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[13/03/2002; Family Court at Greymouth (New Zealand); First Instance]
P v P, 13 March 2002, Family Court at Greymouth (New Zealand)

U.P. v D.S.P.

13 March 2002

IN THE FAMILY COURT AT GREYMOUTH, FP 102/01

IN THE MATTER OF the Guardianship Amendment Act in the ratification thereby of the Hague Convention on the Civil Aspects of International Child Abduction 1980

Appearances: Mr P A Wetherall for Central Authority and Applicant; Ms B Connors for Respondent

RESERVED JUDGMENT OF JUDGE B P CALLAGHAN

INTRODUCTION

[1] Ordinarily in Hague Convention cases the Court of habitual residence should determine custody issues. In this case the two subject children, L.P. born 10 November 1994 (aged 7) and S.P. born 17 March 1999 (aged almost 3) are German nationals. Their mother, the applicant, U. P., resides in Pfullingen, Germany. Their father, the respondent, D.P. previously resided in Germany but now resides in New Zealand. The mother is a German national and the father was born in New Zealand. The parties were married on 28 June 1991 in Pfullingen, Germany.

[2] The father came to New Zealand on 17 June 2001 with the two children for a holiday. The mother had agreed to this. The children were due to return to Germany on 8 August 2001. The father's family lives in the Greymouth area on the West Coast of New Zealand. On or about 8 July 2001 the father asked the mother whether she would agree to the children staying longer than the scheduled return date. The mother agreed to this. As a result the father adjusted the return date to 13 September 2001. It is during this time the father alleges that the mother agreed to or acquiesced in the children remaining in New Zealand.

[3] The parties had previously lived in Australia for a period of time but had returned to Germany in September/October 1998.

[4] Some time in late July 2001 the father notified the mother of his wish to permanently remain in New Zealand with the children. I find that there followed a number of telephone conversations between the mother and father during which they discussed the father's wish to stay. As the father states, at first the mother was very hostile towards this idea and was upset. I find that she did not at this stage accept the father's decision.

[5] During this period, from late July through until 23 August, the mother also spoke regularly with the children, and in particular L. On two occasions the maternal grandmother also spoke with L. The father states that the mother placed pressure on L. about returning and he says that L. herself did not and does not wish to return to Germany.

[6] I have no doubt, having read the evidence, that this was a very distressing time for the mother and it is clear that the impasse between the parents has had an effect on L. The evidence is not so clear as to whether it has had an effect on S., who is much younger. Nevertheless, this was a difficult time for the mother who had to deal with the father's decision to remain in New Zealand.

[7] This is the background which led to the mother sending a letter to the father by facsimile on 23 August at about 4.00 pm from Germany. The letter followed a telephone conversation during which the mother told the father that she agreed to him staying with the children in New Zealand. The mother does not deny that this telephone conversation took place. That letter is annexed as exhibit C to the father's affidavit and the translation is exhibit D. That translation has been accepted as the English version of the letter.

[8] The father alleges that by this course of events the mother confirmed her agreement and/or acquiescence to the children remaining in New Zealand. He says the relevant date for her agreement/acquiescence is 23 August 2001.

[9] The mother states that she never agreed to or acquiesced in the children remaining in New Zealand. She says that the letter that she wrote was written under pressure and that she always wanted the children to return to Germany.

[10] The mother filed her petition for the return of the children pursuant to the Hague Convention (New Zealand Guardianship Amendment Act 1991) on 31 October 2001. This was transmitted by the German Central Authority to the New Zealand Central Authority on 2 November 2001. A pro forma application was filed on the mother's behalf on 14 November 2001.

[11] The details of the telephone conversation preceding the letter are not covered in evidence. However, the mother's agreement/acquiescence over the telephone must be viewed in light of her letter, which sets out her reasoning. I find that the mother did tell the father by telephone that he could remain in New Zealand with the children but on the basis as set out in the her letter sent following the telephone discussion. It is important in the context of this case that I refer to the contents of the letter in full:

"Hi D.,

I am trying to write a letter to you. By using the PC you will be able to read it. I will also write in German because this is easier for me and your knowledge of German is good anyway. Today is a difficult day for me, I have put away all photographs of the children at the office. After our last talk you were furious and confused. I don't really understand you. I know you want only the best for our children but that should also involve the mother. I have still breast fed S. until March. I think you don't know what that means! But what is really hurting is that you remove the children from me while I sit here and can't do anything at all. You are responsible for all this. I do understand that you are homesick and that you like being in New Zealand, however this can't be sufficient. Why have you done this to me and the children? I also don't know how you will go about it financially. You and the children will receive social welfare do you believe this is fantastic? I am thinking of L. I can only hope that she will not be teased at school. I really want a better life for my children, financially we wouldn't have any problems here in Germany. As soon as S. goes to kindy you would be able

to go back into the workforce. It hurts very very much that you don't love me anymore and don't feel passionate about me. I always believed and hoped that we would become a happy family. After all you could stay at home and look after the children. I can offer you just one thing, if you feel it was the wrong decision, please tell me. As it is at the moment I will see the children only once a year because we won't have the money for more. I don't receive child support anymore. I will cancel L.'s school registration. All your gear will be packed in boxes and sent over. Our last savings will just cover the costs. I don't know how to manage all this, I miss you all terribly, have you ever thought about how you would feel if I had taken the children away from you? Our children are also for me the most important thing in life, but you don't care. You never cared about how I feel and how I am, above all is the benefit of the children. A pity, I always tried too, to still think of you. I even wanted to pay you a trip to Nepal for your 40th birthday. We are now together for 11 years and I know it was not always easy but we also had wonderful times together. This weekend I will put away all things that belong to the children and try to make a new start. I am getting now psychic therapy treatment because I can't cope with the situation and hope that I will slowly recover from this shock caused by you. I want to tell you one thing, that I could have the children back at anytime according to The Haag Conventions who deals with repatriation of kidnapped children. You have just taken away our children from me. But I will not do this because I know that it would be dreadful for you and the children if they would be picked up by the police and taken back to Germany by plane. I don't do this because you would shoot yourself afterwards. I try to accept the situation and leave the children in your care but I expected you to provide access to the children. I want to be able to talk with them over the phone at any time and to see them whenever I have the money to fly to New Zealand. I also want you to come to Germany to visit me next year. You will have an air ticket, for the return flight to NZ we still have to save money. You don't have to fear not being able to return to NZ, until then I might have learnt to cope. Please let me know how much money you will get for yourself and the children in NZ. Please always be true to the children and tell them that it is not my fault that I can't see them anymore. Instead it was your decision. I love you all give the children a kiss and a gentle hug from me.

Love U."

[12] Following the letter, the father enrolled L. in school as a permanent student. L. had been enrolled at school initially on 25 July 2001 with the enrolment record showing her as being on "holiday from Germany". The father informed the mother of this. He also told the mother that he was considering a job as a school bus driver and told her that he would be looking after S. The mother suggested that S. attend kindergarten. The father also looked for permanent accommodation.

[13] The mother also spoke with the father's sister, A.P., and advised her that she had made a decision. At paragraph 12 of her affidavit, A.P. said that the mother had told her that she knew the children would be safe with the father and that he was a good father. However, according to A.P. the mother also said that she might come and pick up the children and take them back to Germany.

[14] During October, A.P. again spoke with the mother and the mother advised her that she was coming to New Zealand for a holiday in 2002 to see the children. In her affidavit A.P. refers to L. being quite upset until the time when the decision was made that she was able to stay in New Zealand.

[15] Some time in October the mother told the father that she wanted the children returned. It was within that month that the mother filed her application with the German Authority.

[16] It is clear from the mother's evidence that at the time she sent the letter to the father she was considerably distressed about the situation; she was undergoing therapy and counselling; she was concerned about the manner in which the children may be returned if she insisted upon her rights; ie being transported by the Police; and was also concerned about the father taking his own life. In the letter to the father she refers to the father shooting himself.

[17] In her affidavit at paragraph 11 Ms A.S. (the mother's sister) referred to the father previously telling her that he would shoot himself if anybody attempted to take the children off him. It is clear that this conversation took place because the mother specifically refers to it in her letter. The mother was aware that the father had said this to her sister, and the mother was conscious of his threat.

[18] There are some other aspects of the evidence that I need to refer to. There are allegations and counter allegations about the respective parents ability to look after the children. These allegations relate to the time the parties were living in Australia and when the parties were living in Germany. The allegations against the mother include abuse issues, whereas the allegations against the father are more parenting issues.

[19] When the parties moved to Australia in 1997 the father alleges there were two incidents in which the Australian Social Services were called as a result of the mother allegedly physically abusing L. The father alleges on one occasion that the mother hit L. in the face and on another occasion kicked her causing her to be propelled across the room. The mother admits on one occasion she did tap L. on the back of the head but denies kicking L., although accepts that she was spoken to on two occasions.

[20] The father, and indeed his mother, make allegations about the mother's parenting ability in Germany and refer to circumstances which could well amount to abuse of the children, particularly L. The mother denies these allegations and states that no incidents were reported to the child care authorities in Germany.

[21] These allegations and counter allegations have a proper place in contested child care decisions and are matters that may be relevant to a contest between the parents as to the care of the children. They can only be relevant in the current proceedings if they affect one of the grounds set out in s13 on which the Court can refuse to make an order for the return of the children. I will turn to those grounds shortly.

THE COURT'S APPROACH

[22] Under the Guardianship Amendment Act 1991, which implements the Hague Convention on the Civil Aspects of Child Abduction, there is a presumption that children are to be returned to the country from which they have been removed so any issues as to the children's care can be resolved in that country. Section 12 of the Guardianship Amendment Act provides the Court shall make an order for the return of the children where the four pre conditions set out in ss(1) are satisfied. Those pre conditions are:

a) the children are present in New Zealand;

b) the children were removed from another contracting State in breach of the applicant's rights to custody in respect of them;

c) at the time of removal the rights of custody were actually being exercised by that person or would have been so exercised but for the removal;

d) that the children are habitually resident in the contracting State immediately before the removal.

[23] "Removal" is defined in s2 as meaning: "The wrongful removal or retention of the child within the meaning of Article 3 of the Convention". Article 3 provides as follows:

"The removal or the retention of a child is to be considered wrongful where-

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

[24] Section 12(1) is subject to the defences set out in s13.

[25] Section 13 provides the Court may refuse to make an order on certain grounds. The relevant provisions of s13 in relation to this application are:

"13. Grounds for refusal of order for return of child

(1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court -

(a) ...

(b) That the person by or on whose behalf the application is made -

(i) ...

(ii) Consented to, or subsequently acquiesced in, the removal; or

(c) That there is a grave risk that the child's return -

(i) Would expose the child to physical or psychological harm; or

(ii) Would otherwise place the child in an intolerable situation; or

(d) 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; or

(e) ..."

[26] It has to be noted that notwithstanding that any ground may be made out the Court still has a discretion in terms of s13 as to whether the order should be made. The discretion is to be exercised taking into account the purpose and the policy of the Hague Convention which provides for the return of children wrongly removed to their place of habitual residence so

that questions relating to their welfare can be determined in that country: see M v M (AP 14/01, HC, Christchurch, 4/7/01).

[27] In Clarke v Carson (1995) 13 FRNZ 662 the now Chief Justice had this to say of the discretion to be exercised (page 665):

"Section 13 sets out the only circumstances which constitute grounds for the refusal of the order for return. Where those grounds are made out to the satisfaction of the Court by the person resisting the order for return (here, the mother), the consequence is not that the order will be refused but that the Court is no longer obliged to return the child but has a discretion whether or not to do so. That discretion must be exercised in the context of the Act under which it is conferred and the Convention which it implements and schedules. (See In Re A (minors) (abduction: custody rights) [1992] 2 WLR 536, 550, also reported as Re A and anor (minors) (abduction: acquiescence) [1992] 1 All ER 929, 936 at per Balcombe LJ.) It therefore requires assessment of whether decisions affecting the child should be made in the Court from the country from which the child has been wrongfully removed or the country of the Court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other. (See In Re A (minors) (abduction: custody rights) (No 2) [1992] 3 WLR 538, also reported as Re A and anor (minors) (abduction: acquiescence) (No 2) [1993] 1 All ER 272 at p 547; p 280 per Sir Stephen Brown P, at p 548; p 281 per Scott LJ. Some balancing may be required, as is indicated by the fact that art 13 of the Convention (from which s 13 of the Act is derived) requires consideration of "information relating to the social background of the child".

GROUNDS ALLEGED IN DEFENCE

[28] The grounds alleged by the father are three fold.

(1) That the applicant consented to or subsequently acquiesced to the children being resident in New Zealand. As part of this the father argues that the mother's delay in making a formal application amounted to acquiescence as well.

(2) That there is a grave risk that the children's return would expose them to psychological harm or otherwise place the children in an intolerable situation. (Physical harm is not pleaded in the notice of opposition but is referred to in the evidence).

(3) That the child L. 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 view.

EVIDENCE/SUBMISSIONS

[29] There is a substantial amount of evidence before me in affidavits filed on behalf of the mother and the father. In addition I have had a s29A psychological report from Dr Arnold Staite which considers the following matters:

"1. ascertaining as much as he or she can about L.'s objection, if any, to being returned to Germany;

2. the level of maturity of L. (an aspect of Section 13(1)(d)); and

3. the basis of fear that L. is reported to hold about a return."

[30] I have also had very helpful submissions from counsel.

[31] In this decision I do not intend to refer to all aspects of the evidence or to the submissions in detail but I have taken all those matters into account.

RIGHTS OF CUSTODY/HABITUAL RESIDENCE/WRONGFUL REMOVAL

[32] It is accepted by the father that the "rights of custody" are available to both parties in this instance. It is agreed that Germany was also the place of the children's habitual residence for the relevant period.

[33] In respect of "removal" the Guardianship Amendment Act defines this as meaning "the wrongful removal or retention of the child within the meaning of Article 3 of the Convention". It is submitted by the father that there was no wrongful removal of the children. With respect that cannot be right.

[34] Prior to 23 August 2001 the father had informed the mother of his wish to remain indefinitely in New Zealand with the children. She was opposed to that. At that point in time such a declaration by the father was in breach of the mother's "rights of custody" notwithstanding the children were still in New Zealand by agreement until 13 September 2001. She had not, at least at that point, given any indication that she agreed to them staying indefinitely. She was opposed to this at that time. The removal by the father occurred when he informed the mother that he was effectively retaining the children in New Zealand. Of course the issue of consent/acquiescence is relevant as to whether or not an order should be made for the return of the children.

CONSENT/ACQUIESENCE

[35] There is a subtle difference between consent and acquiescence. In Re A and another (Minors) (Abduction: Acquiescence) [1992] 1 All ER 929 at page 943 the Court said:

"... the difference between 'consent' and 'acquiescence' is simply one of timing. Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it. ..."

[36] Acquiescence is not a continuing state of affairs and once it occurs the ground is made out and it makes no difference that there is a change of mind. However, at the very least a change of mind can be relevant to the overall exercise of the discretion.

[37] In Re A (supra) Stuart-Smith LJ in relation to this said the following: (page 941):

"The change of mind cannot alter the fact that he had acquiesced. Acquiescence is not a continuing state of affairs. The question is whether at some time prior to the issue of proceedings the plaintiff had acquiesced. If the acceptance is quickly withdrawn, that is no doubt a relevant matter for the judge to consider when exercising his discretion; but it does not affect the acceptance."

[38] In that case Lord Donaldson MR considered that a withdrawal of consent may invalidate the acquiescence but in any event agreed with the approach of Stuart-Smith LJ. At page 943 Lord Donaldson MR said this:

"... an apparent acquiescence followed immediately by a withdrawal may lead the court to question whether the apparent acquiescence was real or whether it was the product of emotional turmoil which could not reasonably be interpreted as real acquiescence. That apart, the only relevance of the time which elapses between acquiescence and a purported withdrawal of the acquiescence is in the context of the exercise of a discretion whether to

return the child to the jurisdiction of the courts of country A in order to enable those courts to make decisions as to its future."

[39] In Re A the father had written a letter to the mother following her departure from Australia to the United Kingdom. Although the father had no knowledge at the time of his rights under the Hague Convention to seek the return of the children, he was aware that the mother's actions were illegal. The father wrote to the mother expressing his concern about the way in which she had acted but said for the sake of the children he would not fight it. He asked to keep in contact with the children and said he also wanted to see them if he came over on business or on holiday. Both Lord Donaldson MR and Stuart-Smith LJ held that this letter was an acquiescence, notwithstanding that the father did not know of his legal rights under the Convention at the time he wrote the letter. The majority held that he had acquiesced in the children's removal and it was sufficient that he know generally that the mother's acts were unlawful even if he did not know about his rights under the Convention.

[40] Balcombe LJ, who dissented, held that the father had not acquiesced and stated that all the circumstances should be considered, not simply the contents of a single letter. He was of the view that the exceptions (equivalent to s13) should be considered from the point of view of the children's interests. At page 937 he said:

"... the main object of the Hague Convention is to require the immediate and automatic return to the state of their habitual residence of children who have been wrongfully removed. To this there is a limited number of exceptions, but it is apparent that the purpose of the exceptions is to preclude the automatic return of the children to the country whence they were removed, only if it can be shown or inferred that this could result in unnecessary harm or distress to the children. In other words, it is to the interests of the children that the exceptions are directed, not (except in so far as these directly affect the interests of the children) the interests of the parents or either of them. In my judgment this requires the court to look at all the circumstances which may be relevant and not, as is here submitted, to the terms of a single letter.

[41] The salient facts for this issue are:

(1) Some time in the latter part of July 2001 the father told the mother he wished to remain in New Zealand with the children.

(2) The mother was against this and, to use the father's words, was "hostile" and "upset".

(3) During a telephone conversation shortly before 23 August 2001 the mother advised the father that she would not oppose the children staying or, in other words, would not insist upon their return.

(4) Her reasons are set out in the letter of 23 August 2001.

[42] The father's decision to remain in New Zealand with the children amounts to him deciding to retain them here without the mother's agreement. The mother's subsequent capitulation amounts to her saying that she was not going to enforce the return of the children pursuant to the Hague Convention.

[43] I think it does not matter greatly as to whether the mother's view is taken as either consent and/or acquiescence. However, it does seem to me that the mother was probably acquiescing in the father's decision to retain the children in New Zealand by saying she would not insist upon their return, even though she knew that she could (see Re A (supra)).

[44] I am not so much concerned about the distinction but more concerned about the circumstances surrounding the mother's apparent agreement. The mother had agreed to the children coming to New Zealand and then later agreed to an extension of that holiday. Initially she was opposed to the children remaining in New Zealand but after giving the matter some thought and in a state of clear emotional trauma over this decision, she elected not to enforce a return of the children because of the effect it would have on the children and also her concern that the father may harm himself.

[45] While on the face of it that latter concern, namely that the father would shoot himself, appears to be fanciful, I am of the firm view that the mother clearly believed that the father may well do something along these lines. My reasons for that conclusion are that the mother saw fit to specifically refer to it in her letter, and the evidence of the mother's sister, Ms Schulze, shows that this subject had been raised by the father. Whether or not he in fact he intended to do that is irrelevant given that the mother considered it was a possibility.

[46] I find the mother was clearly acting under considerable emotional duress when she advised the father that she would no longer oppose him retaining the children in New Zealand. She was undergoing counselling and therapy at the time which is referred to both in her evidence and in her letter. The letter clearly shows she was anything but happy about the decision and in my view she was literally forced into a corner.

[47] I do not accept for one moment that there was any undue delay on the mother's part, as counsel for the father submitted. It was some time during October that the mother notified the father of her change of mind and proceedings were lodged reasonably promptly thereafter. In the circumstances the delay between the mother's advice on 23 August 2001 (including the prior telephone call) and the advice to the father in October of her change of mind is understandable given the circumstances that she found herself in.

[48] As I have indicated above, while the mother's letter and previous telephone call probably amounted to an acquiescence in terms of s13 (because she knew of her rights to demand a return under the Hague Convention) I have some concerns about holding the mother to that when she was clearly, I find, in a state of emotional turmoil. Her mind was turned to the effect of a return on the children and the effect on the father. Within a relatively short timeframe she reversed her view and informed the father.

[49] Given her state of turmoil, and the circumstances generally, I have real doubts a to whether or not the letter of 23 August 2001 amounts to a real acquiescence or real consent.

[50] My dilemma is solved because even if the mother's actions amounted to acquiescence or consent, in my discretion, I am not prepared to refuse an order for the return of the children on this ground. She was in this state of emotional turmoil over the father's decision, and in this state, notwithstanding her knowledge of the Convention, she relented. However, the letter read as a whole shows that it was not a dispassionate and clear cut decision for her. I acknowledge that in most disputes over children the emotions of the parties play a part by the very nature of the dispute. Her letter does not close off her decision completely because she said: "I try to accept the situation and leave the children in your care". Even though she goes on to talk of access, that shows she still had some doubts.

[51] I have referred to the evidence of A. P. (paragraph 12 of her affidavit) where she speaks of the mother telling her she might come and still get the children. This confirms my view that the mother still had some doubts about the children remaining.

[52] These children were on holiday with the mother's consent. She had herself already refused to move to New Zealand and to all intents and purposes the issue of relocation to

New Zealand for the family was a closed subject. While the father may not have decided before he arrived in New Zealand to stay, there is evidence which I accept as to him making some preparatory arrangements in the event of his moving, such as packing personal belongings etc and that leads me to the conclusion that he considered that there was very much a possibility for him remaining in New Zealand. Shortly after his arrival this became a reality.

[53] The enrolment of L. at school as a "holiday student" also reinforces my view. She was to start school in Germany in September, so there can be no other reason in my view in him enrolling her at school shortly after the arrival here unless there was a real intent on his part to stay.

[54] The father in this case has manipulated the holiday to effect his desire to remain in New Zealand which was something he had considered as a possibility in the time before his trip to New Zealand for the holiday. In my view, subject to the other grounds raised, the appropriate forum in these circumstances is for the German Courts to decide the issue of future care of the children. As I will also mention later in my judgment, I am satisfied that the German Family Court system can very adequately make child focussed decisions which are in their best interests.

GRAVE RISK (SECTION 13(1)(C)

[55] Mrs Connors, counsel for the father, acknowledged in her submissions that the approach adopted by the Courts under this heading was for a respondent to establish, first, that there was a grave risk to the children being exposed to physical or psychological harm and, secondly, that the Courts of the country of habitual residence could not safeguard those children from such risk.

[56] Counsel acknowledged that the father could probably not overcome the second limb of this approach. In my view that was an appropriate submission in light of the evidence given about the Family Court system in Germany. I refer to the evidence of Ms John, a barrister and solicitor of the High Court of New Zealand and also a qualified lawyer in German law where she deposes in paragraph 7 of her affidavit as follows:

"Basically the law is pretty similar to the law in New Zealand in regard to the Court's approach to ascertain the children's wishes, the ability of the parents to care for the child properly and the Court's obligation to ascertain what is in the child's best interests."

[57] As to grave risk of physical or psychological harm, the use of the word "grave" connotes a severe and substantial risk. In respect of this aspect of the test I refer to the commentary in Butterworths Family Law in New Zealand at paragraph 6.151:

"Judge Boshier has emphasised in the Family Court 109 for the s 13 exceptions to apply the harm must be "severe and substantial". Unacceptable risk of physical or psychological harm is not seen as enough - "the risk is promoted to a much higher threshold. 'Grave' and 'expose' import the most serious of situations". In assessing the risk for a child, both the factual situation from which the child has come, and the nature of family law of the country of origin and the ability of that law to afford protection for the child, have been held to be relevant. The country of origin must at least regard the child's welfare as paramount. The onus is on the person opposing an order for return to "at least advert to" the nature of family law in the country of origin. Canadian and New Zealand law have been held to be similar in regarding the welfare of the child as paramount ..." (emphasis mine)

[58] As to the children being placed in an intolerable situation by a return I am content to agree with Judge Boshier in Damiano v Damiano [1983] NZFLR 548 where at page 554 he said:

""Intolerable" in s 13(1)(c)(ii) means "simply and demonstrably not able to be countenanced".

[59] Turning to the grave risk of physical/psychological harm, the evidence before me concentrates mainly on L. and not S., although if there is a risk to L.'s psychological/physical welfare there is by implication similarly a risk to S..

[60] The evidence of the father and his witnesses about the mother's parenting refers to physical and psychological (mental) abuse directed to L., and neglect in areas of health and child safety for both children.

[61] On the other hand, there is evidence from the mother and her witnesses concerning the father's parenting, although these allegations are not on the same scale as those against the mother.

[62] The impression I have from the evidence, and including Dr Staite's s29A report, is that the mother has less patience with the children than the father.

[63] The more concerning allegations against the mother are the ones pertaining to her physical abuse of L. in Australia. Certainly these allegations must have had some basis given the involvement of the Australian Social Services. However, there are no such similar reported incidents in Germany.

[64] L. has a strong psychological attachment to her mother. The report from Dr Staite confirms this. At page 7 of his report he says:

"She has strong attachment to her mother, although the fragmentary data indicates that it is an insecure resistant attachment with a strong grief (from loss) component overlaid on the attachment."

[65] In his summary at page 8 of his report he says:

"L.'s attachments to both parents are strong but qualitatively they are different. Whereas her attachment to her mother has the quality of being insecure, anxious and resistant albeit strong, her attachment to her father is strong, secure and comforting although a little clingy owing to the mother's alleged threats to take L. from her father back to Germany."

[66] The last comment in that quotation needs to be read in conjunction with Dr Staite's view on L.'s objections, where at page 2 he said:

"L. has an objection, and it is a strong one, about returning to Germany if her father remains in New Zealand. The data indicates that she is missing hr mother and yearns for her mother."

[67] What Dr Staite is saying is quite understandable. This child has been caught in a conflict between two parents that she obviously loves and is strongly attached to. In the midst of that conflict she has been removed from her mother and a reasonable inference for the Court to draw is that some of her anxiety/resistance has its origin in that separation. The evidence from the father is that during the period when the mother had not reconciled herself to agreeing to the children staying L. became upset during phone calls when her

mother talked to her about returning to Germany. Just as L. was upset about that outcome, I have no doubt she is similarly upset about being apart from her mother.

[68] The position therefore as far as L. is concerned is that psychologically there is harm for her being separated from both parents. The exact measure of the harm is not particularly relevant for present purposes. The issue of psychological harm for her and no doubt, I infer, for S. is one which is common place in most disputes between separated parents over the care of children. There is harm to both children in being apart from their mother, just as there will be harm for both children in being apart from their father. If the children are returned to Germany then the issue of child care arrangements will need to be settled. There is no assumption that the father could not return with them.

[69] In my view there is no grave risk to the children's psychological welfare by a return to Germany.

[70] As to physical harm to L., having considered the evidence, the most I could say is that potentially there may be a risk to L.'s physical wellbeing. However, it is only potential and it is not at a severe and substantial level. The same comments would apply to S.

[71] In any event, as I have indicated above, the Courts of Germany can be entrusted, as they should be under the Hague Convention, with making decisions which will promote the best interest and welfare of the children.

[72] I cannot find that the return of the children to Germany will place them in an intolerable situation. I note that this aspect of s13 was not advanced with any force.

[73] The issues raised in these proceedings as to psychological/physical abuse and inappropriate parenting are clearly matters that will be weighed in the balance if the parties themselves need to litigate this matter further.

L.'S OBJECTIONS

[74] I have considered the evidence about L.'s objections to returning to Germany. The evidence is contained in the father and his witnesses evidence and in the s29A report of Dr Staite which I have referred to under the previous heading.

[75] Dr Staite's report shows at the very outset that L.'s objection is one of being separated from her father as opposed to returned to Germany per se. I repeat what I have said above that she has strong although differing psychological attachments to both of her parents.

[76] L. is aged 7. L.'s maturity is described by Dr Staite as being that she does have a maturity that comes through her age appropriate emotions and behaviours. Maturity needs to be linked with her age and the circumstances she finds herself in. Reading the report as a whole there is a picture of a young 7 year old child who is in the midst of a parental conflict about her care, having only started school and having some difficulties with her social adjustment. However, in listening to her objection, namely that she does not wish to return to Germany if it means going without her father, I conclude on the evidence overall that she is not at an age and has not reached a degree of maturity where it is possible for her wish to be given effect to over the objects and policy of the Hague Convention. In any event, her objection is not so much about a return but of being separated from her father.

[77] Assuming that L.'s objections come within s13 I would not be prepared to refuse an order for the return of the children because the ground would only relate to L. and not to her sister, S. It would be unrealistic and potentially damaging for the children to be

separated. As I have held none of the previous grounds raised for the refusal of an order have succeeded and if I were to accede to this ground in the father's favour there is no evidence upon which I could come to a similar view in respect of S. Therefore, even assuming that L.'s objection was one that could be given effect to, when considering the sibling relationship in the exercise of my discretion, I would not uphold this ground.

CONCLUSION

[78] It follows that the children will be returned to Germany. The mother is booked to return to Germany on 19 March and has provisionally made arrangements for the children to return with her. There will therefore be an order that both children will be returned to Germany on 19 March 2002 or at such other date as directed by the Court. The CAPS listing preventing the removal of the children from the jurisdiction will be revoked as from that date to enable the return of the children to Germany.

[79] Counsel informed me at the hearing that as the mother is now in New Zealand she was to have the children for the two week period prior to her departure, and that if an order was made in her favour there would need to be provision for the father to have time with the children prior to them leaving. Of course it is open to the father to return to Germany on or about the same date with the children.

[80] Until the children depart from New Zealand there shall be an interim custody order in favour of the mother, reserving reasonable access to the father on such terms and conditions as agreed between the parties or, failing agreement, by order of the Court. That reasonable access will include the father having telephone contact with the children.

[81] If any further orders or directions are sought (including any issue as to costs) leave is reserved to counsel for the parties to refer the matter back to the Court.

[82] There will be an order prohibiting the publication of the parties, witnesses and children's names. In the event of publication the parties and witnesses names are to be referred to by their first Christian name initials. The children's names are to be referred to as X (L.) and Y (S.).

B P Callaghan

Family Court Judge

Signed at 9.45 am on 13 March 2002

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