ANONYMISED VERSION - PUBLICATION PERMITTED IN THIS FORM - OTHERWISE SECTION 139 CARE OF CHILDREN ACT 2004 APPLIES

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2009-470-511

BETWEEN	CARPENTER Appellant
AND	ARMSTRONG Respondent

Hearing: 14 July 2009

Counsel: A Brown and T Barlett for Appellant
F McKenzie and I Vukona for Respondent
K Casey and A Evetts, Lawyer for Children

Judgment: 31 July 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 31 July 2009 at 9.O0am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Tauranga Family Law, Tauranga
Mackenzie Elvin, Tauranga
Cooney Lees Morgan, Tauranga

Contents

Introduction

[1] Mr Carpenter and Ms Armstrong met in England in 1994. Mr Carpenter was born in Canada but regards himself as a New Zealander. Ms Armstrong is English. In 1998, they married, in New Zealand. Mr Carpenter and Ms Armstrong separated finally in January 2007, after a torrid relationship.

[2] There were two children of their union. The elder, Craig, is now aged seven years. The younger, John, is three years old.

[3] Since separation, Mr Carpenter and Ms Armstrong have been in a state of conflict. Each views the other with suspicion. Neither communicates or co-operates with the other. Mr Carpenter has, by his conduct, erected financial barriers to any collaborative upbringing of their children. Despite efforts through counselling, neither Mr Carpenter nor Ms Armstrong has shown any real inclination to put aside their personal agendas, in the best interests of the two children.

[4] Since late January 2007, Craig and John have spent close to equal time in the care of each parent. Mr Carpenter has had primary care for 43% of the time, with Ms Armstrong caring for the children for the balance.

[5] During 2008, it became clear that the shared parenting regime was not working. In fact, it was having negative impacts on the two children. Ms Armstrong filed an application seeking day-to-day care of the children.

[6] The state of conflict between the parents has reached a climax. Ms Armstrong believes that psychological abuse from Mr Carpenter, coupled with her lack of finances, means that she must move back to England, to have the benefit of both emotional and financial support from her extended family. Once that decision was made, Ms Armstrong amended her application to seek day-to-day care of the children, on the basis that she could move to England with them. Mr Carpenter opposed Ms Armstrong's application.

[7] Ms Armstrong has stated categorically that, if day-to-day care of the children were not granted in her favour, she will relocate to England alone. Demonstrating an equal degree of stubbornness, Mr Carpenter refuses to move to England if day-to-day care were granted in favour of Ms Armstrong, citing the need to care for his elderly mother in New Zealand. Mr Carpenter seeks day-to-day care of the children on the basis that they continue to live in New Zealand.

[8] At face value, the reasons given for the parents' respective stances are understandable. It is clear that Ms Armstrong has been put under significant emotional and financial pressure through Mr Carpenter's failure to provide adequate financial support to her. Similarly, Mr Carpenter's desire to remain in New Zealand to care for his mother is worthy of praise. However, there are deeper undercurrents that cast considerable doubt on the purity of either's motives.

[9] Ms Armstrong's application for day-to-day care was granted by Judge Annis Sommerville on 25 June 2009. The Judge permitted Ms Armstrong to relocate to England with the children. Consequential orders were also made, with the intention of promoting continued contact between Mr Carpenter and the children.

The appeal

[10] Mr Carpenter filed an appeal against Judge Somerville's orders on 30 June 2009. Even though he acted promptly, Ms Armstrong had already taken steps to pay for and to book air tickets to the United Kingdom for herself and the children. Ms Armstrong took those steps even though both she and Mr Carpenter had agreed, before the hearing, that the children would not be told of her intention to move to England with the children. By the time the order was made, no attempt had been made to prepare the children for such a fundamental change to their lifestyles. The arrangements made by Ms Armstrong had all three leaving Auckland for London, on Saturday 18 July 2009.

[11] Mr Carpenter applied for a stay of the Family Court orders pending appeal. That application came before me on 2 July 2009. The appeal was set down for an urgent hearing, on 14 July 2009. During the course of that hearing, after some prompting from me, Ms Armstrong agreed that she would not travel to England on 18 July, so that I had sufficient time to give adequate consideration to the arguments and the evidence, in what I regard as a finely balanced case.

[12] At the end of the hearing, I made an order preventing the removal of the children from New Zealand, pending further order of the Court. I also sought additional submissions from counsel on two issues. The need for submissions arose out of concerns I expressed about the adequacy of the conditions imposed by the Family Court to promote a continuing relationship between Mr Carpenter and his children, if the order were to stand and their enforceability, if breached.

[13] Since the hearing, Mr Casey, Lawyer for the Children, has sought leave to make an application to have the children be placed under the guardianship of this Court, as well as an order to that effect. The possibility of the children being placed under the guardianship of a Court was mooted by Mr Casey in the Family Court. The issue re-emerged during the course of the appeal hearing. For practical purposes, Mr Casey's applications are opposed.

[14] Submissions have now been filed. I indicated to the parties that I would give judgment on or before 31 July 2009, so that if the children were to go to England arrangements could be made for them to be enrolled at a new school for the start of the English school year, on 1 September 2009.

Approach on appeal

[15] The leading authority on the approach to appellate review is *Austin Nichols & Co Inc Stichting Lodestar* [2008] 2 NZLR 141 (SC). That case involved an appeal under the Trade Marks Act and considered the concept of an appellate Court's "deference" to a decision of a specialist tribunal. Delivering the judgment of the Supreme Court, Elias CJ said:

> [13] The procedure prescribed for appeals by s 27 [of the Trade Marks Act] does not provide for full *de novo* rehearing of evidence. While "further material" can be brought forward under subs (8) either "in the manner prescribed or by special leave of the Court", it is clearly envisaged that there will be rehearing on the record. That is usual, and is for example the manner of appeals under s 76 of the District Courts Act 1947. The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary". Such caution when facts found by the trial judge turn on issues of credibility is illustrated by *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [[1998] 3 NZLR 190 (CA)] and *Rangatira Ltd v Commissioner of Inland Revenue* [[1997] 1 NZLR 129 (PC)].
>
> …
>
> [16] *Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.* In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion. (my emphasis)

[16] Appeals from the Family Court are governed by s 143 of the Care of Children Act 2004 (the Act). Section 143(4) imports ss 73 to 78 of the District Courts Act 1947 as part of the procedures on appeal. The appeal is by way of rehearing (s 75) and falls within the scope of an appeal of the type to which the Chief Justice referred in *Austin Nichols* at para [16]. If the appeal were allowed, this Court may make any

decision that it thinks should have been made or remit the proceeding to the Family Court for reconsideration on a basis to be articulated clearly in its decision (s 76(1)).

[17] Application of the *Austin Nichols* principles is not altogether easy in the context of appeals from the Family Court, particularly in care of children proceedings. Many first instance decisions of that type represent a mix of findings of fact (after seeing and hearing witnesses), the formation of an evaluative judgment and the exercise of statutory discretions. Indeed, it is sometimes difficult to characterise a particular decision as evaluative, factual or discretionary in nature.

[18] Appeals from the Family Court were addressed specifically in *D v S* [2003] NZFLR 81 (CA) at para [18]. Blanchard J, delivering the judgment of the Court of Appeal, said:

> … An appeal to the High Court from the Family Court is an appeal by way of rehearing. 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, including the issue of what is in the best interests of the child or children concerned. There is no rule of law requiring the High Court to defer in these respects to the Family Court even in a finely balanced case. ….

[19] I consider that *D v* S remains good law, so far as appeals from the Family Court are concerned. Blanchard J, who gave the judgment of the Court of Appeal in *D v S,* was also a member of the Supreme Court in *Austin Nichols.* It is unlikely that the Supreme Court intended to undermine the approach articulated in *D v S*.

[20] I approach this appeal on the following basis. First, I must take account of the advantage that Judge Somerville had of hearing and seeing the witnesses give evidence before her, at a hearing which extended over four sitting days: see *Austin Nichols* at para [13]. Second, to the extent that the Judge exercised any discretion in reaching her decision, I am entitled to determine whether those discretionary decisions were or were not correct, based on *May v May* [1982] 1 NZFLR 165 (CA) and *Blackstone v Blackstone* [2008] NZCA 312 at para [8]. Otherwise, I am free to reconsider the Family Court's decision and to substitute my own view on questions of fact and evaluation, if I were convinced that the first instance decision was wrong.

In that regard, with respect, I endorse Randerson J's remarks in *WPH v ITP* (High Court Auckland, CIV 2009-404-462, 10 June 2009) at para [15].

Mr Carpenter and Ms Armstrong's relationship

[21] Most of Ms Armstrong's close family live in the English Midlands. Her extended family appears to be close-knit. After Craig was born Ms Armstrong took him to England. There appears to have been some issue about whether Mr Carpenter and Ms Armstrong had separated at that time.

[22] When Craig went to England, he was aged less than two years old. He is unlikely to have any real personal memories of his time in England; though, undoubtedly, he will have received considerable reinforcement of the enjoyable aspects of that visit from Ms Armstrong, by reference (for example) to photographs taken at the time.

[23] Having stayed for about four months in England, Ms Armstrong refused to return Craig to New Zealand. In January 2003, Mr Carpenter initiated proceedings in the Family Division of the English High Court, under the Hague Convention on the Civil Aspects of International Child Abduction. Ms Armstrong reconsidered her position and voluntarily returned to New Zealand, with Craig, without the need for any order from an English Court.

[24] Following Craig's return to New Zealand, Mr Carpenter and Ms Armstrong (with the assistance of counsel appointed to represent Craig) reached an accord on various issues, all relevant to the desirability (in Craig's bests interests) of maintaining a close family relationship in this country.

[25] Their agreement is set out in a letter from Craig's counsel, dated 15 July 2003. The terms are repeated below, with aspects that deal with issues other than care of the children, highlighted:

> (1) That [Mr Carpenter and Ms Armstrong] have joint custody of Craig. The care arrangements in respect of the joint custody arrangement

are to be worked out between the parties from time to time but are to recognise that Craig will be in [Ms Armstrong's] day to day care.

(2) It is envisaged that Craig would remain living in New Zealand but be able to travel to the UK with his mother for holidays, as agreed between the parties. I have discussed with [Mr Carpenter] the arrangements for Craig's passport being held by a person mutually agreed upon by the parties so that Orders currently before the Court can be discharged.

(3) As to property matters, the parties have discussed the follows:-

(a) *That [Mr Carpenter] will pay the sum of $100,000 to [Ms Armstrong]. The purpose of this payment is to assist her in purchasing a property in the Bay of Plenty area. The reality for [Mr Carpenter] is that his properties are owned by his family trust (Craig being the sole beneficiary) and that two units will need to be sold in order to realise the sum of money to be paid to [Ms Armstrong]*. One of the units has already been sold and *settlement is likely to take place some time in September, when title is available.* It is likely the second unit will sell around the same time. Both units are under construction at present.

(b) *[Ms Armstrong] will be paid a salary of $25,000.00 per annum until Craig starts school. In reality, the salary will be paid by [Mr Carpenter's] family trust*. For your information, [Mr Carpenter] and his solicitor (Chris Giddens) are the only trustees.

[Mr Carpenter] wishes to reassure [Ms Armstrong] that the assurances that he has given and agreed upon will be honoured by him and can be incorporated in an agreement under the Property (Relationships) Act. I have also explained to [Mr Carpenter] that he will have obligations under the Employment Relations Act. [Mr Carpenter] is prepared to enter into an Employment Contract between [Ms Armstrong] and the family trust. (my emphasis)

[26] Although consent orders were made in respect of shared custody, Mr Carpenter failed to honour any of the financial obligations he had assumed. To that extent, Mr Carpenter has contributed (more than, I suspect, he will ever realise) to Ms Armstrong's emotional and financial insecurity. Those factors represent the underlying reasons why she wishes to return to the English Midlands, to be with her extended family.

[27] From July 2003 until 8 January 2007 (the date of final separation), the relationship between Mr Carpenter and Ms Armstrong was intermittent. On some occasions, they lived together. On other occasions, they lived together only at weekends. Sometimes, they lived apart.

[28] John was born in December 2005. It appears that he was conceived at a time when Mr Carpenter and Ms Armstrong were living together at weekends only. After a reconciliation of sorts, just before John was born, Mr Carpenter and Ms Armstrong resumed cohabitation on a full-time basis. That arrangement continued until their final separation.

The Family Court proceedings

[29] On 8 January 2007, Mr Carpenter applied for a parenting order granting day-to-day care of both children in his favour. The following day, Ms Armstrong applied for and was granted a (without notice) temporary protection order, based on allegations of verbal, emotional, sexual and financial abuse. She was also granted an interim parenting order in respect of day-to-day care. To my knowledge, the allegations of abuse have never been tested at a defended hearing.

[30] On 24 January 2007, an interim shared day-to-day parenting regime was negotiated (with the assistance of the Lawyer for the Children) and orders were made by consent.

[31] Craig began attending [a primary school], in February 2007. The following month, final orders granting shared day-to-day care orders were also made by consent.

[32] Ms Armstrong made a further day-to-day care application in June 2007. A relationship property application followed, on 29 October 2007.

[33] Mr Carpenter did not respond to the relationship property application and was required to be examined, by order of the Family Court. In August 2008 he advised there was no relationship property for division. He has adjudged himself bankrupt, I have seen no evidence to support that assertion. Mr Carpenter's lack of personal assets probably accounts for his stance in the relationship property proceedings, but his failure to use family trust assets for the benefit of Ms Armstrong and the children (at least, to the extent promised in 2003) does him no credit and has contributed significantly to the situation with which he is now faced.

[34] On 7 August 2008, Ms Grove, a registered psychologist, was appointed to prepare a psychological report on the children, with reference to the applications before the Court. The initial brief to Ms Grove required reconsideration in September 2008, when Ms Armstrong signalled, for the first time, a desire to relocate to England, with the children.

[35] On 4 September 2008, counsel for Ms Armstrong asked the Court to direct that the brief be expanded to assess the impact on the children (and how such impact could be best addressed) if Ms Armstrong were to relocate to the United Kingdom, either with or without the children. The Court declined to make an order in those terms. However, the brief was amended so that Ms Grove could consider any psychological effects on the children if one parent was living in a different country from the other parent and the children.

[36] The final form of the brief to Ms Grove is set out in her report:

> **BRIEF**
>
> a. To assess the attachment of the children and the needs of those children based on the attachment findings.
>
> b. To assess the psychological and emotional needs of the children and the ability of the parents to meet those needs under the current care regime.
>
> c. To investigate the impact of the conflict between the parents on the children and to indicate steps to alleviate that conflict and to report any effects on the children's psychological wellbeing as a result of the conflict.
>
> d. To investigate the children's developmental needs and to ascertain the ability of the parents to meet those needs.
>
> e. What are the psychological effects on the children if one parent is living in a different country from the other parent and the children, namely the UK and New Zealand?
>
> f. What are the psychological effects on the children arising from the care arrangements in the different households?

[37] The terms of the brief were approved by Judge Somerville, in a judgment given on 11 November 2008. Of relevance is the fact that, ultimately, the brief was amended by consent.

[38] Ms Grove reported to the Court on 31 January 2009. She was cross-examined at the hearing before Judge Somerville, as were all other material witnesses.

The Family Court's reasons for judgment

[39] Judge Somerville referred to ss 4 and 5 of the Act as her guiding principles. Section 4 requires that "the welfare and best interests of the children" shall be "the first and paramount" consideration. Section 5 sets out factors to be taken into account in undertaking the best interests inquiry.

[40] Section 6 of the Act requires that the children's "views" be ascertained. Whether that occurred in this case is in issue on appeal. Judge Somerville attempted to see the children in her room, in an endeavour to comply with s 6. Sadly, the Judge's attempts at communication proved futile.

[41] The effect of the parental conflict on the children can be vividly seen from Judge Somerville's description of what occurred, when she tried to talk to the children:

> [55] It is usual in a case such as this that I would speak with the children prior to or during the case so that s 6 can be addressed. Unfortunately the experience of speaking with the Judge was not a happy one for either child. *John was in tears and had to be brought to my room in the arms of his maternal Aunty and so I considered it inappropriate to speak with him. Craig curled up on my couch in a foetal position with his thumb in his mouth and refused to engage in any ongoing discussion and so there was a one-sided conversation by me and accordingly I did not ascertain the children's views at all.* Although it is the submission of counsel for the father the children could have been asked, in my view such a question by me would not have progressed matters with the boys. The lawyer for child was present throughout. (my emphasis)

[42] The Family Court Judge identified a number of areas in which the distrust and animosity between Mr Carpenter and Ms Armstrong has manifested itself in the upbringing of their children.

[43] One was in relation to health concerns. Ms Armstrong harbours concerns that John suffers from eczema. Mr Carpenter refuses to accept that. Therefore, they

disagree on whether John should be given vitamin supplements or medication. Ms Armstrong says that she has received medical advice that John suffers from that condition, while Mr Carpenter says that he has obtained medical advice to the contrary.

[44] The parents disagree strongly about religion. Each has taken active steps to discourage the other from acting on his or her beliefs in the way in which the children are raised. Both children understand that Ms Armstrong is religious and that their father does not believe in God.

[45] Each parent says that new clothes have been purchased for the boys because the other would not return old ones.

[46] Ms Armstrong does not believe Mr Carpenter when he says that there is no relationship property to distribute. She has reached the end of her emotional tether and needs psychological and financial support from her family in England. Ms Armstrong recognises that, in recent times, her parenting skills have declined but believes that, with the support of her extended family in England they will revive.

[47] The parents differ in the parenting styles they adopt. Judge Somerville described the father as "authoritative" and the mother as "passive-indulgent". The Judge adopted those descriptions from Ms Grove's report.

[48] Ms Grove defined "authoritative parenting" as a style which encouraged children to be independent, yet placed limits and controls on their actions. While verbal "give and take" was permissible, parents employing this technique remained warm and nurturing towards their child. On the other hand, "permissive-indulgent parenting" was defined by reference to parents who are "highly involved with their children but place few demands or controls on them". Ms Grove added that "indulgent" parenting was associated with children's social incompetence, especially a lack of self-control and a lack of respect for others.

[49] The Judge adopted the approach to relocation cases articulated in *D v S* [2002] NZFLR 116 (CA), to which I shall refer as *D v S* (2002). In that case, a Full

Court eschewed an approach taken in the English Courts (see *Payne v Payne* [2001] 2 WLR 1826 (CA)) in favour of the need to balance all relevant factors in determining what was in the best interests of the relevant child. She also referred to articles about empirical studies of relocation cases: an instructive example being Tapp and Taylor, *Relocation: A Problem or Dilemma?* (2008) 6 NZFLJ 94.

[50] In *D v S* (2002) Richardson P, delivering the judgment of the majority, cited with approval the following passage from Lord MacDermott's speech in *J v C* [1970] AC 668 (HL) at 710-711, in which His Lordship expressed the view that the statutory injunction to regard the welfare of the child as the first and paramount consideration:

> . . . 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 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 has 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.

[51] Judge Somerville set out the principles articulated by Richardson P in *D v S* (2002). She referred also to the United Nations Convention on the Rights of the Child. Ultimately, the Judge accepted that she had to balance the particular circumstances with which the children were concerned and make personalised assessments of what decision met the statutory test of the welfare and best interests of each child.

[52] From her reasons for judgment, it is plain that the Judge recognised that issues of day-to-day care and relocation were inextricably intertwined. She was right to consider both issues together: see *D v S* (2002) at para [35] and *R v S* [2004] NZFLR 207 (HC) at para [44].

[53] Judge Somerville reached the conclusion that the boys should be in the sole day-to-day care of Ms Armstrong and allowed to travel to England. She rejected shared care in New Zealand as "unworkable" and something that would put the children "at risk".

[54] The Judge made a number of findings that were favourable to the mother, in reaching her decision on the parenting application. In summary, the Family Court Judge found:

a) The mother was more likely to be "an effective gate-keeper whereby the children will have a relationship with their father". She had "no confidence" that Mr Carpenter would encourage such contact. She based that conclusion on her assessment that, because he refused to allow Ms Armstrong to travel to the United Kingdom for a holiday with the children, he had demonstrated that he could not keep his word. She referred also to abuse aimed at the mother at "changeovers", in front of the children.

b) On the occasions when Ms Armstrong was overseas, Mr Carpenter did not encourage telephone contact between Craig and her.

c) Based on evidence from Ms Armstrong's sister, the Judge "had more confidence the mother's family [had] more insight into how important it is for the children to have contact with their father".

d) The children needed a carer who could give them the best emotional support. However, Ms Armstrong also needed "ongoing therapeutic and family support". The Judge found that Ms Armstrong would have those needs "best met in the English Midlands". The Judge considered that Ms Armstrong had shown that she could follow advice from professionals, to assist herself and the children.

[55] Necessarily, because of the nature (or lack) of relationship between Mr Carpenter and Ms Armstrong, the Judge determined the application on principles of "damage containment", to reach "the least detrimental outcome for" the children. In concluding that Ms Armstrong should have day-to-day care of the children in England, with contact being reserved to Mr Carpenter, Judge Somerville said:

> [82] It is agreed that John is young. According to the s 133 report writer for John relocation or living apart from the other parent may affect him

> psychologically at this age more than at Craig's age. *The evidence did show that John has a strong relationship with his mother. If the children must be together and John needs to be with his mother then the natural conclusion is Craig must be there too.* Individually, the parents decided not to tell the boys about the relocation. Therefore, relocation knowledge has not been a reason for the difficulties of these boys.
>
> …
>
> [89] In this case I need to consider damage containment as the Judge has in the High Court case. *Removing the boys from the conflict places them at less risk because of the attitude of the father. Their relationship with him is likely to remain positive [more] so than if they remain in New Zealand and are exposed to the ongoing and damaging conflict between their parents. In this case the mother has shown she can support the relationship with their father and will have the financial means to do so and she also keeps to her word. If the children are living with the mother in the UK she will have the emotional, physical and financial support and security and be free of conflict. This is preferable to continuing to live in the destructive and conflicting relationship of the parents now*. According to the s 133 report writer negative hostile behaviours of the parents are part of the problematic destructive pattern that leaves these children at risk.
>
> [90] I have not specifically addressed all the factors as set out in *[D v S* (2000)], but have referred to those which are particular to Craig and John. I have not placed weight on any factor over and above any other factor. *In my view the least detrimental outcome for these boys is that the mother is to have day to day care of the children and the father has contact. This means that the children will move with her to the United Kingdom*. … (my emphasis)

I read those passages as suggesting that the factors weighing in favour of Ms Armstrong having primary care of the children in England were the existing parenting conflicts, financial problems, the likelihood of Ms Armstrong best nurturing a continued relationship with the other parent, the need for the siblings to be together and the emotional needs of each parent.

[56] In discharging all existing orders in relation to the care of Craig and John, the Family Court Judge constructed a detailed set of directions, the broad thrust of which is set out below:

a) Day-to-day care of the children rested with Ms Armstrong, on terms requiring them to attend a Catholic school in the English Midlands. The order recognised Mr Carpenter's continuing status as a guardian and required Ms Armstrong to consult with him on all important guardianship decisions, including medical treatment.

b) Therapeutic counselling for the two children and Ms Armstrong was to continue; the purpose of the latter was to assist her to enhance her parenting skills.

c) The extent of contact between the boys and their father was defined as one holiday in New Zealand each year (to be financed by Ms Armstrong) and an additional holiday (if Mr Carpenter could afford it). Either Ms Armstrong or "a suitable family member" was to accompany John until he was of an age where he could safely travel alone. In addition, Mr Carpenter was entitled to contact (on one month's notice to Ms Armstrong) if he were able to travel to England during any school holiday. Specific provision was made for weekly telephone conversations between the children and their father, as well as other forms of digital communication; eg webcam, Skype, email and text.

[57] The Judge directed that the Family Court's order be registered in the English Court nearest to the place at which the children were to live, as well as in the Family Court at Tauranga.

Grounds of appeal

[58] Ms Brown, for Mr Carpenter, raised eight grounds of appeal. She submitted that the Family Court Judge:

a) Failed to afford adequate opportunity for the children to express their views on the proposed move to the United Kingdom.

b) Failed to give adequate weight to views expressed by Craig on the proposed day-to-day care arrangements.

c) Failed to give adequate weight to the opinions expressed by the specialist psychologist appointed by the Court about the children's welfare and best interests, particularly Craig's.

d) Made findings, not supported by the evidence, in relation to the children's ability to be separated from one parent.

e) Failed to make any findings in relation to s 5(b) of the Act; that is the desirability of continuing relationships with both parents.

f) Put undue weight on evidence called by Ms Armstrong, to the exclusion of other evidence.

g) Gave too much weight to the interests of one parent (Ms Armstrong), rather than the children.

h) Erred in her reference to the principles set out in *Payne v Payne,* which were expressly disavowed by the Court of Appeal, in *D v S* (2002).

[59] The points directed to the absence of a reasonable opportunity for the children to express their views on the proposed move to England and the question whether the Judge erred in her approach, having regard to *Payne v Payne*, are questions of law. The balance of the grounds of appeal go to the weight given by the Judge to particular evidence.

[60] On that basis, the points on appeal reduce to two:

a) Did the Judge err in law?

b) Was the ultimate decision justified by the evidence?

[61] The need to give a prompt judgment means that I cannot set out or analyse every point raised by counsel. I intend no disrespect to counsel. Their assistance on appeal has been significant and helpful.

Analysis

(a) The alleged errors of law

[62] There are two distinct legal points that require attention:

a) The first concerns the obligation of the Court to ensure that reasonable opportunity is given to a child to express a view on the subject matter of the proceedings.

b) The second is whether the Judge erred in her reference to *Payne v Payne*, having regard to the decision of the Court of Appeal, in *D v S* (2002).

(i) "Reasonable opportunity" for the children to express views

[63] Section 6 of the Act provides:

> **6 Child's views**
>
> (1) This subsection applies to proceedings involving—
>
> (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
>
> …
>
> (2) In proceedings to which subsection (1) applies,—
>
> (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
>
> (b) any views the child expresses (either directly or through a representative) must be taken into account.

[64] There is no doubt that s 6 applied in this proceeding. It was one involving the provision of day-to-day care of the children: s 6(1)(a). Therefore, the requirements of s 6(2) came into play.

[65] There are three relevant aspects of s 6(2). A child *must* be given reasonable opportunities to express views on matters affecting the child": s 6(2)(a). If "views" were expressed, they *must* be taken into account: s 6(2)(b). The views of a child can be expressed, either directly or through a representative: s 6(2)(b). The corollary of the need to take into account any "views" expressed is that those views cannot be regarded as determinative of any application, irrespective of the age of the child concerned.

[66] Ms Brown, for Mr Carpenter, submitted that the Judge had failed to put a mechanism in place before the hearing to obtain the children's views on the specific question of living in England without the father, or in New Zealand without the mother. She also submitted that what evidence there might have been in relation to the children's "views" was not sufficiently directed to the central relocation issue.

[67] From a legal perspective, the critical issue is whether the children were given a reasonable opportunity to express "views" on the relocation issues. As I have already explained, although Ms Armstrong sought to have that specific issue inserted into the brief to Ms Grove, the issue was expressed in more nuanced terms: see para [36] above.

[68] Mr Casey also submitted that, irrespective of the way in which the point was put to the children, there was adequate evidence to communicate their views. The sources he identified were: (a) conduct observed by others; (b) the interpretations provided by Ms Grove and (c) the discussions Mr Casey had had with the children.

[69] Mr Casey referred me to Ms Armstrong's evidence, before the Family Court, on the question whether Craig's "views" on the proposed move to the English Midlands had been sought. Under cross-examination by Mr Casey, the following exchange occurred:

> When I tried to [elicit] from Craig yesterday some details about the English Midlands I got nothing did I? That's right.
>
> For one of two reasons. One, he didn't want to go there and so he tried to distract one away from it, correct. He just didn't want to talk about England? He didn't want to talk about England.

> And if I had of used photos and been very pushy I might have got him to talk about who was in a photo? Yes.
>
> Might? Yeah.
>
> But while he has met his cousins it would be fair to say he has no sense of who they are in his little reality in the Bay of Plenty? Yes.

[70] Judge Somerville's reasons, in relation to the "views" of the children are not happily expressed. She said:

> [56] The lawyer for child in his submissions indicated that the views of the children could be ascertained through their actions, the views of the report writer and the observation of the school and the observation of other members in the family. *The views of these children can only be ascertained in how they relate to their parents and not to the relocation.* In any case I note that in *C v S* [2006] 25 FRNZ 123, Randerson J noted at page 134 (para 31 (h)):
>
> > The obligation to take any such views [of the child] into account is mandatory, but the section … [in contrast to s 23(2) of the Guardianship Act and Article 12 of [the United Nations Convention on the Rights of the Child]] is silent as to the weight to be given to the views expressed. It is implicit that the Court retains a discretion to give such weight to the child's views, as it considers appropriate in the circumstances of the case. (my emphasis)

[71] The evidence to which Mr Casey refers provided some foundation on which Craig's "views" of England could have been assessed. But, even on that evidence, the Court could draw no conclusion on whether Craig had any view about living in England away from his father, or in New Zealand away from his mother. To that extent, the drift of the Judge's comment was correct.

[72] Because the question of Ms Armstrong moving to England with or without the children was not put to them directly, it is necessary to consider whether the information provided by Ms Grove, on the psychological effects of the children living in a different country from one of their parents, was sufficient. Ms Grove addressed this as follows:

> 4.42 **What are the psychological effects on the children if one parent is living in a different country from the other parent and the children, namely the UK and New Zealand?**
>
> 4.43 Relocation and parenting is an area where significant empirical research is yet to become available, although it is being undertaken. Comments relating to this question are therefore based on a large

body of published work on child development, parent-child relationships and divorce.

4.44 It is widely recognised that it is in children's best interests to have regular contact with both parents, unless a situation of risk to the children by that contact exists and needs to be managed in some other way. Ideally contact would be in person, and would allow each parent to perform regular meaningful care giving for the child. If however the parents are separated by distances where it is impractical to travel regularly, such contact can be by way of photographs (alone and with the child), letters, cards, telephone calls, special toys, videotapes or DVD's, and visual internet calls.

4.45 Such relocations do appear to create barriers to continuity of relationship, and may result in diminishing contact, drifting apart, and deterioration in relationship quality. Longitudinal research has found that after such relocations children perceived their parents as less positive role models, less available for emotional support, and that children felt more emotional turmoil and distress than children whose divorced parents remained in accessible proximity.

4.46 *Craig is of an age where such a separation from one parent could be tolerated. Developmentally, regular interactions would be necessary for him to retain his internalised image of, and sense of belonging to, that parent. Physical reunions would be an easier process than for John, and their quality would depend on how well the relationship had been nurtured by other means of contact previously.*

4.47 *John is of an age where such a separation from one parent could be barely tolerated, in developmental and relationship terms. He is only just old enough chronologically, and due to the parental conflict, possibly not old enough developmentally, to be able to sustain such a separation. He may well regress for a period of time. John would still need at least monthly meaningful interactions with the absent parent, to be able to develop and draw on internalised images of that parent. There would be deterioration in the quality of that relationship, and physical reunions would initially be hesitant, as though getting to know that parent again.*

4.48 *The literature relating to the question of identity in children states that while children less than 6 or 7 years of age have a sense of family, they have no conception of 'blood relatives' until later in their development. When children begin to deal with operational thinking, generally in the age rate of 7 to 11 years, then 'where things belong' and 'which things belong together' become of interest. As children develop the capacity for abstract thought, around ages 11 to 15, their emerging sense of identity becomes important. At this time, 'who am I and where did I come from' needs to be answered.*

4.49 One of the issues in this case is contact for Craig and John with their maternal extended family. Craig has previously spent time in England with his maternal grandparents, aunts, uncles and cousins. Craig in particular is developmentally of an age where his ancestry

> will become of importance to his developing view of himself in the world, his emerging identity. Psychologically then, it is important that the children have contact with their extended maternal family, as well as their extended paternal family, and if possible this contact should include an experience of the other culture. (my emphasis, footnotes omitted)

[73] In *C v S*, although not necessary for the purposes of the case before him, Randerson J made some comments on the "discretion" that might be inherent in the need to give "reasonable opportunities" to express views. At para [31](d), the Chief High Court Judge said:

> [31] The key features of [s 6] are:
>
> …
>
> d) The obligation is to provide reasonable opportunities which means it may be necessary to provide more than one opportunity for the child to express views. That may be particularly important where proceedings extend over a substantial time period. Views expressed reasonably close to the time of hearing are usually essential given the possibility the child's views may change. And it may be necessary to provide more than one opportunity to a child to express a view in different contexts or in relation to different people. Care should be taken however not to subject a child to burdensome or repetitive questioning or processes which may have adverse impacts on the child.
>
> ….

[74] In *HC v PS* (CA115/07 18 October 2006), the Court of Appeal dismissed an application for leave to appeal from Randerson J's judgment, in *C v S*. The Court of Appeal refused the application on the basis that failure to comply with s 6 of the Act did not necessarily vitiate the judgment reached in the Family Court. In doing so, the Court considered a critique of Randerson J's judgment by Professor Henaghan, at [2006] NZFLJ at 54. Professor Henaghan had argued that the reason for obtaining a child's view was "not to determine the outcome of the case" but rather "to listen to the child, to show respect to the person who the decision is about".

[75] William Young P, delivering the judgment of the Court of Appeal, in *HC v PS*, said:

> [6] We do not accept that the failure to comply with s 6 of the Act meant that judgment of the Family Court was void or *ultra vires*; cf *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1. A rehearing in this case would not have been a cost-free option. Leaving aside the financial costs, such a

> rehearing would have caused more upset and trouble for the appellant and respondent and this would be likely to have had associated adverse consequences for the child. *Once Randerson J was satisfied that the breach had no material impact on the outcome of the proceedings, the ordinary rules of appellate practice mean that there was no requirement to direct a rehearing in the Family Court. Addressing the point made by Professor Henaghan, we are inclined to think that the direction to take the views of the child into account suggests the purpose of the exercise is associated with outcomes and not just process.* But in any event, directing a rehearing is not necessarily the most sensible way of redressing a breach of a child's rights under s 6. It would obviously not be a sensible remedy if such a rehearing would be inconsistent with the best interests of the child (as may have been the case here). *It follows that once Randerson J concluded that there was a breach of s 6, there was still a decision to make as to the consequences of that breach. So the argument that the Judge did not have a discretion has no prospect of success*. (my emphasis)

[76] Against that background, I consider whether Judge Somerville erred in the approach she took to obtaining the "views" of the children. It is necessary to draw a distinction between two different issues. The first question is whether the Court "gave reasonable opportunities" to the children to express views on matters affecting them. Only if the answer to that question were "yes", does the second issue arise; namely, whether the weight attributed by the Judge to those views was appropriate.

[77] The extracts from Judge Somerville's decision (see paras [41] and [55] above) demonstrate that John, in particular, was of an age and disposition that made it pointless to ask a specific question about whether he wanted to live in England with his mother (but without his father) or in New Zealand with his father (but without his mother).

[78] Craig's situation is somewhat different. At seven years of age, he had the capacity to articulate his views on where he wanted to live, so long as he had an ability to understand the extent of the distance between England and New Zealand and the lack of any real opportunity him to see the other parent regularly. I have seen nothing in the psychological assessments which helps me to conclude whether the effect of relocation of Craig to England could have more lasting adverse consequences than if he were to remain with his father in New Zealand.

[79] With the benefit of hindsight, I consider that it would have been better to ask the psychologist to explore Craig's understanding of the distance between the two

countries and whether separation from one parent might be more detrimental to him than the other. Whether direct questions were appropriate tools to do so was for the psychologist to decide. Given the obvious emotional turmoil in which the children were at the time of the hearing in the Family Court, it was probably too late for the issue to be raised by the Judge herself.

[80] It was open to Mr Casey, as Lawyer for the Child, to raise this issue with Craig, even in the absence of agreement between the parents to do so. Mr Casey's role is as an advocate for each child. To fulfil that role he needed to understand the children's views on the issue before the Court. If they were not prepared to engage in discussion or had insufficient understanding to express reliable views, at least a "reasonable opportunity" would have been given to them, as required by s 6(2)(a).

[81] I emphasise also that Mr Casey's role was to gather information from which he could advocate the position he considered was in the best interests of each child, notwithstanding any particular agreement between the parties. At the stage of Mr Casey's inquiries, he was required to satisfy himself whether or not the best interests of each child required the siblings to live together; that was a factor to which the Court was required to direct its attention by s 4(2) of the Act.

[82] If Ms Grove had been able, from her expertise, to convey "views" to the Court (even in the form of a statement recording an unwillingness to engage on the topic) that would have amounted to a reasonable opportunity for the views to be expressed. I refer to *K v K* [2005] NZFLR 28 (HC) and *C v S [Care of Children]* [2007] NZFLR 583 (HC) at [78]. In the latter decision, I emphasised that Venning J and I (in *K v K*) did not intend to affect the ability of a child psychologist to use specialist skills to interpret what had been said by a child to express a "view". That "view" could be communicated indirectly to the Court, by the psychologist.

[83] I hold that, so far as the Family Court proceeding was concerned, Craig was not given a reasonable opportunity to express his views on the proposal that his mother had put to the Court.

[84] However, the steps that were taken after the appeal was lodged cured the problem that arose in the Family Court. Mr Casey's inquiries reveal a young boy of seven years, who is troubled by inappropriate parental influences. The conflicting "views" expressed by Craig on two occasions, within a short space of time, were plainly the subject of coaching by each parent. In those circumstances, any "views" expressed by Craig are equivocal and cannot be given any weight in the evaluative process.

[85] To an extent, an unwillingness to engage on the topic can also be discerned from Craig's words and conduct. It is clear that he had little appreciation (if any) of the distance between England and New Zealand, or the fact that his father would not have regular contact with him if he were to live in the English Midlands.

[86] I am mindful of another criticism by Professor Henaghan, this time about the Court of Appeal's decision in *HC v PS.* Professor Henaghan, in *Doing the COCAcobana – Using the Care of Children Act for your Child Clients* (2008) 6 NZFLJ 53, criticised the Court of Appeal's determination not to direct a rehearing for failure to comply with s 6 on the basis that: "How can a Court know whether a view is material until it is heard?" In this case, the position is different because inquiries were undertaken by Lawyer for the Child before the appeal was heard. I am satisfied that Craig was given a reasonable opportunity to express his views at that time.

[87] For those reasons, as in *HC v PS*, I consider that the breach of s 6 at the Family Court level has had no material impact on the outcome of the proceeding.

(ii) The Payne v Payne point

[88] *Payne v Payne* is a decision of the English Court of Appeal dealing with an application by a mother for an order authorising her to remove a child permanently from the jurisdiction. The father had cross appealed, seeking a residence order in England. A "residence order" is akin to a day-to-day care order under the Act.

[89] Two of the Judges of the Court of Appeal in *Payne* had been very experienced Judges of the Family Division of the High Court: Dame Elizabeth Butler-Sloss P and Thorpe LJ. In judgments with which Robert Walker LJ agreed, they sought to provide some guidance to practitioners in their jurisdiction on the way in which relocation cases should be approached.

[90] While recognising that the first and paramount consideration was the welfare of the child, both the President and Thorpe LJ considered that principles established in a line of appellate decisions stretching over some 30 years required a Court, in addition to considering the welfare of the child, to grant a primary carer's reasonable proposals for the relocation of "her" family life if refusal was likely to impact detrimentally on the welfare of "her" dependent children: Thorpe LJ at para [26]. Thorpe LJ prefaced his observations on the proposition that, almost invariably, relocation applications were brought only by maternal primary carers; an assumption that may or may not hold good in New Zealand.

[91] Butler-Sloss P did not put the approach based on the carer's welfare as high as Thorpe LJ. Rather, she identified a number of factors to weigh in the balance in any particular case. Nevertheless, her approach was different from that which has historically been used in New Zealand because the "welfare of the child" was regarded as a factor of equal weight to be taken into account with others listed in para [85] of her judgment; notwithstanding, Her Ladyship's recognition that the welfare of the child "is always paramount".

[92] The *Payne v Payne* approach was considered by the Court of Appeal in *D v S* (2002). A Full Court of the Court of Appeal rejected the *Payne* approach to international relocation cases. Richardson P, for the majority, said:

> [46] *Payne v Payne* is thus marked by the emphasis on guidelines, by the prescribing of an approach to relocation cases where there is a primary carer who wishes to remove the child from the jurisdiction; and by the allocation of particular weight to the reasonable proposals and emotional and psychological wellbeing of the primary carer. It is not a long step to the assumption that the happiness of the relocating parent will meet the best interests of the child's welfare.
>
> [47] 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* [[1995] NZFLR 493 (CA)] 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 (*Stadniczenko v Stadniczenko* at pp 500-501).

Blanchard J dissented on the outcome of the appeal, but agreed with the majority that the approach taken in *Payne v Payne* should be rejected: at para [67].

[93] In referring to *Payne v Payne*, Judge Somerville said:

> [63] In *Payne*, the English Court noted "the necessity to examine whether the parent seeking to remove the children was genuinely motivated and not acting from a desire to frustrate the parenting role of the other party." The conclusion that I come to in considering the case law is that all factors should be given equal weight and one factor should not be given any priority over the other so I keep that in mind when I am considering my reasons. ….

[94] I do not consider that Judge Somerville erred in her approach to *Payne.* The problem is one of expression. The juxtaposition of the principle quoted from *Payne v Payne* (in para [63] of her judgment) to the need to give all factors equal weight provides the basis of Ms Brown's complaint.

[95] In my view, the Judge did not apply the *Payne v Payne* principle. All she was saying (in my view, rightly) was that the motives of a parent who seeks to remove a child from the jurisdiction was a relevant factor in determining what was in the best interests of the child. It is self-evident that a parent who seeks to relocate a child with the object of frustrating the parenting role of the other party is not acting in the best interests of the child. In those circumstances, malevolent motives become a relevant factor in determining what order best serves the best interests of a child.

[96] As a matter of principle, the Judge was alive to the need to balance all relevant factors in determining what orders should be made. She was entitled to take that factor into account. This point of appeal fails.

(b) Was the Judge's decision right?

[97] I consider first whether the Judge enjoyed any particular advantages in seeing and hearing the witnesses that prevent me from reviewing the substance of her decision. There are a number of findings, in relation to the conduct of the parents that are important considerations in a predictive assessment of the best interests of the children.

[98] The Judge found that Mr Carpenter had shown he could "not keep his word". That led her to the view that he would not encourage contact with the mother if the children were to remain in New Zealand with him. Another finding, that the father did not encourage telephone contact with the mother while she was overseas in 2008, buttressed that assessment.

[99] The Judge also made a finding that "the mother's family has more insight into how important it is for the children to have contact with their father". But, that finding was based solely on evidence from Ms Armstrong's sister. She had sworn an affidavit in the Hague Convention proceedings in England in March 2003 supporting her sister's decision not to return Craig to New Zealand at that stage. While I accept the Judge was entitled to make a finding in respect of the sister's views, I would have tempered the weight to be given to it on the basis that she might not necessarily reflect the views of the extended family as a whole. Further, because Mr Carpenter's sister lives in Spain, it is unlikely that she will play a significant role in the day-to-day upbringing of the children, if they were to move to England.

[100] Earlier, I summarised my perception of the reasons that led the Judge to order that Ms Armstrong have primary care of the two children, in England: see para [55] above. I address each of those issues as follows:

a) I do not consider that the existence of "parenting conflicts" points in favour or against the proposition that day-to-day care should be undertaken by Ms Armstrong. While the evidence establishes that the children will be better off if their parents are separated by as much

distance as possible, the existence of present conflicts does not assist in determining which of the two parents can best undertake day-to-day care of the children in the future, while living in a different country from the other.

b) Ms Armstrong's financial problems arise, undoubtedly, from Mr Carpenter's failure to honour his undertakings, when Craig was returned voluntarily from England after the Hague Convention proceedings were issued. But, on an inquiry directed to the best interests and welfare of a child, it is inappropriate to reward Ms Armstrong for making a decision to move overseas for reasons of emotional or financial stability or to punish Mr Carpenter for a deliberate breach of the assurances he gave his wife in 2003. The point is equivocal, so far as the issue of future day-to-day care is concerned.

c) There was ample evidence on which the Judge was entitled to conclude that it was in the best interests of each child for the siblings to remain together. While the Judge accepted Ms Grove's opinion that Craig would prefer to be in the day-to-day care of his father and that John was more attached to his mother, there is no evidence to suggest that the interests of each child would be enhanced by living with a different parent in a different country.

d) There was evidence that Ms Armstrong was more prepared than her husband to take steps to improve her parenting abilities. For that reason, I consider that Judge Somerville was right to conclude that Ms Armstrong was more likely to promote the boys' continued relationship with their father. However, I do not regard that factor as of significant weight. The way in which both parents have behaved gives rise for considerable concern about their good faith towards each other in the future. While I am prepared to accept Judge Somerville's finding, I have less confidence that Ms Armstrong will

actively encourage a fruitful relationship between the children and Mr Carpenter.

e) I do not consider that the emotional needs of each parent is a dominating factor. Plainly, the emotional needs of both Mr Carpenter and Ms Armstrong require them to be separated from each other. Each is more likely to experience emotional tranquillity from that separation. However, the fact that each parent is likely to be more stable, emotionally, does not assist the Court to determine what day-to-day care order should be made. If Mr Carpenter was just as likely to provide proper care to the children as Ms Armstrong, the factor is neutral.

[101] Section 4(1) of the Act identifies the "welfare and best interests of the child" as the "first and paramount consideration". It is the interests of a particular child in his or her own circumstances that must be assessed: s 4(2). A parent's conduct must be relevant to the child's welfare and best interests before it can be taken into account, whether in favour or against the terms of any day-to-day care order that might be sought: s 4(3).

[102] The Court, while being required to make and implement decisions affecting the child "within a timeframe that is appropriate to the child's sense of time" (s 4(5)(a)) and to apply the principles set out in s 5 (s 4(5)(b)), is also entitled to take into account any other matters relevant to the welfare and best interests of the child (s 4(6)).

[103] The principles expressed in s 5 of the Act are premised on the assumption that parents should, if possible, play a significant role in the development and upbringing of the children. In an international relocation case, particularly one involving relocation to the other side of the world, that assumption diminishes in its significance. A child of the age of Craig or John, if asked for their views, will inevitably say that they want to be in a family unit of which mother and father are part. But, when extreme stances are taken by the parents (as in this case) that desirable consequence falls away. As Priestley J observed in *R v S*:

> [74] Any parental application seeking to relocate a child to another region or country, thus imposing substantial geographic separation between parent and child, will inevitably raise emotional issues. Few parents, even the most child-focused, can be expected to view with equanimity the disruption and change which geography will impose on a valued parent/child relationship.
>
> [75] This dynamic is aggravated by the obvious proposition that a relocation dispute is difficult to settle by compromise. The parents and child are faced with two stark alternatives. A choice between Auckland and Hamburg cannot be bridged in the same way as a choice between access for four nights or six nights per fortnight.
>
> …
>
> [82] In particular the Court, in a relocation case is required to weigh the respective advantages and disadvantages to the child of the status quo as opposed to the proposed new environment. The predictive features referred to in paragraphs [1] and [2] of Heath J's judgment are important. Equally important is the prediction of how the child will react to relocation and adjust in the new environment.

In para [82] of his judgment, Priestley J is referring to my observations of the need for the Court to predict the way in which the parents will behave in the future and the assessment of how the children would likely react to living in a foreign environment.

[104] The Judge was obliged to determine the case on the basis of the entrenched positions taken by both Mr Carpenter and Ms Armstrong as to what they would do, irrespective of where the children were to live. In those circumstances, many of the factors set out in s 5 were of little assistance to the Court's determination. There was little (or no) prospect that Mr Carpenter and Ms Armstrong (as parents and guardians) could be encouraged to make their own arrangements for the upbringing of their children: s 5(a) and (c). The desirability of maintaining relationships between the children and their family group was equivocal because either the maternal or paternal family would be significantly excluded from participation in their upbringing: s 5(d). The children's culture and religious identity was likely to be forged by the place in which they grew up and through the influence of the parent with day-to-day care: s 5(f). Continuity in arrangements for the children's care could only be viewed prospectively.

[105] Stability is important to the future of both Craig and John, as is the need for them to have continuing relationships with both parents: s 5(b).

[106] Both Mr Carpenter and Ms Armstrong recognised that, if Ms Armstrong were to relocate, the probable effect on the children would be "devastating". Despite that, Ms Armstrong takes the entrenched position that she will not remain in New Zealand if the children were in the day-to-day care of their father; and Mr Carpenter takes the same stance in relation to his remaining in New Zealand, if Ms Armstrong were to relocate to England.

[107] It is apparent that the day-to-day care/relocation application has been fought entirely on the basis of what is in the best interests of each parent. As a result, the Family Court felt compelled to search for the least detrimental outcome for the children. Such a solution, while necessary as a result of the lack of available options, runs counter to the spirit of the Act. Undoubtedly, the result will be regarded as a "win" by one parent, at the expense of the other. Whatever the outcome, the children are the losers.

[108] Ms Grove opined that Mr Carpenter and Ms Armstrong are in a state of "entrenched conflict". She explained the concept in her report. In its post-separation phase, which has most impact on children, "entrenched conflict" usually exhibits high rates of litigation and relitigation, pervasive mistrust, covert and overt hostility, ongoing negative attitude to one's former partner or spouse, the making of unsubstantiated allegations about a former partner's behaviour and parenting practices. Those descriptions fit the conduct of both Mr Carpenter and Ms Armstrong perfectly.

[109] Ms Grove stated:

> 4.36 Children who have been caught up in entrenched conflict between their parents become pre-occupied with surviving in the emotionally charged and unpredictable home environment, confused about loyalties, and unsure whether their perceptions of either parent are 'true'. This creates acute anxiety for the child, and in turn their capacity for learning, thinking, interacting and playing can be much diminished. For the child, their parents thus become a source of inner conflict, and not the developmentally necessary source of stability and reassurance. The resulting emotional state experienced by the child is frequently one of pent up confused rage. In my opinion this is what Craig is communicating, through his negative behaviours.

4.37 The established effects of entrenched conflict on children include; disturbed patterns of emotional arousal and affect regulation, heightened aggression, impulsivity, anxiety, poor social skills, emotional problems, dysfunctional behaviour, increased physiological arousal which in turn affects brain development, and sequelae such as affected children being 2 to 5 times more likely to be clinically disturbed in emotion and behaviour.

4.38 *The data suggests that Mr Carpenter and Ms Armstrong have not been able to provide the necessary emotional and behavioural regulation skills to Craig and that they are beginning to respond inappropriately to John. It is likely that the entrenched conflict is in fact producing parents who model inappropriate behaviours.*

4.39 *The empirical research regarding how parents in such situations tend to respond to the needs of their children, has found three main models; parallel co-parenting, co-operative co-parenting, and continued conflictive co-parenting*. Of the three models, the best for children has been found to be co-operative co-parenting. Parallel co-parenting often fails to co-ordinate around aspects of children's lives, and often falls down to the areas which need monitoring such as homework, or tending to medical problems. Parenting plan schedules need to be unrealistically rigid for this model also, which means some events are missed, however children can adapt to it quite well, due to the predictable nature of the timeframes

4.40. *Unfortunately for Craig and John, the data shows that their parents are following the third model, that of 'continued conflictive co-parenting', and its negative effects are exhibited by the children's behaviours. In my opinion neither parent is able to repair the damage done to Craig and John's development to date, without coaching. I consider that the defences each parent has erected, due to the entrenched conflict, have then made it impossible for them to pool their knowledge and skills to respond appropriately to each child's individual needs, despite a desire to do so*. (my emphasis, footnotes omitted)

[110] The most disturbing aspect of Ms Grove's report is her assessment of the psychological effect of the parents' behaviour on both children. In cross-examination in the Family Court, Ms Grove described the protagonists as like "boxers in corners with their support teams" and expressed the view that the "effects of the parental relationship on these children" met the definition of "emotional abuse" under the Children Young Persons and Their Families Act 1989, something that can justify the exercise of the care and protection jurisdiction of the Family Court. Both parents should be ashamed of themselves for bringing about such a shocking consequence.

[111] Counsel made varying submissions on the weight to be attributed to each of the principles set out in s 5 of the Act. There was some conflict as to whether a primary goal should be stability and continuity in care for the future (s 5(b)) or the preservation and strengthening of the children's identity, including issues of culture and religious denomination (s 5(f)).

[112] The critical findings of the Judge are contained in para [89] of her decision: set out at para [55] above. She concluded that if the children were removed "from the conflict" they were at less risk. That observation, however, begs a fundamental question: is it better to remove the children from the conflict directly by allowing their mother to take them to England or by placing them in the care of their father while mother returns to the English Midlands? The Judge's next finding, that the children's "relationship with [their father] is likely to remain positive [more so] than if they remain in New Zealand and are exposed to the ongoing and damaging conflict between their parents", misses the point. On either option available to the Judge, the children would not be exposed to damaging conflict because the parents would be living at opposite ends of the Earth.

[113] It seems to me that the Judge's assessment of "damage containment" rested fundamentally on her view that the children would be better off with their mother in England because she would then have "the emotional, physical and financial support and security and be free of conflict". That being so, the Judge appears to have found that she would then be in the right frame of mind to foster the boys' continuing relationship with their father. Yet, that finding is juxtaposed with the puzzling observation that those circumstances were "preferable to continuing to live in the destructive and conflicting relationship of the parents now". There is no dispute that shared care will end and that the parents will live in different countries. Thus, whatever order is made, the children will be removed from the immediate battle zone.

[114] The Judge also seemed to place significant weight on the need to improve the children's understanding of their English culture. She said:

> [53] In s 5(f) the children's identity in terms of their culture, language, religious denomination and practice is important. The children certainly

> know they are New Zealanders but they do not have a sense of their English culture. There continues to be an argument over their religion so that the parents need clear orders in relation to that.

With respect, the reasoning contained in that extract is unconvincing.

[115] The children are both New Zealanders. They were born in New Zealand and have been raised in this country. Craig has been to England on one occasion. However, because of his age at the time of his visit, he will have no independent recollection of his experiences; only what he has been told over time by his mother.

[116] The effect on a child of Craig's age being transported suddenly into a different environment and culture was not addressed. Nor was it explored fully in the psychologist's report. It is an important factor because any relocation permitted now will likely extend through his childhood and into adolescence. Those concerns counterbalance Ms Grove's view that Craig is more able than his brother to tolerate separation from one parent.

[117] Conversely, while John might find separation from one parent less tolerable in the short term, he may adapt more readily to a new environment because he will have little (or no) recollection of living full time in the Bay of Plenty.

[118] Moving countries is not easy, particularly for a boy of Craig's age. He will speak with a strange accent and will risk taunting. He faces the prospect of few lengthy summers, if, because of the English school break in their summer, contact is to be in New Zealand during our winter. Some further inquiry is required in respect of Craig's ability and willingness to adapt.

[119] I respect the views formed by an experienced Judge on the difficult issues with which she was confronted. There is no single "right" answer in a case like this. Nevertheless, I have reached a firm view that the decision permitting relocation was premature. More focussed information is required before a final decision can be made with confidence. Given the statutory injunction that decisions affecting a child should be "made and implemented within a timeframe that is appropriate to the child's sense of time" (s 4(5)(a)) steps need to be taken to have the relocation issues determined finally this year.

(c) What should be done?

[120] In a case where the behaviour of the two parents is such that they have no regard for the welfare and best interests of a child, it is not uncommon for a Judge to embark upon a "damage control" function and to impose a regime assessed as "least detrimental" to the welfare and best interests of the particular child. Such an approach accepts the reality that future parenting of the child will not be ideal, recognises that some parents are sub-optimal in carrying out their responsibilities to their children and structures an imposed parenting regime around the perceived strengths and weaknesses of each parent's skills.

[121] Necessarily, such an approach involves a greater degree of consideration of the ability of each parent to realise identified parenting goals. That approach acknowledges "both that a child lives in a social context where their wellbeing is intrinsically linked with the wellbeing of others in their (wider) family environment; and that welfare is the paramount, but not necessarily, the sole consideration": Tapp & Taylor, *Relocation: a problem or a dilemma?* at 99.

[122] In this case the Judge was faced with a stark choice. Given the entrenched positions taken by each parent and the need to keep the siblings together, she had only two choices. Either the children lived with their mother in England, in the absence of the father, or they lived with their father in New Zealand, in the absence of their mother. The limited nature of the available options formed one underlying assumption on which a decision had to be based.

[123] The other underlying assumption for the decision, which necessarily flowed from the fact that the parents would be living in different countries, is that any decision made at this stage will inevitably impact on the way in which these children develop for the balance of their childhood, if not into early adolescence. There is little likelihood of any day-to-day care order being reversed by a Court in New Zealand; particularly, once the children's "habitual residence" changes for Hague Convention purposes.

[124] While I do not consider that Judge Somerville erred in applying the "least detrimental" pathway, the issue could, perhaps, have been framed more positively. By asking a series of questions, designed to ascertain the welfare and best interests of the children, it becomes more likely that the Court can predict the parent more likely to serve the welfare and best interests of the children for the foreseeable future.

[125] I set out the type of information that I consider is necessary to enable a better predictive assessment to be made:

a) First, there is a need to identify the *developmental milestones* for each child over the next five years; or, for as long a period as is possible given the chronological age of the children.

b) Second, it is necessary to identify each child's *needs* over that time, if they were to meet those milestones.

c) Third, consideration should be given to identifying the parent most likely to meet those needs, leaving to one side (at least initially) the country in which that parent will be residing. Reasons why one parent is more likely than the other to help the children to meet their developmental goals must be articulated.

d) Fourth, what information is available to provide guidance on whether the children's needs can best be met in the English Midlands or in the Bay of Plenty? It will be relatively easy to make that assessment in relation to the Bay of Plenty, but more information may be required for the English Midlands, so that a proper comparison can be made.

e) Fifth, the psychologist should be asked to ascertain whether it is feasible to obtain a view from either child on any of those issues. If so, a reasonable opportunity should be given for those views to be expressed. Even though John is unable to express views verbally and Craig demonstrates the effect of coaching, it may be possible for a

child psychologist, indirectly from behavioural responses, to provide some reliable information to the Court on each child's view, through the use of her expertise.

f) Sixth, what adverse effects is each child likely to suffer if the parent with day-to-day care of the children in one country does not actively foster a continuing and good quality relationship between the children and the other parent who will, necessarily, have limited contact with them.

[126] Posing the questions in that way moves away from a balancing of negative consequences to an assessment of what is in the best interests of each of the children and the way they can be met, given the limited options before the Court. That is a more positive way of expressing the question for determination and, in my view, is more likely to result in an outcome that will benefit the children, as opposed to one of the parents.

[127] I intend no criticism of Judge Somerville, counsel or Ms Grove in making those comments. Rather, as I see it, the need for more focused information has emerged from the evidence given before the Family Court. Just as there are advantages that trial Judges enjoy over those who sit on appeal, removal from the heat of battle and the personalities involved is often an advantage for an appellate Judge.

[128] There are two other factors which I consider require further exploration before a final decision is made. The first is the need to craft appropriate contact orders in a way that will require as little co-operation between the parents as possible. The second is the legal enforceability of any contact orders, if the children were to live in England.

[129] As to the first of those issues, it is likely that the Court can be assisted further, by a further report from Ms Grove and Mr Casey's continued involvement with the children. I see regular contact between Mr Casey and the boys as an important part of the information gathering process.

[130] As to the second, counsel have helpfully referred me to an array of decisions of English, New Zealand, Canadian and American Courts touching on the ability to enforce orders for contact of the type proposed by Judge Somerville. It is not altogether clear whether such orders could be enforced adequately. That is a concern given my relative lack of confidence in Ms Armstrong's ability to co-operate with her fellow guardian on contact issues. I consider that additional time will enable proper argument to be put before the Court on those issues, to the extent that they may remain relevant to a final decision.

[131] In the meantime, I consider that decisions about the children's immediate future in New Zealand is best left to the Court. The children are vulnerable, as Ms Grove's reference to psychological abuse and potential invocation of the care and protection jurisdiction of the Family Court makes clear. The parents are incapable of co-operating on issues such as religion, education and medical treatment. Therefore, the better course is to make an order placing the children under the guardianship of the Family Court until such time as the further information to which I have referred is available and a full hearing can take place to enable a final decision to be made on Ms Armstrong's parenting application.

[132] The touchstone for making an order placing a child under the guardianship of a Court is "the need to protect a vulnerable child": see *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA), *Eve (Mrs) v Eve* [1986] 2 SCR 388 (SCC), *Re An Unborn Child* [2003] 1 NZLR 115 (HC), *Hawthorne v Cox* [2008] 1 NZLR 409 (HC) at [75] and *Fletcher v Blackburn [Guardianship]* [2009] NZFLR 354 (HC). Ms Grove's report provides ample evidence on which a finding of "vulnerability" can properly be made. While placement of a child under Court guardianship is a remedy of last resort, I consider the circumstances are such that an order is justified. There needs to be time for important decisions about the children's welfare to be made promptly and without the need for acrimony between the parents. Some stability is required for the period leading up to the time at which a final decision is made about day-to-day care. The only way of achieving those goals, in any practical sense, is for the Court to assume guardianship of the children on an interim basis.

[133] The advantage of using the guardianship jurisdiction in this case, is that it can be invoked for a limited period of time, an agent (or agents) can be appointed to undertake the responsibility of carrying out Court orders and guardianship rights of each parent are suspended (*Hawthorne v Cox* at para [81]) while the Court oversees the way in which the children are cared for pending a final decision.

[134] I shall deliver separately a judgment on Mr Casey's application for leave to have the children placed under the guardianship of the High Court. For reasons to be given in that judgment, that application will be adjourned pending an urgent decision by the Family Court on whether to transfer the whole proceeding to the High Court.

Result

[135] For those reasons, the appeal is allowed and the orders made in the Family Court are set aside. In their place, I make the following orders:

a) Craig and John are placed under the guardianship of the Family Court, pending further order of that Court.

b) The children shall live in the day-to-day care of Ms Armstrong from 3pm each Sunday until 6pm each Friday. That order shall come into effect at 3pm on Sunday 9 August 2009. Until then the interim order made by this Court at the end of the hearing on 14 July 2009 shall continue in effect.

c) From 6pm each Friday until 3pm each Sunday the children shall live in the care of Mr Carpenter.

d) For the period that she has day-to-day care of the children, Ms Armstrong shall act as an agent of the Court and shall obey any directions given by it.

e) For the period during which he has care of the children, Mr Carpenter shall act as agent of the Court and shall obey any directions given by it.

f) Lawyer for the Child shall confer with counsel for Mr Carpenter and Ms Armstrong respectively to develop further contact arrangements through telephone, webcam, email, text or Skype, so that Mr Carpenter may contact and speak to his children during periods that Ms Armstrong has day-to-day care of the children. Once agreement has been reached, Lawyer for the Child shall submit a memorandum to the Court so that a contact order may be made in the terms agreed. If no agreement has been reached within 14 days of the date of delivery of this judgment, Mr Casey shall refer the issue to the Court for decision.

g) Mr Casey shall enrol Craig at [a primary school], pending further order of the Court.

h) Mr Casey shall arrange therapeutic counselling for Craig and John to address all issues raised in Ms Grove's report to the Court under s 133 of the Act. A copy of Ms Grove's report shall be made available to the counsellor.

i) Ms Grove is appointed, under s 133 of the Act, to prepare a supplementary psychological report on the children, to be filed and served on or before 30 October 2009. The report shall address all issues set out in para [125] above.

j) Craig and John shall not be removed from New Zealand, pending further order of the Family Court.

[136] If there are any difficulties with the terms of the care orders I have made, leave is reserved for any party to apply to the Family Court for variation. I have left

the existing interim orders in place so that problems I have not foreseen can be addressed.

[137] Leave is reserved for any party (or Lawyer for the Child) to apply to modify the terms of the guardianship order. Any decisions on "important matters" affecting the children (as defined by s 16(2) of the Act) shall be made by the Court.

[138] Leave to apply, generally, is also reserved.

[139] As both parties are in receipt of legal aid, there will be no order as to costs on appeal as between the parties. Mr Casey's costs as Lawyer for the Children shall be paid out of moneys appropriated for that purpose by Parliament.

[140] Mr Casey's appointment as Lawyer for the Children is continued, for Family Court purposes. His costs shall be paid out of money appropriated by Parliament for that purpose. Mr Casey shall file and serve a further report setting out his findings and submissions on or before 11 November 2009.

[141] Both Mr Carpenter and Ms Armstrong must realise that the way in which they behave (and the impact of such behaviour on the children) pending the further hearing will be a relevant consideration in the final decision. I have no confidence that they will improve the relationship as between themselves. All I can say is that it would be in the best interests of the children for them to do so.

[142] I intend that the hearing to determine day-to-day care on a final basis will take place in the Family Court no later than early December 2009, unless the proceeding were transferred to this Court. If the proceeding did come to this Court the same timing would apply. I envisage that only updating evidence will be called, but leave a final decision on that to the Court that conducts the hearing.

[143] The parties have agreed that the published copy of this judgment shall contain fictitious names to hide their identity. This version of the judgment has been

anonymised for general distribution. Another copy has been forwarded to counsel for the parents and the children in a form which identifies the parties.

_____

P R Heath J

Delivered at 9.00am on 31 July 2009