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**IN THE FAMILY COURT
AT WELLINGTON**

**FAM-2015-085-003623
[2016] NZFC 4703**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	ERNEST MCCABE Applicant
AND	TERESA ACARDI-MCCABE Respondent

Hearing: On the papers

Appearances: Applicant in Person
S Spaak for Respondent

Judgment: 9 June 2016

**JUDGMENT OF JUDGE A P WALSH
[Contact Arrangements]**

Introduction

[1] On 8 April 2016 the father applied for a contact order. At that time the mother was residing in [name of city 1 and name of country deleted] with the children. It was understood her residence with the children there would continue until her diplomatic posting expired in late 2017.

[2] At a telephone conference on 3 May 2016 I indicated the issue of contact was to be resolved on an interim basis. It appeared matters could not be resolved by a settlement conference tentatively allocated for 14 July 2016. I directed the most expedient way to resolve contact arrangements was for each party to file their proposals for contact and the issue be determined on the papers. I determined this process was to be followed as there was no hearing time available for a defended hearing before 12 June 2016 when the children's school extended holiday break started in [name of country deleted].

Background

[3] On 11 May 2016 the mother was advised by the Chief Executive Officer of MFAT her posting in [name of city 1 deleted] would be concluded effective from 17 June 2016; the departure date from [name of city 1 deleted] for her and the children was 20 June 2016. This development necessitated a change to the father's contact proposals.

[4] The father filed written submissions on 17 May 2016. The mother swore an affidavit on 24 May 2016 explaining the termination of her diplomatic posting. Ms Spaak filed written submissions for the mother on 25 May 2016. The father then filed on 30 May 2016 a memorandum, seeking leave if required, to file an affidavit in reply and an affidavit sworn 30 May 2016. When I made the timetabling directions on 3 May 2016 I directed the parties were to file specific proposals for contact arrangements. Given the change in circumstances, however, relating to the mother's diplomatic posting it was appropriate for her to file an affidavit explaining

the position. In those circumstances I considered it was reasonable for the father to file an affidavit in reply.

[5] In a submissions only hearing on the papers the Court is not evaluating the probative value of evidence filed. Decisions regarding the relevance and reliability of evidence cannot be made without the evidence being tested in cross-examination. The Court is not in a position to make findings of credibility. The father argued the Court should make findings of credibility against the mother for reasons set out in his submissions. As I explained at the teleconference on 3 May 2016 I am unable to do this. I note also there is hearsay in the submissions of the father. In a submissions only hearing I can place no weight on hearsay material.

[6] The complicating feature in this litigation arose from ongoing litigation in [name of overseas court deleted], relating to the mother's application for a divorce and issues relating to diplomatic immunity. In a judgment 9 December 2015 I determined the Family Court of New Zealand had jurisdiction to resolve the proceedings, commenced by the father, under the Care of Children Act 2004. There are ongoing issues relating to the proceedings in [name of overseas court deleted] which are not relevant to the issue of interim contact I have to decide.

Contact Issues

[7] The issue to be determined is the father's contact on interim basis. At this stage no lawyer for the children has been appointed. As the children will now be returning to New Zealand that appointment should now be made. Once the mother has returned to New Zealand it may well be possible to convene a settlement conference to resolve parenting arrangements. If there is no agreement at that conference then steps can be taken to set the matter down for hearing. In these circumstances my focus will be to determine the duration of contact arrangements for the children upon their arrival in New Zealand.

The Law and Legal Principles

[8] When dealing with any application under the Act relating to parenting arrangements for children, the Court must have regard to the provisions of s 4, 5 and 6 of the Care of Children Act (the Act). Section 4 stipulates the welfare and best interests of the child must be the first and paramount consideration in any proceedings involving the guardianship of, or the role of providing day to day care for, or contact with, the child. The welfare and best interests of the particular child in his or her particular circumstances must be considered. A parent's conduct may be considered only to the extent (if any) that it is relevant to the child's welfare and best interest.

[9] In determining what best serves the child's welfare and best interests the Court must take into account:

- (a) The principle that decisions affecting the child should be made and implemented within a timeframe that is appropriate to the child's sense of time.
- (b) Any of the principles specified in s 5 that are relevant to the welfare and best interest of the particular child in his or her particular circumstances.

[10] The principles in s 5 can be summarised as follows:

- (1) Section 5(a) provides a child's safety must be protected. In particular a child must be protected from all forms of violence as defined in s 3(2) to (5) Domestic Violence Act 1995 from all persons including members of the child's family, family group, whānau, hapu and iwi.
- (2) Section 5(b) stipulates the children's care development and upbringing should primarily be the responsibility of the parents.
- (3) Section 5(c) provides a child's care, development and upbringing should be facilitated by ongoing consultation and cooperation between the parents.

- (4) The importance of continuity in the child's care development and upbringing is highlighted in s 5(d).
- (5) Under s 5(e) the Court must have regard to the need for the child to continue to have a relationship with both parents and that child's relationship with both his or her family group, whānau, hapu or iwi should be preserved and strengthened.
- (6) Section 5(f) stipulates a child's identity (including without limitation culture, language and religious domination and practice) should be preserved and strengthened.

[11] In applying the principles contained in s 5 the Court must also have regard to principles established by case law when dealing with applications for interim parenting orders.

[12] The principles which the Court must follow when dealing with an application for an interim parenting arrangement are now well established; I refer particularly to the decisions in *Fletcher v McMillan* [1996] 2NZLR 491, *K v K* [Custody] [2009] NZLFR 241 and *MES v JGR* [2005] NZFLR 511. In *Fletcher v McMillan* Hammond J formulated a number of principles. Although these principles related to the Guardianship Act 1968 it is clear those principles are still valid; refer *MM v DM* (2005) 24FRNZ 389; *Churton v Bishop* [2013] NZFC 5277.

[13] The principles, as established in the case law I have referred to, can be summarised as follows:

- 1 The principle of law that the welfare and best interests of the child are paramount; this principle is clearly reflected in s 4 of the Act.
- 2 The Court's function on an interlocutory application is a limited one. It has to decide what is to be done pending a full investigation and hearing.

- 3 An interim parenting hearing is not to enquire into or determine factual allegations.
- 4 A hearing, in principle should be relatively short and focused.
- 5 It is rare to resolve serious differences of fact or weigh the respective merits of each parent. Those merits have to be determined at the substantive hearing.
- 6 An interim parenting order is to be used to advance matters as quickly as possible to a substantive hearing.
- 7 The aim of an interim parenting order is to decide what is to be done pending a full investigation and hearing.

The Father's Position

[14] The father's proposal for contact can be summarised as follows:

- (a) The children are to be in his care from 12 June to 30 September 2016:
 - (i) on 12 June 2016 the children are to travel from [name of city 1 deleted] to the parties' property in [name of city 2 deleted] where they will remain in his care for the northern hemisphere summer;
 - (ii) the father and children will return to [location deleted] New Zealand in September 2016.
- (b) The mother is not to prevent the MFAT-spousal reunion travel policy enabling:
 - (i) part of the travel cost to be subsidised;

- (ii) funding the acquisition of passports for the children and other travel related expenses.
- (c) During the period 12 June to 16 September 2016 the children are to be in the care of the mother for a 3 week period to enable her to visit extended family. Such travel is to originate and terminate in [name of city 2 deleted] at the costs of the mother.
- (d) The children are to be enrolled in [name of school deleted] in [location deleted] for the term starting 10 October 2016.
- (e) From 1 October 2016 the care of the children is to be split equally between the parents with changeovers on Monday. The father set out a schedule of blocks of care of 3 to 4 weeks for the period 1 October 2016 until 30 January 2017. On and from 30 January 2017 care was to alternate on a fortnightly basis.
- (f) Other conditions sought by the father related to:
 - (i) establishment and maintenance of a telephone landline;
 - (ii) communicate by text, email and skype.
- (g) Re-enrolment with the children's previous doctor and sharing of medical information relating to the children.
- (h) Neither parent is to say anything derogatory about the other parent and not expose the children to adult conflict.

[15] The father framed his proposal on the basis the parties had purchased a property in [name of city 2 deleted] near his extended family in 2012. It was intended this property would have become the family home. He claimed the parents recognised the importance of close relationships between the children and whānau.

[16] The father described the background to the mother accepting the diplomatic posting to [name of city 1 deleted] and how this posting could strengthen the relationships with their paternal grandparents and extended family. Over the past year, when the children were not attending school in [name of city 1 deleted], they returned to the property in [name of city 2 deleted] either in his care or the care of the paternal grandparents.

[17] The father advised his work was in New Zealand; under his existing contract of employment he was able to undertake international travel.

[18] The father made the following allegations against the mother which I summarise.

- The mother had used stalling tactics to prevent resolution of parenting arrangements.
- She had not discontinued the proceedings in [name of overseas court deleted] or requested that orders made by that Court restricting the movement of the children be discontinued.
- She had indicated in the [name of city 1 deleted] proceedings a new appeal against my decision of 9 December 2015 might be filed regarding the issue of jurisdiction.
- The father's request for substantially greater contact during the period 2015 to June 2016 had been declined.
- The mother had obstructed MFAT funded travel and had misrepresented to the Court the nature of the MFAT family travel policy.
- The mother had created other unnecessary barriers to his free communication with the children and had misrepresented the situation to the Court.

- The mother had instructed her [name of city 1 deleted] attorney to pursue her claim in [name of overseas court deleted] including child support and division of property.

[19] These allegations of the father raise issues of credibility which cannot be determined, for the reasons I have set out, in a submissions only hearing.

[20] The father believed MFAT's decision to terminate the mother's posting was because of her unwillingness to dismiss the proceedings in a [name of overseas court deleted]. He claimed the grant of waiver of diplomatic immunity enabling her to file proceedings in that Court was shown to be illegal. I am unable to make any findings regarding these claims in the absence of such evidence being tested in cross-examination at a substantive hearing.

[21] The father further argued there was clear evidence on the papers that the mother had:

- (a) mislead the Court about the issue of the children's school contracts in [name of city 1 deleted]; and
- (b) obstructed access to MFAT travel and benefits policies to have his contact with the children in the past year.

The father claimed the proceedings in this Court and in [name of overseas court deleted] were the direct consequences of illegal actions by MFAT officials. These allegations can only be resolved after being tested in cross-examination at a substantive hearing.

[22] The father opposed any proposal by the mother for the children to start school in New Zealand when the third term began in July 2016. He considered any such proposal was yet another disingenuous attempt to prevent the children from being in his care. She knew he did not have accommodation currently in [location deleted] which was suitable for the children and would be unable to secure such accommodation within that timeframe. He submitted it would be unfair to the

children to expect them to restart school in New Zealand without a longer summer holiday in [name of city 2 deleted]; he was concerned the children had been in school for all but 4 weeks since the beginning of September 2015. The children looked forward to the extended summer holiday. His proposed care schedule was effectively identical to what had occurred in the past two summers.

[23] The father proposed the parents obtain accommodation in [location deleted] in the same school district where the children were enrolled from 2010 to 2013. This would reflect the status quo before they moved to [name of country deleted].

The Mother's Position

[24] In her affidavit sworn 24 May 2016 the mother produced a letter from the Chief Executive Officer of MFAT setting out the reasons why her posting had been terminated and she had been reassigned to [location deleted]:

- The ongoing litigation in New Zealand and [name of city 1 deleted] jurisdictions was complex and protracted with no early end in sight in either jurisdiction. There appeared to be no other option for resolving the dispute.
- The level of effort required from her to participate in two sets of proceedings given her current work requirements in [name of city 1 deleted].
- The unsustainable level of MFAT senior-level leadership, legal and human resources to address issues arising out of both legal proceedings.
- MFAT was at risk of being drawn further into the litigation which created potential significant reputational risks for the ministry.

[25] The mother did not have either regular New Zealand passports or [name of country deleted] passports. The only passports she had were New Zealand

diplomatic passports. If the children remained in [name of country deleted] after 20 June 2016 MFAT might need to check with [name of department deleted] about them remaining in [name of country deleted] with New Zealand passports given their [name of country deleted] citizenship. Layla was not currently registered as a foreign-born [name of country deleted] citizen; the mother claimed this complicated the issue.

[26] The mother's visa/immigration status meant she must return to New Zealand on or before 20 June 2016; if she remained in [name of country deleted] after that date she would be there illegally and she could not do that as an employee of MFAT.

[27] On 14 June 2016 the children's school in [name of city 1 deleted] closed for the summer break. Term 3 of the New Zealand school term would begin on 25 July 2016 and this would give the children 6 weeks off school. The mother believed the children would need this break to readjust to life in New Zealand before starting school.

[28] The mother proposed the Court should only deal with urgent issues of contact over the coming school holidays. Ms Spaak submitted the issue of longer term care arrangements required the appointment of lawyer for child. She sought a settlement conference to address long term care arrangements.

[29] The mother's contact proposal was as follows:

- Wednesday 22 June at 2pm until Saturday 2 July at 2pm in the father's care (11 days).
- Saturday 2 July at 2pm until Sunday 3 July at 5pm in the mother's care (1 overnight).
- Sunday 3 July at 5pm until 18 July at 2pm in the father's care (15 days).

- Monday 18 July at 2pm until Saturday 23 July 10am in the mother's care (6 days).
- Saturday 23 July at 2pm until Sunday 24 July 2016 3pm in the father's care (1 overnight).

[30] After the holiday contact arrangement until a settlement conference was allocated, Ms Spaak submitted the children remain in the mother's care during the school week and one of every four weekends from Friday after school until 3pm on Sunday. The children could also spend Wednesday afternoon/evening in the father's care after school pickup until 7:15pm and on the Friday evening from after school pickup until 8pm on her weekend with the children.

[31] The mother opposed the father's proposal that the children be in his care from 12 June 2016 until 30 September 2016 taking into account his proposal she had the children for 3 week holiday during that period.

[32] As the children will be returning to New Zealand Ms Spaak submitted they had to be enrolled in a school having regard to s 20 of the Education Act 1989 which requires New Zealand citizens and residents to be enrolled and attend school between the ages of 6 and 16 years.

[33] The mother disputed the father's claim she had kept the children away from him. She claimed, since the parties separated in December 2014, the children had spent 16 of the 17 weeks of school holiday time with the father. The father disputed that claim. I am unable to resolve that issue in a submissions hearing.

[34] Given the change in circumstances of the mother's employment and the need for the children to return to school in New Zealand, Ms Spaak submitted the children's holiday contact with the father would have to change. The children would need to begin the process of transition and reintegrating into life in [location deleted] and starting school on 25 July 2016. Ms Spaak argued the mother had been the primary caregiver of the children over the past 18 months. The only time the

children would be able to spend time with the father was between 20 June 2016 and the start of term 3 on 25 July 2016.

[35] The mother claimed the children did not want to spend the period 12 June to 30 September 2016 with the father. He disputed that claim and said the children had told him they did. It may well be the children are saying different things to each parent which is not uncommon. At this stage I have no way of determining whether this is in fact happening. I cannot resolve this issue on the papers. The views of the children will need to be ascertained under s 6 of the Act and that would be part of the brief of lawyer for child.

[36] Ms Spaak submitted the Court also needed to consider the children were upset, unsettled and vulnerable with the significant and unexpected change in their circumstances. They had never been away from their mother for longer than 6 weeks. She believed a long separation from her in these circumstances would impact negatively on the children especially on Layla as she is only 6 years of age.

[37] The mother was concerned, if the father's proposal was accepted by the Court i.e. the children start school in New Zealand on 10 October 2016 they would in effect spend 10 weeks only in school in the 8 months from mid-June 2016 until school resumed in New Zealand in February 2017. Ms Spaak submitted it was not in the interests of the children to spend such a long period out of school when they needed to reintegrate into the New Zealand school curriculum.

[38] Ms Spaak advised the mother did not agree to the children remaining in the [name of country deleted] with the father, after she returned to New Zealand on 20 June 2016, as she had no confidence the children would be returned to New Zealand. She referred to an order made in [name of overseas court deleted] of its own motion preventing the children being removed from [name of country deleted]. That Court had overseen the agreement of a stipulation regarding the children's care on 5 June 2015 which included penalties if the father did not return them to the mother at the end of the summer holiday period. She submitted [name of overseas court deleted] had made the order and stipulation with knowledge and information that had not been submitted to the Family Court of New Zealand. The provisions of that order

and stipulation enabled the children to see the father in [name of city 2 deleted] for each subsequent school holiday period.

[39] If the children remained in [name of city 2 deleted] the mother was not confident they would be returned to New Zealand for these reasons:

- (a) The father had repeatedly requested the children travel to New Zealand in March 2016, knowing they did not have [name of country deleted] passports to enable them to return to the mother in [name of city 1 deleted]. There had been ample time for him to obtain these passports as the mother had requested they be obtained in early December 2015.
- (b) The father's application for a parenting order 22 May 2015 was based on the fact the parties and the children were domiciled in New Zealand which was their home. The father had now changed his position by claiming in his submissions the children had no other permanent home other than the property in [name of city 2 deleted].
- (c) The father had alleged in his submissions the children had a "*place based*" spiritual attachment to "*sacred sites*" in [name of city 2 deleted].
- (d) The father had asserted in his submissions the property and his family in [name of city 2 deleted] provided stability in the children's lives.

[40] The mother was also concerned the father could request [name of city 2 deleted] to deal with issues of custody relating to the children having regard to these factors:

- His residency status in [name of city 2 deleted].
- The children having been physically present in [name of city 2 deleted] for a substantial amount of time.

- There was no agreement or court order in any other jurisdiction about long term care arrangements for the children.
- The discontinuance of the mother's action for divorce in [name of city 1 deleted] when she left [name of country deleted] on 20 July 2016 and their loss of protection and oversight that Court had been providing.
- As the father had started property proceedings in [name of city 2 deleted] this might provide a procedure for him to file a more comprehensive application for divorce that encompassed child care issues.

[41] The mother preferred the children return to New Zealand on 20 June 2016 and acquire passports with no limitations and conditions associated with diplomatic provisos before any further overseas travel was considered.

[42] The father disputed any suggestion he would not return the children to New Zealand. He claimed there was no evidentiary basis for the mother's concerns. He did not accept her account about the process followed in [name of overseas court deleted]; he argued the order made on 21 May 2015 was made without any input from him as he was still living in New Zealand and had not made any submission. The summer stipulation had been agreed by the parties. He claimed the mother had made similar allegations in the past where she needed to generate false urgencies to manipulate the Courts.

[43] In the absence of this evidence, relating to this return of the children, being tested in cross-examination I am unable to make any findings regarding the mother's claims the father may not return the children to New Zealand. Likewise I cannot make any finding regarding the father's claim the mother has previously made such allegations to mislead the Courts. Such findings can only be determined after the allegations have been tested in cross-examination and the Court has had the opportunity to assess the credibility of the parties and any documentation provided to support their respective claims.

[44] Reference was made to the Hague Convention relating to the return of children. I cannot address comprehensively the various possibilities under that convention in a submissions only hearing.

[45] In their submissions each party has made various claims about the status of the children's passports. The father argued this issue continued to be wielded as a means of constraining arbitrarily the children's movements and misleading the Courts. The issue relating to the children's passport needs to be resolved. On the basis of the submissions filed I do not have sufficient reliable and accurate independent information which would enable me to make any informed assessment of the issues argued relating to passports.

Decision

[46] As noted when I made directions on 3 May 2016 for the parties to set out their specific proposals for contact this was the basis the mother and the children would continue to reside in [name of city 1 deleted]. Since then there has been a complete change of circumstances consequent upon the termination of her posting in [name of city 1 deleted] and being required to return to New Zealand.

[47] When I considered the father's proposal to have the children in his care from 14 June 2016 to 30 September 2016 I was concerned about the disruption of their education and the impact of this disruption on their welfare and best interests.

[48] As matters now stand the mother must return to New Zealand on 20 June 2016. If the children remain in [name of country deleted] they will be in the care of the father until 30 September 2016. They will miss a considerable period in their school curriculum in New Zealand. Given the father's proposal the children start school in term 4 in New Zealand on 7 October 2016 this would in effect mean the children have spent only 10 weeks in school in a period of 8 months from mid-June 2016 until school resumed in New Zealand in February 2017. I consider this period is too long and would be unacceptably prejudicial to the children's education and have a negative impact on their welfare.

[49] I find the change in the mother's circumstances necessitates confining the scope of the interim contact arrangement to the New Zealand school holidays as submitted by Ms Spaak. If the children start school in New Zealand in July 2016 I consider these factors significant:

- (a) The six week period would provide an opportunity for the father to have a significant block of time with the children in New Zealand.
- (b) The six week period would enable the children to readjust to living in New Zealand and resuming school in New Zealand.

[50] The father is understandably concerned to have as much time with the children as possible given his limited periods of contact since the parties separated. Once the children have returned to New Zealand arrangements can be negotiated for the ongoing care. It may well be a settlement conference can be convened enabling these arrangements to be resolved if the parties cannot reach agreement. If there is no resolution at the settlement conference then the matter can be set down for a substantive hearing.

[51] Having regard to ages of the children it is important their views are ascertained before making any long term decisions about their future care arrangements. Lawyer for the children is to be appointed with the standard brief including ascertaining the views of the children.

[52] The parties may be able to reach agreement about the possibility of the children spending part of the Christmas/New Year school holiday period in [name of city 2 deleted] between Christmas 2016 and the end of January 2017. There will be sufficient time between now and the start of that holiday period for issues to be resolved regarding the passports for the children and Hague Convention issues if the mother still retains concerns about the father not returning to New Zealand with the children.

[53] The parties put forward long term proposals for the care of the children. Given the change in circumstances and the decision I have made about contact arrangements between now and the start of school in July 2016 I consider the father should have the opportunity to consider further care proposals following the return of the mother and the children to New Zealand. For those reasons I have confined my decision to contact arrangements between now and the children starting school in July 2016.

Orders and Directions

[54] The father is to have contact with the children on the following terms:

- (a) Wednesday 22 June at 2pm until Saturday 2 July at 2pm.

(b) Sunday 3 July at 2pm until Saturday 23 July at 2pm.

[55] For the reasons I have set out I am not prepared to make any further orders for the long term care of arrangements of the children. As noted their views need to be ascertained. Given the changes affecting the mother and the children the parties will need to reconsider their future long term care arrangements.

A P Walsh
Family Court Judge

Signed at am/pm on June 2016