ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILD.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2019-419-11
[2020] NZHC 1377

BETWEEN	X Appellant
AND	M Respondent

Hearing: 15 June 2020

Appearances: Appellant in person
Respondent in person

Judgment: 18 June 2020

JUDGMENT OF LANG J
[on appeal against refusal of application to be appointed as litigation guardian]

This judgment was delivered by me on 18 June 2020 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Copies to:
Appellant and Respondent

[1] Dr X and Ms M have been engaged in litigation in the courts of both Germany and New Zealand since at least 2010. The subject of the litigation is their daughter L. L is now nearly 13 years of age, having been born in Germany on 3 July 2007.

[2] Ms M, her new husband and L have been living in New Zealand since April 2015 under the authority of visas granted under the Immigration Act 2009. Ms M procured these by falsely stating she had sole custody of L when she entered New Zealand. The true position was that the courts in Germany had awarded sole custody of L to Dr X.

[3] Ms M and L left Germany without letting Dr X know they were leaving or where they were going. Dr X did not know where Ms M and L were living until late 2016, when he discovered they were residing in New Zealand.

[4] Dr X then invoked the procedures available under the Hague Convention to have L returned to Germany. This resulted in an unsuccessful application to the Family Court followed by unsuccessful appeals to the High Court, Court of Appeal and Supreme Court (the Hague Convention proceedings).

[5] The present appeal arises from the fact that on 2 May 2017 Dr X applied to the District Court at Thames to be appointed as L's litigation guardian for the purpose of bringing a further proceeding in the District Court against Ms M. In that proceeding Dr X will seek orders giving him control over funds held in a New Zealand bank account that he alleges belong to L. He says Ms M has misappropriated those funds for her own purposes.

[6] On 14 February 2019, Judge R G Marshall dismissed Dr X's application to be appointed as L's litigation guardian for the purpose of bringing the proposed proceeding.[1] Dr X appeals against that decision.

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1 *X v M* [2019] NZDC 2023.

The proposed proceeding

[7] The funds that would be the subject of the proceeding came from the sale of assets owned by L's grandmother, who inherited them on the death of her husband. Dr X contends the funds were earmarked for L's education but Ms M denies this.

[8] Ms M acknowledges that funds are currently held in L's name in bank accounts in both Australia and New Zealand. The account in New Zealand is held with Kiwibank and holds approximately $34,000. The bank account in Australia holds between AU$100,000 and $120,000. The proposed proceeding in New Zealand relates only to the bank account held in this country. Ms M denies she has been using the funds in either account for her own purposes. Sha also confirmed during the hearing that the funds in the New Zealand bank account have been frozen as a result of orders made by a court in Germany. If Dr X is appointed as L's litigation guardian he proposes to seek an order that the funds held in the Kiwibank account are transferred to a bank account in Germany. He proposes also that he be appointed as the person responsible for the manner in which those funds are disbursed.

The Judge's decision

[9] After setting out the relevant provisions in the District Court Rules 2014 and the competing arguments of the parties, the Judge set out the reasons for his decision in the following paragraphs:

> [36] It is patently evident that the events leading to the creation of any trust took place in Germany and the trust monies themselves are divided – the main part in Australia and a smaller balance in New Zealand. In my view, there are a number of reasons why this application should be dismissed. The applicant is, and has on the material I have, been involved in numerous civil, criminal and family litigation cases against [Ms M]. Many of these proceedings have affected [L's] position. Although in the normal course of events an applicant can have the same interest as a minor in litigation, it should not be adverse to the interests of the minor.
>
> [37] Here set out in great detail in the affidavit of [Ms M] dated 2 August 2018 clearly shows on the face of it, the snatch of the minor [L] which traumatised her when the applicant and a snatch team without warning removed her from her school in New Zealand. That evidence is not challenged by way of affidavit by the applicant and his response in his memorandum of 25 September 2018 has more to do with the criticism of a psychologist's involvement in the Family Court proceedings than anything else, apart from

> touching briefly on his intention to seek approval to have joint control over [L's] assets.
>
> [38] In my view, it is very clear that it would be entirely inappropriate for the applicant to be appointed a litigation guardian. Litigation history between the parties discloses that the applicant is willing to advance his own position and take actions that may be averse to the interests of the minor [L] and in particular I refer to the "snatch".
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> [39] In any event there are jurisdictional issues if the purpose of the appointment in the District Court is to gain control of trust funds. It seems clear from the definition of "Court" under the Trustee Act 1956, that "Court" means the High Court and excludes the District Court from that jurisdiction.
>
> [40] That is other than potential jurisdictional problems: where the trust was created in Germany, civil and criminal proceedings have been ongoing in Germany for some time regarding this matter and the bulk of the money seems to be in Australia in any event.

Approach

[10] This is a general appeal by way of rehearing. As a result, conventional appellate principles apply. Dr X is entitled to the opinion of this Court as to whether or not the Judge's decision was wrong. He bears the onus, however, of demonstrating the areas in which he says the Judge was in error.[2]

[11] When Judge Marshall heard Dr X's application the Court of Appeal had not delivered its decision in the Hague Convention proceedings. The Court of Appeal held that the Family Court had been wrong not to order L's return to Germany and the High Court was similarly in error in not allowing Dr X's appeal.[3] Ultimately, however, the Court of Appeal held that no order should be made requiring L to return to Germany. Such an order was no longer appropriate because of the length of time the Hague Convention proceedings had taken to make their way through the courts in New Zealand and because of events that had occurred since the Family Court delivered its judgment. I am conscious that the decisions of the District Court and High Court may have influenced the Judge's decision in the present case. To guard against that risk I consider it appropriate to consider Dr X's application afresh.

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2 *Austin Nicholls & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5].
3 *Simpson v Hamilton* [2019] NZCA 579 at [84] and [96].

Relevant principles

[12] Rule 4.31 of the District Court Rules 2014 provides that, with limited exceptions and unless the Court otherwise orders, a minor must have a litigation guardian as his or her representative in any proceeding. A minor in this context means a person who has not attained the age of 18 years.[4] Rule 4.33 provides that rr 4.34 to 4.36 apply to a minor, and every reference in those rules to an incapacitated person must be read as if it were also a reference to a minor.

[13] Rule r 4.35 provides as follows:

> **4.35 Appointment of litigation guardian**
>
> (1) This rule applies if an incapacitated person does not have a litigation guardian within the meaning of paragraph (a)(i) of the definition of litigation guardian in rule 4.29.
>
> (2) The court may appoint a litigation guardian if it is satisfied that—
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> (a) the person for whom the litigation guardian is to be appointed is an incapacitated person; and
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> (b) the litigation guardian—
>
> (i) is able fairly and competently to conduct proceedings on behalf of the incapacitated person; and
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> (ii) does not have interests adverse to those of the incapacitated person; and
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> (iii) consents to being a litigation guardian.
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> (3) In deciding whether to appoint a litigation guardian, the court may have regard to any matters it considers appropriate, including the views of the person for whom the litigation guardian is to be appointed.
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> (4) The court may appoint a litigation guardian under this rule at any time—
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> (a) on its own initiative; or
>
> (b) on the application of any person, including a person seeking to be appointed as litigation guardian.

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4 District Court Rules 2014, r 4.29.

[14] In the present case Dr X plainly consents to being appointed L's litigation guardian. The issue to be determined is whether he is able fairly and competently to conduct the proposed proceeding on L's behalf and does not have interests adverse to those of L.

Is Dr X able fairly and competently to conduct the proposed proceeding on L's behalf?

[15] In terms of basic competence to conduct a proceeding I accept that Dr X is now well-versed in Court procedures. He appeared for himself in the Hague Convention proceedings in the Court of Appeal and Supreme Court. Furthermore, he conducted the present appeal before me in a manner that demonstrated he is comfortable in making submissions to a court. This is not, however, sufficient to satisfy the test of whether he is fairly and competently able to represent L's interests in the proposed proceeding.

[16] Dr X has not yet formulated the precise nature of the claim he proposes to advance. He advised me during the hearing, however, that he will rely on German law in support of his submission that the funds in the Kiwibank account should be returned to Germany and placed under his control. He relies on the fact that the courts in Germany have made orders placing L in his sole care. He says German law requires the assets of a person in L's position to be placed under the control of his or her legal guardian.

[17] These factors raise a question as to whether the courts in New Zealand will accept jurisdiction to determine the dispute. The actions that led to the funds being transferred to New Zealand occurred in Germany. In addition to the fact that Dr X will rely on German law it seems that the courts in Germany have already made an order freezing the funds in the Kiwibank account. Given that background the courts in New Zealand may well hold that the issues raised by the proposed proceeding in New Zealand should be determined by the courts in the existing proceedings in Germany. It would be unsatisfactory for courts in two separate jurisdictions to deal with the same issues in concurrent proceedings, particularly when the amount held in the Kiwibank account is relatively small.

[18] This leads to the next issue, which arises out of the fact that Dr X advised me during the hearing that he proposes to conduct the proposed proceeding himself from Germany rather than appoint counsel in New Zealand. This raises an obvious issue as to whether the Court will receive competent legal argument regarding the issue of jurisdiction and the substantive claim.

[19] The most significant issue in this context arises out of Dr X's lack of objectivity regarding Ms M. The manner in which Dr X conducted the appeal makes it clear he will find it difficult, if not impossible, to separate the events that have occurred in the past with those that will be relevant to the proposed proceeding. The dispute between the parties regarding L's care obviously forms part of the background to the issue to be determined in the proposed proceeding. Ultimately, however, the issue to be determined in that proceeding would be relatively narrow.

[20] The material filed in support of the present appeal sought to raise many issues that have already been traversed thoroughly in the Hague Convention proceedings. This is understandable to some extent because the Judge referred to issues that had arisen and been determined by the Family Court and High Court in those proceedings. I have grave doubts, however, that Dr X will be able to narrow his focus to ensure that irrelevant and extraneous factual matters are not introduced so that the new proceeding becomes an attempt to re-litigate issues that have already been examined exhaustively and finally determined in the earlier proceedings.

[21] This leads to the final issue, which relates to Dr X's lack of independence. As the Judge observed, the fact that a litigation guardian is related to the party whose interests they represent in litigation is not unusual or, in most cases, untoward. It is relatively common for a parent to be appointed as litigation guardian for a son or daughter where there is no conflict between the interests of the parent and those of the son or daughter. In most cases, however, the litigation guardian is represented by counsel in the substantive proceeding. Counsel are independent of the parties and have no stake or personal interest in either the proceeding or its outcome. This ensures important decisions relating to the commencement and conduct of the proceeding are made competently and objectively. If that does not occur, the opposing party and the

court can be exposed to considerable unnecessary time and expense in determining the proceeding.

[22] Independence has also been described as a "fundamental" requirement of a litigation guardian.[5] In *Gronnerud (Litigation Guardian of) v Gronnerud Estate* the Supreme Court of Canada observed:[6]

> The third criterion, that of "indifference" to the result of the legal proceedings, essentially means that the litigation guardian cannot possess a conflict of interest *vis-a-vis* the interests of the disabled person. Indifference by a litigation guardian requires that the guardian be capable of providing a neutral, unbiased assessment of the legal situation of the dependent adult and offering an unclouded opinion as to the appropriate course of action. In essence the requirement of indifference on the part of a litigation guardian is a prerequisite for ensuring the protection of the best interests of the dependent adult. A litigation guardian will be able to keep the best interests of the dependent adult front and centre, while making decisions on his or her behalf. Given the primacy of protecting the best interests of disabled persons, it is appropriate to require such disinterest on the part of a litigation guardian.

[23] Dr X cannot in any sense be regarded as independent. He has now been engaged in acrimonious litigation with Ms M for approximately 10 years. It must have been extremely frustrating for him to fail in the Family and High Courts only to have the Court of Appeal determine he should have succeeded at first instance. Even then, however, he did not obtain the order he sought. I consider that Dr X's involvement in the earlier litigation will inevitably colour his approach to any further litigation involving Ms M. I consider this will effectively deprive him of the ability to conduct the proposed proceeding in an independent and objective manner.

[24] The Court might have more confidence that this could occur if Dr X instructed counsel to act on his behalf in the proposed proceeding. As matters currently stand, however, I cannot be satisfied Dr X could represent L's interests in a fair and competent manner.

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5 *Erwood v Harley* HC Auckland CP179/SD02, 17 March 2003 at [30].

6 *Gronnerud (Litigation Guardians Of) v Gronnerud Estate* 2002 SCC 38, [2002] 2 SCR 417 at [20].

Does Dr X have interests adverse to those of L?

[25] Dr X's argument on this point is that his objective is to ensure funds that belong to L are restored to her, albeit under his control. He therefore says his interests are aligned with L's, and that he seeks no material benefit from the proposed proceeding himself.

[26] I accept that Dr X does not intend to use the proceeding to gain control of the funds in the Kiwibank account for his own benefit or to deprive L of them. Nevertheless, he has a clear motive for continuing with proceedings against Ms M, namely to exact some form of retribution for the anxiety and frustration she has caused him over the last ten years. Ongoing litigation is also likely to be adverse to L's interests because she will undoubtedly become aware of it and it will be a further reminder of the ongoing nature of the conflict between her parents.

[27] In addition, L is now reaching an age where she should be consulted about the litigation because the funds to which it relates belong to her. If Dr X is appointed as L's litigation guardian this will create an issue because of the effects on L of an incident that occurred in 2017. The Court of Appeal described this as follows:

> [79] Before addressing Dr Calvert's report, it is necessary to relate a significant incident that occurred on 28 September 2017, some four weeks after the Family Court judgment was delivered. Shortly after 10 am that day, the father, accompanied by a man and a woman, arrived at [L's] school classroom without any forewarning and forcibly uplifted [L] in front of her teacher and classmates while the class was in session. The male associate stood in front of the teacher and blocked her attempt to protect [L] while her father picked her up out of her seat. The three adults bundled [L] into a car and took her away. They drove to the nearby town of Tairua where they had a short stop before continuing to an address in Auckland where German friends of the father were living. Seeing that [L] was upset, the female at the address contacted the police and advised them where [L] was and that she was in a distressed state. The mother was informed and immediately made a without notice application for an interim parenting order. This order was granted by Judge Coyle that day along with a warrant to uplift [L] and return her to her mother's care. The police executed the warrant and [L] was returned to her mother later that same evening.
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> [80] This incident has had a profound effect on [L]. Dr Calvert says in her report that [L] suffers from Post Traumatic Stress Disorder directly associated with her experience on that day. Dr Calvert reports that [L] was "extremely distressed, anxious and displayed frank hypervigilance" throughout the time she spoke to her about this incident even though this was some 18 months after it happened. [L] told Dr Calvert she thought her father was taking her to

> Germany. She remembered she was "shaking", "terrified" and "thought [she] was going to die". [L] says she remains scared of her father because of this incident. She reports that sometimes she has "bad dreams" because she is worried it might happen to her again.
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> [81] In Dr Calvert's opinion, this event clearly traumatised [L] and it "now forms a very significant component of her views about a potential return to Germany and her father's care". She reports that [L] is now strongly opposed to returning to Germany. [L] says she is "scared of her father because of 'one big thing' that is his removal of her from her school in 2017".
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> (footnote omitted)

[28] This incident formed one of the reasons why the Court of Appeal found it was no longer appropriate for L to be returned to Germany.[7] The relevance of it now is that there is currently no prospect of Dr X discussing the proposed proceeding with L either before he commences it or whilst it is in progress. Any such discussion would clearly be adverse to L's interests.

Conclusion: result

[29] For the reasons given above I have concluded the Judge was correct to refuse Dr X's application to be appointed as L's litigation guardian for the purpose of the proposed proceeding against Ms M.

[30] The appeal is accordingly dismissed.

[31] Ms M represented herself in relation to the appeal. There is therefore no order as to costs.

Lang J

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7 *Simpson v Hamilton,* above n 3, at [84] and [96].