Translation from the German language

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File number:
2 UF 200/19
2 F 1701/19 AG Karlsruhe

[crest]

Karlsruhe Higher Regional Court

2nd CIVIL CHAMBER – CHAMBER FOR FAMILY MATTERS

Order

In the family matter

[redacted], United States of America

- Applicant -

Legal counsel:

Lawyer [redacted]

trial lawyer

-v-

- Respondent, and Complainant in the Appeal -

Legal counsel:

Lawyers [redacted]

Further parties involved:

Children:

1) [redacted], born on December XX, 2015

Guardian ad litem:

[redacted] Karlsruhe

2) [redacted], born on August XX, 2017

Guardian ad litem:

[redacted] Karlsruhe

Jugendamt (Youth Welfare Office):
[redacted]

for the return of a child pursuant to the Hague Child Abduction Convention

Karlsruhe Higher Regional Court – 2nd Civil Chamber – Chamber for Family Matters – represented by Presiding Higher Regional Court Judge [redacted], Higher Regional Court Judge [redacted] and Local Court Judge [redacted] has decided:

1. The complaint appeal lodged by the Respondent against the Order issued by the Local Court – Family Court – in Karlsruhe on November 14, 2019 (2 F 1701/19), is hereby refused.

2. The costs of the complaint appeal proceedings shall be borne by the Respondent.

3. The value of the dispute for the complaint appeal is set at 5,000.00 Euros.

The reasons for this are:

I.

The Respondent is lodging a complaint appeal against the order to return the children to Connecticut (U.S.A.) issued under the terms of Art. 12 para. 1 of the Hague Convention on the civil aspects of international child abduction.

The Applicant, born in Brooklyn (New York) and the Respondent, born in Mineola (New York), married in New York on [date redacted]. The relationship between the parents was fraught with conflict from the outset. The marriage resulted in the birth of the daughters of both parents, [redacted], born on December XX, 2015 and [redacted] on August XX, 2017. The marriage of the couple was bindingly dissolved by divorce by order of Fairfield Superior Court of Bridgeport, Connecticut dated September XX, 2017. The family has never lived together in the same home. Until the end of 2018, the Respondent and the daughters had their habitual residence in Connecticut. The Applicant lived and remains living with his mother in New York.

The parties have already been involved in numerous court cases regarding the daughters in the U.S.A. After the Applicant had had access to the children in December 2017, the mother

made an allegation against person(s) unknown of physical/sexual abuse committed on [redacted]. Police made enquiries and investigations via the local Child Protective Services (CPS) but these were not able to confirm the suspicions. The Respondent had a bio-psychosocial report [in respect of the child] commissioned by the Yale Study Center, a child psychiatry clinic. Further details can be seen in the report from the Yale Study Center dated [redacted] (File page [redacted], File page. [redacted]).

On [redacted], the parents entered into a “Parental Responsibility Plan” before Bridgeport Superior Court, Connecticut which was upheld by the court (File page [redacted] et seq.). This stated that the parents agreed that the children would have their primary residence with the Respondent and that the parents would share legal and physical custody of the children. The parents further arranged that all important decisions for the children would require the consent and agreement of both parents and, in the event that they could not agree, neither of the parents would be permitted to take decisions without the consent of the other. Furthermore, arrangements were put in place for the Applicant to have access to the children during vacations among other things. Further arrangements concern any journey undertaken with the children beyond the borders of Connecticut, New York or New Jersey, or a move of home or change of residence. The essence of these arrangements is that the parent wishing to travel or move [with the children] must inform the other parent in writing of such plans and that the other parent must take the matter to court if they do not consent.

The Applicant last had access to his daughters in early-mid September 2018. After the Applicant failed to return the children to the Respondent at the agreed time, the Respondent had an ex parte order of custody issued by Bridgeport Superior Court, Connecticut on September 11, 2018, transferring temporary custody to her and temporarily barring the Applicant from having access to the children (file page [redacted] and file page [redacted]. The decision was made in written proceedings without the parties being heard, upon the written application of the Respondent, and she assured by means of an affidavit that the Applicant was refusing to return the children. Moreover, the court set a date for a hearing of September 24, 2018. On September 16, 2018, the Applicant returned the children voluntarily to the Respondent. The only one of the parties to appear at the hearing on September 24, 2018 was the Respondent. By order of Bridgeport Superior Court, Connecticut dated September 24, 2018 this is mentioned with the express wording: “Order regarding application of September 11, 2018 for emergency ex parte order of custody”, the Respondent was transferred sole rights of legal and physical custody of both children and it was also ordered that visits to the Applicant’s home would be at the discretion of the Respondent (file p. [redacted] and file p. [redacted]).

On October 31, 2018, the Applicant made an application for modification to Bridgeport Superior Court, Connecticut. As a result of this, a hearing took place before the court seized on December 13, 2018, at which both of the parents were present. The court did not modify the decision of September 24, 2018, but adjourned to December 28, 2018 (file p. [redacted]). On December 14, 2018, the Respondent applied to have the hearing delayed, In her reasoning she stated that she would be on holiday from December 22, 2018 and would only return, after a business trip following straight on from this, on January 9, 2019. In light of this, the adjournment was postponed until December 31, 2018.

By fax dated December 30, 2018, the Respondent once again requested adjournment of the hearing, providing the same reasoning that she had been on vacation since December 22, 2018 and, following directly on from this, would be on a business trip until January 9, 2019. The court refused the request to adjourn and awarded the Applicant sole legal and physical custody of the children after the oral hearing on December 31, 2018 by order of the same date (file p. [redacted]).

The Respondent, who, according to her own information, had been intending to move to Germany with the children since her adoptive sister and her husband, later followed by her adoptive mother, had moved from the U.S.A. to Germany, then went on a short vacation to London with the daughters on December 25, 2018 and from there to Germany on December 31, 2018 without the knowledge of the Applicant. On the way to the airport in London, the Respondent learned that Bridgeport Superior Court in Connecticut had awarded by order of the same date, custody of the children to the Applicant. In response to this, she abandoned her original intention to fly back to the U.S.A. on January 9, 2019 with the children to pick up the remainder of her possessions from storage. The Respondent and the children have been in Germany permanently since December 31, 2018.

On April 1, 2019, a further hearing took place at Bridgeport Superior Court, Connecticut at which the Applicant and the children's Guardian ad Litem were personally present. The Respondent joined the hearing by telephone. By order dated April 1, 2019, Bridgeport Superior Court, Connecticut ordered that the children be placed in the care of the Applicant, who had been awarded legal and physical custody of the girls as per the order dated December 31, 2018. It further reads: "The court finds the agreement of the parties on the record that the defendant will personally travel to Germany to pick up and travel with the minor children to return them to the United States to be in their best interests. The parties will set a pickup time and date before April 5, 2019 through the GAL, [redacted]. The parties are ordered "to establish the manner of transition and appropriate details by April 5, 2019" (file p. [redacted]). This did not occur as the Respondent refused to cooperate.

Further hearings took place at Bridgeport Superior Court, Connecticut that the Respondent also joined by telephone on April 26, 2019, and in September and November 2019 without a decision being reached by the Superior Court.

The Applicant did not make any criminal complaint in the U.S.A. in relation to the child abduction.

On September 30, 2019, the Applicant tabled a motion with Karlsruhe Local Court requesting the return of the daughters to the U.S.A., to the State of Connecticut.

The Applicant claimed not to have any knowledge of the proceedings which took place in Connecticut in September 2018, and that he was not summoned to the hearing on September 24, 2019. He claimed that the Respondent had fabricated a false version of events to deceive both him and the Court in the U.S. by making claims that were not correct in order to delay the modification of the custody decision for which he had tabled a motion. She, he said, could not claim that he had failed to exercise his rights of access, as it was she who had prevented him from doing so. Further to this, he claims, the Respondent, at the hearing on April 1, 2019 agreed to an arrangement under which she would return the children to him so that they could return to the U.S.A. and that the parties to proceedings would agree on the details with the help of the GaL by April 5, 2019. Because of the failure of the Respondent to comply with this arrangement, a case of wrongful retention of the children has existed since April 5, 2019 at the latest.

The Respondent rejected the premise of this application and stated that she had moved lawfully with the children to Germany. She said that the custody decision of September 24, 2018, under which she was transferred parental custody permanently and without restrictions made obsolete the Parental Responsibility Plan dated July 2, 2018, meaning that she was not required to inform the Applicant as to the exact details of the move. Contrary to the wording of the order dated April 1, 2019, she said that at no time had she agreed to return the children. Such an agreement was never in place, she said, and she therefore cannot be said to have retained the children unlawfully. She also testified that the handover of the children to place them in the care of the Applicant represented a grave risk of physical and psychological harm for the children and would also place them in an intolerable situation. She said the children were two and three years old and had not had any contact with the Applicant for over a year. She said the Applicant was a more or less unknown person to [redacted]. And that for [redacted], the father was a person who had neglected her and of whom she was afraid. On November 3, 2019, i.e. the day before the hearing at Karlsruhe

Local Court – Family Court, having been asked by her maternal grandmother, Ms. [redacted], [redacted] is said to have opened up to her and told her that “brown daddy”, i.e. the Applicant, had abused her ten times in December 2017. In saying this, she is said to have meant the Applicant.

The Youth Welfare Office submitted a statement of its position on October 22, 2019. With regard to the exact details of the position statement, see file p. [redacted] et seq.

The GaL submitted a report dated October 30, 2019 on an initial meeting with the children in their mother’s home (file p. [redacted] et seq.).

At around 11.00 p.m. on the evening of November 3, 2019, the Respondent presented herself, alongside [redacted], the adoptive mother, and the husband of her adopted sister at the police station in Lahr, Germany and made a criminal complaint against the Applicant on the grounds of sexual abuse committed against [redacted]. The Respondent stated that the then 2 year old [redacted] had been with the Applicant on the night from December 8 to December 9, 2017 and returned from this in a completely disturbed state of mind. She claimed to have already made a criminal complaint on suspicion of sexual abuse in the U.S.A. These proceedings are said to have been dropped after [redacted] refused to cooperate with enquiries and conversations. [Redacted] was today said to have told her maternal grandmother that the Applicant had touched her vagina. With regard to the details, see the letter from Offenburg Police Headquarters to Offenburg Public Prosecution Office dated January 5, 2019 (file p. [redacted] et seq.]).

The Local Court heard the parents, the child [redacted] and the Guardian ad Litem in person on November 4, 2019 and questioned the adoptive mother, Ms. [redacted] as a witness. With regard to the details of this, see the contents of the note verbale dated November 4, 2019 (file p. [redacted] et seq.).

In its order dated November 14, 2019 the Local Court ordered the Respondent to return the children [redacted] and [redacted]to the U.S. State of Connecticut within two weeks and that in the event that she failed to comply with the aforementioned obligation, she, and any other such person at whose home the children may be staying, would be obligated to surrender the children to the Applicant or any person as determined by him for the purposes of their return to the State of Connecticut in the United States of America. In essence, the Court set out that the Respondent, owing to the Parental Responsibility Plan entered into on July 2, 2018, had been obligated to have the prior consent of the Applicant before leaving [the United States] with the children. The emergency, ex parte order issued on September 24, 2018 did not give

the Respondent the right to move to Germany without the prior consent of the Applicant or a further court decision. In any case, the Respondent can be deemed to have violated, probably since December 31, 2018, but at the latest since April 1, 2019, the Applicant's sole/joint rights of custody by removing the children from their place of habitual residence in Connecticut and retaining them wrongfully in Germany. The Court found that the conditions for an exemption from the principle of a return under Art. 13 Hague Child Abduction Convention had not been fulfilled. This referred especially to the fact that the allegations of sexual abuse committed on [redacted] could not be confirmed. It stated that the testimony of witness [redacted] could not lead to any other assessment. It stated that it was at the very least odd that [redacted] supposedly first revealed the identity of the perpetrator just one day before the hearing. Furthermore, it said that it was highly improbable that a child who was 2 years old at the time of the [alleged] offence would remember it or be able to report on it coherently nearly two years later. With regard to the details of the reasoning, see the contents of the decision (file p. [redacted]).

It is against this order, served on the Respondent on November 19, 2019 that the Respondent lodged a complaint appeal on December 2, 2019.

She is of the view that the elements of wrongful removal are not fulfilled, because, contrary to the presumption made by the Local Court, the Parental Responsibility Plan dated July 2, 2018 had ceased to be effective as of September 24, 2018. The Respondent had not only requested an "ex parte order", i.e. an emergency decision without recourse to an oral hearing, but had lodged a "motion for modification" with regard to the Parental Responsibility Plan dated July 2, 2018. As evidence that such a procedure is a necessity in the U.S.A. so that not only is a new judgment issued independent of the original one, but to modify a previous order or arrangement, she is also applying for a legal expert opinion to be obtained.

She claimed it was possible that, because the Applicant reported the children missing (case number [redacted]) with the Center for Missing & Exploited Children (NCMEC), criminal action could have triggered against her. She claims that his general statement that he had tried to get access on a number of occasions does not constitute evidence that he has actually exercised his rights as a parent. After all, she claims, for reasons of the circumstances under which it was discovered, the report from Yale Child Study Center, and the most recent testimony from [redacted], that it is established that the sexual abuse took place. The Respondent says that she has been the primary carer of the children since their birth. She says the children and the father do not feel a connection of any sort to one another. She backs this up by saying that the father saw the children at the hearing at the court of first instance and did not react in any way. As the sole holder of custody rights, she

says, the Applicant would be able to take in the children as soon as they were on the territory of the U.S.A. and, and prevent the Respondent from having any sort of contact with the children until alternative access arrangements had been put in place. For this reason, she says, it would have to be presumed that the Respondent would be de facto separated from the children for the time being, as any modification would take months to go through the courts.

The Respondent brings a motion to the Court:

1. That the contested order be overturned.

2. That the Applicant's motions be dismissed.

The Applicant brings a motion to the court:

That the complaint appeal be dismissed.

He defends the contested decision and adds that he experienced a great deal of uncertainty and desperation as a result of the Respondent's behavior, by which she even barred him access at the hearing at the local court and, for this reason, did not show any reaction to the children. He says, given that the Respondent already has a lawyer who operates in both the U.S.A. and Germany, it would appear to be a more than obvious course of action to launch an emergency motion in the U.S.A., so that the children could remain in her care until any hearing in the main matter. She was in a position to find out whether the NCMEC had made a criminal complaint, given that she knew the case number. The fact that the Applicant did not submit any response from the NCMEC shows in his opinion that no criminal complaint had been made in the first place.

In its ex parte order dated January 24, 2020, Bridgeport Superior Court, Connecticut, established, upon application of the Respondent [translator's note: this should probably read "Applicant"], that the Respondent had removed the children wrongfully from the U.S.A. and ordered that the Respondent be barred from having access. Moreover, the court set a date for a hearing of February 7, 2020.

For more information as to the testimony entered by the parties during the proceedings, please refer to the documents submitted and annexes.

The Chamber heard the child [redacted], the parents and the Guardian ad Litem in person on January 27, 2020. With regard to the details, reference is made to the notes verbales of January 27, 2020.

II.

The time-limited complaint appeal of the Respondent is permissible as per Sec. 40 Subsec. 2 No. 1 ILFPA (*IntFamRVG*) and Sec. 58 Subsec. 1 Act on Proceedings in Family Matters (*FamFG*) It was lodged with the competent Local Court – Karlsruhe – Family Court in the correct form and within the deadline as required by Sec. 40 Subsec. 2 sentence 2 ILFPA in conjunction with Sec. 63 Subsec. 1 Act on Proceedings in Family Matters and thus is permissible.

However, the complaint appeal is unsuccessful in relation to the matter. The Local Court was correct to obligate the mother to return [redacted] and [redacted] to the U.S.A.

1. The matter falls within the scope of the personal and legal scope of the Hague Child Abduction Convention. The Federal Republic of Germany and the U.S.A. are states signatory to the Convention. The Convention has been in force between the two countries since December 1, 1990. The children [redacted] and [redacted] are under sixteen years of age (Art. 4 sentence 2 of the Convention).

2. The Applicant is able to demand the return of the children under Art. 12 para. 1 Hague Child Abduction Convention because the Respondent unlawfully removed the children to Germany (a) on December 31, 2018 (Art. 3, Art. 14 of the Convention) and (b) the application has been made within the deadline of one year set out in Art. 12 of the Convention and (c) none of the exemptions set out in Art. 13 of the Convention apply.

a) Art. 12 para. 1 of the Hague Child Abduction Convention sets out that the competent court is to order the return of the child forthwith when the child has been wrongfully removed or retained as per the terms of Art. 3 of the Hague Child Abduction Convention and, at the date of the motion being laid before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed since the date of the removal or retention. Article 3 para. 1 of the Convention sets out that the removal or retention of a child is to be considered wrongful where 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 where 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 Convention does not define the term habitual residence. The term relates to the de facto situation. It is defined by the child's factual center of vital interest and, in most cases, also requires a significant period of residence and that the place in question be the actual focus of the child's social ties. The length and regularity of the center of vital interest is required because the child cannot otherwise become socially integrated. The habitual residence cannot be automatically derived from that of the parent with custody for the child, but should be determined in its own right (see MüKoBGB/Heiderhoff, 7th ed. 2018, *KindEntfÜbk* (ChdAbdCon) Art. 3 Margin No.. 14, beck-online)

Both in the case of the wrongfulness of the removal and of the retention, it is the custody situation at the time these acts were committed that is the decisive factor – this applies both in terms of the prevailing law and in terms of the custody arrangements that were in place. Art. 5a Hague Child Abduction Convention makes clear as regards changes of residence that, as the basis for a ruling, custody in this sense only refers to personal care and not provision of financial means, and that a central element of this personal care is the right to determine the child's place of habitual residence (Staudinger/Pirrung (2009), margin note D 27) Art. 3a of the Hague Child Abduction Convention states that the removal or retention of a child is wrongful even if it violates mere joint rights of custody (Hausmann, *Internationales und Europäisches Familienrecht* (International and European Family Law), 2nd edition, 2018, Part U., margin No. 95, beck-online) A wrongful retention or removal is only deemed to have taken place if the parent who is left behind, at the moment the child leaves his or her country of habitual residence, held (joint) rights of parental custody for the child. Retrospective decisions in the country of origin on custody or right to decide on a place of residence are thus not to be taken into account (Hausmann, ibid, U. *Kindschaftssachen* (Child Custody Matters), margin No. 104 and further references; ibid, D31).

It is uncontested fact that, before they moved to Germany with the Respondent on December 31, 2018, the children's habitual residence was in Connecticut, U.S.A. There, they shared a home with the Respondent and received child care in her apartment from a nanny. The wrongfulness of the removal or retention is thus to be judged in accordance with the prevailing law of Connecticut, U.S.A.

It is questionable whether the Order dated September 24, 2018 actually authorized the Respondent – as she claims – to move to Germany with the children without the prior consent of the Applicant. With this in mind, it should be highlighted that many U.S. States allow even parents with sole custody of the children to change the habitual residence of the child only with the prior consent of the other parent (Staudinger/Pirrung a.a.O., Margin note D 30) If the other parent does not give the necessary prior consent to a change of the child's

habitual residence, this is considered to be a violation of rights of custody, even if the parent's powers do not go beyond agreeing to such a decision (Federal Constitutional Court, Order dated 18 July 1997 – 2 BvR 1126/97 - NJW 1997, 3301, Staudinger/Pirrung, ibid). The fact that such prior consent is also required under the prevailing legal provisions of the U.S. State of Connecticut (Connecticut General Statutes, see: https://www.cga.ct.gov/current/pub/title_46b.htm) could be seen from the fact that the General Statutes set out specific preconditions for a move ("relocation") of the parents with a minor child under Secs. 46b-56. For if the power to change the children's place of residence on a permanent basis were one of the general rights bestowed as part of parental custody, there would be no need for it to be mentioned in a separate provision.

It is also conceivable that the Parental Responsibility Plan dated July 2, 2018, as confirmed by the Court, would continue to apply at least in part despite the Order dated September 24, 2018, and as such, that the move to Germany would have required the prior consent of the Applicant. Another indication that this is the case is provided by the wording of the order dated September 24, 2018 in the emergency proceedings ("order regarding the application for ex parte order of custody").

Ultimately, however, it is not this that is the decisive factor, and this meant that to the Respondent's motion for evidence for an expert opinion to be gathered did not have not be complied with. For, in the words of the Respondent herself, it was not until the evening of December 31, 2018 that she entered German territory with the children; this was thus after the decision was made to award sole rights of custody to the Applicant as per the order dated December 31, 2018, As far as the timing of the wrongful removal is concerned, it is the actual date and time of the act that counts. In this respect, it is of no importance that the Respondent had already made the decision in September 2018 to leave the U.S.A. with the children and move to Germany. Furthermore, when assessing the date of the move, it is not possible to say that it had already taken place on December 25, 2018. It is true that the Respondent had already left the U.S.A. with the children on this date. However, this only occurred so that they could spend a few days on vacation in London. There were no plans at any time to establish a permanent residence there. The move to Germany, with the intention of remaining there, did not occur until December 31, 2018. When being heard by the Chamber, the Respondent described in detail that she had had access to the case file while in London and, while there, was informed of the Order issued by the Superior Court on December 31, 2018, by which the Applicant was awarded parental custody. On this basis, she entered Germany while no longer having rights of custody for the children.

For the sake of completeness, it is noted that the conditions set out in Art. 3 Hague Child Abduction Convention would even have been fulfilled if one, giving the Respondent the benefit of the doubt, assumes that she was entitled, on the basis of the order dated September 24, 2018, to change the children's place of residence without the Applicant's prior consent, and even working on the counterfactual assumption that she was already in Germany when the decision was issued on December 31, 2018. In this case, the manner in which she had brought the children to Germany would have been lawful, but her retention of them in Germany would still have been wrongful given the decision made by the Superior Court on December 31, 2018. Even if the removal of the children had complied with a court decision which was provisionally enforceable, but then overturned by another court order awarding the parent in the other country the right to decide on the place of residence, the failure to return the children to the country of origin following on from this second decision would be wrongful if a new habitual residence had not yet been established (see European Court of Justice decision of 9 October 2014 C-376/14 PPU – *FamRZ 2015* (Family Law Magazine 2015, 107)).

It is of no relevance whether the parents entered into an agreement before the superior court on April 1, 2019 obligating the Respondent to surrender the children to the Applicant. It is not disputed that the Superior Court upheld the decision dated December 31, 2018, meaning that the Applicant held sole rights of custody and continues to hold them. Given that the Applicant still has not given his consent to the children remaining permanently in Germany, the removal or retention of the children by the Respondent remains unlawful. This is confirmed by the determination that the removal or retention was wrongful issued by the Superior Court dated January 24, 2020 as submitted by the Applicant, in which he states that the Respondent, given the existence of the decisions dated December 31, 2018 and April 1, 2019 was and remains obligated to return/surrender the children.

The Applicant actually exercised his rights of parental custody in the U.S.A. Art. 3 para. 1 does not place requirements on actually exercising rights of custody that are particularly difficult to fulfill. This requirement intends only to exclude such persons from custody who do not comply with or exercise their legal or agreed rights and obligations at all, not even a minimum of their visitation rights; i.e. even a failure to comply repeatedly would not lead to such an exclusion (Staudinger/Pirrung, ibid, margin No. D 32). The fact that the Applicant was actually exercising his rights of custody becomes sufficiently apparent from his motion to the court dated October 31, 2018 with which he applies for the modification of the decision on custody dated September 24, 2018. It does not depend on whether – as claimed by the Respondent – the Applicant had not contacted her at all her since mid-September 2018 or

whether the Applicant made an attempt to have access to the children but this was prevented by the Respondent.

b) The deadline set out in Art. 12 of the Convention had not elapsed, as the wrongful removal took place on December 31, 2018 and the application under the Hague Child Abduction Convention was received by the competent Karlsruhe Local Court – Family Court on September 30, 2019, and thus within a year of the removal.

c) The Local Court correctly held that the preconditions for refusing the return as per Art. 13 of the Convention had not been met. The objections raised by the Respondent do not alter the legal foundation of the decision which is being contested. The Respondent has not shown that a return to the U.S.A. would entail a grave risk of exposing the children to psychological or physical harm (aa) or otherwise place them in an intolerable situation (bb).

Under Art. 13 para. 1b) of the Hague Child Abduction Convention, the judicial or administrative authority of the requested State, notwithstanding the provisions of Art. 12, is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation.

Within the scope of Art. 13 para. 1b) of the Convention, it is to be considered that the parties should, by way of the Convention's rules, be prevented from taking their child abroad unlawfully. This is to ensure the decision on custody is made in the child's former place of habitual residence. The strict nature of the rule, according to which the court with original international jurisdiction, has to decide on rights of custody taking into consideration the children's wellbeing, is intended to prevent states of affairs from predominating which themselves were brought about by the abduction (Federal Constitutional Court, Family Law Magazine 1999, 85, margin No. 65). The Convention gives paramount importance to the best interests of the child, as can be seen from Preamble. A balance is to be struck between the interests of the different parties involved, and it must be considered that the child's best interests are of top priority (ECHR, judgment of May 21, 2019, Family Law Magazine 2019,1239 (1240); judgment dated July 6, 2010, No. 41615/07, margin No. 134 [Neulinger and Shuruk, Switzerland], BeckRS 2011, 81381, beck-online; judgment of July 12, 2011, No. 14737/09 [Sneersone and Kampanella ./. Italy], Family Law Magazine 2011,1482; judgment of November 26, 2013, No. 27853/09, margin No.. 95 [X ./. Lithuania], NJOZ 2014,1825, beck-online). The Hague Child Abduction Convention presumes in doing so that the immediate return of the child to their previous place of residence usually corresponds to the

child's best interests, because this ensures continuity of their living conditions. (Federal Constitutional Court, Family Law Magazine 1999, 85 margin No. 65). However, this presumption can be ignored if the conditions of Art. 13 para. 1b) are fulfilled However, with the aims of the Convention in mind, no consideration can be given to the strain under which the child is certain to be placed when going through such a return. Rather, consideration can only be given to unusually severe restrictions to the child's best wellbeing, going well beyond the usual difficulties associated with a return; narrow construal of Art. 13 is imperative on this basis (Federal Court of Justice, Family Law Magazine 1996, 405, margin No. 11, Court Chamber, Order dated March 28, 2017 – 2 UF 106/16 - Family Law Magazine 2018, 39 margin No. 15, juris) Therefore, it is only possible in some individual cases to demonstrate the existence of unusually severe impediments to the child's best wellbeing so as to impede a return of the child; these must go well beyond the usual difficulties associated with a return (Federal Court of Justice, Family Law Magazine 2016, 1571, margin No. 18, juris).

On these terms, the return of the children to the U.S.A. must take place.

aa) The court could not see any specific indications that the return to the U.S.A. would in any way represent a grave risk of physical or psychological harm for the children (Art. 13 para. 1b Hague Child Abduction Convention, previous version). The Respondent's opinion that it had been established that [redacted] was sexually abused by the Applicant in late September 2017, is not shared by the Chamber with competence for the legal decision. This allegation had already been made by the mother in the U.S.A. in May 2016 and again at the end of December 2017. In both cases, the complaint was found to be without foundation after investigations were carried out by the local Child Protective Services, because no evidence could be found (see file p. [redacted] and [redacted]). In relation to
the report dated April 19, 2018, it is true that Yale Child Study-Center, Psychiatric Clinic for Children found that [redacted] had experienced emotional turmoil due to the parent's conflict-fraught relationship, in which there are said to have been repeated arguments and even physical fights. [Her] erratic behavior did not go so far as to be a sign of post traumatic stress disorder. The report says that for [redacted] to develop in a healthy way from now own, it is imperative that the parents learn to learn to communicate in a safe and productive way about matters affecting [redacted] and to recognize her emotional needs (file p. [redacted] and [redacted]). This information makes it clear that the emotional turmoil experienced by [redacted] is not down to any misbehavior on the part only of the Applicant, but rather is down to the fights and conflicts between the parents. The Superior Court was correct to uphold the Parental Responsibility Plan in July 2018, according to which joint custody was retained and the Applicant was given the right to have access to the children unaccompanied and on a regular basis. If the allegations of sexual abuse had not been without foundation,

the Parental Responsibility Plan would not have been agreed to, and the court would not have upheld it.

The idea that [redacted] just happened to reveal the identity of the perpetrator for the first time, the day before the hearing, on November 3, 2019, and that this was one “brown daddy”, seems implausible. The Chamber shares the view of the Local Court that it was highly improbable that a child who was 2 years old at the time of the [alleged] offence would remember it or be able to report on it coherently nearly two years later. It is also worthy of note in this respect that, when the children were heard by the Chamber, she wasn’t even able to put events from the recent past in the correct order. For instance, she answered the question as to whether she had been to kindergarten the day before, i.e. on a Sunday, in the affirmative. The fact that [redacted], being prompted by the witness, when asked the question as to whether anyone had touched her in an intimate area or her vagina, is said to have answered: “Yes, ten times”, shows very clearly that her statements are not reliable and cannot be said to stem from her own experience. It is totally unrealistic to expect that a two-year-old child would remember the events to a level of detail that she remembered the number of times the acts were repeated.

bb) The return of the children to the U.S.A. does not otherwise put the children in an intolerable situation (Art. 13 para. 2b Hague Child Abduction Convention, previous version).

An intolerable situation would be said to exist for the child if the parent carrying out the abduction is the child’s primary carer and it would be intolerable for the parent to return to the country of origin. An intolerable situation due to a return would be possible if the parent carrying out the abduction were threatened with acts of violence by the other parent if they returned to the country of origin *MüKoBGB/Heiderhoff,* 7th edition., Art. 13 Child Abduction Convention, margin No. 30). On the other hand, the Respondent cannot be said to have deduced that a return would bring about an intolerable situation solely on the basis that she may be subject to prosecution for having abducted the children. It is generally recognized by the courts that the mere fear of consequences in terms of criminal law cannot be an impediment to a return, as it would be never be possible to order a return in practice, as the parent who committed the abduction could almost always use the fear of prosecution as a way of preventing the return. The aim of returning children to their country of origin could no longer be achieved by the Child Abduction Convention if this were the case (Federal Constitutional Court, *NJW (Neue Juristische Wochenschrift* – New Legal Weekly Journal,) 1997, 3301).

There are no sufficient indications that the Respondent would be arrested as soon as she set foot on U.S. territory. Nor is it in any way apparent that criminal investigations of any kind have been initiated against the Respondent in the U.S.A., and, specifically none were not mentioned as part of the Respondent's testimony. The Applicant has satisfied the Court that he has, to date, not made any criminal complaint against the Respondent. The Respondent could easily have ascertained for herself whether the NCMEC had made any criminal complaint. She has the case relevant case number. The fact that she has not been able to submit a positive answer in writing from the NCMEC would seem to suggest that no such criminal complaint has been lodged. It can therefore not be presumed, given the facts as known, that the Respondent would be arrested and separated from the children .

The fact that the Applicant would mostly likely demand the immediate handover of the children from the Respondent as soon as they set foot on U.S. territory cannot be said to place the children in an intolerable situation. With regard to the initial point, the Chamber states that it shares the Respondent's view that separation of the children from the Respondent as primary carer should be avoided in the children's best interests. The last time the children saw the Respondent was in September 2018. It is very likely to be the case that [redacted] especially, in light of her young age, at most only has very dim recollections of the Applicant. However, there are not currently sufficient indications that a return would automatically result in the children being separated from the Respondent. It is indeed the case that the Applicant was awarded sole custody and with the same Order issued by the Superior Court dated January 1, 2020, the Respondent was barred from having access. When being heard by the Chamber on January 27, 2020, however, the Applicant recognized that separating the children from the Applicant would not served the children's best interests and declared on record that, in the event the Respondent and the children moved back to the U.S.A., he would consent to the children remaining in her care until the hearing at the Superior Court. Furthermore, he has undertaken, until the end of February 2020, to waive any right to enforcement measures being undertaken as a result of the court rulings made in his favor in both the U.S.A. and Germany. There are no indications to suggest that the Applicant will not comply with this undertaking.

Regardless of this however, it is down solely to the Respondent to apply to the Superior Court for an ex parte order to ensure that the children do not become separated from her. The Respondent's objection that proceedings for modification take months does not hold any water in this regard. As the decisions made by the Superior Court to date in the custody proceedings between the parties demonstrate, such ex parte orders can be and are made from one day to the next.

Given that the Respondent took the unanimous decision to leave the U.S.A. and thus put her interests above those of her children, and given that the children have a right to have a decision taken in their best interests in custody proceedings by a court in the U.S.A., she should return to the U.S.A. immediately for the sake of the children and in their best interests, to enable the Superior Court to make a decision on the move to Germany.

III.

The decision on costs has been made as per Sec. 14 No 2, Sec. 20, Subsec. 2 Subsec. 3 ILFPA and Secs. 84 and 81 Act on Proceedings in Family Matters The determination of the value of the dispute is based on Sec. 14 No 2 ILFPA and Sec. 42 Subsex, 3 Act on Court Fees in Family Matters (*FamGKG*). Complaint on grounds of law not admissible, as per Sec. 40 Subsec. 2 sentence 4 ILFPA

Presiding Higher Regional Court Judge at the Higher Regional Court	Judge at the Higher Regional Court	Judge at the Local Court

Issuance of the judgment (Sec. 38 Subsec. 3 sentence 3 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*FamFG*)):
Delivered to the registry
on February 3, 2020

[redacted], *AI* [German civil service title]
Clerk of the registry at the Court

issued
[redacted]
AI
Clerk of the registry at the Court