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**IN THE FAMILY COURT
AT WELLINGTON**

**FAM-2011-085-001022
[2017] NZFC 4064**

IN THE MATTER OF	THE CARE OF THE CHILDREN ACT 2004
BETWEEN	[AYAN RAJAN] Applicant
AND	[HEATHER CROSBY] Respondent

Hearing: 13, 14, 15, 16 March 2017

Appearances: J Forrest for Applicant
P Paino for Respondent
P Harrison as Lawyer for Child
D Milliken as Lawyer to assist the Court

Judgment: 1 June 2017

RESERVED JUDGMENT OF JUDGE T M BLACK

Introduction

[1] These are aged and intractable proceedings in relation to [Katelyn] who is 6.

[2] [Katelyn]'s parents are both intelligent and capable people who have unfortunately become enmeshed in interpersonal conflict to the point where they have been quite unable to focus on their daughters needs.

[3] There are two issues that I need to determine:

- (a) Whether Ms [Crosby] should be able to relocate with [Katelyn] to [Location 1];
- (b) What the care arrangements should be for [Katelyn].

[4] The structure of this decision is as follows:

- (a) Background;
- (b) Hearing process;
- (c) Positions/Submissions;
- (d) Legal issues;
- (e) Analysis of the evidence yet against those legal issues, which will lead me to;
- (f) Result.

Background

[5] The parties began a relationship in 2006 when they were both living and working in [overseas location deleted].

[6] Ms [Crosby] returned to New Zealand in early 2008 and Mr [Rajan] followed later that year. The parties have lived in [Location 2] since that time.

[7] The parties' relationship encountered difficulties and each acknowledge that the relationship was in significant difficulty at the time of [Katelyn]'s birth in March 2011.

[8] The parties agreed to separate in late April 2011 and Mr [Rajan] moved to his own accommodation towards the end of May 2011.

[9] At the time Mr [Rajan] moved out the parties had some hope that they might reconcile but that did not eventuate.

[10] In July 2011 Ms [Crosby] took [Katelyn] to [overseas location deleted] for a holiday with the primary purpose of [Katelyn] meeting her paternal family in [country deleted].

[11] Mr [Rajan] had various absences from New Zealand in the second half of 2011.

[12] There were significant difficulties between the parties in relation to Mr [Rajan]'s contact with [Katelyn] in the later part of 2011 and the early part of 2012.

[13] On 29 March 2012 Mr [Rajan] filed an application for a parenting order. Proceedings have been on foot continuously since that time.

Hearing process

[14] A four day hearing took place commencing 13 March 2017. I was provided with a hearing bundle comprising approximately 450 pages. At the hearing, I heard evidence from the parties, Ms [Crosby]'s mother and [sibling], and Mr [Rajan]'s current wife.

[15] Somewhat unusually, I also heard evidence from three psychologists.

[16] Ms Vincent was commissioned to provide a report pursuant to s 133 and I heard evidence from her. She was present throughout the hearing.

[17] [Katelyn] has had various behavioural difficulties and the parties have sought assistance from two other psychologists – Dr [I] and Mr [G]. I had made a direction appointing Mr Milliken as lawyer to assist. Both psychologists indicated they did not wish to file affidavit evidence and they were accordingly summoned to give evidence.

[18] The notes of evidence from the hearing run to some 385 pages.

[19] Following the conclusion of the hearing I have received written submissions from Mr Paino, Ms Forrest, and Mr Harrison. I should record that Mr Harrison's submissions, although filed on 7 April in accordance with my directions, were not made available to me until 3 May. Mr Milliken did not file submissions. He had indicated to me at the conclusion of the hearing that given his limited role in the proceedings he did not intend to file any, unless he felt he needed to address matters raised in the submissions of other counsel.

[20] I have anxiously considered all of the relevant material. This is a difficult case. Most cases which require 4 days of hearing time are.

[21] I should indicate that as a result of discussions and evidence during the course of the hearing a number of agreements were reached at the hearing including:

- (a) Agreement that a therapeutic approach was required including an art therapist to work with [Katelyn] and for a clinical psychologist Jane Dugdale to carry out therapeutic work to address the issues raised in the psychological evidence.
- (b) For the weekend contact to conclude at [day and time deleted]
- (c) For there to be additional contact time during the school holidays.

Positions/Submissions

Ms [Crosby]

[22] Ms [Crosby] seeks relocation to [location 1 deleted] on the basis that:

- (a) She has extended family support available to her there.
- (b) She has more flexible work options available to her there.
- (c) Geographical distance between the parties would be helpful in reducing the potential for ongoing conflict.

[23] Ms [Crosby] has set out in her counsel's submissions detailed proposals for Mr [Rajan] contact with [Katelyn] in both relocation and non-relocation scenarios.

Mr [Rajan]

[24] Mr [Rajan] is vehemently opposed to relocation. He says relocation will jeopardise [Katelyn]'s relationship with him, jeopardise [Katelyn]'s relationship with Ms [Nichols], prevent [Katelyn] from developing an appropriate relationship with her half-sibling due in [month deleted], and prevent her from preserving and strengthening the [religion deleted] part of her cultural identity.

Lawyer for Child

[25] Mr Harrison has not advocated a particular outcome in relation to relocation. His submissions helpfully point to the difficult questions that I must answer.

[26] Mr Harrison has made a number of submissions in relation to contact if relocation is not permitted.

Legal Issues

[27] It goes without saying that I must have regard to s 4 which states that [Katelyn]'s welfare and best interests in her particular circumstances are my first and paramount consideration. That principle is known by the lawyers as the paramountcy principle. It is a lawyer's way of saying that I have to care about what is best for [Katelyn]. Conversely, what is best for either of her parents is not my concern.

[28] When I consider [Katelyn]'s welfare and best interests, I must have regard to the relevant s 5 principles.

[29] Section 5(a) requires [Katelyn]'s safety to be protected and that she should be protected from violence including psychological violence.

[30] Under s 5(b) [Katelyn]'s care development and upbringing should be primarily the responsibility of her parents. No one suggests otherwise.

[31] [Katelyn]'s care development and upbringing should be facilitated by ongoing consultation, cooperation between her parents. There have been significant difficulties in that regard throughout [Katelyn]'s life, although there have been times when the parties have been able to reach agreement on various matters.

[32] Under s 5(d) [Katelyn] should have continuity in her care development and upbringing. That principle is relevant because of the proposed relocation.

[33] Under s 5(e) [Katelyn] should continue to have a relationship with both of her parents and her relationship with her wider family should be preserved and strengthened. In this case that principle assumes some importance because of the proposed relocation.

[34] Under s 5(f) [Katelyn]'s identity including her culture and religious practice should be preserved and strengthened. That principle is relevant because [Katelyn] is of mixed culture.

[35] None of the s 5 principles have any more weight than any other principle except for s 5(a) (safety) which is a mandatory consideration and trumps all other principles.

[36] I am required to weigh all of the relevant s 5 principles and should not start from any prior assumptions¹.

[37] There is no presumption for or against relocation. Rather it is a question of assessing the benefits to [Katelyn] of a relocation, assessing any disadvantages to [Katelyn] of the proposed relocation, and weighing those benefits and disadvantages against each other. It is always a balancing exercise.

[38] Pursuant to s 6 I am required to give [Katelyn] an opportunity to express her views. That opportunity has been provided both through the s 133 report process but also from interviews that [Katelyn] has had with Mr Harrison. I must take account of any views [Katelyn] expresses. What weight I give to any views depends on my assessment of [Katelyn]’s maturity, level of development, and those sorts of things. I agree with Mr Harrison there is no evidence which would allow me to conclude that [Katelyn] is able to understand the concept of a relocation to Auckland and all that would entail. [Katelyn]’s expressed views, such as they are, are of little assistance to me in determining this case.

Analysis

[Katelyn]’s behaviours

[39] By the end of the hearing, it was accepted by both parties that [Katelyn] has over most of her life exhibited some concerning behaviours both while in her mother’s care, at crèche, and at school. It is also accepted that [Katelyn] does not display those behaviours when she is in the care of her father.

[40] During the course of these proceedings, each party has spent an enormous amount of energy and time “pointing the finger” at the other when looking at the cause of [Katelyn]’s behaviours.

¹ *Kacem v Bashir* [2010] NZSC 112

[41] While each of the three psychologists who gave evidence at the hearing proffered some suggestions as to the underlying cause, none of them claimed to be able to confidently assess the cause or causes of [Katelyn]'s difficulty. Rather the consensus expert evidence is that her behaviour is likely to be caused by a number of things including the behaviours of each of her parents, parenting styles, underlying personality issues, and exposure to conflict.

[42] The lack of expert understanding of the cause of [Katelyn]'s behaviour is what has led the parties to agree to the ongoing therapeutic interventions.

[43] If the experts are unable to determine the causes of [Katelyn]'s behaviours I am not about to attempt to embark on that exercise. Indeed, for me to attempt to do so would be improper and destructive given the agreements reached as to the need for a therapeutic response to [Katelyn]'s behaviours.

[44] Having said that, I want to be clear that in my view each of the parents have contributed to [Katelyn]'s problems. They have each behaved in ways which have not been conducive to [Katelyn]'s welfare. They have each contributed to an atmosphere of tension and conflict and each of them has behaved badly at handovers from time to time.

[45] That is all I intend to say about that issue, given the agreement as to therapy and my earnest hope that the hearing process may have opened their eyes to [Katelyn]'s needs and to the vital role that each of them has to play in [Katelyn]'s life.

Grounds for relocation

Pleaded advantages

[46] Ms [Crosby] says that a relocation to [location 1 deleted] would have the following advantages:

- (a) A strengthening of [Katelyn]'s relationship with her maternal family.

- (b) A possibility of more flexible work options, making her more available to [Katelyn].
- (c) Geographical distance promoting a reduction in conflict.

[47] Each of those assertions needs to be examined in turn.

[48] In terms of the relationships that [Katelyn] has with members of her maternal family, Ms [Crosby] asserts that [Katelyn] would benefit from being in the bosom of her family. The evidence is that [Katelyn] has a good relationship with her grandmother and other family members who live in [location 1]. There are a number of cousins who she gets on well with.

[49] The evidence establishes that [Katelyn] has already has regular contact with those family members. Ms [Crosby] travels with [Katelyn] to [location 1] on a regular basis and family members, particularly [Katelyn]'s grandmother, travel to [Location 2] also.

[50] I accept that there is at least the potential for [Katelyn]'s relationship with her paternal family to be strengthened as a result of relocation to [location 1] (s 5(e)).

[51] In relation to job opportunities, Ms [Crosby] asserts that a move to [location 1] would allow her to work in the [deleted] sector at a rate of remuneration which would allow her to work more flexible hours and be more available for [Katelyn] before and after school.

[52] While I accept that the expert evidence **may** provide some evidence that Ms [Crosby]'s work commitments **may** be a slightly contributing factor to [Katelyn]'s insecurities, that evidence is far from certain. The unchallenged evidence is that [Katelyn] is securely attached to her mother. The evidence is that Ms [Crosby] is able to balance the requirements of her work commitments and caring for [Katelyn]. It is not always easy. That is the reality for most working parents.

[53] While Ms [Crosby] has provided some evidence in support of her assertion about [location 1] opportunities, that evidence is equivocal. There is nothing in the

nature of a clear prospective employer or job offer. There is no evidence that Ms [Crosby] has made any real effort to identify job options in [Location 2] which might provide the same benefits in terms of work/life balance. There is certainly no independent evidence that such opportunities do not exist.

[54] I am not satisfied that this ground is established on the evidence.

[55] Finally there is the issue of conflict.

[56] I accept that geographical distance may reduce potential for conflict, particularly at handovers, simply because there will be less handovers.

[57] However, the evidence is that conflict at handovers is largely a thing of the past. There is no recent example in the evidence of either party behaving in a psychologically abusive way at handover.

[58] I cannot ignore the commitment which each party has made to a therapeutic process designed to help them understand the causes of [Katelyn]'s distress and their agreement to work together to try and resolve those issues. Ms [Crosby] has committed to remaining in [Location 2] until the beginning of 2018 to enable that therapeutic work to occur. If all goes as the parties hope it will, the potential for conflict will have been largely reduced if not eliminated.

[59] Given that at least one cause of the conflict is Mr [Rajan]'s strongly held grievance and frustration at what he perceives as Ms [Crosby]'s attempts to shut him out of [Katelyn]'s life, a relocation with all of the attendant logistical difficulties around contact and the impossibility of incidental contact may in fact raise those levels of grievance and frustration and increase conflict rather than reduce it.

[60] I am not satisfied that [Katelyn]'s psychological safety would be enhanced by relocation. There is no s 5(a) justification for relocation.

[61] I observe that there is no independent psychological evidence that Ms [Crosby] has been unable to manage conflict to the extent that [Katelyn]'s welfare has been

negatively impacted, or that refusing relocation will cause her psychological distress having a negative impact on [Katelyn].²

The disadvantages of relocation

[62] The pleaded disadvantages are:

- (a) Potential difficulties in [Katelyn]'s relationship with her father.
- (b) Potential negative influence of Ms [Crosby]'s family.
- (c) Difficulties with maintaining [Katelyn]'s [religion deleted] identity.

[63] In relation to [Katelyn]'s relationship with her father, she is currently having fortnightly weekend contact with her father. All are agreed that that will continue for most of this year, while therapeutic intervention takes place.

[64] If relocation is permitted, Ms [Crosby] proposes baseline contact of two weekends a term plus week long periods in the term school holidays and two week long periods in the summer holiday period, together with some other incidental and special occasion contact.

[65] Her proposal means that the baseline contact would see [Katelyn] having face to face contact with her father on 13 occasions each year.

[66] If relocation is not permitted, Ms [Crosby] proposes fortnightly weekend contact (for 3 nights) and the same holiday arrangements. That proposal would mean that in terms of baseline contact [Katelyn] would be spending time with her father on some 25 occasions each year.

[67] The baseline contact frequency is therefore approximately halved. There is clearly a significant quantitative difference in contact in the two scenarios. The issue

² *B v B [Relocation]* [2008] NZFLR 1083 (HC), *Abbot v Blair* [2013] NZHC 2358, at [28].

is not just about quantity though. It is about what qualitative difference that reduction and frequency might make to [Katelyn]'s relationship with her father.

[68] The only expert evidence which assists me in that regard is the evidence of Ms Vincent whose unchallenged evidence was that there is a good relationship between [Katelyn] and her father but that there is room for that to improve and strengthen, both as to quantity and quality.

[69] Given that all are agreed the arrangements should remain as they are for most of this year there is no real opportunity to improve the relationship (remembering that none of [Katelyn]'s stress is evident when she is in Mr [Rajan]'s care) before the proposed relocation occurs.

[70] A halving of the frequency of baseline contact must raise real questions as to whether [Katelyn]'s relationship with her father might be damaged, or at the very least fail to grow in the way I would want it to, if relocation is permitted.

[71] It is obvious that opportunities for incidental contact (school events, sporting events, involvement in afterschool care in case of Ms [Crosby]'s unavailability, to give but a few examples) would be almost completely nonexistent should the relocation occur.

[72] [Katelyn]'s relationship with her father needs to be "normalised". It is not a normalised relationship for a 6 year old to be seeing her father once a fortnight (remembering that that itself has only been in place for little over a year). A relocation to [location deleted] would put the normalisation of [Katelyn]'s relationship with her father very distinctly at risk, or put another way, it would not give effect to the s5(e) principle of [Katelyn] having a continuing meaningful relationship with her father.

[73] Another strand to the analysis of this issue relates to the ability of the parties and their support networks to foster positive regard towards the other parent and [Katelyn]'s relationship with that parent.

[74] Mr [Rajan] has undoubtedly behaved in ways which do not demonstrate that positive regard. So, to a lesser extent, has Ms [Crosby].

[75] Ms [Nichols] gave evidence. She impressed me as a witness. She made concession against Mr [Rajan]'s interests. I gained the clear impression that she has worked hard to help Mr [Rajan] modify his view and his behaviours. I do not think she would tolerate Mr [Rajan] behaving in a way which undermines [Katelyn]'s relationship with her mother.

[76] What of Ms [Crosby]'s support networks? I heard evidence from her mother and her [sibling] Her mother, who is a significant influence in her family, clearly demonstrated a significant antipathy towards Mr [Rajan]. She attempted to make light of that antipathy but I was not convinced. For example, I am quite satisfied that during the altercation at the end of 2011 she used the term "sperm donor" in a deliberate way to insult and belittle Mr [Rajan]'s role in [Katelyn]'s life.

[77] There is a real risk that if [Katelyn] is living with her extended family in [location deleted] (which is the accommodation proposal at least in the short term) that she will be exposed to that family's antipathy towards Mr [Rajan].

[78] In [Katelyn]'s particular circumstances, particularly her significant psychological difficulties, that exposure must create a real risk that her relationship with Mr [Rajan] is damaged and undermined.

[79] In addition, I cannot ignore Ms [Crosby]'s 2016 proposal to relocate to [overseas location] to pursue a relationship. That proposal seemed entirely adult centred and must give pause for thought as to how committed Ms [Crosby] was, at least at that time, to the relationship between [Katelyn] and her father. Hopefully that might change.

[80] Ms [Nichols] is due to have a baby in [month deleted]. If relocation occurs in early 2018 [Katelyn]'s ability to establish develop and strengthen a relationship with her half sibling will be undoubtedly compromised.

[81] I have regard also to the fact that Ms [Nichols] is an important person in [Katelyn]'s life and there is some risk to that relationship of relocation is permitted.

[82] Looked at another way in terms of s 5(e) relocation provides an opportunity to preserve and strengthen [Katelyn]'s relationships with her maternal family but creates a risk to the relationships between her and her stepmother and unborn sibling. The overall effect can be seen as neutral at best. When [Katelyn]'s relationship with her father is considered, relocation is a significant risk to the s5(e) relationship principles.

[83] The final disadvantage to relocation asserted by Mr [Rajan] is the risk that relocation would place to [Katelyn]'s identity. [Katelyn] is of mixed [ethnicity and religion deleted] and [ethnicity and religion deleted] heritage. Because she is living most of the time with her mother regardless of relocation, there is no risk to her mother's side of her identity.

[84] If she relocates to [location 1] I have already identified the significant reduction in baseline contact with her father.

[85] I agree with Mr [Rajan]'s evidence (paraphrased) that cultural identity is gained by living the culture.

[86] Although I accept that there might be cultural opportunities available in [location 1] through the school and other community events, such cultural experiences run a poor second to cultural experiences taking place with a family member within the context of that culture.

[87] Relocation carries a significant risk to the s 5(f) principle of [Katelyn] preserving and strengthening her [religion deleted] identity.

[88] Bringing those strands together, the established advantages of relocation are outweighed by a significant margin by the real and potential disadvantages of relocation for [Katelyn].

[89] It follows that I find that relocation to [location 1] is not in [Katelyn]'s welfare and best interests. I am not prepared to permit relocation.

[90] I must now turn to care arrangements in light of that decision.

Interim or final order

[91] Ms [Crosby] advocates for an interim order and for progression of contact to be contingent on Ms Vincent being satisfied that such progression should occur.

[92] Mr [Rajan] seeks a final order now.

[93] Mr Harrison raises the possibility of an interim order but (rightly) recognises the tension between the psychological reasons for suggesting that approach and the desirability of achieving finality in this long running litigation.

[94] Pursuant to s 49, I must not make an interim order unless I am satisfied that an interim order serves [Katelyn]'s welfare and best interests better than a final order. Given the history of these parties, especially in relation to therapeutic processes (for example Ms [Crosby]'s withdrawal from the [G] therapy and Mr [Rajan]'s belligerence towards Dr [I]) I am concerned that any review mechanism creates significant risk of ongoing litigation.

[95] On balance, the risk to [Katelyn]'s welfare of providing the parties a further opportunity to engage in litigation about her care arrangements outweighs the benefits which a review prior to progression can provide.

[96] That is not to say that a review should not occur. I would hope that part of the therapeutic process that the parties have committed to will include them agreeing and concurring and cooperating as [Katelyn]'s parents that progression of contact as I am about to order can occur, or should be deferred. But I am not going to let them play that therapeutic discussion out in the setting of this Court.

[97] I decline to make a further interim order and will make a final order.

Contact arrangements

[98] I have regard to the proposals made by each party and to Mr Harrison's submissions at paragraphs 168 to 171.

[99] I do not intend to finely analyse the differences in the respective proposals. Rather, I stand back and approach matters from the perspective of wishing to normalise [Katelyn]'s relationship with her father.

[100] The order I make will necessarily be prescriptive because of my desire to minimise the requirement for discussion and negotiation (and therefore conflict), at least in the meantime. I do hope that as time goes on the parties may be able to negotiate some additional contact or flexible contact.

[101] In terms of specific proposals, I am not minded to order midweek contact. It has proved problematic in the past and my view is that at least for the foreseeable future certainty of routine and minimisation of transitions outweighs the fact that there will be a significant gap in contact on the fortnightly baseline.

[102] Given that decision, I have to consider the duration of fortnightly contact. In my view there is no reason not to adopt Mr [Rajan]'s proposal of 4 nights.

[103] As Mr [Rajan] himself acknowledges, overseas travel is some way away. I am not going to provide for overseas travel at this time.

[104] I will continue the current agreed arrangements through until the summer holidays, provide for the forthcoming summer holiday period, provide for baseline fortnightly contact ([details of days and contact arrangements deleted]) from the commencement of 2018 school year and then an ongoing pattern of holiday contact.

Result

[105] I make the following orders and directions:

- (i) In relation to the application to resolve a dispute between guardians, I decline the application for a direction that [Katelyn] may relocate to

[location 1]. I make a direction that [Katelyn] is to live in [Location 2] unless agreed otherwise in writing by her guardians.

- (ii) All previous interim parenting orders are discharged.
- (iii) I make a final parenting order providing for [Katelyn] to be in the day to day care of her mother.
- (iv) I make a final parenting order as to contact. Mr [Rajan] is to have contact with [Katelyn] on the following basis:
 - (a) From now until the commencement of the school year in 2018, fortnightly contact from [days and times deleted].
 - (b) In each of the term holidays term two and three 2017, [care details deleted].
 - (c) During the summer holidays 2017/2018, [care details deleted].
 - (d) As and from the commencement of the 2018 school year, [care details deleted].
 - (e) [Care details deleted].
 - (f) [Care details deleted].
 - (g) In the summer holidays from 2018 onwards, [care details deleted].
 - (h) [Care details deleted].
 - (i) [Care details deleted].
 - (j) In the event of [Katelyn]'s birthday falls on a weekend she will spend half the day with each parent.

- (k) [Care details deleted]
- (l) [Care details deleted].
- (m) Each parent will facilitate [Katelyn] having phone or skype contact with the other parent if she should so request at any time when she is in the care of that parent.
- (n) During times that [Katelyn] is in each parents care, [care details relating to religion deleted].
- (o) Mr [Rajan] may have such further or other contact with [Katelyn] as is agreed.
- (p) Any application for leave pursuant to s 139A of the Act is to be referred to me for consideration in the first instance, or if I am not available, to a [Location 2] resident Judge with access to the files.
- (q) Any without notice applications in relation to [Katelyn] filed within the next two years is not to be placed on the National e-Duty platform I judicially override the protocol. Any such application is to be referred to me, or if I am not available, to a [Location 2] resident Judge with access to the files.
- (r) Mr Harrison's brief is extended to draft, in consultation with other counsel, an order for sealing.
- (s) Following the issue of a sealed order, Mr Harrison's brief is terminated with the thanks of the Court.
- (t) Ms Vincent's brief is terminated 10 days from the date of the issue of this judgment. That is to allow her to undertake any final briefing of the therapists involved.

- (u) Mr Milliken's appointment is terminated with the thanks of the Court.
- (v) I reserve the question of costs. I indicate my provisional view that this is a case where costs should lie where they fall. If either party seeks costs they should file a memorandum within 21 days setting out the costs sought and their submissions in support of their position. The other party has 21 days to respond following which the file should be referred to me in chambers and I will make a decision on the question of costs.
- (w) These are pending proceedings as defined in s165 and the CCO regime does not apply to them. The file may therefore be closed once any issue of inter parties costs is dealt with.

Judge TM Black
Family Court Judge