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 AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2019-044-000788
[2022] NZFC 1748

IN THE MATTER OF	THE CARE OF CHILDEN ACT 2004
BETWEEN	[KENDRA NORTON] Applicant
AND	[ANDREW RU] Respondent

Hearing:	1 December 2021
Appearances:	S Morris for the Applicant No appearance by or for the Respondent L Kenny on behalf of D Holbrook as Lawyer for the Children
Judgment:	4 March 2022

RESERVED JUDGMENT OF JUDGE A M MANUEL

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[1] These are proceedings under the Care of Children Act 2004 (COCA) concerning three children: [Iasepa Norton Ru] born [date deleted] 2012 (10), [Sela Ru] born [date deleted] 2013 (8); and [Tua Ru] born [date deleted] 2017 (5).

[2] The applicant is the children's mother and the respondent is their father. The applicant has effectively been their sole parent and guardian since the parties separated in November 2017 (and arguably for some time before that as well).

[3] The applicant is seeking to have the respondent removed as a guardian for the children under s 29 of the COCA. If the Court declines to remove him, she is seeking orders under s 46R of the COCA appointing her as sole guardian for decisions about the children's names, their residence (including domestic and international travel) medical treatment, and education. She wishes to change the children's surnames from the respondent's surname [Ru] to her own surname [Norton]. [Iasepa Norton Ru], the oldest child, has her surname as his middle name and she is proposing to reverse the order so he has his father's surname [Ru] as a middle name and hers as his surname. The two younger children's surnames would be replaced with her surname.

[4] The respondent was served with the proceedings by substituted service but has taken no steps. Lawyer for child was appointed and reported and supports the s 46R orders sought but not the s 29 order.

[5] The matter proceeded as a formal proof hearing by AVL on 1 December 2021.

[6] The applicant is a New Zealander of European descent. The respondent is an American of [descent details deleted]. They met in China in 2008 and married in New Zealand in [month deleted] 2011.

[7] After they married, the parties lived in China. By the time they decided to move to Hong Kong in October 2016 there were difficulties in the marriage. The applicant attributed this to the respondent's mental health and issues with drugs and alcohol.

[8] In late 2017, the applicant told the respondent she wished to separate. From November 2017 to January 2018 he had limited involvement in the children's lives. He then moved to Hawaii and has not seen the applicant or the children since. They remained living in Hong Kong and the applicant took on sole responsibility for raising them. In December 2018 the Hong Kong District Court made orders granting her complete care and control of the children.

[9] [On date deleted] 2020 the applicant and children travelled from Hong Kong to New Zealand to spend time with the maternal family. They were unable to return to Hong Kong because of the COVID-19 lockdown and travel restrictions. The applicant decided to relocate permanently to New Zealand. She re-partnered and bought a home in Auckland. The applicant's partner has lived with her and the children since February 2020. Her partner has shared care of his two children who are [both aged under 10]. The children's maternal grandparents live in a township some hours distance from Auckland but are very involved in the children's lives. In August 2020 the Hong Kong District Court made orders formally relocating the children to Auckland.

[10] As at the date of hearing, the respondent had not seen the children in almost four years and had not spoken to them over the phone for almost three years. The last phone call had been on Christmas Day 2019. He was not sending the children any letters, birthday or Christmas cards or presents.

[11] Despite the applicant's attempts to keep the respondent and his family involved in the children's lives, he responded to her text or phone calls only sporadically. He was difficult or impossible to engage about guardianship decisions.

[12] However, he was not completely disinterested in the children. On 31 March 2021, the parties spoke over the phone after he messaged saying they needed to talk and sort everything out. This was the first time she had heard from him since 2019. But when the applicant tried to engage him about his involvement in the children's lives he did not want to discuss the topic. He became angry and hung up on her.

[13] In June 2021, after the respondent was served, he replied acknowledging that he had received the court documents.

[14] Over the winter of 2021, [Tua] broke [a bone] and the applicant texted the respondent to let him know. On 14 September 2021 he sent her a message *"Hey I heard [Tua] broke something. Everything okay?"* She replied saying that the break had been a couple of months ago and that [Tua] had healed well.

[15] On 27 October 2021 the applicant sent a message to the respondent, *"Hey [Kendra] thanks for the photos. The kids looking good! We made some cuties. Hope everything's well"*. This was a little puzzling because the applicant had not sent the respondent any photos.

[16] While the applicant was aware of her obligation to make guardianship decisions consulting with the respondent, she was unable to do so given his low level of engagement. The suggestion in her evidence was that he may be struggling with personal problems. Meanwhile, she had been making guardianship decisions for the children such as enrolling them in pre-school and school, arranging for them to have medical treatment and so forth. This was not always straightforward. By way of example, at the date of hearing, the eldest child required a psychologist's report because of the possibility of ADHD which required the consent of both his guardians.

The legislation

[17] Part 2 of the COCA concerns guardianship and the care of children.

[18] Under s 15 guardianship of a child means having:

> (a) all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child…

[19] Under s 16(1) the exercise of guardianship includes (without limitation) the guardian:

> (a) having the role of providing day-to-day care for the child…; and
>
> (b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
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> (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.

[20] Section 16(2) defines important matters affecting the child as including (without limitation):

> (a) the child's name (and any changes to it); and

(b) changes to the child's place of residence (including, without limitation, changes of that kind arising from travel by the child) that may affect the child's relationship with his or her parents and guardians; and

(c) medical treatment for the child (if that medical treatment is not routine in nature); and

(d) where, and how, the child is to be educated; and

(e) the child's culture, language, and religious denomination and practice.

[21] Under s 16(3) a guardian of a child "may exercise (or continue to exercise) the duties, powers, rights and responsibilities in relation to the child whether or not the child lives with the guardian, unless a Court order provides otherwise."

[22] Section 16(5) provides that the guardian of a child must "act jointly (in particular by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child."

[23] Section 29(3) and (4) provide that the Court must not make an order depriving a parent of the guardianship of his child 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.

[24] Section 46R provides for the resolution of disputes between guardians if they are unable to agree on any matter concerning the exercise of the guardianship.

[25] Part 1 of the COCA contains general provisions which apply to proceedings under the COCA.

[26] Section 4 provides that a child's welfare and best interests must be the first and paramount consideration in decision-making and that the six principles in s 5 must be taken into account. These include:

- 5(a) – safety;

- 5(b) – a child's care being primarily the responsibility of his or her parents and guardians;
- 5(c) – a child's care being facilitated by ongoing consultation and co-operation between his or her parents and guardians;
- 5(d) – a child having continuity;
- 5(e) – a child continuing to have a relationship with both of his or her parents and the child's relationship with his or her family group being preserved and strengthened; and
- 5(f) – a child's identity being preserved and strengthened.

[27] Under s 6, a child must be given reasonable opportunities to express views and any views expressed must be taken into account.

Case law – s 29 COCA

[28] The lawyers referred to a number of s 29 cases, most of which had been decided in the Family Court over the past 10 or 12 years. Some had resulted in a parent being removed as a guardian, either on the grounds of unwillingness or unfitness or both, with a finding that the order would serve the welfare and best interests of the child. Others resulted in the Court declining to remove a parent as guardian.

[29] In all the cases referred to, the Courts emphasised the gravity of removing a parent as a guardian.

[30] The 2012 Family Court decision *BLB v RSC* is an example of how such decisions are typically approached. The case begins with a statement that:[1]

> …alongside the physical removal of a parent from the lives of children, the removal of legal rights is a serious intrusion into the natural order of things.

[1] *BLB v RSC* [2012] NZFC 7162, [2013] NZFLR 25 at [2].

[31] The Court continues by describing s 29(3) as setting "a high threshold indeed" and comments that there are:[2]

> …few more emphatic legislative restrictions on the exercise of a judicial power than where an enactment states an order 'must not be made' unless certain prerequisites are made out.

[32] The Court then goes on to cite two passages from earlier decisions in the same vein:[3]

> As his Honour Judge Murfitt commented in *IMB v BMA*:[4]
>
> > …Section 29 of the Care of Children Act 2004 empowers the Court to make an order depriving a parent of the guardianship of his child. The restraints contained in s 29 confirm Parliament's intention that this should be a power exercised rarely, and only when strict criteria have been established. Section 29(3) directs that such an order must not be made unless the Court is satisfied [as to the matters in s 29(3)(a) and (b)].
>
> A similar view was taken in *Re: D (An Infant)* where the then Supreme Court stated:[5]
>
> > ...I take the view that by "grave" reason of unfitness the Legislature intended that, before a reason should be taken as establishing that a parent is unfit to be a guardian of a child, that reason must be shown to be a really serious one. (Emphasis mine)

[33] Having set the scene in this way, the Court in *BLB v RSC* considered removal of the father of three children. The father had been violent towards the mother, had a chronic drug addiction, had been to prison and had a significant criminal history. His approach had been to leave guardianship decisions such as schooling and health up to the children's mother. The mother argued that the father was both unwilling and unfit to be a guardian. The Court disagreed.

[34] It was acknowledged that removal had been ordered in cases where there had been, for example, homicide within the family, serious violence to the other parent, sexual or serious physical abuse of the children, unavailability through lengthy periods of incarceration, or serious unfitness through mental health.[6] But in *BLB v RSC* the

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[2] At [3] and [4].
[3] At [5] and [6].
[4] *IMB v BMA* (2007) 26 FRNZ 484 (FC) at [20].
[5] *Re D (An Infant)* [1971] NZLR at 744.
[6] *BLB v RSC* [2012] NZFC 7162 at [37].

Court found that although the father had "conducted himself poorly over many years his misdemeanours towards his family [fell] well short of reaching the level required at law".[7]

[35] The Court also found that the father had not been so much unwilling to perform his guardianship duties as trying to reduce the negative fall out on the children.[8] Given that neither of the grounds for removal were made out, the Court was not required to consider the welfare and best interests of the children.

[36] *BLB v RSC* is probably the case factually closest to this case but there are some differences. In *BLB v RSC* the father was involved in the hearing. Here, the respondent has taken no steps. The applicant is relying on unwillingness, rather than unfitness. Although there was evidence of poor behaviour on his part, she accepted quite realistically that this did not amount to "some grave reason which made him unfit to be a guardian of the [children]".[9] And the inference could be drawn from the applicant's evidence that the respondent's failures as a guardian were due less to unwillingness than to mental health and addiction issues.

[37] As the Court held in *BLB v RSC*:[10]

> …the use of the word "unwilling" in the context of the purpose of this provision requires an element of intention or desire. It requires something more than mere incapacity to perform the role. If the Court determines that a guardian has been shown to be unwilling to perform the guardianship role, it would need to establish any reasons for that non-exercise. In certain cases there may have been unwillingness but, by dint of circumstances, it nonetheless does not merit removal of that guardian.

[38] The lawyer for the applicant also relied on two other similar Family Court cases where removal was ordered.

[39] *Dalal v Alfarsi* concerned removal of a father as guardian of a two year old child.[11] The mother wished to travel to South Africa with the child and needed to establish that she was either the sole guardian or had full custody for immigration

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[7] *BLB v RSC,* above n 1 at [41].
[8] At [11].
[9] Care of Children Act 2004, s 29(3)(a).
[10] At [11].
[11] *Dalal v Alfarsi* [2016] NZFC 10653.

purposes. The parents had separated when the father left New Zealand. The mother was three months pregnant at the time. After the child was born, the only contact she had was a single telephone call and a letter telling her that he had divorced her. She did not know his whereabouts. He had never met the child. He had never even acknowledged him.

[40] The Court held there was "little doubt" that the father was unwilling to be the child's guardian.[12] He had abandoned the child before he was born and the child had never known his father. It was in the best welfare and interests of the child that his mother travel with him as she wished to do. This could only be achieved by removal because a parenting order would not be sufficient for travel purposes.

[41] That case is different from the present case because the respondent in this case was involved in the children's lives until at least November 2017 (albeit unsatisfactorily). He acknowledges all three children. He sporadically contacts the applicant and expresses some interest in them. There is a plausible 'explanation' for his lack of parental behaviour.

[42] *NS v RJAN* concerned the removal of a father as guardian of a six and a half year old child.[13] His parents had separated when he was young. Before then the father had suggested a termination, did not support the mother during her pregnancy and disappeared from time to time. He had last seen the child when he was about two. After that, the mother and child moved to another city. The child had special needs and required stability. He had been born in New Zealand to UK citizens but did not have citizenship himself.

[43] The Court had "little difficulty" in finding that the father had not "even begun to act appropriately in his role as guardian".[14] The Court considered resolving the application as a dispute between guardians but acknowledged that:[15]

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[12] At [11].
[13] *NS v RJAN* [2013] NZFC 1784.
[14] At [22].
[15] At [25].

> …the UK British passport authorities may be reluctant to accept such a New Zealand Court order dispensing with or overriding the father's consent to such an application without it being converted into a UK order.

[44] Removal was in the child's best interests. He was too young to have any views which needed to be considered under s 6 and there was no bond or attachment to his father.

[45] This is probably the most helpful case for the applicant but, again, there are differences. In *NS v RJAN* there was no evidence to help explain the father's lack of participation in the child's life. There was also specific evidence that resolving the application as a dispute between guardians would not be sufficient. This is not so in this case.

[46] Here I find it has not been established on the balance of probabilities that the father is a parent who is unwilling to perform or exercise the duties, powers, rights and responsibilities of a guardian. He may be inadequate as a guardian, but this is not necessarily tantamount to being unwilling. He may wish to be a guardian but simply be unable to do so because of his own limitations.

[47] Having made this finding, it is not necessary to decide whether removal would be in the welfare and best interests of the children but I have considered it for completeness.

[48] In *IMB v BMA* the Family Court held that:[16]

> One of the factors which can legitimately be taken into account is the impact on the child of a decision which effectively condemns one his or her parents, from whom he or she has received some genetic blueprint as unworthy and untrustable. With the development of insights into child development, it is now well-known that the child's own sense of self-worth is shaped, at least in part, by his or her knowledge or and understanding of where he or she comes from…

[49] At 10 and 8 years of age [Iasepa] and [Sela] have memories of their father. His heritage is reflected in the children's Christian names. It would not be in the children's

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[16] *IMB v BMA* (2007) 26 FRNZ 484 (FC) at [36].

welfare and best interests for their father to be "effectively condemned" by removal as a guardian. In addition, as the children's lawyer points out, there is:[17]

> …no recourse for a natural guardian to be reinstated thus that door can be said to be permanently closed (the only recourse being an application to be a court appointed guardian which is contextually different to a natural guardian…)

Section 46G applications

[50] In the alternative, the applicant sought an order permitting a change of the children's surnames as set out at [3] above. The children's lawyer supported this because the children considered themselves to be part of her family and identified with their mother's surname. They were known by her surname [Norton] amongst their family and community. This was not unusual given they were in her day-to-day care and supported by the extended maternal family. Having the same surname would allow the applicant to travel with more ease with the children.

[51] I find that an order permitting a one off change of name as proposed would be in the children's welfare and best interests and promote the principles of continuity and the children's identity being preserved and strengthened. An order is made accordingly.

[52] The applicant also sought an order granting her the ability to make sole guardianship decisions about the children's education, residence (including domestic and international travel), medical treatment and education.

[53] The reality is that she has already been making sole guardianship decisions about education and medical care as they arise and as COVID-19 travel restrictions are eased, she intends to travel abroad with them.

[54] I do not consider it necessary for the applicant to be given sole guardianship rights regarding the children's residence, because they are now well settled in Auckland.

[17] Lawyer for Child's submissions date 29 November 2021 at [15].

[55] I am satisfied, however, that it is in their welfare and best interests to appoint her as sole guardian for decisions about domestic and international travel, medical treatment (both in New Zealand and abroad) and their education. This will promote the principles of safety and continuity. The applicant's ability to parent effectively may be hampered if orders are not made sanctioning sole guardianship decisions about these matters.

[56] Accordingly, an order is made giving the applicant the sole right to determine decisions as they arise as to the children's domestic and international travel, medical care (whether in New Zealand or abroad) and education.

[57] In conclusion, it is to the applicant's credit that she has assumed sole responsibility for the children's upbringing and they are clearly thriving in her care. Leave is expressly reserved to the respondent to apply on 21 days notice to be reappointed as guardian for the purposes from which he has now been excluded. The children will only ever have one father and the door should be left open for him to become a part of their lives.

Signed at Auckland this……………day of……………..2022 at …………..am/pm

A M Manuel
Family Court Judge