

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

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**IN THE FAMILY COURT
AT NELSON**

**I TE KŌTI WHĀNAU
KI WHAKATŪ**

**FAM-2016-059-000021
[2021] NZFC 11188**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[GILLES GIROUX] Applicant
AND	[GRACIE BOND] Respondent

Hearing: 4 November 2021

Appearances: Applicant appears in Person (via AVL)
C F Dupuy for the Respondent
S M Tocker on behalf of S E Gracia as Lawyer for the Child

Judgment: 4 November 2021

**ORAL JUDGMENT OF JUDGE R J RUSSELL
[as to a dispute between guardians under s 46R of the Care of Children Act
2004]**

[1] These are proceedings under the Care of Children Act 2004 for [Carole Giroux], who is aged eight years. [Carole] was born on [date deleted] 2013. In particular it is an application by [Carole]'s father, [Gilles Giroux], to determine a dispute between guardians, the guardians being himself and [Carole]'s mother, [Gracie Bond].

[2] Mr [Giroux] appears at this submissions only hearing by AVL link from [a Western European country — the WEC] and Ms [Bond] appears from [a town in the South Island of New Zealand – location 1] by telephone link, she having misunderstood the requirement to be in court today. She is represented by her counsel, Ms Dupuy. Mrs Gracia, [Carole]’s court-appointed lawyer, is not able to be here today and Ms Tocker appears as her agent.

Brief background

[3] The parties are the parents of [Carole] who lives with her mother in [location 1]. There is a final parenting order in place, dated 30 January 2020, which was made by consent. This order provides for [Carole] to be in the day-to-day care of Ms [Bond] and contact with Mr [Giroux] when he is in New Zealand is provided for and, when he is back to his [home country], contact is to occur by way of Skype video.

[4] There is no application to vary the terms of the parenting order, this being prevented in any event by the application of s 139A of the Act because today is still within the two year period prescribed by this section of the Act.

[5] Mr [Giroux] filed an application under s 46R of the Act to settle disputes between guardians. The guardianship issues which were concerning him related to [Carole]’s schooling, whether she should see a psychologist, the ability of [Carole]’s parents to consult in relation to guardianship issues, the lack of encouragement for [Carole] to engage in the Skype contact sessions with her father and, finally, the issue of whether [Carole] is able to travel to [the WEC] to have face-to-face contact with her father and the frequency of that travel, if it is to occur.

[6] Upon the filing of this s 46R application, Mrs Gracia was appointed to represent [Carole] and has filed reports as required of her. Ms [Bond] has filed her response. Issues and directions conferences have been held. Round-table meetings have been authorised, communication counselling has occurred and on 31 May 2021 I directed a submissions only hearing to be held to determine any outstanding guardianship issues which the parties were unable to agree upon.

[7] At the outset of the hearing I have clarified that of the five issues I have mentioned which were in dispute, it is now only the issue of [Carole]'s ability to travel to see her father in [the WEC] which needs to be determined.

The evidence

[8] To address this overseas travel issue each party has filed affidavit evidence and submissions. Mrs Gracia has also filed a report outlining her views which I need to consider under s 6 of the Act.

[9] Mr [Giroux] is permanently resident in [the WEC]. He is in a relationship with another person. Neither of them have any children apart from [Carole]. Mr [Giroux] is a [citizen of the WEC]. He is not a New Zealand citizen, nor is he a permanent resident, and as the position stands in New Zealand at the present time, he has no right to travel to this country. [Carole] has dual citizenship. Mr [Giroux] accepts he cannot travel at the present time to New Zealand. In earlier times he has travelled twice a year to see his daughter in the months of July and December of each year. Since the COVID-19 pandemic began he has not been able to have face-to-face contact with [Carole].

[10] Mr [Giroux] accepts that it is not possible for him to travel here nor is it possible for [Carole] to travel to [the WEC] at the moment. What he seeks is to have a plan put in place so that overseas travel can occur in the future, he envisaging this occurring once every second year, preferably in the month of July which is the [northern hemisphere] summer but, if this is not possible, then in the month of December to coincide with the longer New Zealand Christmas school term holiday period. During the month of July he would be able to take time off his work to spend with [Carole]. He has extended family in [the WEC] who he considers it is important for [Carole] to meet and get to know. If travel was to occur in December, he would be able to take some, but not necessarily all, of the time off his employment to look after [Carole].

[11] Currently Mr [Giroux] is not vaccinated against COVID-19. He is not sure about whether he would be prepared to be vaccinated or not. He accepts that as things

stand he will not be able to undertake international travel from New Zealand as an unvaccinated person.

[12] Currently there is no ability to immunise a child of [Carole]'s age against COVID-19. He is unsure whether [Carole] should be vaccinated if the New Zealand health authorities were to authorise a vaccine for children of her age. At the present time, [Carole] is not vaccinated against anything whatsoever.

[13] Mr [Giroux] is prepared to travel again to New Zealand once the border is open and he is able to do so to see [Carole] and spend further time with her in this country before the overseas travel is able to occur. Following these introductory visits he is prepared to travel with [Carole] each way between New Zealand and [the WEC]. When the borders re-open, permitting travel to occur and the vaccination rules can be complied with, he is prepared to pay for the costs of this travel.

[14] Ms [Bond] lives in [location 1]. [Carole] is in her primary care. She does not agree with [Carole] being vaccinated against COVID-19. She is not opposed to overseas travel per se, but points out the difficulties with travel at the present time, including the uncertainties created by the global pandemic, and to the risk of [Carole] and herself of contracting COVID-19.

[15] Ms [Bond] points out that there is a New Zealand travel advisory notice advising all New Zealanders not to travel overseas at this time. She points to the risks of not being able to get back to New Zealand through the managed isolation and quarantine ("MIQ") system currently in place. She is concerned about Mr [Giroux]'s financial ability to provide for international travel both ways in the event that travel could occur. She is not vaccinated herself against COVID-19 and has no proposals to do so.

[16] Ms [Bond] is concerned about the lack of face-to-face contact which has occurred between [Carole] and Mr [Giroux] and points to past difficulties and behavioural issues for [Carole] which have occurred following the earlier contact visits. She points to issues with current Skype contact as she sees it and refers to [Carole]'s strong view that she does not want to travel to [the WEC]. Ms [Bond] has

undertaken some research as to the impact of COVID-19 in [the WEC] pointing to the daily average number of cases currently being in excess of 5,500. She considers the risk of overseas travel at this time, given all of the factors that I have summarised, to be too great to permit overseas travel to occur. She recognises the need for [Carole] to have contact with her father and paternal family, considering this can, at the moment, be best achieved by continuing with the Skype contact.

[17] Mrs Gracia has provided a comprehensive report on behalf of [Carole] and has addressed the issues I have already referred to in this judgment. She describes [Carole] as being an intelligent, creative, thoughtful and very engaging child and is a particularly articulate eight-year-old who understands the issues which I need to determine. Mrs Gracia does not have any concerns that her views are being influenced by either of her parents.

[18] [Carole]'s views, which I need to consider under s 6, are that she does not want to leave [location 1] with her father at the moment. She would like to see him if he stayed in the [location 1] area and they could spend some time together. She describes the idea of going to [the WEC] as being horrible if her mother did not accompany her. She said that she could not speak French and this made it hard for her to understand people. This made her anxious and she said she would find it a bit scary to go on any plane without her mother and she does not want to fly by herself anywhere. She has an aversion to flying. She has a clear view that she would like to speak to her father once a week rather than two times a week but, as Mrs Gracia notes, there is no application to vary the parenting order and these preliminary issues are in any event prevented from being considered by s 139A of the Act until two years has expired since the making of the previous order.

[19] Mrs Gracia notes that overseas travel at the present time is extremely difficult for all of the factors that I have referred to and submits that no order can be made for overseas travel at this time.

Discussion

[20] As in any decision under the Care of Children Act, I must and do have regard to the provisions of ss 4, 5 and 6 of the Act. In this case, the important s 5 principles to have regard to are, first of all, the issue of [Carole]'s safety under s 5(a) and, secondly, the need for her relationship with her father and his extended family to be preserved and strengthened under s 5(e) and, thirdly, in s 5(f), the importance of [Carole] having some knowledge of and some connection with her cultural identity, in particular her [WEC] heritage. Under s 6 I must also have regard to her views which I have recorded.

[21] It is very clear to me that as things stand no overseas travel for [Carole] can be directed. Mr [Giroux] is not able to travel in or out of New Zealand because he is not a citizen, has not been vaccinated and is not a permanent resident. Ms [Bond] is unable to travel out of New Zealand because she is not vaccinated. I accept Mrs Gracia's submission that [Carole], at the age of eight, with her aversion to flying, is simply too young to travel between New Zealand and [the WEC] alone. In addition to these factors, getting back into New Zealand is problematic given the queues lined up for admission into the MIQ system. All of this means that no return travel could be assured even if the prerequisites for leaving New Zealand could be met.

[22] For these reasons I accept Ms Dupuy and Mrs Gracia's submission that no order for overseas travel can be made at this time. For these reasons, the other s 5 issues which I have referred to are going to have to be addressed by electronic contact.

[23] For the parties' benefit I will set out the issues which I think they are going to need to address before overseas travel can occur at some point in time in the future. These are observations which are made as things stand at the present time and are not intended in any way to bind a future judge at any further hearing to address this issue.

[24] The following points need to be considered by the parties and their counsel.

- Firstly, overseas travel is in the pre-pandemic period generally regarded as a positive experience for children where they have one or other parent domiciled

overseas. It allows the overseas domiciled parent to teach their child something of their cultural, language and heritage in a way which the New Zealand based parent cannot. It also allows the parent/child relationship to be fostered. In pre-pandemic times overseas travel required the application of the Hague Convention to be addressed by recording an acknowledgement that the child was habitually resident in this country needed to be confirmed and the countries being travelled to were signatories to the Hague Convention. I do not anticipate there being an issue with [the WEC] on this issue but have no direct evidence about this.

- Secondly, the overseas travel needs to be arranged and the details confirmed before the travel commences – proof of travel arrangements being made, advice given of the travel destinations, the ability of the remaining parent to contact the child during the period of overseas travel and proof of return air tickets needs to be provided. Details of who will be accompanying the child during the period of travel also needs to be addressed. All of this information needs to be exchanged between a child’s guardians well in advance of the travel and hopefully agreement can be reached between the parents and guardians. If no agreement is able to be reached then the Court can generally deal with such applications on a submissions only basis similar to the hearing this morning.

[25] Specific to this case the parties are going to need to address the following:

- (a) Firstly, Mr [Giroux] I think would need to travel to New Zealand once or twice prior to the overseas travel to spend some direct face to face contact time with [Carole] in order to get to know her again and to give her some confidence in travelling with him to [the WEC]. He is obviously going to need to address his COVID-19 vaccination status (unless there is a change to airline requirements) in order to travel to and from New Zealand.
- (b) The issue of whether [Carole] is vaccinated for COVID-19 is also going to need to be addressed. In particular if it is an airline travel requirement that children be vaccinated then in absence of agreement between her

parents on this issue, an application, under s 46R of the Act, seeking vaccination directions for [Carole] will need to be filed and determined and, depending on the outcome, vaccination certificates would need to be obtained.

- (c) If Ms [Bond] wishes to travel to [the WEC] with [Carole], which appears to be [Carole]'s preferred option, then she would need to re-address her opposition to being vaccinated for COVID-19.
- (d) The MIQ system would need to have been modified or removed as a re-entry requirement into New Zealand for it is untenable for [Carole] to leave New Zealand and then to have no certainty about the date of her return to this country.
- (e) Mr [Giroux] will need to be in a position to meet the costs of airfare travel from New Zealand to [the WEC] and return for both [Carole] and the person who is accompanying her on the trip.
- (f) [Carole]'s views will need to be considered at the time of the proposed travel. It would be particularly problematic to try and force a child of [Carole]'s age onto an aeroplane to travel such a distance if the child is unwilling to travel or becomes distressed at the prospect of such travel. The risk is that airline, immigration or customs officials may not permit the travel to occur at the border.

[26] All of those factors will need to be considered and addressed by the parties in the lead up to any further overseas travel application being made.

Outcome and orders

[27] Against all of this background, I make the following orders and directions:

- (a) The direction sought by Mr [Giroux] permitting [Carole] to travel overseas is refused for the reasons I have outlined.

- (b) Mrs Gracia's appointment as counsel for [Carole] is now discontinued with the thanks of the Court. I will leave it to her to advise [Carole] of the outcome of these proceedings as required by the Act.

- (c) Costs are reserved. If sought, memoranda are to be filed within 21 days with a right of reply within a further 21 days following which the file is to be referred to me in chambers for decision.

Judge RJ Russell

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 15/11/2021