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**IN THE FAMILY COURT
AT TAUPO**

**I TE KŌTI WHĀNAU
KI TAUPŌ-NUI-A-TIA**

**FAM-2016-069-000150
[2022] NZFC 882**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SOPHIA RANDALL] Applicant
AND	[JEFFREY COBB] Respondent

Hearing: 13 January 2022

Appearances: P Kennelly for the Applicant
M Kirkeby for the Respondent
D Johnston as Lawyer for the Child

Judgment: 11 February 2022

ORAL JUDGMENT OF JUDGE C L COOK

[1] This decision follows a one day hearing in the Rotorua Court to determine an application by Ms [Randall] that the parties' son, [Lewis], whose date of birth is [deleted] 2016 (so he is aged just six) relocate to Auckland where his mother is living and an order varying the existing Parenting Order dated 8 April 2021 to define the contact for the parent not having the full-time care of [Lewis].

[2] From the outset I make it clear that this has been a difficult decision. Both parents impressed me as being capable and competent parents who love their son very much. As is often in relocation cases there will be a strong perception of a winner and loser. This is a risk in itself to [Lewis] from the evidence I have it is vitally important that his parents are able to communicate and whatever the practical arrangements, ensure that [Lewis] has the opportunity for both parents to have as much time and as much input as possible in his life.

Issues

[3] The issues for the Court's determination are:

- (a) Whether it is in the best interests and welfare of [Lewis] to relocate to Auckland with his mother or to remain in [location A] with his father.
- (b) Dependent on the relocation issue what the final care arrangements for [Lewis] need to be.

Background

[4] The parties were in a relationship. The duration of that relationship is unclear from the evidence, but they separated when [Lewis] was between eight to 10 months' old.

[5] At that time Ms [Randall] had the day-to-day care of [Lewis] and continued to have the day-to-day care of [Lewis] until March 2021 when her mother had [an accident] and was airlifted to Auckland Hospital. Ms [Randall] travelled to Auckland to support her mother; who has had ongoing operations and medical issues including [medical details deleted]; and has been with her since that time.

[6] There have been historical proceedings between the parties. Back in December 2016 Ms [Randall] made an application on a without notice basis for a Protection Order on the basis that Mr [Cobb] was verbally abusive towards her.

[7] Ms [Randall] also made an application for an Interim Parenting Order which was granted providing Mr [Cobb] to have supervised contact. On 27 January 2017 the parties agreed that the Temporary Protection Order would be discharged, that the substantive proceedings for Protection Orders would be discontinued and that the matter would be set down for a settlement conference. On 10 March 2017 the parties entered into a Parenting Order by consent providing that Mr [Cobb] would have contact with [Lewis] every Friday from 4 pm until 6.30 pm, every Tuesday from 9.30 am until Wednesday 11.30 am, 4 pm until 6.00 pm to 6.30 pm Father's Day and provision for contact on Christmas Day on an alternate basis.

[8] The parties then entered into a variation order by consent that contact occur every Tuesday from, 25 September 2018 from 4 pm until 6.30 pm, every alternative Thursday from 4 pm until 6.00 pm to 6.30 pm, every alternate Friday from 5 pm until Sunday 5 pm, on Mother's Day and Christmas periods.

[9] The evidence was that the parties had varied that arrangement by consent and the arrangement prior to March of 2021 was that [Lewis] was in the day-to-day care of his mother, Ms [Randall], and that Mr [Cobb] was having contact with him every second weekend, every alternate Thursday overnight and every alternate Tuesday.

[10] Since Ms [Randall] has been residing in Auckland since March 2021, caring for her mother, she has been having contact with [Lewis] every second weekend.

[11] The matter proceeded to a full day hearing. Both parties gave evidence, as did Dr Llewelyn Ward, a psychologist who had provided a report to the Court dated 8 December 2021.

[12] I turn firstly to the legal position.

[13] The starting point is s 4 of the Care of Children Act 2004 that [Lewis]’s welfare and best interests in his particular circumstances is the paramount consideration. To assist the Court in making that determination I must consider all of the principles pursuant to s 5 of the Act:

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.

[14] Due to [Lewis]’s age, stage of life and the information contained in Dr Ward’s report it is clear that [Lewis] is not able to “grasp the essential issues or consequences fully”.¹ Therefore, I approach this matter on the basis of [Lewis]’s welfare and best interests as opposed to any views expressed by him.

[15] I take into consideration the decision of *Kacem v Bashir* in which the Supreme Court emphasised the case specific nature of the enquiry; that the welfare of this particular child in these particular circumstances is the key focus.² The principles in

¹ Dr Llewelyn Ward’s report at [39].

² *K v B* [2010] NZSC 112, [2011] 2 NZLR 1.

s 5 are a guide and not exhaustive. There is no room for prior assumptions as a decision-maker must weigh all the relevant factors in the balance, in order to make a predictive assessment of what will be in the welfare and best interests of the child in these particular circumstances.³

[16] Mr Kinnelly in his submissions drew the Court's attention to the decision of his Honour Judge Burns in the case of *Malcolm v Lloyd* where his Honour undertakes a detailed examination of the previous authorities and principles under s 5.⁴ I am mindful of the fact that his decision is not binding but I adopt his reasoning as follows. At [25] of the decision he stated:

I have tried to synthesise the factors and have brought them up to date with changes to the Care of Children Act and taking into account the *Kacem v Bashir* judgment of the Supreme Court. In my view the Court should analyse the following factors:

- (a) section 5 principles;
- (b) the child's relationships/needs;
- (c) reasons/motivation/intention to shift i.e. the reasons for the proposed move, the validity of those reasons and other ways the objectives of the proposed move might be met, how thoroughly the person considering the move has considered all the ramifications and likely effects and weighed them in the balance;
- (d) attitude — the parents' current attitude towards each other and the way their attitudes might be affected by the move (or a decision against such a move);
- (e) conflict/violence/safety;
- (f) parenting capacity/emotional health;
- (g) contact;
- (h) child's views;
- (i) economic/material factors;
- (j) historical choice of residence — whether undertakings/understandings between the parties;
- (k) cultural, social and spiritual factors.

³ *K v B*, above n 3, at [24].

⁴ *Malcolm v Lloyd* [2014] NZFC 9558.

[17] I turn firstly to the principles under s 5.

A child's safety must be protected and in particular a child must be protected from all forms of violence

[18] Although there had been a previous historical application for a Protection Order there are no allegations between the parties of any direct family violence, substance abuse, or behaviours of either parent that would directly make [Lewis] unsafe in the care of either parent. However, the definition of protection from all forms of family violence has been widely defined under s 5(a).

[19] Dr Ward indicated in his report that [Lewis] showed an “appropriate and positive connection with each parent negotiating the presence of a stranger”.⁵ Dr Ward’s opinion was that [Lewis]’s attachment style was more anxious than secure.⁶

... in that he never fully was able to relinquish his parent in order to interact with the wider world. This included him not being entirely comfortable with a one-on-one interview where he was focused or prepared to discuss aspects of family. From another viewpoint, how he managed also showed that he feels safe with each parent and to the point where he can rely on them for his internal regulation.

[20] Dr Ward’s report highlighted the lack of trust between the parents, the need for them to communicate effectively for [Lewis] going forward.

[21] The evidence of Ms [Randall] in her affidavit sworn 3 June 2021 is that Mr [Cobb] had been abusive towards her when they separated⁷ and that Mr [Cobb]’s objection to the relocation is not about what is best for [Lewis] but about his control of her.⁸ He is saying untruths about her and her friends to [Lewis], he has no filters and [Lewis] is being confused.⁹ Further, Ms [Randall] states that the longer he remains with Mr [Cobb] the more lies he is going to be told; he has no rules with his father; Mr [Cobb] will distract [Lewis] from trying to talk to his mother; and [Lewis] is very reticent when he is with his father.

⁵ Report of Dr Ward, dated 8 December 2021, p 9 at [16].

⁶ Report of Dr Ward, dated 8 December 2021, p 10 at [16].

⁷ Affidavit of [Sophia Randall], sworn 3 June 2021 at [9].

⁸ Affidavit of [Sophia Randall], sworn 3 June 2021 at [15].

⁹ Affidavit of [Sophia Randall], sworn 3 June 2021 at [18].

[22] Mr [Cobb], under cross-examination gave evidence that he thought that the parties had after an initial period of difficulty come to a much better place with their communication and that the deterioration of recent times had been due to Ms [Randall]'s relocation.

[23] It was clear that Mr [Cobb] and Ms [Randall] had a different communication style and that they really have not parented [Lewis] together. However, Ms [Randall] was not really challenged on her evidence and I am satisfied that she has at times found it difficult to communicate with Mr [Cobb] about matters for [Lewis]. However, the evidence does not reach, in my view, that there is a risk for [Lewis] that he will be exposed to any family violence of an emotional/psychological level. My impression is that the issue is more correctly identified for [Lewis] in assessing which of his parents will support the other and whether [Lewis] may be impacted by the other parent's negative attitude towards that parent.

A child's care, development and upbringing should primarily be the responsibility of his or her parents or guardians

[24] Historically, Ms [Randall] has been [Lewis]'s primary parent. The parents were able to communicate previously in respect of important guardianship decisions for [Lewis], such as which school he will attend.

[25] I was impressed by both parents and reached a view that they would both be able to make decisions in respect of [Lewis]'s ongoing care, welfare and development, and would be able to make guardianship decisions going forward.

[26] Certainly, a change of school will be necessitated if [Lewis] resides in his mother's full-time care. This potentially would mean that there will be some upset and certainly a change in the day-to-day environment for [Lewis]. There is limited evidence provided about [school 1] that his mother would be intending to send [Lewis] to. However, I am satisfied that that is the school that she is in zone for, that it is a decile 9 school and there were no issues raised by Mr [Cobb] about the school.

A child's care, development and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents

[27] As with principle (b) above there is no evidence that either parent have made any unilateral decisions which have not been in [Lewis]'s best interests.

[28] Ms [Randall] has only her mother in New Zealand as family. It was absolutely understandable that Ms [Randall] made the decision to go to Auckland to care for her mother. I am also satisfied on her evidence that her mother has substantial ongoing medical issues. She has suffered from [medical details deleted]. She has a trauma team working with her and she is facing a number of ongoing challenges and medical interventions. Although there was some criticism of Ms [Randall] in her lack of independent medical evidence, given the nature of the injuries that she described and the history of her accident I do not doubt that there is a need for ongoing assistance from Ms [Randall].

A child should have continuity in his or her care, development and upbringing

[29] Up until March of 2021 the continuity of care for [Lewis] had been day-to-day with his mother but with frequent contact with his father.

[30] That of course was changed from March 2021 and the continuity from thereon has been in the day-to-day care of [Lewis]'s father and with regular contact with his mother. In terms of [Lewis]'s age, the majority of the day-to-day care has been met by his mother. However, the report from Dr Ward supports that Mr [Cobb] is very able in meeting [Lewis]'s day-to-day needs. There is continuity for [Lewis] living in the home which his father has purchased in [location A] and there is continuity in his current schooling environment. The evidence was that [school 2] where [Lewis] is attending works well and [Lewis] enjoys it.

[31] [Lewis]'s maternal grandmother of course lives in Auckland. [Lewis]'s paternal grandmother lives in [location B] but has reasonably frequent contact with [Lewis] on an approximately monthly basis.

[32] Ms [Randall]’s evidence was that whilst she is renting, she has a private rental which is, on her understanding, on a long-term basis, that she now has employment, that she is working from 7.30 am to 3.30 pm Monday to Friday. Her evidence was that her hours were flexible. She is working in the kitchen for [employer deleted].

[33] Mr [Cobb]’s evidence was that he works as a truck driver. He works from 9 am to 5 pm, five days a week. [Lewis] is in after-school care if needed. He has changed his employment hours as he was working from 3 am to 3 pm, Monday to Friday.

A child should continue to have a relationship with both his or her parents and that child’s relationship with his or her family group, whanau, hapu or iwi should be preserved and strengthened

[34] I got the impression that [Lewis]’s parents provide him with their different strengths. Mr [Cobb] is an ex-New Zealand representative and professional [sports] player and his evidence and the evidence from Dr Ward was that they have a shared interest in doing outside activities, which they both enjoy, and that [Lewis] has adapted and is enjoying that aspect of life with his father. Under cross-examination Dr Ward in response to a question from Ms Johnston when it was put to him that “[[Lewis]] has adapted to the situation. His parents have made the most of it. Why would you change that and risk more adversity for [Lewis]?” The answer from Dr Ward, at the top of page 92, was:

Well that’s exactly the question from a psychological viewpoint. You probably wouldn’t, as it was once asked, it was once said, you know, we don’t experiment with children. I guess that’s why my role is to point out the risks for the parents and for the Court.

[35] He was then asked:

Q. Because one thing you say on page 103 at paragraph 33: “However, to the extent that he finds this triangle distance between parents difficult, his family system also presents him with a source of adversity, at least potentially.” That’s what you’re talking about, aren’t you?

A. Yes, exactly.

[36] He also, under cross-examination, indicated that [Lewis] had gained from being in the day-to-day care of his father a role model. It was put to Dr Ward:

Does that make it harder or easier for [Lewis] if he goes to Auckland, that the relationship he has developed with his father, that role model, that closeness that you have observed and strong bond that you have mentioned?

[37] The response was:

I think it will make it harder and I think there is that thing that we all know with our own children that they're a little bit like us and so as being a male role model, Mr [Cobb] really is a good male role model for [Lewis] and one would hope that regardless of [the] decision, he continues to have enough time and contact for that to persist and I think as time progresses it's not unusual for young boys to want to spend more time with their Dads as well and it's a good thing.

[38] In terms of the relationship with the wider family, if [Lewis] was living in Auckland, he would have an opportunity to have and spend time with his maternal grandmother. The evidence was that Mr [Cobb]'s mother has assisted in the care of [Lewis] and given that she lives in [location B] the chances of [Lewis] having more contact with her if he was living in the day-to-day care of his father would be increased.

[39] I now turn to the balance of the issues as identified in the decision of his Honour Judge Burns in *Malcolm v Lloyd*.

[40] From the evidence and my impression of both parties under cross-examination I agree that Ms [Randall] has a slightly more positive and inclusive view of Mr [Cobb] and would be more likely to support him as a parent. However there was no evidence from Dr Ward that [Lewis] has been directly impacted as a result of this. Whilst I accept that Mr [Cobb] may be slightly less flexible in regard to the care arrangements, I must balance that up against the other factors.

[41] I had a strong sense that both parents were good parents and who have complementary strengths that they can offer their son, but that they have the challenges of not parenting together and the mistrust that they have of each other. Both parents were open to attending communication counselling and in my view that is vital for them moving forward to parent [Lewis].

[42] In this case there is very little between the parents as to their availability to care for [Lewis]. Both are employed but I do not have any evidence to suggest that either parents' employment is such that that it would impact on their availability. There is very little between the parties regarding their financial position, and I accept that whilst Ms [Randall] is renting, her evidence is that the rental is long-term and stable.

[43] I accept the evidence from Ms [Randall] that she was unhappy in [location A] and that she is happier in Auckland but more importantly in the near to medium future she needs to remain in Auckland to assist her mother. In this case I accept that the relocation has been one for reasons of necessity.

[44] This decision came down to the strong familiarity of location, school and circumstances for [Lewis] and the enjoyment of the lifestyle that he has with his dad. I make this decision against my concern that Mr [Cobb] may not support [Lewis]'s contact and relationship with his mother as much as Ms [Randall] supported [Lewis]'s relationship with his father. However in assessing the evidence and cross-examination responses from Dr Ward and assessing the level of risk for [Lewis] from a psychological perspective with the different options I have reached a view that there is greater risk for [Lewis] if he moves from the familiar and established routine that he currently has in the day-to-day care of his father. That is not to minimise the relationship that his mother has with him nor the importance of that and in an ideal world, I would agree that both parents should be having shared care of [Lewis]. However, that cannot work in reality. Whilst I accept and I agree that Ms [Randall] is more open to communication and may be more promoting of the other parent, there is not such a difference in their abilities to communicate that I could discount the other factors.

[45] In weighing up all of the factors, given the complementary strengths of each parent for [Lewis], the determining factor in my view is that [Lewis] has remained where he is in [location A] with his father for almost a year. He has adjusted to it. He has familiarity in school, place of residence, social relationships so that if he can maintain and needs to maintain his frequent contact with his mother I have reached a view that [Lewis] should remain living in [location A].

[46] Therefore, in conclusion I make a final parenting order for the day-to-day care of [Lewis] with his father in [location A].

[47] His contact with his mother will be every second weekend Friday to Sunday. The changeover is to be in [location C] at 5 pm. If contact falls on a long weekend it will be extended to Monday.

[48] Ms [Randall] is to have [Lewis] for the term school holidays from either Friday at the conclusion of term until the following Sunday or Friday at the end of the first week of the term holidays until the following Sunday to coincide with her weekend contact.

[49] There was some discussion about [Lewis] flying to and from Auckland for contact. The parties seemed open to that, it would have huge advantages in terms of reduction of travel time, but disadvantages in terms of having to fit around Air New Zealand schedules. I do not make any specific order in respect of air travel but expect that the parties will make enquiries and if possible arrange for [Lewis] to fly once he is of an age and stage when that is practical. The parties are to share the costs of flights equally. [Lewis] will also have sports commitments as he gets older and again it is impossible to anticipate the impact of that on the care regime but I expect that the parents for [Lewis]'s sake act co-operatively, to ensure that he is able to participate whilst prioritising his contact with his mother.

[50] The parties are to share Christmas school holidays. Ms [Randall] is to have the first half of the Christmas holidays in 2022, 2024 alternating annually thereafter.

[51] The order that [Lewis] not be removed permanently from [location A] will be retained.

[52] The parties are referred to communication counselling for ten sessions. Ms Johnston's appointment as lawyer for [Lewis] has ended with thanks of the court.

[53] If the parties are legally aided there will be no requirement for them to pay any cost contribution if they are not, they may make submissions in the normal way.

C Cook
Family Court Judge