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**IN THE FAMILY COURT
AT TIMARU**

**FAM-2016-009-000019
[2016] NZFC 4561**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	PAUL NILE Applicant
AND	KIRSTEN HAYWARD First Respondent
AND	EMMETT WHEELOCK Second Respondent

Hearing: 1 June 2016

Appearances: G Keenan for the Applicant
C O'Connor for the First Respondent
Second Respondent Appears in Person
C Doyle as Lawyer for the Children

Judgment: 1 June 2016

ORAL JUDGMENT OF JUDGE M B T TURNER

[1] Before me are proceedings in respect of Joe seven years of age and Clara three and a half years of age. Joe's parents are Ms Hayward and Mr Wheelock who resides in Christchurch. Clara is the child of Ms Hayward and Mr Nile.

Applications

[2] The proceedings before the Court involve various applications filed by Ms Hayward (the mother) and Mr Nile. I summarise those applications in this way.

[3] Mr Nile filed an application under the Care of Children Act 2004 seeking appointment as additional guardian of Joe. He and Ms Hayward have been living in a relationship for about five years and are the parents of Clara. He considered it appropriate that his application be made so as to recognise his role in Joe's life. As at today's date Joe's father has not been served with the application. Since the application was filed the parties separated, reconciled and have separated again. When the matter was first called before me on Monday Mr Nile indicated he would discontinue the application. I formally discontinue that application.

[4] The second application was also filed by Ms Hayward (against Mr Nile) and is under the Domestic Violence Act 1995. A temporary protection order was made in her favour on 21 December 2015. The parties had separated shortly beforehand. Mr Nile filed a notice of intention to appear on 15 January, and that was followed by a further application by Ms Hayward seeking to discharge the temporary protection order and discontinue her application for a final order. That arose as a consequence of the parties reconciling.

[5] The matter was before the Court on 1 March and adjourned to 31 May for further consideration. On or about 28 May the parties separated again. Ms Hayward no longer seeks to discharge the temporary protection order. She seeks a final order. She now seeks leave to discontinue her applications; leave is granted to do so.

[6] On 30 May 2016 Ms Hayward applied without notice under the Care of Children Act for an interim parenting order seeking day-to-day care of both of the children, and an order that Mr Nile have supervised contact. The matter was dealt with on the e-duty platform. An interim parenting order was made granting the mother day-to-day care and Mr Nile contact with both of the children supervised by a person approved of by the Court. That order was made notwithstanding Mr Nile is not Joe's father.

[7] Ms Hayward's application was filed as a consequence of the parties' separation on 27/28 May in which she alleges that Mr Nile raped her on 27 May, and on 28 May Mr Nile drove dangerously with Clara in the car.

[8] I was advised of the without notice orders as the case was called on Monday. I adjourned the proceedings to today's date.

[9] Firstly, this morning Mr Nile has filed an application under the Care of Children Act seeking a variation of the interim parenting order to permit him to have supervised contact with both of the children, and an application to be appointed Joe's additional guardian. That application has yet to be served on the mother and Mr Wheelock as Joe's father.

Today's Hearing – Mr Wheelock

[10] I thank Mr Wheelock, Joe's father, who has travelled from Christchurch to participate in today's hearing. He has yet to be served with all of the applications and I have encouraged him to take legal advice once that has happened. He has, however, told me that he opposes Mr Nile's application for appointment as additional guardian of Joe. If he wishes to participate in the proceedings he will need to take formal steps in that regard.

Mr Nile and Ms Hayward – General Matters

[11] Today's hearing has been conducted in a semi-formal way and an inquisitorial rather than an adversarial manner. I have spoken directly with the parties and have heard from all counsel and Mr Wheelock.

[12] By way of general background it appears that the parties lived together, that is Mr Nile and Ms Hayward lived together for about five years in Christchurch, Ashburton and Timaru. There have been two periods in which they lived in Timaru. During the course of their relationship they have lived at least half of the time in this area. They had been living in Timaru for about 12 months when they first separated late last year. Timaru is Mr Nile's family's place of residence. Ms Hayward's mother and sister live in the Christchurch area.

[13] When the parties separated late last year Mr Nile remained living in the family home, rented accommodation, and Ms Hayward and the children moved to Christchurch where she stayed with her mother for approximately two months. At that point the parties decided to reconcile and at the end of January 2016 Ms Hayward and the children returned to this area and the family home. They lived together until final separation on 28 May.

[14] At that point Ms Hayward moved from the home. She is currently residing in the Women's Refuge in Timaru as I understand it. That is temporary accommodation only. Earlier this week I was advised that Joe was still in Christchurch but he has returned to Timaru since then; thus the mother and the children are living in Timaru at this point at the Women's Refuge.

[15] In terms of the family home, that is rented at \$380 per week. It is a three bedroom home and plainly suitable for the mother and the children. The mother now receives a benefit from Work and Income New Zealand of about \$350 per week. If she was able to secure accommodation in this area she might be eligible for an accommodation allowance, but for Timaru she has been advised that the maximum amount payable is \$75 per week. She owns no assets. In fact, through the "no asset" procedure under the Insolvency Act she was bankrupted in November 2015, owing about \$12,000.

[16] The family home in Timaru is furnished. The furniture is owned by Mr Nile. It is subject to hire purchase and I am advised that the outgoings for those items is in the order of \$300 per week. Mr Nile is employed [employment details deleted] working in the Timaru area. He estimates that he earns about \$1000 net per week; \$380 is paid for rent on the (former family) home; about \$300 on the hire purchase commitments, and other usual household items (such as power, phone and the like) consume more money leaving about \$250 per week which he spends on food, fuel and other incidentals. At best he estimates he might have around \$40 per week left over for discretionary spending. Now that the parties have separated he will be liable for child support. No assessment has been undertaken but Mr Nile understands he could be liable for as much as \$250 per week.

[17] He too has significant debt, currently \$15,000 or thereabouts on the furniture I have mentioned. He was bankrupted in December 2015, a voluntary bankruptcy, he owing about \$45,000 in total to creditors. How he has managed to keep the current assets secured by hire purchase in the face of bankruptcy is unclear.

Options for the Children – Residence

[18] I am faced with the issue of where the children should reside in the interim while the Court looks at these matters. The mother's proposal is that she move with the children to Christchurch to live with her mother. Her mother rents a three bedroom property (from another family member) which also has a double sleep out attached. Currently living at the address are the maternal grandmother, a maternal aunt and her daughter aged five years. I am told they reside in the sleep out. That leaves two bedrooms spare for the mother, Joe and Clara.

[19] The mother's proposal is to move to Christchurch to live with the maternal grandmother while she looks for alternative accommodation. Mr Nile has some concerns about that environment. I am not in a position to assess that but if I permit the mother to move to Christchurch with the children a social worker can assess the home environment offered or proposed as I intend to direct a s 132 report.

[20] On the other hand, Mr Nile submits that the mother and children should remain in Timaru. That would permit him to have regular contact with them. Ideally he would like to see the children on a daily basis because the parties have lived together for lengthy periods over the last five years and he has actively been involved in the children's lives.

[21] In my discussions with him he did not appear to accept that there was a practical impediment to the mother and children remaining in this area, he advising that he was aware of a rental property in Timaru through the same agency which rented the former family home to the parties. He understood the rental to be about \$240 per week. It is unfurnished. His proposal would be that in some way "the rental" would be transferred, presumably so that the mother could live at the former family home, and Mr Nile would take the other address.

[22] I have not heard from the land agent as to whether this is a viable proposition nor whether there would be any fees incurred, but generally up to six weeks rent plus GST is required for rent in advance, bond and the letting fee. It is unclear how the parties could afford that, or how the mother could afford to pay \$380 per week rent on the former family home given her limited income and, if she was in the other property, how she could afford rent, power and usual costs associated with accommodation plus meet living expenses for herself and the children.

[23] Mr Nile's view of matters can perhaps best be summed up in this way. He told me that he considered it would be better for the mother and children to remain in the refuge than to live in Christchurch, particularly at the grandmother's house. It would be better in his view for the mother and children to live in a camping ground in Timaru than in Christchurch and better to live in a house bus if one was available. He drew the line at the mother and children living in a car.

[24] While Mr Nile's wish that the children should remain in this area so that he can have regular contact with them is entirely understandable he fails, in my view, to give adequate weight to the realities of the situation. Both parties have been bankrupted. On the face of it Mr Nile's income is adequate but entirely consumed by living expenses. Shortly he will be paying child support. The mother is also

bankrupted. She has no assets. At best her income is \$350 per week plus an accommodation allowance if one is granted to her.

[25] I must focus on the best interests and welfare of the children. On the information before me that demands that, on an interim basis, the children be permitted to relocate to Christchurch in the first instance to live at the maternal grandmother's address.

Interim Contact

[26] The second issue I need to consider is the father's interim contact with the children. Two aspects need to be considered. First, the existence of a protection order, and secondly the practical arrangements given that the father will be residing in Timaru and the mother and children in Christchurch.

[27] Insofar as the temporary protection order is concerned, serious allegations of violence have been made against the father, including the more recent allegation of sexual violence. In addition, I am told that Joe, in the course of discussions since the parties separated, has made allegations that Mr Nile hit or smacked him. I am advised that a formal notification has been made to the Ministry who is investigating the matter.

[28] Given the existence of the protection order and the allegations which have yet to be determined in this case, it is appropriate that Mr Nile's contact be supervised. He does not strenuously argue against that. In Christchurch an approved agency is [name of contact centre deleted]. I am unsure today whether [name of contact centre deleted] is available for weekend contact between Mr Nile and the children. Further inquiries will be made but my intention is to permit him contact at that venue, but grant leave to counsel to seek a variation in the event that [name of contact centre deleted] is unable to accommodate the direction and some other approved agency is available.

[29] Mr Nile seeks to have contact with both of the children. There is no challenge by the mother that Mr Nile should have contact supervised with Clara.

She opposes contact with Joe at this point. Lawyer for child's submission is that caution should be exercised in permitting Mr Nile contact with Joe, given first that he is not Joe's biological parent, and more importantly the issues which are being investigated as we speak.

[30] I have come to the view that Mr Nile should have contact with Clara but not Joe at this point. I place weight on the fact that Joe has expressed negative views of Mr Nile and there is an ongoing investigation of alleged physical abuse of Joe by Mr Nile. The position will need to be reviewed once that investigation is complete. I also attach some weight to the views of Joe's mother in reaching that determination.

Orders and Directions

[31] Against that background I make the following orders and directions:

- (a) I transfer all of the proceedings from the without notice track to the complex track.
- (b) I direct that all of the Care of Children Act proceedings be consolidated.
- (c) I direct a hearing on all matters. Accordingly, counsel may continue to act for the parties at all conferences, meetings and hearings.
- (d) I authorise lawyer for child to convene a round-table meeting, more than one if necessary, in an effort to resolve the issues of care and contact.
- (e) I direct the Registrar allocate a settlement conference, the date and time to be notified to parties and counsel in due course. The conference is to be held at the conclusion of the round-table meeting process and after the s 132 report, which I am about to direct, has been received. Memoranda are to be filed three days prior to the settlement conference setting out the parties' respective proposals.

- (f) I direct that a report from a social worker pursuant to s 132 of the Act be obtained. I ask that lawyer for child prepare the brief for the report in consultation with counsel. Once received the brief can be referred to me in chambers for approval.
- (g) I direct that all of the Care of Children Act proceedings be served on Mr Wheelock, Joe's father.
- (h) I reserve leave to counsel to seek the Court's further orders or directions on three days' notice in the meantime.

Interim Parenting Order

[32] I vary the interim parenting order made without notice on 30 May 2016 as follows:

- (a) The order is now to provide for the mother to have day-to-day care of the children on the condition that the children are to reside in the Christchurch or Timaru areas and are not to be moved from those areas without order of the Court.
- (b) The order is further varied to permit Mr Nile to have supervised contact with Clara. Contact is to occur by an approved agency, [name of contact centre deleted] in Christchurch, once a week, a Saturday if possible. The cost of contact is to be met by the State until further order pursuant to s 60 of the Care of Children Act. Leave is reserved to the parties to seek a variation of that arrangement in the event that [name of contact centre deleted] are unable to accommodate that contact. Contact is to commence this Saturday if possible.

[33] Mr Nile has asked whether it would be possible for him to see Clara today. She is in Timaru. I have heard from lawyer for child and lawyer for the mother in that regard. Both express reservations about the benefit of contact today particularly after what will be a two hour Court hearing where emotions are high. That is more

relevant given that Mr Nile is a very emotional man evidenced by his recent statements to lawyer for child, Court staff and to the mother that he wished to take his own life. In that regard the father has indicated he is seeing a counsellor. He will need to provide more information to the Court about that issue. I do not consider it would be in Clara's best interests and welfare for there to be contact today and I decline that request.

Domestic Violence Proceedings

[34] Previously I suspended the direction that the father attend a mandated programme and had adjourned the proceedings to permit the father to look for a non-Court mandated programme. I am advised that such a programme is not available. I therefore direct Mr Nile to attend a mandated programme. He is to remain in Court after this hearing while details of the programme are given to him. I have advised him of the serious consequences of failing to attend and complete the programme.

Directions – Domestic Violence Proceedings

[35] The applicant, Ms Hayward, is to file and serve all further affidavit evidence necessary to determine the domestic violence proceedings within 21 days.

[36] Mr Nile is to file and serve all further affidavit evidence necessary to determine the proceedings and in response to Ms Hayward's affidavits within 14 days of receipt.

[37] Ms Hayward may file and serve a reply to matters raised by Mr Nile's affidavit evidence within seven days of receipt.

[38] I direct that the Registrar allocate a one day fixture for these proceedings. No date is available today. I direct that three weeks before the allocated hearing date a pre-trial conference be convened by telephone to make final arrangements for the hearing of this case.

[39] No less than seven days prior to the fixture the parties may file and serve updating affidavit evidence covering any material changes of circumstances which have occurred between the date of the filing of their last affidavit and the date of hearing.

[40] At the hearing all evidence-in-chief will be the affidavit evidence filed. No further evidence-in-chief will be permitted without leave of the Court. The hearing will proceed by way of cross-examination of deponents and submissions.

[41] Ms Hayward is to file an agreed indexed paginated bundle of documents seven days prior to the hearing. The cost of that is to be shared between the parties.

[42] For the avoidance of doubt I confirm that lawyer for child's appointment is extended to cover these proceedings.

[43] Leave is reserved to any party to seek the Court's further orders or directions on five days' notice in the meantime.

M B T Turner
Family Court Judge