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

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IN THE FAMILY COURT
AT HUNTLY

I TE KŌTI WHĀNAU
KI RĀHUI PŌKEKA

FAM-2022-024-000024
[2022] NZFC 5478

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SHARON MERCER] Applicant
AND	[PIRIPI MERCER] Respondent

Hearing:	9 June 2022
Appearances:	D Bogers for the Applicant M Roots for the Respondent R Gubb as Lawyer for the Children
Judgment:	9 June 2022

ORAL JUDGMENT OF JUDGE N J GRIMES

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[1] Mrs [Sharon Mercer] and Mr [Piripi Mercer] are the parents of 15-year-old [Ginny] and 13-year-old [Della Mercer]. Mrs [Mercer] lives in Queensland, Australia and Mr [Mercer] lives in [location deleted], Waikato, New Zealand.

[2] [Ginny] and [Della] lived with Mrs [Mercer] in Queensland until they came to New Zealand for a holiday in [date deleted] 2021 and where they remain living with

Mr [Mercer]. Mrs [Mercer] seeks the girls' return to Australia. Mr [Mercer] is opposed.

The application

[3] The application is brought pursuant to the provisions in the Care of Children Act 2004 (the Act) that incorporate into New Zealand law the Hague Convention on the Civil Aspects of International Child Abduction.

[4] Section 105 provides that an application for return may be made where it is claimed that:

(a) The child is present in New Zealand.

(b) The child was removed[1] from another Contracting State in breach of an applicant's rights of custody in respect of the child.

(c) At the time of removal those rights of custody were actually being exercised by the applicant or would have been but for the removal.

(d) The child was habitually resident in the other Contracting State immediately before the removal.

[5] There has been no dispute that each of these grounds are made out so as to find jurisdiction to make an order for return of [Ginny] and [Della] to Australia.

The opposition

[6] Mr [Mercer]'s opposition to the return to Australia is for two reasons:

(a) That Mrs [Mercer] consented or later on acquiesced in the retention under s 106(1)(b)(ii); and

(b) The girls' objections to returning to Australia.

[1] "Removal" by definition encompassing "retention", s 95.

[7] The child objection is provided for in s 106(1)(d) which enables the Court to refuse to make an order for return if it is satisfied that the child objecting has obtained an age and degree of maturity at which it is appropriate to take the child's views into account and to give them weight.

[8] As is usual given the priority that is given to these types of hearings[2], the determination is by assessment of the untested affidavit evidence filed for each party and the written submissions I have received.

Some factual background

[9] Mrs [Mercer] is Australian. She was born there on [date deleted] 2017. Mr [Mercer] was born in New Zealand on [date deleted] 1988. Their relationship started in Australia in 2004 after which they married on [date deleted] 2007. Their date of separation is disputed but is either in 2014 or 2016. Both girls were born in Australia and are Australian citizens.

[10] Mr [Mercer] returned permanently to New Zealand in 2018 and the girls have travelled back to New Zealand for contact during their school holidays.

[11] Whilst return tickets were purchased for a visit to New Zealand between [dates deleted – a three-week period] 2021, Mr [Mercer] advised Mrs [Mercer] on [date deleted – four days before they were scheduled to return] 2021 that the girls would not be returning to Australia because they wished to live with him, learn their Māori whakapapa and culture. This was confirmed by the girls in messages with their mother and their maternal grandparents.

[12] Mrs [Mercer] travelled to New Zealand in July 2021 to spend time with the girls and was unable to secure their return.

[13] By September 2021, [Ginny] became upset and told her mother that she wanted to return to Australia. By October 2021 Mrs [Mercer] emailed Mr [Mercer] about this, indicating that whilst she had agreed the girls remain in New Zealand it was

[2] In accordance with s 107(1) and the purposes of the convention.

conditional upon his promise that if the girls became unhappy, they would return to her. Therefore, she sought the girls' return.

[14] Prior to this, in July 2021 Mr [Mercer] had started the process of mediation through family dispute resolution. This did not take place until December 2021 at which time the girls spoke to a child mediator. The evidence suggests that they confirmed they wished to remain in New Zealand at that time.

[15] Mediation was unsuccessful and after finally obtaining legal advice Mrs [Mercer] brought her application for the girls' return on 14 April 2022. [Ginny] then told her father that she wished to return to Australia.

[16] Mr Gubb for the first time on 11 May 2022, they did not express a view of which country they wished to live in. Rather, it was recorded that they loved both of their parents very much, their extended families, their friends in both countries and their schools.

[17] Upon the matter being set down for a hearing today Mr Gubb met with the girls again on 1 June 2022. On both occasions the meetings were with the girls separately. On this occasion both girls articulated firm views of wanting to remain in New Zealand. [Ginny] was able to express her reasons being in relation to spending time with her father, liking her school and her friends. The girls' views were put in Mr Gubb's memoranda that were filed with the Court.

[18] I met with the [Ginny] and [Della] on the morning of this hearing. Mr Gubb was present and I recorded a minute at the start of the hearing setting out the conversation and the girls' views. In summary, despite feeling pressured by their mother to return to Australia, they wished to remain in New Zealand. Both girls liked their schools, friends, being close to their many cousins and getting to know their father. [Della] in particular is enjoying learning te reo at her full Māori immersion school and learning her whakapapa from her father.

[19] Ms Bogers, counsel for Mrs [Mercer], sought an adjournment to take instructions. As a result, Ms Bogers subsequently advised the Court that Mrs [Mercer], whilst naturally upset, accepted the girls' views and wished the Court to focus on making a parenting order that provided her with contact. The parties have now worked hard on the consent memorandum I have before me.

Discussion

[20] In order to make a parenting order under s 110 of the Act I must first determine the application for return under s 109. I have had the benefit of counsel's thorough written legal submissions prior to the hearing.

[21] Having reviewed the evidence, submissions, Mr Gubb's reports and after my discussion with both girls, I am able to determine that the ground of the children's objections for return is made out.

[22] Determination of that defence is a four-step process as identified by Chisholm J in *White v Northumberland* and subsequently approved by the Court of Appeal.[3]

[23] The process is:

(a) does the child object to a return? If so

(b) has the child attained an age and degree of maturity at which it is appropriate to give weight to the child's views? If so

(c) what weight should be given to the child's views? and

(d) how should the residual statutory discretion be exercised?

[24] The residual discretion to order or decline, return in child objection cases is to be exercised mindful of the general purpose of the convention to ensure prompt return of children to states from which they have been wrongfully removed. General welfare

[3] *W v N* [2006] NZFLR 793, (2006) 25 FRNZ 963.

considerations can be taken into account but limited to the period up to when the Court, (be it foreign or domestic), could deal with the question of where the child should live.[4]

[25] I take the girls' strong preference to be of living in New Zealand. The flipside to articulating that strong preference is that they do not want to go back to Australia, ie, they object to a return. Both, and in particular [Della], want to continue their te reo and tikanga journey. Exploring their whakapapa and heritage as Māori tamariki suggested that they have not and cannot do that in Australia.

[26] There is no evidence before me to suggest the girls' maturity was other than within the norms of their chronological age. Both girls spoke openly and candidly to their lawyer and myself in a considered and articulate fashion. I met with the girls separately ensuring that [Della] as the younger of the two siblings could have her own voice. She most certainly did.

[27] The girls had considered their lives in both countries. In both countries they have a parent they love, extended family, friends and no adverse child experience they want to forget. Against that background both could articulate why they reject Australia in favour of New Zealand, namely, to really get to know their father and heritage overlaid by now having had 13 months in New Zealand where they have forged friendships and stability at schools that they do not want to give up.

[28] [Della] in particular has barely changed her view since coming to New Zealand over 12 months ago. [Ginny] knows this and reported that to me as did [Della]. [Ginny] on the other hand accepts that her view has at times changed but is firm now.

[29] Whilst Mrs [Mercer] has been worried that [Ginny]'s view is influenced, especially now that [Ginny] has freedom of living in a sleepout at her paternal grandmother's home, my discussions with the girls suggest [Ginny] is at her paternal grandmother's for no other reason than to have independence and some space. As I have already recorded in my earlier minute, being at Nan's home is not a soft option.

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[4] *White v Northumberland* [2006] NZFLR 1105 (CA) at [54] and [55].

Furthermore, the girls as interviewed separately, both confirmed any influence that they have felt has come from their maternal family.

[30] This combination of factors satisfies me that given the girls' ages and degree of maturity, their views should be given considerable weight.

[31] Policy considerations weigh in favour of exercise of the discretion to order return, however given my findings in relation to the weight given to the girls' views, I exercise my discretion to decline to order their return to Australia.

Result

[32] Mrs [Mercer]'s application for an order to return is dismissed.

[33] By consent, I make final parenting orders as sought under s 109 of the Care of Children Act in the terms of the draft orders presented to me. Ms Bogers' advised the draft has been seen and confirmed by her client Mrs [Mercer] who is in Australia.

Other matters

[34] I record that hearing this decision this afternoon has been [Ginny], [Della] and their father.

[35] I also record, given that Mrs [Mercer] is not here, that I applaud her for making what has been a very difficult decision. However, by working together with Mr [Mercer] I hope that this is the start of a new journey for them as the parents of two gorgeous girls. They need to do better in their communication about the girls so that the rest of the girls' childhood is free from parental conflict. I trust that they will now do this for their children. They have settled the arrangements, they know what these are, they now can get on and talk about the other matters for these girls, including their schooling and how they are getting on in life.

[36] I thank [Ginny] and [Della] for their candid views today. That has most certainly helped their parents and I wish them all the very best.

[37] Finally, my thanks to counsel for their assistance and the speedy work they have needed to do to get this matter ready for hearing today.

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Judge NJ Grimes
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 19/06/2022