducting parent. In order to accept the objection of the child – and thus a rejection of the petition for return – it is important that the child indicates very clearly why he does not wish to return. According to Dutch case law, a child's preference to stay in one country is insufficient.<sup>3</sup> The judge must be convinced that the objection is authentic and comes from the child itself.<sup>4</sup> There must be serious objections on the part of the child to return to the country of origin.

Yet, it remains a difficult decision to determine whether the opinion comes from the child or whether he has been influenced by the abducting parent. The GAL is of great importance in this respect. Because the GAL talks to the child twice, he is generally better able to judge whether a child can oversee its comments and whether its opinion is authentic. For this reason, the court asks the GAL to always include in its report whether the child is free to express its opinion and whether the child can oversee what it is saying.

3. Concl. P-G L. Strikwerda, ECLI:NL:PHR:2002:AE5804, bij HR 18 oktober 2002 LJN AE5804, punt 37.

4. Hof Den Haag 12 september 2016, ECLI:NL:GHDHA:2016:2016:2814, r.o. 5



### Summary

In summary, a positive aspect of the Dutch child abduction procedure is that it offers the child several possibilities to participate indirectly and directly in the procedure. However, if we look critically at the actual space for the child to participate, we can – also in the Netherlands – take some extra steps to improve the realisation of the right of children to be heard.

Research shows that it is difficult to explain to children that a decision in child abduction proceedings does not relate to the question of where the child can best live, but that it is about whether there are serious objections against its return.<sup>5</sup> Therefore, it is imperative that the child is explained transparently what its role is in the procedure, what influence the child's opinion has on the outcome of a procedure and that he receives feedback on the underlying reasons of a decision. With this last step we can ensure that – despite the fact that a child is not a litigant – its interests are safeguarded as fully as possible.

<sup>5</sup> S. Lembrechts e.a., 'Conversations between children and judges in child abduction cases in Belgium and the Netherlands', *Family and Law*, February 2019, p. 12-13.

*Magali van Maanen is a partner at De Boorder Lawyers, and was admitted to the Dutch Bar in 2006. She is a member of the International Academy of Family Lawyers (IAFL) and the Dutch Association for Family Law Lawyers and Divorce Mediators (vFAS). Next to litigation, mediation and collaborative practice are her preferred manners of dispute resolution. Magali is a member of the board of the Dutch International Child Abduction Lawyers' Association (D.I.A.L.). Her practice predominantly concerns cases with a cross border aspect, mainly due to her own international upbringing.*

*Mindy Mosk graduated with distinction at Leiden University in 2018 and was admitted to the Dutch Bar in 2019. During her studies she was a volunteer at child's rights organisation Defence for Children-ECPAT. Mindy wrote her Master's thesis on international child abduction and in July 2019 presented her findings at the "Gender, Inclusivity and Protecting the 21st Century Family Conference" in London. Although her work is in the broad field of family law, Mindy specialises in international child abduction cases.*

