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**IN THE FAMILY COURT
AT INVERCARGILL**

**FAM-2013-012-000962
[2016] NZFC 3670**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN BEAU HIGGINS
 Applicant

AND SHANI THOMAS
 Respondent

Hearing: 28 April 2016

Appearances: A J Stevens for the Applicant
 V A Walsh for the Respondent
 G S Williamson as Lawyer for the Children

Judgment: 28 April 2016

ORAL JUDGMENT OF JUDGE C L COOK

[1] This is an interim oral decision in respect of the care arrangements for Bayze, whose date of birth is [date deleted] 2007, and Storm, whose date of birth is [date deleted] 2009.

[2] The current position is that the boys' are living with Mr Higgins in [name of town 1 deleted], just out of [location deleted].

[3] As indicated in my preliminary decision, Mr Higgins is not the natural father of Bayze but is considered to be the emotional parent or the parenting figure.

[4] There have been previous proceedings which have occurred in the [name of town 2 deleted] jurisdiction.

[5] Mr Higgins has had the care of the boys' since about November 2015. He obtained an interim parenting order on a without notice basis following a decision of His Honour Judge Grace where, in deciding the application on E-duty, he found that due to the allegations around the mother's mental health issues and potential suicide, the children would be put at risk until the matter is looked into. He therefore decided there should be an interim parenting order in favour of Mr Higgins. That position remains.

[6] Ms Thomas says there are no longer any risk issues for the children in her care and the status quo for the children in terms of being in her care, being at school in [name of town 2 deleted], having the benefit of extracurricular activities, and extended family and also their [sibling details deleted]), is all within the [name of town 2 deleted] area.

[7] Mr Higgins denies it is appropriate for the children to be returned to [name of town 2 deleted]. He says there are still ongoing risk issues due to a suicide attempt and the mental health of Ms Thomas.

Background

[8] The background to parties' relationship is that they met in 2007. They married in 2009. They separated in October 2013. A police safety order and

a protection order were made but discontinued against Mr Higgins in February of 2014. A further interim protection order was made but this was not made final.

[9] I have been provided with the decision of His Honour Judge Walsh, which is dated 1 May 2015, who dealt with whether the protection order should be made final. He found (para (22) of his decision) that:

Unequivocally, based on Beau's candid confessions that he has subjected Shani to domestic violence in all its forms, including economic control, verbal and physical abuse,"

[10] He found there was no longer a necessity for the protection order to be made final for the following reasons:

- (a) The time period that had elapsed since the domestic violence had occurred.
- (b) Mr Higgins was subject to a supervision order and one of the conditions was that he attend counselling to address violence issues.
- (c) There had been no reported breaches of the temporary protection order.
- (d) Under cross-examination, that Ms Thomas conceded that the relationship was volatile. It was a two-way street and the parties had been embroiled in arguments and disputes. However, Ms Thomas explained her acts of violence were in self-defence.

[11] His Honour also found, at para (28), there had been well-defined arrangements for unsupervised contact between Mr Higgins and Ms Thomas.

[12] The parties have previously lived in [name of town 3 deleted], [name of town 4 deleted] and [name of town 2 deleted]. There has been intervention from Child, Youth and Family Services and the children have been previously placed in care through the Department.

[13] As recently as 17 June 2015, there was a family group conference where the goal of the conference was that the children live in the safe, secure home with both parents, in an environment free from negative emotional impact, stay well connected with the wider family and set out a number of steps the parents were to take to ensure they both addressed issues for themselves and maintained a good relationship for the children.

[14] There has been a previous s 132 report in regard to matters in the [name of town 2 deleted] jurisdiction. That report is dated May 2015. That sets out that there has been a history between the parties of allegations of domestic violence from 2007. I note at page 4 of the report it sets out the history of domestic violence callouts from 2007 through to 2014, where there were five domestic violence callouts.

[15] That report concludes there had clearly been a number of issues between the parties in terms of substance abuse for both parents and the children had been exposed to family violence.

[16] There was also some concern in respect of that report that Nevada was reported to be scared of Mr Higgins. There had been a previous allegation of violence against Nevada by Mr Higgins, which was accepted in part by Mr Higgins.

[17] I have set this out to provide some background and flavour of the conflict which has been occurring between the parties because clearly the parties did agree by consent, which was approved by the Court by way of the final orders in July 2015, that the children would be in the day-to-day care of Ms Thomas and the children would have contact with Mr Higgins for school holiday periods. The reason the contact was for school holiday periods was that Mr Higgins left the [name of town 2 deleted] area and relocated to [name of town 1 deleted].

[18] There has been some dispute and debate as to why Mr Higgins did relocate to [name of town 1 deleted] and why he did not relocate somewhere closer like [location deleted], where I understand there is family support.

[19] The explanation from Mr Higgins is that he relocated to [name of town 1 deleted] to remove himself from the volatile and, by my reading, toxic relationship between the parties.

[20] There is a question raised by counsel for the mother and also lawyer for child as to why he relocated to [name of town 1 deleted]. As I understand, that is where his partner resides and why he did not relocate somewhere closer to [name of town 2 deleted], where the children were residing but there has been no evidence on that point.

[21] The reality and the starting point of the determination is that with the approval of the Court, there have been final parenting orders made by consent between these parties. They provide clearly that the children will be living with their mother and the children will be having unsupervised contact with their father.

[22] Therefore, whilst there has been quite a lot of discussion about domestic violence issues, for the purposes of today's hearing, the Court has made a determination in respect of safety. I will determine the matters on the principles of an interim hearing.

Legal position

[23] The children's welfare and best interests are the paramount consideration. I must take into consideration the principles contained in s 5 of the Act: under s 5(a), the children's safety must be protected from all forms violence; under s 5(c), a child's care, development and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians; under s 5(d), that a child should have continuity in his or her care, development and upbringing; under s 5(e), that a child should continue to have a relationship with both of his or her parents and that a child's relationship with his or her family group, whānau, hapū or iwi should be preserved and strengthened; and under s 5(f), a child's identity (including without limitation) his or her culture language and religious denomination and practice should be preserved and strengthened.

[24] I also take into consideration s 6 of the Act, that a child must be given reasonable opportunities to express views on matters affecting the child and that any view as the child expresses must be taken into account.

[25] In regard to the test for an interim care dispute, I refer to the decision of *Fletcher v McMillan* [1996] 2 NZLR 491, [1996] NZFLR 302, (1996) 14 FRNZ 234, the decision of Hammond J where he said at para (4):

Assuming that there has been a state of affairs with respect to the child which can properly be described *as a* status quo, or something like it, such should not be disturbed unless the welfare of that child, using that term in its largest sense as covering physical, mental or moral matters, is distinctly put at risk. And some appellate authorities indicate that such intercession should only be undertaken on convincing proof.

[26] I bear in mind, however, that in the decision of *K v K* [2009] NZFLR 241, a decision of Keane J, 21 May 2004, His Honour did indicate at para (42) that that enquiry should be a reasonably wide one where the Court will naturally be most concerned to safeguard child's welfare and that the Court can take into consideration the welfare of the child in its larger sense, including both physical, mental or moral wellbeing.

[27] That is the legal structure on which I approach matters.

Submissions

[28] I now refer to the submissions. I am indebted to counsel for the helpful and detailed submissions they have made.

[29] Ms Stevens gave oral submissions. In regard to the children's wishes, the suggestion is from Mr Higgins that those wishes have been influenced by the mother promising material benefits to the children. As a result of that, and because of the children's ages, there should be really little weight which could be provided to those wishes.

[30] The theme of the submissions was that the issue of the mother's incapacity or inability, to care for the children, is an ongoing and repeated pattern. She draws the Court's attention to the family group conference which occurred on 17 June 2015 as

an example. She says her client is in a position where he can provide stable settled care for the children and that looking at the interests of their welfare, that the mother, because of the challenges around her mental health and allegations of repeat concerns around that and neglect, was not in a position where she could care for the children.

[31] Ms Walsh also provided helpful submissions. In her submissions, she says the status quo for these children is clearly in the [name of town 2 deleted] area in the care of their mother, both in terms of the school they have attended since commencing school, being in mother's day-to-day care and the wider status quo in terms of family connections, particularly with their [sibling details deleted].

[32] She says in her submissions that in essence the goalposts have moved. The order was obtained on the basis of a narrow enquiry in regard to the issues of Ms Thomas' mental health and the immediate risk. She says the evidence from Dr Boggis, psychiatrist, on 18 February, states Ms Thomas' mental health problems are no barrier to Ms Thomas parenting her children and providing them with a set, stable and safe environment. Ms Thomas has done everything humanly possible to promote and safeguard her health and thereby the safety and stability of her children going forward.

[33] She also refers to affidavit evidence from the children's teachers, which is supportive of Ms Thomas and the children. There is further the evidence from the mental health worker which provides support.

[34] She makes reference to a Strengthening Families meeting which is attached to her latest affidavit which summarises the input of a significant number of key people in Ms Thomas' life, including the principal of [name of school deleted].

[35] In regard to the principles under s 5, the submission is that in regard to principle 5(a), there is a risk to the children being in Mr Higgins' care. Secondly, in regard to the child development and upbringing, it is relevant to the Court's assessment of the nature and quality of Mr Higgins' relationship with each child that he left [name of region deleted] of his own volition in 2015, thereby reducing his potential to provide effective guidance, comfort and input into the children's lives.

Further, that the continuity of the care for the children will be returned to the existing care arrangements and also she highlights the wider family support that Ms Thomas has in the [name of town 2 deleted] area.

[36] She also highlights to the Court the children's views, which I will come to shortly.

[37] Mr Williamson, as the children's lawyer, has submitted the children should be returned to [name of town 2 deleted] on an interim basis until this matter has been heard. In his two reports, he has confirmed the children have expressed a clear wish to live in [name of town 2 deleted] and attend school there.

[38] He highlighted in the submissions today that the wish was not in respect of either parent particularly, but the wish was for a return to the [name of town 2 deleted] area.

[39] He also refers to Mr Higgins' convictions for domestic violence. As indicated, I approach the matter on the basis the Court has accepted that Mr Higgins was safe to have the children in his unsupervised care. He also highlights Mr Higgins's move away from the [name of town 2 deleted] area.

[40] It is clear from his reports and submissions the children have expressed a clear wish to be in the [name of town 2 deleted] area, despite them residing now with their father since November 2015.

Risks

[41] Therefore, I must now examine what exactly are the risks for the children residing in their mother's care.

[42] The primary risk I see and ascertain, and the genesis for the order being made on a without notice basis, was the suicide attempt by Ms Thomas. The risks as set out in the application by Mr Higgins were that the children witnessed their mother slitting her wrists, they have had nightmares as a result of that, there has not been food, the new partner bullies and hits the children with a wooden spoon, and they have moved homes on a frequent basis.

[43] Ms Thomas says the children did not witness the suicide attempt. There is no issue with food. She says she was under a lot of pressure due to the activities of Mr Higgins' associates and their actions towards her in [name of town 2 deleted]. She also highlights some safety issues with the children with Mr Higgins.

[44] As I have indicated, there is before the Court some, what I would view to be, largely independent evidence. I do give considerable weight to the report from Dr Boggis, Ms Thomas' psychiatrist. She has had contact with Ms Thomas since 2010, which was the last episode of some major depression for Ms Thomas.

[45] At that time, according to her report, there had been a previous episode of self-harm in 2009, which is accepted. In Dr Boggis' view, she says she does not believe that Ms Thomas' mental health problems are a barrier to her ongoing parenting of all three children. She states:

I believe she is making her best efforts to provide the children with a safe, stable environment, that their best interests are likely to be served by returning into her care. She is keen to engage in further psychological treatment, both for anxiety and for longstanding issues which stem from her childhood abuse and we will be facilitating that.

[46] In addition, as mentioned before, there is the affidavit of Sarah Meade, who speaks highly of Ms Thomas as a parent. She was a teacher for Storm at [name of school deleted].

[47] There is the affidavit from Lorraine Tewi, mental health worker, in support and she confirms she is available for support. There is also the Strengthening Family report which is exhibit A in the affidavit of 15 April. That says there are plans for weekly home visits to support Ms Thomas and there also appears to be support from the Salvation Army to work with Ms Thomas.

[48] On my reading of that objective information, there are substantial community supports which are available and there is independent evidence before the Court to alleviate the issue of risk.

[49] In regard to the issue of providing the children with food, that is contradicted from the report from the school. In regard to general parenting issues, there has not

been an opportunity to test the evidence but in the context of an interim hearing, if those issues had been substantial and longstanding, I question why Mr Higgins would have ever left the children or agreed to leave the children in the day-to-day care of Ms Thomas in the first place and left the area.

[50] In regard to the repeating pattern of mental health issues, as I read the evidence, there has been one previous serious mental health issue back in 2009 of post natal depression.

[51] In regard to the submission by Ms Stevens that the family group conference was to address parenting issues by Ms Thomas, I do not accept from my reading of the background of this file that was the primary motivation for the family group conference.

[52] It appears clear, and I accept the submission from Mr Williamson, that really this conference was called due to ongoing and chronic conflict between the parents. The submission from Ms Walsh is that the conference was actually initiated by Ms Thomas.

Assessment

[53] Accordingly, I do not accept the evidence from that conference does support a repeating pattern of either mental health issues nor of a pattern of inability to parent the children on a day-to-day basis.

[54] However, I do accept that due to the attempted suicide which occurred, there is an ongoing need for oversight from the Court's perspective. I accept there are issues of risk.

[55] I do accept the status quo has clearly been with Ms Thomas and the children in her day-to-day care.

[56] In regard to the children's views and wishes, I do give them some weight but they are simply a factor which I take into consideration in the matrix of the overall determination I make.

[57] The boys are still young but this is not a situation where they are expressing views about something they have no knowledge about, such as a relocation case. This is a situation where they have been familiar with environments in both areas and they have been consistent, even though they have been residing in the day-to-day care of their father, to return to the [name of town 2 deleted] area.

[58] There has been a suggestion that Mr Higgins' partner is undertaking the care of the children. I do not know. There has not been any evidence in respect of that. There is also a suggestion that there is a dynamic with Mr Higgins' partner with her son [details deleted]. That must raise some concern in regard to the dynamics in the home.

[59] I am also very concerned in respect of the issue of contact. I accept really there is little clear evidence in front of the Court about the facilitation of contact within the last week.

[60] Ms Thomas advises through her counsel she came down with the benefit of assistance of the Salvation Army last Sunday to have contact with the boys but has only been able to get contact yesterday afternoon. The suggestion had been that contact needed to be supervised, although it did not progress on a supervised basis.

[61] Mr Higgins' explanation is unclear to me. He indicated there was some breakdown in communication and also there was an issue of unavailability of Ms Stevens. That is not a criticism of Ms Stevens. He also he wished to have an opportunity that he supervise the contact.

[62] I am concerned this raises a suspicion of a power and control dynamic and surely if Ms Thomas had come down all the way to Invercargill, there must have been and should have been a facilitation of liberal contact to occur for as long a period of time as possible.

[63] I also question why, in light of the evidence which had been filed, there is any requirement for Ms Thomas' contact with the children to be supervised. That raises an issue around Mr Higgins's ability to support Ms Thomas' relationship with the boys' and, as highlighted by Mr Williamson, that must particularly be the case in

light of what are very clear views that the boys' are expressing to him. I do take that factor into account in my overall consideration of the s 5 principles.

[64] Therefore, what is the conclusion I have come to in relation to the evidence in front of me? Whilst I have highlighted certain aspects of the evidence, there has been insufficient time and opportunity today to go through all of the evidence but I have certainly considered it.

[65] Where I have come to, is that whilst there was clearly a risk, and there presents arguably an ongoing risk, of deterioration for Ms Thomas in terms of her mental health, the evidence is that the level of the risk is such it does not preclude the children being returned to the day-to-day care of Ms Thomas in the meantime.

[66] I am satisfied the evidence shows that Ms Thomas has taken a number of steps to access appropriate support within her community on all levels. I am satisfied that, in combination with a concern I have in regard to Mr Higgins' attitude towards contact and combined with the boys' views, it leads me to a position where on an interim basis I am satisfied it is appropriate for the boys to be returned to the day-to-day care of their mother.

[67] The question then arises as to whether there is a risk for the boys if this matter goes through to a substantive hearing and they are then moved again into the day-to-day care of their father.

[68] That is a factor which I have considered but given the strength of the boys' views and given the potential delay which would occur in respect of these matters, I am satisfied it is appropriate, taking into consideration the boys' best interests, that they do go back into the day-to-day care of their mother.

[69] If there needs to be a full determination of these issues, that should take place following all the appropriate information then coming in front of the Court and the matter being considered in an appropriate way, rather than orders being made on a without notice basis.

Result

[70] Accordingly, I discharge the current interim parenting order in favour of Mr Higgins. I make an interim parenting order in favour of Ms Thomas upon the same terms as the final parenting order made on 2 July 2015. I make the following variation:

- (a) The pickup and drop off will occur in [location deleted] unless otherwise agreed between the parties.

[71] In addition, I transfer this matter to the [name of town 2 deleted] Family Court as there has previously been lawyer for child appointed in that jurisdiction. I ask that matter be listed for a directions conference in front of the Court on the next available opportunity to consider the position when the s 132 report is obtained.

[72] I also direct that lawyer for child report within 28 days of today in respect of the boys' situation in [name of town 2 deleted].

[73] Further, I make it a condition of the interim parenting order that Ms Thomas will continue to engage with any Mental Health Services as directed and follow any safety plans as agreed.

[74] Accordingly, I terminate the appointment of Mr Williamson, with the exception of any tasks that he needs to undertake to ensure the file is safely transitioned to the [name of town 1 deleted] jurisdiction.

C L Cook
Family Court Judge