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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2018-004-001066
[2021] NZFC 8191**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[AIDAN MORTIMORE] Applicant
AND	[HANI SHERMAN] Respondent

Hearing: 10 August 2021

Appearances: Applicant appears in Person
S Larkin for the Respondent
L Gray as Lawyer for the Child

Judgment: 10 August 2021

**ORAL JUDGMENT OF JUDGE L de JONG
[COCA : decline trial schooling]**

Introduction

[1] [Baden] is not here today but I am guessing he has mixed feelings. [Occasion deleted] today and his parents are in court rather than with him. Although, had they not been in court, [Baden] would have been at school anyway.

[2] To make things a whole lot more difficult for [Baden], his father is in the process of moving to [location A] with his stepmother and their two young children. [Baden] has known about the move for some time now but that will not have made things any easier for him because it has been a drawn out process that has not yet ended.

[3] Until now [Baden] has been sharing his time equally with each parent. He adores them both and is adored by each of them. He doesn't want to disappoint either parent. From where he sits, each parent wants him to live with them. He is so torn by the situation that he can't decide what he wants to do. Instead he has chosen to sit in the middle so he does not disappoint either parent. The pressure he feels is captured beautifully in his lawyer's latest memorandum.¹

[4] The reason why [Baden]'s parents are here today is because his father has applied for [Baden] to trial a local high school near [location A] for the last two terms of this year.

[5] [Baden]'s mother does not want the trial to happen. She wants him to stay in Auckland but acknowledges that [Baden] wants to change school.

[6] A submissions hearing has been directed today to decide what school [Baden] should attend while the family waits for the main hearing required to decide what school [Baden] should attend long term, whether he should relocate, and what the care arrangements should be.

[7] [Baden]'s parents say that [Baden] is intelligent, sensitive, mature, engaging and thoughtful. His teachers are just as glowing about [Baden]. [Baden] sounds like an amazing young man with a bright future.

[8] [Baden] must be feeling stressed at the moment about what is happening. His lawyer says it is a similar situation to that faced by [Baden] back in 2018 when his mother applied to relocate [Baden] to [location B]. Those proceedings ended with Ms

¹ Lawyer for child's memorandum dated 22 May 2021 paragraphs 39 to 47.

[Sherman] withdrawing her application to relocate and the 2019 shared parenting orders were made.

What is the relevant background ?

[9] [Baden] was born on [date deleted] 2007. He is the only child Mr [Mortimore] and Ms [Sherman] have together.

[10] Ms [Sherman] has two other children. [Pania] was born on [date deleted] 2013. [Howell] was born on [date deleted] 2015.

[11] In May 2015 Mr [Mortimore] married [Marilyn Mortimore]. They have two children. [Taimana] was born on [date deleted] 2016 and [Ariki] was born on [date deleted] 2019.

[12] On 28 February 2019 final shared care parenting orders were made by consent at a time when both parents were living in Auckland.

[13] [Baden] is in his first year at [school 1]. He is not enjoying it and has told his lawyer he wants to change schools no matter what the outcome of today's hearing is.

[14] In April this year Mr [Mortimore] filed a s 46R application for an order that [Baden] attend a [location A] school without reference to him or his mother. Predictably that application was put on notice on 12 April 2021.

[15] The application was made on the basis that [Baden] is unhappy at [school 1], that Mr [Mortimore] was moving with his wife and their children to [location A], that [Baden] wants to attend [school 2] in terms 3 and 4 this year, and that [school 2] is a better school for [Baden]. Mr [Mortimore]'s wife and their two children moved to [location A] near the end of July. Mr [Mortimore] has remained in Auckland but will move after this hearing.

[16] The reality of the situation faced by Mr [Mortimore] and his family is that the home he has been planning to build for some time is still about nine months away. The intention is to live in a transportable/relocatable home on the property.

[17] Ms [Sherman] is opposed to [Baden] attending [school 2] or living in [location A]. Since the 5 July directions conference, where Judge McHardy directed this hearing, Mr [Mortimore] has filed a pro forma s 46R application for [Baden] to relocate to [location A] so this case can progress today and so that the main hearing dealing with long term arrangements can be organised.

[18] There is agreement today to make timetabling directions allowing Mr [Mortimore] to file an application to vary or discharge the 2019 parenting order. He will file that application and any supporting evidence by Monday. Ms [Sherman] is to file her evidence within two weeks thereafter. Mr [Mortimore] will have an opportunity to file any evidence strictly in reply.

[19] I will also be directing a one day hearing so that long term issues relating to this family can be finally determined. At this stage it is anticipated that the only witnesses will be [Baden]’s parents. Time might need to be allowed for [Baden] to see the judge, if he wishes. This might also be a situation where the Judge wants to meet [Baden].

[20] There is a major obstacle to me granting Mr [Mortimore]’s application today. Although both parties anticipated the s 46R applications being dealt with today on a temporary basis, no application has been filed to vary or discharge the 2019 parenting order. To this extent I have no jurisdiction to make a change to the 2019 shared parenting order. The effect of granting Mr [Mortimore]’s application means there will inevitably be a change to the 2019 parenting order. In the event that I am found to be wrong about lacking jurisdiction today, the next part of this judgment addresses why I would not have otherwise allowed the application.

What are the relevant legal principles ?

[21] Under ss 15 & 16 of the Care of Children Act 2004, being a guardian involves having the role of providing day to day care (s 16(1)(a)); having parental duties, powers, rights and responsibilities (s 15(a)); contributing to a child’s intellectual, emotional, physical, social, cultural and other personal development (s 16(1)(b)); and addressing “important matters” effecting a child (s 16(1)(c)).

[22] “Important matters” effecting a child include those listed in s 16(2) as to a child’s name, residence, medical treatment, education, culture, language and religion.

[23] Under s 46R(4) I may make any order I think proper concerning the choice of [Baden]’s school. However, the decision about what school [Baden] should attend must be made with s 4 in mind. That section requires me to undertake a child focussed enquiry² and to view the welfare and best interests³ of [Baden] as the paramount consideration.

[24] In the context of this overarching paramountcy principle, the s 5 guiding principles and the facts of this case must be weighed in order to make a predictive assessment of what is likely to be in [Baden]’s best interests and welfare in his particular case.

[25] Section 6 is also relevant because it requires me to take account of [Baden]’s views, as neutral as they are.⁴

What is this Court’s decision about trial schooling ?

[26] Mr [Mortimore] has had a lot to say, not only in writing but in word. That’s understandable because there is a lot at stake. Mr [Mortimore] has made a life decision to relocate to a dream home he is building with his wife. [Baden] has had some input into the house as well. That is inevitable with the discussions leading up to the move and build.

[27] Putting aside for a moment whether or not I have the jurisdiction to make s 46R orders without varying the 2019 parenting order, Mr [Mortimore] wants an interim order that allows [Baden] to enrol at and attend [school 2] in terms 3 and 4 this year. He suggests this would allow [Baden] to decide whether he likes the school and give him a taste of living in [location A].

² Section 4(2) and *Kacem v Bashir* [2010] NZFLR 884 at [18]

³ “Best interests” is examined in *Brookers Family Law* Volume I, *CCIntro.02*.

⁴ *Brown v Argyll* [2006] NZFLR 705 at [49]. The child’s perspective is considered in paragraph *CC6.02* onwards in *Brookers Family Law Child Law* Volume I.

[28] Mr [Mortimore]'s proposal is for lawyer for child to interview [Baden] near the end of term 4 to ascertain his views. Part of the difficulty with this proposal is that [Baden] will very likely be faced with the same dilemma he has today and the dilemma he had in 2018. That is, he doesn't want to decide because he worries about how this will be received by his parents. He doesn't want to make either parent sad or to disappoint either of them.

[29] In his submissions Mr [Mortimore] also sought a half day hearing in December or January to determine long term issues. I have already made reference to the fact that one day will be directed for the hearing.

[30] In my view [Baden] is the kind of young man who is likely to excel academically whatever school he attends. However, achieving academically is not the only ingredient. In my view the best time to assess [Baden]'s long term care, contact and schooling issues are at the main hearing.

[31] At the moment [Baden]'s life is somewhat at turmoil. He is torn between his parents. His father is leaving but not yet gone. The dream home is on paper but has not yet arrived. The accommodation [Baden] would be greeted with, if he moved to [location A], would be temporary. He would be living in close quarters with two very young children that [Baden] loves but he has expressed views about the relationship he has with those two children to his lawyer in her latest memorandum. The reality for [Baden] is that all his friends, his schooling, extracurricular activities, and so on, are in Auckland. This has been his home and his city.

[32] Having said that, it is important for Ms [Sherman] to reflect on the fact that while [Baden] has a male figure in the form of Mr [Sherman], it is inevitable [Baden] will express views about spending more time with his father, particularly if they are going to live so far apart.

[33] One of the two things [Baden] expressed to his lawyer about the future was making sure both his parents are accessible. It is also important to remember that [Baden] is not required to make a decision. From [Baden]'s point of view, he is a young man who is entitled to be consulted but can choose not to make a decision if he doesn't want to. He has felt under pressure to make a decision. That is the type of personality he has. Even though he is very bright and articulate, it is clear he is also very sensitive.

[34] As acknowledged by Mr [Mortimore], it will be difficult for [Baden] to cope with the other parent and family living so far away and not readily accessible. Until now both parents have been actively involved in his daily life. The transition will be difficult for [Baden] and, in my view, will be made even more difficult for him if he is to spend a trial period with his father at this time. I say again this should not rule out any opportunity offered to [Baden] in the future to trial a period with his father if that is something he later wishes.

ORDERS & DIRECTIONS

[35] I make the following orders and directions:

- (a) The application for interim 46R orders is declined.
- (b) Mr [Mortimore] is to file any application to vary or discharge the 2019 parenting order by 16 August.
- (c) Ms [Sherman] is to file her evidence by 30 August.
- (d) Mr [Mortimore] may file evidence strictly in reply by 13 September.
- (e) A one day hearing is directed to determine:
 - (i) whether [Baden] will relocate to [location A].
 - (ii) whether and how the 2019 parenting order is discharged or varied.

(iii) what school [Baden] will attend.

(iv) standard long cause fixture direction shall apply.

Judge L de Jong
Family Court Judge

Date of authentication: 16/08/2021
In an electronic form, authenticated electronically.