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

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**IN THE FAMILY COURT**
**AT WELLINGTON**

**I TE KŌTI WHĀNAU**
**KI TE WHANGANUI-A-TARA**

**FAM-2019-085-000220**
**FAM-2020-085-000326**
**[2021] NZFC 12271**

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| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004 |
| BETWEEN | [ROSEN]<br>Applicant |
| AND | [STOKES]<br>First Respondent |
| | [GUY]<br>Second Respondent |

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| Hearing: | 13 December 2021 |
| Appearances: | M Twentyman for the Applicant<br>No appearance by or for the First Respondent<br>T Jackson for the Second Respondent<br>M Chisnall as Lawyer for Child |
| Judgment: | 10 January 2022 |

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**RESERVE JUDGMENT OF JUDGE P R GRACE**

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[1] The hearing was on 13 December 2021. Ms Twentyman was counsel for the applicant, Ms [Rosen]. Ms Jackson appeared for the second respondent, Mr [Guy],

(who I will refer to as "the respondent"). There was no appearance for the first respondent, Mr [Stokes]. Ms Chisnall was Lawyer for Child.

[2] This was a hearing in respect of an application brought by Ms [Rosen], to relocate her two children to Auckland.

[3] The first respondent, Mr [Stokes], is the father of [Emily], now aged 10. [Emily] resides with the applicant.

[4] The respondent, Mr [Guy], is the father of [Oscar], aged four, and [Oscar] also resides with the applicant.

[5] [Emily] has had little contact with the first respondent over the past several years. She is in the process of re-establishing her relationship with the first respondent. The first respondent and the applicant have come to an understanding as to a parenting agreement in respect of [Emily], and a final parenting order was made by consent.

[6] The applicant and the first respondent also reached a consensus on the issue of relocation with the first respondent, who resides in the [location A] area, coming to the position that he did not oppose the application for relocation because, from a practical perspective, whether [Emily] lives in Wellington or Auckland probably makes little difference to him due to the limited contact he has been having, but also the need to travel is much the same whether [Emily] is in Auckland or in Wellington.

[7] Ms Chisnall, as lawyer for both children, could not consent to the Court allowing the relocation of [Emily] due to the potential impact that that had on [Oscar]'s position in these proceedings. Consequently, because the applicant and the first respondent had reached their consensus, the first respondent did not take part in these proceedings.

[8] The witnesses at this hearing have been the applicant and the respondent. The proceedings commenced in August 2020 with the applicant making an on notice application seeking resolution of a dispute between guardians. Since then, there have been some eight affidavits filed by the applicant, and eight filed by the respondent.

[9] At the commencement of the hearing, the applicant sought to introduce an affidavit from her new partner in Auckland. No affidavits had been filed by him throughout the course of the proceedings. That application was opposed by the respondent on the basis that there had been approximately 16 months while the proceedings had been before the Court and no affidavits had been put forward by the applicant's new partner, and that it was not appropriate to admit an affidavit at the last minute. The proposed witness was not available at court for cross-examination, but it was said he could be available by way of AVL if required.

[10] I declined leave to admit the affidavit evidence. While it is relevant to ultimate determination of what is in the best interests and welfare of [Oscar], the reality seemed to be that the second respondent could well be taken by surprise and, therefore, would be entitled to have the matter adjourned. These proceedings have been before the Court now for some considerable time and [Oscar] requires a decision which is age appropriate for him, and to delay the matter further would take us well into the new year. There clearly had also been ample opportunity for the proposed witness to file an affidavit in the intervening period.

[11] The matter, therefore, proceeded on the basis of the evidence from both the applicant and the second respondent who were both cross-examined at some length.

**Background**

[12] The applicant and the respondent were in a de facto relationship from some time in 2014 until March 2020.

[13] Following separation, the applicant and the children remained living in the family home. The respondent moved into the couple's beach property [near Wellington]. He has maintained steady contact with [Oscar] which involves [Oscar] spending every second weekend with the respondent from Friday afternoon until Sunday afternoon (this contact occurs at the beach house) and, latterly, two nights over the fortnight with collection from pre-school and delivery back to pre-school, with that contact occurring at the home of a friend of the respondent's.

[14] During the relationship the applicant had a health scare following which she came to the realisation that if anything were to happen to her, [Emily] would return to the care of the first respondent. As a consequence of that, she issued proceedings seeking to have the respondent made an additional guardian of [Emily]. That application was filed in June 2019. It was subsequently resolved by consent with the order issuing on 28 November 2019.

[15] By September 2020, six months after separation, the applicant was applying to the Court to remove the respondent as an additional guardian or, in the alternative, to have him declared a stepfather for the purposes of child support. That matter was subsequently resolved by consent with an order removing the respondent as an additional of [Emily], made on 11 December 2020. The application to have the respondent declared a stepfather was not pursued.

[16] It appears that the applicant and the respondent have now almost resolved the division of relationship property which will result in a significant payment by the respondent to the applicant with the respondent retaining both the former home and the beach property.

[17] The applicant wishes to relocate to Auckland where she says she has developed a relationship with her new partner. She says that he has purchased a five bedroom home in which she and the two children would reside. Each child will have their own bedroom. The partner has two children of his own from an earlier relationship and he and his former partner share the care of the two children on a week about basis, so those two children, whose ages are between the age of [Oscar] and [Emily], will also have their own bedroom in the home.

[18] The applicant works in Wellington but says that she has arranged to transfer her position to Auckland.

[19] The applicant has also sorted out a school which [Emily] would attend, and a pre-school facility for [Oscar]. Her intention is that [Oscar] would then follow on to the same school that [Emily] is at once he turns five.

[20] The respondent is opposed to relocation because of its impact upon his relationship with [Oscar] and the ability to expand that relationship as [Oscar] gets older.

[21] The applicant has made it clear that if the Court were to decline relocation for [Oscar], notwithstanding the impact that that would have on her, nevertheless she and [Emily] would move to Auckland. It appears to be her intention to contribute her relationship property proceeds towards the home in Auckland and she made reference to her and the partner entering a contracting out agreement. The agreement was not placed in evidence, so it is unclear as to whether or not that has been signed at this point.

[22] The respondent is employed in Wellington where he has recently been promoted to the position of director of the company he works for. He is the sole director in Wellington and in charge of the business operation there. It seems the main office of the business is situated in Auckland, but the respondent was clear that he is not able to transfer to Auckland as the whole basis of his promotion has been to assume responsibility for the Wellington operation.

**Applicant's position**

[23] The applicant has stated that she wants to ensure that the respondent has a positive input and ongoing relationship with [Oscar], and she wants to do whatever is required to ensure that relationship continues.

[24] The evidence given by her suggests that she has reservations about the respondent's ability to parent [Oscar] and comply with her standards of care. In the event that the second respondent does not meet those standards, it seems she keeps track of those "failures". By way of example, [Oscar] has difficulties with asthma and croup. He has two inhalers, a blue and a pink one. The pink inhaler is required both morning and evenings and the blue inhaler is used during the day if there are problems. She is critical of what she believes is the respondent's failure to administer those inhalers. She relies on what she claims has been reported to her by [Oscar]. The respondent says that he does use the inhalers.

[25] The respondent also has [Oscar] sleep in the same bed as sleeps in. The applicant does not agree that this is appropriate because it undoes the work that she has done in getting [Oscar] sleeping in his own bed. The respondent says that he puts [Oscar] into his own bed at the beach house, but [Oscar] often comes into bed with him during the course of the evening. Also, he says [Oscar] spends overnight with him in the mid week contact periods when they stay over at the friend's place in Wellington. The applicant does not agree with this approach.

[26] The applicant is critical of the respondent's failure to maintain a relationship with [Emily] following separation. She says that [Emily] does not want to go with the respondent, and she is critical of the respondent not seeking to engage with [Emily] post-separation.

[27] The respondent's position is that he was cut out of [Emily]'s life by the applicant, and he considers that the applicant cut the first respondent out of [Emily]'s life and, as a consequence, he is concerned that if [Oscar] is allowed to relocate to Auckland, eventually he will also be cut out of [Oscar]'s life. He is, therefore, adamantly opposed to [Oscar] relocating.

[28] The applicant has accepted that [Oscar] and the respondent have a positive relationship. [Oscar] enjoys his time with his father and talks positively of his experiences with the respondent.

[29] To gain some insight into the state of the relationship between [Emily] and the respondent before difficulties arose, I quote from the applicant's application to have the respondent appointed an additional guardian of [Emily]:

> After meeting [Mr Guy] early in 2014, he has played an equal role in raising [Emily], culminating in [Emily] now calling [Mr Guy] dad on her own accord. [Mr Guy] and I now have a son and the four of us are a family… Alongside myself, [Mr Guy] provides [Emily] with a safe and secure home, with love, care and attention. [Mr Guy] provides [Emily] the role of a guardian by being involved in schooling decisions, taking her to doctor and specialist appointments, a stable and healthy home, attending sports and extra-curricula events and supporting [Emily] in every life aspect. [Emily] is a very loved, very happy and content, smart, friendly, respectful wee girl with many friends and family members in her life.

[30] The respondent's evidence supports that view.

[31] At the time of separation, the applicant and the respondent had agreed to [Emily] attending a private school with associated private school costs. The respondent says that they had paid the first year of those fees in advance. When separation came about, he contacted the applicant to inform her that they could no longer continue to meet those school fees, meet the outgoings on the home, and the respondent meet his own separate living costs. He also notified the school that he could not meet future school fees, and that [Emily] would probably be returning to her earlier school. It appears this upset the applicant as she sees this as an example of the respondent withdrawing his support of [Emily]. The respondent explains it as a readjustment of the financial structure within which the parties worked because of the impact of separation.

[32] As a consequence of the difficulties which have arisen between the parties, they do not communicate. The applicant is critical of the respondent for not replying to her emails and attempts to discuss issues as she sees them with the respondent. The respondent's stance is that he is concerned that any discussion he gets involved in results in criticism of him with subsequent comments in affidavits and correspondence from solicitors. He, therefore, will only respond to what he sees as relevant issues. If, in his view, the matter does not require a response, then he does not respond.

**The law**

[33] The law is contained in ss 4, 5 and 6 of the Care of Children Act 2004 ("the Act").

[34] By virtue of s 4, I am required to make a decision that is going to advance [Oscar]'s best interests and welfare. This is quite case specific and is not a generic decision. I am required to take into account [Oscar]'s specific living situation in his specific circumstances and relationships in coming to a decision. In this particular case the complicating factor is the relationship between [Oscar] and his sister, [Emily]. [Emily] and the respondent now have no legal standing between them, so the respondent has no say over what happens to [Emily]'s living situation. But the relationship between [Emily] and [Oscar] is important and is a factor which I must take into account because it has an impact on [Oscar].

[35] I did not meet the children. Ms Chisnall has spoken to both [Oscar] and [Emily] in an effort to obtain their views and wishes which I am required to take into account by virtue of s 6 of the Act. [Emily] has made it quite clear that she would be angry if [Oscar] did not accompany the family to Auckland.

[36] [Oscar] could best be described as a chatty, happy young boy who, at his age, would not have the life experience or capacity to express a view that would have any meaningful impact on the decision which I am required to make as to relocation. What is apparent is that he has a positive relationship with both of his parents.

[37] In coming to a decision as to what is in the best interests and welfare of [Oscar], I am required to take into account the various principles set out in s 5 of the Act. I can also take into account such other factors as may be relevant in this particular case.

[38] The leading authority is *K v B*.[1] That decision makes it clear that this is an assessment which the Court is required to make as to the best interests and welfare of this child and must be based on the evidence, and is an exercise of judgement. There is no presumption in favour of relocation or in favour of the status quo. Neither party bears any onus of proof.

**Discussion**

[39] I start from the position that the evidence has satisfied me that [Oscar] has a positive relationship with both of his parents. Clearly he has a strong relationship with the applicant because she, as his mother, has been the primary caregiver since separation. It would be natural and expected for a child to have a strong and positive relationship with the primary caregiver.

[40] The respondent, on the other hand, has also played a significant role in [Oscar]'s life whilst the parties were living together as a couple. This is evidenced from the applicant's own statements in support of the request to have the respondent appointed an additional guardian of [Emily] and supported from the respondent's evidence. This is notwithstanding criticism levelled at the respondent by the applicant,

[1] *K v B* [2010] NZSC 112.

who has placed in evidence a list of days that she says the respondent was late home from work or away. The criticism was put forward on the basis that it endeavoured to show that the respondent was not as committed to home support as he claimed. However, I do not accept that the evidence put forward by the applicant supports that contention. The respondent was clearly working towards his promotion with the subsequent improvement in income, which would benefit the family. That is the logical progression of anyone engaged in business and requires a juggling of time between business commitments and home life. The two are not always compatible.

[41] The applicant was able to juggle her working activities with the care of the children because she worked part-time and around the daycare and schooling hours of both children. Her criticism seems to be that if she could do it, why could not the respondent do so? That approach, in my view, is not realistic.

[42] I, therefore, have come to the view that during the course of the relationship these parties both contributed in their own way to the care and support of their children.

[43] Following separation, the respondent has continued to be engaged in the life of [Oscar]. His evidence is that he had wanted more time with [Oscar] but has been denied that extra time. That decision has been the applicant's and the applicant's alone.

[44] An example of the respondent's concern was a trip that the applicant had overseas. The respondent had the care of [Oscar] for that weekend. The applicant appears to have been detained overseas due to COVID restrictions. The respondent accuses the applicant of not telling the truth because she denied being overseas, but I did not understand from the evidence that she now disputes that she was caught overseas. The respondent could see no reason why he could not have kept [Oscar] in his care whilst the applicant was overseas, but she insisted that [Oscar] had to be returned to a member of her family. It was clear from the evidence that the applicant saw the need to ensure [Oscar] maintains a positive relationship with her family (her mother). The respondent fails to see why, in the face of such an emergency, he could not have retained the care of [Oscar]. In my view there is some merit in the view

adopted by the respondent. He is the father. He has a positive relationship with the child. There was no basis for that restriction. That restriction was a decision solely made by the applicant.

[45] I am also satisfied that there is a positive relationship between [Emily] and [Oscar]. This, again, would be normal and expected. The fact that [Emily] has told her counsel that she would be angry if separated from [Oscar] is the factor which supports that close relationship. That close relationship is also inferred from the evidence of the applicant filed in support of the application to have the respondent made an additional guardian of [Emily].

[46] I turn to the first principle as to the safety of [Oscar] (s 5(a)). The only issue that relates to safety is the evidence from the applicant around the respondent's behaviour towards her during the weeks leading up to separation. The respondent accepts that both parties argued and that there were inappropriate comments made by each of them, and he accepts responsibility for his part in all of that. He points out, however, that he could not understand why things had changed from his perspective and in hindsight, from his view, he now sees the applicant as having entered her current relationship before separation, and that was the issue causing difficulties. He supports that by reference to a letter from the applicant's solicitor in June 2020 indicating that the applicant wanted to relocate to Auckland to be with her new partner. This is the person whom the applicant accepts that she was in a friendship with, but no relationship with, prior to separation.

[47] The respondent had stated that prior to the separation the applicant had indicated to him that she wanted the family to relocate to Auckland. He was opposed to that because of his work situation and because he could see no basis for such a move. He says the applicant became very upset when he refused. He could not understand the intensity of that upset. In hindsight he now believes it adds weight to his view that the relationship between the applicant and her new partner had begun before separation. I do not know if the relationship had started before separation, but there is a strong inference that it may well have begun, otherwise the relationship had only been in place for three months, at a distance, before the applicant made her decision to move in with her new partner.

[48] It is not surprising that when relationships are breaking up people react inappropriately. There is no suggestion that there had been inappropriate behaviour from the respondent or from the applicant, towards the other prior to the breakdown in the relationship. This view is reinforced by virtue of the fact that the applicant was making the application to have the respondent appointed an additional guardian of [Emily] in mid to late 2019, with the order not being made until the end of 2019. The relationship between the applicant and the respondent seemed to break down through the early stages of 2020.

[49] There is no evidence to suggest that the respondent has in any way put the safety of [Oscar] at risk or, indeed, that he has put the safety of [Emily] at risk. There is little doubt that the relationship between [Emily] and the respondent has broken down, but the basis for that breakdown is unexplained.

[50] Whilst the parties are not communicating at this point, that, in my view, does not impact on the safety of [Oscar] whilst in the care of the respondent.

[51] The applicant is critical of the respondent in what she says is the respondent making negative comments about her to [Oscar] while [Oscar] is in his care. The respondent denies that he makes such negative comments. He accepts that he does talk to [Oscar] about the applicant but more in a conversational way when asking what [Oscar] and his mother have been doing.

[52] The criticism of the applicant towards the respondent over the administering of the ventilators is based upon what the applicant says [Oscar] has reported to her. The respondent says that he does administer the ventilators as required. He, himself, had sought advice from [Oscar]'s doctor because the respondent was concerned about the way the applicant attended to [Oscar]'s health. So the respondent has taken steps to ensure that he is informed about [Oscar]'s needs and health issues.

[53] Having taken these matters into account I am satisfied that both parties can attend to the requirements under s 5(a) and that safety issues will be met by both of them in respect of [Oscar].

[54] The reasons for the applicant's wish to relocate to Auckland are, on the face of it, realistic. She has formed a new relationship which, clearly, she wishes to develop, and she has also arranged to transfer her employment to Auckland.

[55] The respondent has expressed concern as to the stability of that relationship. That concern is at two levels. Firstly, his concern relates to how often and how well [Oscar] knows the new partner and his children. The evidence is that the applicant and her partner have spent weekends together in Auckland and in Wellington and that [Oscar] and the partner's children have met, and that they do exchange time on Facetime. The actual physical meetings have not, however, been that frequent as far as [Oscar] is concerned, so, in the circumstances I am satisfied that [Oscar] would still be in what could be described as a "settling in" period.

[56] The other area of concern raised by the respondent is to the stability of the new relationship. He pointed out in his evidence that the first respondent was "the one" when the applicant commenced her relationship with him. The respondent was then "the one" when the applicant commenced her relationship with him. Now the applicant is saying that her new partner is "the one" as she moves into this new relationship. The respondent infers that there is, therefore, potential for the relationship to break down and further disruption in the children's lives. This concern is greater if the relationship was developed before the parties separated.

[57] Not surprisingly this is disputed by the applicant. However, the best predictor for the future is the past. I am not in a position to predict what might happen in the new relationship, but I cannot ignore the fact that the new relationship does seem to have commenced relatively quickly following separation and the flush and excitement of new relationships can wane once people have to step in to the hard slog of daily living. Only time will tell.

[58] The principles set out at ss 5(b) and 5(e) somewhat overlap. Those principles require that [Oscar]'s care, development and upbringing should be primarily the responsibility of his parents and provide that [Oscar] should continue to have a relationship with both of his parents and his relationship with his family group should be preserved and strengthened.

[59] Under the extended family relationships, currently the applicant's mother and brother are residing in Wellington. Her evidence is that her brother is going to be attending [a tertiary education institute] and that her mother is likely to move to Auckland. So the main members of her family will be in Auckland. She also says that she has other relatives in Auckland.

[60] The applicant is of [ethnicity deleted] background and there is a large [ethnic] community in Auckland, and she says that she wants to ensure that [Oscar] has the opportunity of interacting with that community. There is also a, albeit smaller, [ethnic] community in Wellington. There are some relatives in Wellington, but lesser number.

[61] The respondent is English, with his family being in the United Kingdom. He has close friends in Wellington and also in Auckland. [Oscar]'s interaction is through social media with the English side of the family, but the respondent would like permission to take [Oscar] overseas for holiday visits to his extended family.

[62] As indicated earlier, [Oscar]'s relationship with both of his parents is important to him. The question under these headings is whether the relationship between [Oscar] and his father can be sustained and built upon if [Oscar] is allowed to relocate to Auckland. This has a number of advantages and disadvantages. In no particular order they are:

(a) The distance between Wellington and Auckland creates its own logistical problems. The applicant's proposal is that contact would continue on a fortnightly basis with her coming to Wellington for one weekend a month and the respondent travelling to Auckland one weekend a month, and the respondent having half of all school holidays. The cost of travel does not appear to be an issue because both parties are on relatively good incomes. However that sort of arrangement poses the following difficulties:

(i) Firstly, it is requiring a substantial amount of travel on [Oscar]'s part. As I understand it, he is to be living [in an area of Auckland]. The distance between [that area] and Auckland

airport involves significant travelling time. A traveller is required to be at the airport at least half an hour before departure. The flight is approximately an hour. Then there is the travel at the Wellington end. It would be approximately a half day in travel in each direction.

(ii) In the event the respondent travels to Auckland on this proposal, he has to have accommodation in Auckland. He has to have some means of transportation. The applicant sees no reason why the respondent could not stay with friends and, whilst at one level that is potentially possible, at another level that is asking a lot of friends to commit themselves to having someone stay on a regular monthly basis. The applicant has suggested a friend whom the respondent has stayed with previously who has given the respondent access to a vehicle. Whilst that has worked on the odd occasion in the past, the respondent's concern is the realistic implications of that on a regular monthly basis.

(b) The respondent is proposing contact during the week by way of some electronic communication. While that is logically possible and not uncommon, the reality is that young children do not engage for lengthy periods through that media as their interests are often distracted by the circumstances around them. It is clearly not the same communicating in that way as it is on a face to face and physical interactive basis.

[63] One of the concerns under this heading is the respondent's worry that the applicant will not continue to be supportive of the relationship that [Oscar] has with his father as time goes by. He bases this on the premise that:

(a) The applicant, he says, did not encourage a relationship between the first respondent and [Emily];

(b) Since separation he says the applicant has not supported his relationship with [Emily]; and

(c) He is concerned that once the applicant and the two children move to Auckland and settle into their relationship he, the respondent, will be very much on the back foot and will required to "give way" if his contact with [Oscar] conflicted with family events within the Auckland household.

[64] On the first of those points, it does seem that the first respondent did have alcohol and drug issues which brought about the end of that first relationship. I say that because the first respondent acknowledges that in his documentation filed in respect of the proceedings. So there does appear to have been a basis for the break down in that relationship between the first respondent and [Emily].

[65] The first respondent does say, however, that the applicant did not encourage him to maintain his relationship with [Emily]. It seems probable that the applicant told the first respondent that he needed to clear up his act before he developed a relationship with [Emily]. The first respondent now does appear to have achieved that and the relationship between [Emily] and the first respondent is starting to re-establish. In the circumstances, therefore, I do not consider that the applicant has actively discouraged a relationship between [Emily] and the first respondent but, rather, there was a reason and purpose behind the stance taken by the applicant.

[66] As to the second matter, there is some concern as to why there was such a sudden change between what appears to have been a very positive relationship between [Emily] and the respondent, to one now of negativity and reluctance to engage from [Emily] towards the respondent. The respondent can offer no explanation or reason for it. Neither does the applicant. The suggestion has been raised that [Emily] witnessed the disharmony that developed between the parties at the break-up of the relationship and that this has had a negative impact on her, coupled with [Emily] having lost contact with the first respondent, and then the respondent, and felt that all had rejected her. The applicant says she did encourage [Emily] to have contact with the respondent, but [Emily] has turned that down.

[67] I also have little doubt that [Emily] would have been made aware of the respondent notifying [Emily]'s school that he could not afford the school fees into the

future and, no doubt, that had an impact on her attitude towards the respondent. The applicant indicated that she had had to borrow money to meet the school fees as [Emily] has remained at the private school. I have little doubt that [Emily] would be aware that the mother was placed under financial pressure as a consequence of this. These factors would, no doubt, impact on [Emily]'s attitude towards the respondent. It seems to me that, regrettably, [Emily] has been drawn into adult issues.

[68] As to the third factor, I do consider that there is some genuine basis for this concern. I come to that view because:

(a) On the evidence there can be little doubt that the applicant, whilst at one level supports the relationship between [Oscar] and the respondent, at another level she does not accept that the respondent is necessarily "up to it" in caring for [Oscar] and is looking for any issue, however minor, that would support her view.

(b) The fact that the applicant keeps a list of purported failings, which list was put into evidence and goes back to 2018, almost two years prior to the separation, indicates to me that the applicant is likely to keep a list into the future and if there are issues, however small, there is likely to be repercussions as far as the ongoing contact is concerned.

[69] These issues do raise a concern about the applicant's ability to maintain an ongoing relationship between [Oscar] and the respondent if [Oscar] were to live at a distance.

[70] The respondent, on the other hand, did acknowledge the importance of the relationship between [Oscar] and his mother and the need to ensure that that relationship is maintained, irrespective of where [Oscar] resides.

[71] There are, therefore, concerns in my mind as to the reality of what the applicant is proposing and whether or not she has the capacity to maintain the proposed contact arrangements if [Oscar] were to move to Auckland.

[72] Dealing with ss 5(d) and 5(c), communication between these parties is virtually non-existent. Both have undertaken court-directed communication skills counselling, and both have had two sessions each but, at this stage, that does not appear to have improved their communication level.

[73] The respondent has indicated that, in his view, once these proceedings are out of the way, then the parties should be able to re-establish communication. He bases that on the presumption that once the proceedings are finished there is no need for either of them to take an adversary position on issues that may arise and they should, therefore, be able to negotiate resolutions without difficulty as they clearly were able to do during the course of their relationship.

[74] It is clear that the applicant is frustrated with the respondent's failure to reply to her communications.

[75] Both parties have agreed to use the New Zealand Wizard app as a means of communication and, whatever the outcome of this hearing may be, I am going to make a direction that that is how they are to communicate in the future. Both of them are to acquire the app and to meet their own administrative costs in setting the app and maintaining the app and are to communicate each with the other through that device.

[76] When looking at other factors, one has to bear in mind that the primary wish to move is clearly adult-based and is not based around the best interests and welfare or the needs of either child. There is no evidence that either child, and in particular [Oscar], is going to be advantaged by the move.

[77] It could be argued that if the applicant achieves her wish to move (which she has clearly indicated she is going to do irrespective of the outcome) then she will be happy and, of course, a happy parent is normally a more effective and appropriate parent. That, of course, would reflect on the child.

[78] The concern here, however, is that the applicant has made it clear that she intends to move irrespective of the outcome. That suggests to me that she is prioritising her own interests over those of her son.

[79] Not only that, but she is not prioritising the best interests of [Emily]. I say that because her decision to go to Auckland without [Oscar], if the decision does not go her way, will remove [Oscar] from the life of [Emily] and the negative impact that such a removal could have on [Emily].

[80] It is often said in these cases that the Court finds itself in the position of deciding what is the least detrimental outcome for the child or children in question. Regrettably that is the case here. These parents have abrogated their responsibility for the decision to the Court because the applicant wants something which is opposed by the respondent. Because neither party is prepared to move on their position, the decision then falls to the Court.

[81] It is concerning to find a parent prepared to put their own interests before the interests of their child/children. The threat by the applicant to relocate with [Emily], irrespective of the outcome of my decision, was a real threat. It was not being made in the hope that the Court would buckle to her threat and allow [Oscar] to relocate.

[82] During the evidence, I discerned that the respondent felt there was an inevitability that an order would be made allowing [Oscar] to relocate to Auckland. Clearly, he did not want that as I accept he wants to maintain his close physical relationship with [Oscar]. I have no doubt that [Oscar] wants to maintain his close physical relationship with his father. I have no doubt that the close relationship that they have is beneficial to [Oscar]. It is a question in my mind of trying to balance that against the deliberate move by his mother out of his life and thereby becoming a contact parent (by virtue of distance) and also removing [Emily] out of his life who, likewise, would become a contact stepsibling also by reason of distance. It is the impact of that on [Oscar] which is the decisive factor.

[83] In my mind the impact on [Oscar] by the deliberate removal by his mother from his life and the deliberate removal of [Emily] from his life is likely to have a more detrimental impact on [Oscar]. That must be balance against the impact on [Oscar] of the loss of the relationship that [Oscar] has with the respondent. Coupled with that is the view I have come to that the stance adopted by the applicant leads me to conclude that the applicant is unlikely to support the respondent and [Oscar] in their

ongoing relationship. If the applicant is prepared to remove [Oscar] from her life, then I have no doubt that she would have no hesitation in making future decisions that suit her needs rather than make decisions that support [Oscar] in his relationship with the respondent.

[84] It is for that reason that I have come to the view that [Oscar] should not relocate to live in Auckland. There will be that direction accordingly.

[85] In view of the understanding that the applicant and the first respondent have come to about [Emily] relocating to Auckland, I have questioned if I should also decline that application because of the impact the relocation would have on [Oscar]. The Act is clear in that parenting decisions are to be made by the parents and guardians of a child, and the guardians have made their decision here. In view of that I do not consider I have a decision to make as the guardians have made that decision, and as the respondent is not a guardian of [Emily] he has no authority to intervene.

[86] That then leads to the question of contact which should be maintained between [Oscar] and the applicant. That contact should be as follows:

(a) Until [Oscar] commences school, one weekend a month he is to travel to Auckland. That weekend will commence with [Oscar] being placed on a flight from Wellington at around midday on the Friday and returning to Wellington on a flight from Auckland to Wellington at around midday on Monday. Also, once a month the applicant shall be entitled to travel to Wellington to be with [Oscar] from Friday evening after pre-school or school, until Monday morning start of pre-school, or school. The costs of those flights are to be shared equally between the parties, with applicant meeting one of those return travel costs and the respondent meeting the other. This arrangement should enable the parties to book these travel arrangements well in advance and, therefore, obtain cheaper fares.

(b) [Oscar] will be entitled to spend half of all school holidays with the applicant. If the parties are unable to agree upon how those holidays

are to be worked out, then the respondent is entitled to the first week of the school holidays from the Friday midday until the Sunday, the ninth day later, at midday. That arrangement will apply during term school holidays or the equivalent thereof whilst [Oscar] is at pre-school.

(c) [Oscar] shall spend half of his Christmas school holiday periods with each of his parents. That means the holidays are to be divided equally. One parent will have the first part of the school holidays which will include Christmas and New Year, and the other parent will have other half and that arrangement will alternate each year. Having regard to the fact that I anticipate the applicant will be in Auckland for the coming Christmas, [Oscar] shall spend Christmas 2021, which includes the first part of the school holidays, with the applicant and the second half of the school holidays with the respondent. In 2022 that arrangement shall reverse and will alternate yearly thereafter. Again, the costs of travel are to be shared equally between the parties.

(d) Should either party wish to take [Oscar] overseas during the time that [Oscar] is in their care, then they will be entitled to do so subject to the travelling parent giving the non-travelling parent at least one month's notice of the intended travel and, not later than 14 days prior to travel, details of the travel arrangements and contact details for [Oscar] while he is overseas. [Oscar] is to be able to have some form of electronic communication with the non-travelling parent at least once per week whilst he is overseas.

(e) When [Oscar] turns five and commences schooling, the only change will be to the fortnightly travel. [Oscar]'s interests require him to be at school so the travel to Auckland will commence between 4 pm and 5 pm on the Friday evening and he is to be returned to Wellington on a flight from Auckland between 5 pm and 6 pm on the Sunday. The costs are to be shared on the same basis as (a) above.

(f) [Oscar] is entitled to have electronic communication with the applicant during the school term at least once per week. If the parties cannot agree on the day and time, then I fix Wednesdays between 5 pm and 6 pm as the time and day for the communication. That arrangement will also apply during mid-term school holidays when the non-caring parent is entitled to have that form of communication with [Oscar]. That form of communication will also continue to apply during the Christmas school holidays.

[87] There will be no order as to costs between the parties. Cost contributions will follow the normal course.

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Judge P R Grace
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 10/01/2022