

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 20701

IN THE MATTER

of The Infants Ordinance
1961 (Part 1)

BETWEEN:

CHRISTINE WAGNER of
Cork, Ireland, Mother

Applicant

A N D:

HOLGER RADKE of
Ululolea, Decorator and
DARIA SCHUHARDT his
wife

Respondents

Counsel: K M Sapolu for applicant
P A Repuleai for respondents

Hearing: 10 February 1997

Judgment: 19 February 1997

JUDGMENT OF SAPOLU, CJ

This is an international child abduction case. All the evidence that has been adduced in these proceedings has been by way of affidavits filed by the father and the mother of the child who is the subject of these proceedings. The affidavits contain a number of annexures. There are a number of material conflicts of factual issues in what the parties say in their respective affidavits and in the annexures. There are also matters stated in the respective affidavits and in some of the annexures in respect of which one or the other

party is not aware and therefore there is no express denial or admission.

Having said that I turn now to the evidence. The father and mother of the child are both German nationals. They had lived in a defacto relationship in East Berlin, Germany, where the child was born on 14 October 1988. The child is a boy and is now about 8 years and 4 months old. Three months after the birth of the child, the father and mother separated and the child continued to live with the mother. The father and the mother lived together again for short periods in 1989 and 1990 but they have not lived together again since. During the periods of separation the child continued to live with the mother in Germany and the father continued to make visits to see his son. There is a conflict here in the evidence. The father says that the mother restricted his liberty to visit his son until December 1991 when she would not allow any further contact between him and his son. On the other hand the mother says that the father was free to visit his son but his visits ceased to be regular when he took up a relationship with her sister.

Subsequently the father married the mother's sister. And in 1993 the father applied to the Courts of Germany for visitation rights to enable the child to visit his father's family. The arrangement that followed was that the father could see the child every fortnight for five hours. The mother says it was not necessary for the father to go to Court on that occasion as he was free to see his son. Then in early 1994 the mother, her new partner (boy friend) and the child emigrated to Cork, Ireland. The child attended school in Cork, Ireland, but it is not clear when he actually started his schooling. Then in the spring of 1994, according to the mother, she was having difficulties settling down in

Ireland; she had also had a miscarriage and was very sick. She wanted the father to look after the child until she was in a position to organise herself and be able to devote the necessary time to the care of the child. She therefore asked the father to look after and take care of the child. The father on the other hand says the mother called him saying she could not cope with the child. And when he went to Ireland to get his son, he observed that the child was healthwise not in the best of conditions.

In the German Embassy in Dublin, Ireland, the mother signed a document which says that she agreed that the father may take his son as a member of his family and that the child shall live with his father who shall take care of his well-being. The mother now says that there was never any intention on her part to grant custody of the child to the father. She also says the arrangements contained in the document were temporary. The father takes a different view and says that the document in effect grants him custody of the child. Be that as it may, in November 1994 the mother picked up the child in Germany and returned with him to Ireland.

Then on 4 June 1995, the father after receiving an invitation from the mother for his family to visit her family in Ireland, wrote to the mother and invited the child to come to Germany for his school holidays if he wanted to. There are also allegations by the father against the mother of mistreatment of the child which are denied by the mother who says that the child was living a stable and happy life in Ireland. Anyway, the mother accepted the invitation for her son to spend his holidays in Germany. And on the 8th of July 1995 the child flew from Ireland to Berlin.

In the third week of August 1995, the father without the mother's knowledge applied to the Courts in Germany to withdraw the rights of the mother to determine the child's place of residence and to revoke her parental custody. It appears that the mother was informed by a friend in Germany of the father's application to the Court and she came to Germany. On 25 August the German Court which dealt with the application dismissed the application and made a temporary order directing that the child should be returned to his mother in Ireland to continue his schooling. The father appealed that decision, but when the appeal was called before the Court in Germany on the 3rd and then again on the 15th of November 1995, he failed to appear. The Court then dismissed the appeal.

In the written reasons which were given by the Court for its decision, reference is made to three reports which were prepared on the child's psychiatric and psychological condition. Much consideration is given in the Court's reasons for its decision to these reports. The first report was prepared on 18 September 1995 by a German neurologist-psychiatrist who had examined the child. His view was that the child, because of his condition, should not be returned to his mother. The second report which was prepared on 19 October 1995 by a German psychologist on the child, the father and the mother was favourable to the mother. The third report which is dated the 1 December 1995 was prepared by another German social welfare official who interviewed the child and the mother, and who also appears to have interviewed the father. His view was that the child should be returned to the care of the mother. It is clear from the reasons of the German Court that it accepted the last two reports and not the first report and the Court stated its reasons for reaching that decision.

After the decision of the Court in Germany the mother could not find the child or the father in Germany. It was not until March 1996 that she found out that the child and the father had come to Western Samoa. The father, his wife and their child are all in Western Samoa now. On 30 December 1996 the mother having borrowed and saved enough money travelled to Western Samoa. When she arrived here she contacted the Western Samoan Government authorities for assistance regarding her child.

On 9 January 1997, the father and his wife filed in this Court a joint application for the custody of the child. The Registrar of the Court set the application down for mention on 20 January. A copy of the custody application was served on the mother but when the case was called on 20 January, only the father and his wife appeared but not the mother. Normally applications for the custody of children are filed and determined in the Magistrates Court. However counsel for the father and his wife requested this Court to hear this custody application as a foreign judgment is involved. I decided to grant the request by counsel.

As the mother did not appear on 20 January 1997, the Court adjourned the case to 28 January for the father and his wife to adduce affidavit evidence to prove their application. On 28 January the Court adjourned the case again to 29 January and then asked for the child to be brought to my chambers so that I could talk with him. That was done. When I asked the child whether he was happy in Western Samoa he said yes. When I asked him whether he wanted to stay with his father or mother, he said his father. Then on 29 January when the case was recalled, only the father adduced affidavit evidence. The Court granted custody

of the child to the father and his wife. I should point out here that apart from the oral indication from counsel for the father and his wife that a foreign judgment is involved in this case, there is nothing in the custody application or the father's affidavit evidence about a foreign judgment. So this Court proceeded on the basis that this was a straightforward custody case as the full meaning of what counsel said was not clear to the Court at the time.

On 31 January 1997, the mother filed an application in this Court for an order to set aside the custody order granted on 29 January, for an interim order to prevent the father and his wife from removing the child from Western Samoa, for an order granting custody of the child to the mother, and for a further order that the child should be returned to his habitual place of domicile. The Court on the same day granted an interim order to prevent the removal of the child from Western Samoa and directed that all other matters be set down for mention on 3 February. The mother's application was also to be served on the father and his wife. On 3 February the case was further adjourned to 10 February for submissions by counsel. I will come back to those submissions.

A great deal more information has now been placed before the Court so that the Court now has a clear picture of what is involved in this case. Apart from the judgments of the German Courts and the psychiatric and psychological reports I have already referred to in this judgment, the mother has also annexed to her affidavits, letters and testimonials from several people in Berlin, Germany, Ireland and Luxembourg in support of her application and her fitness and competence as a mother to look after her child. Also annexed to the mother's affidavit is a letter dated 7 January 1997 from the Western Samoa Chief

Immigration Officer declining an extension of the child's permit to stay in Western Samoa and a letter dated 14 January 1997 from the same authority declining an application from the father and his wife for extension of their permits to remain in Western Samoa. In other words the child, as well as the father and his wife are now prohibited immigrants in Western Samoa. The mother also says in one of her affidavits that the reason why she did not appear in Court when the custody application by the father and his wife was called was that she had been advised by a Government official that she did not have to appear. If she had known that she had to appear, she would have done so. After all she had come all the way from Germany to Western Samoa for her son.

On the other hand, there are annexed to the father's affidavit two letters both dated 30 January 1997, written by the child to the Western Samoan Prime Minister saying that he wanted to live with his father in Western Samoa and that he did not want to live with his mother. He makes various accusations against his mother in those letters. The mother in one of her affidavits also says that when she met with her son in the Office of the European Union here in Apia he was accusatory of her. The mother claims that the father must have brainwashed the child against her. The father denies that allegation. Also annexed to the father's affidavit is the report by the German neurologist-psychiatrist who examined the child in Germany and came to the view that the child should not be returned to the mother. Another report annexed to the father's affidavit is by a Western Samoa psychiatrist who examined the child on 26 January 1997 and came to the conclusion that the father should have the care of the child.

Now as the arguments by both counsel unfolded in this case, it became clear

that the emphasis and focus of the arguments by counsel for the mother is that the more appropriate Courts to deal with the question of custody of the child are the Courts in Germany and not the Western Samoan Courts. A number of reasons were given and authorities were cited in support of that position. Counsel for the father and his wife, on the other hand, argued that this Court should bear the evidence on the question of custody and make a decision on that issue; the case should not be referred back to the German Courts.

That brings me to the law which is applicable to this case.

Law:

It was submitted by counsel for the mother that in deciding the question of custody of a child the relevant common law principles apply. But if a custody case also involves the abduction of a child from a foreign country, then the Court must also have regard to the policy and principles of the Hague Convention on the Civil Aspects of International Child Abduction 1980, notwithstanding that Western Samoa is not a signatory or party to that Convention. Counsel for the father and his wife did not find problems with that approach. I, myself, would agree with that approach. I think our law should not fall behind modern developments. Apart from that, cases of international child abduction are not purely domestic but have a foreign and international element. Therefore our law in this area should, as far as it is practicable, be as consistent as it can be, with the law of other nations.

As the stated approach requires having regard to the common law as well as the principles of the Hague Convention, I will start with the common law. At

common law the welfare of the child is the first and paramount consideration in questions of custody; and a custody order made by a foreign Court will not prevent a domestic Court from making a custody order in what is in the best interests or welfare of the child : *McKee v McKee* [1951] AC 352; *J v C* [1970] AC 668. In other words, the temporary custody order made by the Courts of Germany in respect of the child in this case will not prevent the Western Samoan Courts from making a custody order in respect of the same child having regard to his welfare which is the first and paramount consideration. Therefore this Court had jurisdiction to make the custody order which was made on 29 January 1997.

Section 3 of our own Infants Ordinance 1961 provides that in custody proceedings, the Court shall regard the welfare of the child as of the first and paramount importance. What is in the welfare interests of the child is a question of fact to be decided in the light of all the relevant circumstances : *J v C* [1970] AC 668, per Lord MacDermott at pp 710-711; *Re L (minors)* [1971] 1 ALL ER 913, per Buckley LJ at pp 925 - 926.

In the "kidnapping" cases, as such cases used to be called at common law, (the word "abduction" now seems to be in more popular usage since the Hague Convention came into existence in 1980) the English Courts had two alternatives. Either the Court makes a summary order for the return of the child to the foreign jurisdiction from which he had been removed, or the Court may decide to investigate the merits of the dispute itself and come to a decision on what order should be made. In either case, the welfare of the child is the paramount consideration. See *Re L (minors)* [1971] 1 ALL ER 913 per Buckley LJ at pp 925-926.

In more modern times, the procedure to be followed in an international child abduction case was more explicitly stated by Lord Donaldson MR in *In re A (Minors) (Abduction Custody Rights)* [1992] 2 WLR 536 at p.550 in these words :

"(1) In all the circumstances is it more appropriate that a court of the country to which the child has been wrongfully removed or in which it is being wrongfully retained (country B) should reach decisions and make orders with a view to its welfare or is it more appropriate this should be done by a court of the country from which it was removed or to which its return has been wrongfully prevented (country A)?"

"(2) If, but only if, the answer to the first question is that the court of country B is the more appropriate court, should that court give any consideration whatsoever to what further orders should be made other than for the immediate return of the child to country A".

In considering each step of this procedural approach, the welfare of the child is still of paramount importance. That was also made clear by Lord Donaldson MR in the earlier case of *Re F (A Minor) (Abduction Custody Rights)* [1990] 3 All ER 97 at p.100 where His Lordship stated :

"The welfare of the child is indeed the paramount consideration, but it has to be considered in two different contexts. The first is the context of which court shall decide what the child's best interests require. The second context, which only arises if it has first been decided that the welfare of the child requires that the English rather than a foreign court shall decide what are the requirements of the child, is what orders as to custody, care and control and so on should be made".

It appears to me that the approach stated by Lord Donaldson MR in *Re A (Minors) (Abduction Custody Rights)* and *Re F (A Minor) (Abduction Custody Rights)* is essentially the same, although more clearly and explicitly stated, as the approach adopted by Buckley LJ in *Re H (minors)* [1974] 1 All ER 913 which was decided before the Hague Convention 1980 came into existence.

I turn now to the Hague Convention on the Civil Aspects of international Child Abduction 1980. The general rule under the Convention is stated in Dicey and Morris, *The Conflict of Laws*, 12th ed (1993) p.829 in these words :

"The 'normal rule', in the absence of factors such as those in Art.13 of the Hague Convention, has been held to be that abducted children should "be returned to their country of habitual residence"

Article 12 of the Convention requires in mandatory terms the return of a child who has been wrongfully removed or wrongfully retained. However the return of the child may be refused if it is demonstrated that the child is now settled in his new environment. Article 13 then provides three further grounds on which the return of a child may also be refused. The first two of these grounds is where the person who opposes the return of the child establishes : (a) that the person having the care of the child was not exercising custody rights at the time of removal or retention of the child, or had consented to or subsequently acquiesced in the removal or retention; or (b) that there is a grave risk that the return of the child would expose him to physical or psychological harm or otherwise place the child in an intolerable situation. The final ground is whether the child objects to his return and he has attained an age and degree of maturity at which it is appropriate to take account of his views. In considering the three grounds provided in Article 13 the interests of the child have to be considered together with the fundamental purpose of the Hague Convention which is to ensure as far as possible that children wrongfully removed from their place of habitual residence are returned there as soon as possible : *In re A (Minors) (Abduction Custody Rights) (No.2)* [1992] 3 WLR 538 at pp 546-547 and 548-549 (C.A.).

I will refer now to the authorities cited by counsel for the mother to support the proposition that even though Western Samoa is not a signatory or party to the Hague Convention, this Court should have regard to the principles of that Convention. The first of these cases is the judgment of the Full Family Court of Australia in *Re Barrios and Sanchez (1989) 96 FLR 77,603*. In that case a father abducted the two children of his marriage from Chile, which at the time was not a party to the Hague Convention, to Australia which was a party to the Convention. The Court of first instance ordered the father to return the child to the custody of the mother in Chile. On appeal against that order, the Full Family Court of Australia said at p.77,608 :

"Although His Honour was correct in saying that the Convention had no direct application to this case in the strict sense, we think that it is nevertheless open to a court, and appropriate in this case, to pay regard to the policy of the Convention, particularly having regard to the fact that Australia is a party to it".

At p.77,609 the Court went on to say:

"The clear policy of the Convention is that save in exceptional circumstances, children who have been removed from their lawful custodial parent in another country without the authority of a court should be returned to that parent".

The next case is the judgment of the English Court of Appeal in *Re P (A Minor) (Abduction Custody Rights) [1990] 3 All ER 97*. That case was concerned with the wrongful removal of a child by the father from Israel, which at the time was not a party to the Hague Convention, to the United Kingdom which was a party to the Convention. On an application by the mother to an English County Court that

Court awarded the custody and care of the child to the father. The case went to the Court of Appeal which reversed the decision of the County Court and ordered the return of the child to Israel to enable the Israeli Court decide the issue of custody. In the judgments that were delivered, Lord Donaldson MR and Balcombe LJ clearly had regard to the Hague Convention. Balcombe LJ himself, expressly referred with approval to the approach adopted in *Re Barrios and Sanchez*. The last case is the judgment of the High Court of New Zealand in *Lehartel v Lehartel* [1993] 1 NZLR 578. In that case the child was the subject of a joint custody order between the father and mother made by a Court in Tahiti where the child and his parents were residing. The mother then took the child from Tahiti which was a non-Convention country to New Zealand which is a Convention country and failed to return the child to Tahiti. The father went to New Zealand and sought a Court order for the return of the child to Tahiti. The New Zealand Guardianship Amendment Act 1991 which implements in New Zealand the Hague Convention did not apply. Tompkins J in the High Court of New Zealand held that the child should be returned by the mother to Tahiti and stated at p.583 :

"Although the Amendment Act and the Convention do not directly apply to this case, I consider that the Court can properly have regard to principles of the Convention as a factor to take into account in deciding how the Court should exercise its discretion on the application before it. This approach accords with that of the Full Court of the Family Court of Australia in *In the marriage of Barrios and Sanchez* [1989] FLC 77,602. That was an appeal against an order requiring the father to return two children of the marriage to the custody of the mother in Chile. The Convention did not apply because Chile was not a signatory. The Full Court considered that although the Convention had no direct application, it was open to the Court and appropriate in that case, to pay regard to the policy of the Convention, particularly having regard to the fact that Australia was a party to it".

As it appears from *Re Barrios and Sanchez, Re F (A Minor) (Abduction*

Custody Rights) and *Lehartel v Lehartel* the Courts were there concerned with the removal of children from a non-Convention country to a Convention country. The present case is the reverse : it is concerned with the wrongful removal of a child from a Convention country (Germany) to a non-Convention country (Western Samoa). In my view that should not make any difference to the approach to be adopted. The Court must have regard to the purpose and philosophy of the Convention in applying common law principles to this case.

Exercise of discretion:

On the first question to be decided whether the Courts in Germany or this Court is the appropriate forum to decide the question of the child's custody, counsel for the mother submitted that the appropriate Courts are those in Germany. Therefore this Court should order the return of the child to Germany so that the Courts there can determine the issue of custody and any related matters. Counsel for the father and his wife asserted that the question of custody should be determined by this Court and that he was ready to call two witnesses, one of them a local psychiatrist. I must say that there are great difficulties with the position advanced by counsel for the father and his wife.

Except for the father, his wife, the child, and the mother who are presently in Western Samoa, all other witnesses relevant to this case are either in Germany or Ireland. The experts who prepared psychiatric and psychological reports on the child and his surrounding circumstances in Germany are still in Germany. But their reports appear to be very relevant. As all their reports are also in the German language, it is not clear whether they can speak or are fluent in the English language. Apart from these expert witnesses, there are

conflicting factual issues raised in the allegations and counter-allegations contained in the affidavits filed by the father and the mother which necessarily require the supporting evidence of witnesses in Germany and Ireland. Some of those conflicting factual issues have been mentioned in this judgment but there are many more which are stated in the affidavits. I cannot see how those factual conflicts can be satisfactorily resolved without the assistance of witnesses from Germany and Ireland.

The other difficulty is that the duration of the father, wife and child's stay in Western Samoa is now very uncertain as their permits to remain in Western Samoa have expired and the immigration authorities have declined their applications for extensions of their permits. In other words they are now prohibited immigrants and would have to leave Western Samoa. If therefore this Court decides that it is the appropriate Court to deal with the case and therefore to determine the question of the child's custody on the merits, it would mean that the case would be given a lengthy adjournment not only because of the Court's present workload but to allow time for the parties to bring over witnesses from Germany and Ireland. That in itself can create difficulties. Apart from the possibility that it may be difficult to find hearing dates suitable to all those witnesses to come to Western Samoa at one time, my impression of the parties, as far as I can gather from their affidavits, is that they are not persons of means; so they, especially the mother, are not likely to be able to pay for the expenses of witnesses from Germany and Ireland to come to Western Samoa. Moreover, there is the likelihood that by the time the case comes up for hearing, the father, his wife and the child will no longer be in Western Samoa as their permits to remain in Western Samoa have expired and cannot be

extended.

It also appears to me that if this Court decides that it is the appropriate forum to determine the question of the child's custody, any custody order that may follow will necessarily be of shortlived duration, whoever of the father or mother will be awarded the custody of the child. The reason is that if the mother is given custody of the child she will return to Germany or Ireland with the child whereas if the father is given the child's custody he and his wife and the child will still have to leave Western Samoa as they are now prohibited immigrants. Any custody order made by this Court will not, in the absence of any statutory provision to the contrary, be binding on the Courts of any other common law country, and that must also be the position with regard to non-common law countries. So the question of custody of the child will be fought all over again before the Courts of whichever country the child will be next. It makes any custody proceedings on the merits before this Court a pointless exercise.

I am of the view that if the scenario I have described is allowed to happen, it will only add more stress and trauma to the life of this young child. And that will not be in his best welfare interests.

The Courts in Germany have been concerned with the question of the child's custody. A temporary order related to his custody has been made there. Most of the relevant witnesses reside in Germany. The witnesses in Ireland can be more conveniently brought over to Germany should that be necessary. And there is also no reason to conclude that the Courts of Germany will not fairly and properly deal with the question of custody in the best welfare interests of the child.

Germany is also the country where the child has lived most of his life. Most of his relatives must also be in Germany.

Turning now to the Hague Convention on the Civil Aspects of International Child Abduction 1980, it is clear from the provisions of the Convention that its policy is to discourage the abduction of children across national borders and to ensure as far as possible that children who are wrongfully removed from their habitual place of residence are returned there as soon as possible. There are of course grounds provided in the Convention where the Court in the exercise of its discretion may refuse an order for the return of the child to the foreign country from which he had been wrongfully removed. I refer to those grounds now.

The first ground is whether the child is now settled in his new environment. The child as the evidence suggests, may now have been in Western Samoa for about 15 or 16 months. There is no evidence that he is now attending school in Western Samoa, or any other evidence to demonstrate that he has settled in his new environment. His permit to remain in Western Samoa has expired and cannot be renewed so that he is now a prohibited immigrant in this country. So there is virtually no hope, to say the least, for him to have any stable or settled life in this country. With regard to the second ground, that is, whether the mother was exercising custody rights in respect of the child at the time of his removal and whether she consented or acquiesced in his removal, it is clear that the mother was exercising custody rights at the relevant time and that she did not consent or acquiesced in the removal of her child. As to the third ground, that is whether there is a grave risk that the return of the child to Germany would expose him to physical or psychological harm or otherwise place him

in an intolerable situation, I am not satisfied on the evidence that that would be so. In fact this ground was not raised in argument by counsel.

The final ground is whether the child objects to his return, which must mean his return to Germany, and has attained an age and maturity at which it is appropriate to take account of his views. The child is about 8 years and 4 months old. There is really no evidence that he objects to being returned to Germany although he has stated to me in chambers that he is happy in Western Samoa and that he wants to live with his father and not his mother. According to the father's affidavit, the child also told a local psychiatrist that he wants to live with his father and does not wish to return to his mother. This issue about the wishes of the child was addressed in detail in the reports prepared by the psychiatrist and the two social welfare psychologists who examined the child in Germany, and those reports are discussed in the reasons given by the German Court which dismissed the father's appeal. The psychiatrist came to the view that the child should not be returned to the mother whereas the psychologists came to the opposite view.

The Court has weighed and considered all these various factors and has had regard to the Hague Convention, and has come to the clear view that in the best welfare interests of the child, the appropriate Court to determine the question of the child's custody are the Courts of Germany. Therefore the child should be returned to Germany. To achieve that purpose, I think interim custody of the child should be granted to the mother. I am not confident that if interim custody is given to the father, he will return the child to Germany in view of the fact that he wrongfully removed the child from Germany in breach of a

temporary custody order made by a German Court.

In view of all the information which is now before the Court, but was not before the Court on 29 January 1997, the custody order made by this Court on 29 January 1997 in favour of the father and his wife is discharged. In its place the following new orders are made :

- (a) As the appropriate Court to determine the question of the child's custody are the Courts of Germany, this Court orders the return of the child to Germany.
- (b) Interim custody of the child is given to the mother on the condition that she and the child travel forthwith and within the next seven(7) days to Germany.
- (c) The father shall deliver the child forthwith to the interim custody of the mother together with any passport or other travel document of the child in order to facilitate his return with his mother to Germany.
- (d) Question of costs is reserved.

If any practical difficulties arise in implementing these orders, leave is reserved to the mother to apply further to this Court.

TFM Sapota
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CHIEF JUSTICE