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**IN THE FAMILY COURT
AT NEW PLYMOUTH**

**FAM-2009-043-000794
[2016] NZFC 10544**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MIA MORGAN] Applicant
AND	[DAVID PALMER] Respondent

Hearing: 3, 4 and 7 October 2016

Appearances: Applicant appears in person
G J Wilson for the Respondent
Ms K McKenzie as Lawyer for the Children

Judgment: 16 December 2016

JUDGMENT OF JUDGE G P BARKLE

[1] The applicant [Mia Morgan] (“Ms [Morgan]”) and the respondent [David Palmer] (“Mr [Palmer]”) are the parents of:

[Jacey Palmer] born [birth date deleted] aged 15 (“[Jacey]”);

[Xiomara Palmer] born [birth date deleted] aged 11 (“[Xiomara]”); and

[Alex Palmer] born [birth date deleted] aged nine (“[Alex]”).

[2] Ms [Morgan] seeks that the Court grant her application filed on 12 October 2015 for [the children] to move to live with her to Brisbane, Australia . Mr [Palmer] opposes the application and not only wishes that the children remain living in [location deleted], but that the Court determine new care arrangements for the children allowing him greater time with them.

Procedural Issues

[3] I heard an application by Ms [Morgan] for a protection order on 19 February 2016. In a reserved judgment dated 2 March 2016 I granted that application. The protection order remains in existence and in accordance with s 5A Care of Children Act 2004 is one of the relevant issues that must be considered by the Court in determination of this application.

[4] At a directions conference in respect of this proceeding I raised with Mr [Palmer], he was representing himself at that time, whether he had any objection to myself hearing this matter. Mr [Palmer] advised that he did not.

[5] Prior to the hearing Mr [Palmer] instructed Mr G J Wilson of Quin Law to act for him. Having reviewed the file Mr Wilson filed a memorandum dated 18 August 2016 seeking directions that Mr [Palmer] withdraw the affidavit evidence that he had filed on his own behalf and that it be recast together with having the opportunity to file further affidavits relevant to the application. There was no opposition to that course from Ms [Morgan] who has been representing herself throughout and Ms K McKenzie who is lawyer for the children.

Background

[6] Ms [Morgan] and Mr [Palmer] commenced a de facto relationship during 1994. At that time Mr [Palmer] had a [child] from a prior relationship, aged three whom he was having contact with. In or around 1998 [the child] came into the day-to-day care of Mr [Palmer] following proceedings in the Family Court. [The child] lived with Ms [Morgan] and Mr [Palmer] until [details deleted].

[7] The parties were married in [month deleted] 1998. [Jacey] was born on [date deleted] 2001. The parties separated for a period during [years deleted]. [Contact details deleted]. The parties reconciled in [year deleted]. [Xiomara] was born in [month deleted] 2005 and [Alex] in [month deleted] 2007. Throughout the marriage Mr [Palmer] worked in the [employment details deleted], resulting in Ms [Morgan] having the major responsibility for the upbringing of [the children]

[8] The parties separated for the final time in [month deleted] 2009. The first applications filed in the Family Court were a without notice application for an interim parenting order and resolution of a dispute between guardians by Mr [Palmer] in early [month deleted] 2009. The children had remained living with Ms [Morgan] following separation. The guardianship dispute related to the school and kindergarten to be attended by [Jacey and Xiomara] respectively.

[9] An interim parenting order was made on [date deleted] 2009 and final parenting order on very similar terms to the interim order on 9 July 2010. Mr [Palmer]'s contact with the children was defined in that parenting order and otherwise the day-to-day care of the children remained with Ms [Morgan]. A further parenting order was made by consent on 20 August 2011 with a variation to that order being made on 4 July 2012.

[10] A temporary protection order was granted to Ms [Morgan] on 18 March 2011. That order was discharged by consent on 20 August 2011. Mr [Palmer] had completed a memorandum of undertaking that provided sufficient comfort to Ms [Morgan] to agree to the temporary order being discharged.

[11] The parenting order of 20 August 2011 provided that Mr [Palmer] would have contact with the children [details of contact deleted]. The order also provided that should Mr [Palmer] consistently exercise contact for a period of three months then the weekend contact would be extended [details deleted]. Mr [Palmer] was also able to have the children for four consecutive nights during school term holidays and two blocks of four consecutive nights during the summer holidays. Provision in the order was also made for Christmas day to be shared and how changeover was to take place if not at school together with closely setting out the terms of communication between the parties.

[12] The variation order of 4 July 2012 provided that the extension of the weekend fortnightly contact was deleted and that Mr [Palmer]'s contact with the children would remain as the 24 hour period.

[13] There was considerable evidence from Mr [Palmer] and cross-examination of Ms [Morgan] by Mr Wilson to try and establish what the extent of Mr [Palmer]'s contact with the children was between mid 2012 to October 2015. It is not possible nor necessary in my view to determine exactly the amount of time the children spent with him. What is not disputed is that the children lived in the day-to-day care of Ms [Morgan]. The terms of the order of 20 August 2011 were generally adhered to but on occasions it was varied by arrangement between the parties. There were various reasons for that being the case and resulted in Mr [Palmer]'s periods of time with the children being both longer and shorter than provided in the order of 20 August 2011. Agreed variations reflected that at times Ms [Morgan] and Mr [Palmer] were able to communicate better and have a more respectful parenting relationship. However, that was not always the case and at times Ms [Morgan] felt uneasy and intimidated by the conduct of Mr [Palmer].

[14] On [date deleted], Mr [Palmer] was involved in [event details deleted]. In a letter dated 29 March 2016, [the respondent's doctor] advised that he had seen Mr [Palmer] on a three monthly basis but sometimes more frequently since the [event]. As a consequence of the [event] Mr [Palmer] suffered [medical details deleted] that had not improved and indeed got worse. The condition was not amenable to surgery and the pain suffered by Mr [Palmer] limited his ability to work. [Details deleted] Mr

[Palmer] also suffers from [medical condition deleted] that depending on his psychological state and stressors affects his cognition. [The doctor] recorded that Mr [Palmer] does not respond well to new or stressful environments. Unsurprisingly at times Mr [Palmer] can become depressed because of his condition.

[15] Following separation Ms [Morgan] undertook study through [details of education and study deleted]. From [year deleted] Ms [Morgan] began working for [employer and details of business] based in Brisbane, as [employment details deleted]. Because of Ms [Morgan]'s experience and qualifications together with her work ethic she was offered [a position arising from transitioning the New Zealand and Australian roles into one position] . It required her to be based out of the Australian Head Office located in Brisbane.

[16] Ms [Morgan] raised the issue of relocation of the children to Brisbane with Mr [Palmer] in late [month deleted] 2015. After consideration Mr [Palmer] advised Ms [Morgan] that he opposed the children being relocated. He proposed should Ms [Morgan] wish to take up the job opportunity the children come to live with him. It is apparent from email correspondence exchanged at that time and exhibited to affidavits that Ms [Morgan] was of the view that Mr [Palmer] had initially agreed to the relocation of the children. If that was the position, it was quite apparent by Mr [Palmer]'s email of 4 August 2015 that was not the case.

[17] The guardianship application seeking relocation of the children filed by Ms [Morgan] increased the level of tension between the parties. Unpleasant incidents took place on [dates in November 2015 deleted]. Following the latter incident Ms [Morgan] made a without notice application for a temporary protection order. That was granted. As I have already stated a final protection order was granted by myself on 2 March 2016 having heard evidence about the three incidents, determining that domestic violence had taken place and that it was necessary for such an order to be made. Police charges were laid with respect to the incidents [details deleted].

[18] Contact between Mr [Palmer] and the children ceased once the temporary protection order was granted on [date deleted] 2015. With significant assistance from Ms McKenzie the parties agreed on contact arrangements and a further variation to

the parenting order of 20 August 2011 was made by consent on 16 December 2015. Contact was provided for [details deleted] the children were to be in Mr [Palmer]'s care each [contact details deleted]. On occasion the children because of their activities have not attended contact on the [day deleted] night.

Ms [Morgan]'s application to relocate

[19] Ms [Morgan]'s evidence was that she has had the day-to-day care of all three children since she and Mr [Palmer] separated in [month deleted] 2009. The Court orders referred to earlier confirm that has been the case. When the parties lived together, due to Mr [Palmer] working [details deleted] in the [industry details deleted], Ms [Morgan] was responsible for the predominant amount of care of the children.

[20] As set out earlier the main impetus for the relocation application was an employment opportunity for Ms [Morgan] with [employer deleted] in Brisbane. In mid 2016 that company went through a restructuring process. Ms [Morgan]'s position here in New Zealand was disestablished. She was offered the role of [job title deleted] based in Brisbane. A backup hearing for this matter set for early July 2016 did not proceed and the offer of employment was withdrawn soon after by [the employer]. Ms [Morgan]'s redundancy became effective at the end of [month deleted] 2016.

[21] Ms [Morgan]'s now has two other offers of employment in Brisbane. One is with [potential employer 1 – name deleted] who have offered Ms [Morgan] the position of [job title deleted] with an initial 90 day trial period commencing at the beginning of [date deleted]. A letter from [name deleted], General Manager dated 9 August 2016 was annexed to Ms [Morgan]'s affidavit of 16 September 2016 in respect to that opportunity. In addition, a position is available within [potential employer 2 – name deleted] [business details deleted] whose work includes the [details of business deleted] places throughout Australia. Employment with that business is available upon Ms [Morgan]'s arrival in Brisbane.

[22] Some criticism of the job opportunities was made by Mr Wilson because of [the application connection – details deleted] related to both positions. He suggested a certain convenience about the availability of both positions without adequate

certainty of them existing. Mr Wilson also noted that no executive from either company provided affidavit evidence. Having heard Ms [Morgan] being cross-examined about the positions I am satisfied that each job opportunity is legitimate.

[23] Ms [Morgan]'s evidence was that since her loss of employment she has been listed with a number of recruitment agencies in [location deleted] but that the current job market provides limited opportunities in [location deleted] in [employment field deleted] field. For example, she stated that [details deleted – an advertised position in the area] attracted 260 applicants. Even if she had obtained that position it would have resulted in a significant reduction in her remuneration and other benefits by comparison with the positions available in Australia. The ongoing recession in the [employment field – details deleted] has also diminished the opportunities in Ms [Morgan]'s field. Ms [Morgan] stated that she had placed her name with a recruitment agency in Queensland and also subscribed to a number of online employment sites and through those sources had found 73 [positions – details of field of employment deleted] advertised in Queensland in the week prior to completing her affidavit dated 16 September 2016. Her evidence was that in New Zealand her likely income and remuneration package would be in the range of \$55-80,000 per annum as opposed to Queensland where it would be \$90-120,000.

[24] Ms [Morgan]'s evidence was that living costs were generally comparable between [location deleted and Queensland] with variations both positive and negative. Taking that into account she was confident that the general living situation for her and the children would be more positive in Brisbane than it was currently here in [location deleted].

[25] Ms [Morgan] said that there would be closer family links in Brisbane. Her parents live in [location deleted] which is approximately an hour by car from [location deleted]. They live an independent life [family details deleted]. While not diminishing her parents' interest and love of their grandchildren she says that they are not readily available to her and the children. Her siblings all live overseas [family details deleted]. Mr [Palmer]'s parents have both passed away in the last 10 years. Her evidence was

that the children have limited contact with Mr [Palmer]'s [family – details deleted]. Only Mr [Palmer]'s [family member] lives locally.

[26] By contrast Ms [Morgan]'s evidence was that there is a significant family support network available in Brisbane. Her [sibling] with whom she states she is very close and who is the children's [godparent] and [the sibling's partner] live in that city together with their [family]. Her [sibling]-in-law has [siblings] who themselves have children. Her [sibling]'s parents-in-law also live in Brisbane. This extended family would be living within close proximity in Brisbane and are supportive of Ms [Morgan] making the move.

[27] In addition, Mr [Palmer]'s [child, name deleted]], has been living in Brisbane for some time. All the children, particularly [Jacey], have maintained contact with [their older sibling]. It will be positive for them to have their half-[sibling] living in close proximity.

[28] When Ms [Morgan] filed her application for relocation in October 2015 it was apparent she had made significant enquiries about education and recreation opportunities that would be available for all of the children in Brisbane. Because it is now 15 months since the application was filed Ms [Morgan] acknowledged that if relocation was allowed some further work and also discussion with Mr [Palmer] would be required to settle the schools that each of the children would attend. Nevertheless, it seems apparent that appropriate and comparable education opportunities are available in Brisbane with [location deleted] and that schools that meet each of the children's needs and aspirations are available.

[29] The children have a wide range of interests. In a city the size of Brisbane there is little doubt that the children's current and new future interests would be well catered for. Because of its size compared with [location deleted] there would be greater numbers involved which has both its benefits and challenges.

[30] Ms [Morgan] underlined the ongoing level of conflict between her and Mr [Palmer] since separation. Her position is that the last seven years have been extremely challenging and personally draining as she has tried to move on from the

past and establish clear boundaries with Mr [Palmer] while balancing the children's relationship with him as well as ensuring her and their safety from his sometimes unpredictable behaviour. In her view a relocation with the distance between the two cities and a well-defined parenting order setting out when and how Mr [Palmer] can have contact with the children would be in the children's best interests and welfare.

[31] Ms [Morgan] acknowledged that each of the children has a close relationship with Mr [Palmer] and she undertook to ensure that was maintained. She refuted the suggestion by Mr [Palmer] that because he would inevitably have less frequent face-to-face contact with children that she would undermine his relationship with the children. Ms [Morgan] said that she had listened carefully to the evidence of [name deleted], Clinical Psychologist about the importance of her making a particular effort to ensure that the children maintained their relationship with their father rather than relying on them doing that themselves. Ms [Morgan] was agreeable to Mr [Palmer]'s child support payments being used to meet the cost of airfares for the children to and from [location deleted] so that regular contact during school holidays could be financed.

[32] By the conclusion of the hearing there was broad agreement between the parties as to what contact should take place that Ms McKenzie concurred with. Finer details were left to be resolved by the Court.

Mr [Palmer]'s opposition to relocation

[33] Mr [Palmer]'s position was that the children are all doing well in [location deleted] and that a move would present too many risks and place them all at some jeopardy. The evidence of [the Clinical Psychologist] was that each of [the children] were "tracking well" and Mr [Palmer] saw no reason that the alleged benefits of a move should compromise each of the children's current positive situation.

[34] Mr [Palmer]'s evidence was that Ms [Morgan] has been largely responsible for the conflict that has arisen between them. In his view her motive in wanting to maintain a conflictual relationship was to ensure that Mr [Palmer] had limited time with the children. Mr [Palmer] could accept that there were significant benefits for

Ms [Morgan] herself in making the move to Brisbane, particularly in respect to employment and consequent material benefits but those would not translate he suggested into anything positive for the three children.

[35] Mr [Palmer]'s view was that the close relationship he had with the three children would be undermined by not having frequent face-to-face contact. His position was that despite the many obstacles placed in his path by Ms [Morgan] he had managed to play a valuable and important role in each of the children's lives. Mr Wilson's closing submissions proposed that Ms [Morgan] had since separation effectively tried to alienate the children from their father. If relocation was allowed that continuing endeavour on the part of Ms [Morgan] would be much easier to achieve.

[36] Mr [Palmer]'s evidence was that the children have close family relationships in [location deleted], both paternal and maternal. They have a number of [relations] of similar age whom they have enjoyed growing up with and it is important that those relationships be maintained. Mr [Palmer] filed a number of affidavits to support that position. In contrast he said that the children do not have a close relationship with Australian relatives. There had been infrequent contact by visits to [location deleted] and some of the extended family Ms [Morgan] referred to were not at this stage known to the children.

[37] Mr [Palmer] also said that the education, recreational and sporting opportunities in [location deleted] were comparable to those in Brisbane. If the children moved then they would miss his close support of these activities.

[38] Mr [Palmer] said that he and his wife, [name deleted], provided a stable living situation for the children that was available as much as the Court determined was in the best interests and welfare of [the children]. In his evidence he suggested a week about regime would be his preferred option.

Psychological evidence

[39] [Name deleted], Registered Clinical Psychologist met [the children] in mid 2011 to prepare a s 133 report at that time. [The Clinical Psychologist] recorded that observations of all three children with each parent indicated they were comfortable and relaxed with both their mother and father. His view was that the children appeared to have a positive and significant relationship with both parents.

[40] [The Clinical Psychologist] stated that both [Jacey and Xiomara] were clear that they were aware of their father's anger and [he] believed four year old [Alex] would have a pre-operative understanding of this dynamic. Fortunately there was no clear indication that the children had been impacted to a point where their behaviour or emotional relationships were affected by their father's anger. Nevertheless they were aware that his anger was something to avoid but would not inhibit them having contact with him.

[41] [The Clinical Psychologist] noted that Mr [Palmer] presented with fixed ideas about solutions, persistence for short term outcomes as opposed to long term ones, with a high emotional reactivity that can result in him making poor choices and with emotional heat that can have a negative impact on his relationships and his children. [The Clinical Psychologist] also noted that Ms [Morgan] presented as having a range of behaviours that were consistent with having lived in an abusive relationship.

[42] While not opposed to unsupervised contact for the children with their father, [the Clinical Psychologist] recommended that arrangements be put in place that reduced as much as possible the contact between Ms [Morgan] and Mr [Palmer] so that the opportunity for conflict between them could be reduced as much as possible.

[43] In [his] second s 133 report dated 29 March 2016, [the Clinical Psychologist] advised that the children have a strong relationship with both parents. All three viewed their father positively with [Jacey] having a balanced view of both parents seeing that both Mr [Palmer] and Ms [Morgan] can be highly emotional regarding the other party.

[44] [The Clinical Psychologist] noted that there had been a lengthy period of time with lesser conflict and a somewhat more flexible approach to contact. That had come to a conclusion following the application for relocation which had resulted in

heightened levels of conflict with a protection order being sought by Ms [Morgan] and granted. Despite involvement of the children in some of the incidents related to the protection order proceedings this had not affected their perception of their father or wanting to have contact with him.

[45] [The Clinical Psychologist] reported that [Jacey] was clear that he did not want to move to [the overseas location] while [Xiomara and Alex] each wanted to go. Both parents were clear that they did not want the children separated.

[46] [Jacey] advised [the Clinical Psychologist] that there was nothing in [country deleted] that attracted him or he believed could not be achieved through a visit. While [Jacey] acknowledged that Ms [Morgan] had family in [the country] he himself did not know them particularly well. [Jacey] was ambivalent about his choices should his mother be allowed to relocate. He identified those were either, moving to live with his father or just moving with his mother and siblings.

[47] [Xiomara] was clear that she wanted to move to Australia in her discussions with [the clinical psychologist]. She was keen to live with her maternal family in Brisbane and was looking forward to the opportunity to develop friends in Australia while maintaining relationships with her friends in New Zealand.

[48] [Alex] said he wanted to move to Australia. His reasons were that he was looking forward to spending time with family. [The Clinical Psychologist] commented that [Alex]'s age and development meant his wishes to relocate are likely to represent the nature of his relationship with his mother and were in line with her perspective but that does not imply any overt influencing of [Alex]'s views.

[49] In giving evidence [the Clinical Psychologist] stated that all of the children impressed as resilient, articulate and intelligent.

[50] [The Clinical Psychologist] stated that [Jacey] now has sufficient understanding and insight into the dynamics of his parents' relationship to base himself alongside both of them without necessarily buying into their respective world view. He saw [Jacey]'s relationship with both his parents as stable and positive.

[51] [The Clinical Psychologist] said that [Jacey] was a young man who was developing and exploring a whole range of really interesting issues in his life. He is doing that within a social matrix of his school and his friends and at his age those are his primary relationships. So the prospect for him of moving away from those relationships would leave him bereft. Moving into a whole new milieu in Australia places him with the difficulty of locating and finding other adolescents who are thinking and experiencing along the same lines that he is. [[Details deleted]. [Jacey] had found a group with which to explore those issues which provided a degree of safety for him.

[52] [Jacey] saw his mother as a primary person in his life and saw her as a supporter and a person of strength for him. By comparison he saw his father as important without the close emotional relationship he had with his mother. [Jacey] also commented to [the Clinical Psychologist] that he accepted living long term with his father was not necessarily practical. [The Clinical Psychologist]'s view was that Ms [Morgan] would be better placed to deal with [Jacey]'s psychological and emotional issues. [The Clinical Psychologist] also voiced a word of caution about the cultural differences between Australia and New Zealand and that difference may well exacerbate some of the difficulties for [Jacey].

[53] [The Clinical Psychologist] described [Xiomara] as a delightful child who has established herself within a very clear social context at school and was doing very well. In accordance with her age, [Xiomara] had an expectation that she would move effortlessly into a similar social situation wherever she is. In [the Clinical Psychologist]'s view her clear position about wanting to move and reasons for doing that were chronologically and developmentally appropriate. He said that [Xiomara] had a very strong and close emotional relationship with Ms [Morgan]. While she had a close emotional relationship with Mr [Palmer] she was not dependent on him for her emotional wellbeing. [The Clinical Psychologist] said that Ms [Morgan] was better placed to assist [Xiomara] through the challenges of being a teenage girl.

[54] [Alex], [the Clinical Psychologist] described as being much more connected to his mother and the care of his older siblings and the challenges he would face if relocation took place were less than the older two. His connection to Ms [Morgan]

was strong and she was the primary support for him. They had a developmentally appropriate and close emotional relationship. He identified Mr [Palmer] as an important person but that sometimes he can be frightening to [Alex] who nevertheless sees his father as a significant and reasonably positive person.

Children's views

[55] As set out in discussing [the Clinical Psychologist]'s evidence each of the children hold firm views about the issue of relocation. Ms Kaye McKenzie has represented [the children] since the application for relocation was filed by Ms [Morgan]. She first met with the children in December 2015.

[56] At that time Ms McKenzie reported [Jacey] was "very firm" that he did not wish to relocate to Australia. He had a number of friends in New Zealand that he did not want to leave as well as his father. [Jacey] appreciated that the move presented a great opportunity for his mother because of employment and family and as much as he did not want to go if Ms [Morgan] went he would also join her and his siblings. [Jacey] said he would miss Mr [Palmer] "heaps" but did not think that his father had the capacity to parent him on a long term basis.

[57] [Xiomara] told Ms McKenzie that she really wanted to go to Australia. She was especially keen to be part of a larger extended family and that the new opportunities would present really good experiences.

[58] [Alex] also advised Ms McKenzie that he very much wished to go to Australia. He foresaw no difficulty with changing schools and making new friends in Brisbane.

[59] Each of the children wish to spend good parts of all school holidays with their father in [location deleted].

[60] Ms McKenzie saw the children again at the end of July 2016. [Jacey]'s ideal outcome from the proceedings would be that both of his parents remain living in New Zealand with him primarily in his mother's care with a little more contact with his father than was currently the case. If relocation was permitted [Jacey] told

Ms McKenzie he would prefer to stay in New Zealand. He felt he would probably wish to live with his father although was unsure how that would go for an extended period. [Jacey] said that he would miss his mother, [and siblings] terribly and would not want them to go. If, however, he did relocate to [country deleted], [Jacey] said he would want to come back to New Zealand to see his father as often as possible, including all school holidays.

[61] [Xiomara] remained consistent in her very firm view that she wished to move to Australia citing family as the most important reason. [Alex] confirmed to Ms McKenzie that he also still really wanted to go to Australia which he told her would be a change from all that is happening here. As with [Jacey] both [Xiomara and Alex] wanted to have generous periods of school holiday time in New Zealand.

[62] Close to the hearing each of the children told Ms McKenzie they wished to meet with the Judge. Prior to the commencement of the hearing I met separately with [the children]. [Jacey]'s position remained the same to the extent that he preferred not to move from [location deleted] but he did say that if the Court decided to grant his mother's application then he would go to Australia with the rest of the family. Both [Xiomara and Alex] confirmed their positions that they had told Ms McKenzie when discussing the matter with her.

The law

[63] I must have regard to the provisions of ss 4, 5 and 6 Care of Children Act 2004 (the Act).

[64] Section 4 of the Act requires me to consider the welfare and best interests of [the children] as the first and paramount consideration in their individual circumstances. I need to make decisions appropriate to their sense of time. The gender of the parent is not a relevant consideration and the conduct of the parent does not need to be considered unless it is relevant to the welfare and best interests of the children.

[65] I must also have regard to the specific provisions in s 5 when considering what is in the best interests and welfare of each of the children. In particular that they need to be protected from all forms of violence including psychological harm (s 5(a)), that their parents have the primary responsibility for them (s 5(b)), that there should be ongoing consultation and cooperation between their parents (s 5(c)), that there should be continuity in the children's care arrangements and there is a right to have a continuing relationship with their parents (s 5 (d)), that familial relationships should be preserved and strengthened (s 5(e)), and that their individual identity as persons (including matters of culture, language and religion) need to be preserved and strengthened (s 5(f)).

[66] I also must have regard to each of [the children's] views under s 6. This does not mean that their views are determinative of what the Court order should be. I need to have regard to each of their ages, level of maturity and awareness of all of the relevant factors and also have regard to the extent that those views might have been subject to manipulation or improper influence.

[67] The Supreme Court in *Kacem v Bashir*¹ considered the application of the principles in s 5. The statements of principles set out by the Court have general application to all cases being considered under the Act. The following principles emerged:

1. The welfare and best interests of the children are the first and paramount consideration;
2. The Court must take into account, in a case specific way, which of the principles specified in s 5 are relevant;
3. The focus must be on these particular children in their particular circumstances with no presumption of what the welfare and best interests of the children may require or what influence the s 5 principles may have on that question;

¹ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1

4. The s 5 principles are not an exhaustive list of the matters that may be relevant to the welfare and best interests of the children involved; and
5. The ultimate objective is to determine what outcome will best serve the welfare and best interests of these particular children in their particular circumstances. In making that determination the s 5 principles must each be examined to see if they are relevant, and if they are must be taken into account along with any other relevant matters.

[68] Since the decision in *Kacem v Bashir*, the legislature amended and reordered the s 5 principles. Subsequent to that amendment, the High Court in *Lowe v Way*² discussed the implications of that statutory reordering. Duffy J acknowledged³ that while the Supreme Court in *Kacem v Bashir* had held that the order of the s 5 principles did not affect the weight given to them, there would be no point in Parliament reordering the principles if it did not intend to stress the s 5(a) principle. Accordingly particular emphasis must be given to the safety principle in s 5(a).

[69] In this case because of the existence of the protection order between the parties s 5A of the Act is also relevant. The Court is required to give specific consideration to the circumstances in which the protection order was made and any written reasons given by the Judge who made the protection order.

[70] The principles applicable to the relocation of children have been addressed in a number of cases. The Court of Appeal decision in *D v S*⁴ remains relevant. The principles applicable in the relocation context were summarised by Richardson J as follows⁵:

1. Freedom of movement is an important value in a mobile community, but subject to the paramountcy principle;

² *Lowe v Way* [2015] NZHC 93

³ At [9]

⁴ *D v S* [2002] NZFLR 116, (2001) 21 FRNZ 331

⁵ at 127-129

2. The approach mandated by s 23 (now s 4 in the new Act) and the emphasis on parental responsibility for the wellbeing of a child is consistent with the relevant provisions of the United Nations Convention on the Rights of the Child;
3. All aspects of the child's welfare must be taken into account;
4. The decision maker must weigh all relevant factors in the balance in order to make the predictive assessment of what will be the best interests of the child, there being no room for a priori assumptions;
5. Section 23(1)(A) (now s 4(4)) was designed to dispel any gender based assumptions as to which parent's care would best promote the welfare of a child;
6. With reference to relocation, the nature and duration of existing custodial arrangements and the degree of change proposed may require greater weight to be accorded to the status quo;
7. Decisions of Courts beyond New Zealand are likely to be of limited assistance; and
8. In the end, difficult relocation disputes may result in "differing assessments" by different Judges. Each case must be dealt with in a personalised assessment within the principles enshrined in s 4 of the Act.

[71] In *S v L (Relocation)*⁶, Harrison J affirmed the principles to be applied as follows:

[26] The inquiry will be multifaceted, but the factors to be weighed in the balance are only those which are actually relevant to the particular circumstances. Among those which have been authoritatively recognised are that the decision of the custodial parent on where to live is an important incident of a day-to-day parenting order; the nature of the relationship between the child and the contact parent; and the closer the latter relationship, and the

⁶ *S v L* [2008] NZFLR 237, (2007) 26 FRNZ 684

more dependent the child is upon it for her emotional wellbeing and development, the more likely will be an injury resulting from removal. The reason for the move is important. So, too, is its physical distance. The child's views are relevant where they can be ascertained: (*Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA) per McKay J at 500-501 (see also s 6)).

[27] There is no presumptive weight given to one or more factors. Providing the Judge's decision is based on the welfare of the children and takes account of all material factors, including the need of a particular child for a continuing relationship with a mother or father, there will be no error of law: *D v S* [2002] NZFLR 116 per Richardson J at [47].

[72] In *Malcolm v Lloyd*⁷ Judge Burns reviewed the relevant appellate authorities in light of the changes to the Act which came into force in 2014 and stated that the Court should analyse the following factors in relocation cases:

1. section 5 principles;
2. the children's relationship/needs;
3. reasons/motivations/intention to shift. In other words - the reasons for the proposed move, the validity of those reasons and other ways the objectives of the proposed move might be met, and how thoroughly the person considering the move had considered all the ramifications and likely effects and weighed them in the balance;
4. attitude – the parents' current attitude towards each other and the way their attitudes might be affected by the move (or a decision against such a move);
5. conflict/violence/safety;
6. parenting capacity/emotional health of the parents;
7. contact;
8. children's views;

⁷ *Malcolm v Lloyd* [2014] NZFC 9558

9. economic/material factors;
10. historical choice of residence – whether there have been undertakings/understandings between the parties; and
11. cultural, social and spiritual factors.

Analysis

Section 5 principles

Section 5(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi

[73] This principle requires me to make a parenting order which ensures that [the children] are kept safe.

[74] There is no evidence that any of the children have been the subject of physical violence from either of the parents nor was there evidence of verbal abuse directed at the children.

[75] However, the relationship between Mr [Morgan] and Mr [Palmer] since separation has been at best strained and at other times highly conflicted. Communication between the parties has not been easy. A protection order was in place during 2011. A protection order is currently in place. The children were part of or in close vicinity of two of the incidents in November 2015 that resulted in the protection order being made. I made a finding that Mr [Palmer]'s conduct amounted to psychological abuse of the children.

[76] Nevertheless, the evidence, particularly from [the Clinical Psychologist], is that the impact on the children of the November 2015 incidents has not manifested in any ongoing impact on the children's behaviour and not appeared to affect their view of their father or wishing to have a relationship with him.

[77] The evidence of [the Clinical Psychologist] was that the relationship of each of the children with both Ms [Morgan] and Mr [Palmer] had not been affected by their parents' dysfunctional relationship. [The Clinical Psychologist] said in his report prepared in June 2011 that there was no indication that the children had been affected by the conflict between their parents up to that point. In respect of the renewed state of conflict since mid 2015, [The Clinical Psychologist]'s view was that this was only having a minimal impact if any on the children. He described each of the children as resilient, articulate and intelligent.

[78] As a protection order is in force s 5A of the Care of Children Act requires me to take into account the circumstances in which the protection order was made and the reasons I gave for my decision. I record that I have considered the judgment of 2 March 2016. The three particular events of domestic violence all took place in close proximity to each other in November 2015. Ms [Morgan]'s evidence at the hearing in February 2016 was that it was necessary for the order to be made. No breaches of the protection order are alleged. The children have continued contact since December 2015. There is no evidence of any detrimental impact on them or their safety being compromised as a consequence of contact with their father. I am satisfied that the existence of the protection order in itself should not impact on the terms of any contact order.

[79] In my view a relocation of the children to Brisbane with their mother would result in reduced conflict between Ms [Morgan] and Mr [Palmer]. The level of anxiety and stress that each feels around contact periods of the children with Mr [Palmer] would diminish because the frequency of these periods will reduce. The chances of the parties coming into contact at children's events would also decrease. Knowing that unintentional contact in [location deleted] would not occur would also be beneficial for both parties. I accept that because of their roles as guardians and parents of the children there must be communication between the parties which means the possibility of conflict still arises. The children not being at risk of being witness to unpleasant incidents between their parents is beneficial for each of them. I determine that the distance between [location deleted] and Brisbane decreases the potential for, but will not necessarily eliminate, conflict between Ms [Morgan] and Mr [Palmer].

However, it is a considerably better position than has existed for the past seven years and in my assessment favours relocation being allowed.

[80] A decreased number of situations where the parties can come in to contact and knowing that potential conflict is significantly reduced must result in reduced levels of stress and anxiety for both Ms [Morgan] and Mr [Palmer]. I have no doubt that the conflicted situation that has existed since separation has had a detrimental and corrosive impact on both parties and diminished their capacity to parent the children. The downstream impact for the children of a relocation of increased parenting capacity due to diminished conflict will be positive.

Section 5(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians

[81] Both Ms [Morgan] and Mr [Palmer] have been primarily responsible for the upbringing of their three children. It is apparent that Ms [Morgan] has had a significantly greater portion of the day-to-day care of [the children] since separation. Indeed due to Mr [Palmer]'s employment obligations, Ms [Morgan] was the main caregiver when the family was one unit.

[82] Relocation of the children to Brisbane will not change the respective roles of Ms [Morgan] and Mr [Palmer] in the lives of [the children]. They will each remain parents and guardians. Mr [Palmer] will get to see the children for blocks of time as opposed to each fortnight. However, the actual amount of time he sees the children may not be significantly less. It will be important for Ms [Morgan] to respect Mr [Palmer]'s role as a guardian and ensure that he is involved in decisions such as schooling.

[83] The parties recognise that once this application is determined then the assistance provided by the Court system will be at an end. Both are weary from ongoing involvement in Court proceedings and sought some form of process be imposed for resolution of disputes that may arise. It is beyond the Court to be able to do that. Once they have closely and reasonably considered each other's views then agreeing that a third party professional in whom they have faith to make the decision

would appear to be the only method available short of asking the Family Court to resolve the matter.

Section 5(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order

[84] This principle requires Mr [Palmer] and Ms [Morgan] to consult and cooperate on matters affecting [the children]. The evidence is that the level of consultation and cooperation has been poor since separation. However, at times Ms [Morgan] and Mr [Palmer] have shown the ability to consult and cooperate concerning their children.

[85] For example, the email correspondence between the parties when first discussing the possible relocation of the children largely concentrated on the issue. Also the period from mid 2012 to October 2015 was devoid of Court proceedings. Changes in arrangements concerning contact were negotiated over that period.

[86] Regardless of whether relocation took place this principle requires a change in attitude from both parties. Each needs to accept and acknowledge that the other has the best interests of the children at heart and consider their point of view on all issues affecting the children.

Section 5(d) a child should have continuity in his or her care, development, and upbringing

[87] There is some tension as to whether this principle refers to a continuation of the status quo or which parent is more likely to provide continuity of care, development and upbringing into the future. It is relevant that both the Court of Appeal and Supreme Court in *Kacem v Bashir* made it clear that s 5(d) does not provide any kind of presumption that the status quo is to be maintained.

[88] In seeking a change in the children's day-to-day living location to Brisbane, Ms [Morgan] acknowledges much change will take place in respect of such matters as schools, friends and recreational activities. Nevertheless, she has been the

predominant care provider for each of the children throughout their lives. Therefore that consistency would be maintained.

[89] Mr [Palmer] is seeking a change in the children's care arrangements to allow for him to have the children in his care 50 per cent of the time. That also would be a significant change in the living situation of the children.

[90] The respective positions of each party as to the outcome they seek acknowledges in my assessment that they are confident the children have the ability to cope with change and is an acceptance of [the Clinical Psychologist] evidence that each of the children are resilient.

[91] Nevertheless, I recognise for each of the children, a move to Brisbane will result in a new school for each of them at [date deleted]. For [Xiomara] that will occur if remaining in [location deleted]. Similarly, new friends will need to be made. A new home and living environment will also be a challenge. Inherently there is greater risk in each of those changes by comparison with remaining in [location deleted]. My assessment is that the children have the ability to confront each of those matters and successfully overcome them. Seen as new opportunities and experiences, [the children] can all grow as a result of relocation.

[92] In my view this is a neutral factor insomuch that [the children] have the ability and qualities to each cope with change but in any relocation the risk is greater by comparison with remaining in their current living situation.

Section 5 (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened

[93] This principle requires the Court to make as best as possible in the circumstances an order that will preserve and strengthen [the children]'s relationship with their parents and their wider family.

[94] [The Clinical Psychologist]'s evidence was that for each of the children their primary relationship, especially emotionally, was with their mother, Ms [Morgan]. That of course would be maintained if relocation takes place. By contrast [The Clinical Psychologist]'s evidence was that none of the children are especially dependent on Mr [Palmer] for their emotional wellbeing. In that sense it would appear that relocation is unlikely to have a detrimental impact on the children.

[95] But each of the children love their father, have a good attachment with him and enjoy spending time with him. The nature of the current arrangement will change with relocation taking place and the frequency of face-to-face contact diminishing. Regular contact through social media and gaming need not change. A contact order that sets out a strict regime for Mr [Palmer] contact with the children will be put in place.

[96] Having considered Ms [Morgan]'s affidavit evidence and listened to her give evidence I am confident she is aware of the importance of Mr [Palmer]'s relationship for each of the children. Having heard [the Clinical Psychologist] give evidence, Ms [Morgan] acknowledged that it would be necessary on her part to more actively promote the relationship of each child with their father than she thought previously was going to be necessary. In my view, Ms [Morgan] will do that.

[97] I have also considered the evidence with regard to each of the children's relationships with wider family. The only maternal family in [location deleted] are Ms [Morgan]'s parents who live in [location deleted]. They have offered assistance and support to their daughter and grandchildren since separation. Age, declining health, especially of Ms [Morgan's parent], and their own interests mean that their relationship with [the children] is not as close as it has been in the past. Otherwise there are no other maternal relations of the children living in New Zealand.

[98] There was some dispute about quite how close the relationship of the children with the wider paternal family has been. Mr [Palmer]'s evidence was that there were [relations] locally of similar age together with [relations] with whom they had a close association. Photographs were exhibited to affidavits of the children with relations but a number of those were taken prior to separation. Further, it seems that Ms [Morgan] had maintained relationships with some of the children's paternal family

following separation. [Details of how relationships were maintained deleted]. Interaction between Ms [Morgan] and Mr [Palmer]'s wider family came to a halt when Mr [Palmer] voiced objection [date deleted]. While that had an impact on Ms [Morgan] it also resulted in less contact for the children with paternal relatives.

[99] In my view, it has been Ms [Morgan] who has largely promoted the children's relationships with both maternal and paternal family. It will be a matter for Mr [Palmer] during longer periods of contact that will form part of the parenting order what contact the children have with his family. It is intended that the Christmas/New Year contact will include the [details of family event deleted].

[100] Ms [Morgan]'s evidence was that [relatives] live in Brisbane and the intention is that she, [and the children] will live in close proximity to them. [Family details deleted]. There will be an available family network in Brisbane to offer support for Ms [Morgan] and the children. By comparison with [location deleted] that will be an advantage for the children but I acknowledge the submission of Mr Wilson that it would have been helpful to have had affidavit evidence from these persons to offer more comfort that the position will be as set out by Ms [Morgan].

Section 5 (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened

[101] There was no particular evidence about this principle requiring that it be factored into the relocation decision or parenting order to be made.

The children's relationship/needs

[102] While there are a number of features that are common to [the children] because of their different ages and gender there are also matters which are only relevant to each of them individually. As I have set out earlier the Court is required to consider the best interests and welfare of each of the children in their particular circumstances. In my view, the features common to all three are:

1. Ms [Morgan] has been largely responsible for their upbringing.
2. Each has had regular contact with Mr [Palmer] albeit at times that contact has been interrupted.
3. Each has witnessed some of the significant parental conflict but the evidence is that the conflict has not detrimentally impacted any of them.
4. All three children have a closer emotional relationship and dependence on their mother.
5. All three enjoy and desire an ongoing relationship with Mr [Palmer].
6. Ms [Morgan] and Mr [Palmer] agree that all three children should, if possible, remain living together.

[Jacey]

[103] [Jacey] at age 15 understandably places much importance on his relationships with his peer group. As [the Clinical Psychologist] said he is currently exploring his own identity [details deleted]. Jacey.

[104] My sense after listening to the evidence is that Ms [Morgan] is best placed to support [Jacey] who himself recognises that the option of living fulltime with his father may well not be realistic and only sustainable for a short period. [Jacey]'s relationship with his father will be maintained through their shared interest in [interest deleted] and use of other devices together with regular blocks of contact.

[105] I recognise that leaving the local support network that he has built will create risk and be very difficult for [Jacey]. As with almost all young people, [Jacey] is technologically savvy and the relationships he has in place will be able to be maintained at some level. Hanging out with those friends of course will not be so easy. On the other side of the coin, Brisbane is a far larger city than [location deleted] and will provide [Jacey] with the opportunity to access more and better support networks.

[106] In my view, [Jacey] also enjoys his older brother role to [Xiomara] and [Alex] and sees it as an important part of his own identity. In making the move to Brisbane, [Jacey] will willingly accept the responsibility of providing support to his younger siblings. I am also cognizant of Ms [Morgan]'s evidence that should the relocation not work for [Jacey] after a relatively short period of some months then return to [location deleted] would be seriously considered.

[Xiomara]

[107] The parties agree that [Xiomara] should attend [school name deleted] in [date deleted] if remaining in [location deleted]. Change of school and almost all her friends would therefore take place even if relocation did not occur.

[108] Reflecting her optimistic outlook on life, [Xiomara] sees relocation as an adventure and opportunity to be embraced. Because of her age and positive personality [Xiomara] does not fully understand the challenges and difficulties that could well arise and that the comfort of the familiar is going to be replaced by the risk of the unknown. If relocation was not to be allowed I have little doubt that initial disappointment on the part of [Xiomara] would soon be replaced by the enjoyment of her life here in [location deleted]. However, in my view a relocation to Brisbane will allow [Xiomara] to blossom more quickly into an outward looking worldly young woman as a result of the resilient and optimistic pre-teenager that has grown [in location deleted].

[Alex]

[109] I recognise at nine, [Alex] has little understanding of the magnitude of a move to Brisbane. His relationship with his mother is more dependent than that of his older siblings. [Alex] at times displays a level of wariness of his father brought about by displays of anger on the part of Mr [Palmer] and also because [Alex] has witnessed domestic violence. The evidence is that [Alex] is a [details deleted] and this will assist him to integrate into peer groups and make friends. Due to his particularly strong relationship with Ms [Morgan], I accept relocation is unlikely to be as challenging for him by comparison to [Jacey and Xiomara].

Reasons/motivations/intention to move

[110] Ms [Morgan]'s application to relocate filed in October 2015 was a result of an employment opportunity with her then employer. Unfortunately because the application could not be determined in a timely manner she was made redundant from that company [in month deleted] 2016. Nevertheless, two other job opportunities are available to her which provide employment once relocation has taken place. Those jobs will result in advancement in her career in [industry deleted].

[111] Both positions available in Brisbane will result in improved material rewards and benefits by comparison to similar positions in New Zealand. The evidence of Ms [Morgan] is that opportunities in [location deleted] in the [industry deleted] are limited and there is significant competition for any vacancies that occur. Since separation Ms [Morgan] has spent much time and resource in obtaining qualifications while having the day-to-day care of the children.

[112] In choosing to be self-represented Ms [Morgan] left herself open to the valid criticism from Mr Wilson, on behalf of Mr [Palmer], that there was little corroborating evidence of the job opportunities. Nevertheless, I am prepared to accept Ms [Morgan]'s evidence that both positions are available in Brisbane. In my assessment her commitment to [the children] would not allow her to make such a move unless she was confident that both jobs were available. The certainty of employment that a move will provide will allow for the children to be better supported in a material sense and thereby be provided with greater opportunities as they get older.

[113] I also accept Ms [Morgan]'s position that there is strong family support available in Brisbane, particularly from her [sibling]'s family but also from her [sibling]-in-law's extended family. It is correct that Ms [Morgan] and the children have not lived in close proximity to this part of the family for any period but good connection has nevertheless been maintained despite the distance. The only maternal family in [location deleted] are Ms [Morgan]'s parents in [location deleted]. Because of largely distance and age their support is limited. While there are paternal family in [location deleted] I do not accept that it is as closely supportive of the children as Mr [Palmer] submitted. Further, until Mr [Palmer] decided to stop Ms [Morgan]'s

relationship with his [close relatives] it was her that largely cultivated the children's relationship with the paternal family.

[114] A desire to put greater distance between her and Mr [Palmer] to hopefully reduce the level of parental conflict is a genuine and understandable motivation for the move on the part of Ms [Morgan]. The opportunity to parent the children with the chronic level of stress and anxiety that has been a feature of post-separation life diminished is something that Ms [Morgan] wishes to grasp. Her evidence that consequently she will be a more relaxed and fulsome parent of the children seems to me realistic.

[115] Ms [Morgan]'s application and supporting evidence reflected significant consideration and effort on her part to consider the risks and benefits of the relocation for [the children]. Practical matters such as housing and schooling for each of the children had been closely researched having proper regard to matters that impacted on each of them individually. Her proposal that Mr [Palmer]'s child support responsibility be used to fund airfares to allow contact periods during school holidays is sensible and pragmatic. Further, Ms [Morgan]'s position that she would not relocate herself leaving the three children in [location deleted] underlines her commitment to them. As [the Clinical Psychologist] said, her role as their mother is an important aspect of her identity.

Attitude of Ms [Morgan] and Mr [Palmer] to each other

[116] The ongoing parental conflict that has ebbed and flowed since separation has had a debilitating effect on the relationship of Ms [Morgan] and Mr [Palmer].

[117] While they acknowledge the importance of their respective roles as mother and father of [the children] there is an almost total breakdown in trust and respect between them. Communication mostly is strained and can be precarious.

[118] Mr [Palmer]'s position is that since separation Ms [Morgan] has run a determined campaign to alienate all the children from him. [The Clinical Psychologist's] evidence that each of the children love their father, enjoy their

relationship with him and wish to maintain that relationship shows that Ms [Morgan] has not acted in the manner alleged by Mr [Palmer]. If it had been her intention to alienate the children, one or all of them would be displaying negative behaviour towards Mr [Palmer] and not wanting to have anything to do with him. The relationship and views of the children about their father reflect in part his efforts to maintain the relationship but also that Ms [Morgan] has supported the relationship of the children with their father rather than the opposite as asserted by Mr [Palmer].

[119] Mr [Palmer] also regards the instigation of the protection order proceedings on the part of Ms [Morgan] as deliberate steps on her part to reduce and control contact of the children with him leading up to determination by the Court of the application to relocate to Australia. If that was the case then Ms [Morgan] would not have consented to the terms of contact set out in the December 2015 variation to the interim parenting order of August 2011. That variation provided more contact between Mr [Palmer] and the children than had been the case prior. Furthermore, Ms [Morgan]'s application for a protection order was found to be justified in my decision of 2 March 2016.

[120] Mr [Palmer] also suggested in his evidence that Ms [Morgan] has been trying to buy the agreement of the children to relocate alleging purchase of various items for them in the period leading up to the hearing. The view of [Xiomara] and [Alex] of wishing to relocate that has been held for over 12 months again suggests Mr [Palmer]'s allegation is not correct. Furthermore [Jacey] has remained opposed to a move in any event.

[121] While Ms [Morgan] is wary of Mr [Palmer] and has sought and been granted a protection order my view is that she has done her best to not let the conflicted relationship between the two parents compromise the relationship of the children with Mr [Palmer]. She has tried to ensure the parties' difficulties have been kept away from the children as much as possible. [Jacey] as he has got older has been more acutely aware of the situation between his parents. Again, the evidence of [the Clinical Psychologist] that the children appear not to have been detrimentally affected by the level of conflict between their parents supports the conclusion that Ms [Morgan] has successfully managed to ensure they have been largely isolated from what has taken place between the parties.

[122] While distance will not improve the lack of respect and trust of the parties for one another, in my view, the decreased changeovers and potential lessening of any face-to-face contact between Ms [Morgan] and Mr [Palmer] will result in a decrease in conflict. As I have said previously, in my view that will be a benefit for all of the children. Communication will still be required but in the Court's view that should be confined to email exchanges so that there is a record available of everything that is transacted between the pair.

Conflict/violence/safety

[123] I have dealt with these issues when giving consideration to s 5(a) and 5A of the Care of Children Act 2004 at paragraphs [73] to [80] of this judgment.

Parenting capacity

[124] Mr [Palmer]'s parenting capacity is impacted by the ongoing effects of the [event]. As set out earlier in this judgment he continues to take medication for [pain]. His ability to drive a motor vehicle is impaired. [Medical condition deleted] means that stress and anxiety is going to be a feature of life for him. The reality is that with the support of his wife, [name deleted] he has been able to cope with short periods of contact with the children. As I understand the evidence no period has been longer than four nights.

[125] [Jacey] recognises that despite the positive relationship he has with his father, Mr [Palmer] does not have the capacity to cope as a full-time parent.

[126] The longer periods of contact that will be provided in the parenting order that I will make are going to be challenging in themselves for Mr [Palmer]. In my view, he will need to plan carefully what is to happen with the children when they are in his care during school holiday periods.

[127] If the application for relocation had been disallowed the predominant day-to-day care of each of the children would have remained with Ms [Morgan]. There was no challenge to her parenting capacity. The positive way in which each of

the children have been described in the evidence reflects well on her because since separation she has been largely responsible for the day-to-day care of the children.

Contact

[128] The contact arrangements between the children and Mr [Palmer] once relocation has taken place have been largely agreed by the parties and Ms McKenzie on behalf of the children. The orders will largely adopt those views.

Children's views

[129] I have set out at paragraphs [55] to [62] the views of the children. The difficulty that of course arises is that [Jacey]'s preference would be not to relocate while [Xiomara] and [Alex] are both firm that they wish to live in Brisbane with their mother.

[130] In *Brown v Argyll*⁸ Priestly J considered the question of the child's views under s 6 and how that issue interrelates with the best interests and welfare of the child under s 4. His Honour noted the application of the principle in this way:

The s6(2)(b) requirement for the court to take the child's views into account does not mean such views must be followed or are in any way determinative. Such views may well be in clear conflict with the judge's s4 assessment and in particular conflict with the s3(1)(a) purpose of promoting a child's welfare, best interests, and development. Human beings are frequently not the best arbiters of their own best interests. Children, who have yet to develop to adulthood and are so frequently the casualties of parental conflict, are no exception to that truism.

[131] I have set out [Jacey]'s personal situation and I accept his view of not wanting to go to Brisbane is genuine and valid. He is almost fifteen and a half and his peer group are of primary importance for him, particularly having regard to his delicate life situation. I have given much thought to [Jacey]'s views and situation. More than any other matter this gave me most reason to pause before granting the application for relocation.

⁸ *Brown v Argyll* [2006] NZFLR 705 at [49]

[132] Nevertheless, I must balance all of the children's views. [Jacey]'s relationship with his mother is a close and supportive one. Of the two parents, Ms [Morgan] is the parent in my view with the greater skills to guide and assist [Jacey]. I am also of the view that [Jacey]'s own wellbeing is assisted because of his awareness of his importance to [Xiamara and Alex]. Their wellbeing and happiness is of significant importance to him. Of importance as I have already noted is that Ms [Morgan] is prepared, should the relocation not be successful for [Jacey] for him to return to [location deleted]. The order to allow relocation will therefore include [Jacey].

[133] Both [Xiomara and Alex] have consistently said that they wish to move to Brisbane. Neither are of an age and maturity to recognise nor appreciate the magnitude of the move and the significant impact on their respective lives. Nevertheless, they each have the capacity and willingness to make the move a success. While their views are a factor that supports moving to [the overseas location] it does not weigh heavily in the decision.

Economic/material factors

[134] Ms [Morgan] is currently unemployed having been made redundant at the end of [date deleted]. Two job positions are available to her on arrival in Brisbane in the field in which she is qualified. The remuneration will be much greater than what she and the children have been surviving on since Ms [Morgan] was made redundant. The evidence that she has provided indicates that salary packages in Australia for comparable jobs in the [industry deleted] are better. While Mr [Palmer] has paid the required child support over the years and from time to time provided extra assistance the lion's share of the responsibility for the children's material needs during their upbringing has fallen to Ms [Morgan]. No real dispute was taken by Mr [Palmer] that Ms [Morgan]'s economic position would be more favourable in Brisbane. Consequently the living situation of the children from a material view point will be better in that city by comparison with remaining in [location deleted].

Historic choice of residence

[135] The children have lived all their lives in [location deleted]. There has not been any evidence of an understanding or agreement between the parties that would remain the position for an unlimited period of time. A move will present risk for all of the children. But all children can benefit from new experiences and change. Relocation cannot be prevented simply because the children have lived in the one place until now.

Cultural, social and spiritual factors

[136] There was no evidence to suggest that any of these factors should influence the Court's decision.

Conclusion

[137] Having carried out the above analysis my determination is that relocation of [the children] to Brisbane should be allowed. By a significant margin the Court's assessment is that the move will be in the best interests and welfare of each of the children. I summarise the matters that lead to the determination that relocation should occur including:

1. Ms [Morgan] has been primarily responsible for the upbringing of the children since they were born but particularly since the parties' separation in 2009.
2. Each of the children has a closer emotional relationship and dependence on Ms [Morgan]. While they all have a good attachment to Mr [Palmer] none of them regard him as the primary parent on whom they are emotionally dependent.
3. Ms [Morgan] has employment available in [industry deleted] in Brisbane. She is currently unemployed in [location deleted]. The evidence was that job opportunities in the field in which she is qualified are limited and highly sought after in New Zealand. By contrast there would appear to be a good number of opportunities available in Brisbane. As has been noted earlier the material benefits of

employment are significant. There are also other intrinsic benefits for Ms [Morgan] in having work which will have a positive roll on impact for the children.

4. There is good maternal family support available in Brisbane. That has not been the case in [location deleted]. A move will result in greater assistance being available to Ms [Morgan] and for closer relationships for each of the children with her family.
5. Ms [Morgan]'s capacity to parent the children is decisively greater than Mr [Palmer]. Well intentioned that he is the impact of the [event] is now longstanding and there was no evidence of any likely improvement. Despite Mr [Palmer]'s position, Ms [Morgan] has done her best in difficult circumstances to ensure the children have maintained a relationship with their father.
6. My view is that Ms [Morgan] will support the relationship of each of the children with their father. Formal contact provisions will be set out. No opt-out provision will be provided for any of the children. In addition the use of the various technology devices that the children have the aptitude to use will allow their relationship with their father to be positively maintained between contact visits. Ms [Morgan] has taken on board the evidence of [the Clinical Psychologist] that she must ensure the children make contact with their father by email, Skype and other similar platforms.
7. The greater distance between Ms [Morgan] and Mr [Palmer] will provide the opportunity in my assessment for the level of parental conflict to diminish if not entirely disappear. That will be of benefit to the children.

Orders

[138] I make the following guardianship orders and directions pursuant to s46R of the Care of Children Act 2004:

1. [The children] are able to relocate to permanently reside in [the overseas location] on or after [date deleted].
2. Ms [Morgan] is to advise Mr [Palmer] of:
 - a. each residential address the children are living at from the time of arrival in Brisbane, Australia;
 - b. the medical provider with whom the children are enrolled;
 - c. an email address for each child;
 - d. an email address for herself to allow the parties to communicate about matters solely related to the children.
3. Ms [Morgan] is to initiate email discussion with Mr [Palmer] in respect of which school each of the children is to attend and will only undertake enrolment once his views have been fully considered.

[139] Pursuant to s48 of the Care of Children Act 2004 I make the following orders and directions:

1. The interim parenting order of 20 August 2011 and variation orders of 4 July 2012 and 16 December 2015 are discharged.
2. [The children] will be in the day-to-day care of their mother, [Mia Morgan].
3. [David Palmer] will have contact with [the children] as follows:
 - a. [-c. Contact details deleted];

- d. Mr [Palmer] will pick up and drop off the children at [location deleted] on each occasion contact takes place in [location deleted] prior to their relocation to Brisbane, Australia;
- e. from [details deleted] of two of the three school term holidays of each year:
 - (i) Mr [Palmer] is to advise Ms [Morgan] no later than 15 February each year by email during which of the two school holidays he wishes to exercise the contact;
 - (ii) should Mr [Palmer] not have communicated his choice by 15 February in any year Ms [Morgan] will nominate the holiday period in which the children will not travel to New Zealand;
 - (iii) travel to New Zealand will take place no later than the first Monday and return travel to Australia no later than [details deleted].
- f. for a period of [duration deleted] in the Christmas/New Year holiday period. In odd numbered years that period will commence no later than [date deleted] each year. In even numbered years the period will commence no later than [date deleted] each year.
- g. should Mr [Palmer] travel to Brisbane then he will be able to have contact with the children at such times as the parties agree.
- h. should Ms [Morgan] return to New Zealand with one or more of the children then Mr [Palmer] will be able to have contact with the children at such time as the parties agree.
- i. reasonable contact with each of the children on the electronic devices used by each of them. Mr [Palmer] may initiate such

contact and it will not be a breach of the protection order for him to do so.

4. The cost of air travel for the children from Brisbane to [location deleted] is to be paid by Mr [Palmer]. He will be responsible for making the bookings for the children's air travel in accordance with the orders for contact. This order will remain in force unless and until such time as the mother applies for a formal assessment of child support under the Child Support Act 1991. If that should happen then the cost of the airfares are to be shared.
5. Once Ms McKenzie has discussed the terms of this judgment with each of the children, her appointment is concluded with the thanks of the Court.

G P Barkle
Family Court Judge