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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-007828
[2012] NZHC 1188

UNDER the Care of Children Act 2004

BETWEEN B [REDACTED] F [REDACTED] W [REDACTED]
Appellant

AND M [REDACTED] P [REDACTED] G [REDACTED]
Respondent

Hearing: 10 May and 17 May 2012

Counsel: A Cooke for Appellant
MK Headifen for Respondent
A Goodwin on instruction from J Robertson as counsel for the child

Judgment: 31 May 2012

JUDGMENT OF ASHER J

*This judgment was delivered by me on Thursday, 31 May 2012 at 2pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

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Introduction

[1] J [REDACTED] W [REDACTED] is a healthy and happy five year old boy who is achieving well in all aspects of his life. He is cared for by his parents B [REDACTED] F [REDACTED] W [REDACTED] and M [REDACTED] P [REDACTED] G [REDACTED] who are undoubtedly both successful and loving parents.

[2] Ms W [REDACTED] and Mr G [REDACTED] live approximately 25 kilometres apart. They are not able to agree which local school J [REDACTED] should attend. The issue ultimately was determined in the Family Court. Judge Druce decided that J [REDACTED] should go to D [REDACTED] P [REDACTED] S [REDACTED], the school closest to Mr G [REDACTED]. Ms W [REDACTED] appeals that decision submitting that he should attend a different school, W [REDACTED] P [REDACTED] S [REDACTED] which is close to her place of residence.

Background

[3] J [REDACTED] was born on [REDACTED] July 2006 and is now five years, ten months old. He was five years and three months at the time of the Family Court hearing.

[4] Ms W [REDACTED] and Mr G [REDACTED] were neighbours in Papakura. A relationship developed between them and J [REDACTED] was conceived. The relationship came to an end shortly after. Parenting orders were made in 2007. After the making of those orders Ms W [REDACTED] relocated some 25 kilometres west to C [REDACTED] B [REDACTED], near the area of W [REDACTED] P [REDACTED].

[5] The Family Court orders divided J [REDACTED]'s care structure into weeks one and two. J [REDACTED] is in his mother's care except for every second weekend and one night a week. In week one he is with Mr G [REDACTED] from Tuesday afternoon (the end of school) through until Wednesday morning (commencement of school) and he is also with his father that week from the Friday (after school) to the Monday morning (commencement of school). In week two he is with his father overnight on the Thursday, with the same schooling arrangements.

[6] Both parents are employed. Mr G [REDACTED] works in construction. He goes to various jobs in the Auckland area where he works for the duration of the particular

contract. He has a vehicle which he is able to use for private purposes, subject to the usual obligations to his employer. Although there is clearly some flexibility in his work hours, it would seem that he is expected to start work at around the 8.30am time and works through till around 5pm.

[7] Ms W [REDACTED] has a senior position in human resources, working in Auckland. Her work hours seem also to be 8.30am to 5pm, although there is no indication that there is any particular flexibility in those hours.

[8] The upshot of the care arrangements is that Mr G [REDACTED] and Ms W [REDACTED] have J [REDACTED] on alternate weekends, and Mr G [REDACTED] takes J [REDACTED] to school three out of ten days every fortnight and Ms W [REDACTED] takes J [REDACTED] to school seven out of ten days every fortnight.

[9] D [REDACTED] P [REDACTED] S [REDACTED] and W [REDACTED] P [REDACTED] S [REDACTED] are similar. They were described by Judge Druce as both being relatively medium to large primary schools. D [REDACTED] P [REDACTED] S [REDACTED] has 406 students and W [REDACTED] P [REDACTED] S [REDACTED] 339. D [REDACTED] P [REDACTED] has a slightly more multi-cultural population. D [REDACTED] P [REDACTED] is a decile eight school and W [REDACTED] P [REDACTED] is a decile nine school.

[10] J [REDACTED] is a European/Pakeha. He has a half-brother L [REDACTED] who is a number of years older than him and in the care of Ms W [REDACTED]. He enjoys a close relationship with L [REDACTED] as he does with both of his parents. L [REDACTED] goes to W [REDACTED] P [REDACTED] S [REDACTED] which is some five minutes drive from Ms W [REDACTED]'s home.

[11] In the years prior to him attaining the age of five, J [REDACTED] attended a daycare known as S [REDACTED] P [REDACTED] S [REDACTED] D [REDACTED] L [REDACTED] ("S [REDACTED] d [REDACTED]"). He developed strong peer relationships during that period with children from the D [REDACTED] area, including W [REDACTED] his best friend. When the application came before Judge Druce, J [REDACTED]'s start at school had been delayed pending resolution of the dispute between his parents. He was still attending S [REDACTED] d [REDACTED]. It is close to D [REDACTED] P [REDACTED] S [REDACTED] and by and large J [REDACTED]'s peers from that daycare had commenced their schooling at D [REDACTED] P [REDACTED].

[12] Thus, the position faced by the Judge was that on the one hand J [REDACTED] could attend D [REDACTED] P [REDACTED] where his peer group had largely gone from S [REDACTED] d [REDACTED] and continue to use S [REDACTED] d [REDACTED] before and after school when his parents were at work. On the other, he could go to W [REDACTED] P [REDACTED] S [REDACTED]. This would involve him not being with his previous friends, and require new arrangements to be made for his care before and after school, but would have the advantage of him being at school with L [REDACTED]

[13] When the matter came before Judge Druce the arrangements for J [REDACTED]'s care should he go to W [REDACTED] P [REDACTED] S [REDACTED] before school were somewhat unclear, but involved him either going to a woman called "Pam" who provided informal assistance in looking after children, or being dropped off at school early and then being looked after by some form of daycare after school.

The decision

[14] The Judge worked through a number of factors. He noted that there was not in the end a great difference between the two schools. He referred to the principle of continuity set out in s 5(b) of the Care of Children Act 2004 ("the CCA"). Under the same principle he noted the reinforcement of J [REDACTED]'s sibling relationship with his older brother should he go to W [REDACTED] P [REDACTED] S [REDACTED]. He observed that W [REDACTED] P [REDACTED] S [REDACTED] is in a more rural environment which might involve some particular strengthening of relationships within the local school community.

[15] He contrasted this with the fact that J [REDACTED]'s peer groups were in his daycare and would continue at D [REDACTED] P [REDACTED]. He did not discern any particular "identity" factor in terms of culture or language that favoured either school. He noted that J [REDACTED] was happy and well adjusted and smart, and that he had an expectation of going to W [REDACTED] P [REDACTED] S [REDACTED]. J [REDACTED] did not have a basis to make any realistic judgment or preference. The Judge thought that travelling to W [REDACTED] P [REDACTED] S [REDACTED] in terms of travel distance and time, was a better option for J [REDACTED] than D [REDACTED] P [REDACTED] S [REDACTED] but in the end did not place a lot of weight on that.

[16] The Judge focussed on the before and after school care. He had some misgivings about the care for J [REDACTED] at W [REDACTED] P [REDACTED] S [REDACTED] I. This was to be contrasted with the situation as it related to D [REDACTED] P [REDACTED] S [REDACTED] where there was a licensed daycare operator, S [REDACTED] d [REDACTED], with which J [REDACTED] was already familiar. He did not consider that the Court could endorse a school option which would result in J [REDACTED] being in unlicensed care before or after school. He thought that parental travel time and convenience were evenly balanced. In his conclusory paragraph he stated:¹

I now stand back and weigh the factors. As I have indicated, a number of factors and principles slightly favour the W [REDACTED] P [REDACTED] S [REDACTED] option. On the other hand I do have serious misgivings about the before and after school care option that the mother is relying on and the D [REDACTED] P [REDACTED] S [REDACTED] option provides a high level of continuity for J [REDACTED]

He concluded that he should direct that J [REDACTED] go to D [REDACTED] P [REDACTED] S [REDACTED] J [REDACTED] duly started at the school on 28 November 2011, and has been attending there this year.

The position of the parties

[17] A number of technical points on appeal were sensibly dropped by the appellant, in particular an argument that the Judge had wrongly amended his decision, and had failed to take into account some particular case law.

[18] A number of grounds of appeal were raised. In essence it was argued that the Judge had not given sufficient weight to J [REDACTED]'s relationship with I [REDACTED] and the benefits for J [REDACTED] in terms of travel time if he went to W [REDACTED] P [REDACTED]. It was argued that there was too much emphasis on Mr G [REDACTED]'s interests and situation.

[19] It was also submitted that there were unjustified findings of fact about the operation of W [REDACTED] P [REDACTED] S [REDACTED] and the daycare operations without an evidential basis. It was argued that the Judge's description in relation to the W [REDACTED] P [REDACTED] option, that it would put J [REDACTED] in "unlicensed" after school care, was overstated. It became apparent at the hearing that the arrangements that had developed since the decision

¹ *MPG v BFW FC Papakura* FAM-2007-055-357, 9 November 2011 at [29].

for dropping J [REDACTED] off at D [REDACTED] P [REDACTED] S [REDACTED] were not exactly as the Judge had anticipated.

Approach

[20] The welfare and best interests of the child is the first and paramount consideration.² Section 5(a) and (b) of the CCA are of particular relevance and provide:

5 Principles relevant to child's welfare and best interests

The principles referred to in section 4(5)(b) are as follows:

- (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing;
- (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whānau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):

[21] This was a dispute between guardians under s 44 of the Act. Section 143(1)(a) and (2) provides that in respect of such proceedings there may only be an appeal with the leave of the High Court. However, the cases that relate to leave to appeal to the Court of Appeal where it will be a second appeal are of little assistance.³ This is a first tier appeal in a court in which no further right of appeal lies,⁴ so it is the only opportunity for challenge. The Court will be more willing to give leave in a case such as this, than if it was a second appeal.

[22] In granting an appeal right with leave Parliament must have intended that some, but not all, decisions resolving disputes between guardians ought to be subject to appellate review.⁵ In imposing the leave requirement Parliament undoubtedly had in mind that there was a need for finality and that not all challenges would warrant the granting of leave.

² Care of Children Act 2004, s 4.

³ For instance *X v Y* [2006] NZFLR 237 (CA) and *Waller v Hider* [1998] 1 NZLR 412 (CA).

⁴ Care of Children Act 2004, s 145(1)(a).

⁵ *PJKW v DAR [Guardianship]* [2006] NZFLR 946 (HC) at [31].

[23] In a case such as this, where the decision is not for a short term arrangement, but has long term implications for the welfare of a child, leave will be more readily granted. Leave will also be more readily granted if there is a discernible serious issue to be determined.

[24] The issue that arises here, namely the long term schooling of a child, undoubtedly has such long term implications. The appellant here raises serious issues which she legitimately wishes to have determined. Ultimately, the decision will have a significant impact on J [REDACTED]'s daily life over his primary school years. I grant leave to appeal.

[25] Leave being granted, this appeal proceeds by way of a rehearing.

[26] In terms of the approach to the appeal, this Court will form its own views of the merits while giving weight to the views of the specialist court. It will only intervene if it is of the view that the Family Court decision has been shown to be wrong.⁶

Discussion

Factors that do not weigh strongly for either position

[27] Despite its impact on how J [REDACTED] will live, a distinctive feature of this litigation is that whatever decision is reached, it is unlikely to go to the heart of J [REDACTED]'s wellbeing. He is a well adjusted and happy child with functional parents who on a day to day basis undoubtedly do an excellent job of bringing up their son in a loving and nurturing environment. J [REDACTED] is likely to do well whatever the decision of the Court. He should flourish at either D [REDACTED] P [REDACTED] or W [REDACTED] P [REDACTED] S [REDACTED].

[28] There is no clear preferable option in relation to travel time. J [REDACTED] is likely to spend more time in the car travelling to D [REDACTED] P [REDACTED] S [REDACTED] as his mother who

⁶ *D v S* [2003] NZFLR 81 (CA) at [18], *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

has the majority of the caring days has to drive further to drop him off and, after he has been collected, to take him home. However, the time in the car is undoubtedly quality time with a parent.

[29] As to J [REDACTED]'s wishes, counsel for the child, Ms Robertson, and Mr Goodwin who presented the submissions on her behalf as she was unavailable, made it clear that J [REDACTED] does not wish to get involved in the debate as to which school he should go to. He had expected to go to W [REDACTED] P [REDACTED] S [REDACTED]. He is happy at D [REDACTED] P [REDACTED] S [REDACTED]. Rightly, he has not been pressed on the matter.

Developments since the hearing

[30] In terms of where he will be dropped off, there have been some developments on the facts as they were presented to Judge Druce. At the moment Ms W [REDACTED] drops J [REDACTED] off at D [REDACTED] P [REDACTED] S [REDACTED] at around 8am in the morning when she has him in her care. He is therefore in the school grounds until school starts at around 8.45am. She does not, as the Judge anticipated, drop J [REDACTED] off at S [REDACTED] d [REDACTED]. In contrast, Mr G [REDACTED] on the three days per fortnight does drop J [REDACTED] off at S [REDACTED] d [REDACTED] at around 8am before he goes to work north up the motorway to Auckland. So J [REDACTED] goes to daycare at 8am one or two mornings a week, and school the other three or four days. J [REDACTED] goes to S [REDACTED] d [REDACTED] after school every day, so that has not changed from the position anticipated by the Judge.

[31] The other development is as to what would happen if J [REDACTED] went to W [REDACTED] P [REDACTED] S [REDACTED]. Ms V [REDACTED] would no longer leave him with "Pam". Rather, she would leave him at the school in the morning at around 8am.

[32] Both D [REDACTED] and W [REDACTED] P [REDACTED] P [REDACTED] S [REDACTED] offer a service for children who have to be dropped off before school at about 8am. There is always a teacher present to keep an eye on the children from that time or earlier, although the children are left to their own devices under broad supervision until school begins. This is an option that many working parents utilise.

[33] So if J [REDACTED] was going to W [REDACTED] P [REDACTED] S [REDACTED] whether he was coming from Ms W [REDACTED]'s home or Mr G [REDACTED]'s home on a given day, he will be dropped off at W [REDACTED] P [REDACTED] S [REDACTED] in the morning and then after school he would be cared for by the Safe Kids in Daily Supervision ("SKIDS") programme, which is a daycare recognised by CYFS, until he is collected.

[34] Thus, one of the factors that was important to Judge Druce in reaching his decision, namely that J [REDACTED] would be in unlicensed care before or after school at W [REDACTED] P [REDACTED] S [REDACTED] whereas he would be in a recognised daycare if he was at D [REDACTED] P [REDACTED] S [REDACTED] does not apply. He will be in a recognised care option at W [REDACTED] P [REDACTED] S [REDACTED] both before and after school if he goes there. If he stays at D [REDACTED] P [REDACTED] S [REDACTED] he will not be at S [REDACTED] d [REDACTED] in the mornings when his mother drops him off.

Factors of weight

[35] A significant factor in favour of W [REDACTED] P [REDACTED] S [REDACTED] is that J [REDACTED] will go to and from school (when he is with his mother) and be at that school with his brother L [REDACTED]. There is no doubt that going to school with his brother would give J [REDACTED] pleasure. This is clear from his comments to counsel for the child. The two brothers are likely to be at the same school, if J [REDACTED] went to W [REDACTED] P [REDACTED] S [REDACTED] for the rest of L [REDACTED] primary schooling which could be another two to four years (the exact span between them is unclear as the evidence does not give L [REDACTED] date of birth).

[36] Of course there is real force in Judge Druce's observation that it is likely that J [REDACTED] will be largely independent of his brother socially and educationally during the school day. The facts of school life would indicate that the age gap between the boys will mean that they will have their own friends and their own activities at school.

[37] Nevertheless it can be readily seen that to have a sibling at the same school is a matter of comfort and pride to a child. The extent will always be a matter of fact and degree. Here it can be anticipated that there will be occasions when there will be useful and meaningful contact between J [REDACTED] and L [REDACTED] which would not occur if

they were at separate schools. They will be together more going to school and going home, and in the before and after periods. Family relationships are relevant to a child's welfare and interests under s 5(b) of the Act. This is a factor in favour of J going to W P S

[38] While the advantage of the D P S option in terms of before and after daycare has been somewhat neutralised by Ms W's not using S d in the morning, while J is going to D P S he still goes to S d each afternoon after school. Also he is there in the mornings when he is dropped off by his father. If he changed to W P this would no longer happen and he would remain at the school in the afternoon. He would no longer attend S d.

[39] It is clear that J has good friends at D P S who also have attended and who still attend S d. Particular reference is made to his best friend W who attends both D P and the daycare. Like the Judge I am satisfied that the daycare is a significant part of his life. These associations would all end should J be moved to W P S. As the Judge noted prior to J starting D P S the D option provided "greater continuity in his peer relationships". This is a factor against W being J's school.

[40] There is a benefit to J staying in D P S as on the three occasions each fortnight on which he is dropped off at W P S there would be an early start for him. I understand that by and large his father has to start work at a building site further north up the motorway in Auckland at around 8.30am every morning. In order to get to his work, Mr C if J was at W P S would have to get on the road at about 7.15am so that he could drop J off at about 7.35am at his mother's house, or at another daycare. The school may not be able to accept J before 8am. That would then give Mr C an opportunity to be at work at around 8.30am. Even that would be tight for some building jobs and he may have to get up earlier. So this is a reason for J to go to D P. However, the facts surrounding this are imprecise, and I will give it slight weight in the overall assessment.

[41] Of much greater importance is the reality that D██████████ is J██████████ school. He is doing extremely well there. It is clear from the two reports of counsel for the child that he has developed an excellent association with the school and its teachers. For instance Ms Robertson reports that J██████████ has named his guinea pig after one of his teachers at daycare. His best friends are there and in particular W██████████ He is prospering. The reality is that the benefit of continuity points against a change to W██████████ P██████████

Overview

[42] The association with S██████████ d██████████ combined with the superior before and after school arrangements that appear to be associated with D██████████ P██████████ S██████████ when the Judge heard the case, show that there was a sound basis for Judge Druce's decision to direct that J██████████ go to D██████████ P██████████ S██████████

[43] One of the planks of his decision, namely the superior pre-school option of S██████████ d██████████ for D██████████ P██████████ S██████████ has somewhat weakened, given Ms W██████████'s practice of dropping J██████████ off at the school direct. However, in another respect the effluxion of time has strengthened the case for D██████████ P██████████ While J██████████ is also likely to prosper at W██████████ P██████████ S██████████ in due course, a move would undoubtedly be difficult for him and to an extent there will be the inevitable distress of losing connections and friendships.

[44] These factors lead me to the clear view that it is best in J██████████'s interests that he stay at D██████████ P██████████ S██████████ The advantage in him being with his brother more and having the pleasure and comfort of being at school with him if he was at W██████████ P██████████ S██████████ is outweighed by the friendships and associations he has with S██████████ d██████████ and D██████████ P██████████ S██████████, and the fact of continuity. I see no point in breaking what was and is an excellent arrangement in which J██████████ has been prospering at S██████████ d██████████ and where he is now prospering at the nearby D██████████ P██████████ S██████████

[45] I have not ignored other points raised in the latest round of submissions, which arise from new matters that were raised in an updating affidavit filed by

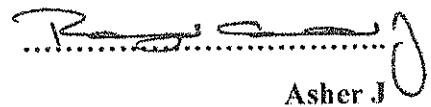
Mr G [REDACTED] The new facts relating to these are unclear and go beyond the purpose for which leave was granted.

Result

[46] Leave to appeal is granted.

[47] The appeal is dismissed.

[48] The parties agreed that costs should lie where they fall. There is no order as to costs.


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Asher J