

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

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**IN THE FAMILY COURT  
AT CHRISTCHURCH**

**FAM-2014-009-001457  
[2016] NZFC 4738**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	LYDIA FLEMMING Applicant
AND	BARRY GREEN Respondent

Hearing: 27 May 2016

Appearances: C Gibson for the Applicant  
No appearance by Respondent  
Ms Marsden (agent) Lawyer for Child

Judgment: 8 June 2016

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**RESERVED JUDGMENT OF JUDGE E. SMITH  
[Reasons for decision s 48 COCA]**

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[1] The parties are the separated parents of two children, Poppy born [date deleted] 2013 and Noah born [date deleted] 2015.

[2] After separation Mother assumed the day to day care of the children. There were concerns regarding Father's ability to care for the children unsupervised given issues of potentially mental health and his lack of sobriety. In that regard I gave a reserved decision on 4 December 2014 that traversed a number of significant concerns regarding Father's disposition and ability to have the children's care. Fundamental to that were issues of Father's overuse of alcohol and from time to time decompensating mental health position. One of the other issues within that fixture was Father's prevarication about being prepared to disclose to the Court professional assistance he may have had with respect to both of those matters. He was guarded and covert and on other matters vague.

[3] At the fixture before me in November 2014 Mother was incredibly supportive of contact and the children's relationship with their father providing it was safe. This is an enduring and admirable feature of Mother and a matter I return to later in this decision.

[4] Irrespective, I approved unsupervised contact on an interim basis in a limited fashion (refer paragraph [60] of my decision of 4 December 2014). Those orders were predicated on Father providing to Lawyer for the Child consents to enable Mr Wren to obtain an independent psychiatric/psychological assessment of Father in matters touching on sobriety. Father duly provided those consents. That report commissioned by Mr Wren came to hand in April 2015. Father co-operated fully in the process of the report.

[5] Once the report came to hand, a round table meeting was held and taking into account the recommendations and opinion of the psychiatrist with the assistance of counsel, the parties reached a further interim agreement. A fundamental condition of that agreement, however, was that Father would on the third and sixth month anniversary of the meeting provide to Mother and Lawyer for the Child appropriate blood testing and liver functioning assessments as recommended by the psychiatrist

in that report. It was agreed that unless the test results raised significant issues, the interim order that the parties were inviting the Court to make would become final.

[6] Accordingly, by consent the Court made a further interim order of 4 August 2015. That order continued to vest the day to day care of both children in Mother and preserved defined unsupervised contact to Father. The intent was that the interim order would become final subject to Father providing the testing results of the twelfth and twenty-fourth week. The Court duly issued such an order.

[7] However, while some of the contact had gone particularly well, by May 2016 Mr Wren advised the Court that Mr Green had not undertaken the blood and liver functioning tests as agreed, during the six months following the meeting in July 2015 and he had still failed to do so.

[8] In the light of that information, Mr Wren was unprepared to agree to final orders that might have Father having unsupervised contact with the children without some better assurance of safety, in particular his consideration of any ongoing mental health or sobriety issues.

[9] Accordingly, the matter came before me in Chambers. I was unprepared to allow the interim order to become final in light of the above information and set the matter for a Case Management Conference on 27 May 2016. The Minute I issued required parties and counsel to attend and if the parties did not attend, they were put on notice that their respective applications or defences might be discontinued or maybe debarred from defending and if so, a formal proof fixture would proceed that day.

[10] I am satisfied that the fixture notice for 27 May 2016 was sent to the parties at the last known address for service.

[11] When the matter was called on 27 May 2016 Mother and her counsel were present together with agent for Lawyer for the Child. There was no appearance by or for Father. Mother confirmed Father's last known address. I confirmed that the fixture notice had gone to his last advised address but more than that Mother had

indicated Father had contacted her the night before and said “Good luck for tomorrow”. He was clearly aware of the proceeding.

[12] Given there was no appearance by Father I debarred him from further opposing Mother’s application for final parenting order and as indicated in my prior Minute, the matter proceeded by way of formal proof.

[13] The evidence that the Court had was the updating affidavit of Mother together with a copy of the report of James Foulds (Consultant Psychiatrist) of 17 April 2015. I record my findings on the evidence below but overall Mother was still seeking an unsupervised contact order for Father but with the provision for her to require supervision or suspension at her discretion if there is or was, on her assessment, decompensation by Father or he was using alcohol.

[14] Mother’s updating evidence established that after April 2015 there was a two week care arrangement put in place whereby Father in week 1 had the children from 4pm Wednesday to 7.30/8.00 am Friday and on Week 2 4pm Friday from 4pm until 6 – 6.30pm Sunday. In general terms that went well. The children were happy to see Father and returning without issues. For Mother’s part at that time she said there was nothing to suggest Father was relapsing in terms of sobriety or decompensation of mental health. Communication and co-operation was good and there were elements of flexibility. At that time Father was in another relationship with Claire.

[15] However in 2016 Mother began to notice Father becoming unreliable. He was not turning up to collect the children or ringing to let her know that he could not have them. This pattern continued and Mother noted Father did not have the children on 6 January 2016, 19 February 2016 (weekend visit) and 4 March 2016. In addition, other issues began to re-emerge that alerted Mother to potential concerns. In particular Father started sending her inappropriate texts, asking to take her and the children out for dinner, on picnics and other outings. He began to make personal comments about her and what she looked like e.g. “*you still take my breath away how beautiful you are*” and “*your hair looks amazing*” and asking her questions about who she was seeing. For my part I note that during my prior fixture I had

commented that Father still had an affection and attachment to Mother that was causing some difficulty.

[16] Mother also deposed that Father began being elusive about his living arrangements. He initially said that he was returning to live with his parents as his relationship with Claire had ended but his mother had told the applicant otherwise as recently as 22 February 2016. Mother is still uncertain as to where the children are staying when they are with their Father.

[17] In April 2016 the mid-week overnight visits (Week 1) stopped. Father said to Mother they were “*too hard*” because he was working. Further, Father told Mother he wanted the children to change preschools so that it would be easier for him. He also talked about changing the arrangements to week about arrangements which Mother disagreed to as the children are very settled at preschool.

[18] Very recently Mother began to receive further text messages. They confirm Father was drinking again (i.e. talking of falling off the wagon) and about having to have a break up (sec). He also rang to ask if Mother wanted airpoints.

[19] Mother reflected on all of the above information, assimilated it and suggested that perhaps in light of the behaviour that contact did not occur. Mother had formed the view by this stage that perhaps Father’s changes in behaviour were symptomatic of other issues affecting him. She reread Dr Foulds’ report and noted the likelihood of Father relapsing within twelve months and particularly the reference to relationship issues being the trigger.

[20] For Mother’s part she gave evidence that she believed the children had an absolutely lovely time when they were with Dad and they tend to do child focused activities. She understood and appreciated that he often takes them to his parents [details deleted]. Further, their paternal auntie has a wonderful relationship with them and Poppy often returns home with her hair and nails done.

[21] Mother was at utter pains throughout her oral evidence to impress how desperate she was for the children to have a relationship with their Dad and they love him to bits and he can be a particularly good father.

[22] All that said, Mother did indicate that she found the two week period between visits was too long for the children, they were missing their Dad and Poppy often asked where Daddy was and she wanted to see him or talk to him. Other than that the children remained amazing and were in great routines and when they returned from Father's care they fell back into the same routine easily.

[23] For all of these reasons Mother was very reluctant to stop the contact arrangements but she was very worried about Father's pattern of behaviour and the deterioration of his mental health and associated use of alcohol. Mother did not want to disappoint the children but also did not want to do anything that could jeopardise Noah and Poppy's safety.

[24] Given Mother's recent unilateral stopping of the contact, she was quizzed by paternal family as to why she had done that. This is burdensome to her particularly given that she is so supportive of paternal family. Perhaps the paternal family are not aware of the findings that I made originally or the contents of Dr Foulds' report.

[25] Mother's solution was that if the children in her day to day care and if Father was able to exercise the contact on the two week cycle that she proposed but with provision that the fortnightly weekend extend to include Sunday night. That would ensure the changeovers take place at a neutral setting. She proposed the contact occurred on a condition that Father not use or be under the influence of alcohol and that if she suspects Father has relapsed that his contact should immediately take place on a supervised basis to be monitored by his parents or his sister Jamie.

[26] Mother was going on a family holiday to [holiday details deleted] and while Father had agreed she did not want him to change his mind.

[27] I have considered ss 4, 5 and 6 of the Care of Children Act. I am entirely satisfied that the children's welfare and development is optimised by being in their

mother's day to day care. Similarly, they should be having contact with their father. The contact regime proposed by Mother is also in their welfare and interests. However, the Court has to consider the children's safety as an issue of mandatory consideration.

[28] It would indeed be very unusual for the Court to make an order that provided Father unsupervised contact but to repose in Mother the singular and sole adjudication as to when that should stop, who should supervise and for what length of time. That provides a degree of uncertainty to Father. However, in these circumstances I am entirely persuaded such a condition is not only required, but would optimise the children's safety and welfare. I have confidence in Mother given her extreme support of Father in all of the circumstances and their love for the children that she would not elect to cease, curtail or have the children's contact with their father supervised without good and proper reason. If I did not allow such a mechanism, such is the nature of Father's chronic relapsing alcoholism, Dr Foulds' report and the issues raised by Mother, that there could successive and rapid need for Mother to apply to vary or suspend the unsupervised order on each and every occasion. That does not provide an appropriate response.

[29] Therefore I am going to repose in Mother the ability to cease, suspend or have the contact supervised on such terms and conditions as she solely deems fit. Father needs to appreciate that he has taken no steps, he has not complied with the agreement for the blood and liver testing and he did not appear in Court. If Father takes exception to this condition, the remedy is to apply to the Court for variation but he will need to appreciate that he would have to overcome the hurdle of s 139A.

[30] For the above reasons, therefore, I make the following orders and directions:

- (1) There shall be a final parenting order in the terms annexed as Exhibit A to the affidavit of 24 May 2016 but with the following variation:
  - (a) Father shall not use or be under the influence of alcohol and if the applicant Mother suspects that Father is under the influence of alcohol or has relapsed in the use of alcohol or is

mentally unwell in any way she assesses, then Mother may suspend, vary Father's contact immediately (by giving notice to him electronically, orally or by letter) and such contact will take place in such a way as Mother deems fit (which may include any supervised basis with such persons as she deems fit) for such frequency, duration and nature as Mother deems fit.

- (2) The applicant shall file an amended draft order for sealing.

E Smith  
Family Court Judge

Signed at Christchurch on 8 June 2016 at                      am/pm