

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

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2023-004-000277
FAM-2023-004-000243
[2023] NZFC 6792**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MARIO ROSSI] Applicant
AND	[MARY ROSSI] Respondent

Hearing: 22 June 2023

Appearances: A Ashmore for the Applicant
I Blackford and I Stevenson for the Respondent
S Houghton as Lawyer for the Child

Judgment: 22 June 2023

ORAL JUDGMENT OF JUDGE S J FLEMING

[1] This matter was set down to determine the issue of interim contact for [Martin] and his father between now and the determination of the substantive Hague proceedings. The application is a relatively rare one, in that both of [Martin]’s parents are presently in New Zealand so that face-to-face contact is possible. The application is made under s 108 of the Care of Children Act 2004.

[2] Counsel agreed in their helpful submissions, which I had read prior to coming to court today, that there is jurisdiction under s 108 to make an interim contact order, notwithstanding the fact that in general there is a limitation on welfare considerations being considered in Hague matters and also the issue about ongoing care arrangements is usually something that cannot be pursued when there are Hague proceedings pending. However, as I have indicated, there is agreement there is jurisdiction and I agree.

[3] What specifically has been sought by [Martin]'s father is that there should be an equal shared care arrangement pending the disposition of the proceedings in which a determination will be made as to whether [Martin]'s future will be determined in New Zealand or in some other court overseas.

[4] The present position is that there was an agreement reached whereby [Martin] is in the care of his father on Tuesdays and Thursdays - on Tuesdays for a good portion of the day and on Thursdays for the evening – and on Sunday overnight until Monday morning. That agreement was reached in April when [Martin]'s father was unrepresented. He made it clear at that time, and has remained of the view, that he believes it is in the best interests of his son for there to be equal shared care.

[5] [Martin]'s mother is opposed to an increase in contact between [Martin] and his father. She believes that the present arrangements meet [Martin]'s needs to spend time with his father and, importantly, she has a concern that [Martin]'s father uses the time that he spends with his son to involve [Martin] in adult issues which have been and will continue to be distressing to [Martin], even though there was a condition imposed on the agreement when contact was negotiated that there should be no discussion with [Martin] about adult issues.

[6] Although I expressed a preliminary view that even if [Martin] was being subject to influence by his father, that would have no real effect on the Hague proceedings. Ms Blackford has submitted to me that it may still be influential in that [Martin]'s apprehension as to where he is habitually resident may be taken into account, and I accept that that is a submission she can legitimately make.

[7] Turning then to Ms Houghton, she has filed two reports. She acts for [Martin]. It has been made very clear by [Martin] to Ms Houghton in both of those reports that he wants to spend more time with his father. There were concerning comments made to Ms Houghton by [Martin]. They certainly indicated he was being involved in the adult issues and it seems from that report that that creates difficulties, as could be expected, for [Martin] who is not of an age where he will be able to comprehend how to deal with these sorts of issues. It is unnecessarily distressing for him and completely wrong.

[8] I urge his parents, who obviously in all other ways are very good parents to their son, to think long and hard about whether they involve him in any further discussions. It is easy to say to [Martin], who is clearly aware of this dispute, that he does not need to be concerned about it and it is something that his parents will decide with the assistance of some other people rather than involving him any further in these proceedings. I am hoping that the parties will take my comments to heart and not involve [Martin] any further in discussions about this litigation because it will inevitably harm him and is detrimental to his overall wellbeing. I intend to include the conditions agreed initially in the orders that I am about to make around contact to ensure that neither parent involves [Martin] in any more adult discussions.

[9] Having read the submissions and the affidavits as I had and heard some further submissions this morning, it was clear to me that it was in the best interests of [Martin] that he spends more time with his father. I am aware of the submissions of Ms Blackford to the effect that [Martin]'s care arrangements may be changed again in the relatively short term because there is a hearing date which has been allocated in approximately two weeks' time for the determination of the Hague Convention, and I am also conscious of the background whereby [Martin] was living with both of his parents up until February of this year and there has then been a significant change for him.

[10] [Martin] has strong views that he wants to spend more time with his father. The current care arrangements have been in place only for a relatively short period of time. It seems to me likely that [Martin]'s expressed wish to spend more time with his father is also driven by the fact that he did not see his father for some weeks until his

father had returned again from the United Kingdom to New Zealand and remain here until this matter is heard.

[11] I am quite satisfied it is in his best interests to spend additional time, but the increase to an equal shared care arrangement seems to me to be too big a change for [Martin] at present and I am satisfied that his need to spend more time with his father, and for his father to have good contact with him, can be met on the basis that he spends three nights a week and full days in the care of his father.

[12] Accordingly, the interim contact arrangement will be that in each week [Martin] will spend from Sunday at 10.30 am until the following Tuesday at 3 pm in the care of his father, and again from Thursday at 10.30 am through until Friday, that is the next day, at 3 pm.

[13] I will return in a moment to ask counsel whether they wish me to make any arrangement around any long weekend which may occur over the duration of this contact order. I have conferred with counsel and no other arrangements are required.

[14] The conditions attaching to this interim contact order are that neither party is to hold any conversation, discussion, or make any remarks to [Martin] or in [Martin]'s presence that are concerned with adult issues, particularly around these proceedings, and all such conversations, discussions and remarks made to [Martin] or in his presence will be child-focused. There is to be no mention made to [Martin] or discussions had with him or with anyone in his presence regarding matters relating to the legal proceedings and neither party is to make any negative or derogatory remarks about the other to or in the presence of [Martin].

[15] The second matter that I am asked to determine is whether leave should be granted to Ms [Rossi] to file her affidavit affirmed on 7 June. It is stated to be in response to the affidavit of the applicant dated 5 May. Ms [Rossi] was allowed leave to file a response in relation to contact and objection is taken by Mr [Rossi]'s counsel, Mr Ashmore, to the content of this affidavit that goes beyond a response to the interim contact application. Mr Ashmore makes the point that the usual procedure is that there is an application, a response and an affidavit in response and what we have here by

Ms [Rossi] filing her affidavit is a response to a response which will require him to respond because there is no objection, if I do grant leave, for this affidavit to be filed in its present form to Mr [Rossi] having an opportunity to respond.

[16] In the end I am satisfied that the affidavit should be allowed to be filed. I have pointed out that much of the response is repetitious and comments on discrepancies in the evidence which could be pointed out to the hearing judge in submissions. However, rather than put Ms [Rossi] and her counsel to the extra expense and trouble of redrafting that affidavit to only include what are fresh and relevant matters seems unnecessarily onerous, and so the affidavit is allowed in its present form on the basis that Mr [Rossi] has an opportunity to respond within seven days. There are to be no further affidavits filed without leave first obtained and granted.

[17] Finally, counsel are agreed that in preparation for the hearing which is to take place on 7 July, counsel for the applicant and respondent will file and exchange their submissions no later than three working days prior to the hearing. Ms Houghton will file her submissions on or before 30 June, and the reason for that is that she is away and out of the country until the day before the hearing.

Judge SJ Fleming

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 05/07/2023