

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

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**IN THE FAMILY COURT
AT HAMILTON**

**I TE KŌTI WHĀNAU
KI KIRIKIROA**

**FAM-2020-019-000574
[2021] NZFC 11418**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[VALERIE SADAT] Applicant
AND	[JOEL FOX] Respondent

Hearing: 12 November 2021

Appearances: K Sporle for the Applicant (via AVL)
Respondent appears in Person (via AVL)
F Amarasekera as Lawyer for the Child (via AVL)

Judgment: 12 November 2021

ORAL JUDGMENT OF JUDGE N GRIMES

[1] This is the fourth hearing relating to 20-month-old [Mona]'s care arrangements which does not bode well for improving the parenting relationship between her parents, Ms [Valerie Sadat] and Mr [Joel Fox].

[2] Today has been a rescheduled submissions only hearing to consider increasing Mr [Fox]'s contact with his daughter.

[3] The hearing has been brought on as a priority hearing as Mr [Fox] has not had contact now for some months.

[4] The hearing has taken place by way of MS Teams and submissions only, affidavit evidence having previously been supplied in accordance with the court's earlier directions.

[5] Present has been Ms [Sadat] with her counsel Ms Sporle. Mr [Fox] represents himself, and Ms Amarasekera represents [Mona].

[6] As the court is aware, [Mona] was born on [date deleted] 2020 before New Zealand went into its first COVID-19 lockdown. The parties had separated. Ms [Sadat] and [Mona] live in Hamilton and Mr [Fox] lives in Auckland. There had been a protection order that was discharged and subsequently a further protection order granted with a final protection order then granted by consent. Three decisions have already gone before this one regarding the times and terms of Mr [Fox]'s contact with his daughter, including a safety enquiry hearing on 25 May 2021 at which the parties agreed contact would transition to unsupervised. That unsupervised contact started just prior to the most recent New Zealand COVID-19 lockdown from August 17 2021 and in which both Auckland and Waikato remain.

[7] There was a difference of opinion as to whether Mr [Fox] could travel to the Waikato to have contact with his daughter, given the guidelines regarding the shared parenting arrangements between alert levels and therefore his travel over the border. Ms [Sadat] did not consider that Mr [Fox] would be able to travel and therefore the contact has not occurred. Rather, there has been video contact.

[8] As has been highlighted in the previous decisions Mr [Fox]'s contact with his daughter has been stop/start since she was born. That is not consistent with the principles of the Care of Children Act 2004 whereby [Mona] is entitled to have a relationship with both of her parents. Today's hearing is about getting that contact back on track.

[9] Pleasingly, and with the assistance of Ms Amarasekera and counsel, the parties have been able to again agree on the bulk of the terms of a further interim parenting order and have provided me with a signed memorandum of consent. They are congratulated for doing so.

[10] They have done so against a backdrop of no trust and no communication. Yet again I have reminded them that with four hearings behind them they both need to reflect on the role they have played to get to this level of conflict. They have both been responsible for this and it is not for this hearing to determine whether one is more responsible than the other. In any respect, such a determination is not going to help their daughter. That is just point scoring.

[11] For determination today has been three outstanding issues. The first is whether there can be an additional contact above what has been agreed on Mondays from 9.30 am until 11.30 am. The second issue relates to whether Mr [Fox] sees [Mona] for 30 minutes if she is unwell, and the third issue relates to whether Mr [Fox] (who is unvaccinated against COVID-19) needs to be tested for COVID-19 before seeing his daughter once the borders re-open and mandatory testing is no longer necessary.

[12] In relation to the first issue, the parties have agreed to [Mona] seeing her father every week on Saturdays and Wednesday for two hours in Hamilton at an independent location. She is 20 months old, continues to be breastfed and has, at times had ill health particularly last year in relation to reflux issues. Notwithstanding this, she also has a busy schedule attending three playgroups each week. I accept Ms Amarasekera's submission that given [Mona]'s involvement in these activities, it is at odds with [Mona] being frequently unwell as has been suggested.

[13] Mr [Fox] says he is 100 per cent committed to being available for contact three times a week. He tells me he has not missed any sessions since the last hearing and intends to find work that would not interfere with his being able to have such contact. He is committed to abiding by the terms of the order at changeovers so there is no conflict.

[14] On behalf of Ms [Sadat], Ms Sporle submits there is evidence of ongoing conflict at contact, suggestive that contact three times a week may increase the chance of conflict. There is a lack of trust between the parents and Ms [Sadat] is taking a big leap of faith in Mr [Fox] in having the extended contact, particularly as she knows very little about his life, including where he lives and any work that he is undertaking. She is also concerned at whether such an arrangement is sustainable. She has however been open to adding in Monday contact when [Mona] turns two.

[15] I have taken these submissions on board. At this stage [Mona] would be out and about every day of the week if contact occurred on the Mondays as well as Wednesdays and Saturdays given her other activities with her mother.

[16] I am concerned at the sustainability of such contact at this present time, given I have no evidence from Mr [Fox] regarding his financial circumstances and whether he can practically afford to make this work, together with the reality that whilst the border is in place Mr [Fox] will need to undertake COVID testing prior to each visit. Whilst he is prepared to do so, that could be onerous.

[17] Nevertheless, [Mona] has had a very disrupted contact regime with her father. For [Mona] to be able to establish her relationship with him she needs to see him little and often given her age. This is particularly important as the parties move towards Mr [Fox] having increased contact.

[18] I listened very carefully to Mr [Fox] today when he said he wants to be actively involved with [Mona] in all parts of her life and not just playing with her, ie taking on a parenting role rather than just a visiting role.

[19] Given the borders will open, [Mona] shortly turning two together with the possibility that her breastfeeding will have reduced and health improved over the summer months, the Monday contact can commence from Monday 3 January 2022.

[20] The second issue relates to what, if any, contact Mr [Fox] should have with [Mona] when [Mona] is sick. This issue arises because the parties do not trust each other. Mr [Fox] acknowledges there have been times that [Mona] has been unwell.

However, he is also concerned that ill-health is being used as an excuse to thwart his contact. The order the parties have consented to requires facetime contact to occur if [Mona] is unwell, together with make-up time. I have determined that this is more appropriate than expecting [Mona] to see her father for approximately 30 minutes if she is unwell.

[21] I had given consideration as to whether Ms [Sadat] should obtain a medical certificate to confirm that [Mona] is unwell. However, given the parties are seeking a judicial settlement conference in early 2022 to review these arrangements I have faith Ms [Sadat] will not use health as a reason to prevent contact if [Mona] is not actually unwell.

[22] Mr [Fox] will be able to gauge that from the facetime contact. However, I will order that if [Mona] misses two consecutive visits due to ill-health then a medical certificate needs to be supplied if the third consecutive visit cannot go ahead.

[23] The third issue is whether Mr [Fox] should be COVID tested before each visit as he is not vaccinated against COVID-19. Ms [Sadat] is fully vaccinated. Presently the border requirements between Auckland where Mr [Fox] resides and Hamilton where [Mona] resides means he has to produce a negative COVID test within 72 hours of travel. However, when that requirement is no longer mandatorily necessary to travel across the Auckland border the issue is whether Mr [Fox] should do so before contact with [Mona] because he is unvaccinated against COVID-19.

[24] As I have explained to Mr [Fox], s 5(a) Care of Children Act 2004 states that [Mona]'s safety must be protected. This includes consideration of [Mona]'s immediate physical safety. COVID-19 is an immediate risk to her physical safety. Presently both Auckland and Waikato are in alert level 3 step 2 because there are a number of COVID cases in the community. There is unlikely to be any change to that any time soon.

[25] By law [Mona] cannot be vaccinated against COVID-19 but she is not immune from contracting it. Whilst it is impractical to protect [Mona] from having any exposure to the virus, steps to limit the risk should be taken where possible. As New Zealand prepares to return to a new normal under the COVID-19 protection

framework known as the traffic light system, the New Zealand Government and community have also taken steps to limit the risk to children like [Mona] who are under the age of 12 and cannot be vaccinated. There are, or will shortly be, requirements for teachers and health providers to be fully vaccinated. Vaccination certificates will be required to fly, attend hospitality venues, gatherings, indoor and outdoor events, gyms and close contact businesses. Many organisations not mandated by the New Zealand Government to require vaccination certificates are doing so in any event.

[26] In [Mona]’s case, the Care of Children Act 2004 not only requires the arrangements for her to be made that are in her best interests and welfare but that it is beholden upon her parents to be primarily responsible for her care, development and upbringing.

[27] With that comes many benefits as parents, but also responsibilities. Part of that responsibility is the duty to protect [Mona]’s physical safety. As I have said, one way of protecting her safety is limiting the risk of her exposure to COVID-19 before contact. It is optimal for her parents to be fully vaccinated, but it is beyond my authority to mandatorily require that of her parents. However, it is within the legal framework of the Care of Children Act 2004 that I can make a parenting order on terms I consider that meet [Mona]’s best interests and welfare which must be my primary consideration.

[28] I am grateful to counsel for bringing to my attention the Supreme Court, New York County case of *C.B v D.B* where the issue of testing a parent for COVID-19 and the COVID-19 vaccination for a parent was brought before the court.¹ This decision was delivered on 7 October 2021 and has been of assistance.

[29] In that case the father refused to either be tested for COVID-19 or be fully vaccinated before contact. As a result, the court suspended the father’s contact until such time as he either undertook the regular testing before contact or was fully vaccinated against COVID-19. Cooper J did so on the basis that it was a reasonable condition to protect the child’s health, safety and wellbeing.

¹ *C.B v D.B* [2021] Supreme Court, New York County.

[30] Of relevance are the following passages:

In this ongoing divorce case involving a three-year-old child the issue of COVID-19 vaccination is now before me. The issue is not one of whether the child should be vaccinated, she is still too young to receive any of the vaccines. Nor is it one of whether I can require an adult to be vaccinated; to do so would stretch the authority of the Matrimonial Court to unprecedented lengths. Instead, the issue is whether the plaintiff mother who has the de facto custody of the child and is fully responsible for her care and upbringing can condition the defendant father's access with the child which is limited and supervised, on defendant and his supervisor being vaccinated, or at the very least, submitting to a testing regime prior to each of the access periods.

[31] He went on further to say as follows:

It is well established that there is rebuttal presumption that visitation by a non-custodial parent is in the child's best interest and should be denied only in exceptional circumstances where 'Compelling reasons and substantial evidence show that visitation would be detrimental to the child ...' or is otherwise: 'inimical to the welfare of the child....' Further, 'the paramount concern when making a parental access determination is the best interests of the child under the totality of the circumstances....'

[32] Cooper J went on to set out the concerns around remaining unvaccinated during access with the child as follows:

Here in person parental access by defendant is not in the child's best interests, and there are exceptional circumstances that support its' suspension. The danger of voluntarily remaining unvaccinated during access with a child while the COVID-19 virus remains a threat to children's health and safety cannot be understated. Although some children infected with the virus experience mild symptoms, others are subjected to serious illness and long-term health effects. Children under the age of 12 have not yet been approved to receive COVID-19 vaccines. They are dependent upon the vaccination and health status of the adults around them. The danger extends beyond this child and includes a risk of serious infection to any person with whom the child comes into contact including plaintiff, the child's classmates and the families.

[33] Mr [Fox] is not vaccinated. He told me on Monday 8 November 2021 that he was not vaccinated because he was focussed on this case. Today he informs me that the vaccination is not safe. As I have said, I cannot mandatorily require Mr [Fox] to be vaccinated, but the focus must be on [Mona] and protecting her, and accordingly, there will be a condition in the order that unless Mr [Fox] is fully vaccinated he needs to produce a negative COVID test taken within 72 hours of any contact visit.

[34] Against that background I now make the following orders and directions:

- (a) I record that Mr [Fox] has consented to accept the service of the final protection order at the email address he has provided to the court.
- (b) I discharge the interim parenting order dated 25 May 2021 and make an interim parenting order in terms of the memorandum of consent dated 12 November 2021. It is to commence from Wednesday 17 November 2021. I include in that order the following:
- (i) From Monday 3 January 2022 Mr [Fox] shall have contact with [Mona] each Monday from 9.30 am to 11.30 am.
 - (ii) If [Mona] is unwell on three consecutive visits, then a medical certificate needs to be supplied for the third visit to be cancelled.
 - (iii) It shall be a condition of the order that unless Mr [Fox] is fully vaccinated against COVID-19 he needs to produce a negative COVID test taken within 72 hours of any contact visit and provide the test results to Ms [Sadat].
 - (iv) It shall be a condition of this order that there is to be no videoing or recording of any changeover relating to [Mona]'s contact.
 - (v) [Mona] is not to be in a vehicle that is not registered or warranted.
 - (vi) Ms [Sadat] will supply [Mona]'s pram, any medication and communication book with Mr [Fox] to supply all of [Mona]'s other necessities.
- (c) I record that it is beholden on Mr [Fox] to make arrangements to be able to travel to Hamilton for the contact noting, as I already have, that his contact does not fit neatly within the guidelines regarding care arrangements over the border. That is because the guidelines provide for parents to cross the border to collect a child or return a child to the other parent before and after contact, whereas in this case Mr [Fox]

crosses the border to stay here for approximately two hours to have contact in Hamilton before returning to Auckland.

- (d) As I have indicated in this decision the contact needs to occur. It is [Mona]'s right to have a safe relationship with her father, she also has the right to the continuity of that. It is therefore for Mr [Fox] to organise his travel by providing this information at the border, and if that is not accepted then he is authorised to use this decision and a copy of the interim parenting order in order to apply for an exemption noting, as I have, that there is a condition in the order that Mr [Fox] will be testing for COVID before each visit.
- (e) I adjourn the proceedings to a judicial settlement conference on 9 February 2022 at 10am. The parties and counsel are to file memorandum five days in advance that sets out any issues that are agreed, those that remain in dispute, and an outcome sought in a general way.
- (f) The parties are aware, there have been four hearings. Therefore, the parties are to turn their minds to settling the proceedings once and for all. I accept that at [Mona]'s age this can be difficult. However, the parties may like to consider a staged approach to increasing contact in an order. In other words, contact that may occur from when she turns two to when she is say two and a half, to when she is three, and up until she is approximately four or five.
- (g) Leave is reserved to any party to seek the court's further directions on two days' notice if further directions are necessary to implement this decision.
- (h) At the parties' request, I authorise communication counselling for 10 sessions under s 46G Care of Children Act 2004. I direct Ms Amarasekera liaise with the Family Court Co-ordinator to ensure that such communication counselling is organised in a timely fashion.

It will need to happen remotely given the COVID levels, but the parties have the technology to ensure that can occur.

- (i) I authorise Ms Amarasekera to convene a further round-table meeting in a way she considers appropriate before the judicial settlement conference.

Judge NJ Grimes

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 06/12/2021