EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT ROTORUA

FAM-2013-063-000529
FAM-2014-063-000338
[2016] NZFC 6130

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	ALEX STONE Applicant
AND	SOPHIE READER Respondent

Hearing:	18-19 July 2016
Appearances:	K Yarrall for the Applicant T Braithwaite for the Respondent N Utting as Lawyer for the Children
Judgment:	21 July 2016

RESERVED JUDGMENT OF JUDGE S D OTENE
[As to schooling and immunisation]

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[1] These proceedings concern the children of Alex Stone and Sophie Reader. They are Madison, born [date deleted] 2003, aged 12, Liam, born [date deleted] 2006, aged 9 and Mason, born [date deleted] 2009, aged 7.

[2] There has been an extensive history of Court proceedings regarding the children, including a period of time when they were in the interim custody of the Chief Executive of the Ministry of Social Development, but for present purposes, it is sufficient to record that the operative order is an interim parenting order made on 25 May 2016. That grants Mr Stone day to day care of the children and Ms Reader supervised contact, such supervision to be by an approved supervised contact provider or a person approved by the Court.

[3] Subsequent to the making of the interim parenting order, further applications have been brought by each party. Ms Reader has applied to rescind the order and for an interim parenting order for week-about contact pending receipt of the s 133 psychological report that had been earlier directed. Mr Stone has applied for directions that Madison attend [name of school 1 deleted] for her secondary school education commencing next year and that all the children be immunised and vaccinated.

[4] The hearing was allocated to determine interim contact and guardianship matters. The psychological report was received and distributed to counsel a few days prior to the hearing. At the outset of the hearing, counsel for Ms Reader conceded that in light of the report, the absence of time to file evidence in response and the inability to cross-examine the report writer, who was not required for the interim hearing, it was not possible to advance her application to rescind or for a parenting order for week-about care. Interim contact will therefore proceed in terms of the current order at a supervised contact centre.

[5] Despite that, I record my indication to counsel that in my view that there is no jurisdiction to rescind the interim parenting order. The application is purportedly made pursuant to r 34(c) Family Court Rules 2002, which rule is in within Part 2. Rule 416A provides that Part 2 only applies to proceedings under the Care of Children Act 2004 ("the Act") if, and to the extent, that Part 5A provides. There is no provision in Part 5A for the application of r 34 or otherwise for the Court to

rescind an order made under the Act. In any case, for the purposes of the interim hearing, it is only the guardianship matters that now fall for determination.

The law

[6] Where parents are unable to agree on any matter concerning the exercise of their guardianship, either may apply pursuant to s 46R to the Court for direction. The Court has the power to make such order in relation to the matter as it thinks proper.

[7] In determining the matter, s 4 requires that the children's welfare and best interests in their particular circumstances must be my first and paramount consideration. When considering welfare and best interests, I must have regard to all matters which are relevant, but in particular to the principles in s 5 of the Act. None of those principles start with any greater weight than the others, rather the significance of the each principle will depend on the circumstances of the case. Relevant to both guardianship matters are the principle in s 5(b) that a child's care development and upbringing should be primarily the responsibility of his or her parents and guardians and in s 5(c), that a child's care, development and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents and guardians. Unfortunately, the relevance is in the breach in the sense that the parties have not been able to realise those principles so it falls to the Court to make guardianship decisions for their children.

[8] Also I am required by s 6 to give the children an opportunity to express their views on the matters I must decide. I must take account of those views. They are not determinative, but I must accord them such weight as is appropriate in the circumstances, including, for example, their ages and maturity.

Madison's schooling

[9] Madison is to commence her secondary school education next year. Mr Stone proposes she attend [name of school 1 deleted] or in the alternative, [name of school 2 deleted]. He is prepared to meet the additional school fees for Madison. Ms Reader proposes that Madison attend [name of school 2 deleted].

[10] Each party makes assertions about the advantages and disadvantages of each school, but there was no objective evidence as to relative merits. I have no reason to doubt that either school would meet Madison's educational needs. Leaving aside the element of religious education, which I will address separately, the combination of one party's arguments does not clearly outweigh the combination of the other party's arguments. The issue is finely balanced.

[11] Ms Reader is concerned with the cost of attendance at [name of school 1 deleted], but more fundamentally, her objection is to the compulsory Catholic religious education to which Madison would be subject if she were to attend that school. The former can be answered by Mr Stone's agreement to be responsible for the additional costs of attendance. In terms of religious or spiritual matters, Ms Reader is a member of [name of religion deleted] and Mr Stone does not practice religion. Ms Reader has not raised the children within her faith but rather practised with them the Virtues programme. She describes this as a non-denominational programme that emphasises virtues such as kindness and honesty and which she accessed via the internet and delivered at home. In her evidence, she referred to a concern that Madison will not be able to apply a critical mind to the religious concepts to which she will be exposed at [name of school 1 deleted] without sufficient support at home, and which support will not come from Mr Stone.

[12] Madison has expressed through her lawyer a very strong preference to attend [name of school 1 deleted]. She has attended the school open day. She has also had a look around [name of school 2 deleted], though not at the formal open day because that has not yet been held. She believes that [name of school 1 deleted] offers her better opportunities and articulated to her lawyer reasons for reaching that conclusion.

[13] Ms Reader, in essence, says that the seed of attending [name of school 1 deleted] has been planted with Madison so she has been unduly influenced to attend there without having been given a real opportunity to assess and consider other options. Furthermore, she says that Madison does not have the maturity to understand that consequences of her decision, demonstrated by her recent wish to attend a school other than [name of school 2 deleted].

[14] I do not accept either proposition. Whilst the prospect of attendance at [name of school 1 deleted] has been held out to Madison by her attendance at the open day and the submission of an application form and may therefore have been an influence on her views, I am satisfied that it is not the sole or primary determiner of her views, that she has a level of maturity to take a range of matters into consideration and that she has in fact done so. The reasons for her preference, as articulated to her lawyer, are rational and cogent. She is described by her lawyer as strong willed and strong minded, a description that is accepted by her parents. I take into account also the observation of Mr Dwyer in his psychological report of 14 July 2016 that Madison was able to understand issues regarding guardianship matters conceptually from different perspectives. Those qualities also suggest that Madison does have a capacity and skill to think critically about the religious aspects to which she will be exposed at [name of school 1 deleted]. I take into account also that Ms Reader will have ongoing opportunity to provide an alternative religious or spiritual perspective for Madison.

[15] I give considerable weight to Madison's wishes. I make it clear that they are not determinative, but in this case, where matters are so finely balanced, I consider that they weigh the decision in favour of Madison attending [name of school 1 deleted], subject to the application being successful.

Immunisation

[16] Mr Stone's application was not specific as to the diseases he sought the children to be immunised against. In cross-examination, he made reference to measles, mumps and rubella, tetanus and a particular injection that Madison wanted, having learned about it at school. Despite deposing that he had done "a lot of reading and research about the pros and cons of immunisation/vaccination", he was not able to detail the specific literature he had considered and did not impress as having particularly well informed views. The submission of his counsel is that Mr Stone seeks that the children receive immunisations recommended by the Ministry of Health.

[17] Ms Reader says the children have received homeopathic vaccination and are healthy and well so not in need of the orthodox vaccination[1] sought by Mr Stone. Orthodox vaccination is contrary to her belief in holistic healing and symbiotic living.

[18] Both parties acknowledged a recent outbreak of an infectious disease in the Waikato district when children were prevented from attending school if they had not been vaccinated to the school's satisfaction. Ms Reader accepts that if a similar situation were to occur at any of the schools the children attend, homeopathic vaccination would not be considered adequate by the schools, so the children may be prevented from attending.

[19] The children's lawyer reports that Mason has no understanding of immunisation, Liam is worried about getting a disease, having suffered cuts from rusty nails and barbed wire, and Madison wants to be immunised particularly for the HPV virus. Madison voiced a concern about not being immunised and queries whether Ms Reader's animals, which Madison understands to be immunised, mean more to Ms Reader than her. Lawyer for child raises as a concern the consequence of the children not being able to attend school during an outbreak of infectious disease and beyond that, their sense of being marked out as "different" if that were to occur. The issue of immunisation is more complex than that of schooling, so whilst I take into account Liam and Madison's views, I do not give them the same weight as I did to Madison's views regarding schooling.

[20] Counsel for Ms Reader submits that the principle in s 5(a) that a child's safety must be protected and in s 5(d) that a child should have continuity in his or her care development and upbringing, insofar as the status quo for the children has been homeopathic rather than orthodox vaccination, are most particularly to be weighed. I consider that issues of safety, including protection from disease, must take priority over the continuity for which Ms Reader contends.

[21] Although neither party placed before the Court any medical or other expert evidence regarding the issue, I consider that I can take judicial notice of the fact that

[1] The term "orthodox vaccination" is not used in an affirmative sense but as a convenient description for the immunisation sought by Mr Stone.

the government agency responsible for the management and development of the New Zealand health system recommends a schedule of vaccination for all New Zealanders based upon a body of medical evidence. On this basis, the best evidence before the Court of protection of the children from disease is by way of the Ministry of Health recommended immunisation schedule. When I take into account also the acknowledged possibility that if the children are not immunised they may be prevented from attending school, I am satisfied that it is in their welfare and best interests to be so immunised.

Directions

[22] In order to give effect to this decision, I make the following directions:

(a) In 2017, Madison shall attend [name of school 1 deleted] subject to her acceptance and upon the condition that Mr Stone shall be responsible for the school fees over and above those that would be incurred at a state secondary school. If Madison is not accepted as a student at [name of school 1 deleted], she shall attend [name of school 2 deleted].

(b) The children shall be immunised in accordance with the Ministry of Health schedule of immunisation, unless their general practitioner advises that there is a specific contra-indication in relation to any particular immunisation for any child.

[23] In terms of progress of the substantive proceedings, I note that Judge Munro directed on 13 April 2016 that the case is complex. I direct a case management conference in four weeks time or as soon thereafter as can be allocated by the registry. Counsel are to file memoranda (or a joint memorandum if possible) setting out directions sought to progress this matter to determine the substantive applications.

S D Otene
Family Court Judge