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

**FAM-2015-072-000077
[2016] NZFC 1891**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	ELEANOR NASH Applicant
AND	ISSAC TOFILAU Respondent

Hearing: 9 March 2016
(Heard at Hamilton)

Appearances: J Cammock for the Applicant
G O'Brien for the Defendant
M Earl as Lawyer for the Child

Judgment: 9 March 2016

ORAL JUDGMENT OF JUDGE G S COLLIN

[1] These are proceedings between Eleanor Nash and Issac Tofilau. They relate to their son, Cole Nash born on 28 [date deleted] 2015. A hearing to determine disputed matters commenced yesterday. The issues before the Court at the time were:

- (a) Whether or not a protection order that had been sought by Ms Nash should be made final.
- (b) Whether Cole should be entitled to relocate to Australia.
- (c) What the day-to-day parenting orders should be.

[2] Yesterday the Court heard evidence from Eleanor Nash and some evidence from Ms Nash's mother Tiffany Nash. Her evidence remained uncompleted. It is my understanding that following the giving of evidence yesterday the parties reconsidered their position in respect of the disputed issues. As a consequence of that there have been significant negotiations between the parties this morning as a result of which they have reached agreements which finalise all matters between them.

[3] I have expressed to the parties in my discussions with them my gratitude for the way in which they have approached the negotiations today. I record formally that gratitude and hope that the negotiations today are a commencement by the parties of an ability to work together for Cole's benefit over the coming years.

[4] I want to acknowledge in particular the involvement of the women in Cole's life, particularly his grandmother Tiffany Nash and his Aunty Samara Hudnall and for the part that they have played in the negotiations today. Both Mrs Nash and Ms Hudnall are important people in the ongoing day-to-day care and in particular contact arrangements between Cole and his dad. I urge them particularly to have regard to Cole's interests, to ensure that Cole travels to New Zealand so that he maintains an ongoing relationship with his father and to ensure when he is here he is in every way kept safe.

[5] I have not had the opportunity of hearing from Mr Tofilau and his side of the story remains, from an evidential point of view, untested by cross-examination. Having heard Ms Nash, however, he has realistically recognised that Cole's best interests are served by him returning to Australia with his mother where she has family support. The consequences for Mr Tofilau are a loss of potential relationship and in particular a loss of the potential of the frequency of his contact with Cole. It may well have been that the Court would have made a relocation order but, in any event, it has not been necessary to do so and Mr Tofilau has realistically accepted that a relocation can occur.

[6] There are serious allegations that have been made during the course of both the affidavit and oral evidence. I am left in a position where I am unable to determine on any definitive basis the s 5(a) issues that pertain to Cole's safety. The proposed order reflects that and provides that Samara Hudnall is to be the supervised contact person during Cole's contact with his father. Having met briefly Samara Hudnall, who is seated in the Court, read her affidavit but in particular received an assurance from Mr Earl that she is a suitable contact person, I have no hesitation in agreeing to the orders that are proposed on the basis that Cole's contact with his father is supervised by Ms Hudnall. I believe that that will address the necessary s 5(a) issues.

[7] The parties have provided a consent memorandum. It was not signed by Mr Earl but Mr Earl confirms to me his agreement with the proposals. I raised some concerns that the consent was not specific enough that it could if necessary be enforced. The parties realistically accepted that this was the case but pointed out that they had not had time to finalise default positions. I accept that entirely.

[8] We have had further discussions and default positions have been agreed which I intend to dictate as part of the consent orders I am going to make. This will help ensure that the orders are clear and that if there cannot be agreement default positions exist that provide certainty of contact.

[9] I do point out to the parties that even certainty of contact does not guarantee that it will occur unless there is a significant element of goodwill. The orders that

are proposed provide an imposition on both parties. From Mr Tofilau's point of view he is committed to a financial arrangement which will be reasonably hard to maintain. The arrangements involved the funding of travel for Cole to New Zealand four times a year and the providing of accommodation for Ms Nash during those times. The success of Cole's contact with his father is going to depend on his willingness and ability to ensure that the financial commitment he has now made is maintained.

[10] From Ms Nash's point of view she is now committed to coming over four times a year. This is also going to require an element of goodwill from her point of view. If, however, she refuses to come the orders are likely to be enforceable to the extent that the Court either in New Zealand or in Australia could enforce compliance. This might involve the uplifting of Cole by a social worker or by the police and his return to New Zealand for the purposes of ensuring that contact occurs.

[11] Against all of that background I now make the following orders and directions:

- (a) All existing orders, including the order preventing removal that are currently in force, are discharged.
- (b) A final protection order in favour of Ms Nash is made against the respondent Mr Tofilau. Mr Tofilau is to attend such assessment or programmes as determined by the registrar of the Court.
- (c) I make a guardianship direction allowing Ms Nash to relocate to Australia with Cole. This is made in terms of the consent memorandum. I specifically note the agreement that Cole will not leave New Zealand until 22 March 2016.
- (d) Day-to-day care and contact orders are made as set out in the consent subject only to the following alterations:

- (i) Contact is to occur four times per year in New Zealand for a period of one week (seven days inclusive of travel) at times to be agreed, but if times are unable to be agreed, the contact is to occur three times each year from the first Sunday following the end of each Australian school term holiday and continue until Sunday one week later and in respect of the Christmas contact, from 1 December until 7 December.
- (ii) 5(b) is to be amended to read, “Until Cole’s second birthday contact shall occur during the daytime only at times to be agreed but failing agreement for the first two contact periods from 9.00 am to 3.00 pm and thereafter from 9.00 am to 5.00 pm. From Cole’s second birthday contact is to occur as agreed between the parties but failing agreement Cole will be with his father for not less than three periods 10.00 am overnight until 4.00 pm the next day. If the parties are unable to agree on the times the nights are to be alternated commencing at 10.00 am on the first Monday Cole is in New Zealand during the holiday period.”
- (iii) I record that the parties intend that that contact be extended so that in time Cole is with his father for the duration of his time in New Zealand. The parties agree that extending contact for a lengthier period of time than the overnights will depend on Cole’s ability to cope.
- (iv) Paragraph 5(e) is to be amended to read, “The respondent shall be responsible for paying for the cost of flights between Townsville and Auckland for the applicant and child so that contact can occur and also for the applicant’s accommodation costs within New Zealand.”
- (v) An additional condition of contact is to be provided that if at any time Cole becomes distressed he is to be either returned to

the care of his mother or his mother will be contacted and requested to attend at the home of Samara Hudnall for the purposes of settling him.

- (vi) Samara Hudnall will provide to Eleanor Nash written confirmation of flights to and from New Zealand together with accommodation details. The information is to include confirmation that the flights and accommodation are paid and an itinerary and details of both flights and accommodation. If it is not provided within 21 days prior to the proposed departure date there is to be no expectation that contact will occur on that occasion. Unless otherwise agreed communications regarding contact arrangements in New Zealand are to occur directly between Ms Nash and Ms Hudnall.
- (vii) Both parties are legally aided. As a consequence I make orders that neither contribute to the cost contributions of lawyer for child.
- (viii) I direct that a copy of the final sealed order be forwarded to the Secretary of Justice for transmission to the Townsville Court in Australia for the registration of these orders in the Australian Court.

G S Collin
Family Court Judge