IN THE FAMILY COURT

TAURANGA **FAM-2017-079-000008**

IN THE MATTER OF	Interim Parenting Order(s)
UNDER	The Care of Children Act 2004
BETWEEN	Lisa Hopfengärtner Mother / Appellant
AND	Dr. Axel Schmidt Father / Respondent

Application to recuse Judge Stephen Coyle from this case

Dated 17 April 2020

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MAY IT PLEASE THE COURT:

A.

I make in person an application to recuse the Tauranga Family Court Judge Stephen Coyle from this case.

B.

I. Introduction

1. Currently there is an application for leave to appeal to the Supreme Court submitted which should clarify whether an order should be made under S105 of the Care of Children Act 2004 for the return of the girl Clara Larissa Schmidt (DOB 03.07.2007) to the Federal Republic of Germany, who was unlawfully abducted by her mother and brought to New Zealand on 23.01.2015.

2. The child was concealed in New Zealand and the signatory received the information that the child could live in New Zealand in August 2016. An order for return was made on 06.12.2016. The signatory has been granted sole custody and the right to determine the whereabouts of the child for his daughter Clara Larissa Schmidt by the Family Court Fürth (17.12.2014, 201 F 1835/13) and the Court of Appeal Nürnberg (30.05.2016, 9 UF 149/15). The signatory has also the right to take the child, assigned by the Family Court Fürth (18.10.2016, 201 F 949/15). These decisions were renewed in December 2019 by the German Courts (09.12.2019 and 16.12.2019, 201 F 1554/19).

3. The procedures in New Zealand have thus far had a duration from February 2017 to November 2019 (34 months). The Family Court at Tauranga (decision 01.09.2017) and the Tauranga High Court (results judgement 18.05.2019, reasons judgement 11.06.2018) declined to order Clara's return. The Court of Appeal primarily based its decision on the Family Court's judgement (decision 22.11.2019).

II. Decisions of the Tauranga Family Court Judge Stephen Coyle

4. Tauranga Family Court Judge Stephen Coyle made three decisions up to now:

- FAM-2017-079-000015 [2017] NZFC 69293 in relation to application of return of child under the Hague Convention, dated 01.09.2017
- FAM-2017-079-000008, dated 28.09.2017
- FAM-2017-079-000008, dated 14.02.2020

III. The Judge's limited knowledge of the relevant law – here Care of Children Act 2004

5. Tauranga Family Court Judge Stephen Coyle stated in his decision FAM-2017-079-000015 [2017] NZFC 69293, dated 01.09.2017:

"... I have reached the view that to require [Anna] to return to Germany would be too cataclysmic for her. It would require her to be in the primary care of her father whom she has not physically seen since 2013. It would require her to leave behind her mother, her stepfather and her sister. It would require her to leave behind the life that she has in New Zealand and move to a life in Germany, the present realities of which are unknown to [Anna]. I agree with Ms Lightfoot's evidence that for [Anna] that would be an intolerable situation (in a psychological sense)".

6. The Judge considered this would be *"too cataclysmic"* for Anna and he therefore exercised his discretion against making an order for her return.

7. The Court of Appeal found in his decision dated 22.11.2019 (CA398/2018 [2019] NZCA 579) that the discretion to decline return was not appropriately exercised by Judge Stephen Coyle.

8. The evaluation of the Court of Appeal (CA 398/2018) dated 22.11.2019 (in paragraph [1] to [76]) as to whether the discretion to decline return was appropriately exercised at the time of the hearing at the Tauranga Family Court in 2017 is explained in in paragraph [76]: "*In conclusion, we see no good reason why any discretion should have been exercised against ordering Anna's return to Germany at that time"*.

9. The Court of Appeal found: *"[66] In Secretary for Justice (as the New Zealand Central Authority on behalf of TJ) v HJ, the majority (Blanchard, Tipping and Anderson JJ) concluded that the discretion in a "settled" case under s 106(1)(a) of the Act requires the Court to balance the welfare and best interests of the particular child against the general purpose of the Convention in the circumstances of the case.[48] The majority continued:*

[86] When undertaking this exercise the judge should consider whether return would or would not be in the best interests of a child who has necessarily already been found to be settled in its new environment. That very settlement implies that an order for return may well not be in the child's best interests. Matters relevant to the assessment include the circumstances in which the child is now settled; the circumstances in which the child came to be wrongfully removed or retained; and the degree to which the child would be harmed by return. Other factors capable of being relevant will be the compass and likely outcome of the dispute between the parties, and the nature of any evidence directed to another ground of refusal, whether or not that ground is made out. In short, everything logically capable of bearing on whether it is in the best interests of the child to be returned should be considered.

[67] Even if the Court determines that return is not in the child's best interests, that is not necessarily the end of the matter. The Court must consider whether return should nevertheless be ordered to promote the objectives of the Hague Convention, for example to avoid perverse incentives created by rewarding concealment.[49]

[68] We have already addressed the circumstances in which Anna was wrongfully removed from Germany and the circumstances relied by on by her mother to support her claim that Anna was settled in New Zealand as at August 2017, the date of the hearing in the Family Court. These factors weigh in favour of exercising the discretion by ordering return.

[69] We now consider the likely harm to Anna, assessed as at that date, of an order for her return to Germany. Judge Coyle accepted Ms Lightfoot's evidence that this would place Anna in "an intolerable situation" and would be "too cataclysmic for her".[50] Ms Lightfoot's reasons for this conclusion were set out in her report and may be summarised as follows:

(a) Loss of primary attachment — the effects of Anna losing her secure attachment to her mother will be considerable and will extend over time.

(b) Loss of sibling relationship — Anna and her half-sister have a very close bond which would be lost if Anna returned to Germany.

(c) Loss of emerging sense of self — Anna has "recently begun to develop" a sense of self that identifies with New Zealand and the lifestyle here. A return to Germany would require her to redevelop her sense of self which is likely to be

problematic "given she does not now identify as being German, and does not want to live there".

(d) Relationship with her father — returning Anna to Germany would require her to live with her father, effectively a stranger, with whom she associates "a traumatic memory" (the September 2013 car incident). Anna would likely experience "considerable anxiety, fears about her safety, and hyper-vigilance" in the company of her father until she began to know him.

[70] Once it is accepted, as we do, that the mother would not have been permitted to remain in New Zealand and would have returned to Germany with Anna and the rest of her family, the Judge's primary concerns based on Ms Lightfoot's evidence ((a) and (b) above) fall away. The "cataclysmic" consequence of "severing" Anna's primary attachment and separating her from her stepfather and half-sister was not a realistic prospect. An order for Anna's return would not have placed her in this "intolerable situation".

[71] The father has consistently maintained that he wishes to share Anna's care with her mother. He has always regarded this as being in Anna's best interests as he made clear in his submissions to the Family Court and to the High Court. He confirmed before us that he does not expect Anna would be ready to live full-time with him and he would not seek to enforce such an outcome. To the contrary, he acknowledges that if Anna is returned to Germany, she should continue to live with her mother, at least initially. All he seeks at this stage is access. That would be a matter for the courts in Germany to determine. However, the prospect of Anna being returned alone to Germany to live solely with her father ((d) above) can be discounted.

[72] Leaving Anna in her mother's sole care in New Zealand clearly carries its own risks for Anna's future development. For example, Professor Spangler assessed themother as having "[s]ignificant weaknesses and risk factors" shown by "her perception and interpretation of [Anna's] emotions and needs, which are mainly channelled by her own needs and points of view". He went on to say that the mother is "only to a limited extent able to orient her behaviour towards [Anna's] needs".

[73] In the context of considering whether Anna was settled, Judge Coyle referred to Ms Lightfoot's evidence that Anna sees herself as a "kiwi kid" in the sense that "a kiwi outdoors life" is important to her, "particularly the ability to be involved with animals".[51] This was the "sense of self" referred to by Ms Lightfoot in her report — "a well-stated sense of self that identifies with NZ and the lifestyle here". We place little weight on this factor ((c) above). It must be kept in mind that the present application is concerned with the forum in which Anna's best interests should be considered and does not require an analysis of all the factors that might weigh in any further decision about custody and access.[52] In any event, there is no reason to suppose that Anna's opportunities

for development and fulfilment will be any less in Germany. She will still be able to enjoy the outdoors and be involved with animals. For example, her father owns 60,000 m^2 of parkland in Mönchengladbach where Anna was born. He is also responsible for the restoration of a nature reserve of some 250,000 m^2 in that area.

[74] The likelihood of ongoing dispute between the parents could not be avoided by Anna remaining in New Zealand. The father did not abandon the prospect of having any involvement in Anna's life even in the face of her disappearance for over two years. He has the time, the means and the determination to pursue his rights (and what he perceives to be in Anna's best interests) and has demonstrated he will do so regardless of whether the forum is Germany or New Zealand. This was a neutral factor in determining whether an order for return should have been made.

[75] The mother's strategy of running and hiding to prevent the German courts from being able to implement care and access arrangements assessed as being in Anna's best interests should not have been encouraged by declining to make a return order. This risked creating perverse incentives. It tended to justify the mother's decision to defy the authority of the German courts and come to New Zealand unlawfully. The decision rewarded her behaviour in fleeing that jurisdiction with Anna and concealing her in New Zealand, contrary to Anna's best interests. It also effectively lent assistance to the mother's ongoing efforts to defeat the father's right to be involved in Anna's life. These consequences ran directly counter to the objectives of the Hague Convention.

[76] The courts in Germany were perfectly well-placed to determine what was in Anna's best interests. Those courts, and the independent experts in Germany who had been involved with this family, had accumulated significant knowledge about the issues having dealt with them over the course of six years, from early 2010 to February 2016. In our view, at the time of the hearing in the Family Court, the Federal Republic of Germany was the appropriate forum to resolve all questions of custody and access for Anna, not the courts in New Zealand. In conclusion, we see no good reason why any discretion should have been exercised against ordering Anna's return to Germany at that time."

10. The Tauranga Family Court Judge Stephen Coyle was not able to exercise the relevant law in this case, so that further proceedings are necessary. The consequence are damage suits against the State of New Zealand (2020) and new arrest warrants against the mother of the child issued by the authorities of the Federal Republic of Germany (2019). The biggest TV-production company of Europe is producing a 45-minute story of the New Zealand's jurisdiction competence regarding international law and will distribute the story of Clara Larissa Schmidt in the TV-channels in Europe. The above case raises some

structural questions why international law is included in domestic law and why cases of international law are not centralized but decentralized to every family court in New Zealand (for more information see: Keith, K. (2016). New Zealand family law and international law – A comment. With some questions. *Victoria University of Wellington Law Review*, 47, 5-18).

IV. The Judge's knowledge of the best interests of children – here Clara Larissa Schmidt

11. Tauranga Family Court Judge Stephen Coyle stated in his decision FAM-2017-079-000008, dated 28.09.2017:

> "*Jurisdiction made out. Threshold met. I am very familiar with the contents of the s133 report referred by the applicant. Based on the evidence around how Clara was removed from school by her father, and the evidence before the Hague proceedings****, I have no doubt that the father's action in removing Clara today have been cataclysmic for her****. She has not lived with her or seen her father for years.* ***She is petrified of him for the reasons set out in my decision and the s 133 report****.* ***She has now been unilaterally removed from her primary caregivers' care, and placed her with a father that she fears and whom she will not know at present****.*
>
> *This court has in effect, by refusing to order return, determined that the jurisdiction for determining what is in the welfare and the best interest of Clara lies now with the NZ Family Court. Mr Schmidt has thwarted that process by snatching Clara. Of this application were to proceed on notice.* ***Clara would remain with her father and that, for these reasons, would cause her undue hardship****. I have taken into account the principles in Martin v Ryan and Fletcher v McMillan, and the relevant rules. On the evidence before me, and taking into account the evidence in the Hague proceedings that were heard before me,* ***there is no doubt in my mind that Clara's emotional and psychological safety has now been put at risk, and that she has been harmed by her father's actions****. The delay that would be caused by proceeding on notice* ***will continue to cause undue hardship to Clara and serious psychological injury to her****.* ***This order must be made without notice to her father, who has shown that he has no respect for the rule of law in New Zealand, and no insight as to what is best for Clara****.*"

12. In his decision dated 28.09.2017 the Judge Stephen Coyle made the following order: *"Axel Schmidt is to have no contact with the child listed below until further order of the court".*

13. The District Court Fürth issued an arrest warrant for grievous bodily harm for the stepfather of Clara and investigations against Clara's mother were announced. The Tauranga Family Court Judge Stephen Coyle ignored the facts and stated, that he '*was unable to resolve the factual dispute*'. In contradiction to the facts the Judge Stephen Coyle used the car-incident to assume a trauma of Clara and therefore refuse to order the return of the child to Germany and to refuse any contact of the child to the signatory.

14. On 20.09.2013 Clara was exposed to this violent act and was affected directly. Violence in this case directed against the father, has an adverse and long-lasting effect on the mental health of children and, if not addressed, violates their rights to enjoy the highest attainable standard of health. The Court of Appeal stated in paragraph [14] (see also paragraph [56]): *"On 27 November 2014, the Fürth District Court issued an arrest warrant for Mr Hamilton on a charge of causing grievous bodily harm to the father by deliberately running into him with his car on 20 September 2013. This is the "incident" referred to by the Court at [13] above and witnessed by Anna, who was in the car at the time"*). Family violence and abuse have a huge impact on children (see Ministry of Justice - A Parenting Through Separation programme factsheet, 2020). Based on these facts, it is not clear why grievous bodily harm against the father of the child by the stepfather and the mother was used by the Tauranga Family Court Judge Stephen Coyle 'to protect the child from the father'. The Tauranga Family Court Judge Stephen Coyle based his judgements on the will of the child to refuse to see the father because of this 'incident'.

15. The Court of Appeal made in his decision dated 22.11.2019 (CA398/2018 [2019] NZCA 579) completely opposite findings regarding Clara Larissa Schmidt bests interests as exercised by Judge Stephen Coyle.

16. The Court of Appeal found that the signatory is the better parent for the education of the child Clara Larissa Schmidt.

17. The Court of Appeal found the following to be true: (1) Clara's "*mother's estranging behaviour had an important bearing on Anna's objection*"; (2) Clara is "*enmeshed*" by her mother; (3) Clara's objection is "*influenced*" and "*manipulated*" by her mother; (4) Clara's "*fear of her father is in part a product of her mother's manipulation";* (5) This behaviour "*forms the foundation for her objection"*; (6) Clara's mother has a "*impaired parenting ability";* and (7) The actions of Clara's mother have an "*very distressing*" impact on Clara.

18. In paragraph [91], [92] and [94] the Court of Appeal explained that for Clara in New Zealand nothing changed since the Sole Custody Decision of the German Family Court dated 17.12.2014 (Decision of the Court of Appeal Nürnberg dated 30.05.2016) and the expert report of Prof. Dr. Gottfried Spangler, dated 04.02.2016. The Court of Appeal also predict for the future that *"the mother is likely to respond in ways that are harmful to Anna"* in paragraph [92]. For Clara's father the Court of Appeal assessed in paragraph [92]: *"on the contrary, a German court found that the father is the more suitable parent and we have no reason to disagree"*.

19. The best interest principal is not defined in the law, but the principles in Section 4, 5 and 6 in part 1 (preliminary provisions) and the issues provided in Section 133 in part 3 (procedural provisions) of the Care of Children Act 2004 may help us to define the welfare and best interest principal, and to consider what children need when their parents separate. As a consequence, any judicially determined decision must consider the welfare and best interests of the child as a paramount consideration and must take into account the principals relevant to the welfare and best interests set out in section 4, 5, 6, 133, (and 106) of the Care of Children Act 2004.

20. These sections of the law provide a framework for consideration of what best serves a child's welfare and best interests, with a partial indication of weighting within the principals:

<u>Child related factors:</u>

- Continue to have a relationship (S5) and attachment (S5, S133) with both of his or her parents.
- Preserve and strengthen child's relationship with his or her family group (understood to mean and include the extended family, the descent group, and the tribe) (S5).
- A child's identity (S5) should be preserved and strengthened.
- The view of the child must be taken into account (S6, S106).

<u>Parent related factors:</u>

- Parenting skills (S133).
- Co-operation abilities in parenting of the child and the likelihood that each parent will support the child's relationship with the other parent (S133).
- Continuity and stability in care, development, and upbringing (S5).

Risk- and protecting factors (S106):

- Factors of the child.
- Factors of the family environment.
- Factors of the social environment.

21. If the statements of the Court of Appeal were arranged to the relevant section of the law the Court of Appeal gave clear remarks on the probability and the possible outcomes of the other relevant criteria for the best interests of the child in the case of Clara:

Child related factors (S5, S6, S106, S133):

- S5, S133: Clara *"became enmeshed in her mother's deceit*". [53]
- S5: *"[93] First, the father is seeking contact, which is important and should be encouraged and appropriately managed".*
- S5, S133: *"[90] There is every reason to think that the mother will go to almost any lengths to prevent contac*t".
- S5, S6, S133: Clara's *"mother's estranging behaviour had an important bearing on Anna's objection"*. [56]
- S6, S106: Clara's objection is *"influenced"* [92] and *"manipulated"* [92] by her mother.
- S6, S106: Clara's *"fear of her father is in part a product of her mother's manipulation".* [94]
- S6, S106: Clara's mother's behaviour *"forms the foundation for her objection".* [28]
- S6, S106: Clara's mother's *"kind of manipulation appears to be a longstanding behaviour, as we note at [62]".* [28]

Parent related factors (S5, S133):

- S133: Clara's mother has *"impaired parenting ability".* [91]
- S133: *"on the contrary, a German court found that the father is the more suitable parent and we have no reason to disagree"*. [92]
- S133: *"[74] The likelihood of ongoing dispute between the parents could not be avoided by Anna remaining in New Zealand"*.

Risk- and protecting factors (S106):

- S106: Clara's *"mother is likely to respond in ways that are harmful to Anna"*. [93]
- S106: Clara's mother's activities have an *"very distressing"* impact on Clara. [61]

22. The Court of Appeal stated in his decision dated 22.11.2019 on the one hand, that for Clara, *"a relationship with her father is essential for [her] future wellbeing"* [91] and that Clara's father *"is the more suitable parent"* [92] and therefore to claim that contact of Clara with her father *"is important and should be encouraged and appropriately managed"* [93] and, on the other hand that *"there is every reason to think that the mother will go to almost any lengths to prevent contact"* [90].

23. The Court of Appeal made the most comprehensive analysis of the case of Clara Larissa Schmidt. Despite these findings of the Court of Appeal the Tauranga Family Court Judge Stephen Coyle prevented again any contact of Clara Larissa Schmidt with her father – since February 2017. In the decision of Judge Stephen Coyle dated 14.02.2020 he found in paragraph [13] that *"it is not in her* (remark of the signatory: Clara's) *best interests and welfare to progress the proceedings at this point in time"*.

24. It is absurd, that after the findings of the Court of Appeal in New Zealand in his decision 22.11.2019 and the findings of the Court of Appeal in the Federal Republic of Germany in his decision dated 30.05.2016, that the better parent for the education of this particular child Clara Larissa Schmidt is completely expelled from the education in New Zealand.

25. The Taranga Family Court has undermined the judgement and findings of the Court of Appeal dated 22.11.2019 (CA29/2018 [2019] NZCA 579) and the most recent German decisions dated 09.12.2019 (201 F 1554/19), 16.12.2019 (201 F 1554/19) and other German decisions dated 17.12.2014 (201 F 1835/13), 30.05.2016 (9 UF 149/15) and 18.10.2016 (201 F 949/16), the Tauranga Family Court has ignored and undermined the decisions of the Courts in New Zealand and of the Federal Republic of Germany.

V. The Judge's limited ability to control expert reports – here the expert reports of Sue Lightfoot dated 18.06.2017 and Dr. Sarah Calvert dated 03.01.2019

26. The Family Court at Tauranga and the Tauranga High Court followed the expert report of Ms Sue Lightfoot and dismissed the return of the child Clara Larissa Schmidt (DOB 03.07.2007) to the Federal Republic of Germany. The Tauranga Family Court Judge Stephen Coyle used the expert report of Sure Lightfoot dated 18.06.2017 and the expert report of Dr. Sarah Calvert dated 03.01.2019 for his evaluation of this individual case.

27. Sue Lightfoot and Dr. Sarah Calvert worked together at the Department of Child, Youth and Family, Tauranga, published together (e.g. Calvert & Lightfoot (2002). Working with children with complex presentations: A New Zealand approach. New Zealand Journal of Psychology, 31, 65-72) and have had also an intimate relationship.

28. In his decision dated 22.11.2019 the Court of Appeal discounted the expert report of Ms Sue Lightfoot (in paragraph [89]) and discounted also in parts the expert report of Dr Sarah Calvert dated 13.05.2019 (in paragraph [90], [93] and [94]) (see appendix 2).

29. The evaluation of the Court of Appeal dated 22.11.2019 made clear that the expert report of Ms Sue Lightfoot dated 18.06.2017 was nonviable and that the decision of the Family Court Judge Stephen Coyle was wrong. The Court of Appeal summarized in his decision dated 22.11.2019 in paragraph [89] "***Regrettably, Dr Calvert's report rests on some of the same false assumptions that lead us to discount the report of Ms Lightfoot.*** *Notably, she assumes that on return to Germany Anna would live with the father and the mother and partner would not return. She concludes that return to Germany will cause psychological harm for two reasons: the return will be to Anna's father's sole care and she will be in a situation where she will have no meaningful supports. This assumption is wrong on both counts, as is Dr Calvert's important conclusion that return would sever Anna's relationships with her mother, her mother's partner and her sibling.* ***These errors require that those whose task it is to implement the Convention should subject Dr Calvert's conclusions to critical scrutiny***".

30. The Court of Appeal followed the advisory opinion of the signatory dated 03.07.2017 to the expert report of Ms Sue Lightfoot dated 18.06.2017 completely.

31. The Tauranga Family Court Judge Stephen Coyle expressed in this decision dated 14.02.2020 in paragraph [11] that he will continue with Dr Sarah Calvert as an expert in this case for further evidence and facts: *"More pragmatically as alluded to by Ms Gunn and Ms Hopfengartner if I were to simply direct that Dr Calvert continue there is the potential for Dr Schmidt to challenge any expert opinion evidence that she gives and/or use that for a subsequent appeal and given the delays that have already occurred for Clara that cannot be in her best interest and welfare".*

32. In this case all necessary data are available. The Tauranga Family Court Judge Coyle is collecting data since February 2017. Since that day no contact between the child Clara Larissa Schmidt and the signatory was arranged by the Judge Stephen Coyle.

33. The Tauranga Family Court Judge Stephen Coyle supports the ongoing alienation of the child. The Court of Appeal found in his decision dated 22.11.2019 in paragraph [56] that Clara's mother estranged her daughter from her father: *"mother's estranging behaviour had an important bearing on Anna's objection"*; in paragraph [90]: *"[90] There is every reason to think that the mother will go to almost any lengths to prevent contac*t"). This behaviour is and emotional abuse of children and should be avoided by the Judges in New Zealand (see "Your children need both parents, so help them keep up their relationship with the other parent"; see Ministry of Justice - A Parenting Through Separation programme factsheet, 2020).

VI. The Judge's efforts to influence the opinion of the New Zealand Psychological Board

34. The signatory made an 03.07.2017 an advisory opinion to the expert report of Sue Lightfoot dated 18.06.2018 and a complaint to the New Zealand Psychological Board.

35. The Tauranga Family Court Judge Stephen Coyle did not consider the advisory opinion and the complaint.

36. But the Tauranga Family Court Judge Stephen Coyle tried to influence the decision of the New Zealand Psychological Board with his Chambers Minute dated 18.10.2017. The Chambers Minute of Judge Coyle dated 18.10.2017 is not available to the signatory but in a letter of lawyers Wotten Kearney, Wellington to the New Zealand Psychological Board, dated 11.12.2017 was written:

"Judge Coyle was also critical of Mr Schmidt for using the complaints process as a means of relitigating arguments that his lawyer had run, unsuccessfully, at trial, in circumstances where counsel had had a full opportunity to put those matters to Ms Lightfoot in cross-examination. In fact, His Honour noted that many of these issues raised as complaints were put to her and she responded. [4] (Chambers Minute dated 18 October 2017, paragraph 9)" (Page 3 Wotten Kearney to the New Zealand Psychological Board 11.12.2017).

37. Furthermore, the lawyers Wotten Kearney, Wellington stated:

*"As the Judge appropriately recognized, the Board is the appropriate arbiter of complaints about the professional conduct of report writers. However, it is respectfully submitted that a review of the relevant material (now supplemented by Ms Lightfoot's detailed response to the complaint) should be held to bear out His Honour's view "**That there I no merit in the complaint as it is principally an attempt to relitigate issues arising out of decisions I have reached that Mr Schmidt does not agree with**"* (Page 4 Wotten Kearney to the New Zealand Psychological Board 11.12.2017).

38. The judgement of the Court of Appel dated 22.11.2019 was opposite to the opinion of the Tauranga Family Court Judge Stephen Coyle.

VII. The Judge's prejudice regarding the signatory's competences of the best interest of children and the individual child Clara Larissa Schmidt

39. In his decision FAM-2017-079-000008, dated 28.09.2017 the Tauranga Family Court Judge Stephen Coyle made the assertions that the signatory "***has shown that he has no respect for the rule of law in New Zealand, and no insight as to what is best for Clara".***

40. The signatory is an expert of the best interest of the child. The signatory is graduated with a Diploma in Economics and a Diploma in Psychology. The signatory is also graduated with a degree of doctor of the human science faculty of the University of Cologne. The signatory is lecturer at two universities for the best interests of the child (University of Cologne and University of Applied Sciences of Mönchengladbach).

41. The signatory was also appointed to an expert group by the government of the Federal Republic of Germany to change to custody law.

42. The leading law publisher Nomos, Baden-Baden, Federal Republic of Germany published in April 2020 the title of the signatory “Interdisciplinary commentary of the child: Empirical results for the judicial practice if parents separate” (Schmidt, A. & Westhoff, Kr. (2020). Kindeswohl interdisziplinär: Empirische Ergebnisse für die juristische Praxis bei Trennung der Eltern. Baden-Baden: Nomos).

https://www.nomos-shop.de/Schmidt-Westhoff-Kindeswohl-interdisziplinär/productview.aspx?product=43544

43. This book closes the gap between norms, judicial interpretations and empirical results of human scientific consensus in order to better define the undetermined legal term "best interests of the child". The first part of the book presents the legal foundation and constitutional court and supreme court judgments concerning the "best interests of the child"; this forms the framework for the second part which presents the corresponding empirical facts from human science. Human sciences provide a value system corresponding to the judicial decision criteria and thus a measure for assessing the best interests of the child in an individual case and putting decision finding on a fact-based foundation. This interdisciplinary approach of a human science commentary on judicial criteria for the best interests of the child can help family courts, expert witnesses and people with a professional interest in the subject. The famous German psychologist Prof. Dr. Karl Westhoff – publisher of the standards for expert reports in the Federal Republic of Germany – is co-author. The publication has a preface of the retired Presiding Supreme Court Judge Prof. Dr. Bernd von Heintschel-Heinegg. In New Zealand and in Australia well known Professors from Law Universities in Auckland and Queensland proof to adapt this publication together with the signatory in their countries.

44. In the Federal Republic of Germany, the interdisciplinary commentary is compulsive reading for Family Court Judges. The signatory is appointed by all Court levels in the Federal Republic of Germany for expert reports and advisory opinions to expert reports (Family Court, High Court, Court of Appeal, Supreme Court, Constitutional Court).

45. The assertion *"the father has shown"* that he has *"no insight as to what is best for Clara"* has no substance and must be evaluated as prejudice.

VIII. The Judge's prejudice regarding the signatory's activities regarding the individual child Clara Larissa Schmidt on 28.09.2017

46. In his decision FAM-2017-079-000008, dated 28.09.2017 the Tauranga Family Court Judge Stephen Coyle made the assertions that the signatory "***has shown that he has no respect for the rule of law in New Zealand, and no insight as to what is best for Clara".***

47. The German Court decision the warrant to take the child dated 18.06.2016 was stated: *"Final decision: 1. The defendant is obligated to release the child Clara Larissa Schmidt, born 03.07.2007, into the care of the Claimant. 2. For the execution of the release claim the use of direct force – if required – may be ordered".*

48. It is unsubstantiated to make the assertion that the signatory *"has no respect for the rule of law in New Zealand".* The written recommendation of QC Murray Earl was: "I indicated to him that it appeared from the information that he had provided under New Zealand Law as long as the children's mother did not have an Order in her favour, that he had as much right to the care of the child as she did" (Murray Earl, Hamilton, 28.08.2017).

49. Tauranga High Court Judge Davidson stated in his decision reasons dated 11.06.2018: *"[37] ... While it is clear from Anna's comments to her counsel, Mr Blair, that she was unsettled and traumatised by these events and the appellant's action it is relevant to note that at the time of that occurrence, the German custody order was the only custody order in place, and furthermore that the German Court had made an order in which it had said that the respondent had shown by her conduct that without the use of direct force she would not release Anna".*

50. The warrant to take the child was renewed on 16.12.2019 by the Courts of the Federal Republic of Germany.

51. The assertion *"the father has shown"* that he has "***that he has no respect for the rule of law in New Zealand***" has no substance and must be evaluated as prejudice.

IX. The Judge's behaviour regarding the guidance of the proceedings

Appointment of telephone conferences

52. The Tauranga Family Court Judge Coyle made an appointment for a telephone conference on 17.12.2018, 04:00 pm New Zealand time knowing that this time is in the middle of the night in Germany. New Zealand and the Federal Republic of Germany have 12 hour time difference, so that the appointment will be at 04:00 am German time.

53. The Tauranga Family Court Judge Coyle was not willing to choose a time-frame between 06:00 am to 12:00 am New Zealand time, so that the signatory has not to wait until 04:00 am German time in the middle of the night. The signatory has to work at 08:00 am German time. There should be no doubt that a court telephone conference at 04:00 am is not a usual procedure.

54. The right to be heart could only be achieved if the signatory has not to wait until 04:00 am German time for a telephone conference.

Acceptance of affidavits

55. The Family Court at Tauranga informed the signatory with E-Mail dated 10.03.2020 that he did not accept an affidavit of the signatory dated 27.02.2020. The Family Court at Tauranga will only accept affidavits which are complaint with the rules in New Zealand.

56. The Family Court has only one rule concerning authority to 'take' an affidavit. The word 'take' is used here to mean take an oath from a 'deponent' or administer an oath to a 'deponent' – someone producing sworn evidence for the court. That rule is Family Court Rule 168. It only allows affidavits sworn before persons who are in one of the categories listed in section 104 of the District Court Act 2016 – Judge, Registrar, JP, CM, or lawyer – see section 104.

57. The Family Court is a division of the District Court of New Zealand. That is why it turns to section 104 of the District Court Act for its authority. Wherever the Family Court Rules, and the Family Court Act 1980, does not cover a particular situation, then the District Court Act and the District Court Rules apply.

58. In the Federal Republic of Germany, no person or authority is allowed to take oaths. Therefore, the signatory is not able to swear before an authority "*who are in one of the categories listed in section 104 of the District Court Act 2016 – Judge, Registrar, JP, CM, or lawyer – see section 104*".

59. New Zealand family law has no legislation for international cases in the before mentioned legislation. The legislation is so far limited.

60. The signatory was able to find a notary public who certified that that the signatory signed this document. That is what a notary public is allowed to do. The notary public Dr. Kessel charged 52,80 EUR for each affirmation. In total 105,75 EUR.

He signed now the affidavit with the words: "*I hereby certify the above is the true signature, subscribed in my presence, of Dr. Axel Schmidt, born on 21.04.1964, resident Botzelaerstraße 6, 41199 Mönchengladbach, who is personally known to me. The notary public is not able to understand the text above the signature, because it is written in a foreign language*". The goodwill is 5.000 each case.

61. Another significant piece of legislation on this subject is the Oaths and Declarations Act 1957. Section 11 of that Act sets out the procedure for declarations made outside NZ. For a country that is not part of the Commonwealth, it lists a Judge, a notary public, a JP, or a solicitor of the High Court of NZ, as persons authorised to administer declarations. The affidavit of the signatory dated 27.02.2020 was complaint to the Oaths and Declarations Act 1957.

62. There was no reason not to accept the two affidavits of the signatory dated 27.02.2020.

63. All other courts in New Zealand accepted the way that a notary public can only confirm the signature in the Federal Republic of Germany (complaint to the Oaths and Declarations Act 1957).

64. Because of the circumstances of this case and the inflexibility of the Tauranga Family Court Judge, the authorities of the Federal Republic of Germany made an exemption to allow the notary public Dr. Rezori to take oaths in the proceedings of the signatory at the Tauranga Family Court regarding § 352 Abs. 3 S. 3 FamFG (certificate of inheritance). The same text was now before the notary public Dr. Rezori on 27.03.2020. He signed now the affidavit with the words: "*A person authorized by the laws of the Federal Republic of Germany to take oaths in the Federal Republic of Germany*". The goodwill is now 100.000 each case.

65. The notary public Dr. Rezori charged 446,61 EUR and 443,04 EUR for the affirmations. In total 889,65 EUR.

66. The signatory is not able to pay for each affidavit ca. 450 EUR. In New Zealand the parties have no costs for affidavits. This could be evaluated as an act of unequal treatment.

67. The Tauranga Family Court Judge Coyle made an order that the 9th change of address of Clara in New Zealand in 2019 is confidential. With this order the Judge wanted probably to prevent the signatory to enforce the final judgements of the Courts of the Federal Republic of Germany against s Lisa Hopfengärtner, in total ca. 21.000 EUR without interests and against Mr Simon Hopfengärtner, in total ca. 11.000 EUR without interests and the final judgments of the Federal Republic of Germany against Ms Lisa Hopfengärtner. The signatory needed to order a private investigator to find out the new address. These costs could be charged to the other parties. The signatory also indicates that still ca. 20.000 EUR of the assets of the child were not transferred back to an account of the child. This money is lost for the child and used by the mother of the child for expenses. The complete assets plus interest needs to be delivered to the child when she became 18 years old.

C.

68. The guiding principle of this application is that a Judge is disqualified from sitting if, in the circumstances, there is a real possibility that in the eyes of a fair-minded, objective and fully informed observer, the Judge might not be impartial in reaching a decision of the case. This will include instances where a Judge has a material interest in the outcome of a case but there may also be other circumstances in which the appearance of bias in law arises.

69. The Court may prima facie be viewed as a state-sponsored dispute resolution service to society – the Tauranga Family Court Judge Stephen Coyle has shown:

- that the Judge failed to apply the Care of Children Act 2004,
- that the Judge failed to apply the best interests of the child Clara Larissa Schmidt,
- that the Judge has not the competences to control expert reports,
- that the Judge tried to influence decisions of authorities of New Zealand and
- that the Judge is able to remove the right to be heard wherever he can.

67. For these reasons the signatory asked to recuse Judge Coyle from this case.

Dr. Axel Schmidt

17. April 2020

Copy: Minister of Justice Minister Andrew Little, the Principal Family Court Judge Ms Jacquelyn Moran and the Chief District Court Judge Mr Heemi Taumanud