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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**FAM-2013-009-003154
[2016] NZFC 1721**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	ANABELLE EDGAR Applicant
AND	LAURA STENET First Respondent
AND	GREGORY GARDENER Second Respondent

Hearing: 28 January 2016

Appearances: K May for the Applicant
No appearance for or on behalf of First Respondent
R Mackie for the Second Respondent
L Michell as Lawyer for Child

Judgment: 3 March 2016

RESERVED JUDGMENT OF JUDGE J A McMEEKEN

Introduction

[1] Sarah was born on [date deleted] 2013. The only order in force in respect of her is an order preventing her removal from New Zealand which was made on her mother's application on 2 February 2015.

[2] In November 2013, Sarah's maternal grandmother applied for a parenting order and in December 2013 she applied to be appointed additional guardian. She did not include the father as a party and the applications stalled.

[3] On 21 November 2014, the Court directed that the father was to be joined to the proceedings.

[4] In February 2015, the father applied for a parenting order and for an order that Sarah be returned to live in Christchurch.

[5] In June 2015 the mother applied to have the order preventing removal discharged but that application has not been progressed.

[6] Other than that June 2015 application, the mother has taken no steps in respect of either her mother's applications, or the father's application. The parties involved in the hearing on 28 January 2016 were the maternal grandmother and the father.

Background

[7] Sarah was born in Christchurch. Her young parents never lived together and were not in a relationship at the time of her birth. Sarah's mother was then 19 and was on home detention for her part in an aggravated robbery that had taken place before her pregnancy.

[8] After Sarah's birth, she and her mother spent some time living with the maternal grandmother. The father went to see Sarah in the hospital after her birth, having been told by others of her birth.

[9] Although the relationship between the parents was poor, the father had regular contact, including overnight contact from when Sarah was very young.

[10] The mother had difficulties. The maternal grandmother said in November 2013 that the mother suffered from severe post-natal depression, had been hospitalised and treated by the psychiatric team, and had some undesirable associates. Because of those concerns, the grandmother made those applications to the Family Court in November and December 2013.

[11] When she made her first application in November 2013 the grandmother said “There is no father on Sarah’s birth certificate and the putative father has no contact”.

[12] In January 2015, without the father’s consent or knowledge, the mother took Sarah to live with the maternal grandmother in Nelson. Sarah had been in the father’s care from 22 December 2014 until 2 January 2015 and there was an agreement that the father would have Sarah for weekend contact beginning in about 2 weeks time.

[13] The father, upon finding that Sarah had been taken to Nelson, applied urgently to the Court on 2 February 2015 seeking the return of Sarah to Christchurch and for a parenting order.

[14] In Nelson, the grandmother said in February 2015 that the mother “has had serious difficulties with drugs and bad relationships”, and although receiving help, she was not capable of caring fulltime for Sarah at that time. The grandmother said she was working closely with CYFS social workers and that Sarah was safe and happy with her.

Delay

[15] The systemic delays in this case cause considerable concern. On 2 February 2015, the father filed a without notice application seeking the return of Sarah to Christchurch. Sarah was one year four months old and had lived her entire life in

Christchurch with her grandmother and/or mother and was having regular contact with her father, including overnight contact.

[16] On the eDuty platform on 2 February 2015 Judge McHardy said “Threshold not met. Urgency is however required given the nature of the allegations”.

[17] At a directions conference on 22 April 2015 it was noted that there had been a referral for a family group conference in Nelson. Timetabling directions were given and the matter was adjourned for a prehearing conference that was to be “in mid to late June”. On 22 July 2015 the prehearing conference was convened and a one day hearing was directed.

[18] The next thing that occurred was five months later on 7 December 2015, where there was a fixture callover and a hearing date was set for 28 January 2016.

[19] It is of real concern that on 2 February 2015, an experienced Family Court Judge should note that “urgency” was required in respect of the unilateral removal of a child aged one year and four months and yet it should take almost exactly one year for a one day hearing to take place.

[20] Section 4(1) and (2) of the Care of Children Act 2004 (The Act) provide that the welfare and best interests of a child are the first and paramount consideration, and that any person considering the welfare and best interests of a child must take into account the principle that “decisions affecting the child should be made and implemented within a time frame that is appropriate to the child’s sense of time”.

[21] The principle set out in s 4(2)(a)(i) has been grievously breached in this case.

[22] As at January 2015 Sarah had been having regular contact, including overnight contact, with her father. Indeed, she spent 11 nights in his care ending on 2 January 2015. Between that date and 7 December 2015, that is in the next 11 months, she saw him on only two very brief occasions.

Child, Youth and Family involvement

[23] A s 131(a) report was filed on 11 February 2015 and a s 132 report was filed on 17 February. The February 2015 report noted the following reports of concerns:

9 July 2014 – concern re adequate nutrition;

10 November 2014 – concern about the mother’s drinking, her associates and poor parenting;

19 January 2015 – concern about the mother threatening self-harm;

27 January 2015 – concern that the grandmother may be manipulated by the mother.

[24] The July 2015 report noted the following:

4 March 2015 – first Strengthening Families meeting held to support the grandmother caring for Sarah;

19 March 2015 – grandmother agreed to enter into family/whanau agreement;

30 March 2015 – concerns re grandmother after home visit;

8 April 2015 – second Strengthening Families meeting;

23 April 2015 – mother engaged with SVS;

5 May 2015 – mother engaged with alcohol and drug counsellor;

25 May 2015 – third Strengthening Families meeting cancelled because grandmother doing well;

11 May 2015 – decided no family group conference needed because grandmother living separate from mother, engaged with Family Start and mother engaged with counsellors.

[25] Ms Nairn, a Senior Practitioner with Child, Youth and Family's Nelson office filed a report dated 26 January 2016 and stated:

- The [mother] continues to live in Stoke but visits daily.
- [The mother] has grown in maturity since Ms Nairn last saw her and that in her view the mother "has turned her life around".
- The grandmother told her that "she initiates and has made every endeavour to ensure that Sarah has regular contact with her father".
- The mother and grandmother said they have always wanted Sarah to have her father in her life.
- The grandmother said she had taken Sarah to Christchurch five times since September 2015.

[26] I am concerned at the way Child, Youth and Family Services (CYFS) dealt with this matter, and in particular their failure to involve the father in their enquiries.

[27] The Nelson office became involved in January 2015 as a result of the mother's behaviour soon after she arrived in Nelson. Social workers worked reasonably intensively with the mother and the grandmother, they convened Strengthening Families meetings, they contemplated convening a family group conference and they were involved with the mother and grandmother from January until July 2015. At no time did they contact the father. Given the objects and principles of the Act it is of real concern that no contact was made with the father.

[28] Ms Nairn agreed in cross-examination that normally the father would be involved, but she said that in January 2014, they were led to believe that the grandmother had a parenting order, and so "we were supporting her at that stage".

[29] Given the emphasis on the family group in the objects and principles of the Children, Young Persons and Their Families Act 1989, and noting that s 7 of that Act specifically says that the Chief Executive is to act to ensure the objects are attained,

it is of real concern that CYFS completely ignored the father when they had concerns about Sarah in early 2015.

[30] The principles set out in s 5 speak of the importance of the relationship between a child and her family being maintained, that endeavours should be made to obtain the support of the parents, and that the child's family should participate in decisions about the child. These principles were all grievously breached because no-one from CYFS investigating Sarah's situation in 2015 made any attempt to contact the father, or involve him in discussions about his daughter.

[31] The systemic delays in the Court system and the failure of CYFS to properly investigate Sarah's situation have led to a situation where a young girl's relationship with her father has been seriously impacted, despite the father seeking immediate redress when he realised that Sarah had been taken from her home in Christchurch.

The mother

[32] The mother was served with the grandmother's applications on 22 January 2014 and the father's applications on 5 February 2015. She has taken no steps at all in respect of those applications. When the mother filed an application in June 2015 applying to have the order preventing removal, removed as she said she wanted to take Sarah to Australia to visit her paternal grandfather, she gave no evidence about Sarah other than to say that Sarah lived with her mother and she was able to visit her whenever she likes, and that the father had the same rights but lived in Christchurch.

[33] Importantly, the mother did not file any evidence at all to indicate her views in respect of the competing applications.

The father

[34] The father's position is that he says he had immediate contact with Sarah after her birth despite difficulties between him and the mother. He says his name was put on the birth certificate very soon after birth.

[35] The father had concerns about the mother's behaviour, particularly her drinking. He exhibited Facebook posts from mid-2015 when the mother was talking about excessive drinking. The father was also concerned about conflict between the mother and grandmother. He reported his concerns to CYFS.

[36] The father did not see Sarah from 2 January 2015 until 3 April 2015 when Sarah stayed with him until 6 April. He next saw her in October 2015. The father's evidence was that he is in full time employment and has to take his holidays over the Christmas period when the business closes. He has no flexibility in respect of his holidays. That means, for example, that he cannot take long weekends to travel to Nelson for visits. He has made cash payments to the grandmother the last two times that she has brought Sarah to Christchurch.

[37] In May 2015, the father advised he had moved into a two bedroomed flat with his partner of two years, Olivia, and that the second bedroom was for Sarah. A social worker's report of 17 July 2015 reported no safety concerns about that flat.

[38] In evidence at this hearing the father and his partner Olivia confirmed that they are due to have a baby in late March. They are hoping to move into a bigger and more child-focused home in the next few weeks. The father is in full time employment, as is Olivia. Olivia will be taking maternity leave once their baby is born. They both gave evidence of considerable family support.

[39] The father's partner, Olivia, confirmed she was taking at least 16 weeks maternity leave after the birth of their baby and that she would assist in the care of Sarah, if she came to live with them. She and the father proposed that Sarah would attend some form of preschool.

The grandmother

[40] The grandmother was a protective and loving grandmother and stepped in soon after Sarah's birth when she was clearly needed, because her daughter struggled as a young mother.

[41] The grandmother's evidence was a little confusing as to what she saw her long-term role in Sarah's life.

The issues

[42] The maternal grandmother seeks a parenting order in her favour and an order appointing her an additional guardian. She wants Sarah to remain living in her care where she will be able to spend considerable time with the mother who, she says, spends several nights a week with the grandmother. The grandmother said she supports the father having contact.

[43] The father seeks the return of Sarah to Christchurch and he seeks either day-to-day care of her or shared care if the grandmother is to return to live in Christchurch.

Credibility

[44] I am concerned that the grandmother is not always a reliable witness. My clear view is that the grandmother dearly loves Sarah and is motivated to do what she thinks is best for her. The grandmother also wants to help her daughter, Sarah's mother. However, the level of concern that she has, has led her to misrepresent the facts and to not always be reliable in the information she provides.

[45] For example, I find that the grandmother misled the Court in her application of November 2013 when she stated "There is no father on Sarah's birth certificate and the putative father has no contact with Sarah".

[46] The use of "the putative father", rather than naming him, implied she did not know him. I accept the father's evidence that his name was on Sarah's birth certificate at the time it was registered, and even the grandmother acknowledged in cross examination that it was incorrect to say the father had had no contact.

[47] The application did not name the father at all and he was not even referred to as a party.

[48] The grandmother said in evidence that she made the applications, having been asked by the mother to do so because “we’d had threats from (the father) to uplift Sarah and take her away”, and because of the mother’s criminal history, they thought it best that the grandmother be the applicant. She did not mention any of that in her written application.

[49] That evidence made the grandmother’s original applications ever more concerning because, if her oral evidence is believed, then she clearly knew the father and he was clearly having some involvement with Sarah when she stated he was having no contact and she did not name him.

[50] Later in evidence the grandmother said in respect of her first application:

I filed that application because when Sarah was born, they weren’t getting along then, um, he would come round and play head games with (the mother)...

[51] I find that the grandmother knew the father when she made her application, that he should have been named by her, and that she also knew he was having contact with Sarah. I find she misled the Court.

[52] It is also unclear exactly what the mother’s current living arrangements are.

[53] In her affidavit dated 13 August 2015 the grandmother said of her home –

...Sarah has her own room, there is a bedroom for me too, and one for my daughter (the mother) who now lives at home with me.

[54] At a fixture callover on 7 December 2015, Judge Moran recorded:

Ms Walshe appears today for (the grandmother) she says that (the mother) is living with her and therefore Sarah has her mother and grandmother in her life on a daily basis.

[55] The social work report at 26 January 2016 said:

(The mother) continues to live in Stoke but visits daily and maintains regular contact. ...and often stays the occasional night.

In evidence Ms Nairn said she was told the mother did not live with the grandmother but does stay there to help care for Sarah.

[56] At the hearing, when her affidavit of 13 August 2015 was put to her, the grandmother said:

Yeah, well, it wasn't full time, she, I can't say that like she stays, she lives there part time.

She added that the mother also lives at a friend's place.

[57] When I noted my concern about the grandmother not always being accurate, she said:

Well, she lives with me, I've got a room set up there for when she stays because I work weekends. She stays and looks, gets up to Sarah and does everything with her, um... as far as I was concerned that she lives there...I didn't think they (CYFS) had a problem with her living there anymore...

[58] It is unclear but it does appear that the mother may be living with the grandmother and Sarah. I find the grandmother's evidence on this point is not clear.

[59] I also note that Ms Nairn said in her January 2016 report that:

(The grandmother) has taken Sarah down to Christchurch 5 times since September 2015.

[60] In cross-examination Ms Nairn noted that her visit with the grandmother was rushed but that the grandmother thought it was five times since September. In evidence the grandmother having been taken through the actual contact visits, acknowledged that there had been three contact visits since February 2015, four visits including the one scheduled around the hearing and fifth had been planned but cancelled.

[61] The evidence is that since September 2015, Sarah has had contact with her father once; and a second time was to occur after the hearing. He has not had 5 contact visits in the entire time since Sarah left Christchurch.

[62] It is of concern that as such on such an important point, the information given to the social worker was clearly wrong.

[63] In summary, I have concerns about the accuracy of the information provided by the grandmother. I have no such concern about the information provided by the father.

The Law

[64] In my decision making under The Care of Children Act 2004, the Court's paramount obligation is to make orders which are in a child's welfare and best interests. In considering that criteria, I must take guidance from the s 5 principles.

[65] These are:

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[66] In respect of (a), there were concerns, acknowledged by the grandmother, in 2014 and early 2015, about the mother's volatility. The grandmother was required to act protectively. There is no suggestion that Sarah's safety is at risk with the father.

[67] In respect of (b), (c) and (e), the emphasis is on the importance of the child's relationship with both parents. The mother and grandmother effectively sidelined the father's involvement with Sarah by their unilateral decision to leave Christchurch. I find they did not tell social workers in Nelson of the father's involvement with Sarah, they did not consult with him about Sarah and they minimised his involvement in her life.

[68] I find that before Sarah was taken to Nelson, she had regular contact with her father, which was, at times, required to fit around his employment. I am not going to criticise the father for the fact that his full time employment meant he could not spend more time with Sarah. I believe that Sarah had an attachment to her father by January 2015, and that this attachment, and her relationship with her father was ignored by the mother and grandmother.

[69] I observe that the mother has never participated in any arrangements made for Sarah to have contact with the father since January 2015.

[70] In respect of (d), the actions of the mother in removing Sarah from Christchurch, given the financial resources of the maternal family, and the father's employment meant that the continuity that Sarah had had in having contact with her father was severed.

[71] The cumulative actions of the mother and/or grandmother in not naming the father in the parenting application, removing Sarah without consultation, not advising CYFS of the father's involvement, and not facilitating regular contact, do not support most of the principles which the law says relate to a child's welfare and best interests.

Discussion

[72] Because the mother chose not to respond to either application filed, or to file any affidavit evidence, her current circumstances and plans are not clear.

[73] I believe that Sarah is clearly closely bonded to her maternal grandmother, who stepped in when the mother had difficulties, and Sarah would be affected if her contact with her grandmother was reduced.

[74] I have also considered that Sarah has already missed out on contact with her father for over a year. There are no disintitling features in the father's life. Indeed, the evidence in respect of him is positive. He is in full-time employment. He is in a settled, supportive relationship. He has support. He has displayed tenacity and perseverance in pursuing his applications, as indeed he did, in pursuing contact with Sarah after she was born.

[75] I observe that the father has also assisted the grandmother financially, with contact costs, despite his opposition to Sarah's removal.

[76] I observe that the father has proposed a shared parenting agreement if the grandmother/mother return to Christchurch. The father's evidence is that he acknowledges and supports the maternal side of Sarah's family and wants Sarah to have positive and meaningful relationships with them.

[77] Although Ms Nairn reported the mother and grandmother to want the same thing, their actions do not indicate that to be the case.

[78] I have carefully considered the close relationship that I find Sarah has with her grandmother. I acknowledge that it may cause Sarah some distress if her contact with her grandmother is significantly curtailed. However, the Court must consider the rest of Sarah's life, and not just the next few months.

Conclusion

[79] I find that Sarah is entitled to an on-going relationship with both of her parents and her grandmother. Indeed it is in her best interests that she has that. I have very little evidence about the mother because she chose not to provide any, but I do have concerns about her stability and alcohol and drug use. I acknowledge that Ms Nairn said she had witnessed positive changes in the mother. However, I note that

Ms Nairn described her involvement with the mother for the purposes of her report as “rushed”, and she also relied on self-reporting. I cannot place a lot of weight on Ms Nairn’s conclusions about the mother.

[80] The father presents as ready, willing and able to parent Sarah. There is no evidence which would disentitle him as a care-giving parent. Indeed the mother trusted him to care for Sarah overnight when Sarah was a very small baby. The mother also trusted the father and his partner to care for Sarah for 11 days over the 2014/15 Christmas period.

[81] Since Sarah was removed from Christchurch, I do not accept that the grandmother has fully supported Sarah to remain in contact with the father. I am of the view that when making the move to Nelson, neither the mother nor the grandmother considered the importance of Sarah’s having contact with her father. The grandmother’s current proposals for on-going contact were not well thought-out nor realistic, given what has happened in the last year.

[82] I find that the father would support Sarah’s on-going relationship with the grandmother. Indeed he proposed shared care, if the grandmother returns to live in Christchurch. The father has contributed financially to help the grandmother travel to Christchurch. He has thereby demonstrated that he means what he says.

[83] I find it is in Sarah’s best interests that the father and the grandmother share her care in Christchurch, but if the grandmother chooses not to relocate to Christchurch, then it is best for Sarah that she be in the day-to-day care of the father.

[84] If the grandmother does not return to Christchurch, Sarah needs to see her as often as is practical. The mother can see Sarah when she is with the grandmother.

Orders

[85] I make the following orders:

- (1) Sarah is to be returned to live in Christchurch by 31 March 2016 or a date mutually agreed to by the father and grandmother.

(2) If the grandmother also returns to live in Christchurch, then the grandmother and the father will share the care of Sarah on a week about basis, with changeover to be each Sunday between 3.00 pm and 4.00 pm.

(3) If the grandmother returns to Christchurch by 31 March, then Sarah will transition into her father's care as follows:

She will be in her father's care from:

(i) 3.00 pm Sunday 3 April to 4.00 pm Tuesday 5 April;

(ii) 3.00 pm Sunday 10 April to 4.00 pm Wednesday 13 April;

(iii) 3.00 pm Sunday 17 April to 4.00 pm Wednesday 20 April;

and thereafter every second week beginning Sunday 24 April.

(4) (a) The father may have Sarah in his care for the duration of his holidays, if he is in fulltime employment, and the grandmother, if she chooses, is to have an equal amount of time during school holidays or otherwise to equalise the time that Sarah spends with each of them. Once Sarah is at school, the school holidays are to be shared equally.

(b) The father must give the grandmother notice in writing of his holiday periods at least six weeks in advance, and the grandmother must also give the father six week's notice of the times when she seeks the make-up time.

(5) If the grandmother does not return to live in Christchurch by 31 March 2016, then Sarah will go into the day-to-day care of the father on 31 March by 4.00 pm or at a mutually agreed date and time.

(6) If the grandmother does not return to Christchurch she may have Sarah in her care:

(i) for up to 12 weekends per calendar year from after school Friday until school on Monday, and

(ii) for two week-long periods;

(iii) at such other times as is agreed between the parties.

(iv) the cost of travel is to be shared equally.

(7) If the grandmother does not return to Christchurch she may telephone, Skype or Facetime Sarah once per week at an agreed time, and she may telephone, Skype or Facetime Sarah on Sarah's birthday, her birthday and Christmas Day and Sarah's mother's birthday.

(8) When Sarah is in the grandmother's care, she is not to be left in the overnight care of the mother unless the father agrees.

[86] I presume that if the grandmother returns to Christchurch, then the mother will also do that, and will live with the grandmother. In that case I would not appoint the grandmother as an additional guardian. If the grandmother remains in Nelson, I would not appoint her as an additional guardian. I, therefore, dismiss the grandmother's application to be appointed as additional guardian.

[87] If the grandmother returns to Christchurch and the mother does not, I would expect the father to agree that the grandmother could be an additional guardian, given that they would be sharing Sarah's care and Sarah's life.

[88] I extend Ms Michell's appointment as Sarah's lawyer and she is to talk with the parties and is to prepare a final parenting order for sealing when the grandmother has decided whether or not she will relocate.

J A McMeeken
Family Court Judge

Signed in Christchurch on _____ at _____ am/pm