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**IN THE FAMILY COURT
AT HAMILTON**

**FAM-2014-019-001003
[2016] NZFC 1517**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN MARLENE BELL
 Applicant

AND HERBIE SALVAGE
 Respondent

Hearing: 23 February 4 March 2016

Appearances: Mrs S Paekau for the Applicant
 Ms K Quinn for the Responent
 Ms M Williamson as Lawyer for the Children

Judgment: 7 March 2016

**RESERVED JUDGMENT OF JUDGE R H RIDDELL
[Care of Children]**

Introduction

[1] These proceedings concern two children Lindsay who is eleven and Kerri who will be five on [date deleted] 2016.

[2] At present the older child Lindsay lives with her father and Kerri is with her mother.

[3] The mother wishes that arrangement to continue. The father seeks an order that both children are placed in his day to day care.

Background

[4] After the parties' relationship ended, the two girls were in their mother's day to day care. The father has lived in a flatting arrangement for some time with his friend Mr Clifton whom he has known since childhood. Mr Clifton has a partner and they have two children Cam and Major.

[5] Lindsay has her own room at the house. If the children were in the father's care he plans to move out and obtain a larger house for them.

[6] He works part-time at [occupation details deleted] and his hours are flexible to allow him to finish at 3pm, although recently he has changed his hours on a Monday and Tuesday to work until 8pm.

[7] The father's concerns about the mother's care relate to the following:

- (a) That the mother has been working as a sex worker from home and Kerri is starting to demonstrate sexualised behaviour which leads him to believe she has been exposed to that behaviour.
- (b) The mother's mental health and in particular her threats to kill herself.
- (c) The mother's alleged physical violence towards the older child.

(d) Allegations about the mother's poor parenting.

[8] On 11 December 2014 the mother applied on a without notice basis for the return of both girls to her care. The father had not returned the girls to her at the end of his visit because of disclosures made by Lindsay that she had been hurt by her mother.

[9] Despite that, the father subsequently returned the younger child to the mother but later made application for day to day care of both girls in October 2015.

[10] Child Youth and Family had become involved because of a number of notifications dating back to February 2012. At that time there was concern that Lindsay had absconded from her parents' home between 5am and 6am and had been brought back by police on several occasions. The social worker noted that the longest time Lindsay had gone missing was six hours. Subsequent notifications were made in 2013, 2014 and 2015.

[11] In particular Lindsay disclosed to a social worker that she preferred to live with her father because her mother had "tried to kill me, she was very angry and choked me and grabbed my wrist."¹

[12] The father told the social worker that he agreed to return the younger child to her mother because Kerri was a "mummy's girl" and he felt that Kerri was safe in her care.

[13] A family group conference was held on 16 October 2015 and it was agreed that both children were in need of care and protection and that a declaration should be made. It was also agreed that Child Youth and Family would seek a s 91 support order and that Lindsay would live with her father. There was no agreement at the FGC about which parent Kerri should live with.

[14] Child Youth and Family then filed an application on notice for a declaration on 29 January 2016. That is the date the application was received by the Court, but

¹ Social worker's affidavit in support of declaration 29/1/2016

because of an administrative oversight, the application was not served on the parties to these proceedings until they became informally aware of the application just a day or so before the hearing in mid February.

[15] The social workers involved were required for cross-examination, also at the eleventh hour and the unfortunate consequence of that was that they had not had time to prepare sufficiently for the hearing or gain access to their background notes which were held in Auckland.

[16] Originally the mother had sought day to day care of both children. The current position is that she wants the status quo arrangement to remain.

[17] The father cross applies for care of both children.

Evidence

[18] In her original affidavit of 11 December 2014, the mother deposed that Child Youth and Family were involved with Lindsay before her diagnosis of ADHD when she would jump out the window and run away. The mother went on to state:

Since her diagnosis and medication, they have not been involved and I understood the file was closed last year after I received a call from Sue White from FYFS.²

[19] In that same affidavit the mother denied ever having hurt Lindsay.

[20] The mother downplayed Child Youth and Family's previous involvement. There have in fact been a number of notifications and the file has not been closed as she asserted. That has been emphasised by the more recent application for a declaration that the children are in need of care and protection.

[21] There were nine reports between 24 February 2012 and 20 January 2015. Seven of those reports were about the mother's mental health or her parenting and raised concerns at different times about the mother's home being messy, that the

² [20]

mother's mental health was unstable and that she was unable to care for both children.

[22] The mother takes Fluoxetine for depression and social anxiety, but that medication has been altered at different times by her doctor because her behaviour became unpredictable and erratic. The mother asserted that she believes her medication is now at the optimal level.

[23] She was also asked about being a sex worker in the light of her troubled childhood. She was the victim of an indecent assault and later a rape at the age of 13 and suffers post traumatic stress disorder. The mother said that she had serious financial problems and decided that being a sex worker and working from her home would alleviate those debts.

[24] She denied that the children were ever at the home when she was working. At one point she said that her friend and flatmate Ms Derby took the children away to the park on occasions. However that contradicted the affidavit of Ms Derby who said that:

I am aware that Marlene works as a sex worker from our house. As far as I am aware Marlene only works in the weekends that she does not have the girls in her care.³

[25] So, either Ms Derby was saying that the mother did not work as a sex worker when she had the children, or, the mother is saying that Ms Derby would take the children down to the park. This was an issue which could not be conclusively determined as Ms Derby refused to come to Court.

[26] As Ms Derby had lived with the mother for some time and was a friend and support to her, I was very concerned about Ms Derby's refusal to attend Court. Therefore at the end of the day's hearing I issued a minute in which I required Ms Derby to be produced as a witness to Court and the matter was adjourned to Friday 4 March 2016 for Ms Derby to attend and be cross-examined on her evidence. When the hearing re-convened, Ms Derby made herself available and answered questions about her relationship with the mother.

³ Affidavit 12/10/2015 [4]

[27] It was clearly difficult for Ms Derby at times, caught between her loyalty to her friend and her fear that her evidence might result in Kerri being taken from the mother. I had to reassure her that there were many factors at play and her evidence was only one aspect to be considered. The date the mother started as a sex worker and how recently she had continued were at variance with the mother's evidence as was the issue about whether the children were present or not.

[28] When I step back and objectively assess Ms Derby's evidence, I find there are three compelling conclusions that emerge.

[29] First there were times when the mother worked as a sex worker and the children were present, contrary to the mother's evidence.

[30] Second, it was the exchange of texts between the mother and the father's female flatmate which fanned the dispute about whether the mother was capable of caring for her daughters. The flatmate was concerned about Kerri's sexualised behaviour, but went further emphasising that she would "do all I can in my might and (the father's) might to make sure the girls are not with (the mother) and are safe"⁴.

[31] While the flatmate's concern might be valid, her insistence that she would do what she could to see the girls removed from the mother would have placed the mother under significant stress, particularly given her mental health difficulties. It would seem that led to the mother's threats of self harm or suicide. On balance I don't think the flatmate's involvement in that conversation was helpful.

[32] Third, Ms Derby was able to confirm that she believed the mother was able to care for Kerri. Her evidence did not ignore the mother's challenges. She was honest in recognising that the mother struggled with routines and needed help with that.

[33] Overall I found Ms Derby's evidence assisted me in the final decision making process.

⁴ Text 10/01/15 attached to Ms Derby's affidavit 12/10/2015

[34] According to the mother, she has ceased working as a sex worker and has [occupation details deleted]. Her finances are reportedly now more manageable, she has a vegetable garden and she believes her medication is at an optimal level and she is no longer so stressed. She still meets with her doctor every five weeks to have her medication monitored.

[35] The stress was exacerbated by receiving texts from the father's female flatmate and she now concedes she did not deal with that issue sensibly.

[36] I suspect that, in retrospect she also realises that her decision to conduct work as a sex worker from her home was not wise. She was closely cross-examined about the unknown people who might come to the home, that they knew where she lived, that they might have drug or alcohol problems and that, for her children's sake she should not conduct such work in her children's home environment.

[37] The mother has a boyfriend, but he does not live with her and they see each other very infrequently. There would seem to be very little commitment from him to the relationship and little hope from her that the relationship might develop.

[38] There is some suggestion that the mother's relationship with her older daughter Lindsay is problematic and there is a lack of attachment between mother and daughter. The mother views Lindsay as "Daddy's girl".

[39] The mother has denied that she strangled Lindsay. The police have declined to take the matter further and, on the limited evidence available to me I am not able to find that any strangling event occurred.

[40] After reading her evidence and observing the mother in Court, I was left with the impression of a young woman who still has her struggles, but is trying hard to be the best parent she can to her younger daughter, with whom she is very close.

[41] The father believes that both children should be together and he wants to find alternative accommodation if they are placed in his care. His work routine is flexible around the children's school commitments. He expressed real concern about the

number of previous notification to CYFS involving the mother and he agrees that the children are in need of care and protection.

[42] I would describe his parenting style as permissive. He allows Lindsay to go to bed at 8.30pm and watch Utube for an hour or so after that. Despite the fact that Lindsay is overweight her teacher reported in July 2015 that Lindsay often bought her lunch at the bakery and had arrived at school at 8.15am eating fried chicken. The teacher had to remind Lindsay, who is 11 to have a bath and change her uniform. All of that occurred while Lindsay was in the father's care.

[43] Despite Lindsay's allegation of strangling by the mother, he allowed his younger daughter to return to the mother's care, which suggested to me that either he had no serious concern about the mother's ability to safely manage Kerri or had not turned his mind to the risk.

[44] He agreed with a social worker's observation that a year ago he would not have been able to parent both girls but felt he was now able to do so. He also agreed that his flatmate's partner did a lot of parenting tasks for Lindsay.

[45] The allegations about Kerri's sexualised behaviour have apparently not been repeated. It is difficult to determine whether they were caused by watching her mother; if so, I suspect that would have been an isolated occasion rather than regularly, especially given Ms Derby's presence and her insistence on the children being kept away from such activity.

[46] Lindsay has a number of challenges academically and socially and her behaviour will need to be monitored. She is a child who will need close and careful nurturing. The Gateway assessment of Lindsay described her as a child who has learning difficulties with an IQ in the borderline range. She is vulnerable to influence from others and, last year her teacher reported she had spoken to Lindsay about 'safe' behaviour with strangers as she had been over-familiar with visitors to the school.⁵

⁵ School report attached to social worker's report 23 July 2015

Law

[47] The proceedings are governed by the Care of the Children Act (“the Act”).

[48] S 4 sets out the primary obligation of the Court which is to make a decision which is in the child’s welfare and best interests. To assist in that task, s 5 contains a list of principles to be applied. They are not intended to be exhaustive but a guide to important matters for a child’s care and upbringing. Among those is the recommendation that the parents should be the primary caregivers of the child and that a child should have continuity of care and the opportunity to have an ongoing relationship with both parents.

[49] S 6 ensures that the child’s voice is heard in any proceedings, so any views expressed about the matters in dispute can be taken into account. The weight to be afforded to those views will be governed by a number of factors, including of course what is in the child’s best interests.

Decision

[50] Each child has lived in the care of one parent for over a year now. To that extent there is a status quo arrangement in place and one that suits each child. Before changing that arrangement, the Court would have to be persuaded that the concerns about the mother are at such a high threshold that a change must be made. The Court would also have to be satisfied that the father was able to care for both children.

[51] The mother has not been transparent with the Court. She downplayed CYFS’ involvement in her life. She was not truthful about her children being present while she worked as a sex worker. She was less than honest about why her friend Ms Derby moved out to live elsewhere.

[52] At the same time she is a young woman struggling with depression and PTSD. She is very close to her younger daughter and by all accounts is able to parent her adequately. She knows that she needs some assistance with her routines and that

it is vital for her to maintain contact with her doctor so her mental health can be regularly monitored.

[53] The father has had his challenges also. He has relied heavily on his flatmate's friend for the day to day parenting of Lindsay. He has been a permissive parent and perhaps has underestimated the challenges that raising Lindsay presents.

[54] His sense of judgment is also questionable at times. In cross examination he was asked about his cannabis use and whether being under the influence of cannabis while the children were in his care represented a risk to them. His answer was no. I disagree, particularly if say a child has a medical incident and he has to take her to hospital immediately while under the influence of cannabis.

[55] His present flatting arrangement is not ideal for raising two daughters but he has said he would find alternative accommodation. Whether he could manage both children without the support of his flatmates is untested.

[56] He has acknowledged that Kerri is more attached to her mother and so he would also have to deal with the separation issues that Kerri might exhibit. He agreed that if the children came into his care, then fortnightly contact with their mother would not be sufficient for them, so there would need to be more frequent changes of care, which might be particularly unsettling for Lindsay given her behavioural challenges and her attachment to her father.

[57] Lindsay has told her lawyer recently that she liked staying with her Dad and seeing her mother and sister on weekends. But she felt it would be better if she and her sister lived together all the time. Kerri did not express any clear views about where she might live.

[58] There are disadvantages in separating the children; particularly the risk of disturbing the sibling bond. There is also the stated view of Lindsay to take into account. Those factors must be weighed against what is best for each child.

[59] On balance I am not persuaded that the difficulties experienced by this mother are so overwhelming that Kerri should be transferred to the father's care. Her mental health can be managed and, in the past the father has been content for Kerri to be in her care.

[60] I would hope that the mother would seriously reconsider whether it is wise for her own mental health to be working as a sex worker. If she qualifies as a [occupation deleted], it would give her the kind of employment and regular income she is anxious to achieve. That would also help her sense of self worth.

[61] Child Youth and Family will be more formally involved as a result of their application for a Declaration. They will be able to monitor both parents to ensure that each has the capability to parenting the child in their care. I consider that provides a safety net in the event of any particular difficulties.

[62] There are no parenting orders in place. I consider an order is appropriate and now make the following:

- (a) I make a parenting order for Lindsay and Kerri directing that Lindsay shall live in the day to day care of the father.
- (b) Kerri shall live in the day to day care of the mother.
- (c) Contact shall occur as follows:
 - (i) To the other parent once a fortnight, the pickup and drop off and the exact times to be arranged between the parents.
 - (ii) Half of each school holidays.
 - (iii) Half of the Christmas holidays including time on Christmas day.
- (d) The order will contain a heading "Conditions" with the following:

- (i) Both parents shall speak respectfully to the other and communicate by text, phone or face to face about any issues concerning either of the children.
- (ii) There will be no physical discipline used on either child.
- (iii) Each parent will keep the other informed about any educational or medical issues concerning the child in their care and ensure that the other parent has adequate notice of any specialist appointments.
- (iv) The mother agrees to ensure that her mental health remains at an optimum level and will have regular consultation with her doctor regarding medication.
- (v) If any third party is engaged in assisting the parent with the care of the child, then that third party will not communicate directly with the other parent. Any issues about the children should be communicated directly to the other parent by that parent.

[63] Lawyer for child's appointment is concluded in these proceedings. However her appointment will continue in relation to the Children Young Persons and their Families Act application.

[64] I have heard sufficient evidence about each party's financial circumstances and consider that it would mean financial hardship for both parents if they were required to contribute to the costs of professional involvement. Therefore under s135A (2) I do not require either parent to make any contribution to the costs of lawyer for child's appointment.

[65] There is no order as to costs.

R H Riddell
Family Court Judge