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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2019-044-000269
[2024] NZFC 1637

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ZHILAN HOU] Applicant
AND	[JIANYU HOU] Respondent

Hearing:	13 December 2023
Appearances:	Applicant appears in Person Respondent appears in Person C Lee as Lawyer for the Child
Judgment:	26 February 2024

RESERVED JUDGMENT OF JUDGE R VON KEISENBERG

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[1] The Applicant, [Zhilan Hou], and the Respondent, [Jianyu Hou], are the parents of [Miller Hou] ("[Miller]") born on [date deleted] 2014 aged 9. The matter was set down for a submissions-only short cause hearing to determine Ms [Hou]'s application to discharge the order preventing removal of [Miller] from New Zealand, made on 3 May 2019.

[2] Proceedings involving Mr and Ms [Hou] in the Family Court have been ongoing since 2019. I have case managed this file since 2020. The application to discharge the OPR by Ms [Hou] is one of several applications I have dealt with to date. The history of this litigation has been set out in an earlier judgment and in subsequent minutes.[1] However, to give the current application for the discharge of the OPR some context, a brief outline of the litigation history is instructive.

[3] Ms [Hou] first commenced proceedings on a without notice basis for orders under the Care of Children Act and Family Violence Act on 1 May 2019. On 3 May 2019 a temporary protection order was granted in favour of Ms [Hou] and an interim parenting order made giving her day-to-day care of [Miller]. An order preventing removal of [Miller] was also granted in favour of Ms [Hou].

[4] Mr [Hou] defended the making of a final protection order and sought orders for contact with [Miller]. The matter came before me in December 2020 by way of a defended hearing. On the 16 December, I gave an oral decision and made orders discharging the temporary protection order in favour of the mother and varied the interim parenting orders to allow for weekly supervised contact for the father at Care for Kids for a period of six weeks with a view to progressing the father's contact outside the centre.

[5] Unfortunately, there was a delay in the referral for supervised contact and as a result it did not commence until 16 January 2021. Again unfortunately, the father's supervised contact did not go well, and Care for Kids eventually suspended Mr [Hou]'s contact with [Miller]. [Miller] has not had contact with his father since 1 May 2021 apart for a brief time when Mr [Hou] turned up at [Miller]'s school unannounced.

[6] In August 2021 the Court directed a s 133 report to address many of the issues identified in this dispute including the reasons why [Miller] did not wish to have contact with his father. After a significant delay (in part due to a shortage of s133 report writers at that time) the clinical psychologist Megan Burke filed her report on 12 April 2023. In it she made several recommendations:

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[1] Oral Judgement of Judge von Keisenberg dated 16 December 2020.

(a) It is in [Miller]'s best interests that he is supported by his mother to have positive and healthy communication with his father with a view towards therapeutic intervention, supervised contact and then unsupervised contact in the future.

(b) The level of estrangement between [Miller] and his father was to such a degree that there needed to be a clear guided succession of steps before contact could be resumed, in partnership with a clinical psychologist.

(c) The mother was recommended to undertake psycho-education about the positive impact a relationship with both parents would have on the child's psychological, emotional and social development.

(d) The psychologist also recommended that Mr [Hou] work with a clinical psychologist prior to indirect and direct contact.

(e) Prior to any contact resuming Mr [Hou] would have to complete an evidence-based parenting programme. Without it, it was not considered appropriate for the reintroduction of [Miller] to his father.

[7] In April 2023 Ms [Hou] applied to discharge the order preventing removal. On 23 May 2023 following receipt of the s133 report and in accordance with the recommendations, the father Mr [Hou] applied for a guardianship direction that [Miller] attend therapeutic parent child meetings with him and a clinical psychologist. Mr [Hou]'s application was not only opposed by Ms [Hou] but she responded with an application to remove him as a guardian of [Miller]. That application was filed without notice and considered and declined by her Honour Judge McMeekin on the eDuty platform.

[8] Due in part to his frustrations with the court process and the ongoing lack of contact with [Miller], Mr [Hou] applied to discontinue all his applications in the

Family Court. His application to discontinue his proceedings was eventually granted on 14 August 2023.[2]

[9] Shortly thereafter Ms [Hou] similarly filed an application to discontinue her applications. However, following the release of the s133 report, on 28 June at a judicial conference, lawyer for child expressed her concerns about [Miller]'s welfare in the care of his mother. Based on the findings in the s133 report, I agreed and made a s 15 direction for Oranga Tamariki to investigate matters for [Miller].

[10] Oranga Tamariki investigated and found that there were well founded concerns for [Miller] in his mother's care (including him being left at times to fend for himself and exposure to adult discussions). Oranga Tamaki made referrals for the mother to complete parenting course and counselling. By the time the matter next came back to Court, Ms [Hou] had undertaken a Triple P parenting intervention and voluntarily agreed to engage with the next Triple P level 5 programme commencing in 2024. Ms [Hou] also confirmed that she had undertaken counselling sessions with [Miller] and that the counsellor was working with [Miller]'s worries and anxieties arising from his parents' divorce.

[11] On 11 October 2023 Ms [Hou] filed a further application under s 77(5) to discharge the order preventing removal of the child from New Zealand. It was unclear why she filed a second application. Mr [Hou] opposes the discharge.

Ms [Hou]'s application for the OPR

[12] Initially, Ms [Hou] sought a discharge of the order preventing removal of [Miller] from New Zealand on the grounds that [Miller] wanted to spend Christmas and school holidays with his grandmother in China. However, when the matter came to court Ms [Hou] was now seeking a discharge of the OPR because she was seeking to find an alternative country to live in so she could afford a mortgage-free house with "less pressure and less stress". She claimed that if they continued to live in New Zealand they would be "homeless".

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[2] Court Minute dated 14 August 2023.

Mr [Hou]'s position

[13] Mr [Hou] opposed the discharge of the OPR. In his May affidavit filed in support, Mr [Hou] disagreed that his son, [Miller], should stay with his grandmother in China or that he should be allowed to leave New Zealand during the Christmas and school holidays. He claimed that by the mother taking [Miller] to China was yet another way of her stopping him from having contact. However, his objection on this ground had less relevance after he withdrew his applications before the court and indicated that he was no longer pursuing contact with his son.

The hearing

[14] Both parties appeared at the submissions-only hearing on 13 December 2023. Each filed written submissions. Lawyer for child also filed written submissions which I address shortly.

[15] Despite the sole purpose for the hearing was to determine whether the OPR should be discharged, neither party was able to confine or indeed focus their submissions on this issue. Rather Mr [Hou] focussed solely on the issue that he was still required to pay child support despite having had no contact with his son since 2021. He described the mother as a "kidnapper" and drew analogies with the demand for child support as "a ransom". He railed particularly against IRD's recent attempt to increase his assessment for child support. Both parties' conduct during the hearing was less than optimal requiring frequent intervention from the Bench.

[16] Similarly, Ms [Hou]'s central focus was on what Mr [Hou] should be paying by way of child support and her financial situation. Ms [Hou] did not attempt to disguise her plans that in the event the OPR were discharged, this would free her to leave New Zealand with [Miller]. In her affidavit of 2 October 2023 filed in support, Ms [Hou] acknowledged that she had spoken at length with [Miller] about leaving New Zealand and had sought his views about relocation. She wrote:[3]

> I have had multiple conversations with my son [Miller Hou]. He shows a strong will to go overseas and suggests that "we will be able to afford to a

[3] Affidavit of [Zhilan Hou] dated 3 October 2023 page 2 at para 4.

> house on a mortgage free basis less pressure and a happier life". If we choose to continue to live in New Zealand, we will be homeless as we cannot afford to pay the big repayment to the bank.

[17] She confirmed that she was contemplating relocating to Brisbane where she could afford a house without a mortgage. She acknowledged that she had not filed an application for relocation nor had she turned her mind to it.

The legal framework

[18] Section 77(2) provides that an authority if it believes on reasonable grounds, that a person may take a child out of New Zealand with intent to or in circumstances where the taking of the child out of New Zealand would be likely to:

> **77 Preventing removal of child from New Zealand**
>
> (2) An authority may, on an application for the purpose by any person, exercise the powers stated in subsection (3) if the authority believes on reasonable grounds that a person may take a child out of New Zealand with intent to, or in circumstances where the taking of the child out of New Zealand would be likely to,—
>
> (a) defeat the claim of a person who has applied for, or is about to apply for, the role of providing day-to-day care for, or an order for contact with, the child; or
>
> (b) prevent any order of any court (including an order registered under section 81) about the role of providing day-to-day care for, or about contact with, the child from being complied with.

[19] Section 77(5) provides that a person against whom an order is enforced may apply to the authority for the discharge of the order and "the authority may if it thinks fit discharge the order accordingly". There are no other guiding principles set out in s 77(5) apart from "if it thinks fit".

[20] However, it is general principle that when making any decision under the Care of Children Act, the Court must consider and apply the mandatory principles contained in ss 4, 5 and 6 of the Act. Section 4 requires that the welfare and best interests of the child in his or her circumstances must be the first and paramount consideration in any proceedings involving the guardianship or the role of providing day to day care for or contact with the child. Section 5 sets out the principles relating to a child's welfare and best interests. Section 6 states a child must be given reasonable opportunity to

express views on matters affecting the child and those views should be taken into account.

Views of the Child

[21] Lawyer for child, Ms Lee filed several memoranda in relation to [Miller] during the proceedings. She filed two memoranda in relation to the discharge of the OPR.

[22] In an earlier memorandum dated 9 November, Ms Lee reported the views of [Miller] in relation to the discharge of the OPR.[4] He told his lawyer he "knew the whole thing" and that his father had discontinued his applications. He told his lawyer "I hate him. Hopefully he does not come back. I used to have nightmares about him coming to the house." He had never travelled overseas and was looking forward to that. He hoped his father would agree to the OPR being discharged.

[23] Ms Lee helpfully addressed the court on the jurisdiction for the discharge of an OPR, noting that based on the mother's evidence at the hearing, it was in effect an application for relocation even if she had not applied for one. She submitted however that Ms [Hou]'s application under s 77(5) must succeed because there were no orders in favour of the father for contact and he had discontinued all his applications before the Court. Therefore, an order allowing [Miller] to travel overseas was not a breach under s 77(2).

[24] In a further memorandum filed by Ms Lee after the hearing, she submitted that the Court could consider amending the parenting order in favour of Ms [Hou] to record that [Miller]'s habitual place of residence is New Zealand. She also addressed the provisions of the Contempt of Court Act 2019.

Discussion

[25] As noted at the outset, I have case managed this file since early in the proceedings and over this time I have observed that there has been effectively no

[4] Counsel for child memorandum dated 9 November paras [16] to [21].

reduction in the palpable hostility and antagonism each has expressed towards the other as amply demonstrated at the last court hearing. Neither parent in my view has shown much insight into the needs of a child as I have frequently observed in my various decisions and minutes. It was plain from the start that the mother never supported the father having an ongoing relationship with the parties' son.

[26] Unfortunately, the Court is left with few options now that the Oranga Tamariki's involvement is at an end and the father has withdrawn all his applications including his application for contact. Throughout these proceedings I have expressed my concerns about this situation as has the s133 court report writer and lawyer for child. Despite Ms [Hou] engaging with Oranga Tamariki and undertaking a parenting intervention (ostensibly to learn more appropriate ways of parenting) clearly this has had little impact as evidenced by the tenor and content of her submissions during the December hearing and the fact that she has continued to embroil [Miller] in these proceedings as evidence by the last lawyer for child report.

[27] Lawyer for child has reported [Miller]'s views about contact with his father and his views about the discharge of the OPR as outlined earlier. Consistently these show that because the mother has not supported the relationship, this has effectively ensured that [Miller] does not wish to have a relationship with his father. It is not surprising therefore that [Miller] supports the OPR being removed.

[28] During the December hearing the mother appeared genuine in her surprise that she needed to apply under s46R of the Act if she wished to relocate with [Miller] to Australia or any other offshore destination. She confirmed however that she did not have firm plans to leave New Zealand at this time. She was now aware that relocation is a guardianship issue and must consult and obtain Mr [Hou]'s consent. In the absence of an agreement from Mr [Hou], she must apply to the court for relocation with [Miller] before doing so.

[29] Following the December hearing, the lawyer for child filed supplementary submissions. She submitted that if the Court were minded to discharge the OPR the parenting order in favour of Ms [Hou] is amended to record that New Zealand is the habitual place of residence for [Miller]. She also proposed that Ms [Hou] be asked to

give an undertaking pursuant to s19 of the Contempt of Court Act 2019 that she will not remove [Miller] from New Zealand with intent to relocate to another country without first filing an application to the Family Court for relocation.

Result

[30] Given that the father is not pursuing contact I am satisfied that there are no grounds under s 77(5) to maintain the OPR and therefore Ms [Hou]'s application must succeed. This is the culmination of a very unhappy state of affairs for this child. It follows that any order permitting [Miller] to travel overseas would not result in a breach under s 77(2). The only issue remaining, as Ms [Hou] herself said, is her desire to leave New Zealand and relocate to another country.

[31] I have considered the submission of lawyer for child that I ask Ms [Hou] to give undertaking under s 16 of the Contempt of Court Act 2019 that she will not remove [Miller] from New Zealand with intent to relocate to another country without first filing an application for relocation. This matter was not canvassed at the hearing with Ms [Hou] and for that reason I will not seek it from Ms [Hou]. I am satisfied that Ms [Hou] knows she must apply for relocation if it is her intention to leave New Zealand with [Miller] permanently.

[32] I am also of the view that proceedings need to come to an end. Accordingly, I discharge the order preventing removal of [Miller] from New Zealand but record that the parenting order made in favour of Ms [Hou] will record that New Zealand is [Miller]'s habitual place of residence.

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Judge R von Keisenberg
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 26/02/2024