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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2020-004-000104
[2020] NZFC 8370

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ESTHER SHU] Applicant
AND	[JIAO HUANG] Respondent

Hearing:	24 September 2020
Appearances:	C Jiang for the Applicant Respondent self-represented C Lee as Agent for S Singh as Lawyer for the Child
Judgment:	5 October 2020

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to application for removal of father as guardian]

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[1] This case concerns the life of [Lula Shu] born [date deleted] 2007. She will be turning 13 shortly after the hearing.

[2] The applicant [Esther Shu] ("Ms [Shu]") and the respondent [Jiao Huang] are [Lula]'s parents.

Background

[3] The parties are originally from China. They met in New Zealand and were married on [date deleted] 2006. Both of them had come to New Zealand to study.

[4] [Lula] was born in New Zealand.

[5] The parties separated in June 2009. Following the separation the parties agreed to share the care of [Lula].

[6] On or around December 2009 Mr [Huang] made a decision to return to live in China permanently. Ms [Shu] remained in New Zealand and retained day to day care of [Lula].

[7] Ms [Shu] and [Lula] visited China during the Chinese New Year in early 2010. However after Ms [Shu] and [Lula] returned to New Zealand in February 2010 all contact ceased. [Lula] and Mr [Huang] have not seen or spoken to each other since early 2010.

[8] Contact between Mr [Huang] and [Lula] ceased in early 2010. It is accepted that this was as a result of a decision made by him.

[9] Ms [Shu] has remarried. Until recently [Lula] considered her stepfather [Paul Lim] to be her biological father and stepbrother [Ed Lim] to be her younger brother.

[10] In or around July 2017 Ms [Shu] and Mr [Lim] moved to [location deleted – "the first location"], China with [Lula] and [Ed].

[11] In May 2018 Ms [Shu] obtained work in Hong Kong. Initially Ms [Shu], Mr [Lim], [Lula] and [Ed] all moved to Hong Kong. However, due to difficulties applying for residency and schooling for [Lula] in Hong Kong, [Lula] and [Ed] returned to [the first location] and currently live with Ms [Shu]'s parents while Ms [Shu] and Mr [Lim] work in Hong Kong. [Lula] attends an international school in [the first location].

[12] Mr [Huang] has since remarried and has two young children. He lives permanently with them in [the second location], China. A decision was made by Ms [Shu] to shift to Hong Kong in May 2018 and there were two reasons for that relocation:

(a) Ms [Shu] found work in Hong Kong and obtained a work visa to work there. She travels between Hong Kong and New Zealand for her work;

(b) Ms [Shu] and Mr [Lim] wanted [Lula] and [Ed] to learn their heritage and to study the Chinese language. They considered it important that both children be fluent in both Mandarin and English.

[13] Both Ms [Shu] and Mr [Lim] state clearly that it is their intention to return to live in New Zealand permanently and they have not shifted their domicile back to either China or Hong Kong.

[14] That Ms [Shu] experienced difficulties applying for a visa and schooling for [Lula] in Hong Kong. The Hong Kong school authorities required Mr [Huang]'s consent as guardian and also the immigration authorities required his consent for a temporary residence visa and schooling. There was a further requirement that Mr [Huang] be interviewed personally by the Hong Kong school which would require him to travel from [the second location] to Hong Kong for that purpose. He was not available to do that.

[15] As a result of the inability for Mr [Huang] to travel and the requirements of the school and immigration authorities [Lula] remained living with Ms [Shu]'s parents in [the first location in] China and attends an international school there. The school in China does not require Mr [Huang] to attend personally for the purposes of an interview. Ms [Shu] and Mr [Lim] currently work and live in Hong Kong and are therefore separated from the children. This has proved to be very difficult for them.

[16] Ms [Shu] and Mr [Lim] want [Lula] and [Ed] to live with them in Hong Kong and attend school there for another year or so before they return to New Zealand (including for [Lula]'s high school).

[17] Ms [Shu] has from time to time contacted Mr [Huang] for the purposes of consulting with him and having him exercise his guardianship responsibilities. He is a guardian. She says he is reluctant to be contacted and that it causes issues within his household when she does.

[18] That the current planning is for the children to remain in Hong Kong for another year or so to cement in place their language skills before returning to New Zealand for the purposes of secondary schooling.

[19] That in the more longer term Ms [Shu] has a possible wish that [Lula] may study in the United Kingdom.

[20] Ms [Shu] therefore anticipates in the next year or two the following issues:

(a) obtaining a visa and for [Lula] to attend school in Hong Kong and also ongoing guardianship decisions for [Lula] including place of residence, schooling, medical issues etc in Hong Kong as well as returning to live permanently in New Zealand;

(b) she says that she has effectively exercised guardianship responsibilities solely for the last 10 years and seeks to have the situation formalised;

(c) that she has consulted with Mr [Huang] and he has consented to the application;

(d) she says that apart from guardianship decisions there will not be any other negative outcome or impact on [Lula]. She says [Lula] will be able to establish a relationship with her biological father at any stage in the future with her approval (should she wish) and will also be able to establish a relationship with her two half siblings (Mr [Huang]'s two further children). She says there is no other implication for [Lula]

which gives her any concern and she essentially seeks formalisation of what is the reality to meet the requirements of the Hong Kong authorities.

Applications

[21] On 3 February 2020 Ms [Shu] filed an application to remove Mr [Huang] as a guardian of [Lula]. She filed affidavit evidence in support. In addition, Mr [Huang] has filed an affidavit consenting to Ms [Shu]'s application. That affidavit does not comply with the applicable rules. The affirmation has not been completed before a Notary Public or a Commissioner of Oaths and a lengthy explanation for the difficulties experienced by Mr [Huang] in getting that attended has been received by the Court. One issue is whether the Court accepts the affidavit for filing in its present form.

[22] There are two legal issues that arise in this application. They are:

(a) whether the Family Court in New Zealand has jurisdiction to determine the application under s 126 of the Care of Children Act 2004 ("COCA"); and

(b) if the Court has jurisdiction under COCA whether it should remove Mr [Huang] as a guardian of [Lula].

[23] I set out s 126 of COCA in full as follows:

> (1) The Court has jurisdiction under this Act in any of the following cases:
>
> (a) if a question of guardianship of a child, or of the role of providing day-to-day care for a child, or of contact with a child, arises as an ancillary matter in any proceedings in which the Court has jurisdiction; or
>
> (b) if the child who is the subject of the application or order is, when the application is made, present in New Zealand; or
>
> (c) if the child, a person against whom an order is sought, or the applicant, is, when the application is made, domiciled or resident in New Zealand.

(2) Despite subsection (1), the Court may decline to make an order under this Act if—

(a) neither the person against whom it is sought nor the child is resident in New Zealand; and

(b) the Court is of the opinion that no useful purpose would be served by making an order or that in the circumstances the making of an order would be undesirable.

(3) Nothing in this section applies to an appointment (of an eligible spouse or partner of a parent as an additional guardian) under section 23.

[24] Therefore the Court has jurisdiction under s 126(1)(c) of COCA in relation to the application if the subject person, the respondent or the applicant was domiciled or resident in New Zealand at the time the application was made.

[25] Under s 126(2) the Court may decline to make an order under COCA if:

(a) neither person against whom it is sought nor the child is resident in New Zealand;

(b) the Court is of the opinion that no useful purpose would be served by making an order or that in the circumstances the making of an order would be undesirable.

[26] It is clear on the facts that at the time of the application neither the child nor the person against whom the order is sought Mr [Huang] were resident in New Zealand. That requirement is therefore being met. I therefore have to be satisfied on two matters:

(a) that the applicant or the child or both are domiciled in New Zealand at the time of the application;

(b) the order would serve a useful purpose.

[27] Mr Jiang submits that the Care of Children Act does not define the term domicile. That caselaw has not provided assistance in the definition. He submits that the Domicile Act 1976 is applicable and that Act provides the meaning of domicile as

defined. The Domicile Act abolished the old rule of law that provided that a woman acquired her husband's domicile on marriage. The domicile provides that every married person is capable of having an independent domicile. Mr Jiang submits that the operative provision (s 6(5)) provides that a child whose parents are no longer living together has a domicile of his or her mother. Section 7 provides that a person becomes capable of having an independent domicile upon obtaining the age of 16 years. Section 8 provides that a person's domicile immediately becoming capable of having an independent domicile continues until he acquires a new domicile under s 9. Section 9 states that a person acquires a new domicile in a country at a particular time, if, immediately before that time:

(a) he/she was not domiciled in that country;

(b) he/she was capable of having an independent domicile;

(c) he/she is in that country;

(d) he/she intends living indefinitely in that country.

[28] Mr Jiang analysed caselaw under the Family Proceedings Act 1980, the Property (Relationships) Act 1976 and made submissions referring to that caselaw and I set out paragraphs 26-34 inclusive of his submissions:

> 26 In the context of an application for dissolution of marriage or civil under section 37 of the Family Proceedings Act 1980 (the "FPA") [BOA11], at least one party to the marriage or civil union must be "domiciled in New Zealand" at the time of the filing of the application.
>
> 27 The seminal case in relation to "domicile" under section 37 of the FPA is *Humphries v Humphries* (1991) 7 FRNZ 655 [BOA266]. This case involved an application for dissolution by the applicant husband who had been living in the United States for the last 35 years. Judge P von Dadelszen reviewed the law of domicile in New Zealand and set out the following principles [BOA281, at lines 25 to 36]:
>
> (a) Firstly, the starting point is the Domicile Act. To answer whether a person has acquired a new domicile (domicile of choice) can be found in that person's intention (section 9(d) of the Domicile Act);

(b) Secondly, there is a presumption that a person continues to be domiciled in the country in which he/she is domiciled. Therefore, the onus on the opposing party to prove that the person had abandoned his/her domicile of origin and acquired a domicile of choice somewhere else;

(c) Thirdly, the standard of proof is on the balance of probabilities;

(d) Fourthly, it is more difficult to prove a change from the domicile of origin than a change from a domicile of choice; and

(e) Fifthly, in making the decision, the Court is to have regard to the importance of the matter and having regard in particular to the change of status involved and the possible consequences of that. The conscience of the Court must be satisfied by the evidence, which is to be clear.

28 In *Humphries v Humphries*, the applicant father first left New Zealand at the age of 21 (on a New Zealand passport) and his domicile of origin was New Zealand. At the time of his application for dissolution of marriage in New Zealand in 1990, he had been living outside of New Zealand (in the United States) for 35 years. However, he retained his New Zealand citizenship and had always intended to return to New Zealand permanently. This is evidenced by the fact that he and his wife had arranged for his children to be educated in New Zealand and purchased a home in Palmerston North in preparation for their return. In these circumstances, the wife failed to establish that the husband had intended "to live indefinitely" in United States [CB282]. Judge P von Dadelszen held that the husband was domiciled in New Zealand.

29 The same approach was followed in the recent decision of *Forde v Hoenie* [2018] NZFC 164 [BOA57] (which also dealt with an application for dissolution under section 37 of the FPA). Judge Wagner held that applicant husband's domicile of origin was New Zealand (as he was born and raised in New Zealand) under section 8 of the Domicile Act. The key issue was whether or not he had acquired a new domicile in Monaco under section 9 of the Domicile Act. In this case, the applicant father had been living in Monaco for the last five years. The key issue was whether Mr Ford intended to live in Monaco indefinitely under section 9(d) of the Domicile Act [BOA65, paras 40 to 43]. Her Honour noted contested evidence on this point but did not make a finding on this issue as she held that Monaco was forum conviens for the matter.

Property (Relationships) Act 1976

30 A similar approach has been followed in relation to the Property (Relationships) Act 1976 ("PRA"). Section 7(2) of the PRA [BOA12] states that it applies to moveable property situated in New Zealand or elsewhere if one of the spouses/partners is "domiciled in New Zealand" at the date of the application, the date of any relationship property agreement, or the date of death. Section 7(3) of the PRA [BOA12] provides that if a respondent is "neither domiciled nor

resident" in New Zealand, then the Court may decline to make an order in respect of any movable property outside of New Zealand.

31 In *Howson v Howson*, HC Hamilton CP52/01, 2 May 2002, Master Faire [BOA255], the defendant husband applied for stay of relationship property proceedings disputing the jurisdiction of the New Zealand courts. Master Faire held the Domicile Act determined the domicile of every married person [BOA262 to BOA263, para 26(c)]. His Honour held that the parties were born in New Zealand, were married in New Zealand, currently resided in Australia, and had been resident in Australia for much of their relationship. The plaintiff wife says she has New Zealand domicile. The judge held that on the balance of probabilities, the New Zealand courts had jurisdiction to determine movable properties [BOA264 to BOA263, para 28].

32 In *Johnson v Johnson* [2016] NZHC 890 [BOA97], a United States (from Oregon) couple separated six-months after permanently moving to New Zealand. The husband eventually returned to the United States. The husband issued relationship property proceedings in the Circuit Court in Oregon and the wife issued relationship property proceedings in New Zealand. In relation to the New Zealand court's jurisdiction under section 7 of the PRA, Justice Asher applied the Domicile Act [BOA102, para 17]:

> "[17] There can be no doubt that of the two, at least Ms Ellis has been and remains domiciled in New Zealand. She has been living here for over five years and is treating it as her permanent home. Under s 9 of the Domicile Act 1976, a person acquires a new domicile in a country if, immediately before that time, that person was not domiciled in the former country, is capable of having an independent domicile, and is in the new country and intends to live indefinitely in that country. Ms Ellis' former country of domicile would be the United States of America, but having chosen to move to New Zealand and intending to live here permanently, she has acquired a new domicile in New Zealand."

33 Justice Asher's decision was affirmed on appeal in *Johnson v Johnson* [2017] NZCA 1476 [BOA76].

34 Similarly, in *Madera v Lantano* [2018] NZHC 1192 [BOA54], Mr Madera moved to New Zealand from the Philippines in 2008 to work in the dairy industry. He was tragically killed in a farm accident on 25 September 2016. The proceeding involved a PRA claim against his estate by his surviving partner. Evidence showed that Mr Madera had applied for a New Zealand residency and considered himself in the process of becoming "Kiwi". Justice Nation applied the Domicile Act 1976 [BOA55, para 6]. His Honour held that while Mr Madera's original domicile was the Philippines, he intended to live indefinitely in New Zealand and was domiciled in New Zealand at the time of his death [BOA55 to BOA 56, paras 7 to 11]. Accordingly, the Court had jurisdiction section 7 of the PRA.

[29] He also referred to the fact that the Care of Children Act did not define residence and referred to caselaw under s 126(1)(c) of the Care of Children Act in terms of guidance as to what residence means. I set out paragraphs 36-39 inclusive of his submissions:

> Resident in New Zealand
>
> 35 The COCA also does not define "resident". Case law under section 126(1)(c) of the COCA provides some guidance in relation to the meanings of "resident".
>
> 36 Firstly, case law have differentiated "domicile" and "resident". In *Humphries v Humphries*, Judge P von Dadelszen equated "resident" or "residence" to where someone resides physically whereas domicile concerned where someone intended live indefinitely [BOA279]. Similarly, in Johnson v Johnson [BOA111, para 44], Justice Asher equated "resident" to "physically residing", which is distinct from domicile.
>
> 37 Secondly, the Courts have adopted the Laws of New Zealand definition of "resident" or "residence". In *Harper v Hodges* [2013] NZFC 7733 [BOA142t] Judge D G Smith referred to the Laws of New Zealand definition of "residence" [BOA152, paras 67 to 68]:
>
> > [67] Residence is not defined in the Care of Children Act. In the Laws of New Zealand, there is a discussion of the definition of residence" in general terms but not specifically related to children. The terms "residence", "ordinary residence", and "habitual residence" have no particular significance as a matter of common law but are used as a connecting factor in some statutes. "Residence" or "ordinary residence", unlike "domicile", have no fixed meaning and care needs to be taken in using a definition for the purposes of one statute in connection with another. In the absence of a statutory definition the ordinary meaning of the words should be used, and care should be taken to avoid introducing the refinements and technicalities associated with the concept of domicile.
> >
> > [68] Generally, "residence" means: physical presence other than casually or as a traveller. That presence must be voluntary. The person must have some intention to remain in the country for a settled purpose, but the intention may be to remain for a limited time only. A person may continue to be resident in a country despite a temporary absence. It is possible to be simultaneously resident in two or more countries for certain purposes. A person may, in the absence of a settled abode, have no country of residence at all."

38 In *AND v MMN* FAM-2011-009-000341, FC Christchurch, 8 July 2011 [BOA188], the children grew up in Singapore. The mother took the children to New Zealand and wrongfully retained them in New Zealand. Judge E Smith also referred to the definition provided by Laws of New Zealand and held that the children were not "resident" in New Zealand [BOA204, paras 52 to 53].

39 In *SG v DSG* [2019] NZHC 2579 [BOA13], the respondent husband permanently moved to New Zealand from India in June 2002. The applicant wife permanently moved to New Zealand from India in 2010. In 2017, the parties and their three children went temporarily to India. Without the applicant wife's knowledge, the respondent father put the children into boarding schools in India. In 2018, the applicant wife made an application seeking orders placing her children under the guardianship of the High Court. The Court held that at the time of the applicant wife's application, both her and her husband were "resident in New Zealand" under section 126(1)(c) of the COCA [BOA37 paras 83 to 84].

[30] Mr Jiang argues that the Court has jurisdiction under s 126(1)(c) of COCA because the child and the applicant Ms [Shu] were domiciled in New Zealand when the application was made. This is based on the fact that Ms [Shu] did not at any stage when going back to mainland China and/or Hong Kong ever thought of living there permanently and always had an intention to return to New Zealand in due course. The purpose of going was a temporary one while [Lula] learnt and improved her language skills and became more familiar with her cultural heritage.

Section 126(1)(c)

[31] I find as follows:

(a) The Court has jurisdiction under s 126(1)(c) of COCA because the child [Lula] and/or the applicant were domiciled in New Zealand when the application was made.

(b) I accept that in relation to the applicant her domicile was originally China. She was born there and lived there until she was 18. I accept that her domicile changed pursuant to s 9 of the Domicile Act when she moved to New Zealand in 1999 and formed an intention to reside and remain in New Zealand permanently. I accept that she has resided in New Zealand for half of her life from 1999-2018. This is evidenced by

the fact that she became a New Zealand citizen and I accept her evidence that she regards New Zealand as her permanent home.

(c) I accept that she has not acquired a new domicile in Hong Kong because I accept she is only a temporary resident in Hong Kong/China. She shifted there to promote her children's cultural identity and language skills. I accept that she shifted there at a time when her children would readily absorb the language and become fluent in it so that it was cemented in place for the rest of their lives. I also accept that she has not acquired property in Hong Kong or China and is renting a property there and the other evidence does not demonstrate a change of domicile.

(d) I accept here evidence given to the Court that she intends to return to New Zealand for [Lula]'s secondary schooling and the timing will depend on when she is satisfied that the language skills are cemented in place and that [Lula] has a full appreciation of her cultural heritage.

(e) I accept her evidence that she intends together with her husband and her stepson [Ed] together as a family return to New Zealand and resume their residence in New Zealand. The evidence shows that she has returned to New Zealand on a regular basis since departing in May 2018. That current inability to return is due to Covid-19 restrictions.

(f) In addition I accept that the applicant's parents have also shifted and have a domicile in New Zealand and intend to return to New Zealand when she does.

(g) I accept that as [Lula]'s parents have separated that [Lula] acquires the domicile of her mother.

(h) I accept that neither [Lula] nor the applicant were resident in New Zealand at the time of the application but are domiciled in New Zealand.

Section 126(2)

[32] The issue is should the Court decline to exercise a discretion and find that no useful purpose would be served by making an order or that in the circumstances the making of the order would be undesirable.

[33] I find as follows:

(a) An order is necessary for Ms [Shu] to apply for a visa for [Lula] to reside in Hong Kong with her and Mr [Lim].

(b) An order is necessary for the applicant to apply and interview for [Lula] for schooling in Hong Kong.

(c) An order would allow Ms [Shu] to continue to make guardianship decisions for [Lula] including place of residence, schooling, medical issues including after she returns to New Zealand.

(d) It is desirable and in the best interests of [Lula] that the orders be made.

[34] In addition I find that there is no prejudice to [Lula]. I was concerned about possible impact on inheritance and any possible restrictions on [Lula] establishing a relationship with her biological father at a later stage in her life as a result of the questions asked by Ms Lee as Lawyer for the Child during cross-examination and further evidence given by the applicant I am satisfied that there is unlikely to be any impact (on the relationship of [Lula] with her father) other than what currently is in existence and that she will be free to re-establish a relationship as she chooses. I am also satisfied it will not disadvantage her in terms of any inheritance rights from her biological father. I have to apply the law as it is in New Zealand and my reading of the Family Protection Act 1955 removal of the biological father as guardian does not impact on [Lula]'s status as a child of her father and makes her eligible to make an application under that Act in the event that her father does not provide for her in his estate.

Removal of the respondent's status as guardian

[35] The applicant relies on s 29 of the Care of Children Act 2004 which I set out in full as follows:

> (1) On an application for the purpose by an eligible person, the Court may make—
>
> (a) an order depriving a parent of the guardianship of his or her child; or
>
> (b) an order removing from office a testamentary guardian or Court-appointed guardian; or
>
> (c) an order revoking an appointment of an additional guardian made under section 23.
>
> (2) In this section, eligible person, in relation to a child, means any of the following persons:
>
> (a) a parent of the child:
>
> (b) a guardian of the child:
>
> (c) a grandparent or an aunt or an uncle of the child:
>
> (d) a sibling (including a half-sibling) of the child:
>
> (e) a spouse or partner of a parent of the child:
>
> (f) any other person granted leave to apply by the Court.
>
> (3) An order under subsection (1)(a) (that is, an order depriving a parent of the guardianship of his or her child) must not be made unless the Court is 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.
>
> (4) An order under subsection (1)(b) or (c) must not be made unless the Court is satisfied that the order will serve the welfare and best interests of the child.
>
> (5) On making an order under subsection (1), the Court may also make on its own initiative an order under section 27.

[36] The applicant is seeking to remove the respondent as guardian of the child on the basis of unwillingness pursuant to s 29(3)(a).

[37] It is accepted that there is no grave reason to declare the respondent unfit to be a guardian. That is not applicable and it is accepted that he is a good parent to his two further children. He is clearly not unfit on that basis.

[38] The responsibilities for the exercise of guardianship are set out in ss 15 and 16 of COCA. They include:

(i) having the role of providing day to day care for the child;

(ii) contributing to the child's intellectual, emotional, physical, social, cultural and other personal development;

(iii) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.

[39] Mr Jiang in his submissions looked at some caselaw that had interpreted the word "unwillingness" and I set out paragraphs 51-53 of his submissions:

> Section 16(1)(c)
>
> 51 A guardian's intention of unwillingness can be proven by conduct. In *IMB v MBA* (2007) 26 FRNZ 484 [BOA242], Judge Murfitt stated that the respondent father's actions speak louder than his words [BOA248 to BOA249, para 41]. The respondent father deposed in affidavit evidence that he had a continuing interest in his daughter's welfare. However, the Judge found that the father had made no attempt to learn anything about his daughter or to initiate contact for almost her whole life.
>
> 52 "Unwilling" requires proof of something more than incapacity to perform the role. It requires proof of lack of intention or desire. In *BLB v RSC* [2013] NZFLR 25 [BOA175], the father did not have contact with the children for some time as he had been in prison. There were also incidents of violence at home. The fact the father had consciously permitted the mother to operate as a sole guardian since separation did not amount to unwillingness [BOA182, para 29].

> 53 In *Dalal v Alfarsi* [2016] NZFC 10653 [BOA92], the father departed New Zealand and left the pregnant mother. The father did not provide support for the mother either emotionally or financially and had never seen his son. The mother wanted to travel to South Africa with her son but the South African Embassy required evidence that she was the son's sole guardian. The Court granted removal of the father as guardian in these circumstances.

[40] With respect to the determination of whether the respondent is unwilling I find as follows:

(a) The respondent has not had any contact with [Lula] since she was two years of age;

(b) Has not carried out any guardianship responsibilities for 10 years;

(c) He consents to the removal and indicates by that consent that he accepts that he is unwilling to carry out guardianship responsibilities;

(d) That [Lula] presently does not have any relationship with the respondent and as a result of these proceedings has been advised of her biological father. She had prior to that advice regarded her stepfather Mr [Lim] as her father;

[41] In the circumstances of this case it is similar to the *Dalal v Alfarsi* decision of Judge Murfitt referred to above.

[42] I find that the applicant has been solely responsible for [Lula]'s day to day care with the assistance of her parents and her new husband Mr [Lim] and has been for the last 10 years. She has been attending to all her needs and makes all the decisions and in practice has been exercising sole guardianship responsibilities for at least 10 years. Therefore I accept that the criteria relating to unwillingness has been proven and I find accordingly.

Second test – welfare and best interests of the child

[43] I have to decide as to whether the removal in this particular case and the particular circumstances [Lula] is facing is in her best interests and welfare. This is an individualised assessment. I have to consider the principles contained in s 5 of the Act in determining what is in the best interests and welfare of the child. I find that the removal of the respondent as guardian is in the best interests and welfare of [Lula] for the following reasons:

(a) If I was to decline the application the reality for [Lula] would be continuation of the applicant exercising sole guardianship responsibilities in practice but it will result in her not being eligible to go to a school of her mother's choice in Hong Kong and will restrict her being reunited with her parents and brother. This will have a potential negative impact on her education;

(b) The evidence reveals that [Lula] is a good student and is doing well academically. Her education is important to her and she should have as much opportunity as possible;

(c) I accept that the reasons for shifting to Hong Kong/China are genuine and were done for the best interests and welfare of [Lula].

(d) Having heard the evidence of the applicant I am satisfied that she is child-focused and is not bringing the application for any ulterior motive or hidden agenda;

(e) I accept that the s 5 principles can all be established by this application with the exception of s 5(b). However the evidence shows that the respondent has not exercised guardianship responsibilities for 10 years and so the reality for [Lula] will not change;

(f) I accept that there are good reasons for bringing the application and I am satisfied that there are pressing issues for [Lula]'s current schooling

arrangements. That if the order is not made it will continue to mean that mother and daughter will be separated and it will have an impact on her schooling;

(g) I accept as a result of the assistance provided to the Court by Lawyer for the Child Ms Sonya Singh and Ms Christina Lee that [Lula] understands the application and at her age consents to it. She is clearly an intelligent young woman and I am satisfied that she has been consulted and understands. She does not raise any objection and I think it is her views as set out by Lawyer for Child in the reports to the Court confirm that the decision is consistent with [Lula]'s views. I am also satisfied that in the event of a change of circumstances (which is not predicted) that it is always open to the respondent if he returned to New Zealand (unlikely) to apply to be reinstated as a guardian should he wish to establish a relationship with [Lula]. This seems a remote possibility at the time of this judgment but I record that the possibility remains in the event of an unexpected change of circumstance;

(h) [Lula]'s views as ascertained by Lawyer for Child was summarised in paragraph 67 of Mr Jiang's submissions which I set out as follows:

> 67 Ms Singh, lawyer for child, has spoken to [Lula] on two separate occasions. Ms Singh's reports show that [Lula] supports the Application:
>
> (a) [Lula] is clear about her views and understood the issues of guardianship [CB27, para 7];
>
> (b) [Lula]'s face lit up when talking about her stepfather [Paul] and her stepbrother [Ed] [CB27, para 4].
>
> (c) As [Lula] was very young (only two years old) when [her father] left her life, she does not even remember what he looks like [CB27, para 6]; and
>
> (d) [Lula] would prefer that her mother make the decisions for her [CB27, para 6].

[44] Therefore I order that the application be granted and the respondent removed (with his consent) as a guardian. I dispense with the requirement of him to sign an affidavit recording his consent in front of the New Zealand Consular General or a Commissioner of Oaths because of the difficulties he has experienced in that occurring due to the Covid-19 pandemic around the world and on the basis of the findings that have been made in this judgment. Leave is granted for the respondent to apply to be reinstated as a guardian of the child on 10 days' notice should a change of circumstances occur. There is no order for costs.

Dated at Auckland this day of October 2020 at am/pm.

D A Burns
Family Court Judge