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[SQUARE BRACKETS].

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**IN THE FAMILY COURT
AT PALMERSTON NORTH**

**I TE KŌTI WHĀNAU
KI TE PAPAIOEA**

**FAM-2019-054-000027
[2019] NZFC 2180**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ALLAN HOLMES] Applicant
AND	[BEVERLY CARLSON] Respondent

Hearing: 20 March 2019

Appearances: J Logie for the Applicant
S Kiehne for the Respondent
B Alexander as Lawyer for the Child

Judgment: 4 April 2019

DECISION OF JUDGE D G SMITH

[1] The parties are the parents of [Larry Holmes] born in Australia on [date deleted] 2007

[2] On [date deleted] 2018 the respondent, Ms [Carlson], with [Larry] and two daughters of another relationship, left Australia and came to New Zealand.

[3] On 11 December 2018 the applicant, Mr [Holmes] made application under the Convention on Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (The Hague Convention) for the return of [Larry] on the basis he was wrongfully removed from or retained outside Australia.

[4] Ms [Carlson] filed a notice of defence on 23 January 2019 objecting to the return of [Larry] to Australia on the grounds:

- (a) that if he was returned to Australia he faces grave risk of harm or an intolerable situation; and
- (b) [Larry] objects to being returned to Australia.

A supporting affidavit was filed on 30 January 2019.

[5] Upon receipt of Ms [Carlson]’s notice of response, I directed that a lawyer for child be appointed and to report within 7 days.

[6] On 1 February 2019 following application by counsel for Ms [Carlson], I made a request of the [Australian location deleted – location A] Police to provide a copy of all documents on Ms [Carlson]’s police file including documents in relation to her involvement in the Domestic Violence and High Risk Unit, as soon as possible.

[7] The first call of the matter was on 5 February 2019. I granted Mr [Holmes] 14 days from receipt to file any response to any material from the [location A] Police. A psychologist’s report under s133 Care of Children Act 2004 was sought. The brief was solely on the issue of [Larry]’s maturity to be able to decide where he wishes to live and any factors which may be influencing him.

[8] Ms [Carlson] was required to clarify her statements as to the violence she stated she had suffered, to be filed within 7 days.

[9] On 13 February 2019 Ms [Carlson] filed an updating affidavit attaching the documents from her domestic violence file held by the [location A] Police.

[10] Mr [Holmes] filed an affidavit in response dated 21 February 2019.

[11] On 4 March 2019 I set the matter down for a two-hour submissions only hearing on 20 March 2019.

[12] There is no dispute by any of the parties or counsel that:

- (a) [Larry] is present in New Zealand;
- (b) [Larry] was removed from Australia in breach of Mr [Holmes'] rights of custody in respect of the child;
- (c) At the time of [Larry]'s removal those rights of custody were being exercised by Mr [Holmes], or would have been so exercised but for the removal; and
- (d) That [Larry] was habitually resident in Australia immediately before the removal.

Mr [Holmes'] evidence

[13] Mr [Holmes] attests to having a very close and supportive family with both his parents still living near him and his five siblings, some of whom he sees either daily or on a regular basis. Mr [Holmes] states [Larry] has regular contact with his [half-siblings] from Ms [Carlson]'s relationship with [Brian Carlson].

[14] After [Larry] was born, Ms [Carlson] and he came to an agreement that [Larry] would stay with him every second weekend as well as visits during the week for dinner. They had, he stated, agreed to share school holidays and Christmas. While this was an informal agreement, it was developed over the years around his shift work.

[15] While there is a dispute between the parties as to the date that Ms [Carlson] left her residence, Mr [Holmes] discovered that she had departed her residence when he went around to pick up [Larry] for his contact time with him.

[16] Mr [Holmes] contends he has cared for [Larry] on his own since he was very little, meeting his day to day needs. His time with [Larry] was, he says, fulfilling for the both of them with swimming, fishing and other activities. Mr [Holmes] claims he would always make sure that he had been to all [Larry]'s events at school such as fetes, concerts and parent teacher interviews when he has not otherwise had to work.

[17] Contact was made through Mr [Holmes'] sister who sent a text to Ms [Carlson] asking her to let [Larry] call Mr [Holmes]. Ms [Carlson] evidently replied that [Larry] would call Mr [Holmes] when they got settled.

[18] That Ms [Carlson] and [Larry] were in New Zealand was discovered when Mr [Holmes'] sisters saw posts on her Facebook enquiring about what accommodation was available in New Zealand.

[19] At the time that Mr [Holmes] made his application he had been unable to speak to Ms [Carlson].

[20] Mr [Holmes] claims the return of [Larry] to Australia would not expose him to any grave risk, neither physical or psychological abuse, nor would it place him in an intolerable situation. Mr [Holmes] claims that he has provided [Larry] with a secure and loving environment when he stayed with him. On his return to Australia [Larry] could live with him and he would be surrounded, he says, by his family and friends in [location A].

[21] Mr [Holmes] was not aware of any financial circumstances that would prevent Ms [Carlson] returning to Australia with [Larry].

[22] Mr [Holmes] claims that in and around March 2018 there was one incidence of family violence between Ms [Carlson] and him. His sister [Janice] had referred him to a Facebook exchange between Ms [Carlson]'s sister and [Robert Bishop]'s stepdaughter which indicated there had been a big argument between Ms [Carlson] and Mr [Bishop]. The post on Facebook referred to Ms [Carlson]'s ICE (methamphetamine) addiction.

[23] Mr [Holmes] says that when he dropped [Larry] back to his mother the following Monday he raised the Facebook post with her. He claimed that her face was gaunt, she looked pale and thin. He says that she began screaming loudly and was abusive towards him. He had never seen her react like that before. When he asked her to calm down she became more verbally aggressive towards him. She swung her fist out from behind a curtain and it landed heavily on the side of his head, striking him on the ear. He states he took her wrists and pushed her down onto the bed to try and restrain her. She was kicking and screaming, and he did have his hand on her neck at one point to try and subdue her. Ms [Carlson] would not calm down and he was concerned about the children hearing so he let her go and left the room. When he walked out of the house she followed him and picked up rocks from the driveway, and while screaming abuse at him started to throw them at the vehicle.

[24] The next day, he says, the police came to his house as Ms [Carlson] had reported that he had held her down and tried to strangle her. He states he was not charged with an offence, but he agreed to a protection order being put in place. He did this, he said, because he was trying to keep the peace and he thought the children had been through enough. The protection order was granted to Ms [Carlson] on 30 April 2018. That order is in place until 2023. [Larry] is listed on the order. The order does not prevent him from having contact with [Larry].

[25] Mr [Holmes] claims that he would be able to care for [Larry] if he was returned to Australia. That will enable him to live in a home with which he is familiar with a bedroom set up with his clothes and other belongings. He would be able to return to his school, have contact with his half-[siblings] and reconnect with other family members and friends. He can return to the [sport's club] club that he enjoyed and that he would be able to have contact with his mother either by telephone or other means, and visits.

[26] Mr [Holmes] says he has the support of a very close family, particularly [Larry]'s paternal grandparents and a good network of friends. One of his friends and he have been able to work together in the past to collect and look after children for each other when one of them has to attend something else. Mr [Holmes] expects that

arrangement with his friend would continue should [Larry] return to Australia and into his care.

[27] Mr [Holmes] raises grave concerns for [Larry] in the care of his mother:

- (a) He refers to Ms [Carlson]'s history of ICE use.
- (b) That [Larry] and the other children in her care have been exposed to domestic violence over many years particularly in the relationship between Ms [Carlson] and [Robert Bishop].

[28] Mr [Holmes] particularised the statements about domestic violence that [Larry] has been exposed to in the relationship between his mother and [Robert Bishop]. He says he is aware that Ms [Carlson] once stabbed [Robert] in the head with a file in front of the children. Secondly, in around June 2018 when he went to collect [Larry] from his mother's house there was a domestic violence incident between Ms [Carlson] and [Robert]. Ms [Carlson] had called him one night and told him to get "the f'ing c** out of my house". He says he could hear [Robert] yelling in the background and that he and Ms [Carlson] were fighting. When he went to pick up [Larry] he was in his bedroom and appeared to be scared and upset. He said that [Larry] was trying to block out the fighting by doing some colouring.

[29] Mr [Holmes] states that [Larry] was receiving counselling organised by domestic violence women's shelter before he left Australia.

[30] Mr [Holmes] claims that Ms [Carlson] has been diagnosed with a multiple personality disorder, mood disorder and bipolar and that this has impacted on her parenting of [Larry]. He says that at one stage when [Larry] was around three years of age she attempted suicide.

[31] Mr [Holmes] gives examples of other minor matters relating to Ms [Carlson]'s behaviour with [Larry] and others.

Ms [Carlson]'s evidence

[32] Ms [Carlson] had [three children] by her ex-husband [Brian Carlson]. They are aged between 18 and 26 years of age. The 26-year-old [child] lives in New Zealand, independent of [Ms Carlson]. One [child] lives with their father and the other [with a partner].

[33] Ms [Carlson] also has two daughters by her recent ex-partner [Robert Bishop]. [Brook] is around 8 years old. [Harley] is around 6 years of age. They accompanied Ms [Carlson] and [Larry] to New Zealand, apparently without the consent of Mr [Bishop]. There has been no application made by Mr [Bishop] in respect of [Brook] and [Harley].

[34] Ms [Carlson]'s evidence contradicts the evidence given by Mr [Holmes]. She states that she is opposed to [Larry] returning to Australia and one of the reasons is [Larry] does not want to go back. [Larry] has, she says, been exposed to severe domestic violence and whilst this was not primarily at the hands of Mr [Holmes], there has been abuse by Mr [Holmes] towards her.

[35] Ms [Carlson] claims [Larry] has become stressed and anxious about being forced to return to Australia.

[36] Ms [Carlson] also claims [Larry] would be at a grave risk or placed in an intolerable situation should he be forced to return. She says that she is unable to return due to concerns for her safety. She was relocated by the Domestic Violence High Risk Unit. Victim Assist paid for the children and her to relocate. She has sought confirmation from the Domestic Violence team as to their involvement but that had not been received at the time of hearing.

[37] Ms [Carlson] states she was beaten up every six to eight weeks by [Robert Bishop], notwithstanding there has been a protection order in place. The children were exposed to this. Her relocation was so that she could get away from the ugly environment that was caused by Mr [Bishop] and Mr [Holmes]. She said she was classed as high risk with the [location A] Domestic Violence Team. She says that even since leaving she has received threats from Mr [Bishop] about her going on "a boot ride".

[38] Ms [Carlson] states:

Simple sending [Larry] back to Australia to live with [Allan Holmes] and for me to stay in New Zealand is not an option. [Allan] is in no way capable of having [Larry] full time. He is an ice addict, has very little parenting skills and I would be worried for [Larry] should he be in [Allan]'s care for any extended period of time. [Allan] rarely managed a weekend of care for [Larry]. On one occasion that [Larry] did stay at [Allan]'s he gave [Larry] a 500 ml Panadeine Forte and I found [Larry] alone and lethargic. [Allan] was nowhere to be seen even though he was meant to be caring for [Larry].¹

[39] Ms [Carlson] says a lot of what Mr [Holmes] has said in his evidence is either untrue or not in context. Ms [Carlson] says that Mr [Holmes] and she were never in a relationship as such, they were more friends with benefits. That ended after Mr [Holmes] caused her to go into premature labour by pushing down on her belly repeatedly. She says he tried numerous times to encourage a miscarriage by physically abusing her, forcing her to have sex and putting stress on her by constant verbal abuse.

[40] Mr [Holmes] was also violent to her while she was not pregnant, and a protection order was obtained.

[41] She states that [Larry] never went to Mr [Holmes] or had contact for the first two years. Contact, she says, has never been consistent and that Mr [Holmes'] attitude has always been he will see [Larry] as and when he wants.

[42] Ms [Carlson] says that while Mr [Holmes] may say the arrangement is flexible this was only due to him not sticking to any agreement. When Mr [Holmes] had [Larry] he would often palm him off, so he could socialise. Contact was meant to start on a Friday but more often than not he would not turn up until Saturday.

[43] Contrary to Mr [Holmes'] evidence Ms [Carlson] says that Mr [Holmes] has never been interested in what [Larry] was doing, he has not attended any events at school, he would tell [Larry] that he was picking him up from school only to leave him sitting there wondering what was going on.

¹ Paragraph 14, affidavit 30 January 2019.

[44] Ms [Carlson] finds it ironic that Mr [Holmes] has accused her of having an addiction to ice. He has, she says, a longstanding problem with that drug.

[45] As to Mr [Holmes'] evidence that in March 2018 there was one incidence of family violence between them, Ms [Carlson] says that is not true. She attaches as an appendix the Facebook post to which Mr [Holmes] referred. The post annexed make no reference to Ms [Carlson] having a drug problem but does of Mr [Holmes]. She felt that she did not have to justify herself because she knew that she did not have a drug addiction problem.

[46] On the March 2018 occasion, she says, Mr [Holmes] nearly strangled her to death. She says that he did not put his hand around her neck to try and subdue her, he was trying to hurt her. The Domestic Violence Unit has pictures of the bruising and other injuries that she says that she suffered at the hands of Mr [Holmes]. "He dragged me backwards through a doorway, he was so rough with me that he caused speakers and other furniture to fall over". The incident which Mr [Holmes] referred to as the domestic violence between Mr [Bishop] and her, she says, occurred in June 2017 when the children were sleeping. Mr [Bishop] began to hurt her, and she says there was a metal craft file within reach and she picked it up to try and defend herself. The children were not, she states, present.

[47] She also disputes the matters referred to by Mr [Holmes] as occurring in June 2018. She says the children and her had been to a safe house the night before because of Mr [Bishop]'s violence. They returned home because they had animals needing care. Mr [Bishop] turned up at the house and the children were in their rooms. Mr [Bishop] was going on about Mr [Holmes]. It was not Mr [Bishop] and her fighting, she says, but more that he had an issue with Mr [Holmes]. He would not leave. She did as Mr [Holmes] attests, ring Mr [Holmes] and told him to come around. Mr [Bishop] was yelling in the background, she says, but it was not at her, it was at Mr [Holmes] telling him to get around to the house. When Mr [Holmes] arrived, the two men went to have a go at each other. Ms [Carlson] says she told them they were not fighting in her house and they needed to get out and later they walked down the driveway abusing each other. Later Mr [Holmes] came back and told [Larry] he was

going with him. Mr [Holmes] took him to school the next day but then failed to turn up to collect him and school then contacted her.

[48] The counselling that [Larry] was receiving, Ms [Carlson] said, was organised by her. Mr [Holmes] was complaining continually about [Larry]'s attendance at the counselling. He did not understand why [Larry] needed to go. He was not, Ms [Carlson] says, the supportive parent he is trying to portray.

[49] Ms [Carlson] accepts that she was diagnosed in her 20s with a borderline personality disorder. Mr [Holmes], she says, has for years called her 'mental'. She was on medication which she was able to stop about three years ago, but she is back on it now due to the stress of the situation caused by Messrs [Bishop] and [Holmes].

[50] Ms [Carlson] accepts that it is correct that [Larry] was removed from her care on one occasion in [month deleted] 2013. She underwent intensive DDT therapy through the Mental Health Unit and the children were returned to her care in nine weeks. There has not, she says, been anything further of this nature since. She has no knowledge or dismisses the other minor matters that Mr [Holmes] has referred to.

[51] She denies that she moved to New Zealand to pursue a relationship with anyone that she has met online. She says she came to get away from the violence. She is not in a relationship.

[52] In an updating affidavit dated 13 February 2019 Ms [Carlson] makes it clear that the physical violence that she suffered was primarily from [Robert Bishop]. The last time that Mr [Holmes] was physically violent towards her was in 2017 when he tried to strangle her as previously set out. The other violence was when she was pregnant with [Larry] as above.

[53] She says that the physical abuse that she received from Mr [Bishop] occurred every six to eight weeks, notwithstanding the protection order. She cannot return and subject herself to further abuse from both Mr [Holmes] and Mr [Bishop]. To her affidavit she has attached her domestic violence file from the [location A] Police. That

details the incidents that have been reported are predominantly due to Mr [Bishop]'s actions but also includes the strangulation incident in 2017 with Mr [Holmes].

[Larry]'s views

[54] [Larry]'s views have been obtained both by the lawyer for child and through the report from Kevin Garner the clinical psychologist engaged to complete the s 133 report.

[55] Lawyer for child reports [Larry] presents as intelligent, articulate, thoughtful and mature for his age.

[56] As to his life in [location A], [Larry] stated he did not really like the town they lived in as there was nothing to do there. It was very hot, and you could not stay out in the heat for very long. He denies that he knows everyone, as his father stated, but accepted that he was welcoming and friendly to people wherever he is.

[57] [Larry] identifies half siblings both in New Zealand and Australia as his family.

[58] As to his father, [Larry] claimed he had never lived with his father but went to him on weekends and some weeks in the school holidays. He stated to Ms Alexander, lawyer for child, that his father would often ship him off to his friends so that his father could go out and drink. He did stay over at his father's sometimes but said that when his father got home he would send him to bed sometimes without dinner. He claimed that his bed was an old wooden bed with a sheet on the bottom, a pillow and a sheet on the top. He was pleased when his paternal grandmother gave him a sleeping bag for Christmas, so he could take it to his father's and not be cold. He said that he often got bruises from the old springs in the bed.

[59] Evidently this has not been discussed with Mr [Holmes] because in [Larry]'s view his father would have been angry.

[60] When asked whether his father's reactions of anger happened often he described to Ms Alexander of being hit by his father with a jandal when he was three, when he was nine being hit once on the back for not being able to answer a hard maths

question, and once with his father's belt when he complained about being hot and itchy in his father's house. [Larry] is apparently allergic to dust. He also complained to Ms Alexander that his father would get angry with him if he could not do a homework problem.

[61] As to the positive aspects of his father he related getting a bike for his birthday but said that was the only time he bought a new bike as previously he had been given old repaired bikes. He also saw as a good thing getting his [dog]. Losing [his dog] has obviously been a big concern for [Larry]. He is worried that [his dog] will not be looked after properly. He also misses his pet birds.

[62] [Larry] knew of his mother's plans to come to New Zealand and that it was because of the domestic violence occurring in Australia. He related that he and his siblings would see their mother bleeding, being hit and held down. [Larry] recalls waking up to find his mother being held down by [Brook] and [Harley]'s father, ie [Robert Bishop] (who was also holding a hand over her mouth). He said incidents such as that happened for all of his [sibling]'s lives. He was clear that most of the violence was from Mr [Bishop] but said there was an incident when his father had tried to choke his mother. It is apparent that he did not personally witness that incident, but he said he heard the row and that he kept his [sibling] upstairs.

[63] [Larry] said these incidents made him feel annoyed, scared and worried about his mother. He did not like her being alone in the house. He did not have any faith in the ability in the police to keep his mother safe.

[64] [Larry] was clear that he objects to going back to Australia "100 percent". He advised Ms Alexander that he was happy and excited of the thought of coming to New Zealand and starting a new life. He said his mother is not getting yelled and screamed at now and is a lot happier. He believes there is a lot more for him to do here and he has been enjoying time with New Zealand relatives and friends.

[65] [Larry] misses his [siblings] in Australia but he believes that they will be able to visit. His maternal grandmother lives in New Zealand. He denied that he saw much of his father's family in Australia. He said he would mostly go to his father's mother's

place for a swim. He denied that his father had ever attended any school events. He did acknowledge that his father sometimes went to [sports] with him but added that he used his involvement with [sport] against his mother because his mother did not contribute towards the cost.

[66] [Larry] advised there were a few things at his father's house to play with but said he always had to take clothes to wear from his mother's house because anything his father had was too small.

[67] Notwithstanding the views that he expressed about his father [Larry] was willing to return to Australia for visits provided he could be allowed to remain living here. He said that he had spoken to his father a few times on the telephone since he arrived.

[68] As Ms Alexander comments in her first report, some of the matters [Larry] talked about in his interview with her were matters of which he would not have any personal knowledge, for example, he talked about his father trying to kill him while he was still in his mother's tummy by trying to push on her stomach.

[69] In Ms Alexander's view given [Larry]'s age, level of maturity and understanding, considerable weight should be given to his wishes in determining this matter.

[70] Mr Kevin Garner, a clinical psychologist, interviewed [Larry] on 22 February 2019 over a period of one and a half hours.

[71] In his report he relates a number of matters which have been referred to by Ms Alexander in her report. He asked [Larry] to describe domestic violence. [Larry] advised: "Mum got hit by [Robert] and [Allan]". [Larry] advised Mr Garner that he would commonly hear arguing and raised voices or swearing although he cannot recall actually seeing physical violence. He recalls his mother with bruises on her neck, arms and fingers.

[72] When asked about his father [Larry] indicated that everything was unfair, that his father would eat ice cream in front of him, that he would go out drinking and smoking, be angry for no reason, slouchy, grumpy and rude.

[73] [Larry] expects that if he had to go back to Australia he would live with his father. His mother has offered that he could go back, but he does not want to. He advised that he would feel sad and miserable back there and he would be uncared for. [Larry] says that his mother is smart, clever, amazing and lovely; the mother that everyone should have.

[74] Mr Garner said that [Larry] had a firm handshake, confidently looked him in the eye and spoke easily and fluently. He appeared to Mr Garner to be a well-rounded boy, very grounded and mature.

[75] [Larry] advised that he told his father by phone that he wants to remain in New Zealand and he does not understand why his father has tried to stop him. Despite that he is sure that he could go back and stay with his father for holidays.

[76] Mr Garner states:

In my opinion [Larry] is sufficiently mature to understand the factors that have led to him expressing the views that he has, to understand the implication of expressing those views and of them coming to fruition. He is capable of having independent views that represent his interests and needs as he understands them. I believe that significant weight ought to be given to his expressed wishes.²

[77] Mr Garner, as does Ms Alexander, notes [Larry] clearly regards his mother and his [two siblings] as his primary family unit. Mr Garner thinks that one of the major underlining factors influencing [Larry] is that he has difficulty managing being apart from his mother and [siblings]. His mother has been his stability and security. Another factor is that [Larry] does not believe that he would be adequately cared for by his father and he would be worried about his own safety. That last concern is not based on his own experiences but the experience of the type of behaviour which his father is capable of.

² Paragraph 19 of s133 report.

[78] [Larry] has a sense of excitement and adventure about living in New Zealand which may also be influencing him. The final matter that Mr Garner notes is that [Larry] has become accustomed to worrying about and attempting to protect his mother. Mr Garner thinks he would worry about her if he lived apart from her.

The law

[79] Subpart 4 of the Care of Children Act 2004 (COCA) relates to International Child Abduction. The purpose of the subpart is to implement in New Zealand law The Hague Convention.

[80] The Hague Convention in its preamble and Article 1 set out the principles and objects of the Convention and include that the interests of children are of paramount importance, children must be protected from the harmful effects of abduction and children must be promptly returned to the originating country. The law relating to the rights of custody and access in the originating country must be respected in all other Convention countries.

[81] The principles and objects are applied on the basis:

- (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 defences (contained in our s106 COCA) has been made out.

[82] The process for the application to return a child is set out in sections 102-104 COCA. The sections relevant for determination of the application are ss 105 and 106.

105 Application to court for return of child abducted to New Zealand

- (1) An application for an order for the return of a child may be made to a court having jurisdiction under this subpart by, or on behalf of, a person who claims—
 - (a) that the child is present in New Zealand; and

- (b) that the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and
 - (c) that at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and
 - (d) that the child was habitually resident in that other Contracting State immediately before the removal.
- (2) Subject to section 106, a court must make an order that the child in respect of whom the application is made be returned promptly to the person or country specified in the order if—
 - (a) an application under subsection (1) is made to the court; and
 - (b) the court is satisfied that the grounds of the application are made out.
- (3) A court hearing an application made under subsection (1) in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a court of that State, or a decision of a competent authority of that State, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that State, and may adjourn the proceedings for that purpose.
- (4) A court may dismiss an application made to it under subsection (1) in respect of a child or adjourn the proceedings if the court—
 - (a) is not satisfied that the child is in New Zealand; or
 - (b) is satisfied that the child has been taken out of New Zealand to another country.

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.

[83] As stated in paragraph 12 above it is not disputed the four requirements of s105(1)(a) to (d) have been established.

[84] Ms [Carlson] relies on s 106(1)(c) and (d) as her defence to the application. The onus is on her to establish those grounds of objection.³

³ See *Basingstoke v Groot* [2007] NZFLR 363; *HJ v Secretary for Justice* [2007] NZFLR 195.

Is there a grave risk that [Larry]’s return would expose him to physical or psychological harm or would otherwise place him in an intolerable situation?

[85] Case law has established:⁴

- (a) The harm must be substantial, severe or significant.⁵
- (b) The grave risk must be substantial.⁶
- (c) The grave risk must be associated with the “returning” of the child to the originating country, as opposed to return into the hands of the other parent.⁷
- (d) Our Courts can have confidence the Family Courts in other Hague countries have the ability and inclination to protect children, particularly if their legal system is based on “best interests”. There can be no argument that is the situation with Australian Family Courts (and is acknowledged by Ms Kiehne, counsel for Ms [Carlson], in her submissions).
- (e) An abducting parent cannot rely on the grave risk defence by creating a situation of potential harm, such as refusing to return to the originating country with the children.⁸
- (f) If the grave risk defence is made out, the Court must exercise its residual discretion to determine whether the child should be returned to the originating country by the principles identified in the obiter comments by the Supreme Court in *Secretary for Justice*.⁹

⁴ I acknowledge the assistance of Judge de Jong by way of his decision in *Karly v Karly* [2017] NZFC 10030 for the following summary of case law.

⁵ See *Damiano v Damiano* [1993] NZFLR 549; *A v A* (1996) 14 FRNZ 348.

⁶ See *Clarke v Carson* (1995) 13 FRNZ 662; [1995] NZFLR 956; *Damiano*.

⁷ See *Armstrong v Evans* (2000) 19 FRNZ 609; [2000] NZFLR 984; *KS v LS* [2003] 3 NZLR 837; (2003) 22 FRNZ 716 as approved by the Court of Appeal in *HJ v Secretary for Justice* [2006] NZFLR 1005.

⁸ See *C v C* [1989] 1 All ER 465; *Clark v Carson* (1995) 13 FRNZ 662.

⁹ *Secretary for Justice v HJ* [2007] 2 NZLR 289; [2007] NZSC 93; [2007] NZFLR 195.

[86] Ms Alexander, lawyer for child, submits:

There is some support on the psychological report obtained by the Court under s 133 for the purposes of these proceedings for an argument that a return to Australia would expose [Larry] to psychological harm. He has always lived in the day to day care of his mother and regards his mother and sisters as his primary family unit. His mother has been his stability and security. I understand the mother's position to be that she will remain in New Zealand regardless and therefore a return to Australia would result in [Larry] being separated from her and his [siblings] and moving to live with his father who [Larry] sees as unsafe and not someone who will provide adequate care for him.

[87] It was submitted however that the potential harm to [Larry] in that situation is unlikely to reach the threshold of grave risk required by s 106(1)(c), it is more relevant to the issue of general welfare discussed later in the submissions.

[88] Ms Kiehne, counsel for Ms [Carlson] accepts that to establish a defence under s 106(1)(c) that there is a high onus on Ms [Carlson] that needs to be met.

[89] Ms Kiehne submits that the situation [Larry] would be returning to needs to be considered. She relies upon *COL v LRR*.¹⁰ Simon France J at para [23] said that:

As a starting point, I suggest that some focus is needed on the situation that is likely to exist upon return and which is said to be intolerable. If it is ordered that the child be returned to his home country, what will be the situation to the medium short term.

[90] Ms Kiehne submits that the context for [Larry] would be:

- (a) He would move into the care of his father for an unknown period. This would be a new situation for him. Both parties have recognised that [Larry] has been in the primary care of his mother, this is the only arrangement he knows. There is dispute in the evidence as to the role Mr [Holmes] played in [Larry]'s life prior to removal.
- (b) There are risks identified by the mother for [Larry] in the father's care. These are yet to be tested. Although there are counter allegations of risk, these do not appear to be new and the father has not taken steps

¹⁰ *COL v RR* [2018] NZHC 2902 [8 November 2018].

previously to have these addressed by the Court in Australia. Therefore, it could be argued that in the father's view his concerns were not at a level that he felt warranted Court intervention.

- (c) [Larry] will be leaving his half siblings behind. Ms Kiehne refers to *Azoulay v Nelson*¹¹ where His Honour Judge Walsh referred to Associate Professor John Caldwell's paper "The Hague Convention and the 'Child Objection' Defence" 2008 and the statement at page 29,

"The need to keep siblings together, by way of either ordering or declining the return of the children as a collective group, has often weighed heavily with the Courts."

[91] As Ms Kiehne points out, there is no application to return [Larry]'s siblings. They will remain in New Zealand. As Mr Garner has noted his mother and [two siblings] are his primary family unit and separation from them would, Ms Kiehne submits, be extremely difficult for [Larry]. Contact between [Larry] and his mother and siblings would be significantly reduced for an unknown time and [Larry] would worry about his mother if apart from her. [Larry] has a perception that he would not be safe in his father's care. Whether that is reality is yet to be determined but with that perception a return would be, it was submitted, unnecessarily stressful to him.

[92] Ms Kiehne also submits that the length of time it would take to have this substantive matter dealt with in Australia is a factor in her submission. She accepts that The Hague Convention cases are about appropriate forums rather than the merits of each party's case. Given that he is settled in New Zealand, Ms Kiehne was of the view that a determination of matters could be dealt with in these Courts far more quickly than Australia.

[93] I am unable to accept that submission. As set out above the primary thrust of The Hague Convention is the determination of forum. By entering into the Convention, the contracting states have accepted that the legal systems of the country

¹¹ *Azoulay v Nelson* [2017] NZFC 7713.

they are contracting with are sufficiently robust to deal with matters such as this in a time that is acceptable.

[94] Ms Kiehne relies on *Pollastro v Pollastro*¹² where the Court declined to return a six-month-old child against the background of domestic violence on the basis the child's "interests are inextricably tied to her [mother's] psychological and physical security" even though the Court system of the habitual residence had the ability and mechanisms to protect the mother against further violence. The Court there found that returning the child to a violent environment placed the child in an inherently intolerable situation and exposed it to a serious risk of psychological and physical harm. Ms Kiehne submits that is the case for [Larry].

[95] Mr Logie, counsel for Mr [Holmes], referred the Court to *Mikova v Tova*¹³ a decision of Palmer J. At para [35] His Honour stated:

[35] Several points about the interpretation of this section are relevant here:

- (a) The legal focus is on the risk to the child who has been abducted, not on the risk to the abducting parent.
- (b) The psychological harm, to which there must be a grave risk that a child would be exposed, must be substantial and more than merely transitory. The standard is high and stringently tested.
- (c) A grave risk of being exposed to an "intolerable situation" is not the same as being exposed to physical or psychological harm since it is qualified by "otherwise". For example, it may include a grave risk of substantial deprivation of other necessities of life or of breach of other human rights.

[36] Article 13 and s 106 have been applied in a variety of cases in the New Zealand courts. Tipping J for a majority of the Supreme Court in *Secretary for Justice v HJ*¹⁴ has observed statements in judgments and other writings about one ground for refusing return of a child should not be applied automatically to other grounds and that general statements about such grounds should be treated carefully, recognising their generality. That said, Tipping J also stated:

"... all the exceptions must be approached with an understanding of their shared context, within a Convention that has the general purpose of deterring child abductions.

¹² *Pollastro v Pollastro* [1999] 171 DLR (4th) 32.

¹³ *Mikova v Tova* [2016] NZHC 1983.

¹⁴ *Secretary for Justice v HJ* [2006] NZSC 97, [2007] 2 NZLR 289 at para [39].

That is achieved by ensuring prompt return in cases where no ground to refuse return is established.”¹⁵

[37] As noted above, s 4 concerns the “paramountcy principle” that the welfare and best interests of the child must be the first and paramount consideration. But s 4(4)(a) states that section “does not limit” subpart 4 of Part 2. In *Secretary for Justice v HJ* the Supreme Court considered, when no ground for refusing to order return can be invoked, the court’s duty to order return is not “limited” by what is best for the individual child and a court is not concerned with the merits of any underlying custody dispute or the reasons which prompted the child’s removal.¹⁶

[96] At para [39] Palmer J stated:

The relevant question is whether a New Zealand court is satisfied that the system of applying and enforcing laws in the country of habitual residence of an abducted child is so defective that it is likely to fail to prevent grave risk of the child of being exposed to physical or psychological harm or from being otherwise placed in an intolerable situation. If so the court has a discretion to refuse to make an order for the child’s removal under s 106(1)(c). But establishing that will not be an easy task. No court has done so in New Zealand, yet.

[97] Mr Logie also referred the Court to Simon France J’s statement in para [24] of *Col*:

I consider it important to recognise the home country here being talked about is Australia which has a Family Court system and structure similar to ours and which is governed by the same principles. It is a short distance away and its systems afford no basis for any hesitation by a New Zealand court about order return.

[98] In *B v B*¹⁷ Doogue J stated:

He directed himself to the three possibilities which were put to him on behalf of the appellant.

The first of those was that it would be psychologically harmful to the children if they were separated from their mother. Understandably that possibility has not been put at the forefront of the appellant’s submissions before me as the cases make clear that it is an inevitable consequence in respect of Hague Convention cases that there is likely to be harm to a child as a result of separation from the parent having primary care.

¹⁵ Ibid at [40].

¹⁶ Ibid at [5]-[7] (Elias CJ), [48] (Tipping J for the majority) and [123] (McGrath J).

¹⁷ *B v B* [1994] NZFLR 497 at [509].

Analysis of evidence

[99] I acknowledge that in a submissions only hearing made on the affidavits filed by the parties and without the benefit of seeing the witnesses and having cross examination, that it is often difficult to make determinations of factual matters.

[100] Notwithstanding the above statement there is sufficient commonality in the evidence of both Mr [Holmes] and Ms [Carlson] to determine that:

- (a) Ms [Carlson] was in a violent relationship with Mr [Robert Bishop].
- (b) That there had been at least one incidence of reasonably serious physical violence between Mr [Holmes] and Ms [Carlson] in 2017.
- (c) That Mr [Holmes'] continued involvement with his son [Larry] and therefore with Ms [Carlson] was a source of irritation to Mr [Bishop] and in itself led to further abuse on Ms [Carlson].
- (d) That [Larry] was in a position of suffering from the abusive relationship his mother was living in.
- (e) That Ms [Carlson]'s actions in removing her two [children] and [Larry] from her relationship with Mr [Bishop] was a sensible course of action in itself. That could have been done within [location A] or Australia as a whole. Ms [Carlson] did not need to come to New Zealand to achieve that objective.

[101] The position that [Larry] is placed in were he to return to his father is:

- (a) He may have some minor physical discomfort in terms of the facilities that his father provides to him.
- (b) He will find it stressful to be separated from his mother and his [siblings].

[102] I accept the submission from Ms Alexander, lawyer for the child, that the potential harm to [Larry] in that situation does not reach the threshold of grave risk required by s 106(1)(c) and is more relevant to the issue of general welfare.

[103] As Mr Logie submits there is no independent evidence that Mr [Holmes] has abused or in any way harmed [Larry].

Is there an intolerable situation?

[104] Again, what must be evaluated is the effect of a return on the child. Intolerable, when applied to a child has been defined as “a situation which this particular child in these particular circumstances should not be expected to tolerate”¹⁸

[105] I accept the submission of counsel for Mr [Holmes] that:

Factors creating and contributing to an “*intolerable situation*” for a child are not necessarily restricted to the potential for the psychological, physical or sexual abuse. There may be environmental factors such as poverty, poor housing, school violence or bullying or risk to the child’s safety or physical or mental health.¹⁹

[106] Simon France J in *COL* considered the approach to be taken in assessing whether a particular set of circumstances would amount to an “intolerable situation”.

[107] His Honour assessed the facts of that matter with respect to the child. At para [31] he stated:

Care is needed before too readily transferring M’s unhappiness and even desperation over the situation to a conclusion that the child faces an intolerable situation. Although that may seem harsh, it is the Convention and the Act’s focus as it seeks to deter child abduction.

[108] As in *COL*, the following can be said:

- (a) If Ms [Carlson] cannot herself tolerate the situation, there is no evidence before the Court to say that Mr [Holmes] cannot care for [Larry]. The primary risks are to her, not [Larry].

¹⁸ *Re D (A Child), (Abduction: Rights of Custody)* [2006] 3 WLR 989.

¹⁹ Brookers Family Law – Child Law 1 – CC 106.23.

- (b) Ms [Carlson] will not be required to live with Mr [Bishop] (or even Mr [Holmes]). There are non-violence orders in place in respect of both.
- (c) [Larry]'s long term situation is likely to be before the Family Court in Australia in a relatively short time frame.

[109] I do not consider that Ms [Carlson] has discharged the onus to establish that there is a grave risk that [Larry] would be in an intolerable situation if he had to return to Australia.

[110] The defence under s 106(1)(c) therefore fails.

[Larry] having objected to being returned, what weight should be given to his views?

[111] To determine the objection under s 106(1)(d), a determination of [Larry]'s maturity, coupled with his age, needs to be made.

[112] Mr Garner describes [Larry] as very grounded, mature, independent, socially resourceful and confident. He was of the view, for the reasons expressed above, that significant weight should be given to [Larry]'s expressed wishes.

[113] Mr Logie made the point in submissions that Mr Garner was not requested in his brief to determine whether weight should be given to [Larry]'s wishes. Mr Logie is correct, but the statement made by Mr Garner is a consequence of the matters he was asked for in the brief. This is not a case of an expert determining the issue before the Court as I take Mr Garner's evidence as his view, based on his experience, as one of the factors in coming to my own conclusion concerning [Larry]'s maturity and the weight to be given to his views.

[114] Ms Alexander's submission was that there was ample evidence available that [Larry] has reached the required threshold.

[115] Ms Kiehne refers to *Azoulay v Nelson*, where His Honour Judge Walsh considered the paper of Associate Professor John Caldwell when considering age and maturity factors.²⁰ It was stated:

There is no halfway house; the child is either of a sufficient age and maturity to have his/her views taken into account, or he/she is not. The question of the child's maturity is obviously a matter of judicial judgment that needs to be formed on an individualised basis.

[116] Professor Caldwell noted the Court would have regard to non-statutory factors relating to the rationality and cogency of the child's views and the independence of the child's views. As to the strength of the child's views, such strength nevertheless remains relevant and the question of weighting under the third step proposed by Chisholm J in *W v N*,²¹ see below at [128]. Professor Caldwell considered the forcefulness of the child's views would, along with matter of cogency and independence, be part of the ultimate discretionary mix.

[117] The evidence of both Mr Garner and the report from the lawyer for child are almost identical in their observations of [Larry]. Although not yet 12, he is presented as a confident, articulate and rational young man who is of an age and degree of maturity at which it is appropriate to give weight to his views.

[118] Mr Garner found that [Larry] had sufficient maturity to understand the factors that had led him to express the views that he has and to understand the implication of expressing those views.

[119] In the High Court, William Young J, as he then was, in *B v C* stated:²²

When a Hague Convention application concerns a teenager, the Courts are required to pay close attention to any strong and reasonable objection to return which that teenager articulates.

[120] [Larry] is not yet a teenager, but he is close to being so.

[121] In *Re R (Child Abduction: Acquiescence)* Millet L J stated:²³

²⁰ *Azoulay v Nelson* [2017] NZFC 7713.

²¹ *W v N* [2006] NZFLR 793.

²² *B v C* [2002] NZFLR 433.

²³ *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716.

[That if a child is] of sufficient age and maturity for his views to be taken into account, the Convention clearly envisages that he will not be returned against his wishes unless there are countervailing factors that require his wishes to be overridden.

[122] Ms Alexander's submission puts the question to be determined as whether the objection is cogent, reasonable and rational, and refers to the observations William Young J in *B v C* at para [56]; and William Young J and Fisher J in *S v S*.²⁴

[123] The relevant concerns [Larry] raises for objecting to a return to Australia are that he felt unsafe there, that he feels safer here because there are not so many scary people in the neighbourhood, that he does not want to leave his [siblings], [Brook] and [Harley], that he would feel sad and miserable back there and he would be uncared for.

[124] Ms Alexander submits it is difficult to deny the soundness of [Larry]'s judgement in thinking that he and his family will be better off away from the situation where he and his siblings were accustomed to their mother being the subject of physical violence, seeing her bleeding, being hit and held down, and when he went to school worrying about the safety of his mother. He is now experiencing a life where his mother is not getting yelled and screamed at, he is much happier, and he is no longer worried about his safety.

[125] Similarly, Ms Alexander submits it is difficult to deny the reason that [Larry] wished to enjoy a relationship with his older sibling, [Dakota], and not to be separated from his little [siblings] with whom he has shared his life for probably almost as long as he can remember. [Larry]'s belief that he would be unsafe and not able to be cared for by his father appears to have been accepted by Mr Garner in his report that they are [Larry]'s genuine beliefs.

[126] The question as to the independence of [Larry]'s views was raised. I accept that in any case there must be influences by the adults in a child's life which would affect their views. The question is whether such influence has been undue and whether there has been excessive parental manipulation or pressure.

²⁴ *S v S* [1999] NZFLR 625 at 634.

[127] As noted, [Larry]’s descriptions of some of his father’s behaviour could not be within his direct knowledge and could have only have come from being told by his mother. It is noted by Mr Garner, some of the matters influencing [Larry] though reflect his experiences rather than anything being told to him by anyone else.

[128] The Court of Appeal in *White v Northumberland*²⁵ adopted four sequential questions identified by Chisholm J in *W v N (Child Abduction)*.²⁶ His Honour said the consideration of a child’s objections involved four issues:

1. Does the child object to return; if so,
2. Has the child obtained an age and a degree of maturity in which it is appropriate to give weight to the child’s views; if so,
3. What weight should be given to the child’s views; and,
4. How should the residual discretion under s 106(1) be exercised.

[129] At [50] Chisholm J stated:

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 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 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 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.

[130] In my view, the answer to questions 1 and 2 as posed by Chisholm J is clearly “yes” based on the reports of Ms Alexander and Mr Garner. The answer to question 3 is that considerable weight should be given to [Larry]’s views, subject to consideration of the residual discretion under s 106(1).

²⁵ *White v Northumberland* [2006] NZFLR 1105.

²⁶ *W v N (Child Abduction)* [2006] NZFLR 793.

[131] The submissions by Ms Alexander in respect to this last matter, was firstly directed to the potential for psychological harm. Ms Alexander relies in part upon the evidence given by Ms [Carlson]. As stated before, however, this is in conflict with Mr [Holmes'] own evidence and in a submissions only hearing, I am unable to resolve conflictual conflicts.

[132] What is of more relevance is that [Larry]'s own statements about his father were made without enthusiasm and particularly telling for Mr Garner was that his father put his own interests before [Larry] and was often angry. He described a physical environment at his father's home which he found uncomfortable. It was noted by counsel and Mr Garner that [Larry] showed more emotion and warmth when he discussed [his dog].

[133] Ms Alexander submits that removing [Larry] from his mother, whom she says he adores, and the stability of his current family unit, of which he has been part of all his life, to return to Australia in the care of his father who he perceives as unsafe and uncaring, would result in significant psychological harm. I accept that there would be the potential for psychological harm to be caused to [Larry], but I am unable, on the evidence I have, to say it would be significant.

[134] There are also the factors that were raised by the psychologist in *Azoulay v Nelson*. Where a child has been asked as to what he/she wants by those involved, then had been disregarded, is likely to have a strong feeling of injustice and powerlessness.

[135] I note the submission of Ms Alexander that [Larry]'s return to Australia would not mean a return to the status quo in terms of his day to day existence. This is not a situation where an order for return means that the entire family unit returns to Australia, though I bear in mind the point made in [85](e) above which is equally applicable here. This situation is complicated by the fact that [Larry]'s two [siblings] are in fact his half-[siblings] and that their father was the prime instigator of the family violence, which Ms [Carlson] seeks to leave behind.

[136] What is proposed here is that [Larry] live with his father in circumstances which have not been experienced by him before. To order a return does not restore

the status quo but creates a quite different and new situation for [Larry]. As noted by counsel, [Larry]'s removal from Australia was facilitated by the Australian authorities.

[137] In my view, an order for return would cause [Larry] serious concerns in terms of his relationships with his mother and his [younger siblings], and that coupled with the welfare factors in his father's home to which I have related, justify an exercise in discretion in refusing an order for return.

[138] As Judge Coyle found in *Kruger v Winkel*, the welfare and best interests outweigh policy considerations and in an exercise of the discretion, [Larry]'s views should prevail. An order for return is refused.²⁷

Judge D G Smith
Family Court Judge

Date of authentication: 04/04/2019

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.

²⁷ *Kruger v Winkel* [2017] NZFC 6923.