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IN THE FAMILY COURT
AT INVERCARGILL

FAM-2014-025-000123
[2016] NZFC 1208

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	WINSTON GILBERT Applicant
AND	MADELAINE LARSON PETER LARSON First Respondents
	AUBRIE TOFT Second Respondent
	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Third Respondent
	MELANIE BONE Fourth Respondent

Hearing: 15-17 February 2016

Appearances: F C D More for the Applicant
P B Redpath for the First Respondents
A Stevens fro the Second Respondent
A Robles for the Chief Executive
M Gill for the Fourth Respondent
T E McKenzie as Lawyer for the Child

Judgment: 1 March 2016

ORAL JUDGMENT OF JUDGE C L COOK

Introduction

[1] This decision follows a two and a half day hearing. The issue for the hearing was Mr Gilbert's contact with his daughter Steph. Steph is aged seven and will turn eight on [date deleted] next. Steph is living with her maternal aunt and uncle, Madelaine and Peter Larson. There is an interim parenting order under the Care of Children Act in favour of Mr and Mrs Larson. There had previously been custody orders under the Children Young Persons and Their Families Act 1989 ("the Act") which were discharged by consent.

[2] Mr Gilbert currently has supervised contact with Steph for two hours every three weeks. He is seeking unsupervised overnight contact every three weeks. There is a support order in favour of the Chief Executive.

[3] Steph's mother, Aubrie Toft, has contact as agreed between family members.

[4] The Court has had the benefit of two reports from Dr Staite, the first being a report pursuant to s 133 of the Care of Children Act dated 7 July 2010; the second a s 178 report dated 26 January 2015.

[5] All parties gave evidence, with the exception of Ms Melanie Bone who is very unwell and was unable to be present at the hearing. Ms Bone is an additional guardian of Steph and has previously had Steph in her care for a period of time.

[6] Further, there was affidavit evidence from Ms Sandra Hastie, Steph's social worker and Ms Julie Tippett, a social worker from the Open Home Foundation who undertook a parenting assessment and also reported on the supervised access, who provided an affidavit and was cross examined.

Issues for determination

[7] The issues for determination by the Court are:

- i. Whether Steph will be physically safe with Mr Gilbert in his unsupervised care due to previous allegations of violence by Mr Gilbert towards Steph;

- ii. The ability of Mr Gilbert to support Steph's placement with her maternal family;
- iii. Mr Gilbert's mood management;
- iv. Any other identified risk issues;
- v. Structure of orders/way forward.

Care of Children Act

[8] Section 4 of the Act is the starting point of the Court's determination, which states:

4 Child's welfare and best interests to be paramount

(1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—

- (a) in the administration and application of this Act, for example, in proceedings under this Act; and
- (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

(2) Any person considering the welfare and best interests of a child in his or her particular circumstances—

- (a) must take into account—
 - (i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
 - (ii) the principles in [section 5](#); and
- (b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.

[9] I also refer and must be guided in this decision by the relevant principles pursuant to s 5 of the Act:

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in [section 3\(2\) to \(5\)](#) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

[10] Section 6 is also relevant in this case because Steph has expressed through her counsel Ms McKenzie that she enjoys the contact with her father and that she wishes to have contact with him overnight. Section 6 states:

6 Child's views

...

- (2) In proceedings to which subsection (1) applies,—
 - (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
 - (b) any views the child expresses (either directly or through a representative) must be taken into account.

[11] I have also considered a paperwritten by Dr Nicola Atwool entitled, "Permanency: What Children Need".¹ On page 36 of that paper Dr Atwool states:

The priority has to be ensuring that the child has a primary place of belonging and that contact arrangements do not undermine this. This does not mean that contact with birth family automatically take second place but it does mean that arrangements need to be well thought out and supported by all parties.

Mr Gilbert's position

¹ Nicola Atwool "Permanency: What Children Need" (paper comprising part of a New Zealand Law Society Continuing Legal Education Seminar: Care and Protection Orders and CYFS, October 2012).

[12] There is no doubt that Mr Gilbert dearly loves his daughter and has a number of positive attributes that he can offer her. Due to the nature of the hearing, Mr Gilbert's behaviour has been very much in focus but it is important to note Mr Gilbert's positive qualities and his relationship with his daughter as summarised in the second report from Dr Staite at pp 8 and 9:

- (a) Winston has a good understanding of Steph's developmental needs.
- (b) Steph is comforted by his love.
- (c) Winston obtains great delight and satisfaction from being a father.

[13] Dr Staite observed:

Rarely does one come across a father so devoted, passionate and committed to his child. Winston would introduce Steph to lots of experiences.

[14] Dr Staite reports that "Winston is very intelligent and resourceful and has an enquiring mind". He further reports that "Steph and Winston are very attuned to each other" and that "Winston is good at soothing and calming Steph" and that, "to Winston's credit, he has over the years had counselling from several agencies in Invercargill addressing his issues".

[15] The role of the Court is to recognise the need for Steph to have Mr Gilbert in her life, in balance with any risk issues and her permanent placement with the Larson's.

History of physical risk

[16] The Ministry became involved due to a notification on 22 April 2008 that Mrs Toft was treating Steph roughly.

[17] The records show that Mrs Bone, the maternal grandmother, obtained a parenting order and guardianship orders on 30 April 2008.

[18] On 27 August 2012 a notification was received with allegations that Steph was being "physically and emotionally abused by her father, Mr Gilbert, who had

care of her”.² Ms Hastie’s affidavit sets out at paragraph 12 that Mr Gilbert and his ex partner, Ms Woodward, had been working with the Young Parents Service at Family Works since 17 July 2012 because Ms Woodward was pregnant. During that time it was noted that Mr Gilbert had increasingly been struggling with depressive mood, lack of motivation and insecurities around his parenting of Steph. At paragraph 14 of Ms Hastie’s affidavit she states:

On 24 September 2012 Child Youth and Family received additional information from Ms Lorna Allott, social worker with the Young Parents Service. She reported that on Friday 7 September 2012 she had had a meeting with Ms Woodward and Mr Gilbert. At this meeting Mr Gilbert agreed he had slapped Steph’s face and still did not think this was worth making a fuss over. Mr Gilbert stated that he had not lost control and he got the result he wanted from Steph in the end.

[19] Ms Hastie’s affidavit continues at paragraph 17 that on 27 September 2012 Mr Gilbert reported that he had had a “mini breakdown” and left Steph in the care of Ms Toft.

[20] At a family group conference on 11 December 2012 it was agreed that Steph would continue to live with her mother. Mr Gilbert was having contact with Steph every second weekend. A parenting capacity assessment was completed and that assessment was undertaken by Ms Suliana Williams (now More). The findings of that parenting capacity assessment were that there were some barriers to Mr Gilbert providing a safe and stable home for Steph. He had little in the way of family support and there were concerns about his apparent inability to maintain firm boundaries and to deal with Steph’s tantrums.

[21] A family group conference was re-convened on 28 June 2013. At that time it was agreed that Steph was a child in need of care and protection and that a declaration should be made. It was recommended there should be an interim custody order in favour of the Chief Executive of the Ministry of Social Development and that Steph would live in the day to day care of her maternal aunt and uncle, Madelaine and Peter Larson.

² Affidavit of Ms Sandra Hastie dated 18 July 2013 at p 147/11, bundle of documents.

[22] On 30 September 2013 His Honour Judge Turner made a declaration by consent that Steph was in need of care and protection pursuant to s 14(1)(a), (b) and (f) of the Act. He approved the family group conference plan with the exception that he did not approve Mr Gilbert having unsupervised contact. At paragraph [18] Judge Turner stated:

The father's access is not to be unsupervised until he satisfies the Court that Steph will be safe in his unsupervised care. If he seeks unsupervised access he will need to make an application for access.

Current evidence as to physical risk

[23] It is necessary to examine the evidence around the allegation that Mr Gilbert slapped Steph in the face. Mr Gilbert denies this and denies agreeing that it occurred. At paragraph 2.2 of the affidavit sworn on 28 July 2014, Mr Gilbert sets out his evidence of what occurred. He states:

Steph was having a tantrum for no particular reason. It had happened two previous mornings. This morning Steph was giving 100 decibel percent effort. ... Steph's screaming had overwhelmed my partner often, who was clearly agitated. I got to the ground on one knee, at Steph's height so I could calm my daughter down face to face. Between prolonged bursts of screaming energy that reverberated inside my skull, I heard my partner at the time's voice which was loud, agitated and unhelpful. Steph my daughter was not responding to my communication efforts and continued to pierce the air with her long shrill and deafening outburst. So, I took the two fingers closest to my thumb on my right hand and struck my daughter, with a (essentially) tap, a two finger tap to her left cheek. This instantly bought respite from the screaming which ceased, Steph opened her eyes with a look of surprise, I briskly hugged her to my chest, she felt very hot, I stood up with my little girl in my arms ignoring my ex partner's agitated gibberish.

[24] I do not accept Mr Gilbert's evidence around the "tap" to Steph's left cheek for the following reasons:

- (a) His partner at the time felt that it was of sufficient concern to make a notification around his behaviour. Unfortunately Mr Gilbert has no contact with his child from this relationship.
- (b) There is hearsay evidence in the form of a professional's record of a meeting which states that Mr Gilbert accepted that he had slapped his daughter.

- (c) Mr Gilbert's own evidence around Steph's response - if she had been as worked up and agitated as he describes, I do not accept that a tap would have caused her to cease her behaviour and open her eyes with a look of surprise.
- (d) The conclusion that I reach from that evidence is that her reaction was due to her being slapped across the face by her father.

[25] That conclusion is also consistent with the evidence from Aubrie Toft, Steph's mother, who, in her evidence sworn on 5 September 2014³, states that she witnessed him [Winston] smacking Steph on more than one occasion:

At one point Steph was wetting the bed at night and soiling herself during the day and I witnessed Winston smack her as punishment. I told him I thought this was unfair and he should not smack her.

[26] In that evidence she also sets out concerns that Mr Gilbert was suffering from depression and he was, on some occasions, not able to get out of bed.

[27] It was put to Ms Toft that she had not reported these allegations or these concerns in her evidence.⁴ She said that she did not report it but had threatened to do so.

[28] Her evidence in response to cross-examination from Mr Redpath was that the nature of the smacking was a "hand on bum or on her thigh"⁵.

[29] I find on the evidence, notwithstanding Mr Gilbert's denial of the allegation, that there is a risk of Steph being physical disciplined by her father.

[30] However, I am satisfied that that risk is reduced for the following reasons:

- (a) Steph is now older and more able to express herself.

³ Affidavit of Aubrie Toft sworn 5 September 2014 at p 113/13-14, bundle of documents.

⁴ Affidavit of Aubrie Toft sworn 5 September 2014 at p 152, bundle of documents.

⁵ Affidavit of Aubrie Toft sworn 5 September 2014 at p 153/25, bundle of documents.

- (b) Mr Gilbert has, since these events, undertaken parenting courses and gave evidence that he was also undertaking personal counselling with Dr Paul Clymer, an ACC-funded psychologist. Mr Gilbert also advised Dr Staite that he had completed 12 sessions with Family Works, 12 sessions with Awarua Social Services and another 12 sessions of counselling with the South Centre, although there is no independent evidence or information from those agencies in front of the Court to support this.

[31] Accordingly, on balance I still consider a risk exists, albeit reduced.

Mr Gilbert's ability to support Steph's placement with maternal family

[32] As Steph is in the fulltime care of the maternal family and as it is accepted by Mr Gilbert that this is a permanent arrangement, the priority has to be supporting Steph's placement.

[33] As expressed by Mr More in his opening, Mr Gilbert's position is that: he supports the placement of Steph in the primary care of Mr and Mrs Larson for the long term; he consented to the interim parenting order; he has no desire to undermine the parenting role played by Mr and Mrs Larson; he has no desire to deny Mr and Mrs Larson the right to be accepted as Steph's other 'mum' and 'dad'; that Steph is alert as to who is her birth father and who is the mother and father that meet her everyday practical needs.

[34] The issue for determination is whether that is, in fact, Mr Gilbert's position and whether he does truly accept and support the placement with the Larsons.

[35] The Larsons and professionals involved in this case hold concerns about Mr Gilbert's lack of validation of their family and risk of undermining the placement if contact is not supervised.

[36] The report undertaken by Dr Staite in January 2015⁶ stated:

⁶ Dr Staite's report of January 2015 at p 237, bundle of documents.

Winston's anger and bitterness is a problem making cooperation impossible at this stage. I asked Winston, "How can you share the parenting with Madelaine and Peter more cooperatively and what can they do?" His reply was, "Aunty, Grandma and I are poles apart. If they would just accept their roles in Steph's life such as their titles afford, instead of manipulating my unfortunate and undesirable situation, I am sure we would get along as we have done before.

[37] Dr Staite concluded that Mr Gilbert's bitterness is driven by his lack of acceptance that Steph is not in his and/or Ms Toft's care. Dr Staite's opinion was that Mr Gilbert's future capacity to cooperate will grow in tandem with his increasing acceptance, and even validation, of Steph's placement. Much of the focus in the hearing was around how far Mr Gilbert had come to accepting the placement, in reality. Dr Staite's observations, after sitting in on the cross-examination of Mr Gilbert,⁷ were that Mr Gilbert –

...certainly has moved a long way since I did my second assessment and report in January of last year." At that time Winston was extremely bitter towards the maternal family and he certainly did not validate Steph's placement at all. ... I think he now accepts given his evidence that Madelaine and Peter are not primarily Aunt and Uncle but Mum and Dad ...

[38] However, he also expressed concerns that there was an overlay of intensity, sadness and yearning coming through the evidence of Mr Gilbert.⁸

[39] That is consistent with my impression of Mr Gilbert. I was concerned that Mr Gilbert gave an impression that he was a victim of allegations that had been made against him, and that the hearing was, in some ways, an opportunity to defend those allegations and to clear his name

[40] Mr Gilbert commented at page 19 of the evidence that he had been, or felt, hard done by. Concerningly, he also indicated that he was unable to find permanent accommodation. At page 65 under cross-examination he indicated, "While this process has been going I have found it difficult to find a nice place I belong."

[41] At page 67, he was asked about his employment. He stated he was unemployed and said: "I have been wishing to have this burden of what I am overcome with, of having my child uplifted from me." Therefore I did gain the

⁷ Notes of Evidence, p 169/24.

⁸ Notes of Evidence, p 177/23.

impression - despite the fact that Mr Gilbert agreed in May 2015, and indicated his possible agreement prior to that date, to the permanency of the arrangement - that he was still struggling with the loss of Steph. Consequently his life has, in many ways, been put on hold – a situation that is likely to continue in the absence of his acceptance of the situation. There were some positive indications, however, that he was seeking employment. Mr More confirmed in his closing that Mr Gilbert had a job interview that week and that he has entered into a new relationship with Ms Spearing. They have a son born in [month deleted] of 2016.

[42] Ms Julie Tippett in her affidavit attached a number of reports following supervised access visits. They are extremely detailed. Mr Gilbert does not accept all the contents of those reports. In his view, the reporting from Ms Tippett had been “selective”. Limited cross-examination of Ms Tippett was undertaken. I accept that her reports provide her recollection of the contact arrangements and it is normal that observers of the same incident will have a different recollection of what occurred.

[43] Throughout the reports, there are concerns around Mr Gilbert’s behaviour in terms of validating Steph’s placement. That was partially around Mr Gilbert’s response to Steph talking about the Larsons as “Mum and Dad”. For example, on 12 June 2015 Mr Gilbert made it clear he did not like Steph calling Madelaine “Mum” and Peter “Dad”. In July 2015 the same issue arose and Mr Gilbert corrected Steph when she referred to them as “Mum and Dad”. The same issue arose on 24 July at contact, again in the September contact, and again in the October contact.

[44] However in January 2016 the report noted Mr Gilbert did not correct Steph’s use of the word “Mummy” in reference to the Larsons.

[45] In Mr Gilbert's evidence⁹ he said that he was not correcting his daughter:

When I'm talking to my daughter I'm not obliged to call Madelaine and Peter "Mum" and "Dad" so I say, "Aunty Madelaine" and I say, "Uncle Peter".

[46] That response suggests to me that whilst some progress has been made, Mr Gilbert does still struggle with his acceptance of the situation. He did have a tendency in his responses in cross-examination to refer to the maternal family as "those people". In answer to a question from Ms Gill¹⁰ when it was put to him that he had laid quite a lot of blame for what happened since her birth on [Melanie], the maternal grandmother, his response was:

If that woman had never been involved we would never be in this situation, which is just the way this is.

[47] The submission from Ms Gill was that Mr Gilbert's acceptance of the maternal family must move beyond his acceptance of Mr and Mrs Larson, to the wider family. The response given by Mr Gilbert suggests that he still holds a considerable amount of bitterness towards the maternal grandmother, which is of real concern as she has had an important role in Steph's life.

[48] I respect that Mr Gilbert has a right to hold his personal views. However, the evidence has been that up until at least the beginning of this year, Mr Gilbert was still expressing those views to Steph and whilst there has been a change in his presentation and the intensity of the views, those views are still present and Mr Gilbert does require some assistance to enable him to refocus and support the placement. It is vital that Mr Gilbert does so, or at least is able to separate his private views from his expressions to Steph.

Gluten

[49] I am also satisfied that there were other examples of Mr Gilbert not respecting the Larson's day-to-day parenting role. An example of that was Mr Gilbert feeding Steph food which had gluten in it. Although there was no

⁹ Notes of evidence, p 11/10.

¹⁰ Notes of evidence, p 73/5.

evidence that Steph suffered from Coeliac's or that she had a diagnosed intolerance, the Larsons' experience was that without gluten in Steph's diet, her behaviour improved.

[50] Mr Gilbert's position was that without evidence of the need to be gluten free or direct communication, he was unaware of it being an issue. It appears that it had been discussed at a meeting and had been the subject of a Gateway assessment. Mr Gilbert should have been more proactive in recognising and acknowledging that it was the Larsons' wish that Steph be gluten free, and promoted that or at least been more enquiring about the reasons for their concern, rather than ignoring it.

Travel

[51] It was also put to Mr Gilbert by Mr Redpath in cross-examination (at page 26, 27) that on 24 April 2015 the Larsons wished to take Steph to the Netherlands. Mr Gilbert accepted that he was "uncooperative" with the Larsons. Mr Gilbert's response to cross-examination from Ms Gill¹¹ was that he had not been approached in a manner that was "respectful" and that:

All these people did was demand her passport without giving reasons and then eventually they went through Alyse, gave their reasons for it and came up with a small plan of what they were going to do, of which I was still very much in the dark, they went around behind me, got the passport it was expired all the same.

[52] I accept the submission that the response of Mr Gilbert towards the request for the travel is a further illustration of his inability to support the placement for Steph and to put Steph's needs in front of his own. A trip to The Netherlands was a great opportunity for Steph and this should have been something that Mr Gilbert cooperated with freely.

[53] However I also accept that this incident did occur in April of 2015, that a lengthy period of time has passed, and that there has certainly been some progress made in Mr Gilbert's way of thinking. However, I have concerns about Mr Gilbert's continued lack of acceptance of the issues and I am concerned that whilst there has

¹¹Notes of evidence, p 72/11.

been a lot of talk about Mr Gilbert's change, there was no concrete evidence of steps taken by Mr Gilbert to improve the communication with the Larsons. I accept that Mr Gilbert is entitled to his own adult views about the issues of separation and the effect of the exposure of those views to his daughter.

[54] I accept the submission Mr Redpath made in his closing submissions that this hearing was the first time that Mr Gilbert has signalled his real acceptance of the situation and the need for change. The affidavit of 5 May 2015 which was sworn just one day before the settlement conference where the day to day care was agreed still refers to the Larsons as "these people"¹². Mr Gilbert states:

The difficulty I have with Steph's current placement is the manner upon which these people conduct themselves: scaremongering and misleading and lying. If the applicants are reasonable and prepared to work with me I am comfortable with my position where Steph continues to remain in the primary care of the applicants.

[55] There remains a lack of communication between Mr Gilbert and the Larsons. Although Mr Gilbert stated he was agreeable to communicating with the Larson's, he had taken no practical steps.

Emotional regulation

[56] There were a number of specific instances which were highlighted in the evidence which relate to the ability of Mr Gilbert to protect Steph from his emotional responses. The first of those incidents I will refer to as 'the circle game'. During the observation that Dr Staite had with Mr Gilbert¹³ he noted:

Winston swings Steph around by her ankles close to the metal swings. He did three revolutions. I became quite anxious and looked at my papers to control my anxiety. I wonder if Winston did it as a reaction (excitement?) to my comment about his natural, loving style with Steph. I was concerned about the circle game because of the potential for accident, especially for head injury, through Steph's head hitting something at speed. The person in the middle must circle fast enough and at speed so that other persons can combat gravity and whirl around. There was a swing nearby, the revolutions were done two to three metres from the swings. However it was potentially dangerous even without the proximity to the metal swings.

¹² P 51 paragraph 14Q bundle of documents.

¹³ P 9 of Dr Staite's second report, p 233 bundle of documents.

[57] Dr Staite elaborated on this in evidence and the potential for it to cause Steph head injury. He explained it as one of the worst examples of parenting that he had seen over the last 33 years. His concern was that it may have been a reaction to praise that he had given Mr Gilbert and that he had undertaken this action during the course of his assessment.

[58] ‘Horseplay’ is a natural and normal part of parenting. The concern of Dr Staite and the Court is the nature of Mr Gilbert’s actions and that when challenged under cross-examination, he did not accept that there was anything wrong with his behaviour. Mr Gilbert’s response¹⁴ was that Dr Staite was 20 metres or more away, his line of sight was impaired, that he felt safe, and “Steph trusted me and she felt safe”.

[59] I accept that this incident was potentially a high risk to Steph because of the impulsive nature of the behaviour and the lack of insight by Mr Gilbert to recognise that the incident presented a potential risk to her.

The cat incident

[60] Mr Gilbert’s cat passed away. It had been a family cat and was 19 years old when it was euthanised. Mr Gilbert brought the deceased cat in the car to a contact visit and took Steph to see it. The incident is described in the report from Ms Tippett relating to the access visit of 24 July 2015¹⁵. She states:

Mr Gilbert took Steph to his car, got a cane basket and opened the lid to show Steph the dead cat, Willy. Steph was a bit shocked and looked at me in disbelief. Steph gave a quick couple of cries and went to stand with Winston and ask questions. Winston was crouched down so he could cuddle Steph as she stood and answer her questions at eye level.

[61] Ms Tippett in her report said that Steph did not stroke the cat. Mr Gilbert was adamant that she did and that Ms Tippett was inaccurate around that. Ms Tippett’s report states:

While allowing a child to say goodbye to a dead pet is a typical part of family life, I felt that this situation was more about Winston’s grief and his

¹⁴Notes of evidence, p 43/20.

¹⁵Annexure B, P 188-190 bundle of documents.

own need for closure. Steph had not lived with Winston or seen the cat for a long time and once the cat was out of sight, it was out of mind for Steph.

[62] Mr Gilbert did not accept that there was anything untoward in his behaviour. I agree with Ms Tippett that farewelling of a family pet, instructing children and allowing them to learn about grief in a controlled way is a very important part of parenting. However I am also concerned that, firstly, there was no preparation with the Larsons' about this incident or with the contact supervisor. Secondly, as Steph had not been living with her father for a lengthy period of time, her knowledge of the cat would be small, if not non-existent.

[63] Therefore I do accept, on balance, that that is another example where the need was more around Mr Gilbert's emotional state, rather than his daughter's and that it demonstrates an inability by Mr Gilbert to separate his own needs from his daughter's.

Depression

[64] Mr Gilbert has suffered period of depression previously. At page 10 of the second report, Dr Staite in his second report records that Mr Gilbert has had episodes of depression in the past. He was a patient at a Dunedin facility for treatment for this in 2010 and retains ongoing symptoms of depression.

[65] Mr Gilbert also has a heart condition as a sequel of alcohol abuse. Dr Staite's report recommends that there be information provided about medical clearance to the Court in respect of his heart problems.

[66] I am of the view that some medical evidence around Mr Gilbert's depression should have been provided and would have been useful for the Court to make an assessment. Unfortunately, none of that information was provided. It does present concerns around expansion of contact, particularly to unsupervised contact, in the absence of evidence when these issues were clearly signalled.

[67] In addition, there was some evidence that Mr Gilbert sometimes uses the issue of contact to work through his own issues. It is expressed in the parenting

assessment of Ms Tippett that Mr Gilbert, on the third access session, was feeling down and expressed this to Steph through prolonging a cuddle at the start of access. Steph had to ask more than once to go into the library but Mr Gilbert continued to hold Steph on his lap, gently rocking. Mr Gilbert told Steph he had something not nice to show her and said Steph's shoes were the same colour as his mood.

Lack of family support

[68] It was put to Mr Gilbert that he has a lack of any real family support, that he is now alienated from his sister and also his parents. It appeared that he did spend some time with his father over the Christmas period but he accepted that he was alienated from his sister and other family members and does have contact with his mother. He does have the support of Ms Spearing but I am concerned that his family support is somewhat sporadic and, certainly in regard to his sister, the position that she has given is that she has become alienated from him due to his views about her parenting and his inability to take instruction. Mr Gilbert's inability to take instruction was an issue which came through in the evidence, particularly in the reports from Ms Tippett.

[69] The Court is concerned that Mr Gilbert is somewhat estranged from his family and that without the network of family support, it increases the potential for risk.

Discussion

[70] In conclusion, my determination is that there are still a number of risk factors which would make it premature for the Court to consider unsupervised contact. That position was accepted in the closing submissions of Mr More for Mr Gilbert.

[71] I am concerned about the ongoing litigation and the toll that it must take for all parties concerned, particularly for Steph who is the subject of these proceedings and I am strongly of the view that matters need to be finally resolved. However, for Steph there is still a need to recognise and support her relationship with her father, and for that relationship to be as normal and natural as possible; but in a context that

recognises the permanent placement for Steph and where contact is not so extensive that it creates loyalty conflicts for her between her father and her placement with the Larsons. We are not at that place yet. It is up to Mr Gilbert to build on the progress that he has made and continue to address the issues.

[72] The Court's view is that there is a real benefit from the continuity of supervision provided by Ms Tippett. Mr More in his closing submissions stated that Mr Gilbert would prefer a different supervisor. That submission was opposed by other counsel. The Court's view is that Ms Tippett is the most appropriate person for Steph for the following reasons:

- a) There is benefit for Steph in having as much continuity as possible because her relationship with Ms Tippett is already well established;
- b) Ms Tippett is available at no cost to the parties through the Open Home Foundation;
- c) She provides detailed reports following her observations of contact which will allow progress made by Mr Gilbert in emotional regulation to be monitored by all parties.

[73] I am therefore satisfied that it is appropriate to continue the contact upon the current terms for three hours every three weeks (if possible) for the next six months.

[74] During that time, Mr Gilbert needs to engage with a professional. Dr Staite in his evidence recommended a psychotherapist rather than a cognitive behavioural therapist¹⁶. That therapist would need to be available to report to the Court about Mr Gilbert's insight into his behaviour; that he has addressed the issues around his victim mentality and his ability to regulate his emotions, and also address his identified shame in the loss of his daughter and the sadness and sense of grief that he has suffered from the loss of having his daughter in his care. He also needs to produce medical evidence that his heart condition is controlled, and around his

¹⁶ Notes of evidence, p 201/25.

depression. In addition, details of the parenting course he has attended need to be before the Court.

[75] If these issues are addressed, consideration would need to be made to the structure of contact going forward. Dr Staite has proposed that some contact occur on a three weekly basis and there would be no issue with that contact being overnight. I agree that a regime from Saturday morning to Sunday evening with shared transport would allow Steph a good, normal arrangement with her father, but is not so frequent as to create a loyalty conflict.

[76] The Court heard the evidence of Mr and Mrs Larson. Both Mr and Mrs Larson impressed as being sensible, reasonable people who were open to the contact moving to an unsupervised basis. Mrs Larson was restrictive in her views around contact, but as I understood, that was due to Steph's being part of the busy family unit.

[77] Whilst I accept that that is a legitimate concern, the Court must also bear in mind the positives of the relationship between Mr Gilbert and Steph. Steph has previously been in the fulltime care of Mr Gilbert and he clearly has an attachment to her. If the issue of access being supervised is being resolved, there would be no reason why the transport arrangements could not be shared and therefore the burden will be lessened on the Larsons. Mr Gilbert should also be involved in Steph's activities.

[78] I also accept the submission that it is appropriate for Mr Gilbert to have regular contact with Steph through school as long as that is planned and there is consultation with the Larsons in advance.

[79] Ms Spearing, Mr Gilbert's partner, gave evidence. She impressed as a sensible person. Dr Staite had no concerns around her parenting ability. However, from the Court's perspective, it is important to maintain a neutral, independent supervisor at this time. The Court has concerns around the conflict for Ms Spearing being both in a relationship with Mr Gilbert, and Mr Gilbert and Ms Spearing having a child together. The conclusion is that she may struggle with being assertive,

particularly in light of the finding that I have made that Mr Gilbert is not good at taking directions. The Court's reading of Ms Tippett's reports were that Mr Gilbert often pushed the boundaries, for example by bringing in people who were not authorised for supervised contact. Therefore, I am not satisfied that it is appropriate for Ms Spearing to be a supervisor.

[80] Given the reluctance from Mrs Larson to engage in counselling, I agree that it not practical for them to engage in counselling and I do not direct counselling.

[81] However, I do consider it is extremely important that the parties simply get on with matters and start communicating with each other in a respectful manner for Steph's benefit.

Decision

[82] Accordingly, I have come to the conclusion that it is necessary for the Court to discharge the current interim orders, to make interim orders, and to set this matter down for a determination if Mr Gilbert files updated evidence and produces to the Court the information supporting that he has taken steps to address the issues as identified.

[83] The Court will release a copy of this decision to any psychotherapist working with Mr Gilbert, if requested by Mr More by way of memorandum to the Court, or if the psychotherapist is engaged by the Ministry. That engagement with a psychotherapist can be between Mr Gilbert and the psychotherapist independently, or under the auspices of the support order in favour of the Ministry.

[84] The Court is cognisant of s 49C(2) of the Care of Children Act 2004 which states:

When an application for a parenting order is finally determined by the Court, a Judge must make a final parenting order.

[85] However, s 49 of the Act allows the Court to make an interim parenting order at any time before an application for a parenting order is finally determined in a

Court. However, the Court's view is that the matter cannot be finally determined until further evidence is provided.

Orders

[86] Accordingly, I am satisfied that it is appropriate to make the following orders:

- i. The previous interim custody order is discharged.
- ii. A fresh interim custody order shall issue upon the same terms with the following variations:
 - a. Mr Gilbert may have telephone contact with Steph every Friday at 7.00 pm.
 - b. Mr Gilbert is to have supervised contact (if supervisor available) for three hours every three weeks, and such further supervised time as can be agreed on a three weekly rotation during the school holidays.
 - c. Mr Gilbert may have contact with Steph at school events on a planned basis.
- iii. This interim order shall be made final within the next six months upon these terms unless Mr Gilbert provides to the Court within five months, or such further time as agreed by the Court, evidence as to the further steps that he has taken by way of engaging with therapeutic assistance, including direct evidence from any professionals who he has been engaged with – medical evidence, confirmation of parenting courses attended, and evidence of any practical steps taken by Mr Gilbert to engage appropriately with Mr and Mrs Larson.

[87] If Mr Gilbert provides that evidence to the Court, there shall be a case management conference allocated, if possible, within 14 days following the provision of the evidence, to discuss further timetabling and whether a further hearing is required.

[88] In the meantime, the support order of the Ministry is to continue. The Ministry is to file an amended plan to reflect the terms of this judgment, if possible, within 14 days of the date of this judgment.

C L Cook
Family Court Judge