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

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2021-009-001693
[2022] NZFC 5256

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MEREDITH LEWIS] Applicant
AND	[JEREMY ANDERSEN] Respondent

Hearing:	28 April 2022
Appearances:	C Moore - Applicant M J Bryant - Respondent A Beaumont – Lawyer for Child
Judgment:	7 June 2022

RESERVED JUDGMENT OF JUDGE J K HAMBLETON

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[1] Dr [Meredith Lewis] and Mr [Jeremy Andersen] both love their son [Lester] very much but cannot agree on how they should care for him. I need to decide if that parenting dispute is determined in the United States of America ("USA") (where [Lester] was born and raised, and where [Meredith] lives) or in New Zealand (where [Lester] is currently, and where [Jeremy] has lived since 2018).

[2] There is no dispute between [Meredith] and [Jeremy] that the grounds for return under section 105, Care of Children Act 2004, are met.

[3] [Jeremy] says I should decline to order [Lester]'s return to the USA because there is a grave risk that an order for [Lester]'s return to the USA would expose him to psychological harm, or otherwise place him in an intolerable situation (s 106(1)(c)(i) and (ii)), and that [Lester] objects to being returned and has attained an age and degree of maturity at which it is appropriate to give weight to his views (s 106(1)(d)).

[4] [Meredith] says that [Lester] has been wrongfully retained in New Zealand, that the exceptions pleaded are not applicable and she wants [Lester] returned to the USA with urgency.

Background - chronology

[5] [Lester] was born on [date deleted] 2011 and his parents separated in 2012. [Lester]'s care arrangements have been recorded in three orders, made within the USA jurisdiction, the last of which dated 3 January 2018 ("the order"), and made by consent, provides:

(a) That [Jeremy]'s parents share his care, with [Meredith] designated as domiciliary parent,

(b) That [Lester] travel to New Zealand every summer with the cost of travel to be met by [Jeremy], and [Jeremy] was also required to lodge a bond for each occasion of travel until [Lester] was 10 years old; and

(c) That neither parent may relocate [Lester] from his home state or from his country of residence, without written consent.

[6] [Jeremy] moved to live in New Zealand in [2018].

[7] [Lester] has travelled to New Zealand to be in [Jeremy]'s care since then. [Lester] was in the USA from on or about [late] 2020 until on or about [mid-] 2021,

when he again travelled to New Zealand to spend time with his father. The date of return was not agreed other than an acknowledgement that [Lester] would not return later than 10 January 2022.

[8] [Lester] has stayed for longer periods than defined in the order for three reasons. The first is that [Jeremy] applied for [Lester] to have dual residency and told [Meredith] that [Lester] needed to be in New Zealand for a minimum of 6 months; this application has been supported by [Meredith]. The second reason relates to the visit for Christmas 2019, which became extended beyond what either parent could have anticipated because of the impact of Covid. There were difficulties with [Lester]'s return, not on the grounds argued now but because of Covid and then [Jeremy]'s inability or unwillingness to make travel arrangements for his return. Contrary to the Court order, [Jeremy] required [Meredith] to travel to New Zealand to collect [Lester] and to fund the travel costs of herself and [Lester], in full. The third reason for [Lester] staying longer is that on 28 December 2021, [Jeremy] told [Meredith] by text that he would not be returning [Lester].

[9] On 1 December 2021 [Jeremy] filed an on-notice application for a Parenting Order under the Care of Children Act 2004. On 28 December 2021, [Jeremy] told [Meredith] by text message that [Lester] would not be returning to the United States, saying:

> "I have serious concerns about his safety in your care due to a number of factors that have occurred recently and others that have been brought to light since [Lester] arrived in New Zealand."[1]

[10] On 29 December 2021, [Meredith] was served with [Jeremy]'s application for a Parenting Order. These proceedings were filed on 17 March 2022 and [Jeremy] was served on 21 March 2022.

The Convention and New Zealand Implementing Legislation

[11] The Convention on the *Civil Aspects of International Child Abduction* ("the Convention") was adopted by the Hague Convention on Private International Law on 25 October 1980. The Convention is widely ratified; there are 101 countries that are

[1] Bundle of documents, page 141

parties to the Convention. New Zealand became a party to the Convention with effect from 1 August 1991. The United States of America became a party to the Convention with effect from 1 December 1983.

[12] The objects of the Convention are set out in Article 1 which provides:

> The objects of the present Convention are -
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[13] Article 3 provides that the removal or retention of a child is considered wrongful where it is in breach of person's rights of custody under the law of the State in which the child was habitually resident, and at the time of removal or retention those rights were actually exercised. The term 'rights of custody' is defined in Article 5 to include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

[14] The operative provisions of the Convention are set out in Articles 12 and 13 which are implemented in New Zealand by ss 105 and 106 of the Act. If the requirements set out in s 105 are satisfied, a New Zealand Court must make an order for the return of a child to that child's state of habitual residence unless one of the exceptions in s 106 applies.

[15] Section 106 provides, so far as relevant:

> **106 Grounds for refusal of order for return of child**
>
> (1) If an application under section 105(1) is made to a court in relation to the removal of a child from a Contracting State to New Zealand, the court may refuse to make an order under section 105(2) for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the court—
>
> (a) that the application was made more than 1 year after the removal of the child, and the child is now settled in his or her new environment; or

(b) that the person by whom or on whose behalf the application is made—

(i) was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the court that those custody rights would have been exercised if the child had not been removed; or

(ii) consented to, or later acquiesced in, the removal; or

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

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

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

(d) that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate, in addition to taking them into account in accordance with section 6(2)(b), also to give weight to the child's views; or

(e) that the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.

(2) In determining whether subsection (1)(e) applies in respect of an application made under section 105(1) in respect of a child, the court may consider, among other things,—

(a) whether the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to refugees or protected persons:

(b) whether the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.

(3) On hearing an application made under section 105(1) in respect of a child, a court must not refuse to make an order under section 105(2) in respect of the child just because there is in force or enforceable in New Zealand an order about the role of providing day-to-day care for that child, but the court may have regard to the reasons for the making of that order.

[16] This subsection refers to s 6(2)(b) which provides that:

6 Child's views

…

(b) any views the child expresses (either directly or through a representative) must be taken into account.

[17] The leading case with respect to the exception defined within s 106(c)(ii) is *LRR v COL*[2]. The Court made eight observations about that exception:

> [87] First, as noted above, there is no need for any gloss on the language of the provision. It is narrowly framed. The terms "grave risk" and "intolerable situation" set a high threshold. It adds nothing but confusion to say that the exception should be "narrowly construed". As this Court said in *HJ v Secretary for Justice*, "there is no requirement to approach in a presumptive way the interpretative, fact finding and evaluative exercises involved when one or more of the exceptions is invoked".
>
> [88] Second, the court must be satisfied that return would expose the child to a grave risk. This language was deliberately adopted by the framers of the Convention to require something more than a substantial risk. A grave risk is a risk that deserves to be taken very seriously. That assessment turns on both the likelihood of the risk eventuating, and the seriousness of the harm if it does eventuate. As the United Kingdom Supreme Court said in *Re E*:
>
> … Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.
>
> [89] Third, consistent with the focus of the exception on the circumstances of the particular child, a situation is intolerable if it is a situation "which this particular child in these particular circumstances should not be expected to tolerate".
>
> [90] Fourth, the inquiry contemplated by this provision looks to the future: to the situation as it would be if the child were to be returned immediately to their State of habitual residence. The court is required to make a prediction, based on the evidence, about what may happen if the child is returned. There will seldom be any certainty about the prediction. But certainty is not required; what is required is that the court is satisfied that there is a risk which warrants the qualitative description "grave". This inquiry, and the relevance of protective measures to reduce a risk that might otherwise exist on return, is discussed in more detail at [111]–[119] below.
>
> [91] Fifth, it is not the court's role to judge the morality of the abductor's actions. It is not in a position to do so, and this is in any event irrelevant to the forward-looking inquiry contemplated by the Convention. As Baroness Hale said in *Re D*:
>
> … By definition, one does not get to article 13 unless the abductor has acted in wrongful breach of the other party's rights of custody. Further moral condemnation is both unnecessary and superfluous. The court has heard none of the evidence which would enable it to make a moral evaluation of the abductor's actions. They will always have

[2] *LRR v COL* [2020] NZCA 209 [3 April 2020].

been legally wrong. Sometimes they will have been morally wicked as well. Sometimes, particularly when the abductor is fleeing from violence, abuse or oppression in the home country, they will not. The court is simply not in a position to judge and in my view should refrain from doing so.

[92] Sixth, the burden is on the person asserting the grave risk to establish that risk, as the language of art 13 and s 106 of the Act makes plain. But the process for determining an application under the Convention is intended to be prompt, and the court should apply the burden having regard to the timeframes involved and the ability of each party to provide proof of relevant matters…

[93] Seventh, although the question is whether there is a grave risk that return will place the child in an intolerable situation, the impact of return on the abducting parent may be relevant to an assessment of the impact of return on the child. In *Re S* the United Kingdom Supreme Court allowed an appeal by a mother who opposed the return to Australia of her son on the basis that there was a grave risk of her son being placed in an intolerable situation because of the impact that return would have on Ms C's mental health, and (as a result) on her son. The critical question, the Court said:

> … is what will happen if, with Ms C, the child is returned. If the court concludes that, on return, Ms C will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether Ms C's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for Ms C to be anxious on return will nevertheless be relevant to the court's assessment of Ms C's mental state if the child is returned.

[94] We do not accept Mr Keith's submission that if the Court is satisfied that return will expose a mother to family violence, it is not necessary to establish a specific link between that abuse and the risk of a serious adverse effect on the child. We accept, of course, that intimate partner violence can cause significant direct and indirect harm to children. As Baroness Hale said, writing extrajudicially:

> Nowadays, we also understand that domestic violence directed towards a parent can be seriously harmful to the children who witness it or who depend upon the psychological health and strength of their primary carer for their health and well-being.

[95] However, the focus remains on the situation of the child. It is necessary for the person opposing return of the child to the requesting State to articulate why return would give rise to a grave risk of an intolerable situation for the child. Is it because there is a grave risk that the child will be exposed to incidents of violence directed at the child's mother? Is it because there is a grave risk that actual or feared violence will seriously impair Ms C's mental health and parenting capacity? The person opposing return needs to establish to the court's satisfaction the factual foundation for the specific concerns they advance.

> [96] Eighth, s 106(1) confers a discretion on the court to decline to make an order for the return of the child if one of the specified exceptions is made out. However, as Baroness Hale observed in *Re S*, if a grave risk of an intolerable situation is made out, "it is impossible to conceive of circumstances in which … it would be a legitimate exercise of the discretion nevertheless to order the child's return". [3]

[18] In *White v Northumberland* the Court of Appeal approved a four-step inquiry that the court must undertake to determine when a "child objects", for the purposes of s 106(1)(d):[4]

> (1) Does the child object to return? If so;
>
> (2) Has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views? If so;
>
> (3) What weight should be given to the child's views? And;
>
> (4) How should the residual statutory discretion be exercised?

[19] The Court of Appeal said further that the Court should not amount an inquiry into the relative merits of future care arrangements in the two countries concerned.[5]

[20] The onus of proof for a s 106 defence is on the parent resisting return and must be established to the balance of probabilities.[6] Establishing a defence is an issue of fact while the question of return involves the exercise of the court's discretion.[7]

[21] Given the summary nature of these applications and the fact that parties were in different jurisdictions, there was no application for cross-examination on the affidavits, the matter was therefore to be decided upon the basis of the written evidence. There are conflicts in the evidence given by the parents and witnesses; that is not unusual. In the Court of Appeal decision of *Basingstoke v Groot* the Court of Appeal addressed this issue and said:[8]

> "[38] We were referred by counsel for Mr Groot to the case of *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548 at pp 553–554, where Butler-Sloss LJ set out her view of how conflicts of evidence based on affidavit evidence should be resolved. She said that, if it is necessary to decide conflicts

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[3] *LRR v COL* para [87] to [96]
[4] *White v Northumberland* (2006) 26 FRNZ 189 (CA) at [44].
[5] *White v Northumberland*, above n 2.
[6] *Summer v Green* [2021] NZHC 3111 at [11].
[7] *Secretary for Justice v HJ* [2007] NZFLR 195
[8] *Basingstoke v Groot* [2007] NZFLR 363 at page 372, para [38] and following

> of evidence on affidavit evidence, the first step is to see if there is independent extraneous evidence in support of one side. She said, however, that this evidence must be compelling before the Judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit must be inherently improbable and so unreliable that the Judge is entitled to reject it. If there are no grounds for rejecting the written evidence of the other side, the applicant will have failed to establish its case.
>
> [39] We consider that the approach of Butler-Sloss LJ is too extreme. The fact that the evidence has not been tested must be taken into account. However, the standard of proof remains on the balance of probabilities and Butler-Sloss LJ's approach risks raising that standard. In our view, deciding on conflicts of evidence is done in the usual way, taking into account such factors as any independent extraneous evidence, consistency of the evidence (both internally and with other evidence) and the inherent probabilities. …. Courts will thus no doubt be inclined to attach more weight to the contemporaneous words and actions of the parents (and any independent evidence) than to their bare assertions in evidence as to the position — see *Re H (minors) (abduction: acquiescence)* [1998] AC 72 at p 90 per Lord Browne-Wilkinson.
>
> [40] After assessing the evidence in the normal way, the Court must decide, on the basis of all of the evidence, whether the applicant has proved the matters set out in s 105 of the Care of Children Act (in this case habitual residence) on the balance of probabilities. We recognise that there may be cases where it is not possible, after making due allowance for the absence of cross-examination, to resolve the conflicts of evidence. If that is the case, then the applicant will have failed to discharge the burden and the application will be refused. Such cases would, in our view, be relatively rare. The Judge should, however, articulate why and to what extent the evidence of the parties is accepted or rejected and the effect that this has on the determination…"

Grounds argued by father

Ground One – That there is a grave risk that an order for [Lester]'s return to the United States of America would expose him to psychological harm, or otherwise place him in an intolerable situation.

[22] [Jeremy] alleges that when [Lester] was last in the USA, [Meredith] and her then husband Mr [Abel Lewis] ("[Abel]") physically and psychologically abused [Lester].

[23] [Abel] cared for [Lester] for a period of 5 weeks from early February 2021, when [Meredith] deployed to [location deleted] as part of her countries' Covid response. At all other times, [Meredith] was responsible for [Lester]'s care.

[24] [Jeremy] alleges [Abel] unreasonably punished [Lester], that he was physically abusive to him and that on one occasion [Abel] verbally threatened [Lester]. [Jeremy]

alleges that [Meredith] whipped [Lester] on one occasion and hit him with footwear on another occasion. [Jeremy] alleges there was an incident between [Meredith] and [Abel], involving a motor vehicle, that put [Lester] at risk.

[25] In arguing that there is a risk of [Lester] being exposed to psychological harm, [Jeremy] further relies on an allegation that Dr [Lewis] attempted suicide in October 2021, that she has a gun in the home, that she has been involved with potentially dangerous men, has sought advice from a psychic and that she was diagnosed with borderline personality disorder when she was a teenager.

[26] [Meredith] sought Police assistance with respect to the vehicle incident. She has obtained a protective order against [Abel], and their relationship ended.

[27] [Lester] has told Lawyer for Child that he was hit with a belt and slipper by Mum and spoke of Mum being angry and getting mad. [Lester] also referred to [Abel] kicking him, being angry and getting mad.

[28] On 20 January 2021, [Jeremy] send a text message to [Meredith], "do you want to tell me what happened regarding [Lester] and getting whipped". [Meredith] replies "I spanked him", but later appears to accept the allegation.[9]

[29] [Lester] talked to his schoolteacher (in the USA), who then involved Child Protection Services ("CPS").

[30] CPS investigated and would have had multiple sources of information (given the intake referral was from [Lester]'s school and Police had been involved). CPS concluded and closed the investigation without taking any steps intervening in [Meredith]'s parenting of her children; there is no evidence suggesting otherwise. The investigation began in March 2021 and [Meredith] was advised of the outcome in May 2021.[10]

[9] Bundle of documents, page 153 and page 85
[10] Bundle of documents page 110

[31] [Lester] has allegedly later said to his father, that he did not speak frankly to CPS. I do not know what [Lester] said to CPS.

[32] [Jeremy] was aware of the CPS investigation; he spoke to [Lester]'s school principal, to [Meredith]'s former partner and to [Meredith]. [Meredith]'s evidence is that she gave [Jeremy]'s email address and cell phone number to CPS. [Jeremy] says that he tried to contact the CPS but could not prove his identity over the phone. It does not seem that he pursued engaging with the investigation by other means than by phone.

[33] [Jeremy] and his wife have engaged a counsellor for [Lester]. I understand that [Lester] also has seen a counsellor in the USA. References in this decision to the counsellor, refer to the New Zealand counsellor.

[34] The counsellor has provided evidence in support of [Jeremy]'s defence. In doing so, she provides evidence as to her qualifications, experience and professional affiliations. The counsellor saw [Lester] when he was here between 2019 and 2021 and has been seeing him since he returned to New Zealand in June 2021. The counsellor says [Lester] has told her that [Abel] was mean and did not follow [Meredith]'s rules.

[35] There is some confusion as to when [Jeremy] became aware of the matters that he now relies on as establishing grave risk/intolerable harm. The Counsellor's affidavit refers to meeting with [Jeremy] and his wife [Kirsten], after [Lester] returned to New Zealand in mid-2021, and says,

> "[Jeremy] and [Kirsten] were clearly distressed when they arrived for their appointment. It had been a harrowing time for them the whole time [Lester] was in the US because [Lester] was telling them was happening to him." [11]

[36] [Jeremy]'s evidence to this Court suggests some concerns about phone calls and particularly [Abel]'s assertion of control over those phone calls, but not the heightened sense of concern that might lead to it being described as a harrowing time.

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[11] Bundle of documents, page 199

Indeed, [Jeremy]'s evidence is that he only became aware of most of what happened after [Lester] returned to New Zealand.[12]

[37] [Meredith] denies attempting suicide. The timing of that alleged incident relates to a period when [Lester] was in New Zealand. She also denies that if she had relationships with other men, that there was any risk to [Lester] from being in her care or would be any risk. She has provided evidence of having a transitory mental health condition following separation from [Abel] but denies the allegation of diagnosis of borderline personality disorder.

Conclusion

[38] Grave risk and intolerable situation are high thresholds, and the onus is on [Jeremy] to establish that those risks arise for [Lester].

[39] There is scant evidence of [Jeremy] identifying his concerns about [Lester] to [Meredith], as he became aware of the issues he now relies upon.

[40] These parents have been parties to consent orders as to [Lester]'s care on three occasions. The orders they consented to have been sanctioned by the USA Court. The 2018 order defines future care arrangements and includes explicit provisions as to the jurisdiction within which [Lester]'s care arrangements are to be determined. I must not refuse to make an order for return because of the USA order but I can have regard to the reasons for the making of the order. The 2018 order provided continuity as to [Lester]'s care, as well as for his residence in the USA and domicile with [Meredith], together with certainty as to when his father would care for him in New Zealand.

[41] As to the grave risk and intolerable harm,

(a) The relationship between [Abel] and [Meredith] has ended and the evidence indicates that [Meredith] has acted protectively by seeking police assistance, applying for protective orders against [Abel],

[12] Bundle of documents, page 141

enforcing those orders against [Abel] and engaging with the CPS investigation.

(b) [Jeremy]'s evidence is that [Meredith] told him, during their relationship, that she has had a diagnosis of borderline personality disorder since she was a teenager. If [Jeremy]'s evidence is correct, then he knew of that diagnosis when he consented to the three orders defining [Lester]'s care. The alleged diagnosis must not have been of such concern to him then, particularly when he consented to the 2018 order which defines [Meredith] as [Lester]'s domicile parent. [Meredith] has given evidence, denying that diagnosis and that she has had a transitory mental health condition which is now resolved.

(c) The CPS investigation has been closed. There is no evidence of any intervention on either an isolated or ongoing basis. [Meredith] retains care of her other three children.

(d) [Jeremy]'s Counsel and Lawyer for Child asked me to decide that [Lester] would be in grave risk if he was returned to the USA, because he was at risk when previously in [Meredith]'s care, because the child protection measures in the United States, are either insufficient or ineffectual.

(e) I am not prepared to make that finding. Care is taken in these proceedings not to question the competence of another Convention member's child protection law and practice. Secondly, that submission requires me to make findings of fact as to what occurred in another jurisdiction, despite the limited enquiry made in a hearing such as this.

(f) It is not illegal for [Meredith] to own a gun in her country; that of itself does not establish grave risk, neither do the other matters raised by [Jeremy] under this ground.

(g) There are protective measures in place. [Lester] will not be exposed to [Abel]'s behaviour, as the relationship with [Abel] is at an end and [Meredith] has a protective order in place, which she has enforced. The 2018 order remains in force between [Jeremy] and [Meredith], which provides the certainty referred to earlier in this decision. I have not been given notice of any application by either party to vary it.

(h) In addition, I impose a condition that [Lester] is not to be punished using any form of corporal punishment or physical force.

[42] [Jeremy] has not established that there is a grave risk such that an order for return to the United States of America would expose [Lester] to psychological harm, or otherwise place him in an intolerable situation.

Ground two - that [Lester] objects to being returned and has attained an age and degree of maturity at which it is appropriate to give weight to his views

[43] There are four sources of information as to [Lester]'s views:

(a) [Jeremy]'s evidence,

(b) [Meredith]'s evidence,

(c) Evidence from [Lester]'s counsellor; and

(d) Lawyer for Child's report after meeting with [Lester].

[44] [Jeremy]'s evidence is:

> "[Lester] wants to remain living in New Zealand and does not want to live in the USA. [Lester] feels safe here. He has told me that if he goes to the USA for visits he wants me to travel with him, because he is worried that he will not be allowed to come back to New Zealand".[13]

[45] The evidence as to [Lester]'s objection is broadly described. [Jeremy]'s evidence does not specify when, where and the circumstances when [Lester] expressed

[13] Bundle of documents, page 148

his objection. I am unable to discern if [Lester] said this once or on more than one occasion. I do not have evidence as to [Lester]'s actual words, what may have been said to him to elicit that objection and any reasons given by [Lester], other than that he is worried about being able to return to New Zealand to see his Dad.

[46] The counsellor's evidence as to [Lester]'s views is:

> "[Lester] told me that he did not enjoy going to the US this time because his mummy and [Abel] were "not nice to me". He was upset that his mummy went away for over a month and left him alone to be looked after by [Abel]….[Lester] reported that he did not like [Abel] "he is not nice, he ignores mum's rules, he is mean to me". [Lester] was very clear about the fact that he didn't enjoy going back to the US this time."[14]

Then, in reference to [Lester] knowing of [Jeremy]'s application for a Parenting Order:

> "He continued to tell me that this is what he wanted to happen".[15]

And in the concluding paragraphs of her affidavit:

> "He has told me on several occasions that he wants to be able to live in New Zealand with his father and family here and just visit the US from time to time to see his mummy and his family there."[16]

[47] Lawyer for Child met with [Lester] shortly before the hearing. [Lester] told Ms Beaumont that in the beginning it was nice being back with Mum but then it was not nice at all. He refers to Mum and [Abel] yelling, being angry, [Abel] kicking him, Mum hitting him with a slipper and a belt, and Mum and [Abel] getting mad at him. He says he does not feel safe with Mum. He tells Lawyer for Child that he prefers if it is [Abel], [Nancy] and [Kenneth] (the last two being his younger siblings). He says that if he goes back, stuff like being hit with a belt will definitely happen. He is asked to rank going back to the US on a scale of 1 to 10, with 10 being the worst. [Lester] ranks going back as a 9. He tells Lawyer for Child that he wants to remain in NZ with his father and go to school here. He refers to having family and friends in NZ but says he has no friends in the US. He says if he goes back to the US he wants Dad to go back with him, protect him and to ensure he is able to leave again and return to NZ.

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[14] Bundle of documents, page 200 to 201
[15] Bundle of documents, page 202
[16] Bundle of documents, page 203

Does [Lester] object to return?

[48] [Lester] has said he does not want to return. [Lester]'s objection appears focused on [Lester]'s return to [Meredith]'s care as opposed to returning to the USA.

Has [Lester] attained an age and maturity at which it is reasonable to give weight to his views?

[49] [Lester] was 10 years and 4 months old at the date of hearing.

[50] [Meredith] has given evidence that [Lester] is an exceptionally bright, gifted and caring boy but yet is also emotionally immature.[17] She provides context for that evidence related to his academic attainment as compared to his social ability and emotional maturity.

[51] Lawyer for child has recorded her observations of [Lester] as being thoughtful and moderate in the expression of views, and she interpreted that as a sign of some maturity on his part.

[52] There is congruence between the views expressed by [Lester] to his counsellor and to his court appointed counsel.

[53] [Lester] is of an age where it would be reasonable for a child's views to be given weight and taken into account but not so as to be determinative.

What weight should be given to [Lester]'s views

[54] In considering this issue, I must assess if [Lester]'s views are reasonable, if they are soundly based, whether he has been unduly influenced, and whether any pressure has been brought to bear on him?

[55] [Lester]'s views appear coloured by his experience of the negative effect on family life resulting from the relationship between [Meredith] and [Abel]. The period of time that [Meredith] and [Abel] were in a relationship has had an impact on [Lester].

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[17] Bundle of documents, page 100.

That relationship ended while [Lester] was in [Meredith]'s care and the family situation should have improved.

[56] No findings have been made as to the physical abuse [Lester] says he experienced. It appears accepted that [Abel] kicked [Lester]. [Lester] refers to two allegations of [Meredith] using physical violence against him. One appears to have been accepted, though [Jeremy] refers to it as a whipping and [Meredith] says she smacked him. [Meredith] denies the allegation of hitting [Lester] using footwear. I am not able to determine that allegation. I acknowledge that corporal punishment is not contrary to law in the USA, in contrast to New Zealand law. Two isolated occasions, across a lifetime of a 10 year old child, does not reasonably correlate to a certainty that it will happen again.

[57] [Meredith] alleges that [Jeremy]'s retention of [Lester] is not an isolated event. She says that prior to the 2018 order [Jeremy] had retained [Lester] in his care, contrary to their court ordered arrangements, on more than one occasion. I infer those retentions gave good cause for the bond requirement in the 2018 order (although [Meredith] waived that for the present holiday). The circumstances of [Jeremy]'s failure to return [Lester] in 2021 are also concerning. These matters provide possible context to [Jeremy]'s approach to the present issue and decision not to return [Lester] to [Meredith].

[58] Taking those matters into account, it suggests that the real difficulty has been [Lester]'s return to [Meredith]'s care and more recently to the USA. That places doubt on the validity of that aspect of [Lester]'s objection. It also suggests that [Jeremy]'s fears as to future contact and care arrangements may have influenced [Lester]'s views.

[59] I also note that the timing suggests that [Lester] knew of his father's application for a parenting order, and intention not to return him to the United States, before [Meredith] did. Perhaps that it is to be expected in such a conflictual situation but it also goes to how [Lester]'s views may have been influenced.

[60] [Lester] referred to wanting supervision when he is with [Meredith]. That is specific terminology, going to a safety concern and arrangement to manage contact

between a parent and child. It is not a concept that a child of [Lester]'s age would ordinarily be aware of, particularly if they have not experienced supervision of contact with a parent, as [Lester] has not.

[61] [Lester] refers to his concerns about [Abel]'s behaviour (his use of physical violence against [Lester], anger and that [Abel] didn't follow mum's rules) then says that he prefers it if it is "[Abel], [Nancy] and [Kenneth]". Those conflicting statements indicate a lack of cogency as to how [Lester] has constructed and expressed his objection.

[62] [Lester] refers to missing his sisters in New Zealand if he is returned to the United States but does not refer to missing his mother, siblings (both of his parents have children from other relationships; [Lester] has older and younger paternal siblings and younger maternal siblings) or his maternal and paternal grandparents. [Lester] provides very little sense of any positive view about the USA. Those matters may indicate that [Lester] has not been able to weigh up the pros and cons to make a comparative assessment.

[63] [Lester] has spoken about these matters to his counsellor. The counsellor has by affidavit given evidence of what [Lester] has said to her and her observations of his presentation and emotions. The counsellor describes [Lester]'s presentation as being more relaxed and cheerful during her first engagement with him, and then being sad and low in mood up to November 2021.

[64] The counsellor met with [Jeremy] and [Kirsten] for a session on each occasion prior to her work with [Jeremy]. The counsellor's knowledge of [Lester]'s childhood is derived from her conversations with [Jeremy], [Kirsten] and [Lester]. The counsellor did not speak to [Meredith], before or during her work with [Lester]. In those circumstances, a counsellor could not have a balanced view of the parental relationship or history, which I expect the counsellor would accept. Within the counsellor's evidence there is an incorrect description of past parenting history (that [Jeremy] was [Lester]'s primary caregiver for his first four years) which is linked to the counsellor's assessment that [Lester] is primarily attached to [Jeremy]. There is reference to [Meredith] constantly changing the arrangements for [Lester]'s return to

New Zealand and the impact on him, when in fact those travel arrangements were [Jeremy]'s responsibility. I am concerned that the perspective provided to the counsellor, may have influenced the counselling and outcomes, being [Lester]'s reported views and presentation.

[65] [Meredith]'s evidence is that in November, [Lester] asked her if he could have a puppy. [Jeremy] and [Kirsten] had told him he was not allowed a puppy. [Meredith] says she and [Lester] talked it over and she agreed [Lester] could have a puppy, when he returned to her care. [Meredith]'s evidence is then that [Kirsten] asked her not to get [Lester] a puppy; [Kirsten] is said to have expressed a view that neither she nor [Jeremy] thought [Lester] was mature enough. Then on their Christmas Day FaceTime call, [Lester] excitedly introduced [Meredith] to [name deleted], a border collie puppy [Jeremy] and [Kirsten] had got him as a present. The counsellor refers in her affidavit, to seeing [Lester] after Christmas 2021 and says he got a new puppy as a present, "[name deleted], his new puppy has been a very valuable addition to [Lester]'s life. She provides him with companionship and comfort."[18] There is a sense of permanency, attachment and connection created by the gift of a pet, which may have been compelling to [Lester].

[66] I am concerned that not all of [Lester]'s views are reasonable or soundly based. The memories he refers to of his last time with [Meredith] are not happy. There is a connection between that experience and his present objection to returning to the USA, but the strength of view may not have been formed independently or be entirely authentic to [Lester]. There is a basis for concern that he has been influenced and that pressures have been brought to bear on him. Those matters taken together detract significantly from the weight that can be placed on [Lester]'s views.

[67] I have determined that whilst [Lester] has expressed a view and is of an age where his views can be taken into account, the context around which he came to form that view and some of how that view is expressed, means that little weight can be attributed to his objection.

[18] Bundle of documents, page 202.

[68] [Jeremy] has not been successful in establishing that [Lester]'s objection should prevail.

How should the residual discretion be exercised

[69] The Court retains a discretion as to whether [Lester] should be returned. This requires a balancing exercise between the Convention considerations against [Lester]'s objection, the weight to be attributed to his objection and his best interests.

[70] In addition to the matters identified by [Jeremy], he also contends that [Lester] should remain in New Zealand because he is settled here, along the lines of practicalities referred to in other decisions of this Court in such cases. [Jeremy] wanted [Lester] here for longer periods to support a dual residency application and [Meredith] agreed to that.[19] Then there are the longer periods resulting from Covid and the failure to return in January, resulting in these proceedings. [Jeremy] relies on these periods of care cumulatively and asserts through counsel that it would cause [Lester] upheaval to return him to the United States while long term care arrangements await determination.

[71] To endorse [Jeremy]'s claim, would be to validate a situation which has arisen because [Jeremy] has twice broken the agreement between himself and [Meredith], and because Covid earlier impacted on [Lester]'s ability to travel out of NZ.

[72] An order for return will typically involve some disruption for the child, but that does not justify refusing an order. [Lester]'s parents have agreed between them that he lives between two countries; that will necessarily involve disruption for [Lester], of relationships with family, friends, schooling and extracurricular interests on an annual basis.

[73] There are two instances in the evidence where [Lester] is observed by his counsellor to be more settled, because he believes he understands what will happen next for him. The first occasion is when he knows arrangements have been made for

[19] Bundle of evidence, page 81.

him to return to the United States in December 2020.[20] The second is between mid-November and mid-December when he is said to know that his father is applying for him to remain in New Zealand.[21]

[74] Taking all matters into account, I consider that the United States Courts are best placed to determine [Lester]'s long-term care, as that court has previously assisted these parents to do so three times already in his short life.

[75] This is not an occasion where the Court's discretion should be utilised to make an order contrary to the return of the child.

Conclusion

[76] I make an order pursuant to section 105(2) that [Lester] is to be returned to the United States subject to the condition set out in paragraph 41(h).

[77] I expect that [Lester] will be returned on or before 24 June 2022, unless flights cannot be obtained in that time.

[78] I direct that [Jeremy] is to meet the cost of [Lester]'s travel to the United States, including [Meredith]'s costs, if she is required to travel to New Zealand to facilitate [Lester]'s return.

[79] I ask that Counsel file Memorandum recording the agreed arrangements for [Lester]'s travel so that I can confirm the discharge the order preventing removal and release [Lester]'s passport. [Meredith] sought a warrant; I would hope that arrangements for the return can be made by agreement, failing agreement, I will make further directions as to the issue of the warrant.

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Judge JK Hambleton
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 07/06/2022

[20] Bundle of evidence, page 199.
[21] Bundle of evidence, page 202.