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**IN THE FAMILY COURT
AT AUCKLAND**

**FAM-2015-004-001058
[2016] NZFC 1806**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN MATT HUDSON
 Applicant

AND KAYLA STEVENS
 Respondent

Hearing: 1 March 2016

Appearances: S Keith for the Applicant
 J Robertson for the Respondent
 G Wagner as Lawyer for Child

Judgment: 1 March 2016

**ORAL JUDGMENT OF JUDGE L de JONG
[COCA : interim parenting orders]**

Introduction

[1] This hearing is about Waldo, born on [date deleted] 2014, now aged 2.

[2] As I understand it the parents only lived together for a number of months. I directed this half day hearing on 7 December last year for the purpose of deciding what parenting orders are likely to be in the welfare and best interests of Waldo.

[3] Waldo was in his mother's day to day care from birth until around 5 November 2015. His father held on to Waldo and alleged Waldo had been exposed to neglect, violence and alcohol abuse. Both parents applied for without notice Care of Children Act 2004 orders but both sets of applications were put on notice. Each parent wants a parenting order made in their respective day to day care.

What does the father say?

[4] The father seeks day to day care and specified unsupervised contact in favour of the mother limited to half a day at a time, three days a week. He also sought conditions to the contact to ensure the mother is not affected by alcohol and Waldo does not have contact with three individuals, including the mother's partner. When the father first applied without notice for a parenting order he expressed concern that "Waldo has witnessed [the mother's] foul language, constant drinking and smoking. Since his birth [the mother] is living in a "party" environment and when Waldo is in her care he is often surrounded by violence, arguments, alcohol, smoking, further foul language and, sometimes, drug use."

[5] The father says their relationship began around February 2013 but they had known each other since they were teenagers. The father says he and the mother have been living apart since the end of 2013 when they were both "kicked out of our rental property due to the excessive partying." The father says he fell from a balcony towards the end of 2013 but accepts today that he may have the date wrong given his doctor's letter, and that it may have been more likely to have occurred in January 2013. In any event the father injured his head when he fell onto the concrete below. He was "diagnosed with concussion and slight brain injury." He says he has recovered from this and "my brain injury does not interfere with my day to day functioning at all."

[6] There was nothing in the father's presentation, and in his evidence, today that suggests his daily life has been impacted by any brain injury. In fact, it seems the father first suffered a brain injury as a result of an assault in 2001, which he tells the Court took several years to recover from. The father is concerned about the mother's

on/off violent partner and he refers to a particular violent incident. The father believes the mother should undertake an alcohol rehabilitation programme, especially because of the affect of her drinking on Waldo.

[7] The father refers to an incident he witnessed when he says he saw the mother “lock Waldo in his room and leave him to cry while she drinks and has a good time.” When cross-examined the father explained the mother did not physically lock the door with a key but closed it in a way that Waldo could not get out because of his age. The father explained he saw this incident at a contact changeover around July last year when he had a cup of tea while waiting for his return bus. The mother and her partner were said to have been drinking beer.

[8] In another incident the father says he arrived to pick Waldo up on 24 October 2015 but the mother was asleep on her bed. This occurred sometime in the late morning. Waldo was between her and her partner. Waldo was said to be awake but trying to get his mother’s attention. The father was unable to wake the mother. He thinks it is likely she was still drunk or affected by alcohol from the night before. The father told this Court that the mother’s partner presented as very hung over and there were remnants of a party around the house.

[9] The father has also spoken to a social worker about other incidents the mother told him about which are recorded in the social worker’s s 132 report. The father admits he used to enjoy a party life with much drinking with the mother but that he has been sober for just over 12 months. He attends AA meetings twice weekly. He says he has maintained complete sobriety since 27 December 2014 and he showed this Court his one year sobriety medallion.

[10] The father accepts a “no contact order” was made against him in Australia for a year in respect of the mother of his first child. He says he returned to New Zealand depressed and was on medication for this until around February last year. But he denies ever being diagnosed as a schizophrenic.

[11] The father accepts he smashed things when he was drinking but denies being physically violent to the mother. Before holding on to Waldo in November, the

father was having contact about three weekends per month. He was living on Waiheke Island to be close to where Waldo lived with his mother. Once Waldo was in the father's care he relocated to the mainland where he has paternal family support in the suburb of [location deleted]. The father says he presently lives with Waldo in a self-contained unit at the [location deleted] which is managed by Waldo's paternal grandmother.

[12] The father wants Waldo to remain in his care. He believes he interacts far more with Waldo than the mother does. Although Waldo does not show any outward signs of being affected by the change in care, the father expects the change will have had an effect on him because he will have missed his mother and wondered why there had been such a dramatic change.

What does the mother say?

[13] The mother filed her without notice application for a parenting order and warrant within days of the father. Those applications were put on notice but what she said in her supporting affidavit was that she is a good mother who had, until then, been Waldo's primary caregiver. She said the "trauma Waldo will suffer by being suddenly snatched from my care by [the father] will cause him emotional trauma."

[14] The mother's evidence is that it was "completely out of the ordinary" and unexpected that the father refused to return Waldo to her. She refers to this as irrational behaviour and a breach of trust. This leaves her with concerns about Waldo's safety in his father's care. The mother claimed the father was a diagnosed schizophrenic on prescribed medication who had previously told her that he heard voices. The mother also referred to the father's life of drinking, including drinking a whole bottle of vodka and then he "fell out of a ranch slider". She also described the father as being violent when he was drunk. She understood the father was "banned from having any contact with his son" in Australia.

[15] Despite these and other concerns the mother says Waldo should have shared care on a week about basis if he is returned to her care. However, if Waldo remains

in his father's care the mother wants contact to occur each alternate Saturday and Sunday.

What is the social work evidence?

[16] A comprehensive social work report has been filed dated 24 February. There have been a number of reports of concern. On 20 December 2013 the lead midwife for the mother identified her as an alcoholic who had been using alcohol during her pregnancy. The mother declined support to address this issue.

[17] The mother was noted by the social worker as someone with a Ministry of Social Development history herself and had been in care as a young person. She was identified as someone who would "very likely require support with her parenting given her own experiences."

[18] When questioned by the social worker the mother admitted drinking alcohol during her pregnancy. At that time she was in a relationship with someone who was not Waldo's father. An incident occurred at the end of March 2014 which involved Waldo's father at the mother's address. He "fell through an open ranch slider window onto concrete. He received hospital treatment. The address was known to be that of known alcoholics." The mother said she would see a family therapist and the case was closed "as the allegations were not found."

[19] On 23 April 2014 the police were called to a family violence incident. The mother advised she was a "self-confessed alcoholic". A month later the mother advised she had not engaged with support services because of transport issues. The mother reportedly advised that if "the services wanted to help her they could come to her." The mother did not believe "alcohol was a big issue for her" and said she "hadn't drunk for a month. " She believed her "drinking was in the past."

[20] By August 2014 it was clear to the Ministry of Social Development that the mother had not engaged with any support services, that she had no family support, and that her alcohol issues were current. However, it appears nothing happened at

that time because the “mother and baby had presented well and the child was meeting his milestones.”

[21] On 1 December 2014 someone expressed concern to Ministry of Social Development about Waldo’s living situation. The concern was that there were frequent parties at his address, sometimes two a week, but at least once a week. The night before it is said a party had ended at 4.30 am. The notifier also referred to the fact the police and noise control had been involved, especially when the parties ended up with fights. The mother believed the notifier was a malicious neighbour. She said that she had seen a counsellor and psychotherapist but did not think she needed their help any longer. The social worker report records that Waldo was “sighted and appeared to be all right.” The file was closed as the “allegations were not found.” It is unclear from the social work report whether the counsellor, psychotherapist, police or noise control were approached at that time.

[22] Another report of concern was received on 10 March 2015 because of all night parties at Waldo’s house and partying three or four times a week. The address was allegedly frequented by the police and noise control. The maternal grandfather was spoken to on 5 October last year. He reported to the social worker that the mother was a responsible parent and that Waldo was not at home during parties. The maternal grandfather’s only concern at that time was that Waldo did not “socialise enough with other children.”

[23] On 2 November 2015 another report of concern was received as a result of two drunk men found caring for Waldo outside a liquor store. One of the drunk males had deliberately blown smoke into Waldo’s face making him “upset and cough.” The male was also “rocking the pram violently and at one stage lost control of the pram, causing it to tip backward.” The police arrived and confirmed both men were “extremely intoxicated” and known alcoholics. The mother claimed she left Waldo with them momentarily and accepted she had made a poor decision to leave Waldo with intoxicated people. Ministry of Social Development closed their case because “the allegations were not found.”

[24] I have to say it was a disturbing and recurring theme that, despite repeated notifications of concern, the Ministry of Social Development files were simply signed off as “allegations not proved.”

[25] On 11 February 2016 a family Hui is said to have been convened, presumably in response to Waldo being withheld by his father. The Hui identified four concerns. The first is that there had been four separate notifications to Ministry of Social Development about the care and supervision of Waldo since December 2013. It was noted that Waldo was only two years old. Second, each notification involved Waldo’s safety being compromised, due to alcohol, by those responsible for his care. Third, Waldo was exposed to family violence which may have a negative impact on his psychological and emotional wellbeing. Fourth, the family have denied or minimised the impact of their actions on Waldo’s safety and wellbeing.

[26] It seems a lot of time was spent at the Hui on contact between Waldo and his mother. That was understandable given the dramatic change in his living circumstances. It is clear there was difficulty trying to organise a suitable supervisor. However, when the father offered unsupervised contact the mother “did not appear keen ... putting up various barriers to increased access.” When lawyer for child is said to have asked the mother at the family Hui whether she would have Waldo for her two days off, the mother “prevaricated and appeared unwilling to answer.” This meant the contact was left on the basis that it is only taking place once a fortnight. The mother said she could not afford the associated ferry travel even though the father was happily offering three days a week.

[27] It is clear from the social worker’s discussions with the mother’s partner that he too has an issue with alcohol and has previously informed the police he is a violent person. While he denies he is a violent person, he admits assaulting his former partner in response to her violence.

[28] This Court does not have the benefit of any evidence from the mother’s partner. The mother does not have any convictions but there is police activity for alcohol related matters and 10 family violence events

between 2000 and 2004. The mother's partner has violence and drug convictions, and he has been involved in 7 family violence incidents. The father has 11 alcohol/drug incidents up to 2012 and 4 related convictions up to 2000. He has two family violence incidents, the last of which was on 10 April 2014. Noise control is said to have been called 11 times to the mother's property between April 2014 and March 2015 and on four occasions notices were served.

[29] The social worker report also records that the social workers had discussions with Piritahi Hau Ora who believe the mother needs encouragement to engage with support services because of alcohol and drug abuse "prior to Waldo; victim of abuse and lack of family support." The mother "admitted to two mild alcohol binges a week." An alcohol and other drugs counsellor reported that the mother self-referred on 9 December 2015 and has attended an unknown number of sessions. Since then the mother has produced a letter from the counsellor referring to about seven sessions.

[30] Ministry of Social Development are now concerned there have been four reports of concern in Waldo's two years of life and that alcohol, and the mother's lack of care, has been a feature in each. The report states they want Waldo to live in an environment "free of drinking and violence." They have also expressed concern that the maternal family do not acknowledge the mother's issue with alcohol. A potential issue is also raised by the social worker about "attachment concerns between Mum and Waldo".

[31] The social work report also identifies the father's past history of alcohol/drug abuse and depression after a brain injury in 2001. However, the social worker is satisfied Waldo is currently being well cared for, has good support, and his needs are being met in his father's care. I note also that the father has been dry for more than 12 months. The social worker also outlines the father's allegations about what he says he has seen in relation to the mother's care of Waldo, or what he has been told by the mother and has heard about.

[32] It is clear from the page 12 of the s 132 report that the mother herself has had a tragic beginning in life after being stabbed repeatedly by her mother at the age of

three. Her mother is said to have a mental health disorder. The outline of her past also refers to a number of behavioural and other difficulties encountered by the mother in this case.

What is this Court's decision?

[33] In this Court's view the father should not have unilaterally held on to Waldo in November last year. Waldo had been in his mother's day to day care for the first 21 months of his life.

[34] There are two things he could have done differently. The first is that he could at the very least have talked to the mother about his concerns for Waldo's safety and wellbeing or had otherwise written to her about them. This would have at least alerted her to the father's concerns and she could have made a decision about whether or not to change her behaviour and/or seek help.

[35] On the father's evidence he had reason to intervene at any time within those first 21 months but chose to, without warning and seemingly without an excuse of a particular incident. It is little wonder his without notice application was put on notice. Even if he had talked to the mother, or written to her, about his concerns it is questionable whether this would have made any difference to the mother's conduct but it would at least have provided justifiable grounds for granting a without notice order if the mother chose to do nothing.

[36] The second thing the father could have done was to notify the authorities by making a notification to Ministry of Social Development. In fairness to the father, it is also questionable whether this would have been an effective step to take given the fact Ministry of Social Development have had ample opportunity to protect Waldo before today but had failed to do so before November 2015.

[37] It is clear from the evidence before this Court that Waldo has been a child in need of care and protection since he was born.

[38] The problem for the mother today is that s 4 Care of Children Act requires me to view the welfare and best interests of Waldo as the paramount consideration. This means the paramountcy principle applies to Waldo. Not his mother. Not his father.

[39] In the context of this overarching principle, the s 5 guiding principles, and the facts of this case must be weighed when deciding what is in Waldo's best interests and welfare.

[40] The guiding principles set out in s 5 are important for me to bear in mind when making a predictive assessment of what is likely to be in the best interests of Waldo. Those principles relate specifically to matters affecting Waldo's safety, care, contact, development, upbringing, relationships and identity.

[41] Section 6 is relevant because it requires this Court to take account of Waldo's views. Given his age, his ability to express views are limited to responses or actions or a few words. What is clear from those actions, words and responses is that he likely loves both his parents and feels safe in his father's care. In this Court's view Waldo's welfare and best interests are more likely to be met with an interim parenting order placing him in his father's day to day and contact reserved to his mother.

[42] This Court is satisfied on the balance of probabilities that the father has made radical changes and maintains a life of sobriety. It is of course very early but the present signs of recovery are very encouraging. It is important not to forget that the father will be on his journey of change and recovery for the rest of his life. He is endeavouring to change many years of addiction. He freely acknowledges having an addiction to tobacco.

[43] This Court finds the father was likely to have been violent when he was a drinker. He readily accepts he carried out wilful damage in respect of furniture and items. He denies being physically violent to the mother. The mother alleges, among other things, that the father punched her on the arm and also kicked her in the leg. Those things may or may not have happened. The reason I say this is because the father will not necessarily recall everything that happened while under the influence

of alcohol. I also say this because of my concerns about the mother's evidence, which I will refer to shortly.

[44] The father was an impressive witness today. He demonstrated insight into Waldo's need to have a relationship with his mother. The social worker's assessment is that Waldo is safe in his father's care and I agree with this assessment.

[45] In contrast, this Court was left concerned after hearing the mother's evidence. She was unconvincing and inconsistent at times. Sometimes her explanations were simply implausible. For example, the mother denies she contacted the father after being physically assaulted by her partner. She says she only had a verbal argument with her partner.

[46] In light of the history of this family I simply cannot accept the father would have gone to the mother's home in the evening out of distress over a verbal argument. It is more likely than not that the mother was indeed assaulted by her partner and was left bloodied by the incident.

[47] The mother either denied or minimised how serious her alcohol problem is. In my view, she lacks insight into her alcohol problem particularly in light of the evidence contained in the s 132 social work report about her failure to seek professional help. She told the social worker she had stopped drinking on 10 December but it is clear from her evidence today she is still drinking.

[48] It is sometimes believed by people with a drinking problem that they do not have a drinking problem because they can stop drinking alcohol at any time. What they fail to understand is that stopping drinking alcohol is not the same as addressing underlying problems that lead to the drinking problem.

[49] The mother admitted today in evidence that she has been "battling in and out of alcohol." This is a good description of the dilemma she is faced with. The mother says she only drank once during her pregnancy. This statement is inconsistent with her own evidence that her doctor referred her for specialised help. It begs the

question, why on earth would her doctor make a referral for specialised help when she only drank once during her pregnancy? This statement is also inconsistent with what the midwife has previously reported to the social workers.

[50] In this Court's view the mother has a serious alcohol problem which she has not yet addressed. In fact it has only been in recent weeks that she has begun addressing alcohol issues in her life. She has a very long way to go. The mother continues to be in a relationship with her partner who has alcohol problems and issues with violence.

[51] I struggle to reconcile the mother's proposals with regard to care and contact. Her position today was that if Waldo is returned to her care then she would be seeking an order for a week about day to day care. However, if Waldo is not returned to her care, her position, which was confirmed after receiving legal advice, is that she wants to be able to have Waldo two days each fortnight and proposes this occurs on Saturdays and Sundays. In this Court's view this is less than ideal to meet Waldo's needs. Waldo's lawyer is particularly concerned about this proposal.

[52] In my view, the proposal for week about care is unrealistic. The mother and her partner have issues they need to address. The mother is also working and would only be able to look after Waldo for three days in a row. This would mean spending the rest of the week in daycare or cared by others.

[53] I very much suspect the mother's error in judgement by leaving Waldo with two highly intoxicated individuals was not necessarily a one off. What it does demonstrate is a lack of insight which is consistent with other areas of the mother's life.

[54] I propose to make an interim parenting order which will have two conditions. One is that neither parent is to consume or be affected by alcohol before or during care and contact. There is no need for the father to drink. He has made a commitment to sobriety. It is important the mother is not affected by alcohol when she has Waldo in her care. When she is under the influence of alcohol it is likely she will make a poor judgement.

[55] The second condition is that Waldo is not to have contact with three individuals. They include Joey Abram. He is a known alcoholic who has serious issues in his life with regard to alcohol and is one of the two individuals who was left with the care of Waldo. The mother's evidence is that she has made changes in her life, including those she associates with, in an effort to address her alcohol issues. What transpires as a result of today's hearing is that the mother still has a relationship with Mr Abram. She says they see each other in the street. Although she is opposed to a condition being attached to the parenting order, in my view, it is unsafe for Waldo to be around Joey Abram.

[56] The second person is Garry Leach. He is the second individual said to have been tasked with the care of Waldo when grossly intoxicated. The mother is not opposed to a condition preventing Waldo having contact with him.

[57] The third person is the mother's partner. The mother is opposed to a condition attached to the parenting order preventing contact between the two of them. She says her partner is a father figure to Waldo. It may well be that he is. The only evidence this Court has suggests the partner is a risk to Waldo because of violence and alcohol abuse. It is open for the mother to arrange for her partner to give evidence in the form of an affidavit in due course so an assessment can be made of Waldo's safety.

[58] Of all the s 5 principles, the most important is s 5(a) and the need to protect Waldo from all forms of violence. In this Court's view the only way this can be achieved is by making an order which places Waldo in the day to day care of his father and for him to have contact with his mother on conditions.

[59] Given the seriousness of the mother's alcohol problem, and her lack of insight, this Court finds an order for daytime contact only can be made at this stage. It appears the past history of the mother's drinking has been primarily partying and night time consumption. Given the nature of the mother's drinking problem, it is likely she has consumed alcohol during the day as well. However, with the restriction of hours, and imposition of conditions, this is likely to minimise the risk to Waldo.

[60] Although the father would support more regular contact than in the order I make today, the mother has made it clear she is only able to commit to contact every second weekend. She says this is due to financial considerations. I note she is employed at a [details of employment deleted] but that employment only commenced on 3 February. Whether she is able to keep that job remains to be seen and may be a useful indicator as to what is happening in the mother's life.

[61] I urge the mother to take her issues seriously and to address them in a specialised way. Alcohol addiction is a disease. It is recognised in many countries as such. For this reason the mother needs medical help to deal with this. Alcoholic Anonymous provides a proven track record in assisting people to address this abhorrent disease. For many people the focus and concern is on drugs. However, alcohol is like drug but it is even more serious in our community than people often realise. Most of the incidents of family violence that come before the Family Violence Court occur with a background of one or both parties being affected by alcohol.

[62] I intend to make an interim parenting order that also allows for other daytime contact as agreed between the parties. It is this Court's expectation that if any other contact is agreed to it should be recorded in some way, for example, a text or email exchange so that if there is a dispute between the parties the authorities will be able to see what has been agreed.

[63] The daytime alternate weekend contact is to take place between 10.00 am and 4.00 pm on Saturday and Sunday. This is on the basis the mother will pick Waldo up from [location deleted] at commencement of contact and the father will pick Waldo from [location deleted] at the end of contact.

[64] The proceedings have been in the without notice track. There is no need for this to continue. For that reason the file will be transferred to the standard track.

[65] I understand the balance of the social worker's s 132 report will be filed shortly. I propose to adjourn the proceedings to a directions conference in about four

weeks. The purpose of this is to review what steps are required to advance this matter to a final hearing.

ORDERS & DIRECTIONS

[66] I make the following orders and directions:

- (a) An interim parenting order is made as to day to day care in favour of the father.
- (b) An interim parenting order is made as to contact in favour of the mother as follows:
 - (i) Daytime contact every second weekend on Saturday and Sunday from 10.00 am to 4.00 pm. The mother will uplift Waldo from [location deleted] at the beginning of contact and the father will uplift Waldo from [location deleted] at the end of contact.
 - (ii) Such other or further daytime contact as agreed between the parties.
 - (iii) Telephone contact as agreed between the parties.
- (c) The conditions to the parenting order are as follows:
 - (i) Neither parent is to consume or be affected by alcohol before or during care and contact.
 - (ii) Waldo is not to have contact with Victor Mondy, Joey Abram or Garry Leach.
- (d) The file is to be placed on the standard track.
- (e) A directions conference is directed in about four weeks.

L de Jong
Family Court Judge