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**IN THE FAMILY COURT
AT HAMILTON**

**FAM-2013-019-000008
FAM-2015-019-000130
[2016] NZFC 3000**

IN THE MATTER OF	THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989
BETWEEN	MN Applicant
AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT First Respondent
AND	RH Second Respondent
AND	OH BORN ON [DATE DELETED] 2006 IH BORN ON [DATE DELETED] 2001 Children or Young Persons the application is about

Hearing: 7-8 April 2016

Appearances: D Mayall and S Cousins for the Applicant
T Tran on behalf of L Pepperell for the Chief Executive
Second Respondent appears in Person
N Palmer as Lawyer for the Children

Judgment: 15 April 2016 at 4.30 pm

RESERVED JUDGMENT OF JUDGE D R BROWN

[1] The mother of two children now aged nine and 14 years, taken from her care three years ago, applies for their return from their present Child, Youth & Family (“CYF”) foster homes.

Issues

[2] Should the custody order in favour of Child, Youth and Family be discharged.

[3] If not, what contact is the children’s mother to have with them.

Background and history

[4] IH is the 15 year old daughter and OH the nine year old son of the applicant MN and the second respondent RH. On 4 January 2014 CYF began proceedings for a declaration that the children were in need of care and protection and for a custody order pending determination of those proceedings. At the date of its application CYF had received 27 notifications in respect of MN-RH children. At the date of the application, Mr RH was recorded in police records as involved in 52 separate domestic dispute incidents over the past 14 years and Ms MN in 59 (In the majority of cases these are the same incidents with Ms MN and Mr RH listed variously as offender, complainant, victim or suspect.)

[5] At the date that CYF took action, Ms MN and Mr RH had not been living together for more than a year. A few days before, at a drunken gathering at Ms MN’s home, her oldest son PN had had his eye ruptured from punches from an uncle. On a visit to follow up this issue, CYF found that the children’s older sister AN was still living in the family home, despite a CYF request that she live elsewhere: AN had earlier been the subject of a neighbour complaint that she had been handling OH very roughly, if not physically abusing him and she now had children of her own in respect of whom CYF had been receiving complaints.

[6] Although Ms MN disputes that this was literally so, neighbours would have experienced the family home as a gang house. From Ms MN's perspective, she was struggling to control PN (who had appeared in the Youth Court on charges including aggravated robbery) and PN was allowing onto the property against her wishes associates who were, at the least, gang affiliated.

[7] Over the past two years CYF had been receiving complaints and information that IH was not being supervised. At one stage she appeared to be drifting innocently into a place of neighbourhood child sexual abuse risk. There is a general sense of her wandering the neighbourhood without adult supervision, interest or concern.

[8] It is also clear that the home was a place of frequent parties and very significant alcohol use. Social workers recorded an impression that Ms MN was drinking every day of the week. Visiting members of the Hamilton Child Protection Team experienced her as under the influence of alcohol when they called to request permission to interview IH about the risk of sexual abuse to which she had been apparently exposed. A school principal who brought IH home after family had failed to collect her when she was stood down from school could get no answer to his door knock but could see Ms MN, whom he thought was "spaced out", on the couch, with a young child wandering around the room.

[9] IH herself ingenuously told social workers of her mother's extensive use of alcohol. She also spoke of an uncle assaulting and bruising her father during a party at the home.

[10] A family group conference shortly after the children were uplifted recorded an agreement that the children were in need of care and protection and that there should and would be a custody order placing the children in the custody of two older family members who had been looking after them since they were uplifted.

[11] The order eventually made by the Court (16 September 2013) was an order placing the children in the custody of the Chief Executive. The children's parents did not ultimately oppose the order but the presiding Judge noted that their mother

“wishes the children to return to her care and is intending to file a s 125 application in that regard”.

[12] The children remained in their original whānau placement for only one further month. Their caregivers then advised CYF that they were unable to care for the children on a permanent basis. Attempts to arrange another whānau caregiver failed. The children were then placed with separate service caregivers: this change was considered in OH’s interests as he was being bullied and excessively controlled by his older sister.

[13] OH and IH were placed with their present caregivers in January and August 2014 respectively.

[14] Contact between the children and their parents has become problematic. They have not seen each other since May 2015 when CYF organised for the children to attend an uncle’s tangi at [location deleted]. Before that date there had been continual exasperation for both the parents and for CYF in a fruitless search for a whānau member who could supervise contact. A number of prospects were suggested and assessed but none was approved: the essential reason was that all the persons proposed had previous criminal convictions. In the absence of a suitable supervisor, CYF have fallen back to proposing contact at a supervised contact centre. Ms MN has refused to take that up.

The children’s positions

[15] Ms Palmer reported that she had met with OH and had a private discussion with him. He is in his second season of hockey and “doing extremely well”. Ms Palmer said that “he was proud to show me his hockey sticks”. She continued, “He is doing good at school; his reading”. Some improvement could be made with maths and the caregiver is helping with some mathematic games in the evening. OH has a strong attachment to his caregiver. He calls the other child in the placement his brother. He talks positively about the family members in his placement.

[16] Ms Palmer reported that OH was not sure why he had not seen his parents. He would like to see them:

He would prefer someone that he knows is there with him and he would like to know the time that he would have to stay with mum and dad. I asked him of his views on if he had to spend some overnight time with mum. OH remained non-verbal. He presented as thoughtful and a little bit anxious and decided he did not want to give an answer....OH informs he is safe where he is. He likes staying where he is and he doesn't know much about where mum and dad live.

[17] Ms Palmer reported that IH was attending college:

She was proud to say that she has a 98 percent attendance record. The one thing that she says she was away [for] was athletics. She is enthusiastic about school. She loves dance, she loves music and she likes reading.

[18] Ms Palmer reported:

IH would like to have contact with mum and dad. I discussed with IH the prospect if it was a supervised contact and explained what a formal centre, supervised centre was about. IH told me that she knows her mum doesn't want to go to a place like that. IH herself wouldn't care as long as she got to see mum. IH is aware that there needs to be a supervisor for her contact. IH herself feels that she would be okay with mum if there was no supervisor there.

[19] Ms Palmer reported that in terms of contact, IH had expressed:

She would like to know that mum is not drunk. She would like to know where mum lives and who stays there. IH recalled when she lived with mum lots of other people came round drunk and had parties...IH is worried that things haven't changed for her mum. IH would only like to spend time with mum during the day and she wouldn't want to stay overnight. IH did say she thought that might change after having some visits with mum and then she would get an idea of where she is living and if she is drinking or not.

[20] Ms Palmer asked IH how she would feel if she had to live with mum. She recorded that IH responded that she did not think she was ready for that because she simply didn't know what was happening with mum. In this discussion IH said that she was closer to her father and she would like to live with him if she could.

Ms MN's case

[21] In her affidavit (19 February 2015) in support of her application, Ms MN said she was living at [address deleted] with a Mr JD (“a cousin to both my parents”). The house had two bedrooms but she would look for a three bedroom house for her and the two children.

[22] Ms MN was able to display a certificate of participation and competency in a “healthcare course” and a New Zealand Red Cross first aid certificate.

[23] Ms MN said she had “secured employed (sic) caring for the elderly and disabled people in the community”. She had “a job interview on 20 February for employment in the healthcare industry”.

[24] Ms MN said she had sought “counselling for my alleged alcohol use”. She had talked for about two hours with a counsellor and had been told that she did not fit the criteria and that she did not have any issues with alcohol. She said that she did not often drink these days and “might drink a six pack of four percent beer at a barbeque or on the occasional Saturday night”.

[25] Ms MN said “My lifestyle has completely changed from what it was when the children were removed from my care. Looking back I can accept the children were not living in the best environment they should have been living in.” Her older son PN was no longer living with her.

[26] She had attended the HAIP Maori women’s programme and was able to attach a completion certificate.

[27] Significantly, Ms MN said that in the two years since the children had been removed from her care, the police have not been called to her addresses.

[28] Eight months’ later, Ms MN filed a second affidavit, chiefly dealing with issues of contact supervision, but saying in regard to her current living arrangements, “I am currently living with HE and her son TE. We live in a two bedroom state home in Hamilton. HE has turned the lounge into

her bedroom. I accept that if the children are returned into my care, I would need to find more suitable accommodation so that the children can have their own room. I am currently receiving a Jobseeker benefit from WINZ. I am currently looking for work.”

[29] Ms MN updated her position immediately before hearing. She said she was “currently living by myself in a three bedroom home in Dinsdale. I have been residing at this house for approximately three months and although this was only meant to be short term accommodation, I am currently organising with the landlord to stay at this house long term. Unfortunately I am still unemployed and still on the Jobseeker benefit”.

[30] Ms MN renewed her statement that there had been no police callouts to her household since before the children were removed from her care. She added that she and Mr RH were now grandparents:

We have both ‘grown up’ and no longer use violence towards each other. I would estimate that we would see each other several times each week. These interactions are civil and we discuss the children. We are friends and there is no animosity between RH and I.

[31] Of her use of alcohol, Ms MN said:

Throughout this proceeding my consumption of alcohol has been raised as a concern and a reason for the children being removed from my care. I confirm the contents of my previous affidavits. I have made drastic changes to my lifestyle. When I was younger I was consuming significantly more alcohol and to some degree I accept that I led a party lifestyle. I no longer consume alcohol to the same extent that I used to consume alcohol, nor do I live a party lifestyle. I accept that I drink socially on some occasions. For example, in the summer, whilst the weather is fine I would drink a 12 pack of beer throughout the day whilst I was working outside doing the gardens, the lawns and making dinner. However during the winter I would drink very little alcohol. I may have a bottle of beer or a glass of wine over dinner on the odd occasion but that is certainly not what I used to consume. During a weekend I would drink socially at family gatherings but not to excess or until I am intoxicated.

Mr RH’s position

[32] Mr RH supports Ms MN.

[33] I thought Mr RH an honest person. I believed him when he said that he had seen “the changes” in Ms MN over the last three years, especially the last year. “I have seen the changes in her from her alcohol drinking and, and her responsibility she’s got, not getting any younger, and all that”.

[34] Mr RH said that to his regret he could not say he was “stable”.

The Law

[35] The primary application is the application to discharge the order in favour of CYF under the Children, Young Persons, and Their Families Act. The principles under which that application is to be decided are set out in s 5 of that Act:

5 Principles to be applied in exercise of powers conferred by this Act

Subject to section 6 of this Act, any Court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:

- (a) The principle that, wherever possible, a child's or young person's family, whānau, hapū, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whānau, hapū, iwi, and family group:
- (b) The principle that, wherever possible, the relationship between a child or young person and his or her family, whānau, hapū, iwi, and family group should be maintained and strengthened:
- (c) The principle that consideration must always be given to how a decision affecting a child or young person will affect—
 - (i) The welfare of that child or young person; and
 - (ii) The stability of that child's or young person's family, whānau, hapū, iwi, and family group:
- (d) The principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:
- (e) The principle that endeavours should be made to obtain the support of—
 - (i) The parents or guardians or other persons having the care of a child or young person; and

(ii) The child or young person himself or herself—

to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:

- (f) The principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.
- (g) the principle that decisions affecting a child or young person should be made by adopting a holistic approach that takes into consideration, without limitation, the child's or young person's age, identity, cultural connections, education, and health.

[36] Section 5 is subordinate to s 6, which provides:

6 Welfare and interests of child or young person paramount

In all matters relating to the administration or application of this Act (other than Parts 4 and 5 and sections 351 to 360), the welfare and interests of the child or young person shall be the first and paramount consideration, having regard to the principles set out in sections 5 and 13 of this Act.

[37] Section 13 sets out additional specific principles relating to care and protection proceedings, but these are subject to the overriding principles of s 5 and the paramountcy principle of s 6.

[38] In *B v DSW* 16 FRNZ 522, the Court of Appeal said of the principles:

They are all matters which must be considered in each case, but what relevance and importance they will each have in individual circumstances will be a matter for individual assessment.

Discussion and decision

[39] A Judge must take a case as he finds it.

[40] Here my independent evidence about Ms MN's situation is very scant. I have no social worker's report under s 132 or psychologist's report under s 133. The CYF social worker who managed the case for a considerable period has left New Zealand. In any event there has been little contact with CYF and Ms MN over the past year or so because Ms MN has declined to see the children at a supervised contact centre, there being no approved whānau supervisor to meet the CYF position that contact requires to be supervised.

[41] Ms MN has turned her life around insofar as there has been no police involvement with her in respect of domestic violence since before the children were removed. She has continued to be involved in serious traffic offences but she now has her licence back.

[42] Her living situation is cloudy. She has had frequent changes of address. Her present economic status as a beneficiary undoubtedly means her choices are limited. But the fact remains that as at the date of hearing, her ability to meet the children's housing needs is uncertain.

[43] My sense of Ms MN's alcohol use is that it has changed but there are still grounds for concern. I have the sense of a deeply ingrained involvement with alcohol on a long term basis rather than party binge drinking. Ms MN's affidavit statement that she would drink a dozen beers through a summer day's gardening was not ultimately disowned during cross-examination. I accept that Ms MN believes that the counsellor she consulted gave her an effective all clear on the issue of alcohol use but this assessment was based on her self-report and may have also reflected the counsellor's sense of a lack of readiness to change.

[44] The children's wariness about their future involvement with their mother is palpable. It reflects their memories of their lives before foster care and that they have heard nothing, or at least nothing reassuring, about her present situation.

[45] Each of these children is now stable and is achieving. Of OH's present world his school wrote "His caregiver seems to go the extra mile for him, such as making sure he has the right gear for his hockey and attends the games and cheers for him on the sideline. (She) was also unwell on the night of our concert but rang the teacher beforehand with the arrangements for getting him to and from the venue of the concert."

[46] IH's social worker wrote of her late last year "With regards to IH, she is in a settled and stable placement and she has a good relationship with her caregivers, who are prepared to care for her until she reaches independence. IH is enrolled at [name of school deleted] and is attaining expected levels in all areas

of her education. She also attends hip-hop classes. Having been away from her parents, IH is now able to identify that living with her parents was not a positive influence on her life and development. IH is happy in her placement and at school and accepts that she cannot return to the care of Ms MN. Likewise with OH, I believe that if IH were to be returned to Ms MN, the progress she has made in her life would be negated.”

[47] On the limited material available to me, I am not persuaded that the risk of returning them to their mother can be justified as being in their best interests.

[48] The application to discharge the custody order in favour of the Chief Executive is therefore dismissed.

[49] It has been humanly assumed by Ms MN and Mr RH that in the present proceedings I have a legal jurisdiction to decide the issue of their contact. There is however no application for an access order under the Children, Young Persons and Their Families Act and I have no formal jurisdiction. My suggestion to the social worker is that, assuming that Ms MN and Mr RH are prepared to actively cooperate, there is a case to consider now moving in the direction of unsupervised public place contact, but if, and only if, there is a credible agreement from the parents to actively support, and not to undermine, their present placements.

D R Brown
Family Court Judge