

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).

**IN THE FAMILY COURT
AT HAMILTON**

**FAM-2016-019-000623
[2016] NZFC 10653**

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| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004 |
| BETWEEN | SHARIFA DALAL Applicant |
| AND | QADIR ALFARSI Respondent |

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| Hearing: | 12 December 2016 |
| Appearances: | Applicant Appears in Person No Appearance by or for the Respondent D Bogers as Lawyer to Assist the Court |
| Judgment: | 12 December 2016 |

ORAL JUDGMENT OF JUDGE R H RIDDELL

Introduction

[1] This is an application by Ms Dalal to remove Mr Alfarsi as a legal guardian for their son Barak Alfarsi born on [date deleted] 2014. The application has been filed because Ms Dalal wishes to travel to South Africa with her son and she needs to establish for immigration purposes that she is the sole guardian of the child or has full custody.

Background

[2] The parties were married under Sharia Islamic law on 13 March 2013. They separated in March 2014 when Mr Alfarsi left New Zealand. At the time Ms Dalal was three months pregnant. Their son was born on [date deleted] 2014 and Ms Dalal received a letter from Mr Alfarsi that was dated 10 November 2014. The letter told her that he had divorced her. The only contact he had before that was a phone call after the child was born. Since then he has had no physical contact with Ms Dalal and she is unsure of his whereabouts except that she knows he is outside New Zealand. Mr Alfarsi has never met his son. He has never financially supported him and he has never acknowledged him. Mr Alfarsi is named on the child's birth certificate but that is only because Ms Dalal arranged that by providing letters of support from her daughter the leader of their community.

[3] Now Ms Dalal wishes to travel to South Africa with Barak and she requires one of the following:

- (a) An affidavit from the other parent giving permission.
- (b) A Court order saying she has full parental responsibilities and rights for the child.
- (c) A Court order saying that there is permission for the child to travel to South Africa.
- (d) A death certificate of the deceased other parent.

The law

[4] These proceedings are governed by s 29 of the Care of Children Act 2004. The Court may make an order depriving a parent of guardianship only in certain circumstances. Under s 29(3)(a) and (b) the Court can only make an order if:

(a) The Court is satisfied that the parent is unwilling to perform the duties and responsibilities of a guardian.

(b) The order will serve the welfare and best interests of the child.

[5] I am grateful to Ms Bogers who was appointed as counsel to assist the Court. She has provided very full submissions on the law and its applicability to these circumstances.

[6] It is clear from the four decisions provided by Ms Bogers that the removal of legal rights is a very serious matter.

[7] The Court requires more than simply an incapacity to perform the role as guardian. In three of the cases provided the Court declined to remove a person as guardian for various reasons. In one case¹ the Court found that the father had his deficits but they did not reach the high standard required to remove him as a guardian.

[8] In another decision² the father was opposed to him being removed as a guardian and the only issue was the mother's wish to change the child's surname.

[9] In the decision where the father was removed as a guardian³ it was clear there was no bond or attachment to the father and he had not seen the child for some time. On one occasion the child was hospitalised. The mother told the father of this but he still did not visit.

¹ *BLB v RTSC* [2012] NZFC 7162

² *IMB v BMA* BC 200780324 4/9/07 FC New Plymouth

³ *NS v RJAN* [2013] NZFC 1784

[10] One Judge described removal of a person as guardian as being a serious intrusion into the natural order of things⁴.

Applying the two-step approach

[11] Firstly the Court must be satisfied that the person is unwilling to perform the responsibilities of guardianship. In this case there is little doubt of that. Mr Alfarsi left Ms Dalal when she was only three months pregnant. He did not return for the birth and he has never seen his son. He has not provided for him in any way financially or emotionally and it appears he has not acknowledged his son at all. He did not respond to a request to provide his consent for the birth certificate.

[12] This application has been brought to his notice by substituted service on his sister and he has taken no steps. The mother has no contact details for him and it is clear he has not attempted to maintain contact with the child.

[13] There is clearly an element of intentionality about his lack of engagement in his son's life.

[14] I consider that the first limb of the test is met because in the words of the statute by his action he is unwilling to perform or exercise the duties, powers and rights of a guardian.

[15] The second test is whether the order will serve the welfare and best interests of the child. This child has never known his father. He effectively abandoned the child leaving New Zealand before the child was born. The only important question for this child is whether he will be able to travel overseas under a parenting order. Such an order might state that the mother has sole right of determining where the child can travel. However that is not the application which has been filed today, rather the mother seeks to remove the father as a legal guardian.

[16] Ms Bogers has filed submissions which refer to her conversation with the South African High Commission. They have made it clear to her that unless the

⁴ *BLB v RSC* [2012] NZFC 7162

document states that Ms Dalal is the sole custodian or has full custody then there may be difficulties for the child in being granted entry to South Africa. Essentially what Ms Dalal needs is a document which makes it clear that she is the sole guardian for this child. That can only be achieved by removing the father as guardian and declaring that the mother is the sole guardian.

[17] In this case I do not find that a parenting order would be sufficient for the purposes of the mother's travel. It would not be in the child's welfare and best interests to be stopped at the point of entry to any country overseas with his mother.

Decision

[18] I find firstly that the father is not willing to perform his duties as a guardian. I find that this child's best interests and welfare would be served by being able to visit without impediment any country out of New Zealand with or without his mother. In the circumstances of this case I find that an order removing the respondent as a legal guardian is well founded.

[19] I now make an order which declares that Qadir Alfarsi is removed as a legal guardian for Barak Alfarsi. The order is also to state that the applicant is henceforth from now on the sole guardian of the named child.

[20] I am grateful to Ms Bogers for her very helpful submissions. Her appointment as counsel to assist is now concluded. I do not require Ms Dalal to contribute to those costs.

R H Riddell
Family Court Judge