NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT MASTERTON

FAM-2011-035-000365
[2016] NZFC 2766

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	HELENA ROACH Applicant
AND	KURTIS BRANNON Respondent

Hearing:	5 April 2016
Appearances:	Applicant appears in Person Respondent appears in Person (via telephone) P Reid as Lawyer for the Children (via telephone)
Judgment:	6 April 2016

JUDGMENT OF JUDGE A P WALSH

Introduction

[1] I refer to the minute of His Honour Judge Grace 7 March 2016. He directed a submissions hearing take place to determine an application for contact between the respondent and his children. He further directed consideration be given as to whether or not the application should be struck out pursuant to s 140 Care of Children Act 2004.

[2] A submissions hearing was held on 5 April 2016. Mr Reid and the respondent attended by telephone. The applicant was present in person.

Background

[3] These proceedings have been before the Court since August 2011.

[4] A final parenting order was made in August 2014 granting the applicant the day-to-day care of the children. At that stage an interim contact order was made in favour of the respondent in respect of both children, Asha born [date deleted] 2002 and Martin born [date deleted] 2005.

[5] These proceedings have a complex history. A final protection order was made against the respondent on 7 August 2012 in favour of the applicant and children. Since then there have been numerous breaches of the protection order by the respondent. He has been sentenced to terms of imprisonment for breaching the order.

[6] On 25 February 2016 the respondent was sentenced to imprisonment for 18 months following convictions on three charges relating to breach of the protection order. I was the sentencing Judge. In my sentencing notes 25 February 2016 at paragraph [22] I made the following observation:

> [22] Sadly, this has impacted not only on her [the applicant], as I have noted, but also on your children. While you express your love for your children, your actions beg the question as to how sincere your love and devotion to your children are. For a long time you have noted you have been aware of the detrimental effects on your children. A point has been reached where your daughter wants nothing further to do with you. You have tried to

> put pressure on the victim in this matter to have the matters taken out of the Family Court. Time and again you have said that you will not give up until you get custody of your children. Your pursuit of custody of your children defies reality, and it is time you faced up to that reality. You continue to carry on, as I have said, a charade about disclosure of information. Today you have written a letter expressing remorse, but how many times have you done that in the past? You may have expressed remorse, but I have real difficulty in accepting how genuine you really are, given your actions.

[7] At sentencing, I noted the primary purpose was to denounce the respondent's offending and to deter him from this type of offending in the future. I noted he had been relentless in his attempts to psychologically abuse the applicant. He had communicated directly with her, exploring issues, knowing this would unsettle and worry her. He had gone to considerable lengths to try and get information made public. He had gone directly to the applicant's employer in an attempt to have her employment terminated. He had also gone to higher authorities to try and get information relating to the applicant's employment.

[8] The impact of the offending on the applicant and the children has been considerable. A point has been reached where Asha has made it clear she wants no further contact with the respondent.

[9] Throughout the history of these proceedings, the Court has become concerned over the actions of the respondent. He completely lacks insight into his actions. Despite him giving written assurances and expressing remorse for his actions, he has continued to breach the protection order. Even after he had been remanded in custody on the charges for which I sentenced him in February 2016, further breaches of the protection order have been alleged. I am aware the respondent is due to appear again in the District Court at Masterton on 7 April 2016 on further charges relating to breaches of the protection order.

Section 140 – Care of Children Act 2004

[10] Section 140 of the Act provides:

> **140 Power to dismiss proceedings**
>
> The court may dismiss proceedings before it under this Act if it is satisfied -
>
> (a) that the proceedings relate to a specified child, and that the continuation of the proceedings is, in the particular circumstances, clearly contrary to the welfare and best interests of the child; or
>
> (b) that the proceedings are frivolous or vexatious or an abuse of the procedure of the court.

[11] The Court's power to dismiss proceedings under s 140 must be carefully exercised, given the consequences for a party if that party's application is dismissed. In *RAW v CR* [2012] NZHC 1470, Duffy J considered the provisions of s 140. At [58] Her Honour said:

> [58] A decision to stay or dismiss a proceeding under s 140 necessarily involves considerations of the best interests of the child, and it carries serious consequences for the parties. In this regard it is comparable to a decision on a parenting order.

She observed while s 140 is couched in permissive terms, as a Court "*may*" dismiss the proceedings, there was nothing to suggest a Court, once satisfied the conditions for dismissing of the proceeding had been made, had a residual discretion nevertheless to refuse to do so.

[12] In *Baer v Urban* [2013] NZFC 5637, His Honour Judge Russell reviewed Family Court cases where the interpretation and application of s 140 had been considered. At [18] he stated:

> [18] It is clear from the wording of s 140 and from my review of the authorities, the jurisdiction to strike out may only be used if the circumstances are such that a continuation of the proceedings is either clearly contrary to the welfare and best interests of the child in his or her particular circumstances, or the proceedings are frivolous or vexatious or are an abuse of the procedure of the Court. This is a high threshold which must be met, and serious consideration must be given before depriving a parent or guardian of their right of access to the Court to have parenting issues determined. While previous cases are helpful, each case must be decided with reference to its particular facts. It is a judicial discretion which must be exercised having regard to this particular child in his particular circumstances.

I agree with those observations.

[13] At [19] Judge Russell noted a number of matters needed to be considered:

(a) It must be shown the proceedings were clearly untenable, with little prospect of success. In such circumstances it would be wrong to allow the application to continue or to waste Court resources;

(b) If there was shown a reasonable basis for an application, then it should be permitted to proceed;

(c) When considering whether to strike out an application, an assumption should be made the applicant was able to make out the factual allegations pleaded provided those allegations were based on evidence which was reasonably relevant and able to be proved. Such evidence should be construed in a way which was favourable to the applicant.

[14] When considering the application of s 140, the Court must always keep in mind the welfare and best interests of the children being the paramount consideration. This is emphasised by s 140(a), where the Court must be clearly satisfied the continuation of proceedings would be "*clearly contrary to the welfare and best interests of the child*."

[15] In *Chief Executive of the Ministry of Social Development v Shandey* [2015] NZFC 1728, the Court was concerned with a similar provision in s 206B Children, Young Persons, and Their Families Act 1989. The Court referred to the "New Zealand Oxford English Dictionary" definition of "clearly" as: *the need for a distinct, unambiguous, manifest case or one which is not confused or doubtful*.

[16] In *Holden v Foote* (HC Christchurch CIV-2010-409-955, 3 September 2010), Panckhurst J noted there was a considerable overlap between the alternative grounds for dismissal in s 140(a) and (b). He stressed the requirements of s 140 pose a significant threshold and that dismissal of a proceeding is always a serious step.

Views of the Children and Analysis

Application for Contact with Asha

[17] Mr Reid filed a comprehensive report 24 March 2016. Referring to Asha, Mr Reid reported she described being happy at home and happy at school and did not want those constants in her life to change. Her position relating to contact and her relationship with the respondent had not changed and, if anything, her views had got stronger. Before the respondent was sentenced to imprisonment in February 2016 she had hardly seen him, and she had given up attending contact a long time ago. She had no wish to see or have a relationship with the respondent upon his release from prison. She observed if the Court made an order providing for such contact to occur, she would have to be physically compelled to attend contact and, even then, unless she was restrained, she would leave.

[18] While Asha did not foresee a time when her views might change, she indicated that should this happen, she would talk to the applicant about it and, through the applicant, would establish some kind of initial contact with the respondent. She had absolute confidence in the applicant's ability to support her wishes and made it clear the applicant had always supported whatever relationship she said she wanted to have with the respondent. On this basis, she saw no need for the Court to make any orders. She was happy for the proceedings relating to her to come to an end.

[19] When I reviewed the file it is clear from the reports filed by Mr Reid, Asha has been consistent in her views. She is now aged 14, and her views must be given considerable weight. The impression I have from Mr Reid's reports is that Asha is mature and has given matters serious consideration.

[20] At the submissions hearing the respondent advised he respected Asha's views and indicated he would not proceed with his application for contact with her. He emphasised "*the door would always be open*".

[21] Having regard to the factors I have set out relating to Asha's views, I am satisfied in terms of s 140(a) that the continuation of the application for contact with Asha would be clearly contrary to her welfare and best interests. The respondent appears to have recognised the reality of the situation from Asha's perspective. It is sad this situation has resulted, but when matters are viewed objectively, this situation has come about directly because of the actions of the respondent. In that context I note the circumstances which led to the protection order being made in August 2012 and his subsequent convictions for breaching this order on numerous occasions.

[22] The respondent's offending does raise serious questions about his inability to focus on the welfare and best interests of the children. As I have noted, he has expressed remorse for his actions in the past but has continued to breach the order. He has filed numerous memoranda in Court and with Lawyer for Child setting out his position. The significant theme which emerges from the memoranda filed by him is that he is entirely focused on his own needs; he shows no insight into the needs of his children, and in particular how his conduct has impacted adversely on their welfare and best interests.

Decision – Contact with Asha

[23] I make an order pursuant to s 140(a) dismissing the respondent's application for contact with Asha.

[24] I note the applicant has supported Asha's position. I am satisfied if Asha does express a wish at some subsequent time to have contact with the respondent, then the applicant will support that contact.

Application for Contact with Martin

[25] Mr Reid reported extensively on views expressed by Martin. At paragraph 17 of his report 25 March 2016 he summarised Martin's views as follows:

> 17.1 He did not want to express a choice as to which parent he lived with, but he accepted it as being unlikely that the Court would allow him to live with his father at this time.

> 17.2 Ideally he would be able to see more of his dad when he was released from prison than he had been at the time that his contact stopped when his father had been remanded in custody.
>
> 17.3 That if contact could not increase (and again Martin understood that this was unlikely), he would want it to continue as it was before his father had been remanded in custody.
>
> 17.4 If contact has to be supervised (and Martin understood that for reasons of trust that this may be considered necessary), he would want to see his dad as much as possible and also for Ms B…. to supervise the contact.
>
> 17.4 Should that be considered necessary, he would also want the supervision to be for a finite period of time and to move on to unsupervised contact as soon as possible. He would also be sad and disappointed if the Court directed supervision.
>
> 17.6 The worst outcome possible from Martin's perspective would be for the Court to suspend contact or order that no contact could occur – whether that be for a defined period of time or indefinitely. If that happened he would be sad, disappointed and angry.

[26] At the submissions hearing the respondent confirmed he wishes to have ongoing contact with Martin. He maintained there is a close relationship with him.

[27] The applicant accepted Martin does want to have contact with the respondent. She had taken into account his views as recorded in Mr Reid's report 24 March 2016. She remained concerned, however, the respondent was still focused on his own needs. While Martin does enjoy contact with the respondent, she was concerned about the respondent's instability; in the past he had worked for extended periods overseas and at times had been imprisoned in New Zealand following convictions for breach of the protection order.

[28] The applicant was further concerned if there was to be ongoing contact, it needed to be supervised to safeguard against inappropriate discussions between the respondent and Martin. She did not want Martin's placement with her and her husband to be undermined by the actions of the respondent. Given those concerns, she maintained all contact should be supervised.

[29] The applicant felt at this stage, while the respondent was in prison, contact should take place by way of phone calls and letters. She did not feel comfortable

with Martin visiting the respondent in prison. Martin has a mobile phone. All letters sent by the respondent to Martin were vetted by the applicant.

[30] While Martin had made it clear in his views he wanted ongoing contact with the respondent, Mr Reid stressed the need for caution when weighing Martin's views. He considered the following factors needed to be taken into account:

1. Over time Martin had changed his views about contact with his father. These changes effectively mirrored the nature of the relationship/contact with the respondent at those times.

2. There had been a degree of influence on Martin arising out of the respondent's conduct, whether that was intentional or not.

3. Martin was only aged 11 years. For the majority of his lifetime, his life had been subject to conflict between his parents. Over time he had become aware of the respondent's expectations of him. Against that, he had the security of care provided by the applicant. Given the ongoing nature of the conflict, Martin was caught in the middle and was not entirely sure of his position.

4. Martin appreciated his wish for longer periods of contact was not going to happen in the foreseeable future. He understood the respondent had been imprisoned for breaching the protection order and he knew there were issues of trust relating to the respondent's conduct.

[31] When I weighed Martin's views, having regard to the matters set out in Mr Reid's report 24 March 2016 and after hearing submissions, I was satisfied the respondent's application for contact with Martin should not be dismissed at this stage. It is clear Martin has enjoyed contact in the past. The respondent has throughout expressed his commitment to maintaining a relationship with Martin and has given numerous assurances he would not do anything to harm Martin.

[32] For reasons I have already set out regarding the credibility of the respondent's assurances, the Court cannot place any weight on assurances given by the respondent. He must understand his credibility has been undermined by his own actions, particularly arising out of the ongoing breaches of the protection order.

[33] At this stage I consider the contact between Martin and the respondent does need to be strictly supervised.

[34] While the respondent remains in prison, I am satisfied contact can occur by way of correspondence and by telephone. All correspondence can be vetted by the applicant, and if she has any concerns about the contents of any letter sent by the respondent, then she is entitled to withhold that letter.

[35] There is an issue about the monitoring of telephone contact. Martin has his own cellphone and would be able to talk to the respondent, it appears, each Sunday for approximately 10 minutes. In his submissions Mr Reid raised concerns about monitoring telephone contact. He submitted if the applicant detected Martin was being upset by telephone discussions with the respondent, then such telephone discussions should cease.

[36] There has been concern throughout about the respondent's inability to manage his own behaviour. As I have noted, he lacks insight into how his behaviour affects the children. He must understand the Court will not tolerate a situation where Martin's placement with the applicant is undermined by his behaviour.

[37] The issue of ongoing contact will need to be reviewed once the respondent is released from prison. At this stage he is eligible for release about May 2016. As I have noted, however, he is due to appear on 7 April 2016 on further charges relating to breach of the protection order. If he is convicted of those breaches of the protection order, he may face a further term of imprisonment which may be cumulative on the existing sentence of imprisonment.

Decision – Contact with Martin

[38] I have determined contact between Martin and the respondent is to occur on the following basis:

(a) The respondent is to have contact with Martin by letter to be vetted by the applicant, who will have complete discretion to withhold such letter if she considers the contents of the letter to be inappropriate.

(b) The respondent is to have telephone contact with Martin each Sunday morning for 10 minutes subject to the condition if the applicant considers such telephone contact is causing any distress to Martin and is unsettling him, then such telephone contact will be terminated.

(c) A judicial conference is to be convened upon the respondent's release from prison to determine how ongoing contact is to occur.

I extend Mr Reid's appointment to monitor ongoing contact pending the release of the respondent from prison.

Issues of Concern

[39] It is important the respondent understands that the Court will be monitoring his actions closely. Mr Reid was concerned that despite warnings given by him to the respondent about breaching the protection order, the respondent had continued to behave in such a way that he was convicted subsequently for breaching the protection order on three occasions and he was sentenced to imprisonment for 18 months.

[40] There is concern if there are further breaches of the protection order by the respondent, this will directly impact on the welfare and best interests of Martin. What the respondent must understand is that if he persists in breaching the protection order, such behaviour will raise serious questions about his ability to promote the welfare and best interests of Martin. His ongoing behaviour must demonstrate he is prepared to comply with the protection order. He is put on notice by the Court that he must accept responsibility for his actions. As I have noted, it has been a theme in all the memoranda filed by him the respondent does not accept any responsibility for his behaviour except at times when he has been convicted for breaching the protection order. At times of sentencing he has expressed remorse, but his history shows he has continued to breach the protection order.

[41] That situation cannot carry on. If the respondent continues to breach the protection order, it is inevitable a point will be reached where the Court may have no

option but to terminate contact and direct that he file no further applications under the Care of Children Act. That is a serious step to take, but the Court does have that power where it is satisfied the welfare and best interests of the child require contact between the child and a parent to be terminated.

[42] I have recorded these concerns particularly because I am concerned the respondent continues to make inquiries which appear to be focused on having the applicant removed from her employment, claiming he has to make full disclosure of events leading to his convictions when seeking employment. In the past he has been warned that such actions may well result in him breaching the protection order. If he persists in this conduct and, in particular, continues to make inquiries relating to the applicant, he is likely to face further charges of breaching the protection order. Having regard to his history of breaching the order, it is inevitable, in my view, if he is convicted he will face further lengthy sentences of imprisonment. Such actions would also have significant implications for ongoing contact with Martin.

[43] For far too long the children have been exposed to the adverse effects of the respondent's behaviour. This has accounted for the complete breakdown in his relationship with Asha. It is incumbent on the respondent to ensure the situation is not repeated with Martin.

A P Walsh
Family Court Judge

Signed at am/pm on day of April 2016