

**NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004,
ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO
11D OF THE FAMILY COURTS ACT 1980**

**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

CIV 2009-470-745

BETWEEN CAC
 Appellant

AND KFO
 Respondent

Hearing: 2 December 2009

Appearances: Phoebe Bromiley-Loane for Appellant
 Patricia Jones for Respondent
 John Douglas for Children

Judgment: 2 December 2009

JUDGMENT OF HARRISON J

SOLICITORS

Phoebe Bromiley-Loane (Thames) for Appellant
Beach Legal (Mt Maunganui) for Respondent

COUNSEL

John Douglas

Introduction

[1] CAC appeals against parenting orders made by Judge Annis Somerville in the Family Court at Tauranga on 4 August 2009. Those orders governed the day-to-day care of the three sons of CAC's relationship with KFO who were then aged five, four and two years respectively (Travis, Axel and Campbell).

[2] Mrs Bromiley-Loane's original synopsis of submissions for CAC raised eight grounds of appeal. However, prior to hearing she reduced the focus to three grounds, since reduced to two, but supplemented in oral argument this morning. The purpose of the appeal then emerged, namely to secure an equal caring regime rather than the imbalance in KFO's favour under the existing orders.

[3] Before dealing with the merits, a degree of perspective on the merits of this appeal is required. Both Mrs Jones for KFO and Mr Douglas for the children have emphasised that, following the parties' separation, interim parenting orders made by consent on 20 November 2008 provided for CAC to have unusually restricted contact with the boys. Apart from one weekly telephone call, contact was to be supervised for twice weekly sessions and then from 29 December 2008 for a full day between 10:00 am and 4.30 pm for six days over six weeks. By contrast, the result of the orders made by Judge Somerville either months later is that the boys will now spend, on Mr Douglas' calculations, 120 nights, or about a third of the year, with their father. This progression speaks for itself.

[4] The issues raised on this appeal are not complex and, having heard from all three counsel, I am able to deliver judgment orally.

Family Court

[5] It is unnecessary to traverse the detail of the relationship between the parties. Prior to separation the couple and the boys lived together for a short period on a bush block at Tapu on the Coromandel Peninsula. KFO and the children then moved to

reside with her parents in Katikati. CAC was residing in the same town when the case was heard in the Family Court.

[6] KFO is presently in receipt of a domestic purposes benefit. However, she wishes to better herself and acquire a vocational qualification. She is presently attending a tertiary education course at the Bay of Plenty Polytechnic in Tauranga. The three boys are attending Katikati school.

[7] The hearing before Judge Somerville lasted two days. Its purpose was to determine CAC's application for equally shared parenting. The Judge heard extensive evidence from both parents and to a lesser extent from CAC's mother. She had the benefit of the assistance of Mr Douglas and she also interviewed the boys.

[8] Critically Judge Somerville decided that it was then appropriate for CAC to have overnight contact with the boys, a significant advancement on the prevailing situation. It must be noted, as the Judge found, that CAC had previously been guilty of inappropriate, even violent, conduct towards his children in the name of physical discipline. The Judge accepted, however, that this conduct was attributable in large part to CAC's underlying depression leading to mood swings and aggressive behaviour. Such behaviour might have disqualified CAD from suitability for anything other than supervised or daily contact even when Judge Somerville heard the defended application. But she found, and these findings are not under challenge, that:

[11] However, since the last Court appearance the father appears to be more circumspect about the boys' situation. He has realistically agreed Travis is fine at school and Katikati is a suitable place for the boys to live.

[12] He has completed a second Living Without Violence course. He is in the process of completing an Incredible Years Parenting course. He has found suitable accommodation in Katikati. He is attending Travis' school on a regular basis and keeps in touch with the teacher... The father has completed the parenting through separation programme in Tauranga. The father said he does not drink while the boys are in his care and will not do so in the future. He is happy to have that condition as part of any order.

[9] Accordingly there was room for qualified optimism that CAC had made significant changes in both his behaviour and his attitudes. But of course, as the Judge recognised, change takes time and she concluded that even though CAC was

by then living at Katikati, it was preferable that the children should stay with him for shorter periods rather than during the week. Her conclusion was fully and carefully reasoned: at [18].

[10] In the result the Judge made orders as follows:

- (a) The father is to have the care of the children overnight every alternate weekend from Friday 4:30pm until Sunday 4:30pm and also Thursday night from after school until school the next morning. The condition of his care is to be that he is not to consume alcohol while the children are in his care.
- (b) If the father is prescribed medication to assist his depression he is to follow the recommendations and he is to take that medication as directed by his health professional.
- (c) The father is to have one week of the school holidays each term holidays from the Saturday to the following Sunday, however Campbell is to be returned after three days to the mother's care unless the parents agree that he is able to stay longer. Christmas holidays are to be shared but are not to be longer than one week at one time unless the parties agree.
- (d) Visits to the school are to continue and any extra-curricular activities for any of the children is to be available for the father to attend.
- (e) The mother is to have the care for the balance of the time.
- (f) There is to be no derogatory or negative comments made by either parent about the other parent in front of the children or within their hearing.
- (g) The overnight contact is to commence in the nearest weekend to this decision.

Decision

[11] It is unnecessary to traverse the principles governing the determination of appeals from orders made in the Family Court. It is sufficient to note that CAC carries the burden of showing that Judge Somerville erred. In practical terms he must show that the orders were not in the best interests of the children. I emphasise this point because Mrs Bromiley-Loane's argument, both written and oral, was not directed to that express criterion but more to challenging some of the specific findings made by the Judge in support of her conclusion that it was preferable that the children spend shorter periods with CAC.

[12] Also I must record what is obvious. Judge Somerville had the inestimable benefit of seeing and hearing the parties both in evidence-in-chief and cross-examination, of interviewing the children, and of Mr Douglas' assistance. All this provided a foundation for a factual inquiry leading to an evaluative decision based, as the Judge expressly noted, on the best interests of the children.

[13] Against that background I shall refer briefly to the two amended grounds of appeal advanced by Mrs Bromiley-Loane this morning. First, she submits that Judge Somerville failed to make findings of fact relating to much of CAC's evidence and other evidence she says supported his position. She refers to findings made by the Judge, for example, that "the father blames the mother for a lot of the matters he should be accountable for" and that "the father still blames the mother for the current situation". Mrs Bromiley-Loane says there was considerable evidence that the father had a loving and positive relationship with the children. Additionally there was other evidence to illustrate that CAC had not spoken in an abusive or derogatory manner to KFO and that he had changed and would cope well with the children for extended periods. Furthermore, CAC had given evidence that he had weaned himself off previous medication which contributed to his past states of depression.

[14] I must say that these criticisms of the Judge are misdirected and of little assistance in determining the principal question of whether she erred in failing to recognise the best interests of the children. Mrs Bromiley-Loane, with commendable candour, acknowledges that CAC had acted "appallingly on occasions" towards KFO and the children and that he had indulged in inappropriate discipline. These acknowledgements are entirely consistent with the Judge's findings.

[15] What Mrs Bromiley-Loane's submission appears to overlook is, as noted, the Judge's express recognition that CAC had made major and positive changes in the previous years. Her reference to some of his past misconduct was appropriate to provide an evidential basis for her conclusion that equally shared parenting would be premature and further improvement was required. But overall the Judge's findings, as reflected in the orders, were that CAC's behavioural modifications were such that

he was now qualified to have overnight contact with the children unsupervised for extended periods.

[16] CAC plainly has much to offer his sons. Mr Douglas has spoken this morning of CAC's passion for and familiarity with the outdoors. It goes without saying that they will benefit from those attributes and from his love, guidance and support. I read the Judge's orders as expressly designed to foster that relationship. Moreover, as Mr Douglas points out, the Judge, as a term of her orders, directed that CAC's visits to the school were to continue and that he was to have full access for the purpose of attending extra-curricular activities. The Judge also noted that after school arrangement with CAC should be appropriate at a later date. CAC's decision to move back to Tapu within two weeks of the order, a distance of at least an hour's drive from Katikati, has frustrated the Judge's proposal.

[17] In my judgment Judge Somerville can hardly be criticised for making orders as part of a progressive continuum towards an easier relationship within which both their mother and father participate fully in the boys' upbringing. The Judge's gradual approach was plainly responsible and correct. I am in no doubt that she hoped the orders would allow CAC to establish a closer bond with his sons, as a result restoring his credibility as a parent and consequentially a degree of trust and confidence between CAC and KFO.

[18] Second, Mrs Bromiley-Loane submits that Judge Somerville failed to make findings of fact relating to conflicts in evidence. She provides four examples. I mean no disrespect in observing that they are of no relevance to the appeal or to the orders made in the Family Court.

[19] For these brief reasons the appeal is dismissed, subject to one variation. In a most constructive updating report Mr Douglas refers positively to the boys' progress since they have enjoyed extended contact with CAC (subject only to an issue about the eldest son appearing withdrawn at school). Mr Douglas notes that the boys interact extremely well as a unit. He concludes that the present arrangements are satisfactory to the boys' needs but that Campbell should probably enjoy the same access to his father as his older brothers.

[20] While Mrs Jones supports the Judge's order that Campbell is to be returned to his mother's care after three days in his father's care during one week stays, I am satisfied that it is now timely for that part of the order to be quashed. In part my conclusion is due to the change in CAC's living circumstances. As Mr Douglas points out, it would be impractical and disruptive to the boys as a group for CAC to return Campbell half way through an extended stay. Given Mr Douglas' advice about Campbell's progress, I am more than satisfied that he should share the same contact arrangements as the others.

[21] Accordingly, the appeal is dismissed, subject to this minor variation, with my appreciation to Mr Douglas for his assistance in preparing for this appeal and in Court today.

Costs

[22] Mrs Jones seeks an order for costs for KFO. She has applied for but has not been granted legal aid. Mrs Bromiley-Loane advises that CAC's financial circumstances are poor. He likewise has applied for legal aid. His application was rejected and he has sought a review.

[23] Costs normally follow the event. I am satisfied that this appeal should never have been brought. The grounds advanced in support had no prospect of success. I would have made an award for increased if not indemnity costs accordingly. However, in recognition of CAC's financial position, I order that he pay costs and disbursements according to category 2B. He is also relieved from the burden, which I would normally impose, of a contribution towards Mr Douglas' costs.

Rhys Harrison J