

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/](https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/)**

**IN THE FAMILY COURT
AT ROTORUA**

**I TE KŌTI WHĀNAU
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE**

**FAM-2022-063-000001
[2022] NZFC 3352**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[JAMES PAARUA] Applicant
AND	[NGAIO RUIHA] Respondent

Hearing: 24 March 2022

Appearances: W Swanson for the Applicant
M James on behalf of B Pereeti for the Respondent
M Bodde-Phillips as Lawyer for Child

Judgment: 19 April 2022

RESERVED DECISION OF JUDGE M BROEK

[1] [Ngaio Ruiha] (“[Ngaio]”) and [James Paarua] (“[James]”) are from Rotorua but met in Australia, where their 22-month-old daughter [Manaia Paarua-Ruiha] (“[Manaia]”) was born, on [date deleted] 2020. They were living together in [Australia] at the time of her birth and shared her care until early 2021 when [James] returned to Rotorua.

[2] A few months after his return, [Ngaio] and [Manaia] followed suit, according to [Ngaio], to co-parent with [James], whereas he perceived her actions as an attempt at reconciliation. In Australia and prior to her arrival in Rotorua, [Ngaio] had formed an online relationship with [Noel Triggs] (“[Noel]”) who lives in Rotorua, who she met in person for the first time upon her return. [James] was aware of their relationship prior to her arrival, which he has struggled with.

[3] Irrespective of their intentions regarding the possibility of resuming a relationship, they cohabitated for about eight to nine months in separate cabins at the property of [James]’ sister [Āwhina Paarua] (“[Āwhina]”) who was unaware of [Ngaio]’s relationship with [Noel].

[4] By December 2021, their living arrangements had become untenable for [Ngaio] who cited [James]’ alcohol use, family violence and unsatisfactory parenting as the reasons. [James] denies the latter criticism, which was often a feature of arguments between them. The breakdown of their arrangements led to [Ngaio] deciding to move out with [Manaia], and to return to [Australia], to live with [Noel]. She was transparent with [James] about her decision and was satisfied he had agreed to [Manaia] relocating, as she had proposed.

[5] While [James] acknowledges he initially agreed to the relocation, he says his agreement did not truly reflect his wishes, as it was premised on a misunderstanding of his legal rights based on conversations with [Ngaio]. He erroneously believed he could do nothing to prevent it. Upon learning his legal rights, he took urgent action and obtained orders preventing [Manaia]’s relocation out of the Rotorua District and New Zealand.

[6] [Ngaio] is currently staying with her extended whānau in Rotorua which she says is only temporary and due to the unavailability of alternate suitable housing. She still wishes to return to [Australia], and with urgency, as a career opportunity will soon expire.

[7] [Ngaio] proposes that if [Manaia] is permitted to relocate, she should have face-to-face contact with [James], in New Zealand, for the entirety of each school term holiday period, being two consecutive weeks, three times annually, as well as three consecutive weeks during summer holidays. While in Australia, there could be video calling, three times weekly.

Issues

[8] The developments I have outlined means I must determine the following issues:

- (a) Whether it is in [Manaia]’s welfare and best interests to relocate to [Australia] with [Ngaio],
- (b) If I permit [Manaia]’s relocation, her contact arrangements with [James],
- (c) Whether the orders preventing [Manaia]’s removal from Rotorua and New Zealand should be discharged.

The law

[9] If a child’s guardians cannot agree about a guardianship decision, they may seek a direction from the court on the issue. ¹ The Court’s direction must be guided by the dual purposes of the Act which are to; promote children’s welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care; and recognise children’s rights ².

¹ Section 46R – Care of Children Act 2004.

² Section 3.

[10] It must also reflect the paramountcy principle which requires that the child's welfare and best interests are the first and paramount consideration.³ The focus is on what is best for the child, not for either of their parents. This necessitates an individualised assessment, having regard to the child's particular circumstances, their needs and how they will best be met.

[11] Section 4 also requires that decisions affecting a child are made and implemented within that child's sense of time and clearly expresses that the court is not prevented from taking any other matters considered relevant into account.

[12] The Court must consider ss 5 and 6 of the Act. Section 5 contains six non-exclusive principles which must be taken into account when determining a child's welfare and best interests. In terms of approach, the Court must identify those principles that are relevant and those which are irrelevant and in doing so, indicate the weighting given to those considered to be relevant while observing the mandatory nature of s 5(a).

[13] Section 5(a) requires that a child's safety is afforded primacy over the other principles which are not mandatory and are expressed as ideals. I set out those principles in summary; children must be protected from all forms of violence,⁴ a child's parents should be primarily responsible for their care, development and upbringing⁵ and consult and co-operate about those issues,⁶ a child should have continuity in their care, development and upbringing,⁷ a child should continue to have a relationship with their parents, and their relationship with their family group, whānau, hapū or iwi should be preserved and strengthened as should, their identity.⁸

[14] There is no presumption of what the welfare and best interests of the child require or the influence the s 5 principles may have on that question. And, the onus of

³ Section 4.

⁴ Section 5(a).

⁵ Section 5(b).

⁶ Section 5(c).

⁷ Section 5(d).

⁸ Section 5(e) and (f).

proof does not rest with either party.⁹ As Priestley J held in *Brown v Argyle* there can be no formulaic approach.¹⁰

[15] *Kacem v Bashir* endorsed the decision in *D v S*,¹¹ in which Richardson J made a number of helpful comments, including:

- (a) While the child's welfare is not the only consideration, and freedom of movement is an important value in a mobile society, the child's welfare is the first and paramount consideration.
- (b) The emphasis on parental responsibilities for the welfare of a child is wholly consistent with the relevant provisions of UNCROC.
- (c) All aspects of welfare must be taken into account. It is necessarily a predictive assessment taking into account all relevant factors. It is not a reward for past behaviour.
- (d) The choice of residence and relocation may be affected by the nature and duration of the existing care arrangement and the greater degree of change proposed may require greater weight to be accorded to the status quo.

[16] Section 6 requires that any views expressed by the child must be taken into account, although their views are not determinative of the issues, as ultimately the decision is for the court to make. The amount of weight placed on a child's views will vary depending on their age, maturity, the extent to which they are informed about the issues in the proceedings, and whether there has been any undue influence on those views.

⁹ *Kacem v Bashir* [2010] NZCS 112, para [18].

¹⁰ *Brown v Argyll* 2006 26 FRNZ 383 (Priestley J) or [2006] NZFLR 705.

¹¹ *D v S* [2002] NZFLR 116 (CA), (2001) 21 FRNZ 331 (CA) at [30]-[38].

[17] The Court's inquiry into relocation matters is not confined to those considerations, which was affirmed in the High Court decision of *S v O*.¹² In that case a range of other relevant factors, bespoke to relocation disputes, were identified:

- (a) the relocating parent's capacity to value the input of the other parent, and to facilitate and encourage contact by the other person;
- (b) the non-moving parent's capacity to demonstrate continued interest in the child after relocation;
- (c) the extent and focus of the conflict between the parents, either underlying or resulting from a decision to relocate;
- (d) the practical consequences of relocation (transport, costs accommodation) and of refusing relocation (financial and employment consequences for the parents);
- (e) the distance between the two parents' homes currently and post-relocation;
- (f) the impact of granting (or declining) relocation on the child's family and social support networks;
- (g) cultural and spiritual considerations;
- (h) the child's previous living arrangements (e.g. number of previous moves) and the suggested new living arrangements (i.e. whether the child has lived there before);
- (i) the merit and reasonableness of the parent's wish to relocate;
- (j) the emotional wellbeing or psychological welfare of a parent;

¹² *S v O (Relocation)* [2006] NZFLR 1 (HC), (2005) 25 FRNZ 259 (HC).

- (k) the nature and quality of the child’s relationship with each parent and the extent to which that relationship maybe affected by relocation;
- (l) the wishes and needs of the child; and
- (m) the impact on the child of granting or declining relocation.

[18] At [26] of the High Court decision of *S v L*¹³ Harrison J affirmed the principles to be applied:

“The inquiry will be multifaceted, but the factors to be weighed in the balance are only those which are actually relevant to the particular circumstances. Among those which have been authoritatively recognised are that the decision of the custodial parent on where to live is an important incident of a day to day parenting order; the nature of the relationship between the child and the contact parent; and the closer the latter relationship, and the more dependent the child is upon it for her emotional wellbeing and development, the more likely will be an injury resulting from removal. The reason for the move is important. So, too, is its physical distance. The child’s views are relevant where they can be ascertained (*Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA) per McKay J at 500-501 (see also s 6)).”

[Manaia]’s circumstances

[19] It is prudent then to first consider [Manaia]’s current circumstances.¹⁴ While the parties were living at [Āwhina]’s property, [Manaia] was able to spend time with both of her parents daily, which included active care and support from [Āwhina]. Those were her arrangements from the time of her arrival in Rotorua, and which lasted for some eight to nine months, when [Ngaio] moved out in January 2022.

[20] Currently, [Ngaio] and [Manaia] are staying with [Ngaio]’s maternal aunt [Miriam Teira] in Rotorua. Also residing in their household are Ms [Teira]’s daughter and two grandchildren. [James] continues to live in a cabin at [Āwhina]’s property.

[21] [Manaia] is in [Ngaio]’s day to day care and has contact with [James] every second weekend from after day care on Friday until late Sunday afternoon. From time

¹³ *S v L (Relocation)*[2008] NZFLR 237 (HC), (2007) 26 FRNZ 684 (HC).

¹⁴ Section 4 Ibid.

to time there is additional contact for a few hours by agreement. These arrangements have been in place for the last three months.

[22] Each weekday, [Manaia] attends [day care] which entails her spending extended periods of time with [Āwhina], who works there as an Early Childhood Educator. [Āwhina] continues to provide support by transporting [Manaia] to and from day care, as [Ngaio] does not hold a driver's licence.

[23] [Ngaio]'s unchallenged evidence is that contact between [Manaia] and her extended maternal whānau in [Australia], which incorporates her maternal grandmother and uncle, has been maintained by frequent video calls. [Noel] is also a familiar person to [Manaia], as a consequence of [Ngaio]'s relationship with him.

Welfare concerns

[24] [Ngaio] harbours concerns about the quality of [James]' parenting, alleging physical neglect of her on a specific day through his failure to feed her the entire day, which contributed to [Ngaio]'s request for [Āwhina] to supervise his contact.

[25] The neglect allegation is refuted by both [James] and [Āwhina], however, [James] did not offer his account of what had occurred on that day. Rather, he refers to [Ngaio]'s subsequently contradictory actions, twice in February, when she requested he look after [Manaia] without requiring supervision. When those allegations were put to [Ngaio], she could only remember one request which [James] had obliged, and conceded she was unaware of whether he was supervised on that occasion.

[26] Whereas, [Āwhina] had recalled the incidents of that day in some detail. She says [James] had been shopping with [Manaia] and upon his return in the early afternoon, had told her [Manaia] had drunk a drink but she had refused food. At some stage after that she had heard a conversation between [James] and [Ngaio] when [James] had explained that [Manaia]'s grizzly mood could be attributable to her being full of drink and that she had refused the offer of food.

[27] [Āwhina]'s account went unchallenged as did [James]' evidence. It was clear that [Ngaio] had no direct knowledge of the events which had transpired that day as she had not been present at any material time. Therefore, I accept [Āwhina] and [James]' combined evidence that on the day concerned, [Manaia] had consumed a drink, had been offered food and refused it and that this had been communicated to [Ngaio]. Those findings do not satisfy me that [Manaia]'s physical needs had been neglected.

[28] In a broader sense, [Ngaio] also expresses concerns about [James]' alcohol consumption and generally alleges that he uses drugs. In her oral evidence, [Āwhina] accepted that [James]' drinking had been problematic in the earlier stages of their cohabitation in Rotorua, however, she said it has since abated and is less frequent.

[29] [James] accepts he drinks but not when [Manaia] is in his care. Although he acknowledged his drinking had been problematic when he had first returned to Rotorua, he denied recent consumption. He was unable to recall when he had last used cannabis, but he expressed certainty that a three-month hair follicle drug test would be clean and was willing to undertake one.

[30] My assessment of those acknowledgements and a point I agree with [Ngaio] about, is that there is a general basis for concern about [James]' alcohol consumption, (and possibly cannabis use), which was a feature in the family harm incidents, which I will say more about in the safety assessment which follows.

[31] [Ngaio] had in her first affidavit, expressed concerns about [James]' handling of [Manaia] on Christmas Day 2020, in Australia. According to her, [James] had dropped [Manaia] headfirst onto the bed while he was trying to grab his phone. Her affidavit does not set out the height she was dropped from, but she does add that [Manaia] was not injured. [James] had not responded to this issue in his affidavit evidence and it was not raised in cross examination. If it did occur, then it appears it was an accident and it is fortunate that [Manaia] was not injured.

Section 5 principles

[32] I then turn to consider the s 5 principles, all of which, except for s 5(f) have relevance, but to varying degrees and for varying reasons which I will discuss in order of their appearance in the section.

Section 5(a) - A child should be protected from all forms of family violence

[33] Principle 5 (a) has relevance because there were incidents of family violence between [Ngaio] and [James] which [Manaia] was exposed to. While neither party gave detailed accounts about the incidents in their affidavits, Ms Bodde-Phillips was in possession of the family harm records which the parties agreed could be admitted into evidence.¹⁵

[34] They reveal there had been two police callouts, one in May 2021 and the other in June 2021. In May, [Ngaio] had wanted to go out with her friends in the expectation [Āwhina] would look after [Manaia], but [James] had arrived home intoxicated and wanted to look after her instead. [James] had become upset by comments made by [Āwhina] and his mother, he then punched holes in the walls and threw items around which resulted in [Āwhina] calling the police. [Ngaio] had then supported [James] to calm down and he was issued a two-day Police Safety Order. He was noted to be co-operative with the police. The records also state that while [Āwhina] had witnessed the incident and he had verbally abused her; she had not felt threatened by him. [James] did not challenge the accuracy of those records or [Ngaio]'s affidavit evidence about them.

[35] On reviewing the evidence, I could not find any suggestion [Manaia] had been directly exposed to the incident. The police records indicate she was being looked after by [Āwhina] and that the conflict had occurred away from her house, either in [Ngaio]'s or [James]' cabin, where [James] had caused the damage.

[36] On the other occasion, [Ngaio] had called the Police because [James] had slammed the sliding door shut, which had scared [Manaia]. In response, [Ngaio] had

¹⁵ pursuant to s 9 of the Evidence Act 2006.

rushed at [James] and pushed him. That incident had been preceded by an argument about the care arrangements in the context of [James] struggling to accept that [Ngaio] was in another relationship. At that time, [James] was experiencing a period of low mental health for which he was taking anti-depressant medication.

[37] The Police spoke to both [Ngaio] and [James], but the incident did not result in any charges being laid. [James] was assessed as being the aggressor, and he expressed a willingness to engage in an anger management programme and counselling at the time.

[38] Again, [James] did not challenge the accuracy of the records or [Ngaio]'s account which leads me to find that [James] and [Ngaio] had engaged in a heated exchange, that [James] had slammed the sliding door in anger, which in turn scared [Manaia]. Their combined and [James]' individual actions, amounted to psychological abuse of [Manaia].

[39] Otherwise generally, it was [Ngaio]'s evidence that there were many incidents of verbal conflict between herself and [James] which [Manaia] was exposed to.

[40] [James] had neither expressly rejected nor accepted [Ngaio]'s allegations. I infer from his silence and the evidence of his attendance at anger management and parenting programmes, that he accepted his behaviour needed to change. Under cross-examination, he was able to articulate some of the insights he had gained from the anger management programme, including strategies to assist with his emotional regulation.

[41] I find that, generally, both of the parties have caused [Manaia] psychological harm through her exposure to their heated exchanges which must have been frightening for her at the times of their occurrences. [James] has been responsible to a greater extent, primarily due to his behaviour in June.

[42] On [James]' behalf, it was submitted that his behaviour needs to be considered against a backdrop of mixed messages from [Ngaio] about the status of their relationship, who, denied that contention, and according to her, she had made it clear

there was no prospect of reconciliation. However, under cross-examination she accepted she had sent two text messages to [James] asking him to “hop into bed with her” and “come to sleep with me”. The text messages were unequivocal as to her intentions and I accept they did amount to mixed messages.

[43] It is difficult to assess if there has been any enduring impact on [Manaia] of the psychological harm the parties have exposed her to because of her young age and inability to articulate her views. Indicative of there being none, was the unified evidence of [Ngaio], [James] and [Āwhina], that she is a happy, thriving and engaging toddler.

[44] Since [Ngaio] and [James] have been living separately, contact between them has largely ceased, spelling the end of any conflict. The clear evidential delineation leads me to conclude that their conflict was situational and symptomatic of the decline of their relationship. That, together with [James]’ satisfactory completion of the two programmes, gives me confidence that [Manaia]’s psychological safety can be adequately addressed with conditions on the parenting order.

[45] An issue I was uncertain about and as it transpired, [Ngaio] was also, was whether [James]’ contact was being supervised by [Āwhina]. The confusion arose because [Ngaio] had requested this of [Āwhina] and had understood her to have agreed. Yet, the interim order does not reflect this and neither did her contact proposal, if the relocation was permitted. [Ngaio] accepted that [James] had enjoyed short periods of unsupervised contact, which he elaborated had been up to a half a days’ duration sometimes, which [Āwhina] confirmed.

[46] In her oral evidence, [Ngaio] requested that [Āwhina] continues to play a role in overseeing and monitoring [James]’ care of [Manaia]. Any confusion about whether there was a need for supervision or support was readily resolved, as both [James] and [Āwhina] agreed to [Āwhina] continuing to provide support. [Āwhina] thought her ongoing support was needed to guide [James] in developing his parenting skills and relationship with [Manaia].

[47] This principle is not directly relevant, rather, its relevance is as to the form of [James]'s contact with [Manaia].

Section 5(c) - A child's parents should consult and co-operate about their care, development and upbringing

[48] A strongly contested issue and one which received a good deal of attention in both the affidavit evidence and under cross-examination, was whether [Ngaio]'s consultation and communication with [James] about the proposed relocation was conducted in good faith. Her evidence was that [James] had agreed to [Manaia] relocating back to [Australia] on more than one occasion, which he had consistently affirmed until 31 December. Acting in reliance on his assurances, she then proceeded to make plans to leave, and secured accommodation and employment in [Australia].

[49] [James] acknowledged that initially he consented to [Manaia] relocating, explaining he had understood his situation to be a hopeless case. He asserted [Ngaio] had advised him the relocation was already settled and he had no legal standing because [Manaia]'s birth certificate does not bear his name. He denies entering into any communication after 31 December which might have indicated his continued agreement to the relocation. He does, however, accept he inquired about [Ngaio]'s ability to fund the relocation.

[50] While the evidence diverges about whether [James] consented after that date, it is unnecessary for me to resolve the factual dispute or the parties' respective interpretations of their communication, because the legal steps [James] took subsequently, by attaining orders preventing [Manaia]'s removal from Rotorua and New Zealand, made his position unambiguous.

[51] Section 5(c) is clearly directly relevant, but if there was any element of bad faith in [Ngaio]'s communication with [James]' as has been alleged, any resultant prejudice caused to him was subsequently addressed by the orders made.

[52] At present, communication between [Ngaio] and [James] is poor, illustrated by her decision to block both [James] and [Āwhina] from contacting her on social media.

Section 5(b), (d) and (e) - A child should have continuity in their care, development and upbringing which should be the primary responsibility of their parents, and the child should continue to have a relationship with their parents. Relationships with their family group, whānau, hapū or iwi should be preserved and strengthened.

[53] Section 5(b), (d) and (e) are all directly relevant for [Manaia], and insofar as they relate to her parents, they overlap so I will discuss all three principles in combination.

[54] Assessing [Manaia]'s continuity of care is not a simple exercise, as her parents' relationship has been on and off, and together and separately, they have both lived in Australia and New Zealand and so a close examination of her arrangements is essential.

[55] For the first eight months of her life, she was jointly cared for by her parents in [Australia]. She then encountered disruption to those arrangements due to [James]' departure for Rotorua. Fortunately, that disruption was short-lived, because three months after that at most, [Ngaio] and [Manaia] relocated to Rotorua. Then, co-parenting resumed, which endured for somewhere between eight to nine months, ending when [Ngaio] moved out in early January 2022. Since then and for the last three months at least, [Manaia] has been in [Ngaio]'s care and has had contact with [James] every second weekend, for most of the weekend.

[56] The time [Manaia] has spent in Rotorua has resulted in her developing a relationship with both [James], and [Āwhina], from both her living arrangements and attendance at day care. The existence of a close relationship with both [James] and [Āwhina], is accepted by [Ngaio]. [Āwhina] has also demonstrated strong support of the parties and [Manaia] through the provision of accommodation, transporting [Manaia] to and from day care and support of [James] as he finds his feet as a father. Their practical and financial support is something [Ngaio] had hoped to gain by relocating to Rotorua.

[57] [Manaia] has attended [day care] for the last five months. [Āwhina]'s unchallenged evidence was that she has formed trusting relationships with other staff members and is very settled there.

[58] If I step back and take a global view of [Manaia]'s care arrangements, [Ngaio] has been her constant caregiver and to a lesser but still significant extent, [James] has also been a constant, for most of her life except for the three-month interruption when he returned to Rotorua. It is undisputed, as between [Ngaio] and [James], that she is [Manaia]'s main caregiver and his relationship with [Manaia] is developing.

[59] The issue of continuity of place has little relevance for [Manaia], a point [Ngaio]'s counsel readily accepted. At her age and stage of development, it is highly unlikely she has any concept of place, other than her immediate home environments.

[60] [Manaia]'s current care and contact arrangements ensure she continues to have a relationship with both of her parents, as well as providing continuity of care and development.

[61] [Āwhina] also gave evidence about [Manaia] enjoying relationships with local paternal whānau, including cousins and children. Those relationships will be preserved and strengthened if [Manaia] remains in Rotorua, but in recognising the importance of those relationships, I must also acknowledge they are secondary to her most important relationships, those with her parents.

[62] [Manaia] has a maternal grandmother, and aunts and uncles in Australia who are familiar to her through her involvement with them prior to relocating to Rotorua, and via video calls while they have been in Rotorua. I do not doubt that if [Manaia] is permitted to relocate, those relationships will strengthen, as it is [Ngaio]'s intention to live with her bother and re-engage with them. I accept there will likely be benefit to [Manaia] from her increased contact with those whānau members, however, as is the case with her extended paternal whanau, they are secondary to her parental relationships.

[63] When I evaluate the evidence in the context of the three principles, I conclude that [Manaia] has been primarily cared for by both of her parents for the majority of her life, and in doing so, I appreciate that [Ngaio] has undoubtedly provided greater care and has been her main caregiver.

[64] [Manaia]’s continuity of care has been with both of her parents, even though her care has been provided in different countries and in different households. Her arrangements have been and are currently consistent with principles 5(b) and (d).

[65] Section 5(e) is also met with regard to extended whanau, although to a lesser extent with [Manaia]’s maternal whanau, which is an inevitable consequence of the geographical distance.

[Manaia] (22 months)

[66] [Manaia] is represented by Ms Bodde-Phillips who filed a report in January 2022 noting she had no health issues and was happy at the time of her visit. [Ngaio] did not report any developmental concerns, other than the issues before the Court and accommodation concerns.

[67] [Manaia] is too young to express any views.

Other relevant factors

The merit and reasonableness of the parent’s wish to relocate

[68] [Ngaio] cited a need to feel safe from [James]’ alcohol abuse and violence as the drivers for her decision to move out of [Āwhina]’s property, and to relocate, together with the pull factors which she sees are a better lifestyle and employment opportunities in [Australia], which would result in greater financial provision for her and therefore [Manaia]. She also claims that [Manaia] will benefit from quality childcare, education and strong whānau support from her immediate whānau identified as her mother, two sisters and two brothers, with whom [Manaia] has a bond.

[69] [Ngaio]'s reasons for moving from [Āwhina]'s property are understandable and have benefitted [Manaia]. Other than adducing a letter from her prospective employer confirming the offer of employment and her salary level, [Ngaio] did not adduce any independent evidence to support her claims about the life [Manaia] would lead in [Australia].

The distance between the two parties' homes currently and post-relocation

[70] Both parties currently live in Rotorua, at 15 – 20 minutes from each other by car.

[71] [Australia] is a 3 ½ hour flight from all major cities in New Zealand. The closest international airport to Rotorua is Auckland and the one which would be utilised if [Manaia] was permitted to relocate, which is just under a three-hour drive from Rotorua.

The nature and quality of the child's relationship with each parent and the extent to which that relationship may be affected by the relocation

[72] [James] works full-time as [occupation deleted] in Rotorua. He explained he had returned to New Zealand as he had been unable to secure work in Australia, and he was concerned about homelessness, as New Zealand citizens are ineligible for state support in Australia. He has no plans to return to Australia to live and has lost touch with his cousin with whom he had contemplated living with on the Gold Coast, if the relocation was permitted. Those comments, he explained, had been made at the time he believed he had no right to prevent the relocation.

[73] [Ngaio] is not proposing to relocate without [Manaia], therefore, of the parties, it is only [James]' relationship with [Manaia] which will be affected by the relocation. There was no dispute that [Ngaio] is [Manaia]'s main caregiver, and neither was there any criticism levelled at her about the quality of her relationship with, or parenting of, [Manaia].

[74] Limited evidence had been adduced about the quality of the relationship between [James] and [Manaia], and [Ngaio] was unable to comment, as she has no direct contact with [James] and has not had an opportunity to observe any recent interactions.

[75] Summarising [James]' oral evidence about [Manaia]; - he described her face lighting up when she sees him, they both enjoy each other's company, and he enjoys cooking for her. He encourages her to ride her bike, they play with the ball, her dart board, blocks and do puzzles together.

[76] I asked [Āwhina] about [Manaia]'s reaction when she sees [James] at the commencement of a contact period and her unchallenged evidence was this:

A Oh she goes absolutely ballistic trying to get out of her car seat. We get her out and she just goes running up to her father, snuggles into him and just sort of, holds onto him for a little bit before she allows anybody else to, like interact with her.

Q Right. How does he react?

A Oh he just absolutely loves it. Just runs up, well, waits for her to go running to him, picks her up and just, yeah, gives her a really big hug and speaks to her and says hello and whatnot and – yeah, they just have their little moment.

[77] [Āwhina] also described [Manaia]'s routine when [James] exercises contact, which, according to her, involves him taking responsibility for all aspects of her care.

[78] [Ngaio]'s contact proposal if [Manaia] is permitted to relocate, is for two consecutive weeks each school term holiday period, three times annually, as well as three consecutive weeks during summer holidays, all in New Zealand. In its totality, this is a generous proposal and amounts to a substantial amount of time, being some nine weeks annually. She also proposes the parties share the travel costs equally.

[79] The proposal is a very different configuration to [Manaia]'s current arrangements which provide for greater frequency of care by [James] although for significantly lesser periods of time. The time in between contact periods is eleven days, whereas with [Ngaio]'s proposal there will be gaps of some ten weeks, which a

very long time for a child of her age. [Ngaio]'s oral evidence about this issue discredited her affidavit evidence that her proposal would meet [Manaia]'s needs. Critically, her evidence was this:

“When we first moved back to New Zealand I felt there was a very big disconnection, even though they had been talking on the phone while we over in Australia, I could see that there was disconnection between them two, and I wanted for that bond to, you know, reconnect, get stronger....”

[80] On my further inquiry, [Ngaio] confirmed that the disconnect had occurred as a result of a gap of some three months' contact, a relatively similar gap in face to face contact, as there is with her contact proposal. There were also the following exchanges with [Ngaio] under cross-examination, and in answer to my questions:

Q Just picking up on the issue about disconnect. You had an extreme concern about [Manaia] and the disconnect with her father.

A Yes.

Q Do you accept that in relocating back to Australia you're creating the problem again?

A I could yeah, it could be a possibility.

.....

QWhy do you think it is important for there to be midweek contact?

A. I feel like two weeks is quite a far distance between seeing him, living in the same town.

[81] [Ngaio]'s evidence only affirmed the view I had reached, that for [Manaia]'s psychological needs to be continuously met and her relationship with [James], preserved and strengthened, she needs to experience frequent contact with him, in an arrangement much like the present contact arrangements, which [James] would like to increase over time, and which cannot occur from afar.

[82] The other aspect of [Ngaio]'s contact proposal was video calling, offered three times weekly in between any face to face contact. Video calls are no substitute for direct contact, a point [Ngaio] had already conceded. I therefore, reject her contention that her contact proposal will meet [Manaia]'s needs, which I treat as a hollow assertion, as it is directly in conflict with her own evidence.

The impact of granting (or declining) relocation on the child's family and social support networks

[83] It is submitted that [Ngaio] seeks the benefit of support from maternal whanau in Australia. The problem with that submission, is that there were pronounced inconsistencies in [Ngaio]'s evidence about the amount of support she had received from them and the quality of those relationships. I invited her to comment on the family violence records which stated; *“things had not been going well and the [Paarua] family offered to pay for [Ngaio] and [Manaia] to return and she took their offer.”*

[84] [Ngaio] confirmed she had made those statements and they were an accurate record of what she had said to the Police. She elaborated that her comments were narrow in scope, relating to a lack of support only on [Manaia]'s birthday, that there had been no fallout, and that things had not been going well for her at the time. I found it quite implausible that she would relocate abroad, because of dissatisfaction with support on one day only.

[85] I asked questions of her about those statements and the amount of support available to her in Australia, in response to which she gave numerous vague answers. She explained that being a single mother and not having support from [James] had been stressful, and also added that [James] and [Āwhina] had threatened to cease contact with [Manaia] unless she returned to New Zealand, and that had been a factor in her moving here.

[86] The alleged threat was not in her affidavit evidence. The allegation was put to [Āwhina], who denied exerting pressure but did accept suggesting it and she had recalled that during a video call with [Ngaio], [Ngaio] had alluded to an inability to cope, was feeling let down and did not have support. That led to [Āwhina] paying for her flights to New Zealand.

[87] Those evidential inconsistencies could have been overcome by [Ngaio], had any of her whānau given evidence about the support they could and would offer her and [Manaia] in future, but they had not tendered any evidence.

[88] It was [Ngaio]'s evidence that she had explored alternative accommodation options in Rotorua because she can only stay with her aunt [Miriam] temporarily. She had also explored the possibility of putting a cabin on the backyard of [Noel]'s property, but that was not agreed to. If she is placed on the waiting list for public housing, nothing would materialise for at least three years. As there is a lack of available state housing and she could not secure another suitable place, she opined she would need to utilise emergency accommodation, which is available immediately, if required. She expressed apprehension for her and [Manaia]'s safety about emergency accommodation, as she understands it is synonymous with gangs, drugs and violence. She had not inspected any available accommodation. In the absence of immediate accommodation options, her focus turned to [Australia].

[89] [Ngaio] did not give a specific time limit for the time she is able to stay with her aunt. There was, however, a letter purportedly signed by her aunt which had been exhibited to her affidavit. The letter is hearsay and therefore it is inadmissible. I am able to make that determination because it was abundantly clear to all of the hearing participants that [Ngaio]'s aunt was available to give evidence as she had been clearly visible in the background, albeit briefly, as [Ngaio] gave evidence. I do not consider there would have been any undue expense or delay if her aunt had been required as a witness. Therefore, I disregard its contents.¹⁶

[90] The difficulty I have, is that I only have [Ngaio]'s assertions about the scarcity of suitable accommodation options in Rotorua. The absence of corroborating evidence has troubled me, because other aspects of [Ngaio]'s evidence were unreliable and in conflict.

[91] [Ngaio]'s oral evidence was that she had not explored the possibility of any local employment or educational opportunities, however she was excited about the employment opportunity she has been offered as a trainee marketing executive for

¹⁶ Evidence Act 2006, s 18 provides; – a hearsay statement is admissible in any proceeding if—(a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and (b) either—the maker of the statement is unavailable as a witness; or (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

three years, commencing in April with an annual salary of \$50,832.60 (Australian dollars).

[92] In New Zealand, [Ngaio] is entitled to state support which will meet her financial needs, pending her ability to secure employment. [Noel] has not relocated as had been planned and remains living and working in Rotorua. [Ngaio] claims she has no friends in Rotorua, but again, that is in conflict with the family harm records of May 2021, which state - “[Ngaio] wanted to go out with her friends and [James] sister was to look after their baby girl.”

[93] I have already discussed the likely impact on [Manaia]’s relationship with [James], [Āwhina] and his extended whanau if the relocation is permitted or declined.

The practical consequences of relocation (transport, costs accommodation) and of refusing relocation (financial and employment consequences for the parents)

[94] It quickly became apparent that [Ngaio] had not seriously thought about the practical aspects or financial ramifications of her contact proposal. She had not adduced any evidence about the estimated costs of the flights she had proposed, or her ability to meet half of the costs, as proposed. While answering my questions about these issues, she assessed that her share of the annual flight costs would be about \$600 return, \$2,500 annually, and she appeared to be searching the information on the internet. Those costs did not factor in other sundry expenses such as food, transport to and from Auckland or accommodation, if necessary, although she was confident her aunt would assist, but as I observed earlier, there was no evidence from her aunt.

[95] As for the execution of her contact proposal, she proposed she fly with [Manaia] at the commencement of the contact period and that [James] fly back with her at the conclusion. I accept that it is entirely possible for her to deliver [Manaia] to [James]’ care during a weekend, if necessary, because of her work commitments. But, what if [Manaia] resists the handover, which is a real possibility if there has been a gap in contact. If that scenario eventuated, [Ngaio] might be required to stay in Rotorua longer than anticipated to resettle [Manaia]. [Ngaio] did not appear to have

contemplated this as she had not consulted her future employer about the ability to take time off if needed, for travel to New Zealand.

[96] In oral evidence, [Ngaio] estimated her weekly costs would be \$500 (\$A). She was uncertain about her exact weekly income, which she estimated would be \$1,187 (\$A) however I calculated it would be \$938 (\$A). I suspect the difference between the two is that [Ngaio]'s figure was the gross amount. Using the net amount, she would have a surplus of \$438 (\$A) weekly.

[97] That exchange left me with a degree of uncertainty about whether the contact proposed was financially feasible for her, and whether it was an earnest proposal.

[98] Another uncertain factor to consider, and a point [James] makes, which is pertinent in the current Covid-19 landscape, is the potential risk of future border closures which could interrupt any contact arrangements for an open-ended period of time. If that was to occur, it would undoubtedly have a damaging effect on [Manaia]'s relationship with him.

[99] [James]' employment and financial situation will not change if [Manaia] is permitted to relocate.

The extent and focus of the conflict between the parents, either underlying or resulting from a decision to relocate

[100] Although currently, tensions still exists between the parties, demonstrated by [Ngaio] blocking [James] and [Āwhina] from communication via social media, nevertheless, [James] accepts that [Ngaio] values his role as [Manaia]'s father and is confident she would make good on her contact proposals, if she was permitted to relocate.

[101] [Āwhina] was, what I describe as apprehensive about the current tensions. Her fear is that [Ngaio] would cut them out of [Manaia]'s life, abruptly and with little recourse from afar, pointing to the severance of communication via social media.

[102] The tensions and inattention to the practicalities of the contact proposal, lends weight to [Āwhina]'s view.

The non-moving parent's capacity to demonstrate continued interest in the child after relocation

[103] It was evident that [James] cares deeply for [Manaia] from the warmth and emotion emitted as he described their relationship and the activities they undertake together, which left me with confidence he would maintain contact with her, both in New Zealand and in Australia, if the relocation was permitted. He gave an assurance he could and would be able to afford to travel to Australia from time to time.

The impact on the child of granting or declining relocation

[104] If I permit the relocation, [Manaia] will experience significant disruption to her continuity of care, critically, the development of her relationship with her [James], a relationship [Ngaio] readily acknowledges is very important for [Manaia]. There will undoubtedly be damage to their relationship and [Manaia]'s psychological wellbeing.

[105] [Ngaio] was critical of [Āwhina]'s close involvement with [Manaia] and she clearly felt undermined as a parent, which is understandable. Nevertheless, she acknowledged the existence of a close relationship with [Āwhina], her views being captured in this exchange:

Q You talk about in your evidence about [Āwhina] having, [Āwhina Paarua] having a toxic attachment to [Manaia].

A Yes.

Q What do you mean by that?

A I believe she's tried to become mother role model in [Manaia]'s life and she begun, [Manaia] actually begun crying for [Āwhina] and not wanting to come to either [James] or I. To my knowledge some of the staff at ...her previous day care would say that [Āwhina] would walk past [Manaia]'s classroom and purposely make her cry to want her. I don't believe that is a great attachment.

[106] The significance of [Āwhina] in [Manaia]'s life is undeniable and important. [Manaia] clearly enjoys a close relationship with her and she has offered much in the

way of practical support and continues to do so despite the parties' separation. Disruption to their relationship as well as the severance of established adult and peer relationships at day care, is inevitable.

[107] Compounding those disruptions, [Manaia] will need to form new relationships at a new day care in [Australia], as that is the plan.

The wishes and needs of the child

[108] I have already addressed these issues.

The child's previous living arrangements (e.g. number of previous moves) and the suggested new living arrangements (i.e. whether the child has lived there before)

[109] [Manaia]'s previous living arrangements have been addressed earlier.

[110] The plan in [Australia], is for [Manaia] to live with [Ngaio], her partner [Noel] and her maternal uncle, both of whom are familiar people to her, but she has not lived with either of them previously. [Ngaio] and [Noel] have not lived together previously either, so this will be uncharted territory for them.

[111] There was very limited evidence available about [Noel] or his circumstances, or the amount of support he could and would offer [Ngaio] or [Manaia]. [Ngaio] spoke favourably about him, referring to him as her main support, but she volunteered that there were safety concerns in relation to his sister's partner, which meant it was unsafe for her to live with him in Rotorua. She also alluded to his ex-partner, whose violence towards him she had witnessed. The lack of evidence about or from [Noel], gives me cause for disquiet. I am unable to properly assess the safety or suitability of [Manaia]'s proposed future living arrangements in the absence of this evidence.

[112] [Ngaio] had produced photos of her brother's property which was well presented and would clearly meet her and [Manaia]'s needs. I have no concerns about the quality of the accommodation or its availability.

The emotional wellbeing or psychological welfare of a parent

[113] [Ngaio] has a long-standing diagnosis of depression and anxiety for which she takes medication. She deposes that moving to [Australia], to be closer to her support systems, would benefit her mental health, and that her family have always supported her in any way and every way needed when it comes to herself or [Manaia]. I am certainly empathetic to [Ngaio]'s health challenges, but they were not significant enough to prevent her relocating away from whanau, to Rotorua. I cannot accept [Ngaio]'s assertion about the amount of support available to her in [Australia], as it is in conflict with her and [Āwhina]'s evidence set out earlier at [83] to [87].

[114] If [Manaia] is permitted to relocate, I have no reason to doubt that [James] will miss her dearly, who I note has also had challenges with his mental health. [Manaia]'s relocation is likely to have a negative impact on him, but I am unable to assess the gravity.

Cultural and spiritual considerations

[115] [James] seeks a condition on the order that [Manaia] is permitted to return to New Zealand for tangihanga for certain named whānau members, if the relocation is permitted.

Outcome

[116] Having weighed up all of the evidence against the legal framework and the leading case law, I assess that the most important considerations for [Manaia], at her age and stage of development, and in her present circumstances - are the continuity of her present care and contact arrangements, and the preservation and strengthening of her relationship with [James]. Her psychological needs will be met by [Ngaio] continuing to provide her day to day care, and [James] exercising regular and consistent contact, with extended opportunities. These considerations carry the most weight and inform my decision of what is in [Manaia]'s welfare and best interests at this time.

[117] There was no suggestion [Ngaio] would relocate without [Manaia], and [James] will not return to Australia, if [Manaia] is permitted to relocate. Of the two options I am presented with, [Manaia]'s needs will only be met if she remains living in Rotorua for the foreseeable future.

[118] I have carefully considered [Ngaio]'s reasons for wanting to return to [Australia] with [Manaia]. The evidence adduced has been insufficient to satisfy me that her accommodation situation is as dire as she claims, that there are no other comparable employment opportunities available to her here, that she would be better supported by whanau in [Australia] or of any of the other purported benefits she identified.

[119] Even if I was satisfied that the relocation was in [Manaia]'s welfare and best interests, I could not be certain on the evidence available, that [Ngaio] had sufficient means to meet the costs of travel or the ability to travel as she had proposed.

[120] I fully appreciate that [Ngaio] will be deeply disappointed by this decision but the law requires that my decision is child centric. It is a decision based on [Manaia]'s circumstances and most important needs as they are now.

[121] The relationship between [James] and [Manaia] is not sufficiently developed, and neither is [Manaia] mature enough, to cope with the contact proposed by [Ngaio]. It should not be interpreted to mean there will never be a time when a relocation could be realistically contemplated.

[122] I also wish to be clear, that my decision does not preclude [Manaia] from travelling to Australia for holidays, as it is vitally important that her maternal whānau connections there are preserved and strengthened. That is a position which is supported by Ms Bodde-Phillips who has signalled her support of the discharge of the orders preventing [Manaia]'s removal from the Rotorua District and New Zealand, to enable such travel.

Orders/directions

[123] It follows then, that I make the following orders and directions:

- (a) The interim order dated 5 January 2022 requiring [James] and [Manaia] to remain living in the Rotorua Court's jurisdiction is discharged.
- (b) I make a final order pursuant to s 46R, directing that [Manaia]'s primary place of residence shall be the Rotorua District, and she shall not be permitted to relocate to Australia, except by further order of the Court.
- (c) I discharge the order dated 5 January 2022 preventing [Manaia]'s removal from New Zealand.
- (d) I vary the Interim Parenting Order of 5 January 2022 to include the following conditions:
 - (i) Neither party shall expose [Manaia] to any family violence (as defined in the Family Violence Act 2018), or cause or permit her to be or remain in an environment where she is exposed to any family violence.
 - (ii) [James] shall not consume illicit drugs or alcohol 24 hours prior to or while he is exercising contact with [Manaia].
 - (iii) [James]' contact with [Manaia] shall be supported by [Āwhina] which means she shall be present at their property to support [James] if needed while he is exercising contact, and she may be absent for short periods of time for up to half a day, provided she is contactable by phone.
 - (iv) There shall be additional contact or further variations to the order by agreement between the parties and Ms Bodde-Phillips.

- (v) Counsel are to file, preferably, a joint memorandum in 28 days' time indicating the directions sought to progress the existing proceedings. The registry is asked to allocate a CMR to monitor receipt.

Judge M Broek
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 19/04/2022