CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/00

LISA TRACY SONDERUP (previously TONDELLI)	Appellant
versus	
ARTURO TONDELLI	First Respondent
THE FAMILY ADVOCATE	Second Respondent

Heard on : 23 November 2000

Decided on : 4 December 2000

JUDGMENT

GOLDSTONE J:

Introduction

[1] This appeal concerns a four-year-old girl, who was brought to South Africa from Canada by her mother in June 2000 and who is still here with her mother. The question which this Court has to consider is whether the mother is acting in violation of the provisions of the Hague Convention on the Civil Aspects of International Child Abduction[1] (the Convention). If so, further questions arise including the constitutionality of the statute incorporating the Convention into South African law.

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[1] The Convention was adopted at The Hague on 25 October 1980.

[2] On 18 October 2000, Jennett J, sitting in the South Eastern Cape High Court (the High Court), ordered that Sofia Chilo Tondelli (Sofia) forthwith be returned to British Columbia, Canada.[2] The order was made pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction Act[3] (the Act). This Act gives statutory recognition to the Convention which has been ratified by many nations including Canada and South Africa. The Act came into force on 1 October 1997. In terms of section 2, the Convention, which is a schedule to the Act, applies in South Africa and, in terms of section 231(4) of the Constitution[4] it has become law. It is the meaning and effect of this Act which falls to be interpreted in this case.

[3] There were competing applications in the High Court. Lisa Tracy Sonderup, the mother of Sofia (the mother) claimed an order granting her custody of Sofia. Arturo Tondelli, the father of Sofia (the father), sought in a counterclaim to have an order of the Supreme Court of British Columbia awarding him custody of Sofia made an order of the High Court, and to have Sofia returned forthwith to British Columbia. The Chief Family Advocate[5] (the Family Advocate), who is designated by section 3 of the Act as the Central Authority for the Republic,[6] brought her own application for the return of

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2 *Sonderup v Tondelli and The Family Advocate* 18 October 2000, as yet unreported.

3 Act 72 of 1996.

4 Section 231(4) of the Constitution provides inter alia that:
> "Any international agreement becomes law in the Republic when it is enacted into law by national legislation . . . "

5 The Family Advocate is appointed by the Minister of Justice in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

6 The Convention requires the appointment of a "Central Authority" as the relevant official to ensure that the provisions of the Convention are implemented. See para 13 below.

Sofia to British Columbia in terms of Article 12 of the Convention. It was the last-mentioned application that was granted by the High Court.

[4] On 9 November 2000 the mother sought leave to appeal directly to this Court in terms of rule 18 of the Rules of the Constitutional Court. In considering the mother's application, we came to the conclusion that there is a constitutional issue to be determined in the appeal and that this Court therefore has jurisdiction to entertain the matter. We were further of the view that it is in the interests of justice and of Sofia that this litigation should be finalised as soon as possible. The father and the Family Advocate did not object. Accordingly this appeal was set down for hearing in this Court on an expedited basis. The father did not appear in this Court and filed a consent to abide our decision. We are indebted to counsel appearing for the mother and the Family Advocate for having filed helpful argument in the short time available to them.

The Background

[5] The mother was born in South Africa and the father in Italy. They were married to each other in South Africa on 19 June 1989. They lived for some years in Italy and in July 1997 they emigrated to Canada. They made their home at Owl Ridge, Mount Currie in British Columbia. The marriage foundered and during 1998 they separated.

[6] On 7 July 1999 a consent paper was made an order of the Supreme Court of British Columbia. In terms thereof, the mother was granted sole custody of Sofia and the father rights of access to her.

They were granted joint guardianship and the father was ordered to pay maintenance for the child. It was further provided that:

> ". . . neither the Plaintiff (the father) nor the Defendant (the mother) shall remove the Child from the Province of British Columbia without further Court Order or the written agreement of the parties except that either party will be permitted to travel outside of British Columbia with the child once per year for a period not to exceed 30 days.
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> . . . if the Child is taken out of Canada for a period exceeding 30 days, without further court Order or written consent of both parties permitting the same, the child will have been wrongfully removed from the Province of British Columbia, Canada, in contravention of the Convention [on] the Civil Aspects of International Child Abduction (Convention).
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> . . . the state of habitual residence of the Child, within the meaning of the Convention, is the Province of British Columbia, Canada."

[7] On 31 May 2000, the mother and the father were divorced in the Supreme Court of British Columbia. The order of 7 July 1999 was left in place. In June 2000, the father sought an urgent order from the Supreme Court of British Columbia restraining the mother from removing Sofia from British Columbia. The application was settled and by consent it was ordered on 9 June 2000 that an investigation be conducted into issues of custody of and access to Sofia and that they be set for trial at the earliest date. It was further ordered that:

> ". . . the Defendant (the mother) be allowed to travel to South Africa with the Child, for a one-month period from June 12, 2000 and returning July 14, 2000 on the following conditions:

(a) the Plaintiff (the father) will have sole custody of the Child in the event that the Child is not returned to British Columbia by July 14, 2000;

(b) the Defendant will deposit the sum of $5,000.00 with her counsel to be held by him or her as security for the return of the Child and be immediately paid over to the Plaintiff or his counsel if the Child is not returned to British Columbia on or about July 14, 2000."

[8] The mother and Sofia left for South Africa where they moved in with the mother's family in Port Elizabeth. When it became clear to the father that neither Sofia nor the mother was returning to Canada, he approached the Supreme Court of British Columbia and on 21 July 2000 obtained an order, without notice to the mother, to the effect that he was awarded sole custody and guardianship of Sofia, ordering the mother forthwith to deliver Sofia to the father and providing for the arrest of the mother in the event of her breaching the order.

[9] Thereafter, the Family Advocate received a request, in terms of the Convention, from the Central Authority of British Columbia, for steps to be taken to ensure the prompt return of Sofia to British Columbia.

The Convention

[10] According to its preamble, the purpose of the Convention is to protect children from the harmful effects of their wrongful removal or retention and to ensure their prompt return to the state of their habitual residence. I agree with L'Heureux-Dubé J's comments in *Thomson v Thomson*[7] that:

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7 (1994) 119 DLR (4th) 253 at 296.

> ". . . the necessity of international agreements with regard to the abduction of children has been abundantly demonstrated particularly in recent years. The increase in rapid international transportation, the freer crossing of international boundaries, the continued decrease in documentation requirements when entering foreign jurisdictions, the increase in 'international families', where parents are of different countries of origin, and the escalation of family breakups worldwide, all serve to multiply the number of international abductions."

[11] The Convention provides for a mandatory return procedure whenever a child has been removed or retained in breach of the rights of custody of any person or institution "under the law of the State in which the child was habitually resident immediately before the removal or retention" and where those rights were actually being exercised or would have been but for the removal or retention. These rights, according to the Convention may arise by operation of law, by judicial or administrative decision or by an agreement having legal effect.[8] The Convention defines "rights of custody" to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[9] In applying the Convention "rights of custody" must be determined according to this definition independent of the meaning given to the concept of "custody" by the domestic law of any state party. Whether a person, an institution or any other body has the right to determine a child's habitual residence must, however, be established by the domestic law of the child's habitual residence. As L'Heureux-Dubé J correctly points out:

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8 Article 3 of the Convention.

9 Article 5a of the Convention.

> "[h]owever, although the Convention adopts an original definition of 'rights of custody', the question of who *holds* the . . . 'right to determine the child's place of residence' within the meaning of the Convention is in principle determined in accordance with the law of the state of the child's habitual place of residence . . ."[10] (Emphasis added)

At all material times Sofia's habitual place of residence was British Columbia, and the law of that province prohibited her from residing in any other place without the authority of an order of court or written agreement between the mother and the father.

[12] Where a child has been wrongfully removed or retained in terms of Article 3, and a period of less than a year after the wrongful removal or retention has elapsed, the judicial or administrative authorities of the requested state "shall order the return of the child forthwith."[11] Such judicial or administrative authority is granted a discretion to refuse to order such return by the provisions of Article 13. It reads as follows:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
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> a the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
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> b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an

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10 *W.(V.) v S.(D.)* (1996) 134 DLR (4th) 481 at 496.

11 Article 12 of the Convention.

intolerable situation.

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."[12]

A further ground for refusing to return a child is to be found in Article 20. It provides that:

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

[13] Article 6 requires states parties to designate a Central Authority to discharge the duties imposed by the Convention. As already indicated, in South Africa the Act designates the Family Advocate for this purpose.[13] In British Columbia, according to the papers before the Court, the Attorney-General has been so designated.[14]

[14] Under Article 7 the Central Authorities are to co-operate with each other and promote co-

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12 In the present case the mother relies on Article 13b, claiming that the return of Sofia would expose her to psychological harm or otherwise place her in an intolerable situation.

13 Above para 3.

14 In Canada, the respective provinces have ratified the Convention and the terms thereof are incorporated in provincial legislation.

operation amongst the competent authorities in their respective states to secure the prompt return of children to achieve the objects of the Convention.[15] Thus, under the Convention, the Family Advocate must act on behalf of the Central Authority of the requesting state to facilitate the return of children. Contrary to the neutral role that the Family Advocate takes in domestic matters, the Family Advocate may be obliged to adopt an adversarial role and oppose the wishes of the parent opposing such return.[16]

[15] In addition, Article 7 requires the Central Authorities, directly or through an intermediary, amongst other things, "to exchange, where desirable, information relating to the social background of the child".[17] This requirement for co-operation between Central Authorities suggests that the Family Advocate ought, where possible, to liaise with the Central Authority of the requesting state, here the Attorney-General of British Columbia, to obtain any reports with relevant information. Reports containing the objective assessment of facts that are in issue would greatly assist the courts. Under the Convention, it is reasonable to expect the Family Advocate to initiate the exchange of information and provide the results of those inquiries to the courts. It would also be most helpful for the Central Authority of the requesting state to furnish a court considering an Article 13 exemption with any relevant information relating to the circumstances of the child. This is envisaged by Article 13 itself, which states:

> " . . .

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15 Article 7 of the Convention.

16 Article 7f-g of the Convention

17 Article 7d of the Convention.

> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority . . . of the child's habitual residence".[18]

The Proceedings in the High Court

[16] By agreement, the High Court considered only the urgent application brought by the Family Advocate, in which she sought an order for the return of Sofia to British Columbia in terms of Article 12 of the Convention. It was accepted that if the Family Advocate's application was granted, the mother's application and the father's counter-application would fall to be dismissed.

[17] The mother challenged the application of the Family Advocate, arguing that to order Sofia back to Canada under the Convention would amount to making an order in conflict with section 28(2) of the Constitution[19] because such a return would be against the child's best interests. Jennett J held that there is no conflict between the Convention and section 28(2) of the Constitution, since under both instruments, the interests of children are of paramount importance in determining custody. He recognised, however, that the central issue of the case before the court was not to decide who should have custody but rather to decide which court should consider the merits of custody. Jennett J determined that the best interests of the child would be to allow the court that could best dispose of the case to do so. He held that the Convention is reconcilable with section 28(2) of the Constitution.

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18 It is not necessary to decide in this case the precise implications of the language used in this sub-paragraph of Article 13.

19 Section 28(2) of the Constitution provides:

> "A child's best interests are of paramount importance in every matter concerning the child."

[18] Jennett J also decided that, given the evidence before him, it was not inconsistent with Sofia's best interests that issues relating to the father's access and custody be considered by the Supreme Court of British Columbia. Accordingly, he concluded it was in her best interests to grant the Family Advocate's application and order the return of Sofia to British Columbia. In his order, he recorded the terms of a number of undertakings given by the father.[20]

The Issues

[19] The issues before this Court are the following:

(a) Whether the provisions of the Convention apply in the present case;

(b) If so, whether, as incorporated by the Act, they are consistent with the Constitution;

(c) Whether these provisions require the return of Sofia.

The Applicability of the Convention

[20] The mother denies that the father possesses any "rights of custody" as defined in the Convention and thus asserts that neither the removal of Sofia from British Columbia nor her retention in South Africa are wrongful. Consequently, so she claims, the Convention has no application in this matter.

[21] As stated above, the Convention defines "rights of custody" to include, in particular, "the right

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20 Para 49 below.

to determine the child's place of residence".[21] In this case there was a non-removal ("ne exeat") provision in the order of the Supreme Court of British Columbia of 7 July 1999.[22] It has been held by courts in several jurisdictions that such a non-removal provision can, depending on the circumstances, confer a right of custody within the meaning of the Convention.[23]

[22] In urging this Court to find that the Convention does not apply, the mother relies on the recent case of *Croll v Croll*[24] in which the United States Court of Appeals for the Second Circuit held, contrary to the weight of authority, that a non-removal provision does not found a right of custody.

[23] In the court a quo, Jennett J dismissed this argument, preferring to follow the approach taken in the dissent of Sotomayor J. In his judgment, Sotomayor J said that:

> "rights arising under a *ne exeat* clause include the 'right to determine the child's place of residence' . . . A parent's *ne exeat* rights fit comfortably within the category of rights the Convention seeks to protect".[25]

This followed, according to Sotomayor J, because when a parent takes a child abroad in violation of

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21 Above para 11.

22 Above para 6.

23 Australia: *Director-General Department of Families, Youth And Community Care v Julie Hobbs* [1999] FamCA 2059 at paras 68-69. Canada: *Thomson*, above n 7 at 278-80. England: *B v B (abduction: custody rights)* [1993] 2 All ER 144 (CA) at 148-49; *C v C (minor: abduction: rights of custody abroad)* [1989] 2 All ER 465 (CA) at 469, 472 and 473.

24 *Croll v Croll* 229 F.3d 133, 139 (2d Cir 2000)

25 Ibid at 146.

ne exeat rights, that parent effectively nullifies the custody order of the country of habitual residence – exactly the mischief the Convention seeks to avoid.

[24] In any event, the facts in *Croll* are not identical to those in the present case. Here, we are not dealing only with a non-removal provision in a final custody agreement. In this case we have an interim agreement between the parties that Sofia would be returned to her country of habitual residence by a particular date, and that "the issues of custody and access be set for trial at the earliest dates . . . available for counsel and the court registry".[26] That agreement was made an order of the Supreme Court of British Columbia.

[25] The "rights of custody" as defined in the Convention may, according to Article 3, arise either by court order or by agreement having a legal effect under the law of the requesting state. It is not in dispute in this case that both the agreement and the order incorporating it constituted the basis upon which the mother was to retain custody of Sofia and upon which the father was entitled to exercise rights of access to her. In effect the mother was entitled to exercise her rights of custody (in the sense of caring for the daily needs of Sofia) only in British Columbia, save for the period from 12 June 2000 to 14 July 2000. Her failure to return to British Columbia with the child on the latter date was a breach of the conditions upon which she was entitled to exercise her rights of custody and a concomitant breach of the father's rights under the agreement and order. It therefore constituted a wrongful

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[26] Order of the Supreme Court of British Columbia of 9 June 2000 in the matter of *Tondelli v Tondelli* No. D110334.

retention by her of Sofia outside British Columbia as contemplated by Article 3 of the Convention.[27] I conclude therefore that the Convention is applicable.[28]

The Constitutionality of the Act and the Effect of Section 28(2)

[26] It is now necessary to consider the submission on behalf of the mother that the Act is inconsistent with the Constitution. The only basis upon which this submission was made was that the Act obliges our courts to act in a manner which does not recognise the paramountcy of the best interests of the child.

[27] That the Constitution is our supreme law is made clear from section 2 which provides that:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

As was stated by Mohamed CJ:

> "This inquiry must crucially rest on the Constitution of the Republic of South Africa Act . . . *It* is supreme—not Parliament. It is the ultimate source of all lawful authority in the

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27 In *Re H and another (minors)(abduction: custody rights); Re S and another (minors)(abduction: custody rights)* [1991] 3 All ER 230 (HL) at 238, Lord Brandon held that, within the context of the Convention, retention is an event which occurs once and for all on a specific occasion. He continued at 240 that:

> ". . . retention occurs where a child, which has previously been for a limited period of time outside the state of its habitual residence, is not returned to that [state] on the expiry of such limited period."

28 It is unnecessary to consider whether the order of 21 July 2000 granting the father sole custody and guardianship of Sofia has relevance in this matter.

country."[29] (Emphasis in the original)

It follows that if the Act or any of its provisions are inconsistent with a provision of the Constitution, such inconsistency would have to be justifiable under the provisions of section 36 of the Constitution[30] in order for the Act to be constitutionally valid.

[28] The Convention itself envisages two different processes — the evaluation of the best interests of children in determining custody matters, which primarily concerns long-term interests, and the interplay of the long-term and short-term best interests of children in jurisdictional matters. The Convention clearly recognises and safeguards the paramountcy of the best interests of children in resolving custody matters. It is so recorded in the preamble which affirms that the states parties who are signatories to it, and by implication those who subsequently ratify it, are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody." As was stated by Donaldson MR in *Re F*:[31]

"I agree with Balcombe LJ's view expressed in *Giraudo v Giraudo* . . . that in enacting

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29 *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (CC); 1999 (11) BCLR 1339 (SCA) para 14.

30 Section 36(1) of the Constitution reads as follows:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
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> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

31 [1999] 3 All ER 97 (CA) at 99.

> the 1985 Act [giving effect to the Convention], Parliament was not departing from the fundamental principle that the welfare of the child is paramount. Rather it was giving effect to a belief—
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> > 'that in normal circumstances it is in the interests of children that parents or others shall not abduct them from one jurisdiction to another, but that any decision relating to the custody of the children is best decided in the jurisdiction in which they have hitherto been habitually resident.' "

[29] What, then, of the short-term best interests of children in jurisdictional proceedings under the Convention? One can envisage cases where, notwithstanding that a child's long-term interests will be protected by the custody procedures in the country of that child's habitual residence, the child's short-term interests may not be met by immediate return. In such cases, the Convention might require those short-term best interests to be overridden. I shall assume, without deciding, that this argument is valid. To that extent, therefore, the Act might be inconsistent with the provisions of section 28(2) of the Constitution which provide an expansive guarantee that a child's best interests are paramount in every matter concerning the child. I shall proceed therefore to consider whether such an inconsistency is justifiable under section 36 of the Constitution,[32] which requires a proportionality analysis and weighing up of the relevant factors.

[30] In conducting this proportionality analysis, section 36 enjoins this Court to consider the importance of the purpose of the limitation, and the relationship between the limitation and its purpose.[33]

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32 Above n 30.

33 See *De Lange v Smuts* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at paras 86-88 and *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 SA (CC) at para 104.

The purpose of the Convention is important. It is to ensure, save in the exceptional cases provided for in Article 13 (and possibly in Article 20),[34] that the best interests of a child whose custody is in dispute should be considered by the appropriate court. It would be quite contrary to the intention and terms of the Convention were a court hearing an application under the Convention to allow the proceedings to be converted into a custody application. Indeed, Article 19 provides that:

> "A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue."

Rather, the Convention seeks to ensure that custody issues are determined by the court in the best position to do so by reason of the relationship between its jurisdiction and the child. That Court will have access to the facts relevant to the determination of custody.

[31] Given the appropriateness of a specific forum, the Convention also aims to prevent the wrongful circumvention of that forum by the unilateral action of one parent. In addition, the Convention is intended to encourage comity between states parties to facilitate co-operation in cases of child abduction across international borders. These purposes are important, and are consistent with the values endorsed by any open and democratic society.

[32] There is also a close relationship between the purpose of the Convention and the means sought to achieve that purpose. The Convention is carefully tailored, and the extent of the assumed limitation

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[34] See para 37 below.

is substantially mitigated by the exemptions provided by Articles 13 and 20.[35] They cater for those cases where the specific circumstances might dictate that a child should not be returned to the State of the child's habitual residence. They are intended to provide exceptions, in extreme circumstances, to protect the welfare of children. Any person or body with an interest may oppose the return of the child on the specified grounds.

[33] The nature and extent of the limitation are also mitigated by taking into account section 28(2) of our Constitution when applying Article 13. The paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention. The absence of a provision such as section 28(2) of the Constitution in other jurisdictions might well require special care to be taken in applying dicta of foreign courts where the provisions of the Convention might have been applied in a narrow and mechanical fashion.

[34] Moreover, in the application of Article 13, recognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction.[36] Our courts should not trivialise the impact on children and families of violence against women. In *S v Baloyi*[37] this Court quoted the following

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35 Above para 12.

36 For a perspective on the failure of courts to apply the Hague Convention with adequate concern and information about domestic violence and gender dynamics, see Kaye, "The Hague Convention and the Flight From Domestic Violence: How Women and Children Are Being Returned by Coach and Four" (1999) 13 *International Journal of Law, Policy and the Family* 191at 195.

37 *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 11.

statement with approval:

> "Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person."

Where there is an established pattern of domestic violence, even though not directed at the child, it may very well be that return might place the child at grave risk of harm as contemplated by Article 13 of the Convention.

[35] A South African court seized with an application under the Convention is obliged to place in the balance the desirability, in the interests of the child, of the appropriate court retaining its jurisdiction, on the one hand, and the likelihood of undermining the best interests of the child by ordering her or his return to the jurisdiction of that court. As appears below, the court ordering the return of a child under the Convention would be able to impose substantial conditions designed to mitigate the interim prejudice to such child caused by a court ordered return.[38] The ameliorative effect of Article 13, an appropriate application of the Convention by the court, and the ability to shape a protective order, ensure a limitation that is narrowly tailored to achieve the important purposes of the Convention. It goes no further than is necessary to achieve this objective, and the means employed by the Convention are proportional to the ends it seeks to attain.

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[38] Below para 51.

[36] For the above reasons I am satisfied that the limitation is manifestly reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Therefore, I conclude that the Act incorporating the Convention is consistent with the Constitution.

[37] It was argued on behalf of the mother that the provisions of Article 20 require the provisions of section 28(2) of the Constitution to be applied as a further exception to the obligation to return the child to the state of habitual residence. In the light of the above analysis the argument based on Article 20 takes the matter no further.

The Reliance on Article 13

[38] Within the parameters of the Convention, the mother submitted that there should not be an order for the return of Sofia because she would be at grave risk of psychological harm and would be placed in an intolerable situation should she be returned. The factual matrix upon which the mother's claim is based is to be found in the affidavits and documentary material placed before the High Court. Much of it is disputed by the father and none of it has been tested by viva voce evidence.

[39] Counsel for the mother, in argument in this Court, relied upon the following allegations of the mother:

(a) A physical assault upon her by the father on one occasion during June 1998. (An allegation by the mother of an earlier assault was not relied upon by counsel. It

occurred soon after the Tondellis took up residence in British Columbia, and resulted in the mother having a bruised thigh.) The June 1998 incident resulted in a peace bond being placed upon the father. It was issued on 30 July 1998 and was the consequence of the father, during an argument, having "grabbed my arm and [thrown] me onto the kitchen counter";

(b) A second peace bond was issued on 11 May 2000 and was the consequence of alleged threatening behaviour on the part of the father. In her affidavit in the High Court, the mother alleged that the peace bond was granted in the light of the following conduct by the father (who is referred to as the First Respondent):

> "23.1 Over the period 1 November 1999 to 25 March 2000 [he] verbally and psychologically abused and intimidated me. Explanations thereof are the following:
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> > 23.1.1 First Respondent informed me that if I wouldn't live with him, I would not live with any other man.
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> > 23.1.2 He informed me that there wouldn't be a divorce until I did things the way he wanted me to do them.
> >
> > 23.1.3 First Respondent followed and watched me and phoned me incessantly. He once queried me where my car was and who was driving it, and stated that he saw my car outside my home.
> >
> > 23.1.4 First Respondent's tone of voice and body language towards me was often threatening and intimidating. On

> occasion he did not want to leave my shop and I was compelled to call in the assistance of the police to do so.
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> 23.2 [He] was inclined to insult hunters, whom he never liked. First Respondent informed me that he on occasion sabotaged a hunter's summer house by sealing all the locks and bolts of the door with super glue, so that the hunters had to break the door down to get into the house.
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> 23.3 [He] informed me that he had thrown light bulbs filled with brake fluid on hunters' cars that were parked near our property. He told me that he threw the light bulbs on the cars because the brake fluid would eat the paint on the cars. First Respondent used a syringe and injected the brake fluid into the bulbs.";

(c) During the proceedings for the second peace bond, the judge who heard the matter commented adversely on the father's conduct in court. She said:

> "Mr. Tondelli, unfortunately, appears to have no insight into the effect his actions have on others. Today in the courtroom he clearly displayed anger, frustration and hostility. I understand he is upset at the present state of his access to his daughter, but at times he appeared to be barely in control.";

(d) In her replying affidavit the mother refers to incidents where the father allegedly lost control of himself and broke a kitchen tap, threw framed photographs on the floor and broke them and hit his fist through the top of a washing machine;

(e) While watching a movie, the father made a remark approving of the physical and verbal abuse of a woman;

(f) The father cut the telephone lines of a woman with whom he had had an argument;

(g) Statements allegedly made by the father to a newspaper journalist during the proceedings in the High Court to the effect that "I don't care if she [the mother] gets arrested [on her return to Canada] or not although it will be to the detriment of little Sofia. I will fight this matter to the bitter end.";

(h) The mother's strong objection to returning to Canada where she was desperately unhappy, alone and isolated. She has "no real friends and family there" and no support system;

(i) The father "has been telling all those concerned that [the mother] was either paranoid or schizophrenic and that [she has] a great mental instability. . .";

(j) Sofia is a special needs child who requires constant supervision and treatment. She is receiving such treatment in Port Elizabeth. In Owl Ridge, on the other hand, there are no comparable facilities;

(k) Sofia's condition improved after she came to Port Elizabeth and has again deteriorated after the father's arrival there to contest the High Court proceedings;

(l) If she is forced to return with Sofia to Canada, she will be completely dependent upon the father for the financial needs of herself and Sofia.

[40] The mother's counsel relied also on the report of Mr Ian Meyer, a clinical psychologist practising in Port Elizabeth. Based upon the information furnished to him by the mother and her parents, he expresses the view that the evidence is overwhelmingly in favour of the mother remaining the sole

custodial parent. He states further that the continuation of the status quo in Canada would have a severely compromising effect on the healthy psychological development of Sofia.

[41] Finally, counsel referred to the likelihood of the mother being arrested upon her return to Canada for being in contempt of the order granted by the Supreme Court of British Columbia on 9 June 2000.[39] He also drew attention to the ex parte order made by the Supreme Court of British Columbia on 21 July which took away her rights of custody and co-guardianship of Sofia.[40] He submitted that it would be unfair and unjust to expect the mother to return to live in Canada.

[42] The question we have to decide is whether, on her allegations, the mother has established, under Article 13 of the Convention, that there is a grave risk that Sofia's return to Canada will expose her to psychological harm or otherwise place her in an intolerable situation.

[43] A matrimonial dispute almost always has an adverse effect on children of the marriage. Where a dispute includes a contest over custody, that harm is likely to be aggravated. The law seeks to provide a means of resolving such disputes through decisions premised on the best interests of the child. Parents have a responsibility to their children to allow the law to take its course and not to attempt to resolve the dispute by resorting to self-help. Any attempt to do that inevitably increases the tension between the parents and that ordinarily adds to the suffering of the children. The Convention recognises

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39 Above para 7.

40 Above para 8.

this. It proceeds on the basis that the best interests of a child who has been removed from the jurisdiction of a court in the circumstances contemplated by the Convention are ordinarily served by requiring the child to be returned to that jurisdiction so that the law can take its course. It makes provision, however, in Article 13 for exceptional cases where this will not be the case.

[44] An Article 13 enquiry is directed to the risk that the child may be harmed by a court ordered return. The risk must be a grave one. It must expose the child to "physical or psychological harm or otherwise place the child in an intolerable situation." The words "otherwise place the child in an intolerable situation" indicate that the harm that is contemplated by the section is harm of a serious nature. I do not consider it appropriate in the present case to attempt any further definition of the harm, nor to consider whether in the light of the provisions of our Constitution, our courts should follow the stringent tests set by courts in other countries.[41]

[45] I accept that the mother finds herself in a most difficult situation. The relationship between her and the father is clearly hostile. In addition the mother's difficulties are exacerbated by the absence of a family or support system in British Columbia. On her allegations, her reasons for leaving British Columbia are not difficult to understand. That, however, is not the issue. The question is whether the mother has established the elements for exemption under Article 13.

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41 Australia: *Laing v The Central Authority* (1999) 24 Fam LR 555 at para 29, *Gsponer v Johnstone* (1989) 12 Fam LR 755 at paras 45-51. Canada: *Thomson* above n 7 at 285-86. England: *Re C (abduction: grave risk of psychological harm)* [1999] 1 FLR 1145 at 1154, *Re L (abduction: pending criminal proceedings)* [1999] 1 FLR 433 at 440, *Re A (a minor)(abduction)* [1988] 1 FLR 365 at 372. Germany: *Korowin v Korowin-Schreiner* (District Court of Horgen) LS 138036 (1992) a translation of which was furnished to the Court by counsel for the Family Advocate. United States: *Friedrich v Friedrich* 78 F.3d 1060, 1067-68 (6th Cir 1996), *Nunez-Escudero v Tice-Menley* 58 F.3d 374, 376-77 (8th Cir 1995).

[46] There is no suggestion that Sofia will suffer physical harm if she is returned to British Columbia. The psychological harm which it is said that Sofia will suffer if she is returned to Canada is not harm of the serious nature contemplated by Article 13. It is in the main harm which is the natural consequence of her removal from the jurisdiction of the courts of British Columbia, a court ordered return, and a contested custody dispute in which the temperature has been raised by the mother's unlawful action. That is harm which all children who are subject to abduction and court ordered return are likely to suffer, and which the Convention contemplates and takes into account in the remedy that it provides.

[47] I have thus come to the conclusion that the facts are insufficient to support a finding that the return of the child to British Columbia involves the grave risk of the harm referred to in Article 13. I base this view upon the following specific considerations:

(a) There are no allegations at all which suggest that the father has abused Sofia either physically or psychologically. Mr Meyer refers in his report to the father having "taken a more involved role with his daughter, albeit predominantly subsequent to the parties separating. He clearly has a keen love for his daughter and interest in her progress." The return of Sofia to the proximity of her father does not in itself pose a grave risk of harm to her;

(b) The problems which Sofia may experience are the consequence of the tension and trauma which is associated with the relationship between her mother and father. There is nothing to suggest that if Sofia and her mother return to British Columbia the mother

and father need associate with one another;

(c) The mother nowhere suggests that she fears for her physical safety when she is not in physical proximity with the father;

(d) The child's special needs can adequately be catered for in British Columbia;

(e) This Court can make an appropriate order to address some of the concerns of the mother with regard to her possible arrest on her return to British Columbia, her needs and those of Sofia pending a determination of the custody and guardianship of Sofia by the Supreme Court of British Columbia, and ensuring that finality with regard thereto should be reached expeditiously;

(f) The order which I propose we should make will render enforceable the undertakings of the father which were recorded in the order of the High Court;

(g) Although there is evidence that Sofia is adversely affected by the interaction between her parents, it has not been established that if returned to British Columbia, Sofia will suffer psychological harm of a serious nature or that she will otherwise be placed in an intolerable situation. I have come to this conclusion on the basis of accepting at face value the relevant allegations made by the mother.

[48] Accordingly, I am of the opinion that the mother has not satisfied the grave risk requirement and that it is in the best interests of Sofia that the Supreme Court of British Columbia should determine questions relating to her future custody and guardianship. That court is already seized of the matter, and the relevant incidents took place within its jurisdiction. It is clearly in a better position than a South

African court to resolve the serious disputes of fact between the mother and the father. It could also consider an application by the mother for the permanent removal of Sofia to South Africa.

The Form of the Order

[49] The following order was made by Jennett J in the High Court:

> "1. It is ordered and directed that the minor child, Sofia Tondelli, be forthwith returned to the jurisdiction of the Central Authority, British Columbia, Canada.
>
> 2. In the event of applicant being willing to accompany the minor child Sofia Tondelli on her return to British Columbia, which willingness applicant must communicate to both first and second respondents on or before Wednesday 25 October 2000 it is ordered that the minor child Sofia Tondelli will remain in the de facto custody of applicant pending the final adjudication and determination of the Supreme Court of British Columbia, Canada of the issues of custody and care of and access to the said child which adjudication and determination applicant and first respondent, or either of them, must request forthwith.
>
> 3. In the event of 2 above i.e. Applicant being willing to accompany the minor child Sofia Tondelli on her return to British Columbia, the following undertakings given by First respondent are recorded: -
>
> (a) He will not seek to enforce against respondent the Order of the Supreme Court of British Columbia dated 21 July 2000 in terms of which he was granted custody of Sofia and he will not seek to remove Sofia from the day to day care of applicant save for the purpose of exercising his rights of reasonable access to Sofia.
>
> (b) He will not institute or support any proceedings, whether criminal or contempt of court proceedings, for the punishment of applicant or any

member of her family, whether by imprisonment or otherwise, for any matter arising out of the removal by applicant of Sofia from British Columbia and her retention therefrom on or after 14 July 2000. In particular he will not proceed with any charges against applicant in respect of her breach of any of the previous Orders of the Supreme Court of British Columbia and he will take all steps that he reasonably can for the withdrawal of any criminal charges pending against her in this regard.

(c) He will arrange separate accommodation for applicant and Sofia in British Columbia, close to an appropriate school for Sofia and he shall contribute 500 Canadian dollars per month to applicant's expenses pertaining to such accommodation. He will also pay maintenance for Sofia from the date of her arrival in British Columbia until the final adjudication of the issue of the custody and care of Sofia by the Supreme Court of British Columbia at the rate of 500 Canadian dollars per month and he will contribute towards the cost of schooling for Sofia and also the cost of all her reasonable educational and extramural requirements.

(d) He will provide for the use by applicant of a roadworthy motor vehicle from the date of applicant's arrival in British Columbia for a period of 2 months or until the adjudication of the custody issue, whichever may be the later, and he will share the expense of running such vehicle equally with applicant.

(e) He will pay for any medical expenses reasonably incurred by applicant in respect of Sofia and in the event of her receiving therapy he will bear the costs of such therapy.

(f) He will co-operate fully with the Ministry of Children, British Columbia and with any professionals who conduct an assessment in order to

determine what future custody, care and access arrangement will be in the best interests of Sofia.

(g) He will contribute, if so required and so notified as provided in paragraph 2 hereof, towards the cost of air tickets and if necessary, also rail and road tickets for the return of applicant and Sofia from Port Elizabeth to British Columbia. Details of the travel arrangements in this regard will be made by first respondent and specified to applicant's attorneys no later than 3 working days before the date of departure of the flight upon which applicant and Sofia are to depart from Port Elizabeth.

(h) He will upon receipt of this Court Order, at his own expense, take all steps necessary to cause this order to be made an order of the Supreme Court of British Columbia, Canada, insofar as that is possible, and he will take such other steps as are necessary to ensure that this order is enforced in the Province of British Columbia, Canada and to provide proof thereof to applicant's attorneys and to this Court as soon as such Order of the said Canadian Court has been granted, that such necessary steps have been taken.

4. In the event of Applicant requiring first respondent to implement his undertaking in paragraph 3(g) above applicant is ordered to return the minor child Sofia Tondelli to British Columbia, Canada on the tickets provided and the flights and other means of transport specified.

5. In the event of applicant failing to notify first and second respondents of her willingness to accompany the minor child Sofia Tondelli on her return to British Columbia, Canada, it is to be accepted that applicant is not prepared to so accompany the said minor child in which event second respondent is authorised to make such arrangements as are necessary to ensure that the minor child, Sofia Tondelli, is safely returned to the custody of the Central Authority, British

Columbia, Canada and to take such steps as are necessary to ensure that such arrangements are complied with.

6. Pending the return of the minor child Sofia Tondelli to British Columbia, Canada as provided for in this Order, applicant shall not remove Sofia from the district of Port Elizabeth and she shall until then keep first respondent's attorney informed of her physical address and contact telephone numbers in Port Elizabeth.

7. Pending the return of the minor child Sofia Tondelli to British Columbia, Canada first respondent is to have reasonable access to the said minor child, such access to be under the supervision of a suitably independent person nominated by Ian Meyer, Clinical Psychologist, which access will be exercised in accordance with such person's reasonable requirements.

8. The costs of second respondent in this counter-application are to be paid by applicant.

9. No order is made on applicant's application or on first respondent's counter-application but applicant is ordered to pay the costs of both first respondent and second respondents in opposing applicant's application, which cost in the case of first respondent are to include the costs of employing two counsel."

[50] I agree that there should be an order for the return of Sofia to British Columbia. However, as the mother appears to be intent on accompanying Sofia, it is in Sofia's interests that her mother be given greater protection than that provided by the order of the High Court. On the evidence before this Court, I cannot find that the mother is acting unreasonably in not being content to rely upon the undertakings of the father.

[51] Section 38 of the Constitution provides that, where anyone approaches a court alleging that a right in the Bill of Rights has been infringed, that court may grant appropriate relief.[42] Pursuant to section 38, read with section 28(2),[43] this Court is entitled to impose conditions in the best interests of Sofia. Such conditions should be consistent with, and not hamper, the objectives of the Convention, and in particular, should not unnecessarily delay the return of the child to the proper jurisdiction.[44]

[52] The order should ensure that the mother can return to British Columbia without the risk of arrest. If she accompanies Sofia, she and Sofia should not be required to leave South Africa before there is an appropriate order of the Supreme Court of British Columbia to the effect that criminal proceedings are no longer pending against the mother for her failure to comply with the order of that court dated 9 June 2000. Such an order is consistent with the undertakings given by the father in the High Court. In the implementation of this order, the father will no doubt be able to rely on the co-operation of the Family Advocate who, in turn, can obtain the assistance of the Central Authority in British Columbia.

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42 Section 38 provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are —
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

43 Above n 19.

44 See *Thomson*, above n 7, at 294.

[53] On the information before this Court, it seems likely that sole custody of Sofia will be awarded by the Supreme Court of British Columbia to the mother. I refer specifically in this regard to the age of Sofia and the fact that she has been in the constant daily care of her mother all of her young life.[45] Whether it is in the best interests of Sofia that she should be allowed to live permanently with her mother in South Africa is a matter on which it is unnecessary for me to comment. It appears on the information before this Court that the best interests of Sofia dictate that she should remain in the sole custody of her mother subject, of course, to reasonable rights of access for her father until this matter has been finally adjudicated by the courts of British Columbia. The order of this Court should be formulated to achieve this.

[54] It is clearly also in the interests of Sofia that certainty as to her custody and guardianship be settled at the earliest possible time. It was primarily for this reason that the appeal before this Court was expedited. For this reason this Court requested the Family Advocate to make inquiries from the Central Authority in British Columbia as to the time it would take to have the custody and guardianship proceedings commence in the Supreme Court of British Columbia and the time which any appeal from such a decision would require. In response, the Attorney-General of British Columbia has assured the Family Advocate that an urgent interim custody application could be heard within two days of a request therefor and that a full expedited trial could be heard in four to five months. An appeal would take a further two months. The mother's attorneys have informed the Court that their inquiries indicate that

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[45] These remarks are not intended in any way to influence any decision taken by the courts in Canada.

a trial and appeal would take from eleven to thirteen months. Having regard to the fact that Sofia is to be returned to British Columbia under the Convention, it can be assumed that the judicial and administrative authorities there will ensure that custody and associated matters regarding Sofia are determined on an expedited basis.

Costs

[55] The mother has had limited but significant success in this Court with regard to the order which is made. To that extent the order of the High Court will have to be set aside and replaced with the order which appears below. In these circumstances I am of the view that we are at large to consider the costs in the High Court. The father was substantially successful in that court in obtaining an order for the return of Sofia and there is no reason he should not have been awarded his costs in that court. However, I can find no warrant for the order that the mother should pay the costs of the Family Advocate. The latter is a state official acting in terms of an international Convention which provides in Article 26 that each Central Authority should bear its own costs in applying the Convention. In this Court the Family Advocate has not sought an order for costs.

The Order

[56] The following order is made:

A The appeal is upheld in part.

B The order of Jennett J in the South Eastern Cape High Court is set aside and it is

replaced by the following order:

1 It is ordered and directed that the minor child, Sofia Chilo Tondelli (Sofia) be returned forthwith, but subject to the terms of this order, to the jurisdiction of the Central Authority, British Columbia, Canada.

2 In the event of Lisa Tracy Sonderup (the mother) indicating to the Family Advocate on or before 9 December 2000 that she intends to accompany Sofia on her return to British Columbia the provisions of paragraph 3 shall apply.

3 Arturo Tondelli (the father) shall, within 30 days of service of this order on his Port Elizabeth attorney of record, launch proceedings and pursue them with due diligence to obtain an order of the Supreme Court of British Columbia in the following terms:

(a) The warrant for the arrest of the mother is withdrawn and she will not be subject to arrest by reason of her failure to return Sofia to British Columbia on 14 July 2000 or for any other past conduct relating to Sofia;

(b) The mother is awarded interim custody of Sofia pending the final adjudication and determination by the Supreme Court of British Columbia of the issues of custody and care of and access to Sofia, which adjudication and determination shall be requested forthwith by the father;

(c) Until otherwise ordered by the Supreme Court of British Columbia:

(i) the father is ordered to arrange separate accommodation for the mother and Sofia in British Columbia, chosen by the mother, and the father is ordered to contribute the sum of 500 Canadian Dollars per month towards the cost of such accommodation;

(ii) The father is ordered to pay maintenance for Sofia from the date of her arrival in British Columbia at the rate of 500 Canadian Dollars per month;

(iii) The father is ordered to pay for the reasonable costs of the schooling of Sofia and also the costs of her other reasonable educational and extramural requirements;

(iv) The father shall provide for the use of the mother a roadworthy motor vehicle from the date of her arrival in British Columbia until the adjudication of the custody issue and share equally with the mother the reasonable expenses in respect of the running of the vehicle;

(v) The father is ordered to pay any medical expenses reasonably incurred by the mother in respect of Sofia which shall include the cost of therapy Sofia may reasonably require;

(vi) The father and the mother are ordered to co-operate fully with

the Ministry of Children, British Columbia and with any professionals who conduct an assessment in order to determine what future custody, care and access arrangements will be in the best interests of Sofia;

(vii) The father is ordered to pay for the costs of economy air tickets, and if necessary road or rail costs, for the return of Sofia and her mother to British Columbia. Such arrangements are to be made by the mother;

(viii) The father is granted reasonable access to Sofia which access shall be arranged without the necessity of direct contact between the mother and the father.

4 In the event of the mother giving the notice to the Family Advocate referred to in paragraph 2, the order for the return of Sofia shall be stayed until the Supreme Court of British Columbia has made the order referred to in paragraph 3 and when the Family Advocate is satisfied that such an order has been made, she or he shall so notify the mother.

5 In the event of the mother failing to notify the Family Advocate of her willingness to accompany Sofia on her return to British Columbia, it is to be accepted that the mother is not prepared to accompany Sofia, in which event the Family Advocate is authorised to make such

arrangements as are necessary to ensure that Sofia is safely returned to the custody of the Central Authority, British Columbia and is to take such steps as are necessary to ensure that such arrangements are complied with.

6 Pending the return of Sofia to British Columbia, as provided for in this order, the mother shall not remove Sofia from the District of Port Elizabeth and until then she shall keep the father's attorney informed of her physical address and contact telephone numbers in Port Elizabeth.

7 Pending the return of Sofia to British Columbia, the father is to have reasonable access to Sofia, such access to be under the supervision of a suitably independent person nominated by the Family Advocate. Such access will be exercised in accordance with such person's reasonable requirements.

8 No order is made on the mother's application or on the father's counter-application.

9 The mother is ordered to pay the costs of the father, which costs are to include the costs of two counsel.

10 There is no order as to the costs of the Family Advocate.

C The Family Advocate is directed to seek the assistance of the Central Authority of

British Columbia in order to ensure that the terms of this order are complied with as soon as possible.

D In the event of the mother indicating to the Family Advocate, in terms of paragraph B2 that she is willing to accompany Sofia to British Columbia, the Family Advocate shall forthwith give notice thereof to the Director of this Court, the Registrar of the South Eastern Cape High Court, the Central Authority of British Columbia and the father's attorney.

E In the event of the Supreme Court of British Columbia failing to make the order referred to in paragraph B3, the father is given leave to approach this Court for a variation of this order.

F In respect of the appeal there is no order as to costs.

G A copy of this order shall forthwith be transmitted by the Family Advocate to the Central Authority of British Columbia and served upon the father's attorney.

Chaskalson P, Langa DP, Ackermann J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J,

GOLDSTONE J

Yacoob J and Madlanga AJ concur in the judgment of Goldstone J.

For the appellant:	PJ de Bruyn SC and BJ Pienaar instructed by Smith Tabata Loon and Connellan Inc.
For the second respondent:	GG Goosen instructed by the State Attorney, Port Elizabeth.