

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

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**IN THE FAMILY COURT
AT NELSON**

**I TE KŌTI WHĀNAU
KI WHAKATŪ**

**FAM-2017-042-000350
[2021] NZFC 6283**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[TELMO CURIEL] Applicant
AND	[BLANKA ZEMANOVA] Respondent

Hearing: 2 July 2021

Appearances: G Melvin for the Applicant
S McGovern for the Respondent
K R Meyer as Lawyer for the Child

Judgment: 2 July 2021

ORAL JUDGMENT OF JUDGE G P BARKLE

[1] The parties are the parents of [Madeleine Curiel] (“[Madeleine]”), who was born on [date deleted] 2010 in [Eastern European country deleted – the EEC]. [Madeleine] is the parties’ only child.

[2] On 12 June 2018, his Honour Judge Russell made a parenting order pursuant to s 48 of the Care of Children Act 2004 setting out the care arrangements for

[Madeleine]. Effectively his Honour provided for the parties to share the care of [Madeleine] on a week about basis from the commencement of the first school term of 2019.

[3] In the decision, Judge Russell also provided that Ms [Zemanova] was able to travel to [the EEC] with [Madeleine] for up to two months each year until [Madeleine] commenced secondary school. That period of two months was to include the July school holidays.

[4] 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 in that year. The application sought the postponement of the trip until the end of the year. His reason for making the application was due to the health situation that had arisen worldwide caused by the COVID-19 pandemic outbreak.

[5] The application was put on notice. Ms [Zemanova] filed a notice of response. I determined that application on 29 May 2020. In my decision I concluded that [Madeleine] would not be able to leave New Zealand prior to the conclusion of the school year of 2020 but over the summer school holiday period the trip to [the EEC] could take place for up to two months.

[6] What transpired was that the registry of the Court issued an order that [Madeleine] was not be removed from New Zealand until further order of the Court and also included within the order, a direction that any airline tickets or travel documents, including passports, were to be surrendered to the registrar. That, in my view, did not reflect either the application made by Mr [Curiel] or the outcome of my decision.

[7] In any event, Ms [Zemanova] decided that she would not travel with [Madeleine] to [the EEC] over the school holiday period of 2020/2021.

[8] Earlier this year Ms [Zemanova] decided that she wished to undertake the travel in accordance with the terms of the order of Judge Russell of June 2018. Notification was made to Mr [Curiel] of that intention as required by the terms of the

extant parenting order. On 24 May 2021, Mr [Curiel] made a without notice application seeking that the parenting order be varied to not permit travel for [Madeleine] outside of New Zealand when our government has in place a travel advisory stating that New Zealanders should not travel overseas.

[9] Her Honour Judge Montague directed that the application should proceed on notice and further that whether a material change in circumstances had occurred in terms of s 139A(2) of the Care of Children Act should be addressed prior to any consideration of the substantive matter.

[10] The parties agreed that the required leave should be granted as both accepted that the current provision concerning overseas travel had been overtaken by the pandemic situation, and some form of variation of the 2018 order was required. However, where they are at odds is what the terms of that variation order should be.

[11] Therefore, her Honour Judge O'Dwyer granted leave by consent when the proceedings were before her on 14 June 2021, and made directions for an urgent hearing to be held prior to Ms [Zemanova]'s proposed departure date from New Zealand with [Madeleine] on 8 July 2021.

[12] Mr [Curiel]'s position is that no travel for [Madeleine] should take place when the advisory from the New Zealand government is that no person should undertake overseas travel. Whether there is a specific reference to [the EEC] is not necessary but rather, as I say, if the advice is for citizens not to go overseas then that should be an end of the matter.

[13] In contrast, Ms [Zemanova]'s position is that [Madeleine] should be permitted to travel to [the EEC] by reference to a website known as <https://graphics.reuters.com/world-coronavirus-tracker-and-maps/> ("the Reuters coding"). That website sets out metrics relating to the COVID pandemic risk levels in countries around the world, having regard to the number of cases per 100,000 people. The framework roughly is that if there is less than one COVID case per 100,000 people, then the coded risk level is green, the risk level is yellow if there is

one to nine cases per 100,000 people, orange if there is 10 to 24 cases per 100,000 people and a COVID risk level of red if there are 25 or more cases per 100,000 people.

[14] Ms [Zemanova]'s travel is currently booked for her and [Madeleine] to leave New Zealand on 8 July 2021 and return on 26 September 2021 with two weeks of managed isolation, to be completed from that date. That means, of course, that the length of time that [Madeleine] would be away from her usual home environment and more particularly Mr [Curiel] is 13 and a half weeks. The period provided for the overseas travel by Judge Russell was two months, to include the July school holidays. They commence next Friday, 9 July 2021.

[15] I recognise in making bookings for overseas travel that there is now the reality of also obtaining a MIQ spot when returning back to New Zealand which of course was not an issue that confronted the Court when the original parenting order was made. I did make some comment about this issue in my decision of May last year.

[16] I noted in my decision of 29 May 2020, that Judge Russell, in making the provision for travel to [the EEC] by [Madeleine], referred to her diverse cultural heritage and particularly that she was born in [the EEC]. I noted that he also stated that [Madeleine] had maintained close links with her family in that country and that she had good knowledge of [the EEC]'s culture and heritage.

[17] Ms Meyer, lawyer for [Madeleine] last year and for the present application, has reminded me that the parties agree that [Madeleine] enjoys overseas travel and will no doubt want to spend time with her maternal family, particularly her grandparents, in [the EEC]. It is also relevant that in terms of the original order that the travel is only allowed until [Madeleine] commences secondary school and neither party seeks for that to be changed. Currently [Madeleine] is in year 5 at the [school A] in [location 1].

[18] In her affidavit, Ms [Zemanova] advised that it is intended that her and [Madeleine] would be staying with her parents and sister and spending some time in the city of [deleted] but most of the time in the smaller town of [deleted] in the [region deleted] of [the EEC]. Having been picked up from the airport in [the capital city of

the EEC], I understand that the intention is that [Madeleine] would be in a very low risk area of [the EEC] in respect of the COVID-19 virus.

[19] In her memorandum of 24 June 2021, Ms Meyer noted that the information concerning the COVID-19 situation in [the EEC] was that the number of infections was decreasing with 114 reported on average each day. That was one per cent of what the peak had been, with the highest daily average having been reported on 28 October 2020. In total there have been 1,666,325 infections and just over 30,000 Coronavirus related deaths in the country. [The EEC] had administered at least 7,456,800 doses of COVID vaccines.

[20] In essence Ms [Zemanova] submits that while recognising the health risk for [Madeleine] and indeed herself, those can be adequately mitigated at this time and the positive experience for [Madeleine] of time spent with her maternal family outweighs that present risk.

[21] In contrast, Mr [Curiel] submits to the Court that the health risk to his daughter of such travel cannot be adequately dealt with currently and any travel must await a time when the issues around Coronavirus are more fully and safely resolved, most particularly in [the EEC] but also transit countries. He submits that if the Reuters coding in [the EEC] changes to red while Ms [Zemanova] and [Madeleine] are in that country, then every reasonable step will be taken for [Madeleine] to be returned to New Zealand as quickly as possible.

[22] In addition, he is concerned about the proposed length of the time away from New Zealand for [Madeleine] and naturally from himself. In addition, he submits that her friends will be missed by [Madeleine] and there are potential issues with education. [The principal of the school A] has noted in an email to Mr [Curiel]'s counsel that a whole term of teaching and learning would be missed, which may cause academic disadvantage and require extra learning support upon return. She also notes that [Madeleine] may experience a sense of social isolation due to changes in friendships which can be dramatic at this particular age. If that did occur it could result in some anxiety for [Madeleine].

[23] As with any decision such as this, the Care of Children Act 2004 (“the Act”) must guide the Court’s determination. Therefore [Madeleine]’s best interests and welfare are paramount. A number of the s 5 principles are of course informative. I am also required by s 6 of the Act to have regard to [Madeleine]’s views.

[24] The health reality of the COVID-19 pandemic sadly still has much impact worldwide. I naturally must have regard to the particular situation in [the EEC] and transit countries and the proposed manner of the visit by Ms [Zemanova] to ensure that if the travel does go ahead, the risks are mitigated as best possible. I observe that the Family Court has to now accept the pandemic reality and that each country has adopted a different approach to dealing with the coronavirus situation. New Zealand is one of the few countries which has adopted an elimination strategy.

[25] There is also the impact on [Madeleine]’s familial relationships of the proposed trip, most particularly with Mr [Curiel], but I also accept that the attachment and bond between him and his daughter is now firmly in place. There are the usual social media avenues available for that to be maintained while [Madeleine] is away.

[26] I recognise and acknowledge the applicant’s submission concerning the potential impact on [Madeleine]’s schooling and friends but recognise that the information before the Court indicates she is a talented young woman who is doing well at school with firm friendships in place. Ms [Zemanova] intends to take schoolwork for [Madeleine] with them and ensure that her daughter completes that.

[27] Balanced against those matters are that it is now some time since [Madeleine] saw her maternal family in person with whom I accept she has very close relationships. As I have said [Madeleine] was born in [the EEC]. Her mother has ensured that [Madeleine] is acutely aware of her [heritage].

[28] Ms Melvin has brought to my attention the decision of her Honour Judge O’Dwyer in the case of *Aslan v Huffman*.¹ That concerned the desire of a mother for her children, aged 11 and 10, to be able to travel to Spain for a period of approximately four weeks. In the circumstances of that case, Judge O’Dwyer

¹ *Aslan v Huffman* [2020] NZFC 10288.

determined that any travel of the young person should be governed by the terms of the New Zealand government travel advisory. I note the case was decided in November 2020 and things have moved on to some extent with respect to the Coronavirus situation and particularly the availability and use of vaccines. The proposed travel in that case was to occur during winter, which by comparison to the summer appears to be a time of heightened risk for acquiring the COVID-19 virus. No two cases are the same and while any decision of the Family Court and particularly of a highly experienced judge must be treated with much respect, it is of course not binding on this Court.

[29] I appreciate that each of the positions of [Madeleine]'s parents are genuinely held and each regard themselves as providing for her welfare and best interests. However, in the circumstances that are before me today, I am of the view that the best interests of [Madeleine] are promoted by allowing the travel to take place. On this occasion, bearing in mind the bookings that are already in place, the period of the trip can be in accordance with how that is currently ticketed. Going forward, however, the period of future travel is not to be any longer than the two months plus one week to make some allowance for the need for MIQ to be undertaken.

[30] In terms of the formal variation to the 2018 order, it will be in part as set out in the draft order that has been provided by Ms Melvin, with outbound travel to [the EEC] to take place provided it has a green or yellow risk assessment using the Reuters coding. A similar requirement is needed for the transiting countries. On return the travel will go ahead regardless of which of the four risk levels are in place in the countries through which transiting is to take place. The bookings for the travel are to occur at least four months prior to the proposed departure or sooner should MIQ places be available so that the period of time away from New Zealand is no greater than two months plus one week. If no managed isolation is required, then the length of travel is to be no longer than two months. As with the 2018 order, the travel period is to include the July school holidays.

[31] The Reuters coding website is to be consulted at midday on the date of booking the travel and a week prior to departure at midday. If, in the week prior to departure,

[the EEC] and any of the transiting countries are not green or yellow, the travel will not take place.

[32] I record that I understand that Ms [Zemanova] will make appropriate arrangements with the [school A] to ensure that all work proposed by the school that [Madeleine] complete while away is completed.

[33] There shall be at least three FaceTime or video calls between [Madeleine] and Mr [Curiel], of half an hour timeframe for the time that she is in [the EEC]. The 2018 order will be varied to include this amendment.

[34] The order preventing removal of [Madeleine] from New Zealand dated 29 May 2020 is discharged.

[35] I am acutely aware that the parties are much vexed by this issue and have been for a considerable period. They could not have anticipated that COVID-19 pandemic predicament when the proceedings were before the Family Court in 2018. It would seem to me that the circumstances of [Madeleine] may well be detrimentally impacted should either party be required to contribute to the costs of Ms Meyer. In those circumstances I direct that neither will be required to make any contribution to lawyer for [Madeleine]'s fees.

Judge GP Barkle
Family Court Judge

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