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**IN THE FAMILY COURT
AT WHANGAREI**

**FAM-2015-088-000430
[2016] NZFC 2229**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN ELIZABETH PENDER
 Applicant

AND MARCUS PENDER
 Respondent

Hearing: 16 March 2016

Appearances: H Drummond on behalf of D Whitehead for the Applicant
 S Woods for the Respondent
 T Manuel-Belz as the Lawyer for the Children

Judgment: 16 March 2016

ORAL JUDGMENT OF JUDGE M J HUNT

[1] These are the proceedings between Mrs Elizabeth Pender, represented today by Mr Drummond and Mr Marcus Pender represented today by Ms Woods. They have three children, Clay born [date deleted] 2011, Antony born [date deleted] 2013 and Phoenix born [date deleted] 2009. They are being represented by Ms Manuel-Belz. The separation between the parties occurred on or about 25 April 2015. No significance today attaches to the date of separation and I take that from Mr Pender's affidavit.

[2] Subsequently the issue which has not been resolved and which is required determination today are questions of care and contact for the three children. For a period post-separation Mr Pender had limited contact with the children and subsequently arrangements were made for supervised contact at Barnardos. That developed to a point where in the latter part of last year, in December in particular, there were agreements to contact at Mr Pender's home overnight with all three children.

[3] The understanding the parties had about that arrangement was that it would be supervised and I use the term, "Supervision," in the sense of a situation where there was to be four agreed adults present to effectively monitor the respondent father Mr Pender's contact. The reason for that is that Mr Pender was diagnosed in or about February 2002 with motor neurone disease. He tells me today that there is the possibility that that diagnosis is not correct and that there may be an alternative medical explanation for his disability.

[4] The fact of it is, however, that Mr Pender is effected by an illness that is of a degenerative kind and although slow in terms of its progression has left him with limitation in terms of his physical capacity to undertake tasks and specifically in the context of this issue, some of the tasks that might be required of a parent responsible for the care of three young, active and otherwise healthy children.

[5] In that sense the supervision, therefore, that was contemplated was to ensure that tasks such as changing nappies, should the children need to be picked up,

bathed, put to bed, those sorts of things, that there was assistance on hand as well as assistance with meals.

[6] Mr Pender, for his own part, receives assistance from North Able Disability Services with routine housekeeping matters and also with certain aspects of his personal care and he was frank in acknowledging that there are aspects of the responsibility for the care of the children that his physical limitations mean that he requires assistance.

[7] The question, however, of supervision became important in terms of the narrative because on the visit which occurred on or about 19 and 20 December Mr Pender's mother was called away, it seems an older daughter, not of this relationship, of Mr Pender's was hospitalised and she left the home to attend with that daughter. There was a period of time, exactly how long is not clear, when Mr Pender was effectively unsupervised or without the benefit of assistance from an adult although his younger daughter, again of the former relationship, was present.

[8] During that period Mr Pender's former mother-in-law, that is Mrs Pender's mother, arrived and it became apparent that he was not supervised and the arrangements did not continue on after that weekend. Sadly contact did not resume at all and although offers were made they appear not to be made as late as 19 February.

[9] It is a concern to me that matters did take as long as they have for the parties to directly deal with the question of resuming contact and I remind both that there is an expectation that the Court has, and indeed a responsibility on them, to try and work through difficulties in a constructive way and the advantages to their children of regular contact with their father and of a straightforward, predicable and essentially harmonious arrangements for contact should be obvious.

[10] Concern remains today as the live issue at this hearing is not whether contact should resume but effectively on what basis. Initially I was told that the matter at issue was only the question of supervision and, again, I use the supervision in the sense only of the monitoring and support that Mr Pender requires to have contact but

it emerged from Mr Pender's perspective that not only did he have an issue regarding that aspect of having another adult present but also the question of frequency and duration of contact.

[11] Those issues did seem to resolve as the hearing progressed albeit I am today in a position where I can only make an interim decision because contact is to resume and the success or otherwise of the forthcoming visits that are to be scheduled will, in part, determine what arrangements are made in the future and obviously the comfort and confidence the parties have in those arrangements.

[12] Mrs Pender's proposal was fortnightly visits commencing on a Saturday morning and concluding on a Sunday afternoon. Her requirement initially was that one of four persons only would be involved in the monitoring and support role and that they would be present continuously throughout.

[13] She also expressed strong reservations about Mr Pender driving, being concerned on a number of fronts but, in particular, the physical demands of driving, his response to an emergency circumstance and specifically his ability to get the children in and out of the car both in good and favourable circumstances but also in the case of an emergency or difficult situation.

[14] In that sense, Mr Pender had filed details confirming he had been assessed as capable of driving and a medical certificate that he was fit to do so. It did not address the more complex tasks required in terms of getting children in and out of booster and car seats and there was a helpful exchange between Mr Pender and myself about those when he gave evidence.

[15] What emerged from Mrs Pender's evidence was that the presence of adults was a requirement from her perspective to ensure that routine tasks required for the manage and care of the children were able to be completed without delay and essentially that Mr Pender was not faced with the circumstance beyond his control, the children were at all times safe and that she, accordingly, was able to have peace of mind that the children would be well looked after during the period of contact.

[16] There was not a concern expressed by her nor do I understand it to be a factor in this case that Mr Pender would behave inappropriately, that he in any other way, presented a risk or a concern by reason of any other behaviour or aspect of his conduct towards the children.

[17] Mrs Pender expressed the view that that arrangement could be reviewed after a period of time and I took it from her evidence that if it went well she was open minded about the possibility of extending it although was in two minds about whether or not Mr Pender's proposal, which was from Thursday evening until Monday morning, was an appropriate one given its duration and perhaps having regard in particular to Antony's age.

[18] The evidence of Mr Pender was helpful. He presented as someone who was frank in acknowledging his limitations and optimistic that there might, in more recent times be some more favourable prognosis for his illness including the possibility of re-diagnosis and a new therapy but wanting to be involved in and participating in a meaningful way in his children's lives.

[19] I did not get the sense that he had any intention that the children would knowingly be put at risk and he was accepting of the proposition that having someone present would ensure that he was never faced with the circumstances where had no one to call upon in the immediate vicinity, by that I mean within his own home, that the children were, accordingly, safe at all times and that to the extent there was any concern of apprehension from Mrs Pender it would be put at rest by the presence of another adult.

[20] He had a range of adults who he felt were responsible and could be called upon and those persons included his mother and step father, father and step-mother, his partner Emily, his sister Lesley, Tom and Gloria, who are friends, and his step-sister Susan. It seems that none of those persons were not known to Mrs Pender and when inquiry was made, all were considered to be people who would act responsibly, protectively so far as the children are concerned and, if present, would be able to intercede to make sure that the children's needs were met in a timely and appropriate way.

[21] I stress the presence of these people is not to provide for alternate caregivers but to supplement and compliment Mr Pender's skills as the father of the children and as a parent. It is to the extent that he is unable to undertake tasks that they are looked to for assistance and in that sense the confidence that he places in them and judgement that he makes can, in my view, be respected and accepted in terms of their suitability.

[22] So far as driving is concerned, Mr Pender acknowledged that there were limitations to his ability to drive, such that he had recently received a Lotteries Commission grant to buy a modified vehicle. The extent of the modifications were said to be modest including an electric boot opener, some modifications to the indicators and things of that kind but the further challenge, of course, with having children was the installation of the child seats and the appropriate arrangements to secure the children in them. He was looking into the question of whether or not more convenient and easily workable car seats and safety capsules, things of that kind, could be made available and at this stage that was not known.

[23] He accepted, for the moment, that pending the purchase of an appropriate vehicle and further investigation of the means by which the children would be secured and how he would manage that, that he could rely on the other adults who are part of the support network to provide transport either using his own vehicle or their own vehicles and that accordingly normal safety considerations would apply.

[24] In that sense, whilst I note there is a condition today that there is to be no driving by Mr Pender of the children during contact, that is not a finding that goes beyond the concession made by Mr Pender today that he has not yet thoroughly investigated all of the options or in a position to put all of the options before Mrs Pender or ultimately if required, before the Court.

[25] Given the concession that were made both in cross-examination and, in particular, upon inquiry from me, a consensus emerged from the evidence which I am satisfied reflects an appropriate, safe and suitable outcome as far as the children are concerned. That contemplates a fortnightly regime starting this

Saturday 19 March at 8.30 and concluding Sunday at 4.00 pm the children are to be delivered by Mrs Pender who is take responsibility for delivery and pickup at the conclusion of each visit.

[26] Mr Pender is to have one of the named people, that is one of the mix of four paternal grandparents including partners, his partner, sister, Tom and Gloria or step-sister present at all times during the contact. That does not preclude the involvement of his two daughters, Antonia and Carey, but they are not to be responsible for the monitoring and plainly does not preclude Mr Pender in going to the park or other activities but there is to be no driving by him of the children during the period of contact.

[27] My expectation is that the parties will converse and communicate with each other about the children's needs during the period of contact, any particularly requirements, medication or otherwise or any particular activities which had been pre-arranged.

[28] I do reserve to the parties the option of varying these arrangements by agreement but it seems, to me, the safer course as to settle upon the routine and stick to it. I stress that agreement is agreement freely given and that it is not open to either party to arbitrarily impose changes without agreement from the other party.

[29] Further to the contact which is to occur on a fortnightly basis at the weekends in the way I have described, there is to be phone or Skype contact on a Wednesday evening at or about 7.00 pm. Particulars will need to be supplied by Mrs Pender as to the appropriate phone number if they are not already available. Skype was not immediately an option but could be and Mr Pender is realistic about his expectations given the age of his children.

[30] Mr Pender may also enjoy contact at school or kindergarten, Mrs Pender has undertaken to advise the school of the option in that regard. Mr Pender, of course, is to be respectful of the children's needs and the circumstances for the organisation but sports days, activities where parents are encouraged to participate and those sorts of

opportunities are the sorts of things that I had in mind and which would be appropriate for Mr Pender to participate in.

[31] Mr Pender has agreed and gives his expressed consent to the North Able physical assessment or reports which have been prepared to assess his level of incapacity and to his medical records being made available to counsel. In saying that, they are not to be copied or further disseminated and are exclusively for the purposes of understanding and appreciating the extent of Mr Pender's disability. That is a crucial aspect of understanding the appropriate and safe arrangements and it is appropriate they be released but they remain, at their essence, confidential and personal to Mr Pender and so for that reason I direct that they not be disseminated or copied but retained on respective counsel's files at all times.

[32] The review of these arrangements is to occur three months from today. By that point, at least six visits will have passed. I authorise Ms Manuel-Belz to convene a round table meeting or meetings to ascertain how contact has progressed, what further agreements might be possible and, if necessary, what further Court intervention is required.

[33] In the absence of further agreement, these current arrangements are to continue pending further Court order. They are interim in nature but I do not intend they stop at the review interval. My hope would be that the parties can sit down and sensibly discuss arrangements that meet their needs and the needs of their children without the intervention for direction of the Court. I adjourn the proceedings formally to a registrar's lists on 8 July which should allow for the review meeting that I have spoken of to occur and for a report from Ms Manuel-Belz and counsel as to what, if anything, is required from the Court at that point.

[34] It will follow from the orders that I have made for contact, that at all other times the children are to be in the day-to-day care of their mother. That too is an interim order to run alongside the interim contact arrangements that I specified. Should the parties agree on any other arrangements, and I stress that is an agreement freely given between them, then they are free to do so. I also stress that all

correspondence, contact, discussions are all to be respectful and child focused at all times.

[35] It would be very unfortunate if the good will that has been shown today was to be spoiled or undone by momentary lapses of good judgement and I also mention to the parties that there will need to be, from time to time, some flexibility because it has not been possible today to predict all of the contingencies that might arise. I have made that plain to both parties but I stress that good will and a willingness to make these arrangements work is a pre-requisite to them being successful.

M J Hunt
Family Court Judge