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**IN THE FAMILY COURT
AT PORIRUA**

**FAM-2014-091-000342
[2016] NZFC 2268**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN ESPERANZA CARDONA
 Applicant

AND VALERIO VALDEZ
 Respondent

Hearing: 8, 9, 10 and 11 February 2016

Appearances: F L Miller for the Applicant
 Respondent (in person) via AVL
 C Dellabarca lawyer for children
 A Gray counsel to assist the Court

Judgment: 6 April 2016

**JUDGMENT OF JUDGE MNE O'DWYER
(as to parenting, relocation and care arrangements)**

[1] This is an international custody (parenting) dispute concerning two children, Rico (12) and Marina (9), for whom New Zealand has been their home for the past nine years. A decision has to be made regarding the children's future care arrangements, in particular whether they will live with their father in [location deleted] or their mother in New Zealand, and what contact arrangements should be made.

[2] Ms Cardona (the mother) is the applicant. Mr Valdez (the father) is the respondent. The mother is [ethnicity deleted] by birth and now a New Zealand citizen. The father is [ethnicity deleted] and posted to the [name of country deleted] Consulate in [location deleted]. The children are citizens of the [location deleted], as they were both born there. They have a stepfather and [sibling] in New Zealand. They have a stepmother and four stepsiblings in [location deleted]. Their extended family members live in [location deleted].

[3] The children have been the subject of parenting proceedings in New Zealand and [name of country deleted] since 2014 and the litigation has been protracted. It has taken its toll on the children and the parents.

[4] It is abundantly clear that both parents are loving and capable, both highly committed to their children's wellbeing. They each have genuine and reasonable proposals for their children's future, faced with the painful reality of geographical separation.

[5] The substantive hearing concerning the parenting issues proceeded over four days in February 2016. I heard evidence from the mother, the children's stepfather in New Zealand, and the father and stepmother by AVL from [location deleted]. The father represented himself and was present throughout the four-day hearing by AVL.

[6] At the start of the hearing the mother sought an order to enable the children to remain in New Zealand in her care for the foreseeable future. The father sought an order consistent with the [name of country deleted] Court order made in 2013, confirmed by the Superior Tribunal in 2015, that the children move to live with him in [location deleted].

[7] After three days of evidence the mother made a decision at significant personal cost to herself that the children should move to live in [location deleted] with their father. The issue for the Court to determine became more contained: when and in what way should the children move to [location deleted].

[8] Relevant to that issue the following factors were identified:

- (1) When should Rico move to live in [location deleted] with his father?
- (2) Should Marina remain for a longer period with her mother in New Zealand?
- (3) What contact order meets the children's needs?
- (4) Which jurisdiction should determine any future parenting and guardianship disputes?
- (5) What therapeutic support is required to assist the parents and children with this transition?

[9] At the end of the hearing I advised the parents of my decision that the children should move to [location deleted] to their father's care in July 2016. My reasons for the decision are now provided together with detailed orders.

Relevant factual developments

[10] The background to the parenting dispute is set out in earlier decisions and it is not necessary to repeat that here. It is helpful to summarise significant events.

- (1) Both children were born in the [location deleted] and their cultural background is [ethnicity deleted] through their paternal family and [ethnicity deleted] through their maternal family.
- (2) The children's parents met and married in the United States.

- (3) The mother's parents, siblings and their families live in [location deleted]. The mother had a temporary residence visa in [location deleted] while living there.
- (4) In 2006 the family moved to New Zealand when the father took up his [occupation details deleted]. The mother's opportunity to apply for a full resident's visa to live in the [location deleted] expired.
- (5) Between 2006 and 2011 the children lived with both parents in New Zealand and were loved and well cared for.
- (6) In 2011 the parents separated. The parents worked together to minimise the impact of their separation by establishing a week about shared care parenting routine. The children lived in alternate weeks with each parents and each newly constituted family group.
- (7) In February 2013 the parents obtained a divorce from the [name of country deleted] Court. Both parents eventually remarried. The children spent alternate weeks with their father and their stepmother, Cecilia, and her four children. They spent alternate weeks with their mother, her husband who is a New Zealand citizen. In [date deleted] 2014 their [sibling], was born.
- (8) In 2014 the father's posting to New Zealand came to an end. The mother was unable to relocate to live in [location deleted]. The proceedings commenced. The parents' ability to communicate constructively regarding the children broke down.
- (9) In May 2015 the father's wife obtained an order by consent enabling her to relocate her four young children to live [location deleted]. It was a provision of the order that the children could move to [location deleted] in August 2015.

- (10) Following the father's move to [location deleted], the children's routine of alternate weekly care changed. Their contact to their stepmother and stepsiblings reduced.
- (11) In August 2015 the father's wife, Cecilia, and the four stepsiblings moved to [location deleted].
- (12) The children have maintained frequent and lengthy Skype contact with their father each week.
- (13) The father has not visited New Zealand to see the children since May 2015. Both children have consistently expressed the wish to see their father. Rico has expressed an increasingly firm wish to live with his father in [location deleted] and has expressed that to his lawyer, Mr Dellabarca. Marina has not wanted to express her views about her future care.

Legal principles

[11] The welfare and best interests of each child is the first and paramount consideration: s 4(1) of the Act. I must focus on the welfare and best interests of each particular child in his and her particular circumstances (s 4(2) of the Act). It is an individualised assessment of each child's needs.

[12] In reaching a decision as to what is in each child's welfare and best interests, I must consider the principles in s 5 of the Act. I am conscious that decisions need to be made and implemented in a timeframe that is appropriate to each child's sense of time (s 4(5)(a) of the Act).

[13] I have to assess what is in the welfare and best interests of each child by applying the principles in s 5 of the Act that are relevant to the facts of this case. The importance of the s 5 principles to cases where the issue is whether children will move to an international location was reaffirmed by the Supreme Court in *Kacem v*

Bashir [2010] NZSC 112. The Supreme Court provided guidance as to the approach to be taken, which can be summarised as follows:

- The s 5 principles must each be examined to see if they are relevant and if they are, must be taken into account with any other relevant matters.
- If a principle in s 5(e) concerning a child's safety is engaged, it is likely to have decisive weight because of the crucial factual importance of protecting the safety of children when compared with the objectives at which the other principles are aimed.
- None of the principles have any presumptive weighting as against other principles, and the s 5 principles are not exclusive, and do not provide the appropriate welfare decision by a formulaic application. The Court's task is to exercise overall judgment in respect to what are the best interests of the individual child.
- The principle in s 5(d) has the objective of continuity in arrangements for a child's care, development and upbringing. It is also concerned with promoting continuity in the child's relationships, with the objective that those relationships should be stable and ongoing. The Court is required to have regard, in particular, to the child's relationships with both of the child's parents because of the special and vital part parents play in each child's upbringing and development.

[14] The importance of continuity of a child's relationship with both parents expressed in s 5(d) of the Act reflects the principles in the United Nations Convention on the Rights of the Child, in particular Articles 9.3 and 18.1. Article 9.3 recognises the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis except if it is contrary to the child's best interests. Further, Article 18.1 upholds the principle that both parents have common responsibilities and primary responsibility for the upbringing and development of their children.

[15] The more contained question that the Court has to determine for the children is when and how they will each move to live in [location deleted] with their father and what contact arrangements to their mother would meet their needs. The principles in s 5(b) to (f) of the Act are relevant. In this case there is no suggestion that the children are at risk of harm in the care of either parent. Both parents are capable and loving towards their children.

[16] Mindful of the relevant principles, the question for each child is how can their developmental needs be met when their parents are obliged to live in different countries. The principles to be applied to assist the resolution of this question emphasise the importance of continuity for each child in their care, development and upbringing; their entitlement to have a continuing relationship with the non-resident parent; their entitlement to have a relationship with the wider family including grandparents, their stepfather and sister; and the children's right to the preservation and strengthening of their identity, including their culture, language and religious practice. The children's sibling relationship is an important factor in this case which has to weighed in the balancing exercise.

[17] There was no psychological evidence presented regarding each child's psychological attachments or the implications for those attachments of the move to [location deleted]. At an early stage in the proceedings, a psychological report was requested, but both parents later preferred not to expose the children to that type of enquiry. After careful consideration and hearing the submissions of counsel and lawyer for child, I considered that a psychological report was not necessary in this case.

The move to [location deleted] in August 2014

[18] The father has a strong sense of grievance that the children did not move with him to [location deleted] in late 2014 when his posting in New Zealand came to an end. He relies on the 2013 [name of country deleted] order, confirmed by the Superior Tribunal in November 2015, giving him the right to custody and care of the children. It has since been confirmed that included the right to care for the children wherever he was posted.

[19] The father's case is that this was settled by agreement between the parents in 2013 and that the mother reneged on that agreement in August 2014 when these proceedings were commenced. The father's evidence is that both parents knew from 2013 that the children would move with him at the end of his posting in New Zealand and live in whatever country he was posted to irrespective of whether the mother and her family were able to live in the same country and exercise shared care.

[20] The mother's case is that she understood that the father had day to day care of the children under the order, but the children were to be in her care under the access provisions in alternate weeks. Her evidence is that any variation to the access conditions had to be made by agreement between the parents. Her case has been throughout that the father's move to [location deleted] in August 2014 fundamentally altered the care and access arrangements in the 2013 order which required the children's needs to be considered afresh.

[21] I am satisfied from the evidence that in February 2013 both parties intended that they would reach an agreement and a variation of the 2013 order if the parents were no longer able to live in the same country and exercise week about care of the children as intended in the 2013 order. I accept the mother's evidence, and that of her husband, that it was always her intention if possible to follow the father to wherever he was posted to ensure the children would have their parents in the same or a close location.¹ When they learnt in June 2014 while the mother was in [location deleted] that the father's posting was to be in [location deleted], their hopes of being in the same country as the children if they were to leave New Zealand came to an end.²

[22] It is also clear from the evidence that parental communication and consultation on the implications of the father's posting for the children broke down completely in 2013. From the correspondence between solicitors it is clear that the father was insisting that the mother provide undertakings before he would attend private mediation or counselling to discuss the children's future.³ The mother's

¹ NOE page 13 PF, NOE page 54 GQ

² Evidence of the father's phone call to the mother in June 2014 advising that the posting was to be [location deleted].

³ Correspondence from Ms Vazquez to Ms Miller in November 2013, Exhibit H, father's Affidavit

evidence is that she gave up trying to communicate with the father regarding future care arrangements for the children when his posting in New Zealand came to an end.

[23] I am satisfied that the mother knew the father's posting in New Zealand was to come to an end in August 2014 and that she had information towards the end of May 2014, three months earlier, that his posting was likely to be the [location deleted]. This was not confirmed directly to the mother by the father until June 2014 when she was overseas.

[24] It is clear that the mother had very short notice of where the father was to be posted. When she and the children returned to New Zealand at the end of July 2014 there was an attempt between the parents to discuss the implications for the children of the move but this was unsuccessful.

[25] The parents unfortunately then took up very fixed positions. The father insisted on his rights under the [name of country deleted] order: the mother countered with opposition to both children leaving New Zealand. These fixed positions have persisted until the hearing.

[26] It is clear that there are important implications for the decisions to be made for the children of their moving to [location deleted]. These were decisions that the parents as guardians both with parental responsibility needed to consult each other upon and reach agreement. The fact that a move to [location deleted] would necessarily disrupt the continuity of care that the children had through the week about care arrangement had to be faced by both parents and an assessment made as to each child's needs. This included the timing of each child's move to [location deleted] and whether it was in their interests to move at that time and together. The parents needed to have discussions regarding the schools that they would attend, who would care for the children while the father was at work given that his wife was not able to leave New Zealand at that time. They needed to discuss the transition for the children of their life without their mother, stepfather and [sibling], and without their stepmother and stepsiblings. Clearly they had to discuss how contact to their mother would be maintained as she was obliged to remain in New Zealand. Unfortunately

none of this occurred and has only been achieved through the proceedings in New Zealand and a full hearing.

Parental proposals and submissions

[27] The hearing finally provided an opportunity for the parents to address the implications for the children from each child's individual perspective. Both parents have made concessions. The mother has made a selfless decision that both children should join their father in [location deleted]. The father made an important commitment to remain resident in [location deleted] for at least seven years to enable the children to have continuity in education and environment. Through this the mother now has certainty that the children will not be moved. Furthermore the children's integration into [location deleted] will be assisted by the presence of their stepmother and stepsiblings with whom they have good relationships.

[28] Contact arrangements have been discussed in the hearing and agreements in principle were reached. The father made a financial concession that will assist the children to maintain their relationship with their mother, stepfather and [sibling] in New Zealand, essential for the children's psychological wellbeing. The father also agreed to obtain a variation of the [name of country deleted] court order to reflect the terms of contact and guardianship agreements and to register that varied order in [location deleted]. The mother was able to agree to this because it is where the children will live and although more complex for her to litigate in a country where she does not live she accepts the reasonableness of that jurisdiction being selected by both parents.

[29] The mother proposes that the children move together to [location deleted] in June 2018. She recognises Rico's strong wish to live with his father and that both children miss their father deeply through lack of contact. She emphasises that Rico is doing well at school in New Zealand and is well integrated here and stresses the benefit to him of having two more years before transitioning to high school in [location deleted]. The mother's strong view is that Marina needs at least two more years in her mother's care before she would transition well into [location deleted]. She emphasises that she is a happy girl who is well integrated into New Zealand and

sees New Zealand as her home. She has a close relationship not only with her mother but also her stepfather and her [sibling].

[30] Both parents strongly submit that the children Rico and Marina should remain together and should not move from New Zealand at different times. This is a significant fact in the decision. The parents consider that the sibling relationship is a very important factor. They both describe the children's relationship as extremely strong and mutually dependent. They say that the children have been each other's support since their parents' separation and that this has been heightened as a result of the dispute since August 2014.

[31] In light of these parental views the decision to be made was whether the children move to [location deleted] during 2016 or at some stage between 2016 and 2018.

Mr Dellabarca's submissions

[32] Mr Dellabarca made careful submissions on behalf of both children recognising the strength of their relationship, their individual wishes and views and the joint parental position that the children should not be separated. He submitted that the decision the Court must make albeit more contained was nonetheless finely balanced and of great significance for the children and parents. In his careful submissions he emphasised the importance for the children of continuity of care and of environment, their need to maintain and strengthen their relationships with both parents, each other and both family groups, and managing the transition of both children away from their mother's care in New Zealand into a new environment in [location deleted]. He submitted that each child's wishes and needs must be balanced. For Rico he emphasised the strengths of his wishes, the effect on him of being burdened by the proceedings and his age with the need to accord significant weight to his views. He submitted that it would be difficult for Rico to remain in New Zealand until 2018 at which stage he would be 15 years old and the order would be "almost redundant".

[33] For Marina he submitted that there has been a consistent theme in her meetings with him of her not wishing to express her views regarding her future care. He emphasised that she did not wish to disappoint or upset either parent. Her younger age and stage of development approaching adolescence is an extremely important time for her to have the opportunity of her mother's involvement in care. He submitted that if the children were to remain together Rico may be able to cope with a delay in a move for 12 months to mid 2017 so that his sister would have more time in her mother's care.

[34] Mr Dellabarca also submitted that the Court could consider different outcomes for Rico and Marina. Whilst the sibling relationship is extremely strong he submitted that could be met by the children having contact with each other during school holidays albeit between [location deleted] and New Zealand. He questioned whether Marina is ready for a move at this particular time.

[35] Mr Valdez criticised Mr Dellabarca for these submissions saying that they did not reflect the children's separate wishes and views. However Mr Dellabarca's responsibility is to represent the children's views and needs from the perspective of their broader welfare and best interests. It has been helpful to the Court to hear a range of submissions as to the decision the Court should make and I find that Mr Dellabarca discharged those responsibilities carefully.

When should Rico move to live in [location deleted]?

[36] I am satisfied that from the evidence and balancing the submissions of all parties that Rico should move to live in [location deleted] with his father this year in July 2016. The reasons for arriving at this conclusion from the perspective of Rico's individual wishes and needs are now set out.

Rico's wishes and views

[37] Rico has expressed an increasingly strong wish to join his father in [location deleted]. His views have been ascertained through his meetings with Mr Dellabarca and also in a judicial interview in December 2015.

[38] In December 2014 shortly after the proceedings commenced Rico, then aged 11 years expressed very positive views about living in New Zealand in his mother's home with his stepfather and sister Marina and baby [sibling] recently born. He was missing his father, enjoying visiting his stepmother and stepsiblings in New Zealand and explained that he "just liked being with them". As to the future he could contemplate going to university in the [location deleted]. He said he wanted to remain in New Zealand and go to intermediate school in New Zealand and have visits with his father in New Zealand and [location deleted]. He said that he saw himself finishing intermediate school in New Zealand and at that stage possibly moving to the [location deleted] but he "would think about that when he was older".⁴

[39] By February 2015 Rico's views had developed. He expressed the strong view that he was really missing his father, whilst he enjoyed attending [name of school deleted], he "felt sad" about not seeing his father. He said he wanted to go and live in the [location deleted] and spend time with his mother during holidays.

[40] In August 2015 his views had become strong. He described missing his father a lot and that his preference was to live with his father. He expressed very positive views about his life in New Zealand, living with his mother and his relationship with her but he said that he:

"really wanted to go and live in [location deleted] with his father".

[41] He described the situation as "tough" and said he thought that his mother would be sad but would understand. He said he found the legal proceedings very stressful. He was asked about his relationship with Marina. He said:

"I'm not really me without her ... I would be really really sad if she didn't come".⁵

[42] In the judicial interview in December 2015 Rico expressed positive views and experiences in his life in New Zealand particularly at his school which he enjoys with his friends and at home. He expressed some concern that he couldn't talk about problems concerning where he and his sister would live with his mother. He said he

⁴ BOD p 264

⁵ Mr Dellabarca's report August 2015 BOD p 298

felt uncomfortable talking to his mother about the issue. He firmly said that he wanted to see his father in person and that he wanted to live with him. He said he really misses his father.

[43] Rico described his Skype calls to his father, the frequency and length of time. He described all that they discuss which he said was “life, Christmas presents, issues and everything”. He said he enjoys hearing about his father’s life and work in [location deleted] and all the activities that his father, stepmother and stepsiblings are experiencing. Rico said he enjoys the opportunity to talk to his stepsiblings. He described Joey as like a brother and Katie as close to him because of their age. He said he was excited to go to school in [location deleted] and really wants the opportunities it would bring. He said that he would soon be finishing intermediate school in New Zealand and he would like to start a new school in [location deleted].

[44] When Rico was asked how he perceived he would see his mother and [siblings] he said instantly that his sister Marina:

“would have to come ... without Marina I’m not me, I need Marina to come too”.

[45] Rico was careful to say that he would have Skype contact with his mum frequently each week and that he would see his mother in the school holidays. When asked whether it would be sufficient for him to see his father during the holidays he became very tearful and emphasised that he really wanted to live with his father and was ready now for that change.

Educational transition

[46] Rico is facing a significant change in education at the end of the school year 2016 when he would complete intermediate school. If he remained in New Zealand in 2017 he would be required to make the transition to high school for a short period before moving to [location deleted]. It is likely to be socially and educationally disruptive for him to start high school and leave midyear.

[47] The evidence provided by the father regarding the school curriculum in [location deleted] at primary and middle school level is an important consideration.

Rico is a capable student but he would need some time to adapt to a very different curriculum. The father's evidence is that the curriculum change is significant and other children in the family struggled with the transition for a period. For Rico to settle well and be prepared for high school is important for his transition and attending middle school in [location deleted] from the start of 7th grade, in September 2016, will assist him.

Impact on relationship with his mother

[48] There is evidence that Rico has been drawn into the parental dispute at a level that is not in his best interests. His actions in late 2015 indicated that he was becoming secretive towards his mother and aligning with his father in the dispute. Whether his father encouraged him in that behaviour is difficult to assess. It clearly conflicts with the values that both parents aim to instil in Rico and Marina.

[49] Rico has a very close relationship with his mother but there is a risk that relationship would be put under strain if he were not able to join his father sooner rather than later.

Marina

[50] The considerations for Marina are more finely balanced. Both her mother and her father consider that she should not be separated from her brother and that they should move to [location deleted] at the same time. Her individual needs must be considered.

[51] Marina is three years younger than her brother and attending primary school. She is described as happy, outgoing and gregarious, a well adjusted child with good friendships. She has a good relationship with her stepfather and her young [sibling]. She has a very close relationship with her mother. It is important to consider her wishes insofar as she has been able to express them, the relationship with her parents, educational transition and the impact on her of a move to [location deleted] at this time.

Her wishes and views

[52] Mr Dellabarca has reported on Marina's wishes and views in each report. Throughout she has been reluctant to express a view about moving to [location deleted] or remaining in New Zealand. In December 2014 she spoke positively about her relationship with her mother and stepfather, school, her friendships and all her activities. She spoke positively about her stepmother and stepsiblings. She clearly enjoyed her wider family including the visit of her maternal grandmother from [location deleted]. She said she had not thought about long term future care arrangements at that stage. In August 2015 she expressed some sadness about her stepsiblings moving to [location deleted] saying that she would miss them unless she moved to [location deleted]. When this was explored with her she said:

"I might just stay here with Mum – I like it, and I would like it when we go and visit Dad and then go to [location deleted]."

[53] If she remained living with her mother she imagined that the current arrangements would continue with her brother, [sibling] living with her, and that she would continue to live with her brother regardless of where she lived. She could imagine living in [location deleted] with her father, stepmother and stepsiblings, but said she hardly thought about it. She did not want to have an interview with the Judge.

[54] This information together with the evidence of both parents presents Marina as a happy, well adjusted child who has not taken on the burden of this decision for herself. Her father's evidence is that she often expresses a wish to live with him during their Skype conversations. I accept that she does. Equally I accept her mother's evidence that Marina conveys to her mother that she is happy living in New Zealand. She clearly is not ready to make a choice.

[55] The continuity of the relationship of Marina and her mother at this stage of her development is very important. She has adjusted to the change in care arrangements after her father and stepmother and stepsiblings left New Zealand. She is not expressing a strong wish to change, unlike her brother.

[56] However both parents have expressed a strong view that the children should not be separated. Their mother described them as very loving towards each other with a very strong relationship. She said when they are away from each other for a short time they miss each other deeply, they were the support for each other after separation. When asked how they would feel if they were separated, she responded that they would feel it was punishment. She has a reasonable concern that Marina would find the move difficult, would miss her mother, stepfather and [sibling] and would struggle to settle. She strongly submitted however that the children should not be split.

[57] The father is confident that Marina will settle with the support of her stepmother, brother and stepsiblings. He said that if she did not settle he would send her back to live in New Zealand with her mother.

[58] The evidence suggests that Marina has a good relationship with her stepmother and with her stepsiblings in [location deleted]. She is close to all the children and there is a good relationship between them. In [location deleted] she would attend the same primary school as three of the children which is likely to help the transition.

[59] Both parents gave evidence that it would be difficult for Marina to remain in New Zealand without her brother. Mr Dellabarca invited the Court to consider that this could be ameliorated by twice yearly contact visits in New Zealand and [location deleted]. The practical difficulty is that the actual contact time would be relatively short because the school holiday periods do not coincide. It would create an additional burden for Marina to maintain frequent weekly Skype contact with her father, brother and stepsiblings on her own.

[60] Further consideration in considering Marina's welfare and best interests is the impact on both children of continuing litigation. The litigation has had an obvious adverse impact on Rico. It is in the interests of both children for the litigation to end and for the parents to work together to ensure that the best possible contact arrangements can be achieved. This is unlikely to occur if the children are separated.

Conclusion on timing

[61] Balancing the needs of both children I find that it is in their interests to move to [location deleted] in July 2016 to be in the care of their father. To delay the move longer would expose them to continuing conflict. It would increase the risk of damaging their relationship with their mother and creating more insecurities.

[62] The transition to [location deleted] is likely to be more difficult for Marina than for Rico. I was impressed by the evidence from the children's stepmother. She was able to anticipate the difficulties for each child and their individual needs and feelings. She understands the importance of both their relationships with their mother and particularly Marina's age and developmental stage. She will play an important part in the children's transition and in understanding their feelings. They may find it easier to express their feelings to their stepmother than their father if there are difficulties. I accept her evidence that she would put the children's interests first and encourage their father to understand if either of the children did not settle.

Contact with their mother

[63] The children have a strong relationship with their mother, they each have a secure attachment to her. It is in each child's long term welfare and best interests to maintain and strengthen their relationship with their mother as a foundation for their psychological wellbeing. A child's need to maintain a strong relationship with parents is reflected in the principle in s 5 of the Act that the child has a right to maintain a personal relationship with both parents. In the foreseeable future their mother is unable to move from New Zealand to [location deleted] although this is her long term wish. The issue is what contact arrangements can be made to meet the children's needs for a strong relationship with their mother, [sibling] and stepfather.

[64] Through the hearing the parties were able to reach general agreement on proposals as to how the relationship for each child can be nurtured and strengthened with their mother, stepfather and [sibling]. Where there was an area of disagreement I have taken into account the evidence of both parties and submissions of counsel.

Indirect contact

[65] Experience has shown in this case that children of Rico and Marina's age can benefit by having contact to a separated parent by indirect means such as Skype. Over the past 18 months the children have maintained regular weekly Skype contact with their father, stepmother and stepsiblings. It is important that it is primarily being with their father, that he has made the time commitment to them and that their mother has supported the children in that contact. Over the past 18 months the Skype calls between the children and their father have generally been lengthy up to two hours each time.

[66] The mother's commitment to supporting the children's relationship with their father is evidenced by her support for such regular Skype contact. I accept her evidence that at times she needed to encourage the children, particularly Marina, to settle for the Skype contact and that she ensured they had privacy and a suitable environment for them to enjoy that time with their father. The result is that the children have experienced regular and frequent long conversations with their father. Despite the geographical separation Skype has been a vehicle to enable the children to maintain their relationship with their father.

[67] The father's proposal is that the children would have Skype contact with their mother three times a week, and the mother asks for four times each week. The father's household is busy and with six children there will be more distractions but consistency and reliability of Skype contact is essential to the children's long term wellbeing. I consider that the order must provide for Skype contact to the children not less than three times each week.

Contact visits in New Zealand and [location deleted]

[68] The frequency of contact visits between the children and their mother is constrained by their availability at school holiday times and financial constraints on the costs of travel. The parents provided evidence of their financial circumstances. It is sufficient to say that both households will need to budget carefully to ensure that they prioritise the costs of the children's travel to New Zealand to see their mother,

and her travel to see them in the [location deleted], as a priority over other expenditure. Both parents expressed a commitment to this.

[69] The parents agree that the children should travel to New Zealand each year during their school summer for a period of not less than one month and up to two months between July and September each year. If the mother wishes that summer holiday contact period may be in the [location deleted], most likely [location deleted] where the maternal grandparents and extended family live.

[70] It is agreed that the children will have a two week contact period with their mother in [location deleted] during the Christmas period in alternate years and the Easter period in the intervening years. At these times the contact period will be two weeks.

[71] The timing of these contact periods is to ensure that the children have visits with their mother approximately every six months in New Zealand or [location deleted]. These are opportunities for the children to spend time with their wider family in [location deleted] and for their mother to become familiar with the children's environment in [location deleted]. They will provide an opportunity for the children's mother to have direct contact with the children's schools if the visits are timed correctly. There is a general agreement that the children have additional time with their mother for visits in [location deleted] provided that those visits do not interrupt their schooling.

[72] The duration of the contact period during each summer break should be expressed as not less than six weeks each year. This flexibility is deliberate to accommodate different durations for the children if that becomes necessary taking into account their different ages. It is also designed to recognise that the children are likely to need some holiday time during summer in [location deleted] if they are travelling to New Zealand for contact with their mother over that period. Equally it allows some flexibility for their mother to propose that the summer contact visit take place entirely in [location deleted] when she is likely to take the children to [location deleted].

[73] With regards to the Christmas or Easter period the intention is that each year the children are in their mother's care for two weeks either during the Christmas period or during the Easter period and that should alternate from year to year.

[74] The father proposed the children be in his care for Christmas 2016 reflecting the children have been in the mother's care at that time in 2014 and 2015. However I find that it is preferable for the children and in their interests that they are in their mother's care in [location deleted] for two weeks over the Christmas period 2016. The purpose is to shorten the period of separation between the children and their mother following their transition to their father's care in [location deleted]. It is likely to help the children, particularly Marina, settle in to life in [location deleted] knowing that she will have a visit with her mother approximately five to six months later.

[75] Agreement has been reached on the costs of travel. It is agreed that the mother will meet the costs of her travel for contact visits in [location deleted]. Each parent will meet the costs of a return flight for one child each year between [location deleted] and New Zealand. The effect of this is that the parents are sharing the travel costs for the children between New Zealand and [location deleted] for an annual visit. If that summer visit occurs [location deleted] the father is to meet the travel costs of both children to and from [location deleted].

Guardianship agreements

[76] The parents recognise that their communications as guardians of the children has broken down over this dispute as to the children's future. It is regrettable particularly because the parents had a high level of communication regarding the children's needs in the early stages following their separation. They have the capacity to rebuild that. They share common values and goals for the children. It is through the parents support that the children's [name of country deleted] and [name of country deleted] heritage will be promoted. Both parents properly place a high value on the children's cultural identity. It will be clear to both parents the risk that the children will be harmed if they do not re-establish effective communication as co-guardians of the children. The parents both agree to a referral to specialist

counselling under s 46G of the Act prior to the children leaving New Zealand. It should be possible for the father to be involved through Skype or AVL in that counselling.

[77] The father agrees to consult the mother on the children's educational development and schooling and on any decision regarding a change of the children's school. He will also consult her on any non routine medical treatment. The parents agree to exchange email correspondence regularly approximately every two weeks regarding the children's development. The father will send the mother an email update about the children every month.

[78] Much of the children's school work and progress is held in secure school sites online. The father will ensure that both children's schools facilitate the mother having access to information about the children online and their educational development.

Future disputes - jurisdiction

[79] One of the principal complexities in this case has been jurisdiction. For reasons that have already been explained the father has resisted this Court exercising jurisdiction on these issues because of his employment by the [name of country deleted] Government in a diplomatic capacity.

[80] The father's evidence is that he is employed now in a consular capacity in one of the [name of country deleted] Consulates in [location deleted]. His evidence is that he is not precluded from being subject to the jurisdiction of the [location deleted] Court to resolve any future parenting disputes regarding the children. Both children are [location deleted] citizens and when resident in [location deleted] would be under the jurisdiction of the [location deleted] Court. Their father has accepted that it is logical for any future disputes regarding the children's care or contact to their mother to be resolved in the jurisdiction where they reside. For the next seven years the children will be resident in [location deleted] and [location deleted] is therefore the most appropriate forum for resolving issues that may arise. The mother

agrees with this position which is to her credit. It would be more difficult for the mother to be involved in litigation in [location deleted] but she has accepted this.

[81] However both parents have agreed that any future disputes regarding care or contact or guardianship issues should be resolved in the first instance by mediation. The father has agreed to identify a mediator in [location deleted] if this is required and meet the costs.

Orders

[82] In this case I do not consider it is necessary to make an interim order for day to day care of the children to their mother pending the children transferring to their father's care in July 2016. It has proven sufficient for the children's passports to be held by the Court pending the outcome of the proceedings. It is appropriate that that remains the case so that the children stay in the actual care of their mother until they travel to [location deleted] in July 2016 to the care of their father. The final parenting order that is to be made will confirm that the children are in the day to day care of their father with defined contact to their mother. The order will take effect from July 2016.

[83] The father will take steps and apply to vary the [name of country deleted] order of February 2013 to reflect the agreements reached and orders made following this hearing regarding the mother's contact to the children and guardianship agreements. The father will then take steps to register the varied [name of country deleted] order in [location deleted] where it may be enforced by either parent.

[84] The children have diplomatic and [country named deleted] passports, and both sets of passports are held by the Court. It is now appropriate that the children's diplomatic passports are returned to the [embassy details deleted] and a direction will be given accordingly. It will be a condition of the final parenting order that the children's [country name deleted] passports are to be kept in the custody of their father once the children have travelled to [location deleted] in July 2016.

Conclusion

Orders

[85] The following orders are made:

- (a) The order preventing removal from the jurisdiction of New Zealand is discharged, to take effect on 8 July 2016. The order is to lie on the Court file until 8 July 2016 when the order is to be issued.

Guardianship direction

1. A guardianship direction pursuant to s 46R of the Act that Rico and Marina can move to live in [location deleted] in the [location deleted] on or after 8 July 2016.
2. The children will remain resident in [location deleted] for seven years unless otherwise agreed.
3. Mr Valdez will take the necessary steps prior to 8 July 2016 to vary the [name of country deleted] Court order dated 28 February 2013 to reflect the terms of the final parenting order.
4. Mr Valdez will file a copy of the varied [name of country deleted] Court order in the Family Court, at Porirua, with an official translation of the varied order.
5. Mr Valdez will take the necessary steps to register the varied order in the relevant Court in [location deleted].

Final parenting order

1. From 8 July 2016 the children will be in the day to day care (physical custody) of Valerio Valdez (Mr Valdez).

2. Esperanza Cardona (Ms Cardona) will have contact (access) with the children as follows:

Transition to United States

- (a) Ms Cardona will accompany the children to [location deleted] in July 2016 to assist with their transition and will have contact with them at times to be agreed over a period of four weeks.
- (b) Mr Valdez will meet the costs of each child's travel from New Zealand to [location deleted] in July 2016. Ms Cardona will meet the costs of travel for herself.
- (c) If the children travel to [location deleted] during July 2016 contact period the parents will share the costs of the children's return travel between [locations deleted]. Ms Cardona will meet the costs of travel for herself.

Indirect contact

- (d) Skype contact four times each week at 7:00 pm ([location deleted] time) unless other times are agreed.
- (e) Email, telephone and text message contact as agreed between the children, their mother and their father.

Direct contact

- (f) Direct contact with the children for two weeks in [location deleted] during the Christmas school break commencing December 2016 and thereafter in alternate years.
- (g) Direct contact with the children for two weeks in [location deleted] during the school spring break commencing spring 2017 and thereafter in alternate years.

- (h) From July 2017 direct contact in New Zealand for not less than six weeks during [location deleted] summer school break. This contact may be in [location deleted] or other location in [location deleted] at Ms Cardona's choice.
- (i) Ms Cardona will advise Mr Valdez of travel arrangements no later than three months before the contact period begins.
- (j) Any additional direct contact in [location deleted] or New Zealand as agreed between the parents.
- (k) If Ms Cardona resides in [location deleted] in the future the children will be in their mother's care on a week about basis.
- (l) It is agreed that from July 2016 Ms Cardona will not pay child support for the children in recognition of the contact costs that Ms Cardona will meet.
- (m) Ms Cardona will meet the costs of all travel and accommodation for herself for contact in (f) and (g) above and the costs of one child's return airfares each year to New Zealand in (h) above. Mr Valdez will meet the costs of one child's return airfare to New Zealand each year in (h) above.
- (n) If Ms Cardona's contact with the children is exercised in [location deleted], in (f) to (h) above the costs of the children's airfares from [locations deleted] will be shared equally by the parents.

Jurisdiction

3. The parents agree that in the event of any disputes arising as to care, contact or guardianship decisions for the children the parents will attend private mediation in the first instance to resolve the dispute. It is agreed that the father will engage a suitable mediator and will meet the costs of the mediation.

4. In the event that a dispute as to care, contact or guardianship decisions cannot be resolved by mediation the parties agree that the relevant Court in [location deleted] is the most suitable jurisdiction to determine any future disputes and both parents will submit to that jurisdiction to resolve disputes regarding the children.
5. Mr Valdez will submit to the jurisdiction of the relevant Court in [location deleted] to resolve any future disputes regarding parenting or guardianship.

Conditions of parenting order

6. Mr Valdez will send an email to Ms Cardona each month to update her as to the children's educational and social development, extracurricular activities and interests, and health and general wellbeing.
7. Mr Valdez will provide the mother's address, telephone number and email contact details to the children's schools in San [location deleted] and provide his agreement to Ms Cardona having access to regular school reports, information from the children's respective schools, and access to relevant information regarding the children on each school's website.

General directions

1. The children's diplomatic passports are to be released to the father, or his agent.
2. The children's [country name deleted] passports are to be held by the Family Court at Porirua until 8 July 2016. On or after 8 July 2016 the children's [country name deleted] passports are to be released to Ms Cardona for the purposes of the children's travel to [location deleted].

3. From arrival in [location deleted] after 8 July 2016 the children's [country name deleted] passports are to be held by Mr Valdez.
4. A direction under s 46G of the Act that Ms Cardona and Mr Valdez will attend counselling to improve their communication and their co-operation as guardians for the children. Mr Valdez's attendance may be by Skype or other indirect means. The Court authorises six sessions.
5. In the event if either child needs to attend counselling prior to the move prior to [location deleted] then that counselling is to be arranged privately by the parents and the costs of the counselling are to be met by Mr Valdez.
6. Mr Dellabarca's appointment as lawyer for the children is to continue to assist in the implementation of this order.
7. Leave is reserved to the parties to apply for any directions necessary as to the implementation of this order.

MNE O'Dwyer
Family Court Judge