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**IN THE FAMILY COURT
AT HAMILTON**

**FAM-2015-019-000569
[2016] NZFC 3160**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN ELLA TODD
 Applicant

AND DAN WALSH
 Respondent

Hearing: 13 April 2016

Appearances: Ms S Lister for the Applicant
 Mr D Venter for the Respondent
 Ms C Starr as Lawyer for Child

Judgment: 20 April 2016

**RESERVED JUDGMENT OF JUDGE R H RIDDELL
[Care of Children]**

Introduction

[1] The parties have two children Helen who is eight and Fay who is six. The parents have been separated for a number of years.

[2] The younger child has a number of diagnosed health conditions including [details of health conditions deleted]. The older child has high functioning autism.

[3] On 19 August 2016 the mother filed a without notice application seeking to suspend the father's time with the children. That was placed on notice. Regardless of the Court declining to make the order sought by the mother, she arbitrarily reduced father's contact to day time only.

[4] On 28 September 2015 the mother agreed to revert to the usual arrangement of the father having each week from Thursday to Saturday and the mother having the rest of the care time. That agreement became an interim parenting order.

[5] At the hearing the mother wished to continue that arrangement while the father sought equal time with the children.

[6] The mother identified her issues of concern being:

- (a) Her view that the father had not been careful enough to avoid giving Fay food which aggravated her allergies.
- (b) She does not believe the father has had care of the children for a week at a time for anything other than occasional holidays and does not believe he could manage their care.
- (c) She is concerned about the lack of communication between the adults and his failure to talk to her about issues affecting their daughters.
- (d) The mother believes that the father is unlikely to be available to the children on a week about basis because of his work commitments. The mother notes that she has been the one who has taken Fay to

various medical appointments and claims the father has chosen not to be involved in this.

- (e) The father has not always been precise about ensuring Fay takes her necessary medication at the right time. The mother is also concerned that the child has been returned to her unwell and required medical intervention.

[7] The father denies that he has been inattentive to the girls' medical needs or that he is unable to care for them on a week about basis.

Evidence

[8] Both parents gave evidence as did the father's partner.

[9] It is accepted that the mother has borne the brunt of attending the necessary medical appointments for their daughters. That is probably reflective of the fact that the girls have been in her primary care. The father says that he has attended some appointments when he is aware of them and was at the hospital when Fay was admitted for some time.

[10] The mother was working but gave up her job when Fay was to have surgery for her [details of health condition deleted]. The operation resulted in medical misadventure and Fay was in hospital for a month.

[11] The mother hopes to be able to take on some part time work from home, but for now is totally focussed her daughters' health needs. It is apparent that, in the past Fay's health concerns have required careful monitoring and the mother has done an excellent job in taking primary responsibility for that.

[12] At the same time, it has resulted in her being somewhat of a gate keeper to the children. She is critical of the father's efforts. She does not trust him to administer the correct medication. In the past she has sent prepared food with the children on visits to their father.

[13] Because the mother is understandably cautious and careful about her daughter's health and because she is unable to communicate in a reasonable way with the father, she is left in the position of believing that she is the only one that can attend to their needs properly. That is the gate keeper attitude to which I am referring.

[14] After listening carefully to the evidence, I had some concerns about the position taken by the mother. Specifically:

- (a) She maintained that the father had not cared for the children independently "for any length of time" since separation. That was an overstatement. He has had the children in his care for a week at a time during holidays and has been the primary caregiver when the mother has had to go overseas for work related matters.
- (b) The mother detailed the father's failure to take Fay to the doctor on 26 March. As a result when the child was returned to her care on 27 March, she had a throat infection requiring medical intervention. What the mother failed to disclose to the Court in her without notice application, was that the child was unwell on Thursday 24 March to such an extent that she was kept home from school. Yet the mother did not take the child to the doctor then prior to the father's contact.
- (c) The mother's claim that the father does not take the children's medical concerns as seriously as her is not borne out by the evidence. The father's explanation for the child having blueberries was a reasonable one and there is no evidence that he deliberately gives them food which might exacerbate the allergies. The parents' failure to be able to discuss that incident is typical of the lack of trust between them and the mother coming to the conclusion that the father had deliberately fed the child food that was forbidden, or at least was careless about it.
- (d) The mother was critical of the father's partner caring for the children. But in evidence she referred to her partner caring for the children on

occasion when she started work at 4am or currently when he occasionally looks after the girls. I do not see why the father's partner is any less suitable to look after the children.

- (e) The mother complained that if the children were in the father's care they would have to be in after school care which was unacceptable to her, particularly as she was available to look after them. In my view that was an unreasonable assumption to make and shows a lack of respect for the father's ability to manage the girls' care. She had not communicated with him by text or email to find out if he *was* available and he has indicated to the Court that he would make arrangements to change his work hours so that he could be with the girls after school. Even if he could not, I consider that is a responsibility for him to meet.

- (f) The blueberry incident was a catalyst for this application which led to the mother arbitrarily restricting contact to day time only. As time passed the mother agreed in late September 2015 to the father's original contact being reinstated. That suggests two things to me. First the mother's actions in restricting contact was an over-reaction. Second I can only conclude that, with the passing of time she realised that she was being unreasonable in agreeing to go back to the original terms of contact. I do not consider that the blueberry incident warranted such a drastic step as reducing the father's time with the children so he could not have them overnight at all.

[15] The father appeared to me to be a sensible parent who is well aware of the dietary restrictions and other issues for his daughters.

[16] He is a [occupation details deleted] and is able to exercise a degree of flexibility in his work hours.

[17] In his affidavit he said:

I have always been careful about what food I feed Fay. I use separate cooking utensils and have taken all necessary steps to prevent cross contamination. Fay was taught from an early age to cross check whether she can eat a particular food before she eats it.

As part of my job as [occupation details deleted] I hold various food safety certificates. [Details deleted]. All this is helpful with Fay's dietary requirements.¹

[18] The father acknowledged that Fay ate a sweet containing blueberries. He said at the time he had not deliberately fed it to her and that Fay did not show any of the usual signs of an allergic reaction. The father further said that there was no sign of any allergy symptoms when he dropped her off that afternoon.

[19] From the father's written evidence and in cross-examination, I am satisfied that he is able to attend to his daughters' needs and that he would not deliberately put them in harm's way.

[20] A number of challenges were put to the father about his failure to attend functions such as school sports, camps and parent teacher meetings. It seems that from time to time he has done so. In an ideal world, both parents would attend all children's' activities. In reality that is rarely possible. The commitments of work mean compromise is necessary. Third parties must occasionally care for children. One parent might assume a greater responsibility for medical appointments as has happened here. I do not consider any criticism of the father in that regard is warranted.

[21] The father gave evidence that he made a separate appointment for his daughter's parent teacher interview. He did not tell the mother of that arrangement. She sent a text to him informing him that she had made an appointment and gave him the time.

[22] That was a prime example of both parties not communicating well. The mother assumed that she would make the appointment, without checking with the father first. He made a separate appointment without advising her. This is the kind

¹ Affidavit 28 August 2015 [14 – 15]

of lack of trust which has led to poor communication between the parties and they will need to address that in another forum.

[23] I was impressed by the father's partner who also gave evidence. She presented as a kind and sensible woman who might be a suitable person to act as go between for the parents.

[24] The father was cross-examined about the possibility that his relationship with his partner might end.

[25] While the father disputed that might occur, it is always a possibility. The mother's relationship might end. One of the parties might become incapacitated or die. The parents would need to face those major changes if they occurred. The Court cannot make an order based on "what if" but rather on "what is".

[26] At present the arrangement sees the children in their father's care from Thursday afternoon to Saturday afternoon. Therefore he only has one evening in which he is responsible for helping them with homework and doing school related matters.

[27] Those evenings together are very important. It is not just working together on homework but spending time in the evening, having dinner together, reading stories in bed and having breakfast together which helps to cement a parent's relationship with their child.

[28] In her affidavit of 5 April 2016, the mother set out two reasons why she thought a week about arrangement would not work well for the children. They were firstly the father's work commitments which would mean he could not care for the girls adequately and secondly Fay's medical issues.

[29] The father more than adequately addressed the concern about his work commitments. He is able to have flexible hours. I do not consider that his work arrangements to be a serious impediment to caring for the children.

[30] I am also satisfied that he is quite aware of both girls' health needs and it is significant that Fay has not suffered any major allergic reactions since the blueberry incident in August 2015. If the father had been careless about the kinds of foods that Fay ate, then I would have expected to see a number of more recent incidents as examples of that negligence. There have not been any.

[31] I made reference to the mother's gate keeping attitude. She was asked about her action in limiting father's contact to day time only and whether that sent a message to the girls about their father. She did not think so. With respect I disagree. The girls would have wondered why they were not seeing their father as often. Given the comment by Fay to her father after accidentally eating a blueberry sweet, it would seem Fay was well aware what her mother's reaction would be.

The law

[32] The proceedings are governed by the Care of Children Act and in particular s 4, 5 and 6.

[33] Section 4 places the welfare and best interests of the children as the paramount consideration in any dispute.

[34] Section 5 sets out a number of principles which should be considered when determining the care arrangements. Ideally parents should make their own arrangements for their children's care and it is only when the dispute escalates to the extent that they are unable to agree, that the Court must step in and decide for them.

[35] The first principle is that a child's safety must be protected. In this case it is particularly important that Fay is not exposed to food which might make her unwell.

[36] Section 6 of the Act deals with children's views. Generally where a child is of an age to convey any views or wishes that can be done through their lawyer. Occasionally a child may wish to meet with the Judge before or during the hearing. Neither child wished to meet with me.

[37] The girls reported to their lawyer that they liked their father's partner and that the incident where Fay had a blueberry sweet was probably a mistake.

[38] They did not report any other concerns to their lawyer.

Decision

[39] Both parents are careful and committed to their daughters' care in their own way. Neither is the perfect parent. Neither gets it right all the time.

[40] Each parent needs to develop some trust in the other, despite the differing approaches.

[41] I consider that this conflict is primarily adult based rather than being about the children's health issues or the father's inadequacies in regard to their care.

[42] That being so, it is the adults who need to change their approach.

[43] I return to the issues raised at the start of this decision and make findings about them as follows:

- (a) The mother had alleged that the father had aggravated Fay's allergies by feeding her food that was forbidden. I find that that was a one off mistake some eight months ago and it has not been repeated. It is not an example of the father's lack of care or any deliberate attempt by him to harm his daughter. It was simply a mistake.
- (b) The mother was concerned that the father had not cared for the children for any length of time. I find that is not so. He has had the children in his care for a week at a time and there has been no particular issue about that when the girls were returned to their mother's care apart from Helen being somewhat unsettled. The mother was not entirely upfront with the Court in acknowledging the times when the father has had the children in his sole care.

- (c) The mother cited a lack of communication between the parents and she is certainly right that there is not adequate and respectful consultation between them. That is not a reason to curtail father's time with the children, but rather suggests that both parents need to work on their interaction.
- (d) I have found that the father's work commitments do not preclude him from having the children in his care. It will be up to the father to manage the children when they are with him and if he can rearrange his work commitments that would be ideal. If there are times that he cannot do so, then he will have the responsibility for putting the girls in after school care. That alone is not a reason to deny him further time with the children. It only represents a couple of hours in each week day and the time spent together that evening and the following morning is also very valuable.
- (e) The allegation that the father has failed to give Fay the appropriate medication is based on a couple of incidents. The first one when she was returned to the mother's care and had to visit the doctor is a case in point. I do not know why the mother failed to disclose that Fay was unwell before she went to the father's home and on that occasion she did not take the child to the doctor. Perhaps the father did not notice that Fay was unwell at the end of the visit. Children can become unwell very quickly and if the father missed it that is unfortunate but again is not a reason to punish him by reducing his time with the children. I am satisfied that the father is well aware of both children's needs. He knows about medication and there is a communication book which should be used to convey anything that arises in relation to the children's health.

[44] On balance I see no reason why these parents should not share the care of their children on an equal basis. The father is ready and willing to assume that responsibility. He has demonstrated a sound knowledge of the children's needs and

he has a partner who is matter of fact in her approach to the children. They get on well with her and she with them.

[45] No doubt there will be slip ups on both sides. That is not an opportunity to return to Court but should be a timely reminder that the parents need to learn to communicate better for the sake of their children. As noted above I consider that is at the heart of this conflict. Unless these parents can learn to work together, accepting that each has a different parenting style, then their misunderstandings and tensions will continue and the girls will no doubt be aware of that.

[46] Given that the children will be in the equal care of their parents, there will be no sense that one parent is more “in charge” or solely responsible for decision making. Any guardianship decisions such as choice of doctor, medical treatment, schooling issues and so on must be made jointly after consultation with each other.

[47] I make orders as follows:

[48] The interim parenting order of 28 September 2015 is discharged.

[49] I make a final parenting order giving both parents the shared care of the children on a week about basis with change over occurring at school at 3pm on a Friday.

- (a) The school term holidays will be shared on an equal basis continuing the week about arrangement.
- (b) There will also be equal sharing of blocks of two weeks holiday during the Christmas school holiday.
- (c) Christmas day will be alternated on terms agreed by the parties. In the event they cannot agree then the parent who did not have the children on Christmas day in 2015 will have them from 4pm on 25 December to 2pm 26 December 2015 alternating in every even numbered year thereafter.

- (d) Reasonable telephone contact will be reserved for the parent who does not have the care of the children at the time.

Conditions

- (i) The parties are to notify each other if there are any immediate health concerns for either child and the parent that has the care of the children at that time is to take the child to the doctor.
- (ii) A communication book is to travel between the parents to contain details of any medication that either child is required to have, any health issues that require monitoring and any “[details deleted] diary” for Fay.
- (iii) There is to be consistency between the homes in terms of the routines for the children and in terms of any health supplements that the children are taking.
- (iv) The children’s doctor is not to be changed without consultation and agreement.
- (v) Communication between the parties is to be by way of text message which is to be limited to dealing with matters affecting the children.

[50] It is school term holiday time. It is not clear where the children are currently staying or how much time they will have with their father. If a week about arrangement is in place, then that should simply continue as per the above order. If the children are in their mother’s care and the father does not have allocated time in these holidays, then the order will commence on the Friday at the conclusion of the first week back at school with the children being in the father’s care for the following week.

[51] In the event that the parties are prepared to attend specialist counselling I direct such counselling to occur with a psychologist pursuant to s 46G of the Act.

That person is to be provided with a copy of this decision to assist with the background to the dispute. Up to 12 sessions are directed and the cost is to be met by the Court.

[52] Lawyer for child's appointment is concluded with the Court's thanks.

[53] Neither parent is legally aided. The mother is not working at present. The father is working. In the circumstances of this case I consider it would impose an undue hardship on either parent to require them to contribute to the cost of lawyer for child's appointment. In the circumstances under s 135 (a) (2) of the Act no contribution is therefore required.

[54] No order is made as to costs.

R H Riddell
Family Court Judge