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**IN THE FAMILY COURT
AT NELSON**

**FAM-2009-042-000255
[2016] NZFC 4541**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	NINA NICHOLSON Applicant
AND	JACK EPIHA Respondent

Hearing: 31 May 2016

Appearances: C S Munro for the Applicant
A N Gulbransen for the Respondent
N J Grimes on behalf of M J Duggan as Lawyer for the Children

Judgment: 31 May 2016

ORAL JUDGMENT OF JUDGE R J RUSSELL

Introduction

[1] These are proceedings under the Care of Children Act 2004 for Georgia and Kayla Epiha. In particular it is a submissions only hearing which has been held today following Judge Grace's directions to determine the interim parenting arrangements leading up to what all counsel agree would be a three day hearing which will be needed to settle the framework of a final parenting order.

Background

[2] The position here is that on 20 October 2015 I addressed what was yet another round of litigation between these children's parents at a directions conference. The children had been subject to week about care arrangements which had been in place for the last preceding two or three years and both were complaining that the order had not worked for the children.

[3] I recorded then that Ms Nicholson sought to have the arrangements changed so that she would have the primary day-to-day care of the children and Mr Epiha would have contact with them each second weekend. There would be a sharing of the school term and Christmas holiday periods. Ms Nicholson complained about her inability to communicate effectively with Mr Epiha on parenting and guardianship issues which led to flow-on effects in terms of the children missing out on their activities when they were with their father.

[4] I noted Mr Epiha was similarly unhappy about the care arrangements. He complained about Ms Nicholson's inability to effectively communicate with him on parenting and guardianship issues. Communication provisions had not been working satisfactorily and the outcome sought by Mr Epiha was that he have the primary day-to-day care of the children and Ms Nicholson have contact every second weekend.

[5] After hearing from counsel I commissioned a s 133 psychological report from a Court-appointed psychologist and classified the case as a complex track case. The case was adjourned while Mr Martin Kelly was engaged and prepared a s 133 report.

The evidence/submissions

[6] I have had the benefit of reading the s 133 report in advance of today's hearing. It has not been tested by cross-examination which would occur at the substantive hearing. It has been completed and filed shortly following further applications filed by Mr Epiha.

[7] What has happened is that the parties elder child, Georgia, disclosed to her mother in mid-April that she had been abused by Mr Terry Whatnall, a person with whom the mother had been having a relationship with. Ms Nicholson acted immediately upon this disclosure and both her church and the police were advised. Charges against Mr Whatnall have been laid. I understand from submissions today that he has made a confession to the police and that charges are progressing their way through the criminal jurisdiction with reports being commissioned under the Criminal Procedure (Mentally Impaired Persons) Act 2003 on Mr Whatnall. The outcome of these charges is, at the moment, unknown.

[8] What is relevant is that bail conditions prevent any contact between Mr Whatnall and Ms Nicholson and the children. Upon becoming aware that such abuse occurred Mr Epiha has applied for and obtained an interim parenting order on a without notice basis. Judge Matheson who dealt with those applications took a justifiably cautious approach and determined that any contact between the children and their mother needed to be supervised.

[9] Two supervisors have been involved in supervising contact with Ms Nicholson. There has been seemingly no set pattern for this contact. It has been infrequent and sporadic.

[10] Mr Epiha's evidence is that he received a text message from a Mr Patrick James which could be interpreted to show Ms Nicholson was continuing to associate with Mr Whatnall. This is denied by Ms Nicholson. Mrs Grimes, appearing on behalf of Ms Duggan, has drawn my attention to some susceptibility around this evidence and she has submitted I should treat it with some caution.

[11] Ms Gulbransen submitted that between now and the three day hearing the status quo for the children should continue as per Judge Matheson's decision in that they should continue to reside in the primary day-to-day care of their father and have supervised contact with their mother.

[12] Ms Munro submitted that the need for caution has passed, noting that the children's interviews have been undertaken and admissions have been apparently made by Mr Whatnall. She seeks the week about seven day care arrangement be restored. She submits this is in accordance with the established legal principles. This outcome is also sought by Ms Duggan and Mrs Grimes on behalf of the children.

[13] As to the views of the children, I do not have any up-to-date views of what the children currently think. Counsel are quite rightly cautious about over-interviewing the children and thereby run the risk of them being subject to what is known as "systemic abuse".

[14] Mrs Grimes noted that Georgia needs counselling and her submission is that the status quo of the earlier parenting order should be restored with conditions attaching to what Ms Nicholson can and cannot do with the children during the periods they are in her care.

[15] Mrs Grimes pointed out that Child, Youth and Family's position as to whether there would be any care and protection issues for the children if they were returned to their mother's care, is unknown. There are no s 132 social work reports.

The law

[16] I need to make orders which are in the welfare and best interests of both children. That is the first and paramount consideration. I accept the dicta set out by the High Court in *Fletcher v McMillan* [1996] 2 NZLR 491, [1996] NZFLR 302 and *Sime v Redshaw* [2005] NZFLR 511 that the status quo for children should be restored to the extent possible with the over-arching provision that it must be in the welfare and best interests of the children to do so.

Discussion

[17] I need to have regard to the children's view under s 6 when making orders. With Georgia at the age of nearly 12 and Kayla who is aged seven and [age details deleted], their views are important, but will not be determinative of the outcome. Georgia's views, given her age, will be more determinative than those held by Kayla although neither party advocates that the children have split times with their parents.

[18] I have concluded, on the information available to me, the need for formal supervision of Ms Nicholson's contact of the children has past. It is common practice when such abuse allegations are made for Judges to take a cautious approach until the position can be properly investigated, for example, by lawyers being appointed to represent the children and to investigate and report and for Child, Youth and Family and any police inquiries to be completed and the results of that known. In this case all of this has now occurred except the outcome of the criminal charges.

[19] I have specifically ascertained from Ms Munro Ms Nicholson's position with regard to her relationship with Mr Whatnall and also about the allegations which have been made by Georgia. The submission is that Ms Nicholson does not intend to resume any relationship with Mr Whatnall. Indeed she would be very unwise to do so if she wants to have the care of her children given the abuse allegations and the subsequent admissions of abuse which have been made.

[20] I also wanted to know whether Ms Nicholson believes what Georgia has said and disclosed, given this has occurred while Georgia was in her care. To this question I have the evidence and the submission that Ms Nicholson does accept the truth of what Georgia has said. This is important because Georgia does not need to be challenged or questioned or asked to recount in any way what she has already said to the police and to Child, Youth and Family. Her evidence will be recorded in DVD form, transcripts of her evidence will be prepared, and she may need to give evidence at a subsequent hearing. Ms Nicholson will do herself no favours at all if she attempts to discuss what has happened in terms of the allegations that have been

made with her daughter. This should be done through a professional abuse counsellor and the parties need to take steps to see that this occurs.

[21] The other issue that has concerned me is the traumatic effect the abuse will have had on Georgia. As I have noted at the moment she has not, it seems, been referred for any specialist counselling. The abuse has occurred while she is in her mother's care although I am not exactly clear as to where, but I am concerned about the effect of a full resumption of contact on Georgia and her general wellbeing where she will be going back into an environment she was living in when the abuse occurred.

[22] What I have concluded that there should be a resumption of the shared care arrangement which I am prepared to look at in two steps. The first step will be a five night/nine night fortnightly care arrangement. This will allow Mr Epiha to spend each second weekend with his children which he has wanted to do and will allow Ms Nicholson to spend the alternate weekends and have some school time with the children.

[23] I am going to impose a number of conditions to apply during the time Ms Nicholson has the children in her care and what she can and cannot do with them when they are in her care. She needs to follow those conditions to the letter because I make it clear that I have the ability to re-visit the terms of the parenting arrangements if she fails to comply with the terms of the order.

[24] I will leave with Ms Duggan and counsel the ability to address whether these conditions need to be modified or discharged and I will consider whether any further changes to the order need to be made at a further 30 minute submissions only hearing to be convened approximately two-three months from now.

[25] In this way there will not be any overly sudden changes for Georgia from what she has been used to since the interim orders were made in Mr Epiha's favour and she can transition back to a shared care type arrangement in a way that hopefully minimises the concerns which I have identified. Additionally her views, if necessary, can be ascertained by Ms Duggan and adjustments can be made to the

interim parenting regime in the period leading up to the substantive hearing by agreement or by a variation to the interim parenting order at the next submissions only hearing.

Outcomes and orders

[26] Against this background, I make the following orders and directions:

Commencing Thursday 2 June:

- (a) The interim parenting order made by Judge Matheson is varied to permit Ms Nicholson to have the care of both children for five nights each fortnightly cycle. The care periods are to commence Thursday afternoons through to Tuesday mornings
- (b) Mr Epiha shall have the care of the children for the balance of the time.
- (c) The following conditions shall attach to Ms Nicholson's care of the children:
 - (i) She is not to associate nor are the children to associate either directly or indirectly with Craig Whatnall.
 - (ii) She is not to discuss in any way either directly or indirectly the allegations Georgia has made against Mr Whatnall with Georgia or within the hearing of Georgia.
 - (iii) Unless Ms Duggan considers it appropriate Georgia is not to attend church activities in the care of Ms Nicholson. Her views about this issue should be ascertained. If she is agreeable to attend church then upon Ms Duggan confirming this, the condition can be discharged.

- (d) I adjourn these proceedings to a further submissions only hearing to be convened by the registrar in approximately two-three months from now. 30 minutes is to be allocated. The parties may file further evidence and make further submissions as to any changes to the interim parenting order that are sought at that time.
- (e) In respect of the substantive issues in the proceedings, I direct that the parties file all further affidavit evidence from themselves and any supporting witnesses within one month from today.
- (f) The parties are then given 14 days to file any evidence in reply. The applications filed by both parents are set down for hearing. Three days is to be allocated. The issue to be determined at the hearing is the framework of a final parenting order to be made for the children.
- (g) At the hearing of all evidence-in-chief will be by way of 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 the deponents and any submissions.
- (h) Not less than 14 days in advance of the allocated fixture, the parties may file and serve updating affidavit evidence covering any material changes of circumstance that have occurred between the date of the filing of their last affidavit and the date of hearing.
- (i) Not less than five days in advance of the hearing Ms Duggan may file an updated report on behalf of the children outlining their position and any views which need to be considered under s 6. If thought appropriate that the children see a Judge in chambers in advance of the hearing Ms Duggan is to make the appropriate arrangements with the registrar.
- (j) Ms Munro, being counsel for Ms Nicholson, as the original applicant is directed to file and serve a paginated bundle of documents two days

prior to the allocated fixture. The cost of that work is to be shared equally between the parties.

- (k) If it is considered necessary for Mr Kelly to update his s 133 psychological report this is to occur. If there are major or material changes to the children's circumstances then a written updated report is to be filed 21 days in advance of the allocated fixture, otherwise Mr Kelly will be given permission to orally update his report at the date of hearing.
- (l) These proceedings are now accordingly adjourned to the further submissions only hearing which I have directed. I reserve the right to modify these timetabling directions at this hearing.
- (m) Given Ms Duggan's absence, Mrs Grimes is authorised to advise the children of the outcome of these proceedings in an age-appropriate way in a manner she best determines is appropriate in the circumstances.
- (n) Leave is reserved to any party to seek the Court's further directions on three days' notice.

R J Russell
Family Court Judge