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[07/05/1993; Family Court of New Zealand at Kaitaia; First Instance
D. v. D. [1993] NZFLR 548

Damiano v Damiano

Family Court Kaitaia FP 029/25/93

6, 7 May 1993

7 May 1993

P F BOSHIER J.

Pursuant to s 12 of the Guardianship Amendment Act 1991, the application before me seeks return of three children to Canada. The central issues arising and requiring determination are:

(i) Whether there is established to the satisfaction of the Court:

That there is a grave risk that the children's return -

(a) Would expose them to physical or psychological harm; or

b. **Would otherwise place them in an intolerable situation s 13(1)(c) and/or**

(ii) Whether objections by the children to return ought to be instructive in this case. (s 13(1)(d))

In cases under the Guardianship Amendment Act, there are often a number of issues requiring consideration and determination. Those often include: whether there has been a retention or removal; whether an applicant had a right of custody; and was exercising it; and proof that a country is a Contracted State.

Here the respondent, through her counsel, accepts all of those matters and accordingly accepts that the Court has jurisdiction. The only issue that is raised by the respondent is whether because of s 13 the children should not be returned.

In outlining the facts, my detailing of them can be limited to the essential enquiry that I am asked to make, and as I have just set out.

Background

The applicant is aged 38 and was born in Canada. His wider family resides in Canada, fairly close to where he lives. The respondent mother is aged 39. She was born in Papakura near Auckland and her family live mostly in Kaitaia. The parties were married in Ontario on 11 July 1981 and have lived in their home in Scarborough ever since. There are three children. The oldest is C. who is practically eleven; she was born on 9 June 1982. The next is L. who is

eight and a half and she was born on 31 October 1984. The youngest is A. who is six, she having just turned that on 12 March 1993.

The respondent went overseas on holiday and commenced living in Canada in 1974. Since that time she has returned to New Zealand on three occasions. The first was in 1976/1977, the second occasion was in 1985/1986 and there is this present visit which commenced on 28 February 1993. All of the visits have been about two months in duration. The respondent's parents have visited her in Canada once and that was in 1979/1980.

Unhappiness arose in the marriage and strain developed particularly as of about three years ago. Regrettably no counselling was sought. Two incidents occurred which have attracted considerable attention. The first was in December 1992, and the second was in February 1993. The first incident involved a traumatic threat by the applicant to his children. The second incident, occurring on 21 February 1993, involved a threat by the applicant to kill the respondent after a heated exchange, and in the course of which some violence was used. Both these incidents require exploration and I will do so shortly.

Mrs D. left for New Zealand with the children on 26 February 1993, having spent all of that week making arrangements to depart and having made the arrangements without the knowledge of Mr D. It is common ground that the parties were living together and were jointly parenting the children when the respondent left. It is also common ground that the applicant had no knowledge of the departure. It seems that the departure was initially intended to be a temporary one. The applicant found out about it upon discovering a note.

The respondent wishes to remain in New Zealand, living with the children. She fears the applicant and regards the marriage as having ended. Mr D. applies for the return of the children to Canada on the basis that he accepts separation, and proposes that the children live in the custody of their mother. The children and the children's mother should have the exclusive occupation of the family home. The family here have substantial assets by New Zealand standards and a property division should occur.

On the subject of assets, in addition to a house valued at CAN$270,000 there are shares, investment and cash totalling in all nearly CAN$900,000 or well over NZ$1,000,000. Mrs D. brought nearly NZ$100,000 with her and Mr D. has ready access to a similar amount.

The Legal Position

Cases involving application of the Guardianship Amendment Act require a wholly different approach to the legal position as it was prior to the coming into force of that Act. Previously the consideration of paramouncy of the best interests of the child was foremost from a New Zealand Court point of view. Thus in In Re B (Infants) [1971] NZLR 143, M. v C. (1989) 5 NZFLR 417 and H. v H. (1988) 5 NZFLR 161 the circumstances in which a child had come to New Zealand, the existence of overseas orders, and any demonstrable breach of those orders were secondary considerations to what the welfare of the children, or child, apparently required as at hearing.

Welfare remains important, but it is no longer so broadly paramount. In this respect s 35 of the Guardianship Amendment Act is important in that it qualifies s 23 of the Principal Act. The Guardianship Act 1968 must be seen as requiring a wide enquiry in deciding on appropriate care arrangements for children. Conversely cases falling for determination under ss 12 and 13 of the Guardianship Amendment Act involve a confined and clearly spelt out enquiry. The words used in the Statute are strict and concise. It is as well to emphasise the departure from previous principles by emphasising the purpose of the legislation.

The preamble says:

An Act to amend the Guardianship Act 1968 in order to implement the Hague Convention on the civil aspects of International Child Abduction

The Convention, which forms a schedule to the Act, itself spells out the intention clearly. The preamble says, interalia:

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.

The scope of the Convention in Article 1 is stated as being:

The objects of the present Convention are -

(a) to secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

The discretion that remains in a Court is now limited severely and stringently. Once certain qualifying conditions are established, s 12(2) provides that the Court:

shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.

The strong statutory presumption is for return, save for certain specified circumstances. This is a powerful statement in relation to International Law. The Family Court is undoubtedly required to be faithful to the stringency of discretion and be alive to the clear boundaries for enquiry into welfare.

In Director-General of the Department of Family and Community Services v Davis (1990) FLC 902-182, 78,226 a decision of the Full Court of the Family Court of Australia, and in Re A (A Minor) (Abduction) [1988] 1 FLR 365 a decision of the English Court of Appeal there is to be found ample support of a strong presumption of return, and for the wish that subsequent enquiry into welfare be made in the country of origin. The views that I have just expressed are similar to two New Zealand cases which were drawn to my attention. In W. v W. [1993] NZFLR 273. The Court said at p 277:

> **I take note in passing that the language used is forceful and vigorous. It is not a "best interest" test that must await the substantive Court hearing. The onus of proving the existence of such a grave risk in on the respondent.**

And in S v M (Family Court, Auckland FP 004/113/93 18 March 1993, Judge MacCormick) the Court said:

> **The words "grave risk" and "intolerable situation" are strong words and the Court must be satisfied in this regard, with the onus of establishing the situation firmly on the respondent.**

Crucial to the determination of this case, and I apprehend to cases which will continue to arise, is the meaning of s 13 when it provides that the Court may refuse to make an order for

return if the person who opposes establishes to the satisfaction of the Court that there is a grave risk that the children's return:

> **(i) would expose the child to physical or psychological harm or**
>
> **(ii) would otherwise place the child in an intolerable situation.**

Use of words such as establish and to satisfaction of the Court are not to be found in other Family Law Statutes. The onus of proof is heavy. In E. v E. [1989] FCR 153 Lincoln J said:

> **In my judgment there is a very heavy burden indeed upon a person alleged to have abducted a child bringing himself or herself within the provisions of Article 13, and the Court should hesitate very long before it grants which is in effect an exemption from the urgency which is characteristic of this Convention and the Act incorporating it.**

In C v C [1989] 2 All ER 465 CA Lord Donaldson MR said:

> **...in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation", which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the Court of the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those Courts in the circumstances of the case, the Courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these Courts, should be limited to giving the child the maximum possible protection until the Courts of the other country, Australia in this case, can resume their normal role in relation to the child."**

C v C [1989] 2 All ER 465 CA is recognised as a leading authority on the question of the Hague Convention implementation. It was followed in Davis (supra) and in Gsponer v Director General, Department of Community Services, Victoria (1989) FLC 92-001, 72,157 another decision of the Australian Family Court.

In Macmillan v Macmillan [1989] SLT (Scots Law Times) 350 the Court was not pursuaded that adequate welfare arrangements could be put in place. In that case the applicant father, with a history of depression and alcohol abuse, sought return of a child to Ontario, Canada, from Scotland.

The Court said:

Having regard to the long period over which this history of alcohol abuse and of depression extended, and to the fact that his state of depression recurred as recently as August 1988, it seems to me that to make an order the effect of which would be to place the child in the sole care of the petitioner would be highly undesirable from the child's point of view. In terms of Art 13 of the Convention, the question is whether the respondent has established a grave risk to the health or welfare of the child. On the information before me, and particularly on the medical information, it seems to me that to place the child in the sole care of the petitioner, without some supervision, support or backup would be to place her in an unstable situation in which she would be exposed to considerable risk if the petitioner's mental health suffered any deterioration.

In considering proposals to ameliorate the risk, the Court concluded:

> **The petitioner did not place before me any positive proposals for any arrangement by which the child's care could be supervised by an authority in Canada. Such suggestions as were made did not, in my view, form a sufficient basis for proceeding to grant the order given the risk which I think exists. Any necessary arrangements would require, in my view, to be spelt out with precision.**

The authorities establish that for the exceptions in issue here to apply, harm must be severe and substantial. The test is not whether there appears to be unacceptable risk of physical or psychological harm. The risk is promoted to a much higher threshold. ("Grave") and ("exposed") import the most serious of situations.

I think that also relevant to the establishment of risk, is not merely the factual situation from which a child may have come, but also the nature of Family Law of the country of origin, and the ability of that law to afford protection.

The onus rests on the person opposing an order for return, to at least advert to this. The assumption is that countries of origin will regard welfare as paramount (see C v C (supra)).

In this case I attach some importance to the provisions of the Canadian legislation. The relevant Act is the Children's Law Reform Act, Revised Statutes of Ontario 1990, chapter C 12. Section 24 of that Act commences with the statement:

24(1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.

There then follows a detailed list of the considerations which apply. They are similar, if not identical, to New Zealand Law. Section 30 of the Act contains provision similar to our s 29A of the Guardianship Act, enabling the Court to obtain expert assistance to enable decisions to be made. My reading of the relevant Act is that the Canadian law and thrust is similar to New Zealand law in regarding welfare of children as paramount and ensuring that that welfare is achieved.

The factual position in Canada and the ability of law to control and monitor are also clearly relevant to the second leg, that the children would otherwise be placed in "an intolerable situation". It should be noted that quite deliberately the requirement of the making out of this condition as set out in s 13(1)(c)(ii) is disjunctive from the first requirement. The Court is required to consider firstly s 13(1)(c)(i) and then, and in my view only then, to move on to s 13(1)(c)(ii), if s 13(1)(c)(i) does not apply. While there is some linkage between what is envisaged under the two legs, I reiterate that they are disjunctive and cannot involve the same factual situation giving rise to each leg. To my mind "intolerable" means "simply and demonstrably not able to be countenanced".

Circumstances giving rise to intolerable may be akin to, but relate to other than psychological or physical harm. There may be few cases in which a situation is intolerable given the disjunctive definition and the stringency of establishing the degree required of the word "intolerable".

So much for s 13(1)(c). Also relied upon by Mrs D. is s 13(1)(d) which states:

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 the child's views.

This provision is worthy of close analysis. It is quite different to s 23 of the Guardianship Act, which requires the Court to take the wishes of a child into account. The first requirement is clearly that there is an objection on the part of a child. Preference is not sufficient. There must be a quite emphatic reluctance that extends to the unacceptable. It is only if that threshold is reached, that the Court can move on to consider if the objection is one to which the Court ought to take note.

How the objection is expressed, and why it is made, will be important aspects for enquiry. It seems to me that a child's age must always be relevant. The nature of the question, whether or not children should return to their country of origin is a fundamentally important question. It follows that in order for views to have an instructive basis, a child must be of an age and maturity which clearly satisfies the Court that an objection is a reasoned one. That this threshold is correct, seems to me to be supported by the decisions of Davis (supra) and Re G (A Minor) (Abduction) [1989] 2 FLR 475.

Decision

From 1990 this family commenced being disfunctional. There was poor communication, there was increasing financial pressure. I consider that there was alcohol abuse and depression on the part of Mrs D. Mrs D. had become increasingly unhappy with what she perceived as her husband's role, which was one of the maintenance of power and privilege as she saw it. I am sure that by 1992 the situation in the house had become unpleasant and indeed unacceptable. There was friction, bickering, periods of silence and intense frustration. In December 1992 Mr D. snapped. The children had been fighting and he made his way up to C.'s bedroom. What Mrs D. says of the incident in her affidavit is, in my view, largely correct. Quoting from her affidavit she says:

> **The Applicant ran upstairs and pushed them down on the bed and pinned them down. He screamed at them "if you don't stop I'll kill you". The Applicant's face was purple with rage and he was quite out of control. The children were very upset, they cried and they were shaking.**

The threat to kill was taken seriously by the children and that threat will haunt Mr D. for years to come. I believe however that, notwithstanding that incident, the family continued to function more or less as it had. I am sure that there would have been however, increased trepidation on the part of the children as to when there might be another similar explosion on the part of their father. The outward evidence is that at this time the children were continuing to progress well - certainly at school. The medical information shows nothing untoward. It must therefore be said that outwardly, notwithstanding the traumatic December incident, there were no signs of psychological damage. There were a number of family occasions after the December incident, and one occurred on 23 January 1993 when the children's paternal grandmother had a birthday.

One has to be very careful about drawing too many conclusions from such occasions however a video which I saw persuades me that fear which the children may have developed towards their father was not apparent. In my view, Mrs Damiano may have been affected more by the December incident than perhaps the children. To her the steady escalation of power imbalance and threat had perhaps been manifested in a clear way for the first time.

On 20 February the D.'s had friends around for dinner. The following day, arising out of the dinner there developed a heated exchange. Again I am inclined to accept that what Mrs D. says in her affidavit is largely correct. She says:

He got up from his chair and rushed at me with his fists clenched and abused me. He then pushed me up against the wall and held me with his hands and arm up under my chin. I was very passive towards him and put my hands over my head so as not to provoke him in any way and to protect myself. I sensed that if I struggled with him that he would hit me. He then moved away but after some further words between us he rushed at me again and pushed me up against the wall again and tried to put a headlock on me. I again put my hands around my head and he said to me "if it wasn't for the children I'd kill you".

There was undoubtedly a threat made by Mr D., and probably exactly as Mrs D. records it. There was a degree of violence but it is unlikely that I will know the exact extent of it. What happened was enough to promote immediate action on the part of Mrs D. She immediately set in train a request for help. She telephoned a support agency. She was shocked and fearful. I think that the applicant now has some insight into what lead up to this incident and what has happened as a result of it, but in my view it will take some time before he fully appreciates the consequences of his actions.

The children did not witness this second incident but were told it by their mother. That is not surprising. She quickly made the decision to leave for New Zealand, and as she did not want to involve Mr D. in that, she obviously had to convey to the children what she was about and why.

On the morning of 26 February the respondent saw a lawyer and instructed him to write a comprehensive letter to the applicant proposing separation and consequential matters. That was written on 1 March, the applicant quickly consulted his own lawyer and a letter from him was conveyed back on 3 March 1993. A note was left by Mrs D. for Mr D. The contents of that are as follows:

M.

Have gone to New Zealand to visit my parents with the children. I am really worried about what has been happening at home. My lawyer will be in contact with you about our marriage.

So it was that Mrs D. left with the three children on 26 February without the knowledge of Mr D. and arrived in New Zealand on 28 February.

Quite some evidence was adduced as to the situation here in New Zealand, particulary in Kaitaia, but it is all of somewhat limited relevance to s 13(1)(c). Probably the main relevance of this evidence is as to the views of the children pursuant to s 13(1)(d).

Upon arrival in New Zealand Mrs D. engaged a psychologist, Mr Smith. He saw the children on 6 March, that is less than a week after their arrival. He prepared a report closely based on the requirements of establishing exemptions to the Hague Convention. While I am sure that Mr Smith undertook his task and provided a report in a professional manner, I am bound to say that the obtaining of the report in these circumstances was curious and I am inevitably of the view that what is contained in the report is stilted. One cannot really imagine a more difficult situation in which a psychologist should be asked to assess. Nevertheless Mr Smith's views are of some relevance, particularly as to what the children had to say to him at that time.

I requested a report pursuant to s 29A of the Guardianship Act and that was obtained from Leslie Gray, a registered psychologist. Mr Gray has been a kingpin in this case and has provided valuable evidence and valuable assistance. That is so because, Mr Gray also has

expertise and wide experience in the field of family violence. In his report Mr Gray put emphasis on the following matters:

(i) the children have a fear of their father

> **(ii) if there was a magic wish that the children could make, it was that they should be allowed to stay in New Zealand**
>
> **(iii) if the children were returned to Canada from a situation which they had come, that would be serious**
>
> **(iv) if the situation could be changed so that safeguards were put in place, the degree of seriousness would be greatly diminished**

One passage from Mr Gray's report should, I think be set out because it has importance for the future. It is this:

The impression gained from the girls was that the household was subjected to a tyranny of temperament from Mr D. in the rather classic expression of the male privilege to control the lives of the woman and children of his household.

He went on:

To live in fear of father's temperament is a more insidious form of violence, while it leave no bruises, it is never-the-less toxic to the psychological wellbeing of those subjected to such an environment.

Mr Gray also concluded that the children had a real fear of punishment and retribution if they returned to Canada. I accept much of what Mr Gray says as to fear and harm. I say to Mrs D. that I accept the reality of her fear and her unease that there will not easily be provided the degree of protection that she seeks. I believe that Mr D. has damaged the family more than he initially realised, but that he now begins to realise. I venture to suggest that the solution available, particularly in relation to addressing the children's fear, is not simple and will not be achieved or remedied by mere words. A deliberate and structured reorganising of this family, so that the parents can live apart, and so that Mrs D. and her children feel safe, is absolutely important. Because it is relevant to say so, I convey to the wider D. family that there needs to be an acknowledgement that an abuse of power is insidious, and grave harm can be occasioned if it is not checked. Safeguards, acknowledgements and remedial steps are required before serious harm can be obviated here and nothing less will do. Having conveyed those concerns, I come rather easily to the view that the exemptions set out in s 13(1)(c) of the Guardianship Act here are not made out. The combination of -

(i) Mr Gray's evidence

(ii) the proposals set out in Canadian lawyers letters

(iii) the provisions of Canadian law

(iv) Mr D.'s evidence as to accepting many matters

(v) Mrs D.'s increased strength and resolve

(vi) My own insistence in putting in place reasonable safeguards easily led me to conclude that no grave risk will be occasioned to these children if they return. Indeed with due respect

to the Canadian Family Courts, I have confidence that a regime which is important for me would have been imposed in Canada in any event, if the Canadian Courts had been requested and permitted to put such a regime in place before Mrs Damiano left.

I merely make the comments that I have as to the importance of safeguards, because of the evidence that I have heard and because those who read this decision in Canada might benefit from my remarks.

Given however that the children, and in particular C., have expressed such marked reluctance to return to Canada, what regard should I have to s 13(1)(d) of the Act?

Rights of children are extremely important. I find the balancing of factors in attaching weight to the objections of the children here a most difficult exercise. In the case of S v M (supra) it was the objections of the children that proved conclusive to the Court. The children were then aged 14 and 11. In that case the father had drug involvement in Australia and the impact of what he had done was pronounced. The Judge saw the children and was easily persuaded that they had genuine mature objections. With respect, it is not difficult to see how the Judge reached that view.

In this case it is much more difficult in assessing the objection, particularly that made by C. The first objection she made was expressed less than a week after her arrival. She had a strong wish to remain in New Zealand, but particularly live in Kaitaia. There was almost a complete blocking out, by all three girls, of the wider family in Canada, as evidenced by the Bene-Anthony Family Relations test. Objections were repeated to Mr Gray even after the children had had time with their father in New Zealand.

As Mr Fairley rightly points out, s 13(1)(d) requires the rights of each individual child to be addressed, ie the objection that each child has. Where there is a difference in age and maturity, the result may be that the Court will have regard to the objection of one child but not to that of another.

In such circumstances the discretion of the Court to order return may be heavily influenced by not wishing to split a family. I think that undoubtedly there is heavy influence in the children's objection, by the fact that their mother is here and is happy; but mostly I think that for the children, Kaitaia is a haven - a release from unhappiness and tension.

I can well understand the fear and apprehension they have if required to go back.

It is important, I think, that I look objectively at the factual situation that most likely gives rise to the objection. It has two bases. The first is the fear of their father's presence. The second is the attractive alternative offered by Kaitaia. The children, and in particular C., express strong views which ought to be regarded by the Court. However, given the reorganisation of the family, which will now occur, I do not think here the objections to return are sufficiently pursuasive. I think too that the ages of the younger two children require great caution as to maturity of view. So grave is the nature of the issue here that I would want to ensure that an objection is very soundly based before regarding it as instructive. I am not so satisfied.

I conclude that the exceptions as put forward are not established, and it follows that the children should be returned to Canada forthwith. I wish however to put in place safeguards and to address some other matters.

Having reached the view that I have, I observe in relation to Mrs D. that I do not believe her departure from Canada was mischievous. Rather I think it was a clear statement of position and of the need for help, and a requirement for change.

In the course of this case I did not see the children directly and that was deliberate. I was asked to do so on Mrs D.'s behalf by Mr Ross. It is preferable in cases such as this, where the children are the ages of these children, that the Court only see them if that seems necessary. I far prefer it if someone of Mr Gray's skill and experience undertakes consultation. Section 12 requires me to return the children "forthwith". Ideally it would have been helpful if the children could have received some counselling from Mr Gray prior to their departure. That is not possible, Mr Gray is on holiday as of Monday for the next two weeks. It is important that after this decision, you Mr Fairley, convene a meeting and explain to the children that they must return to Canada. Return cannot be delayed. It is in no-ones interest that more than a week elapses before the children are returned.

Before moving on now to make the orders I do, I cover two further areas. This is the case where a contribution ought to be made by the parties pursuant to s 29A and 30 of the Guardianship Act. New Zealand is a party to the Convention and as a Contracting State, has a responsibility to conduct cases such as this expeditiously and to use all of the resources at its disposal. But neither parent here has lived in New Zealand for a long time and in the case of Mr D, he has never lived here. The parties have substantial money available. There have been bad errors of judgment on the part of both parents. In the exercise of my discretion I consider that the consolidated fund should receive some refund from costs expended in the appointment of Mr Gray and Mr Fairley.

The final matter is that Mr Jefferson seeks costs. That is opposed by the respondent. This is the case where I propose to exercise my discretion to make no order as to party to party costs.

Orders

(1) Pursuant to s 12 of the Guardianship Amendment Act I order return of the children to Canada forthwith, namely by no later than the end of Wednesday 12 May 1993.

(2) There is an interim custody order in favour of Mrs D. It is my wish that in her custody, the children are returned to Canada.

(3) By consent, final orders are made as to non-violence and non-molestation pursuant to the Domestic Protection Act 1982.

(4) I order immediate interim access by Mr D. to the children, but to be exercised on the basis as has been occurring hitherto.

(5) Conditions of the custody and access orders are -

> **(i) Upon her return to Canada, Mrs D. and the children exclusively occupy the family home.Time must be permitted for Mr D. to uplift his personal belongings and find alternative accommodation. This should take no longer than 12 hours from arrival.**
>
> **(ii) There is a curfew wherein the applicant does not come within the immediate property boundary to the family home.**

(6) A further condition of the access order by Mr D. to the children, is that all access until otherwise decided by the relevant Canadian Family Court should be supervised.

(7) Orders previously made in this Court as to surrender of passports and inability to remove the children from the jurisdiction of New Zealand are now discharged.

(8) There is no order as to costs interpartes.

(9) Each party is required to pay $1,000 pursuant to s 29A and $1,000 pursuant to s 30 of the Guardianship Act, a total of $2,000 each to the costs incurred to the State over the appointment of the psychologist and counsel for the child respectively. Those amounts will be paid prior to 12 May 1993.

(10) Pursuant to s 28(1), that the cost of removal of the children back to Canada be borne by the parties equally.

Further Notes not forming part of Order

The Court notes it as important that -

(i) Mrs D. receive immediate support counselling upon her return to Canada

(ii) Mr D. is in need of Anger Management or counselling for non-violence upon his return to Canada

(iii) In the course of this hearing, Mr D. has given an undertaking that he will not initiate any criminal action in Canada concerning the abduction of the children to New Zealand.

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