

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

**NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY
REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND
11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION,
PLEASE SEE [https://www.justice.govt.nz/family/about/restriction-on-
publishing-judgments/](https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/)**

**IN THE FAMILY COURT
AT PORIRUA**

**I TE KŌTI WHĀNAU
KI PORIRUA**

**FAM-2006-091-000855
[2020] NZFC 6567**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[EBONY MULLEN] Applicant
AND	[NGATANA MULLEN] Respondent

Hearing: 4 August 2020

Appearances: Mr Dunstan for Mrs [Mullen]
Ms L Postlewaight for Mr [Mullen]
Ms T Davis – Lawyer for Child

Judgment: 11 August 2020

JUDGMENT OF JUDGE P R GRACE

[1] This hearing was in relation to the father's request to relocate this couple's child [Paora], aged 15 years and 8 months, to the United States. The application is opposed by the mother.

[2] Following the father's request to allow [Paora] to relocate to the United States, the mother obtained an order preventing removal.

[3] Both parents are guardians of this child.

[4] The parents finally separated in 2013. They have, however, been involved in litigation since 2006, from when [Paora] was aged about two.

[5] [Paora] is the youngest of five children born to this couple. The oldest child lives in [the lower North Island]. The next eldest is married, residing in [the upper North Island], with two children. The third child resides currently with the father. The fourth child resides with the mother.

[6] The father remarried in June 2019. He married an American woman who lives in [a state in the Midwest]. She is employed by [an employer] located nearby where she resides.

[7] The father wishes to move to [the state] to be reunited with his wife. Not only that, but the father is currently quite ill with a [condition], and unless he receives treatment, his future prognosis is not good. His evidence is that he can obtain that medical treatment in [the state] and can obtain that on his wife's medical insurance. He says that he is able to access that medical treatment with an initial interview approximately two days after arriving in the United States, and the suggestion is that any operation would be carried out on him in the not too distant future thereafter.

[8] [Paora] has resided with his father for the past three years. He has made it clear through his counsel that he does not wish to live with his mother and that he wants to move to the United States to be with his father. He has stated that if he is not allowed

to go, he will inevitably move to the United States once he reaches the age of 16, which is the point at which this Court ceases to have immediate jurisdiction over him.

[9] The mother wishes to have [Paora] remain in New Zealand. She acknowledges that he does not wish to live with her at the present time, but she wishes to have the opportunity of re-establishing a relationship with him. She wishes [Paora] to remain in New Zealand at least until he is 18 years of age, at which point she accepts that he would be in a position to make his own decisions.

Background

[10] There have been a number of hearings over the years which have resulted in orders in relation to the children when they were younger.

[11] There is also a protection order made in favour of the mother, against the father, and that order still remains in full force and effect. Whatever issues exist between the mother and the father, it is common ground that the father does not pose any physical risk to [Paora].

[12] The expressions from [Paora] that he wants to remain living with his father are not new. He was expressing that wish in 2015 and was quite clear at that point that he wanted to live with his father. Notwithstanding that wish, when this matter was last before the Court by way of a hearing, in 2016, the Court made an order in respect of [Paora], which split his care equally between both of his parents. By 2017, [Paora] had voted with his feet, and gone to live with his father. His mother appears to have accepted that situation, but it appears from her evidence at this hearing that her view at that time was that [Paora] would “*see the light*” and would in all probability return to the care of his mother.

[13] The present situation is that [Paora] sees his mother once a month and spends the day with her. He does not stay overnight as he has no wish to do that.

The Evidence

[14] It is accepted between the parents that [Paora]’s relationship with his mother is somewhat fractured. Both parents have different views as to the reasons why this is the case.

[15] The father’s view is that [Paora] has been rejected by his mother, and that the only way the relationship will be re-established is for the mother to encourage [Paora] and make the effort to engage with him.

[16] For her part, the mother sees the problem having arisen as a consequence of the father having a negative view of her, and thus influencing [Paora] against the mother. She sees the father as the prime cause of the problem and she would like time with [Paora] to be able to explain her position to him. Her evidence was that she would hope that [Paora] would come around to her accept her way of thinking and thus see the father in the same light as she sees him.

[17] Both the father and [Paora] are members of the Latter-Day Saints Church. While the mother was also originally a member of that church, she is no longer an adherent of that belief. This has caused some problems within the family because [Paora] was to be baptised into that faith, and he invited his mother to attend the baptism ceremony. The evidence is that it was only to include a small group of immediate family members and some of the church, but the mother declined to attend. Her evidence is that she felt rejected by the church when she was a member, and because the relationship between herself and the father failed, she has taken the view that she was subject to criticism from those within the church and she sees that criticism as being unfair.

[18] It seems that [Paora] felt rejected by his mother because she declined to accept the invitation to come to his baptism.

[19] The religious views also permeate through other aspects of this family. The daughter living with the mother has a partner and they have a child. That daughter is

not married, and the fact that they have a child out of wedlock is something which is open to criticism on religious grounds.

[20] Historically these two parents were subject to a s 133 report in 2013. Whilst that is now a long time ago, at that time the clinical psychologist described *“the relationship between (mother) and (father), as separated parents, is one of the most dysfunctional that I have encountered”*.

[21] The Judge who heard the case in 2016 commented in her decision that, *“the level of dispute and the need for precise defined orders is such that I left Court yesterday despairing for [Paora]”*.

[22] [Paora] has commented to his counsel that he has been *“talking to lawyers all his life”*.

[23] Whilst the father is clearly a very sick man, having listened to both he and the mother give their evidence, both still remain accusatory of the other as the cause/reasons for [Paora]’s stance that he wants to remain living with his father and wants to move to the United States.

[24] The father has been employed in [job details deleted]. Due to his health he is now in the course of disengaging from [that role] based on medical grounds. He says that once he is able to move to the United States he will have no difficulties financially.

[25] The Court received a copy of [Paora]’s latest school reports, which indicates he has been doing well at school. This is his NCEA year, and the school have written a letter indicating that they are in a position to and able to support [Paora] through a virtual classroom, were he to move to the United States, so that he could finish the current academic year and be in a position to complete his NCEA year. The father’s evidence was that there is a certified organisation near where he will be residing, able to supervise foreign examinations, so [Paora] would be able to sit his NCEA exams in the United States. If not, then the father is prepared to fly [Paora] back to New Zealand, allowing for a fortnight’s isolation, before [Paora] would undertake his NCEA exams in New Zealand.

[26] Notwithstanding that, the mother's position is that she wants [Paora] to remain in New Zealand to at least complete his NCEA year and remain in New Zealand until he is 18.

[27] The issue of Covid-19 was raised during the course of the argument, as the United States has a high infection rate. The father's evidence was that although that may well be the case, the area to where he intends to move is a small community of about 3,000 people. The family unit into which he has married have their own bubble, and he and [Paora] would be joining that bubble.

[28] There are other children of [Paora]'s approximate age within that extended bubble in the United States. They are likely to be home-schooled during the Covid-19 continued crisis. The father says that the intent would be for [Paora], once he completes the current New Zealand academic year, to be tutored by one of the other family members to prepare him to start the United States school year in September 2021.

[29] The father has indicated he would be prepared to lodge a bond with the Court. He is prepared to have [Paora] returned to New Zealand on at least one occasion before the end of this year, and then up to four occasions during each year thereafter. It may be that family members from New Zealand may wish to travel to the United States to visit [Paora] there rather than [Paora] returning to New Zealand, and the father is prepared to accommodate that.

The Law

[30] The law is contained in ss 4, 5 and 6 of the Care of Children Act 2004. The leading authority on relocation disputes is *Kacem v Bashir* [2010] NZSC 112.

[31] I am required to make a decision that is going to advance this young boy's best interest and welfare, both immediately and for the foreseeable future. In doing that I am required to take into account the various principles set out in s 5 of the Care of Children Act 2004, particularly those principles that are relevant to this case. This

case is about this boy in these particular circumstances. It is quite therefore case-specific.

[32] I am required to make a judicial assessment based on an evaluation of the evidence.

[33] When considering the principles, the main principles cover the question of safety, development and upbringing, and ongoing family relationships.

[34] I am also required to take into account the views and wishes of [Paora] by reason of s 6 of the Act. I am required to make some assessment of his level of maturity and dependent upon my view of his maturity, that will influence the weight that I attach to his views and wishes. The views and wishes of a child, of course, are not determinative of the outcome, but clearly the older a child and the more mature a child is, greater weight should be given to the views and wishes if they appear to be a genuine expression on the part of that young person, and the young person has given rational consideration to those views and wishes.

Discussion

[35] This is a boy who will be 16 in four months' time. He is said to have a degree of maturity and intelligence.

[36] His views expressed to his lawyer have been consistent and are consistent with those expressed to an earlier lawyer for child back in 2015. This boy has made it clear, not only by his verbal expressions, but also by his physical actions in moving to live with his father. He has also made it clear that when he is 16, if he is denied the right to move with his father, he will make that move in any event. In that eventuality I have little doubt that the father would provide the financial resources to enable [Paora] to travel to the United States.

[37] Here is a young boy who, as he puts it, has been talking to lawyers all of his life. He is clearly familiar with the process.

[38] The various provisions set out in the United Nations Rights of the Child Convention also dictate that the views and wishes of a young person should be listened to, and where appropriate, given recognition.

[39] Having regard to, therefore, the age of this young boy, his consistent view, backed up by his physical actions, I have come to the view that considerable weight must be given to those expressions of his wish.

[40] His father's reasons for wanting to relocate himself to the United States, and take [Paora] with him, are reasonable and realistic. This is not a spur of the moment decision on the part of the father but is backed up by adequate and proper medical reasons. Not only that, he is married to an American citizen who lives and works in the United States. [Paora] has met this woman on at least two occasions and has visited the United States and met with extended members of her family.

[41] I am satisfied that the reasons for wishing to relocate are well reasoned and appropriate.

[42] Whilst I accept that for any young person of [Paora]'s age, the concept of travelling to a country like the United States would be exciting and have appeal, there is more involved in this particular case. This young boy appears quite attached to his father. The 2016 decision which split his care equally between his parents, clearly did not meet [Paora]'s expectations or desires. He wants to be with his father, and that is why he moved to live with him.

[43] [Paora] has made it clear through his counsel that even if his father went and the Court declined his father's application to relocate [Paora], he, [Paora], will not return to live with his mother. He wishes to remain living where he is, living with his father at present. Also living in that house is one of his sisters. The evidence is that the eldest brother will move from [the lower North Island] and relocate to live in the house with [Paora], and that brother would commute to work in [the lower North Island] until such time as [Paora] was 16 years of age and able to make his own decision. So, if [Paora] is not allowed to travel, the evidence suggests clearly that he will not in any event be returning to live with his mother.

[44] There has been a dispute between the parents as to which of them is responsible for [Paora] forming his current views/wishes. The mother blames the father for influencing [Paora] against her. The father blames the mother for her lack of interest in [Paora]. It is for that reason that I have referred to the earlier comments from the psychologist and earlier decision. The negative state of affairs that exist between the parents is not new. Those views have prevailed for years and listening to the parents give their evidence I formed the opinion that nothing has changed between them. Time has not mellowed them. [Paora] is a product of the environment within he has been raised. Children are more astute than parents often give them credit. There comes a time however when young people must be listened to and their wishes respected. For [Paora] that time is now.

[45] On the evidence before the Court, there can be little doubt the relationship between [Paora] and his mother is not as sound as a relationship between a son and his mother should be. I did not understand the mother to dispute that. Her wish, however, is to have the opportunity to re-establish and build up her relationship once again with her son.

[46] Whilst that in one sense is commendable, the reality is that [Paora] has now been with his father for some three years, and the mother has had ample time to try and re-establish her relationship with [Paora], but she does not appear to have been able to achieve that. The fact that she did not go to his baptism is a prime example of the breakdown in the relationship. If she really wanted to establish that relationship, then in my view, she could have gone to his baptism because it is the relationship between the boy and his mother that is important, not the mother's views and feelings about rejection by other members of the church group.

[47] In fairness to the mother, she herself has had tragedy in her life of recent times. She has re-partnered, and her partner's son died earlier this year from [a terminal illness]. That has clearly had an impact on her and her partner, and this hearing poses the possibility of her losing a second son if [Paora] were to go to the United States. That can be upsetting, but nevertheless this hearing is about this boy in his particular circumstances.

[48] There is no suggestion that this boy would be at risk of harm whilst in the care of his father, whether that be in New Zealand or in the United States.

[49] There is an issue about [Paora] remaining in New Zealand to complete his current academic year, or whether he should be allowed to move to the United States and complete it in a virtual classroom. The evidence from the school is that education through the virtual classroom is possible and the school is prepared to support it. The father has therefore put proper steps and plans in place to ensure [Paora] can complete his current school year.

[50] The concern I have is that if [Paora] were not allowed to relocate, then in my view that has the potential to cause resentment on his part, and that has the potential to negatively impact on his education and commitment to his studies. There is an element of risk whichever way the decision goes as far as this particular point is concerned.

[51] There is also a concern regarding his relationship with his mother and other members of his family if [Paora] is not allowed to relocate. In view of his strongly expressed wish, I have little doubt that he would be very resentful towards his mother and any attempt by her to re-establish the relationship is likely to be resisted on his part as he would see his mother as the person responsible for his wishes not being listened or adhered to.

[52] Another issue which arose during the course of the hearing, is what is likely to happen to [Paora] in the event that his father dies from his [condition], or if the treatment which he is seeking is not successful in the United States. The father has indicated that he would be prepared to lodge a bond that could be utilised to enable a member of the family from New Zealand to travel to the United States to collect [Paora] and take him back to New Zealand. This of course would only be relevant between now and when [Paora] turns 16.

[53] The mother's position was that [Paora] should remain in New Zealand until at least the father's treatment outcome was known, before [Paora] goes to the United States. There is some logic in that approach, but in my view, if [Paora] was not allowed

to go to the United States with his father, and if something did happen to his father, again [Paora] is likely to react negatively against the mother because he will perceive her as the person who was responsible for that refusal to allow him to relocate.

[54] The mother suggested that the father is using [Paora] as “a crutch” in supporting the father through his ill health, and the father needing [Paora] for that purpose. On the evidence I have no doubt that is what the mother sincerely believes. But I do not accept that to be the case. The father described a positive relationship with his son. The father has supported [Paora] in his schooling, his homework, his sports, and describes the two of them as great mates. I do not accept the suggestion that the father has manipulated [Paora] into this situation. [Paora] has made his own decisions, for his own reasons, and the father has supported him in that whereas the mother has felt rejected and does not accept [Paora]’s reasoning or his wishes/views.

[55] Another issue that arose during the hearing is that [Paora], being a young Maori will not fit in in the United States. The father rejected that suggestion. The father has not been rejected or subjected to abuse. He described that both he and [Paora] as being “fair skinned” Maori, and once people hear their New Zealand accent they are accepted within the community without difficulty. These sorts of risks exist throughout the world, no matter what race or creed one is. In this case the risk is not at a significant level that would warrant the Court refusing the application on that basis.

[56] Taking all those factors into account, I have come to the view that the father’s application should be granted and [Paora] should be able to relocate with the father to the United States and there will be an order accordingly.

[57] Having come to that view, the order preventing the removal of [Paora] from New Zealand must be discharged.

[58] The leave to relocate, however, is granted on condition that the father lodges a bond, which I fix at \$NZ10,000, with the Porirua Family Court, with those funds to be held on a term deposit (for what it is worth) until [Paora]’s 16th birthday. At that point, the bond together with an accrued interest is to be refunded to the father if the

bond has not been called upon in the interim. The bond would be available to fund a family member to travel to the United States to collect and to bring [Paora] home in the event of the father's demise, but [Paora] should only be returned to New Zealand if he wishes to return at that point.

[59] [Paora] should continue to have regular skype contact with his mother and members of his extended family in New Zealand on a regular basis, which I fix at every two weeks, and that direction will continue until [Paora] turns the age of 16 years.

P R Grace
Family Court Judge