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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2021-009-001038
[2022] NZFC 2797**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[BRIAN GREEN] [JACQUELINE GREEN] Applicants
AND	[NEIL BROWN] Respondent

Hearing: 14 March 2022

Appearances: S Aitken for the Applicants
M Bryant for the Respondent
C Eason as Lawyer for Child

Judgment: 30 March 2022

RESERVED JUDGMENT OF JUDGE P W SHEARER

[1] This proceeding relates to [Hamish Brown], who is aged [six years]. [Hamish] is the son of [Neil Brown] and [Roslyn Spicer]. Mr [Brown] and [Ms Spicer] were in a relationship for approximately two years from 2012 to 2014. They lost [their first child] to [details deleted] in 2013 at [under two months]. They separated late in 2014 when [Ms Spicer] was pregnant with [Hamish].

[2] Tragically, [Ms Spicer] took her own life at the age of 25 on [date deleted] 2019 when [Hamish] was then aged [four years]. Fortunately, [Hamish] was already used to having regular contact with Mr [Brown], usually every weekend and every Wednesday.¹ [Hamish] has been in Mr [Brown]'s full-time care since then, so for approximately [two years] now.

[3] The application before the Court for a parenting order was filed by [Brian] and [Jacqueline] [Green] in July 2021. Mr and Mrs [Green] were friends and supporters of [Ms Spicer]. Specifically, they are the parents of [Ms Spicer]'s friend, [Hillary Green]. Mr and Mrs [Green] filed an application for leave to apply and seeking a parenting order providing for contact with [Hamish] every second weekend from Friday after school until Monday morning and for half of all school holidays.

Background

[4] Mr and Mrs [Green] are 57 and 53 years of age, respectively, as at the date of the hearing. They advised in their initial affidavit dated 20 July 2021 that they consider themselves to be [Hamish]'s "psychological grandparents".

[5] They deposed that they first met [Ms Spicer] through their daughter, [Hillary], in 2013. [Hillary] and [Ms Spicer] knew each other from high school and were best friends at the time [Ms Spicer] and Mr [Brown] lost their first child in 2014.

[6] Mr and Mrs [Green] deposed that [Ms Spicer] became part of their life in 2014, after she separated from Mr [Brown] whilst pregnant with [Hamish], and then moved into the rental property they owned where [Hillary] and her partner were living.²

[7] Thereafter, Mr and Mrs [Green] helped [Ms Spicer] move into a Housing New Zealand rental property of her own just before [Hamish] was born³ and continued to have a relationship with her and [Hamish]. Mr and Mrs [Green] deposed that they were there when [Hamish] took his first steps, they bought him his first swing set⁴ and

¹ Affidavit of Mr [Brown] dated 27 October 2021 at [22].

² Affidavit of applicants dated 20 July 2021 at [8].

³ Affidavit at [9].

⁴ Affidavit at [11].

when [Ms Spicer] first went back to work when [Hamish] was six months old, it was Mrs [Green] who babysat [Hamish] while [Ms Spicer] worked. [Ms Spicer] was working in a bakery and Mrs [Green] would leave home at 4 am to look after [Hamish] so that [Ms Spicer] could work, and deposed that she did that 2-3 times each week over a three month period.⁵ Mrs [Green] states she had a strong and positive attachment with [Hamish] and that [Hamish] called her “[Jackie]”.⁶ [Ms Spicer] eventually engaged a nanny but Mrs [Green] deposed that she would visit and babysit at least weekly and would deliver food for [Ms Spicer] and [Hamish]. She stated:⁷

I was, in effect, [Roslyn]’s mother and [Hamish]’s grandmother.

[8] [Hamish] started day-care at eight months old and Mrs [Green] stated that “I would also often collect [Hamish] from day-care, throughout his day-care years”.⁸ Mr and Mrs [Green] also deposed:

17. [Hamish] spent his first night away from [Roslyn] with us, so [Roslyn] could have a break. Both [Roslyn] and [Hamish] became an integral part of our family and we considered [Roslyn] as our other daughter...

[9] Mr and Mrs [Green] assisted [Ms Spicer] with the purchase of three cars, made sure she had firewood, purchased a fire gate to make sure [Hamish] was safe when he started to crawl and they say that [Hamish] learned to ride his bike on their driveway when [Ms Spicer] visited them, with [Hamish], on the weekends.⁹ They have a bedroom set up for [Hamish] at their house.

[10] Mr and Mrs [Green] attached six pages of colour photographs to their affidavit depicting them doing various different fun and healthy activities with [Hamish] in his early years. Referring to those photographs they stated:¹⁰

19. ... We have shared many precious moments with [Hamish] and [Roslyn] and we want for this to continue. We believe it is in [Hamish]’s best interests for us to continue to build our relationship with him as his grandparents.

⁵ Affidavit at [12].

⁶ Affidavit at [12].

⁷ Affidavit at [13].

⁸ Affidavit at [14].

⁹ Affidavit at [17].

¹⁰ Affidavit at [19].

[11] If only the affidavit had stopped there.

[12] Much of the remaining seven pages (approximately) of Mr and Mrs [Green]'s affidavit is a criticism of Mr [Brown]'s character and parenting of [Hamish], either express or implied. For instance:

27. ...The weekend after [Roslyn] passed, [Neil] and his then girlfriend took [Hamish] away for a long weekend.
30. As we understand it, [Neil] does not currently work, he left his full-time employment shortly after [Roslyn]'s passing. [Neil] has previously told us he "works" cutting firewood at a friend's property and he does the occasional cash job. We believe this is still the case but have not had contact with [Neil] for some time so cannot be sure.
31. [Neil] has never asked for our help as he does not appear to believe he would benefit from any help or support. We feel we have to walk on eggshells around [Neil] ...
32. [Neil] is very keen on hunting and firearms. We are not sure how many firearms [Neil] owns, but we have seen both a .22 calibre rifle and a shotgun that [Neil] has "for [Hamish]"...The last time I, [Brian], was at [Neil]'s home, in mid-January 2021, [Neil] had an ammunition loader on his coffee table with shells set out.
33. We are aware that [Neil] has previously taken [Hamish] to the [location deleted] for a long weekend hunting. [Hamish] told us the walks were so steep [Neil] had to lift him up. We would be worried about [Hamish]'s welfare in such an environment.
34. We have observed [Neil] does not appear to prioritise cleaning his and [Hamish]'s home environment...
35. We gutted the house, painted it and brought in new furniture, to make sure [Hamish] had a hygienic and appropriate home environment ... Unfortunately, we noticed that it did not take long for the home to revert to the dirty, dusty environment it had been prior to our renovations.
36. [Neil] also has a very relaxed approach to parenting, in our observation. [Neil] appears to favour an 'independence' approach – that is, [Hamish] must dress himself and be exposed to adult activities without precaution on the basis that once he hurts himself, he won't do it again.
37. We recall one visit when [Hamish] was little, where [Hamish] came back from [Neil]'s utterly filthy. [Roslyn] was very upset ...
38. ...While [Neil] is an adult and able to make whatever decisions he chooses around his own lifestyle and health, we are concerned about [Hamish]'s welfare should he make similar decisions and involve [Hamish].

39. We are aware that [Hamish]’s school, [School A], also has concerns about [Neil]’s ability to care for [Hamish] ...
42. It appears to us that [Neil] uses [Hamish] as a sounding board regarding our involvement with [Hamish]...

[13] At the start of the school year in 2021, Mr [Brown] chose to take [Hamish] with him to a music festival called “[festival name deleted]” in [location deleted] for two weeks, where Mr [Brown] was working or assisting with the electrical systems, meaning that [Hamish] at the age of 5½ missed two weeks of school.

[14] Mr and Mrs [Green] deposed that “We do not believe the festival itself is suitable for children and were extremely concerned as to who would be supervising [Hamish], particularly while [Neil] was working”.¹¹ Mr [Green] said that he spoke to Mr [Brown] and tried to explain that [Hamish] should be at school. He said “[Neil] did not appreciate that and told me not to interfere with his parenting”.¹²

[15] It is apparent that Mr [Brown] then stopped [Hamish]’s contact with Mr and Mrs [Green]. Mr and Mrs [Green] stated:

54. We have the [School A] app, so we get the school messages that relate to [Hamish]. We have been to two school sports events since the start of this year, and they are the only times we have seen [Hamish] since mid-January 2021. We did not have an opportunity to interact with [Hamish] at those events, however.

[16] Mr and Mrs [Green] went on to say that they left things for almost two months after they stopped being able to see [Hamish], as they were hoping that “[Neil] would come around and agree to let us have regular contact again.”¹³ At that time, on 9 March 2021, they met with a lawyer and on their lawyer’s advice they initiated the FDR mediation process. Mr [Brown] did not engage in that process and on 17 May 2021 Mr and Mrs [Green]’s lawyer sent a letter to Mr [Brown], a copy of which was attached to their affidavit, which letter stated:¹⁴

...It is the view of Mr and Mrs [Green] that they have a close and meaningful relationship with [Hamish] and, while there has been some informal contact by agreement, they are seeking regular contact to be recorded in a formal

¹¹ Paragraph [47].

¹² Paragraph [48].

¹³ Paragraph [59].

¹⁴ Exhibit “E” to affidavit.

agreement. Accordingly, we are instructed to engage in a discussion with you around contact arrangements that would best serve [Hamish]’s best interests and welfare...

Mr and Mrs [Green] are seeking to share in the care of [Hamish] but as a starting point, are seeking fortnightly contact with [Hamish] from say, Friday after school until Monday before school along with a 50/50 shared arrangement with respect to public holidays and school holidays. As has previously been the case, Mr and Mrs [Green] would facilitate transport associated with this contact arrangement, with pick-ups and drop-offs taking place at [Hamish]’s school.

[17] Mr [Brown] did not reply and two months later, on 20 July 2021, Mr and Mrs [Green] filed their application.

Mr [Brown]’s response

[18] Mr [Brown] filed a notice of response and affidavit on 20 October 2021. He acknowledged that Mr and Mrs [Green] were “close family friends of [Roslyn] and were involved in [Hamish]’s life through [Roslyn]”. He noted that “they are not biologically related to [Hamish] and had little to do with me prior to [Roslyn]’s death”.¹⁵

[19] Mr [Brown] then stated:

5. I respect that [Brian] and [Jacqueline] have been involved in [Hamish]’s life previously and I am agreeable to [Hamish] spending time with them on occasion by agreement, however I do not consider that a parenting order should specify when [Hamish] spends time with [Brian] and [Jacqueline].
7. I do not consider it is in [Hamish]’s best interests to spend every second weekend from Friday after school to Monday before school with [Brian] and [Jacqueline]. This would mean that [Hamish] and I are only able to spend quality time together every second weekend as our time together during the week largely consists of transporting [Hamish] to and from school, homework and getting him ready for bed. This would also limit the time that [Hamish] is able to spend with his close extended family members, such as [my mother] (“Mum”).
8. I am prepared for [Hamish] to spend time with [Brian] and [Jacqueline] during the school holidays by mutual agreement between us, however I do not consider it is appropriate for [Hamish] to spend 50 percent of the public holidays and school holidays in [Brian] and

¹⁵ Affidavit of respondent dated 27 October 2021 at [4].

[Jacqueline]’s care. This is a significant amount of time and it would limit [Hamish]’s time with his family.

9. [Brian] and [Jacqueline] have been critical of my parenting style as this sometimes differs from their own preferences. I find that [Brian] and [Jacqueline] often consider that they know what is best for [Hamish] and want to make decisions for him despite not being his parents, or biological relatives. Additionally, [Brian] and [Jacqueline] have repeatedly failed to respect both personal and safety boundaries which I have set in respect of [Hamish]. This is difficult for [Hamish] and I.

[20] Mr [Brown] explained that he and [Hamish] live alone in a two bedroom rental property in [suburb name deleted]. He said:

30. [Hamish] attends [School A] which is just down the road from our home. [Hamish] is on track with his educational development. [Hamish] is going well with his reading and writing and is doing accelerated maths. He is a social and bubbly kid and has many good friends at school.

[21] Mr [Brown] explained that his mother lives in a different rental property on the same property as him and [Hamish] and said we “frequently spend time together in the evenings for dinner”.¹⁶ He also talked about his grandparents in [location deleted], who [Hamish] knows and has seen on “numerous occasions”.¹⁷

[22] Mr [Brown] noted that [Ms Spicer] did not know her father and had a very limited relationship with her mother, given that she grew up in foster homes. He said that he used to take [Hamish] to visit [Ms Spicer]’s maternal grandmother, who [Ms Spicer] was close to, including visiting her at her retirement village but, unfortunately, she died in [2021].

[23] Mr [Brown] acknowledged that [Ms Spicer] was close with Mr and Mrs [Green] and that they regularly spent time with [Hamish]. He noted that Mr and Mrs [Green] were supportive initially following [Ms Spicer]’s death but said:

41. However, the relationship between [Brian], [Jacqueline] and myself became difficult at times. This was mostly due to [Brian] and [Jacqueline] forcefully voicing criticisms of how I parented [Hamish].

¹⁶ Paragraph [32].

¹⁷ Paragraph [35]

[24] Mr [Brown] concluded, effectively, as follows:

56. In light of the above, I considered that it was no longer in [Hamish]’s best interests to spend frequent time with [Brian] and [Jacqueline].

[25] Mr [Brown] then responded to the other matters that Mr and Mrs [Green] had raised about him. Mr and Mrs [Green] subsequently filed a second affidavit on 1 August 2021 providing confirmation they had both attended the Ministry of Justice parenting information programme. They completed a third affidavit on 17 December 2021 which was, in summary, much the same flavour as their first affidavit. Mrs [Green] stated:

36. [Roslyn] was like my daughter. I will always look out the [Hamish] as my grandson. I don’t believe I have overstepped boundaries and my involvement in [Hamish]’s life.

[26] They later commented:

68. Ideally, we would like to share [Hamish]’s care with [Neil], to ensure both that we have an ongoing meaningful relationship with [Hamish], but also to ensure that [Hamish] is appropriately cared for.

[27] The only other deponent was Mr and Mrs [Green]’s daughter, [Hillary], who completed an affidavit dated 20 July 2021 which was filed with the initial application. Ms [Green] stated that [Hamish] called her “Aunty [Hillary]”.¹⁸ Ms [Green] was also critical of Mr [Brown] in various passages of her affidavit.¹⁹ Like her parents, Ms [Green] also was critical of Mr [Brown] taking [Hamish] to the [music festival] at the beginning of February 2021. She stated as follows:

51. When my parents queried it, [Neil] said that there would be other children there. [Neil] told my parents during this time to stop interfering. This was on 22 January 2021, and this was in a text message, which I have seen.

52. My parents contacted Oranga Tamariki while [Neil] and [Hamish] were at the music festival. Their reason for calling was around neglect, in the sense of taking [Hamish] away from education to go to a music festival; also around [Hamish]’s nutrition and general wellbeing and [Neil]’s possession of guns – including loading of ammunition in the lounge room and leaving live rounds easily accessible. My parents also contacted Ministry of Education (“MOE”) to try and find out some more information around truancy

¹⁸ Affidavit of [Hillary Green] dated 20 July 2021 at [20].

¹⁹ Paragraphs [11], [13], [15], [33], [41], [45] and [50].

laws in New Zealand. I know this as my parents contacted me first for some advice, due to my experience in [work areas deleted]. They then followed up after these phone calls and informed me of the advice given by Oranga Tamariki and MOE.

53. They also contacted the school to inform them of the reasons why [Hamish] would be taken out of school. They were worried about truancy and absences. I believe my parents had a meeting with an education co-ordinator and [Hamish]’s teachers, at the school.

Reports of Lawyer for Child

[28] Mr and Mrs [Green]’s applications were referred to Her Honour Judge McMeeken in chambers before the proceedings were served on Mr [Brown].²⁰ Her Honour granted leave for Mr and Mrs [Green] to apply for a parenting order and directed the appointment of lawyer for child by chambers minute dated 11 August 2021. Her Honour stated:²¹

I grant leave to the applicants to apply for a parenting order (seeking contact) pursuant to s 47(1)(e). I find the applicants are psychological grandparents having exercised that role since [Hamish]’s birth by virtue of their relationship with [Hamish]’s late mother, and her lack of close relationships with her biological family. It is clear that [Hamish] has a close and important relationship with the applicants.

[29] Mr Colin Eason is a senior Christchurch family lawyer and was appointed as lawyer for [Hamish] on 16 August 2021. Mr Eason has filed two reports dated 23 November 2021 and 4 March 2022 respectively. He reported as follows in his first report:

7. [Hamish] has a view that the application is unnecessary. He says that he does not want additional time with the applicants and does not think at all positively about them regularly being in touch with him or [Hamish] having to stay with them on a regular basis.
8. [Hamish] believes that they are not useful for dad and he is aware that dad gets upset with their attempted interventions.
9. On speaking with both the applicants and the father, there is no real accord and definitely no evidence of a committed friendship.
10. The father does not see the help offered from time to time by the applicants as being something that in fact works for [Hamish], and certainly does not work for him. Instead of seeing the applicants as

²⁰ Mr [Brown] was not served until 17 August 2021.

²¹ Minute dated 11 August 2021 at [1].

supporters of him and his fathering, he understands that they are bossy towards him and demand that he does what they say.

[30] The conclusion of his first report was as follows:

17. While the application is a very commendable effort on behalf of the applicants, I do not think that the order they are seeking should be granted. In my view, it will not improve the strained relationship that already exists and it would create a situation of long-term disharmony and distrust.
18. It is my view that the advantages in making the order to [Hamish] do not outweigh the risks to the family structure which is already in place.

[31] Mr Eason's second report was filed 10 days before the hearing. The report advised:

6. When I spoke to [Hamish] about the application of Mr and Mrs [Green], he became concerned. The prospect of a set time when he sees them, troubles him. He sees it as taking away his time from dad. He is very protective of his father. There is a very strong bond between them.
7. My views remain unchanged. I have not yet seen how the applicants will make the kind of relational contribution that would be best for [Hamish].
8. I don't anticipate that [Hamish] is going to change his view for the foreseeable future.

The Law

[32] The first and paramount consideration in the decision that I make has to be Jackson's welfare and best interests, and in his particular circumstances.²² I am required to take into account the principles set out in s 5, which are:

The principles relating to a child's welfare and best interests are that—

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents,

²² Care of Children Act 2004, s 4(1).

guardians, and any other person having a role in his or her care under a parenting or guardianship order:

- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[33] In this particular case I consider that all of the principles, except paragraph (a), are relevant or at least have some relevance. There are no safety issues or concerns for [Hamish].

[34] The other factor that I must take into account is the views that [Hamish] has expressed through Mr Eason.

Submissions

Ms Aitken

[35] Counsel for Mr and Mrs [Green], Ms Aitken, filed comprehensive written submissions prior to the hearing and made further oral submissions at the conclusion of the hearing.

[36] Ms Aitken clarified that Mr and Mrs [Green] are not seeking shared care, but are “seeking regular and reliable contact with [Hamish], to take place over a weekend, consistent with that which would be expected for grandparents”. Ms Aitken said “It is not disputed that the parties have a tense relationship, and the applicants have proposed changeovers occur at [Hamish]’s school, where possible, to alleviate any unintended burden on [Hamish]”.²³

[37] Ms Aitken submitted that²⁴ “[Hamish] has been influenced so significantly by his father that the views expressed by [Hamish] are not likely to reflect his own

²³ Written submissions of counsel for the applicants at [47].

²⁴ At [46].

position, but rather the position of his father.” Ms Aitken made the point that a six year old is unlikely to be able to comprehend whether a Family Court application is “unnecessary” or not. Ms Aitken submitted that both Mr and Mrs [Green] were stable and consistent grandparents to [Hamish] while his mother was alive, and that there is no evidence that [Hamish] did not enjoy and thrive during the time he spent with them. Ms Aitken argued that Mr and Mrs [Green] filled the role of maternal grandparents and that this relationship contributes an integral part of [Hamish]’s identity. She submits that Mr and Mrs [Green] represent [Hamish]’s maternal family and that to ignore or sever that relationship will inhibit the development of [Hamish]’s identity. Ms Aitken submitted that [Hamish]’s welfare would be enhanced by ongoing connection with Mr and Mrs [Green] and that, prior to [Ms Spicer]’s passing, [Hamish] had a loving and significant attachment to Mr and Mrs [Green].

[38] Ms Aitken submitted that the message given to [Hamish] by his father, has alienated [Hamish] from Mr and Mrs [Green].²⁵ Ms Aitken drew attention to the fact that although Mr [Brown] states he is willing to facilitate contact, no contact has occurred since January 2021, other than a brief meeting at [Hamish]’s great grandmother’s funeral in September 2021. Ms Aitken argued that Mr [Brown] is opposing contact based on his personal views and feelings about Mr and Mrs [Green] and rather than on any assessment as to [Hamish]’s best interests and welfare maintaining a relationship with established psychological grandparents. Ms Aitken submitted that the longstanding relationship between [Hamish] and Mr and Mrs [Green] was a positive one and ought to be supported and strengthened. Ms Aitken suggested that the reference in s 5(e) to a child’s relationship with hapū and iwi being preserved and strengthened, acknowledges that close connections are not always blood connections to be of value.

Mr Bryant

[39] For Mr [Brown], Mr Bryant advised that Mr [Brown] was appreciative of the support that Mr and Mrs [Green] provided he and [Hamish] after [Ms Spicer]’s death, but over time Mr and Mrs [Green] overstepped boundaries and didn’t respect Mr [Brown]’s parenting.

²⁵ Written submissions at [55].

[40] Mr Bryant submits that the issue for the Court to determine is a narrow one – whether it is in [Hamish]’s welfare and best interests to have an order providing for him to be in a shared care arrangement. He said that while Mr and Mrs [Green] say they are seeking contact, they are really seeking a shared care arrangement and it is necessary to have a working communicative relationship to make a shared care arrangement work. He said Mr and Mrs [Green] have acknowledged they do not have a good relationship with Mr [Brown], and they have been critical of him. Mr [Brown] has felt betrayed by their actions, contacting Oranga Tamariki and the Ministry of Education.

[41] Mr Bryant emphasised that Mr [Brown] is [Hamish]’s surviving parent and sole guardian, and therefore [Hamish]’s care, development and upbringing is and should primarily be his responsibility. Mr [Brown] believes it is in [Hamish]’s welfare and best interests for the status quo which is working so well for [Hamish], to continue. He submitted that s 48 specifically states that the Court may make a parenting order, but is not obligated to do so.

Mr Eason

[42] Mr Eason emphasised that the first and paramount consideration is [Hamish]’s welfare and best interests in his particular circumstances. [Hamish]’s circumstances are that he has lost his mother but has a father who he loves and adores. If things occur that are difficult or damaging for [Hamish]’s father, that creates risk for [Hamish]. Mr Eason observed that with the background of a corrosive relationship and 60 pages of negative affidavit evidence, it is difficult to see how placing [Hamish] in this world would not create risk or fears.

[43] Mr Eason observed that people build lives together, not just because they communicate, but because they choose to be committed and accept who the other person is. Mr Eason does not support the order that Mr and Mrs [Green] are seeking.

Analysis

[44] As I commented to the parties at the conclusion of the hearing when I reserved my decision, I am well aware that this is a very important decision for all of the adults

involved. [Hamish] is a much loved little boy, notwithstanding the absence of maternal family following the deaths of his mother and great grandmother.

[45] Mr [Brown] has also suffered significant tragedy, losing a child to [details deleted] in 2013, and then losing [Hamish]'s mother to suicide in [late] 2019. Whilst Mr [Brown] and [Ms Spicer] were not in a relationship at that time, and had not been for about five years, Mr [Brown]'s life was forever impacted by [Ms Spicer]'s suicide in that he instantly became a solo parent with the responsibility of raising a then four year old boy.

[46] No-one can or would dispute that [Hamish] and Mr [Brown] now have the strongest and most important bond and attachment. Mr [Brown] is very much [Hamish]'s world in these circumstances. [Hamish] depends on Mr [Brown] for everything.

[47] Nor can anyone dispute or deny the helpful and supportive role that Mr and Mrs [Green] played in the first five years of [Hamish]'s life, particularly when [Ms Spicer] was alive and [Hamish] was in her primary care. It is apparent that [Ms Spicer] did not have family support of her own, other than her grandmother, and that Mr and Mrs [Green] were a great support to her, and to [Hamish], in numerous and different ways. I can see and understand that Mr and Mrs [Green] grew very fond of [Hamish], love [Hamish] as if he were a grandchild, and wish to have an ongoing relationship with him.

[48] Mr and Mrs [Green] are good people. Mr [Green] is a [job title deleted] up until the COVID-19 global pandemic interrupted international travel. As I understand it, Mr and Mrs [Green] do not yet have any grandchildren of their own. They are only in their fifties and I am aware that their daughter, [Hillary], is approximately six months pregnant. [Hillary]'s baby will, no doubt, be doted on and rightly so.

[49] The only criticism I have of Mr and Mrs [Green] is that they have, in my view, gone about these Court proceedings in the wrong way and do not appear to have any insight about that. Mr and Mrs [Green] clearly had a very close relationship with [Ms Spicer] and were very fond and supportive of her, but that relationship was with [Ms

Spicer] and not with Mr [Brown]. Mr and Mrs [Green] obviously knew Mr [Brown] prior to [Ms Spicer]'s death, but Mr [Brown] and [Ms Spicer] had been separated the entire time that the [Green]s knew [Ms Spicer], and so they only really knew Mr [Brown] indirectly, as [Hamish]'s father. They did not have the same close personal relationship that they had developed with [Ms Spicer].

[50] Mr and Mrs [Green] should, in my view, have been sensitive (or more sensitive) to that and, in particular, to Mr [Brown]'s feelings, who was new to the role of fulltime parenting and likely feeling his way to some extent, as well as dealing with a four year old boy who had just lost his mother. Clearly, Mr and Mrs [Green] wanted to help and wanted to remain involved with [Hamish], and they did so. Offering advice and assistance is one thing, but arguing with Mr [Brown] and endeavouring to force their will and opinion is quite another.

[51] There are, unfortunately, a number of clear examples where Mr and Mrs [Green] overstepped the mark, and all in a relatively short space of time:

- (a) Mr [Brown] referred to Mr and Mrs [Green] visiting unannounced and then criticising the tidiness of his house.²⁶
- (b) Mr [Brown] said that they would enter his house, even when he was not home, to inspect it.²⁷
- (c) By taking [Hamish] to get his hair cut, without consulting or asking Mr [Brown].²⁸
- (d) When it came time to enrol [Hamish] at school, Mr and Mrs [Green] presented Mr [Brown] with enrolment papers already filled in, which noted themselves as emergency contacts and grandparents.²⁹ Mrs [Green] said in her evidence that she could not recall whether she or the school had written grandparents,³⁰ but Mr [Brown] was very clear that

²⁶ Mr [Brown]'s affidavit of 27 October 2021 at [44].

²⁷ Affidavit at [43].

²⁸ NOE, page 33, line 4.

²⁹ Affidavit at [46].

³⁰ NOE page 34, line 4.

it was Mr and Mrs [Green] that had written this as it would not have been him that described them that way. I accept Mr [Brown]'s evidence on that point.³¹

Q. And then coming to school and the enrolment form for school [Jacqueline] I think said this morning that she couldn't remember whether she had written grandparent on the form or the school had or someone else had, what do you say about that, who wrote that?

A. I wouldn't have done it.

Q. You wrote it?

A. No I would not have written grandparent on the enrolment form.

Q. And are you saying the enrolment form when it was given to you had already been filled in by [Jacqueline] with her – their details on it?

A. Yes.

(e) Mr and Mrs [Green] pushed for [Hamish] to go back to day-care soon after [Ms Spicer]'s death and, according to Mr [Brown], would not listen to his point of view.³² Under cross-examination Mr [Brown] said:³³

Q. Sorry to interrupt, I will just go back a step before we move on so I am clear, we are talking about the enrolment form at school or pre-school?

A. At the moment we are talking about school but they also got enrolment forms for pre-school and yes tried to – [Brian] wanted to pick [Hamish] up for a pre-school visit and so I at that time I said that I hadn't even been to have a look at the place yet so I don't actually want [Hamish] going to visit. I felt it was very pushed and rushed as opposed to allowing me to see the place and make decisions based on what I felt of the place. It was just [Jacqueline] thought it was a good place for [Hamish] so I was expected to just let it happen.

³¹ NOE, page 76, line 29.

³² At [47].

³³ NOE, page 76, lines 1-11.

- (f) The clearest example is Mr and Mrs [Green]'s concern about [Hamish] missing school to go to the [music festival] with Mr [Brown] in February 2021. I accept and understand that Mr and Mrs [Green] thought that the priority should be for [Hamish] to attend school, but [Hamish] was only five years old and missing two weeks of school was not a big deal. It was Mr [Brown]'s decision to make as [Hamish]'s sole parent and guardian. Mr and Mrs [Green]'s reaction to Mr [Brown] taking [Hamish] away was completely unnecessary and inappropriate. I refer, in particular, to Mr and Mrs [Green] contacting [Hamish]'s school and Oranga Tamariki. They had no right to do so.

[52] The affidavit of [Hillary Green], which I have already referred to earlier, advised that Mr and Mrs [Green]'s reason for calling Oranga Tamariki "was around neglect, in the sense of taking [Hamish] away from education to go to a music festival, also around [Hamish]'s nutrition and general wellbeing and [Neil]'s possession of guns, including loading of ammunition in the lounge room and leaving live rounds easily accessible".

[53] The Oranga Tamariki "report of concern" was obtained by Mr Eason and put to Mr [Green] in cross-examination. The social worker's case note is more than a page long and records such comments as "child thin and only seems to be surviving", "surviving not thriving", "father has lots of firearms laying around the house", "dad returned to rubbish everywhere" and "contact person at school is [name deleted] keeping an eye on [Hamish] and the situation". Those notes (and others) all make it clear that Mr and Mrs [Green] were not reporting positively about Mr [Brown].

[54] [Hillary Green] deposed that her parents had also contacted the Ministry of Education, although Mr [Green] said his daughter was mistaken about that. [Hillary Green] had been required for cross-examination but was unable to come to Court on the day due to feeling anxious and for fear of not wanting to create any complications with her pregnancy. Mr [Green] advised that his daughter suffers from anxiety.

[55] Mr and Mrs [Green] also contacted [Hamish]’s school and had a meeting or meetings with [Hamish]’s teacher. [Hillary Green] in her affidavit said “they were worried about truancy and absences. I believe my parents had a meeting with an education co-ordinator and [Hamish]’s teachers at the school”. Mrs [Green] confirmed that.³⁴

Q. Did you contact the school?

A. I believe I rang the school to make an appointment to see his teachers, yes.

Q. Was that in 2020, or was that following the [festival name deleted] –

A. No that was at the time of the [festival] so I’m guessing that date was incorrect and we missed it.

Q. You understand that you’re not a guardian of [Hamish]?

A. I do.

Q. And, therefore, you’d accept that [Hamish]’s education is Mr [Brown]’s responsibility?

A. Yeah.

Q. But you felt that you should contact the school and arrange a meeting?

A. We were concerned for his wellbeing and that was the step we took at the time.

Q. And that concern was only about attendance at [festival name deleted] from your perspective or was there more to it?

A. That was the initial, there was more to it. There’s – no I guess, yeah it was just the fact that he’d missed school, was missing school and we thought that was an important fact.

[56] In any event and as I have already commented, Mr and Mrs [Green] had no right to be seeking meetings with [Hamish]’s school, given that they are not guardians.

[57] I accept that Mr and Mrs [Green] did all of these things with the best of intentions, being their genuine concern for [Hamish] who they are so fond of, but I refer to my earlier comment that they went about things the wrong way. They completely overstepped appropriate boundaries and it was not surprising, and was probably inevitable, that Mr [Brown] reacted by then wanting to keep Mr and Mrs

³⁴ NOE page 33, lines 14-32.

[Green] at arms-length. As from January 2021 he chose to stop their contact with [Hamish].

[58] Mr [Brown] also referred to noticeable changes in [Hamish]'s behaviour when he returned from spending time with Mr and Mrs [Green]. He described [Hamish] as acting "in an arrogant and entitled manner and would not follow my instructions. He was often much less independent and would demand assistance with everything".³⁵ By way of specific examples, Mr [Brown] referred to [Hamish] being much more fussy than usual and refusing to eat his dinner and no longer being willing to get himself dressed and ready for school in the morning, when he had previously been doing that.

[59] It is quite common for young children to struggle with different routines and rules as they move between different houses. Such confusion is easily resolved by good communication and co-operation by the adults in each house, so as to ensure that each house enforces the same rules and routines for consistency, but I am conscious that there is/was poor communication between Mr [Brown] and Mr and Mrs [Green] and there is now a lack of trust and goodwill as well. I am not attracted to Mr and Mrs [Green]'s proposal that all "or most changeovers take place at [Hamish]'s school" because that would seem to accept and perpetuate the preference that the adults will not communicate. [Hamish] will inevitably pick up on and become more aware of that.

[60] The concern about Mr and Mrs [Green] having overstepped boundaries, as I find they have, is that they have no insight that they have done that or acted inappropriately in these instances. I endeavoured to ask them about that at the conclusion of their evidence. Firstly, Mr [Green]:³⁶

Q. Have you reached out to [Neil] at all in the last few months?

A. No, your Honour.

Q. Why not, did you think about doing that?

A. No, no your Honour. I haven't thought about doing that.

³⁵ Affidavit 27 October 2021 at [44].

³⁶ NOE, page 28, line 9.

Q. No particular reason or?

A. No particular reason.

[61] Later I asked Mrs [Green]:³⁷

Q. Mrs [Green], you were asked a few moments ago about – you said something a few moments ago about if you had a time machine. So let's assume there is a time machine and you could go back to, say, December 2020 but before your visits with [Hamish] stopped. Would you do anything differently in respect of how you dealt with [Neil] since then?

A. I think if we – if everything had continued on, we may have learnt on both sides how to rein in our opinions. 'Cos if we can take what [Janine] has told [Brian] that everything is looking great and hunky-dory and rosy, I'm sure – yeah, time would have evolved how we – I don't know if I would have changed anything but I think it would have evolved so it would have changed on its own merit.

Q. When you look back, if I ask you to look back at the letters that were written to [Neil], or his lawyer, and the affidavits that you filed in court, do you regret anything that you've said?

A. No, because in our opinion I guess it was all true and correct at the time and it's I guess how we felt and due to the breakdown, it's how it was portrayed.

Q. So you don't regret anything about the way you've gone about seeking a court order, or seeking –

A. No, because we did try the mediation, we did try the asking, we did try the letters, we did try – and we did try, so [Neil] has not come to the party on any – we've had no – he didn't do the mediation at all, didn't go to any of the meetings, he didn't reply to any of the letters, like there's been no counters, there has been no half way point, there's been no third of the way point. So I don't know what else we could have done. We love this little boy to pieces and to have him ripped out of our lives after five years and no – it's not – how do you get it across that we're not – we were not nobodies to him. I was there week – like, weeks at a time every day. Yeah, we just love him and we just want him in our lives. And we think he wants us in his life. Because he did up until this. And nothing changed apart from this, for him to stop wanting us in his life. And for his dad to say no. So up until then, up until the last day we had him, it was just love and fun. So basically no, we just didn't know what else to do. So this is the route we've taken.

[62] My clear impression is that neither Mr or Mrs [Green] could see that they have gone about this process too critically and aggressively, nor that they would or should

³⁷ MOE, page 45, line 30.

do it differently if they were able to turn back time. It was never necessary to criticise Mr [Brown]'s parenting or lifestyle in order to seek a parenting order in respect of [Hamish] themselves, but in doing so they have (currently) alienated Mr [Brown].

[63] My concern about that apparent lack of insight is that it does not give me any confidence that things will be any different in the future, were Mr and Mrs [Green] to have the significant contact with [Hamish] that they are seeking. Mr and Mrs [Green] had previously made it clear that their ultimate goal was a shared care arrangement and it is apparent that Mr [Brown] felt threatened by that. It is a natural reaction on his part to want to keep Mr and Mrs [Green] at arms-length in those circumstances.

[64] Turning to the application of the law, the paramount and overriding consideration is [Hamish]'s welfare and best interests in his particular circumstances. [Hamish]'s circumstances, through no fault of his or anyone else, is that he is now completely dependent on his father. His mother is deceased and due to [Ms Spicer]'s own upbringing there is no maternal family. [Hamish] is fortunate, however, that his paternal grandmother lives literally next-door to Mr [Brown] so it is apparent that he has very regular, I infer daily, contact with her if need be, and that Mr [Brown]'s mother is a vital and significant support to him and [Hamish].

[65] Anything that disrupts, destabilises or stresses Mr [Brown]'s world is, therefore, likely to have the same effect on [Hamish] and that is, again, a point that seems to have been lost on Mr and Mrs [Green].

[66] It is apparent that Mr [Brown] was offended and that he felt betrayed by things that Mr and Mrs [Green] have said about him and/or done, effectively going behind his back to complain to [Hamish]'s school, Oranga Tamariki and, latterly, the Family Court. Considerable damage has been done to that adult relationship in terms of trust and confidence and it is a vital adult relationship in circumstances where Mr and Mrs [Green] are asking to have such a significant role in [Hamish]'s care and upbringing (three nights every second weekend and half of school holidays). That is very significant contact even for a biological grandparent to have with a child but the point, of course, is that Mr and Mrs [Green] are not [Hamish]'s grandparents.

[67] Mr and Mrs [Green] were very good and helpful supporters of [Hamish]'s mother, but they are not "blood" and are not family in the strict or normal sense of the word. Arguably, Mr and Mrs [Green] fall into the wider category of "family group, whānau, hapū or iwi" within the principle in s 5(e) as Ms Aitken submitted, with whom a child's relationship should be preserved and strengthened, but principle (e) is just one of the principles to be weighed.

[68] In my view, Mr and Mrs [Green] are more accurately described as "family friends". They were very good family friends of [Hamish]'s mother, but sadly [Ms Spicer] is no longer with us. Ideally, the [Green]s' relationship with [Hamish] will be preserved and strengthened but there are other ways to do that and without a Family Court parenting order that reserves Mr and Mrs [Green] such significant rights of contact as those they are seeking.

[69] Principle 5(b) directs that [Hamish]'s care, development and upbringing should be primarily the responsibility of his parents and guardians, and the obvious point is that Mr [Brown] is now [Hamish]'s only parent and sole guardian.

[70] By principle 5(c) [Hamish]'s care, development and upbringing should also be facilitated by ongoing consultation and co-operation between his parents and guardians, and any other person having a role in his care under a parenting order. I am wary about making a parenting order for contact in favour of Mr and Mrs [Green] in circumstances where there is, currently, such poor communication and co-operation. The last thing that [Hamish] needs is an ongoing source of conflict and disruption in his otherwise settled life, with him being the subject of ongoing, and potentially protracted Family Court proceedings through the course of his childhood.

[71] Principle 5(d) notes that [Hamish] should have continuity in his care, development and upbringing and he will have that with Mr [Brown]. In the relatively short period after [Ms Spicer]'s death, until the cessation of regular contact with Mr and Mrs [Green] in January 2021, Mr [Brown]'s evidence was that [Hamish] struggled with the adjustment of moving back and forth between the two houses and the different parenting styles and expectations.

[72] [Hamish]’s identity must also be preserved and strengthened, but Mr [Brown] was clear, and I find genuine, in his evidence when he said that he regularly talks to [Hamish] about his mother, has “many” photos of [Ms Spicer] in [Hamish]’s bedroom, and takes [Hamish] to her grave in [location deleted] and to places where she used to take him.³⁸ [Hamish] knows and will always know where he has come from.

[73] In all the circumstances I do not put any weight on the views expressed by [Hamish] to Mr Eason. I accept the submission of Ms Aitken and the concern of Mr and Mrs [Green] that [Hamish] is clearly aware of and is influenced by the views of Mr [Brown], and is now expressing those views as his own. What I do take into account, however, is the reality that, rightly or wrongly, [Hamish] is now aware of his father’s views and will be aware that Mr [Brown] does not want [Hamish] to stay with Mr and Mrs [Green] anywhere near as regularly as what Mr and Mrs [Green] have been seeking. If the Court were to order that sort of contact, it would then place [Hamish] in an unenviable position and feeling of being stuck in the middle and that, in turn, would likely create problems for Mr and Mrs [Green]. [Hamish]’s loyalty and primary attachment to his father would potentially cause [Hamish] to reject Mr and Mrs [Green], which is not a healthy situation for [Hamish], or Mr and Mrs [Green] either.

[74] Rather, I see [Hamish]’s loyalty to Mr [Brown] and his awareness of Mr [Brown]’s views and feelings as being the key to future success as regards contact and a relationship with Mr and Mrs [Green]. The challenge for Mr and Mrs [Green] now is to reset and to allow time for Mr [Brown], and [Hamish], to come to them. I shall return to this point in a moment.

[75] While I am not placing any weight on [Hamish]’s views, I am influenced by the position and submissions of Mr Eason who is appointed to advocate in [Hamish]’s best interests. Mr Eason is very clearly of the view that there should not be a formal order for contact. He opined in his first report that the Court making a parenting order “will not improve the strained relationship that already exists and it will create a situation of long-term disharmony and distrust”. I agree.

³⁸ NOE, page 87, line 31 to page 88, line 14.

Conclusion

[76] None of what I have said is to say that Mr and Mrs [Green] are not good people, are not well-meaning, or should not have an ongoing relationship with [Hamish]. On the contrary, they clearly are good people, they clearly are well-meaning, and my hope is that they will still have an ongoing and regular relationship with [Hamish].

[77] The challenge for Mr and Mrs [Green], their daughter, and for Mr [Brown] and also his mother, is to find a way to do that so that all of these adults are singing from the same song sheet in their respective interactions with [Hamish].

[78] In my view a Family Court parenting order is not in [Hamish]'s welfare and best interests and I, therefore, decline to make an order and I dismiss Mr and Mrs [Green]'s application.

[79] I hope, however, that this is not the end of [Hamish]'s relationship with Mr and Mrs [Green]. I do want to close the Family Court file but I first make a referral for the parties to engage in up to 12 sessions of communication counselling pursuant to s 46G. That is for the purpose of assisting Mr [Brown] and Mr and Mrs [Green] to reset their relationship and to find a way to communicate and work together in the future. I appreciate that will not be easy and hence the offer of a professional and expert counsellor experienced in these sorts of matters.

[80] In making this referral I note a forewarning that the Court registry has recently advised judges that there is currently a backlog of cases awaiting counselling referrals, such that there will inevitably be a delay of several weeks before counselling can actually begin. That may not necessarily be a bad thing, because I appreciate that Mr and Mrs [Green], in particular, are going to need some time to reflect on and accept this decision. I hope that they will be able to understand what I have said and be able to move forward positively. They will, naturally, be very disappointed and upset. Unfortunately, that is the nature of the beast when the Court is asked to decide these cases. There is inevitably at least one party that is unhappy with the outcome.

[81] Nor is this to say that Mr [Brown] has won. Mr [Brown] has a long and difficult task ahead of him. Solo parenting is never easy. I was impressed with the way that

Mr [Brown] gave evidence. He appeared to me to be thoughtful and considered in his answers. I was reassured that he has [Hamish]’s welfare and best interests front and centre in his mind and decision-making.

[82] I take Mr [Brown] at his word when he said at various different times and in various different ways that he respects the involvement that Mr and Mrs [Green] have had in [Hamish]’s life, and that he is agreeable to [Hamish] having an ongoing relationship with them.

[83] I can, likewise, respect and understand that Mr [Brown] did not want to be compelled to such regular and onerous contact as every second weekend and half of all school holidays, nor be worried about further applications for shared care in the future and ongoing challenges to parenting decisions that he makes. I hope that I have now taken that concern away. At the same time, I am trusting and hoping that Mr [Brown] can also find a way to wipe the slate clean and to move forward positively with Mr and Mrs [Green]. My hope is that Mr [Brown] will reach out to Mr and Mrs [Green] in due course. A simple text message asking if they would like to see [Hamish] for a few hours on a certain day of the weekend or school holidays should be all it takes to restart, slowly, an ongoing relationship as “family friends”.

[84] It will be awkward, no doubt, for the adults initially, but what will be important, in my view, is that Mr [Brown] is able to deliver [Hamish] to Mr and Mrs [Green] at their home, so that [Hamish] takes his lead from his father and sees that this contact has his approval.

[85] Likewise, I suggest that Mr and Mrs [Green] should then deliver [Hamish] back to Mr [Brown] at the conclusion of such visits. [Hamish] will need to see, and will be reassured by, the adults engaging in some brief but polite conversation. That will give [Hamish] the message that Mr and Mrs [Green] are, indeed, friends and that it is okay with his father to have that relationship. No doubt that is exactly what happens when [Hamish] visits [Ms Spicer]’s former foster-mother, [Janine Young], and her adult daughter, [Hannah], who is [Hamish]’s Godmother.

[86] The challenge for Mr [Brown], and for Mr and Mrs [Green], is as I have put it and for the want of a better word, to “reset” and repair their adult relationship to that extent. They will know if and when they are ready for that and I am hopeful that the communication counselling will be of assistance. I ask the Family Court Co-ordinator to provide a copy of this judgment to whichever counsellor is appointed.

[87] I make no order as to costs. Costs are to lie where they fall.

[88] I will leave it to Mr Eason to decide whether he needs to have one last meeting with [Hamish] to explain this decision to him in appropriate terms. I think it would be helpful for [Hamish] to know that a decision has now been made, and to also be told that his dad and [Brian] and [Jacqueline] are friends and all love him very much. I then terminate Mr Eason’s appointment with the thanks of the Court.

Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 30/03/2022