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**IN THE FAMILY COURT
AT NELSON**

**FAM-2015-042-000257
[2016] NZFC 3648**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN SIMONE SINCLAIR
 Applicant

AND RORY HAYDEN
 TOM HAYDEN
 KERRY HAYDEN
 Respondents

Hearing: 4 May 2016

Appearances: K Meyer for the Applicant
 S E England for the Respondent R Hayden
 W F Freeman for the Respondents T and K Hayden
 P M Shoemack as Lawyer for the Children

Judgment: 4 May 2016

**ORAL JUDGMENT OF JUDGE R J RUSSELL
as to a parenting order under s 27 Care of Children Act 2004]**

Introduction

[1] These are proceedings under the Care of Children Act 2004 between Simone Sinclair, Rory Hayden, and Kerry and Tom Hayden. Ms Sinclair and Rory Hayden are the parents of Taj, aged eight, and Bailey, aged three. Kerry and Tom Hayden are the children's grandparents. In particular there are applications by Ms Sinclair to vary a parenting order, and there are also applications by Mr and Mrs Hayden for leave to commence these proceedings and for a parenting order.

Background

[2] The proceedings for these two children have been before the Court since August 2015. A temporary protection order was then made, and a parenting application filed by Ms Sinclair was placed on notice to Mr Hayden.

[3] On 24 October agreement was reached that Mr Hayden was to have contact with his children, supervised by his parents for one or two overnight contact visits each week.

[4] In November 2015 the temporary protection order was made final.

[5] Between November and March of 2016 there have been a number of breaches of the protection order by Mr Hayden. These consisted of various phone calls and messages, Facebook communications which were inappropriate and abusive. The police were notified and, as a result of their inquiries, 11 counts of breaching the protection order have been laid against Mr Hayden. He has pleaded guilty to these charges. He has been remanded in custody, and is currently awaiting sentence, with the sentencing date being now scheduled for 17 May.

[6] The outcome of his sentencing process is, of course, unknown. I understand from Mr England, who represents Mr Hayden, that the sentencing recommendation from the Probation Service is a term of imprisonment, although home detention options are being addressed. Ultimately the sentence imposed on him will be a matter for the sentencing Judge. If a home detention option is imposed, then Mr

England said this would be to an address in Invercargill. Mr England said that while Mr Hayden's future plans following completion of the sentence are at the moment unclear, he may well stay in Invercargill where he has other family support.

[7] In December 2015 a referral was made to Care Solutions for supervised contact visits to occur, although no supervised contact visits have to date occurred. There is therefore unused funding for supervised contact from the allocation which was made.

[8] In March 2016 Ms Sinclair applied to vary the parenting order. Her application was granted. Mr Hayden was directed to have no contact with the children pending receipt of a lawyer for child report. Ms Shoemack was appointed in that role, and has filed various reports as required of her.

[9] In April 2016 Mr and Mrs Hayden Snr applied for contact to see the children at the same times as the original parenting order provided for their son to have contact. They essentially sought to "step into the shoes" of their son while he was in custody, to maintain the paternal family links with the two children.

[10] In April 2016 an interim parenting order was made permitting contact by Mr Hayden with the children by letters. Contact with the paternal grandparents was to occur every second weekend. I timetabled the framework of a final parenting order, in respect of all of the applications, to a submissions-only hearing today.

[11] Mrs Meyer on behalf of Ms Sinclair, Mr Freeman on behalf of Mr and Mrs Hayden Snr, Mr England on behalf of Mr Hayden, and Ms Shoemack on behalf of the children have all filed submissions. The parties filed affidavit evidence setting out their position and the outcomes which they sought.

The case for Ms Sinclair

[12] Ms Sinclair has given evidence that she has suffered what she described as "significant and escalating psychological and verbal violence" following the end of her relationship with Mr Hayden. She retains concern about his mental health well-

being, noting the multiple breaches of the protection order which have occurred, noting there was a suicide threat as recently as February 2016. She considers she has promoted the relationship between the children and their father and his parents by agreeing to the supervised contact, letter contact, and the other contact which has been set out in the Court orders.

[13] She feels entirely unsupported by the paternal grandparents, and often feels blamed by them for the situation. Despite this deteriorating relationship she is still committed to the children maintaining contact with their grandparents and for them to have a grandparent/grandchild relationship, and receive the benefits that the children can derive from such contact occurring.

[14] She is concerned about the impact of the contact arrangements on the children. With Taj in particular, she is concerned about the number of changeovers which occur which Taj had found confusing.

[15] What Ms Sinclair seeks from this hearing is a clear and stable regime of contact, recognising Mr and Mrs Hayden's role as grandparents in the children's lives.

[16] Ms Sinclair points to the stresses and strains these proceedings has caused, and seeks a final parenting order so that she can move on with her life and focus on her parenting of the children.

[17] Insofar as Mr Hayden's future contact with the children, Ms Sinclair proposes whilst he is incarcerated this occurs by letter. She is willing and able to facilitate communications to and from the children and their father in this way. She has always been open to the children having face to face contact with him, and wants this to occur when he is released from the sentence which be imposed on him shortly.

[18] Before any contact becomes unsupervised, however, she is concerned about safety issues. She contends Mr Hayden needs to provide some evidence of mental health assessments and his attendance at the programmes and appointments. She wants him to complete a Stopping Violence course and she wants to know something

of what he has learned from this course, and also for him to complete the Parenting Through Separation programme.

[19] On his release from his sentence, and upon him being available to do so, Ms Sinclair seeks supervised contact to occur using the unallocated sessions with the approved provider and, from there, safety assessments can be made by the Court.

[20] Insofar as the children's contact with their grandparents are concerned, Ms Sinclair proposes a continuation of the each second weekend arrangement which is currently in place. She proposes there be a half day at Christmas and a half day at or near each child's birthday, and that there be other contact as agreed upon between the parties. She does not support any contact in between the fortnightly weekend visits.

[21] In support of this submission, Mrs Meyer referred me to two decisions, *N v H* FC Gisborne FAM-2006-082-55, 10 July 2008, and *B v B* FC Wanganui FAM-2007-083-630, 11 November 2008. She submitted copies of those decisions, and I have had a chance to look at those. The principles in those cases are important, in particular that there is to be the primacy role of the parents in the children's lives and any contact with grandparents must not diminish or inadvertently affect the parents' role in the children's upbringing. Having said this, I accept the point other counsel have made, that the factual circumstances of those cases are quite different than this one.

[22] Mrs Meyer has correctly pointed me to the relevant s 5 principles which I shall address shortly.

The case for Mr and Mrs Hayden Snr

[23] For Mr and Mrs Hayden Snr, Mr Freeman submitted there should be contact with the paternal grandparents to maintain the family link which the children need to have with paternal family members. He sought contact occur each second weekend, and for there to be two mid-week visits each fortnight. He promoted counselling to assist in smoothing the relationship between the grandparents and Ms Sinclair. He

points out at a submissions-only basis hearing the evidence has not been tested by cross-examination, and so no particular findings of fact can be made where the affidavit evidence conflicts. Mr Freeman points out there are a number of areas in the affidavit evidence where allegations are made which are not necessarily accepted.

[24] Mr and Mrs Hayden Snr seek to have Ms Sinclair contribute to the transport arrangements to enable contact to occur. Mr Freeman also seeks to have Mr and Mrs Hayden Snr act as the conduit for communications between the children and Mr Hayden. I hasten to add that in respect of communication between Mr Hayden and Ms Sinclair, Mrs Meyer submitted the grandparents are a suitable conduit. It is only communications between the children and their father which she is prepared to facilitate directly.

The case for Mr Hayden

[25] For Mr Hayden, Mr England conceded it is likely that Mr Hayden will be sentenced to a term of imprisonment on 17 May, although he is promoting a home detention outcome. On a best case scenario, it is likely that a term of imprisonment of four to five months from now could be the end outcome for Mr Hayden, but if a home detention sentence was imposed it would be a lesser time than this.

[26] The end outcome of Mr Hayden's sentencing is partially relevant for me in this decision for Mr Freeman has conceded that such time as Mr Hayden is able to be back in Nelson and play a more active part in the children's lives, then Mr and Mrs Hayden Snr accept that they then need to step back from her contact times with the children to allow their son to develop a proper father/child role with these two children.

The case for the children

[27] On behalf of the children, Ms Shoemack filed a total of four reports. She set out the results of her inquiries of the children. In coming to a decision, I must have regard to any views under s 6. Taj's views about visits with his paternal

grandparents varies from being there was nothing that he liked doing when staying with them and he found it a bit annoying and did not like to travel in cars, to then saying that it was good staying with his nana and granddad on a school night because he received a good breakfast the following morning. In the end, at the age of only eight years, his views have only a minimal impact on the decision I am about to give.

[28] Interestingly, Ms Shoemack reported on Taj's three wishes. The first was for his dad to come back into his life, and the third was to have 1000 more wishes that he could make. This perhaps indicates, not unnaturally, his view of the world and of his parents, and these views do not reflect the actual reality for both of his parents. As outlined, Ms Shoemack reported the existing contact arrangements may well have been confusing for Taj at times.

[29] In the conclusion to her report Ms Shoemack supports there being mid-week overnight contact during both weeks, or at least during the second week, suggesting this be on a Thursday so that Mrs Hayden Snr could take the children to school and preschool on a Friday morning, enabling contact and the relationship with the children to be maintained, and possibly help Taj with his education.

[30] Upon inquiry at the hearing, Mrs Meyer told me that Taj and Ms Sinclair are actively engaged in [name of recreational activity deleted]. These occur each Thursday evening and each Saturday morning. Taj has been doing this for a year and a half or so now. It seems this is very much a family occasion for them on a Thursday night in the sense that Ms Sinclair's own mother has time with both of the children on the Thursday, and every alternate Thursday she has an evening meal with the children, although they do not stay overnight with her.

The law

[31] I must and do have regard to the provisions of ss 4, 5 and 6 of the Act.

[32] I need to record that s 4 requires me to make orders which are in the the welfare and best interests of both of the children, having regard to their individual circumstances and the circumstances of their parents. The gender of the parent is not

a relevant consideration and the conduct of the parent does not need to be considered unless it is relevant to the welfare and best interests of the child. I must have regard to the children's sense of time which means that, for young children, their memory retention abilities are more limited than would be the case for an older child.

[33] I also must have regard to the specific provisions in s 5 when considering what is in the best interests and welfare of the children. In particular, that they need to be protected from all forms of violence including psychological harm (s 5(a)), that their parents have the primary responsibility for them (s 5(b)), that there should be ongoing consultation and co-operation between them (s 5(c)), that there should be continuity in their care arrangements and there is the right to have a continuing relationship with their parents (s 5(d)), that familial relationships should be preserved and strengthened (s 5(e)), and that their individual identity as a person (including matters of culture, language and religion) needs to be preserved and strengthened (s 5(f)).

Section 5(a)

[34] This principle mandatorily requires me to make orders which are safe for the children. Section 5A requires me to have regard to the reasons for any protection order that is made. It is very clear to me, from the evidence, that Mr Hayden has a number of serious issues which he needs to address before he can play a positive and meaningful role in his children's lives. As I observed at the hearing, I cannot remember, when sitting in the criminal jurisdiction, the last time I dealt with someone that had a total of 11 charges of breaching a protection order to be dealt with at the one time. I am told the offending occurred in groups or batches as far as the dates of offending are concerned. I understand he was staying with his parents at the time this offending occurred, although accept his parents had limited control over what was occurring.

[35] The relevance of all of this is that I do not underestimate, in the slightest, the significant impact this offending has had on you, Ms Sinclair, in terms of the stresses and strains which have been going on for you personally, and on your ability to properly parent the children.

[36] I also appreciate, Mr and Mrs Hayden Snr, that you have been caught very much in the middle of the offending which has occurred by your son, and your obligation to support him with the issues and difficulties he has had, yet at the same time trying to maintain a positive relationship with your grandchildren and their mother.

[37] You each, I think, need to take a moment to recognise the impact of the stresses and strains all of Mr Hayden's offending has had on each of you, and none of this is the children's fault. They have a right to have a positive relationship with the important members of their families, including their grandparents, and unfortunately Mr Hayden's own conduct has very much put that at risk.

[38] I will address the ss 5A and 5(a) safety concerns by continuing the supervised contact for Mr Hayden to see the children, and for the non-face to face letter writing contact which has, by and large, been agreed upon. I would not be prepared to look at any unsupervised contact, at least until the issues identified by Mrs Meyer in her submissions, which I have recorded in this judgment, are mostly addressed by Mr Hayden. He may be able to do this as part of the sentence conditions which will be imposed in the criminal jurisdiction.

Section 5(b)

[39] The s 5(b) principle is emphasised by Mrs Meyer. That gives the children's parents and guardians the primary responsibility for their care, upbringing and development. Mr and Mrs Hayden Snr are not the children's parents or guardians. The primary responsibility for them is and will continue to rest with Ms Sinclair. From all the information I have received, despite all of the trauma and stresses she has been under, she has been doing a good job in looking after these children. To her credit she is prepared to positively promote face to face contact with their father when he is in a position to do so, and is also prepared to agree to and facilitate contact with the children's paternal grandparents to ensure their relationship is maintained.

[40] As I have said in a number of cases, it takes "a village to raise a child", and good grandparents can teach children much about life which the children's own parents cannot. They come from a different generation, and can teach children matters from a different perspective than can the children's own parents. On the information I have in front of me, there is nothing which I have seen which indicates Mr and Mrs Hayden Snr are anything other than positive role models for their grandchildren.

Section 5(d)

[41] This principle requires there to be some continuity in the care arrangements. I cannot satisfy this principle as far as Mr Hayden is concerned because of his offending. Currently the care arrangements are for the children to be living with their mother, and having frequent contact with their grandparents, and I will provide for continuity for this in the care arrangements in the orders I am about to make.

Section 5(e)

[42] This principle requires that I need to preserve and strengthen the relationship between the children, their parents and their wider family. It is a matter of not only preserving, but also strengthening this relationship. This principle is difficult to satisfy for Mr Hayden because of his offending against Ms Sinclair, but in the orders I am going to make I will provide for the children's relationship with Mr and Mrs Hayden Snr to continue and to be strengthened.

Section 6

[43] I have already addressed the children's views as required.

Parenting order - conclusion

[44] Insofar as the day-to-day care issue is concerned, I have concluded that the children should continue to live in the primary day-to-day care of their mother. She has asked for a final parenting order to be made and, in my view, is entitled to have these proceedings brought to an end. I will make such an order for this to occur.

[45] Insofar as Mr Hayden's contact is concerned, I will leave it open to him to uplift and use the unallocated sessions of supervised contact through an approved provider. I will also leave the door open for Ms Sinclair and Mr Hayden to consider further supervised contact as they may from time to time be able to agree upon. It may be that upon Mr Hayden's release from prison, and on visiting his parents, Ms Sinclair may agree to contact being supervised by Mr and Mrs Hayden Snr. I have already made observations about them in this judgment and would see no difficulty with contact occurring in this way. Ultimately, though, it will be a matter for the parties to agree upon at the time.

[46] I have heard competing submissions on the method by which Mr Hayden can communicate with the children. My view is that, with Ms Sinclair's agreement, Mr Hayden can write to the children at her address. I see no reason for him to send communications through his parents, but if he wants to do this and have Mr and Mrs Hayden pass letters on to the children, then this can occur.

[47] I am going to provide that the children can communicate either directly with their father, if Ms Sinclair wants to facilitate this, or alternatively if the children want to, they can send a note or a gift or a card to the father during the times they are in the care of their grandparents.

[48] I will put communication provisions in the parenting order for Mr Hayden to communicate with Ms Sinclair via his parents. He needs to understand that any contact outside the terms of the parenting order with Ms Sinclair or the children will constitute a further breach of the protection order, for which he can be charged and would face further penalty in the criminal jurisdiction.

[49] For Mr and Mrs Hayden Snr's contact, there is agreement that the weekend contact each fortnight occurs. I have considered Mrs Meyer's submission there should be only fortnightly weekend contact the children have with their grandparents. I have two difficulties with this. Firstly, I accept the submission made by Mr Freeman that with the absence of the children's father in the children's lives, some continuing link does need to be maintained with members of the paternal family in accordance with the s 5 principles which I have addressed. Secondly, there

needs to be some continuity in the care arrangements for the children. They are already seeing their grandparents on one weekday occasion during each week. Mrs Meyer's submission does not meet this continuity principle.

[50] Having said this, I accept the point made by Ms Shoemack that the number of contact changeovers in the fortnightly cycle will be confusing for the children. It would have been my preference to have a mid-week visit occur each second week on the Thursday night, but I accept Ms Sinclair's explanation that this night is a maternal family night for the children. If mid-week visits were to occur, Mrs Meyer submitted it should be a Wednesday night, and this will occur in the order I am about to make. The Christmas and birthday arrangements will follow as submitted.

[51] I will build into the order the power for the parties to communicate with each other about guardianship and parenting issues, and any issues that may arise from the implementation of this order. It is important for the parties to understand that the order I am about to make is a minimum parenting requirement. It can be varied or changed if the parties agree either to cater for one-off events which occur or, alternatively, as their or the children's circumstances might change.

[52] As to the issue of transport, I accept Ms Sinclair has enough on her plate at the moment. I am not going to require her to contribute to the transport arrangements as was submitted. It is a relatively short distance from where the parties live, in [location 1 deleted] and [location 2 deleted] respectively, and I consider Mr and Mrs Hayden can be responsible for the transport arrangements for their contact to occur.

[53] I have been asked to address the issue of whether there should be leave included in this decision under s 139A of the Act to enable any party to come back to the Court to seek a variation of these orders in the next two year period. My view is that the issue of leave needs to be considered as and when any further application is filed. In commencing any application Mr Hayden, in particular, will need to be mindful of my observations about the sort of work he needs to do before he can progress on to unsupervised contact, if that is what he seeks. I also accept if leave is granted, the provisions of the parenting order for Mr and Mrs Hayden Snr will need

to be revisited if Mr Hayden seeks contact with the children outside the framework of the parenting order which I have put in place for Mr and Mrs Hayden Snr.

Orders and directions

[54] Against this background, I make the following orders and directions:

Day-to-day care

- (a) A final parenting order will issue. Ms Sinclair will have the primary day-to-day care of both of the children.

Contact for Mr Hayden

- (b) There shall be contact reserved for Mr Hayden to see the children as follows:
 - (i) There shall be supervised contact able to be uplifted from an approved provider. The funding already allocated under s 60 of the Act is to remain. This contact is to be uplifted upon request being made by either party from the registrar. Thereafter the contact is to occur at such times and on such terms as are arranged through an approved provider.
 - (ii) There shall be such further supervised contact as the parties may from time to time agree upon.

Contact - Mr and Mrs Hayden Snr

- (c) For Mr and Mrs Hayden Snr I grant them leave to bring their application. They shall have contact with the children as follows on a fortnightly cycle:
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(i) Week 1

From Fridays, 4.30 pm, until Sundays, 4.30 pm, commencing 13 May 2016. It shall be a condition of the weekend contact visit that they shall take Taj to his [name of recreational activity deleted] class on a Saturday morning and to any other sporting events in which he may be enrolled and expected to attend.

(ii) Week 2

Contact shall occur on Wednesdays between 4.30 pm and Thursday morning at 9.00 am. The uplifting and return can be to the children's school or preschool where appropriate otherwise shall occur at Ms Sinclair's home.

- (d) Christmas Day there shall be half a day allocated for the children to spend time with their grandparents at times to be agreed.
- (e) On the children's birthdays there shall half a day allocated near to the children's birthdays for their grandparents to have contact with them to receive birthday gifts.

Variation

- (f) There shall be such further or other contact as Mr and Mrs Hayden and Ms Sinclair may from time to time agree upon.

Transport

- (g) Mr and Mrs Hayden Snr shall facilitate the transport arrangements necessary for these contact arrangements to occur.

Communication

- (h) Mr Hayden may write to the children at their mother's address. Ms Sinclair shall keep Mr Hayden informed of her current postal address.
- (i) The children may correspond with their father either directly or via the paternal grandparents. In the event that Ms Sinclair does not know Mr Hayden's address, then such correspondence will need to be forwarded via the children's grandparents.
- (j) Communication between Mr Hayden and Ms Sinclair on any parenting guardianship issues or any other issues arising from the implementation of this order shall occur via Mr and Mrs Hayden Snr. Any other communication between Ms Sinclair and Mr Hayden outside the terms of the parenting order, in the absence of any written agreement, will potentially constitute a further breach of the protection order.

Counselling

- (k) I direct the registrar allocate a maximum of six sessions of counselling available to all of the parties under s 46G of the Act. The counselling is to be uplifted only if the parties agree for funding to be allocated and for counselling for them to commence. My expectation is that such counselling will be joint appointments after any initial introductions with the counsellor.

Parenting Through Separation course

- (l) I direct the registrar make all of the parties aware of the next available Parenting Through Separation course which they could attend. It is my recommendation that Mr and Mrs Hayden and Ms Sinclair do attend that programme if they have not recently done so. I am not

making this a formal direction, but consider both parties could benefit from learning different and better ways of managing these children in circumstances where the significant adults in their lives live in separate households.

Lawyer for child

- (m) Ms Shoemack's appointment as counsel for the two children is now discontinued with the thanks of the Court. There is no need for her to see the children to advise of the outcome of the proceedings given their young ages.

R J Russell
Family Court Judge