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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT WAITAKERE

FAM-2017-090-000514
[2017] NZFC 10030

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ETENA KARLY] Applicant
AND	[ALEXANDRA KARLY] Respondent

Hearing:	11 December 2017
Appearances:	K Swadling for the Applicant Respondent appears in Person
Judgment:	11 December 2017

ORAL JUDGMENT OF JUDGE L de JONG
[Hague Convention - grave risk & child objection]

Introduction

[1] These parents are originally from New Zealand. They had one child together in NZ.[1] Around [dates deleted] they moved to Australia[2] where they had three more children together. The children are now aged 13 ½ ("child 1")[3], 9 ½ ("child 2"), nearly 8 ("child 3") and 4 ("child 4").

[2] Depending on which parent is believed they separated around December 2015 or April 2016 but continued to live under the same roof until about September 2016. The respondent mother says she was the children's primary care giver and struggled to cope with the separation.[4] She decided without reference to the father that it was best to relocate the children to NZ where she had family support.[5] They arrived in this country on [date deleted - mid] 2017.

[3] On arrival the mother obtained a without notice interim order[6] allowing her day to day care of the children on the basis the father could have contact as agreed by the parents. A without notice interim order was made at the same time preventing the children being removed from NZ. These orders were based on allegations the father was physically and psychologically abusive, and that he was addicted to Valium.

[4] When the applicant father found out the children had left Australia he rang the mother and tried without success to persuade her to return. He travelled to New Zealand in vain to halt the proceedings. In the meantime, the parents agreed to contact during the father's visit, and Skype contact with him in Australia, pending his application to return the children to Australia.

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[1] The mother has another child from a former relationship now aged about 10 who lives with his father in nz – paragraph 26 of father's affidavit dated1 August 2017.

[2] The father deposes they became permanent Australian residents sometime in 2009 but this is disputed by the mother.

[3] For the purpose of anonymising their names.

[4] She deposed that she was "devastated" by the separation and "became very depressed" – line 40 of mother's affidavit dated [date deleted - mid] 2017.

[5] The mother deposes that she sought legal aid advice in Australia and erroneously understood there was nothing preventing her from taking the children to nz.

[6] Issued on [date deleted – mid] 2017.

[5] The father has since applied to have the children returned to Australia by relying on the Hague Convention which deals with international child abduction. This convention is embodied in our Care of Children Act 2004.

[6] I have the benefit of affidavits the parties have both filed in the parenting and Hague proceedings, including an affidavit filed by the maternal grandmother and a counsellor.

What is the Hague Convention about ?

[7] When dealing with Hague Convention cases it is helpful to be reminded about why the Hague Convention was developed.

[8] There are probably two main reasons.

[9] First, it was introduced internationally in 1980 in response to a large number of children being abducted by their parents. American estimates at the time suggested 100,000 children a year were being abducted, mostly by their fathers.[7]

[10] The second main reason for developing the Hague Convention was due to the growing international concern about inconsistent way cases involving abducted children were being determined.

[11] The preamble to the Convention, and article 1, set out the principles and objects of the Convention. They include:

(a) the interests of children are of paramount importance.[8]

(b) children must be protected from the harmful effects of abduction.

(c) children must be promptly returned to the originating country.

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[7] By 1996 the trend changed to the extent that the majority of children are abducted by their mother.

[8] See s4(4)(a) – this does not limit the Court's ability to take into account matters other than the child's welfare and best interests due to, among other things, the Hague Convention provisions of the Act.

(d) the law relating to the rights of custody and access in the originating country must be respected in all other Convention countries.

[12] These principles and objects have been universally applied on the basis that

(a) the Court in the originating country is the most appropriate forum for determining the relative merits of custody and access disputes.

(b) once the grounds for an application for return have been made out the child must be returned to the originating country unless one of the s 106 defences has been made out.

What are the legal issues ?

[13] I note at the outset of this hearing that the mother appeared in person. What I was not previously aware was that she had filed a notice of change of representation on 27 November. This notice was filed in the wrong section of the file but recorded that her lawyer no longer acts for her. She explained to the Court today that she was unable to obtain legal aid and for this reason she appears in person.

[14] Although I have legal submissions on behalf of the father by a lawyer appointed by the New Zealand Central Authority, I did not have the mother's legal submissions. Enquiries with the registry found her submissions were filed on Friday morning by email.

[15] The mother's submissions are 60 pages long.[9] They include some material that has also already been filed but also new material such as an affidavit from Mr [Anae] dated 6 December 2017. I can safely say Mr [Anae]'s affidavit does not add anything to the legal issues I must address today. The mother's legal submissions also include reference to "evidence" that is not before the Court.

[16] The father must satisfy this Court on the balance of probabilities that each of four requirements set out in s 105 have been made out before an order returning the

[9] I read her submissions before the hearing proper commenced and went through them with her.

children to Australia can be made - *Hall v Hibbs* [1995] NZFLR 762 at 764; *H v H* (1995) FRNZ 498 at 50; *Basingstoke v Groot* [2007] NZFLR 363 (2006) 26 FRNZ 707

[17] I note from reading through the file, and received confirmation from the mother this morning, that the parties accept the four requirements of s 105 have been made out. This concession is entirely appropriate in the circumstances of this case. The reality of the situation is that the children were ordinarily living in Australia before they were taken to New Zealand without reference to the father or his legal rights, and he had been exercising his rights of custody.

[18] I must now order the children's return to Australia in terms of s 105(2) unless satisfied a s 106 defence has been made out.

[19] The mother relies on two defences set out in her notices of defence and referred to in Court documentation. However, today she raised a third defence pursuant to s 106(1)(e). It is her submission the children should not be returned because it is not permitted by fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms. I intend to deal with this defence in short measure.

[20] The mother relies on the fact the children do not have legal representation at today's hearing, that they are New Zealand citizens, and that they are Māori children who should be dealt with in New Zealand. None of these matters are grounds to support the defence.[10] Later in this judgment I will refer to the children's views and how they have been presented to the Court.

[21] The two main defences the mother particularly relies are, first, the s 106(1)(c) "grave risk" defence. The mother says there is a grave risk the children's return to Australia would expose the children to physical or psychological harm or otherwise place them in an intolerable situation.

[10] The fact of the matter is that the Australian family law system is very similar to New Zealand's. There is no discernible breach of the children's human rights or fundamental freedoms if the children are returned to Australia.

[22] The second is the s 106(1)(d) "child objection" defence. This defence involves the Court assessing whether the children object to being returned to Australia and whether the children have reached an age and degree of maturity where it is appropriate to give weight to their views.

[23] The onus is on the mother to satisfy this Court on the balance of probabilities that one of these two defences has been made out.

ISSUE 1 : IS THERE A GRAVE RISK TO THE CHILDREN ?

Introduction

[24] As mentioned already, the mother must satisfy this Court there is a grave risk the children's return to Australia will expose them to physical or psychological harm or otherwise place them in an intolerable situation – *Basingstoke v Groot* [2007] NZFLR 363; *HJ v Secretary for Justice* [2007] NZFLR 195.

[25] There are a cluster of principles that can be distilled from New Zealand and international case law relevant to our interpretation of the Convention when considering the grave risk defence including:

(a) the harm must be substantial, severe or significant – *Damiano v Damiano* [1993] NZFLR 549; *A v A* (1996) 14 FRNZ 348

(b) the grave risk must be substantial – see *Clarke v Carson* (1995) 13 FRNZ 662; [1995] NZFLR 956; *Damiano*.

(c) the grave risk must be associated with the "returning" of the child to the originating country, rather than into the hands of another parent – S v S[19099] NZFLR 513; Armstrong v Evans (2000) 19 FRNZ 609; [2000] NZFLR 984; KS v LS [2003] [2003] 3 NZLR 837; (2003) 22 FRNZ 716 as approved by the Court of Appeal in *HJ v Secretary for Justice* [2006] NZFLR 1005 in preference to *El Sayed v Secretary for Justice* [2003] 1 NZLR 349

(d) unless otherwise demonstrated, our Court can, on the face of matters, have confidence Family Courts in other Hague Convention countries have the "ability and inclination" to protect children, particularly if their legal system is based on "best interests" – see *Re E (a Minor) (Abduction)* [1989] 1 FLR 135; *Murray v Director Family Services* [1993) FLR 92--416; *S v S* [1999] NZFLR 513; *Hollins v Crozier* [2000] NZFLR 775; *KMH v Chief Executive of the Department of Courts* [2001] NZFLR 825

(e) the ability of the originating country to provide protection is likely to be a "highly relevant consideration."

(f) Hague Convention defences (and grave risk defence in particular) are by their very nature difficult to make out – *S v S* [1999] NZFLR 513; *KS v LS*; *HJ v Secretary for Justice* [2006] NZFLR 1017

(g) an abducting parent cannot rely on this defence by creating a situation of potential harm, such as refusing to return to the originating country with the children – *C v C* [1090] 2 All ER 465; *Clark v Carson* (1995) 13 FRNZ 662.

(h) while this defence is not to be used as a device to litigate best interests, this does not mean the assessment of risk is made without reference to the children's interests and circumstances – *KMH v Chief Executive of the Department of Courts* [2001] NZFLR 825.

(i) if the grave risk defence is made out the Court must exercise its residual discretion to determine whether or not the children should be returned to their originating country in accordance with principles identified in the obiter comments of the Supreme Court in *Secretary for Justice v HJ* [2007] 2 NZLR 289; [2007] NZ SC 93; [2007] NZFLR 195. See also *Smith v Adam* [2007] NZFLR 447 (CA).

What does the mother say about grave risk ?

[26] The mother alleges she experienced, and was distressed by, "all the domestic violence" she experienced at the hands of the father. After they separated the mother believes the father controlled her by "paying the rent on the house. He would not let me move anywhere else apart from that house."[11] She felt isolated and says she was not eligible for financial support because she was a New Zealand citizen and owned a property with the father in [Australian state deleted].[12]

[27] The mother alleges there were eight violent incidents, since May 2016, involving the father hitting her each time he came back from working away. She accepts they had arguments when they "both used physical force against one another"[13] but says she only hit out in self defence.

[28] Although the father never hit the children the mother deposes that "the children have seen [their father] choking me,[14] pushing me against the wall, pushing me on the bed and throwing me on the ground."[15] I note today the mother informed me the father had grabbed one of the children on one occasion. This is not supported by any evidence before the Court.

[29] The mother deposes that on the last violent occasion in March this year child 1 "came between us and tried to stop us fighting."[16] When the mother consulted Women's Refuge in Australia she claims they talked her out of applying for a protection order because it "could backfire and make more angry".

[30] It is the mother's view the children have been psychologically affected by witnessing the violence. She deposes that, of all her children, child 1 did not cope with the separation. Child 1 withdrew from her Australian sports teams "threatened to commit suicide," was "quite depressed about the conflict between us" and had four counselling sessions in Australia.

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[11] Paragraph 26 of her affidavit dated 2 October 2017.
[12] The mother informed this Court this is a rental property the parties still own together.
[13] Paragraph 37 of her affidavit dated 2 October 2017.
[14] At line 71 of her affidavit dated [date deleted – mid] 2017 the mother deposed that he put his hands around her neck "as if he intended to strangle me."
[15] *Ibid*. The mother also deposed at line72 of the same affidavit that he would "punch holes in walls, break furniture and kick and punch the car that I was driving away in."
[16] Compare this with line 45 of her [date deleted – mid] 2017 affidavit where she deposed to a violent incident in September 2016 when they had another fight and "he had thrown me on the ground in the laundry" but she made no reference to the latter incident involving child 1.

[31] It is against this background the mother says the children are settled in New Zealand and have good family support here.

[32] As a consequence of all this the mother says she is fearful to return to Australia because of the potential for violence and control. She says she has no support in Australia because her family support is in New Zealand. She has limited finances. She suggests that, at the very least, child 2 is scared of her father's anger and has not had contact with her father since May this year.

What does the father say about grave risk ?

[33] The father accepts "on occasion" they had "very serious arguments in which we both used physical force against one another."[17]

[34] What the father says the mother has not mentioned in any of her evidence is that she "abandoned" the children without explanation for about three weeks on one unspecified occasion.[18] He also deposes that the mother suffered with depression in the past, has attempted suicide in the last year and did not cope with the separation "despite my continued financial support."[19]

[35] In the father's view the mother's unilateral removal of the children to New Zealand was "deliberate and deceitful."

[36] The father deposes that he earns about $170,000 Australian per annum and pays $583 child support per month. He believes the mother is entitled to different forms of financial support in Australia, but he is able to care for the children if the mother elects not to return to Australia.

[37] No violence is acceptable, but if the most serious allegation of choking is true,[20] then this allegation would fall within the category of substantial, severe or significant harm contemplated by the Convention. However, I am not satisfied there

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[17] Paragraph 72 of father's affidavit dated 1 August 2017.
[18] Paragraph 7(d) of father's affidavit dated 24 July 2017.
[19] Paragraph 7(e) of father's affidavit dated 24 July 2017.
[20] It is not altogether clear from the evidence what happened. For example, see footnote

is a grave or substantial risk the children's return to Australia will expose them to physical or psychological harm or otherwise place them in an intolerable situation for the following reasons:

(a) the Australian Family Court system is very similar to ours and protective measures are available, if necessary.

(b) the father has not previously been arrested or made the subject of a protection order or exhibited any signs he would breach protection orders if imposed. While the Australian Women's Refuge may have discussed with the mother the risks of obtaining a protection order, I find it most unlikely they talked her out of applying for an order given the work this organisation does and well publicised Australian government action targeting family violence, particularly over the last 12 months.

(c) the mother agreed to the father having unsupervised contact with the children in New Zealand on a recent visit.

(d) the father has been paying child support and has offered to provide financial support to the mother and children in Australia.

(e) there is nothing in the children's interviews with their lawyer to suggest the children do not want to have contact with their father, except in relation to child 2 of whom I will address later.

(f) the mother has undermined the children's right to have a relationship with their father, and the father's rights of custody, by secretly removing the children to New Zealand.

[38] For these reasons, I find the grave risk defence has not been made out.

ISSUE 2 : IS THERE A VALID CHILD OBJECTION ?

[39] If a child objects to being returned to their country of habitual residence, the Court has a discretion to refuse an application for return if the child has attained an age and degree of maturity where it is appropriate to give weight to the child's views in the context of s 106(1)(d).

[40] The phrase "give weight to" replaced the phrase "take account of" on 1 July 2005 when the Guardianship Amendment Act was replaced by the Care of Children Act 2004.

[41] Chisholm J in *W v N* [2006] NZFLR 793 expressed a view that "this change in wording is cosmetic and does not fundamentally alter the interpretation that should be applied."

[42] On appeal[21] the Court of Appeal embarked on a thorough but unsuccessful search to understand why there had been a change in wording. Instead, the Court of Appeal drew an inference that Parliament was signalling a preferred approach as a means of overcoming conflict and confusion resulting from competing English Court of Appeal decisions.

[43] Since the *W v N* decision, s 106(1)(d) was amended further on 20 September 2007. The effect of this change is to introduce the need to "take account of" as well as "give weight to" the child's views in the context of their age and maturity.

[44] The English Court of Appeal in *Re R (Child Abduction: Acquisescence)*[22] in a judgment found, in a judgment delivered by Balcombe LJ, "taking account of views" is all about giving weight to them. In his view "[t]he older a child, the greater the weight; the younger the child, the less weight."

[1] This view was re-examined with approval in both *Zaffino*[23] and *Vigreux.*[24] This approach is sometimes referred to as the "shades of grey" approach. In *Zaffino*, Thorpe LJ found[25]:

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[21] Where *W v N* was rename by the Court of Appeal as *White v Northumberland* [2006] NZFLR 1105
[22] [1995] 1 FLR 716 at 731 & 735
[23] *Zaffino v Zaffino (Abduction:Children's views)*[2006] 1 FLR 410
[24] *Vigreux v Michel* [2006] EWCA Civ 630
[25] pp 418 & 419

> I am persuaded that, in the exercise of the discretion arising under Art 13 (possibly fortified by Art 18), the Court must balance the nature and strength of the child's objections against both the Convention considerations (obviously including comity and respect for the judicial processes in the requesting State) and also general welfare considerations. To suggest otherwise seems to me to risk artificiality in judgments in future cases.

[45] In New Zealand the Court of Appeal in *White v Northumberland* expressly favoured the Balcombe LJ shades of grey approach adopted by Chisholm J in *W v N*.

[2] The Court of Appeal also approved Chisholm J's four step approach when dealing with a child's objection. Relevant aspects of Chisholm J's High Court decision judgment include:

> `[46] On my analysis of the Authorities and the relevant statutory provisions consideration of a child's objection under s 106(1)(d) involves four issues:
>
> - Does the child object to return? If so;
> - Has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views? If so;
> - What weight should be given to the child's views? and;
> - How should the residual statutory discretion be exercised?

And then:

> [50] My conclusion is that if the Court reaches the view that it is appropriate to give some weight to the child's views, it would then to take the next step of determining the actual weight to be given to the child's objection so that that factor can be taken into account when exercising the residual discretion. It follows that I reject the rigid proposition advanced on behalf of the appellant that the obligation to recognise a child as a person in his or her own right means that it must give effect to the child's objection. Whether or not the child's objection prevails will depend on the circumstances of the particular case, including the weight the Judge ascribes to the child's objection.

And further:

> [57] All of this suggests that the relocation issue will have to be revisited, either in England or New Zealand. Despite the temptation to simply endorse the *"practicalities"* of the current situation on the basis that because C is in New Zealand and appears to have settled well it would be expedient for the matter to be resolved in this country, I believe that such an approach would be contrary to principle, not to mention the underlying purpose of the relevant

> statutory provisions and the Convention. The Family Court Judge seems to have reached the same conclusion. Given the history of the matter, particularly that C and his parents have habitually resided in England and are British citizens, I do not see how it could be responsibly concluded that the live issues involving C's best interests could be satisfactorily resolved in this country.

[46] Nothing in s 106 or article 13 points to an age a child is considered to have sufficient maturity. Clearly, as the convention applies only to children under the age of 16, the closer the child is to reaching 16 the more likely the Court is to consider the child has reached the appropriate level of maturity. As I say, this was supported by Balcombe LJ.

[47] How children's views are ascertained varies from jurisdiction to jurisdiction. In the UK a child is often interviewed by a Court welfare officer. In America children are often interviewed by a psychologist. In New Zealand sometimes children are represented by a lawyer, and interviewed by a Court appointed psychologist as well as the presiding Judge.

[48] In this case the need to appoint a lawyer for the children and a psychologist was considered and rejected by Judge Partridge on 27 September. Judge Partridge acknowledged two of the children[26] were attending counselling in New Zealand, one[27] had previously attended counselling in Australia, and that the children had a lawyer in respect of the mother's New Zealand parenting application.

[49] While the mother believed child 1's views had changed, Judge Partridge found the "children's views about Australia are articulated" and lawyer for child's 18 July 2017 memorandum "in their purest form."[28] She also found a psychological report was not essential to the proper disposition of the proceedings especially in light of an anticipated delay of up to five months to obtain such a report. All Hague Convention cases require priority and our Act refers specifically to this.[29]

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[26] Child 1 & child 2.
[27] Child 1.
[28] Paragraphs 10 & 11 of Judge Partridge's 27 September 2017 minute. I note that s6(1) does not include Hague Convention proceedings but the objection defence does require the views of the children to be presented to the Court in some form or rather. In this case the children's views have been presented by former lawyer for child, the mother and in letters written by two children.
[29] Section 107

[50] The issue of ascertaining a child's views in the wider context of the Act (in terms of s 6) and how those views are taken into account, has been the subject of much academic debate[30] and some judicial analysis.[31]

[51] On the meaning of "views," as opposed to "wishes," Professor Henaghan suggests

> ""Views" implicates a wider range of concerns than "wishes" which could be seen to be limited to what the child longs for rather than to try to understand how the child sees the situation from the child's point of view.

What amounts to an "objection" ?

[52] This Court must assess whether one or more of these children objects. An objection:

(a) must be stronger than a preference.

(b) is a question of fact.

(c) must be valid and reasonable.

(d) must be an objection to returning to the originating country.

[53] Child 1 is about 13 ½. Her views articulated to her Court appointed lawyer in relation to the parenting applications[32] are that:

(a) she had lived in Australia since she was [a baby] and was missing her Australian friends but was keeping in touch with them through social media.

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[30] For example, M Cochrane "Children's views and participation in decision-making" (2006) 5 NZFLJ 183; P Tapp "A child's right to express views: a focus on process, outcome or a balance" (2006) 5 NZFLJ 209

[31] For example, *C v S [Parenting orders]* [2006] NZFLR 745; *In re D (a child)* [2006] UKHL 51; *C v S [Care of children]* [2007] NZFLR 583; Judge J Doogue "A seismic shift or a minor realignment ? A view from the bench ascertaining children's views" (2006) 5 NZFLJ 198. See also unreported decision o*f AD v KT* 13/6/08, Rodney Hansen J, HC Tga, CIV 2008-470-43

[32] But against a background that the children had been unilaterally taken by their mother to NZ.

(b) she would like to return to Australia but "is making the best of what she is doing now."[33]

(c) she would be happy to stay with her father if he visited New Zealand and would prefer to see him with her siblings.

[54] Today the mother informed the Court by way of submissions that child 1 does want contact with her father but does not want to live in Australia because there is no home there for her.

[55] In my view child 1's views do not amount to an objection. Her views are more of a reflection of what has happened between her parents.[34]

[56] Child 2 is about 9 ½. When she met her lawyer she cried. The interview took place only about five weeks after her arrival in New Zealand. She was upset by "all the changes" the biggest of which was "moving."[35] She was not sure if she wanted to see or talk to her father and did not want to discuss it with her lawyer.

[57] In her submissions today the mother informed the Court that child 2 has not talked to her father since [month of leaving Australia deleted] and did not attend contact when the father visited New Zealand. It is the mother's submission that child 2 does not feel safe in the father's care.

[58] There is no evidence to support this submission. Even the counsellor's evidence does not go this far. Attached to one of the mother's affidavits is a letter she says was written by child 2 dated 7 September 2017. In this letter child 2 articulates that "I did not feel safe when my parents were fighting around me and my brother and sisters. I felt safe in New Zealand because I have the support" from her counsellor. The letter describes how she enjoys New Zealand.

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[33] Paragraph 21 of lawyer for child's memorandum dated 18 July 2017.
[34] As child 1 notes in a letter dated 7 September 2017 (attached to her mother's affidavit) "all I am saying is that I like it here [NZ] and so do my brother and sisters.
[35] Paragraph 27 of lawyer for child's memorandum dated 18 July 2017.

[59] On the face of matters child 2 was upset about the move to New Zealand, was unilaterally removed from Australia and her friends, was most probably affected by her mother's upset, and was highly likely conflicted about her relationship with her father. However, I am not satisfied there is an evidential basis for finding child 2 has a valid and reasonable objection to returning to Australia.

[60] In fact, I find child 2's views do not amount to an objection so far as the law is concerned. Even if I am wrong about this, I am not satisfied child 2 has attained an age and degree of maturity that is appropriate to give weight to her views or give much weight to them.

[61] In my view, child 2's welfare and best interests would be best served by both parents making joint decisions about her future, and failing agreement, the Australian Family Court is better placed to hear and determine evidence about her future care and contact arrangements.

[62] Child 3 is nearly 8. He is described today by his mother as happy go lucky and unsure what he wants. The mother's belief today is that child 3 is influenced by promises the father makes over the phone. There is nothing before me to suggest child 3 has a view that amounts to an objection.

[63] The mother submits child 4, aged 4, has separation anxiety. There is no evidence to support this or the mother's contention that three of the children sleep in the bed with her. It may well be three of the children sleep in the bed with her, but this raises concerns about the mother's role as a parent.

[64] There can be little doubt from what is before the Court that there has been a lot of tension and conflict within this family from at least March 2016, if not earlier. I am sure both parents, and the children, have been unhappy at times as a result of the tension, conflict and alleged violence. Child 2's letter dated 7 September is testimony to this.

[65] The mother struggled with the separation and, by her own account, felt depressed. It is very likely this has affected the children as well. Unfortunately, efforts

by the parents to resolve matters between them through counselling was unsuccessful.[36]

[66] Against this background the mother elected to uproot the children from their Australian life without reference to the father. It is completely understandable the mother saw relocating to New Zealand with the children as a way out of what she viewed was a miserable life. From what I can tell, the father does not dispute the mother's right to live in New Zealand, but he does dispute her unilateral decision to move the children far away to New Zealand with little prospect of meaningful contact.

[67] At the conclusion of this submissions hearing I indicated to the mother that I intended to make orders to return the children to Australia. I sought to clarify with her whether she intended to accompany them to Australia. She made it clear she intended to pursue other lines of inquiry including the use of a member of Parliament to change the law.[37]

[68] It was clear from what she told me that she does not intend to accompany the children to Australia. I suspect this may be because of the misguided belief the children will not go without her. The difficulty for the mother and children is that the grounds for each defence raised by the mother have not been made out. For this reason I have no alternative but to make an order for return of the children to Australia pursuant to s 105(2).

[69] What I plan to do is to make an order for the children's return forthwith and adjourn the proceedings to a judicial conference, by telephone if necessary, for the purpose of giving effect to the orders made today. Practical arrangements will need to be made for flights. It is with this in mind that the proceedings will be adjourned particularly as there is currently an interim order that prevents the children leaving New Zealand which will need to be discharged when the children leave New Zealand.

ORDERS & DIRECTIONS

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[36] Line 41 of mother's affidavit dated [date deleted - mid] 2017.

[37] The mother sought clarification about publishing details about this case and I explained that she is entitled to do this so long as this does not lead to the identification of the children in anyway.

[70] I make the following orders and directions:

(a) An order is made that the children are to forthwith be returned to Australia.

(b) I adjourn the proceedings to a date to be fixed, by telephone conference if necessary, for the purpose of giving effect to the orders made today.

(c) For publication purposes this decision may be referred to as *Karly v Karly*

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L de Jong
Family Court Judge