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**IN THE FAMILY COURT
AT NELSON**

**I TE KŌTI WHĀNAU
KI WHAKATŪ**

**FAM-2017-042-000350
[2020] NZFC 3782**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN [TELMO CURIEL]
 Applicant

AND [BLANKA ZEMANOVA]
 Respondent

Hearing: 29 May 2020

Appearances: Applicant appears in Person
 Respondent appears in Person
 K R Meyer as Lawyer for the Child

Judgment: 29 May 2020

ORAL JUDGMENT OF JUDGE G P BARKLE

[1] The parties, [Telmo Curiel] and [Blanka Zemanova], are the parents of [Madeleine], who was born on [date deleted] 2010 in [eastern European country deleted – the EEC]. [Madeleine] is the parties' only child.

[2] Mr [Curiel] is a [South American country deleted] National by birth. He left that country at the age of eight. He was educated in [country deleted] until he was 17. Ms [Zemanova] is a [national of the EEC].

[3] The parties met in [country deleted] in 2008. They then moved to [the EEC] and lived together from November 2009. They left that country in 2011 and moved to [location 1], where they resided together until March of 2015, when they separated.

[4] Following separation, Mr [Curiel] and Ms [Zemanova] shared the care of [Madeleine]. However, difficulties arose around those arrangements. Proceedings were filed in the Family Court at Nelson by Mr [Curiel] in November 2017.

[5] His Honour Judge Russell made a parenting order pursuant to s 48 Care of Children Act 2004, following a day-long hearing on 12 June 2018. In essence, Judge Russell provided for the parties to share the care of [Madeleine] from commencement of the first school term of 2019 on a week about basis.

[6] Cognisant of [Madeleine]'s diverse cultural heritage, the Judge also provided for [Madeleine] to be able to spend periods of time in each year in [the EEC] with Ms [Zemanova] and also [the South American country] with Mr [Curiel]. Most particularly, Judge Russell made an order that for a period of up to two months each year, which is to include the New Zealand July school term holiday period, [Madeleine] may travel overseas with her mother, Ms [Zemanova], to [the EEC]. As I said, [Madeleine] was born in [the EEC], and therefore she has citizenship in that country as well as New Zealand.

[7] In his decision of 12 June 2018, Judge Russell set out that Ms [Zemanova] had maintained close links with her family in [the EEC] since the parties and [Madeleine] came to live in New Zealand. He accepted that Ms [Zemanova] was passionate about her background, culture and heritage, and also ensuring [Madeleine] has knowledge of this. She had seen it as being of importance that [Madeleine] learns the [language of the EEC] and by going back to [the EEC], ensuring she was able to experience something of that country's culture.

[8] His Honour recorded in his decision that [Madeleine] spoke positively about the time she spent in her birth country. [Madeleine] enjoyed spending time with her family and friends there, referring with much affection to those persons. She told the Judge that she was looking forward to the planned trip in July and August 2018 to [the EEC].

[9] As I have said, Judge Russell made a detailed parenting order, including that [Madeleine] could travel in July and August of each year to [the EEC] through until she started secondary education.

Without Notice Application of Mr [Curiel]

[10] On 28 April 2020, Mr [Curiel] made a without notice application to this Court to prevent removal of [Madeleine] from New Zealand for the mid-year trip this year that is provided for in the parenting order of 12 June 2018. Mr [Curiel]'s reason for seeking that outcome was due to the uncertainty created around health and travel matters as a result of the COVID-19 pandemic.

[11] Judge Russell declined the without notice application because in his view there would be enough Court time to allow Ms [Zemanova] to provide her reasons for wanting to undertake the travel at this time and for the Court, if necessary, to make a decision. His Honour abridged time for the filing of a defence and also appointed lawyer for child to look at the issues and report to the Court.

[12] Ms [Zemanova] filed a notice of response within the required timeframe, together with an affidavit in support. She acknowledged the difficult time that had been created as a consequence of the COVID-19 pandemic but from her perspective, she said it was especially important for [Madeleine] to be with her extended family at this time and have the tangible support of wider maternal family that are non-existent in New Zealand.

Lawyer for [Madeleine]

[13] Ms Kim Meyer was appointed by the Court as lawyer for [Madeleine]. Because of the health situation, Ms Meyer was not able to meet with [Madeleine] but did fleetingly see her by way of video link. However, [Madeleine] did not feel comfortable discussing this particular matter via electronic means. Therefore, her views are not directly before the Court.

[14] Nevertheless, both Mr [Curiel] and Ms [Zemanova] agree that [Madeleine]'s views are that she loves spending time with her grandparents in [the EEC] and does want to go on the trip.

[15] In terms of [Madeleine]'s best interests, Ms Meyer said that it appeared that everyone agreed that her annual trip to [the EEC] to spend time with her maternal family is in [Madeleine]'s best interests. However, in the current circumstances, there is disagreement between Ms [Zemanova] and Mr [Curiel] about the level of risk to [Madeleine]'s health and well-being due to the COVID-19 situation.

[16] Ms Meyer advised the Court that both parents appeared to her to be very thoughtful and considered, and generally had a functional parenting relationship. However, the issue of travel is one that creates difficulties for them and that is apart from the particular issue that has now arisen.

[17] Mr [Curiel] had advised Ms Meyer that he did not want the trip to be cancelled but rather preferred that it be postponed until the December/January holidays at the end of the year when hopefully the COVID-19 position is better resolved and the risk to [Madeleine] hopefully significantly reduced. If that occurred, he advised Ms Meyer that he would not be seeking any makeup time, the order of June 2018 providing for Mr [Curiel] to have a four week holiday period with his daughter over the December/January summer school holidays. He also told Ms Meyer that he would be happy to care for [Madeleine] if Ms [Zemanova] did determine that she would travel to [the EEC] at this time alone.

[18] Ms [Zemanova] told Ms Meyer that in her view any risk to [Madeleine] could be appropriately mitigated. She accepted that she herself was very homesick and wanted to spend time in [the EEC]. Equally, she underlined to Ms Meyer the extremely close relationship that [Madeleine] has with her family. If the trip could not take place over the proposed period, then her preference was that it take place as soon thereafter and not be deferred through until the Christmas school holidays.

[19] In her submissions today, Ms Meyer felt unable to state a preference for either outcome on behalf of [Madeleine]. I accept that is entirely understandable in what is a finely-balanced matter. On the one hand, as Ms Meyer underlined, there are the particular emotional links that [Madeleine] does have with [the EEC], her being born there. The enhancement and preservation of relationships with the maternal family are of much importance. In addition, of course, Ms Meyer reminded me of the impact on Ms [Zemanova] if not able to travel, that in itself would have some inevitable impact on [Madeleine]. Against that, of course, there is then, as Ms Meyer said, the obvious issues with the COVID-19 pandemic situation and whether or not there would be disruption and worse potentially if [Madeleine] and/or her mother unfortunately caught the virus.

Mr [Curiel]’s Position

[20] In his application to the Court, he advised that he had only been given details of the proposed one-way ticket to [the EEC] by Ms [Zemanova] for [Madeleine] and herself. He was concerned first about the number of stopovers involved in the journey and different airlines that were being used. He also was uncomfortable that the return tickets had not yet been obtained and there was risk about whether, even with Ms [Zemanova]’s best endeavours, appropriate return flights could be obtained. That could mean [Madeleine] may have to stay in [the EEC] for an unknown period of time. That would be disruptive of her life here in New Zealand and particularly [Madeleine]’s education.

[21] Apart from that, of course, Mr [Curiel] made the obvious submission that outside of New Zealand there is greater risk of infection for both [Madeleine] and Ms [Zemanova]. He also reminded the Court that there would be quarantine periods

on both ends of the trip and therefore the actual time that [Madeleine] would have available to spend with her maternal family would necessarily be shortened.

[22] Having received and considered Ms Meyer's report, the applicant filed a written submission in which he once more endorsed his position that [Madeleine] should not travel out of New Zealand because it was effectively the one safe haven in the world currently. He repeated his offer of compromise, proposing that the longer timeframe would allow for the world to be better adjusted to the impact of dealing with COVID-19 and there would be greater confidence generally about international travel.

[23] In making oral submissions today, he said that he had checked with Singapore Airlines, which is the first leg of Ms [Zemanova]'s itinerary from Auckland to Singapore with [Madeleine], and had been informed that the proposed flight does not exist. However, there was nothing to confirm that was the case. He had made some enquiries with the Ministry of Foreign Affairs and Trade and it appeared that for [citizens of the EEC], entering into their home country they would have to undertake a form of medical test and then have some limitation about movement or alternatively undertake quarantine measures. [Madeleine], because of being born in [the EEC], is a citizen of that country.

[24] He also submitted that [Madeleine] has already had much disruption in respect of matters this year, and has only just returned to school and what he termed a settled routine. He was of the view that to embark on the proposed travel was an unreasonable expectation of [Madeleine], taking into account the events of this year.

Position of Ms [Zemanova]

[25] In her affidavit, filed at the same time as her notice of response, Ms [Zemanova] said that [the EEC] is one of the countries that had followed strict procedures in respect of confronting the COVID-19 virus and that as a consequence of that, things were getting back to normal slowly but surely.

[26] She said that in her view, in these hard times, it was important for [Madeleine] to be with her extended family and have the wider support of her grandparents, aunties, uncles and cousins. No such extended family exists for [Madeleine] in New Zealand and Ms [Zemanova] suggested that her daughter was missing that familial support.

[27] [Madeleine] was looking forward to visiting [the EEC] and in her view it would be disturbing and stressful for her not to go. The changed environment after the lockdown would, in her view, be a positive experience for [Madeleine] in a nice way to release the tensions that existed while her life had been much restricted here in New Zealand.

[28] She said that as [Madeleine]'s mother, she would never put her daughter in danger and she would always take the necessary precautions to ensure her daughter's good health was not compromised. She also reminded the Court that the medical advice generally was that COVID-19 rarely affected children.

[29] Ms [Zemanova] also suggested that Mr [Curiel]'s primary motivation in making his application was due to him feeling lonely himself during the period when [Madeleine] was away and noted that he had spent some time in her and [Madeleine]'s bubble over the lockdown weeks.

[30] In oral submissions this afternoon, Ms [Zemanova] explained that her usual procedure in terms of obtaining a return ticket was in fact to purchase that return flight very close to the time of embarking for Europe as it then allowed her to in fact have an open 12 month ticket for her next journey to that country and return to New Zealand. She advised that the costs were lower if that was the method by which the purchase was made.

[31] As pointed out by Mr [Curiel], that is at variance with the order which requires, as I understand, two months' notification of the actual flights. Nevertheless, I understand, but of course do not condone, non-compliance with the terms of the order.

[32] Ms [Zemanova] also reiterated her understanding was that the COVID-19 virus had been effectively dealt with in her home country. She explained that the intention

on arrival in [the capital city of the EEC] was for members of her family to pick her and [Madeleine] up from the airport and then travel to a country home of the family approximately an hour from their home city of [deleted]. That was a cottage, as I understand, in the country which from the description of Ms [Zemanova] would provide an idyllic base for the two week quarantine period and longer over the proposed summer break. She advised that there was no intention of [Madeleine] attending school, particularly because the long European holiday break began at the end of June.

[33] The respondent said that if [Madeleine] was unable to make the trip, then she had no intention herself of going to [the EEC]. She once more reminded the Court of [Madeleine] having been born in that country and the extremely close relationship she has with her maternal family. She advised that when in her care, [Madeleine] has almost daily contact with family by way of the WhatsApp medium. In the past few weeks, she said that much of the discussion with family was about the short timeframe through to when it is expected that [Madeleine] would arrive in [the EEC].

Decision

[34] In making my decision, I must have regard to the provisions of the Care of Children Act 2004. Section 4 of the Act requires me to treat the welfare and best interests of [Madeleine] as the first and paramount consideration.

[35] Principle 5(a) requires that [Madeleine]'s safety must be protected. Safety is broadly defined, and in my view encompasses the situation of her health not being compromised or potentially compromised.

[36] Principle 5(d) requires that there be continuity of [Madeleine]'s care, development and upbringing. Mr [Curiel] would submit that because of the uncertainties around travel and other matters related to the COVID-19 pandemic, that there may well be interruption to the usual care arrangements for [Madeleine] if the trip to [the EEC] went ahead in June 2020.

[37] Principles 5(e) and (f) cannot be overlooked as I accept that the regular trips to [the EEC] allow for [Madeleine]'s relationship with her maternal family group to be preserved and strengthened, as well as providing the same outcome with respect to [Madeleine]'s identity.

[38] While Ms Meyer has not spoken directly to [Madeleine] to obtain her views in terms of s 6 of the Act, I accept the shared position of the parties that no doubt [Madeleine] is looking forward to the trip and very much enjoys spending time with Ms [Zemanova] and the wider maternal family in [the EEC].

[39] Ms [Zemanova]'s evidence was that [the EEC] is one of the countries that followed strict procedures during the critical phase of the COVID-19 pandemic and therefore things in that country are getting back to normal slowly but surely.

[40] There was no detailed evidence provided about the situation in [the EEC]. However, Ms Meyer's research appeared to correspond with mine in advising that the confirmed cases of persons who had contracted the virus was just over 9000, with active cases remaining of just under 2400. The total deaths appeared to be just under 320. [The EEC] has a population of [over 10 million]. Those figures, as I say, are not confirmed in the usual evidential way but appear relatively reliable, and would indicate that the country has dealt relatively successfully with the challenge of the pandemic.

[41] While again no specific details of the steps taken by the Government of the country was known, it seems that a state of emergency has been in place for a relatively lengthy period, from mid-March at least through until mid-late May 2020 and that there is a slow return to some form of relative normality. However, it does not appear that the very strict lockdown regime that was applied in New Zealand was in place in [the EEC].

[42] More generally, as far as Europe is concerned, there has been different approaches adopted in countries to fighting the virus. In addition, there are varying levels of success across that continent and the impact of the virus has been significant but variable again.

[43] The proposed travel that [Madeleine] would be undertaking through to [the EEC] requires for stopovers in Singapore and Zurich prior to arrival in [the capital city of the EEC]. There will be four flights, if one includes the Nelson to Auckland leg of the trip.

[44] While I accept that it appears [the EEC] has done a relatively good job of dealing with the challenges of the virus, it would seem from my assessment there is a greater risk for [Madeleine] in that country by comparison with being in New Zealand during the comparable period. We know that currently there is, as of today, only one COVID-19 case outstanding in New Zealand and none in this region. Therefore, it seems a matter of common sense that the potential risk to [Madeleine]'s health must be increased if the trip is undertaken.

[45] I accept that Ms [Zemanova] is a conscientious and competent mother. She will no doubt take all the prudent and expected steps to diminish the risk of [Madeleine] contracting the virus. I also acknowledge that the Ministry of Health advice in New Zealand is that children are at less risk of contracting the virus than adults.

[46] Ms Meyer advised me that the New Zealand Government stance in terms of travel is presently that none should be undertaken.

[47] Should [Madeleine] contract the virus during the trip, whether in transit or in [the EEC], she would necessarily have to receive treatment in that country. How long before she was well enough to make the return journey would be unknown. While [Madeleine] would have Ms [Zemanova] and her wider family to support her during her recovery, Mr [Curiel] would not be in close proximity. He, along with Ms [Zemanova], are the most important adults in [Madeleine]'s life. It is not possible to say what the impact on [Madeleine] would be of not having the close and loving support of her father when unwell, but I am prepared to accept it would, from her perspective, be less than ideal.

[48] There is also of course the risk that Ms [Zemanova] herself may contract the virus. That also would result in the arrangements for [Madeleine]'s return having to

be reorganised. In either eventuality, that is [Madeleine] or Ms [Zemanova] becoming unwell and consequent change to arrangements for return to New Zealand, [Madeleine] would very likely be away from this country for longer than expected. That of course means that the length of time away from her father would be greater than expected, local friends would not be seen, and school would be missed. None of those are outcomes which could be regarded as positive for [Madeleine].

[49] I acknowledge that no return bookings are in place. As I have said, I now understand the reason advanced by Ms [Zemanova] for that and I also accept that she would have those return flights in place before leaving New Zealand. I also accept that airlines are beginning to fly more frequently and there would likely be flights available. Nevertheless, I accept that there is still a degree of uncertainty about what the actual position is.

[50] Also, while it is not resolved, Ms [Zemanova] proposes that if the trip was undertaken, then one week of the two week required quarantine period on return would in fact take place beyond the two month period. That again would extend the time of [Madeleine] being away from her usual living environment in New Zealand beyond what is provided in the order.

[51] I accept, of course, the importance for [Madeleine] of maintaining and preserving her relationships with her maternal family in [the EEC]. [Madeleine]'s [heritage] is very much part of the fabric of her identity. I also accept that [Madeleine] will be looking forward to the trip. She would be much disappointed by not being able to undertake the journey at this time.

[52] I do not also underestimate the emotional impact on Ms [Zemanova] of not returning to [the EEC] at this time. As much as she will try to hide the disappointment personal to her from [Madeleine] of not returning, naturally to entirely do so would be extremely difficult, if not impossible.

[53] Nevertheless, I have come to the determination for the reasons expressed that it is in the best interests and welfare of [Madeleine] that the trip planned to commence on 23 June 2020 be postponed until the Christmas/January period in six months' time.

I accept, as I have said, that that will be of much disappointment for [Madeleine] and of course Ms [Zemanova]. While at the moment she has told me that she will not travel, she may reflect on that position again in the next period.

[54] Accordingly, the following orders and directions are made:

- (a) The application of Mr [Curiel] is granted and [Madeleine] will be prevented from leaving New Zealand prior to the commencement of the conclusion of the school year of 2020.
- (b) During the school summer holiday period of 2020/2021, [Madeleine] may travel for a period of two months with her mother, Ms [Zemanova], to [the EEC].
- (c) If Mr [Curiel] wishes, a border alert may be put in place from now through to the December 2020 date, when the school year concludes.
- (d) Since no overseas travel will take place before that time, then the week about shared care regime will be in place through until that takes place.
- (e) I am satisfied in the circumstances of this case that it would be inappropriate for either party to be required to contribute to the costs of Ms Meyer. Accordingly, there will be an order that there will be no requirement of either party to make a contribution to the costs of lawyer for [Madeleine].

[55] Both parties have raised issues about the start and finish of the two month period in December 2020/January 2021. The first matter, it appears to me, is that when Judge Russell provided for the two month period to include the July school holidays, then that provided for five weeks of school time when [Madeleine] would be in [the EEC]. The order also allowed for [Madeleine] to attend a [school] in [location deleted].

[56] Accordingly, the timeframe for [Madeleine]'s trip, in my view, must be two months. It will be a matter for the parties, if they seek, to vary the provisions I have made for that period to start earlier in December to allow [Madeleine] to start the 2021

school year in New Zealand, either in late January or early February. That will be for the parties themselves to, as I say, agree if possible. If they do not agree, then, as I have said, the commencement of the trip will be corresponding with the end of the 2020 school year and then run for two months.

[57] The other matter raised by Ms Meyer, helpfully, was the question of the quarantine period back into New Zealand. I have some sympathy for Ms [Zemanova]'s position in the sense that the timeframe of the trip was determined without of course the knowledge of this pandemic situation arising. No one of course could have anticipated such a situation occurring.

[58] My hope, of course, is that by the time we get to January/February 2021, there will be no quarantine requirement in place. Should there be, however, I determine that one week of that quarantine period can occur beyond the two month timeframe of the holiday.

Judge GP Barkle
Family Court Judge

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