EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS[.

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IN THE FAMILY COURT
AT WAITAKERE

FAM-2017-090-000644
FAM-2017-090-000439
FAM-2017-090-000440
[2017] NZFC 9986

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[AKSHEY GURNANI] Applicant
AND	[VAYU GURNANI] Respondent

Hearing:	30 November 2017
Appearances:	L Soljan for the Applicant A McLean for the Respondent A Page as Lawyer for the Child
Judgment:	8 December 2017

ORAL JUDGMENT OF JUDGE B R PIDWELL

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[1] The applicant, [Akshey Gurnani], through the New Zealand Central Authority seeks the return of his two children, [Maha] aged nine, born on [date deleted] December 2008, and [Srijan] aged four, born [date deleted] December 2012, to the United States of America. Mr [Gurnani] alleges the children have been wrongfully retained in New Zealand by his wife, the respondent Mrs [Gurnani]. He says they were due to return to the United States on 4 August 2017 where they have been living for the past four and a half years. He denies that he consented to the children moving to New Zealand, as is alleged by Mrs [Gurnani].

Legal framework

[2] This is an application under the Hague Convention on Civil Aspects of International Child Abduction. That Convention is fundamentally concerned with the issue of forum. The Court is not asked to resolve issues of care or contact. Rather, the Court at this juncture must solely decide where those decisions should be made. The objections of the Convention are to secure the prompt return of children wrongfully removed from or retained in any contracting state, and to ensure that the rights of custody and access under the law of one contracting state are effectively represented in the other contracting states. The Convention is implemented into domestic law in New Zealand by part 4 Care of Children Act 2004. Section 105 of that Act permits an application for a return order to be made by the Court.

[3] The applicant bears the onus of establishing the jurisdictional grounds set out in s105(1), namely, that the children are present in New Zealand, that they were removed from another contracting state in breach of a person's rights of custody in respect of the child, that at the time of that removal those rights of custody were being exercised by that person, or would have been so exercised but for the removal, and that the child was habitually resident in that other contracting state immediately before the removal.

[4] Removal is defined in s 95 as the wrongful removal or retention of the child.

[5] The respondent accepts that requirements of (a) through (c) under s 105(1) are satisfied. Once the Court is satisfied that jurisdiction exists under s 105, the onus then

shifts to the respondent to prove that any of the s 106 grounds for refusing an order for removal apply.

[6] The grounds relied on in this case are that there was consent to the removal and/or that there is a grave risk that the child's return will expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, and/or that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with s 6, also to give weight to the child's views.

[7] The standard of proof for each party is a balance of probabilities. If a defence is not established pursuant to s 106, the Court must return the children. In the event that one of the exceptions is made out, the Court retains a residual discretion whether to make an order or not.

General background

[8] The children's parents were both born in India. They are New Zealand citizens. They met in New Zealand and were married in 2005 with their marriage being registered in New Zealand in 2008.

[9] [Maha] was born in New Zealand on [date deleted] December 2008. In 2012 the family moved to [the United States – State deleted] to enable Mr [Gurnani] to take up employment there. They shipped their household chattels and after living in a hotel for approximately one month moved into rented accommodation.

[10] [Srijan] was born two months later on [date deleted] December 2012. The parties obtained permanent residency status in the United States in March 2014. The children attended local schools and daycare facilities. [Maha] has attended the same private school since August 2014.

[11] The family travel to New Zealand and India for holidays, returning to their home in [the United States] at the conclusion of each holiday. In 2015, Mrs [Gurnani] travelled to New Zealand for one week without the children for a high school reunion.

She also spent approximately six weeks in New Zealand from May to July of that year with the children. That period of time coincided with the Northern Hemisphere summer holiday.

[12] The parties' marriage had begun to deteriorate during their time in the United States. The wider family became involved to discuss options for the family's future. It is at this juncture that the parties' recollection of events and their intentions differ. Mr [Gurnani] says that Mrs [Gurnani] moved to New Zealand in May or June 2016 with little or no consultation with him. The children remained in America. She went back to America twice that year for periods of a few weeks at a time. He says he had agreed for the children to spend the Northern Hemisphere summer with their mother in New Zealand in 2017. Mrs [Gurnani] travelled to America in April 2017 to collect [Maha] and returned to New Zealand with him. She then travelled back to America to collect [Srijan] once she had completed the school year in June 2017.

[13] Mrs [Gurnani]'s view is that she had moved back to New Zealand the preceding year to set things up for the children's permanent move back to New Zealand with her. She started looking for employment and housing options. She says there were ongoing discussions regarding relocating the children back to New Zealand, which had been their permanent home in her eyes. The children had a return ticket booked for their return to America on 4 August 2017.

[14] On 1 August 2017, Mrs [Gurnani] applied without notice to the Family Court. She made an application under the Domestic Violence Act 1995 for a temporary protection order. She also made an application under the Care of Children Act 2004 for an interim parenting order and an order preventing the removal of the children from New Zealand.

[15] Mr [Gurnani] evidence is that in July 2017, Mrs [Gurnani] had advised him that she would not return to America with the children. He then travelled to New Zealand on 31 July in order to collect them and travel back to America with them on their return ticket scheduled on 4 August. He uplifted them from their school and daycare and stayed with friends. It was at that juncture that Mrs [Gurnani] applied to the Family Court without notice.

[16] The without notice applications were considered by Judge Burns, who granted the temporary protection order and the order preventing removal to "preserve the status quo and give the respondent the right to be heard." He placed the proceedings on the urgent track, appointed lawyer for child, and directed that the time for filing a defence to the substantive applications be reduced to three days.

[17] Notably, in the affidavit evidence filed by the mother in support of those applications, she does not disclose the children had return tickets booked to the United States on 4 August, nor does she reveal the contents of an email from the applicant indicating that he only consented to the children travelling to New Zealand based on her commitment to bring the children back to the United States in August 2017. That was a glaring omission in the respondent's evidence which was filed on a without notice basis. Such applications require full disclosure by the party seeking the Court's determination on an ex parte basis in accordance with the principles in *Martin v Ryan*[1] and r 220 Family Court Rules 2002. In addition, pursuant to r 416HA, counsel are required to file a certificate verifying full disclosure. Full disclosure means absolute honesty and revelation of all facts without strategic omissions. In my view, the non-disclosure of the return ticket was a strategic omission.

[18] As the order preventing removal had been put in place, the applicant returned to America on 11 August 2017 and signed the necessary application for the return of the children to America under the Hague Convention.

[19] Mrs [Gurnani]'s position is that the children moved to [State deleted], America solely for the purpose of her husband's work to enable him to obtain valuable overseas experience but it was never intended to be a permanent move. The parties have retained significant ties to New Zealand in the form of property, investments, and family and she has always considered New Zealand to be her home and the home of her children. She has no support or family in the United States. She opposes the return of the children to the United States.

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[1] *Martin v Ryan* [1990] 2 NZLR 1209

Matters not in issue

[20] The parties agree that the children are currently present in New Zealand and that the applicant has the necessary rights of custody. In addition, at the date of hearing it was conceded that at the time of the children's removal, the applicant's rights of custody were actually being exercised, or would have been but for the removal. Therefore, the applicant need only satisfy the Court on a balance of probabilities that the children were habitually resident in the United States immediately before the removal.

Were the children habitually resident in the USA?

[21] Turning to the requirements of s 105(1)(d), the applicant must establish that the children were habitually resident in the United States immediately before the wrongful retention in New Zealand at the start of August 2017.

[22] Habitual residence is deliberately not defined in the Convention or under the Care of Children Act. As stated by Glazebrook J in *Punter v Secretary for Justice*[2], the expression is not to be treated as a term of art but according to the ordinary and natural meaning of the two words it contains. The Court is guided in its assessment by a range of factors, including the actual and intended length of stay in a state, the purpose of the stay and whether there was a settled purpose, the strength of ties to the state and to any other state, the degree of assimilation to the state, including living and schooling arrangements, and cultural, social and economic integration. Regarding settled purpose, Glazebrook J has said in *SK v KP*[3]:

> [73]…It is widely accepted that the acquisition of a new habitual residence requires both a settled purpose and actual residence for an appreciable period. It is also widely accepted that a settled purpose to leave the place of habitual residence causes that habitual residence to be lost immediately. As the gaining of a new habitual residence requires a period of actual residence this means that a person can be without an habitual residence…
>
> [75]… It has been said, for example, that Courts should have regard not only to the subjective intent of the parents but also to what have been called the "objective manifestations of the intent"

[2] *Punter v Secretary for Justice* [2007] 1 NZLR 40.
[3] *SK v KP* [2005] 3 NZLR 590 (CA).

[23] There does not have to be a plan to live in the state indefinitely or permanently. What will amount to an appreciable period will depend on the particular circumstances of the case. Generally, one parent cannot unilaterally change the habitual residence of a child in the absence of a shared parental intent. However, it has been recognised that this is not an immutable rule. A very lengthy period of residence even in such a situation could eventually change a child's habitual residence.

[24] The relevant time for considering what was the children's habitual residence is the period immediately prior to the wrongful removal. The facts of this case are not that the mother wrongfully removed the children from the United States. Indeed, the father concedes he agreed to them travelling to New Zealand; [Srijan] in April and [Maha] in June 2017. However, he did so on the strict basis that they were travelling to New Zealand for a holiday period and would return to the United States on 4 August, where he says they habitually reside. This case is about a wrongful retention of the children in New Zealand, namely that they were not returned to their home as allegedly agreed. The removal was when the children left the United States. That is agreed. I consider the relevant time for considering where their habitual residence is, is the time when each child left the United States. It is a question of fact, a case-specific enquiry on a broad base analysis.

[25] The Court must look at the situation from the child's view of the world rather than from a parent-centred approach. The focus must be on the actual situation for the child and the connection to the country. I consider the factors in this case overwhelmingly support the determination that these children's habitual residence at the time of their departure from the United States was the United States. That is based on the following factors:

(a) The children had been living in the United States since September 2012. That is a period of over four and a half years. [Maha] was three years and nine months at the time she started living in the United States. [Srijan] had lived his whole life in the United States having been born there.

(b) The parents signed a lease to rent property and extended that lease three times. The children have been living in the same house for the entire period.

(c) The purpose of the stay in the United States was settled. The father had a permanent offer of employment which he accepted, which the parties decided together would benefit his career and therefore the family as a whole. He obtained a high ranking position as [position deleted] of [large company]. There was no set timeframe for his employment. It was open-ended and permanent.

(d) The family holidayed internationally over the period of time, namely from 2012 to 2016, but each time returned to the United States and not New Zealand for work and school commitments.

(e) The family had attained permanent residency status in the United States from March 2014.

(f) The children have been enrolled in and attended educational institutions in the United States. [Maha] has been enrolled in the private school for four years and [Srijan] has attended a preschool and is currently enrolled to commence the school that [Maha] attends. [Srijan] in addition sat an enrolment exam to obtain entry into that school early in 2017. The father has provided independent evidence that [Srijan] is enrolled to start the preschool again in September 2017 and, after that, is enrolled to attend [school name deleted], the school that his sister attends. Furthermore, the father has signed an enrolment for [school name deleted], that was done on 15 March 2017, and committed to paying private school fees of over $16,000 with the first instalment of just under $3500 due to be paid on 1 August 2017. This shows a clear commitment for the children to continue their education in America prior to them leaving New Zealand.

[26] The mother has provided evidence from a New Zealand family doctor that the family was moving to the United States for a number of years. However, the father has also provided evidence from a doctor in the United States saying that they had been registered with his clinic since 2012 and that he had seen the children regularly for medical issues.

[27] Since 2012 the children have known no other day-to-day world except their lives in the United States. They have visited New Zealand and India, countries to which they are culturally tied, but the day-to-day reality is life in the United States.

[28] The children's time in New Zealand in 2017 has not changed their habitual residence as it was a period of time when they were in New Zealand on holiday. The fact that they were enrolled in educational facilities does not displace that. They were due to return to America on 4 August 2017 and their retention does not displace the finding that their habitual residence at the relevant time was the United States.

[29] The mother argues the father gave consent for the children's habitual residence to change to that of New Zealand. She relies on a piece of paper that states that she has the custody of the children, signed by him in either 2015 or 2016. Her evidence differs on the date. She deposes that the parties had an ongoing discussion about her and the children's return to New Zealand when the marriage started deteriorating. Family members became involved in those discussions and as the move to the United States was solely for the father's career benefit, once the marriage ended there were ongoing discussions about her moving back to New Zealand with the children. She says the children are settled in New Zealand and are attending schools and preschools here since their return. She has been cut off from financial support from her husband and has relied on his alleged consent for her and the children to move back to New Zealand. She says therefore the habitual residence is now New Zealand.

[30] I will deal with the issue of consent under the s 106 defences, but the argument that he has consented to the children's habitual residence changing to New Zealand does not displace the factual finding I have made that the habitual residence is the United States at the relevant time, namely before their departure. The children can only have one habitual residence and it has not changed due to their retention in

New Zealand over the past few months. Therefore, the jurisdictional elements in s 105 have been met.

[31] The onus then shifts to the respondent to satisfy the Court that one of the grounds in s 106 have been made out to refuse an order for return. The respondent argues three defences. Namely, consent. Section 106(1)(b)(i), did the father consent to the removal of the children; alternatively, grave risk of harm, intolerable situation, s 106(1)(c)(i); and child's objection, s 106(1)(d). Section 106(1)(e) was not pursued at the hearing.

Child's objection

[32] I will firstly turn to the issue of the child's objection, s 106(1)(d). The parties are agreed that the correct approach to this defence is the approach set out in *White v Northumberland*.[4] Namely, does the child object to return? If so, has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's view? If so, what weight should be given to the child's view? And how should the residual statutory discretion be exercised?

[33] Ms Page has been appointed as the children's lawyer. She has filed reports to the Court under the Care of Children Act proceedings and attended the Hague Convention proceedings.

[34] Mrs [Gurnani] has a concern that the children's views have not been obtained within the context of the mother not returning to America or not being able to survive in America due to financial and medical constraints. Ms Page has canvassed the children's views in respect of the Hague Convention proceedings. She reports the children are relentlessly positive about both parents and both countries. She said that [Maha] did not wish to express a view on the care arrangements and was in a clear loyalty bind. She said that [Srijan] had good things to say about both parents and both countries. The children report to be happy in New Zealand and in America and have no issues with either parent. Accordingly, there is no evidence that the children are reluctant to return to the United States to engage any further enquiry. There is no

[4] *White v Northumberland* [2006] NZFLR 1105, (2006) 26 FRNZ 189.

evidence the children in fact object to the return. Accordingly, the Court need not make any further enquiry. The defence fails at this juncture.

Is there a grave risk to the children?

[35] The parties are agreed the Court must approach this issue as follows:

(a) Identify the existence of any risk arising from the children returning to the United States.

(b) Identify the nature of that risk - is it risk of exposure to physical or psychological harm or to an intolerable situation.

(c) Assess the gravity of that risk.

[36] The stringency of the test for the grave risk defence is well-known. It is not easy to invoke successfully. The authorities both in New Zealand and overseas clearly establish that for the exception to apply, the anticipated harm must be severe and substantial.

[37] The focus is on the risk to the child who has been abducted, not on the risk to the abducting parent. An order for return would typically involve some disruption for the child but this alone does not justify refusing an order. As Greig J said in *H v H*[5]:

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

[38] Mrs [Gurnani] argues that the children will be placed at grave risk of psychological harm or, alternatively, placed in an intolerable situation due to the challenges that she may face upon her return to the United States. She has significant health issues which are exacerbated by stress and travel and she does not know whether she will be able to access medical treatment in the United States, primarily

[5] *H v H* (1995) 13 FRNZ 498 at 504

because she has been financially cut off due to the parties' separation. Their relationship property has not been resolved. She did not work in the United States and she will be placed in a very difficult situation if she had to return. She says the stress that would place her under and the potential adverse medical effect on her would place the children at a risk of psychological harm or an intolerable situation, as even if she did return with the children she may have to return back to New Zealand due to her view that she cannot sustain a life there. However, her evidence and her argument is solely focused on her personal challenges and are obviously clearly significant issues for her.

[39] The children, however, have a home in the United States, in fact, the only home they have known for over four years. They have schools that are waiting for them and they rate their life in America as being 10 out of 10. They are reported to be very happy there. Persuasively, they have lived in the United States since their mother's departure to New Zealand in June 2016 without her. Irrespective of who was caring for the children in the United States, whether it was their grandmother or a nanny or their father, they still report as being very happy with their lives in the United States.

[40] There is no evidence to suggest that there is any risk, let alone a grave risk, of psychological harm or being placed in an intolerable situation even if the mother is not present. There may have been signs that [Srijan] was upset earlier this year which led to the mother collecting him in April 2017, an earlier time than his sister, but there is no evidence to suggest that meets the high threshold required. The evidence suggests he was understandably missing his mother, nothing more. Although the return of the children to America may be difficult for their mother, they have lived without her there for over a year. Therefore, I do not find the defence of grave risk has been made out.

Did the father consent?

[41] Finally, I turn to what I consider to be the primary defence put forward, namely, that the father consented to the children returning, s 106(1)(b)(ii). The

principles for this defence are well settled and agreed from the decision of *Andrews v Secretary for Justice*[6] namely,

(a) Consent must be provided on the balance of probabilities by the person relying on the defence.

(b) The evidence in support of the consent needs to be clear and cogent.

(c) If the Court is left uncertain, then the defence fails.

(d) The consent must be real, positive and unequivocal.

(e) There can be circumstances in which the Court could be satisfied consent has been given even though not in writing, but most people would wish to get written consent to place the matter beyond doubt.

(f) There may be cases where consent could be inferred from conduct. The evidence must be clear and cogent.

[42] The case law clearly establishes that evidence of consent must be clear and compelling. Fitzgerald J has recently framed the approach to the enquiry in the following way:[7]

> [T]he proper approach to consent permits the Court to take into account a broad range of evidence. That is not, of course, to "water down" or otherwise diminish the requirement to reach a positive view that, on the balance of probabilities, consent was actually given. The question is not one of "implied" or "constructive" consent. Further, mere knowledge of relocation will not amount to consent. Nevertheless, the approach recognises that the combination of a broad range of facts and circumstances may ultimately satisfy the Court that, on the balance of probabilities, consent to relocation was actually given.

[43] Her Honour also recognised that while consent may be withdrawn before it is acted upon, it cannot be withdrawn after the child's removal.[8] In making that

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[6] *Andrews v Secretary for Justice* [2007] NZCA 223.
[7] *H v R* [2017] NZHC 2617 at [32].
[8] AT [35].

comment, Her Honour referred to the English Court of Appeal case of *Re P-J* [9] where the Court held that consent can be given to the removal at some future but unspecified time or upon the happening of some future event and such advance consent must however still be operative and in force at the time of the actual removal.

[44] Mrs [Gurnani] argues that there was a long period of planning by her and family members to return to New Zealand with the children. That was premised on the demise of the parties' relationship and her relapse in her health condition. New Zealand was home in her eyes and the United States was a temporary chapter in the lives of the family. She commenced discussions with Mr [Gurnani] and they have been ongoing for a number of years.

[45] She says he consented to the children returning to New Zealand because he signed a document which says, "I authorise [Vayu Gurnani] the custody of my kids, [Maha] and [Srijan Gurnani]. I will not refute this claim in any Court of law. I sign this in my full sanity of mind. Signed [Akshey Gurnani]." The document is undated and handwritten. Mrs [Gurnani]'s evidence is inconsistent on when it was signed. The document however does not address *where* the children were to live.

[46] Mrs [Gurnani] left the United States in May or June of 2016 to travel to New Zealand. She did not bring the children with her so there was clearly no consent by Mr [Gurnani] at that time for them to live in New Zealand. Her evidence was that she intended to set up house and find employment. Her mother went to care for the children for a period of time in the United States as the father was travelling. Mrs [Gurnani] travelled back to the United States in August 2016 and then again in December 2016. Each time she returned to New Zealand without the children. Clearly, there was no consent for the children to return after any of those visits.

[47] The consent issue arises out of the parties' agreement for the children to come to New Zealand in 2017. Mrs [Gurnani] says the consent for them to travel was for them to travel permanently. She collected [Srijan] in April 2017 and travelled back with him as he was exhibiting signs that he was missing his mother and there was

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[9] *Re P-J (Children) (Abduction: Consent)* [2009] EWCA Civ 588, [2010] 1 WLR 1237; [2009] 2 FLR 1051; [2009] Fam Law 786[9].

agreement for him to be collected at that time. She travelled back to the United States to collect [Maha] after the school year ended in June 2017. The children had return tickets to travel back to the United States on 4 August 2017. Her evidence is that as the paternal family were visiting the United States for a short period of time in August 2017, she would return the children at that time and then make arrangements for them to permanently move back to New Zealand after that.

[48] Her evidence in support of her Domestic Violence and Care of Children Act proceedings was predominantly based on Mr [Gurnani] threatening to come and get the children from the United States. She alleged there had been a violent episode between the parties in 2014. She deposed Mr [Gurnani] had put a tracker on her car in the United States in 2015. However, predominantly she argued that the children had been exposed to psychological abuse due to the arguments within the household. She says that he had agreed for the children to return to New Zealand permanently with her.

[49] In the Hague proceedings she concedes that the children had return tickets to America to travel on 4 August 2017. That information, as I have said earlier, was not before the Family Court when the order preventing removal was made. She has provided no evidence of any arrangements for the children after their return or evidence that the paternal family was in fact going to visit America in the month of August.

[50] The father's evidence was that he did not consent to the children moving to New Zealand in 2017, or at any other time, permanently. He said that they remained living with him in the United States after their mother had decided to travel back and move back to New Zealand in 2016. He did not oppose her move but says he was not consulted significantly about it. His position is that the mother travelled back on occasion to visit the children but he did not consent to them moving back to New Zealand permanently at any time. He says the trip to New Zealand in 2017 was agreed to be a holiday over the United States' summer and he has provided his consent for that to occur expressly contingent on them returning to the United States.

[51] His evidence is corroborated by evidence that he purchased the return tickets for the children and for Mrs [Gurnani] on 3 April 2017. A ticket was purchased for Mrs [Gurnani] and [Maha] to travel on [date deleted] June 2017 from [the United States – city deleted] to Auckland, returning Auckland to [the United States – city deleted] on Monday, 7 August 2017. When [Srijan]'s ticket was purchased on 11 July 2017, that return date was changed to 4 August 2017. [Srijan]'s return ticket of 4 August 2017 was also issued on 11 July 2017.

[52] In addition, on the same day that [Maha]'s and Mrs [Gurnani]'s tickets were issued, including the return, Mr [Gurnani] sent an email to Mrs [Gurnani] which states,

> "Per our discussion on the weekend, I have gone ahead and made an exception to the agreement per our call. This should allow you to spend the funds on children's day-to-day expenses when in New Zealand. As committed, I have paid for your, [Maha] and [Srijan's] air tickets. This is based on your commitment to bring the kids back to US in August. The current flights are as follows. You and [Srijan] travelling on [date deleted] April from [United States city deleted] to Auckland. You are covering those costs. [Maha] and you travelling on [date deleted] June from [United States city deleted] to Auckland and I have paid for these tickets, returning [Maha, Srijan] and you on 4 August, Auckland to [United States city deleted]. I have paid for these tickets. I have gone beyond my agreement and borne the cost for your and kids' travel and agreed for you to take [Maha] in April which, as suggested in my view, is based on an emotional decision at your end. I expect you to keep your commitment and confirm this via email. Also can you share a schedule for [Maha] and [Srijan] during the holidays, especially if [Maha] is swimming given her asthma is critical for her to undertake swimming."

[53] Based on that corroborating evidence and the father's evidence, I am satisfied that the father's consent for the children to travel to New Zealand was wholly conditional on them returning to the United States. It was for the purpose of a holiday and nothing more.

[54] The mother's evidence in the Care of Children Act proceedings did not reveal the full background and did not disclose return tickets had been booked. The father's reaction to hearing that the children were not returning was to get on an aeroplane immediately. That is consistent with his evidence that he did not consent to them being removed permanently.

[55] The mother's evidence that the return on 4 August was to provide an opportunity to see their grandparents in the United States is illogical and vague and uncorroborated. The children were in fact enrolled to attend schools in the United States from September 2017. There is no evidence to confirm the grandparents were going to the United States at that time.

[56] Accordingly, I find that the mother has failed to establish on a balance of probabilities that the father consented to the children remaining in New Zealand. His consent was conditional on them returning back to the United States after a holiday period in New Zealand. His evidence was consistent, cogent and corroborated by the documentary evidence establishing a clear plan to return.

[57] I find that once the children were both in New Zealand the mother decided to retain them and sought the Court's assistance on a without notice basis, not revealing all the facts as she was obliged to do so. This is a clear case where the Hague Convention must be enacted to ensure the children's prompt return to their country of habitual residence and is exactly the kind of scenario that the Convention was enacted to establish to avoid.

[58] Accordingly, I make an order for the children's return to the United States of America. Those details will need to be negotiated through counsel and the order preventing removal lifted for when those arrangements are in place.

B R Pidwell
Family Court Judge