EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT NORTH SHORE

I TE KŌTI WHĀNAU
KI ŌKAHUKURA

FAM-2017-044-000569
[2020] NZFC 3089

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[RUDY DAVIDSON] Applicant
AND	[OLIVE BARNES] Respondent

Hearing:	8 May 2020
Appearances:	N Schumacher for the Applicant (by telephone) J Moore for the Respondent (by telephone) G Askelund as Lawyer for the Child (by telephone)
Judgment:	8 May 2020

ORAL JUDGMENT OF JUDGE K MUIR

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[1] The matter that is before me today concerns the children [Milly Davidson] who is aged seven, [Blair Davidson] who is aged six and [Monty Davidson] who is aged three. There is a long running and deep-seated dispute between their parents, their father [Rudy Davidson] and their mother [Olive Barnes].

[2] Father is applying today for an order for admonishment of mother under s 68 Care of Children Act 2004 and for an order that a warrant issue to enforce contact under s 73 Care of Children Act, but that the warrant lie in Court indefinitely.

[3] Mother has not allowed any contact to occur between Father and these children since 24 March which broadly spans the period since we went into level 4 COVID-19 restrictions.

[4] While there is a long and unfortunate background of conflict and litigation between Father and Mother, it is sufficient to record that there are separate parenting orders for [Milly] and [Blair] and for [Monty]. On 1 August 2019 detailed interim parenting orders were made for [Milly] and [Blair] which are set out in full at paragraph 3 of the submissions of Mr Askelund as lawyer for child and those orders are accompanied with a number of conditions. Separate orders were made for [Monty] on 11 September 2019 and because [Monty] is very young he spends less time with his father than [Milly] and [Blair] do, but those times genuinely coincide.

[5] There is also a relevant history where Mother previously unilaterally removed the children to [location B] on 10 January 2018 leading to a decision by Judge Partridge where she found that there had been a breach of the parenting orders and directed that the children return to the [location A] area which I understand is where both parents reside, or at least they reside in the vicinity of that area. Regrettably on 1 August 2019 Judge Munro was called on to make an order resolving a guardianship dispute that had arisen after Mother again unilaterally removed the children, again to [location B], and that is when the current interim parenting order was made. It is noted that Judge Munro's decision included a finding that in relation to the respondent's evidence that ultimately, she was not a credible witness, at least in that matter, for what it is worth.

[6] What has happened here is that [Milly] and [Blair], were due to go into Father's care on 24 March and [Monty] was due to go into Father's care on 25 March. They were withheld by Mother and the initial communication which came from Mother's counsel by email dated 23 March 2020 cited the COVID-19 lockdown restrictions,

rather than medical reasons, as the reason for contact being withheld. However, the email said, "My client has been advised to facilitate contact by social media."

[7] Lawyer for child immediately challenged that position by email dated 24 March pointing out Government communications concerning the transfer of children who are in shared care. Mother was warned by lawyer for the child that she would be in breach of the orders if she maintained the stance that she was maintaining.

[8] Mother then told Father's family by way of a text that [Blair] was sick, without then providing any details. I do not know whether or when that text was seen by Father's family.

[9] Subsequently Mother has evidently made a complaint to the police and Father is now facing charges or allegations. Mother has also applied again for orders under Family Violence Act 2018 having previously had an application declined by this Court.

[10] Mother now says by affidavit that [Blair] was prescribed antibiotics after all of the children were seen at [the hospital] on [date deleted]. She says that on 3 April Pamol was prescribed for the children and that on 5 April the children, I assume all of them, were swabbed for Coronavirus and that on 7 April Mother was told that the tests were negative. She says that she was advised to keep the children isolated because they were displaying flu-like symptoms, evidently for a rather long time. Mother presents in evidence a certificate by Dr [Reilly] dated 17 April as exhibit B to her affidavit of April 2020 and exhibited to her affidavit of 6 May 2020 there is a further certificate by Dr [Reilly] dated 23 April 2020 and Dr [Reilly] said on both occasions that the children should stay or should remain "in the bubble" with Mother.

[11] Unfortunately, none of those medical events were communicated to Father, save a text to Father's father, the children's grandfather, with scant information.

[12] There was no phone contact at all with these children until 24 April. On a submissions only hearing I am unable to determine exactly why that did not occur. Mother says that Father knew that the children had a phone of their own and he could

have phoned at any time. Father seems to be saying that he was eventually given very restricted and rigid times when he could talk to the children by telephone but eventually in that he was not able to first speak to them until 24 April. He says that he finds the phone conversations with these young children difficult and he is concerned that there was no social media contact when at least three separate platforms for social media contact had been suggested. He enumerates a number of things that occurred during COVID-19 lockdown that he missed out on, including [two of the children]'s birthday[s], both of which passed without Father being able to acknowledge or celebrate with them in any way.

[13] I accept that would have been distressing for Father. I accept that Mother felt, and with some plausible justification, that she could not have allowed personal contact, but it is disappointing that Mother did not find a way for the children to be in contact with their father on their birthdays, did not promote contact with their father. I think it is important that Mother remember, and that Father should always remember, that each of them as guardians and parents have obligations to promote the relationship with the other parent and to do what they can to maintain that relationship because it is very much in these children's interests that those relationships are maintained and promoted.

[14] In paragraphs 18 and 19 of the applicant's submissions dated 7 May, I was urged to find that Mother had used [Blair]'s illness, which was evident prior to lockdown, as a means to prevent the children spending time with their father and the paternal whanau and to find that each time Father or paternal family have attempted to pursue or enforce some form of contact with the children, Mother has made allegations against each of them to intending to prevent compliance.

[15] I cannot reach such conclusions on the papers today. However, the father has outlined breaches by the mother and he seeks an admonishment and asks that a warrant issue to lie in Court indefinitely.

[16] Ms Moore, in her memorandum of 6 May 2020, said that Mother has undertaken that she would comply with the contact orders from now on and that a warrant is unnecessary. Her client indicated that the children would come to Father

on 8 May, with [Monty] to come on 10 May, and thereafter the pattern of contact would be complied with. Father's response was that for contact to resume on 8 May would be effectively to vary from the fortnightly pattern that had existed prior to the COVID-19 lockdown, would disrupt their plans for the year, would disrupt plans of paternal grandparents for the year and would mean for example that they would miss out on the opportunity to celebrate [a child]'s birthday while [they were] in their care. I understand as a result, it has been agreed that the fortnightly weekend contact will commence on the weekend after 8 May, ie on 15 May, and that [Monty] will nonetheless come into Father's care on 10 May with [Milly] and [Blair] to come into Father's care on 12 May.

[17] I have been much aided by the submissions filed by all parties but particularly by lawyer for child's very helpful submissions where at paragraph 18 Mr Askelund submitted that it might not be appropriate to admonish Ms [Barnes] on this occasion, but suggest the issuance of a warrant to lie in Court. In his oral submissions today, Mr Askelund helpfully elaborated that he would suggest a warrant being placed before me to execute to record the dates and times of contact visits for say the next six weeks. He will supply a schedule of those dates and times of contact which can be annexed to the warrant. The warrant would then lie in Court to only be released to Mr Askelund on him presenting a memorandum to the Court which sets out that there had been a breach of the orders for either of the children, and that it had not been possible to remedy that breach by negotiation.

[18] Mother's counsel took me through the relevant parts of the Care of Children Act, particularly s 3, 5 and 6 of the Act, and referred to the statutory provisions in s 68 and s 78. She addressed the issues that she says Mother faced with the COVID-19 restrictions and sick children in her care. Counsel annexed to her submissions, effectively giving that evidence from the bar, a new certificate from Mother's doctor stipulating that Mother now suffers from, or has suffered from anxiety. In those submissions Mother's counsel denied that Father's first opportunity for telephone contact was on 20 April, but she did not address in any detail Mother's evident failure to promote phone contact or any social media contact of any kind with the children, notwithstanding her having noted in her email to Lawyer for the children that she

would advise Mother accordingly. Mother's counsel expressed the concern that Father may use a warrant effectively as a tool to intimidate Mother.

[19] There was also a discussion today about an intention by the children's paternal grandfather to record, by way of video recording, the pickup times of the children and drop off times of the children. It was said that the grandfather intended to do that because he was concerned that allegations had been raised against him which were untrue, and which had led to him being named as an associate respondent in a Family Violence application. The discussion between counsel today has been unable to entirely resolve that issue. Mother, through counsel, claimed that that would be effectively a form or instrument of abuse or intimidation towards Mother.

[20] Lawyer for the child reasonably expressed the view that a video recording would be intimidating but that a discreet or hidden audio recording perhaps less so and raised the prospect of third parties being present instead. The obvious concern with that is that that in itself might become intimidating. It was noted in particular that the parties had agreed that there would be nothing said whatsoever during changeovers, which might make things relatively uncomfortable for the children but at least should avoid the prospect of there being any serious verbal conflict. It might also raise the issue of why Mother would be particularly intimidated by a discreet audio recording if nothing was said, since all such a recording should establish would be that silence prevailed.

[21] Having discussed that issue with counsel I am not called on to make any ruling today and it not clear that I would have any jurisdiction to do so, if the intention is to establish that recording as such is intimidatory or is justified. I doubt that a Court would find that it was an act of abuse to discreetly audio record changeovers in these circumstances, but I hope that instead the parties will attend changeovers from the point of view of a loving mother who is taking their children to spend time with their loving father, through the agency of their beloved grandfather, that there will be some goodwill and that the tension might abate over time. I just leave it to the parties' discretion as to exactly how they organise that.

[22] Turning to the legal issues that I have to consider today. I have to take account of s 4 Care of Children Act and the fact that the child's welfare and best interests are paramount at all times, and that is something that is brought home to me by s 4(1) Care of Children Act, which provides that in determining whether or not to make an order or issue a warrant or to respond in another way, under any of s 68 to s 77, the Court must, as required by s 4, consider whether the order or any other response would serve the welfare and best interests of the child who is the subject of the parenting order concerned. I also have to take into account the principles relating to the child's welfare and best interests that are set out in s 5.

[23] Obviously, child safety is to the fore here but particular concerns that arise out of recent events include s 5(b) which requires the children's care, development and upbringing to be the responsibility of their parents and guardians, ie, both of them, both Mother and Father. Section 5(c) requires that the child's care, development and upbringing should be facilitated by ongoing consultation and co-operation between parents and guardians and that is what has been sadly lacking here, I believe on both sides. Section 5(d) requires a child to have continuity in his or her care, development and upbringing. While I observe that Mother had a plausible excuse for withholding contact, she clearly fell short of that obligation in s 5(d) and that is, to put it mildly, regrettable. Section 5(e) provides that a child is to continue to have a relationship with both his or her parents and that a child's relationship with his or her family group, whanau, hapu or iwi should be preserved and strengthened, and again the withholding of children from contact, but more particularly the failure to facilitate realistic, available and reasonable alternative forms of contact during the lockdown period is again to put it mildly, regrettable on Mother's part.

[24] Turning to the specific sections under which relief is sought. Section 68 gives me the power to admonish a parent who has contravened a parenting order. However first I must find that there has been a relevant breach of a parenting order. I do not need to prove an intention to breach, there is no mens rea element here; *R v S*.[1]

[1] *R v S* FC Whanganui FAM-1999-083-326, 6/8/2007 at [19].

[25] I pause here to note that the terms of a parenting order do not incorporate any guardianship obligations. I also note that they do not actually impose any requirements on either parent if contact cannot occur through outside agencies such as the current COVID-19 crisis. However, that does not mean that Mother's failure to promote contact in any form for a long time between the children and their father is justified. It is not. It was wrong. No good explanation is offered, for example, for there having been no social media contact arranged by Mother.

[26] Mother's failure to consult over serious medical issues is not explained and in all the circumstances of this high conflict case, it is more than regrettable. Both of these parents need to put their children's needs to the fore.

[27] Turning from that to s 68, Harrison J in *LH v FD*, discussed the two stage enquiry that needs to occur before an order can issue.[2] The first, or jurisdictional stage of the enquiry, requires proof of the fact of contravention of the order, his Honour noting that the duty of compliance with the order is strict and that issues of excuse or explanation fall for consideration at the second, or discretionary stage of the enquiry, when the Court has to decide whether an admonishment order should be made. He noted that the culpability of the party who has breached the order would be assessed at that discretionary stage, including whether the breach was deliberate or due to factors beyond the party's control. At that stage the Court will also consider the effect of the breach on the children's welfare and best interests.

[28] I am also guided by the helpful decision of Judge Adams in *R v M*, where at paragraph 16 Judge Adams said that the discretion should be exercised with regard to three factors:

(a) whether the breach is sufficiently serious to warrant admonishment;

(b) whether admonishment is likely to be effective; and

(c) whether it will serve the interests of the child.[3]

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[2] *LH v FD* [2010] NZFLR 696 at [19].
[3] *R v M* FC Manukau FAM-2005-057-336, 10 March 2008.

[29] Ultimately, I am unable to conclude, at least on a submissions only basis, that Mother's conduct on this occasion in breaching the parenting order was sufficiently serious to warrant admonishment, given the unique circumstances that have prevailed in New Zealand. Mother had a plausible excuse, if not a reasonable excuse, she took a protective stance.

[30] Mother should not view that as any kind of victory however. There do appear to have been serious breaches of guardianship obligations. Given her history, Mother needs to know that this Court ultimately has other powers if she should subsequently be found to have been breaching contact orders and those powers include the possibility that she might be found to be in contempt of Court. Ultimately, if either of these parents, and Mother is a particular focus here, are found to be acting contrary to the children's best interests consistently, so as to seriously interfere with the children's relationship with the other parent in the future, the Court might need to look at a significant change to the parenting orders in favour of the party that is not interfering with contact.

[31] However, as I have said, I am unable to find that there has been a deliberate, intentional breach by Mother here. Certainly not one that would warrant an admonishment, given the confusion that reigned at the time that the COVID-19 lockdown restrictions came into effect, given the children's medical conditions and given that Mother's stance is backed up by medical certificates.

[32] Moving on to look at the issue of a warrant. I am not prepared to issue a warrant to lie in Court indefinitely in this high conflict case. However, I agree with the submissions of lawyer for the child that given the history there needs to be a message sent here and I am prepared to adopt the proposal that he made which is as follows:

(a) A warrant is to be placed before me for execution. Attached as an appendix to that warrant will be a document that lawyer for the child is going to provide which will record the dates and times of contact visits for [Milly] and [Blair] and for [Monty] for the next six weeks.

(b) That warrant is to be released only to lawyer for the child and only once he presents a memorandum to the court which sets out the details of any breach of the parenting orders.

(c) That memorandum should also record that it was not possible to resolve that breach by negotiation and should provide the Court with some information, preferably including any exchange of emails or correspondence that evidence the attempt to resolve by way of negotiations.

[33] I want to conclude by making it clear to the parties that the Court's orders are to be respected and are to be complied with. However, it is much more important that Mother's role in the children's lives and Father's role in the children's lives are respected and supported. That is what the children need.

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Judge K Muir
Family Court Judge

Date of authentication: 12/05/2020
In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.