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**IN THE FAMILY COURT
AT NELSON**

**FAM-2008-042-001016
[2016] NZFC 3399**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN VINNIE DYER
 Applicant

AND MARTINA GARNETT
 Respondent

Hearing: 26 April 2016

Appearances: J Gully for the Applicant
 M Duggan for the Respondent
 M Vesty as Lawyer for the Child

Judgment: 26 April 2016

**ORAL JUDGMENT OF JUDGE R J RUSSELL
[as to a parenting order under s 47 Care of Children Act 2004]**

Introduction

[1] These are proceedings under the Care of Children Act 2004 for Izan Dyer, born [date deleted] 2008. Izan is aged 7 years. It is yet another round of proceedings between Izan's parents, Vinnie Dyer and Martina Garnett.

Background

[2] These proceedings have been before the Court from the time Izan was born. There have been parenting orders made, a referral to Child, Youth and Family, under s 19 has been made, family group conferences have been held, the parties have reconciled and then separated again, and further parenting orders have been made. In October 2013 I conducted a fully defended hearing and I made a further parenting order.

[3] Initially there was a shared-care type of parenting arrangements in place between Mr Dyer and Ms Garnett. In the October 2013 order I provided for Izan to be in the primary day-to-day care of his father, Mr Dyer, and reserved contact for Ms Garnett to see Izan each second weekend and during school holiday times. At that time Ms Garnett lived in Golden Bay. Mr Dyer lived in Nelson and Izan had started attending school at [location deleted].

[4] In May 2015 Mr Dyer applied to vary the parenting order. This application was declined. When dealing with that application, Judge Boshier noted the risk of Izan being the subject of systemic abuse caused by the repetitive applications which have been made to the Court. Mr Dyer applied again in August 2015. This time Judge Geoghegan granted him leave to bring the application to vary the parenting order within the two year period, as required by s 139A. He put the variation application on notice to Ms Garnett and directed a s 132 social work report be prepared.

[5] In December 2015 Mr Dyer applied to suspend the contact provisions of the 2013 parenting order. Judge Fleming refused that application and put it on notice to Ms Garnett. In January 2016 Judge Grace did suspend the contact provisions of the

order and directed an updated s 132 report and tracked forward the proceedings to a hearing today.

The evidence

[6] Both parties have filed affidavit evidence. There are two s 132 social work reports. There is a s 131A track 4 social work report and Mr Vesty, in his role as lawyer for Izan, has filed reports as has been required of him. The agreed booklet of documents prepared for the hearing total some 167 pages.

[7] At the outset of the hearing counsel appeared. Mr Dyer travelled from Golden Bay for the hearing, but unfortunately, Ms Garnett has not turned up. Her counsel, Ms Duggan, explained that she had recent contact with Ms Garnett last week and confirmed she was aware of the hearing today. My efforts to telephone Ms Garnett through my registrar this morning have been unsuccessful, as have Ms Duggan's own efforts to contact her client. I am left in the position today where I need to finalise the terms of a parenting order as best I can, without Ms Garnett being available to be cross-examined on the issues which were of concern to Mr Dyer which led to his variation and suspension application.

[8] Mr Dyer has given evidence. He confirmed the contents of his affidavits and answered questions from counsel and from me. I do not propose in this oral judgment to traverse in any detail the history of events which have occurred. A brief summary is that Ms Garnett has lived in a number of different residences. She has two other children to a Mr Lincoln Hutson with whom she appears to be have been in an on-again-off-again relationship. Matters between this couple came to a head in August 2015 when Ms Garnett was quite badly assaulted by Mr Hutson. They have now separated and I understand there is a protection order in place. I understand Mr Hutson was the subject of charges in the criminal jurisdiction in respect of this assault.

[9] Up until this assault occurred the fortnightly care and contact arrangements for Izan had been operating satisfactorily, at least so far as Mr Dyer was aware. Mr Dyer then became aware of the assault on Ms Garnett and that Izan had apparently

witnessed it. He was naturally concerned and made notifications to Child, Youth and Family. From August 2015 until now there has been no contact occurred between Izan and his mother. There has, however, been some contact arranged by Mr Dyer between Izan and his two younger siblings who have been in Mr Hutson's care. It appears that, notwithstanding the protection order, Mr Hutson has had the care of his own children, which was able to be arranged informally between himself and Ms Garnett.

[10] Mr Dyer's evidence is that, following his becoming aware of this assault, further issues of concern have come to his attention. He is concerned with Ms Garnett's connection with the gang scene in Nelson. He is concerned about her involvement with alcohol and drugs, in particular the methamphetamine scene. His evidence is that he has heard from others that she is involved in selling such drugs. I hasten to add that I have no direct evidence of her involvement, and the evidence from Mr Dyer in this respect seems very much third-hand anecdotal information.

[11] Of relevance to this decision is that in both his August and November affidavits Mr Dyer accepted that Ms Garnett's own mother, Ms Harate, would be a suitable person to supervise and oversee Ms Garnett's contact with Izan. Mr Dyer's evidence today is that he no longer feels she would be adequately able to supervise such contact, not because of anything Ms Harate has done or not done but, rather, because of the concerns which Mr Dyer has about Ms Garnett which I have summarised.

[12] Mr Dyer proposed that there be a period of supervised contact. He initially sought funding from the Court under s 60 of the Act. If this were not able to occur then he said he was prepared to fund the supervised contact himself. During the course of the hearing and upon being appraised of the cost of supervised contact, Mr Dyer conceded that he would not have the ability to fund supervised contact for the six month period he suggested. He accepts now that other alternatives need to be looked at.

[13] Ms Lisa Jennings is the s 132 social work report writer. Two reports have been filed. In her most recent report Ms Jennings has said that Ms Garnett has now

a property in Nelson which she had visited. The house is a good size and is able to accommodate Izan overnight. The property appeared to Ms Jennings to be a well cared for rental property and there was nothing which Ms Jennings observed which could present a risk to a child. The property was noted to be clean and tidy and appropriately furnished. Ms Garnett has a boarder. This is a person Mr Dyer expressed some concern about in his affidavit evidence. It is, however, said in the s 132 report that this boarding arrangement may change.

[14] Ms Jennings noted Ms Garnett told her that her own father planned to move back in to her home once the Family Court proceedings were completed. It was her understanding that Ms Garnett's father was a positive person in her life. Mr Hutson, however, is not viewed in such a way. Ms Jennings' view is that he presents significant care and protection concerns for the children. Izan apparently witnessed the assault which Ms Jennings described as a "traumatic event" for him and which has impacted on his emotional welfare and which has affected his relationship with his mother. Ms Jennings recorded Ms Garnett's advice that she was no longer in a relationship with Mr Hutson, noting the position with the other children and also with the protection order.

[15] Ms Jennings reported that Ms Garnett acknowledged to her that she had made poor choices in the partners and that she had remained in an abusive relationship with Mr Hutson when she should have walked away. There was no question that Ms Garnett had failed to protect the children from the harm that Mr Hutson had caused. She also noted that Ms Garnett acknowledged suffering from depression, was affected by the loss of the relationship that she had with her children. Antidepressant medication was being taken. Ms Jennings also noted Ms Garnett's acknowledgement that too much alcohol was being consumed by her.

[16] Ms Jennings reported that Ms Garnett's expressed wish was that she wanted to establish a more consistent level of access between herself and Izan, but recognised that Izan may not wish to rush into that, given his lack of access over the last five months. Ms Jennings noted Izan's own views as being that he would like to have some access with his mother. Ms Jennings' view is that it would take some

time to build back the trust necessary to return to the fortnightly overnight contact arrangements which had been previously in place for him.

[17] In the conclusion to her report, Ms Jennings saw no reason why access could not return to the fortnightly overnight stays at Ms Garnett's property in a few months' time, and suggested Mr Dyer be able to ring Izan before bedtime to check that all was well. She concluded her report by recommending a number of courses and programmes that Ms Garnett could attend to help address the issues which she had.

[18] On behalf of Izan, Mr Vesty filed reports. In his most recent report he has suggested a gradual return to the orders resembling those I made in 2013.

[19] Both Ms Duggan and Mr Vesty have cross-examined Mr Dyer today with the view of seeing whether there could be a return to that type of contact arrangements that were previously in place.

[20] It is fair to say that Mr Dyer is somewhat cautious about Ms Garnett and her ability to see Izan in a way that is appropriate and safe for him. He remains working in Golden Bay. He is employed for approximately six months of the year by [name of employer deleted]. It is a four day on, four day off cycle for six months of the year and he works long days. He has recently separated from his own partner of some five years standing, and they have one child, Tina. Tina's mother lives in Nelson and Mr Dyer's evidence is that he travels regularly to Nelson to see Tina. During the four days he is working he has care arrangements in place with an employed caregiver and also wider members of his family are able to assist.

Discussion

[21] In any parenting order I must make orders which are in the welfare and best interests of Izan. His sense of time is an important consideration. For a child of age 7, going from frequently seeing his mother to not seeing her at all must have been confusing at the very least. The gender of the parent is not a relevant

consideration when making a parenting order and the conduct of the parent is only relevant to the extent that it affects the welfare of the child.

[22] Section 5 sets out principles which I must consider when determining what is in the welfare and best interests of the child. Addressing these briefly, s 5(a) is the major concern here. This mandatorily requires I must make orders which are safe for a child. While I do not consider there is the jurisdiction to authorise the funding of supervised contact in this case, under s 60, given the contents of the s 132 report, indicating there are no care and protection concerns with the living environment the mother is able to provide for Izan, there are the undoubtedly wider concerns Mr Dyer has about Izan when he is with his mother which I must address. I will address these concerns and satisfy this principle in the form of the contact order that I make and also by attaching various conditions to that order.

[23] Section 5(b) and (c) requires the parents to consult and co-operate with each other over parenting and guardianship issues and that Izan's care and upbringing is to be the primary responsibility of his parents. Mr Dyer has had the day-to-day care of Izan for some time now. He and Ms Garnett's ability to communicate with each other is non-existent. Communication, it seems, is going to have to be conducted through third parties. I will provide in the parenting order for these parents to communicate with each other in this way and also will reserve to them the ability to come to the Court to seek professional assistance in the form of counselling as it relates to parenting and guardianship matters and any issues relating to the implementation of the parenting order that I am going to make. In this way, the principles in s 5(b) and (c) can be satisfied.

[24] Section 5(d) requires there to be continuity in a child's care arrangements. This principle will be met by continuing the parenting order for Mr Dyer to have the day-to-day care of Izan. There is no other option.

[25] Section 5(e) requires me to preserve and strengthen Izan's relationship with both of his parents. Izan's relationship with his mother, Ms Garnett, will have been significantly affected by the events of last year and this year. It is unfortunate that she has not turned up today to answer the questions that would have been

undoubtedly posed to her, particularly about safety issues. I can only at best try and preserve Izan's relationship with her. Whether it is strengthened, as s 5(e) requires, will depend on how the contact arrangements progress and whether Ms Garnett can complete the courses and programmes which I am going to outline and whether she can remain offence and drug free.

[26] I have heard no specific matters of evidence relating to culture, language or religion which I need to consider under s 5(f).

[27] Under s 6, there are no particular views held by Izan which have been advanced to me by Mr Vesty, although he did note in paragraph 9 of his report that Izan has never expressed any concern about spending time with his mother. Ms Walker noted in her report that Izan had said that he would like some access with his mother.

Parenting order conclusion

[28] The best as I can do today is to make a contact order in two stages. In stage 1 I am going to provide for Ms Garnett and her mother, Ms Harate, to be able to visit Izan in the Golden Bay area. My view is that, realistically, this could only occur on one occasion each month. It can be more often if the parties are able to arrange it but, given Ms Garnett's poor showing over the course of these proceedings, anything more than this I think is unrealistic. I note Mr Vesty's submission that he has little or no confidence that Ms Garnett could follow the terms of a parenting order, and the issues that she has.

[29] I will provide for courses and programmes for Ms Garnett to complete. If she completes these and has followed the terms of the parenting order then, after a period of six months, then I consider stage 2 of the contact order can then occur which will permit trips back to Nelson to occur, providing contact is based at Ms Harate's home. Given the concerns that Mr Dyer has expressed today and which are set out in the reports and affidavit evidence and, given Ms Garnett's non-appearance today, I would not be prepared to order unsupervised contact at this time. I will build into the order provision for the parties to change this if they can agree, but I do not

consider I can address the safety concerns today enabling me to make an unsupervised contact order. I will, however, build into the order the ability of the parties and Izan to communicate and for Christmases and other special days, if that can be arranged.

[30] This is the best I can do today on the evidence that I have in front of me. I will delay the sealing of the order for counsel to be able to confer. Mr Vesty will need to see Ms Harate to see that she is on board with the order and, at the expiration of a seven day period following receipt of the judgment, changes can be agreed to before the final order is sealed.

Outcome and orders

[31] Against all of that background I make the followings orders and directions, considering these to be in the welfare and best interests of the child.

[32] Mr Dyer's application to vary the parenting order is granted. A new order will issue as follows:

- (a) Mr Dyer will continue to have the primary day-to-day care of Izan.
- (b) Ms Garnett shall have supervised contact as follows:

Stage 1

- (i) On one occasion each calendar month in Golden Bay between the hours of 10.00 am and 2.00 pm on a Saturday or a Sunday, as agreed. In the absence of agreement it shall occur on the last Sunday of each calendar month.
- (ii) Changeovers shall occur at [location deleted].
- (iii) It is a condition of the order that Ms Garnett is not to be under the influence of drink or drugs. Mr Hutson is not to be present

at any contact visits. Izan is not to be taken outside the Golden Bay area.

- (iv) All contact is to be supervised by Ms Harate.
- (c) Ms Garnett shall be able to attend any of Izan's sporting or extra-curricular events which are organised for him in Golden Bay. This contact does not need to be formally supervised as there will be other people at such events. Contact shall occur for Ms Garnett to see Izan on his birthday and on Christmas Day. This will need to be at such times and such terms as the parties are able to agree upon, but failing agreement, is to be for a period of two hours between 3.30 pm and 5.30 pm.
- (d) For any face-to-face contact, not less than seven days' notice is to be given either by Ms Harate or Ms Garnett to Mr Dyer of Ms Garnett's intention to have contact on each occasion.

Stage 2

- (e) Upon the expiration of six months following the making of this order, and upon completion by Ms Garnett of the courses and programmes recommended by Ms Jennings, namely:
 - (i) The Parenting Through Separation course;
 - (ii) Counselling through the Alcohol and Drug Service; and
 - (iii) The Women's Programme at SVS Living Safe,

and upon her supplying certificates to this effect, then overnight contact in the Nelson province can occur from Saturdays 10.00 am until Sundays at 5.00 pm. Contact is to be supervised by Ms Harate. He is to be resident overnight at Ms Harate's home in [location deleted].

Variation

- (f) There shall be such further or other contact as the parties may from time to time agree upon.

Telephone contact

- (g) Izan may telephone his mother at any reasonable time. Ms Garnett shall be able to telephone Izan at any reasonable time. Mr Dyer shall be able to telephone Izan during the stage 2 contact visits at any reasonable time. Each party shall keep the other informed of their current telephone contact numbers.

Communication

- (h) Communication is to occur through Ms Harate for the first six month period of the order. Communication may then occur on terms the parties shall be able to agree upon, but failing agreement it shall continue to occur through Ms Harate.

Transport

- (i) Ms Garnett and Ms Harate shall be responsible for the transport arrangements for these contact visits, unless the parties agree otherwise.

[33] I direct the registrar delay the sealing of this order for a period of seven days following the receipt by counsel of my written decision. In that seven day period counsel may confer as to any changes that may be required to the parenting order before it is sealed by the registrar. I direct that Mr Vesty contact Ms Harate to ascertain any issues about her helping Ms Garnett comply with the terms of the parenting order.

R J Russell
Family Court Judge