ANY PUBLICATION OF A REPORT OF THESE PROCEEDINGS MUST COMPLY WITH S 139 OF THE CARE OF CHILDREN ACT 2004

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2009-470-104

IN THE MATTER OF	the Care of Children Act 2004
BETWEEN	BMT Appellant
AND	LRB Respondent

Hearing: 23 April 2009 (at Hamilton)

Appearances: Patricia Jones for Appellant
Stephen Coyle for Respondent
Dean Blair for Children

Judgment: 23 April 2009

JUDGMENT OF HARRISON J

SOLICITORS
Beach Legal (Mt Maunganui) for Appellant
Rice Craig (Papakura) for Respondent
Dean Blair (Tauranga) for Children

COUNSEL
Stephen Coyle

Introduction

[1] BMT, the mother of JB and SB, appeals against orders made in the Family Court at Tauranga on 19 January 2009. Judge Paul Geoghegan granted day-to-day care of the children to their father, LRB, subject to contact with BMT on these terms: at [26]:

> … [T]he most practical arrangement bearing in mind the circumstances of the parties and the geographical distance between them is for the fortnightly contact to continue. The current arrangement involves [BMT] dropping the children off to [LRB] on Friday afternoon at 5.30pm and [LRB] returning the children to Ngatea on Sunday at 5.00pm. I am of the view that the same arrangement should apply with appropriate adjustment for school holiday periods and Christmas. Accordingly I make a parenting order in favour of [BMT] granting her contact with the children as follows:
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> a) Each second weekend from Friday at 5.30pm to Sunday at 5.00pm.
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> b) For half of each school holiday period excluding Christmas.
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> c) For the first half of each Christmas school holiday period in every alternate year commencing in 2009.
>
> d) For the second half of each Christmas school holiday period in each alternate year commencing in 2010.
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> e) For alternate weekend contact [BMT] shall be responsible for uplifting the children from their father's home each Friday and returning them to Ngatea at 5.00pm on Sunday where they will be picked up by their father.
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> f) Transport during school holiday periods shall be shared equally between the parties with [BMT] uplifting the children at the commencement of contact from [LRB's] home and [LRB] uplifting the children from [BMT's] home at the end of contact.
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> g) Telephone contact as agreed between the parties.
>
> h) Contact at such other times as agreed between the parties.

[2] The issue in the Family Court, as articulated by Judge Geoghegan, was whether or not the children should continue to live with their mother in Tauranga or move to live with their father and his partner, VC, in South Auckland. BMT's appeal against the Judge's determination of that issue does not raise an important

point or points of principle. Having had the benefit of admirably comprehensive written synopses from all counsel, supplemented by focused oral argument this morning, I am now in a position to deliver judgment orally.

Background

[3] JB was born in May 1999; SB was born in May 2001. The parties were then living together. However, they separated in late 2005.

[4] The following narrative is taken from the judgment under appeal:

> [2] … On 4 May 2006 a parenting order was made in the Family Court at North Shore providing that [BMT] was to have the role of providing the day to day care of the children and that [LRB] was to have contact with them every second weekend from Friday evening until Sunday evening, for three weeks each year and at other times as mutually agreed. Contact proceeded in accordance with the terms of that order and [BMT] lived in Whangaparäoa while [LRB] lived in Manurewa, South Auckland. It would appear from all of the evidence that the children were settled in the care of their mother and that there were no difficulties in respect of the arrangement.
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> [3] In early November 2007 [BMT] decided to move from her home in Whangaparoa to Tauranga, taking the children with her. It is common ground that there was absolutely no consultation with [LRB] in relation to the proposed move and the first [LRB] knew of the matter was the day before the move took place. His evidence, which I accept, is that he was advised of the move by [BMT], on Friday, 2 November which gave him no opportunity to make an application to the Court preventing her move before she left. [LRB] was advised by [BMT] of the children's new address in Tauranga and received a text saying 'Please don't ring and bitch because I don't have time'.
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> [4] On 4 February [LRB's] lawyers filed an application for the Courts directions as to the exercise of guardianship namely, a direction requiring the children to be returned to the Auckland area and enrolled in a school there. The basis for that application was that there had been no consultation in relation to the move, that the children were well settled in Auckland and it was not in their interests to be moved to Tauranga, that there was no valid reason for [BMT] moving to Tauranga and that the move would fundamentally alter [LRB's] relationship with the children.
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> …
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> [6] On 24 April 2008, an interim consent order was made providing that the children would be in the day to day care of their mother while they would have contact with their father every second weekend. Transport arrangements were that [BMT] was required to drop the children off at their father's home at 5.30pm on Friday and that the parties would meet in Ngatea

> at 5.00pm on Sunday at the end of contact. Accordingly [BMT] bore the brunt of the transport responsibilities. Holiday contact was also confirmed with provision for two weeks holiday contact with [BMT] over the Christmas holidays, one week during the term holidays and one further week of the school holidays with [LRB's] mother in Auckland.

[5] At the time of the hearing in January 2009 LRB and VC were living in her home at Manurewa. LRB is employed fulltime as an executive chef. He earns a salary of $75,000 p.a. He enjoys flexibility in working hours. VC is also in fulltime employment. She earns a salary of $55,000 p.a. She does not have children. Accordingly, as the Judge noted, LRB and VC would be comfortably placed to care for the two children. Also of significance is that the children have close family ties in Auckland. Both sets of grandparents along with cousins, uncles and aunts live in the greater Auckland metropolitan area.

[6] At the time of the hearing LRB made detailed proposals for the children's care if he was to assume the primary parenting role. He had made appropriate inquiries about an appropriate local school. He had arranged for VC's mother to assist in caring for the children immediately after school until he was able to collect them. The Judge was satisfied that appropriate care arrangements would be made. Also LRB had undertaken inquiries about the availability of extracurricular activities, both sporting and cultural. It is plain that his household was well located to take advantage of educational and leisure activities for the children.

[7] BMT's financial and other circumstances were less favourable. She had been living in rented accommodation with the children in Tauranga for a year. She was a fulltime mother in receipt of state benefits. Contrary to her original expectations, she was unable to find either fulltime or part-time employment in Tauranga. However, the children were well settled at Brookfield school. Her finances were parlous. At the time of the hearing she had a weekly surplus of $30 after payment of essential costs. She enjoyed some supplement from contributions from family members and sales of assets.

[8] An updated affidavit sworn by BMT on 17 April 2009 for the purposes of this appeal advises that her financial situation has deteriorated. Since the children went to live permanently with LRB her statutory benefit entitlement has been

reduced by $200. She receives $284 per week. Rent commitments absorb $283. She has continued to sell personal items to pay the rent. She has not had sufficient funds to meet petrol and registration expenses. She has been unable to afford the cost of travelling to Auckland to collect the children in accordance with the contact arrangements.

[9] Counsel for the children, Mr Dean Blair, has provided a comprehensive updating memorandum. He visited the children in their new home in Manurewa earlier this month. His report on their living environment is most favourable. The principal of Clendon Park Primary School, which the girls now attend, has advised that they are performing very well academically and are settled. They have made an exceptional transition into the school. LRB's mother has assumed the obligation of caring for the girls immediately after school. The children are well settled into a routine of school work and domestic chores.

[10] It is of particular relevance to one of the arguments advanced by Ms Jones on appeal that Mr Blair interviewed both girls. He reports that JB says she is 'okay' with her new living arrangements. This reaction is consistent with the view she had earlier expressed to the Court appointed psychologist, Mr Kevin Mist. JB confirmed the principal's report of some initial difficulties in settling at school but says she now has 'at least five friends'. She feels unhappy that she has not seen more of her mother (BMT has only had contact with the children on one occasion, until this school holiday week, since early February 2009).

[11] SB, on the other hand, is very well settled. She speaks effusively about the living arrangements. She enjoys living with her father and de facto stepmother. While she is unhappy at not having regular contact with her mother whom she misses, she 'just gets on with it'.

Jurisdiction

[12] Both Ms Jones and Mr Coyle have addressed the approach to be adopted by this Court when determining appeals from the Family Court. Each has cited a number of authorities, principally from the Court of Appeal and Supreme Court.

However, both accept that this Court's jurisdiction is wide given that the appeal is general and in the nature of a rehearing; and that I must undertake my own independent assessment of the merits of the case, bearing in mind of course any particular benefit enjoyed by the Family Court Judge associated with a first instance viva voce hearing of the evidence. In my judgment this approach is proper. It conforms with well settled principles enunciated in the family law context: *D v S* [2002] FRNZ 116 (CA). More generally it is consistent with a recent decision of the Supreme Court: *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141.

[13] In this respect I have derived considerable assistance from *B v B* [2008] NZFLR 1083 (since upheld on appeal: *B v B* [2008] NZCA 312) where Duffy J fully reviewed the principles applicable in the analogous field of an international relocation appeal. Her Honour noted what she termed 'the traditional approach' of appellate reluctance to interfere with Family Court decisions relating to the care of children on the premise that they are discretionary in nature: at [35]. Duffy J then traced the line of recent authority to the effect that the Family Court makes a value judgment rather than exercises a judicial discretion when determining what is in the best interests of a child. Different principles thus apply, leading to a more intensive appellate inquiry than would be appropriate in the truly discretionary context: at [36].

[14] I respectfully adopt Duffy J's summary in *B v B* of the principles deriving from the authorities as follows:

> [41] The relocation order in this case was made pursuant to s 48 of the Care of Children Act. Section 143(2) of that Act provides a right of appeal to the High Court. The language of that section is consistent with the right of appeal being a general appeal.
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> [42] The questions to be determined under the Care of Children Act seem to me to involve value judgments which at their core will always require consideration of what is in the best interests of the child. Deciding these questions is not a matter of discretion. The Court that is seized of these questions must reach a decision on what is in the child's best interests. Answers to this question may vary with each Judge. But that is because the answers involve value judgments, which by their nature will never yield a definitive answer; it is not because the answers are discretionary.
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> [43] It follows that to read the appeal right in s 143 as if it were an appeal from the exercise of a discretion would be to constrain an appellant's rights. It would remove from the appellant the right to have his or her appeal dealt

> with in accordance with the *Lodestar* principles. It would effectively convert the general appeal right, given in s 143, into something resembling a right to appeal on a question of law only. It would mean an appellant did not enjoy the benefit of having the appellate Court consider the merits of the value judgments being appealed. All this would be wrong. I consider that insofar as there remains a difference of approach towards this appeal right, the approach adopted in *L v A* and *A v X*, which treats the right as on of general appeal, is to be preferred for the reasons given in those judgments.
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> [44] Since I have concluded that the appeal right involved in this case is a general appeal right, I must approach the appeal in accordance with the principles set out in *Lodestar*. This means I must accept responsibility for determining what is in the best interests of the child. It also means I should not confine myself to focusing on whether or not the Judge has committed an error of law, or some procedural error in reaching his judgment.

[15] It is not to be overlooked, however, that if an appeal is to succeed 'the appeal Court must be persuaded that the decision is wrong': *Lodestar* at [13]. The statements made in a number of cases that Judges on appeal are fully entitled to substitute their views for those of the Family Court were in the context of responding to arguments for restraint based on the 'traditional approach' of deference to a discretionary judgment: see *D v S* at [18]; *LH v PH* [2007] NZFLR 737 at 743. The jurisdiction of this Court is appellate and in reaching a decision about the best interests of the child it must nevertheless be satisfied that the Family Court was wrong if it comes to the opposite conclusion. While I accept that the logical consequence of the existence of different results means that the first instance decision is wrong (*Lodestar* at [16]), the appellate process requires a careful analysis of the merits of the Family Court decision.

Appeal

[16] Ms Jones advanced a number of well structured grounds of appeal. I shall address them in the same order as she has. I record, however, that in summary her argument is that what she has identified as errors by Judge Geoghegan, whether individually or cumulatively, are failures to give primary or paramount consideration to the best interests of the children in determining that LRB should have day-to-day care: s 4(2) Care of Children Act 2004 (all subsequent statutory references are to that enactment); and that as a result his decision was wrong and BMT's appeal should be allowed.

(1) Punitive Approach

[17] First, Ms Jones submits that the Judge gave undue weight to BMT's decision to shift without to Tauranga consulting LRB. She submits that Judge Geoghegan's approach was punitive in nature and effect. She says that his reliance on BMT's unilateral decision to relocate geographically was improperly decisive of the application.

[18] Ms Jones particularly emphasises this finding by the Judge: at [24]:

> … The obligations of guardianship are both real and important. The Court should not condone situations where one party has chosen, without the slightest degree of consultation with the other parent, to significantly alter the children's circumstances. To do so merely encourages parents to avoid the ongoing consultation and co-operation which are emphasised by s 5(c) of the Care of Children Act 2004. While it may be said that [LRB] would still be able to exercise the same contact with the children as he did when they were residing in Auckland the reality of the matter is that there is a significant difference between a journey of one hour and a journey of three. A move to Tauranga realistically denies [LRB] the opportunity to have spontaneous contact with the children or to attend their extra curricula activities. These are, in my assessment, significant factors in a parenting role and should not be undervalued.

[19] I disagree with Ms Jones. In determining what best serves a child's welfare and best interests the Judge was bound to consider specific principles: s 4(5)(b). One such principle is that the child's care, development and upbringing should be facilitated by ongoing consultation and co-operation between the child's parents and guardians: s 5(c). BMT acted in violation of that principle. The Judge was plainly unimpressed by her conduct, especially as she elected to draw JB into her subterfuge (BMT directed her to keep the move secret from her father when she disclosed her plan two weeks earlier: at [17]).

[20] BMT's decision had two critical consequences for the children. One was to withdraw them from a settled environment in Whangaparäoa; the other was to deprive them of ready and frequent access to their father. While Ms Jones correctly points out that in terms of timing the move only served to extend the duration of the road journey between the two households from one to three hours, in practical terms this physical dislocation was most significant. A road trip of that length places real

hardship on both the other parents and the girls. Moreover, as the Judge found, BMT willingly visited what she called the 'consequence' of her decision upon the children knowing the inevitable result that the stable relationship with the other parent would be adversely affected.

[21] Judge Geoghegan's findings that BMT acted primarily in her own interests to be closer to a boyfriend who lived in Feilding is not challenged: see [18]. The Judge's consequential finding that her decision was not motivated by any concerns for the welfare of the children and reflected a lack of significant insight into their needs was not only open but inevitable. That conduct, which could be adjudged irresponsible, and its consequences showed that BMT was not acting with the best interests of the children in mind. In my judgment this factor counts heavily in the overall judicial evaluation of what parenting arrangements are in the best interests of the children.

(2) Continuity of Arrangements

[22] Second, Ms Jones submits that the Judge failed to take proper account of the effect on the children of reversing their parenting arrangements, particularly on the continuation of their relationship with their mother: s 5(b). She advances a sustained argument under this head. She says that the Judge did not properly weigh or take into account that: (1) the children had been in the primary care of their mother all their lives; (2) the psychological evidence is to the effect that the mother is their primary attachment figure; (3) the children had a sense of Tauranga as their home and Brookfield as their neighbourhood; (4) the children were moving into a blended arrangement where the stepmother played a significant role and the father's ability as a fulltime caregiver was untested; (5) the girls were moving from a parent available for consistent daily care to a working parent with the inevitable stress and conflict of juggling working and child arrangements; and (6) the physical environment was to be changed for a third time in 14 months, with the children's continuity of schooling, friendship and neighbourhood relationships being altered yet again.

[23] I agree with Mr Coyle in relation to some of these arguments. The changes were triggered by BMT. She cannot use her alteration of the arrangements to her

advantage. But, more importantly, the overall question is whether or not the Judge's decision to break the pattern of continuity of primary caregiving was in the children's best interests.

[24] The factors identified by Ms Jones have weight. All other things being equal, they may have led to a different decision. But the Judge had to consider the issue afresh on LRB's application. I am satisfied that he took into account all the factors raised by Ms Jones. He was particularly careful to assess the living conditions in the new household and VC's likely relationship with the children. His conclusion on her ability to care for the children is as follows: at [20]:

> … she had met the children some four years ago and that she and [BMT] had in fact been friends for some nine years. She conceded that the children moving into the day to day care of their father would be an enormously different prospect from the current arrangement but that she considered herself able to manage the task given the relationship she had built up with the children. [VC] struck me as an able person although someone who was also very organised and perhaps somewhat rigid in her views. I am satisfied however that she would be in a position to provide valuable support to [LRB] in the event that he cared for the children.

[25] The Judge was also satisfied that LRB would be a good parent. He was in a position to provide proper day-to-day care for the children. He was better financially placed than BMT and thus more able to provide for the children's financial needs. He would provide a structured living environment in contrast to BMT's 'more carefree parenting style'. In this respect the Judge placed weight upon his assessment that the need for parental structures and boundaries would increase as the children aged.

[26] There is force in Ms Jones' submission that the Judge did not articulate the effect on the children's relationship with their mother of reversing the parenting arrangements. This is always a risk in any decision made by the Family Court to alter parenting arrangements. The unspoken premise of Judge Geoghegan's decision was that that risk was less than the risk of the girls remaining in their mother's day-to-day care. Furthermore, the Judge structured the contact regime with the objective of ensuring continuity and closeness with BMT. (Regrettably that objective has not occurred. Mr Coyle advises that LRB will consent to a variation of the terms of contact. Accordingly I make an order varying the contact arrangements at

para [26](e) of the decision to record that LRB shall be responsible for taking the children to a meeting point at Ngatea rather than requiring BMT to travel from Tauranga to Auckland.)

[27] I accept Mr Coyle's submission that the continuity principle is directed not only towards continuity of care but also to continuity in the child's relationship with her father. The statutory concept of continuity in arrangements extends to her 'care, development and upbringing': s 5(b). The Judge was entitled to give real weight to this principle, given his adverse findings about BMT. I am not persuaded that he was wrong.

[28] The statute also requires stability and continuity in a child's relationships with her family. Judge Geoghegan gave appropriate weight to this factor: at [8]. Living in Manurewa will have the effect of preserving and strengthening the children's ties with the wider family and in particular both sets of grandparents. With BMT's encouragement, the children will be able to enjoy considerable contact with their paternal grandmother who is able to impart her knowledge of Mäori cultural values and language.

[29] Finally in this respect, the Judge was satisfied that the new environment offered by the household occupied by LRB and VC was most satisfactory. That conclusion has been supported by Mr Blair's supplementary memorandum.

(3) Status Quo

[30] Third, Ms Jones submits that the Judge failed to give proper weight to the status quo. She identified that state as the relationship between BMT and the children. She severed off from its definition the inconvenient factor of physical location. While, as Ms Jones acknowledges, there is no legal presumption of status quo, it is relevant. She submits that the Judge failed to give proper consideration to the circumstances of the children's lives in Tauranga for the one year prior to the order.

[31] Without in any way demeaning this argument, it is in my view a variant of the preceding submission. In any event, I agree with Mr Coyle. It is artificial to attempt to sever the status and locational components of the status quo. I agree with him that the relevant status quo for these purposes, which existed when the orders were originally made in 2006, was the mother's care of the children in the Auckland area. It was not the mother's care of the children in Tauranga.

(4) Views of the Children

[32] Fourth, Ms Jones submits that the Judge failed to give proper weight to the children's views: s 6. She notes that the children had expressed their views on a number of occasions to Mr Mist. She says that JB's views were consistent throughout. She wished to continue to live in Tauranga with her mother. On the other hand, she acknowledges a degree of equivocality by SB. Ms Jones has traced the history of the uncertainty in SB's views starting from her first interview with Mr Blair in February 2008 through to her meeting with Mr Mist in November 2008.

[33] I agree with Mr Blair. Even if there had been some equivocality, SB's constant preference has been to return to Auckland. As can be expected, given the duration of her bond with BMT, SB wanted to continue to live with her mother as well. I note, however, that SB's preference in this respect was related to living with her mother in Auckland, not Tauranga.

[34] Ms Jones' submission is that the Judge allowed JB's views to override SB's in concluding as follows: at [24]:

> All of the factors which I have referred to lead me to the view that the welfare and best interests of the children are best served by their being in the day to day care of their father. In reaching that view I take particular account of the fact that the children have differing views as to who they wish to live with and that [JB] wishes to live with her mother while [SB] wishes to live with her father. Naturally that creates considerable difficulty, however I am persuaded by the evidence of Mr Mist that [SB] is more psychologically vulnerable than her sister and that [JB] is more likely to be able to cope with a change in residential arrangements…

[35] I do not accept this submission. It is common ground that the children should live together under the same care and contact arrangements. The Judge was bound

by statute to take into account the views of both girls. But thereafter he was entitled as a matter of judgment to give them such weight as he considered appropriate. There is no prohibition on placing greater weight on the views of one child than those of another. In a very similar situation, as Mr Coyle points out, Rodney Hansen J endorsed the approach of a Family Court Judge in giving greater weight to the views of one child to those of another where the two were to remain living together: *AD v KT* [2008] NZFLR 761 at [49].

[36] In my judgment the Judge's approach was not only open but proper given that SB was the more psychologically vulnerable. I agree with the Judge that JB would more likely be able to cope with a change in residential arrangements. And I am satisfied that the Judge did not disregard JB's views. He took them into proper account in the evaluative exercise. Giving greater weight to SB's views or preferences was not an error but was appropriate in these factual circumstances.

Conclusion

[37] It follows that I am not satisfied that Judge Geoghegan erred in determining that the children's best interests would be served by a day-to-day care order in favour of LRB. Accordingly, BMT's appeal must be dismissed.

[38] I add this observation, though, for what it is worth. The parties agree on the importance of continuity in the relationship between BMT and her children. She is not being judged by her choice to relocate herself to Tauranga. I accept that she may have moved in part for employment prospects or cheaper living. But, whatever her objectives, it was not in the children's best interests and BMT has not been able to find work.

[39] It is plainly within BMT's power to return to live in Auckland. While her relationship with her mother may be strained, she advised Judge Geoghegan that she has a close relationship with her father. She also has a sister living in Auckland. The wider family is in close proximity to LRB's household. Without doubt, support is available for BMT and the children if she is seeing them regularly in Auckland. She will be actively able to develop their associations with their grandparents and the

wider family. Many of the problems which have led to this appeal would be alleviated, if not eliminated, by BMT's return to live in Auckland. I am confident that that shift would serve the best interests of the children and would enhance their relationship with BMT. However, the remedy rests with BMT.

[40] There will be no order as to costs.

[41] I would like again to repeat my appreciation for the assistance given by all three counsel whose submissions have been of the highest quality.

Rhys Harrison J