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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2016-090-000278
[2021] NZFC 2193

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	KELLI PATRICIA BOOTH Applicant
AND	PAUL ALFRED YOUNG Respondent

Hearing:	12 March 2021
Appearances:	D Connor for the Applicant M W Vickerman for the Respondent
Judgment:	12 March 2021

RESERVED JUDGMENT OF JUDGE S J FLEMING

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[1] Property (Relationships) Act proceedings were commenced in 2016 – five years ago – following the end of the parties' relationship in around 2012.

[2] An application to adjourn the hearing set down for 10 days commencing on 13 April 2021 was made on 19 February by the respondent and is opposed. Further, the applicant seeks, if the respondent is unable to travel to New Zealand (he lives in Australia), then the hearing proceed with the respondent appearing by AVL (audio visual link) or by some other electronic means. Any attendance at the hearing, other than in person, is opposed by the respondent.

[3] After hearing submissions from counsel I reserved my decision, indicating it would be delivered later the same day.

Background

[4] This is the second occasion where dates for the substantive hearing have been allocated to determine the substantive issue. A hearing for 10 days was set down in July last year with those dates having been allocated in 2019. An adjournment request was made by the respondent in June 2020 which was initially opposed. The basis upon which the respondent sought an adjournment was his inability to attend in person because of Covid-19 border closures and quarantine requirements. Having initially opposed the adjournment, the applicant later consented and the hearing dates allocated in July 2020 were vacated with the Judge noting it was likely to "be well into next year before the matter would be heard" and it was "likely to be a final adjournment".

[5] In September 2020 a further 10 day hearing was again allocated in consultation with counsel. The dates allocated were for 12-23 April this year – that is some seven months after allocation.

[6] On 19 February 2021 a further adjournment application was made by the respondent seeking the April dates be vacated. Again, the basis for the application was Covid-19 restrictions and, in the respondent's counsel's memorandum it was claimed, in support of the adjournment application, that there were no places available in quarantine facilities between February and May 2021.

[7] The adjournment application is opposed and the applicant seeks if the respondent is unable to travel to New Zealand – and there is an issue as to whether he can make arrangements even now – then the hearing proceed with the attendance of the respondent by AVL.

Adjournment Application

[8] Mr Vickerman on behalf of the respondent maintains the respondent has made efforts to secure a place in MIQ since Christmas 2020, but has been unable to do so. He submits the ability to appear in person is a fundamental access to justice issue and there would be an unfair advantage to the applicant if the hearing proceeds and the respondent is not able to appear in person. He submits the key issue is whether the parties were in a de facto relationship and there are eighteen witnesses whose evidence addresses that issue. There are also three experts. Mr Vickerman submits there "is a substantive unfairness and a denial of the respondent's right to a fair trial in contravention of his right to natural justice and a fair hearing under s 27(1) of the Bill of Rights Act". Further, Mr Vickerman submitted there is no prejudice to the applicant in adjourning the hearing because she is in possession of the property against which the respondent claims an interest.

[9] The applicant refutes the suggestion there is no prejudice to her in the hearing being adjourned, noting the home she owned prior to meeting the respondent has a s 42 notice lodged against it which prevents her dealing with it and the proceedings are stressful contributing, she believes, to health issues for her. The applicant has had cancer, albeit she is now in remission. The applicant also refers to the inconvenience for her witnesses, who number 14, including the inconvenience and cost to her daughter who has travelled from London to attend the hearing at a cost of over $7,000 if there is an adjournment.

[10] It is not accepted by the applicant that the respondent cannot attend in person, even at this time if he takes all available steps and opportunities to make arrangements.

[11] It is accepted, if I decline the application to adjourn the hearing then I should determine whether the respondent can appear by way of AVL or some other electronic means from Australia.

[12] Mr Vickerman seeks the proceedings be adjourned to either a "review date" or that a further 10 day hearing is allocated but with a review a month or so prior to check whether it can proceed. He submits if the same or similar Covid-19 restrictions apply at or close to the new hearing dates, and the respondent is unable to secure a means of travelling to New Zealand, then the matter should not proceed on those dates either. This would mean there was no certainty about the case proceeding on a third allocation of a hearing.

The Evidence

[13] In accordance with my directions, after I had read the various memoranda filed by counsel, affidavits were filed addressing, in particular, the respondent's ability to attend the hearing in person. Unfortunately, the situation as to whether the respondent can appear in person remains less than clear as I accept places in MIQ do become available at short notice. In addition, there may be still a possibility Mr Young could obtain a place under the emergency allocation provision. Mr Connor pointed out Mr Young was invited by email on 23 February to make a special allocation request on the appropriate form and "provide any supporting documentation you may have. The type of documentation that would be beneficial is evidence that you have attempted to postpone the Court hearing and have been unsuccessful in the attempt". Mr Young's evidence is he had some further correspondence by email with the emergency allocation team and was told he did not meet the threshold for an emergency allocation. It appears the respondent did not complete the application. I agree with Mr Connor's submission, the potential of obtaining a place via the emergency allocation does not seem impossible given the indication in the email of 23 February and could be pursued even now.

Determination

[14] I have been greatly assisted in deciding whether to adjourn the proceedings and if so, direct the hearing proceed with the respondent attending by AVL, by the decision of Nation J in *Biggs v Biggs*.[1] At the outset I accept in the *Biggs* case it was both parties who resided in Australia which is different to this situation where only Mr Young resides in Australia.

[15] The possibility of using remote participation is inextricably linked in this case with the application for an adjournment if the respondent pursues all available avenues but is unable in the end to attend in person.

[16] The factors to be considered in a decision whether to use remote participation if Mr Young is unable to secure a place in MIQ, are contained in s 5 of the Courts (Remote Participation) Act 2010 and they are:

(a) The nature of the proceeding.

This is a property relationship proceeding where all evidence in chief has been long prepared and filed and that evidence is well known to the parties. There will have already, no doubt, been extensive discussions about the evidence between counsel and the parties.

(b) The availability and quality of the technology that is to be used.

There is no evidence that suitable technology is not available or able to be provided in both Australia and New Zealand. It is commonplace now for witnesses to participate remotely and not unheard of for parties to do so as well.

Experience demonstrates it is possible there will be some technical problems, but they have become less as Courts have become more accustomed to using the technology.

[1] *Biggs v Biggs* (2020) 25 PRNZ 331.

(c) The potential impact of the technology on the effective maintenance of the rights of the parties, including the ability to assess witness's credibility and the reliability of evidence.

As was noted in *Biggs*, Australian States have made it clear hearings can generally be conducted with parties or witnesses giving their evidence at a distance (page 336, paragraph 23).

The time difference between Australia and New Zealand is not great and will have little impact on the respondent's ability to participate fully in the hearing and provide instructions for counsel. The same comment applies to preparation for the hearing.

There will no doubt be times when counsel and parties will want to confer as a result of cross examination. As a result of the relatively narrow time difference between New Zealand and Australia, there is little impediment to the ability of the respondent to communicate with counsel by telephone, text, chat or other facilities. I expect the hearing Judge will allow time for counsel to confer with the respondent (if requested) and obtain instructions over and above the usual breaks.

(d) The level of contact with other participants.

A party appearing by AVL will be able to observe the Court and the participants.

(e) Any other relevant matters.

Bundles of documents have been prepared and circulated and a full set of the bundles are already available to the respondent.

[17] I do not accept these proceedings are of such nature that there is a requirement the parties be present in Court during the hearing. I accept there are credibility issues but as I have already noted, the evidence which is assembled in support and opposition to the claim of a de facto relationship is well known to the parties and there will be an

opportunity for counsel to confer with the respondent, if necessary, following cross examination. Again, I refer to the comments of Nation J in *Biggs* that it is now well accepted the demeanour of a witness is not necessarily the most reliable guide to the witness's veracity. Where a witness appears on AVL there is no particular disadvantage even if it is one of the parties.

[18] There would in my view be a significant prejudice to all parties if the hearing does not proceed as scheduled to allow for Mr Young to be present in Court at a hearing, which would in all likelihood not now be before the beginning of 2022, and if restrictions still applied, at some even later unknown date. Inevitably there would be more cost incurred and further preparation if the hearing was adjourned meaning counsel and witnesses had to return for a future hearing. This is contrary to the principles of the Act that questions arising about relationship property should be resolved as inexpensively, simply and speedily as is consistent with justice.

[19] The most important issue is of course the interests of justice for both parties and this involves a balancing exercise between the respondent's ability to participate in person and the need to have a conclusion reached on what has been longstanding litigation. In this case where counsel for the respondent frankly acknowledges another application for an adjournment would be made in the future if the same Covid-19 or other restrictions apply around travel, and the respondent was unable to secure a place in MIQ, I am satisfied it is in the interests of justice that the adjournment application be declined and the matter proceed with the respondent appearing by way of AVL if he is not able to make arrangements to appear in person. I direct a copy of this decision may be provided to the emergency allocation team to assist Mr Young in any application he may choose to make to obtain a place under that regime.

[20] Accordingly, the application for an adjournment is declined and the hearing is to proceed with Mr Young participating remotely from Australian throughout the hearing. The technology needs to be put in place to ensure Mr Young can hear and observe all that is happening during the hearing.

[21] No costs are awarded. The application to adjourn was not made without good cause and the fact it has been declined does not justify a costs award.

Signed at Auckland this 12th day of March 2021 at am / pm

S J Fleming
Family Court Judge