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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2021-004-000147
[2021] NZFC 8343**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[LOIS HANSON] Applicant
AND	[STEVEN FRANK] Respondent

Hearing: 2,3,4 and 13 August 2021

Appearances: J Dale for the Applicant
J Cookson for the Respondent
S Jefferson QC as Lawyer for the Child

Judgment: 13 August 2021

ORAL JUDGMENT OF JUDGE A M MANUEL

[1] This case concerns [Logan] and [Nicholas Frank]. They are aged 14 and 12. The parties [Lois Hanson] and [Steven Frank] are the boys' parents. They cannot agree about which country their sons should live in, the arrangements for their care, or what school they should attend.

[2] Ms [Hanson], who is a New Zealander, says they should live in New Zealand and be mainly in her care during school term time, spending fortnightly four-day

weekends in their father's care and having dinner with him once a week. During the school holidays there would be equal shared care.

[3] Mr [Frank], who is an Australian, says they should live in Australia and be in equal shared care throughout school term and holiday time.

[4] There is a dispute about which school the boys should attend but lawyer for child suggests that the parents should be given the opportunity to agree on a school themselves once the court has decided which country the boys should live in.

[5] [Logan] and [Nicholas] were born in [an Asian country] in 2007 and 2009. Their parents, who are both [profession deleted], met and began their relationship in 2001. In 2004 they moved to live and work in [the Asian country] at [employer deleted]. The children acquired New Zealand citizenship and passports. In February 2012 the parties married and in August 2012 they moved to work at [employer deleted] at Muscat, Oman. The family lived there for nearly nine years. They separated in February 2020, but continued living under the same roof until August 2020, when the father moved out.

[6] They shared the boys' care on a week about basis until June 2021. This was a miserable chapter in the life of the family. The father had begun a relationship with the mother of another pupil at the international school. He decided to end the marriage. It was not the mother's wish to end it. The parents were [details deleted]. Oman is a Muslim country where adultery is illegal and family law is patriarchal. This added an extra layer of difficulty. The mother wanted to return to New Zealand with the boys and the father wanted them to stay in Oman.

[7] Matters came to a head after their [employment] contracts were not renewed and their visas required them to leave Oman before 31 July 2021. They reached an agreement that the mother would return to New Zealand and the father would return to Australia. The boys would shuttle between the two countries and spend several weeks with each parent until a court decision was made. The mother and the boys arrived in New Zealand on 21 June 2021. They spent two weeks in quarantine then moved to stay with their maternal aunt [Clara Hanson-Davies] and her husband

[Nathan Davies] at their home at [suburb deleted]. This is in a far northern suburb of Auckland. Two of the [Davies] children, who are young adults live at home and the third lives nearby. The father went to live [in Australia] with his parents. He started a full-time job on good pay at a local [employer deleted].

[8] The boys were due to fly to Australia on 28 July 2021, but just before then the Trans-Tasman travel bubble popped. The mother wanted the children to remain in New Zealand. She said there was no certainty about their return if they went to Australia and it would be unfair for them to spend more time in quarantine. She said this was an unforeseen event.

[9] The father wished to have the terms of their agreement honoured and the boys put on a plane on 28 July. He said that when the agreement had been reached it was known that there was real uncertainty about the travel bubble.

[10] The boys were not put on a plane. They were here in New Zealand when a three-day hearing took place on 2, 3 and 4 August 2021. Just before the hearing the boys became Australian citizens and were issued with Australian passports.

[11] This is a relocation case with a number of special features:

- (a) Both parents gave evidence that if their preferred country was not chosen they would move to live close to the boys in the other country. In other words, if the decision is that the boys should live in Australia the mother will move there to live and vice versa. Consequently the court does not need to be concerned with the quality of a long-distance relationship with one parent;
- (b) Relocation usually involves one country where the family is living with one parent seeking to move to a second country. But this family has moved from the country where they were living and a life there is no longer an option. The court is faced with a choice between two future proposals and asked to assess the quality of life the boys are likely to

have there. This case is probably better described as a location case rather than a relocation case;

- (c) The mother says that she would be better supported by family and friends in New Zealand and thus able to function as a mother. This impacts on the boys' welfare and more so if she is their main caregiver. She also alleges that there was a thread of power and control that ran through the parties' 19-year relationship but became more apparent around separation. She says that the father is difficult to deal with and tends to be overbearing. She is overborne by him and so are the boys, who are scared of him. At the same time, she affirmed that although he has a different parenting style to hers he is a great father. There is no application for a protection order and the mother is not suggesting that one is necessary to protect her or the boys. Nor does she suggest that the time they spend in his care should be supervised;
- (d) It is also submitted that there may be a decline in her functioning as a parent if she moves to Australia. She has only the paternal family there and the separation and court case have been polarising. Her evidence about her functioning if she were required to move however was equivocal. In cross-examination when she was asked how she would cope she said:

Well I would do it... I will still do it because I did it for 19 years but if I felt there's a point that I wasn't being a very good mother because I was struggling so much then I need to reconsider. I don't know, it's hard to say because I'm not in that situation yet.

- (e) There is no expert evidence about the mother's present or likely future functioning, nor is there any expert evidence about the boys generally. As a result, the cases relied on by the mother are distinguishable on the facts although they include useful statements of general principle. I am referring to *S v O*, *Briggs v Page*, *ACCS v AVMB* and *[M] v [M]*¹;

¹*S v O* [2006] NZFLR 1 (HC); *Briggs v Page* [2013] NZFC 9049; *ACCS v AVMB* [2006] NZFLR 986 (HC); *[M] v [M]* [2014] NZFC 9723.

- (f) There is little if anything to choose between the two propositions that have been put to the court. So little in fact that lawyer for child declined to take a position on the issue. Education, accommodation and employment opportunities are good in both places. There are extended family and friends in both countries and these people are not strangers to the boys because they have holidayed with them in the past. Both countries are safe and stable democracies. There are opportunities for a vast number of sporting and outdoor activities for the boys in both countries. The parents have a sufficient capital base to cushion re-establishment in either country. When it comes to weighing the pros and cons there is very little in it.

The law

[12] Section 46R of the Care of Children Act 2004 provides a mechanism for resolving disputes between guardians. Guardianship matters specifically include: “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.”

[13] Matters such as relocation and parenting arrangements must be decided in accordance with ss 4, 5 and 6 of the Act. Section 4 provides that the welfare and best interests of a child in his particular circumstances must be the court’s first and paramount consideration. The decision-maker must take into account:

- (a) the principle that decisions affecting the child should be made and implemented within a timeframe that is appropriate to the child’s sense of time; and
- (b) the six principles in s 5 of the Act.

[14] The decision-maker may take into account the conduct of a person who is seeking a role in the upbringing of the child to the extent the conduct is relevant to the child’s welfare and best interests. It must not be presumed that the welfare and best

interests of a child of any age require the child to be placed in the day-to-day care of a particular person because of that person's gender.

[15] The six principles relating to a child's welfare and best interests in s 5 include:

(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 ... parents and guardians:

(c) a child's care, development, and upbringing ... should be facilitated by ongoing consultation and co-operation between his ... parents, guardians, and any other person having a role in his ... care under a parenting or guardianship order:

(d) a child should have continuity in his ... care, development, and upbringing:

(e) a child should continue to have a relationship with both of his ... parents, and that a child's relationship with his ... family group, whānau, hapū, or iwi should be preserved and strengthened:

(f) a child's identity (including, without limitation, his... culture, language, and religious denomination and practice) should be preserved and strengthened.

[16] Under s 6 children must be given reasonable opportunities to express views on matters affecting them and any views expressed must be taken into account.

[17] The leading case is the Supreme Court decision of *Kacem v Bashir*.²

The boys and their wishes

[18] The boys have a close and loving relationship with both parents and with each other. They have spent holidays in New Zealand and Australia with both sides of the family as well as holidaying abroad with family members.

[19] Lawyer for child spoke to the boys on three occasions and had a face-to-face meeting with them in July 2021. [Logan] chose to have a judicial interview which took place on 3 August 2021.

² *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

[20] Lawyer for the child's report of 23 July 2021 included the following statements:

10. Both boys were able, individually, to "describe" each of their parents to Counsel as they saw them. In that regard, Counsel considered them to be both insightful and thoughtful.

11. It is abundantly plain that each boy values each parent and recognises their respective parents' different strengths and weaknesses. They are at that stage of their development that they are able to see their parents not only as "parents" but also as "people".

...

15. Each boy had turned their mind to the perceived advantages and disadvantages of living in New Zealand and Australia ...

16. Not surprisingly, the boys expressed some degree of uncertainty in discussing both Australia and New Zealand ...

17. ... each boy made it clear that they did not wish to express any preference.

[21] In that report the boys were said to be coping reasonably well but having met [Logan] I have concerns about their welfare and how the conflict between their parents is affecting them. [Logan] presented as a young man with the weight of his world on his shoulders. He had not slept much the night before he met me. He said that when he was living in Oman he had often missed out on his sleep. He expressed a desire to live in New Zealand: "I just prefer New Zealand," although he was unable to say exactly why. He went on to comment that his mother was not as happy as she had been in the past and he had a concern that she did not have anyone to support her in Australia. He had become overly involved in his parents' separation. He said he had overheard a lot of adult conversations and arguments and read some of the papers. He had talked at length with his mother about the conflict. He was aware that his mother had wanted to keep the family together but "this had not worked out." He agreed that he was a "worrier". He said he definitely wished the conflict and the court case were over.

[22] [Nicholas] is less ostensibly involved in the conflict but in my view the parties have underestimated the effect that all this has been having on their sons. They need the space to be 14 and 12 year olds and deal with their own age-appropriate issues rather than being caught up in what is happening between their parents.

[23] The father suggested that I should place limited weight on the wishes expressed by [Logan] at the interview. He pointed out that he had just spent five weeks in New Zealand and there were no real reasons for his preference for New Zealand. The father ventured to suggest that if [Logan] had been in Australia when the interview took place, he could just as easily have expressed a preference for Australia.

S 5(a) safety issues

[24] The mother's lawyer submitted that:³

.. there [had] been a significant imbalance of power and control in her relationship with the Respondent especially in recent years while they lived in Oman. There was excessive pressure and manipulation used to reach the shared parenting arrangement in place. She is vulnerable and struggles with the respondent's dominating behaviour.

[25] The applicant deposed that the respondent had been psychologically abusive to her and exposed the children to his angry and abusive outbursts towards her and the children at times. A number of examples were given in evidence to illustrate this claim and I intend to refer to some, but not all, of them.

[26] There was an incident before the move to [the Asian country] (so 17 or more years ago) where the mother claims the father spat on her and poured water over her during arguments.

[27] In November 2015 (so more than five years ago) there was an argument after the mother returned from a [trip] with the result that the mother spent one or two nights sleeping away from home. Apparently the father was concerned that she had been unfaithful during the trip (which she denied). Mrs [Wells], a friend of the parties, gave evidence about this incident and went on to give evidence about an [event] in 2018 where she claimed the father was drunk, abusive towards the mother and about the children and behaving erratically. At the [event] in 2019 Mrs [Wells] says he was rude to the mother and dancing publicly and flirtatiously with the alleged third party.

³ Opening submissions for applicant dated 15 July 2021 para 41.

[28] The [Davies] gave evidence about an incident where the father was said to have reacted unreasonably on a family holiday but given this took place about the time [Nicholas] was still being breastfed it must have happened more than 10 years ago.

[29] Between February 2020 and August 2020 there was intense conflict between the parents about whether there should be a shared parenting arrangement for the boys or they should be mainly in their mother's care. Some of their arguments over this issue lasted two or three hours. There were different sleeping arrangements over this period but at times the parents shared a bed, which was unpleasant for both of them. They made recordings of each other's behaviour. Eventually the father's wishes prevailed. A shared care arrangement was signed off and he moved out.

[30] There was then conflict over whether the boys should leave Oman or not. Over this the mother's wish prevailed and there was a move from Oman to Australasia.

[31] There was conflict over Christmas Day 2020 arrangements and where the boys should have their lunch. The father's wish prevailed and they ate Christmas lunch with him. This was a very unhappy Christmas Day for [Logan].

[32] Next there was conflict over the arrangements for the boys pending the court decision. The mother's wish prevailed and the boys did not fly to Australia on 28 July 2021.

[33] There was conflict over the boys' Australian citizenship and passports, which the father eventually managed to obtain despite the mother's lack of cooperation.

[34] Most recently there has been conflict over the father's phone calls and other communications to the boys. These seem to have been mysteriously thwarted with the result that he and at times his parents were left waiting for hours before contact took place. Important connections, for example on his brother [Darryn]'s wedding day and the celebration for his birthday, simply did not happen. Underlying this difficulty was the fact that the mother did not support daily contact between the father and the boys.

[35] Certain words and phrases run throughout the mother's evidence: *intimidation, intense pressure, pressure and threats, aggression and aggressive control, abuse* and so forth. At the hearing this evidence was elevated into allegations of *narcissism* and *coercive control*. She claimed that the father had eroded her confidence and she had been unable to stand up to him.

[36] The father's response was that much of this abuse did not happen. He said in evidence:⁴

20. [Lois] has claimed that I physically intimidated her, manipulated her and verbally, psychologically and emotionally abused her but this is not true ... I will admit our relationship was not perfect and there were struggles towards the end of it but I think it is very unfair to say that I have been abusive towards her in any way.

[37] Later he added:⁵

22. ... However I think it is unfair to say I am the one regarded as "inflexible" and "domineering" because I want to move to Australia. In fact, it has been the other way around where [Lois] is the more controlling one in our relationship.

[38] The father's mother [Cecilia Frank], who knows both the parties well, supported the father's perspective and stated that:⁶

[Steven] and [Lois] are both strong-minded and will voice their opinions accordingly. They both have definite ideas about parenting and what is best for the boys. [Steven] can be very assertive when discussing issues and dealing with injustices ...

[39] She also said that:⁷

43. ... If I was to be completely honest I would say that they are equally determined and strong-willed people.

[40] There is no doubt that this was a highly competitive marriage. The parties even vied for a prime morning exercise space with the father mostly occupying it, much to the mother's chagrin.

⁴ BOE p 273.

⁵ BOE p 274.

⁶ BOE p 413.

⁷ BOE p 415.

[41] I had the opportunity of observing both parties when they gave evidence. They impressed me as having forceful personalities and being capable of being inflexible and adopting black and white positions. However it was an artificial situation. They were under pressure and most witnesses are defensive when they are being cross-examined. I regard their actions as more telling.

[42] The instances given as examples of the father being abusive towards the mother were over the course of about 19 years. Most, perhaps all, long marriages include arguments and episodes of behaviour which do not reflect particularly well on the couple. Behaviour commonly deteriorates around separation. It is possible that some of the father's behaviour as described by the mother and witnesses (which was undoubtedly selfish, emotionally unregulated or disagreeable) is being seen more negatively now that the marriage has ended.

[43] I was not persuaded on the evidence that the mother was overborne by the father. She may be deeply hurt by the end of the marriage but she is a much stronger woman than she thinks she is. Her wishes have prevailed as often if not more than the father's since the separation. After all, the boys are here in New Zealand and not in Oman or Australia right now.

[44] While she opposed a shared care arrangement it is difficult to see why she objected so strenuously and for so long when both parties had been involved in the upbringing of the boys since they were young.

[45] Some of the father's behaviour may have been prompted by his fear that he would lose his close, loving relationship with his sons and the esteem in which they held him. Separation inevitably means we see less of our children but he should not be afraid of losing his relationship with the boys.

[46] I find that s 5(a) of the Act is not engaged in this case. I do not consider it necessary to make findings about family violence. I consider the boys will be safe in their parents' care whether they are in Australia or New Zealand, or mainly in the mother's care or in the shared care of their parents.

S 5(b) parental responsibility

[47] This principle is designed to apply where there is a proposed caregiver who is not a parent or guardian. On either parent's proposal they will be the main caregiver for their sons. I do not consider 5(b) to be relevant in this case.

S 5(c) ongoing consultation and cooperation

[48] It was put to the father in cross-examination that there had been a power struggle between him and the mother. He denied it. I do not see how he could possibly do so. The parties have clearly been involved in power struggles both during the marriage and since it ended. They may have lost sight of the impact this has been having on the boys or on themselves.

[49] The marriage is over. The reality is that although we take lifelong vows when we marry it is not always possible to stay both true to our marriage vows and true to ourselves. A choice has to be made. This is not the first marriage that has ended in difficult circumstances with allegations of third-party involvement. It certainly will not be the last. The focus needs to move from adult issues such as who is to blame, where do the boys live, and what should the parenting arrangements be, so that the parents can support each other as parents. They have not been doing so thus far.

[50] I have considered which parent may be best able to do this in future but I have reached no clear conclusion. In some ways the situation is more difficult for the mother. She needs to find it in herself to put her own feelings to one side and re-affirm the boys' relationship with their father. The father is hurt and saddened by the breakup but it was his wish that the marriage ended. He also needs to re-affirm the boys' relationship with their mother.

[51] Although the separation has been divisive I heard from family and supporters of both parents and they impressed me as good people who will be able to move beyond this situation and support the parents and the boys in the future.

S 5 (d) and (e) continuity and relationship with both parents

[52] Both the parties were active in the children's lives before separation. They spent 10 months sharing the care of the boys in Oman before their move. The mother said that this did not work well but the evidence to support this claim is thin. She says she is the more emotionally able parent, particularly for [Logan] because she is his "go-to-parent." Even if this is so it does not necessarily follow that the boys would be better off spending more time in her care than with their father.

[53] Continuity supports continuation of a shared care arrangement. It is also supported by the children's lawyer. There is to be equal shared care of the children and I will outline the details shortly.

S 5 (e) the family group being preserved and strengthened

[54] The father's parents live [in Australia]. He has a sister and two brothers in Australia. His sister [Kirsty] and his brother [Wilson] live nearby. His brother [Kingsley] lives some distance away but still reasonably handy. He says that there are more cousins about the boys' age in Australia than in New Zealand. [Kingsley] has sons [Martin] and [Todd] who are aged about 16 and 14, [Kirsty] has four children aged between about nine and 14 and [Darryn] has two young adult sons.

[55] The mother's parents have passed away. She has her sister, brother-in-law and their three children. Her brother-in-law's parents have been surrogate grandparents to the children. There are also three families who have relocated from Oman to the greater Auckland area but the father queried the connection with these families. There was also a suggestion that they had become aligned with the mother and took a dim view of his behaviour.

[56] On either proposal I am confident that the boys' relationship with their wider family group will be preserved and strengthened.

S (f) children's identity

[57] This principle barely featured in this case and I am confident that the children's identity as world citizens and as Australasians will be strengthened on either parent's proposal.

Location

[58] Turning to specific location factors:

- (a) accommodation - the parents will be able to arrange accommodation in either New Zealand or Australia;
- (b) education - the boys both suffer to some degree from dyslexia. The mother proposes [two schools in Auckland] as her first choice schools with a private school as a second choice. The father proposes [a school in Australia] (which is not [details deleted] but is nearby) as his first choice. Either proposal would cater for the children's educational needs;
- (c) jobs and immigration - the parents can make arrangements for jobs and immigration in either country;
- (d) Government support – there was some evidence given about available benefits in one country as opposed to the other but the evidence was somewhat confusing. In any event it is unlikely that the parents will need to rely on state assistance;
- (e) available support - there is no support available for the father in New Zealand other than the mother's family and the Oman families and no support available for the mother in Australia other than the father's family. The difficulty cuts both ways.

Location decision

[59] Weighing these factors, my decision about where the boys should live has been made for two key reasons, which are:

- (i) the mother's state of mind; and
- (ii) [Logan]'s wishes.

[60] It was obvious during the hearing that she was devastated by the separation. She was tearful, hurt and angry. The separation had taken place some time ago but the family was living in the hothouse environment of Oman and she has not had a chance to heal. The father is currently separated from the woman he has come to care for but it is possible that they will be reunited and make a life together again in the future. If that comes to pass it will be another obstacle for her to overcome. She has rightly or wrongly the sense that she simply cannot deal with any more loss and change. Of course I have found that she is stronger than she thinks she is, and she may be able to cope with a move to Australia, but I find that she should not be asked to try. There could well be a risk to her functioning as a parent which would have a flow-on effect on the boys.

[61] There are also [Logan]'s wishes. I acknowledge the reality of the father's concern that these may have been influenced by his environment and the three happy weeks he had just spent in the heart of his mother's family. But [Logan] is not a boy, he is a young man. He is 14 years of age so not at an age where I can easily discount his wishes. My perception is that his wish was underpinned by a concern for and a protectiveness of his mother.

[62] For these reasons I consider it in the welfare and best interests of the children to make their future life in New Zealand.

Summary and orders/directions

(A) Location and parenting arrangements

[63] The boys are to reside in New Zealand in the shared care of the parties.

[64] The father's draft parenting order is adopted from para 1(a) to (c). Thereafter the mother's draft parenting order is adopted with regards to her paras 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 carrying on to 21. There are some amendments. In para 9 the numeral "3" and "each week" are deleted to provide every second day. In 21 paragraph (a) is amended to provide that neither parent shall involve the children in or permit them to overhear adult discussions.

[65] I have prepared draft parenting orders for counsel to review and take away before they are sealed. The parties and counsel are to confer on the draft parenting orders with agreed orders which follow the terms of the judgment just given to be filed no later than 5 pm, 17 August 2021.

[66] The parties are referred to 20 sessions of communication counselling under s 46G of the Act which is to commence as soon as possible.

[67] As for contact between the boys and their father until he moves to New Zealand, the mother is to support this and to ensure that it happens without fail at a time which is convenient to all. There is also to be contact on special occasions such as birthdays and so forth. (I remind her how much the boys must be missing their father and how much she would miss them if the roles were reversed and she had not seen them face-to-face for about six weeks. The boys both need to maintain their contact with their father and they need to see their mother supporting his relationship with them in this way).

(B) Schooling

[68] The parties are to confer about schools for the boys and reach agreement as soon as possible and the boys are to be enrolled and start school promptly. (They have been out of school for long enough particularly for children with issues with dyslexia).

[69] If the parties are unable to reach agreement within 28 days counsel are to file submissions no longer than 12 pages. At the same time Lawyer for child is to report any views of the boys and a decision will then be made on the papers.

(C) Costs

[70] I do not anticipate there will be any issue over inter-party costs.

A M Manuel
Family Court Judge