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**IN THE FAMILY COURT
AT TAURANGA**

**FAM-2016-070-000027
[2016] NZFC 1746**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN ERIC DENNELL
 Applicant

AND JEWEL SPEAR
 Respondent

Hearing: 1 March 2016

Appearances: M Stremmer for the Applicant
 P Jones on behalf of T Marshall for the Respondent
 F MacKenzie as Lawyer for the Children

Judgment: 1 March 2016

ORAL JUDGMENT OF JUDGE S J COYLE

[1] At some point Mr Dennell and Ms Spear loved each other and they brought into this world four children; Kerena, Anissa, Nate and Ash.

[2] They have separated now and there is, at this point in time, a high degree of conflict and animosity between them and both have clearly lost sight of the reasons why they were attracted to each other in the first place and at this stage are focused entirely on their conflict.

[3] Caught up in the conflict are their four children. The matter is before the Court today, because Mr Dennell is willing to have a relationship with the children. He has to all intents and purposes, not seen them since November and until recently, there really has been no agreement on a way forward.

[4] Accordingly, when the matter came before me on 22 February, I set this matter down by way of a submissions only hearing to progress the issue of Mr Dennell's contact with the children.

[5] As Ms Mackenzie, the court appointed lawyer for the children, has said it is to the parties' credit that in the intervening time, there is now agreement on who is to supervise Mr Dennell's contact and that contact should occur.

[6] The issues I have to determine are around the duration and the frequency of contact. Mr Dennell seeks contact from 10.00 am to 4.00 pm every Sunday, except when he is working during the day on a Sunday.

[7] Ms Spear seeks contact for either every second weekend or for two weekends out of three and from 10.00 am to 3.00 pm.

[8] As I have said, Ms Mackenzie has been appointed by the Court to represent the children. She has filed a report dated 19 February 2016 and as she has highlighted in her submissions today, the views of Kerena in particular, are somewhat ambivalent about seeing Mr Dennell.

[9] The younger three children, in particular Ash and Anissa have also expressed a view that they do not want contact with their father. The youngest Nate, has not

expressed any clear view but Kerena's view is that Nate would not want any contact with his father.

[10] The Court is required to take into account the views of children, pursuant to s 6 of the Act, but to weigh those views in terms of deciding what weight to be attached to those views, against these children's age and maturity (see *C v S*¹).

[11] Ms Mackenzie, in her submissions, has indicated that Kerena in particular will not like the idea that she is to be forced to see her father and that she may well resist that.

[12] I often describe the care arrangements that are agreed to by parents as a marketing exercise, in that it is for the parents to together support and encourage the children to have contact with both parents. It would be extremely useful, for Kerena in particular in my view, for her mother to communicate to her that she 100 percent supportive of Kerena and indeed all four children having a relationship with their father and that she came to Court proposing regular and frequent contact. It is important for these four children to know that both parents support the children having a relationship with each other.

[13] What is clear to me, is that for whatever reason, the children's relationship with their father at present is fraught and they are, at best, ambivalent about seeing their father. To force them into an arrangement, whereby they are seeing their father every week, runs the risk of that simply being too much too early and having the opposite effect to that which is intended, in that the children begin resisting seeing their father even more because of the issue of frequency.

[14] Those concerns of course have to be weighed against the relevant principles in s 5 of the Act, or an exercising decision about the care arrangements for the children. I am required, pursuant to s 4 of the Act, to take into account the relevant s 5 principles. I remind myself also that I need to recognise that these children are unique individuals, part of a unique family group and thus I need to make an individualised assessment rather than applying any formulaic assessment.

¹ (2007) NZFLR 583

[15] There are concerns and allegations around Mr Dennell's safety with the children. He has agreed today to undertake a hair follicle test and if that comes back with a result not indicating the presence of non-prescription drugs, then it is likely, I am told by Ms Jones that that will give her client some reassurance and that there should be then a way forward. But until those results are available, the safety issues in s 5A Care of Children Act 2004 are met by Mr Dennell's agreement that there be supervision.

[16] The maternal and paternal grandmothers are to provide that supervision, on an alternating basis and the children are to be transported by Ms Spear to the respective grandmother's home at the start and end of the periods of contact, thus the safety issues are addressed through the agreements reached in relation to the supervision.

[17] Sections 5B and 5C are relevant on the facts of this case and provide for these parents to be involved and to be responsible for the care of their children and for there to be ongoing consultation and cooperation. The latter is aspirational at this point in time, although when the matter was last before me, I did direct with the support of parties and counsel, counselling pursuant to s 46G of the Act. I am concerned to hear that that has not been actioned at this point in time.

[18] Section 5E provides for children having a relationship with both of their parents and there is clearly a tension between Kerena's views in particular and that principle, as well as the children's relationship with their wider family group being preserved and strengthened.

[19] I agree that Mr Stemmer, in his submissions that the involvement of the grandparents certainly is giving effect to that principle in terms of the wider family group.

[20] Ms Mackenzie, in her submissions, has squarely highlighted the tension between the principles, a welfare and best interest approach in the views of the children.

[21] It is significant in my view that there is now agreement by Ms Spear that the children should be having contact and a relationship with their father but as I have already said, I am concerned if there is too great a frequency, then frequency itself runs the risk of becoming a stumbling block in terms of the children developing and strengthening their relationship with their father.

[22] Given the paucity of contact between November and now, what in effect is daytime contact every fortnight is not enough contact in my view. I agree with Ms Mackenzie that there is very little in it between 10.00 and 3.00, and 10.00 and 4.00. I note that Nate appears to have an early bed time but I would have thought for one night on occasions he could have a later bed time.

[23] That is, his relationship with his father and the development and strengthening of that has got to have greater priority than a legalistic adherence to a 5.30 bed time.

[24] It is my finding that contact should occur for two weekends out of three between 10.00 am and 4.00 pm.

[25] It is those arrangements which in my view meet the tension between the views of Karena in particular and the need for the children to develop and grow their relationship with their father.

[26] Mr Stemmer has sought costs on the application but Ms Jones has counted by advising that Ms Spear is in receipt of civil legal aid and on that basis I do not intend to make any cost award as I agree with Ms Jones that there are clearly no exceptional circumstances to justify an award of costs.

[27] For those reasons therefore, I make an interim parenting order in relation to all four children as follows:

- (a) The children are to be in the care of their father for two weekends out of three, commencing this Sunday, 6 March 2016 from 10.00 am to 4.00 pm on the Sunday of that weekend.

- (b) Such other periods of contact or care as can be agreed from time to time between the parties.
- (c) The children are to be in the day-to-day care of their mother at all other times.
- (d) The parenting order is conditional upon the following:
 - (i) If Mr Dennell is working during a Sunday in which he is scheduled to have contact, that contact will not take place. However if he is working for the nightshift for that Sunday, then contact on that day is to occur from 10.00 am to 2.30 pm. Mr Dennell is to advise Ms Spaer of any such Sundays where those changes will need to be made, as soon as he is aware that that will become an issue upon receiving his work roster.
 - (ii) Mr Dennell is to provide an affidavit attaching a hair follicle test result, with the test to be undertaken within the next four weeks.
 - (iii) During the periods in which the children are in the care of Mr Dennell, his contact with the children is to be supervised by either the maternal or paternal grandmothers on an alternating basis.
 - (iv) Ms Spear is to deliver the children to the respective grandmother's home at the start of the periods of contact and to collect them at the end of the periods of contact and in recognition that Ms Spear is providing the transport, Mr Dennell is to make a reasonable contribution towards her petrol costs.

- (v) Neither parent or grandmother will be under the influence of alcohol, to the extent that they will be above the legal limit for driving while the children are in their respective care.
- (vi) Neither party nor grandmother is to be under the influence of illegal drugs or non-prescribed medication while the children are in their care.
- (vii) Neither parent is to expose the children to any discussion about the Court proceedings, any adult issue or any negative comments about either parent or the grandparents.
- (viii) The children are not be recorded or taped at any time.
- (ix) Should the children wish to return home during contact, then Mr Dennell will give reasonable consideration to that request.
- (x) There is to be no physical discipline by either parent of the children.
- (xi) Finally, I note that the maternal grandmother is to be the supervisor for the upcoming visit this Sunday.

[28] This order is now in order of the Court and needs to be complied with. It is not for the parents or the children to decide whether they are going to adhere to the order or not. If the order is breached, I would expect there to an application for admonishment before the Court.

[29] The remedies for a Court on a blatant breach are to refer the matter to the police for prosecution, which upon conviction carries a criminal conviction and the potential of imprisonment. Alternatively the Court can fine a party or change the care arrangements.

[30] Certainly, if there are ongoing breaches, then I, probably on my own motion, would convene a contempt hearing and if a party in breach is found to be in

contempt of Court by continuously ignoring an order of the Court, then the only option for the Court is a sentence of imprisonment.

[31] I spell that out because I want to be clear that I expect this order to be complied with, 100 percent. If it is not, there will be consequences and the consequences will be for the adults in this room, thus the children need to understand that the parents have agreed to contact. The Judge has made that into an order and that they now must go and have a relationship with their father.

[32] I note the matter has already been directed to a judicial settlement conference so the matter can come back at that stage in terms of the proceedings, unless of course there is prior agreement reached between the parties.

[33] Finally, having heard further from Ms Mackenzie, I would ask that she meet with the children and explain to them the terms of the order and the applications of the order for them and the expectation of everyone, including the parents, that children will now have an ongoing relationship with their father.

S J Coyle
Family Court Judge