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AND THEIR FAMILIES ACT 1989, ANY REPORT OF THIS PROCEEDING
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IN THE FAMILY COURT AT HAMILTON

FAM-2011-072-000147
FAM-2012-072-000125
[2016] NZFC 5154

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

AND BETWEEN AD
Applicant

AND
DD
Respondent

Hearing: 02 June 2016

Appearances: L Pepperell for the Applicant
H MacColl for the First Respondent
K Tan for the Second Respondent
J Briscoe as Lawyer for the Child

Judgment: 23 June 2016 at 09:00 am

RESERVED JUDGMENT OF JUDGE S D OTENE

[1] HD born [date deleted] 2006 and GD born [date deleted] 2008 have been in the custody of the Chief Executive since 2 August 2012. They are the children of DD. They were placed in the care of GD's father, AD, in January 2013. There they remain with the support of the Chief Executive, who is also their guardian, and Ms DD. HD's father, NL, has not taken active part in these proceedings nor as I understand in HD's life.

[2] It is agreed that the children should remain permanently in Mr AD's care and that he should assume legal responsibility for their care and guardianship through orders under the Care of Children Act 2004 upon discharge of the Chief Executive's custody and guardianship. The issues are:

- (a) what duties, if any, to provide services or support are owed by the Chief Executive to the children or Mr AD retrospectively and in the future; and
- (b) what orders or directions, if any, can and should the Court make to compel delivery of those services and supports.

What does Mr AD want?

[3] I recognise at the outset that Mr AD has demonstrated a sustained commitment to the children and that he intends to maintain that commitment regardless of the outcome of this decision. I accept his unchallenged evidence that as a result of assuming the children's care he has suffered financial hardship. It would be unfair if Mr AD were to be cast as pursuing personal financial gain by

virtue of the funding and other assistance he asks the Court to order. As the children's lawyer Mr Briscoe puts it, relief of Mr AD's financial hardship will ultimately benefit the children.

[4] Mr AD says that upon assuming the care of the children he was entitled to a weekly care allowance (commonly referred to as "board payments") and a monthly clothing allowance to enable him to provide for the children. He wants those sums paid for the period from when the children were placed in his care until such time as orders are made in his favour under the Care of Children Act. He says the Court has the ability to order the Chief Executive to retrospectively provide that financial support by virtue of the following provisions of the Children, Young Persons, and Their Families Act 1989:

- (a) Sections 362 and 363(2) which place a mandatory obligation on the Chief Executive to pay the care and clothing allowance;
- (b) Sections 387 and 389 (a)(ii) which on the basis of GD's special needs entitle him financial assistance which can encompass the care and clothing allowance;
- (c) A s 86 services order;
- (d) A s 91 support order.

[5] In respect of ongoing services and supports Mr AD says it is clear that -GD has significant ongoing needs. He says that HD too has ongoing needs, though to a lesser extent than GD. Mr AD wants service or support orders to provide for those needs.

The Chief Executive's response

[6] The Chief Executive says that:

- (a) Mr AD is the children's parent so is precluded from receipt of care and clothing allowances by virtue of s 363(4).

- (b) Whilst the Court has discretion to make service and support orders for both children up to 1 July 2016 (and from that date only in respect of HD as a consequence of the amendments to Children, Young Persons and Their Families Act that then take effect) the Court should not exercise that discretion because the children's needs are being or can be met by other means.

Ms DD's position

[7] Ms DD supports the position of Mr AD.

Lawyer for child's position

[8] Mr Briscoe declined to sign the memorandum of consent when first prepared last year without assurance of proper supports in place for Mr AD and the children. He submits that the Chief Executive has not met his responsibilities to the children and so supports the position of Mr AD. He endorses the submissions that have been advanced on Mr AD's behalf.

[9] Mr Briscoe has now signed the consent memorandum on the basis that Care of Children Act orders will be made but having advocated on behalf of the children for the provision of ongoing support from the Chief Executive.

Can the Court order retrospective payment of care and clothing allowances?

Section 363: payment to caregivers

[10] The effect of s 363(1) and (2) is to require the Chief Executive to:

- (a) determine the rates of payments to persons and organisations in whose charge he places a child or young person of whom he has control, care or guardianship; and
- (b) ensure that those payments so determined and any additional payments necessary to meet the reasonable needs of the child or young person are made.

[11] Those obligations are mandatory.

[12] Section 363(3) gives the Chief Executive discretion to make payments at a higher rate where there is a special need.

[13] Section 363(4) relieves the Chief Executive from the obligation of payment where the child or young person is placed with his or her parent.

[14] As his counsel conceded, s 363(4) may defeat Mr AD's claim for care and clothing allowances for GD because Mr AD is her parent.

[15] There was considerable focus in written and oral submissions upon whether Mr AD is HD's step-parent and shared responsibility for his day-to-day care with Ms DD, thereby bringing him within the s 2 definition of "parent". Whilst my impression from the evidence is that Mr AD and Ms DD did not share responsibility for HD's day to day care, it is not necessary for me to make any determination as to that or whether the Chief Executive had an obligation to pay care and clothing allowances to Mr AD in respect of either child. That is because the Act is absent any jurisdiction for the Court to provide relief even if the Chief Executive has breached the statutory obligation. This Court cannot of its own motion provide relief even if to do so would be in the welfare and interests of the children and so in accord with the s 6 paramountcy principle. Rather there must be a statutory basis establishing relief. If that gives the Court a discretionary power it is upon the exercise of that discretion that the paramountcy principle informed by the principles in ss 5 and 13 comes into play. However, as the legislation currently stands, if there has been a breach the remedy must lie elsewhere.

Sections 387: payments for the benefit of children.

Section 389: financial assistance for children previously subject to orders under the Act.

[16] Section 387 empowers the Chief Executive to make such payments as may be necessary to meet the reasonable needs of any child or young person in his care,

custody or sole guardianship. This provision is applicable to GD and HD in the current circumstances whereby they are subject to the Chief Executive's custody and guardianship.

[17] Section 389 empowers the Chief Executive to make grants or provide financial assistance to any person to assist that person to care for a child or young person who has ceased to be the subject of, inter alia, custody, guardianship, support or services orders made under the Act and who is in need of special assistance. Assuming the need for special assistance this provision will be applicable to GD and HD if the orders detailed in the memorandum of consent are made.

[18] The assistance contemplated by both provisions is at the discretion of the Chief Executive. The Act gives no jurisdiction to this Court to review that discretion and make any consequential orders. If, as Mr AD contends, the Chief Executive has improperly failed to exercise that discretion, the remedy must again lie elsewhere.

Section 86: services order

[19] Services orders pursuant to section 86 are typically, though not exclusively, used to order financial services. The making of a services order is an exercise of the Court's discretion subject to abovementioned principles in ss 6, 5 and 13.

[20] In the absence of the Chief Executive's consent to the making of a services order this Court in similar cases has taken the approach that it is for the applicant to establish the factual basis for the order whereupon the onus transfers to the Chief Executive to show why the order should not be made. To do so the Chief Executive must satisfy the Court that the provision of the services or assistance is clearly impracticable.

[21] It could hardly be disputed that retrospective payment of care and clothing allowances would be to the benefit of the children. Although probably unpalatable, I doubt given the resources of the state that it would be impracticable for the Chief Executive to make the payment. The question then is whether I should exercise my discretion to make an order. To that end consideration of the principles underpinning responsibility for provision of services and assistance is helpful.

[22] In *Menzies v Ministry of Social Development* (FC Upper Hutt FAM 2000-055-47, 24 June 2010) a case concerning the provision of education assistance, Judge Moss described the foundation for services (and support) orders as follows:

[11] Nor is it necessary, in determining the parameters of the Services Order for the Court to be satisfied that there is some causal link between the assistance sought and the deficit for the child which precipitated state intervention. Rather, the entitlement enshrined in the UN Convention is for special assistance. In my view, reading that provision with the Children, Young Persons and Their Families Act the New Zealand state has accepted that children who are requiring ongoing, state intervention to improve their care are entitled to the benefit of the various orders of assistance which are found in the Act. The deficits which have caused the intervention will predictably impose deficiencies upon children which may last longer than it takes to settle them into desirable permanent care, and may be different in type or severity from the presenting deficiencies at time of intervention. Because of the existence of the need for intervention it appears clear that the general drafting of the entitlement to Support and Services Orders, particularly, contains a recognition by the state that children who have suffered detriments of that nature, sufficient to justify state intervention are then entitled to special assistance, over and above that to which otherwise privileged citizens are entitled. Thus, the provision of education assistance falls squarely within the assistance which could be provided under a Services Order.

[23] Unlike the provision of educational services which fell for consideration in *Menzies*, entitlement by persons who have the charge of children to payment from the Chief Executive (which is in reality the care and clothing allowance sought by Mr AD) is found in the specific statutory obligation in s 363. The Legislature has not, whether by design or oversight, provided the Court with any jurisdiction to remedy a breach of the statutory obligation (perhaps because there are other avenues of remedy) and has seen fit to exclude parents from the entitlement. Given that, it would be an improper exercise of the Court's jurisdiction to remedy the breach, if any, or extend the obligation in a manner not contemplated by the Legislature and in fact positively restricted vis a vis parents. Accordingly I decline to make a services order for payment of care and clothing allowances for either child from the time of their placement in Mr AD's care.

[24] I anticipate the argument by extension that because financial assistance for educational, or indeed any other services, can be provided by exercise of the Chief Executive's discretion pursuant to ss 387 and 389, it follows that the Court should never then make a services or support order to cover those matters.

The counter argument is that those provisions do not prescribe assistance whether to a specific type or to a specific class of person in the manner of s 363. The Legislature specifically prescribed the rates of payment to caregivers to meet the reasonable needs of the child to the limited circumstances of s 363. The conclusion that it would be inappropriate for a Court to extend those circumstances is not inconsistent with the conclusion that other services not so prescribed can be provided by multiple means, for example by the exercise of the Chief Executive's discretion or through a services order.

[25] The other consideration is whether the discretion should be exercised to compel retrospective payment. Given that I have declined to make a services order I do not need to reach a conclusion on this point but note that it has been the subject of differing opinions in this Court. In *J v Ministry of Social Development* (FC Wellington FAM 2001-085-1727, 23 September 2008) Judge Moss made a services order to reimburse a child's medical expenses incurred by her caregiver grandparents. In *Re MR* (FC Christchurch CYPF 009/161/02, 28 April 2003) a young person who had sexually abused his sister was made subject to the Chief Executive's custody and placed in a residential home and treatment programme. When it appeared to the young person's parents that his progress was lacking his father resumed his care in accommodation separate from the rest of the family in order to ensure his daughter's safety. Judge Strettell declined a services order to compensate for the parents' losses. His Honour held that the purpose of a service order is not to compensate for lack of financial opportunity and services orders should be approached on a prospective basis of what likely costs would be rather than a retrospective approach.

Section 91: support order

[26] If a s 91 support order is made s 93 obliges the Chief Executive to, inter alia, provide or co-ordinate the provision of services and resources (including financial services and resources), whether from the community or otherwise, to ensure that appropriate care, protection and control are provided to or exercised over a child or young person. I understand this to be the basis of Mr AD's contention that a support

order can be used to ensure the retrospective payment of care and clothing allowances.

[27] As with s 86, the making of a s 91 support order is an exercise of the Court's discretion. For all the reasons set out at paragraph [23] I decline to exercise my discretion to make a support order for payment of care and clothing allowances for either child from the time of their placement in Mr AD's care.

Ongoing services and support

[28] It is clear from the evidence that GD has significant behavioural issues that have and continue to impact on her, particularly in respect of her education. I refer for example to:

- (a) information provided by her teacher Ms MB at the mediation conference on 5 August 2015 recorded in the minute of Judge Riddell upon the waiving of confidentiality by all parties. At that time GD required a full time teacher aide to maintain her attendance at school.
- (b) the 17 March 2016 intellectual disability assessment report on GD prepared by Christina McQuiod and Dominique and Du Plessis, clinical psychologists at Waikato Hospital Child Development Centre ("CDC"). In broad terms they conclude that although GD's functioning is not at the level that supports a diagnosis of intellectual disability there are nevertheless significant deficits likely to have a major impact on her learning. Paediatric referral is to be made to focus on the possibility of foetal alcohol exposure and attention deficit hyperactivity disorder.
- (c) Mr Briscoe's advice from the school on the morning of hearing (which all parties agreed that I could accept without the need for formal evidence from the school) of ongoing behavioural issues for GD [details deleted]; that Child Youth and Family fund two hours teacher aide assistance per week for GD and the school funds 12.5

hours per week; that HD needs ongoing support [further details deleted].

[29] Mr AD seeks service and support orders for the costs of tuition, respite care, attendance at school holiday programmes and extra-curricular activities; clothing allowances; compensation for his loss of earnings consequent upon his reduction to part time employment and time off work to take the children to various appointments; ongoing unspecified support for any new issues that may arise for the children.

[30] The Chief Executive says that HD's needs appear to be well met by the education system and his teachers report he is generally meeting expected levels of attainment. In respect of GD he says her on-going developmental needs will be met through the CDC and other District Health Board services and her educational needs will be met through the school and Ministry of Education. He draws the Court's attention to comments in CDC report that the school have provided a high level of appropriate support and services. Finally the Chief Executive points to individual counselling for both children that is occurring through Parentline at no cost to Mr AD.

[31] The hearing proceeded on a submissions only basis. It is therefore difficult to resolve the disparate positions of the parties and to make findings of the specific level of support required for either child. However I am satisfied by the totality of the evidence that both children, but most particularly GD, have ongoing needs arising out of their care and protection legacy that may not be adequately met by education or health services.

[32] From what I can establish on the available evidence the assistance from the Chief Executive to address those needs thus far has been a \$250.00 grocery voucher and a \$300.00 clothing voucher provided to Mr AD in 2013 and funding for part of the cost teacher aide assistance.

[33] The question that then arises is whether the extent of services and supports sought by Mr AD is appropriate. I adopt the approach of Judge Cocurullo in *MI v Ministry of Social Development* (FC Huntly FAM 2010-024-76,

17 February 2011). The Judge accepted the central premise in *Menzies* of the overarching responsibility of the Chief Executive as the representative of the State but qualified it by recognising that a balancing exercise should be undertaken taking into consideration the children's needs, steps taken by the Chief Executive to address those needs and the responsibilities of the family that have agreed to assume permanent care of the children. This is highlighted by the following passage:

[21] I suggest the central issue here is to consider the extent to which the State has an on-going obligation to recognise all that has flowed from the previous care and protection concerns against the benefits to the children as not being perceived as being under the state's care but having been handed to them the right as it is enshrined under s 13(f)(iii) and (h).

[22] If that above proposition is correct, the consideration appears to be striking the right balance when considering the permanency proposal. On the one hand there must be I say a recognition of the environment from which the children have come from. There must also be a recognition that the Chief Executive in this case has provided significant support both financial and non-financial to assist the children to address and alleviate those care and protection concerns. The care and protection concerns in my view simply do not stop on the making of the permanency although things are much improved for the children [as] is clearly seen from the latest reporting.

[23] On the other side is the full notion as must be given to the children of the permanency proposal. They have a right enshrined at law to be out of the State's care in all facets of that. The evidence I have is that they are well bonded with the caregivers, see themselves as part of the caregivers' family and are an important and integral part of that nuclear and wider family structure. That is I suggest all that is countenanced as relevant to these circumstances in s 13 of the CYPF Act."

I determine that the balance here lies in the Chief Executive providing assistance for the children's learning, extra-curricular development, and any needs identified from the further paediatric investigations in respect of GD. I consider the loss of income and responsibility for ongoing child care (including during holidays) and clothing costs are incidental in this case to the assumption of the permanent care of the children.

Orders and directions

[34] Accordingly I make the following orders and directions:

- (a) a section 86 services order directing the Chief Executive to:
 - (i) fund teacher aide assistance for GD and HD at the level recommended by their school to the extent that any such funding is not otherwise met by the school or the Ministry of Education;
 - (ii) to fund such extra-curricular tuition for GD or HD as is recommended by the school;
 - (iii) to fund one extra-curricular sporting or cultural activity for each of GD and HD
- (b) a section 91 support order directing the Chief Executive to implement any recommendations arising out of further paediatric assessments of GD.
- (c) the above orders shall be reviewed in 12 months, it being noted that upon the amendments to the Act that take effect on 1 July 2016 that in respect of GD the Court will not be able to make further service or support orders.
- (d) discharge of the section 101 custody and 110 guardianship order in favour of the Chief Executive, leave under Care of Children Act to Mr AD to apply for a parenting order and parenting and guardianship orders. All these orders are on the terms set out in the memorandum of consent signed last in time by lawyer for child on 11 April 2016.

S D Otene
Family Court Judge