

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

**NOTE: PURSUANT TO S 437A OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOV.T.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).**

**IN THE FAMILY COURT  
AT HAMILTON**

**FAM-2014-019-000734  
FAM-2009-019-000669  
[2016] NZFC 5415**

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	BM First Respondent
AND	RD Second Respondent
AND	TD born on [date deleted] 2006 Child or Young Person the application is about

**IN THE MATTER OF THE CARE OF CHILDREN ACT 2004**

AND BETWEEN	BM Applicant
AND	RD Respondent

Hearing: 13, 14, 15, 16 and 17 June 2016

Appearances: M Sharplin for the Chief Executive  
A Gower for the Respondent BM  
Mr RD appears in Person and self represented  
M Roots as Lawyer for child

Judgment: 29 June 2016 at 09:00 am

---

**RESERVED JUDGMENT OF JUDGE S D OTENE**

---

[1] TD born [date deleted] 2006, now aged 10, has been the subject of proceedings in this Court since April 2009. In that period he has had two lawyers, been the subject of five reports by the Court appointed psychologist and by my count at least 11 Court orders. He has been in the care of his mother having unsupervised contact with his father, then in the shared care of his parents, then again in the care of his mother having professionally supervised contact with his father. He has been the subject of various notifications to Child Youth and Family and one notification to the police concerning his care, the investigations that arose from those notifications, including an attempted forensic interview, and a family group conference. A social worker, as the agent of the Chief Executive, has been tasked to make guardianship decisions when his parents are unable to do so. Most recently he has been the subject of a five day hearing and brought to Court to meet with me. In short, TD has since the age of 3 years been the centre of an almost unremitting dispute between his parents, a dispute that now involves the Chief Executive and which requires this further judicial determination. It is clear from our meeting that TD is acutely aware of that dispute.

**Background**

[2] From April 2009 until August 2014 proceedings were conducted under the Care of Children Act 2004 (COCA), and for a briefer period under the Domestic Violence Act 1995, between TD's parents, RD and BM. I do not set out those proceedings in detail though will refer to pertinent aspects as necessary. Most relevant to this decision is the situation that existed for

TD in 2014 that occasioned the Chief Executive's involvement in proceedings, events since then and the current circumstances of TD and his parents.

[3] In 2014 TD was primarily in Ms BM's care. He was spending every second weekend (Friday after school to Monday before school and extended on public holidays) and Friday night of the intervening week with Mr RD.

[4] Ms Orr, the Court appointed psychologist, in her third report to the Court on 14 March 2014 highlighted significant concerns for TD and opined that he was being psychologically abused by both parents to the extent that he was in need of care and protection.

[5] Following receipt of Ms Orr's report the Court made a referral to a care and protection co-ordinator pursuant to s 19 of the Children, Young Persons and Their Families Act 1989 (CYPFTA). The basis of that referral was set out by Judge Cocurullo in his judgement of 21 July 2014 as follows:

[13]..... My grounds for believing that there are care and protection concerns are the matters which are set out quite clearly by Ms Orr. They include TD being exposed to significant emotional and/or psychological issues as between the dysfunction [and] acrimony of his parents and indeed the behaviours which he is displaying, as has been reported by a number of professionals including the school.

[6] A family group conference was held on 20 August 2014. The conference agreed that TD was in need of care and protection and formulated a plan for his care to be shared week about by his parents. Highly detailed conditions were attached to the care arrangement. Those conditions were designed, as I understand, to make clear the expectations of Mr RD and Ms BM so as to reduce the likelihood of, and therefore TD's exposure to, conflict between them. The plan was to be monitored by a social worker, who throughout has been and remains Gloria Chapman, and to be reviewed by way of an updated psychological report from Ms Orr and a further family group conference.

[7] The following orders arising from the family group conference agreement were made by consent on 18 September 2014:

- (a) a declaration that TD is in need of care and protection on the grounds in s 14(1)(a), (b) and (d) CYPTFA;
- (b) a support order against the Chief Executive pursuant to s 91 CYPFTA;
- (c) an order that Mr RD, Ms BM or TD come before the Court if so called upon within 2 years made pursuant to s 83 CYPFTA;
- (d) appointment of the Chief Executive as an additional guardian for the specific purpose making final guardianship decisions for TD in the event that his parents cannot agree made pursuant to ss 110 and 112 CYPFTA (although I note incorrectly sealed as an additional guardianship order for general purposes pursuant to s 110).
- (e) an interim parenting order pursuant to section 48 COCA giving effect to the shared care agreement subject to the various conditions.

[8] The shared care arrangement commenced. Difficulties arose in short measure. Mr RD was alleged to have breached conditions of the interim parenting order and engaged with professionals in a manner unhelpful to TD. TD alleged he was physically, verbally and emotionally abused by Ms BM. TD's behaviour at school and with Ms BM deteriorated.

[9] On 16 December 2014 the Chief Executive applied for and was granted without notice a s 78 interim custody order and s 88 interim restraining order against Mr RD. Those applications were accompanied by an application on notice pursuant to s 125 to discharge the support order and substitute with a s 101 custody order in favour of the Chief Executive.

[10] TD was then placed by the Chief Executive in Ms BM's care and there he remains. He commenced supervised contact with Mr RD at Barnados supervised contact centre in February 2015, having had some earlier contact supervised by Ms Chapman. Contact at Barnados continues and occurs one hour every second Friday

afternoon. Upon occasion it has been attended by Mr RD's wife, FD, and their daughter KD born [date deleted] 2014.

[11] Mr RD applied unsuccessfully to rescind the interim custody and restraining orders or in the alternative for variation to enable TD to be placed in his care. His subsequent appeal to the High Court was dismissed and application to the Court for leave to appeal was abandoned.

### **Applications before the Court**

[12] The "live" applications before the Court are:

- (a) by Mr RD for an access order pursuant to s 121 CYPFTA dated 17 July 2015 and for a parenting order pursuant to s 48 COCA dated 23 July 2013
- (b) by the Chief Executive to discharge of the support order and for a s101 custody order in substitution dated 16 December 2015. Anticipating the grant of that application a plan pursuant to s 128 has been filed proposing the making of that order, a s 87 restraining order and a s 110 additional guardianship order (which is in any case already in place).

[13] Mr RD opposes the Chief Executive's applications. They are supported by Ms BM. She opposes Mr RD's application for a parenting order.

### **The Chief Executive's position**

[14] The Chief Executive says TD has been psychologically abused by his parents, but most particularly Mr RD, by long term exposure to their conflict and their polarised beliefs and parenting practices. He says having tried unsuccessfully to manage that through less interventionist means, custody and restraining orders are now necessary to control the care arrangements and Mr RD's interaction with TD in a way that meets TD's needs.

### **Mr RD's position**

[15] Mr RD says TD's difficulties arise primarily due to deficits in Ms BM's parenting and will be resolved if TD is placed in his care. He is open to that occurring by way of a staged transition and espouses a commitment to working with the professionals who are involved with TD and to working with professionals to assist his own personal development.

[16] In the absence of day to day care Mr RD seeks unsupervised and increased contact with TD.

### **Ms BM's position**

[17] Ms BM acknowledges deficiencies in her parenting and that she has been party to TD's psychological abuse. She wants to retain his care but says it is vital that the Chief Executive retains custody to provide a buffer between her and Mr RD.

### **Lawyer for child's position**

[18] Mr Roots says there is a clear and compelling need for the orders sought by the Chief Executive because TD's parents cannot work together. It follows that he does not support the making of orders under the Care of Children Act. He has put TD's views to the Court and says they should be assessed and weighed in light of comments in Ms Orr's most recent report. I will return to that later. He supports the status quo care arrangement with Ms BM and professionally supervised contact with Mr RD. He suggests contact be at a frequency determined by the social worker to enable adjustment without the need to return to Court for variation of an access order.

### **The Law - CYP TFA**

[19] Section 6 requires that TD's welfare and interests must be my first and paramount consideration. In determining his welfare and interests I must be guided by the principles set out in ss 5 and 13.

[20] This Court has in numerous cases summarised the fundamental underpinnings of those principles. The following passage from the decision of Judge Moran in *Re DM* (FC Greymouth FAM 2008-081-95, 3 September 2010) is helpful:

[22] Section 5 details the principles that the Court must be guided by and which can be summarised are those which provide for consultative and collaborative decision making; strengthening bonds for families; ascertaining the wishes of children where appropriate and for the making of timely decisions.<sup>1</sup>

[23] The principles in s 13 are subject to the overriding principles of s 5 and the paramountcy principle of s 6. They are unusually detailed and explicit<sup>2</sup> but condense down to three basic principle ideas, being:

The wellbeing of the child is entwined with that of his or her family;

The child's wellbeing is to be promoted by and through the family to the fullest extent possible;

The child is to be severed from the family to the least extent necessary, and only as a last resort.

[24] There is a strong emphasis on the retention of family placement and ties which sends a clear message that children have a right to live with and be nurtured by, family and to enjoy a sense of identity and belonging "wherever possible".<sup>3</sup> The latter proviso recognises that for some children a family placement cannot ensure their safety and for them, the emphasis is on providing an opportunity to develop significant psychological attachment to their caregivers.<sup>4</sup> Decisions affecting these children should wherever practicable, be made and implemented within a timeframe appropriate to their sense of time.<sup>5</sup>

## **Issue**

[21] In essence I must decide how to best ensure TD's healthy psychological functioning.

[22] To do so requires consideration of: first, TD's behaviour and functioning in 2014 leading up to the Chief Executive obtaining custody, his development since then and his current behaviour and functioning; secondly, whether Mr RD can safely have an expanded role in TD's life beyond the current restricted supervised contact.

---

<sup>1</sup> *W v Chief Executive of Child Youth and Family Services* [2004] NZFLR 12 at 17, paragraph [37]

<sup>2</sup> *C FC Nelson CYPF 042-400-2/92*, 20 October 1995

<sup>3</sup> ss 5 (a) and (b) Children Young Persons and Their Families Act 1989

<sup>4</sup> s 13(h) Children Young Persons and Their Families Act 1989

<sup>5</sup> s 5(f) Children Young Persons and Their Families Act 1989

Within those considerations I will weigh and assess the psychological evidence from Ms Orr. I must also consider TD's wishes.

[23] The orders that are appropriate will flow from those considerations.

[24] I do not ignore, and will address, the allegations of physical abuse but it is TD's psychological development that poses the greatest risk to his welfare and interests.

### **TD's behaviour and functioning**

[25] The evidence from all sources as to TD's behaviour and functioning is largely consistent and undisputed. The reasons for the behaviour are contentious.

#### 2014 to the present

[26] In 2014 TD's behaviour was at its lowest. At the time of Ms Orr's report in March 2014, so only the second full month of the school year, there had been [number deleted] incidents whereby TD physically attacked [details deleted]. He held no remorse for that behaviour. It followed from similar incidents in 2013. [Details deleted]. At home with Ms BM he was non-compliant, disrespectful and verbally abusive. He was disrespectful to women at school and had engaged in some sexualised behaviours at school and at Ms BM's home.

[27] A further deterioration in TD's behaviour occurred after the implementation of the shared parenting arrangement in August 2014. [Details deleted]. He was reported to be disrespectful to Ms BM and domineering and aggressive when in her care.

[28] Upon the Chief Executive being granted interim custody and placing TD in Ms BM's care in December 2015 TD's difficult behaviours and concerns for his psychological functioning continued, albeit reducing in number and intensity. In January 2015 immediately prior to a supervised contact visit TD remarked to Ms Chapman that he would like someone to kill him with a stone. A few weeks later, again prior to supervised contact, he told Ms Chapman that his hopes and

dreams were to be killed with a rock so he could be a ghost and no one would be able to tell him what to do. Ms Chapman alerted Adrian Tyghe, TD's counsellor, to those comments. No further concerns have presented. In December 2015 TD became involved in a physical altercation [details deleted].

[29] Throughout this year the improvements have been significant and in marked contrast to the behavioural concerns in 2014. There have been no incidents of TD physically attacking [details deleted]. His interactions with other children are positive. In the week before the hearing he was invited to the home of another child, it being the first time TD had ever received such an invitation. He is at the expected standards for reading and maths and working towards the expected standards for writing by the end of the year. Of major note school staff have reported to Ms Orr that TD has developed empathy for others and ability to show insight and take responsibility for his own behaviour. At after school care his behaviour is described as more settled and less problematic and whilst he can still have exhibit difficult behaviour, he is better at decreasing and changing that behaviour than previously. Ms BM reports no significant difficulties with TD's behaviour at home except in the period around contact to which I refer next.

[30] The area of main concern now is TD's behaviour in the days surrounding the fortnightly supervised contact visits with Mr RD. The school professionals observe a change in his behaviour usually from Wednesday before the Friday contact session until the following Monday whereby TD becomes unsettled, anxious, and distracted and engages in "silly" behaviour such as [details deleted]. When contact was occurring mid week TD's behaviour would typically be unsettled for the duration of the week hence a change to Friday to minimise the disruption to his schooling that was perceived to come about from the contact. Similarly his behaviour around this time at home with Ms BM regresses. This disrupted behaviour has remained fairly consistent over the last 18 months or so notwithstanding the significant improvements otherwise.

---

Factors contributing to TD's behaviour

[31] As indicated Mr RD does not dispute the difficulties with TD's behaviour. He described it a number of times as "out of control". Nor does he challenge the observations of TD's disrupted behaviour around the time of contact. He contends however the difficult behaviour arises primarily from TD modelling Ms BM's behaviour and is a result of her poor parenting. He suggests that TD's anxiety around contact may be because TD wants to spend more time with him. I do not accept either proposition.

[32] First of all the evidence does not satisfy me that Ms BM has acted in the violent or aggressive way towards Mr RD or TD that Mr RD suggests. Ms BM acknowledges failing to put in place appropriate boundaries for TD. She acknowledges that she has sworn in TD's presence though not at him, yelled at him and grabbed his clothing when he has misbehaved and she has been under stress. She says too that she has threatened to make TD go to school in his pyjamas when he was not getting prepared rather than making him stand outside naked as Mr RD alleges, but she denies ever physically abusing TD.

[33] TD's disclosures of physical abuse by Ms BM have been investigated by Child Youth and Family. They have not been substantiated. It is accepted that TD gives inaccurate accounts of events from time to time, although Mr RD is of the view that he can tell when TD is being inaccurate. I place the disclosures within the context of TD's confusion and anxiety consequent upon exposure to conflict between his parents. Furthermore apart from Mr RD's evidence no other person has witnessed any physical abuse to TD directly or identified any other indicators. That includes the staff at the school which TD has attended since age 5 and who have had intensive involvement with him and his parents.

[34] Second the evidence satisfies me that Mr RD's actions that have been to TD's considerable detriment. Mr RD placed in evidence an audio recording of conversations between he and Ms BM during which TD was present and between he and TD that took place in 2012 and 2014. Ms BM was unaware that Mr RD was recording the conversations. Mr RD says that they show, inter alia: Ms BM's

disposition to violence because she was prepared to run him over with her car and in doing so endanger TD's safety; that she has "psychologically blackmailed" TD by telling him that he may be placed with strangers; that she raises adult issues in TD's presence; that she is not able to adequately provide for TD's day to day needs. Mr RD accepts that the recordings reflect badly upon him to the extent that he disrespected Ms RD's privacy and his behaviour could be perceived as "stalking" but he says his actions were justified in the greater good of TD's welfare.

[35] The audio recordings were a deliberate attempt by Mr RD to obtain evidence prejudicial to Ms BM. Mr RD initiates discussions on contentious matters with Ms BM and presses those matters even when she tries to shut down the conversation. A number of times she asks him to leave but he remains or delays his departure. TD interrupts and tries to divert his parents on a number of occasions. Neither parent appropriately recognises or reacts to TD's distress. Mr RD cautions Ms BM on a number of times not to raise adult issues in TD's presence yet he continues to do so and it is he who generally first raises those issues. Mr RD exaggerates Ms BM's dangerous driving. It goes no way to establishing a propensity for violence or to endanger TD. In discussions with TD Mr RD frequently puts leading questions to him obviously designed to elicit answers to show he is at risk or not being provided for adequately in Ms BM's care. Sometimes TD outright rejects the negative propositions put to him yet Mr RD presses further. Mr RD tells TD Ms BM is wrong for talking about the possibility of him being placed with strangers but directly asks TD his feelings about that.

[36] To Ms BM's discredit the recordings indicate that she has inappropriately discussed matters with TD. She too has clearly engaged in disputes with Mr RD in TD's presence but she does so by and large in response to Mr RD's baiting rather than as an initiator of disputes.

[37] The recordings do not satisfy me of any of matters for which Mr RD says they are proof. Rather they are consistent with the evidence of Ms BM, Ms Chapman and various professionals engaged with TD to the effect that Mr RD is controlling, unreasonably demanding and unable to see matters other than from his viewpoint even in the face of evidence to the contrary. Most concerning

they show in Mr RD an almost total lack of insight into the inappropriateness of his behaviour and the effect of it on TD.

[38] Although the recordings are dated more recent evidence suggests that there has been little shift in Mr RD's beliefs or his lack of insight. I refer to the following:

- (a) Despite the passage of time, having now had the benefit of hindsight and reflection and having engaged in personal counselling with a psychologist, that Mr RD offers the recordings in evidence seemingly without awareness but certainly without acknowledgement of the serious shortcomings in his parenting that they reveal is in itself instructive of the level of his lack of insight.
- (b) Supervised contact on 11 March 2016 was cut short because TD was unwell. He told the supervisor that he had been hit in the head by another child the previous day. He had been seen the previous day by the doctor and noted to be well. Mr RD called the police in the weekend. He says he did so because he was concerned TD may have concussion and he had not heard from the social worker following contact. That is contrary to the police report recording that Mr RD was concerned TD had bruising which he thought showed child abuse. The police conducted a welfare check on the evening of Sunday 13 March 2016 necessitating Ms BM rousing TD from bed to be sighted by a police officer. At Ms Chapman's request Ms BM took TD to the doctor on 15 March 2016. No concerns were identified.
- (c) The week before the hearing Mr RD sent a number of letters to Ms BM's former and current neighbours outlining his grave concerns for TD's wellbeing and safety and that he had proof TD had been subject to different types of abuse. The letter invited the recipients to provide Mr RD with any evidence of "extreme yelling, swearing, hitting and pushing" or other "bad behaviour". One former neighbour brought the letter to the attention of TD's school. A current neighbour contacted Child Youth and Family. That neighbour told Ms Chapman

she did not have any concerns but had heard TD say on two occasions to Ms BM “I fucking hate you”. I do not consider that surprising in the overall context of conflict to which TD has been subjected. It does not establish abuse of him by Ms BM. Not surprisingly Ms BM now feels unsafe in her home and guilty that her neighbours have become embroiled in this dispute.

- (d) Mr RD maintains a belief that TD’s iron levels are too low. There was genuine foundation for that based on a 2009 blood test. TD now takes iron supplements. There have been further tests in 2012, 2013 and 2014 indicating TD’s iron levels are within the normal range and a doctor’s report on 10 March 2016 recording no signs of anaemia and no need for a blood test. Despite that Mr RD has persistently raised TD’s iron levels as an issue. At hearing he said he no longer requires a blood test, only monitoring, but he also said that without a blood test there can be no assurance all is well. This is indicative of Mr RD’s obsessive nature.

[39] Fundamentally Mr RD believes, contrary to the weight of evidence, that Ms BM is abusing TD and cannot be entrusted with his care. The consequence of that belief is that TD is subject to ongoing unnecessary investigations and inquiries as for example happened after the 11 March 2016 contact visit, Ms BM’s parenting and sense of personal safety is undermined and TD is unfairly portrayed to people in his community as a child who may be suffering abuse.

#### Psychological evidence

[40] Ms Orr’s qualifications and experience as an expert witness were accepted by all parties. She acknowledged the limitation of her most recent report dated 8 June 2016 in that time constraints did not allow her to interview either parent or to observe Ms BM with TD. Mr RD challenged the report on the basis that because he was not interviewed he did not have an opportunity to put to Ms Orr information or explanations that may have affected her conclusions. He also questions in a general sense how any professional can make an accurate assessment of his relationship with

TD on the basis of limited time spent with them. The latter is of course a matter inherent to these types of proceedings and a factor which the Court routinely balances and weighs within the context all the evidence. In respect of the acknowledged limitations of Ms Orr's latest report I balance it against her longstanding knowledge of this matter over the course of 5 ½ years and the preparation of four earlier reports, the methodology she employed to gain information from a variety of sources and the consistency of her conclusions with other evidence before the Court. I consider that in relation to Ms Orr's evidence I can safely rely on her opinions to conclude that:

- (a) TD's primary secure attachment figure at the time of her first report on 8 April 2010 was Ms BM. That attachment was problematic in 2014 but has since returned;
- (b) Mr RD has been consistently domineering and obsessive in his beliefs and despite some improvement at the time of Ms Orr's second report on 31 May 2011 that has not sustained;
- (c) In 2014 when TD's behaviour was most disregulated neither parent had shown the insight or commitment to protect or nurture him – Mr RD being dominating, controlling and harassing and Ms BM passive and submissive;
- (d) Mr RD's parenting style in 2014 and now is a dichotomy of authoritarian and laissez-faire which contributes to TD's insecure, disorganised and chaotic relationship with him;
- (e) The now apparent improvements in TD's behaviour arise primarily from less exposure to Mr RD. They are likely also influenced by TD's greater maturity, the therapy he receives from Mr Tyghe, and changes Ms BM has made in her parenting. However I am satisfied that the reduction in contact with Mr RD is the most significant factor;

- (f) The risk to TD of circumstances as they stood for him in 2014 and if he were to be returned to those circumstances is of future mental health difficulties and criminal offending;

[41] As to Mr RD's suggestion that TD's anxiety and disrupted behaviour at school and home around the time of the contact visits may be because TD wants to spend more time with him, it follows from my above assessment of all the evidence that the most significant factor is Mr RD's actions and behaviour.

**Can Mr RD safely have an expanded role in TD's life?**

[42] Despite the findings I have made against Mr RD I nevertheless consider whether it is possible for him to safely have a greater involvement with TD whether by way of more, less restrictive contact or by way of assuming his day to day care.

[43] The evidence from Mr AG, principal of [name of school deleted] is that there have been no difficulties this year with Mr RD's interactions with the school. That is encouraging but it is a recent development and must be viewed in the overall context of Mr RD's engagement with professionals. Mr RD casts his engagements with professionals as reasonable inquiries by a parent concerned for the welfare of his child often in the face of professionals who are obstructive or not doing their jobs properly. I do not accept that. Even allowing for the mental and emotional turmoil circumstances such as these must create for a parent, my assessment of the evidence of school professionals, the supervised contact supervisor and the social worker together with my observations of Mr RD in the hearing is that the tone and frequency of his written and in person communication has been unreasonable, overbearing, demanding to the point of threatening, unfairly seeking to hold them to account when they have properly discharged their obligations and that he is simply unable to accept information that does not reinforce his beliefs about the risks to TD. I take into account also that Mr RD is restricted by the interim restraining order from going to the school when TD is present. Against that background Mr RD's improved relationship with the school this year does not significantly displace concerns about the way in which he engages with professionals.

[44] Mr RD is engaging in therapy with clinical psychologist Dianne Farrell, having now had eight sessions. Ms Farrell has access to Ms Orr's first four reports so is well apprised of matters. Ms Farrell did not give evidence but Mr RD produced a letter from her. She records, consistent with other evidence before the Court, that she initially found Mr RD's behaviour demanding and unboundaried but that he had responded positively after her frequent reiterations of professional boundaries. Ms Farrell says that this therefore shows a capacity to work with professionals. Her recommendation is that Mr RD focus on what he can offer TD rather than the shortcomings of others. Ms Farrell says that if Mr RD can do so it is hoped that would lead to improved parenting of TD.

[45] I treat Ms Farrell's statements with caution given that a letter by its nature is not a detailed report about the therapeutic intervention she is providing and that she was not available for cross-examination. I rely on it as evidence that in respect of Ms Farrell, Mr RD has established a good working relationship albeit after some effort on her part, and as evidence that Mr RD still has some way to go in terms of personal development before any improvement or insight into his parenting can be expected.

[46] Particularly relevant to this consideration is how supervised contact has progressed. The most recent evidence of this came from Miriamai McBride the Barnados supervised contact co-ordinator. She provided a report of the eight contact visits that took place between January and April this year. On six of those visits it is recorded that Mr RD breached the contact rules primarily by not keeping discussions with or in TD's presence child focussed. Mr RD in general disputed the breaches or put them down to misunderstandings (what he termed "grey areas") or could not recall some of what was alleged. To be fair to Mr RD, Ms McBride accepted that her predecessor may have been more lenient than her in holding him to account for breaches. However I prefer Ms McBride's evidence to that of Mr RD. She has no vested interest in the proceedings and she gave evidence in a thoughtful and measured way. I accept her evidence that she reinforced the expectations of Mr RD under the supervised contact agreement he signed but that he nevertheless continued to breach the agreement and that on a number of occasions he communicated inappropriately with TD or with the supervisors. Furthermore Mr RD's faulty recall

lacks some credibility given that in his affidavit of 13 May 2016 he was able to detail with particularity comments by TD critical of Ms BM. Ms McBride's evidence also lends weight to the conclusion that it is Mr RD's behaviour, rather than TD's desire to spend more time with Mr RD, that causes TD's anxiety and disrupted behaviour around the time of the contact visits.

[47] I do not doubt that Mr RD sincerely loves TD. However the weight of the evidence leads me to conclude that it is not in TD's welfare or interests for contact to be unsupervised or increased frequency nor obviously for him to be in Mr RD's day to day care.

### **TD's views**

[48] In determining TD's welfare and best interests I must be guided by the principle in s 5 (d) CYPFTA that consideration should be given to his wishes and they should be given such weight as is appropriate in the circumstances having regard to his age, maturity and culture. Section 6 COCA requires me take into account any views TD expresses.

[49] TD has been consistent about wanting to spend more time with his father. Most recently he told his lawyer and Ms Orr that that he wants to spend two weeks with Mr RD and two weeks with Ms BM. Unprompted he told Ms Orr that he considered it would be "fair" to his parents and to him. He did not give further detail to his lawyer or to me during our meeting.

[50] I accept that TD wants to spend more time with his father. In assessing the weight to be attached to that wish I take into account Ms Orr's evidence that a concern for "fairness" is consistent with TD's current stage of development and that he is not yet developed the ability to weigh and assess the consequences of various options. I also take into account the manner in which both parents, but particularly Mr RD, have involved TD in or exposed him to conversations that were not appropriate and the audio recording of Mr RD prompting TD to make comments favourable to Mr RD and unfavourable to Ms BM. Given those matters I do not place significant weight on TD's wishes and views.

## Decision

[51] Having weighed all the evidence, considered TD's views and the submissions of Mr RD and counsel I determine that TD's welfare and interests require:

- (a) the Chief Executive to maintain his current custodial and guardianship responsibilities to ensure that TD has adequate protection from exposure to the psychological abuse arising the conflict between his parents. Given Mr RD's current beliefs and behaviour, Ms BM will not, without the intervention provided by the Chief Executive, be able to adequately protect TD from exposure to conflict.
- (b) that Mr RD's contact with TD continues to be professionally supervised but reduced to a frequency that enables TD to maintain a relationship with Mr RD and his younger sister whilst lessening the disruption that TD currently experiences around contact times particularly in respect of his schooling. Contact should therefore occur in the school holidays and at other times assessed as appropriate by the social worker. That will enable contact to be adjusted if the improvements anticipated by Mr RD eventuate.
- (c) that Mr RD be positively restricted from having contact with TD other than when professionally supervised.

[52] In order to give effect to my findings I make the following orders and directions:

- (a) The Chief Executive's application pursuant to s 125 is granted.
- (b) The section 91 support order, s 87 interim restraining order and s 78 interim custody order are discharged.
- (c) There is an order pursuant to s 101 granting the Chief Executive custody of TD.

- (d) There shall be an order pursuant to s 121 granting Mr RD access with TD as follows:
- (i) once each school term holiday and twice in the Christmas/New Year holiday;
  - (ii) at other times as determined by the social worker;
  - (iii) the access shall be supervised by a person or organisation approved by the social worker;
  - (iv) the specific dates and the duration of contact shall be determined by the social worker.
- (e) There shall be a final restraining order pursuant to s 88 against Mr RD.
- (f) The s 128 plan dated 15 September 2015 is noted as complying. There shall be a review in 12 months.
- (g) It is noted that the Chief Executive's appointment as additional guardian for specific purpose continues.
- (h) Mr RD's application for a parenting order pursuant to s 48 of the Care of Children Act is dismissed.

[53] Costs are reserved. Counsel for Ms BM and the Chief Executive are to file written submissions within 14 days. Mr RD may file submissions in response within a further 14 days. The submissions are to then be referred to me in chambers for decision.

### **Future proceedings**

[54] At the conclusion of the hearing counsel for the Chief Executive sought an order pursuant so s 207 CYPFTA that no further proceedings be commenced by

Mr RD without the leave of the Court. The discretion to make such an order arises if the Court is satisfied that a person has persistently instituted vexatious proceedings under Part 2 of the Act and provided that person has been given an opportunity to be heard. Mr RD says that no such order is necessary because he had no intention of bringing further proceedings. In any case I decline to exercise the discretion. I am not satisfied that Mr RD's applications under this Act yet have the requisite persistence. Although there have been a number of applications, some were interlocutory and there has not until now been a final determination of all the issues that have been in dispute.

[55] I observe in any case that Mr RD will require leave to commence substantially similar proceedings within two years of this judgment whether under the Children, Young Persons and Their Families Act (by virtue of s 206A) or the Care of Children Act (by virtue of s 139A).

---

S D Otene  
Family Court Judge