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**IN THE FAMILY COURT
AT TAURANGA**

**FAM-2011-070-001701
[2016] NZFC 4730**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	JEWEL MARSDEN Applicant
AND	SHANELLE BERNARD First Respondent
AND	HOYT WILKERSON Second Respondent

Hearing: 2 June 2016

Appearances: C Andrew for the Applicant
P Eagle on behalf of J Van der Oord for the First Respondent
No appearance by or for the Second Respondent

Judgment: 2 June 2016

ORAL JUDGMENT OF JUDGE S J COYLE

[1] Peace Bernard was born on [date deleted] 2011. Her parents are Ms Bernard and Mr Wilkerson. Until relatively recently she had been living with Ms Bernard. There had been proceedings before the Family Court in relation to Peace arising out of Mr Wilkerson's violence and the end result was a parenting order providing for Peace to be in the day-to-day care of Ms Bernard and to have supervised contact with Mr Wilkerson.

[2] However, in early February of this year Mr Wilkerson's mother, Ms Marsden, applied without notice for leave to apply for a parenting order and a parenting order in which she sought the day-to-day care of Peace. An order was made by the e-duty Judge on a without notice basis granting leave and making an interim parenting order providing that Peace was to be in the day-to-day care of Ms Marsden and to have supervised contact with both Ms Bernard and Mr Wilkerson.

[3] I agree with the submissions of Mrs Eagle that if some of the generic allegations had been accurately portrayed it is unlikely that that order would have been made on a without notice basis. The matter is here today to resolve the issue of whether Peace is to remain in the day-to-day care of Ms Marsden or to return to Ms Bernard's care and if so it is suggested by Ms Marsden that she only return to Ms Bernard's care if Ms Bernard returns to live in [location deleted].

[4] Mr Blair is the Court-appointed counsel for Peace. He has, during the course of this hearing, described her as "precious cargo" with a propensity to do very well in life if she is raised in a home environment which is supportive of her and which she is encouraged to thrive and grow and in which she is free from exposure to violence. The alternative is that she does not meet her full potential and becomes yet another child of Aotearoa who is raised in a home of domestic violence.

[5] My role today is to make a decision in relation to Peace's care arrangements, cognisant of the requirement in s 4 of the Act that I need to focus on what is in Peace's best interests and welfare. I need to recognise that this is an individualised assessment for Peace is a unique child in a unique family. I also need to consider the relevant principles s 5 Care of Children Act 2004 as is required pursuant to s 4. The Supreme Court in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 has

identified that I need to articulate those principles that are relevant but also those that are irrelevant and why I find them to be irrelevant.

[6] Additionally, pursuant to s 6, I need to consider the views of Peace, if they have been expressed. Mr Blair, as I have said, is the Court-appointed counsel for Peace and he has filed reports with the Court. He has met her on at least two occasions and she has had opportunities to express views. In Mr Blair's most recent report, following an interview with Peace yesterday, she expressed a clear view to return to her mother's day-to-day care but she did express some concern around Ms Bernard's partner, Mr Slate, being present. Peace is just over five and her views are, therefore, important but given her age and maturity (see *C v S* [2006] 3 NZLR 420) her views are not determinative. They nevertheless need to be considered by me and are afforded some weight.

[7] In terms of the s 5 principles, s 5(f) is clearly irrelevant. There is no evidence before me pertaining to Peace's identity.

[8] Section 5(b) to (d) inclusive are relevant to the extent Peace having a relationship not only with her parents but with her wider family and that relationship with her wider family needs to not only preserved but also strengthened.

[9] But on the facts of this case it is s 5(a) which does need to be given careful consideration by me. That section records that Peace should be protected from all forms of violence, with violence being given the definition in the Domestic Violence Act 1995.

[10] There is a clear acceptance by Ms Bernard on the evidence that her past intimate male relationships have been categorised by violence and that at times Peace has been exposed to that violence, at other times made aware of that violence and at other times more likely than not to have been oblivious. The stark reality is that Ms Bernard has engaged in successive relationships, relationships which she described as being initially good but which then rapidly progressed into violent and dysfunctional relationships in which she was clearly the victim of domestic violence. She herself described them as becoming toxic and yet she felt powerless often to

leave. Essential to this case, therefore, is the nature of her relationship with Mr Slate.

[11] Additionally the Court of Appeal in *Surrey v Surrey* [2008] NZCA 565 has given approval for the principle that the best predictor of the future is known past facts. In saying that there are many examples throughout the history of humanity of people who change and make significant and profound changes in their life to their betterment and the betterment of those around about them, including their children.

[12] Overlaid with that concern is from my perspective, and quite clearly to the forefront of the concerns of Ms Marsden, and that is Ms Bernard's transience. Ms Marsden was able to articulate a long list of the various homes that Ms Bernard has lived in with Peace since Peace was born. I agree with Mr Blair's assessment that that amounts to around 15 changes of residence in the last five years. The obvious concern for Peace is, if that pattern repeats itself now that she is at school, there are clear risks for her in shifting from school to school.

[13] There is also an allegation in the original affidavit filed by Ms Marsden in support of her without notice application that Ms Bernard has been using methamphetamine. A clear implication is that she is a habitual user of methamphetamine. That view is bolstered by the affidavit of Ms Bernard's father and step-mother, Mr and Mrs Dickman. In their affirmation Mr Dickman recounts a conversation with Mr Slate in which Mr Slate describes Ms Bernard as being addicted to methamphetamine and being a "crack Mongrel Mob whore". There is also an allegation that Ms Bernard was hit by Mr Slate and an allegation that in a conversation with her mother, Mrs Dickman, that she said she had been hit and raped by him.

[14] Much of the evidence of Ms Marsden is, however, rank hearsay and is evidence that would be entirely inadmissible under s 17 Evidence Act 2006. Given that s 12A Family Courts Act 1980 requires that all evidence before the Court must now comply with the Evidence Act it is unclear to me why such rank hearsay has been included in this application. In saying that, as I have already acknowledged, there are some elements of Ms Marsden's evidence which do need to be carefully

and squarely confronted by the Court when considering the welfare and best interests of Peace.

[15] In anticipation that this hearing would be some time away there had been a round-table meeting which resulted in an agreement that Peace would be returned to Ms Bernard's care but on the condition that she relocate from [locations deleted]. That agreement formed the basis of a memorandum of consent which was filed in the Court. But as Judge Parsons correctly noted Mr Wilkerson, as a second respondent, had not signed the memorandum and technically the matter then needed to be set down for a formal proof hearing. Mr Wilkerson has taken no steps in these proceedings at all and he is not present today. He was notified by the registry of today's fixture but has elected to not attend.

[16] Ms Marsden seeks a continuation of that agreement, that is, that Peace is returned to Ms Bernard's care but that Ms Bernard is required, as a condition to a parenting order, to live in [location deleted]. Ms Bernard's position is that she wishes to remain living in [location deleted] with Mr Slate and for Peace to be back in her care but if the Court insists on a relocation that she would then end her relationship with Mr Slate and return to this area. There are, as she has squarely acknowledged, some practical difficulties with that given the paucity of available and/or affordable rental accommodation in [location deleted] at present.

[17] As I raised with Ms Andrew, counsel for Ms Marsden, there is no s 46R application. The only application before the Court is in relation to whether to make the current interim parenting order final or whether to discharge it and if so to in effect make a new parenting order returning Peace to Ms Bernard's care.

[18] There is of course the ability pursuant s 48(4) of the Act for the Court to make a parenting order subject to conditions. But I agree with the submissions of Mr Blair that those conditions (when one reads, for instance, the example given in the Act of including a payment of a bond), are centred around conditions that effect care and not guardianship issues. The Act is a code and clearly draws a distinction between day-to-day care and guardianship and in my view it is improper of the Court

to impose a condition in effect forcing a relocation on a parent as part of a parenting order.

[19] In this case that view is bolstered by the fact that Ms Marsden is not a guardian of Peace and yet she is seeking to impose a forced relocation on Peace from where she was living prior to the interim parenting order being made in the [location deleted] and forcing her to remain in the [location deleted]. Thus the issue really is whether Peace continues to live with Ms Marsden or whether Peace is returned to Ms Bernard's care.

[20] Ms Bernard and Mr Slate are, in relation to the allegation that Mr Slate has hit Ms Bernard, clear in their evidence. Mr Slate suffers from sleep apnoea. There is clear evidence of that from his general practitioner. Their evidence is that while he was asleep he involuntarily lashed out with his arm which hit Ms Bernard in the face. She was clearly hit in the face as Mr and Mrs Dickman observed, when she came up for Christmas shortly thereafter, bruising to her face and swelling on her arm. That needs to be weighed against the evidence of Mr and Mrs Dickman that Ms Bernard has said to them that she has been the victim of assaults from Mr Slate and Mr Slate's admission to Mr Dickman that he hit Ms Bernard.

[21] In relation to allegations such as these the test is established by the High Court in *Blom v Mackay* [2005] NZFLR 1036 and the Court of Appeal in *M v Y* as the balance of probabilities, that is, I need to be satisfied that it is more likely than not that Mr Slate has physically assaulted Ms Bernard. That it was put to Ms Bernard that the explanation of sleep apnoea was fanciful. It is the sheer nature of that contention that in my view bolsters its credibility for it is a pretty elaborate explanation and, given that Mr Slate's sleep apnoea is confirmed by his GP, it is my finding that whilst Ms Bernard was injured by Mr Slate it was involuntarily while he was asleep and, therefore, not an assault against her.

[22] There is also an allegation that Mr Slate has raped Ms Bernard. She denies that. She does acknowledge that she has been raped but it was by someone else known to her as "Greg" and when describing in cross-examination that she had been raped (although understandably not in detail) she became very emotional. There is

simply no evidence for me to conclude on the balance of probabilities that Mr Slate has ever raped Ms Bernard. I accept their evidence that he has not and that any belief that he has done so by Mr and Mrs Dickman is as a result of a confusion that has arisen in discussing the rape of Ms Bernard by Greg.

[23] Following that incident Ms Bernard was understandably upset and it led to an argument between her and Mr Slate. It was clearly a pretty intense argument and I accept Mr Slate's evidence that as part of his venting he rang Mr Dickman and made a series of allegations including implying that Ms Bernard was on methamphetamine. I accept his evidence that those allegations had no foundation at all and was simply him being, in effect, vindictive against Ms Bernard.

[24] Child, Youth and Family investigated the home environment of Ms Bernard and Mr Slate and they have reported that they have no issues of concern.

[25] On the face of it, therefore, Peace can be returned to Ms Bernard's care. But, as Mr Blair has identified, there are the issues around the known frequent transience and Ms Bernard's propensity to engage in relationships with men who are violent towards her.

[26] Mr Slate has a conviction in 2009 for male assaults female in relation to a prior partner, Ms Vanda. He accepted in cross-examination that while he could not remember the specifics of the circumstances surrounding the facts of that event it did include strangulation of Ms Vanda. He is someone, therefore, with a known history of violence and as I put to Ms Bernard it does concern me that, given her history of choosing men who have treated her so violently, that she had not discussed with Mr Slate before embarking upon a relationship with him whether he had a history of violence or not.

[27] The concerns of Ms Marsden around transience and future risk of violence have enormous validity in my view. But those concerns need to be weighed against the evidence of Ms Bernard and Mr Slate. It seemed to me Ms Bernard has some insight into how her past violent relationships have affected her. I am not yet satisfied that she understands the full impact of that violence on Peace for,

notwithstanding that the current order providing for Mr Wilkerson to have contact stipulates that it must be supervised contact, she has on a number of occasions allowed him unsupervised contact. On at least one of those occasions she has been exposed to violence and verbal abuse between Mr Wilkerson and his father.

[28] Mr Slate, however, on his own volition has engaged in counselling with a community organisation. That results in his counsellor coming to visit at least twice a month at their home and at times that involves relationship counselling between Ms Bernard and Mr Slate and at times with Mr Slate to try and address what he described as his short fuse. Both he and Ms Bernard were independently able to describe strategies they have put in place to avoid conflict and to avoid arguments and how they now sit down, after having cooled off, and talk through matters rather than exploding.

[29] Ms Marsden indicated that if the decision that I reached was that Peace could return to live in [location deleted] that she would want monthly contact with Peace. That was supported by Ms Bernard and very generously she has offered to bring Peace through to [location deleted] on a monthly basis.

[30] It seems to me, therefore, that despite what on the face of it is a most appalling history of transience and bad choices in men, there are some positives for Ms Bernard at present. Peace will be coming once a month to see Ms Marsden, who is entirely child-focused and protective. Mr Slate's counsellor is visiting at least twice a month. Ms Bernard is continuing her own personal counselling as a consequence of her PTSD. Peace will be at school and thus there will be other 'eyes' to look out for her. Additionally, the clear sense I got from Ms Bernard and Mr Slate's evidence is that they both want to work at this relationship and both want to improve things in their life so that things are better for them both as a couple and for their children (Mr Slate having children to other relationships).

[31] It is also significant in my view that in effect there is agreement by Ms Marsden that Peace should, all things being equal, be returned to Ms Bernard's care. The clear impression I got from her evidence and from the evidence of

Mr and Mrs Dickman is that Ms Bernard is a good mother and she has much that is positive to offer Peace.

[32] I acknowledge that Ms Bernard has admitted to using methamphetamine on one occasion and she has provided a hair follicle drug-test result which is negative for the presence of any illegal drugs. Whilst that shows that she has been clear for at least the last three months of methamphetamine it also shows she is clear of cannabis which of course remains in the system for much longer than methamphetamine.

[33] I have reached a view, therefore, for the above reasons that Peace is safe in returning to Ms Bernard's care and that she should be returned to her mother's care. For reasons I have set out above I do not accept that I have jurisdiction to attach a condition that Peace return to [location deleted] but in any event even if I did I would not have required that condition. It is important that Peace continues to have a relationship with Ms Marsden and in my view when she is having that relationship Ms Marsden will be able to arrange with Mr and Mrs Dickman for them to have contact with Peace as well. That type of contact addresses the principle that Peace's relationships with her wider family should be preserved and strengthened.

[34] I have given consideration as to whether I would make an interim order today to become final automatically upon Ms Bernard providing further evidence in six months' time of another hair follicle drug-test result with the results indicating that she has not been using any illegal drugs. But on the basis of the evidence as it has unfolded I am satisfied that Ms Bernard has only used methamphetamine on one occasion and she is not a regular drug user and as a consequence and in recognition that the Act itself requires that when matters are heard the Court should make final orders unless it is satisfied that to do so would be clearly contrary to the welfare and best interests that I should be making a final order today.

[35] I am going to make a new order rather than the existing order as I need to provide for Ms Marsden's contact. But additionally the previous orders seem to be a day-to-day care order in favour Ms Marsden and a separate contact order in relation to Mr Wilkerson. For the reasons I have set out *Quince v Rock* [2015] NZFLR 687 it is my view that those two distinct orders are ultra vires.

[36] Against that background and for those reasons:

- (a) The interim parenting order made on 3 February 2016 is discharged.
- (b) I make a final parenting order in relation to Peace Bernard, born [date deleted] 2011, on the following terms:
 - (i) Peace is to be in the day-to-day care of her mother, Shanelle Bernard.
 - (ii) Peace is to have contact with her father, Hoyt Wilkerson, on the basis that it is supervised contact at a Court-approved supervised access centre (and imposing that that ensures there is not the ability for Mr Wilkerson to try to influence Ms Bernard to have unsupervised contact at Mr Wilkerson's home).
- (c) I make an order that Peace is to have contact with Jewel Marsden one weekend each calendar month. The exact weekend to be agreed between Ms Marsden and Ms Bernard.
- (d) The above parenting order is conditional on the following:
 - (i) Ms Bernard is not to use illegal drugs while Peace is in her care.
 - (ii) Ms Bernard is to bring Peace to the home of Ms Marsden and collect her at the end of the periods in which Ms Marsden has contact and return her to [location deleted] unless agreed otherwise between her and Ms Marsden as to a meeting at [location deleted].

[37] In making this order Ms Marsden is a party to this order. For reasons I have set out I am quite satisfied that her involvement will ensure that there is appropriate and adequate monitoring of the situation.

[38] The order that I have made cannot be reviewed until two years after today's date unless leave is granted by the Court to make an application to vary the order earlier. I would expect that if there is a continuation of transience by Ms Bernard or if there is clear evidence that she has been the victim of violence from Mr Slate or any other intimate relationship within that period, that Ms Marsden will be granted leave to make an application as that would clearly be a material change in circumstances.

[39] Any such application, however, must be made on the basis of clear and unequivocal evidence and not what Ms Marsden is told second or third-hand (i.e., no application containing blatant hearsay should be entertained by the Court). But if there is such clear and unequivocal evidence then clearly the risks for Peace are continuing and the Court will need to relook at where Peace is to continue to live.

[40] Finally this being the end of the proceedings Mr Blair's appointment as lawyer for Peace is terminated with the thanks of the Court.

S J Coyle
Family Court Judge