EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT AUCKLAND

FAM-2009-004-000852
FAM-2018-044-000054
[2018] NZFC 1952

IN THE MATTER OF	THE DOMESTIC VIOLENCE ACT 1995
AND	
IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[COREY PARKER] Applicant
AND	[PRISCILLA HEATH] Respondent
AND	CHIEF EXECUTIVE OF ORANGA TAMARIKI–MINISTRY FOR CHILDREN Other Party/Person

Hearing: 14 March 2018

Appearances: M Headifen for the Applicant
M Saini on behalf of S Durlabh for the Respondent
Y Ong for the Chief Executive
S Houghton as Lawyer for the Children
B Robertson as Social Worker

Judgment: 14 March 2018

ORAL JUDGMENT OF JUDGE S J COYLE

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[1] Ms [Heath] and Mr [Parker] are the parents of [Kerry] and [Caden]. The matter is before the Court following a without notice application by Ms [Heath] for a Temporary Protection Order. That application came before Her Honour Judge Farnan on the e-Duty platform and having read the information provided to the Court at that time Her Honour made a Temporary Protection Order for the reasons set out in Her Honour's Minute.

[2] Additionally, Her Honour was concerned about the welfare and best interests of these children and made on her own motion an Interim Parenting Order pursuant to s 28B Domestic Violence Act 1995. The order was made on the basis that Her Honour considered it, "Necessary to protect the welfare and best interests of the children…based on the evidence before the Court." No further reasons were provided by Her Honour as to why she felt it was necessary to make that order.

[3] As a consequence, the registry issued a Temporary Protection Order and the Interim Parenting Order. The effect of the latter order is that the current care arrangements for the girls changed in that they had been in a prior shared care arrangement, with eight days in the care of their father, Mr [Parker], and six days in the care of their mother, Ms [Heath].

[4] Mr [Parker] has applied to rescind that order, essentially on the basis of material non-disclosure, and subsequently he has filed an application prompted by Ms Houghton, the girls' counsel, for an order placing the children under the guardianship of the Family Court pursuant to s 31 Care of Children Act 2004.

[5] The issues I have to determine therefore are:

(a) Whether to rescind or vary the temporary/interim orders made by Judge Farnan.

(b) Whether to place the children under the guardianship of the Court.

Jurisdictional Issues

[6] Before looking at those issues there are a couple of jurisdictional preliminary issues that I need to dispose of. Firstly, the application to rescind is made pursuant to r 34 Family Court Rules 2006. It is accepted by counsel that the application can legitimately be made pursuant to that rule, but for the sake of completeness I set out the reasons why. For the relevance is that r 34 is contained in Part 2 Care of Children Act 2004 and proceedings relating to the day-to-day care of children are governed by Part 5A of the Act, the provisions of which specifically exclude the Rules in Part 2 Family Court Rules unless the rules are expressly saved. Rule 34 is not saved as a consequence.

[7] As I set out in the *Porter v Wilkins*[1] decision, r 2(2) Domestic Violence Rules provide pursuant to r 2(2)(aa)(i) that the Domestic Violence Rules do not apply to proceedings in the Family Court. Thus, as I recorded:

> Pursuant to the DVR which purports to apply to proceedings under the DV Act, those rules cannot apply by virtue of the fact that the only Court that can consider proceedings under the DV Act (the Family Court and the District Court) is specifically excluded by the rules themselves.

[8] Thus, the relevant rules are the Family Court Rules 2002. A Parenting Order made under the Domestic Violence Act is specifically an interim order pursuant to s 28B, and pursuant to s 28B(2) the Court can make an interim order providing for day-to-day care or contact in relation to children. The duration of that order is set out in s 28C and, of more relevance, is s 28D, which states that when an interim order (not referred to in the section as an Interim Parenting Order) has been made under s 28B, then the party in whose favour the order has been made must as soon as possible make application under the Care of Children Act for a Parenting Order pursuant to that Act.

[9] The Domestic Violence Act clearly draws a distinction therefore between an order relating to day-to-day care and contact under that Act and a Parenting Order under the Care of Children Act. It is quite clear through the application of s 28D that there is a distinction between the orders made under the various Acts and thus the

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1 *Porter v Wilkins* [2017] NZFC 9550, [2017] NZFLR 979.

Interim Parenting Order made by Judge Farnan was not a Care of Children Act Parenting Order, but an order made pursuant to the Domestic Violence Act, and as a consequence it is an order made under that Act. It is not caught therefore by Part 5A of the Care of Children Act and thus, as counsel have conceded, r 34 applies which provides jurisdiction for the Court to rescind or vary an order made on a without notice basis. It is that rule that gives me the statutory power to therefore hear and determine the application to rescind.

[10] The second issue relates to the application under s 31 Care of Children Act in which Mr [Parker] seeks that the girls are placed under the guardianship of the Court. Specifically, he seeks that the chief executive of Oranga Tamariki be made agent of the Court. In those circumstances, pursuant to s 32 of Care of Children Act, notice must be given to the Chief Executive and upon a receipt of notice the Chief Executive is entitled to appear and be heard on the application.

[11] At the outset of the hearing Mr Ong for the Ministry sought an adjournment of that application on the basis that Oranga Tamariki had not been served. Ms Houghton advised that she had in fact served the Ministry yesterday by email and Mr Ong's response was that implicit in the Chief Executive being given notice was a requirement that that notice be reasonable notice so as to enable the Chief Executive to be heard. I agree with that submission.

[12] However, as Mr Headifen submitted, s 32(3) specifically provides that s 32(2) (the requirement to give the Chief Executive notice) does not apply if the Court considers that the delay that would be caused by giving notice would or might entail serious injury or undue hardship to these children. It is that provision that Mr Headifen relies upon and thus as part of the decision I make today I need to determine whether the grounds under s 32(3) are made out or not.

[13] As I explained to counsel, the effect of that really is that I am dealing with the matter without notice, although given that Mr Ong is here as is Ms Robertson, a social worker from Oranga Tamariki, it really is proceeding by way of Pickwick hearing in any event. If I decide to proceed under s 32(3), then any order I make pursuant s 32(4) must be an interim order and the Chief Executive can be subsequently heard. Thus, I

determined at the outset that I would proceed with the hearing in relation to the s 31 application and would determine, having heard counsel's submissions, whether to exercise my discretion under s 32(3) or not.

Should the Interim Order be set aside?

[14] I turn now to look at the issue of whether to set the order aside or not. The evidential basis of the application by Ms [Heath] is set out in her affidavit sworn on 25 January 2018. She sets out that the parties were married in 2002, separated in 2008, and that they have two children. That is important as it provides a jurisdictional basis for there to be an application under the Act in that they were in a relationship.

[15] She then goes on to set out her allegations, alleging domestic violence against her and recording that she obtained a final Protection Order in 2006 and that it was subsequently discharged. She sets out some of the allegations of violence that were in support of her application for that Protection Order, including pressure upon her by Mr [Parker] that she has an abortion and that he would kick the baby out of her. She went on to assert that he would physically kick her in the stomach often when drunk and that she was under his control and too scared to do anything about it.

[16] She records at paragraph 11 that in 2009 on Mr [Parker]'s application the Protection Order was subsequently discharged. She then sets out subsequent narrational events, albeit briefly, where she alleges ongoing intimidation by Mr [Parker] towards her, threatening her by asserting that she would not see the children again, and that at changeovers he would become aggressive, threatening and verbally abusive towards her. She does note that there was a shared care Parenting Order.

[17] Her assertion of Mr [Parker] at changeovers becoming aggressive, threatening and/or verbally abusive towards her is a bald statement with no specifics attached to it and certainly on any object of assessment of that bald statement there is insufficient evidence for the Court to conclude that those allegations would be proven on the balance of probabilities.

[18] Of greater relevance is her assertion that on 22 January at the changeover in [location deleted] that the girls, transitioning from their father's care to hers, got out of the car running towards her upset and crying. She asserts that Mr [Parker] said to her that he would kill her and as she drove off she asserts the girls alleged that Mr [Parker] had been hitting, kicking and punching them. Further, that they were able to show the spots where he had hit, kicked and punched them.

[19] Specifically, [Caden] is alleged to have had a red mark on her neck where she says she was grabbed by Mr [Parker]. The girls both asserted that Mr [Parker] had said he would kill them and that [Caden] had redness and swelling around her right eye, redness around her lower left jaw and that [Caden] had asserted the Mr [Parker] had punched her in the face.

[20] Ms [Heath] also states that she observed redness around [Caden]'s abdominal area and back and a mark on her neck. There is an assertion that [Caden] said Mr [Parker] had hit her on the foot with a stick, puncturing the little toe on her right foot although there is no evidence from Ms [Heath] that she observed any such injury on [Caden]. [Kerry] is said to have redness on her right hip, her back and her left shin area where she is alleged to have said to Ms [Heath] that she had been kicked. Ms [Heath] states that she is scared for herself and the children, that she does not feel safe and that she has as a consequence isolated herself.

[21] On the face of it, therefore, there were before Judge Farnan allegations made by the children to their mother that they had been physically assaulted by their father and evidence from Ms [Heath] that she had observed injuries on the children.

[22] The basis of Mr Headifen's submissions is that the evidence of Ms [Heath] was by omission misleading, particularly as in his submission Ms [Heath] failed to set out the history of the proceedings which, as Ms Houghton has said in her submissions, have involved the children in litigation before the Court from when they were pre-schoolers.

[23] In his written submissions, Mr Headifen has referred to a number of High Court authorities setting out the high evidential threshold required when making an application without notice to the Court. In *Hawthorne v Cox*[2], Heath J stated:

> This Court has emphasised the need for applications to the Family Court to be dealt with on notice, unless there are compelling reasons to proceed without notice being given.

[24] His Honour referred to *Martin v Ryan* [3], *Y v X* [4], and *Skelton v The Family Court (2)*[5]. Mr Headifen specifically referred to me *Martin v Ryan* and the comments by Fisher J that:

> It is trite to say that on all ex parte applications the utmost good faith must be observed. There must be full and frank disclosure of all material facts whether or not they assist the applicant. Failure to observe that duty will normally (although not inevitably) result in discharge of the order, whether or not the order would have been justified on other grounds...

[25] Specifically, Mr Headifen asserts that counsel who acted for Ms [Heath] (whom I should record was not Ms Saini) failed to exercise her ethical obligations to the Court in ensuring that all matters were accurately disclosed that could have been disclosed and was therefore in breach of her certificate. There are therefore three issues:

(a) Did Ms [Heath] fail to make adequate disclosure?

(b) Did her counsel to make proper enquiries that would be expected of her in making a without notice application?

(c) If either of those matters are established should the application be rescinded as sought by Mr Headifen on his client's behalf?

[26] It cannot be argued against with any credibility that Ms [Heath] has by omission failed to disclose information that she should have put before the Court. While I accept that her counsel instructed at the time may not have known of the

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2 *Hawthorne v Cox* [2008] 1 NZLR 409, [2007] 26 FRNZ 440 at 39.
3 *Martin v Ryan* [1990] 2 NZLR 209.
4 *Y v X* [2003] 3 NZLR 261.
5 *Skelton v Family Court at Hamilton (No. 2)* CIV-2007-419-97, 4 April 2007.

background, it is inconceivable that Ms [Heath] had forgotten about those events given that she lived and breathed them for years. There was the hearing before Judge de Jong in February 2010 in which she opposed the discharge of the Protection Order. There was the hearing before Judge Burns in July 2011 in which she asserted that the children were at risk in their father's care. His Honour determined that there were no safety issues for the children in their father's care.

[27] There was then another, on my calculation, nine notifications before the matter came before His Honour Judge Neal where His Honour made a finding that none of the allegations of abuse made subsequent to Judge Burns' decision were proven on the balance of probabilities. Indeed, I should record that Judge Burns similarly recorded that the allegations were unsubstantiated.

[28] Ms [Heath] appealed Judge Neal's decision. Mr Headifen, who has been counsel for a number of years, stated that Ms [Heath] was present at the High Court callover for the appeal and during the appeal. Moore J upheld the decision of Judge Neal.

[29] It is significant that there have been, I am told, 26 notifications, all by Ms [Heath], in relation to these children and that three different Family Court Judges and a High Court Judge on appeal have found that none of those allegations have been substantiated. Ms Saini submitted that that was irrelevant as it was in the past and that since the order of Judge Neal the pattern of allegations being made by her client has not continued and that this really should be treated as a stand-alone allegation. I agree with the submissions of Ms Houghton that that is not a call for her or her client to make; relevance is for the e-Duty Judge to determine.

[30] The obligations on parties and counsel in a without notice application are extremely high for the very reason that what the Court has been asked to do is to make a factual determination in breach of a respondent's rights of natural justice to be heard. The Court is empowered to do so only when it is satisfied that the risk of proceeding on notice would cause a risk of harm or undue hardship pursuant to r 220 Family Court Rules 2002 (that rule being the basis upon which without notice

applications can be made under the Domestic Violence Act; in effect mirrored by r 416H of the rules in relation to proceedings under the Care of Children Act).

[31] It may well have been that a Court fully appraised of the background may have come to the same conclusion as Judge Farnan but it may be that the Court did not. What has occurred is that the Court was denied the opportunity of making a full assessment of the issues in light of all the background to proceedings.

[32] Significantly Judge Neal in his decision (upheld by Moore J on appeal) found that Ms [Heath] was engaging in alienating behaviour and clearly gave a, "Shot across her bows," that if it continued the Court may need to look at changing the care arrangements for the girls. Indeed, the s 133 report-writer, as apprehend Judge Neal's decision, clearly indicated that that was an option which she saw the Court undertake as part of that hearing but for the reasons set out by His Honour he stood back from that course of action.

[33] The fact therefore that the Court had expressed concerns that Ms [Heath] was an alienator of these children and that there was a history of Ms [Heath] making numerous allegations, all of which have been unsubstantiated, would have been of direct relevance to the Court in considering the application by Ms [Heath] for a Protection Order on a without notice basis.

[34] Last week on e-Duty on a without notice basis I set aside an order that had been made without notice and recorded that it would be hard to find a more egregious case. I have now found it. The lack of disclosure about what are extremely important and significant events in this case is appalling and can only have been deliberate by Ms [Heath] for, as I have said, she lived and breathed these events for a number of years and she clearly chose to not inform her current counsel of the background matters which were clearly disadvantageous to what she was seeking.

[35] I accept as Mr Headifen has said that given the certificate of counsel she must have received advice that there was an obligation on her to disclose all matters in proceedings, both those that are advantageous and those that are disadvantageous to her. She has clearly, and in my view, deliberately misled the Court by omission and

made a calculated decision to not tell the Court those things that should have been put before the Court.

[36] I am quite clear in my mind that when I apply the law as set out by the High Court in *Martin v Ryan* and the other decisions that Mr Headifen has set out in his submissions that the material misrepresentation in this case has been so egregious that I need to seriously consider whether to set aside the order.

[37] Ms Saini urged me to stand back from that course of action and not set the order aside on the basis that the Court would, faced with these stand-alone circumstances, need to act protectively in order to protect these children, for if the allegations were true then they have been at risk in their father's care.

[38] That submission misses the point. Firstly, it seems to imply that when an allegation is made it should be assumed to be true and the Court should act protectively until the contrary is proven and thus any allegation made on a without notice basis must be dealt with seriously by the Court through the making of an interim order in order to be protective for children. That cannot be a correct assumption at law for it would simply open a floodgate for people to make false allegations knowing that the Court would simply "act protectively" as a knee-jerk reaction.

[39] Indeed, it seems as a consequence of the reforms enacted by Parliament that it is now the assumption of counsel that there is an automatic right to apply any matters before the Court on a without notice basis and I note that prior to the reforms, a minority of applications were made without notice and a majority on notice. Now, most applications are now made without notice and less on notice, notwithstanding that r 220 and r 416H have not changed the legal test.

[40] It appears to me that there is scant regard held for the high obligations and requirements before a without notice application is made and it cannot be right to simply assert that when someone makes an allegation the Court must act on it in order to be protective. For the Court's task has never changed; it is to assess matters on facts available to it, and to make a determination on the basis of facts.

[41] In this case that which has gone before would have been of direct relevance to Judge Farnan in exercising her discretion as to whether to make an order without notice or not. I accept it would have been a difficult decision for her to make; for on the one hand there were on the face of it very strong and forceful allegations made by both girls but on the other hand there is a clear background of false allegations being pursued by Ms [Heath] even in the face of objective evidence that they must lack validity.

[42] In support of that last point I note that Mr Headifen in his submissions reminds me of the condition of the order restricting the children's medical intervention because of the fact that these children have had a number of unnecessary and arguably abusive medical interventions in the past as a consequence of the allegations made by Ms [Heath]. Indeed, in relation to the current allegations she has entirely ignored that condition of the order and taken the children to medical professionals other than that set out in the order.

[43] I accept that the condition of the order relating to the children only going to the [Medical Centre name deleted] has not occurred because the [Medical Centre] refused to become involved, but by agreement they had agreed on another local medical centre and thus Ms [Heath] was clearly under an obligation to comply with the provisions of the order as amended and agreed to by themselves.

[44] The central issue is this. If Judge Farnan had had appropriate disclosure would she have been still minded to make the order? That is, against a background of unsubstantiated allegations made by Ms [Heath] would she have been satisfied as to the veracity of the new allegations such that Her Honour would have decided to intervene in breach of Mr [Parker]'s right to be heard on the basis that Her Honour would have been satisfied that these children were at risk of harm or undue hardship? My view is that any Judge properly applying the law, given that background, would have failed to have made the orders as sought on a without notice basis, as any Judge must have had legitimate concerns given that background as to the veracity of the allegations that are made. I accept that, as Ms Saini has said, that would have required a careful assessment of the potential risks for the children given that on the face of it they have made clear disclosures, but if there is any doubt then the rights that are

enshrined in what should be the standard on-notice process must take precedence in my view.

[45] The second issue is whether Ms [Heath]'s then counsel was in breach of her obligations. I am very conscious that she is not here today and has not given any evidence but there are some matters that do concern me. Firstly, as Mr Headifen has said in his submissions following the making of the s 28B order relating to the children's day-to-day care, Ms [Heath] made application as the Act requires her to do for a Parenting Order under the Care of Children Act. I agree with Mr Headifen that in the intervening time her then counsel should have made enquiries of the Court to ascertain the full background to this matter, and it is of concern to me that the only FAM number that was provided in the application for the Care of Children Act Parenting Order was the FAM number given in relation to the 2018 Protection Order application. It is a very simple process to either email or phone the registry and ask them to do a search on CMS of the parties' names and readily ascertain the background FAM numbers, and CMS would also have given Ms [Heath]'s then counsel a heads-up as to the actual background of this matter.

[46] I accept it is a very difficult position for counsel to be in when, as appears on this case, on a Friday a client came to that lawyer's office making allegations that her children had been assaulted and that the children were due to see their father the next week. But notwithstanding those pressures of time, this case is an example of the care that needs to be taken by counsel and it serves as a timely reminder to counsel of their high ethical obligations to the Court in ensuring that information before the Court is accurate. Counsel cannot assume that their clients are always telling the truth, and in this case Ms [Heath] in my view deliberately withheld information from her lawyer which she knew to be adverse to her case.

[47] Over and above those comments it would be wrong as a matter of principle and contrary to natural justice to comment any further on the role of counsel in this hearing, given that she has not had an opportunity to give evidence before the Court.

[48] It follows therefore that I am entirely satisfied for the reasons I have set out that Ms [Heath] by omission has misled the Court, and that as a consequence there has

been a miscarriage of justice. If full disclosure had been made there would not have been a clear case on its merits and the strong grounds required for overriding the conventional requirements of natural justice would not have been satisfied. I therefore make an order rescinding the Temporary Protection Order and the Parenting Order made by Judge Farnan for those reasons. As I have already said, it is hard to envisage a more egregious case of material nondisclosure.

[49] I now turn to consider the s 31 application and, as Ms Houghton has said, that requires welfare and best interests consideration for these children. There is on the face of it still allegations before the Court that Mr [Parker] has assaulted the children. What has occurred or not occurred since concerns me enormously. It appears the children were immediately taken to the police. Ms [Heath] has not made the children available for the purpose of an evidential interview, through Ms Saini has sought to place the blame for that in effect on a lack of communication due to Oranga Tamariki not having her up-to-date contact details. There is a report from the social worker setting out the difficulties that she has had in trying to engage with Ms [Heath].

[50] The problem I have with the position advanced by Ms [Heath] is that she is no stranger to the process of these children being interviewed. They have throughout their life had a number of medical examinations including invasive medical procedures, they have been interviewed by social workers, they have had evidential interviews and they have had three interviews with a s 133 report writer. She does not approach this situation ignorant of the process of interview and of the need for the Court to have evidence. The Court on previous occasions has made it clear in its findings that when the children have been subject to those interviews and the allegations have been unsubstantiated, Ms [Heath] has not accepted those conclusions. It is surprising therefore if the children had been assaulted by their father that she was not at the local offices of Oranga Tamariki beating down their doors, asking for the children to be seen by a social worker and interviewed.

[51] The children have had an appalling attendance at school since the Interim Parenting Order was made by Judge Farnan. I have had handed up to me for my information (the reports not being acceptable as admissible evidence under s 9 Evidence Act 2006) medical certificates which purport to excuse the children from

attending school. They are entirely useless because they do not provide any basis on which to justify the children not attending school. The children have been taken to Starship in breach of the current Parenting Order and based upon the self-reporting by Ms [Heath] have been referred to the concussion unit, and it appears that they are now being medicated. There is no evidence as to what information Starship have been told, what examinations have or have not occurred, and the basis upon which they have formed their opinion that at least one of the children are suffering from concussion. Thus, on the one hand Ms [Heath] has been extremely industrious in pursuing opinions which suit her view but has been extremely reluctant to engage with a process that she knows would provide for a robust interview of the children. There are no photographs of the injuries. I accept the current order precludes that, but given that Ms [Heath] clearly chooses to ignore the order when it suits her, if there were injuries I would have thought she would have photographed them.

[52] Given the concerns expressed by the s 133 report writer and the conclusions of Judge Neal upheld on appeal, there must remain concerns about the potential for alienation and, while Ms Saini submits that for the last three and a half years the arrangements have proceeded without incident, that is certainly not the position of Mr [Parker] in his evidence before the Court and will need to be determined at a later point in time.

[53] The Court, I suggest, is going to be in a difficult position in relation to these allegations. Given the passage of time from when the incidents were alleged to have occurred, the failure to take them to the very agency charged with assessing by way of a preliminary interview whether the allegations are made out or not and then undertaking an evidential video interview, and the concerns around potential alienation, and it may be that a Judge in the future is going to have some difficulty given the circumstances that Ms [Heath] has created in determining the allegations are proven on the balance of probabilities.

[54] But recognising that there are what are on the face of it serious allegations before the Court, Ms Houghton suggested that I vary the order to provide for Mr [Parker]'s mother to monitor or supervise his time with the children, for the effect of my rescinding the order is that the current Parenting Order is reverted to. Whilst I

am attracted to that submission the power to vary in s 34, it seems to me, only relates to the order that I have now rescinded, but I suggest that Mr [Parker], knowing that there is a matter before the Court, would be well advised to ensure that insofar as is practicable his mother or another adult is with him at all times while the children are in his care so as to prevent the possibility of further allegations being made.

[55] As counsel set out in their submissions the threshold for making an order under s 31 is a high one, and that has been clearly spelled out by Heath J in *Hawthorne v Cox*.

[56] The orders sought by Mr Headifen and Ms Houghton relate to the Court's agent if an order is made being responsible for medical interventions for the children for an assessment of the allegations and to ensure that they are at school.

[57] I am conscious that there remain unresolved allegations which, as I have said, are on the face of it of concern, and I am conscious of the background of the high level of dysfunction and conflict between these parents and the background of Ms [Heath] making many allegations which have been found to be unproven. I am also conscious that Ms [Heath] has shown an apparent disregard for the terms of the current Parenting Order, and I have reached a view that in terms of s 32(3) delay that would be caused by giving the Chief Executive reasonable and appropriate notice would entail undue hardship to the children in that it means without some oversight that there is potential for them to be exposed to further allegations and unwarranted and unnecessary medical intervention, to medication that may or may not be necessary, and that there is a need to ensure that these children are, if deemed appropriate by Ms Robertson, evidentially interviewed, for it may be that when she meets with the girls that she is not satisfied that it would be in their welfare and best interests to undertake an evidential video interview. She, I have no doubt, in her training as a social worker is well used to the faltering process that often occurs between children making apparent disclosures and a subsequent social work decision to either undertake or not undertake an EVI.

[58] Thus, I have determined, conscious of the extremely high threshold but because of the facts in this case that I have set out, that it is in the welfare and best interests of these children for a s 31 order to be made placing the children under the

guardianship of the Court and to appoint the Chief Executive of the Ministry for Children, Oranga Tamariki, as agent of the Court. In making that decision I take particular regard to the principles in s 5(c). The remaining principles in s 5 relating to these parents being responsible for the care of the children and decision in relation to them, are at this point in time effectively suspended by the making of this guardianship order.

[59] The principles relating to the children being in the care of their parents are being given effect to by the reversion to the current existing Parenting Order. On the evidence before me there is not an evidential foundation to consider s 5(f) but s 5(a) has been determinative of my decision to place the children under the guardianship of the Court, that is, to protect their safety.

[60] The brief for the Court's agent is as follows:

(a) To take all steps necessary to ensure that the children are to be in the shared care of their parents in accordance with the current Parenting Order. Given that they have been in the care of their mother now since January they should immediately be in the care of their father, to give effect that the children are to be in their care from today through until next Monday when the cycle under the order will recommence.

(b) If necessary the Court's agent is directed to have the powers that are set out in the Act as if they had a warrant. Thus, that entitles them to uplift the children and to enter any property if necessary as set out in the Act, so as to give effect to this.

(c) The social worker is to meet with the children as soon as practicable and to ensure if the social worker deems appropriate that they are to be available for the police and/or the purpose of an EVI.

(d) To facilitate the children meeting with Ms Houghton at a time in which Ms Houghton deems it is appropriate for them to do so.

(e) To assume sole responsibility for all medical guardianship decisions relating to the children and, particularly but not limited to this, to make decisions around the children's treatment, medication and counselling. To that end the Court's agent will need to make immediate contact with Starship to let Starship know of the provisions of this order, and for the sake of Starship the Court now has guardianship of the children for these purposes and as a consequence the Court's agent is entitled to medical information relating to these children as the agent is standing in the place of the Court as guardian of the children and, thus, Starship should release to the Court's agent any medical information that Ms Robertson seeks.

(f) To ensure that the children attend school unless there is clear medical evidence, which will be available to the Court's agent given the above direction, that they are not well enough to attend school.

(g) To report back to the Court in writing in 21 days as to what has occurred between today's date and then, and to thereafter report to the Court as directed.

(h) As a consequence of the decision I have made the application for a Parenting Order is now on notice. Mr [Parker], if he wishes to file any further evidence in support of his opposition to that order being made final, is to do so within 21 days, and Ms [Heath] is to file any response 14 days thereafter and the matter is to then be set down for a half-day hearing.

(i) There is before the Court a substantive application by Ms [Heath] to vary the terms of the current Parenting Order. That application needs to be progressed. Mr [Parker] is to file his notice of response if he wishes to oppose it, together with his affidavit evidence in support, within 21 days and, similarly, Ms [Heath] is to file any evidence in reply 14 days thereafter.

(j) I declare these proceedings are complex. I am conscious that I am from out of Auckland but given where matters have got to and the decision I have reached I determine that this file is to remain case managed by me in the interim. I very much envisage that the s 31 guardianship order will be interim and, in any event, I know that it has to be pursuant to s 32 as the Ministry is entitled to be heard as to whether it is to continue or not. I understand that in relation to the Care of Children Act proceedings there is a directions conference already set down. I vacate that conference and direct the registrar to set one down before me in 28 days' time, by which time the Ministry would have filed its first report. That conference can proceed by way of a teleconference and I can make further directions at that point in time, including whether to declare the proceedings uncomplex or determine whether they are to continue to be managed by me.

[61] To be clear, what I expect to happen now is for the Court's agent to make its own enquiries in relation to the allegations that are before the Court, as I hope it is clear the decision on whether there is to be an EVI or not rests with Ms Robertson and whether she feels there has been appropriate disclosure by the children so as to trigger that process or not.

[62] Clearly, if there is an evidential video which on the face of it makes clear disclosures then there will need to be a revisiting of the current situation.

Finally, Mr Headifen seeks costs against Ms [Heath]. He is to file his submissions addressing the cost issue and particularly why he would submit there are extraordinary circumstances in terms of the Legal Services Act 2011 as to why the Court should make a costs award, notwithstanding that Ms [Heath] is in receipt of legal aid. Any submissions in reply are to be filed 14 days thereafter. The matter will then need to be referred to me in chambers for a chambers determination on that issue.

S J Coyle

Family Court Judge