

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOV.T.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS](http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications).

**IN THE FAMILY COURT
AT WAITAKERE**

**FAM-2010-092-000893
[2016] NZFC 5017**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	LYN PARKER Applicant
AND	BENJAMIN MONDY Respondent

Hearing: 15 June 2016

Appearances: C Muller for the Applicant
Respondent appears in Person on behalf of J Attfield
M Tolich as Lawyer for the Children

Judgment: 15 June 2016

ORAL JUDGMENT OF JUDGE B R PIDWELL

[1] There is currently in place an order preventing the removal of the parties' two children, Clarence, (DOB [date deleted] 2000) and Tony, (DOB [date deleted] 2003) from New Zealand until further order of the Court. That order is dated 14 January 2015 and was sought and obtained on a without notice basis by Mr Mondy, the boys' father.

[2] The parties have been through the Family Court to resolve the care arrangements for the children and they have been finalised by that process including a settlement conference which took place before His Honour Judge Maude on 25 August 2015. At that conference, agreement was reached that the boys remain in the day-to-day care of their mother and that they have fortnightly contact with their father from each Saturday afternoon until Sunday evening and during the school holidays.

[3] The issue that was not resolved at that settlement conference was whether the order preventing the removal of the children should remain in place. A direction was made for the children's mother, Ms Parker, to file the appropriate application to discharge that order and for Mr Mondy to reply if he still opposed the discharge. The issue for the Court today is whether that order should be discharged.

[4] At the outset let me place on record that I met with Clarence earlier this morning and I must say he presented as a delightful, engaging, articulate, polite teenager much to my surprise. Most teenagers are not able to converse as well as he did. He was not nervous in any way. He was able to tell me what he thought and what his wishes were and he said that he was speaking as well on behalf of his younger brother. What he told me, and it was nothing that was not already in the reports prepared by Mr Tolich, his lawyer, was that he thought the order was unnecessary in his view. He said, quite articulately, that the only reason that the order is there is because his parents do not trust each other; that he does not think there should be any reason for his father to be concerned, that he and his brother wanted to travel overseas for holidays, for their sports, and he just saw it as an unnecessary impediment on his ability to do that. He was very clear that his home is New Zealand. He has talked about his subjects he is doing for NCEA Level 1 this year [details deleted].

[5] The children's views are something that I need to take into account. The law requires me to do that pursuant to s 6 Care of Children Act 2004. The boys' views in this matter have been consistent and have been represented by Mr Tolich throughout in his memoranda to the Court, confirmed in his latest memorandum, that the boys have steadfastly maintained that they wish to have the ability to travel with their mother overseas.

[6] I am firstly going to deal with Clarence because his situation is different from his brother's. The parties are aware he has turned 16. What the law says in relation to children who have turned 16 is that an order preventing removal expires when a child turns 16 unless the Court is satisfied that there are special circumstances to justify it continuing. That is set out in s 77A(2) Care of Children Act. That is a recognition by parliament that when children turn 16 they have clear views and wishes and, given their developmental age and stage, it is very difficult to direct a child to do something against those views and wishes except in exceptional circumstances.

[7] Although the law defines a child as being someone under the age of 18 there are a number of provisions in the legislation including this one which mean that the Court has limited jurisdiction over a child once they turn 16. In these circumstances there is nothing special, there is no particular reason why Clarence's position is different from any other 16 year old in New Zealand. He is a New Zealand citizen. He lives here. He is entitled under s 18 New Zealand Bill of Rights Act 1990 to freedom of movement which specifically sets out a right to leave New Zealand as a New Zealand citizen in s 18(3). There being no special circumstances, the order preventing Clarence's removal from New Zealand did expire on his sixteenth birthday.

[8] That leaves me to consider the implications for Tony who is still under the jurisdiction of the Court, being 12. In considering any application under s 77 of the Act which is the provision which provides for such orders being made, I need to be guided as always by the principles set out in s 5 and to take into account the children's wishes in accordance with s 6. The relevant s 5 principles in my view are

predominantly principles (d) and (e), namely that a child should have consistency in their care arrangements and should continue to have a relationship with both parents.

[9] In this case Ms Parker is seeking to discharge the order. An order is usually made under s 77 to prevent children being removed from New Zealand when there is evidence to suggest that a child is being taken out of New Zealand with the intention to defeat the claim of the person who has applied for the order or to prevent any order from the Court from being complied with. That is set out in s 77(2). When Mr Mondy obtained the order from the Court he had concerns which were heard by the Court.

[10] When the parties separated in August 2006 the children remained living with their mother. The following year, however, she spent three months in [name of country deleted] and left the children to be cared for by him and her parents. In 2008 she again went to [name of country deleted] for 10 weeks and left the children to be cared for by him and her parents. Although she returned each time from [name of country deleted] she continued to visit there in later years and, in particular, in 2013 she was offered [overseas employment details deleted]. He consented to her travelling there with the children where they stayed for approximately three months, returning in August 2013. He said that he consented to that on the basis that he have ongoing contact with the children but that contact was problematic at that time.

[11] He has a concern that Ms Parker has had relationships with men who have lived in [name of country deleted] and a concern at the time that the order preventing removal was made that she was going to relocate there with the boys. He said that the children themselves had expressed a wish not to relocate and that he was acting protectively of them at that time.

[12] His position now, and that is 18 months later, is that those same concerns exist. He does not wish to prevent the children from travelling per se but wants to be consulted about the travel plans. He does not have any confidence in Ms Parker consulting with him and providing him with contact with the children if they travel overseas for short holidays. He does not see the order preventing removal as having any detrimental effect on the children as he says his consent to their overseas travel

will not be unreasonably held and the order preventing removal can be suspended when there is agreement for the children to travel at dates and times specified.

[13] In support of his position, his counsel, who I acknowledge is not here and Mr Mondy is representing himself for the purposes of today but I have her submissions, Ms Attfield submits that it is in accordance with principles 5(b)(c) and (d) of the Act for the order to remain, namely that the order will ensure that Tony's care, development and upbringing remains the responsibility of both his parents and that the order will ensure his care and development and upbringing is facilitated by ongoing consultation and co-operation and that the order will ensure that Tony remains living in New Zealand and is schooled in New Zealand and has an ongoing relationship with his father. In summary, Ms Attfield submits that the continuation of the order does not prevent travel by the child where both parents agree that such travel is in the child's best interests and welfare.

[14] On behalf of Ms Parker, Ms Muller has submitted that the order is not in the children's best interests and welfare, in particular noting that Clarence is not affected by it and Tony will potentially be adversely affected by the order remaining in place in that any proposed travel would be travel organised by Ms Parker for both boys and if the order prevents Tony from travelling, or if Mr Mondy does not consent to the travel, then it potentially singles Tony out to his detriment.

[15] Ms Parker's position is that she is happy with some conditions to be placed on a parenting order to provide that there be consultation; that Mr Mondy is notified of any impending travel, provided with a copy of the appropriate documentation and that contact will be facilitated during the travel time. Overall her view is that overseas travel is a positive aspect of their upbringing and she sees the order preventing removal as a barrier to that and an unnecessarily administrative barrier to their travel arrangements. She confirms she is not relocating overseas, that she has an established business in New Zealand as [business details deleted] and her licence for the business means that she can only operate that business in New Zealand. She has invested money in that business.

[16] The boys are doing well at [details deleted] schools with Clarence in particular doing his first year of NCEA and Tony moving on to [name of school deleted] next year. She says she would not disrupt the boys' education. She lives with her family - her parents and her grandparents - locally. She says they are a close family and she has no intention at all of relocating to another country. However, she would like to be able to take the children overseas. They both enjoy [details of sports deleted] and have opportunities to have tuition and camps in [overseas location deleted] and possibly [name of country deleted]. She has not set out any proposed travel but overall wants the order lifted to provide for the ability to travel with the boys when those opportunities arise.

[17] Turning to s 77 of the Act, orders of this nature are made when there are reasonable grounds that the child will be taken out of New Zealand with the intention to defeat orders under the Care of Children Act. It is usually designed to stop an abduction situation where parental rights will be lost if the child is taken to a jurisdiction where this Court is not able to return them.

[18] In order for the order to remain in place there needs to be evidence that the mother has the intention of defeating the current Court orders. There is no evidence that she is intending to relocate permanently out of New Zealand. Indeed, Mr Mondy appears to have accepted that. Her links to New Zealand are deep. There is no suggestion that she has any ongoing ties with any other country. Her family is here, the children are being educated here and she has a business here. Her sole reason for wanting the order discharged is to provide for freedom of travel for the children.

[19] Mr Mondy accepts that the children would benefit from overseas travel if he is assured that he has details of the travel and that they will return. The clear underlying issue here is the lack of trust between the parties and the inability of them to communicate. In this day and age travel between countries is the norm. New Zealand is an island a long way from anywhere else and it is part and parcel of our culture for there to be overseas travel which in my view can only benefit children, exposing them to different cultures, countries, food, languages; it can only be a positive benefit for them. There is no evidence to suggest that Ms Parker is

going to do anything but provide positive opportunities for the children overseas. An order preventing the removal of them, in my view, is an unnecessary barrier which would affect both parties' ability to travel with the children. Indeed, the children themselves firmly have the view that the order should be discharged. Although Clarence today is beyond the jurisdiction of this Court, I accept that his views, as he expressed to me this morning, are representing the views of his brother as well, as confirmed by Mr Tolich.

[20] Both these parents are guardians of the children. Guardianship remains in place until each child turns 18. Guardianship decisions must always be made jointly. Whether the children travel overseas for holidays is a guardianship issue. Both parties must consent. There is an international law, the Hague Convention on the Civil Aspects of Child Abduction, and that secures the children's return to New Zealand if they are unilaterally retained in any country which is a signatory to that convention.

[21] The freedom of movement is enshrined in our New Zealand Bill of Rights Act in s 18 and is an important fundamental right in this day and age for all citizens of this country, including children.

[22] I do not consider that an order restricting Tony's overseas travel is in his best interests and welfare. Mr Mondy's concern about the children relocating originally, and now not being consulted, can be addressed in other ways including a confirmation that the children's habitual residence is New Zealand and for conditions to be attached to a parenting order and a bond to be put in place if Ms Parker is proposing to travel to a non-Hague Convention country.

[23] Accordingly, it follows then that I do discharge the order preventing removal in respect of Tony.

[24] The order preventing removal of Clarence did expire on [date deleted] [2016], there being no special circumstances in this case.

[25] In order to finalise the care arrangements for the children and to provide for ongoing consultation in relation to the overseas travel issue, I discharge the previous parenting orders that have been made and replace them with a final parenting order in respect of Tony only; that order to provide as follows:

- (a) Tony shall be in the day-to-day care of his mother.
- (b) He shall have contact with his father fortnightly from after [name of sport deleted] each Saturday or 3.00 pm at the latest until return by 6.00 pm Sunday and during each school holidays as agreed.

[26] I record that Tony's habitual residence is New Zealand. For the purposes of the Hague Convention on Civil Aspects of Child Abduction I make the following conditions to attach to the parenting order:

- (a) In the event that it is proposed that Tony travel to a Hague Convention country, Mr Mondy will be informed of the details of the trip and his consent to travel will not be unreasonably withheld. He will be informed as follows:
 - (i) Six weeks to two months' notice of upcoming impending travel and reasons for it.
 - (ii) Provided with copies of return tickets.
 - (iii) Provided with copies of itinerary.
 - (iv) Provided contact details whilst overseas; Skype and landline and cellphone numbers.
 - (v) Provide accommodation details.
 - (vi) Provide copies of travel insurance.
 - (vii) Provide copies of any visas if necessary.

- (b) In the event that it is proposed that Tony travel to a non-Hague Convention country the same conditions apply as set out above but in addition Ms Parker will pay a bond of \$3000 into the Court registry 10 working days prior to travel. If the bond is not paid then that provides time for Mr Mondy to obtain an order preventing removal if need be.

[27] Mr Tolich's appointment is terminated with the thanks of the Court within 28 days, acknowledging that he will need to relay the decision of the Court to the boys in the appropriate way.

B R Pidwell
Family Court Judge