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**IN THE FAMILY COURT
AT GISBORNE**

**FAM-2016-016-000205
[2017] NZFC 638**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	JAKE DODD Applicant
AND	AMELIE MARSH Respondent

Hearing: 16 January 2017

Appearances: J D Allen for the Applicant
A P Dreifuss for the Respondent

Judgment: 2 February 2017

JUDGMENT OF JUDGE M A COURTNEY

[1] Jake Dodd, who is an Australian, and Amelie Marsh, who is a New Zealander, met in Australia in early 2014. They were in a de facto relationship until [date deleted] Septemeber 2016. Their daughter, Demi, was born in Australia on [date deleted] 2014.

[2] Ms Marsh has an older child, Mollie aged five, who lived with the family in Australia.

[3] An incident occurred between the parties on the evening of [Date deleted] September 2016. As a result, Ms Marsh applied the next day for a protection order under the Australian Domestic and Family Violence Protection Act 2012. Ms Marsh flew to New Zealand later that day, bringing Demi and Mollie to New Zealand with her.

[4] Ms Marsh filed an application in the Family Court at Gisborne under the Care of Children Act 2004 (“the Act”) seeking the day-to-day care of Demi.

[5] Mr Dodd did not consent to Demi’s move to New Zealand and has applied to have Demi returned to Australia.

The process for determining if Demi should be returned to Australia

[6] The Hague Convention on the Civil Aspects of International Child Abduction (“the Convention”) provides a procedure for determining where the hearing regarding any child care application should take place when a child is removed from one Contracting State to another Contracting State. Australia and New Zealand are Contracting States to the Hague Convention.

[7] The process to make such determination in New Zealand pursuant to the Convention is contained in ss 102 to 111 of the Act. Mr Dodd has made application under s 105 seeking an order for the return of Demi to Australia.

[8] Section 105(2) of the Act provides that, subject to s 106, the Court must order the prompt return of the child to the person or country specified in the order if the grounds in s 105(1) are made out, namely:

- a. the child is present in New Zealand; and
- b. the child was removed from another Contracting State in breach of the applicant's rights of custody in respect of the child; and
- c. at the time of the removal those rights of custody were actually being exercised by that person; and
- d. the child was habitually resident in that other Contracting State immediately before their removal.

[9] Ms Marsh accepts that the above criteria are met as far as Demi is concerned. I am also satisfied from the evidence that the provisions are met.

[10] Section 106 of the Act sets out various grounds upon which the Court may refuse to make an order. In this case, Ms Marsh claims the grounds set out in s 106(1)(c)(i) and (ii) apply, namely there is a grave risk that Demi's return would;

- (i) expose her to physical or psychological harm; or
- (ii) would otherwise place her in an intolerable situation.

[11] It is for Ms Marsh to establish on the balance of probabilities that the grounds set out in s 106(1)(c) are met. Even if such grounds are established the Court still must exercise a discretion as to whether or not to order the child's return.

[12] I make it quite clear that I am not deciding with which parent or in which country Demi should live. I am solely determining in which country Demi should be whilst the substantive issue of her day-to-day care is determined. The Supreme

Court in *Secretary for Justice v HJ*¹ made it clear the Convention, and the New Zealand legislation which implements it, are not concerned with the merits of any underlying dispute as to the custody and guardianship of the child.

[13] Accordingly, it is a return to Australia, not a grant of custody of Demi to Mr Dodd, which has to be assessed to see if there is the claimed grave risk. The grave risk invoked must be associated with the return of the child to the home country².

[14] Section 4(1) of the Act provides that the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration in determining proceedings under the Act. However, s 4(4)(a) records that s 4 does not limit the international child abduction provisions of the Act. The deterrent policy of the Convention must prevail in making a decision³.

[15] The Court is not able to make any order in the proceedings filed by Ms Marsh in the Family Court at Gisborne pending the determination of the Hague Convention proceedings.⁴ That application and the evidence filed by Ms Marsh forms no part of this proceeding.

[16] Affidavits have been filed by both parties to the proceedings. Mr Dodd was unable to attend the hearing of this matter on 16 January 2017. The Court has proceeded to deal with the matter, as is usual in such proceedings, without the benefit of cross-examination of the parties on their affidavits.⁵ Ms Marsh commissioned a report from Annette Barnes, a registered clinical psychologist. That was provided to the Court by Ms Marsh. It is submitted the report supports the grounds claimed by Ms Marsh under s 106(1)(c). Ms Barnes was called to confirm on oath the contents of her report and to be cross-examined by Mr Allen, who was appointed by the New Zealand Central Authority to act for Mr Dodd.

¹ *Secretary for Justice v HJ* (2006) 27 FRNZ 213 [5].

² *HJ v Secretary for Justice* (2006) 26 FRNZ at [31], CA.

³ *HJ v Secretary for Justice* at [48].

⁴ S 109 Care of Children Act 2004.

⁵ *Basingstoke v Groot* [2007] NZFLR, CA.

[17] In order to establish a defence under s 106(1)(c) Ms Marsh needs to establish there is a “grave risk” that Demi’s return to Australia would either expose Demi to physical or psychological abuse or would otherwise place Demi in an intolerable situation. In *Damiano v Damiano*⁶ the Court stated:

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

[18] In *HJ v Secretary for Justice*⁷ the Court of Appeal held:

The s 106(1)(c) defence is not easy to invoke successfully. This is in part a function of the hurdle provided by the expression “grave risk” and in part because of judicial expectations that, in the normal course of events, the legal systems of other countries will protect children from harm.⁸

[19] The Court in *Damiano v Damiano* considered an “intolerable situation” was one which is “... simply and demonstrably not able to be countenanced”.⁹

[20] The High Court in *KS v LS*¹⁰ was of the view that:

In addition to an evidential requirement for a sound foundation to a s 13(1)(c)¹¹ ground, the evidence must disclose psychological damage and/or an intolerable situation which is more than transitory. The intolerable situation which the Judge found must have a degree of permanence. Similar considerations should apply to psychological harm. In *H v H* (1995) 13 FRNZ 498, 504 Greig J said:

...It must be recognised that any action and the enforcement of that under this legislation is inevitably to disrupt the children’s life. That was disrupted in the removal and the return must further disrupt their life. That disruption is increased the longer it takes and the more proceedings that are involved. That there is trauma is almost inevitable.

...

Intolerable means that something cannot be tolerated. It is not just disruption or trauma, inconvenience, anger. It is something which must be of some lasting serious nature which cannot be tolerated.

⁶ *Damiano v Damiano* [1993] NZFLR 548 at 554, line 4.

⁷ *HJ v Secretary for Justice* (2006) 26 FRNZ 168.

⁸ At [33].

⁹ At page 554.

¹⁰ *KS v LS* [2003] NZFLR 817 at [92].

¹¹ Of The Guardianship Act 1991, now s 106(1)(c) Care of Children Act 2004 .

Human beings, and particularly children, can adjust and re-adjust to various matters, changes in their lives, death and injury, illness, and other matters.

Factors claimed to support s 106(1)(c) defence

[21] Ms Marsh submits there are three matters which support the claimed defences under s 106(1)(c), namely:

- a. a return to Australia would result in a deterioration in Ms Marshs' mental wellbeing, with consequential impact on Demi;
- b. Demi's separation from her sister, Mollie, will give rise to adverse effects for Demi; and
- c. Demi's removal from a stable pre-school setting in New Zealand will have similar effects.

[22] It is submitted that, if not individually, these three matters will have a cumulative effect so that a defence under s 106(1)(c) is established.

A Deterioration in the mental wellbeing of the respondent, impacting on Demi

[23] Significant reference was made in submissions on behalf of Ms Marsh to the decision of Muir J in *KN v CN*¹². The factors which led the Court to direct a return of children to Australia in that case were set out in Mr Dreifuss' submissions and a comparison was then made to the circumstances of the present case. It was submitted that each of the factors suggesting an order for return in *KN v CN* which did not apply in this case then supported no order for return being made in this case. I agree with the submission of Mr Allen which was that this is not a correct approach to determining whether or not a defence is made out. The factors which led to an order for return in one case and which are not present in another case does not mean an order for return should not be made in the second case. The Court needs to look at the factors relevant to this case to determine if the defence is made out.

¹² *KN v CN* [2016] NZHC 2049.

[24] Ms Marsh alleges physical violence on the part of Mr Dodd against her on [date deleted] September 2016 in the presence of both Demi and Mollie. She says this included an act of strangulation. Ms Marsh says Mr Dodd was verbally abusive to her three to four times per week. She says the violence and abuse escalated in the last three months prior to separation, to include damage to property, pushing, grabbing or strangling about once per fortnight. Ms Marsh says these events have occurred whilst the children have been in bed, apart from the incident on [date deleted] September 2016 and one prior incident when Mollie saw Mr Dodd push Ms Marsh aggressively.

[25] Mr Dodd says that on [date deleted] September 2016 Ms Marsh had grabbed his tee-shirt. He told her to let go. She did not so he put his hand on the bottom of her neck to try and stop her holding on to the shirt. He then left the house, pushing the door open which left a dent in the door. He denied punching a hole as alleged by Ms Marsh.

[26] Mr Dodd claims Ms Marsh has a bad temper and has struck him on numerous occasions. He says there have been mutual arguments with each of them behaving inappropriately. Ms Marsh acknowledges she has hit Mr Dodd on three occasions.

[27] Mr Dodd says work, health and relationship pressures were getting on top of Ms Marsh such that around June 2016 she returned to New Zealand with both girls to have a break. She subsequently returned to Australia and to live with Mr Dodd.

[28] Ms Marsh's medical records in Australia were made available to Ms Barnes for the purposes of her report. Excerpts from those medical records are included at paragraph 124 of Ms Barnes' report as follows¹³:

[date deleted].09.14 "stressed... partner no full-time job yet"

[date deleted].10.14 "Had stressful night, partner walked out last night"

[date deleted].10.14 "under a lot of stress...relationship difficulties with partner-fiancé...lots of arguments...he very hard on her daughter Mollie...no violence, lots of verbal abuse..."

¹³ Entries for [date deleted].06.16 and [date deleted].09.16 are out of date order. I assume, given the sequence in which they have been listed that these would have been entries in 2015, not 2016.

[date deleted].10.14 “Lots of stress at home due to partner not liking her close bond with daughter...”

[date deleted].11.14 “Lots of stresses at home with partner...texts frequently concerned she may be out partying” (this is 5 days before Demi’s birth)

[date deleted].11.14 “Some issues with partner – not supportive when comes to breastfeeding”

[date deleted].11.14 “Low mood and anxiety for a while now...lots of stresses at home with partner – not working, he has temper issues (verbal abuse, not physical), financial strain and lack of sleep...has concerns about her daughter – getting upset with arguments...anxiety/depression, relationship issues, post-partum...refer psychologist...stress reduction strategies”

[date deleted].3.15 “Depression – has 4mth old baby”

[date deleted].3.15 “...shaking...sounds like postnatal depression...”

[date deleted].06.16 “Lots of stresses at home...run in with mother-in-law...partner being forced to choose between her and mother and his family”

[date deleted].09.16 “Can’t gain weight...massive stressors...not getting much help...anxious a lot...mood good...exhausted”

[date deleted].09.15 “Lots of stressors...anxious...deep fear of leaving house with kids...”

[date deleted].01.16 “Tension headaches...refer to dietitian and psychologist”

[date deleted].04.16 “Suffering from anxiety...shaking...hard to concentrate/think...losing weight- no appetite...tearful...sleep poor- wakes frequently...V upset re relationship with partner She states her partner threatens her and has anger issues. States she has asked him to get help, but he won’t...too scared to leave him as unsure how he may respond. Had tried to break up 2 weeks ago- he got quite angry and broke some house items, made hole in wall. Was scared for her safety at the time. He has lots of trust issues, monitors her all the time- social media/phone- has logged into her social media on his own phone...paranoid about what she does...always has to know where she is going etc, gets angry...emotional abuse...he will say mean things to Mollie- 4 yr old. if you go find another daddy, they wouldn’t be able to put up with you...in debt, he doesn’t want to work, not providing for family, he is in and out of work. drinks ETOH. admitted to her starting to have drinking problem again, money in pokies...she has no family or supports here in Australia, all back in NZ...recommend booking in for Mh [Mental Health] care plan-refer to psychologist maybe get some legal advice/women’s refuge”

[date deleted] “Mh [Mental Health] care plan completed...reactive depression and anxiety...poor sleep, tearful, low mood, anhedonia...no

motivation...-anxiety/anxiety attacks...racing thoughts...no thought
harm/suicide...minimal supports...refer to psychologist”

[29] There is no mention of violence in the medical records until April 2016. On the contrary, in the records for [date deleted].10.14 and [date deleted].11.14 the records note no physical violence has occurred.

[30] Whilst there were clearly issues between the parties as documented in the medical records, Ms Marsh elected to return to live with Mr Dodd following her break in New Zealand in June 2016. One text to him whilst she was in New Zealand read as follows:

I havnt said I don't want to come home babe

It's ok babe u need to work and u enjoy this I don't want u to loose it. U seem so happy with this job and I'm proud of u. Maybe this is what we need a good start and I'll get new job too. I'm going to come back happy and make our family work. Yes I'll be sad as I'll miss my family but I get over it Iv don it for years. But this is not a place I want to live so don't stress.Xxx

[31] On [date deleted] September 2016, two days after travelling to New Zealand with the girls, Ms Marsh sent an email to Mr Dodd. It was not immediately apparent from the document produced to Court, but it appeared the subject line for that email as sent by Ms Marsh read “I love you”. There was some dispute as to whether or not this was the subject line included by Ms Marsh. Because the printed email produced to the Court had a subject line “re: I love you” it was suggested this was not the subject line included by Ms Marsh. I believe it was as she was the person to send the first email in the chain and subsequent emails would have carried that subject line forward with the prefix “re:”. In addition in the body of her email Ms Marsh stated “I do love u”.

[32] That email includes the following statements:

Hey I'm sorry I havnt contacted u, Iv just needed some time to think and clear my head. But just want to let u know me and the girls are ok. I panicked and just wanted to be with my mum so jumped on a plane. Things have just gotten so bad between us and I couldn't cope anymore. The way u were on Sunday night was not on. I didn't do anything to u first and u hurt me infront of the girls...

I'm not saying it's all your fault cause It's not. We are both to blame for the way this relationship has turned out but it's not healthy for us or the kids anymore...

But I'm not going to sit here and put it all on u as your not all bad. U have been there for at times when I needed u the most you weren't. It's time for me to be with my mum for a little while and sort my health out...

I'm sorry it's gone down like this I do love u. And I know u know that but at this point I need some time and space. U tell me u love me all the time but actions speak louder then words and u havnt showed me much love lately. I don't want to fight with u either and I will never hold these girls away from u and your family as we both know I'm not that type of person. I'm sorry this has happened but I didn't know what els to do...

I just needed my mum at this time.

[33] In her affidavit in support of her notice of defence to the application Ms Marsh makes reference to the physical violence which occurred and stated:

On [date deleted] September 2016 Demi watched me being strangled by her dad. I'm extremely fearful that if another incident happens, the next time Demi could watch me die.

[34] The Court has not been provided with any sworn statement given by Ms Marsh in support of the application for protection order she made in Australia. The Court has a copy of the application for protection order. That sets out the grounds for seeking the order. That appears to have been completed by a third person setting out the alleged actions as described by Ms Marsh. It refers to Ms Marsh as "the aggrieved" or "the agg". It refers to Mr Dodd as the "the respondent" or "the resp".

[35] That part of the document under the heading "Agg Version" includes:

The resp then approached the agg standing with the agg sitting on the bed, the resp grabbed the agg by the throat with his right hand the agg believes as that was the hand he had held up at the named child (Mollie) at the time. The resp has then grabbed the agg around the throat; the agg stood up and the resp let go of the agg's throat but the agg believed the resp would grab her around the throat again so has pushed the resp and grabbed his shirt with her right hand when the resp grabbed the agg around the throat again. The agg said "Let go of me."

[36] Whilst there was a reference to being held by the throat, there was no reference to strangulation.

[37] In her affidavit in opposition to the current application Ms Marsh confirms the police report is generally correct but went on to say:

...however I disagree that Jake grabbed me twice by my throat. I recall one continued act of strangulation, not two. When Jake was strangling me...

[38] I am not required in this proceeding to determine the extent of actions which occurred in the course of the relationship. There was an incident on [date deleted] September 2016 during which Mr Dodd acknowledges putting his hand on the bottom of Ms Marsh's throat. However, I believe the email sent by Ms Marsh on [date deleted] September 2016 and her application for protection order suggest events between the parties were perhaps not as serious as she now claims and certainly do not give a basis for the suggestion that if Ms Marsh returns to Australia with Demi there is a real risk that Mr Dodd will kill her with Demi watching.

[39] Both parties confirm the relationship is over. An order for the return of Demi to Australia will not involve a return of Ms Marsh to the relationship with Mr Dodd. Even if circumstances are as bad as claimed by Ms Marsh an order for Demi's return would not involve a return of Ms Marsh to the circumstances outlined in her affidavit nor to those set out in the medical notes.

[40] It is submitted for Ms Marsh that even if she did not have to return to a relationship with Mr Dodd, there are several other factors which would impact on her mental wellbeing and consequently on Demi. I have referred above to the medical records included in Ms Barnes' report. Those show that throughout a significant part of the relationship Ms Marsh went to her doctor complaining of stress. All of the attendances in 2014 suggest the stress was related to relationship issues. The first two in 2015 appear to relate to issues resulting from Demi's birth. The next two in 2015 (dated June and September 2016) refer to family stressors. The last attendance in 2015 refers to "lots of stressors" but does not specify what those are. I suspect they were family related.

[41] The first significant record in 2016 is that on [date deleted] April. That appears to be very much partner related. By [date deleted] April a mental health care

plan had been completed, noting reactive depression and anxiety, no motivation, anxiety attacks and minimal support.

[42] It was after those attendances in April that Ms Marsh returned to New Zealand in June for a break. Whilst there was the incident which occurred in September 2016 leading to the parties' separation, there is no medical evidence to say that the concerns which existed in April 2016 continued following Ms Marsh's return to Australia, or got worse after her return.

[43] Ms Marsh has made it quite clear she will not be going back to the relationship. Accordingly, those stressors identified in the medical records as being as a result of disputes in the home related to the relationship with Mr Dodd will not be repeated.

[44] The submissions on behalf of Ms Marsh go further to say that the information contained in the medical records for April 2016 paint the picture of a fragile person who is at risk if she was to return to Australia.

[45] Counsel for Ms Marsh refers to the decision of Fisher J in *S v S*¹⁴ where the Court accepted the mother suffered from battered women's syndrome and post-traumatic stress disorder after a history of sustained abuse. The Court found, notwithstanding special and burdensome forms of support from her family, the mother was incapable of effectively challenging a custody dispute in Australia. Any requirement to return, albeit, temporarily would involve major risks to her health and wellbeing. Considering the other factors involved in the case the Court found the circumstances could have scraped into s 106(1)(c) "on only the most marginal of bases".¹⁵ However, as the children wished to return to Australia, the Court ordered a return.

[46] Counsel for Ms Marsh also referred to the decisions in *Armstrong v Evans*¹⁶ and *VP v A (Child Abduction)*¹⁷ as cases offering good authority for not ordering a

¹⁴ *S v S* [1999] 3 NZLR 513.

¹⁵ At 527, line 18.

¹⁶ *Armstrong v Evans* [2000] NZFLR 984.

¹⁷ *VP v A (Child Abduction)* [2005] NZFLR 817.

return when there is evidence that the psychological health of the primary care giver is at risk and consequently the parenting of the children is seriously compromised.

[47] In *Armstrong v Evans* there was evidence from a psychologist that the respondent mother was suffering from post-traumatic stress disorder relating to her history of post-natal depression as well as the effects of her relationship with the applicant. Whilst the mother was functioning well in New Zealand it was the psychologists' opinion that if she were to return to Australia she was likely to suffer a rapid and severe deterioration in her psychological wellbeing which was highly likely to impact on her ability to parent. There was also a prospect of the mother committing suicide and thereby being permanently out of the child's life. These factors led the Court to refuse the application for the return of a child to Australia.

[48] In *VP v A* the evidence established that if the mother were forced to return to the Netherlands her psychological state would deteriorate to the point where her psychological health would be at risk and consequently her parenting of the children seriously compromised. The fact that one of the children had witnessed some of the trauma experienced by the mother and that both children had counselling to obviate the effects of trauma and what their mother had experienced led the Court to accept the "grave risk" defence had been established.

[49] Particular emphasis is placed by Ms Marsh on the evidence provided by Ms Barnes in her report. Ms Barnes was privately engaged by Ms Marsh and did not prepare her report as a result of a direction from the Court.

[50] Mr Allen made criticism of Ms Barnes' report in several respects. His first criticism is that Ms Barnes was not provided with the evidence which had been filed in these Court proceedings. Ms Barnes refers to having received and considered two Court documents. They were a statement of Ms Marsh to the Queensland Police Service on 26 September 2016 and an affidavit of Ms Marsh filed in the Magistrates Court at Queensland on that same date. Neither of those documents have been provided to the Court or to counsel for Mr Dodd. There is therefore no knowledge of what information Ms Barnes relied on from those documents in preparing her report.

[51] Mr Allen is also critical of Ms Barnes for not discussing any of the issues set out in her report with MrDodd. The brief provided to Ms Barnes included a request for her to assess any identified risks to Demi’s psychological safety and how they are being managed. The brief is one that was provided, presumably, by Ms Barnes in consultation with her counsel. Despite not discussing any of the information provided to her with Mr Dodd, Ms Barnes’ report includes the following conclusions:

At paragraph 9 – Amelie has removed Demi from a situation where she was at severe psychological risk due to exposure of ongoing conflict involving verbal and physical aggression and emotional abuse...

At paragraph 21 – Demi is currently living in a safe environment without conflict, abuse and/or violence. The history available to me indicates this was not the case in Australia. It is very likely that Demi has some psychological vulnerabilities as a result of her experience of conflict, abuse and violence in Australia which can be easily triggered by exposure to past stressors. This may be why Demi responded in such a startled and apparently alarmed fashion when I mentioned her “Daddy.”

[52] The only independent comment obtained by Ms Barnes regarding the parties from people who dealt with both of them came from Ellie Watson the supervisor at [name of school deleted], a pre-school attended by Demi in Australia and [details deleted]. Ms Watson reported they had no concerns in regard to Demi’s progress and development. She was reported as meeting her milestones and well adjusted. Demi’s relationship with each parent was described as “healthy”.

[53] Ms Barnes asked Ms Watson to provide information about how she or others assessed the relationship with each parent. A representative of [name of school deleted] subsequently advised Ms Barnes that obtaining any further information would require a subpoena and that the centre would “stay on neutral ground”. Notwithstanding that advice, Ms Barnes made no attempt to discuss matters with Mr Dodd despite her brief to assess any identified risks to Demi’s psychological safety.

[54] Mr Allen submitted the report is one sided. He refers to the commentary in Westlaw on the Care of Children Act at CC106.15 which notes that in preparing a report for the Court for the purposes of a Hague Convention hearing it is good practice for the psychologist to interview both parents of the child where this is

practicable. The commentary notes that a psychological report which relies heavily on information provided by the abducting parent could be attacked on the grounds of bias or breach of natural justice.

[55] This report was not prepared at the direction of the Court. However, that does not detract from the report writer's obligation to ensure it complies with the protocols which would apply if it had been directed by the Court.

[56] Mr Dreifuss confirms the Court is not asked to take anything from the report except that related to the defence of "grave risk". Even in that regard, the report is based solely on information provided by Ms Marsh or contained in her medical notes. No attempt was made by Ms Barnes to obtain Mr Dodd's version of events described by Ms Marsh.

[57] Ms Barnes points out that a mother's mental health is a crucial factor in her ability to provide the emotional availability and attunement which children, and particularly children under three years of age, need for psychological safety and wellbeing.

[58] The report notes Ms Marsh has no history of anxiety and depression before the stressors involved in what Ms Barnes described as "...the abusive relationship with Jake...", apart from two to three months of post-natal depression related to situational factors after Mollie's birth. I believe, having regard to the ages of the children and the medical records, this should have been a reference to factors following Demi's birth in [date deleted] 2014, which are referred to in the medical records in March 2015.

[59] The results of a Personality Assessment Inventory for Ms Marsh indicated a generally well adjusted, warm, and psychologically stable person who has some specific anxieties related to traumatic events, but does not currently meet criteria for any clinically significant mental health diagnosis.

[60] Ms Barnes was of the view Ms Marsh is psychologically equipped to continue to provide high quality emotional safety and security for Demi in her current situation.

[61] Ms Barnes refers to the Australian medical notes documenting Ms Marsh's difficulties as a result of abuse by, and other stressors in the relationship with, Mr Dodd. The difficulties were characterised in the medical notes as "reactive depression and anxiety" as a result of an abusive relationship. Ms Marsh's [NZ location deleted] medical notes, which were not provided with Ms Barnes' report, apparently refer to hyper-vigilance as a result of living in an abusive relationship in Australia.

[62] Whilst the medical notes from Australia recorded that as at April 2016 Ms Marsh needed medication, a mental health care plan and treatment with a psychologist, following her return to New Zealand Ms Marsh has not needed to take medication and has not needed counselling. Ms Barnes reports Ms Marsh is only experiencing significant anxiety symptoms when she has contact with Mr Dodd or feels pressured by him. Ms Barnes goes on to conclude that given the stress and adversity Ms Marsh is likely to experience in Australia, a consequent decline in her mental health is "likely". An decline in Ms Marsh's mental health, which decline was not quantified, would be expected to impact significantly on her ability to provide a "good enough" level of emotional availability to meet Demi's psychological needs and maintain Demi's psychological safety.

[63] Ms Barnes was of the opinion there would be a very significant risk that Ms Marsh's mental health would deteriorate given the adversity she is likely to face in the context of:

- a. Lack of support.
- b. Hostility, as Ms Barnes understood it, from some of Mr Dodd's family.
- c. Pressure from Mr Dodd.

- d. Fear for her safety in relation to Mr Dodd.
- e. Lack of finance.
- f. No employment.
- g. As Ms Barnes understood the position, no right to welfare support as a New Zealander in Australia.
- h. Leaving Mollie in New Zealand.

[64] I address the various points Ms Barnes listed as likely to contribute to a deterioration in Ms Marsh's mental health.

Lack of support

[65] Ms [Marsh] has had significant support from her family following her return to New Zealand. There is no evidence before the Court to say that such support from her family will not continue. The plan is for Mollie to remain in New Zealand with her grandmother until Ms Marsh is settled in Australia. Just how long that will take is not known. There is no evidence before the Court to say that Ms Marsh's mother will not be available to support Ms Marsh in Australia once Mollie returns to Australia. Even if she cannot travel to Australia, Ms Marsh's mother will be able to provide support from a distance by telephone, Skype and other means.

[66] Whilst there will not be the same level of support as Ms Marsh is receiving her in New Zealand, there will still be the ability for her family to provide significant support if she returns to Australia.

Hostility from Mr Dodd's family

[67] This assessment is based purely on information received from Ms Marsh or information she has provided to her doctor in Australia which is recorded in the medical notes. Mr Dodd says his family was supportive of Ms Marsh but she;

...ended up pushing everyone away or they chose to stay away because she became moody and not nice to be around.

[68] Even if there had been hostility from Mr Dodd's family in the past, this was in the context of Ms Marsh living with him and no doubt seeing his family members from time to time. She will not be living with him if she returns to Australia and will not be required to have any contact with his family. If it transpires there is any hostility or unwanted pressure from Mr Dodd's family then there should be the means to deal with that through appropriate authorities within the Australian legal system.

Pressure from Mr Dodd

[69] Even if this has occurred, which Mr Dodd disputes, the parties will not be living together. The significant pressures alleged to have occurred from living with Mr Dodd will not be repeated. The protection order application made by Ms Marsh on the day she left Australia proceeded to a hearing on 15 November 2016. Mr Dodd consented to the order being made without admission. There is therefore a protection order in place in Australia. If there is any action on the part of Mr Dodd which amounts to a breach of the protection order then I expect the Australian authorities would act to enforce the order.

Fear for safety in relation to Mr Dodd

[70] The fear set out in [33] above did not appear to be supported by the email sent by Ms Marsh on 28 September 2016. However, once again, the parties will not be together and the protection order will be available for enforcement by her.

[71] Ms Marsh also expresses a concern that Mr Dodd will hunt her down once she returns to Australia. The protection order will be available for enforcement by her.

[72] Ms Marsh claims that Mr Dodd has been breaching the protection order by attempting to speak to her when he telephones Demi or by attempting to message her every day. She says that this continues even though she has the protection of the

Australia protection order. She does not say if she has taken any step to inform the Australian authorities of the alleged breaches and seek enforcement. If there are breaches following her return to Australia, I would expect her to have the Australian authorities take the appropriate steps in response. The protection order is noted as continuing in force until 14 November 2018.

Lack of finance, no employment, no right to welfare support

[73] Ms Marsh set out in her affidavit details of her financial circumstances including debts owed by her. She set out a budget based on an anticipated income if she was to work full-time and support herself and Demi. The budget she put forward does not provide for paying any of her outstanding debts. Ms Marsh says that on her return to Australia with Demi she would have no option but to live in her car which she left in Australia. She says this could be for the first few days or weeks until she finds accommodation. Ms Marsh says if she cannot find accommodation she would have no alternative but to return to live with Mr Dodd.

[74] Ms Marsh claims it would be extremely difficult for her to secure a rental property in Australia given her credit rating and level of debt. However Mr Dodd has offered to vacate the property he and Ms Marsh were living in and make that available for her to live in “for the short term”. Ms Marsh is listed as a tenant on the lease agreement. The girls’ rooms are still furnished as they were when they left Australia. There is, therefore, available accommodation. Mr Dodd says he will continue to pay the rent on the property. Ms Marsh doubts Mr Dodd’s ability to keep to that commitment, having regard to his employment history. Whether or not Ms Marsh chooses to take advantage of that offer is over to her, but she cannot claim there is no availability of accommodation. She would have the ability to find alternative accommodation whilst living in the former family home.

[75] Having referred to the various financial adversities and the fact she would not be eligible for any benefits offered by the Australian Government, Ms Marsh does acknowledge she can apply for a special consideration benefit through Work and Income in New Zealand if Demi is ordered to return to Australia. No details of that benefit have been provided, but Mr Allen, instructed by the Central Authority in New

Zealand, has confirmed that financial support is available from New Zealand for a parent ordered to return to Australia pursuant to the provisions of the Hague Convention.

[76] Ms Marsh was working in Australia at [employment details deleted] prior to returning to New Zealand. Mr Dodd's evidence is that the job is still available. Ms Marsh appears to confirm she can obtain employment. She says she could earn between \$350 and \$450 in wages, receive a family tax benefit of approximately \$250 to \$300 per week and be eligible for a child care subsidy of an unstated amount. I assume Ms Marsh is referring to Australian dollars. Ms Marsh says expenses, including rent, would leave only about \$70 per week to cover food, electricity, phone and transport.

[77] Ms Marsh complains that Mr Dodd did not provide her with any financial assistance when they were together and she doubts he would be in any position to assist financially if Demi is ordered to return. On Ms Marsh's own evidence she was able to survive in Australia on the income she earned without assistance from Mr Dodd. I expect that she should be able to do the same again. If not, there is apparently financial assistance from New Zealand which she can call upon. In addition there was no evidence that Ms Marsh's family could not assist financially. On the contrary, Mr Dodd claims both he and Ms Marsh received financial help from each of their mothers.

Leaving Mollie in New Zealand

[78] This is a decision Ms Marsh will make weighing up various factors relevant to her. At the end of the day, it is her decision. There is no impediment to Mollie returning to Australia with Ms Marsh and Demi.

[79] I accept that if Ms Marsh decides Mollie is to remain in New Zealand that will not be easy for Ms Marsh or for Demi. However the expectation is that Mollie will return to Australia when Ms Marsh is settled. This is not, therefore, a permanent situation. I would expect that once Ms Marsh has secured housing and employment,

both of which appear to be available to her, then Mollie would be able to go to Australia to be with her mother and younger sister.

Summary of factors relied on by Ms Barnes

[80] Upon examination, most of the factors Ms Barnes refers to as contributing to a “very significant risk” that Ms Marsh’s mental health will deteriorate if she had to return to Australia are not established.

[81] When those various factors in the above context were put to Ms Barnes by Mr Allen, Ms Barnes’ responded:

“...there are a number of risks that could create a situation that from the point of view of responsible parenting could be intolerable”.

[82] When the detailed points were put to her again, Ms Barnes’ response was:

Well from Demi’s point of view, if her mother does not feel safe and her mother’s mental health deteriorates, then we know that that is something that affects children’s attachment with their mothers and can have life-long adverse consequences.

[83] Mr Dreifuss, in re –examination of Ms Barnes, raised the possibility of a return to Australia resulting in Ms Marsh de-compensating and falling apart mentally and the impact this would have on Demi. Ms Barnes said the first case scenario is that Ms Marsh would get all the help she could. She would struggle through. She would continue to look after Demi, but she would not be able to provide the level of security and emotional availability that little children really need. The worst case scenario is that she would just not be able to continue to take care of Demi and Demi would need to be placed with another caregiver. When I asked Ms Barnes if she was able to assess whether there was any likelihood of the worst case scenario being reached given there will be health resources provided in Australia, Ms Barnes conceded it was “a very difficult thing to assess” and “very hypothetical”.

[84] The Court of Appeal in *Smith v Adam*¹⁸ stated that not only is there an expectation on the part of New Zealand Courts that legal systems of other countries

¹⁸ *Smith v Adam* [2007] NZFLR 447.

will protect children from harm, there is also an expectation that the health and welfare systems of other countries will usually be designed to keep people well and to protect children from harm. I believe the Australian health system would operate to protect Ms Marsh from harm if there were a decline in her health. This has been shown to occur in the past by the plan put in place by her doctor in April 2016.

[85] Whilst I will have no doubt it will not be easy for Ms Marsh to have to return to Australia if Demi is directed to return, that is an outcome faced by most, if not all, parents in such a situation. The results of the Personality Assessment Inventory for Ms Marsh showed a generally well adjusted psychologically stable person. Whilst Ms Marsh has some specific anxieties relating to traumatic events, she does not meet any criteria for any clinically significant mental health diagnosis. No medical evidence has been provided to support a risk to Ms Marsh's health if she had to return to Australia.

[86] Ms Barnes' assessment that a decline in Ms Marsh's mental health was "likely" if she was to return to Australia was based on a number of factors which, on detailed examination, are not supported. In addition, Ms Barnes confirmed the prospect of Ms Marsh declining in health to the degree she could not continue to care for Demi was "a very difficult thing to assess" and "very hypothetical". It is speculation, based on a number of factors that are not likely to be present.

[87] I am not satisfied from the evidence of Ms Barnes that the impact of a return to Australia would result in Ms Marsh being incapable of effectively challenging a custody dispute in Australia nor would involve it major risks to her health and wellbeing as established in *S v S* nor to the level which established "grave risk" in *Armstrong v Evan* and *VP v A (Child Abduction)*.

B Demi's separation from Mollie

[88] As I have already noted, Ms Marsh says she would leave Mollie in New Zealand with her grandmother if Demi were ordered to return to Australia. Ms Marsh says Mollie is settled in New Zealand.

[89] Mr Allen submits, as this is a choice on the part of Ms Marsh, any impact created for Demi is as a result of a choice made by Ms Demi and consequently she cannot rely on it to establish a defence. He likens it to the situation where a parent refuses to return with a child when an order is made then seeks to rely on the psychological harm for the child. That situation has not been accepted as raising a defence.¹⁹

[90] Mr Dreifuss on the other hand submits the separation would be a direct result of an order for Demi's return. It would result from a recognition of Ms Marsh's responsibility to both of her children. It is said that Ms Marsh has reasoned that the discrete adverse effect on Demi of being separated from Mollie in the context of all the other adversity would be less than the adverse effect on Mollie of being returned to Australia in the short to medium term.

[91] There is no evidence to support the basis for such reasoning. It may be well reasoned, and if it is, I do not see it as "creating a situation" to rely on as a defence. However, that is a focus on Mollie, not a focus on Demi whom I am required to consider.

[92] Ms Marsh has indicated that Mollie would move to Australia once Ms Marsh and Demi are settled there. That timeframe is unknown. Ms Marsh says this could be many months, given she would need to find accommodation and employment. For the reasons discussed above I do not accept that and believe the separation is likely to be short term.

[93] Ms Barnes' sole comment on the issue of Demi's separation from Mollie was:

Demi is far too young to understand or weigh up the issues involved here but she is not too young to experience grief and loss. Loss of contact with Mollie can only be very detrimental to Demi's psychological wellbeing.

[94] Ms Barnes gives no indication of the specific impact on Demi, nor does she relate it to any specific period of time during which there will be a loss of contact. Her comment appears to be based on a permanent total loss of contact.

¹⁹ *NZCA v Lyons-Felton* [2015] NZFC 3205.

[95] Even if Mollie remains in New Zealand there is not going to be a total loss of contact. Whilst Demi is not of an age she could engage in telephone discussions with Mollie, she will be able to see her regularly by way of Skype or similar media. The separation is going to be temporary, not permanent. Contact between the girls can continue while they are separated.

[96] Another matter considered in Ms Barnes' report was what she referred to as alienation of Demi from Mollie by Mr Dodd. Ms Marsh claims that Mr Dodd has favoured Demi to the exclusion of Mollie. Mr Dodd denies this. Without taking steps to verify the actual situation Ms Barnes concludes:

There is also a very probable risk of Jake continuing to alienate Demi from her sister if Demi has unsupervised contact with him and this could be expected to result in long-term-term psychological damage to Demi, her relationship with Mollie, and very possibly to Demi's relationship with her mother.

[97] As I have noted, the basis for this conclusion is very much in dispute. However, if the allegations made by Ms Marsh are correct then that will be a factor taken into account by a Court when determining substantive issues of day-to-day care and contact. If there were to be contact pending a substantive determination in Australia, I expect the Australian Courts will take appropriate steps to regulate such contact to minimise or avoid any risk to Demi. This factor does not assist me in determining the issue in these proceedings.

[98] I am not satisfied on the evidence that the separation of Demi from Mollie for a temporary period of time would result in a grave risk that Demi would either be exposed to psychological harm or placed in an intolerable situation.

C Demi's removal from a stable pre-school setting

[99] The evidence suggests Demi is well settled in New Zealand, staying with her mother at her grandmother's home and attending a pre-school in Gisborne. Ms Barnes reports that the pre-school is providing good quality care with plenty of one-to-one warm and attuned care-giving attention which is essential for the healthy psychological development of young children.

[100] Ms Barnes goes on to state it would be harmful for Demi to withdraw her from an environment which she is adjusting to well and which is meeting her needs and require her to adjust suddenly to the full-time placement in a new pre-school in Australia. Ms Barnes gives no evidence to support her view.

[101] The evidence suggests that Demi adjusted very well with what was a sudden move from her pre-school in Australia. The report from the pre-school in Australia was positive.²⁰

[102] There is no evidence to suggest that Demi could not cope with a similar move back to Australia. There is the possibility she will return to the same pre-school, at which she was clearly settled. Even if she does not, her move to New Zealand has shown that she can cope with a move to a new pre-school. There will no doubt be disruption for Demi but disruption to children is not a basis for refusing an order²¹. It is a consequence of an order for return.

[103] I do not accept that Demi's removal from her stable pre-school setting establishes either defence under s 106(1)(c).

D The cumulative effect of the above three points

[104] Whilst the individual effect of the separate components claimed by Ms Marsh may not necessarily establish the grave risk, it is submitted the cumulative effect of them is to do so. I do not accept that. The total effect of what no doubt will be an impact on Demi will not, in my view be severe and substantial harm. It will not be a situation which is "...simply and demonstrably not able to be countenanced".

[105] I am not satisfied on the balance of probabilities that a return of Demi to Australia will involve a grave risk that she would be exposed to physical or psychological harm or would otherwise be placed in an intolerable situation. The defences under s 106(1)(c) are not made out. Accordingly, a return of Demi to Australia is to be ordered given the grounds in s 105(1) are made out and are accepted by Ms Marsh.

²⁰ [52] above.

²¹ *KMA v Secretary for Justice* [2007] NZCA 223 at [53].

Orders

[106] I make the following orders and directions:

- a. Demi Dodd born [date deleted] 2014 is to be returned to Australia no later than Monday 13 February 2017.
- b. Demi's passport is to be released to Mr Allen to facilitate Demi's return to Australia.
- c. The order preventing Demi's removal from New Zealand dated 10 November 2016 is discharged.
- d. Mr Allen is to arrange for the CAPPS listing for Demi to be lifted.
- e. A warrant to uplift Demi is to issue, requiring her to be delivered to a person nominated by Mr Dodd. That warrant is issued against the unlikely event Ms Marsh will not return Demi to Australia. Consequently, it is to lie in court and is only to be used if requested by Mr Allen.
- f. Mr Allen is asked to take steps to ensure Mr Dodd is made aware of this decision as soon as possible, so that he can vacate the home and make it available to Ms Marsh and Demi.

[107] I am told Ms Marsh has made application for legal aid. At the time of the hearing a decision on her entitlement had not been made. If there is any issue as to costs on these proceedings counsel are to file and serve memoranda by 23 February 2017.

M A Courtney

Family Court Judge