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**IN THE FAMILY COURT  
AT WHANGANUI**

**I TE KŌTI WHĀNAU  
KI WHANGANUI**

**FAM-2018-083-000229  
[2019] NZFC 5718**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[PEARL DUNLAP] Applicant
AND	[WILBUR NOLAN] Respondent

Hearing: 19 July 2019

Appearances: S Brown for the Applicant  
Respondent appears in Person (via telephone)  
K Crooks as Lawyer for the Child

Judgment: 19 July 2019

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**ORAL JUDGMENT OF JUDGE A P WALSH**

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## **Introduction**

[1] The issue requiring determination is whether the Court should grant the mother's application to relocate to Canada with [Adele].

[2] At a directions conference on 10 July 2019 I noted it had been understood, as a result of the meeting convened by Ms Crooks, agreement had been reached, but that was no longer the issue. The mother was anxious to relocate to [a city in Quebec], Canada to enable [Adele] to settle and resume her education in Canada. It is understood the new school term in Canada will start on 26 August 2019. Mr [Nolan] advised he opposed the relocation to [the city in Quebec] and wanted [Adele] to relocate to Vancouver.

[3] Given the need for a decision to be made as soon as possible, I directed the matter proceed by way of a submissions only hearing today.

## **The Hearing**

[4] The father is not legally represented. At the start of the hearing today I explained the nature of the hearing, emphasising the parties would not be giving evidence but would be focusing on their submissions. Each had filed written submissions as directed by me on 10 July 2019.

[5] The mother is French Canadian. The majority of her family are based in Quebec, Canada. The father was born in [an overseas country]. Subsequently, his parents relocated to New Zealand and they now live in [New Zealand city name deleted]. The mother and the father moved to [the same city] when [Adele] was three years old. She was born on [date deleted] 2012 in Vancouver. The parties separated at the beginning of 2016.

[6] The father returned to live in Canada. He has explained in his affidavit evidence the reasons why he felt he had no option but to return to Canada because of business commitments. It is apparent from his affidavit evidence he found this was a very difficult decision. He is now in a new relationship. His partner has a [child].

The father and his partner are expecting another child later this year. The father is based in Vancouver and has full-time employment.

[7] The mother wishes to relocate to [a named city in Quebec]. In her application for relocation she emphasised there were two main motivations for the relocation; the first being the opportunity to study French at university level and the second, to have the support of her family. She proposed to stay with her mother and her mother's partner for two to three months while finding suitable accommodation. She said the maternal family and friends would be able to care for [Adele] when she was studying. She advised [the city in Quebec] is about 45 minutes away from her mother's home. She observed if she relocated to [the city in Quebec], then effectively she would be within about 2½ hours from all other maternal family members.

[8] The mother set out briefly the advantages of living in [the city in Quebec]. She described it as a vibrant and multicultural city. There were indoor and outdoor activities. She advised renting prices were affordable. If she was able to relocate to Canada, she was confident she would be able to financially support herself through support from her family, payment of child support for [Adele], income from part-time work and also government assistance.

[9] If the relocation went ahead, [Adele] would be enrolled in a French speaking school. The mother advised the option of an English school was not available because the parents and grandparents had not studied in English schools.

[10] There was an issue about providing stability for [Adele]. The mother observed, while the parties lived together in New Zealand, they had moved four times and after separation, there had been two subsequent moves because of renting arrangements.

[11] During the time [Adele] has resided with the mother in [the New Zealand city], she has had regular contact with the paternal grandparents. It is understood the paternal grandparents are contemplating shifting to [another New Zealand city] to be closer to their daughter and her family. The mother contended, if the move to Canada went ahead, [Adele] would be much closer to her father.

[12] In her affidavit evidence, the mother referred to issues that had arisen between the parties. In summary, she alleged there were occasions when the father had been verbally abusive and had made derogatory comments. She considered he dictated decisions. At times, [Adele] had been exposed to domestic violence and in particular, verbal abuse and control.

[13] The father disputed the mother's claims about domestic violence. Attached to his affidavit evidence were copies of emails he had sent the mother to support his claim there had been a loving relationship between them. He also annexed a number of emails from friends to support his position.

[14] I have mentioned these issues simply by way of background. I am not in a position to resolve those issues. The matter I must decide relates to relocation.

[15] The father appreciated the mother's desire to develop language skills and also to develop connections with her family in [a region in Quebec]. While he recognised those concerns, he maintained he wanted [Adele] to be able to live in Vancouver which was the city of her birth. If that occurred, he would be able to have weekly shared access and believed he would have a role in raising [Adele] in a healthy collaborative way. He emphasised he wanted his role as [Adele]'s father to be recognised and he wanted her to spend more time with him and his family in Vancouver. He noted his partner and her daughter speak French and that would be of benefit to [Adele]. He disputed the mother's basis for relocation. He did not consider it was in [Adele]'s welfare and best interest to be removed from New Zealand and be relocated to [the region in Quebec].

[16] The father alleged the mother had demonstrated historically an unhealthy desire to move for the slightest of reasons. He claimed she had caused all the moves in the relationship. He was particularly concerned the parties had negotiated an agreement relating to care arrangements for [Adele] through Family Dispute Resolution in June 2018. When that agreement was negotiated, he maintained the mother had not disclosed her intentions about relocating to Canada. I reviewed the terms of that agreement and it set out proposals for contact on the basis, at that time, of the mother and [Adele] remaining in New Zealand.

## The Law and Legal Principles

[17] When the Court is required to resolve any issues relating to the care of children, including relocation, it must have regard to ss 4, 5, 6 and 16 particularly of Care of Children Act 2004.

[18] Under s 4, the welfare and best interests of [Adele] must be the first and paramount consideration. Her welfare and best interests must be considered given the particular circumstances of her relationship with her mother and her father. The conduct of either parent may be considered only to the extent it is relevant to her welfare and best interests.

[19] In this case, while the parties have made what I would describe as negative allegations against each other, it does appear to me either parent is capable of parenting [Adele].

[20] Section 4(5) stipulates the Court must take into account the principle that decisions affecting [Adele] should be made and implemented within a timeframe that is appropriate to her sense of time and must have regard to any of the principles specified in s 5 that are relevant to her welfare and best interests.

[21] Section 5 sets out six principles that must be considered by the Court relating to [Adele]'s welfare and best interests. Section 5 provides:

The principles relating to a child's welfare and best interests are that—

- (a) A child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) A child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) A child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) A child should have continuity in his or her care, development, and upbringing:

- (e) A child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) A child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[22] The application of the principles in s 5 were considered at length by the Supreme Court in *Kacem v Bashir*.<sup>1</sup> The Court held the s 5 principles were not exhaustive. The Court was required to have regard to any other matters considered relevant to the welfare and best interests of the child.

[23] The Court considered the interaction of ss 4 and 5. At paragraph [19] in the majority judgment it was recorded:

It can therefore be seen quite clearly that the ultimate objective is to determine what outcome will best serve the welfare and best interests of the particular child, or children, in his or her, or their particular circumstances. In making that determination, the s 5 principles must each be examined to see if they are relevant and if they are, must be taken into account along with any other relevant matters. It is self-evident that individual principles may have a greater or lesser significance in the decision-making process depending on the circumstances of individual cases. If, for example, principle (e) concerning the child's safety is engaged, it is likely to have decisive weight not because of any presumptive legal weighting, but because of the crucial factual importance of protecting the safety of children when compared with the objectives of which the other principles are aimed.

[24] Further on at paras [23] – [25], the Court observed:

[23] At the highest level of generality, the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. Put in that way, it is difficult to see how any presumptive weight can properly be given to either side of those competing but necessarily abstract contentions. To do so would risk begging the very question involved in what is necessarily a fact-specific enquiry.

[24] Everything will depend on an individualised assessment of how the competing contentions should be resolved in the particular circumstances affecting the particular children. If, on an examination of the particular facts of a relocation case, it is found that the present arrangements for the children are settled and working well, that factor will obviously carry weight in the

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<sup>1</sup> *Kacem v Bashir* [2010] NZSC 112 [2011] 2 NZLR 1.

evaluative exercise. All other relevant matters must, of course, be taken into account and given appropriate weight in determining what serves the child's welfare and best interests, as s 4(5) puts it. The key point is that there is no statutory presumption or policy pointing one way or the other. All this seems to us to follow from ss 4 and 5 of the Act as a matter of conventional statutory interpretation.

[25] Courtney J put it well in the High Court in the present case:

Of course, whilst there are certain factors that occur commonly in cases of relocation, the tasks of identifying and weighing up the relevant factors must be done on a case by case basis, recognising the infinite variety in family.

She then added:

That is especially so in the present case because the circumstances of this family have some features that are not commonly found.

[25] The observations made by the Supreme Court were made before s 5 of the Act was amended to record the mandatory consideration of the principle in s 5(a) relating to safety of the children. The observations of the Supreme Court as to the application of s 5, however, still remain valid after that amendment.

[26] Section 6 of the Act records that [Adele]'s views must be ascertained, but it is a question of what weight the Court will give to [Adele]'s views having regard to her age.

[27] Section 16 sets out the obligations of the parties as the guardians of [Adele]. Fundamental to the exercise of guardianship is the ability of the guardians to communicate and co-operate in any important decisions affecting [Adele].

[28] In her submissions, Ms Brown addressed ss 4, 5 and 6 of the Act. She noted the judgment of *Malcolm v Lloyd* [2015] NZHC 1483 where the Court recorded a number of factors in relocation cases as follows:<sup>2</sup>

- (a) Section 5 principles.
- (b) The children's relationship/needs.
- (c) Reasons or motivations, intention to shift.

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<sup>2</sup> *Malcolm v Lloyd* [2015] NZHC 1483.

- (d) Attitude. The parents current attitude towards each other and the way those attitudes may be affected by the relocation.
- (e) Conflict, violence and safety.
- (f) Parenting capacity/emotional health of the parents.
- (g) Contact.
- (h) Children's views.
- (i) Economic, material factors.
- (j) Historical choice of residence, whether there have been undertakings or understandings between the parties.
- (k) Cultural, social and spiritual factors.

[29] I have noted those factors as examples of issues the Court may be required to consider in any particular case.

[30] In this case, there is an unusual feature arising from the fact the mother wishes to relocate to Canada with [Adele] and the father already is living in Canada.

### **Submissions**

[31] Ms Brown argued the principles relevant in this case under s 5 were set out at paragraphs (c), (d), (e) and (f).

[32] On the basis of the affidavit evidence, it does not appear there are any concerns under s 5(a) relating to [Adele]'s safety.

[33] Section 5(b) stipulates that [Adele]'s care, development and upbringing should primarily be the responsibility of her parents. No issues arise over that. It is accepted the mother and father will continue to have a role in her upbringing.

[34] Under s 5(c) [Adele]'s care and development and upbringing must be facilitated by ongoing consultation and co-operation between her parents. For the mother, it is submitted a move to Quebec will not make consultation and co-operation



between the parents any more difficult than it is now with the father residing in Canada and the mother in New Zealand.

[35] I am satisfied any relocation will not impact adversely on [Adele]'s care, development and upbringing being facilitated as required under the principle of s 5(c).

[36] The continuity of [Adele]'s care, development and upbringing is relevant under s 5(d). Ms Brown noted relocation to a different city or country was likely to involve a disruption to a child's education, friendships, family and local community. She acknowledged that was the case with [Adele] if she was to leave New Zealand. In those circumstances, Ms Brown submitted such disruption, termination of friendships and involvement with the local community would be mitigated by her moving back to Canada. There she would have the support of maternal family around her and would be closer to the father and step-siblings by virtue of the relocation.

[37] Ms Brown argued this principle must be balanced against other principles and considerations. When balanced against other factors such as opportunities, being closer to father and family relationships, these outweighed the need for continuity in this situation.

[38] While the father's family are in [a New Zealand city], the evidence provided indicated they would be moving from [this city] at some point. If that happened, this would create a change for [Adele] in any event and there would be no family in [the New Zealand city]. By remaining in the mother's care, if she relocated to Canada, that care would continue as would her relationship with the father.

[39] Under s 5(e), [Adele]'s relationship with her parents and wider family must be preserved and strengthened. The mother contended relocating to Quebec would not impact negatively on [Adele]'s continuing relationship with the father and family group. If anything, it would be the opposite. She was likely to have more contact and opportunities to continue her relationship with her father. She was not moving away, but in fact was moving closer to him and that was a positive factor.

[40] Presently, the father has very minimal face-to-face contact with [Adele] due to the geographical distance. Such contact could be increased with the proposed relocation given travelling distances and time involved in travel. It was pointed out that a flight between New Zealand and Canada was approximately 14½ hours, but if [Adele] relocated to [the region in Quebec], flight between Quebec and Vancouver would be about 4 ½ hours.

[41] Ms Brown submitted, having regard to the principle in s 5(e) it would be in [Adele]'s best interest to be able to preserve and strengthen her relationship with the maternal family who lived in Quebec. She had been fortunate to be able to do this with paternal family in New Zealand. The relocation would provide an opportunity to cement those relationships with her paternal family and enable them to have input into [Adele]'s life. In that context, she would be closer to her half-siblings.

[42] Section 5(f) states that [Adele]'s identity, including culture, language and religion, should be preserved and strengthened. Ms Brown argued the proposed relocation to Quebec would enable [Adele]'s identity to be preserved and strengthened. She noted the mother is French speaking. The relocation would enable [Adele], "*to get back to her roots*", and identity and to experience the culture and language her mother was brought up in. It would also enable her to identify with her country of birth.

[43] Ms Brown submitted the balancing of principles weighed heavily in favour of a relocation to Quebec.

[44] In his submissions, the father was concerned the mother had applied to relocate to Quebec for the sole purpose of enrolling herself in a particular educational institution. He considers the reasons for this particular institution were unclear and were not supported by the evidence.

[45] As [Adele]'s father, he believed he was entrusted with ensuring she was heard and her best interests were at the forefront of the hearing. It was his firm stand point, when considering options, that a relocation to Vancouver was by far the ideal option

for [Adele]. He preferred this option to the other options advanced of [Adele] relocating to Quebec or remaining in [the New Zealand city].

[46] If the relocation proceeded, the father was concerned [Adele] would be giving up all she could remember, all her social bonds and friendships. If she was forced to sacrifice so heavily, the father argued should it not be to achieve the ideal outcome for her which in his opinion was to come home to the city she was born in and be reunited with him.

[47] The father set out in his submissions the background to the proceedings. He said, for reasons set out in his submissions, termination of the relationship “*oddly coincided with the applicant receiving her New Zealand work and residency visa (which I had sponsored in good faith)*”.

[48] As a result of the separation, the father felt he was left without any viable options. He was unemployed in [the New Zealand city] and had a struggling [business] that needed his attention in Vancouver]. He said it was with a heavy heart he left [Adele] in the care of the mother after reaching a simple care agreement. He travelled back to Vancouver to sell off assets so he could meet the most basic of expenses. He had continued to travel back and forth between New Zealand for the majority of 2016 until it was clear there was no prospect of reconciliation. Subsequently, he had been offered a partnership in a [company] and was now settled in Vancouver. He had stable employment, and a new family home. He described having a loving partner and a [step-child] who he loved dearly and they were preparing to welcome a [baby] into their family in [date deleted].

[49] The father stressed he wanted:

[Adele]’s sacrifices and the enduring burden she will bear during this relocation to be rewarded with increased access to him and for her to begin building lifetime connections with her stepmother, [and siblings].

[50] He acknowledged the geographical distance between Canada and New Zealand was a significant limiting factor to strengthening his relationship with [Adele]. He did not agree Quebec was much closer. He considered the relocation to Quebec was far from the perfect result for [Adele] as she would be moving to a city she had never

lived in and thrown into a culture which was completely foreign to her, all the while under the care of extended family members most of whom she had never met.

[51] In advancing his concerns, the father stressed he was not discouraging the French Canadian cultural connection which he considered to be an important part of [Adele]'s heritage. He pointed out his own household had extremely strong French roots. His partner and her daughter held French passports. As a family, they were capable of helping [Adele] embrace her French heritage and culture. Having expressed those concerns, the father said he would support and continue to encourage [Adele] to build relationships with her extended Quebec family members. He did not, however, understand how building relationships with grandparents, cousins and uncles superseded a child's need to build a loving and caring day-to-day relationship with her father, stepmother and siblings.

[52] The father argued if the mother's sole desire was to further her education while learning French, there were many other educational institutions in Vancouver that offered this service. He pointed out it was federal law that as a bilingual country, all students were able to request course work and examinations in French.

[53] He agreed with the mother the matter of relocation needed to be resolved quickly so as to enable [Adele] time to settle prior to school commencing in August 2019. He had decided it would be in [Adele]'s welfare and best interests, regardless of the result, to support the outcome of the hearing. He expressed his commitment to support [Adele] during this defining period of her life.

[54] In conclusion, the father considered relocation to Vancouver would provide the mother the same opportunity to pursue her education while studying in French and immersing [Adele] in her French heritage. It would keep the door open for shared care of [Adele] by her immediate family.

[55] At the hearing, the father maintained whether [Adele] remained in [the New Zealand city] or relocated to Quebec would not mean that her contact with him would increase. He explained because of his employment, there was only a limited opportunity to have face-to-face contact with [Adele] and that did not change simply

because she would relocate from [the New Zealand city] to Quebec. He considered he would still have the same amount of time irrespective of where [Adele] lived.

### **[Adele]’s Views**

[56] Ms Crooks advised she had seen [Adele] on 18 July 2019. She was able to discuss to some extent the proposed relocation. [Adele] was aware there was an issue about relocation. She indicated she wanted to be closer to her father and to be able to spend more time with him. The proposed relocation to Canada appeared to be, “*great and wonderful*”, from [Adele]’s perspective. She observed, however, she would be sad to leave her friends in New Zealand, but then said, “*she could not wait to meet her mother’s family*”.

[57] Overall, Ms Crooks considered [Adele] was too young to understand the implications of such a big move. I accept that submission having regard to [Adele]’s age. The impression I have is that [Adele] does have good relationships with the mother and the father and wants to have those relationships enhanced.

### **Analysis**

[58] When I have regard to the matters advanced for the father and the mother relating to relocation, I find a significant issue relates to the fact if the relocation proceeded, the mother and [Adele] would be returning to Quebec where they would have the benefit of support from the maternal family.

[59] While the father is concerned the relocation appears to be motivated by the mother’s wish to increase her education and opportunities and is not focused on the welfare and best interests of [Adele], that is not my view when I review the evidence and the submissions I have heard today.

[60] As I indicated at the directions conference last week, the Court was being asked to determine whether the relocation could proceed. I indicated then if the Court approved the relocation, the father and the mother would still have the opportunity to resolve ongoing care arrangements for [Adele]. If they were unable to resolve those

arrangements, either of them had the ability to apply to the Courts in Canada to have any dispute resolved. As a general observation, I note the law in Canada relating to the care of children is very similar to that in New Zealand.

[61] Ms Crooks did not accept the father's claim about relocation not affecting the amount of time he would have with [Adele]. She acknowledged there would be limitations on the father's ability to have contact because of his work commitments, but she maintained the relocation would provide the opportunity for the father to have more contact with [Adele].

[62] I have to say when I considered the father's submission on that issue I was not persuaded by the logic of his argument. The reality is, if relocation does proceed, [Adele] will be much closer to him. As I have noted, any travel between New Zealand and Canada is approximately 14½ hours flight time. If [Adele] is in Quebec, it is my understanding the flight time between Quebec and Vancouver is reduced to 4 ½ hours.

[63] Ms Crooks contended, having regard to that factor, the father's submission about no change to the periods he would be able to have care of [Adele] appeared to be illogical.

[64] It does seem to me if the relocation proceeds, the parties would have the opportunity to negotiate arrangements enabling [Adele] to spend more time with the father. Although it is not my function today to make any determination about day-to-day care and contact arrangements, I observe it will be in [Adele]'s welfare and best interests to have more time with the father and his family. It is important she has the opportunity to develop her relationship with her stepsister, stepmother and the baby who is due in [month deleted].

[65] The reality for [Adele] is, as a result of her parents separating, she has moved and will continue to move between the maternal and paternal families. It is important as she grows she has connections with each family. This will assist in her developing her identity.

[66] When I have regard to the matters argued relating to the application of the principles in s 5(b) and (c), I do not find the relocation will impact adversely on [Adele]'s care, development and upbringing being facilitated by consultation and co-operation between her parents. The relocation will not prevent the exercise of guardianship responsibilities. It will not impact on the ability of the parties to co-operate and communicate as [Adele]'s guardians.

[67] Under s 5(d), I consider the relocation will not impact adversely on continuity of [Adele]'s care, development and upbringing. As a result of the separation, she has been in the primary care of the mother. It is evident the father wishes to have a greater role in her care, development and upbringing. I do not consider the relocation will impact adversely on the father's wish. To the contrary, I am satisfied the relocation will increase the opportunity for the father to have a greater role in [Adele]'s care, development and upbringing. Looking ahead, if [Adele] was to remain in [the New Zealand city], then I consider that would be disadvantageous to the father's goal of having a greater role in her upbringing.

[68] When I make that observation, I am conscious the father considers if the relocation is to proceed it should be to Vancouver, but that proposal will need to be weighed, in my view, in the Canadian courts if the parties cannot finally reach agreement about the long-term care arrangements for [Adele].

[69] The purpose of relocation from the mother's perspective is to enable her to get family support, to re-train and to ensure [Adele]'s relationship with maternal family is enhanced. Balanced against those considerations is the ability, in my view, for [Adele] to have more opportunity to spend time with the father and his family.

[70] Ms Brown stressed in her submissions today the mother supported the father having more time. Even on occasions when he was unable to provide full day-to-day care because of employment obligations, she still supported [Adele] having that period with the father so long as she was looked after by a responsible adult.

[71] There is the disadvantage of relocation affecting the relationships [Adele] has developed with the paternal family and with her friends. I respect the father's concerns about the disruption relocation may cause to [Adele].

[72] Inevitably, when the Court is asked to consider the issue of relocation, there are always positive and negative factors. In this case, the negative factors relate to disruption to her schooling, loss of friendships in New Zealand and reduced contact with the paternal family. Counterbalanced against those negative factors are the positive factors I have highlighted when considering the application of the principles in s 5.

[73] To that extent, I do have regard to the views expressed by [Adele] about wanting to meet her maternal family. Without doubt, as she grows older and develops, her relationships with maternal family and paternal family are going to be so important for her stability as she enters the more complicating stages of her development.

[74] Overall, I find the positive factors I have set out outweigh the negative factors. It is important the mother and [Adele] have the opportunity to relocate to Canada. If the mother was unable to relocate to Canada and had to remain in [the New Zealand city], I do not consider that would be in [Adele]'s welfare and best interests. It is evident from the mother's evidence she is seeking the support of the maternal family. She has acknowledged the importance of the relationship between [Adele] and paternal grandparents, but the reality is paternal grandparents are likely to relocate to [another New Zealand city] and that will reduce the time they have with [Adele].

[75] In this context, the mother's wellbeing is important. She does wish to advance her education. While it is easy to perceive the relocation being motivated by the self-interests of the mother, that is not my impression when I look at matters as a whole.

[76] I have weighed the father's wish to see relocation proceed on the basis that if it must proceed then [Adele] should be relocating to Vancouver. If I was to adopt that approach, I consider I would not be giving full weight to those factors I consider significant to [Adele]'s welfare and best interests having regard to my findings relating



to the principles under s 5. As indicated, I have set out, I consider that issue may well have to be explored in the Canadian courts if the mother and father cannot resolve long-term arrangements.

### **Decision**

[77] For the reasons I have set out, I have determined the mother's application to relocate to Quebec, Canada is in the welfare and best interests of [Adele] and I grant the application accordingly.

A P Walsh  
**Family Court Judge**