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IN THE FAMILY COURT
AT NORTH SHORE

FAM-2015-044-000378
[2016] NZFC 5437

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	FRED GREER Applicant
AND	GLORIA VILLA Respondent

Hearing:	28 June 2016
Appearances:	E Raika for the Applicant T Homes for the Respondent B MacLean as Lawyer for Children
Judgment:	29 June 2016

RESERVED JUDGMENT OF JUDGE S J MAUDE
[Section 139A Care of Children Act - leave to bring application to vary parenting and guardianship orders within two years]

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[1] Mr Greer applies to vary parenting orders made on 16 November 2015 relating to the children of he and Ms Villa.

[2] The orders were made by consent and provided for the following:

(a) The relocation of the children with Ms Villa to [name of country deleted].

(b) Contact for the children with Mr Greer as follows:

(i) Daily telephone or Skype contact.

(ii) Regular email contact.

(iii) Physical contact at least once a month in [name of country deleted] at times to be agreed between the parties.

(iv) Upon Mr Greer's relocation to [name of country deleted] the contact arrangements to be reviewed and amended to include physical contact.

(v) At any other times as agreed between the parties.

(c) That the children's habitual place of residence is [name of country deleted].

[3] Section 139A of the Care of the Children Act provides that a parent may not apply to the Court within two years of a final order or direction having been made relating to children in respect of substantially similar proceedings unless leave is granted by the Court for the bringing of such an application.

[4] In order to determine whether leave to bring an application within two years of a final order in respect of substantially similar proceedings, the Court must be satisfied that there has been a material change in circumstances of:

(a) a party to the prior proceeding; or

(b) any child of the prior proceeding.

The law

[5] Section 139A reads as follows:

> **139A Leave required in certain cases to commence substantially similar proceedings**
>
> (1) A proceeding (a **new proceeding**) may not be commenced under section 46R, 48, or 56 without the leave of the court if that new proceeding—
>
> (a) is substantially similar to a proceeding previously filed in a Family Court by any person (a **previous proceeding**); and
>
> (b) is to be commenced less than 2 years after the final direction or order was given in the previous proceeding.
>
> (2) The leave of the court may only be given under subsection (1) if, since the final direction or order was given in the previous proceeding, there has been a material change in the circumstances of—
>
> (a) any party to the previous proceeding:
>
> (b) any child who was the subject of the previous proceeding.
>
> (3) In this section, a new proceeding is **substantially similar** to a previous proceeding if—
>
> (a) the party commencing the new proceeding was a party to the previous proceeding; and
>
> (b) a child who is the subject of the new proceeding was the subject of the previous proceeding; and
>
> (c) the new proceeding—
>
> (i) is commenced under the same provision of this Act as the previous proceeding; or
>
> (ii) is for an order varying the order made in the previous proceeding; or
>
> (iii) is for an order discharging the order made in the previous proceeding.
>
> (4) This section does not apply if every party to the new proceeding consents to its commencement.

[6] In short, s 139A of the Act allows the filing of an application in respect of a child within two years after a final direction or order in proceedings substantially similar to the proposed new proceedings if, and only if, there has been a material change in the circumstances of:

(a) Any party to the previous proceedings.

(b) Any child who was the subject of the previous proceedings.

[7] Judge de Jong in *Border v Tokoroa*[1] in my view correctly observed at para [26] as follows:

> … Presumably Parliament felt a need for this kind of filter to guard against parties repeatedly filing unnecessary or unmeritorious applications regarding children.

[8] Judge de Jong also, at para [36] of his decision, observed that a material change should be a significant material change in the circumstances of a child (or party) triggering s 4 consideration (that is consideration as to the welfare and best interests of a child).

[9] I note from a decision of Judge Twaddle delivered on 31 March 2015 in *Valiant v Taylor*[2] that he observed as follows:

> [28] I respectfully adopt Judge de Jong's approach. I do not consider it is particularly helpful to characterise the threshold before leave can be given as "high" or some lesser standard; the focus must be on the significance of the change in circumstances taking into account the welfare and best interests of the child.

[10] Judge Russell in *Pidgeman v Oliver*[3] observed as follows:

> [14] Section 139A was an amendment brought into the Care of Children Act to prevent continual and repeated litigation for issues affecting a child or children. The intention was that once a parenting order is made by the Court, which first satisfies itself the care arrangements are in the welfare and best interests of the child, there should be a two year period following in which the parties need to get on and make the care arrangements work. Continual litigation diverts

[1] FC Auckland FAM-2006-019-001169, 23 September 2014
[2] FC North Shore FAM-2012-044-001815, 7 May 2015
[3] [2015] NZFC 6585

> parents' attentions and resources from properly parenting their child. As a child grows older his or her needs will evolve and change, and parenting arrangements need to be reviewed. Parliament considered two years is an appropriate minimum time for such reviews to occur.

[11] I add to the above the observation that I made in *Roundtree v Tipsanich*[4], when at para [14] I observed that I accepted counsel in that case's submission that to qualify as a material change the change proposed must be one that if placed before the Judge who heard the proceedings earlier would have been one that would have likely led the Judge to reach a different conclusion.

Mr Greer's position

[12] Mr Greer asks the Court's leave to make the following applications:

(a) Application for an order preventing the removal of the children from New Zealand.

(b) Application to vary the 16 November 2015 final parenting orders.

(c) Application for guardianship direction that the children be re-enrolled at [name of school deleted].

[13] Summarising Mr Greer's counsel's closing submissions he urged that:

(a) He had agreed to relocation in the hope that reconciliation would occur.

(b) He had been misled by Ms Villa as to whether she was in a relationship with a Mr Cruz.

(c) Once he formed the view that Ms Villa and Mr Cruz were in a relationship he concluded that reconciliation and his relocation to [name of country deleted] were untenable.

[4] [2015] NZFC 5488

(d) That the result of the above and Ms Villa's reaction to his preventing she and the children departing New Zealand by installation of a border alert was a deteriorated parenting relationship that made implementation of the agreed parenting orders in [name of country deleted] impossible.

Background

[14] The parties separated in November 2014.

[15] Post separation the parties broadly shared the parenting of their children.

[16] The option of both parties and children relocating to [name of country deleted] or all remaining in New Zealand was discussed.

[17] The parties had private mediation in February 2015.

[18] Draft consent orders were exchanged.

[19] On 26 May, Mr Greer submitted a draft that included his acceptance of relocation.

[20] Mr Greer did not initially sign the proposed consent document, having received advice from his then lawyer not to sign, he cautioned as to the consequences of relocation on children.

[21] By 2 June 2015 a consent document had been signed.

[22] Late in June the consent memorandum was filed with related documentation.

[23] The registry rejected the documentation filed, and in July a redrawn document complying with the registry's requirements was signed by the parties and filed.

[24] The Court appointed a lawyer to represent the children.

[25] Discussions between the parties continued.

[26] The children's lawyer prepared draft consent orders.

[27] Mr Greer's lawyer on 5 November advised that there was agreement as to the draft.

[28] Discussion in November continued as to ticketing for the children and Ms Villa's relocation, cancellation of New Zealand medical insurance and as to child support.

[29] On 18 November 2015 the orders were made.

[30] Late in November a farewell dinner was held at Ms Villa's house involving the children and others.

[31] Departure was planned for 11 January 2016 with Mr Greer's acceptance.

[32] Subsequent to the order departure arrangements continued, including termination by Ms Villa of she and the children's tenancy and farewells.

[33] Ms Villa signed a relationship property agreement on 15 December 2015.

[34] Ms Villa's tenancy was surrendered on 22 December 2015.

[35] Furniture from the surrendered tenancy was sold on TradeMe, given to Women's Refuge and in part taken by Mr Greer.

[36] The children spent between 12 December 2015 and 10 January 2016 with Mr Greer whilst Ms Villa was in Melbourne.

[37] The children and Ms Villa moved into the home of a friend upon Ms Villa's return to New Zealand, it being then accepted that she needed to remain pending signing of relationship property agreement.

[38] When it became clear to Ms Villa that Mr Greer would not sign the relationship property agreement she, on 4 February, booked tickets for the departure of she and the children to [name of country deleted] on 5 February.

[39] Mr Greer had his solicitors place a border alert at Customs preventing the children departing New Zealand; however Ms Villa, believing that she would be able to leave New Zealand, presented with the children at Auckland Airport on 5 February only to find that she was not able to.

[40] Mr Greer on 12 February filed in this Court applications for the orders that he now seeks.

[41] There was a deterioration in the relationship between the parents (no doubt not unexpectedly) and for a period there was no contact between the children and Mr Greer.

Preliminary findings of fact

[42] Mr Greer's initiating and primary concern in seeking to revoke his agreement that the children relocate to [name of country deleted] was his belief that Ms Villa misled him as to whether or not she was in a relationship with Mr Mason Cruz.

[43] I allowed brief cross-examination at the commencement of what was to have been a submissions hearing because, while Mr Greer alleged that he had discovered that in January 2016 Ms Villa was in a relationship with Mr Cruz, and indeed had been at the time that the orders were made, Ms Villa had not affirmed or denied the accusation.

[44] To assess what the circumstances were it was necessary for me to make a finding.

[45] What is clear is that Mr Greer had early in 2015 suspected that a relationship might have existed between Ms Villa and Mr Cruz, he however putting the issue aside hopeful as to the possibility of reconciliation.

[46] That it appears remained his position until early 2016.

[47] Examined, Ms Villa's evidence was that early in 2015 there had been romantic feelings between she and Mr Cruz, but that they had early in 2015 been resolved, Mr Cruz becoming a friend that she relied on.

[48] Mr Cruz became, Ms Villa said, her only support person in New Zealand.

[49] Ms Villa conceded that there remained romantic feelings, but unequivocally stated that Mr Cruz was not intending to relocate with her to [name of country deleted], though he might visit.

[50] She accepted that on a couple of occasions there had been intimacy between them.

[51] She said that for the early part of 2015 she had cut off discussion with Mr Greer as to matters personal to her, consistent with a view that their relationship was over.

[52] Ms Villa's definition of what a relationship was when questioned was one that the parties intended to keep going.

The relationship between she and Mr Cruz, she said, was not such a relationship because of her planned departure to [name of country deleted].

[53] Ms Villa in my view gave honest and believable evidence.

She did not seek to deny romantic attachment to Mr Cruz. She was in my view open in the answering of questions put to her.

I accept her evidence.

Consideration

[54] In order to form a view as to whether there has been a material change in circumstances in respect of either party or any of the children I must assess:

(a) What the circumstances were on the making of the orders.

(b) What they have become.

[55] It is clear from the parties' evidence that in early 2015 there was communication about the possibility of reconciliation that I believe likely initiated by Mr Greer.

[56] Ms Villa said in her 16 March 2016 affidavit:

> 24. Just after Christmas 2014, we spoke about two possibilities, one being all of our family going to live in [name of city deleted] and he would see whether we could recover our relationship. The other was we remained in New Zealand but did not reconcile.

[57] Mr Greer in his 31 March 2016 affidavit said:

> 28. … The respondent said to me during the course of the negotiations last year "All I've ever wanted is for my family to be back together again". My response to her was "Well, let's make a start now". Her response to this was "No, I need to go home first to heal"…

[58] In my view, the above narrative likely summarises the parties' perspectives early in 2015.

Mr Greer wanted reconciliation.

Ms Villa's view as described by Mr Greer was diffident … "No I need to go home first to heal".

[59] A process of mediation, discussion and negotiations as to a basis for return to [name of country deleted] for Ms Villa and the children ensued leading to the execution of a consent memorandum in early July 2015 re-executed later in July which after engagement of lawyer for children led to orders being made.

[60] The circumstances when the orders were made (and either party could have sought to withdraw their consent until they were made) were that:

(a) Mr Greer wanted reconciliation against a background of suspicion that there might have been for Ms Villa a relationship with Mr Cruz.

(b) Mr Greer's contention was that Ms Villa and the children would return to [name of country deleted] initially in time for the September 2016 [name of country deleted] school term but then later by 11 January 2016.

He would at some point follow.

(c) The parties, once relocation by both had occurred, would then agree contact arrangement for the children with Mr Greer.

Prior to departure there was akin to shared parenting.

(d) Relationship property negotiations were incomplete.

(e) No condition was imposed that the relationship property negotiations be completed prior to the children's departure (though of course ultimately departure was delayed because after the negotiations had soured it was accepted that there needed to be delay).

(f) Reconciliation was but a possibility in Mr Greer's mind.

(g) Mr Cruz and Ms Villa were close friends, having had romantic feelings for each other early in the year and on the balance of probabilities likely still having them.

[61] Subsequent to the making of the consent orders the parties' positions remained unchanged, communicating openly with each other about the move, Ms Villa terminating her tenancy, farewell party occurring and the children's enrolment at schools terminated.

Mr Greer had the children while Ms Villa was in Melbourne.

[62] The change in circumstances that arose was Mr Greer being informed that Ms Villa was in a relationship with Mr Cruz.

That led to conflict in the relationship property negotiations (there was dispute over whether a non-disclosure agreement should be signed relating to the parties' companies by Mr Cruz and Ms Villa and as to what Mr Greer regarded as an over prescriptive general services agreement sought by Ms Villa.

[63] When property negotiations stalled and Mr Greer affected a boarder alert preventing Ms Villa and the children leaving New Zealand, Ms Villa at short order sought to depart New Zealand with the children (she booked on 4 February tickets for 5 February departure and having thought she would be able to leave went to the airport only to find that she and the children could not).

[64] Mr Greer said that in a video sent by cell phone from the airport Ms Villa declared that war was on.

[65] There were difficulties for Mr Greer having contact with the children.

He did not see them for some seven weeks, his first contact occurring on 29 March.

It appears thereafter that contact has occurred fortnightly.

[66] Ms Villa and Mr Cruz are not in a relationship that is a de facto relationship or is one of commitment to any future.

Plainly however, with visits by Mr Cruz to [name of country deleted] envisaged, the door is not closed to such a relationship.

[67] The parenting relationship between these two parents has been damaged.

[68] Relationship property division has not yet been concluded.

[69] Ms Villa and children are not in their former home.

[70] The children's expressed wish is for relocation to [name of country deleted] with continued relationship with Mr Greer.

Has there been a material change in circumstances for either party or the children?

[71] That Ms Villa has a developing relationship with another man 19 months after the parties' separation is of itself, in my view, not a material change.

[72] Mr Greer knew of the possibility of such a relationship but continued to negotiate relocation.

[73] For both parties the possibility of a new relationship must have been present looking forward.

[74] That the parties have not concluded relationship property settlement is not a material change in circumstances given that the relocation was negotiated with that knowledge and with no condition imposed as to its completion prior to relocation.

[75] I do not accept Mr Raika's proposition (Ms Villa's counsel) that Ms Villa misrepresented her personal circumstances as to whether a relationship existed with Mr Cruz.

[76] Ms Villa's evidence was straightforward and, as I have observed, believable. Understandably she did not discuss her apparent emerging feelings for Mr Cruz with Mr Greer.

[77] Mr Greer negotiated the relocation of the children to [name of country deleted] in the knowledge that there might not be a reconciliation. He simply hoped that there would be.

[78] Mr Greer, I believe, did see relocation as a likely precondition to Ms Villa having a change of heart as to reconciliation.

In short in negotiating relocation he "took a punt".

[79] I do not find that any of the circumstances and in particular the relationship for Ms Villa with Mr Cruz amount to material change in circumstance.

[80] What remains however, is the observation of both the children's lawyer Mr MacLean and Mr Raika, that in their view the agreed orders as they relate to contact for the children with their father, maybe now unworkable.

[81] Ms Villa, through counsel, urges not.

[82] Mr Greer's purported determination not to now relocate, in my view, cannot be viewed as a material change as for him to be able to halt an agreed relocation after all arrangements had been made for it, simply because of a foreseen possibility that reconciliation would not occur would offend against the need for children and families to have certainty in orders made by the Court, particularly if made by consent.

[83] It is accepted that Mr Greer likely is hurt.

[84] It is accepted that Mr Greer likely feels that his desire for reconciliation has been trampled upon; however, he had agreed to relocation knowing that he too would relocate and that reconciliation might not occur.

[85] Reconciliation might not have occurred because of a new relationship formed by either party soon after their arrival in [name of country deleted] or simply because the relationship could not work.

[86] What I am left with is the question of whether I view the breakdown of the parenting relationship as likely to make the agreed orders unworkable and whether then to not allow variation would offend against the welfare and best interests of the children.

[87] In my view, the agreement reached as to relocation is not offended against in a material way. Mr Greer had not committed to relocation.

[88] What is at risk and what is material to the welfare and best interests of the children is the possibility that there will not be implementation of the agreed contact regime.

[89] It is reasonable to conclude that there will be difficulties but not insurmountable difficulties in negotiating how the orders are to be implemented.

[90] If there is not agreement as to the uplift and return of the children for the monthly contact visits envisaged in the orders while Mr Greer remains in New Zealand, he would need to apply to [name of country deleted] Family Court for implementation.

[91] That is a material change as the inability of the parties to agree to contact arrangements was not foreseen as being at issue. If it had been then no doubt the negotiated orders would have provided specifically for contact by date and time.

[92] That there might be difficulties as to agreement as to contact detail when and if Mr Greer relocates to [name of country deleted] though at that point the remedy of using [name of country deleted] Family Court system is available and is just what would have been anticipated if months or years after relocation there developed disagreement.

[93] Mr Greer does not reach the s 139A threshold to enable him to proceed with an application to overturn the parenting orders made in November 2015 and the guardianship order made enabling relocation of the children to [name of country deleted], save as for the purpose of defining the detail of the monthly contact to occur between he and the children in [name of country deleted] prior to his relocation to [name of country deleted] should he still decide to relocate.

[94] The result of my decision is that Ms Villa and the children are able to relocate to [name of country deleted] but that first there must be, if she and Mr Greer cannot agree upon it, definition of the dates and times that Mr Greer will have contact with the children in [name of country deleted] pending his relocation there.

[95] Unless such arrangements are agreed I direct that Mr Greer file his proposals for such definition of contact within 21 days of today's date with Ms Villa to reply with her proposals within fourteen days thereafter.

[96] I direct that a two hour submissions only hearing be allocated before me to determine this issue if possible before Thursday 18 August; however, if not possible, then on Thursday 18 August, which is a day available for me to direct that urgent matters be dealt with by me.

S J Maude
Family Court Judge

Signed 29 June 2016 at 2:05 pm