

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

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**IN THE FAMILY COURT
AT ROTORUA**

**I TE KŌTI WHĀNAU
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE**

**FAM-2017-063-000143
[2021] NZFC 1579**

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| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004 |
| BETWEEN | [ELIZABETH SHEPPARD] Applicant |
| AND | [DIRK ATKINSON] Respondent |

Hearing: 19 February 2021
(Heard at Tauranga District Court)

Appearances: M James for the Applicant
Respondent appears in Person
P McGuire as Lawyer for the Child
J Niemand as Counsel to Assist

Judgment: 9 March 2021

**RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO DAY-TO-DAY CARE AND CONTACT ORDERS]**

[1] Ms [Sheppard] and Mr [Atkinson] are the parents of [Caroline Sheppard-Atkinson], born [date deleted] 2017. Following a reserved decision by me issued on 25 September 2020¹ I made an Interim Parenting Order providing for Mr [Atkinson] to have supervised contact with [Caroline] at [supervised contact centre 1] in Rotorua. However, that order was contingent upon Mr [Atkinson] being able to obtain a variation to his EM bail allowing him to travel to [supervised contact centre 1] in Rotorua for the purpose of exercising supervised contact. Mr [Atkinson]’s evidence in this hearing before me was that his bail has not been varied except to the extent that he may now “attend Court-mandated contact with his child, not in Rotorua, as approved by the EM bail team”.

[2] The hearing before me, therefore, was to determine what contact Mr [Atkinson] could now have with [Caroline], given that he remains precluded from entering Rotorua pursuant to the conditions of his EM bail.² Mr [Atkinson] indicated during his evidence that he has been told by his counsel in the criminal proceedings that it may be at least two years before his trial proceeds. At the last hearing Mr [Atkinson] was hopeful that his EM bail would be replaced with bail simpliciter, but that clearly has not occurred. Mr [Atkinson] finds himself in the situation therefore where he is subject to 24-hour-seven-day-a-week restrictions on his liberty pursuant to EM bail. It is more likely than not he will spend longer under the restrictive EM Bail conditions (effectively house ‘arrest’) than any sentence that he will have imposed, based upon the current charges before the Court, should he be found guilty.

[3] However, accepting Mr [Atkinson]’s evidence that it could be at least two years before he has his trial, I now need to make a Final Parenting Order in relation to his contact with [Caroline]³; it is time to have matters finally determined by the Court as the proceedings have been before the Court for too long, and have not been resolved within [Caroline]’s timeframes.⁴ Clearly, if the charges were dismissed, if he faces additional charges, or a trial was brought on earlier, that may well amount to a material

¹ *[Sheppard] v [Atkinson]* [2020] NZFC 7095.

² I have no idea, on the evidence before me, why Mr [Atkinson]’s bail precludes him from entering Rotorua.

³ As required in s 49C(2) of Care of Children Act 2004; all counsel accepted that a final order should now be made.

⁴ As required by s 4(2)(a)(i) of COCA 2004.

change in circumstances in terms of s 139A of the Care of Children Act 2004. In making this decision, I do so recognising that pursuant to my 25 September 2020 judgment I found no evidence that [Caroline] was at risk in the care of her father. Rather the focus at that time was the reintroduction of [Caroline] into Mr [Atkinson]'s life. There is no new evidence since that hearing giving rise to the necessity to consider afresh any safety concerns in relation to Mr [Atkinson]'s contact with [Caroline].

[4] Thus, the enquiry for this hearing is not whether Mr [Atkinson]'s contact needs to be supervised or unsupervised in response to any safety concerns, but rather simply what Parenting Orders need to be put in place to ensure Mr [Atkinson] can have a relationship with his daughter. In my 25 September 2020 judgment I did find that there was a necessity for supervision. The reasons at that time were not centred in concerns for [Caroline]'s safety; supervision was required around [Caroline]'s need to become reacquainted with her father, and for [Caroline] to develop her sense of confidence in being around her father.⁵ I disagree with Ms James' written submission that I had not considered [Caroline]'s psychological safety in my September 2020 decision; as both Mr Niemand and Ms McGuire set out in their submissions, I determined that there were no unacceptable risks for [Caroline] in her father's unsupervised care.⁶

The Legal Position

[5] My first and paramount considerations has to be the welfare and best interests of [Caroline].⁷ This needs to be an individualised assessment recognising that [Caroline] is a unique child in a unique family environment.⁸ Pursuant to s 4(2)(a)(ii) I need to take into account the relevant principles in s 5 of the Act. The Supreme Court in *Kacem v Bashir* has held that I need to identify not only those principles that are relevant, but also those that are irrelevant and to explain why.⁹ Pursuant to s 6 I am required to consider any views of [Caroline] if she has expressed any, although those

⁵ Note 1 above at [72].

⁶ Note 1 above at [44].

⁷ Care of Children Act 2004, s 4.

⁸ *Brown v Argyll* [2006] NZFLR 705; Care of Children Act 2004, s 4.

⁹ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

views need to be weighed against her age and maturity.¹⁰ Throughout these proceedings [Caroline] has been more than ably represented by Ms McGuire, and she has in her reports set out the views of [Caroline] and the factors which impact upon her best interests and welfare.¹¹

[6] On the facts of this case the principles in ss 5(b) to (e) inclusive are relevant. Given the safety issues have already been determined s 5(a) is not relevant, and there is no evidence requiring the consideration of s 5(f) in terms of [Caroline]'s identity. In terms of the remaining principles, I have considered them carefully.

[7] There is an agreement that [Caroline] should remain in the primary care of Ms [Sheppard]. It is also accepted that she should have a relationship with both of her parents. The principle of co-operation and consultation between [Caroline]'s parents remains, by large, aspirational as there has in reality been no improvement in the distant relationship between [Caroline]'s parents. The principles of continuity of care, and of [Caroline] having a relationship with both of her parents, are principles that I give significant weight to.

[8] In terms of s 5(e) [Caroline] lives with her mother, her husband, her older half-[sibling] [Quinn], and her new baby [sibling], [Dallas], who is only weeks old. These all form part of [Caroline]'s family group in her mother's household. Mr [Atkinson] remains living by himself in [details deleted] in Hamilton. While he considers that he is still married to Mrs [Atkinson], she remains living in [location A] with their foster [child] [Jesse]. Mr [Atkinson]'s evidence in this hearing was that he and his wife will continue to be married but are unlikely to ever live together again. Mrs [Atkinson] occasionally brings [Jesse] to Hamilton to see Mr [Atkinson], and on other occasions visits him herself without [Jesse]. It is clear at this point in time that Mrs [Atkinson] and [Jesse] are likely to be less important to [Caroline] in the foreseeable future.

¹⁰ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 9.2; *C v S* [2006] 3 NZLR 420. See also *Moore v Moore* [2014] NZHC 3213, [2015] 2 NZLR 787 where Brown J reaffirmed the *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402 competency test.

¹¹ In accordance with her statutory obligations pursuant to s 9B of the Family Court Act 1980.

Ms [Sheppard]’s Proposal

[9] Ms [Sheppard] remains cautious and anxious around [Caroline]’s ongoing relationship with her father. In her most recent affidavit of 4 February 2021 Ms [Sheppard] proposes that until such time as Mr [Atkinson] is able to travel to Rotorua, contact should be no more than Skype calls twice a week. That proposal was modified by her in Court; Ms James indicated that she had received recent instructions from Ms [Sheppard], and accordingly I granted leave for Ms [Sheppard] to give evidence-in-chief. Ms [Sheppard]’s proposal was initially for there to be two Skype sessions a week, moving to a combination of Skype and limited supervised contact visits.

[10] Mr Niemand in his capacity as counsel to assist had explored various options for supervised contact outside of Rotorua, and one of those options involves an organisation called JAMS, who provide, at a significant cost, the ability to transport children and/or to supervise contact. Ms [Sheppard]’s position now is that JAMS could collect [Caroline] and take her to a supervised access centre in, for example, [location B] where contact could then be supervised at YMCA [location B], an approved supervised contact provider in [location B].¹² How contact progressed beyond that and whether it moved to unsupervised contact was not something that she had seriously considered, instead suggesting that everyone should await the outcome of a report from YMCA [location B] as to how contact was progressing. Ms [Sheppard] struggled to comprehend that the Court will be making a final order, and that there will be no ability to simply keep reviewing matters on an ongoing basis.

[11] Ms [Sheppard]’s evidence is that she and her husband are struggling financially and that they are unable to do any of the travel or contribute to the cost of travel. Apart from a bald assertion that she is struggling financially no evidence was provided to substantiate her claim. For example, I have no proof of income, no budget, and no means to ascertain whether Ms [Sheppard]’s evidence is accurate or not. Mr [Atkinson] at the conclusion of the hearing and after reflecting upon his cross-examination, submitted that he would be able to pay \$100 per month to Ms [Sheppard]

¹² Confirmed by Ms James in her written submissions of 5 March 2021 at [19].

to contribute towards her petrol costs in transporting [Caroline] out of Rotorua. Ms [Sheppard] is however reluctant to travel at all given that she has a newborn baby.

[12] Ms [Sheppard]'s proposal did envisage that if there was a positive report from a supervised access centre that contact could move to unsupervised contact in [location C], initially for two hours, then moving to four hours and then to six hours. It appears that she did not understand the very clear terms of Mr [Atkinson]'s bail¹³ which precludes him from entering Rotorua. Mr [Atkinson] confirmed that the EM bail team have advised him that he is not allowed past [location D]. Ms [Sheppard] then amended her proposal from [location C] to [location D]. She was not clear on what Mr [Atkinson] could actually do with [Caroline] in [location D] for several hours. I note that in the middle of winter [location D] is a bleak and cold place and would be entirely unsuitable as a place to have contact without a warm and dry place in which to retreat.

[13] Ms [Sheppard] was also adamant that Saturdays and Sundays were not an option for supervised contact, although no explanation was given as to why that is so. [Caroline] remains busy during the week with a combination of playgroup, kindergarten, and other activities in which she has been involved by Ms [Sheppard].

Mr [Atkinson]'s Proposal

[14] Mr [Atkinson] seeks contact with [Caroline] for as much time as he can have. He has been unable to work for the last 14 to 15 months and stated that he could not contribute to the costs, although, as set out above, upon reflection indicated he could contribute \$100 a month. It is clear he is living off his savings and he is adamant that he would do all he can to ensure he does not become dependent upon Government assistance. His proposal is that he has four weeks of contact every Saturday, and then contact move to overnight contact for a weekend in which he proposed to bring [Caroline] back to his home in Hamilton. It is his evidence that either [location E] or [location F] are better places for day visits and/or changeovers. He was the most realistic, contained and respectful that I had ever seen him in the various hearings

¹³ Which have been in place for some time now.

before me. He accepts that his bail is what it is, and simply wants to get on with developing a relationship with [Caroline].

[15] In Mr [Atkinson]’s written submissions he suggests that the changeover venue be the [location E], and that his contact be six days visits, then a progression to increased overnight contact.

Discussion

[16] Mr Niemand provided several options for supervised care in Tauranga, [location B] and Hamilton, as well as JAMS. Ms [Sheppard]’s position is that JAMS could provide transport, but that she was unable to contribute to the costs of supervised contact herself. The assumption appeared to be that the Court would fund the cost of supervised contact on the basis that neither of the parents could afford to pay for that cost.

[17] The ability for the Court to fund supervised contact by an approved provider is contained in s 60(1) of COCA. It only relates to supervised contact ordered pursuant to s 59. Section 59 requires the Court to make a finding that the Court “is not satisfied that [[Caroline]] will be safe with [Mr [Atkinson]]”.¹⁴ Yet pursuant to my 25 September 2020 judgment I found there were no safety issues. Rather the focus was the necessity for reintegration. What is clear is that impecuniosity is not a ground under ss 59 and 60 to order supervision.

[18] Ms James and Mr Niemand submitted that I could find that [Caroline] was not psychologically safe with Mr [Atkinson] on the basis that she does not know who he is, and therefore requires a period of reintegration. I accept that the concept of safety may include psychological safety such that, in some cases, the Court could lawfully conclude that supervision is required under s 59. But that is not so in this case. As Mr Niemand and Ms McGuire set out in their written submissions, I had determined in September 2020 that supervision was required at that time to assist with reintegration between Mr [Atkinson] and [Caroline], at a place¹⁵ and with people that

¹⁴ Section 59(1)(b), COCA.

¹⁵ [Supervised contact centre 1] Rotorua.

were familiar to [Caroline]. As set out above, Mr [Atkinson]’s bail conditions continue to preclude him entering Rotorua. I agree with Ms McGuire’s submission that the “...usefulness of a direction to supervised contact only exists if it is to the previous facility, [supervised contact centre 1] [sic] and will be extant if contact is directed to any other facility.”¹⁶

[19] The evidence in these proceedings has been that [Caroline] has been very anxious about having contact with Mr [Atkinson]. It took some time for [Caroline] to feel comfortable at the [supervised contact centre 2] in Rotorua. However, by the time of the cessation of Mr [Atkinson]’s contact¹⁷ [Caroline] was becoming increasingly confident and comfortable having visits with her father. On the basis that [supervised contact centre 2] Rotorua has become familiar to [Caroline], it has been the position of Ms [Sheppard] that contact should continue to occur at [supervised contact centre 2] in Rotorua. That is of course impossible because of Mr [Atkinson]’s bail conditions, and as submitted by Ms McGuire, given that it has been nearly a year since [Caroline] has been at [supervised contact centre 2] in Rotorua, and given her age, it is likely that some of the personnel may have changed, and that she will no longer be familiar and comfortable with that environment.

[20] Thus, what is proposed by Ms [Sheppard] is that [Caroline] is collected by JAMS (complete strangers for [Caroline]), transported from Rotorua to [location B] to have contact at YMCA [location B] (with complete strangers) so as to become reacquainted with her father (who may well have become a stranger to [Caroline] given the passage of time since she last saw him). In broad terms Ms [Sheppard]’s proposal is that future contact occurs at a supervised access centre (which neither of the parties can afford, and which the Court cannot lawfully fund) to be supervised by strangers to meet her father, an all-but-stranger to [Caroline]. I struggle to understand why she is still so anxious about [Caroline]’s relationship with Mr [Atkinson] when her own proposal involves multiple strangers from [Caroline]’s perspective.

[21] [Caroline] is now nearly four, and thus is developmentally more mature than she was when the matter was last before the Court. As put by Mr Niemand in his

¹⁶ Ms McGuire’s written submissions of 5 March 2021 at [10].

¹⁷ For the reasons set out in [2] and [3] of my 25 September 2020 decision.

cross-examination, it is ridiculous to suggest that whenever [Caroline] is in any new environment, that she will require initial supervision. For example, as he submitted, when [Caroline] starts school she will not need someone to supervise her while she meets new people at school, or that if she becomes involved in any extra-curricular activities, that she will require supervision first until she becomes comfortable with the “strangers” running the extra-curricular activity. In short, the position of Mr Niemand is that there is no need to continue to wrap [Caroline] in cotton wool, and instead, contact should just simply occur as between [Caroline] and her father. Or as he put it in his written submissions:¹⁸

The question then becomes how [Caroline]’s best interests and welfare could possibly be served through supervision of contact intended to ‘protect’ her against exposure to a ‘stranger’ by adding more strangers to the mix. The obvious logic in that proposition is unassailable.”

[22] I am attracted to his view, and that of Mr [Atkinson], that there is no need to wrap [Caroline] in cotton wool. Firstly, the parties cannot afford the cost of supervised contact let alone JAMS which are able to provide an expensive supervised transport option for [Caroline]. Secondly, I cannot now see the point in having supervised contact for [Caroline] to be supervised by strangers so that she can become reacquainted with her father who has probably become all but a stranger to her. I determine that the contact that occurs should simply be between [Caroline] and Mr [Atkinson]. Given Mr [Atkinson]’s offer of providing \$100 a month to Ms [Sheppard] to cover her travel costs, her unsubstantiated assertions of financial hardship are no longer relevant.

The Result

[23] I have reached a clear view that there needs to be a period in which [Caroline] is reacquainted with her father through spending some short daytime visits with him. I disagree with Mr [Atkinson]’s view that the Court should specify what he is to do with [Caroline] during those daytime visits; if he is trusted to have unsupervised visits then he is trusted to make decisions about what to do and where he and his daughter will go during the day.

¹⁸ Mr Niemand’s written submissions of 25 February 2021 at [2.7].

[24] Those shorter daytime visits can then progress to longer periods during the day, and in time moving to overnight visits. It will be for Ms [Sheppard] to demonstrate to [Caroline] that she is supportive of these visits, to reassure [Caroline] that her contact with her father will be fun, safe and enjoyable, and to ensure that any Court order made is complied with. Clearly, once Mr [Atkinson]'s criminal proceedings are resolved, then he will be able to come back to Court and to seek increased contact if that is what he wants at that point in time. Given my background and familiarity with this file, and the conflict for the Rotorua Judges in hearing this matter,¹⁹ I again direct that if there are any further applications filed they should in the first instance wherever practicable be referred to me. If and only if I am not available should they then be referred to Judge Broek.

Orders

[25] Against that background and for those reasons I now make the following orders:

- (a) I discharge all Interim Parenting Orders and the Final Parenting Order made by me on 13 September 2019.
- (b) I make a new Final Parenting Order in relation to [Caroline Sheppard-Atkinson], born [date deleted] 2017, in the following terms:
 - (i) [Caroline] is to be in the day-to-day care of Ms [Sheppard].
 - (ii) [Caroline] is to have contact with her father as follows:
 - (1) Commencing Saturday, 13 March 2021 and thereafter 20 and 27 March from 10 am to 1 pm in [location E]; the changeover is to occur at [location E].
 - (2) Commencing Saturday, 3 April 2021 and thereafter 10, 17 and 24 April from 9 am until 3 pm with the pick-up

¹⁹ Save Judge Broek who has not made any decisions in relation to this file to date.

and changeover to occur at [location E], but Mr [Atkinson] is free to take [Caroline] away from [location E] during those periods.

- (3) Commencing Saturday, 1 May 2021 and thereafter on 8, 15 and 22 May 2021 from 9 am Saturday until 10 am Sunday. The changeover is to occur at the [location E].
- (4) Commencing Saturday, 29 May 2021 and thereafter Saturday 5, 12 and 19 June from 9 am Saturday to 3 pm Sunday with the changeover again to occur at the [location E].
- (5) From Friday, 25 June 2021 and thereafter every second weekend from Friday, 5 pm until Sunday, 5 pm with the changeover to occur at the [location E].
- (6) In each of the school term holidays, commencing at the end of term 3, 2021, on the Saturday after school finishes at 12 noon until the following Wednesday at 12 noon with the changeover to occur at the [location E].
- (7) In even numbered years from 27 December 2021 for five nights, and then the fortnightly weekend contact is continued throughout the Christmas school term holidays but with the weekends being from Friday, 5 pm until the following Wednesday at 12 noon. Changeovers to occur at [location E].
- (8) In odd numbered years from 23 December 2021 for five nights, and then the fortnightly weekend contact is continued throughout the Christmas school term holidays but with the weekends being from Friday, 5 pm

until the following Wednesday at 12 noon. Changeover to occur at [location E].

- (9) Skype contact each Tuesday and Thursday at 2 pm Tuesday and 4 pm Thursday.
- (10) Other contact as agreed.

(c) The above Parenting Order is conditional on the following:

(i) Mr [Atkinson] will provide into a bank account nominated by Ms [Sheppard] the sum of \$100 to be deposited into her bank account:

(1) On or before 12 March 2021; and

(2) Thereafter on the first business day of each month.

(ii) Any failure to pay the \$100 into Ms [Sheppard]'s account shall not constitute grounds to stop Mr [Atkinson]'s contact with [Caroline].

[26] This being the end of the proceedings Ms McGuire's appointment as lawyer for [Caroline] and Mr Niemand's appointment as counsel to assist the Court is terminated with the thanks of the Court.

S J Coyle
Family Court Judge