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ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO
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**IN THE FAMILY COURT
AT TOKOROA**

**FAM-2013-077-000119
[2016] NZFC 1371**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN TU PHUC NGUYEN
 Applicant

AND JOE MAYER
 Respondent

Hearing: 19 February 2016

Appearances: J Rae for the Applicant
 Respondent self represented
 B King as Lawyer for the Child

Judgment: 31 March 2016

RESERVED JUDGMENT OF JUDGE A C WILLS

[1] The applicant is the mother of the two children, Vinh Mayer, born [date deleted] 2009 and Brittany Mayer, born [date deleted] 2008. The respondent, Mr Mayer is the children's father. Ms Nguyen has applied for an order permitting her to take the children for a visit to Vietnam. There is no firm plan for the trip but rather Ms Nguyen wishes to have the opportunity to travel with the children for three weeks in every Christmas holiday period. Mr Mayer opposes the application.

[2] There is an existing order preventing the removal of the children from the [location deleted] area. The care of the children is shared between the parents with those care arrangements agreed upon and set out in an order. There is a history of earlier proceedings which culminated in a defended hearing on 8 November 2013.

[3] The mother's application to allow overseas travel requires either a discharge or suspension of the order which prevents the removal of the children from the [location deleted] area.

Applicable law

[4] Any application under the Care of Children Act 2004 requires that the welfare and best interests of the children be the first and paramount consideration. In accessing the welfare and best interests of the children, I am required to take into account the relevant principles set out in s 5 of the Care of Children Act 2004. In this particular case the relevant principles are principles 5(d), 5(e) and 5(f).

- (a) Principle 5(d) requires that the children have continuity in the care, development and upbringing.
- (b) Principle 5(e) requires the continuation of the relationship with both parents and preservation and strengthening of relationships with the children's family group.
- (c) Principle 5(f) identifies the need to preserve and strengthen the children's identity, including culture, language, religious denomination and practice.

[5] The children's views and wishes must also be obtained and considered in making any decision.

[6] In a case of this nature, a balancing exercise must be undertaken. The court must be satisfied that the travel is in the best interests of the children and that the risk of non return is acceptably low. It is not possible to completely eliminate risk.

[7] There are many cases dealing with similar situations and each turns on its own facts. There are, however, some common factors which may be relevant in considering whether the order should be discharged or suspended. Judge Geoghegan helpfully set out a list of suggested factors in his decision, *BL v BLW* (Family Court Rotorua, FAM-2002-063-000098, 3 August 2007 (para 14) as follows:

- (a) Whether the country of destination is a signatory to the Hague Convention;
- (b) The history of the compliance with Court orders by the applicant;
- (c) The relationship of the parties;
- (d) The applicant's ties to New Zealand;
- (e) The reasons for and duration of proposed travel;
- (f) The ages of the children;
- (g) The wishes of the children;
- (h) Any safety concerns for the children in the country of destination;
- (i) The mechanisms which can be put in place to ensure, as far as possible, return of the children to New Zealand.

Discussion

[8] Mr Mayer accepts that it is in the children's welfare and best interests to have a relationship with their grandparents in Vietnam and for the children to travel to Vietnam to reinforce their language and cultural identity. Having heard from both parties, I am satisfied that it would be in the children's best interests and welfare to have the opportunity to travel to Vietnam unless there is an unacceptable risk that the children will not be returned to New Zealand after that visit.

[9] Mr Mayer lived in Vietnam for 12 years and both children were born there. They moved as a family to New Zealand in 2012, when the children were respectively four and three years old. It would be fair to say that the children are too young to have any real recollection of their life in Vietnam. They do have a relationship with their paternal grandparents and aunty, as they speak regularly by Skype. Although the children are able to speak Vietnamese, and understand their mother, they find it difficult to understand the Vietnamese spoken by their grandparents. As a result, Ms Nguyen says, the Skype contact often involves her parents simply watching the children as they play.

[10] Mr Mayer does not trust that Ms Nguyen will return and he points to a number of events which he says have led to that lack of trust. In order to assess the validity of Mr Mayer's lack of trust, the history of the parties since separation needs to be considered. They separated on 10 August 2013 when Ms Nguyen moved to Auckland leaving Mr Mayer and the children in [location deleted]. On 2 September 2013, Ms Nguyen returned to [location deleted] and without Mr Mayer's consent, took the children to Auckland. Court proceedings were filed on a without notice basis and an interim order made in favour of Mr Mayer requiring the return of the children to [location deleted].

[11] On 10 September, Ms Nguyen alleged, in an affidavit filed in support of the Care of Children Act 2004 proceedings, that Mr Mayer had sexually abused Brittany. The children were interviewed and the matter was a subject of a defended hearing. In her reserved decision of 17 December 2013, Judge MacKenzie found the

allegation not proved and indeed at para [39] said that the evidence was “a long way from establishing sexual abuse.”

[12] Mr Mayer considered then, and still does, that the allegation was malicious and designed to obtain a parenting order in Ms Nguyen’s favour. Her Honour Judge MacKenzie made a finding about this issue and at para [40] she said:

“As I have said, the timing of the alleged disclosure is curious. Mr Mayer firmly believes that the allegations are malicious and designed for Ms Nguyen to be able to obtain a parenting order. It is not my view, as I expressed to the parties, that it was malicious as such. There are very troubling aspects as to the genuineness of the allegations, particularly the timing, the lack of action prior to August 2013 and the leading questioning of Brittany the day after she had seen a lawyer in Auckland.”

[13] Despite subsequent agreements to share the care of the children, and a reasonably cooperative approach to their care and decision making for them, Mr Mayer does not believe that Ms Nguyen recognises the importance of his role in the children’s lives nor does he believe that any measures the Court could put in place would remove the risk of non-return. His trust in Ms Nguyen appears to have been retrievably lost. His subjective view is coloured by the events that occurred just after separation. It is an objective assessment of the likely risk of non-return that is required.

[14] Vietnam is not a signatory to the Hague Convention. There is no evidence as to assistance that might be available to Mr Mayer if the children were retained in Vietnam. Mr King has made some enquiries and in his submissions identified that there would be no right to legal aid for legal representation for Mr Mayer and no infrastructure to support an application for return of the children to New Zealand. The prospect of enabling a return if Ms Nguyen elected to retain the children in Vietnam would be low. That is so despite Mr Mayer’s familiarity with Vietnam and his facility with the language.

[15] It is of significance that ill-founded allegations were made by Ms Nguyen to support a without notice application for a parenting order and that the children were unilaterally removed from [location deleted] by Ms Nguyen. As against that, Ms Nguyen has subsequently complied with Court orders for care and contact. The

relationship between Ms Nguyen and Mr Mayer is still conflicted despite Ms Nguyen's evidence which gives some reassurance about her recognition of the value of Mr Mayer's role in the children's lives.

[16] Ms Nguyen is operating a business which she took over following the division of relationship property. It was her evidence that the business was not making a significant income at this time but that she was optimistic for the future. She said that the decision had been made to come to New Zealand in order to promote the children's education and she remained committed to that. She also gave evidence that she had begun to make friends in the [location deleted] community and was settled there. As against that it was clear from Ms Nguyen's evidence that she continues to regard Vietnam as "home". She talked about going "home" every year in her evidence. She confirmed that the children were being raised in a Vietnamese way but then said "I don't disrespect your country." That of course is not surprising, but it is a reflection that Ms Nguyen's ties to New Zealand are not as strong as her ties to Vietnam.

[17] The reasons that Ms Nguyen proposes for the travel are valid and the time period proposed is reasonable. Annual travel would not be realistic from a financial perspective and there is no fixed plan for the travel other than to identify that it would take place during the Christmas school holidays.

[18] The children are seven and six years of age. As Mr King put it at their age the true value of travelling to Vietnam is to have an enjoyable holiday time with family members. That is the strongest pull and a trip to Vietnam would not be seen as a worthwhile cultural experience at that age. The children have good memories of a holiday with their father. Holiday memories of a trip to Vietnam would be valuable and lasting for these two children. The children are eager to travel to Vietnam. They spoke to Mr King about conversations they had with their grandparents and it is clear that their familiarity with the Vietnamese language as spoken by their grandparents is waning.

[19] Mr Mayer has raised some safety concerns for the children in travelling to Vietnam. The evidence in that area is however sparse and the incident where

Ms Nguyen's mother is said to have threatened her with a knife has been downplayed by Ms Nguyen. Mr Mayer was not present and is simply repeating what was said to him at the time by Ms Nguyen. It seems that this was the only incident which could give rise to concern. Mr Mayer also asserted that Vietnam of itself posed some risk to the children because of the poor treatment of woman in general in that country. There is no specific evidence supporting his concerns and I do not consider there is a safety risk to the children posed by a holiday visit to Vietnam.

[20] Ms Nguyen has proposed that she make payment of bond of \$5000. She proposes that preconditions be met including provision of return tickets and the itinerary. The children's passports she says could be handed to a person in Vietnam. None of those measures would assist in the return of the children in the event that Ms Nguyen decided not to return. The children have Vietnamese and New Zealand passports. They are able to remain legally in Vietnam and there is no evidence that the legal structure in Vietnam would enable Mr Mayer to obtain orders for return of the children to New Zealand.

[21] Ms Nguyen has given evidence that her parent's health does not enable them to travel to New Zealand. She says they are aged 67 and 66. There is no medical evidence, or evidence provided by Ms Nguyen's parents, which would confirm their health problems and inability to travel.

[22] What is clear is that the most important reason for Vinh and Brittany to travel is to enable them to have a holiday and spend time with family. They are not yet of an age where travel to Vietnam would be a significant cultural experience for them. The fact that Vietnam is not a Hague Convention country and that the legal infrastructure in Vietnam would not enable or support Mr Mayer to obtain a return order are important and overriding factors. Although Ms Nguyen has given evidence that she is settled she is in a position where she does not own a home and the business that she is operating barely makes a living to support her and the children. In addition it is clear from her evidence that Vietnam remains her home. Those factors combined with the young ages of the children and the previous willingness of Ms Nguyen to act unilaterally pose risks which cannot be addressed by the usual conditions which could be put in place by the Court.

[23] I am not satisfied that Ms Nguyen's parents and/or sister are unable to travel to New Zealand or a Hague Convention country which is closer to Vietnam. If Ms Nguyen were to arrange travel to a Hague Convention country with passports to be held on arrival that would be a different situation and one which would have Mr Mayer's agreement.

[24] As the children grow older and as Ms Nguyen's situation in New Zealand changes it is likely that the risk profiles will alter and consequently an application in the future may be considered quite differently. At this time however the risks of non-return outweigh the benefits of travel for the children and in the children's welfare and best interests the application to suspend or discharge the Order Preventing Removal from [location deleted] is refused.

A C Wills
Family Court Judge