

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

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

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**IN THE FAMILY COURT
AT MANUKAU**

**I TE KŌTI WHĀNAU
KI MANUKAU**

**FAM-2017-019-000058
[2020] NZFC 9071**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	WILLIAM ROY BLISSETT Applicant
AND	EILEEN ANN RADKE-BLISSETT Respondent

Hearing: 16 October 2020

Appearances: M Earl and S Hyde for the Applicant
S Zindel for the Respondent

Judgment: 16 October 2020

ORAL JUDGMENT OF JUDGE P S GINNEN

[1] A three day hearing has been set down as a primary fixture beginning Monday 19 October. The parties are Eileen Radke-Blissett and William Blissett. Mr Zindel represents Ms Radke-Blissett. Mr Earl and Ms Hyde represent Mr Blissett.

[2] The hearing is of Mr Blissett's application for a dissolution of marriage and Ms Radke-Blissett's application for Property (Relationships) Act orders. An

interlocutory application dated 25 September 2020 has been filed by Ms Radke-Blissett to appear at the substantive hearing by way of audio-visual link (“AVL”). This is the second time she has applied to appear by AVL. Her first application was dismissed by Judge Skellern on 18 June 2019. For that hearing, Ms Radke-Blissett had been directed to file an affidavit in support of her application to better address the medical reasons why she cannot travel, any relevant financial issues and details of the AVL arrangements made for hearing.

[3] At the time of the hearing on 18 June 2019, Judge Skellern had a memorandum dated 17 June 2019 from Mr Zindel but did not have the affidavit in support that Ms Radke-Blissett had been directed to file. Judge Skellern expressed concern about the use of AVL. She said this:

[7] The proceedings before the Court are protracted and lengthy in nature. There is much irrelevant evidence included in both sets of proceedings. The last time AVL was used in respect of the dissolution proceedings, as I understand it, the set-up for it was in Ms Radke-Blissett’s bedroom, which I consider completely inappropriate in terms of security. It would be unable to be determined whether there was in fact anyone else in the room or any of the important issues that must be considered when determining whether AVL is to be used.

[8] The potential impact of the use of the technology on the effective maintenance of the rights of the other party, namely Mr Blissett, including the ability to assess the credibility of witnesses and the reliability of evidence, I consider would be seriously compromised in this case by the use AVL.

[9] I am sympathetic to Ms Radke-Blissett’s difficulties, but I simply cannot see how these proceedings could possibly be conducted without both parties in the room at the same time.

[4] There is now an affidavit dated 17 June 2019 on the Court file, reproduced at page 300 of the bundle of documents. As an aside, the photocopy of the affidavit is very faint and some of the text is barely legible. This will need to be attended to before the substantive hearing. Ms Radke-Blissett annexed to the affidavit a letter from New Zealand immigration services dated 26 November 2013 indicating she was declined a visitor’s visa on 11 October 2013; that is at page 312 of the bundle. She said that she doubts she would be allowed to come back for the court case, although she acknowledges she had not made an application to do so; that is at page 303 of the bundle.

[5] She has also annexed a printout of an immigration alert, which notes the requirements that she be interviewed, should she return, to ascertain her intentions and discover her reasons for overstaying in New Zealand previously. It states: “Please note the risk that this person poses as having shown little regard to breaching the conditions of their temporary permit previously. The likelihood exists that they may do the same in the future.” She has also annexed an undated letter from a registered psychologist from Valerian Consulting Limited setting out her mental health issues; that is at page 343 of the bundle. Annexure E is a barely legible letter, also undated, from the Cross Cancer Institute in Canada, headed “Progress note.” That, from my reading, confirms a diagnosis of [a terminal illness].

[6] There was a teleconference before Judge Fleming on 5 February 2020 to make directions setting the proceedings down for hearing. She noted that the hearing is not suitable for a backup fixture as the applicant is unwell and in Canada. She allocated a primary fixture on 19–21 October 2020.

[7] This second application to attend the hearing by AVL is advanced first, on the grounds that Ms Radke-Blissett resides in Edmonton, Alberta, Canada and is a sickness beneficiary following her diagnosis of [the terminal illness]. She also has diagnoses of [a musculoskeletal disorder and a stress disorder], and she has difficulty travelling.

[8] These were all submissions made to Judge Skellern last year. Although Judge Skellern did not have the 17 June 2019 affidavit, in his memorandum for that hearing Mr Blissett noted that she did have an earlier affidavit sworn in 2018 that contained some of the medical information that Ms Radke-Blissett relied on. Therefore, Judge Skellern had available to her the information advanced in this first ground when she dismissed the application to appear by AVL last year.

[9] The second ground is that the world has changed since the decision of Judge Skellern last year. Now there are COVID-19 restrictions on travel and quarantine requirements.

[10] The application to appear by AVL is opposed by Mr Blissett. His counsel says that Ms Radke-Blissett has not addressed or satisfied the required criteria as set out in s 5 of the Courts (Remote Participation) Act 2010. In summary:

- (a) The email and counsel for Ms Radke-Blissett's memorandum raises unsupported claims, very little of which relates to COVID-19. Much of this information was before the Court when the previous request for AVL was determined, and again in February 2020 when the hearing was allocated.
- (b) On 5 February 2020, the matter was set down for a primary fixture and the October 2020 date was set. Judge Fleming recorded the matter was not suitable for a backup fixture as the applicant was not well and in Canada. It was also recorded that no further steps were to be taken in the proceeding without leave of the Court.
- (c) Considering Judge Fleming's minute in 2020 and Judge Skellern's judgement of June 2019, counsel for Mr Blissett has prepared for the hearing on the basis that the applicant would be present in person.
- (d) The applicant has provided no evidence of any attempt made to arrange travel from that time. There is no evidence before the Court of any steps that the applicant has taken to be present for the hearing despite that requirement being clear.
- (e) A settlement offer was made in July 2019 that was not responded to.
- (f) The Court must take into account the potential impact of the use of the technology on the maintenance of the rights of other parties to the proceeding. Mr Blissett's rights will be compromised if Ms Radke-Blissett is not physically present at the hearing. The inflammatory allegations of the applicant's email dated 6 October

and filed with the memorandum of counsel reaffirmed that witness credibility and reliability are of concern in this proceeding and that the applicant's presence is required to ensure that the respondent's rights are effectively maintained.

[10] There was a teleconference on 14 October 2020, at which I directed Mr Zindel to file a memorandum confirming arrangements for Ms Radke-Blissett's participation by AVL in Canada. I indicated the arrangements needed to sufficiently address the security concerns, as identified by Judge Skellern, and the requirement that the internet connection and technology is of sufficient quality so that the Court and counsel can see and hear Ms Radke-Blissett clearly and vice versa.

[11] In terms of the secure environment, I indicated that an appropriate arrangement would be for Mr Zindel to instruct an agent in Canada who is a barrister and solicitor in that jurisdiction, and who is available from 10 am on Monday 19 October 2020 NZT, up until the conclusion of Ms Radke-Blissett's evidence. The agent would need to confirm on oath that he or she was in the room with Ms Radke-Blissett and would remain so throughout her evidence, and that no one else was present in the room.

[12] The Courts (Remote Participation) Act 2010 provides the criteria upon which judges can decide whether to allow for remote participation of witnesses, parties and counsel. A participant appearing via AVL is regarded as being present in the place of hearing at the proceeding and documents or exhibits can be shown to the AVL participant electronically, either through AVL or in any other suitable manner.¹

[13] In deciding whether to use remote participation s 5 requires me to consider:

- (a) The nature of the proceeding.
- (b) The availability and quality of the technology that is to be used.
- (c) The potential impact of the technology on the effect of maintenance of the rights of the other parts including:

¹ Courts (Remote Participation) Act 2010, ss 14 to 16

- (i) The ability to assess the credibility of witness and the reliability of evidence presented to the Court.
- (ii) The level of contact with other participants.
- (iii) Any other relevant matters.

The nature of the proceeding

[14] There is nothing to suggest that the nature of the proceeding poses a challenge to Ms Radke-Blissett participating via AVL. I understand the dissolution is agreed to although there remains an issue about the date of separation. The hearing will primarily be focussed on the applications Ms Radke-Blissett has made for orders dividing relationship property.

[15] On 7 March 2018, Judge Eivers recorded the issues as follows:

- (a) date of separation;
- (b) clarification of assets;
- (c) valuation disputes regarding the property at Ohinewai. She noted it was purchased after the applicant left New Zealand but there was a dispute over use of relationship property and purchasing the property and loans to the family;
- (d) some disclosure issues regarding Bonus Bonds, KiwiSaver, superannuation. She noted the respondent would obtain as to both dates of separation and;
- (e) contribution generally.

[16] The property and debt at issue are not extensive and the legal issues are not complex. There is a lot of irrelevant evidence on the file and there will need to be vigilance to ensure that the evidence at the hearing is focused on what is required to

resolve the issues. I find that the nature of the proceedings does not prevent Ms Radke-Blissett from giving evidence by AVL.

The availability and quality of the technology that is to be used

[17] Mr Zindel has arranged an agent in Canada by the name of Ike Ulasi. Mr Ulasi is a barrister and solicitor of Prime Synergy Law Office. He is a member of the Law Society of Alberta, Canada and he has provided his admission number [deleted]. He has confirmed his availability from Monday 10 am NZT. He has said in his email dated 14 October 2020 at 2.23 pm that he was at that very time appearing remotely in a courtroom. He confirmed that the best way to answer Mr Zindel's questions was to do a test run of the process. He said he had unlimited internet. All the devices that would be used would be high-definition cameras and sound system. His internet speed is 150mbps. He suggested that they do a test run which could be recorded and presented to the judge as evidence.

[18] Despite the best efforts of the registrar to arrange a test run yesterday afternoon, that has not happened. It may be that a test run can still be done today, but at this point, I do not have that evidence. Mr Ulasi has, though, confirmed that he was able to set up the court platform of the virtual meeting room multi4 [VMR deleted], and he was able to log into that platform. It appears then that the technology to connect with the Manukau Family Court is present and from Mr Ulasi's submissions that the technology available there is also suitable. He has added to the information by saying he has Internet 300, which is unlimited usage. He plans to use his Surface which is running Windows 8.1Pro Intel Core i5-4300u CPU at 1.90Ghz 4GB of RAM, system type 64-bit operating system X64 based processor. He also has landline and a Samsung Galaxy Tab E 8.0.

[19] Counsel for Mr Blissett is concerned that there is no confirmation of the quality of the call or whether it was satisfactory. That is unfortunate. This is one of the drawbacks of the application to appear by AVL having been filed so late in the process. If we had had more time, then that information could have been available to me. I understand that the registrar still intends to attempt a test today so that information may be available shortly.

The potential impact of the technology on the effect of maintenance of the rights of the other party

[20] The main issue for Mr Blissett is the ability to assess the credibility of Ms Radke-Blissett and the reliability of the evidence that she presents to the Court. There are clearly credibility issues to be determined by the presiding judge, given the nature of the evidence that has been filed.

[21] I note in this regard counsel's submission that there is no evidence that she has made any attempt to comply with the direction in June last year that she attend the hearing in person. Ultimately that does not impact on the decision I need to make today for the reasons articulated later, which show that she currently cannot enter New Zealand. However, it is another factor pointing to credibility generally that will need to be determined at the substantive hearing.

[22] *Biggs v Biggs* is a recent relationship property matter determined in the Auckland High Court.² The Court held that both parties and several witnesses could participate in the proceedings via AVL from Australia, following an assessment of the criteria in s 5 of the act. It was considered consistent with the principles of the Property (Relationships) Act that any further delay in the hearings of those proceedings should be avoided if that can be achieved without significant prejudice to the parties. The Court held that the issues presented by delays outweighed the potential credibility and security issues presented by using AVL.

[23] Nation J held that to the extent the Court has to decide issues of credibility with regards to the evidence of the parties as given at trial, neither the Court nor the parties will be significantly disadvantaged through the witnesses giving their evidence remotely. He said it is now recognised that the demeanour with which a witness gives evidence is not necessarily the most reliable guide to either the honesty or reliability of that witness. However, with a witness appearing on AVL, the way in which they give evidence will be clear to the judge as well, and more importantly, the context in which they give evidence.

² *Biggs v Biggs* [2020] NZHC 1046.

[24] Ms Hyde has distinguished *Biggs* in several ways. First, she notes it was significant that *Biggs v Biggs* was not to be a case where the parties were hearing the witness evidence for the first time. Much of the evidence had already been put before the Court, heard by the parties and, indeed, by the same judge. This is not the case here, as this will be the first time that much of the evidence is heard. Arrangements had also been made in *Biggs* that a laptop be made available so that a witness could be referred to documents electronically, as well as through reference to the documented bundle. She notes that the applicant had not addressed this issue or provided any confirmed arrangements with respect to producing documents to the witness. She said it was further unclear whether the applicant had a copy of the bundle of documents to which she can refer.

[25] The other distinction drawn in *Biggs* is that agreement had already been reached for other witnesses to appear by AVL, which was considered significant by his Honour. No agreement had been reached here, rather appearance by AVL has been vigorously opposed and previously denied by the Court.

[26] In respect to arrangements for documents to be referred electronically to Ms Radke-Blissett, Mr Zindel confirms that she has an electronic version of the bundle. Mr Ulasi will be available to confirm that the documents that Ms Radke-Blissett has before her have not been marked up.

[27] Mr Zindel had not made arrangements for further documents to be put to her. It is anticipated that counsel may have documents that they wish to put to her in cross-examination that are not included in the bundle. That is entirely usual in a hearing and a situation that most commonly arises in a line of cross-examination seeking to impeach a witness. That may well arise during the hearing and it is not practical or desirable for counsel for Mr Blissett to be required to provide a copy of any document intended to be used in that way before the hearing, as suggested by Mr Zindel.

[28] Mr Zindel raised the issue about whether there might be objections to documents being put to his client during the hearing. There is nothing to prevent Mr Zindel making an objection at the appropriate time, as would usually occur at a hearing. The issue really is how those documents are to be placed before Ms Radke-

Blissett so that she can meaningfully respond to questions about those documents. In *Biggs* a laptop was available so that the witness could be referred to documents. It seems Mr Ulasi has several devices available to him. It can be arranged for documents to be sent to him electronically during the hearing either by counsel for Mr Blissett or the Court. He can then show those documents to Ms Radke-Blissett.

[29] I acknowledge that Nation J did have the benefit of having heard the evidence of the parties previously, as had opposing counsel. That is a matter that distinguishes *Biggs* from this case; however, it is not fatal to the application of *Biggs* to this scenario, as the key issue is the ability of counsel and the Court to be able to see and hear Ms Radke-Blissett clearly. This is particularly so given the recognition that the demeanour with which the witness gives evidence is not necessarily the most reliable guide and the Court can look to other matters to assess her credibility.

[30] I also note the decision of *Deutsche Finance New Zealand Limited v Commissioner of Inland Revenue* where it was noted that in the most crucial of credibility cases, those involving allegations of sexual abuse against children, evidence by video link was statutorily approved recognising the ability to assess demeanour, credibility and quality of a complainant's evidence.³

[31] Counsel for Mr Blissett submitted that in respect of *Deutsche*, it was held that concerns may arise about the veracity of evidence by video link, given that there is a prima facie absence of sanctions for perjury committed in foreign jurisdictions. She said that those concerns need to be adequately addressed and safeguards put in place, which simply has not happened in this case. In *Deutsche* the plaintiff was directed to address perjury prior to the commencement of the hearing by filing a memorandum about how that would be covered, as well as confirming written instructions. That has not happened here and is something that I will need to consider when weighing up the rights of Mr Blissett. I do note, however, that perjury is the ultimate sanction for a witness who gives false evidence. My primary concern for this hearing will be assessing her credibility in respect of those issues where her position differs from Mr Blissett's evidence. I can do that by way of AVL. Clearly, giving evidence in

³ *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* (2008) 23 NZTC 21,758, (2007) 18 PRNZ 710.

person is the preferred method, however, it has been held that the inability to does not necessarily inhibit the Court's ability to assess credibility.

[32] Ms Hyde drew to my attention two other cases in written submissions dated 5 October 2020. The first was *Trevarton v Warren*⁴, a 2017 decision of Judge Cathcart where there had been agreement that the complainant give evidence by way of AVL. The issue was an unusual circumstance where the complainant sought a direction that the defendant not be able to see her while she was giving evidence. That case was drawn to my attention because of the judge's comment that the consent of the defendant was a mandatory consideration. Both parties had consented to the use of AVL. I note that ultimately Judge Cathcart considered whether the use of AVL would affect the ability to assess the credibility of the applicant and the reliability of her evidence at the substantive hearing, and he was satisfied that the complainant could give evidence by AVL. Regarding the consent of the defendant being a mandatory consideration, I simply note that is not one of the criteria of s 5 of the Act, and the decision I am asked to make in this case is clearly going to be on an opposed basis.

[33] The other decision that I was referred to was *Re P*, a decision of Sir Andrew McFarlane dated 16 April 2020.⁵ This decision was made squarely within the context of the global pandemic and in that case the critical witness whose credibility was being assessed had herself contracted COVID-19. That case differs from this one in several respects. It was a case about a child whose health was allegedly seriously endangered by the mother's actions. The judge referred to the narrow context of an allegation of "FII", saying that category of case is "*a particular form of child abuse which requires exquisite sensitivity and skill on the part of the court*". He endorsed the assessment of the paediatrician that this was an extremely complicated case where the issue was described as an extremely unusual disorder and described the task of investigating it as being "*incredibly challenging*".

[34] Sir Andrew said these are particularly unusual cases and from a judge's perspective and from experience of having undertaken a number of these cases over a number of years, it is a crucial element in the judge's analysis for a judge to be able to

⁴ *Trevarton v Warren* [2017] NZDC 21332.

⁵ *Re P (a child: a remote hearing)* [2020] EWFC 32.

experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined-in-chief and cross-examined but equally when they are sitting in the well of the court and reacting as they may or may not do to the factual and expert evidence as it unfolds during the course of the hearing.

[35] I agree that it would have been entirely preferable to have Ms Radke-Blissett in the Court, so I too could make the observations that Sir Andrew was referring to. However, I distinguish this case from *Re P*, as I have already determined the issues in this case are not particularly complex, and while there is irrelevant evidence that will need to be vigilantly monitored, the evidence is not particularly complex either.

Any other relevant matters

[36] There has been a significant change in circumstances since Judge Skellern's decision was delivered in June last year, which is the advent of COVID-19 and the many changes that courts have had to implement to facilitate the delivery of justice during a worldwide pandemic. New Zealand is currently at alert level 1. The District Court protocol for COVID-19 alert level 1 states that the District Court will carry out all its usual scheduled work. Criminal, Family and Civil proceedings will in general return to normal operation. AVL will remain available for use on application in appropriate cases, determined on a case by case basis. In the protocol AVL means any platform which allows for audio and visual remote participation, without limitation this includes VMR, MS Teams and any other electronic platform approved by the presiding judge.

[37] It is accepted that Ms Radke-Blissett is not a New Zealand citizen or resident. Currently only New Zealand citizens and permanent residents are permitted to enter New Zealand. Travel by anyone else requires permission to enter the country on the grounds of a critical purpose. Persons considered to have a critical purpose to enter the country are limited to those categories set out in the New Zealand Immigration website. The critical purposes do not currently include attending civil legal proceedings. Ms Radke-Blissett does not meet any of the other critical purposes

criteria; accordingly, she cannot enter New Zealand until the alert level 1 restrictions are lifted or relaxed.

[38] Counsel for Mr Blissett initially sought directions that the hearing proceeding on 19 October only proceed with her present (which is clearly impossible as she is still in Canada) or alternatively that the hearing be adjourned to a further date and if she is not present at that date, then her application be struck out. At the teleconference Ms Hyde submitted that the current proceedings ought to be adjourned to a date that Ms Radke-Blissett is able to enter New Zealand, when the alert level 1 border restrictions are lifted. The difficulty with that is it is impossible to estimate with any degree of accuracy when that might happen. The other complicating factor is the precarious state of Ms Radke-Blissett's health which gives rise to some urgency in having these proceedings concluded.

[39] When I weigh up the potential impact of the use of technology on the effect of the maintenance of the rights Mr Blissett against the prejudice to Ms Radke-Blissett if the proceedings are delayed until alert level 1 restrictions are lifted, I am persuaded that she should be permitted to give evidence by way of AVL, provided there are suitable arrangements in place in respect of the security of the environment when she gives her evidence and there being satisfactory technological arrangements to see and hear her clearly.

[40] In respect to that last point, Ms Hyde raises the concern that this application has been made so very late in the piece. Ms Radke-Blissett has had ample time to make an appropriate and considered application to the Court for appearance by AVL. An application made in sufficient time would have allowed for consultation and discussion of the matters set out in her submissions resulting in a remote appearance that the respondent may have consented to. This is correct. It is indeed unfortunate that this application has come so late. Mr Zindel has given reasons why that has been the case, but the reality is that Ms Radke-Blissett would have known, or her counsel would have known during the first lockdown in March earlier this year that the borders were closed and may well be closed for a considerable time. The application should have been filed earlier.

[41] Having said that, I must make a decision that sees justice done in the circumstances and I am of the view that the hearing should proceed on Monday with the arrangements in place as set out by Mr Zindel. I have asked Ms Hyde if there were any more arrangements that could be put in place in addition to what Mr Zindel has already arranged. She was not able to answer that question at today's teleconference and said that she would need to seek her client's instructions about that.

[42] I am of the view that the arrangements that have been made are sufficient provided that Mr Ulasi is sworn in as a witness and gives evidence as to those arrangements at the beginning of the hearing. I also require a test of the quality to be undertaken today and if any issues arise for those to be drawn to my attention and counsel for Mr Blissett's attention.

[43] Accordingly, I make an order that Ms Radke-Blissett be permitted to give evidence at Monday's hearing by way of AVL on the VMR platform, subject to the following conditions:

- (a) Mr Ulasi must be present throughout the entirety of Ms Radke-Blissett's evidence.
- (b) Mr Ulasi is to be sworn in as a witness at the commencement of the hearing and is to give evidence and be available for cross-examination as to the arrangements for him over-seeing Ms Radke-Blissett's evidence. This will include him remaining physically present, ensuring that the documents that Ms Radke-Blissett has before her are unmarked, and assisting in receiving and putting to Ms Radke-Blissett any documents that counsel seeks to put to her during the course of the hearing.
- (c) The evidence and cross-examination is to be recorded and that record is to be made available to the Court and counsel upon request.

[44] The issue of costs on this application is reserved. The primary fixture on Monday is confirmed and the hearing will proceed.

[45] Ms Hyde has sought leave to appeal this decision without notice. I have questioned whether leave to appeal is required. There was a suggestion that she was seeking leave to appeal to the Family Court. However, that is not an available right of appeal as Family Court judges do not sit in appeal of their colleagues' decisions. If leave is required, leave is granted for an appeal to the High Court to be made on an urgent basis given the intention for the hearing to proceed at 10 am on Monday.

[44] I direct that a copy of this decision be transcribed urgently and placed before me so that I can approve the decision for release as soon as possible.

Judge P Ginnen
Family Court Judge

Date of authentication: 19/10/2020
In an electronic form, authenticated electronically.