

“Rethinking Supervised Contact“

**Address to Aotearoa New Zealand Association
of Supervised Contact Services**

**Tugboat on the Bay, Freyberg Lagoon,
Oriental Parade, Wellington**

9.30 a.m.

3 November, 2008

Principal Family Court Judge Peter Boshier

It is a pleasure to be amongst you once again and to have the privilege of speaking at your Annual General Meeting.

My recollection is that I last addressed your meeting shortly after becoming the Principal Family Court Judge in 2004. How much things have changed since then. Not only do we have a new Care of Children Act but we have a brand new Family Court Matters Bill which further reforms the Family Court.

The Family Courts relationship with Supervised Contact Providers is crucial. Simply put, we cannot carry out an important part of our work without you.

Recognising that the Care of Children Act had brought about important changes, we set out on a pathway shortly after the Act came into force in 2005 to amend the protocol that we had with you. It has been a longer journey than one might have liked. But on the 1st August this year, I signed off a new Practice Note which updates our relationship with you. I would like to talk a little about that today, but I also want to talk about whether we need to rethink the extent of our contact service, that the State agrees to pay for.

I suggest to you that the time has arrived when the State must now go further and pay for not just supervised contact arising out of demonstrated violence, but also supervised contact which the Court requires as necessary having embarked on a welfare enquiry. The present law might seem unduly restrictive. So shall we return to how it was that the State became involved in supervised contact.

The supervised access provisions in the Guardianship Act 1968 were introduced in 1995 in the context of the Domestic Violence Bill. The provisions resulted from recommendations from a 1994 Report of Inquiry into Family Court Proceedings involving Christine Madeline Marion Bristol and Alan Robert Bristol by former Chief Justice Sir Ronald Davison.

The report's recommendations proposed that the Guardianship Act include a presumption that a parent who has used violence against another parent or to a child in a domestic situation is not to be regarded as a fit and proper person to have custody of/or unsupervised access to that child.

The recommendations also proposed that where parent had used violence to the other parent or to a child in a domestic situation "such access should be supervised by an appropriate person until such time as the violent parent has satisfied the court that it is safe to allow unsupervised access".

The Guardianship Act was amended in 1995 so that if it was alleged that violence (i.e. physical or sexual abuse) had been used by a party to any application involving custody or access about a child, the Court was required to determine as soon as practicable whether the

allegation was proved. Where violence was proved, the Court could not order custody or unsupervised access to the violent party unless it was satisfied the child would be safe.

The Act also stated that a person who was entitled to have supervised access to a child was responsible for any costs of the supervised access, including the costs of a person to supervise that access.

The requirement for the non-custodial parent to pay full costs of supervised contact was unrealistic. Many families were unable to meet the full costs of the service. Providers were therefore charging only partial or nominal fees and subsidising the service. Providers did not have sufficient money to meet demand and consequently threatened to withdraw services. Other providers were unable to meet demand and had waiting lists for services.

The concern for government was that insufficient funding meant that children would be denied contact with their non-custodial parent. The Government therefore agreed to contribute to the funding of formal supervised access directed under the Guardianship Act.

One can hardly criticise this approach. It is safe and child centred.

And yet in practice, it has been difficult to achieve fairness for both parents and children.

The Guardianship Act provisions are now contained in the Care of Children Act, and s60, requires the Court to embark upon an enquiry when an allegation of violence has been raised in order to see whether unsupervised contact is safe.

The Section requires the Court “as soon as practicable” to “determine on the basis of the evidence presented to it by or on behalf of the parties to the proceedings whether the allegation of violence is proved”.

If the Court is satisfied that violence has been used, then unsupervised contact is not permitted to occur unless the Court is satisfied that it is safe to do so, having regard to the fact as set out in section 61.

Of course, any enquiry must be undertaken conscientiously, in accordance with the rules of natural justice. That means that the Court must permit evidence to be called and tested and must put aside sufficient time to enable all of this to occur properly.

In practice however, scheduling time to undertake these hearings as promptly as the legislation exhorts, is inevitably challenging. At any one time, the Court has an amount of work booked in and ready to proceed. When fresh applications are filed and are required to be dealt with promptly, the requirement does not fit easily within the existing framework.

What it means then, is that when allegations of violence are raised in an affidavit, and knowing that to assemble the evidence and conduct the enquiry may take time, the Court is usually constrained to act cautiously. It may be prudent to put in place supervised contact at the outset in the event that later, demonstrable risk is found. No Judge wants to be put in the position of condoning unsupervised contact when allegations of violence are raised if it transpires that that proves injurious to the child.

Unfortunately then, we have a situation in which supervised contact is imposed in order to act prudently and cautiously while the substantive enquiry awaits. The result can be unfair on the parent against whom the untested allegations have been made.

However the Court does not just order supervised contact within the scope of s60 of the Care of Children Act. It also occurs within the Domestic Violence Act, and as a result of welfare concerns generally that arise under the Care of Children Act.

The Family Court Matters Bill which passed on the 5th September has amended the law, and the two amendments that the Bill introduced will be of interest to you. The first is an amendment to section 58 of the Care of Children Act by changing the definition of an “approved provider”. The definition now includes a provider who is approved firstly by the Chief Executive of the Ministry of Social Development as a community service under section 403 of the Children Young Persons and Their Families Act 1989. But approval can also be given by the Secretary for Justice or a designated Court Officer. In other words, the approval process is now less cumbersome and more focused.

The other amendment occurs by the insertion of a new section 28A into the Domestic Violence Act. Previously, the Court could order as a condition of a Protection Order, that any contact be supervised. But the Act was silent on who was to pay for this. Now, where the Court imposes as a condition, that there be supervised contact by an approved provider, a number of sessions can be funded out of public money. The exact process for doing that will be determined by regulation.

Undoubtedly the latter amendment is progressive.

But I do want to turn to the third category where we order supervised contact and that is where we have a real concern for the welfare of the child. The obvious examples will be where a parent is mentally disordered, or suffering from drug abuse or is otherwise demonstrating a risk to the child, but which is not physical or sexual violence. The issues for the child are the same as in cases of violence, and that is potential risk.

It is hard to see how a risk to a child brought about by violence is much different to a risk of harm brought about by a parent's disability or inadequacy. And yet in one category, namely violence, the State is prepared to pay but in the other, the State is not.

I think it helpful to set out for you in summary form, the number of contact orders we made in the last 12 months.

Summary for parenting orders granted in the last 12 months:

Total Interim Parenting Orders with Contact	3324
Total Parenting Orders with Contact (Final)	4967
Total Parenting Orders with Contact (Interim or Final)	8291

Supervised Contact

Interim Parenting Orders with Supervised Contact	666
Parenting Orders with Supervised Contact (Final)	375
Total Parenting Orders with Supervised Contact (Interim or Final)	1041

Supervised Contact with an Approved Provider

Interim Parenting Orders with Approved Supervised Contact	253
Parenting Orders with Approved Supervised Contact (Final)	122
Total Parenting Orders with Approved Supervised Contact (Interim or Final)	375

You will see that of the total number of contact orders we make, the proportion of supervised orders is slight. Only about 1 in 8 cases of contact are required to be supervised.

Of the 1,041 orders we made for supervised contact, 375 were with approved providers. So the majority of supervised contact orders we made appear not to fall within state funded provisions.

I think there is a cogent case for permitting the Court to find that where there is disability of a defined kind, by a parent, and that might result in a risk to the welfare of the child, then consistent provisions should apply, and that the State should fund such supervised contact in the same way as it does for violence.

I deliberately stop short of suggesting that the State should fund all cases of supervised contact. After all, there are some cases wherein the Court must order supervised contact because of the fear, sometimes wrongly held by one parent, that the other parent is not ready for unsupervised contact. There are accordingly some cases where we order supervised contact because it is a way of easing the child into proper contact with a parent, and where to move to unsupervised care immediately is not tenable. It has to be said that some of these cases arise from a parent's unjustly critical view of the other parent. It may be that in these cases, the State should not pay but require the parents to do so according to a regime which is just as between the parties.

And so now to the new Practice Note which we forged only a few months ago. What changes does this bring about?

The object of the Practice Note is clearly stated as endeavouring to achieve three objectives. Firstly, to establish a national set of procedures and arrangements between the Family Court and supervised contact providers. Secondly to ensure that the need of any child needing such a service of protection and safety is met and thirdly, to ensure that the child's welfare and best interests are promoted.

Within these objectives the first thing that the Practice Note does is make it very clear how the Family Court is to refer cases to supervised contact providers and what information we are to give you. I think it important that you are all closely familiar with the Practice Note as it prescribes whose responsibility it is to carry out the various requirements of it. For instance, the Practice Note makes it clear that it is the responsibility of the Court to supply a range of documents to providers. It equally makes it clear that it is your responsibility to ensure the security of these documents and to return them to the Family Court at the conclusion of the provision of service.

The Practice Note goes on to then set out your assessment process and prescribes what you will do in order to decide whether or not you can take on the requested supervised contact. The nature of your report to the Court that you are either willing or unwilling to do so, is specifically provided for in paragraph 4.4 of the Practice Note. If you agree to provide this service, then the Court must confirm in writing the arrangements.

One thing that we have tussled with in the past is the extent to which you should provide any report to the Court on how supervised contact has gone. This is all now prescribed, and I think you will find it a relief that that is so. Paragraph 5.1 says that you will provide information

on supervised contact to the Court and that this will be done on completion of the eighth session or three months, whichever is the earlier (or upon special request from the Court).

The report that you will give to the Court is in set form. You are not expected to venture into matters of opinion beyond your expertise. Accordingly, paragraph 5.5 very deliberately says that where additional reports are sought, then the Court should engage the services of a specialist report writer. The intention is that if matters of welfare need a more thorough investigation, it is not fair to put you in the position of having to report, and to have to give evidence in this regard. It may place you in an invidious position.

We have inserted very deliberately a clause on what occurs at the termination of the period of supervision. We have for instance made it clear that you have the right to terminate supervision at any time and usually this will be because of risk.

Where supervised contact runs its course, an exit plan is important and paragraph 7.4 therefore prescribes that there be such a plan to ensure that the child is prepared appropriately for the transition from supervised contact.

We considered whether we should insert provisions into the Practice Note to deal with situations in which you are called as witnesses to cases. In the end we have omitted any reference to this and I should let you know why. Any one at all can be called as a witness to a Family Court case. There may be situations in which it is necessary to have supervised contact providers give evidence to the Court. For instance, something may have occurred that you witnessed and that only you can give first hand evidence on.

It would be wrong for a Practice Note to be prescriptive about when or when not you might be able to be called as a witness. In the end we decided to leave it to the discretion of Judges to decide when attendance of supervised contact providers should occur, so as to usefully inform the Court on a relevant issue. I would not expect contact providers to be called either to provide information as to welfare which is properly the province of a specialist report writer, nor on routine matters which are otherwise covered in your report.

I would expect you to resist such requests and write and ask the Judge whether having regard to the Practice Note you are required to attend Court. But I hope you will understand that there are some cases where you have information which is very important indeed to our enquiry as to welfare.

I want to conclude by expressing my enormous gratitude to you for the work that you do. It is demanding and sensitive and I apprehend, sometimes thankless. Children's welfare could not be enhanced without you, and the law could not be carried out without the service you provide. I thank you for your professionalism, for your commitment and for your understanding. I speak not just for Family Court Judges but for the thousands of children who every year, you help.

Speech ends