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**IN THE FAMILY COURT
AT MANUKAU**

**FAM-2014-092-000404
[2016] NZFC 1965**

IN THE MATTER OF The Care of Children Act 2004

BETWEEN AFA OFOLOSE
 Applicant

AND ULANI FALEPE
 Respondent

Hearing: 8 March 2016

Appearances J Maxwell for the Applicant
 Respondent appears in person
 T Norton lawyer for the Child

Judgment: 8 March 2016

ORAL JUDGMENT OF JUDGE A-M SKELLERN

[1] There has been an oral application by Mrs Falepe to join her husband Toli Falepe as an applicant for a Parenting Order providing for Jade to be in their joint day-to-day. There is no opposition by Mr Ofolose and the application is enthusiastically supported by Ms Norton, on behalf of Jade.

[2] I therefore accept that oral application and ultimately the Parenting Order for the day-to-day care of Jade will be a joint one in favour of Toli Falepe and Ulani Falepe.

The Hearing

[3] The matter today is an application by Afa Ofolose for a Parenting Order providing for him to have contact with his daughter Jade who was born on [date deleted] 2003. The respondent is Ulani Falepe who is Jade's mother, but as I have noted, there will now be a joint application for Jade's day-to-day care, including Toli Falepe, Mrs Falepe's husband.

[4] The hearing proceeded today on a defended basis. Mr Ofolose has not had contact with Jade for around nine years, and Mrs Falepe objected to his reconnecting with his daughter after such a long time. Jade's heritage is rich. She is very fortunate. Her mother is of Samoan/Maori decent and her father is Tongan. I met with Jade at the outset of these proceedings at Jade's specific request.

Jade's Interview with Judge

[5] In terms of the application by Mr Ofolose, I discussed the application with her in the presence of Ms Norton in my chambers. She had some anxious view of the proceedings before the Court saying that she did not really want to meet Mr Ofolose after all these years, and that he had not really been there for her. She did not really want him sending her letters. She thought that she did not really want him sending anything to her now, instead of when she was little.

[6] She said that she had been worried about all the interviews that she had to have surrounding these proceedings. She was worried that if Mr Ofolose was involved in her life and that she would not be able to focus on anything else but that.

[7] However, she said that she would respect any decision that I would make as the Judge. My perception of that comment was that there was quite some relief involved in an acknowledgement that this was not something that she had to decide.

Yes, her views were important, and had to be taken into account by me. This was a task for someone different altogether, and she understood that that was my role.

The Parties' Positions

[8] The time surrounding the separation of Jade's parents seems to me to have been acrimonious and difficult. Around that time Mr Ofolose took Jade on holiday to Tonga. He did this without consultation with Mrs Falepe. Apparently she was away at the time and Jade was in the care of her parents. Unfortunately Jade was then not returned to her mother for three months. That was well after the expected return date. Ms Falepe was a young mother at the time, and it could only be imagined how traumatic that experience would have been for her.

[9] Each party has a different view of what occurred next resulting in this application, and then not being brought for seven years and contact not occurring. Mr Ofolose describes making efforts to contact Mrs Falepe and Jade. He says he visited their address, he thought three or four times, but was given the message firmly by mother and maternal grandparents that he was not allowed to see Jade. He says he left a note on mother's car and that ultimately mother moved in 2008 and he was unable to contact her or Jade until he says in 2013 where he made a Facebook connection through his elder daughter.

[10] Mrs Falepe sees the situation completely differently. She is adamant that father simply, as it were, lost interest and did not make strong attempts to see Jade.

[11] Mr Ofolose's application is motivated he says by a wish for Jade to understand who he is, that he is her father.

[12] He wants her to know he would not harm her in any way ever. He now seeks contact on a much more limited basis to that originally. He wishes to be able to write a letter to Jade progressing perhaps to telephone contact and then in the future if she wishes, further contact of a more direct nature. He would also like to receive news of the Guardianship matters that mother deals with.

[13] He conceded some very important matters however. First a Final Parenting Order providing for Mr and Mrs Falepe to have the day-to-day care of Jade. He conceded that Jade's name would remain exactly as it is. That is a vital concession because for Jade's name to be changed at the age of almost 13 years would have significant impact upon her, her relationship with her family and very importantly, and in fact increasingly importantly, her relationship with her peers.

[14] In 2010, by way of explanation, Mrs Falepe says that she was unable to locate Mr Ofolose and she decided to change Jade's entire name from [former name deleted] to Jade Falepe. I am going to traverse something of the procedural background to this matter and it is important.

[15] When the proceedings were first issued by Mr Ofolose Mrs Falepe took several steps to avoid the matter proceeding in a timely fashion to court. She refused to accept documents because her name was spelt incorrectly and the process server had a photo of Jade and she felt suggesting that it was her. The process server then left the papers at her feet. Lawyer to assist the Court and Lawyer for Child had difficulty ultimately engaging with mother.

[16] Mother then also, in the middle of proceedings, issued paternity proceedings to determine whether or not Mr Ofolose was Jade's father. The paternity proceedings were concluded with a Paternity Order being made on 24 October 2014. Mother has steadfastly insisted up to today that the choice in not having contact with Mr Ofolose was Jade's alone and that both she and her husband were simply supporting Jade.

[17] Mother has moved a long way today. It is to her great credit. As I have said, I consider that the impact of Jade being removed from her care for a period of three months all those years ago significantly affected her, and has affected the manner in which she has dealt with these proceedings.

[18] So for mother, today, to come to the point where she accepts this is not Jade's decision, and it is not a matter where she and Mr Falepe are simply supporting Jade but in my view is sincerely agreeing that the decision is mine. She and

Mr Falepe will abide by and support that decision in Jade's interests, it needs to be clear that just like Mr Ofolose has made significant concessions in the interests of Jade, so have Mr and Mrs Falepe. This gives me hope that for the future, given the Orders and Directions that I am going to make. The road for Jade may be a smoother one and if not free of, lessen the anxiety that she has clearly felt around these proceedings.

The Psychologists Evidence

[19] Ms Wali, who is an experienced psychologist, prepared a s 133 report for the Court on 31 May 2015. Her report was in fact unchallenged in any material aspect. There were some questions that Ms Norton and Ms Falepe had for her but in terms of her findings there was nothing that was germane to the decision that I have made that was in any way seriously challenged. Indeed, Ms Maxwell chose not to cross-examine her indicating that there was nothing with which Mr Ofolose took issue to the extent that required cross-examination.

[20] The report is a careful and thorough report and the findings of Ms Wali are sound in the Court's view from a psychological perspective. There are some points in the report which are useful to have included in this judgment so that they can be reflected on at a later date and may well assist Jade's parents and I say "parents" being the three parents here today to come to an understanding of how best to meet Jade's needs.

Ms Wali was of the view, and I refer to para 6.3 of her report, as follows:

Jade is aware of Mr Ofolose's paternal link with her, albeit at a rudimentary level. She does not remember him as she last had contact with him as a three and a half year old. This issue is tinged with considerable anxiety and confusion for her and one she wishes to avoid having to think or talk about.

She went on to say that:

Jade does not currently wish to have any contact with her biological father directly or indirectly. However when different options were discussed with her she was agreeable to receiving a letter from him as long as it did not put pressure on her to see him.

She went on to say that:

In terms of Jade's current living situation the only father figure she has retained awareness of is her stepfather, hence the issue of contact, like for many children who have an absent parent wanting to step back into his or her life is one that is understandably creating anxiety and emotional conflict for Jade that was on the basis that Jade had or appears to have a strong sense of belonging and affinity within her existing family unit, being her mother, stepfather and her half brothers.

[21] In terms of Jade's contact with Mr Ofolose, Ms Wali considered that they appeared to be the outcome of the following factors.

[22] First the understandable outcome of the lengthy period that her biological father has been absent from her life and second that she was appearing to be considerably influenced by her parents' views and anxieties on this issue. She concluded that ascertaining children's true and independent wishes and views in the presence of intense birth parental conflict is a complex and difficult task. Some argue it is simplistic and potentially misleading to assume that determinative information about contact and residence can be obtained from children in such situations. Children's interests are most likely to be served by the need for them to have a voice and to be consulted but not being unduly burdened with the final decision of having to make invidious choices between their parents. Ms Wali rightly noted that this applies to Jade.

[23] She concluded:

In terms of Mr Ofolose's motivation, that he appears to be motivated by a sense of responsibility, affection and wanting to do the right thing, and possibly his advancing age and mortality.

[24] She too made a comment about Mr Ofolose's lack of insight into the extent of damage done to inter parental trust by his handling of the Tonga trip in 2007. She said that while that raises questions about his judgment and psychological sophistication, his empathy for Jade's predicament and willingness to be flexible were positive.

[25] Ms Wali went on to provide some very helpful suggestions as to conditions to be placed on any order by this Court in terms of moving forward for Jade. In terms

of the evidence that I need to determine, the questions are really limited. I find that Mr Ofolose's action in retaining Jade from her mother in 2007 was the catalyst to the disconnection between him and his daughter which followed.

[26] He acknowledged in Court making a serious mistake, although I am unsure, like Ms Wali as to whether he has a genuine understanding of the impact of that action on his future relationship with Mrs Falepe as the other parent of Jade. Mrs Falepe, to her credit, says, "Alright, that is now in the past". Yes she was angry, but she has put that aside.

[27] I accept also that Mr Ofolose has made attempts to contact Jade from time to time. It is my view that Mrs Falepe has to an extent stonewalled him in trying to make contact. The complete change of Jade's name in 2007 with reference to Mr Ofolose is an example of that apparent unwillingness to acknowledge him as Jade's father.

[28] Ms Falepe has voiced some concerns for Jade in Mr Ofolose having unsupervised contact with her but these concerns do not extend to the limited contact that is currently being sought. There is a great deal of grief and anguish in this family and that will need to be overcome ultimately if Jade's welfare and best interests are to be served. She needs to be able to have a connection or a relationship with her biological father which is not tinged by any guilt at all and that is a job that Mr and Mrs Falepe need to take very seriously.

The Law

[29] The Care of Children Act 2004 sets out that in making a decision of this nature the welfare and best interests of Jade in her particular circumstances must be the first and paramount consideration. That is under s 4 of the Act and I must in considering her welfare and best interests take into account the principles in s 5 of the Care of Children Act.

[30] Section 5 provides the safety of Jade is a mandatory consideration and on the widest possible level. It includes her emotional safety as well as her physical safety.

The orders that I am going to make are designed with the protection of Jade's emotional safety at the forefront of my mind.

[31] In terms of s 5(b) of the Act, Jade's care, development and upbringing should be primarily the responsibility of her parents and guardians. However there has been a significant interruption in terms of Mr Ofolose's involvement with her. To make any sudden changes to that arrangement, I consider, would serve to ultimately derail Jade in a serious way and would rebound in terms of her future relationship with Mr Ofolose.

[32] Ongoing consultation and co-operation between Jade's parents as set out at s 5(c) of the Act has not occurred for most of her life. I am hopeful that there will be able, in the future, to be some level of consultation and co-operation amongst the three parents.

[33] Continuity in Jade's care, development and upbringing is a pivotal factor as set out in s 5(d) of the Act. Jade is in a settled, secure, home situation and again anything that interferes significantly with that continuity will not be in Jade's best interests.

[34] However, in terms of s 5(e) and (f) of the Act, Jade needs a relationship with Mr Ofolose. Her [identity] needs to be preserved and strengthened and of course that involves Mr Ofolose who is her biological father and needs to form part of the rich matrix that is Jade's being.

[35] In terms of Jade's views under s 6 of the Act, I acknowledge that Jade has been given reasonable opportunities to express views on matters affecting her and I have taken her views into account. That recognition, however, is tempered with what I have already said, which is that I came clearly to the view that Jade needed to be released from the sense of responsibility that she felt about making this decision.

[36] I therefore make Orders in terms of those sought today on some clear conditions.

Orders

[37] First, there will be a Final Parenting Order providing for Jade to be in the day-to-day care of Mr and Mrs Falepe.

[38] Second, there will be a Final Parenting Order in favour of Mr Ofolose providing for contact with as follows:

- (a) Mr Ofolose will write a letter to Jade on the basis set out in Ms Wali's report of 31 May 2015 at para 8.12 (ii). Before he does this, however, he is to receive the assistance from a counsellor that is set out also in that paragraph.
- (b) Mr Ofolose will be entitled to send Jade gifts on her birthday and at Christmas. Consultation is to occur first with Mr and Mrs Falepe as to what would be appropriate gifts so that the gifts that are provided are such that Jade will enjoy receipt of and Mr and Mrs Falepe are of course to give those gifts to Jade upon receipt.
- (c) Mr Ofolose will have contact by telephone or face-to-face contact with Jade only if instigated by her.

[39] In terms of the conditions attaching to these Orders:

- (a) First neither Mr or Mrs Falepe, nor Mr Ofolose, will speak negatively of any of the other parties either to or in the hearing of Jade.
- (b) Second, Mrs Falepe will provide Mr Ofolose with information regarding guardianship matters, such as education, medical matters, and overseas trips that are planned. That includes providing him with school reports, details of important medical events, and overseas trips proposed.

[40] There will also be a referral to counselling for Mr and Mrs Falepe and Mr Ofolose under s 46(G) of the Care of Children Act. That counsellor is to have

access to Ms Wali's report so that the counselling that is proposed at para 8.12 is implemented before a reconnection with Mr Ofolose starts.

[41] There will, however, not be a Direction that the same counsellor engage with Jade. That is not something I am able to order in terms of the Care of Children Act and I consider that this is a task that the adults really need to take on rather than Jade needing to feel that responsibility.

[42] I just add for Mr and Mrs Falepe that Ms Wali concluded that how things progress will depend on her mother and step-father's ability to genuinely give Jade freedom and permission to feel comfortable in having contact with her biological father.

[43] I make a Direction that this decision is to be delivered to Jade by Ms Norton so that if Jade has any questions they are able to be answered.

[44] I make a Direction also that the Family Court Co-ordinator is to provide Mr and Mrs Falepe with a copy of the s 133 report. That is entirely for them to be able to consider and reflect upon. It is not under any circumstances to be shown or discussed with Jade and it is not to be shown or discussed with any other person. This is a private Family Court document of the greatest sensitivity.

[45] Strictly speaking there is only ever to be one referral under s 46(G) but because it was never implemented I consider that I am quite able to make that referral.

A-M Skellern
Family Court Judge