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**IN THE FAMILY COURT
AT INVERCARGILL**

FAM-2008-082-000004

UNDER "The Care of Children Act 2004"

BETWEEN J T P
Applicant

AND B T T
Respondent

Hearing: 27 and 28 January 2010

Counsel: A J Woods for Applicant Mother
Respondent Father, Unrepresented, In Person
T E McKenzie, Lawyer for Child E
F C D More, Lawyer for Child M
M Gill, Lawyer to Assist the Court

Judgment: 28 January 2010

**ORAL JUDGMENT OF JUDGE P F BOSHIER
[as to parenting orders]**

Introduction

[1] When Parliament passed the Care of Children Act (“the Act”) in 2004, it set down some fundamentally important ideas about how the law makers who represent us wished children to be parented in Aotearoa New Zealand.

[2] Section 5 of the Act sets out the principles that every Family Court Judge must bear in mind when deciding on the care of children. Detailing all of these is unnecessary but what is worth capturing and stressing is the need for continuity of care for children, for the role of each parent to be respected, for the role of their whanau and hapu to be acknowledged and the need to keep children safe. What the Care of Children Act also did was to stress that children are so important that they have the right to their own legal representative and to have their views put to the Court and considered.

[3] This case places into sharp focus the complexity of human behaviour and how achieving what Parliament intended may at times be a real challenge. The case also puts into focus how children’s views should be obtained, for I have adopted a procedure here which I would not have contemplated previously. One of the children gave evidence in the Courtroom. As I give this decision the three children of the parents are present, as are their parents, the children’s whanau and their lawyers.

[4] I have some important and clear messages to give to you all and it is my function, as the Judge who has been given the responsibility of hearing and deciding this case, to do that. I intend keeping my remarks as brief and as helpful as possible but I am bound to give reasons for the decisions that I have come to. I do not expect you all to agree today on what I have to say, but I predict that if you do disagree with what I say today, in the future you may take a different view and reflect that I might just have been right.

[5] Before dealing with the background facts and issues, I acknowledge to the parents and children the Tangata Whenua of Aotearoa, that you are entitled to have me respect you and your culture. Ms P your tribal affiliation is Ngai Kahungunu and

Mr T yours is Tainui. You each come from a proud heritage. Ms P you have set out in wonderful fashion, in a document prepared at my request (and I made this to each parent), your background. I thank you and congratulate you. Some of our proceedings in this case have been spoken in Maori. It is courteous to do so. While this decision is in English, never far from my mind is the wairua and whanau ora central to Maoridom. As I now proceed, I will be referring to the children's parents as the mother and the father. The children's names in this judgment are not their real names in order to preserve their anonymity.

Background

[6] The mother applied without notice for a protection order and a parenting order on 28 January 2009. She said that she had been in a relationship with the father since 1992 and that there were three children of that relationship – John, Elaine and Moana.

[7] The mother detailed the domestic violence that had occurred since 1996. She referred graphically to this domestic violence. She commenced with an incident in 1996 which resulted in the father being charged with a male assaulting a female. In 2006 there was a further incident of violence, another in 2007, when again the father was arrested and charged with male assaulting a female. In August 2008 the mother alleged that the father assaulted her in front of the children, that he tried to strangle her, pushed her and pinned her to the ground. The mother indicated that in early January last year, after a fight between other members of the family, she left the home in M but returned after a brief period of time. However, from her perspective, it seemed clear that the father did not want her back and she consulted a women's refuge. The mother decided to return to her hometown of W and after taking legal advice sought and obtained a protection order on 28 January 2009.

[8] Subsequently the mother returned to the far south, doubtless because the three children were still living with their father and she was missing them. It seemed clear too that Moana was missing her mother terribly. But for Elaine and John they seemed easily persuaded that their mother was in the wrong in leaving and they took up a position which, if anything, is now more pronounced than previously.

[9] On 9 April 2009 fearing that the father might return to his hometown of Matamata with the children, the mother obtained an order that the children not be moved out of this area. By 16 April the mother was convinced that the time had come for Moana to live with her and the Court granted an interim parenting order on 23 April last year. From that point on the position stalemated. John and Elaine remained with the father and decided that they did not want to see their mother. Moana, on the other hand, remained with her mother and developed some diffidence about seeing her father, although she did want to see her brother and sister. On 14 October last year the mother applied to relocate with Moana to W and wishes to actually go in the future if she sees that as appropriate.

Issues

[10] I am required to determine:

- (1) The mother's application for a parenting order for Moana;
- (2) The mother's application to relocate and therefore to discharge the non removal order;
- (3) Whether Elaine should have contact with her mother;
- (4) The father's application for a parenting order in relation to both Elaine and Moana. John (because of his age) does not require any Court orders.

Process

[11] Courts must be prepared to be flexible when normal process is challenged, and that has occurred here. The father has represented himself throughout, although he has had his friend, Mr Watene, help him as a McKenzie friend. All of that has occurred informally.

[12] The father has openly wanted a confrontation with me on a range of procedural matters and mostly I have not responded. But I want to say why that is so and why I have permitted the father enormous latitude.

[13] Without question, a Judge could have held the father in contempt in a number of respects. I think that is rather what the father was hoping for so that he could then blame any action I might have taken against him, on the mother, so that the children might once again believe that he had been punished because of the mother. His decision to bring both Elaine and John to Court contrary to what the Court had previously directed can be explained in this way, if my reasoning is correct.

[14] In addition, the father's documentation has been so contrary to good practice and court rules that, for the most part, his documents should have been rejected. But the task for me is to decide this case on the welfare and best interests of the children. The father's absurd tactics would have succeeded had we not accommodated the often bizarre behaviour that he exhibited.

The Children's Views

[15] Section 6 of the Act requires the Court to obtain the children's views and to take them into account. The obtaining of children's views has assumed its rightful place of importance in family law in New Zealand. Moana's views were before me, both through her lawyer Mr More and through a psychological report written for the Court by Mr Witheford.

[16] For Elaine and John's views to be put however has been more difficult. The father did not permit Mr Witheford to see either of these children. The father has been obstructive and difficult in allowing the Court to obtain Elaine's views. But the fact is that in a small percentage of family cases this happens and we have to adapt.

[17] When I learnt that Elaine was at Court yesterday I decided to offer her the opportunity to see me in the presence of her lawyer and the Registrar. The father would not permit that to occur and in the end I felt it was unfair for me to unwittingly pit Elaine against her father and decided not to force the issue.

[18] After consulting with counsel and the parties (particularly the father), I decided to offer Elaine the opportunity to come into Court and to give evidence. I wish to explain my reasons for that unusual course and why I chose it. There are four:

- i) Elaine was at Court and both she and her father seemed keen for her to convey her views to me;
- ii) The mother has had no contact with Elaine, had not heard her views directly and I felt she had the right to hear them;
- iii) As Elaine's views were not available to me through the psychological report, all I had were the instructions Mrs McKenzie had conveyed to me, but Elaine had not been given the right that most children are entitled to of access to the Judge;
- iv) Elaine wished to take advantage of the opportunity and it seemed to me that the only way I could properly accommodate the law under s 6 was to ask Elaine to come into Court as part of the process.

[19] Elaine was not sworn and answered questions to me and counsel, who I want to say adapted to this unusual situation with utter professionalism. Elaine spoke clearly and forcefully. I experienced one of the saddest occasions I have ever seen in a Family Court and that is to hear directly from someone barely 14 that "she loathes her mother."

[20] When I look objectively at what the mother suffered at the hands of the father and his demonstrably controlling nature, what Elaine said to me so forcefully is an example of one of the clearest cases of parental alienation a Court is ever likely to see. But the law requires the Court to listen and respect children's views, and to act on them in the context of the whole case.

[21] I turn now to Moana's views and those have been conveyed not only through the psychological report but by Mr More on many occasions. Mr More said to me that Moana did not particularly wish to see me and I decided no opportunity needed to be offered. Moana's wishes are to live with her mother and to support her mother's wish to relocate to W.

[22] I did not see John; although have had the pleasure of meeting him. Orders are no longer sought for John in view of his age, but I am pleased that John is here to listen for it is proper that the remarks I make are made to the whole family.

Violence

[23] A protection order is in place based on allegations which I have previously referred to. Section 60 of the Act requires a Court to enquire into allegations of violence and to make parenting orders having regard to safety. On 17 November 2009 Judge O'Dwyer heard the mother's application for a final protection order and the father's application that that be discharged. The Judge concluded the first part of the enquiry under s 60 of the Act.

[24] The Judge's decision must be read and must form part of the decision I make today. I am bound to accept the Judge's findings in accordance with the legal process. I do so without question. It is not possible nor desirable to repeat everything the Judge said but some remarks capture the flavour. For instance in paragraph 2 Judge O'Dwyer said:

"These proceedings arise out of a relationship, that lasted for 17 years or thereabouts. There are three children who are affected, John, Elaine and Moana.

I have heard evidence today of persistent, and severe family violence and children who were exposed to that violence throughout most of their lives. I have no doubt that this represents a state of disharmony and conflict that is not in the children's interests and needs to be brought to an end."

[25] Then in paragraph 8 she said:

“The family is therefore split. The father blames this on the mother. From the evidence I have heard today it is clear that he does not accept responsibility for the violence that has brought about the destruction of the family.”

[26] From paragraphs 11 to 19 the Judge set out her findings in relation to the chilling violence that occurred in this family. While on occasions it is clear the mother retaliated there has been demonstrable violence by the father on the mother. In paragraph 26 the Judge said as follows:

“I find that father has been physically violent towards the mother during this relationship, and also psychologically abusive. The psychological abuse has been more prevalent in recent years but no less serious than the physical abuse of the past.”

[27] The final passage I wish to read in full is paragraph 31 where the Judge said:

“The father gave evidence that he attended counselling in 2008 and went there voluntarily. He has also undertaken the Stopping Violence Programme under the temporary protection order to its conclusion. However he has not gained a sufficient understanding of his responsibility for domestic violence and family violence. He can only express qualified acceptance of responsibility. He does not examine his own behaviour but justifies how he has behaved in the past. The father needs to move from justifying how he has behaved in the past to asking what he has to do to change to be a safe parent and a good role model, and to protect the children from being exposed to any form of family violence.”

[28] And so the Judge found that there had been qualifying violence under s 60 of the Care of Children Act but wisely, in my view, did not proceed to decide the form of parenting orders that should be made, taking the view that that should be left to this more substantive hearing. The Judge did however make the temporary protection order final.

Decision

[29] Virtually all New Zealanders are aware, or should be aware, of the “It’s not OK” family violence campaign. It features men such as Vic Tamati who have owned up to their violent past and bared their souls in order to persuade other men not to be that way.

[30] Recently Reuben Wiki, the famous New Zealand rugby league player, has become an ambassador for stopping family violence. He has explained that he has done that because of the violence he was forced to witness and endure as a child.

[31] The family before me is divided and fragmented because of family violence. I am unable to carry out what Parliament exhorts me to do under s 5 of the Act, not just because of the father’s violence but because of his inability to take responsibility and to change.

[32] The father’s arrogance and obsession with power and control has been one of the striking features of this case. It will take enormous courage for whanau to accept this and to encourage this change.

[33] It was unthinkable for the mother to have remained in this family home. Her decision to leave was difficult but courageous.

[34] The violence notwithstanding, it was a joy to read Mr More’s report of 23 March 2009. Some snippets are these –

“It became apparent in discussion with the elder two children that M offers them a solid home base, security and a way forward. The children describe the community spirit that they enjoy, the friends that they have made, the sports that they are able to play and both consider there would be a complete loss of identity if they were relocated elsewhere.

John is a particularly talented boxer.

Elaine enjoys playing netball, touch and by all accounts she is particularly talented. Both children are achieving academically. John has talents in both maths and

science particularly and Elaine does well in all subjects. They have a good network of friends.”

[35] Now I do not need to refer to Moana, but how proud you must be as parents to hear what I have just said.

[36] I am able to decide the issues in this case without great difficulty because when the children’s welfare is promoted as the prime consideration, the cards in fact stack up quite clearly. I need to deal with the children separately. They have been individually represented in this case and that has been proper. This is a family deeply divided and it is the reality within which I must work.

Moana

[37] I find on virtually every front that Moana’s welfare is best served by living with her mother. Indeed it is unthinkable that she should live with her father until there has been a monumental change.

Should there be contact between Moana and her father?

[38] The law requires me to consider s 60 of the Act. The mother says that the violence was to her and not to the children but without supervision I am clear that the father will psychologically damage Moana just as he has Elaine. He will seek to alienate Moana against her mother. I, too, must take into account Moana’s own wishes that she does not wish to have contact with her father. I have decided that no contact should occur at this time with the father.

Where should Moana live?

[39] There are benefits to Moana living in M. She can see her father incidentally and have informal contact with Elaine and John. This has been her base. However, the way the case has been presented to me today suggests that the risks of the mother staying in M to care for Moana far outweigh the benefits. I believe, given the past, that the risk to the mother is unacceptably high in remaining here. W is a long distance from here but it may provide a sanctuary that M cannot. Ultimately whether

Moana lives with her mother here or in W must be a matter for the mother to decide upon.

Elaine

[40] It is not realistic for Elaine to live with her mother. She wishes, in the strongest terms, to live with her father and to have no contact with her mother. This is one of those exceptional cases where I have decided not to interfere with Elaine's wishes even though I am utterly convinced that what Elaine wants is not in her best interests.

[41] It is quite apparent that the father has parenting qualities and I think he will take care of some aspects of Elaine's nurturing admirably. But the alienation that he has promoted and his bizarre behaviour is such that Elaine will need all of her formidable personal resources, and the resources from other members of whanau, to develop into a functional adult.

[42] So, I accept the reality, but I decline to promote it. I will not make a parenting order in favour of the father sanctioning his care of Elaine.

[43] The mother does not ask me to force contact between she and Elaine. I believe that is the correct position. Again I have a reality to face and although I do not believe that is in Elaine's best interests I will not force the contrary.

Observations

[44] I now come to make the orders I am required to, to give effect to my decision. This judgment will be typed and made available to the parents, the children and such members of whanau and other support agencies as they chose. Beyond this the children are entitled to anonymity as the Family Courts Act requires. However there some issues and messages which perhaps should be shared more widely than just this Courtroom. It is about all of us, each one of us, taking responsibility for our actions. If therefore wider circulation of this judgment is sought I will want to ensure that any further judgment is crafted as to anonymise the children's names and their details.

[45] The other observation I want to make relates to the children's contact with each other. I implore you, the whanau, to promote whanau ora amongst the children and, even though contact by the children and their parents is fraught, contact between the children has to happen. After today, the challenge is how this will be done? Who here will take the initiative? Who will start the process of change? Is any adult in this Courtroom up to that task? It is up to adults and it is not the children's responsibility.

Orders

- i) A parenting order in which the mother has day to day care of Moana.
- ii) I decline to make any parenting order wherein the father has contact with Moana.
- iii) The mother's care of Moana may occur in W if she wishes and the previous order for non removal of all children is discharged.
- iv) I decline to grant the father's application for a parenting order in relation to both Elaine and Moana.
- v) I decline to make any parenting order wherein there is contact ordered as between Elaine and the mother.

P F Boshier
Principal Family Court Judge