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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT MASTERTON

I TE KŌTI WHĀNAU
KI WHAKAORIORI

FAM-2018-035-000116
[2021] NZFC 11755

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ALBERT FRANSSON] Applicant
AND	[KIRSTY FRANSSON] Respondent

Hearing:	8 November 2021
Appearances:	G Freeman for the Applicant B Inglis for the Respondent S Spaak as Lawyer for Child
Judgment:	14 December 2021

RESERVE DECISION OF JUDGE M N E O'DWYER
AS TO STRIKE OUT

---

[1] This is an application brought by Ms [Fransson] ("the mother") in respect to Mr [Fransson]'s ("the father") applications for:

(a) A parenting order; and

(b) A guardianship direction that the children relocate to live in [European country deleted - country A].

[2] The parties are the parents of three children:

(a) [Douglas Fransson] ([Doug]) aged 12, born on [date deleted] 2009;

(b) [Braden Fransson] ([Braden]) aged nine and a half, born on [date deleted] 2012; and

(c) [Gregory Fransson] ([Gregory]) aged seven and a half, born [date deleted] 2014.

[3] On 2 July 2018, Mr [Fransson] applied for a parenting order and an order under s 46R Care of Children Act 2004 ("the Act") to relocate the children to [country A] where he lives. A four- day hearing was scheduled in August 2020. Mr [Fransson] was unable to travel to New Zealand because of the COVID-19 pandemic restrictions and he did not want to appear by AVL. Travel restrictions have continued throughout 2021.

[4] Ms [Fransson] has now applied to strike out the father's application for a guardianship direction that the children relocate to [country A].

Background information

[5] The father is [a citizen of country A] and the mother is a New Zealander. The parties lived together in [country A] between November 2003 and September 2015. The children were all born in [country A] and are [citizens of country A]. The mother and the three children are all New Zealand citizens. The father is not a citizen of New Zealand.

[6] The parties were married during a visit to New Zealand in 2009.

[7] In September 2015 the mother returned to New Zealand with the children, who were then aged almost six, three and 17 months. The father followed in

November 2015. There is a dispute about the understandings between the parents in 2015. The mother's evidence is that they had agreed to stay in New Zealand indefinitely.[1] The father disputes this and says the agreement was to stay in New Zealand for a two-year trial period.[2]

[8] The father returned to [country A] in August 2016 for financial reasons. He has not returned to New Zealand to live since then, in part because of the health difficulties of his mother.[3]

[9] In about January 2017 the mother advised the father of her decision to separate and that she would remain in New Zealand with the children. This decision was against the father's wishes.

[10] In November 2017 the father returned to New Zealand to see the children and remained for approximately four months. The parties attended FDR mediation to attempt to resolve the question of which country the children would live in, and parenting matters. Agreement was not reached.

[11] In February 2018 the father returned to [country A] and filed his application in July 2018. The mother filed a notice of response on 17 August 2018.

[12] The father visited the children in January 2019 and January 2020. He has had almost daily contact by video or Zoom, and other indirect means with the children. That continues to occur.

[13] The COVID-19 pandemic intervened in 2020. There have been no further visits for the father with the children in New Zealand. The children have not been able to travel for contact with their father in [country A].

What is agreed

[14] It is accepted by both parents that:

---

[1] Para [7], exhibit A to Ms [Fransson]'s affidavit dated 17 October 2018.
[2] Para [3], statement attached to Mr [Fransson]'s affidavit dated 2 July 2018.
[3] Para [10], statement attached to Mr [Fransson]'s affidavit dated 2 July 2018.

(a) The children have excellent relationships with both parents and there are no safety issues for the children in respect to either parent's care.

(b) The children have been in their mother's daily care since September 2016 when their father returned to [country A]. The mother has had primary care/sole care for the last five years.

(c) The parents agree that the children should remain together in whichever country they reside in and not be separated.

(d) The ideal would be for the children to live in the same country with both parents.

(e) The children are thriving in their mother's care in New Zealand. They have lived continuously in New Zealand for over six years in settled circumstances. They have developed strong relationships at school and in their neighbourhood.

(f) They have virtually daily contact with the father via video, phone, messaging and exchanges of photos/videos of the boys and their activities. The father is involved in guardianship decisions and is consulted by the mother who encourages his involvement and participation, albeit remotely.[4]

(g) The children have supportive extended maternal family members in New Zealand with whom they have good relationships. They have supportive paternal family relationships in [country A], but the contact is limited because of distance.

(h) The children's views have been ascertained by their lawyer, Ms Spaak, and the parents accept that the views expressed are genuine.

[4] Paras [5] – [9] mother's affidavit sworn 17 September 2021.

What is disputed

[15] The factual matters that are in dispute, relevant to the relocation application, are:

(a) The dispute between the parents concerning their agreement in 2015 as to the length of time that the children would live in New Zealand. Ms [Fransson] says it was an indefinite period. Mr [Fransson] says it was a two-year fixed trial period. When the parties separated in 2017 the children remained in New Zealand and Mr [Fransson] did not apply under the Hague Convention for a return order. Given the passage of time, the dispute as to what was intended in 2015 is less relevant to the issue of whether it is in the welfare and best interests of the children to relocate to [country A].

(b) The psychological impact on Ms [Fransson] of moving to [country A] if the Court ordered relocation of the children. Ms [Fransson] says she would be at risk of depression because of the dynamics in the relationship between the parents, her economic position in [country A] and lack of family support available to her and the children. Mr [Fransson] says these matters are inaccurate and exaggerated.

(c) The risks regarding the ongoing COVID-19 pandemic, whether those risks are greater in [country A] than in New Zealand and the impact on Ms [Fransson]'s willingness/ability to move to [country A]. Mr [Fransson] says the children will be as safe in [country A] as in New Zealand in the future. Ms [Fransson] expresses fear of contracting COVID-19 if she was working as a daycare teacher in [country A] and is no longer willing to move to [country A].

(d) The impact of delaying the proceedings on the children's welfare. If the case proceeded, it would not be heard until after July 2022. The current time estimate is four days. Mr [Fransson] has now advised that he would be willing to have the matter heard with him and other

witnesses appearing by AVL from [country A]. An updated psychologist's report would be required. The children are aware that their parents disagree as to whether they should live in New Zealand or move to [country A]. Ms [Fransson] says that uncertainty and continuing litigation is harmful to the children.

The Law

[16] Ms Inglis and Ms Freeman agree on the legal principles that apply to an application to strike out proceedings in the Family Court. They have provided a helpful outline of the rules and case law.

[17] The application is brought under r 193 of the Family Court Rules ("FCR") which provides:

> **193 Striking out pleading**
> (1) The court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—
> (a) discloses no reasonable basis for the application or defence or other pleading; or
> (b) is likely to cause prejudice, embarrassment, or delay in the proceedings; or
> (c) is otherwise an abuse of the court's process.
> (2) An order under subclause (1) may be made by the court—
> (a) on its own initiative or on an interlocutory application for the purpose:
> (b) at any stage of the proceedings:
> (c) on any terms it thinks fit.

[18] Ms Inglis submits that Mr [Fransson]'s application for relocation has no reasonable prospect of success because of the implications of the global pandemic. She submits this has created a new national and international environment of border closures, quarantine requirements, health anxieties, travel restrictions and controls on everyday movements, all of which combine to make the application for relocation to [country A] now untenable.

[19] Both Counsel refer to r 209 of the District Court Rules 2014 and r 15.1 of the High Court Rules 2016 which contain similar powers. It is accepted that the threshold

is high. In *RGPY v AL*, Judge von Dadelszen considered rr 193 and 194 of the FCR in relation to a domestic violence case.[5] He summarised the principles as follows:

(a) The powers under the rules are to be exercised sparingly;

(b) The cause of action must be clearly untenable;

(c) The Court must assume the pleaded facts are true;

(d) The jurisdiction is not excluded where there are difficult questions of law requiring extensive argument; and

(e) The Court must consider whether amendment will disclose a reasonable cause of action.

[20] Judge von Dadelszen noted at para [20] that: "The purpose of the rules is to provide a procedure where the Court may put an end to litigation which must fail or is an abuse of the Court's process."

[21] Lang J in *TD v T* held that the general focus in the High Court is on whether the pleadings give rise to "a tenable cause of action", while in the Family Court, where the grounds for the claim are generally to be found in affidavits filed in support, the focus is on whether the evidence is sufficient to disclose a reasonable basis for the claim.[6]

[22] Lang J considered the threshold for an application to strike out and how the Court should approach the evidence. He noted that the threshold is high in the Family Court and the High Court. He referred to the Court of Appeal decision *Attorney-General v Prince and Gardner* in the following passage of his decision:[7]

> [16] (a) The strike out threshold is set deliberately high. The onus is on the applicant to show the cause of action is untenable and cannot succeed.

[5] *RGPY v AL* [2005] 24 FRNZ at 369.
[6] *TD v T* [2019] NZHC 2490.
[7] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

(b) The Court should only invoke its power to strike out an application where it is satisfied it has the requisite evidential material.

(c) The Court generally proceeds with strike out applications on the basis factual allegations contained in the pleadings of the opposing party are assumed to be true.

(d) If a claim depends on a question of law capable of decision on the material before the Court, the Court should determine that question even though extensive argument may be necessary to resolve it.

[17] Whether there is a reasonable basis to Ms TD's FPA claim is key to Mr O's strike out application. The spotlight is on him to satisfy this Court on the balance of probability that Ms TD's claim in untenable and cannot succeed.

[23] Lang J went on to adopt the approach of Katz J in *Bean v Bean*.[8] In that case Katz J extrapolated the plaintiff's "best case" from the substantive application and supporting affidavit and then applied the relevant legal principles to the case. Lang J held that approach provided a principled basis to decide whether the plaintiff's claim had a reasonable basis to succeed. If it did not have a reasonable basis to succeed, it should be struck out.

[24] Applying that approach to this case, the question is whether Mr [Fransson]'s claim for relocation of the children to [country A] has a reasonable prospect of success. The spotlight is on Ms [Fransson] to satisfy the Court on the balance of probabilities that Mr [Fransson]'s claim is untenable and cannot succeed.

[25] Ms Freeman drew my attention to cases seeking a stay or dismissal of proceedings under s 140 Care of Children Act 2004 and s 206B Children, Young Persons, and Their Families Act 1989 (now s 206B Oranga Tamariki Act 1989).

[26] In cases concerning children the impact of delay, and other aspects of the process on children, is an important factor because of children's vulnerabilities and the legislative imperative to protect children from the adverse effects of lengthy litigation and take account of the child's sense of time.

[8] *Bean v Bean* [2019] NZHC 20 at para [12].

[27] I refer to the decision of Williams J in *Dillon v Chief Executive Ministry of Social Development* where Williams J said at para [33][9]:

> The test then must be whether the proceeding would amount not to an abuse of process, but to an abuse of the children, that is damaging to and therefore "clearly contrary to" the welfare and best interests of the children. It is of necessity a high test because the price of striking out an application is to remove the important right in the applicant to a full hearing including the ancillary right to test the evidence advanced by his or her opposition. As the cases say, this right to be heard is important and not lightly to be set to one side.

[28] In the *Dillon* case, Williams J found that the Family Court Judge properly considered the evidence that Mr Dillon had presented in support of his application for access to the children. The High Court placed weight on the evidence of the children's views, and the impact that uncertainty was causing to the children. Williams J approved the comment of the Family Court Judge where he said:

> Further, the Judge notes in reliance on a decision of this Court in *H v F* that it is likely to be inconsistent with the welfare and best interests of any child to permit proceedings to continue where they display no prospects of success.[10]
>
> Judge Callinicos continues:
>
> Conversely, if a preliminary assessment of a proceeding indicated reasonable merit or prospects of success, it would not be in the child's interests to dismiss them. [11]

[29] Williams J went on to say:

> The wider power is necessary because children are uniquely vulnerable to what elsewhere is called "systems abuse". Given that both CYPFA and COCA prioritise the welfare and best interest of the child or young person, the Family Court must be vigilant to avoid allowing its own processes to become damaging of that which it must protect, whether intentionally or inadvertently.

[30] Finally, in considering the application for strike out, s 4 Care of Children Act ("COCA") requires that the welfare and best interests of the children must be the first and paramount consideration. The s 5 principles in COCA must be applied. The children's views must also be taken into account (s 6 COCA).

---

[9] *Dillon v Chief Executive Ministry of Social Development* [2017] NZHC 1487.
[10] At para [30] citing *H v F* High Court Christchurch, CIV-2010-409-000905, 3 September 2010.
[11] *Chief Executive Ministry of Social Development v Shandey* [2015] NZFC 1728.

Impact of COVID-19 pandemic

[31] In assessing whether Mr [Fransson]'s application for relocation of the children to [country A] has a reasonable prospect of success, I must consider the affidavits and reports with the welfare of the children in their individual circumstances as the paramount consideration. The principles in s 5 of the Act are the guide.

[32] Before considering the s 5 principles, it is necessary to address the impact of the COVID-19 global pandemic on the children and their parents.

[33] The most significant change caused by the COVID-19 pandemic is that Ms [Fransson] would no longer move to [country A] even if the Court were to order the children to relocate there. At para [14] of her affidavit dated 17 September 2021 she states:

> 14. I continue to hold all the concerns I had previously raised about the possibility of the children moving to [country A]. I previously stated in my affidavit dated 31 January 2019 that if the children were ordered to move to [country A], then I would go too, but this carried with it a lot of extreme hurdles, including the difficult and controlling dynamics in my relationship with [Albert], the economic position I would be in if I moved to [country A], and the lack of family support that would be available to me and the children. Now there is an additional factor from the COVID-19 pandemic, which to me is impossible to overcome. I have been keeping a close eye on the way the pandemic has been handled in [country A] and have been horrified by the approach based on "herd immunity" and the loss of life that has resulted. In comparison, New Zealand has taken an opposite approach which has kept us safe from the virus. The idea of travelling to [country A] for the foreseeable future absolutely terrifies me.

[34] In February 2019 the psychologist, Mr Garner, recommended that it was in the interests of the children if both parents lived in [country A] or both in New Zealand. He said:

> 58. …The value to the boys of having both parents available to be involved in their day-to-day care would clearly outweigh any disadvantages. [Kirsty] and [Albert] are both very competent and conscientious parents. They love the children and the children love them. It is not clear what the disadvantages would be. There might be communication and co-parenting difficulties, but there might not be. Neither parent would want the children affected by those. There might be financial problems. I don't know. In [country A], [Kirsty] might struggle emotionally, but she knows that she would struggle

> more emotionally if she were in New Zealand with the boys in [country A]. I really want to encourage [Kirsty] and [Albert] to do everything they can to agree on a care arrangement with both of them in the same country – if not immediately, at some point in the next few years.
>
> 59. There are difficulties discussing the advantages of either of the other arrangements – the boys in either country with one parent – and that is because [Kirsty] has said she would not remain in New Zealand if the boys lived in [country A]. So the reality is that there are no advantages to the current arrangement continuing in comparison with either of the other actual alternatives.

[35] In 2019, Ms [Fransson] had expressed concerns and reluctance about a return to [country A]. She referred to "extreme hurdles", including the dynamics in the relationship with Mr [Fransson], the economic position she would be in if she moved to [country A] and lack of family support. Notwithstanding those hurdles she told Mr Garner that she would move with the boys if the Court ordered relocation.

[36] Ms [Fransson]'s evidence now is that the COVID-19 pandemic has created anxieties for her that are impossible to overcome. Her anxieties include the high death rates in [country A] compared to New Zealand, the risks of contracting the virus despite high vaccination rates, the resurgence of cases in Europe and the risk of contracting COVID-19 if working as daycare teacher amongst unvaccinated children. She also refers to the hurdles of not being able to return to New Zealand from a "high risk" country such as [country A], including travel difficulties. She says these hurdles have added to her anxieties about relocation and that she would not move to [country A].

[37] Ms Freeman has submitted that Ms [Fransson]'s fears about the higher risks for the children and herself in [country A] compared with in New Zealand are not reasonable. She contrasted the high vaccination rates and strong medical facilities in [country A] with, she submitted, low vaccination rates and poor medical facilities in New Zealand. She emphasised that [location 1] Hospital has limited facilities for ICU beds and HDU beds.

[38] I accept that Mr [Fransson] is confident that if the children move to [country A], he would do everything in his power to keep them safe. His perception of the risks for the children of COVID, if they relocated to [country A], is very different to that of

Ms [Fransson]'s. Mr [Fransson]'s perspective is that New Zealand presents the same level or risk for the children as [country A]. He accepts that [country A]'s approach to the COVID-19 pandemic is unique. There were no lock downs or mandatory restrictions and limited travel restrictions. Mr [Fransson] says non–mandatory stay at home and mask wearing recommendations were followed by most of the population. He says that although there were over 15,000 deaths in a population of approximately 10 million, these deaths were largely in the older aged population and over one million cases recovered. Mr [Fransson] says that [country A] is a country with a high vaccination rate and a well- resourced medical system. He is optimistic that the country is returning to "a new normal" in 2022.

[39] I accept Ms [Fransson]'s evidence that she has genuine anxieties for her health and the children's health arising from the risks of contracting COVID-19 if the children were to relocate. Her perception must be viewed in the context of the New Zealand approach to COVID-19 over the last two years, which has been cautious and restrictive. The aim has been to eliminate and now to contain, with a goal of the lowest possible infection and death rate. Ms [Fransson]'s perception of the risk must be seen against this background, which has been her experience.

[40] Ms [Fransson]'s position must also be understood considering the medical advice that she received following Mr Garner's report. Before the COVID-19 pandemic, Ms [Fransson] filed evidence from a psychologist, Dr Ruth Gammon, assessing the impact on her of a return to [country A]. Dr Gammon recorded that Ms [Fransson] had sought treatment and was briefly on anti-depressants while in [country A]. She scored in the moderate range of risk of depression and anxiety should she return to [country A]. Dr Gammon referred to the adverse impact that parental depression has on parenting and the increased risk to the children if Ms [Fransson] developed depression.[12]

[41] Dr Gammon's evidence has not been tested but it is a compelling report from a very experienced psychologist. The psychologist's opinion in 2019, that Ms [Fransson] would be at risk of depression if she moved to [country A], must be

[12] Dr Gammon's report exhibited to affidavit, 12 August 2019.

treated seriously. It provides a strong and reasonable basis for Ms [Fransson]'s reluctance to move to [country A] now given the measures she has taken to guard against depression since 2015. It is amplified by her fear of contracting COVID-19, either herself or the children, and uncertainties of being unable to return to New Zealand.

Applying the s 5 COCA principles

[42] Mr [Fransson]'s case, therefore, must be assessed on the basis that Ms [Fransson] would not return to [country A] with the children if the Court ordered them to relocate. The issue is whether Mr [Fransson]'s proposal that they relocate to [country A] without their mother has no reasonable prospect of success. That must be assessed based on the "best case" presented by Mr [Fransson] considering the welfare and best interests of the children, guided by the principles in s 5 of the Act and the children's views.

Children's safety – s 5A COCA

[43] The children's safety is a mandatory consideration when assessing their welfare and best interests. Safety is a broad concept and includes protections from all forms of violence. It is accepted that the children would be safe in their father's care in [country A] in the sense that they would be protected from all forms of violence. The older boys were aware of conflict between their parents when they were interviewed by Mr Garner in 2019, but this is not a case where the children's safety is at risk in the care of either parent.

[44] I have discussed the parents' different perceptions of the risk to the children's safety of being exposed to the COVID-19 pandemic in [country A] and in New Zealand. Ms [Fransson] has a strong belief that the risks for the children in [country A] are greater than New Zealand. Mr [Fransson] considers that the risks are similar, if not less in [country A] because of better medical services and higher vaccination rates (at the time of the hearing).

[45] Without disrespecting Ms [Fransson]'s genuine anxieties and concerns about the potential exposure of the children to COVID-19 in [country A], for the purposes of this strike out application I find that the children will be safe in the care of their father if they were to relocate to [country A].

Parental responsibility to provide care – s 5(b) COCA

[46] Mr [Fransson] would discharge his responsibility to care for the children if they moved to [country A]. He discussed the proposal with Mr Garner if the boys were living in [country A] with him and their mother remained in New Zealand. He said the boys and he would live in their apartment. He would work shorter hours and he would arrange some weekend care for the boys to make up his work hours. He would fund Ms [Fransson]'s visits to [country A] to see the boys and he would fund the boys travel back to New Zealand to see their mother and wider family.

Consultation and cooperation between parents – s 5(c) COCA

[47] How effectively Mr [Fransson] would communicate with the boys' mother if they relocated to [country A] is uncertain. Ms [Fransson] has described Mr [Fransson] as dominant and controlling and says that she finds communication with him difficult. Mr [Fransson] denies that he uses a controlling or dominant style and is willing to attend communication counselling or obtain other professional support to improve communication between him and Ms [Fransson].

[48] The affidavit evidence points to Mr [Fransson] understanding the difficulties of separation for a parent and their children, and the importance for the children of consultation on guardianship issues. For the purposes of this application I conclude that Mr [Fransson] would support ongoing consultation and cooperation between him and Ms [Fransson].

Continuity of care, development and upbringing – s 5(d) COCA

[49] Mr [Fransson]'s proposal that the three boys relocate to live in [country A] would involve a significant change to continuity of their care, development and

upbringing. It would disrupt their settled relationship with their mother. They would lose the continuity they have achieved in their education at their different stages. They would experience loss of friendships, which are strong, and they would lose the frequent contact that they have with their maternal extended family.

[50] Mr [Fransson] accepts that the children are well settled in New Zealand but considers that it comes at a significant cost to them of understanding and experiencing their [family and the culture of country A]. He emphasises the loss that the children are experiencing of their paternal grandparents who are elderly and unable to travel out of [country A].

[51] Ms [Fransson] has provided evidence, which is not challenged, as to the children's progress at school. The boys are all doing well and their school reports show that they are developing their different personalities and working to their strengths. They have solid friendships in [location 1], which they enjoy. The length of time that the children have been in New Zealand is an important factor. The youngest child, [Gregory], has been here since he was two years old. He has no memory of [country A] and has not attended the educational system there. The older two boys have some early experiences of education in [country A].

[52] Mr [Fransson] would have to demonstrate that the advantages to the children of moving to [country A] would outweigh the disruption to the continuity of their care and development, including their education and home life in New Zealand. Whether they would adjust is uncertain, particularly in the absence of their mother who has been their sole carer for several years.

[53] Mr Garner commented in his report in February 2019 that [Gregory] would struggle emotionally if he were apart from his mother more than if he were apart from his father. Mr Garner did not go on to consider the prospect of the children being apart from their mother given Ms [Fransson]'s position that she would not remain in New Zealand if the boys lived in [country A]. Ms [Fransson]'s position has changed fundamentally as a result of COVID-19. She would not move to [country A] because of the fears that she outlined. It is likely, on the evidence, that [Gregory] would

struggle emotionally being apart from his mother if he was to relocate with his brothers.

Continuity of relationship with both parents – s 5(e) COCA

[54] The children need strong and secure relationships with both parents. Mr Garner emphasised the value to the boys of their parents doing everything they could to agree a care arrangement with both in the same country, if not immediately, at some point in the next few years.[13]

[55] Ms [Fransson]'s anxieties regarding COVID, coupled with a propensity to depression, rule out her moving with the children to [country A]. Mr [Fransson]'s current position is that he is unable to reside in New Zealand. He lived and worked in New Zealand between November 2015 and August 2016 under a temporary residence visa with a view to obtaining a permanent residence visa. Mr [Fransson] left New Zealand because of his mother's ill health and returned to [country A] and his temporary visa lapsed. Mr [Fransson] has financial security in [country A] and does not intend to return to New Zealand. Therefore, as a result of the COVID-19 pandemic, it is no longer realistic for both parents to live in the same country in the foreseeable future.

[56] Mr [Fransson]'s proposal that the children relocate to [country A] would give them the opportunity to develop a stronger relationship with him, with their wider family in [country A] and experience the [culture of country A]. These needs are important for the children. Whilst Ms [Fransson] promotes a relationship with their father through virtually daily contact with Mr [Fransson] via phone, video messaging and exchanges of photos and videos, they are not able to experience day-to-day care from their father. The reality is that a relocation to [country A] for the three boys would result in separation from their mother. Mr Garner did not assess that in 2019 – the boys in either country with one parent – because Ms [Fransson] had said she would not remain in New Zealand if the boys lived in [country A]. That reality has changed.

[13] Mr Garner's report February 2019, paragraph 58, at paragraph [34] above.

[57] Mr Garner went on to say that the advantages and disadvantages of the boys being cared for solely by their mother in New Zealand, or their father in [country A], would be determined by the extent of contact the children have with the non-resident parent. He commented that whichever scenario involved greater contact would be advantageous for the boys. He then went on to say:[14]

> The one outlying factor is that I think [Gregory] would struggle emotionally being apart from [Kirsty] more than he would be being apart from [Albert] …

[58] Mr Garner's report was written in February 2019 when [Gregory] was [4 years] old. [Gregory] is now [7] years old. The impact of a separation from his mother now, at this age, has not been assessed. However, the evidence points to him having a secure and strong attachment to his mother. He told Ms Spaak that if they lived in [country A]: "Mum would have to be there too".[15] Coupled with Mr Garner's earlier findings, this is a strong indication that significant separation from his mother would have an adverse impact on [Gregory] at this age.

Likely contact with non-resident parent

[59] Ms [Fransson] has demonstrated that she supports the children's contact with their father and involves him in guardianship decisions. It is likely that Mr [Fransson] would do the same if the children were in [country A] and their mother was in New Zealand. It is also likely that Mr [Fransson] would travel to New Zealand to spend time with the children here once the restrictions on travel into New Zealand are eased in 2022. Although there are uncertainties regarding how the COVID pandemic will develop, including new variants, New Zealand's stated policy is to open the borders for non-New Zealand residents from April 2022. Therefore, Mr [Fransson] is likely to be able to travel to New Zealand in 2022 and have the children in his care for an extended holiday period.

[60] Ms [Fransson] is currently opposed to the children travelling to [country A] to see their father (which had previously been agreed). This is a disadvantage for the

---

[14] Mr Garner's report paragraph 60.
[15] Ms Spaak's report 16 March 2021.

children as they need to see their extended family and experience more time with their father provided travel can safely be arranged.

[61] It is clear, however, that if the children move to [country A], they would not have face to face contact with their mother unless they travelled back to New Zealand with their father. Mr [Fransson]'s evidence is that he would facilitate that, which I accept.

The children's views

[62] The Court is required to take account of the children's views. These have been set out in Ms Spaak's report of 16 March 2021. Ms Spaak submits that the children's views should be given weight because they are consistent, and their ages with [Douglas] now aged 12 years.

[63] The children are happy and settled in their life with school, friends and family. They all spoke positively about these elements of their life and very positively about their father. [Douglas] clearly wants to stay in New Zealand, stating thoughtfully that he felt: "A bit more connected to Mum," because she cared for him more. He thought if he was living away from his mother, he would feel homesick. He expressed being happy with his life and school with friends and wider family. He is aware of the restriction that COVID has put on him and his father. He wants to see his father in person and he wants to go to [country A] on a holiday. He would like visits to happen twice each year, once in [country A] and once for his father in New Zealand. He is contemplating doing an exchange to [country A] in future, provided he could do video calls to his mother.[16]

[64] [Braden] wants to be able to stay in New Zealand because he is very happy at school and he has friends and would be sad to leave them. [Braden] said if he lived in [country A], he would want his mother to be there and he wants to be able to live with both of his parents. He would like to see more of his father and said the good thing about being in [country A] is that he would be able to see his dad each day.

[16] Paragraphs 11 to 16 of Ms Spaak's report March 2021.

[65] [Gregory]'s answers reflected his reliance on his mother and his friends. He appeared to contemplate being able to live in [country A] and that he would enjoy seeing friends again. He clearly stated that if he lived in [country A] his mother would have to be there too.

[66] The children miss their father and would like to be able to see him more. They enjoy the daily contact they are having with him. To meet their needs and their expressed wishes, the parents would need to enable them to see their father in New Zealand and in [country A] as soon as this can safely be arranged.

[67] It is clear from the children's expressed wishes that they would not want to be separated from their mother if they were living in [country A]. [Douglas], at his age of 12, can envisage being in [country A] without his mother but the younger two children could not envisage that.

[68] Ms Spaak submitted the children's views should be given weight. She emphasised that the children had become more established in New Zealand and settled. She gave credit to the parents for arranging easy and daily contact with Mr [Fransson] which has enabled the children to make the best of a very difficult situation.

Impact of delay

[69] Ms Freeman submits that the delay and continuing litigation is not demonstrably damaging the children. She says that the parents are able to avoid discussing the proceedings with the children and protect the children from the uncertainty.

[70] Ms Spaak submits that the uncertainty for the children will weigh on the children, particularly [Douglas]. She submitted that further delay will be difficult for them. It leaves the children uncertain about their future. Ms Spaak said that the children are conscious about the issues because she speaks to them at intervals. She cautioned that, with a time estimate for the hearing of four days and an updated psychological report, the hearing could not be scheduled until later in 2022. By that stage the proceedings would have been unresolved with the children for four and a

half years, over half of [Gregory]'s life. Ms Spaak submitted that this was extreme, and the uncertainty is hampering constructive discussions regarding contact.

Conclusion

[71] The conclusion I reach is that Mr [Fransson]'s application for relocation does not have a reasonable prospect of success. The advantages to the children continuing to live in [location 1] with their mother, where they have been settled for over five years, outweighs the disadvantages to them of moving to [country A] without their mother. They have been able to express clear views about their wish to remain in New Zealand but to see their father in New Zealand and [country A] as soon as that can be safely arranged. The prospect of a move to [country A] while the world is grappling with the COVID pandemic would result in them moving to [country A] without their mother. The evidence points to likely adverse impact on the boys if that were to happen.

[72] If this process were to continue, it would require further input from the children through an updated psychological report and further inquiries of Lawyer for Child. There is no prospect of Ms [Fransson]'s position changing in the foreseeable future because of her personal concerns regarding a move to [country A]. Therefore, the decision a court would have to make is stark: should the children move to [country A] without their mother or remain in New Zealand without their father? Given how settled they are in New Zealand, the strength of their relationships with their mother, their developmental stages, the likely adverse effect on the younger boys of separation from their mother, the frequent indirect contact to their father and the likelihood of face to face contact in New Zealand in 2022 and the children's views in favour of remaining in New Zealand, I find here is no reasonable prospect of a court finding that the children should move to [country A].

[73] The right to a full hearing, including the ancillary right to test the evidence, is an important right that should not be lightly put aside.[17] However, if the Court finds that there is no reasonable prospect of success on the "best case" put forward on behalf

[17] Williams J in *Dillon v Chief Executive Ministry of Social Development* [2017] NZHC 1487 at paragraph [33].

of a parent, it must go on to consider the impact on the children of continuing delay. Decisions for children must be made in a timeframe that is appropriate to the children's sense of time.[18] I cannot see that it meets the children's timeframe to allow these proceedings to continue for what would likely be another nine months, given my assessment that there is no reasonable prospect of a court finding that the children should relocate to live in [country A].

[74] This will be disappointing for Mr [Fransson] and the extended paternal family. Mr [Fransson] genuinely believes that Ms [Fransson] has an over-anxious view of the risks to the children of the COVID pandemic in [country A]. However, I find that Ms [Fransson]'s views are genuine and reasonable, given her experience of the COVID pandemic in New Zealand and her previously expressed concerns about living in [country A].

[75] From the perspective of the children, it is important that their lives are settled and that the parents focus on working together to enable them to have better contact with their father and their extended family, including visits in New Zealand and [country A]. It is in the children's interests for the parents to put their efforts into contact arrangements that better meet the children's needs.

Orders and directions

[76] I make the following orders:

(a) Mr [Fransson]'s application for relocation of the children to [country A] is struck out.

(b) Issues concerning the children's contact to their father are to be progressed as follows:

(i) Ms Spaak's brief is extended for her to arrange a further round-table meeting to address the issues of contact and file a reporting memorandum by 28 January 2022;

[18] Paragraph 4(2) Care of Children Act.

(ii) A directions conference is to be scheduled in the Masterton Family Court in the week beginning 8 February 2022; and

(iii) Leave to counsel for the parties and Ms Spaak to apply for further directions in the interim.

_____
Judge M O'Dwyer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 14/12/2021