EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT WELLINGTON

I TE KŌTI WHĀNAU
KI TE WHANGANUI-A-TARA

FAM-2019-096-000112
[2020] NZFC 7624

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[JENNA BARNETT] Applicant
AND	[EDWARD CLINE] Respondent

Hearing:	2,3,4 September 2020
Appearances:	V Nathan for the Applicant J Steele for the Respondent M Chisnall as Lawyer for the Child
Judgment:	4 September 2020

ORAL JUDGMENT OF JUDGE T M BLACK

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[1] Should [Melinda] live in New Zealand with her mum or should she move to the United States to live with her dad? That is the issue I am tasked with deciding today and what this case is about. What it is not about are these things. It is not about whether [Melinda]'s parents love her. They clearly do. It is not about whether [Melinda] loves her parents. She clearly does. And it is not about the parental capacity of either of [Melinda]'s parents. They are clearly both capable and attentive parents.

[2] This is a difficult decision and I acknowledge that my decision will break one of your hearts. This is an oral decision. I am not reading it out. I am extemporising from notes that I made since the hearing concluded earlier this afternoon. For that reason, I reserve the right to myself when the decision comes back from typing to amend it to correct any obvious misstatements, errors, that sort of thing, but any amendments I make will not alter the decision or the reasons for it.

[3] The structure of the decision is that I want to deal briefly with the background to these proceedings, the hearing process, the position and submissions of the parties and lawyer for child, the legal issues I am required to have regard to, an analysis of the evidence set against those legal issues, which will lead me to a result.

[4] By way of background. Mr [Cline] is an American national. Ms [Barnett] is a Dutch national. They met in the United States in 2015 when Ms [Barnett] was undertaking [details deleted] there. Mr [Cline] moved to The Netherlands to be with Ms [Barnett] late in 2015. [Melinda] was born in [mid-2016]. In February 2018 the family moved to New Zealand. Ms [Barnett] had secured a job at [employer deleted] which is a job she still has.

[5] In early 2019 the parties' relationship ended and on [date deleted] there was a violent incident which led on [the following day], to Ms [Barnett] applying without notice for a temporary protection order, an interim parenting order, and an order preventing removal, which orders were granted.

[6] On 22 May there was a hearing as to whether Mr [Cline]'s contact needed to remain supervised. I determined that supervision was not required on an ongoing basis

and I put a shared care regime in place and that regime has continued. In March of this year Mr [Cline] filed his application to determine a guardianship dispute, namely where [Melinda] should live.

[7] This hearing commenced on Wednesday. I heard evidence from Mr McLeod and Mr Williams who are immigration lawyers. I heard evidence from Ms [Powell] who is Mr [Cline]'s mother. I have heard evidence from the parties and this morning I have heard evidence from Ms Dugdale. I have a hearing bundle with various material in it. That hearing bundle runs to about 500 pages and I have notes of evidence which run to a couple of hundred pages. I have had regard to all of the evidence and the submissions made in coming to my decision.

[8] I do want to now address the submissions made by counsel on behalf of the parties. Mr [Cline]'s submission is that I need to remember that I am dealing with two foreign nationals, that there is not a situation where if [Melinda] remains in New Zealand there would be continuity in the sense that that word is usually used because that living arrangement would entail firstly, the loss of daily contact or weekly contact between [Melinda] and her father. Ms [Barnett] circumstances are changed in the sense that she is in a new relationship and intends to live with Mr [Vaughan] and that they have a baby on the way and due [early next year], and also that Ms [Powell] is returning to the US because of her health issues.

[9] Mr [Cline]'s position is that the availability of extended family in the US to [Melinda] is an important consideration that favours allowing relocation. I should remember says Mr [Cline] that although [Melinda] has adapted well to life in New Zealand I should remember that she is of mixed Dutch and American heritage.

[10] In terms of Mr [Cline]'s proposal, Mr Steele submits that Mr [Cline] has demonstrated his ability to foster a relationship between [Melinda] and her mum in a concrete way and there is no reason to suggest that that would not continue. He also submits that I should have some regard to the views which [Melinda] has expressed.

[11] On the other hand, Ms [Barnett] submits that [Melinda] has a stable home with her mum. Her mum has a secure job. She has opportunities to obtain residency,

routine at daycare, friends, so that New Zealand is the stable base and therefore that [Melinda] remaining here would provide for continuity. If [Melinda] moves to the US, continuity will be breached in the sense that her relationship with her mum is compromised, with her friends is lost, her routine, her home, her familiar surroundings all go and in a situation that Mr [Cline] will be working and relying on others to provide before and after daycare/school care.

[12] There is the reality that Ms [Barnett] is having a baby [early next year] and a risk submits Ms Nathan that if I allow [Melinda] to go to the US, then [Melinda] may come to consider the new baby as having replaced her and feel a sense of being abandoned by her mum. Ms [Barnett] does not accept the suggestion that she has not been as proactive as Mr [Cline] in fostering the relationship between [Melinda] and the other parent. She has does different things she says. She co-operated with 46G. She made a proposal to resolve the domestic violence proceedings. She emphasises that if I allow [Melinda] to move to the United States, there are some practical issues around what face to face contact [Melinda] can have with her, both given the current COVID-19 situation and the fact that she will have a new baby [early next year].

[13] Ms Chisnall on behalf of [Melinda] points out that [Melinda] has not expressed any view in relation to the issue of where she should live. To the extent that she has expressed a view, she has expressed positive views about her father. So [Melinda]'s views are not of assistance in determining this question. Ms Chisnall submits the Court is in a situation where it is driven to impose the least detrimental alternative on [Melinda]. Both proposals come with a degree of change for [Melinda]. Both parties are well attuned as parents and [Melinda] is well attached to them. They are both capable of providing emotional and financial support to [Melinda]. There is a level of family support available to both of them. Ms Chisnall submits that [Melinda]'s current centre of gravity is New Zealand, but in the end Ms Chisnall does not advocate for one outcome over another.

[14] In terms of the legal issues I have to have regard to, they are not controversial but I just want to touch on them and these parties have heard me say this before at the hearing we had in the middle of last year, s 4 provides that [Melinda]'s welfare and

best interests in her particular circumstances is the first and paramount consideration. This is about her. It is not about her parents.

[15] I have to have regard to the relevant s 5 considerations. I just want to run through the s 5 considerations and identify their relevance to this case. Section 5(a) says I have to keep [Melinda] safe. I am satisfied that [Melinda] will be safe in the care of either of her parents. Section 5(b) says that her care, development, and upbringing should primarily be the responsibility of her parents, and no one argues otherwise. Section 5(c) says that care, development, and upbringing should be facilitated by ongoing co-operation in consultation between her parents. These intelligent and capable people have a long way to go to achieve that level of co-operation and consultation which their daughter requires and deserves from them.

[16] Under s 5(d) [Melinda] should have continuity in her care, development and upbringing. She should continue to have a relationship with both parents and her relationship with her wider family should be preserved and strengthened. Her identity should be preserved and strengthened.

[17] As the court said in *Bashir v Kacem*, none of those s 5 factors, apart from safety which is not relevant in this case, has any more weight than any other.[1] Of the s 5 factors, I am required to in a fact-specific way consider what evidence in relation to each of those s 5 factors impacts on [Melinda]'s welfare and best interests. I am not to start from any prior assumptions and there is certainly no presumption either way in relation to relocation, so no presumption for relocation and no presumption against.

[18] I want to deal by way of analysis firstly with the question of immigration. As I have made clear I hope during the course of the hearing, the significance of the immigration issues I think has fallen away as the hearing has progressed. I want to say firstly though that I accept the proposition that the parties did not have a fixed intention to remain in New Zealand forever. The parties disagree about what their intention was or to use a colloquialism what the "deal" was when they came to New Zealand. The evidence does not take me as far as to be able to make a finding that there was a definite plan to move to the US after a certain period of time, but it

[1] *Bashir v Kacem* [2010] NZCA 96, [2010] NZFLR 865.

does take me as far as being able to find that a return to the US was at least contemplated by the parties. The contemporaneous exchanges of emails and texts demonstrates that, as does the fact that Mr [Cline] had and still has vehicles and other items in storage in the US.

[19] I accept that the parties' current positions are that Mr [Cline] intends to return to the US and that Ms [Barnett] intends to remain in New Zealand. I accept that it is difficult, if not impossible for Mr [Cline] to remain in New Zealand in the long-term. He is not the holder of a residence class visa. The evidence is that there is no conventional way for him to become the holder of a residence class visa. He does not have, for example, a job offer in an area where there is an identified skill shortage. The only way that he could obtain a residence class visa would be either to have a ministerial discretion exercised in his favour, or for him to successfully appeal a deportation order. A third potential pathway was identified in terms of him undertaking a course of study on a student visa, but of course he would have to pay for that training. So, his ability to remain in New Zealand in the long-term is speculative at best and for any such ability to be tested would require significant time and money to be expended.

[20] Similarly, with Ms [Barnett] she has no current ability to live and work in the United States. She has no job offers. I acknowledge she has not looked for work but the reality is that her current ability to obtain a work visa does not exist because of the COVID-19 pandemic. Such visas, unless for essential services, and working in education is not one of those, are not permitted under the current US administration. That restriction is set to expire at the end of the year. It is not known whether and what the likelihood is of those restrictions remaining in place past that point. I do not have any evidence about what the Democratic Party's candidate for the presidency position is on those restrictions. So, I accept that it is difficult, if not impossible for Ms [Barnett] to move to the US. There is of course some prospect in the longer term that she could obtain work in the US with a visa but there are some practical issues in terms of her new relationship and impending baby.

[21] Where all of that evidence gets me to is that I do not consider it is reasonable for either parent to expect the other to pursue those options at this time and that of

course leads me to what Ms Chisnall described as the reality that I have to decide between or take the path of least damage to [Melinda]. The evidence of Ms Dugdale and just plain common sense actually establishes that [Melinda]'s relationship with what has been referred to in these proceedings as the "distant parent" will be seriously put at risk in either scenario. Indirect contact is not sufficient to maintain the current relationship. Direct contact which is likely only to be able to occur on two, maybe three occasions each year is not sufficient to maintain the existing relationships, or at least there is a serious and credible risk that those forms of contact are insufficient to maintain [Melinda]'s relationship with the distant parent.

[22] So, the decision that I have to make is on the basis that there is the strong possibility, I would put it as probability if not certainty, that [Melinda] will lose the relationship with one of her parents. To put that in a s 5(e) context, I am unable to make a decision which ensures that [Melinda] continues to have a relationship with both of her parents.

[23] I do want to note in passing that I consider that the evidence establishes that each parent is capable of appropriately fostering [Melinda]'s relationship with the distant parent. It is the tyranny of distance and the fact of [Melinda]'s age and developmental stage which places her relationship with the distant parent so egregiously at risk.

[24] I am not in a position to choose between [Melinda]'s parents. In saying that, I mean that I do not consider that the evidence establishes that either parent is a materially better parent than the other. They are both good parents. Neither of them is perfect as a parent. I am not sure why separated parents expect the other parent to be perfect. There is no such thing as a perfect parent because all parents are people and there is no such thing as a perfect person. Each of them brings different things to the parenting table and yes, as I acknowledged last May, each of them has historically had a different role in [Melinda]'s care and upbringing but that does not matter to [Melinda]. Ms Dugdale's evidence is clear that [Melinda] is robustly and securely attached to each of her parents and to borrow a line from a film, it's *Love, Actually.*

[25] In terms of the proposals that are made, Mr [Cline] of course proposes a move to [a north-eastern state] where a large number of his extended family members live. As a recent development, his mother who has lived in New Zealand for a number of years. She moved here with her late husband who has since died. She has some significant health issues which she gave evidence about and she intends to move back to the US for the purpose of investigation and treatment of those health issues. It is thought that she has cancer and she is significantly unwell. Mr [Cline] has an offer of employment in the [field deleted] which is one of his passions, one of the others being [deleted]. Ms [Barnett] proposal of course is that [Melinda] stays here with her and as part of the changes in her life in terms of the relationship with Mr [Vaughan] and the baby.

[26] Dealing with the question of continuity, I accept that [Melinda] remaining here would provide for continuity of location, housing and daycare, although I observe that [Melinda] will be five [mid-year], so she will be starting school next year anyway. But against that, I also accept the proposition that there are changes inherent in Ms [Barnett] proposal, in the sense that the most important change is that [Melinda] will not have weekly contact with her dad; secondly, there is the Mr [Vaughan] relationship and thirdly, there is the sibling. So, my overall assessment is that continuity neither favours nor counts against relocation.

[27] I want to deal with the issue of identity or culture, the s 5(f) situation. It goes without saying I would have thought that Mr [Cline] is likely to be better placed to foster [Melinda]'s American identity and Ms [Barnett] is better placed to better support [Melinda]'s Dutch heritage. Culture is better supported if it is lived and for that reason [Melinda]'s mixed heritage is likely to be slightly better accommodated in the US because she would be living the US side of her culture on a daily basis.

[28] I turn then to s 5(e) relationships. I have already dealt with relationships with [Melinda]'s parents so I turn to relationships with wider family. It is clear that if [Melinda] moves to the United States, there is clear potential for her relationships with her wider family to be strengthened – her cousins, her other family members, her nan who is likely to be living in the US as well. I acknowledge there might be some practical limitations but on the evidence I have, Ms [Powell] is moving to the US. On

the flipside of relationships, her relationships with her maternal family members are likely to be slightly attenuated. They are not especially close relationships at present in the same way that the relationships that [Melinda] has with her paternal family members who live in the US are not especially close relationships at the moment. That again is just the tyranny of distance.

[29] If [Melinda] moves to the United States, her relationship with Mr [Vaughan] is unlikely to progress and it will not be possible for her to develop a relationship with her sibling who is due in [the new year]. It would be wrong on a rule of law basis for Ms [Barnett] to deliberately get pregnant in the face of these proceedings and then use the impending baby, she has not argued this but I am just making this observation, use the arrival of the baby as a reason for [Melinda] to remain in New Zealand.

[30] In the end, the availability of those wider family relationships in the US favours relocation, together with the identity issue. On balance and by some margin, the least detrimental outcome to [Melinda] is achieved by allowing relocation and so that outcome is in [Melinda]'s welfare and best interests. The application for direction that [Melinda] be permitted to relocate to the United States is therefore granted.

[31] Following announcing the result of the hearing, I have had a discussion with counsel about next steps. As I had indicated the decision covers the relocation. What now needs to happen is some discussions and hopefully agreement about the implementation of that decision in terms of timeframes for relocation, contact arrangements once relocation has occurred, a block of time for [Melinda] to spend with her mum leading up to the relocation and those sorts of things. The first and most pressing issue is Mr [Cline] needs to find out whether the announcement made today by the Minister of Immigration means that he can stay here and for how long.

[32] Against that background, I am simply adjourning the proceedings to a teleconference with me, 1 October, 9.30 am for counsel to advise whether agreement is reached or if not, how matters are to be determined. The parenting order application and the s 46R application dealt with in this hearing, although I have announced the result of it, is formally adjourned part-heard to a date and time to be advised.

[33] I record that having had a discussion with Mr Steele, Mr [Cline] does not pursue costs and costs are to lie where they fall. I will deal with cost contribution orders at a later date.

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Judge TM Black
Family Court Judge

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