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**IN THE FAMILY COURT
AT MANUKAU**

**I TE KŌTI WHĀNAU
KI MANUKAU**

**FAM-2015-092-000975
[2021] NZFC 1115**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ZI JIAN] Applicant
AND	[YU YONG] Respondent

Hearing: 29 October 2020

Appearances: C Jiang for the Applicant
No appearance by or for the Respondent
Y-F Wu as Lawyer for the Children

Judgment: 10 February 2021

RESERVED DECISION OF JUDGE A P GOODWIN

[1] [Zi Jian] (Ms [Jian]) and [Yu Yong] (Mr [Yong]) are the parents of [Natalie Yong] born [date deleted] 2009 ([Natalie]) aged 11, and [Thomas Yong], born [date deleted] 2012 ([Thomas]), aged eight.

[2] Ms [Jian] applies to remove Mr [Yong] as guardian of the two children. In the alternative, should Mr [Yong] retain guardianship, Ms [Jian] seeks a guardianship

direction under s 46R of the Care of Children Act 2004 (the Act) that she can solely make guardianship decisions in relation to the children until they are 18 years of age.

[3] Mr [Yong] has provided no formal opposition to the application and therefore the hearing on 29 October 2020 proceeded as a formal proof hearing.

[4] Lawyer for the children, Ms Wu, opposes the application on behalf of the children.

Removal of guardian

[5] Section 29 of the Act provides the test for determining whether to deprive a parent of guardianship of his or her child. The onus is on the applicant to satisfy the Court that on the balance of probabilities the test is met.

[6] Under s 29(3)(a), the Court must not make an order unless satisfied:

- (a) That the parent is unwilling to perform or exercise the duties, powers, rights and responsibilities of a guardian or that the parent is for some grave reason unfit to be a guardian of the child; and
- (b) That the order will serve the welfare and best interests of the child.

[7] Section 16 of the Act outlines the meaning of “exercise of guardianship”:

16 Exercise of guardianship

- (1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian’s—
 - (a) having the role of providing day-to-day care for the child (however, under section 26(5), no testamentary guardian of a child has that role just because of an appointment under section 26); and
 - (b) contributing to the child’s intellectual, emotional, physical, social, cultural, and other personal development; and
 - (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.

- (2) *Important matters affecting the child* include (without limitation)—
- (a) the child’s name (and any changes to it); and
 - (b) changes to the child’s place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child’s relationship with his or her parents and guardians; and
 - (c) medical treatment for the child (if that medical treatment is not routine in nature); and
 - (d) where, and how, the child is to be educated; and
 - (e) the child’s culture, language, and religious denomination and practice.
- (3) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a court order provides otherwise.
- (4) *Court order* means a court order made under any enactment; and includes, without limitation, a court order that is made under this Act and embodies some or all of the terms of an agreement to which section 40(2) or section 41(2) applies.
- (5) However, in exercising (or continuing to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.
- (6) Subsection (5) does not apply to the exclusive responsibility for the child’s day-to-day living arrangements of a guardian exercising the role of providing day-to-day care.

[8] Section 5 of the Act outlines the principles relating to a child’s welfare and best interests that must be considered under the second step of the two stage s 29(3) test.

They are:

5 Principles relating to child’s welfare and best interests

The principles relating to a child’s welfare and best interests are that—

- (a) a child’s safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child’s family, family group, whānau, hapū, and iwi:

- (b) a child’s care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (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:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (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:
- (f) a child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

Position of Ms [Jian]

[9] Ms [Jian] seeks to remove Mr [Yong] as a guardian due to his demonstrated unwillingness. She does not assert that Mr [Yong] is for some grave reason unfit to be a guardian.

[10] Mr Jiang, on behalf of Ms [Jian], refers to a number of cases in support of “unwillingness”.¹ It is submitted that the term “unwilling” requires proof of a lack of intentional desire and this is established by the respondent’s conduct, with reference to the duties, powers, rights and responsibilities of a guardian outlined in s 16(1) of the Act, it is argued that Mr [Yong]’s conduct has demonstrated a lack of intentional desire to act as a guardian over the children:

- (a) Mr [Yong] has never had an active role in providing day-to-day care of the children and has not seen the children since December 2015. It is noted that there is a parenting order of 28 March 2017 providing Ms [Jian] with the day-to-day care of the children and Mr [Yong] contact at times and on the basis agreed to by the applicant. Despite

¹ *BLB v RSC* [2012] NZFC 7162; *IMB v MBA* [2007] 26 FRNZ 484; *Savea v Sefo* [2015] NZFC 9510; *[Shu] v [Huang]* [2020] NZFC 8370.

this availability of legal contact, Mr [Yong] has not pursued such contact.

- (b) Ms [Jian] has had sole responsibility for the children's intellectual, emotional, physical, social, cultural, and other personal development. This has included taking them to all their health appointments, to school, organising after school activities, attending church, and financially supporting the children. Ms [Jian] has had some assistance from her parents; however, Mr [Yong] has been absent from these responsibilities.
- (c) Mr [Yong] has left questions about important matters affecting the children noted in s 16(2) to Ms [Jian]. This includes the children's religion, culture, schooling, medical treatment and place of residence.

[11] With reference to the best interests of the children, it is said:

- (a) Mr [Yong] does not have any relationship with the children.
- (b) It is difficult for Ms [Jian] to arrange such things as schooling without sole guardianship; and
- (c) There have been safety concerns for the children whilst in Mr [Yong]'s care for example, [Thomas] having suffered a head injury and [Natalie] a cigarette burn.

Position of lawyer for child

[12] Ms Wu submits there is insufficient evidence to indicate that Mr [Yong]'s conduct has met the high threshold of the unwillingness test, nor is it in the best interests of the children to remove him as a guardian.

[13] In August 2019, there was a WeChat exchange between Ms [Jian] and Mr [Yong]. Ms [Jian] asked Mr [Yong] for his phone number and he responded: “Is there something wrong with the child?”.²

[14] Lawyer for child submits that this indicates Mr [Yong] has a continued concern for his children and therefore his conduct does not meet the threshold to be considered “unwilling” in terms of s 29.

[15] She further submits that in a letter dated 20 March 2015, Mr [Yong]’s conduct of an apparent lack of desire to have a relationship with his children can be explained by his shame surrounding revelations that he had defrauded Ms [Jian]’s parents and had an extramarital affair. It includes the statement:

I have failed the expectation and grace of my parents-in-law, have betrayed [Zi Jian]’s love and accommodation and am guilty to my two lovely children. My only wish is that they will not be influenced by me in the hope that they will become truly upright persons.

[16] Lawyer for child says this indicates that his desire to stay away from the children was not necessarily a sign of unwillingness, but a desire to ensure the children were not tainted by his transgressions.

[17] With respect to best interests and welfare, lawyer for child says that it is not in the children’s best interests to remove Mr [Yong] as their guardian as the children still desire a relationship with their father. [Thomas] said to lawyer for child in April 2020, that he “wants to see his father”.³ [Natalie] said that she “prefers not to see her father because she is not sure that she could trust her father,” that she did not want her father “having input into her upbringing with her,”; however, she “wants to know where her father lives” and she did not feel “comfortable without her dad”.⁴

[18] Removing this last connection to the children would sever any remaining connections with their father with whom at least [Thomas] wishes to one day reconnect. Lawyer for child, therefore, submits that it is in the children’s best interests that this door is left open.

² Notes of Evidence (NOE) page 6, line 34.

³ Lawyer for child’s memorandum dated 23 April 2020, paragraph [11].

⁴ Lawyer for child’s memorandum dated 23 April 2020, paragraphs [24], [31], [32] and [34].

Discussion – unwillingness of guardian

[19] The first stage of the two-stage test in s 29(3) is whether Mr [Yong] is unwilling to perform or exercise the duties, powers, rights and responsibilities of a guardian.

[20] This is a high standard, albeit a flexible one.⁵ This high standard recognises the importance legal guardianship has in fostering a special relationship between the parent and child. It is not a relationship that can or should be easily severed. This is so for two main reasons. First, the removal of guardianship is a “...decision which effectively condemns one of (the child’s) parents, from whom he or she has received some genetic blueprint, as unworthy and un-trustable... it is now well known that a child’s own sense of self-worth is shaped at least in part, by his or her knowledge and understanding of where he or she comes from.”⁶ In other words, it is a “societal label of profound disqualification”.⁷ Second, it removes the incentive or an excuse for the parent to reconnect with the child at a later date.

[21] The Act does not define “unwilling” under s 29(3). In *BLB v RSC*, Judge Callinicos sought to align the meaning of “unwilling” in s 29(3)(a) with the Oxford English Dictionary definition:⁸

- (a) Not intending, purposing or desiring (to do a particular thing) or;
- (b) Not inclined, willing or ready; adverse, reluctant, loathe.

[22] The guardian must, therefore, intend to not exercise their roles and responsibilities as a legal guardian as defined under s 16. This is demonstrated by the guardian’s conduct.⁹ The evidence suggests that Mr [Yong] has had no role in providing day-to-day care for the children since at least December 2015, if not since their infancy. This correlates to the final parenting order referred to at paragraph [10](a) above. Reading lawyer for child’s reports, it is apparent that the children

⁵ *MLM v Chief Executive Ministry of Social Development* [2013] NZHC 1064 at [24]; *BLB v RSC* [2012] NZFC 7162 at [3].

⁶ *IMB v BMA* [2007] 26 FRNZ 484 at [36].

⁷ *Brooks v Ropata* [2016] NZFC 1385 at [18].

⁸ *BLB v RSC* [2012] NZFC 7162 at [10].

⁹ *Savea v Sefo* [2015] NZFC 9510.

remember little of their father. This indicates a lack of desire by Mr [Yong] to exercise one of the primary responsibilities of a guardian.

[23] It is apparent to me that Ms [Jian] has been primarily responsible, with some assistance from her parents, for the children's intellectual, emotional, physical, social, cultural, and other personal development since their infancy. This includes health, school, activities, church and cultural activities as well as financial support. Mr [Yong] briefly cared for the children in 2015; however, it appears undisputed that the children were primarily cared for by a babysitter in that time.

[24] In regard to the responsibility of guardians to help determine questions about important matters affecting the child, the evidence further suggests that Mr [Yong] has tended to defer such decisions to Ms [Jian]. These include the "important matters" listed in s 16(2) including but not limited to the children's names, religion, culture, schooling, medical treatment and place of residence. There is no evidence to suggest that Mr [Yong] has made any decisions regarding these "important matters". Ms [Jian] has chosen the children's religion as Christianity despite Mr [Yong] not being religious. She has also consulted with the children the schools they wish to attend, with no evidence of input by Mr [Yong]. Additionally, Ms [Jian] has made all decisions regarding their residence, medical treatment and cultural activities.

[25] However, a guardian not exercising contact with their child should not necessarily mean the parent is "unwilling".¹⁰ In many cases it may be a force of circumstances preventing a parent from exercising guardianship. It is therefore, important to note whether there are extrinsic or intrinsic obstacles that may prevent a guardian from exercising their duty.

[26] The letter of March 2015 in which Mr [Yong] refers to his wish for the children not to be influenced by him (para [15] above) may indicate that Mr [Yong] withdrew from his responsibilities not because of a lack of desire, but that the children would be better off without him due to perceived misdeeds. However, the Court must be careful to opine motive in these circumstances, from relatively scant information. At the time the letter was written, Mr [Yong] was aware of possible civil proceedings and in any

¹⁰ *Phillips v Newman* [2013] NZFC 9657 at [27].

event, had been relatively absent from the children's lives prior to this date. His behaviour in recent years, in my view, shows a clear intention to withdraw from his duty. This includes failing to have any input in important matters, personally caring for the children during the brief period they were in his care, failure to have contact with the children on occasions despite having contact details, not attending important milestone events in recent years, no financial contribution and no response to proceedings initiated with regard to the children. This is despite the fact that there appear to be no extrinsic hurdles to him re-entering the children's lives and him having the means to contact Ms [Jian]. It does not appear to me a credible motive to infer that Mr [Yong] seeks to protect his children from his influence.

[27] The WeChat communication by Mr [Yong] does indicate a concern about his children. Ms [Jian] acknowledged that she did not respond to Mr [Yong]'s enquiry about the welfare of the children. Ultimately, if Mr [Yong] was so concerned, one would expect follow up communication or attempts to further obtain an answer. That never happened.

[28] Taking the evidence as a whole, given the number of years that Mr [Yong] has not participated in guardianship decisions, and his failure to further enquire about the children's circumstances, the view I reach is that Mr [Yong] is unwilling to perform his guardianship duties. I am not satisfied on the evidence that his failure to perform his guardianship duties is a form of protection against his undue influence.

Discussion – best interests of the children

[29] The second step of the two-step process is that the Court must be satisfied that making the order is in the best interests of the children.

[30] In considering the welfare and best interests of the children in their particular circumstances, I must take into account the principle that decisions affecting the child should be made and implemented in a timeframe that is appropriate to the child's sense of time and the principles in s 5 and may take into account the conduct of the person

who is seeking to have a role in the upbringing of the child to the extent that their conduct is relevant to the child's welfare and best interests.¹¹

[31] Although there is reference to previous examples of harm to the children, there are no ongoing threats to their safety if Mr [Yong] was to continue his role as guardian. In addition, Ms [Jian] has a parenting order providing her with day-to-day care and control of any contact arrangements.

[32] The children's care, development and upbringing will remain unaffected if the order is made. The children have been in the day-to-day care of Ms [Jian] for years with minimal input from Mr [Yong]. Despite that minimal input, the children have obtained appropriate medical treatment, passports, extracurricular activities, travel and have enrolled at schools (bar [school deleted]).

[33] The removal of Mr [Yong] as a guardian will not hinder the children's identity in respect to their culture, language and religious denominational practice. Ms [Jian] has been active in encouraging those aspects of their identity including Mr [Yong] and Ms [Jian]'s shared culture and language. However, there is a strong possibility of other aspects of their identities being permanently hidden if Mr [Yong]'s guardianship is removed. This includes their sense of identity stemming from their paternal family's history. Similarly, ongoing consultation and co-operation between Ms [Jian] and Mr [Yong] are likely to be unaffected by removal, since there currently is none, save for the sporadic communication between them.

[34] I must take account of the children's views, if views are expressed.¹² I have made some reference to the views at paragraphs [16], [17] and [18] above. I have referred to [Thomas]'s expressed wish to see his father. There is also reference in lawyer for child's memorandum of 23 April 2020, of [Thomas] having some mistaken belief in regard to his father, in particular that he works in a factory and the factory "needs to be quiet".¹³ Clearly, from what has been stated, [Natalie] is more reluctant to reconnect with her father. She expresses trust issues and does not want him to take

¹¹ Section 4 of the Care of Children Act 2004.

¹² Section 6(2)(b) of the Care of Children Act 2004.

¹³ Lawyer for child's memorandum dated 23 April 2020, paragraph [12].

part in her important events. It is also clear that she has some significant knowledge, correct or otherwise. She said that her father had an affair and had misappropriated her maternal grandparents' money.¹⁴ Although [Natalie] made reference to not wanting contact to her father, there was some expressed sadness about her current circumstances. When asked whether she wanted her father to take part in her important events, she said "guess not",¹⁵ that her mother and father had divorced, and that she "felt very lonely",¹⁶ and that "she does not feel that comfortable without her dad".¹⁷

[35] These views are considered in relation to the principle that children should continue to have a relationship with both of their parents and that the children's relationship with their family group, whānau, hāpu or iwi should be preserved or strengthened (principle 5(e)). Removal of Mr [Yong] as a guardian will likely remove any incentive for him to reconnect to the children via his joint guardianship responsibilities and may further condemn Mr [Yong] as "un-trustable" in [Natalie]'s eyes. Keeping the door open in these circumstances is particularly important given that recent WeChat message, in which Mr [Yong] expressed concern about the children. That message does suggest that there may be the possibility of reconciliation between the children and their father in the future. The removal of Mr [Yong] as a guardian may remove that last possibility.

[36] As His Honour Judge Brown noted in *Brooks v Ropata*: "Thousands of sole parents in New Zealand successfully manage their children's lives without input from absent or irresponsible joint guardians."¹⁸ Although it may be frustrating for Ms [Jian] to navigate parenting with an absent father, my view is that the circumstances do not meet the high standard that Parliament intended in writing s 29(3). Unlike the cases of *Savea v Sefo* and *[Shu] v [Huang]*, Ms [Jian] has not struggled to determine important matters without Mr [Yong] and has alternative means available to address

¹⁴ Lawyer for child's memorandum dated 23 April 2020, paragraph [22].

¹⁵ Lawyer for child's memorandum dated 23 April 2020, paragraph [27].

¹⁶ Lawyer for child's memorandum dated 23 April 2020, paragraph [28].

¹⁷ Lawyer for child's memorandum dated 23 April 2020, paragraph [31].

¹⁸ *Brooks v Ropata* [2016] NZFC 1385 at [20].

the issue at the heart of these proceedings for example, choice of school.¹⁹ That is an application to the court for guardianship direction.

[37] [Thomas], although young, wishes to know his father; [Natalie], older, displays some sadness at the loss of a father and some ambivalence toward knowing him in the future. Removal of Mr [Yong] will do nothing to preserve or strengthen those slim relationships that currently exist between the children and their father. For that reason, I determine that it is not in the children's best interests and welfare for Mr [Yong] to be removed as the children's guardian.

Guardianship direction

[38] If the Court does not make an order for Mr [Yong]'s removal, then Ms [Jian] seeks a guardianship direction under s 46R, that Ms [Jian] can solely make guardianship decisions in relation to the children until they are 18.

[39] In *Brooks v Ropata*, His Honour Judge Brown did not remove the father's guardianship despite his request. Instead, His Honour noted that the father's clear desire to be stripped of his guardianship rights should mean the mother would not be required to consult with him on any major issues unless he "actively signals a change of position". This effectively enabled the mother to act as a sole guardian without permanently stripping the father of his rights.²⁰ However, I do not believe that in the circumstances of this case, such a direction should be made for three reasons.

[40] First, the only real issue that Ms [Jian] has had to date in exercising joint guardianship with Mr [Yong] has been enrolling the children in [school deleted]. That school, in contrast to other schools, requires both of the guardians' signatures. Enrolment at other schools has met no difficulty with regard to the sole signature of Ms [Jian]. Second, unlike in *Brooks v Ropata*, Mr [Yong] has not actively requested removal nor has he completely shut off communication with Ms [Jian]. Third, it removes any excuse for Mr [Yong] to return into the children's lives, that is to say via

¹⁹ *Savea v Sefo* [2015] NZFC 9510; *[Shu] v [Huang]* [2020] NZFC 8370.

²⁰ *Brooks v Ropata* [2016] NZFC 1385.

consultation as joint guardians, making any potential reconciliation, much less likely. As already observed that is not in the children's best interests and welfare.

[41] I therefore decline to make a direction pursuant to s 46R as sought.

Conclusion

[42] The application for removal of Mr [Yong] as a guardian is declined.

[43] There is no guardianship direction pursuant to s 46R, allowing Ms [Jian] to make sole guardianship decisions.

[44] There is no order as to costs.

A P Goodwin
Family Court Judge