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**IN THE FAMILY COURT
AT PALMERSTON NORTH**

**I TE KŌTI WHĀNAU
KI TE PAPAIOEA**

**FAM-2011-054-000738
[2024] NZFC 5252**

IN THE MATTER OF	CARE OF CHILDREN ACT 2004
BETWEEN	[MEGAN RITCHIE] Applicant
AND	[SAM BENNINGTON] Respondent

Hearing: 29 April 2024

Appearances: D Iosefa for the Applicant
Respondent appeared in Person
M Faimalie as Lawyer for the Child

Judgment: 8 May 2024

RESERVED JUDGMENT OF JUDGE J F MOSS

[1] [Nick], who is 12, is the son of the two parties. Earlier in proceedings his paternal grandmother sought a parenting order for him. She has, however, withdrawn her application. This application began when there was extreme reactive conflict between the parents and when the mother was restricting the father's care of the child because she was suspicious that he was struggling both with mental health and with

drugs and alcohol use. The mother's fears were realistic. Her aim of controlling contact in the way she did was less effective.

[2] [Nick] has been subject to court orders from 2012, when he was under one year old. Substantial orders were made in 2016, 2018, and 2023. In mid-2022 until now contact for his father became unstable, while his father battled addiction.

[3] The mother has fragile health and has made great progress in the last 12 months, and has assembled a helpful support team around her.

[4] [Nick] is neurodiverse. He carries a diagnoses of [two developmental disorders]. He has been prescribed methylphenidate for some years, and melatonin and clonidine to assist him to settle to sleep.

[5] The parents agree that [Nick] has been living with his mother fulltime, and has had contact with his father. Ideally, his father wishes to move towards shared care of [Nick], such that [Nick] resides with each of his parents week-about.

[6] The father opposes the medication of [Nick], other than that which he needs for being settled enough to stay in the classroom at school.

[7] Although the father does not agree with the provision of the medication, in evidence it transpires that he does not disagree either. In relation to health matters, as in relation to school enrolment and school support matters, the father's field of disagreement is related to how excluded he has felt from decision making.

[8] The question for the Court is how [Nick]'s time is divided between his parents, and whether the Court can assist the parents to undertake the co-parenting responsibility. Both parents agree that, ideally, they would co-parent. They each have experienced periods of time when that has gone smoothly. Most recently, the co-parenting relationship ceased to function well when the father's addiction led to employment instability, a period of depression, and the associated avoidance of issues, and reactivity in confrontation.

[9] The father is now sober, and proud that he has achieved 14 months of sobriety. It is difficult for the mother to accept that while he was impaired by drug use and unstable employment, his mother took a greater role in managing [Nick]'s care. The grandmother's position is that [Nick] needed her to step in, because her son was unsafe. However, the mother experienced that as over intrusive. After a day of evidence, during which the three critical people, and the mother's husband, the stepfather, [Corey], listened to one another, positions softened leading to some optimism that [Nick]'s needs will be met consultatively.

Legal principles

[10] The Court's obligation is to act in accordance with the children's welfare and best interests. This includes not only making decisions which reflect welfare and best interests, but also as far as possible adopting a process in which the children's welfare and best interests remain in and condition how the Court progresses the issues between the parents.¹ I am grateful to counsel for maintaining a solution focussed process, in this matter, where parental distress and distrust has been high.

[11] The matters which contribute to the substantive welfare and best interests are set out in s 5 of the Care of Children Act. Before the Court considers the factors which are discretionary, the Court must consider the children's safety. The legislation expresses this factor as mandatory, and the others as best practice. The desirable but not mandatory considerations are:

- (a) That parents should consult and agree the arrangements for their children.
- (b) That parents should be primarily responsible for the upbringing and care of their children.
- (c) That the children should have continuity in the care and in their relationships.

¹ See s 4 of the Care of Children Act.

- (d) That they should have a relationship with both parents.
- (e) That their identity should be preserved and strengthened.

[12] As the Supreme Court has decided in *Kacem v Bashir*, the Court must consider all of the principles in s 5, but it is not an exhaustive list.²

Child participation

[13] The Court must ascertain the views of the child and consider these. Several mechanisms exist for children's voices to be considered by the Court. Parents will generally give evidence about what their children think. Views are obtained through a social work report (s 132 of COCA) and through representation by counsel. In addition, children may be interviewed by the hearing judge. The Care of Children Act 2004 mandates the ascertaining of views of children by the Court. The Family Court Act 1980, s 11A, excludes the presence of children, other than by leave of the Court. The Family Courts Rules, r 54, enables the hearing judge to see a child who is the subject of proceedings, and to exclude parties and others while that occurs. Typically, the hearing judge sees a child once the matter is set down for hearing, but before evidence begins. This occurred for [Nick]. I have recorded a separate minute in relation to the content of the interview.

[14] The social work report records how promptly and clearly [Nick] expressed his wish to stay sleeping at his mum's house.³ He did not, however, want to talk in any detail.

[15] [Nick] has been more expressive towards his counsel. She reported on 24 April, and provided detailed opinions from [Nick] about the questions before the Court. [Nick] enjoys weekends with Dad, but wants to stay home with Mum during school holidays. He also expressed a wide range of other views, including his pleasure in his bedroom, his time with his younger brother, and his understanding of having two dads. He described school with some pleasure, and the medication regime, at school.

² *Kacem v Bashir* [2010] NZSC 112.

³ Social Work report Juliet Scott 16 August 2023, p 8.

The mother's case

[16] The mother seeks to continue day-to-day care of [Nick], and to limit the father's time to have contact each second weekend and a shortish holiday in the Christmas holidays. The order made in 2018 provided for the father to have school holiday contact, dividing the term holidays week-about, but the mother opposes this being continued. She is concerned about [Nick]'s stability and routine, and the extent to which he does not like change. The mother is justifiably proud of the progress she and [Nick] have made, and the ways in which she enables [Nick] to focus the best he can. The mother perceives the father's attitude to medication, being that [Nick] should not be medicated, as an adverse attitude. During the evidence, it transpired that when [Nick] does not need to go to school, and when the mother has a quiet day planned, she does not medicate [Nick] either. She uses the medication in the holidays and weekends when he is going to be out and about, and needs the chemical management of his impulses. This insight came late in the hearing, and leads me to conclude that the parental attitude to medication is not as different as it appeared at the outset of the hearing.

[17] The mother has been worried that the father does not adequately look after [Nick]'s safety. She cited accidents which had occurred while in Dad's care, including a cut to the head sustained when he fell off a golf trolley, a graze to his ankle when his father pushed a trolley into the back of his leg, which [Nick] reported was deliberate. She was distressed when [Nick] arrived home with sunburn which was blistering. She cited lack of communication from the father about these adversities.

[18] The mother also agreed that she is particularly protective, calling herself a helicopter parent. For her, [Nick] succeeding as far as he can with independence, with education and with good values is the centre of her endeavours for [Nick].

[19] The mother seeks to re-establish a co-parenting relationship with the father so that the parents can exchange reasonable information, each contribute to guardianship decisions, and share necessary information about their son.

Father's position

[20] The father seeks to work towards shared care of [Nick], so that he will care for [Nick] half of the time. He proposed that the time division should be week-about, but although that was the stated position in the written evidence, at hearing the father agreed that would require progressive development of contact. He did not attend court today expecting that the Court's decision would result in [Nick] living with each parent for half of the time. The father described his frustration with decision making, and the extent to which he felt excluded by the mother. The father was also clear that he had contributed to his own exclusion, because he had failed to be in contact with the school, and to use the opportunities he had to participate in the structural issues around [Nick]'s life. The father provided more detail about the cut to the head, the graze to [Nick]'s ankle and the sunburn.

[21] The father is particularly concerned that [Nick] should be permitted to attend [a sporting event] and proposed a weekly contact time, to enable attendance at training. He agreed that it is not essential that [Nick] is present every week, but it is a good opportunity to learn team skills, increase fitness, and practice his social skills.

[22] The father also noted his gratitude to [Nick]'s stepfather, [Corey], for being such a fine, compassionate, and consistent figure in [Nick]'s life. This generous tribute may have been news to the mother. The father and mother both agreed that it would be helpful for the father and stepfather to compare notes about progress in assisting [Nick] to adjust to puberty.

Conclusion

[23] Both parents agreed that there can be an adjustment of the exercise of the alternate weekend contact, so that [Nick]'s weekend with his dad matches the weekend with his first cousins. In order to achieve that, [Nick] will have two consecutive weekends with his father, being the weekends of Saturday 4 March and Saturday 11 March. Thereafter, the arrangements will return to alternate weekends.

[24] The order in 2018 recorded that the alternate weekends would operate from after school Friday until before school on Monday. In practice, [Nick] has returned to

his mother's care on Sunday afternoon in time for dinner. It is agreed that the weekends for [Nick] will be each alternate weekend from after school on Friday until 5:00 pm Sunday. The father will return [Nick] to the mother's address, and conduct the changeover to [Corey], at the edge of the driveway of [Nick]'s family home.

[25] Although the mother proposed that contact should not expand in the school holidays, I do not consider that is the proper structure for [Nick]. It is important that he has an extended stay with his father. It is important for the development of his identity that he has opportunities for extended stays which will involve other members of the family. The weeklong contact is beneficial in term holidays, in my view to embed his relationship with his father, and to extend his capacity for maintaining relationships with his grandparents. It is important however, that he have some days at home with his mother to settle down after the stay with his father. The contact for [Nick] during the school holidays is to occur either:

- (a) Where the father's usual weekend falls in the middle of the holidays, from the Sunday before the weekend until the end of the father's scheduled weekend. On each occasion, changeover time is 5:00 pm. [Nick] will be collected and returned by his father, with changeovers being accomplished by [Nick]'s stepfather.
- (b) Where the father's routine weekend commences with the first weekend in the school holidays, holiday division will occur from Friday to Friday. The transition time is 5 o'clock, and to be achieved as at other times.
- (c) Where the school holiday begins at the close of school on the Friday afternoon, with the father's weekend falling at that point in the holidays, the father will collect from school.

[26] The mother's proposal in relation to Christmas involves a holiday from Christmas Day at 2:00 pm until 2 January at 2:00 pm each year. At the commencement of the hearing, she proposed a 24 hour visit to celebrate Christmas, and a continuation

of the alternate weekend contact. The more expansive proposition of having a holiday together with other family members emerged during the hearing.

[27] The father's position was that he seeks week-about care right through the summer holidays.

[28] In my view, there is reason in 2024 to divide school summer holidays from Christmas until school goes back in term 1 2025. The days before Christmas tend to be busy and tired, and it makes practical sense to commence the division of time at Christmas Day. [Nick]'s routine alternate weekends is to continue up until 25 December. From that point on, he will have contact with his father from 2:00 pm on Christmas Day until 10 nights later. Thereafter, he will be in his mother's care until the Friday which commences the father's routine weekend. He will then be in his father's care for seven nights, and the parents are to alternate his care, each having seven nights until school returns.

[29] These arrangements are not consistent with [Nick]'s spoken views. It is, in my view difficult to accord the same weight to [Nick]'s views as for a child without his neuro diverse challenges. He is delayed in terms of many aspects of independence. The degree of controls and routines which he needs to accomplish everyday life illustrate a degree of cognitive compromise. I also consider that given the difficulties with contact in the last 16 months, it is more likely than not that [Nick] would prefer the arrangement he knows, rather than an arrangement which has not been in place for some time.

[30] The parents accept that there is some flexibility about the use of methylphenidate in the holidays. If a parent chooses not to provide medication during a holiday period, the withdrawal of medication may continue for no longer than four nights. From the fifth night [Nick] is to have medication for a full four days and may then have another break. So that the arrangements for an adequate dose of medicine continues, each parent will need to provide to the other detail of when [Nick] has and has not had medication during the long summer holidays. The limit of four days off medication is to apply during term holidays also. In addition, for all holiday periods,

[Nick] is to have his medication for at least two full days before returning to the commencement of a school term.

[31] The final issue for resolution related to [Nick]'s participation in the [sporting event]. His grandmother has been involved with [the sporting event] in [Nick]'s hometown for 30 years or so. She and [Nick]'s father are keen for [Nick] to be involved with the [sporting event], because this group of activities assists with exercise, social skill growth, challenging capacity to participate, and building community. The mother has been opposed to this. She says that [Nick] does not want to do physical exercise things, that his interests are in science, maths and robotics. She feels bulldozed by the paternal grandmother and feels that the paternal grandmother is taking a larger role in the development of the father's parenting than the father is himself. Finally, the mother is concerned that if [Nick] attends [the sporting event] she will be asked to meet the cost.

[32] Although this appears to be an issue about [Nick] participating in organised sport, as the evidence unfolded it appeared more that it is about communication. The mother is open to [Nick] trying out attending the [sporting event]. The best available slot is on Mondays between 5:00 pm and 6:00 pm. In order to facilitate the participation of [Nick], his father will collect him at 4:00 pm, give him dinner, and return him to his mother by 7:00 pm. The father has confirmed that he would welcome the mother attending to watch, but that he will take responsibility for the arranging attendance at training each week. I consider this is likely to be a helpful participation, and the weekly attendance is to be part of the parenting order, noted as a period of contract.

[33] In s 5 of the Care of Children Act, the Court must consider safety. The three occasions on which [Nick] has had injuries are not of such a degree that they call into play his overall safety. I am satisfied that in relation to the golf trolley incident, the father's evidence is credible. He says he warned [Nick] not to stand on the trolley. He says that he was selecting golf clubs at the time, and [Nick] stood on the trolley having been told not to. The trolley, predictably, wheeled away from him and he fell on his face. He had a cut close to his hairline above one eye, which needed gluing. He had a black eye. The mother agreed that he recovered in a normal way. In relation to the

graze to his ankle, although [Nick] reported to his mother that his father had rammed him with the trolley, I accept the father's evidence that it was an accident, caused in part by [Nick] walking in front of his dad who was wheeling the trolley, and in part by the father looking away at the critical moment. The father recalls putting a plaster on the broken skin.

[34] In relation to the sunburn, the father expressed real regret about that, and noted that although [Nick] was wearing covering clothes, he is a water kid, and got wet. He stripped down to shorts and a t-shirt, played in the water, and was not wearing sunscreen. In written evidence, the mother had raised a concern about [Nick] being in the water without a lifejacket. The father exhibited multiple photographs which showed that [Nick] was in fact wearing a lifejacket and mucking around with other children with kayaks, apparently having a lovely time.

[35] However, both parents agree that [Nick] loves water, and should be able to learn to swim. There is a swimming class which is designed for children with the kinds of challenges [Nick] has. It is run by an experienced coach. This is available as a school holiday programme, and also a regular class. The parents agree that [Nick] should go to the class. During term time, the cost of the class is to be divided equally. Where it is a school holiday programme, the parent who enrolls in the school holidays for that programme should pay for it.

[36] The orders for contact appear at paragraphs [25]-[28]. I ask Ms Faimalie to draft a final parenting order. I agree with her concern that the order needs to be specific, so that the parents do not have the opportunity to argue over the meaning. Ultimately, however, I would not discourage the parents building some flexibility into their division of time. In order to give that the best chance of success, the parents will comply with the parenting order, to the letter of it, for six months. At that point, some flexibility can be negotiated, but in order to facilitate the parents' negotiations, communication counselling should be commenced in November with a view to the parents improving their capacity for co-parenting, and co-operation, by way of mature conversation. The previous court order included a condition that the parents should meet each term to discuss arrangements to manage [Nick]'s medication and health. That condition in the order is to be included. No party or counsel mentioned the issue

of the reservation of time for the mother on Mother's Day. That is an ordinary request, and I would encourage the parents to consider and agree that matter. I will leave it to Ms Faimalie to confer with the parents. If I were asked to decide that matter, I would favour continuing the Mother's Day allowance.

Judge JF Moss

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 08/05/2024