IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

AP 175/93

NOT RECOMMENDED

BETWEEN **ELLIOT (formerly BARKER)**

Appellant

AND **BARKER**

Respondent

Hearing: 23 & 24 November 1995

Counsel: C J Tennet for the Appellant
L J Ryan for the Respondent
D M Stuart for the Children

Judgment: 24 November 1995

ORAL JUDGMENT OF HAMMOND J

SOLICITORS:

Clark & Gay (Waihi) for the Appellant
D M Stuart (Waihi) for the Children

This is a custody appeal. The appellant is the natural mother of a son ("C") who was born on 16 February 1986. He is now nearly ten. She is also the natural mother of a daughter ("N") born on 25 August 1988. She is now nearly seven. The Principal Family Court Judge awarded custody of both children to the respondent.

The matter was listed for a two day hearing before me. The appeal advanced on the required footing that the case be heard afresh in this Court. The affidavits from the Court below have been brought forward and further affidavits filed. Regrettably, due to inadvertence in the Court below, a transcript was not able to be prepared because the tapes had been destroyed. In the result, *viva voce* evidence has been taken in this Court. I have seen and heard both parties, Mr Barker having travelled from the United Kingdom. I have not seen or interviewed the children, they still being resident in the United Kingdom. There is not presently an independent report on the children before the Court.

In any event, after the evidence in chief and cross-examination of the appellant had been conducted, and the evidence in chief of the respondent had been taken but he had not been cross-examined thereon, Mr Tennet indicated that there were certain matters he wished to put to his friend. I had also formed the view that there were certain matters which I should raise at some convenient point with counsel in chambers, and I took that opportunity to do so.

In the result, certain matters are now agreed between the parties, but there are also formal orders required from this Court. In the circumstances I have thought it appropriate to deliver this formal judgment recording the present position in convenient form and making the necessary orders.

Mrs Barker (as she was to become) was born in New Zealand. She went to the United Kingdom on a working holiday and there met the respondent, Mr Barker. After they married the parties lived in Derby, England. The two children were born there. The parties purchased a home. In 1990 they decided to come to New Zealand for a period of time and that home was tenanted.

When the parties arrived in New Zealand they lived at Te Atatu in Mrs Barker's father's house. The family belonged to the Baptist Church. The appellant formed a relationship with a pastor in that church, a Mr Murray Elliot. In September 1992 Mrs Barker left home, taking the children with her. After a short period of time at a friend's place, she resided in Waihi with the children. Mr Barker had access. He took the children to the United Kingdom with him in September 1992. He thought Mrs Barker would likely follow the family to the United Kingdom and that this would lead to the family being reunited. In fact she did not do so.

Instead, Mrs Barker applied for an interim custody order through the Central Authority for the return to New Zealand of the children under the Hague Convention - which is now part of New Zealand law, it having been adopted through the Guardianship Amendment Act 1991. Mr Barker voluntarily returned to New Zealand with the children on 11 November 1992. They went to live with Mrs Barker in Waihi, with Mr Barker having access.

Matters proceeded to a hearing in the Family Court. The Judge's decision was released on 22 December 1992, giving the husband custody but with access to the wife. I should say here that the Judge was well aware in the Court below that Mr Barker was intending to live in the United Kingdom with the children. Mrs Barker thought Mr Barker intended to leave New Zealand with the children some time in January 1993. She gave immediate instructions for a stay of execution to be lodged. But Mr Barker had departed for the United Kingdom with the children

before such could be lodged. I might add in passing here, that Judges delivering custody decisions might consider of their own motion postponing the coming into effect of the order for a period of days to prevent the sort of thing which occurred in this case happening.

In any event, since that time Mrs Barker (as she then was) has had very restricted contact with the children. She has had some phone calls, letters and cards, and the occasional video. She went to the United Kingdom to see the children in Easter 1994. She has not seen the children since that time. On 11 February 1995 she married Mr Elliot. At this time she and he reside in modest circumstances, which would not make it entirely easy to accommodate these two children should matters come to that.

Mr Barker resides in the former matrimonial home in England with the two children. I think it right to record that his care of those two children was not attacked in these proceedings before me; it was accepted that the children are presently being well cared for in their now circumstances in England.

Against that background, I have no hesitation in recording in broad terms that if I had had to determine the point on the material in this hearing which had been advanced up to the point of time at which discussions were held with counsel, and the case terminated at their request, I would have held first that it was inappropriate to require the children to be returned to New Zealand at this time to the custody of Mrs Elliot. I say that because the children are being well cared for in England and are clearly well settled in their now circumstances. Secondly, in my view Mr Barker did act somewhat pre-emptively in taking the steps in the manner in which he in fact did when the children were taken to England. Having said that, I do not suggest that he acted unlawfully. But this is a case in which it is very likely that a stay would have been granted pending the hearing of an appeal. Thirdly, and most importantly,

in the events which have in fact occurred, the children have been deprived of contact to any real extent with their natural mother. That, given the overall concern of this Court with the best interests of the children, has to be a bad thing.

I think, in view of the way matters have fallen in this Court, that both parents now fully appreciate - but in any event I make the statement in open Court so that there can be no doubt on the matter - that full and proper contact, to the greatest extent that it can be practically be achieved, is required for these children with both parents. The fact of the matter is that this is one of these situations in which it is to the ongoing benefit of the children that they are able to have resort to all that both parties can bring to them in their future years.

I am pleased to be able to record that the parties, after some discussion with their advisers, have agreed upon certain arrangements. I propose to read those arrangements aloud, before I make certain other formal orders.

THE Respondent shall have custody of the two children, namely:

1. CARL JAMES BARKER born on the 16th day of February 1986
2. NGAIRE CLARE BARKER born on the 25th of August 1988

The Appellant is granted reasonable access to the children and pending further review by the Family Court at Auckland on a date to be fixed by the Registrar of the District Court such date to be as soon as practicable after Easter 1997.

THAT the Appellant shall in the meantime have the following access:

(i) The children shall travel to New Zealand leaving the United Kingdom by plane on the 15th day of December 1995 and shall return from New Zealand to the United Kingdom by plane on the 5th day of January 1996.

(ii) The Appellant shall have access to the children in the United Kingdom for the last 4 weeks of the summer School holidays 1996, collecting the children from the Respondent's place of residence on Saturday and returning them on Saturday.

(iii) The Appellant shall have access to the children in New Zealand for Easter 1997, the children flying to New Zealand from the United Kingdom on the 22nd day of March 1997 and returning to the United Kingdom by air on the 10th day of April 1997.

(iv) The cost of all such travel, including any escorts provided or required by the airline, to be met equally by the parties.

(v) The children's airfares shall be booked and paid for by the Respondent and the Appellant shall reimburse the Respondent one half of the costs of the children's fares within 21 days or prior to the children's departure whichever is the earlier.

(vi) The Respondent shall reimburse the Appellant for one half of the cost of her travel in August 1996 to the United Kingdom not later than 21 days prior to her departure from New Zealand.

(vii) The Respondent shall immediately on his return to the United Kingdom book the children's tickets for their travel to New Zealand in December 1995 and shall also make urgent application for Passports for each child and shall take all steps necessary to have available the Passports prior to the 13th day of December 1995.

THE parties shall telephone each other for the children's access on alternate fortnights in accordance with their current arrangements. The Appellant shall be entitled, at her own expense, to telephone the children no any other day at reasonable times.

IN the event of one party failing to return the children in accordance with the foregoing arrangements the party in default shall meet the other party's costs of enforcing the Order.

THE parties agree that the file be transferred to the Family Court at Auckland for the following steps:

(a) Counsel for the children, Mr D M Stuart, is retained and he is to act as Arbitrator in any interpretation or procedural questions arising from the above access arrangements. Leave is reserved for counsel for the child to apply for any further directions to implement the above.

(b) A registered Psychologist is to be appointed to prepare a Report pursuant to Section 29A of the Act when the children are in New Zealand during the period 22/3/97 to 10/4/97. The Psychologist to meet with the children and to make recommendations as to future care arrangements.

(c) The Court is to schedule a Directions Conference as soon as practicable after Easter 1997 to review the access arrangements and consider future access.

THE parties agree that exhibit "G" be released forthwith to the Appellant.

THERE shall be no order for costs.

Having regard to that agreement, I make the following orders of the Court.

1. The Court orders access in terms of the above agreement; and further confirms the associated matters set out in that agreement.

2. The Court hereby directs that the Counselling Co-ordinator in the Family Court appoint a psychologist after the usual consultation with counsel thereon.

That psychologist is to see the children when in New Zealand and is to be prepared to report to the Family Court on his or her observations.

3. I order that the Family Court file be transferred to the Family Court at Auckland.

4. I make an order for the immediate release of Exhibit G to the appellant.

5. As to costs, it is my understanding that Mr Ryan's client is legally aided and no order is required from the Court for him. Mr Stuart is appointed by the Court and likewise no order is required in that respect. As to Mrs Elliot's costs, I understand there is an application for costs before the appropriate Committee. I made the observation in ***C v C*** [1995] NZFLR 562, 576, that: "Cases of this kind should not be seen as 'second class' litigation; indeed it is hard to think of a more significant class of private law litigation. It is for those who have jurisdiction to consider the matter of legal aid, but I hope these comments may be of some value." Given the circumstances in which this matter came to this Court, it seems to me inevitable that Mrs Elliot (as she now is) was required to take the steps that she has taken, and she has been substantially successful in this appeal on the question of access. Those comments may be of some assistance to the Legal Aid Committee.

R G Hammond J