ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILD.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-006583

BETWEEN	MS K Appellant
AND	MR B Respondent

Hearing: 19 February 2009

Appearances: C R Pidgeon QC for Appellant
V A Crawshaw for Respondent
G L Harrison for Children

Judgment: 23 April 2009 at 10:00 am

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 23 April 2009 at 10:00 am
pursuant t o R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date……………………….

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Introduction

[1] Ms K, the appellant, and Mr B, the respondent, are the loving and devoted parents of two girls, F and K. Both are capable of providing a good standard of care for their daughters and both wish to be involved in their daughters' daily lives. Sadly, however, the relationship between them is one marked by mistrust and hostility. This has caused serious difficulties in resolving issues relating to the day-to-day care of the girls. A major source of the conflict has been Ms K's desire to relocate to Australia with the children. This desire is strong because Ms K is effectively alone in New Zealand, living in a community in which she feels acutely the lack of a husband. In contrast, in Australia, she has a very large and supportive family, including parents, sisters, brothers and young adult children.

[2] In the Family Court Judge de Jong dismissed Ms K's application for an order allowing her to move to Australia with her daughters[1]. The Judge found that, although moving to Australia might result in continuity and stability in the childrens' care and foster their relationship with Ms K's family, it was unlikely to promote parental consultation and co-operation or to strengthen the children's relationship with their paternal family so to allow both families to be part of the childrens' lives in a real and significant way. Ms K appeals that decision. She asserts error by the Judge in failing to give sufficient weight to the benefits to the children in relocating to Australia and to the conflict between the parents and in giving too much weight to the perceived barriers that might prevent Mr B visiting his children in Australia.

Relevant principles

Approach on appeal

[3] An appeal from the Family Court is by way of rehearing, with the appeal court obliged to reach its own assessment of the merits of the case. In *D v S*[2] Blanchard J described the correct approach thus:

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[1] FAM-2006-004-001761, 5 September 2008
[2] [2003] NZFLR 81 (CA) at [18]

> [18] …whilst the High Court will naturally give weight to the views of the specialist Court and may in some cases think it best to remit the case for reconsideration, it is fully entitled to substitute its views on questions of fact…

[4] That approach is consistent with the recent decision of the Supreme Court of *Austin Nicholls & Co Limited v Stichting Lodestar*:[3]

> [5] The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such credibility is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong [see among other authorities *Shotover Gorge Jetboats Limited v Jamieson* [1987] 1 NZLR 437 (CA) at 440, per Cooke P, for the Court]. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration of an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the Court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[5] I am therefore required to consider the merits of the case afresh, uninfluenced by the reasoning of the Family Court. I acknowledge, however, that the Family Court Judge heard extensive evidence and there are many factual findings of that Court that I defer to.

Principles applying in relocation cases

[6] The correct approach to the difficult issue of relocation is now well settled and was described in *D v S* as an "all-factor child-centred" approach. It requires, first, recognition of the fact that the welfare of the child is the first and paramount consideration.[4] In *D v S*[5] the Court cited Lord MacDermott's statement in *J v C*[6] that a statutory requirement that the welfare of the infant be the first and paramount consideration at 127:

> … must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote

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[3] [2008] 2 NZLR 141
[4] Section 4 Care of Children Act 2004
[5] [2002] NZFLR 116
[6] [1970] 1 AC 668, 710-711

> a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term is now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

[7] Among the other aspects of relocation that the Court emphasised was that determining what will be in the best interests of the child is necessarily a predictive assessment, a decision about the future, not a reward for past behaviour and not to be based on *a priori* assumptions. The Court in *D v S* (2002 decision) said at 132:

> For reasons apparent from the earlier analysis, presumptive or a priori weighing is inconsistent with the wider all-factor child-centred approach required under New Zealand law. Our law, as stated in *Stadniczenko* v *Stadniczenko* requires the reasonableness of a parent's desire to relocate with the children to be assessed in relation to the disadvantages to the children of reduced contact with the other parent, along with all other factors. There will be no error of law if the decision as to residence is based on the welfare of the children looking at all relevant factors, including the need of the particular children for a continuing relationship with their father and with their mother….

[8] Of course, whilst there are certain factors that occur commonly in cases of relocation, the task of identifying and weighing up the relevant factors must be done on a case-by-case basis, recognising the infinite variety in family circumstances. That is especially so in the present case because the circumstances of this family has some features that are not commonly found.

Relevant circumstances in this case

[9] F and K are now aged six and four-and-a-half. As a result of the Family Court decision they spend four nights per week in Ms K's care, along with Ms K's youngest son from her first marriage who lives with her permanently. The girls spend three nights each week with their father, his wife and their son (also the girls' half-brother). In addition, K spends most of Thursday with her father and stepmother. These unremarkable arrangements belie the complicated background of the children and their parents.

[10] Ms K and Mr B, both Muslim, met in Australia in late 2000/early 2001. Mr B is Algerian. He entered Australia illegally with his wife and son and the

family was interned in a refugee detention centre. Ms K and her family are Lebanese born but immigrated to Australia when Ms K was a child. Ms K and her family got to know Mr B and his family as visitors to the detention centre. After Mr B and his family escaped from the detention centre they received assistance from Ms K's family.

[11] In early 2002 Ms K and Mr B agreed to commit to one another in a Muslim ceremony whereby Ms K would become Mr B's second wife. There is dispute as to who proposed this course and for what reason, but those questions are not relevant to the issues that I have to consider. Mr B was still living with his first wife and there was no intention that this relationship would end. Mr B and his first wife and their son left Australia illegally and came to New Zealand, eventually obtaining refugee status. Ms K also moved to New Zealand, bringing the three children from her previous marriage. They maintained separate households but Mr B spent time at Ms K's house.

[12] F was born in February 2003. By early 2004, however, the relationship between Ms K and Mr B had broken down. Pregnant again, and in considerable distress over the situation, Ms K returned to Australia with her three older children, leaving one-year-old F, who did not have a passport, with her father and stepmother. The second child, K, was born in Australia in September 2004. In early 2005 the Muslim marriage between Ms K and Mr B was dissolved.

[13] Ms K visited New Zealand only once after K's birth, for a week in 2005. However, in mid-2006, with proceedings in the Family Court on foot to resolve Mr B's guardianship status in relation to F and to formalise care arrangements, Ms K moved back to New Zealand. K remained in Australia in the care of Ms K's family until December 2006. These events meant that between the ages of 12 months and two-and-a-half years F had spent all her time in the care of her father and stepmother and barely any time with her mother. Conversely, until she was two, K spent her entire life in the care of her mother and her mother's family, having never even met her father or sister.

The Family Court decision

[14] In the Family Court the Judge was dealing with a number of issues in addition to relocation. These included alleged incidents of violence by Mr B and whether Mr B should be appointed K's guardian. The Judge considered the re-location issue in the overall context of what the best care and contact arrangements were for the children.

[15] Having identified the need to conduct a child-focused enquiry and make decisions most likely to meet the children's best interests and welfare, the Judge identified the issues that he regarded as significant to the issue of relocation, namely:

- continuity and stability in the children's care;
- ongoing parental consultation and co-operation;
- preservation and strengthening of the children's relationships with their families in a way that allows the families to be part of their lives; and
- the children's safety.

[16] The Judge briefly summarised the psychologist's evidence and expressed himself to be satisfied that, notwithstanding earlier incidents between Mr B and the older children, F and K would be safe with Mr B. He went on to consider the competing factors on relocation:

> [47] It is accepted, on the face of matters, that the mother wants to move back to Sydney where she has strong family support. And it is accepted [K] is identified by the psychologist to have a "very strong bond with her maternal side of the family".
>
> [48] However, those reasons are not sufficient for finding that it will be in the welfare and best interests of the children to live in Australia. Although the Australian proposal may result in continuity and stability in the children's care it is most unlikely to promote ongoing parental consultation and co-operation, or strengthen relationships between the children and paternal family in a way which allows *both* families to be part of the children's lives in a real and significant way.

[17] At [49] the Judge then specified the reasons against a move to Australia that he considered outweighed those in favour of relocation:

- With both children attached to each parent, a move to Australia would result in important attachments being severed and significant issues of grief for F who was also strongly attached to her stepmother and half-brother;

- The children are very young and are now used to frequent contact with both parents. Moving to Australia would result in less frequent face-to-face contact. Other forms of contact such as internet and telephone are of limited benefit given the children's ages and stages of development. Further, K is unlikely to cope with extended overnight stays during school holidays because of the limited level of contact she has had with her father and stepmother;

- Remaining in New Zealand would enable the children to develop their relationships with both parents and extended family and to allow both parents to participate in schooling and cultural events;

- F's medical condition and needs must be promptly assessed and met. In New Zealand the Court can ensure that this is monitored;

- If both parents are in New Zealand they would be able to participate in counselling programmes together. The Court would be able to get involved if counselling and programmes were not completed;

- Mr B's legal status prevents him from travelling to Australia;

- It was likely that Ms K would continue to receive strong support from her family while she lived in New Zealand;

- Ms K has previously chosen to live permanently in New Zealand and parents often make decisions and sacrifices for their children, her initial move to New Zealand being an example of that; and

- Ms K has moved a number of times in the past resulting in disruptions for her children and raising concerns about her level of insight and ability to provide certainty and stability in terms of future care and contact arrangements. The Judge viewed this as relevant to her ability to maintain and support K's relationship with her father and a risk of parental alienation.

[18] The Judge concluded that:

> [50] For those reasons, it is in the children's interests and welfare for them to live in New Zealand where both parents are able to care for and participate in their daily lives. This is also more likely to promote the children's stability and security and parental consultation and co-operation.

The factors relevant to relocation in this case

[19] This case raises particular difficulties because the girls do not share common early-childhood experiences. As a result there are some issues on which F and K are affected to different degrees. However, notwithstanding that the girls did not know one another until they were toddlers, they have established a strong bond and both parents accept that they should live together in the future. I therefore approach the question of relocation on the basis that the children will remain together.

[20] The Family Court was assisted by psychologist Renuka Wali. She interviewed and observed both the parents and the children. She provided three reports and also gave evidence at the hearing. Ms Wali identified the psychological needs of the children and gave evidence as to the nature of their attachments with their parents and extended family. It is clear from her reports and evidence that the crucial issues in determining whether relocation would be in the best interests of the children are:

- maintaining a meaningful relationship with both parents;

- protection from parental conflict;

- stability and consistency in care arrangements;

- ensuring skilled and nurturing parenting for the children; and

- the importance of other attachment figures and extended family.

[21] The Family Court also had assistance from Mr Harrison, as lawyer for the children. He advised me that in the Family Court he did not express an opinion as to the merits of relocation but only identified the factors that he regarded as relevant. These were parental attitude and ability, parental resources, Ms K's emotional wellbeing and the children's right to a full relationship with each parent. In this Court Mr Harrison expressed the view that, having regard to all the relevant factors, the Family Court's decision was correct. However, he also suggested that, given the desirability of fostering the children's relationship with their extended maternal family, there may be a strong case for temporary relocation in 2010 or 2011 for a period of one to one-and-a-half years.

[22] Against this background I turn now to consider the various factors that bear on the decision as to whether relocation is in the best interests of the children and whether the Judge erred in any way.

Meaningful relationship with both parents

[23] It is undoubtedly in the best interests of these children that they maintain a sound relationship with both parents. F has a strong bond with both her parents. From her birth to the age of one she was cared for primarily by her mother and, despite the separation of nearly three years while Ms K was living in Australia, the bond remains strong. From the ages of one until nearly three years of age she lived with her father, stepmother and half-brother in a stable, functioning family unit and she has a strong and secure attachment to them. Ms Wali considered that if F were to move to Australia she would likely grieve over the loss of her father.

[24] K, as one would expect, has a very strong bond with her mother, with whom she lived from the time she was born, apart from a few months separation in 2006. The bond between K and her father is not as strong, which is also as one would expect given that she did not know him at all until she was two. However, K has spent progressively more time with Mr B since she arrived in New Zealand in late 2006, then aged two, and now spends about half her time in that household. Ms Wali viewed the strength of F's attachment with Mr B as a positive predictor of his future relationship with K.

[25] Ms K has said that, if permitted to re-locate, she would support Mr B's relationship with the girls through telephone and webcam contact. She would also bring the children to New Zealand regularly to visit Mr B. However, whilst the relationship between Mr B and the girls could be maintained through visits during school holidays and regular communication by phone, email and webcam, it would, realistically, be impossible for Mr B to maintain the same quality of relationship as if both girls were living in New Zealand and being cared for by him on a regular basis. Given the girls' ages, these forms of contact are not a meaningful substitute for weekly physical contact. This is particularly the case with K, because that relationship is less well established. Further, based on Ms K's previous negative attitude towards Mr B, Ms Wali was cautious as to Ms K's ability to genuinely maintain and support the girls' relationships with their father.

[26] Further, although Mr B could legally return to Australia now that he has permanent residence in New Zealand as a refugee, he perceives a risk of being apprehended in connection with his escape from the detention centre. His perception is based, in part, on legal advice and even if it is a remote risk it cannot be regarded as unreasonable. As things stand it seems unlikely that he would ever travel to Australia.

[27] It is clear from the evidence that the quality of the girls' relationship with their father would be adversely affected by a move to Australia. Even with remote means of contact and regular visits Mr B would no longer be involved in a meaningful way in the girls' day-to-day school life and activities. So the potential

effect of relocation on the quality of the paternal relationship is a factor to be accorded significant weight.

Alienation / parental conflict

[28] From the time Ms K returned to New Zealand in 2006 there was been conflict between her and Mr B regarding arrangements for the care of and contact with the children. The re-location issue has been a major cause of the conflict. Relations during the period leading up to the Family Court hearing were acrimonious, with each making accusations about the other. Some of these had substance; the Judge cited Mr B's failure to consult Ms K over decisions about F's schooling and medical care and Ms K's refusal to agree that Mr B be appointed K's guardian. The older children of both parents have been drawn into the hostile emotions and aligned themselves with their respective parents.

[29] As at the date of the Family Court hearing in 2008 there had been serious conflict at changeover times. F, in particular, had exhibited behaviour consistent with distress (the hair pulling incidents) and had had difficulty gaining control over toileting, which both parents and Ms Wali thought was probably psychological. As at the date of the appeal there was disagreement as to whether toileting was an ongoing issue; Ms K's counsel conveyed her instructions that there were still problems in this area, whereas Mr B's counsel conveyed the contrary.

[30] In her earlier reports Ms Wali commented on the issues of alienation and parental conflict. She expressed concern about the ability of both parents to maintain and support the children's relationship with the other parent and identified the risk of the children becoming alienated[7] from Mr B if they moved to Australia with Ms K. However, there was also evidence that suggested that the risk of alienation existed even if the children remained in New Zealand. This risk flowed from the ongoing conflict between the parents, rather than alienation resulting from denigration of one parent by the other.

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[7] Ms Wali used the definition of an "alienated child" provided by Joan Kally (2001) as being "one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent".

[31] Ms Wali considered the issue of alienation in her 2008 report which was requested following allegations of an incident of violence by Mr B against F (the Judge found that the allegations were unsubstantiated). Ms Wali concluded that F was not an alienated child and that there was no evidence to indicate that Ms K was acting in any direct way to denigrate Mr B. However, she drew the Court's attention to the possibility of indirect influences that could be potentially damaging given the high level of conflict and mistrust between the parents.

[32] In evidence, Ms Wali expressed the view that the risk of alienation was higher if the children were living at a distance from one of the parents. She then qualified that statement in answer to a question from the Court, indicating that the ongoing conflict over care and contact arrangements held the same risk of emotional damage to the children as alienation in its usual form of denigration of the other parent:

> …Would you agree that if alienation was going to occur that alienation could occur whether the children are in New Zealand or whether they're not?
>
> Yes. I suppose the only thing I'd add to that is probably a higher risk if they're not in the same country as whichever parent we're talking about being alienated from, if the distance is greater.
>
> Would it be alienation in the technical form of a parent discouraging or saying negative things about the other parent or would that just simply be a distance issue?
>
> …The question was about the risk of alienation being regardless of the children residing in New Zealand or Australia. The only thing I was adding to that was that in my view there's probably a greater risk if the children are not residing in the same, or if there's a geographical separation between the child or children which have a parent we're talking about being alienated from.
>
> *The Court:*
>
> *Except in this case if the contact continued in the way that it does?*
>
> *If it does*
>
> *It would be the same as living overseas do you think?*
>
> *The risk emotional risk for – being slightly different presentation but the emotional damage being as bad.*
>
> (emphasis added)

[33] Ms Wali considered that the climate of unsubstantiated allegations and counter-allegations had just as much potential to cause alienation and create distressing tensions and loyalty binds as alienation resulting from the expressed negative attitudes of one parent about another. She concluded that F was at high risk of parental alienation due to the protracted and unresolved relocation dispute. When asked[8] about the level of conflict she perceived to exist between Ms K and Mr B, having met them on six or seven different occasions, Ms Wali described the level of conflict as being "in the severe range" and "detrimental to the children".

[34] Ms Wali was also asked about current literature on the effects on children in shared care relationships where there was serious conflict between parents and said:

> I suppose the big thing that's come out is that if there's severe conflict then the merits of having contact – substantial contact – with parents do diminish so meaning that the cost of that takes away from the rationale being that that's to enable a child to have substantial amounts of time with both parents.
>
> Are you aware of there being links between …childhood mental health issues and the severe exposure to conflict between their parents in shared care relationships?
>
> Well the big thing with conflicts is that if the children are included in it and the intensity of the conflict then that is detrimental.

[35] These conclusions give cause for concern that, whilst relocation carries an undoubted risk of alienation, so too does remaining in New Zealand if there is to be ongoing conflict between Ms K and Mr B. Ms Wali considered that it would be difficult for Ms K and Mr B to resolve the conflicts between them so long as the issue of relocation remained unresolved. However, when asked by Ms K's counsel whether a court order regarding relocation would lessen the conflict between the parties her answer was not at all reassuring:

> I think it will be hard in the sense of [Ms K's] needs or her psychological needs to be close to her family and her home country and as a result of that is likely to have a negative impact on the children because the parental psychological adjustment has an impact on the children's wellbeing. As far as will it be less – it is hard to predict, it is very hard to predict that. In one sense if a decision is made there is a finality about it and there is more of an investment to work co-operatively to make the situation work. On the

[8] Notes of evidence 269-270

> other hand it can also heighten resentment and that's not helpful so a lot depends on how the adults deal with whatever decision is made.

[36] There was a further aspect that Ms Wali saw as relevant but which the Judge did not refer to at all, namely the circumstances of Ms K's and Mr B's marriage, their respective backgrounds and some of their beliefs, all of which are uncommon in New Zealand society. They mean that dealing with parental conflict in the way usually adopted in the Family Court is unlikely to be effective. This was illustrated by some of the evidence, such as the unchallenged evidence of Mr Sahib, whom Ms K consulted in 2006 in his capacity as a religious advisor to resolve the conflict between her and Mr B about care and contact with the children. His evidence was that it was Ms K's Islamic right that F remain with her in the early stage of her life. This "right" had been referred to earlier by Mr B in a 2005 email to Ms K.[9] However, Ms K claimed that Mr B had required her, at the time of their marriage, to pledge that if there were difficulties between them he would have custody of the children and had reminded her of that pledge in an email that was adduced in evidence:

> …I remind you of Allah's pledge that I had made you as well as your children to undertake for several times that when problems do occur again I will take my daughter and get out of your lives, and a covenant with Allah must be answered for…

[37] Naturally, Ms K's and Mr B's beliefs must give way to New Zealand law and to the Court's assessment of what is in the best interests of the children. However, the issue here is whether they can resolve the conflict between them for the sake of their children. Whilst these pieces of evidence do not have any direct bearing on my decision they illustrate Ms Wali's point that these parents may find it very difficult to move past the conflict between them. Significantly, she viewed the parenting courses available in New Zealand that are suitable for the majority of people as being unlikely to resolve the conflict. When asked in cross-examination whether there would be any benefit to Ms K and Mr B in either a parenting programme or family therapy of some description Ms Wali said:[10]

> I think the educational approach and the opportunity for counselling is always helpful to consider. I think in this particular family's case it would

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[9] Agreed bundle 184
[10] Notes of evidence 272/14

> have to be quite tailored or appropriate given their cultural and religious beliefs so the average parenting programme I don't know, wouldn't be that appropriate or applicable so it would need to be tailored and skilled to fit with their background.
>
> If there was to be a tailored programme of some description would that be something that you would be able to write a brief for a therapist to work from?
>
> Yes I could but I'm not aware of a professional that I could recommend, who I would have confidence in.
>
> If you were able to write a brief and it was about how these parents can move forward from this point can you see a way that could happen with Mum in Australia and Dad in New Zealand and then receiving the same information from themselves do you know what I mean?
>
> That would need to be spelt out and perhaps the starting point of that brief would be living with, how best to live with, whatever decision is made.

[38] In considering the relocation issue the Judge did not refer specifically to the conflict between the parents, the effect on the children of that conflict or whether the conflict was likely to be resolved if the application to relocate was refused. The only reference was the rather oblique one, that if both parents were in New Zealand they would be able to participate in counselling and programmes together.[11] It was only after the Judge had reached the view that the children should remain in New Zealand that he went on, in the context of what the best care arrangements would be, to discuss the conflict that had existed between the parents. He was critical of both parents, finding (amply supported by evidence) that both had behaved badly and considered that both would benefit from a "parenting through separation course". He then proceeded to make orders requiring both to attend a parenting course but without any recognition of Ms Wali's reservations as to the relevance or effectiveness of such a course for these parties.

[39] The Judge made an error in failing to consider Ms Wali's evidence that the conflict between Ms K and Mr B posed a risk of parental alienation of the same kind as the risk posed by relocation. The Judge also made an error in failing to directly confront the question of whether that conflict was likely to abate in the event of a decision refusing the application to relocate and in failing to consider Ms Wali's evidence on this point. The result of these errors was that the Judge did not consider

[11] Family Court judgment [47] – [50]

the possibility that remaining in New Zealand carried the same risk of alienation as moving to Australia.

[40] Ms Crawshaw, for Mr B, submitted that parental conflict should not necessarily be viewed as a basis for relocation and that the existence of conflict *per se* should not be seen as a vehicle to obfuscate the fact that the children's needs are best served by adults who co-operate in their interests. Whilst these submissions are correct in a general sense, they overlook the obvious and very real risk that Ms K and Mr B will be unable to move past the conflict in their relationship and the result will be serious risk of damage to the children regardless of whether they remain here or move to Australia. If neither the finality of a court order nor such professional help as is currently available are likely to improve the relationship between the parents there is a very significant risk that the conflict will continue, with serious implications for the welfare of the children.

[41] I can see no grounds on which to conclude that the conflict between Ms K and Mr B is likely to abate as a result of finality achieved through a court order. Ms K finds herself in New Zealand without her accustomed family support and without her two older children, apart from visits. Ms Wali has already expressed concern about the challenges Ms K faces in parenting alone and there is no basis for thinking that these will lessen as time goes on. Ms Wali's evidence suggests that professional help through the available parenting courses that the Judge ordered are unlikely to improve matters.

[42] I conclude that there is a significant risk of parental alienation whether the children remain in New Zealand or relocate to Australia. This factor, too, must be given significant weight because it affects the long-term mental health of the children as well as the quality of the relationship between the children and their parents.

The need for skilled and nurturing parenting

[43] Ms Wali devoted a considerable portion of her reports to assessing the respective parenting being provided in each household. She found that both Ms K

and Mr B are loving and devoted parents. She assessed Ms K as being the more skilled and nurturing parent, possibly due to her greater level of experience, gender and cultural factors. She was observed to be more involved with the children and more skilled in managing challenging behaviour. Ms Wali did, however, observe that she faced challenges in parenting alone. In this regard I note that Ms K expressed concern to Ms Wali about her fear of living in New Zealand alone, without a husband in an Islamic community where that fact would be known.

[44] The parenting style in Mr B's household was, by contrast, more "laid back" and Mr B was not as skilled. However, Ms Wali noted that Mr B's parenting skills are ably supplemented by his wife who attends to many of the caregiving tasks. Ms Wali considered her to be a competent and nurturing parent with whom F had a strong attachment. There were allegations by Ms K against Mr B of harsh discipline towards the three older children and to F. The Judge found that there had been difficulties in the relationship between Mr B and the older children and no doubt there had been some physical scuffles. However, he did not consider that either F or K were at any risk from Mr B.

[45] In summary, both Ms K and Mr B are capable of providing the necessary kind of parenting. Mr B is not as skilled as Ms K, but he has the support of his wife who ably supplements his efforts. Ms K faces greater challenges because she is parenting alone but she has greater skills and experience to draw on.

Stability and consistency in care

[46] Ms Wali expressed concern that Ms K's unsettled history of change raised issues about her ability to provide stability for the children. The Judge cited this as a factor that weighed against relocation, saying that Ms K had moved a number of times in the past and that raised concerns about her insight and ability to provide certainty and stability in the future. At different times Ms K's psychological state seems to have been fragile. However, aside from the fact of Ms K's previous divorce, the only significant changes and problems seem to be those that have arisen from her relationship with Mr B. It was that relationship that brought her to New Zealand and the breakdown of the relationship that took her back to Australia. Her

decision to return to New Zealand can hardly be criticised, given that it has benefited both children by enabling F to renew her relationship with her mother and K to establish a relationship with her father. It may be that Ms K's relationship with Mr B was ill-conceived. However, there is no basis on which to criticise the decisions that she made as a result of the relationship breaking down. There was no evidence on which to find that Ms K was likely to make significant changes to her life that would adversely affect the children if she were to return to Australia.

[47] Further, the evidence was persuasive that the circumstances in which Ms K would be living in Australia in terms of support from her large extended family and secure long term housing would likely provide a greater degree of stability than what she could offer in New Zealand, even allowing for the fact that some of her family members would visit from time to time.

[48] There is no such concern regarding Mr B. His situation is stable. The care that he and his wife would provide will, by all accounts, remain the same.

Importance of other attachments and extended family

[49] The final significant factor to be considered is the strong attachment that the children have to their extended families. This aspect more than any other highlights the differences in the circumstances of F and K. F is attached to her stepmother and has a strong bond with her half-brother, A. However, F is also less settled and less robust than K. She suffers from a medical condition that requires specialist attention. I have already noted that she has had instances of disturbing behaviour and has had, and may still have, problems with toileting. This latter issue has caused quite some distress and disruption to her daily life at school.

[50] Ms Wali considered that relocation to Australia would have detrimental effects on F in terms of general disruption, the change from being the youngest child in the family unit to sharing her mother with several siblings and being separated from her father, stepmother and half-brother. As against these negative factors, however, F also has strong bonds with her mother and her sister and Ms Wali viewed the prospect of being raised with her sister and maternal half-siblings within an

extended family environment as beneficial to F's long term interests. Counsel for the children also considered it sufficiently important that the girls' relationship with their maternal family be fostered as to suggest that a temporary, though lengthy, period of relocation such as a year to eighteen months would be desirable. This is notwithstanding the fact that members of Ms K's family can (and previously have) visited Ms K in New Zealand.

[51] For K the situation is almost the reverse to that of her sister. She is strongly bonded to her mother and members of her maternal family. As at the time of the Family Court hearing she had a growing relationship with Mr B but no significant bond with her stepmother. I would expect that those relationships will have strengthened in the time since that hearing. Moving to Australia clearly would not cause the same level of disruption to K. It would, however, be detrimental to her relationship with her father, stepmother and half-brother.

Conclusion

[52] The two factors that stand out as pivotal to the decision on relocation are the effect on the girls' relationship with Mr B if they were to move to Australia and the risk of damage to the girls through alienation from Mr B, which exists whether they stay in New Zealand or move to Australia.

[53] If the children move to Australia the relationship they currently have with their father will suffer. Modern methods of communication are no substitute for physical presence. Visits during school holidays are not the same as direct involvement in daily school life and activities. Further, the risk of alienation, in the sense of a distorted perception of the other parent, is higher where the children and parent are living at a distance. However, the conflict between Ms K and Mr B is such that, if it does not abate, it will be severely detrimental to the children and there is a significant risk that it will result in their alienation from Mr B even if they continue to live in New Zealand. On the evidence, there are no grounds for thinking that the conflict will abate. In particular, there is no reason to think that a court order will result in Ms K accepting the position and moving past the conflict. Nor is there

is any reason to think that the parenting courses that both parties have been directed to attend will result in them resolving the conflict.

[54] I have reached the conclusion that remaining in New Zealand carries an unacceptable risk of damage to the children as a result of the conflict between their parents. In my judgment moving to Australia ultimately carries less risk because the girls' attitude to their father and relationship with him are more likely to remain positive than if they remain in New Zealand and are exposed to the ongoing and damaging conflict between their parents. I accept that there will be disruption and a sense of loss, especially for F. But if there is provision made for regular contact and visits with Mr B, the long term prospects for both children are better if they are living in a secure extended family environment free of conflict than growing up amid the kind of destructive conflict to which they are now exposed.

[55] I allow the appeal. However, relocation must be subject to conditions that ensure that there is ongoing and positive contact between Mr B and the girls and regular visits by them to New Zealand. This will require further submission by counsel and the Family Court is best placed to make the appropriate orders. I remit the matter for that purpose. I would also expect any orders made by the Family Court should be registered in the Family Court in Australia before Ms K is actually permitted to relocate.

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P Courtney J