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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2021-009-001285
[2021] NZFC 12991

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[GARETH ROBERTS] Applicant
AND	[LINDA CRESSWELL] Respondent

Hearing:	2 December 2021
Appearances:	C Moore for the Applicant S van Bohemen and A Summerlee for the Respondent J Wren as Lawyer for Child
Judgment:	21 December 2021

RESERVED JUDGMENT OF JUDGE J K HAMBLETON

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[1] Mr [Gareth Roberts] ("[Mr Roberts]") seeks the return of [Amelia] and [Brigitte], to France. This is opposed by Ms [Linda Cresswell] ("[Ms Cresswell]").

[2] [Ms Cresswell] concedes that [Mr Roberts] can satisfy the grounds for an order in terms of s 105 of the Act, but submits that the Court should decline to order a return because there is a grave risk that an order for the children's return to France would

expose them to psychological harm, or otherwise place them in an intolerable situation (s 106(1)(c)(i) and (ii))

Background

[3] [Mr Roberts] is a French citizen and [Ms Cresswell] is a New Zealand citizen.

[4] [Ms Cresswell] and [Mr Roberts] met each other in [early] 2009 at [an event] in [country deleted]. [Ms Cresswell] was then living in Australia. [Ms Cresswell] and [Mr Roberts] kept in touch over the following years. They saw each other again in [France] around 2010. In early 2013 they went to [country deleted] together and then started living together in France.

[5] On 11 February 2014, they entered into a pre-nuptial agreement. [Mr Roberts] and [Ms Cresswell] married each other on [date deleted] 2014. Their oldest daughter, [Amelia], was born on [date deleted] 2015. [Brigitte] was born on [date deleted] 2017. Both children were born in France.

[6] Until October 2020, the family lived in France together.

[7] [Ms Cresswell] has French residency which expires in 2027. Her evidence is that she may be able to apply for citizenship, however, she is not sure how her separation from [Mr Roberts] impacts on this.

[8] [Amelia] was educated first at the [school deleted] in [French city A], and then at the Municipal School of [French city B]. [Brigitte] was in nursery school and then attended the same Municipal School as [Amelia].

[9] As noted by Martin Kelly in his s 133 report to the Court, it is evident that until they left France, the girls were developing bilingually. A report from [Brigitte]'s last teacher in France indicated that [Brigitte] was communicating in the French language at a level expected of her age and was succeeding in all curriculum areas.[1] Later in the same report Mr Kelly notes that [Brigitte]'s early childhood teacher in New

[1] M Kelly, s133 report, Bundle 3 page 60.

Zealand had noted that when [Brigitte] started at the early childhood centre her first language was French, but she soon adjusted to speaking English.[2] [Mr Roberts]'s evidence is that by April 2021, the children were understanding when he spoke to them in French, but only speaking to him in English. Yet by November, all conversations were in English, as the children struggled more and more with French.[3]

[10] The relationship between the couple declined over time. In September 2020 [Ms Cresswell] identified that she wished to return to New Zealand for a holiday. Screenshots of text messages between the parties, when these arrangements were being discussed by them, are exhibited to the affidavit sworn on 8 November 2021.[4]

[11] [Mr Roberts]'s preference was that [Ms Cresswell] and girls were away for three months. [Ms Cresswell], with the assistance of the maternal grandmother, booked flights that meant they are away for four months. [Ms Cresswell] sent [Mr Roberts] a message saying, "I am not denying them their father. We will all come back."

[12] It is accepted that the initial agreement for the holiday is that it would be from October 2020 to February 2021.

[13] In October 2020 [Ms Cresswell] travelled to New Zealand with the children, who were then three and five years old.

[14] Whilst in New Zealand, [Ms Cresswell] engaged in some tertiary studies through [university]. To enable those studies to be completed, [Mr Roberts] later agreed, albeit reluctantly, to [Ms Cresswell] and the children remaining in New Zealand until 8 April 2021.

[15] On 8 April 2021, [Ms Cresswell]'s evidence is the girls and she flew to Auckland to return to France. At Auckland International Airport they were refused boarding of the plane because they did not have a negative COVID test for [Amelia]. [Ms Cresswell]'s evidence is that she had had incorrect advice from a travel agent as

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[2] M Kelly, Bundle 3, page 64.
[3] Applicant's affidavit of 21 November 2021, Bundle 2 page 9
[4] Bundle of Documents 2, page 58 and following.

to the requirements for children travelling under the age of 12. The travel agent tried to rebook them on a flight departing on 10 April 2021, but they did not get the results back from their new COVID tests in time. [Ms Cresswell] and the children returned to Christchurch.[5]

[16] [Ms Cresswell] did not take any further steps to return the children to France, and they have remained in New Zealand.

[17] [Mr Roberts] sought the return of [Amelia] and [Brigitte] to France under the Convention. The New Zealand Central Authority applied to the Family Court under the Act for an order for the girls to be returned to France.

[18] On 28 April 2021, in the Family Court registry of [French city A], France, [Mr Roberts] filed a request to commence proceedings against [Ms Cresswell], which was granted by order of the Court on 5 May 2021.

[19] [Ms Cresswell] was served shortly thereafter and says in a message on 11 May to [Mr Roberts], "Thank you for the 48-page email of false facts".[6] The service documents provided to [Ms Cresswell] were in French. The evidence before the Court is that [Ms Cresswell] is conversant in the French language, but had limited ability with written French.

[20] In May 2021, [Ms Cresswell] contacted Victim Support and had counselling sessions through the Employment Assistance Programme.[7] [Ms Cresswell] saw a family whānau support worker from Victim Support and then a registered psychologist for six sessions between 29 May 2021 and 11 September 2021.[8]

[21] The proceedings in France were first called in Court on 17 June 2021. Then there was a hearing on 6 July 2021, and on 23 July 2021 the French Court issued orders. [Ms Cresswell] was not able to instruct counsel until 8 June 2021.

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[5] Bundle 4, page 71.
[6] Bundle 2, page 55.
[7] Bundle 4, page 72.
[8] Bundle 4, page 92.

[22] When the matter was being heard by the Family Court in [French city A], [Ms Cresswell]'s evidence was that she was settling permanently in New Zealand. The decision records, amongst other things, that the parties recognised the jurisdiction of the French Judge and the French law applicable to the divorce proceedings.[9] The decision in respect of the children is as follows:

> Adjudicating on provisional matters concerning the children
>
> Recall that parental authority is exercised jointly by the parents over:
>
> - [Amelia], born [date deleted], 2015 in [French city A],
> - [Brigitte], born [date deleted], 2017 in [French city A].
>
> Say that for this purpose, they must in particular:
>
> - Take all the important decisions together concerning the child's health, educational orientation, religious education and change of residence;
> - Keep each other informed about the organisation of children's lives (school life, extracurricular activities, medical treatment, etc);
> - Communicate in all circumstances the address of the place where the children are and how to reach them;
> - Respect the bonds of children with their other parent.
> - Establish the habitual residence of the children at the home of Mr [Gareth Roberts] from the Orientation Order and on interim measures;
>   - Say that unless better agreed, Mrs [Linda Cresswell] will receive the children as of the present order:
>   - All of the All Saints and February holidays in even years and all of the Christmas and Easter holidays in odd years, half of summer vacation, first half in even years, second half in odd years.

[23] The provision for mother's care under that order is in effect two two-week blocks and one four week block each year.

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[9] Bundle 1, page 66.

[24] Between October 2020 and May 2021, [Mr Roberts] provided [Ms Cresswell] with 600 Euros per month for child support. In May 2021 he reduced that payment to 400 Euros per month, and the payments ceased in August 2021.

[25] In New Zealand, [Ms Cresswell] was living initially with her mother and subsequently in rental accommodation nearby. Both children have been enrolled and are attending school.

[26] [Mr Roberts]'s contact with the children has been by way of Facetime video calls, generally on three occasions each week.

The Convention and New Zealand Implementing Legislation

[27] 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. New Zealand became a party to the Convention with effect from 1 August 1991. France became a party to the Convention with effect from 1 December 1983. The Convention is widely ratified; there are 101 countries that are parties to the Convention.

[28] 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.

[29] 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.

[30] 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 Care of Children Act 2004 ("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.

[31] 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.

[32] The leading case with respect to the exception defined within s 106(c)(ii) is *LRR v COL*[10]. 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

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

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 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 Cresswell]'s mental health, and (as a result) on her son. The critical question, the Court said:

> … is what will happen if, with [Ms Cresswell], the child is returned. If the court concludes that, on return, [Ms Cresswell] 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 Cresswell]'s anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for [Ms Cresswell] to be anxious on return will nevertheless be relevant to the court's assessment of [Ms Cresswell]'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 Cresswell]'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". [11]

[33] 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 or specialist reports, 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:[12]

> [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 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,

[11] *LRR v COL* para [87] to [96]

[12] *Basingstoke v Groot* [2007] NZFLR 363 at page 372, para [38]

> 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 Mother

[34] [Ms Cresswell] asserts that the grave risk defence is made out on three independent, but cumulative grounds, being:

(a) [Amelia] and [Brigitte]'s separation from her; she says she is their primary carer and attachment, and that she will be separated from them if they are cared for according to the French Court order;

(b) That the children will be impacted by the decline of [Ms Cresswell]'s wellbeing which would arise because of the situation to which she would be returning, the negative impact this would have on her mental wellbeing, the consequential impact this would have on both girls directly, and because of her impaired ability to parent; and

(c) That [Mr Roberts] is unable to care for the children by reason of his commitments for five months of the year, which would see [Amelia] and [Brigitte] cared for by their extended family, rather than either parent.

[35] [Ms Cresswell]'s position is that any one of those three grounds is enough to satisfy the threshold of creating a grave risk of putting the girls into an intolerable situation and/or suffering psychological harm should they return to France.

Ground One – Removal of children from their primary carer

[36] [Ms Cresswell]'s position is that she is the children's primary caregiver and that their primary attachment is to her. [Ms Cresswell]'s evidence is: [13]

> "I do not doubt [Gareth] loves the girls or that they love him, but I am the parent who has met their physical and emotional needs and to whom the girls turn when they are upset or need help. The strength of the girls' attachments is a consequence of the roles which [Gareth] and I have played in their lives since they were born."

[37] [Ms Cresswell] describes in detail her parenting and availability for their daughters. She describes [Mr Roberts]'s parenting as: [14]

> "…
>
> (a) preparing meals for them on occasion;
>
> (b) putting the girls to bed on occasion;
>
> (c) as mentioned above, looking after the girls for a few hours when I needed break, usually to run an errand or do a shop;
>
> (d) doing bath time on occasion (when they were older);
>
> (e) at [French city C], taking them on the motorbike around the estate;
>
> (f) at [French city D], taking them to the skate park or beach."

[38] In addition, [Ms Cresswell] provided evidence that:

(a) [Mr Roberts] attended every midwife and gynaecologist appointment for [Amelia];[15]

(b) When [Brigitte] was four months old, [Ms Cresswell]'s [family member] became seriously ill, so [Ms Cresswell] travelled to New

[13] Bundle 4, page 64, para 8 and 9.
[14] Bundle 4, page 65.
[15] Bundle 4, page 140.

Zealand. [Brigitte] travelled with [Ms Cresswell] and [Mr Roberts] cared for [Amelia], who was then two years old; and

(c) [Ms Cresswell] later says that [Mr Roberts] would take the girls to his brothers and his friends' home to swim, on bike rides, on the boat with friends and occasionally took them to the beach with his brother and their cousins.

[39] [Mr Roberts]'s evidence is that he is a primary caregiver of [Amelia] and [Brigitte] alongside [Ms Cresswell], as they have both been extremely present in their daughter's lives since they were born.[16] [Mr Roberts]'s evidence goes on to refer to doing activities with the girls, reading them bedtime stories and songs, and doing bath time in the evening.

[40] [Mr Roberts] says, "upon reflection we were quite a traditional household in the sense that [Linda] was a stay at home mum and I was running the business".[17]

[41] [Amelia] spoke of her father and family to Martin Kelly (s 133 report writer), she said:

> "I don't have a papa in New Zealand. He makes me happy. He made me happy a lot. He made a massive treehouse. He loves me. He talks to me in English a lot. He is still in France. He would like to come but he doesn't want to. He likes going to the pool. We don't have one of those. I want to go to France. I would like to visit him. I have been crying a lot cos I miss him. I got stuck cos I needed a covid test. I can't understand papa when he speaks in English not in French."

[42] Referring to attachments, Mr Kelly relates the following:

> "I believe that [Amelia] and [Brigitte] would consider their home to be wherever their primary attachment relationships are that is I believe their parents."[18]
>
> …
>
> "I understand that up until the 21st of October 2020 [Linda] and [Gareth] were both involved in their lives to their children to the extent that they had formed

[16] Bundle 2, page 7.
[17] Bundle 2, page 12, para 51.
[18] Bundle 3, page 75

> attachment bonds. It seems reasonable to conclude that [Linda] has always been their primary caregiver and most responsible for their day-to-day care."[19]
>
> …
>
> "They have both been involved with the children, perhaps, in different ways, but sufficiently for them to have formed attachment relationships and for [Amelia] at least to have formed a concept of them as her family."[20]

[43] The views expressed by [Amelia] to Mr Kelly were echoed in her conversation with Lawyer for Child.[21]

[44] There are two ways in which [Ms Cresswell] could become separated from the girls. The first is if [Ms Cresswell] did not return to France with the girls, and the second is if she did return to France and the present interim order of the Family Court of [French city A] were enforced.

[45] In this regard Martin Kelly's opinion for the Court was as follows:

> "To fully consider the potential impact on the children's psychological well-being should the Court make an order that they return to France it is necessary to examine more closely the parenting capacity and the ability of [Linda] and [Gareth] to cooperate in future parenting and care of the children. On the information and time available to the writer, it is assumed that the most significant difference for the children should they return to France will be a change in their primary care. This may represent a disruption to their attachment bond to [Linda] if she either does not return to France with them
>
> …
>
> I believe that [Linda] has or cannot contemplate being apart from [Amelia] and [Brigitte]. If they are required to return, she is likely to return with them. If [Linda] is in France, I believe she will also expect to maintain some parental authority. Consequently, there would be a potential for overt conflict between [Linda] and [Gareth] in the presence of the children.
>
> …
>
> Assuming that [Linda] is able to return to France and maintain satisfactory mental health, is in receipt of sufficient support and is able to coparent with [Gareth] it is likely that the girls will adjust. The girls have shown a resilience to repeated separations from [Gareth]. They are yet to experience a significant time apart from their mother. Being required to being in [Gareth]'s care without regular ongoing contact with [Linda] is likely to be distressing for

[19] Bundle 3, page 79.
[20] Bundle 3, page 81.
[21] Memorandum of lawyer for child dated 1 December 2021.

> them and to be reflected in more challenging behaviour and emotional disturbance."

[46] I have referred to the provisions of the interim order of the French Family Court as they presently stand. The order is described as an Interim order and allows for the parents to agree otherwise.

[47] [Mr Roberts]'s evidence regarding those proceedings was as follows:

> "During the hearing before the Family Court of [French city A], [Linda] (through her lawyer) indicated that she has no intention of coming back to France. I was hoping that she could change her mind and decide to return to a life in France, close to where we have always lived so that the girls can see their two parents on a regular basis. I was even thinking of a share custody (a week each and half of the holidays each). I still believe that the girls need to have both parents, not only one and that this latter option would be the best.
>
> …
>
> I do not want and I will never want the girls to have no contact with [Linda] and I would make sure that they could talk or see their mother as much as they want. As I said I have grown in a family environment and I would like the girls to have the same. I never wished the girls to be separated to from any of their parents."

[48] Lawyer for child submits that the following factors address directly the notion that grave risk would not exist such that a return to France would not be intolerable for the children:

(a) [Ms Cresswell]'s position of returning to France if the children are to do so and thereby being available to the children.

(b) That the French court has assessed and recognised [Mr Roberts] as being able to provide primary care.

(c) The recognition of attachment to both parents.

(d) The evidence as referred to above that [Mr Roberts] would support a "shared care" arrangement thereby lessening asserted risk of impact on their relationship with their mother, bearing in mind that their relationship with their father is currently significantly impacted upon.

(e) Familiarity for the children – it would be a return to the children's country of previously undisturbed domicile and habitual residence.

(f) Support for the children and their mother from the paternal side.

(g) The French's court's ability to make proper child focussed decisions as a contracting state to the convention.

Conclusion – ground one

[49] [Ms Cresswell] was the children's primary caregiver, with the support and involvement of [Mr Roberts]. I am satisfied that the children have a primary attachment to both parents. I consider it is likely that [Ms Cresswell] would return to France if I order the children's return. [Mr Roberts]'s evidence is that he would prefer a shared care arrangement and does not wish to see the girls separated from either parent. If [Ms Cresswell] chooses not to return, then the French Court has assessed [Mr Roberts] as being able to care for the children.

[50] Taking all matters into account, I am not persuaded that [Ms Cresswell] has established a grave risk on this ground.

Ground two - Children will be impacted by decline of mother's wellbeing

[51] [Ms Cresswell]'s position is that if she returns to France there is a high risk that she will suffer a recurrence of post-traumatic stress disorder; that this may in turn may place her at risk of developing other mental illnesses and that this would have an adverse effect on her ability as a parent, and so place the children in an intolerable situation.

[52] [Ms Cresswell] provided an affidavit from Dr Elizabeth Macdonald. Dr Macdonald is a Clinical Psychiatrist employed by the Canterbury District Health Board.

[53] Dr Macdonald's opinion is that [Ms Cresswell] is suffering from Post-Traumatic Stress Disorder in response to the stresses experienced while living in France with [Mr Roberts]. Dr Macdonald particularly refers to the following factors:

(a) [Mr Roberts]'s psychologically and physically abusive behaviour to [Ms Cresswell], which was ongoing and cyclical;

(b) [Mr Roberts]'s controlling behaviour to [Ms Cresswell];

(c) [Mr Roberts]'s disregard for [Ms Cresswell]'s emotional and physical wellbeing;

(d) [Mr Roberts]'s infidelity;

(e) A lack of support in the practical aspects of everyday parenting from [Mr Roberts]; and

(f) A lack of supportive network for her in France.

[54] Dr Macdonald records [Ms Cresswell] describing increasing symptoms of stress, anxiety and panic attacks during her marriage. Dr Macdonald's report states that the symptoms have improved since [Ms Cresswell] returned to New Zealand, but that [Ms Cresswell] experiences some residual symptoms triggered by direct or indirect contact with [Mr Roberts]. Dr Macdonald records that there are no reported symptoms of persistently lowered mood or sleep disturbance which would be indicative of depression or evidence of other mental illness.

[55] Dr Macdonald goes on to identify psychosocial stressors that will affect [Ms Cresswell] if she returns to France, and that would place [Ms Cresswell] at high risk of a recurrence and exacerbation of post-traumatic stress disorder symptoms. Dr Macdonald contends that, as the situation will be on going, this may place [Ms Cresswell] at high risk of developing other mental illness such as depression. The factors identified by Dr Macdonald are:

(a) [Ms Cresswell] will be isolated without the close support network she has in New Zealand;

(b) She will be living in a small close community where she has no close supports or confidantes, and where she perceives there to be loyalty to [Mr Roberts];

(c) She will likely have more close contact with [Mr Roberts] and "may be vulnerable to being subject to the psychological, emotional and physical abuse that she has experienced in the past";

(d) She will be unlikely to find suitable employment due to the rural nature of their locality and her limited ability in written French;

(e) She will be living in a situation in which she feels trapped and powerless; and

(f) She will be unable to finish the studies she has started.

[56] [Ms Cresswell] further relies upon the opinion of Martin Kelly, that if the children are in [Ms Cresswell]'s care in France, and if she experiences a decline in her mental health, this will have a damaging impact on the psychological wellbeing of the children.

[57] The sources of information relied upon by Dr Macdonald were her consultations with [Ms Cresswell] on two occasions in late September and early October, a brief from [Ms Cresswell]'s counsel, a conversation with the girls' maternal grandmother, a counsellor seen by [Ms Cresswell] and victim support officer seen by [Ms Cresswell], together with reviewing [Ms Cresswell]'s health contacts with the GP practice she was registered with in Christchurch.

[Mr Roberts]'s emotional and physical abuse of mother

[58] Dr Macdonald's opinion refers to family violence between [Ms Cresswell] and [Mr Roberts] both as a causative factor of the PTSD and as a psychosocial stressor if

she returns to France. I am not required to determine if that family violence occurred but will assess the risk, given the reliance on these matters by [Ms Cresswell] and Dr Macdonald.

[59] Dr Macdonald's report records [Ms Cresswell] describing the marriage as deteriorating over the years with [Mr Roberts] becoming increasingly controlling, emotionally abusive, undermining and critical towards her. [Ms Cresswell] reported to Dr Macdonald a number of incidents where he was physically abusive towards her, for example in 2016 he hit her and pulled her hair while she was breast feeding [Amelia] while yelling at her "you make me like this". On another occasion in 2017/2018, [Ms Cresswell] alleges he pushed her to the ground in front the children. [Ms Cresswell] says she was grabbed by the shoulder and shaken.

[60] Dr Macdonald goes on to say:

> "Of note, [Ms Cresswell] until recently did not have a clear memory of these incidents but has been reminded of them by friends and family, whom she told at the time. [Ms Cresswell] showed text conversations with her sister sent at the breastfeeding and other abusive incidents."

[61] Dr Macdonald goes onto describe another incident referred to by [Ms Cresswell] to illustrate her feeling increasingly fearful and tense in [Mr Roberts]'s vicinity. She said that after twisting her ankle getting off his motorcycle, he lost his temper, and [Ms Cresswell] felt so fearful for her safety that she packed a bag and ran to spend the night at the neighbours vacated house.

[62] [Ms Cresswell] told Dr Macdonald that she noticed that the local police would often visit when the family were at [French city B] and suspected they had concerns for her wellbeing and were aware of Mr [Roberts]'s behaviour towards her.

[63] [Ms Cresswell]'s first affidavit in these proceedings was sworn on 27 September 2021, so two days before her first appointment with Dr Macdonald. Her second affidavit was sworn on 2 November 2021, so approximately a month after her second and last appointment with Dr Macdonald.

[64] In her first affidavit, [Ms Cresswell] refers to the incident of 8 January 2016. She says:

> "[Gareth] and I were in the car, and I was asking for him if I could get my car fixed. [Amelia] was a few months old, and in the car with us. [Gareth] got out to open to the gate leading up to [French city D]; I was upset with him because he was calling me spoilt and ungrateful. So, I drove up the drive without [Gareth], so that I could get into the house to feed [Amelia] and put her to bed. [Gareth] came running in yelling; I did not say anything because I was breastfeeding [Amelia]. [Gareth] then pulled my hair and slapped my head, and then walked away screaming; I slept downstairs for the next few nights, I was so in shock."[22]

[65] In the following paragraph, [Ms Cresswell] says:

> "On other times when we fought, he would often grab me or shake me violently. I became scared of [Gareth]. I thought he would change and get help.
>
> To be clear, [Gareth] had never been physically violent with [Amelia] and [Brigitte]; I do not recall him ever grabbing me in front of the girls. However, he often yelled at me in front of the children, and on one occasion waived a spanner at me in front of [Amelia]."[23]

[66] [Ms Cresswell] refers to the January 2016 incident in her second affidavit. She repeats her evidence about what occurred and comments "that was the first time he had hit me". Exhibited to that affidavit as Exhibit E, are screen shots of a series of messages between [Ms Cresswell] and her sister, where [Ms Cresswell] describes what occurred the previous evening (8 January). [Ms Cresswell] recounts that [Mr Roberts] came running in, yelling and furious:

> He said why the fuck did you do that? I didn't say anything as I was feeding [Amelia]. He pulled my hair and slapped my head while I was feeding her and then walked away screaming I understand why [name deleted] was angry with you, you should go back to your shitty country, an named all my exes and said go be with them.

[67] [Ms Cresswell] also provided affidavits from witnesses who had stayed in the family home with her and [Mr Roberts] for periods of time. [Janette Baron] lived with the family between 28 June 2015 and December 2015, [Veronica Harles] lived with the family between October and December 2017, and the maternal grandmother, gave

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[22] Bundle 4, page 68.
[23] Bundle 4, page 68.

evidence that she had had frequent contact with the family in various locations (predominantly France, United States and New Zealand), generally on three occasions each year.

[68] None of those witnesses give evidence of having observed any physical violence between [Ms Cresswell] and [Mr Roberts], nor do they give evidence of [Ms Cresswell] having spoken to them of physical or other violence in the relationship.

[69] [Mr Roberts]'s evidence is a blanket denial of all allegations of violence or neglect. His evidence is:

> "First of all, at no stage of our divorce proceedings, [Linda] mentioned any acts of violence and/or neglect on my part against her, or that of the children. I read for the very first time that I would have been violent towards her, even though there has never been any complaint or record filed against me for acts of violence.
>
> It is all the more astonishing that [Linda] accuses me of acts of violence within the framework of the New Zealand proceedings even though the proceedings before the Family Court of [French city A] and the proceedings currently pending before the Court of Appeal of [French City E] do not mention any of these allegations.
>
> I have never had any problem with violence or aggression, and I have never fought with anyone in my entire life. I would never have raised a hand on my wife, let alone in front of our children. This is the reason why I vigorously challenge all false accusations on this point."[24]

[70] [Mr Roberts] goes onto provide evidence from two women he had been in prior relationships with, who say he was never violent to them.

[71] [Mr Roberts]'s evidence is that he is the holder of a hunting and firearms licence and that the mere filing of a complaint against him for acts of violence would have automatically resulted in the withdrawal of that licence.

[72] In response to the information given to Dr Macdonald of the suspicion on [Ms Cresswell]'s part that police had concerns for her wellbeing, [Mr Roberts] has obtained records from the French police. [Mr Roberts] says an enquiry had been made with the police of [French city F] which says that no proceedings about any violence has been

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[24] Bundle 2, page 14-16.

initiated against him or [Ms Cresswell] and that no visit from the French police has ever taken place at the family domicile in [French city B]. There is further correspondence from the police of [French city G], stating that they cannot find any trace of intervention at [French city C] concerning inter family violence, that [Ms Cresswell] has not filed any complaint for the behaviour alleged though they had had some incidental interactions with the couple, their attention was never drawn to any violence within the couple.

[73] [Mr Roberts] also produces a medical certificate from the paediatrician who is responsible for care of both daughters that says that during the consultations regarding the daughters he never noticed any symptoms that could suggest violence or negligence.[25]

[74] [Mr Roberts] has filed evidence from his father, his brother, sister-in-law and a friend and none of those close family members give evidence that they observed any family violence, or behaviour that gave them concern or on any occasion when mother sought their assistance. Sister-in-law's evidence is that [Ms Cresswell] spoke to her about the strains on the relationship arising from the alleged infidelity but never mentioned any concerns as to family violence.

[75] [Mr Roberts]'s evidence with respect to the occasion where [Ms Cresswell] twisted her ankle is that they had come home after a party, [Ms Cresswell] was intoxicated and fell.

[76] There are conflicts of evidence and inconsistencies between what [Ms Cresswell] told Dr Macdonald, as compared to mother's evidence in these proceedings, and the evidence given by witnesses for mother.

[77] I note in contrast to the number of specific incidents mentioned to Dr Macdonald, one specific incident of a physical assault is identified in the evidence with a generalised allegation of being grabbed or shaken. The specific incident alleged happened 5 years ago.

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[25] Bundle 2, page 14-16.

[78] The evidence of that incident does not include an allegation that [Mr Roberts] said, "you made me like this".

[79] There is no evidence at all in these proceedings of an incident where [Mr Roberts] pushes [Ms Cresswell] to the ground in front of the children; in fact, [Ms Cresswell]'s evidence is that he was never physically violent to her in front of the children ever.

[80] The text messages exhibited by [Ms Cresswell] are only in relation to the incident on 8 January 2016.

[81] The affidavits of witnesses provided by mother, do not provide evidence of corroborating any allegations of physical violence (either through witnessing it or being told of it by mother), which does not align with [Ms Cresswell] telling Dr Macdonald that it was only through family and friends reminding her, that she had a clear memory of these matters.

[82] Then there is mother's comment to Dr Macdonald that local police would often visit when the family were at [French city B] and her suspicion they had concerns for her wellbeing. That is contrary to the record from that police that they had never visited that property and that there were no family violence notifications made to them. If [Ms Cresswell] was confused, and meant to refer to the other property, while the Police there did have some interaction with the couple, they held no family violence concerns at all.

[83] [Mr Roberts] identifies that there is no mention of these family violence allegations in the Family Court proceedings in France. [Ms Cresswell]'s response is that in the short period of time in which she had to instruct counsel; she did not have the opportunity raise it. [Mr Roberts] goes on to say that the Family Court decision is now the subject of an appeal and [Ms Cresswell] has not raised these matters in the appeal, either.

[84] The allegations of family violence have been pleaded and heavily relied upon by [Ms Cresswell] in these proceedings. Even given the short timeframe, knowing

that the French Family Court were determining the children's care arrangements, it would be expected that [Ms Cresswell] would have mentioned these allegations of family violence to her then lawyer. If the time constraint was the issue for the first hearing, it is not for the appeal, some months have passed; and the uncontradicted evidence of [Mr Roberts], is that these issues have not been raised by [Ms Cresswell].

[85] There is evidence given of verbal arguments between the couple, particularly of father yelling at mother. [Amelia] has referred to her father yelling at her mother, both in her conversation with Martin Kelly and with lawyer for child.

[86] I am concerned of the children being aware of the conflict and the risk to them being enmeshed in it. [Ms Cresswell] told Mr Kelly that the phone calls between [Mr Roberts] and the children can be disruptive and that they "ruin and upset our evenings".[26] I refer to evidence provided by maternal grandmother that on 7 September 2021, [Amelia] wanted to talk to her in private. [Amelia] said to her grandmother that "papa yells at mummy" and [Amelia] says it makes her sad. Grandmother's evidence is that she replies to [Amelia], "I know it makes everyone sad". [Amelia] then says, "when we were babies, papa didn't yell at mummy, but when we got big, he yells at her". Grandmother's evidence is that she tells [Amelia], "papa yelled at mummy when you were babies, you just don't remember".

[87] Grandmother has heard a verbal argument by phone between the parties in 2017. [Ms Cresswell]'s evidence is that there were verbal arguments between them when [Mr Roberts] yelled. Ms [Baron] recalls conversations between [Ms Cresswell] and [Mr Roberts] escalating into arguments, and [Mr Roberts] would often yell then leave the room.

[88] There is no evidence of verbal arguments between [Ms Cresswell] and [Mr Roberts] by way of texting or by phone since [Ms Cresswell] left France. The messaging communication that has been exhibited is polite and civil.

[26] M Kelly page 24

[89] [Ms Cresswell] portrays [Mr Roberts] as controlling. Examples provided relate to the purchase of a household appliance and the maintenance/replacement of a vehicle.

[90] I find that the alleged abuse is not at the serious end of the scale. I accept that if the children were to witness further verbal arguments between their parents, that would be likely to cause them psychological harm. However, I find that the verbal arguments and any disagreements that occurred were within the deterioration of their relationship, when [Ms Cresswell] and [Mr Roberts] were living in the same home. If the children are returned to France, even if [Ms Cresswell] follows, the parents will not be living in the same home together. There will be protective mechanisms available in the French jurisdiction, should those be required.

Isolation and absence of support

[91] [Ms Cresswell] has a close and loving relationship with her mother and has received care and support from friends. [Ms Cresswell]'s mother travelled to France or to other overseas location to meet with the family, on a regular basis. I consider that it is very likely that the practical and psychological support from [Ms Cresswell]'s mother, other family and friends will continue, wherever [Ms Cresswell] lives.

[92] [Mr Roberts] filed affidavits from his father, brother and sister-in-law. Each of those witnesses says that if [Ms Cresswell] returns to France, she will be welcomed and supported by them. Ms [Cassandra Roberts] says: [27]

> If [Linda] comes back to France with the girls, we will be there for her because is what a family does (sic). Being a mother, I fully understand that [Amelia], [Brigitte] and [Linda] is something that is impossible to split and if we are here for the girls, we also have to be here for [Linda].

[93] I refer to the observation by Martin Kelly: [28]

> I also note that [Linda] may have perceived the support [Gareth] had received from many friends and family members attesting to the quality of his relationship with the girls as rejection or criticism of her when that was not the intent. She may not be as

[27] Bundle 3 page 40
[28] M Kelly page 40

> ostracised as she believes she might be. [Gareth] and his family may be more supportive than [Linda] believes.

Small rural location and inability to find employment

[94] [Ms Cresswell]'s counsel drew attention to the small population of [French city B] and its rural location, as providing restrictions on [Ms Cresswell]'s ability to find employment. However, as Counsel for the Applicant noted, the city of [French city A] is 10 km from [French city B]. [French city A] has a population of more than 120,000 people.

[95] [Ms Cresswell] was employed prior to her relationship with [Mr Roberts] and, while with him, worked in the [deleted] industry. She will have transferable skills. [Ms Cresswell]'s evidence is that she could obtain employment within [another] sector.

[96] [Mr Roberts] has previously provided financial support and there was information to indicate that if [Ms Cresswell] were resident in France and caring for the children, she would have an entitlement to financial support, both monetary and supported accommodation, from the State.[29]

Remaining factors

[97] The remaining factors identified by Dr Macdonald were [Ms Cresswell]'s potential inability to complete tertiary study commenced in New Zealand and that she may feel trapped and powerless.

[98] I do not consider that either of those factors is sufficient to meet the high threshold.

Conclusion – ground two

[99] I accept that the [Ms Cresswell]'s psychological well-being was adversely affected by the deterioration of her relationship with [Mr Roberts] and she may experience similar symptoms if she returns to France. Dr Macdonald's opinion is that

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[29] Applicant's affidavit of 21 November 2021, Bundle 2, p 26

there is a high risk of recurrence and that this may place [Ms Cresswell] at a high risk of developing other mental illness such as depression.

[100] However, I remind myself that:

(a) Care is needed before too readily transferring a parent's unhappiness and even desperation over the situation to a conclusion that a child faces an intolerable situation.[30]

(b) Short of evidence of suicide risk or psychosis, considerable care must be exercised before finding that a parent's mental health is such as to expose a child to the grave risk of physical or psychological harm on return, as the evidence on which such a defence is based is likely to be self-serving. [31]

(c) There is no evidence that [Ms Cresswell] has experienced that degree of mental illness.

(d) Wariness is necessary in respect of defences based on psychological fragility: [32]

> Is a parent to create the psychological situation, and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the convention, at least in respect of applications relating to young children.

(e) Despite the impact of previous stressors, [Ms Cresswell] continued to care for the children in France who, were by all accounts thriving. [Ms Cresswell] has continued to parent the children in New Zealand. [Ms Cresswell] sought therapeutic support after she had been in New Zealand for approximately 7 months, and after [Mr Roberts] began proceedings in France. Dr Macdonald's opinion notes that [Ms

[30] *LRR v COLL* at [63]
[31] *KN v CN* [2016] NZHC 2049 at [40]
[32] *KN v CN* at [44], *C v C (minor abduction: rights of custody abroad)* [1989] 2 All ER 465 at 471

Cresswell]'s symptoms have improved and does not suggest the need for either further counselling or medication.

(f) Martin Kelly notes that a deterioration in [Ms Cresswell]'s mental health may be anticipated but it is not a given, and that she may be more resilient than she credits herself.

[101] "Grave risk" and "intolerable" set a high threshold. I am not satisfied that the risk of a decline in [Ms Cresswell]'s well-being is such that there is a grave risk that the children's return would expose them to psychological harm or place them in an intolerable situation.

Ground three: Return means removal from both parents

[102] The third ground relied upon by [Ms Cresswell] is that [Mr Roberts] is unable to care of the children by reason of his business commitments for five months of the year, which would see [Amelia] and [Brigitte] cared for by their extended family, rather than either parent.

[103] [Mr Roberts] is a director of a [business], called [business name deleted]. This is based near his paternal family home at [French city C]. The busiest season for the business is between September and February. It is not in dispute that previously, the family lived at [French city C] for those months. In addition, [Ms Cresswell] has given evidence that the annual marketing plan for the business included attendance at a trade fair in [country deleted].

[104] [Ms Cresswell]'s concern is that those business commitments preclude [Mr Roberts] from caring for the children for 5 months of the year, and so if- [Amelia] and [Brigitte] return to France, then for that period of time they will be deprived of both parents, which would be intolerable or them.

[105] [Mr Roberts]'s response is that he has altered his business arrangements so he does not need to go to [French city C] as often, that he has provided evidence of this to the French Family Court, and should he need to go to the estate for a day or two, then his brother and sister-in-law would care for the children.

[106] The French Family Court accepted that evidence:

> Moreover, it emerges from the testimonies produced that notwithstanding the professional constraints, the father has organised himself to make himself available for his daughters.[33]

[107] The Applicant was the subject of criticism in Counsel's submissions for not putting the evidence that the French Court had considered, before the New Zealand Family Court. However, this decision is limited as to which jurisdiction will determine the post-separation care arrangements for these children. How a parent will manage work and care of children, is a factor in the long-term considerations. The French Court have assessed that issue and determined that [Mr Roberts] could care for the children despite his business commitments.

[108] [Ms Cresswell]'s concern also pre-supposes that she will not return to France if the girls return. Contrary to that, the evidence has been that she would follow them, and so presumably would be available to care for them on occasions when [Mr Roberts] could not.

[109] If [Ms Cresswell] does not return to France, then the French Court have assessed [Mr Roberts] has having made suitable arrangements. It is not unusual for any parent to rely on family support, and it is now these children have been raised; the maternal grandmother's evidence refers to occasions when she looked after the children in the absence of one or both parents while they travelled to trade fairs or on holiday in New Zealand.

[110] I do not agree that the return of the children to France means that they would be deprived of both parents.

Conclusion

[111] I am not satisfied on any of the three grounds argued by [Ms Cresswell] that to order a return would result in a grave risk that would expose the children to psychological harm, or otherwise place them in an intolerable situation.

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[33] Order of [French city A] Family Court, Bundle 1, page 70

[112] I make an order pursuant to section 105(2) of the Act that [Amelia] and [Brigitte] are to be returned to France.

[113] Mr Kelly recommended that the children's return be facilitated by [Mr Roberts] collecting the children from a neutral location with the ability for [Ms Cresswell] to see them shortly after that in France. Lawyer for Child supports an arrangement where [Ms Cresswell] takes the children back to France.

[114] The Christmas Season together with travel/border restrictions imposed because of COVID, may affect the return arrangements.

[115] I expect that [Brigitte] and [Amelia] are returned to the father in [French city B] on or before 31 January 2022, unless flights cannot be obtained in that time.

[116] I direct that [Mr Roberts] is to meet the cost of the children's travel to France, together with [Ms Cresswell]'s costs, if she is accompanying the children.

[117] I ask that Counsel file Memorandum recording the agreed arrangements for the children's travel so that I can confirm the discharge the order preventing removal and release the children's passports. The Applicant 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 motuhēhenga: 21/12/2021