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[09/11/1994; Outer House of the Court of Session (Scotland); First Instance]
Matznick v. Matznick 1994 GED 39-2277

Outer House of the Court of Session

9 November 1994

Lord Cameron

RE M.

Counsel: Act: Davie Balfour & Manson, Nightingale & Bell; Alt: MacNair Drummond Miller

LORD CAMERON: This petition is presented in terms of Part I of the Child Abduction and Custody Act 1985 and Rule of Court 260H, J and L. In it the petitioner applies to this court for an order returning the three children of his marriage to the respondent to the United States and to the jurisdiction of the Superior Court of Michigan in terms of the Child Abduction and Custody Act 1985 and the related Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980, to which both the United States and the United Kingdom are signatories.

The parties were married on 18 February 1983. The petitioner was then serving in the United States Navy and was stationed in Scotland. There are three children of the marriage, D, born on 6 January 1983, L, born on 23 June 1985 and A, born on 10 June 1990.

In 1984 the parties returned to live in the United States. The petitioner left the United States Navy in 1987. For a period of some four years or so prior to 4 July 1994 the parties lived together at **, Michigan. It is a matter of admission that on 4 July 1994 the respondent left the United States with the three children of the marriage for a four week vacation in Scotland. In evidence the respondent admitted that two days or so after her arrival she advised the petitioner in the course of a telephone call that she did not intend to return to the United States with the children. It is further admitted that despite the fact that the petitioner gave no permission for the retention of the children in Scotland, the respondent has kept the children in Scotland to date and that said retention constitutes wrongful retention in terms of Article 3 of the Hague Convention. It is further admitted that until about 4 July 1994 the children were habitually resident with the parties in the State of Michigan and that in terms of the laws of Michigan both parents had custody of the children.**

At the proof the principal issue turned about the respondent's averment that in the event that the children were to return to Michigan there is a grave risk that they would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. It is, however, also averred that the two older children, D and L, have reached an age and degree of maturity at which it is appropriate to take account of their views, and that they object to returning to the United States. The respondent further goes on to aver that in the event that

the said children did not return to the United States, any return of the youngest child would require the family to be split, which would itself give rise to a risk of harm. It is sufficient to say at this stage that neither party sought to argue that the three children should be separated by any order that the court might make. Parties were agreed that in the proof the respondent should lead.

I observe at the outset that the respondent's case on averment appears to be predicated upon the basis that it is the intention of the respondent herself to remain in Scotland. Her position in evidence was, however, that while she would do so with reluctance, if an order were to be pronounced for the return of the children to Michigan, she would prefer to go with them and to look after them there. It is also to be observed that it is averred that if the respondent were to return to the United States with the children, she would have no accommodation apart from the matrimonial home. There was no challenge of this averment for the petitioner. The matrimonial home is a house containing sufficient accommodation for the parties and the children with three quarters of an acre of ground attached to it. It is jointly owned by the parties and is the subject of a mortgage of some $400 per month. The petitioner stated in the course of his evidence that in the event that the court were to pronounce an order for return of the children to the jurisdiction of the Supreme Court of Michigan, and in the event that the respondent herself wished to accompany them, then pending any resolution of proceedings between the parties concerning custody of the children, he would leave the matrimonial home and separate from the respondent and the children so that it would be available for their accommodation. He said that he would undertake in such an event both to continue the mortgage payments on the house, to meet the household accounts for electricity, gas and heating oil and in addition to make payment to the respondent as maintenance for herself and the children of $1,000 per month. At the end of the proof, counsel for the respondent accepted that the substance of the offer and the amount of these payments was reasonable as maintenance for the respondent and the children, though he maintained on other grounds that the undertakings were worthless. The petitioner also stated in evidence that he was prepared to undertake not to attend the matrimonial home for any reason whatsoever in the event that the respondent and the children took up residence there. Furthermore, he also stated that he was prepared to give such undertakings in any proceedings that might be raised either by himself or by the respondent in the Michigan courts concerning matters of status or of custody of the children, pending the resolution of those proceedings or any order of that court on the matter.

The gravamen of the petitioner's case on averment is that having regard to his past conduct to her and to the children, she fears that if she were to return to the petitioner, the children would continue to witness the petitioner's violent behaviour towards the respondent, that she would continue to be assaulted and that the children would witness the petitioner's alcohol abuse. It is said that the petitioner's behaviour towards the children and their mother amounts to abuse and is likely to result in psychological damage to the children. It is further averred that if she were to return to the United States, there is a substantial risk that the petitioner would attend at the place where she was residing to persuade or to force her to allow him to reside with her, and therefore that in such an event the children would suffer both physical and psychological harm.

On averment, the respondent states that throughout the parties' marriage the petitioner has drunk to excess, that he is violent and aggressive, that he has assaulted the respondent on numerous occasions, often in front of the children, and that in particular at Christmas 1993 he threw the respondent naked out of the house. She further avers that on one occasion the petitioner's father hid a number of firearms from the petitioner when the petitioner was drunk, and that he was apprehensive that if the petitioner took one of the guns he would endanger life. She goes on to aver that the petitioner has assaulted the children, that in

particular he would often wake up on a Sunday morning with a hangover and assault the two older children, would drag them by the hair, kick them on the backside and throw them back into their bedrooms. It is also averred that the petitioner has punched D for making a noise, has assaulted the children with a belt and that said assaults were not normal chastisement.

It is perhaps pertinent at this point to note that in the course of evidence the respondent and the child D, who also gave evidence, freely admitted that they would have no objection if the petitioner were to come to Scotland and to live in family with them there. Furthermore, there was no suggestion in the evidence that at the time when the respondent left the United States with the three children on 4 July 1994 she had in mind that she was not intending to return to Michigan. Evidence was given about the background to the respondent's decision, as intimated to the petitioner, not to return to the United States, which concerned an attempt by her brother to commit suicide, but in the end of the day this matter was not explored sufficiently for me to be able to reach any conclusion as to the reasons why the respondent's decision was taken at that time. It does appear, however, that thereafter the petitioner in the course of telephone calls had made arrangements which were intimated to the respondent, for her and the children's return by air at the beginning of August 1994 and that at the last minute the respondent had decided not to fly back with the three children.

The petitioner's case is that he admits that on one occasion in the course of the parties' marriage he has struck the respondent and that this occurred recently when the respondent advised him that she had obtained passports for herself and the children for the purpose of leaving the country. He also admits that he has smacked the children on occasion in the normal course of parental chastisement but that the chastisement has never been excessive or involved kicking, punching or hair pulling.

So far as the children are concerned, there was no dispute in the evidence that the two older children, D and L had been attending school in Durand where their school performance was perfectly satisfactory. On affidavit, the principal of their school notes that D was always courteous and socially well adjusted, that his attendance had been good and that he did not recall any incident of misbehaviour being brought to his attention. As regards L, he made the same observations but in her case it appeared that she was brighter than her brother at school work. This observation accorded with the impressions gained by both child psychologist witnesses led in evidence in the case, Dr Boyle and Dr Furnell. I also note that in an affidavit sworn by Dr Bishop, who has, on occasions, provided routine health care for both D and the youngest child of the marriage, he stated that in routine examinations no evidence of physical trauma was observed.

I have to say that I did not find the evidence of either party in the witness box entirely convincing when set against other evidence in the case. I have no difficulty in accepting that for a material period of time prior to July 1994, there have been strains in the parties' relationship which gave rise to heated arguments between them. While the causes or subjects of the quarrels were not explored in any detail in evidence, there was general evidence, which I found entirely acceptable, from the petitioner's sister, Mrs R., that they were related at least in part to the parties' drinking habits, more particularly at weekends, both in the parties' house and elsewhere. Mrs R. spoke also to the respondent's habit when there had been such quarrels, of removing herself with the children from the matrimonial home to allow the petitioner to cool off. I gained the clear impression from the evidence in general and not least that of Mrs R., that of the two the petitioner was the heavier drinker, but that the respondent herself was by no means blameless in this regard and that the arguments between them very often occurred when both had been drinking, more particularly at weekends. It was noteworthy that notwithstanding some minor criticism by her of the

petitioner's work record latterly, which was not otherwise supported in evidence, the respondent accepted that the petitioner was a good and hard worker who tried to maintain his family properly and in doing so would work long hours. This was also the picture given by an employer of the petitioner, R.A., on affidavit. The respondent's evidence appeared to accept that when he had not been drinking, she had no complaint against her husband. There was evidence about periods after 1990 during which the petitioner was laid off work for substantial periods of time, and the respondent spoke to having required to take up employment in order to supplement the family income. It also appeared from the evidence that it was not unusual when both parties were working, for the petitioner to return home after work and then for the respondent to go out to work. As a result the parties did not see much of each other during the course of the working week. Furthermore there was evidence to indicate that it was not unusual for the petitioner himself to work up to ten hours a day. This may go some way to provide the background for the strains in the parties' relationship which, according to the affidavit of a neighbour Mrs G., appeared more particularly in the last two years.

It was contended for the respondent that latterly the petitioner's drinking habits had worsened to the extent that he was a compulsive drinker, if not an alcoholic. I find no convincing support for this suggestion. Of some significance is the fact that on affidavit the petitioner's doctor who had occasion over the last five years to see the petitioner as a patient, states that he had never had occasion to observe anything which would lead him to believe that the petitioner abused alcohol and no complaints had been received by him which would lead him to believe that the petitioner was an alcoholic. This too accords with affidavit evidence from R.A. Counsel for the respondent founded upon an admission by the petitioner to Dr Boyle, that following a conviction for driving with above the permitted level of alcohol in the body some three years ago, the petitioner had attended Alcoholics Anonymous. But I accept the petitioner's evidence that this was a misunderstanding. The true position was that following his conviction, the petitioner was required to attend for examination to determine whether or not he had an alcohol problem, that he did so and that it was determined that he did not have one at the time. Reference was also made to the affidavit of Mrs G. and, in particular, to an incident concerning the petitioner's driving on an occasion in August this year. But I prefer the petitioner's evidence as to the circumstances of that incident to the inference which Mrs G. seeks to draw from it. I find nothing to suggest that any such incident was related to the taking of drink. Again it was noteworthy that the respondent's sister and father who with other members of the family, a party totalling twelve in all, stayed with the petitioner and respondent in May and June of this year, both spoke to occasions when there had been considerable drinking by many members of the party, it apparently being accepted that both the respondent's father and the two sons-in-law were heavy drinkers. There was no suggestion that the respondent was then making complaints about the petitioner's past drinking habits. My conclusion on the balance of the evidence was that latterly during the marriage there had been a considerable number of occasions when after drink had been taken, the parties had argued violently, that this frequently took place within the matrimonial home and that it was, on occasions, in front of the children but more frequently after the children had gone to bed.

I did not, however, find acceptable evidence to support the respondent's claim that she had been assaulted on numerous occasions, often in front of the children. The child D, who appeared to me to be trying to tell the truth in his evidence in court, which evidence was not substantially different from the accounts given by him to Dr Boyle and to Dr Furnell as recorded in their reports, spoke about the manner in which his parents used to fight about stupid things, and said that his father hit his mother. He spoke to one occasion earlier this year when he was in bed. He said that his mother had been screaming, that his father had hit his mother, and that his mother went off to his aunt, Mrs R. He recounted that subsequently

during the same night he had been taken with his two sisters and two cousins who happened to be staying, back to his aunt's house by her husband and another uncle. According to the respondent the incident had happened about March 1994. The children were in bed at the time. The petitioner had been "partying" and had wished to have sexual relations with the respondent who had refused. There had been a violent argument involving accusations that the respondent was associating with somebody else, and the petitioner had punched her on the body. She had been leaving the house when the petitioner had ripped the telephone from the wall. When she got into the car to drive off in it, the petitioner had punched the passenger door and tried to smash the window. She had driven over to the house of Mrs R. There she had explained that there had been trouble with her husband again because she would not agree to have sexual relations with him. According to the respondent she had then spent a week with Mrs R. before returning home. It is clear from the respondent's evidence that the quarrel did not take place in front of the children, although obviously if it was a violent quarrel it could well be heard by the children. The petitioner agreed that the parties had spent two nights apart on an occasion in about March 1994 following an argument after which the respondent left and the children were subsequently collected from the house. He agreed that on one occasion he had pulled a telephone from the wall. He also agreed that he followed the respondent out to the car. I have no hesitation in holding that this was one and the same occasion as that spoken to by the respondent but I prefer the petitioner on how long the parties remained separate. If it had been as long as a week, I would have expected evidence from Mrs R. to that effect and there was none. I see no reason to doubt the respondent's allegation that some physical violence had been used in the course of the quarrel. On the other hand, from Mrs R.'s evidence, it was clear that no complaint had been made to her of physical violence. Indeed she said that she had never seen any physical violence used by the petitioner to the respondent in the course of any quarrels which took place in her presence. I see no reason to doubt her evidence on this matter. However the respondent suggested that on other occasions the petitioner had pulled the telephone from the wall. The petitioner denies this. There was no other evidence to support the respondent, and none from D. I found this part of the respondent's evidence again exaggerated.

The respondent also spoke to an earlier incident about Christmas 1993 when she had been thrown out of the house naked by the petitioner. She said that at the time the children had been in bed. The petitioner had been abusive to her earlier in the day in the course of a journey home with the children from ice skating. After the children had gone to bed there had been an argument about the petitioner having sexual intercourse with the respondent. She had been dragged by the hair, had escaped and run through to the children's room and closed the door to hide from the petitioner. He had then punched her on the head in front of the children before she was able to escape from the house and run to the house of Mrs G. who then took her in. I have no doubt that there was an incident late in 1993 following a violent quarrel between the parties when the respondent went late at night to her neighbour, Mrs G. This is spoken to by Mrs G. on affidavit. The petitioner admitted that there had been such an incident. He denied however that there had been any physical violence used by him to the respondent. He said that the respondent had indeed left the house but that she was wearing a coat at the time. Mrs G. describes the respondent arriving barefoot, clad only in a pair of pants, upset and complaining of having been struck by the petitioner. Mrs G. further said that she had seen a bruise on this occasion. She also spoke to having seen bruises on other occasions which were not specified, but curiously enough no evidence of a similar kind was elicited from any other witness who gave evidence and the petitioner herself did not speak to having shown bruises to Mrs G. Significantly both Dr Boyle and Dr Furnell, when they interviewed each of D and L, found that the children were unable to particularise general statements that the petitioner had hit the respondent other than on two occasions, the first involving a coffee pot and on the second occasion the petitioner punched the respondent. As regards the coffee pot incident although in evidence the respondent did not

specifically refer to it, the petitioner accepted that there had been an occasion during a violent quarrel between the parties in the kitchen, with the children next door in the livingroom when a coffee pot had been smashed. He denied, however, that he had struck the respondent with it, but agreed that the respondent had been injured on the hand accidentally.

Two further specific incidents of violence were spoken to by the respondent and her sister, Mrs T.M. The first occurred some two days after Mrs M. and her parents and others had arrived on a visit on 29 May 1994. It had taken place while the respondent was making sandwiches in the kitchen. According to Mrs M., the petitioner was drunk and in the course of an argument, she had seen the petitioner punch her sister and then shove her bodily across the kitchen. This incident was also spoken to by the respondent. It had occurred because the petitioner deliberately dropped ash on the sandwiches. No reference was made to it in the evidence of the respondent's father. The petitioner himself admitted that there had been an argument between himself and the respondent on one occasion during the visit of his parents-in-law. On that occasion he had been drinking along with the rest of the party. The respondent was making sandwiches. He had by chance dropped ash upon sandwiches which the respondent was making. He denied that there had been any violence used in the course of the argument. My impression of the evidence relating to this incident was that matters had not been as physically violent as the respondent and her sister claimed, but that there had been a violent argument in which drink taken by both the respondent and the petitioner played a part. I find it incredible that if it had involved physical violence there would not have been very much more reaction than there appeared to have been at the time. The respondent and her sister also spoke to a second occasion later in the visit in which violence had been used by the petitioner. This incident took place a short time before the departure of the respondent's parents and family. Again it appeared that the whole party had been drinking in the course of the day. At some stage the petitioner had asked the respondent for a cigarette. She had refused to give him one. According to the respondent he had then punched her in the face. Evidence in support of this was given both by Mrs T.M. and by the respondent's father. According to Mrs M. the petitioner had then run off to phone the police in order to put the party out of the house. When the police arrived, there had been talk about charging the petitioner with assault, but the respondent had indicated that she did not wish to charge the petitioner. The witnesses also spoke of the arrival of the petitioner's father shortly afterwards and his being concerned about the petitioner's condition. According to Mrs M., this concern was to the effect that the petitioner, who had driven off in his car, might smash it up. The petitioner admitted that on this occasion, there had been an argument about a refusal to provide him with a cigarette. He admitted that he had been drinking. He admitted that he had slapped the respondent once on the face. He explained that he was annoyed because he had just discovered that the respondent had lied to him and concealed the fact that she had obtained a passport for herself and the three children very shortly before. He said that the visit of the respondent's family had created tension between the parties more particularly since apart from a few days holiday which he had taken for the visit, he had been at work throughout. He had phoned the police himself. This was because he was concerned about the aggressive manner in which, following the incident, the rest of the party were behaving towards him. He had then left the house and gone to his parents' house. He denied any suggestion that he was intending to go and obtain firearms. He agreed that his father kept firearms, but said that they were kept under lock and key. I have no difficulty in holding that on this occasion there had been physical violence used by the petitioner to the respondent. I found the petitioner's account as to the form of the blow more credible than the suggestion that it was a punch of the kind spoken to by the respondent and the members of her family. I have no doubt from the evidence that all present had been drinking. If it had been a serious assault, I find it impossible to believe that the respondent would have been prepared not to press a charge standing the presence of

other persons as witnesses to the incident. Neither the respondent nor her sister made any mention of firearms. This matter arose in the course of the evidence of the respondent's father. It was both confused and confusing but his final position on the matter was that at some point after this incident the petitioner's father had visited the house socially in order to show some photographs of the visit. The witness said that on this occasion the father had made mention about being concerned that the petitioner had been driving when he had been drinking and further that he had gone home to make sure that his guns were under lock and key. My conclusion on the balance of the evidence is that if anything was said about firearms, it did not have any of the connotation which is suggested by the respondent's averments on the matter and that it was not regarded as serious.

My clear impression of the whole evidence was that the respondent grossly exaggerated the number of occasions when physical violence had been used by the petitioner towards her, but that on the other hand the petitioner had attempted to minimise the extent of any physical violence used by him to the respondent. My impression on the evidence was that there were a few occasions in the course of much more frequent violent quarrels between the parties when there was physical contact between the parties, that this was to some extent stimulated by the parties' habit of drinking, and that on some four occasions between the end of 1993 up till July 1994, there had been some form of physical violence used by the petitioner to the respondent. On only one of these occasions, that in March 1994, were the children in fact present to witness it. On the other hand the nature of the quarrels between the parties outwith the sight but within the hearing of the children was such to cause the children apprehension and to be persuaded that that physical violence was taking place more frequently than was in fact the case. This seems to me consistent with the inability of Dr Boyle and Dr Furnell to obtain greater particularity from the children than they did about specific incidents of violence.

I now turn to consider the evidence in relation to the petitioner's conduct towards the children. The respondent herself did not suggest that there had been any physical assault upon the youngest child of the marriage other than one said to have occurred during the course of a violent argument between the parties when A was a baby. This suggestion was denied by the petitioner and I found his evidence on this more credible than that of the respondent. It was agreed by the respondent that on occasions there had been reason to chastise the two older children. Her position was, however, as stated in the pleadings, that the petitioner used physical violence to the children which went far beyond normal chastisement. She instanced occasions when he had been lying on the couch after he had been drinking when he would suddenly jump up and grab the children by the hair, would abuse them and threaten to hit them. On other occasions she said that he would kick them on the backside and spank them with a leather belt. This could occur up to a couple of times a month. In the witness box the child D spoke to occasions when both he and his sister L had been struck by their father and when neither he nor his sister had done anything bad. There were also occasions, when, he said, he had done something bad and when his father had hit him. Sometimes he had been spanked and sometimes kicked on the backside. He spoke to his father being annoyed and grumbling at a weekend. Dr Boyle records being told by D that if he annoyed his father or disobeyed him, his father would strike him with his hand or kick him and that he was also hit regularly, particularly at weekends. Likewise, he was told by the child L that her father would hit her and her brother, that he did this when they were "bad" and often would do it for no reason. L had also spoken to her father using his hand or a belt. She had also stated that on one occasion her father had kicked her on the right thigh. The belt was described by her as "a wide brown belt" which her father kept in the top drawer "with his socks". In speaking to Dr Furnell, D had stated that his father had, unjustifiably, pulled his hair, kicked his buttocks and sent him to his bedroom. L had also attributed violent behaviour to her father, claiming that he would hit her on the buttocks

and kick her thigh, indicating the back of her right thigh. She had reported that her father could hit without provocation and was unpredictable, particularly if he had a hangover. The petitioner accepted in evidence that he had on occasions had to chastise his children. He denied however that the chastisement went outside the normal bounds. He said that sometimes he had chastised D and L when asked to do so by the respondent on his return from work because they had been naughty. He agreed that he had a belt such as described by L, and that he had on occasion used it to threaten her. He had never used it to hit her. He denied having kicked the children, although he had on occasions tapped or nudged them with his foot. He considered that he had always been fair in what he had done and that there had always been a reason for punishing the children.

To Dr Boyle the petitioner had stated that the respondent often could not cope with the children and that he was obliged to discipline them when he came home from work, which sessions occurred approximately once a week. In evidence, the petitioner did not dispute having made such statement to Dr Boyle. At this point it is pertinent to note that Dr Boyle, in his report dated 20 August 1994, makes reference to a statement to him by the respondent to the effect that the child D could, on occasion, be violent towards his sister L and that the violence he displayed was more than the respondent would expect from a child of his age. He also noted that the child L was an extremely nervous child. It suffices to say that Dr Boyle found nothing on examination of D and L to support these suggestions. Furthermore they were not repeated in evidence by the respondent. My conclusion on the balance of the evidence was that the petitioner did employ physical chastisement more frequently than might be thought normal in other families, that on occasions he would take exception to the behaviour of D and L and react to it by striking them with hand or foot because he was either tired or suffering from the effects of drink, but that on the other hand there were many occasions when it was proper to punish the children. There was no evidence that on any occasion was either child marked or bruised. It is significant that the child D makes no reference to being struck with the belt either in statements to Dr Boyle and Dr Furnell, nor indeed in the witness box. In this matter I accept the evidence of the petitioner to the effect that he did threaten L with a belt, but that he never struck her with it. In my opinion, the balance of evidence lies against the gravamen of the respondent's averments that there were frequent assaults upon the children which went beyond normal chastisement. Nevertheless, it is clear that the children regarded their father as at times unpredictable and unfair in his reactions to their behaviour and that this has affected their attitude to him as expressed to Dr Boyle and Dr Furnell.

Neither Dr Boyle nor Dr Furnell could suggest that either child showed any overt signs of any psychological, let alone physical, harm. On the other hand, to both witnesses each child separately indicated that they did not wish to return to the United States. In the case of L she appeared to be more attached to her mother and have a less close relationship with her father than did her brother D. As Dr Boyle put it, D appeared to have some positive feelings for his father, while L appeared to be indifferent to him. In expressing these views, I am satisfied, first of all, from the evidence of both Dr Boyle and Dr Furnell allied to my observation of D in the witness box, that each child is sufficiently old and sufficiently mature to be able to express his or her own views upon the matter. I accept their evidence that there appeared to be no suggestion in the manner in which the children spoke to each, to indicate that they had been primed or coached in any way. This conclusion was confirmed by the manner in which D gave evidence in court. He was described by Dr Boyle as a sensible boy who did not appear apprehensive or evasive. While in the witness box he was clearly concerned and to some extent initially overawed by the occasion, his demeanour did not suggest in any way that he was deliberately making up any of his evidence and his distress and breakdown in tears when he came to be asked about the quarrels between his parents, appeared to be perfectly genuine. It is perhaps important, however, in considering the effect

of his evidence, that D regarded the major problem for him as being the way in which his mother and father had been getting on together. In cross-examination he agreed that he would like his father to come and see him. Furthermore, he said that he did not know how he would feel about going back to the United States with his mother. His wish was to be with his mother. He said that he would go back to the United States with his mother if he had to choose between that and staying here in Scotland without her. This point is important since Dr Boyle agreed that in seeking the views of each of D and of L about a return to the United States, he had assumed and it was implicit in the choice being put to each child, that they would return to live with their father and that their mother would not accompany them.

In approaching the decision which I have to make, I bear in mind that I cannot, at this stage, look at the matter as being one in which I am determining the matter of custody of the children or indeed any issue as to the status of the parents. It is of significance that in his second report Dr Boyle found it difficult to reconcile the competing statements between the petitioner and the respondent. Nevertheless, he expressed the view that the children of the marriage appear to be developing satisfactorily and do not show any significant emotional or social problems. He goes on to state that D's educational under-achievement may be indicative of a family problem, but accepts that this would require further investigation. I do not consider on the evidence that there is anything to suggest that any such educational under-achievement is related to any stress of D's home life prior to July 1994. At best for the respondent, Dr Boyle was able to conclude that if the respondent's perceptions of the petitioner's behaviour were accurate, then clearly the children of the marriage had been exposed to risk. But he agreed in evidence, as is stated in his report, that it was well recognised that not all children exposed to abusive psychological conditions develop emotional or behavioural difficulties. In his earlier report dated 20 August 1994, Dr Boyle expressed the view that if the mother's version of the domestic situation was accepted as valid, together with the statements of the children, the children had been subjected for many years to parental discord, violence and alcohol abuse, and that in those circumstances if the children were returned to America and, in particular, to the marital home, they would be exposed to physical and psychological harm. Dr Boyle explained in evidence that in making that statement he was assuming that the children would be returning to live with their father in the marital home. On the other hand he expressed the view that if the children were returned with the respondent to a protective environment uninfluenced by the petitioner, the children could be safe in such a situation. He perceived as the substantial factor the point that the children said that they felt "safe" in Scotland as compared with the position when they had been living with their parents in the United States prior to July 1994. Dr Boyle also expressed the view that even if the respondent were to return to live in the matrimonial home together with the children, there was the possibility that the petitioner would attempt to seek a reconciliation and that in the circumstances the respondent might be unable to resist his overtures. Thus the conditions which she had described as having occurred prior to July 1994 would be perpetuated. If that were so, then the risk of harm would arise. He explained that there were circumstances in which a wife, who had been subjected to physical violence and abuse for a substantial period of years, became unable to resist the return of a husband notwithstanding that she might have good grounds for remaining separate from him. This he described as the "battered wife" syndrome. Dr Boyle did not purport to assert positively that the respondent exhibited the outwards signs of such a syndrome but said she could be such a wife. In some part his opinion is based upon a history of the marriage which I do not find to have been established by the evidence which I heard. While there was evidence that the respondent, when seen by each of Dr Boyle and Dr Furnell, appeared to be anxious for herself, I did not gain the impression while she was giving evidence that her will had been or was likely to be over-borne to the extent that was suggested by the syndrome described by Dr Boyle. If such were to be her state of mind now, I would have expected some very clear indications of it to be obvious to all those with whom she had dealings prior to

July 1994. In particular I would have expected specific reference to have been made to such a matter by members of her own family, more particularly since so far as the evidence showed, they had not seen her for some considerable period of time prior to 1994. In so far as a judgment could be made from the manner in which she gave evidence, she did not give me the impression that she was so lacking in will-power or determination that she would have been unable to resist an approach by the petitioner to affect a reconciliation if she were to return to the United States. It was on that basis, namely that the respondent might suffer from a "battered wife" syndrome, that Dr Boyle expressed concern for the continuance of any risk of physical or psychological harm to the children in the event that they were to return to the United States. I find no warrant for that view. Moreover, my impression from the evidence was that there was no justification for the suggestion made by the respondent that the petitioner would breach the principal undertaking which he was prepared to give and to which he spoke in evidence, namely, that he would not approach the matrimonial home in the event of the respondent and the children returning there. I take into account, first of all, the impression which Dr Furnell received of him from a meeting with the petitioner prior to preparing his report dated 18 October 1994, when he noted that the petitioner conducted himself in a calm and restrained manner. This accorded with my impression of him in giving evidence in the witness box. I accept that a personality can change where an individual is under the influence of alcohol and, as I note before, it is clear that there had latterly been a relatively stormy relationship between the parties. However, there was nothing in the other evidence to suggest that when the parties were apart for even short periods, the petitioner had put undue pressure upon the respondent to return to the matrimonial home. Nothing of that kind was suggested by the respondent herself in evidence, nor was there any other evidence to such effect. Accordingly I can find no warrant in the evidence for the suggestion that if the respondent were to return to the children to live in the matrimonial home in the United States, there is any risk that the petitioner would force himself upon them in order to resume cohabitation with them. That being so, there is nothing in the evidence which satisfies me that there is any ground for the apprehension which gives rise to the children's concern about returning to the United States. I am fortified in this view by the further fact that neither the respondent nor D expressed any concern about the petitioner coming to live in family with them in Scotland. Other than the apprehension voiced by the children about a return to live with their father alone in the United States, there is no suggestion other than that they were happy at school and were developing socially and educationally in a satisfactory manner there.

I therefore turn now to consider the substance of the arguments submitted by counsel for the respondent. He accepted under reference to the cases of C v C [1989] 2 All ER 465, [1989] 1 WLR 654 and B v B [1993] Fam 32, [1993] 2 All ER 144 that the respondent required to face a high and strict test in substantiating her averment that the children would be exposed to physical or psychological harin or otherwise placed in an intolerable situation in the event that they were to return to the matrimonial home. Nevertheless, counsel's primary submission was that the risk remained grave even with, as he put it, the respondent agreeing to return with the children. He submitted that even if the respondent goes back to the United States with the undertakings having been given by the petitioner, the children were at grave risk because of the background of the husband's past conduct towards the respondent and the children and the substantial risk that despite the giving of such undertakings which, on the face of it, would remove any such risk, the parties would resume cohabitation at the insistence of the petitioner and thus subject the children further to the kind of conduct to which they have been subjected in the past. I was thus invited to decide this case upon the basis on which the proof was conducted throughout, namely what would happen if the children returned to live in the United States with their mother in the matrimonial home. In my opinion, on the evidence there is no justification for counsel's primary submission. I am not satisfied that the evidence shows that the petitioner's conduct was of the character

averred by the respondent in her pleadings and spoken to by her in evidence. So far as the independent medical evidence is concerned, whether on affidavit or from Dr Boyle and Dr Furnell, there is nothing to substantiate the suggestion that the children have been physically or psychologically harmed in any real sense to date. Moreover, I am satisfied on the evidence that there is no warrant for the suggestion that if the respondent were to return to the matrimonial home together with the three children, there is any risk in the face of the petitioner's undertakings as expressed to this court, that he will force himself upon the respondent and the children and resume cohabitation with them. I have made a precise note as set out above, of the undertakings which the petitioner gave in evidence. These are available to and can be founded upon by the respondent in the event that she returns to the United States and raises proceedings there. That being so, I find no basis for the suggestion that the return of the children in company with their mother, gives rise to a grave risk that the children would be exposed to physical et separatim psychological harm or otherwise placed in an intolerable situation. I would therefore repel the first plea-in-law for the respondent.

There remains, however, the matter raised in respect of the proviso to Article 13 of the Convention, which states that:-

"The judicial . . . authority 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."

As I have indicated before I am satisfied that each of D and L has attained an age and degree of maturity at which it is appropriate to take account of his or her views. Counsel for the respondent accepted that it is a matter for the discretion of the court as to whether to comply with any objection stated by a child. Reference was made to in re S 1993 Fam 242 and to re M 1992 2 FCR 608. In re S it was pointed out that the discretion of the court to refuse to order an immediate return of a child to the country from which it has been wrongfully removed, must be exercised in the context of the approach of the Hague Convention and that the discretion arises only in exceptional cases. In particular at p 252 it was said:-

"Thus if the court should come to the conclusion that the child's views have been influenced by some other person, for example, the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention . . . On the other hand, where the court finds that the child or children have valid reasons for their objections to being returned, then it may refuse to order the return."

In my opinion each case must be looked at according to its own facts. In the present case, the respondent recognises that she has wrongfully retained the children here but is prepared to return to the jurisdiction of the court of the children's habitual residence with them. That being so, looking to the nature of the children's reservations about returning to the United States, and in the light of the findings which I make upon the evidence presented to me, it appears to me that the grounds underlying the children's views that they do not wish to return to the United States either to live with their father alone or to live in family with him at present, are no longer valid standing the undertakings given by the petitioner. In particular, there is no ground for the fear to which reference is made in the pleadings that if they were to return to the United States further assaults on both the respondent and themselves would occur. I recognise that as was said in Urness v Minto 1994 SLT 988 at 998 the word "objects" in Article 13 of the Convention is not to be read too narrowly. Each case

must of course depend upon its own facts. But it is also necessary for the court to be satisfied that the child has put forward valid reasons for its objections to return. In the present case it is plain that the basis upon which the objections were taken to a return to the United States have disappeared with the acceptance of the mother that if an order for their return is made, she is prepared to return to the United States with the children. D stated in the witness box that in such circumstances he was not clear what his position was. That being so, this court is entitled to look at the circumstances which would then obtain in the event of a return in company with their mother to the matrimonial home and judge whether the views of each of L and D continue to have validity even if they might originally have done so on a different basis. It is plain that they wish to live together in family with their younger sister and with their mother. It did not appear to me from the evidence that there is any concern in either child's mind about the country to which he or she is to be returned, namely the United States. So far as can be judged both from D's evidence in the witness box and his statements and those of L to both Dr Boyle and to Dr Furnell, each was happy and contented generally in Michigan, had friends there and was happy and well settled at school. His reasons thus bear no relation to the kind of reasons which underlay the views of the child being considered in the case of Urness v Minto. For all these reasons I am not prepared to exercise any discretion which this court has to refuse an order for return, in the manner in which I was invited to do by counsel for the respondent. I shall therefore, in the whole matter, repel the second plea-in-law for the respondent.

I am therefore prepared to pronounce an order that the respondent return the three children to the United States and to the jurisdiction of the Superior Court of Michigan in terms of the Child Abduction and Custody Act 1985 and the Convention. However, since this will require arrangements to be made for the respondent and the children to return, I propose to have this case put out By Order at as early a date as possible, to enable such arrangements to be entered upon as soon as possible. At that time I can consider, if necessary, the period of time which will be adjected to any order within which the respondent will be required to obey the order.

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