

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

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**IN THE FAMILY COURT
AT PALMERSTON NORTH**

**I TE KŌTI WHĀNAU
KI TE PAPAIOEA**

**FAM-2019-054-000606
[2020] NZFC 5435**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ANDREA SMALL] Applicant
AND	[CALVIN SMALL] Respondent

Hearing: 10 July 2020

Appearances: Mr J Logie for the Applicant
Ms P Nidd for the Respondent
Ms C Linton as Lawyer for the Children

Judgment: 14 July 2020

DECISION OF JUDGE D G SMITH

[1] The parties are Canadian citizens. Mr [Calvin Small] (the father) was born in New Zealand and holds dual citizenship. Ms [Andrea Small] (the mother) was born in Canada and is in New Zealand on a Visa, which expires on 8 August 2020. The parties two children, [Pat] and [Francis], 10 and seven years old respectively, were born in Canada and have dual citizenship.

[2] The Court has been asked to decide whether the children and their mother should be permitted to return to Canada between 13 and 20 July 2020 together, or whether the children should return with their father in one to two months' time, or even later depending on the COVID-19 pandemic.

[3] The father has applied for a final parenting order seeking increased contact.

[4] The father has been clear throughout the proceedings it is his intention to return to Canada. His last statements have been that he will return on or about 24 August 2020, although there now appears some reluctance to commit to that date.

[5] Based on the father's statements as to his intentions, all of the family are domiciled in Canada.

[6] The request of the Court requires a determination as whether the current COVID-19 pandemic justifies a delay in the children's return to Canada.

Background

[7] The parties came to New Zealand with the children in August 2019 with the intention of remaining here for one year. They have rented out their home in Canada for that time.

[8] The move to New Zealand had been planned over four years ago. The mother is a [job title deleted]. For four years she was paid 80 percent of her salary and for the year that she has been in New Zealand, she has continued to receive 80 percent of her salary.

[9] The parties had savings able to be accessed by either of them. Those funds now appear to have been largely depleted.

[10] The father has not worked since arriving here and has not provided any information as to his current source of funds or income.

[11] The party's relationship broke down shortly after arrival. There have been proceedings before the Court since 11 December 2019. The following orders are at issue:

- (a) Order of 11 December 2019 preventing removal of the children from New Zealand.
- (b) Interim parenting order of 12 December 2019.
- (c) Interim guardianship order of 16 December 2019 requiring the children to reside in [a region in New Zealand] and attend [a local School] in 2020.

[12] On 20 February 2020, I noted in a Minute, inter alia, "It is accepted by all the children will be returning to Canada by 2 August 2020". The mother's submissions claim that statement as a direction. It was not. It was a recording of the parties then agreement as stated to the Court.

[13] Should the father return to Canada on or about 24 August 2020, his objection to the mother returning with the children in the middle of July is a time delay of no more than six weeks. What he is asking the Court to determine is that the [children] would be less likely to contract COVID-19 if they are held back for those weeks.

[14] The mother's concern is that come 24 August, the father will not travel with the children and she will be left being in Canada without them for an indefinite period. She would then be forced into considering her options under the Hague Convention on the Civil Aspects of International Child Abduction.

[15] The applications before the Court by the mother seek a discharge of the order preventing removal, a discharge the children reside in the [region] and attend [School] and a guardianship direction confirming the arrangements for the children to travel back to Canada, to return during the period dated 13 to 20 July 2020. The father seeks a parenting order which ensures regular contact with the children.

[16] It is accepted by all the applications must be determined in accord with ss 4, 5 and 6 of the Care of Children Act 2004.

[17] The children's welfare and best interests are paramount. Section 5(a) provides a child's safety must be protected and is the first and foremost concern of the principles relating to a child's welfare and best interests.

[18] I note also principle 5(d) that a child should have continuity in his or her care, development and upbringing.

[19] Section 6 provides that a child's views expressed either directly or through a representative, must be taken into account. The lawyer for the children's report states that neither of the children thought that their mother leaving for Canada without them and that they stay with their father in New Zealand for further time made any sense. They do not want their mother to leave without them. What the [children] seek is that they should all, including their father, fly home together and that would prevent any issue. The [children] are looking forward to meeting back with their old friends in Canada and starting school again.

[20] There was discussion during the submissions only hearing as to the Court's jurisdiction to make a final parenting order in respect of the children.

[21] The jurisdiction to make an order is set out in s 126. Jurisdiction exists when a child who is the subject of an application is present in New Zealand, but the Court may decline to make an order if it is of the opinion that no useful purpose would be served by making the order, or that in the circumstances, making the order would be undesirable.

[22] The father seeks a parenting order. That can only be of benefit if the children remain here with him. How that would be of benefit to him once all the parties are back in Canada, as is his stated intention, is unclear. The father's situation once in Canada is unknown. It may possibly be easier for a Court in Canada to acknowledge the order but, in my view, a copy of this decision would have an equal effect. Any orders from New Zealand will be unenforceable once the parties have left these shores.

[23] If the children were to remain with their father, they will miss the first week of the Canadian school term. In the father's view, if that means they are COVID-19 free, that should not be too damaging for them.

[24] While I have acknowledged the statutory basis on which this application must be made, the parallels with the procedure under the Hague Convention set out in s 106 and s 107 Care of Children Act 2004, are helpful.

[25] As stated, were the mother to return to Canada without the children and the father does not take them to Canada, she would be able to bring proceedings under the Hague Convention. The onus would be on the father then to prove that there was grave danger to the children. That grave danger needs to be shown to exist in Canada and it is not (usually) in relation to travel arrangements. If there was proven grave danger in the travel arrangements, the Court could use its discretion to refuse the return, at least for a period until those arrangements were deemed safe.

[26] I think its appropriate that their father, in this matter, needs to establish to the balance of probabilities that the children will be placed in appreciable danger, both in the travel arrangements and once returned to their home in Canada.

[27] The greatest difficulty the Court faces in determining this matter is the lack of evidence from either party as to what those dangers really are.

[28] The evidence has been produced by way of screenshots of material obtained from the internet, together with a copy of a letter from the Acting Canadian High Commissioner and screen dumps from IATA, local COVID-19 information and articles as to the pandemic and travel by commentators but no direct evidence from any person in authority, either in Canada or with the airlines.

[29] If there was time I would have insisted on non-hearsay evidence. Given the urgency I have to take the documents into account. I have also sought information from relevant public authorities' websites where I have felt there is a lack of information provided by the parties. I have done so due to the importance of the issues to be determined and the urgency. It is also information which is at least of the same

value as that produced by the parties given they have sourced their information from the web.

[30] The parties' hometown is [deleted]. It is in [a County] and is [distance and direction deleted] of Toronto. It is approximately [travel time deleted] by car from Toronto. The population of [their hometown] is [just over 8,000] as at 2016 (the last census). The population of [the County] in 2016 was [around 60,000]. It is estimated to be in the region of 68,000 people now.

[31] The mother has annexed to her affidavit of 7 July 2020, a COVID-19 status report of 3 July 2020, showing that in [the County] there are nine active cases. There has been a total of 188 confirmed cases and 155 have resolved. There have been fatalities. There was one new case included in those nine active cases. Those who have been or are infected within [the County] are just under 0.3 percent of the population.

[32] The infection rate in Toronto has lowered and there is pressure to move to phase 3. The phases in Canada are 1, 2 and 3, and phase 3 is an equivalent to our phase 1 with some phase 2 elements. Phase 3 will see the opening of all workplaces responsibly and a relaxation on the restrictions on public gatherings, which are currently limited to 10. The use of masks or face coverings is likely to be mandatory.

[33] The European Council is lifting restrictions on non-essential travel to the EU for residents from a number of countries, including New Zealand and Canada. That move by the European Union shows some confidence in the way the pandemic has been handled in our respective countries.

[34] Toronto has an estimated population of 6,196,731 people. The current active cases are 729 (14,678 cases, 12,844 recovered, 1,105 deaths).

[35] While I acknowledge the speed with which infections can occur with COVID-19, the active cases in Toronto now is very low. This is in no way a statement active cases will not climb again but I deal with the situation as it presents now.

[36] The main area of concern for the father was the Los Angeles Airport (LAX). Neither party provided any information concerning the situation in Los Angeles.

[37] The Los Angeles County Department of Public Health website shows that there have been 133,549 confirmed cases with 3,793 deaths. Los Angeles has an estimated population of 12,447,000 people. 1.07 percent of the population have been infected.

[38] The father has provided an article by Hannah Jackson, Global News which relates to Air Canada announcing they would begin selling the middle seats on their aircrafts again as Canada slowly reopens. The article contains advice from epidemiologists cautioning that crowded cabins are risky and could lead to further outbreaks.

[39] The date of the article in Global News is not noted anywhere but must be reasonably recent to have that information. It quotes Colin Furness, an infection control epidemiologist and an assistant professor at the University of Toronto, saying he was appalled and did not want any Canadians taking that type of risk. Also quoted is Dr Timothy Sly, an epidemiologist and Professor Emeritus at Ryerson University School of Public Health, emphasising the need of wearing a mask and refraining from touching surfaces and trying to limit your exposure to other people.

[40] The mother has provided a copy of a letter dated 7 May 2020 sent to her from the Acting High Commissioner for Canada in New Zealand. The letter states:

The Canadian High Commissioner in Wellington is providing consular assistance to Ms [Small] and her two children while she is in New Zealand. We are concerned for her and the children's wellbeing and her ability to support herself if she is not able to return to Canada. Her current circumstances would not make her eligible for the Government of Canada's COVID-19 financial loan or other support while abroad. It is important that Ms [Small] and her family return to Canada as soon as possible to ensure that she is back home in time to take up her employment as planned at the start of the Canadian school year.

The penultimate paragraph states:

Airlines, airports and Government authorities are all taking measures to protect passengers. In the specific case of Canada and Ontario, face coverings are required on flights and self-isolation is mandatory for 14 days upon arrival. We have had Canadians travelling from New Zealand to Canada throughout

this pandemic and are not aware of anyone who has caught COVID-19 while in transit, nor upon arrival in New Zealand.

[41] Presently the only cases of COVID-19 in New Zealand are those which have been caught at the border are from people coming in from overseas. There has been no community transmission for many weeks now. That means whichever airline that the mother was to travel on with the children from New Zealand, the passengers on the plane will be COVID-19 free. I obviously cannot make that statement in relation to the crew, but I have some confidence that the airlines at this time are taking all steps possible to ensure that they are not responsible for transmission of the disease.

[42] The biggest risk in what is sought by the mother is the period of time in transit in LAX and the flight to Toronto.

[43] The infection rate in Los Angeles is concerning. California is going into lockdown again today. What we do know from the New Zealand experience is social distancing, the use of masks together with any other personal protective equipment and the use of sanitiser should be sufficient to keep the mother and her children safe. It will require her to be vigilant, but I have no doubt that she will be very vigilant in the circumstances.

[44] The father raises concerns about the lack of social distancing by many in the United States. That should be able to be avoided within the confines of LAX. From personal knowledge once customs have been cleared it is possible to walk from the international terminal to the domestic terminals without leaving the building. The walk takes some time but should be used if time permits. If a shuttle is used, they would need to queue at security again.

[45] With three of them travelling together it should be possible to have the three in a row on each plane. That precludes some other person sitting right next to them who may possibly be infected.

[46] It is necessary that the mother travel back to Canada. She needs to retain her employment. She needs to be able to prepare for the new school year. She will be

[details of job change deleted] and needs to have at least some time to prepare for that. The [children] wish to be with her.

[47] I do not minimise the effect of COVID-19. It is however something which can be managed individually to keep safe.

[48] Were the [children] to remain in New Zealand, I have no confidence as to how financially the father will look after them. Despite several indications that money is an issue, he has not once responded to that. The suspicion is that he is living on the generosity of his parents and how long that can be maintained is unknown.

[49] If the father is to travel in six weeks' time rather than now, the change in the pandemic around the world may be no different. It may be slightly, one hopes, better, but given the infection rates as set out above, that does not appreciably alter the odds of someone catching the virus.

[50] I am of the view that it is the Canadian courts which should determine the parenting arrangements for these people. They are Canadian citizens domiciled in Canada and the effect of any order that I make at this stage other than the ones that follow, will have no practical effect.

[51] I make the following orders and directions:

1. The order preventing the removal of the children from New Zealand dated 11 December 2019 is discharged.
2. The interim guardianship order dated 16 December 2019 directing that the children reside in the [region] and attend [School] in 2020 is discharged.
3. The interim guardianship order dated 12 December 2019 will expire the day after the children leave New Zealand. I direct the mother to provide more contact for the children with the father prior to departure as is practicable.

4. There is a guardianship direction that the mother and children are to fly to Toronto via LAX in the period between 13 – 20 July 2020. The mother and children are always to wear masks while they are in LAX, on the plane to Toronto and at the Toronto Airport. They will continue wearing masks on the road trip home to [their hometown] if they are in public transport.
5. The passports held by the Court are to be released to the mother upon a copy of the flight details being provided to the Court and the father. The mother is to provide a written undertaking addressed to the Court and the father that she will ensure the children have masks on and social distancing is maintained at all times from the time they arrive at LAX until they transit through Toronto airport and on any public transport needed to get home from there.
6. The father's application for a final parenting order is dismissed.
7. Leave is granted to seek further directions should travel arrangements require.

[52] I have received sufficient information to determine that an award of costs would result in serious financial hardship for both of the parties. There is no order as to costs.

Judge D G Smith
Family Court Judge

Date of authentication: 14/07/2020

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.